File Number: [to be assigned]
Federal Court of Appeal File No. A-205-25
Federal Court File No. T-294-25 / T-432-25

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

APPLICATION FOR LEAVE TO APPEAL
(*Supreme Court Act,* Section 40)

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IN THE SUPREME COURT OF CANADA

(ON APPLICATION FOR LEAVE TO APPEAL FROM THE JUDGMENT OF THE FEDERAL COURT OF APPEAL)

FORM 25

B E T W E E N:

UNIVERSAL OSTRICH FARMS INC.

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL (UNIVERSAL OSTRICH FARM INC., APPLICANT)

(Section 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26; Rule 25 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that **UNIVERSAL OSTRICH FARMS INC.**, Applicant, applies for leave to appeal to the Supreme Court of Canada, under section 40(1) of the *Supreme Court Act*, from the judgment of the Federal Court of Appeal in Court File No. A-205-25, dated August 21, 2025 (2025 FCA 147).

THE APPLICATION IS FOR:

1. An order granting leave to appeal from the judgment of the Federal Court of Appeal dated August 21, 2025 (2025 FCA 147);

2. Expedited determination of this application and, if leave is granted, abridgment of time under Rule 6 of the Rules of the Supreme Court of Canada with directions fixing an expedited timetable for the appeal and an early hearing date;
3. Such further and other relief as this Honourable Court may deem just.

AND FURTHER TAKE NOTICE that this application for leave to appeal is made on the following grounds:

4. Policy-structured discretion post-*Vavilov*. The Federal Court of Appeal recognized that reviewing discretionary, policy-based decisions "requires reformulation" post-*Vavilov* and that the pre-2019 approach in *Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2* (*Maple Lodge*) has been overtaken; national guidance is required on how *Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65* (*Vavilov*) applies when an administrator applies a general policy to a specific premises. See *Universal Ostrich Farms Inc. v. CFIA, 2025 FCA 147*.

5. Statutory discretion under s. 48 of the *Health of Animals Act*. Section 48(1) uses "may," and s. 48(2) expressly contemplates "treatment" alternatives. Guidance is required on whether an agency can assert "no discretion" by policy where Parliament has conferred discretion, and what reasons are required to demonstrate fidelity to the statute and to the availability of s. 48(2) options.

6. Dynamic-facts reconsideration gap. The Court of Appeal directed that fresh evidence of changed circumstances be addressed by administrative reconsideration while acknowledging no established right to reconsideration exists. National guidance is needed to close this systemic gap so that temporary emergency orders do not persist despite fundamentally changed facts.

7. Minimum responsive reasons (including s. 48(2) and proportionality). When a blanket "stamping-out" policy is applied to a particular premises, what reasons must show, including engagement with feasible s. 48(2) treatment alternatives and proportionality consistent with

Vavilov and *Mason v. Canada (Citizenship and Immigration), 2023 SCC 21* (*Mason*), especially where the record showed, inter alia, 69 deaths out of approximately 400 birds and no disease manifestations after January 15, 2025?

8. Mootness — "capable of repetition yet evading review." Recurrent emergency orders typically resolve in months, while appellate review takes longer. Guidance is required on applying *Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342* (*Borowski*) so that uniform standards can be provided notwithstanding practical mootness.

9. Expedition is warranted. In light of Grounds 4–8 and the recurring, time-sensitive nature of these issues, the Applicant seeks expedited determination of leave and, if leave is granted, abridgment of time and directions for an expedited appeal timetable under Rule 6.

Dated at Victoria, British Columbia this 19th day of September 2025.

SIGNED BY:

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NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

SOR/2016-271, s. 44.

Federal Court Cour fédérale

Date: 20250513

Dockets: T-294-25
T-432-25

Citation: 2025 FC 878

2025 FC 878 (CanLII)

Ottawa, Ontario, May 13, 2025

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

UNIVERSAL OSTRICH FARMS INC

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

JUDGMENT AND REASONS

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I. Overview

[1] The Applicant, Universal Ostrich Farms Inc., challenges two related decisions made by the Respondent, Canadian Food Inspection Agency [the CFIA or the Agency], under section 48 of the *Health of Animals Act*, SC 1990, c 21 [the *Act*]. The first decision, a Notice to Dispose issued on December 31, 2024, ordered the destruction of all ostriches on the farm after laboratory tests confirmed infection with H5N1 highly pathogenic avian influenza [HPAI]. The second, an Exemption Denial, dated January 10, 2025, refused the farm's request to spare the flock on the basis that the ostriches formed a self-contained, unexposed "distinct epidemiological unit" with "rare and valuable poultry genetics," thus qualifying for an exemption from the Notice to Dispose under the CFIA's *Highly Pathogenic Avian Influenza 2022 Event Response Plan* [the *2022 ERP*].

[2] At the heart of this proceeding lies an inevitable tension between the CFIA's mandate to protect public health and the Applicant's wish to preserve its ostriches. Parliament has charged the CFIA with preventing the spread of designated zoonotic and enzootic diseases and with protecting the food supply, public health, and Canada's reputation in global trade. To do so, the Agency complies with the internationally recognized and applied "Stamping-Out Policy" approach recommended by the World Organisation for Animal Health [WOAH] that requires rapid culling of affected avian populations. Conversely, the Applicant faces the loss of decades of selective breeding work, disruption to valuable commercial and scientific research, and destruction of birds that might no longer pose an active, ongoing risk of transmitting HPAI. Against this backdrop, the Applicant contends that the CFIA has, in issuing the Notice to Dispose and Exemption Denial, disregarded its unique circumstances and fallen short of providing basic procedural fairness.

[3] These two applications address whether the CFIA's decisions were reasonable and procedurally fair based on facts available to the Agency at the time. This is not an appeal. The Court is not stepping into the shoes of the Agency and making the decisions that the Court feels ought to have been made. Instead, the focus of the review is on the Agency's reasoning and process.

[4] I dismiss both applications for judicial review. The Agency's decisions were reasonable based on the record before the decision-maker and were made in a procedurally fair manner.

[5] Courts must respect Parliament's choice to assign decision-making power to administrative bodies. This respect comes from the principle of separation of powers, a

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cornerstone of Canadian public law: *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at para 30. The separation of powers compels courts to respect the legislature's choice to assign decision-making power to specialized administrative bodies, such as the CFIA, rather than to the judiciary: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30.

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[6] Courts must also respect the demonstrated scientific and technical expertise of administrative agencies. In administrative law, courts generally stay out of scientific debates and focus on whether the decision-makers used their expertise to make reasonable and procedurally fair decisions. When Parliament leaves technical or scientific assessments to specialized administrative bodies, it signals that those bodies, not the courts, are best positioned to make judgments on complex, expertise-driven matters. Indeed, Canadian administrative law explicitly warns that courts must not resolve scientific disputes or substitute their own views for those of specialized decision-makers authorized by Parliament to handle such issues: *Vavilov* at para 93. Judges are experts in law, not in public health, virology, epidemiology, or veterinary medicine. This case undeniably has a strong technical flavour. Both parties have submitted expert affidavits supported by scientific literature. The role of this Court is not to conduct afresh its own studies of that material and decide which science is correct, but to determine whether the CFIA's decisions were reasonable and procedurally fair based on the record before it.

[7] Judicial review hinges on what was before the decision-maker. With very few exceptions, reviewing courts on judicial review must mentally travel back to the moment when the decision was made, and judge the decision with only the evidence that was before the decision-maker at that moment. Here, the dates are December 31, 2024 for the Notice to Dispose

and January 10, 2025 for the Exemption Denial. A reviewing court must assess administrative decisions based exclusively on the information available to the decision-makers at the time they made those decisions: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26.

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[8] If courts conducted judicial review with information that did not exist at the time of decision-making, they would be faulting decision-makers for lacking a crystal ball. No one has the gift of foresight, so courts must avoid reviewing decisions through the lens of hindsight. Therefore, this Court cannot consider "new" evidence, such as the current health status of the ostriches, recent test results, or updated scientific developments that become available only after January 10, 2025, the date of the Agency's last decision.

[9] Concepts like "reasonableness" and "procedural fairness" have specific meanings in administrative law, defined and refined over years of jurisprudence. Reasonableness asks whether the CFIA's explanation of its decisions tells a compelling story of how it reached them. Whether the story is compelling enough depends on whether the outcome and reasons are logically supported by the evidence on record, consistent with applicable law, and aligned with the Agency's past practices and own policies. Reasonableness does not ask whether the outcome is the best or most persuasive course of action.

[10] Procedural fairness is about the decision-making process itself, not the outcome. This assessment asks questions such as whether the Applicant received timely notice, whether the Applicant had meaningful chance to be heard, and whether the CFIA followed the procedures

that it promised it would. In this context, fairness is not about whether the substantive outcome feels fair in an everyday understanding, but whether the CFIA adhered to the required legal standards of fairness in the process it followed to reach its decisions. Keeping these legal meanings in mind helps avoid the understandable, but legally misplaced, reaction of equating "harsh outcome" with "unfair decision."

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[11] This Court accepts that there is a real and negative impact of the CFIA's two decisions on the Applicant and its principals. Beyond the economic loss, the destruction of a long-established ostrich population is also a source of emotional distress, particularly given the decades of work and investment the principals have dedicated to breeding and raising their flock. I have considerable sympathy for them.

[12] Nonetheless, such personal losses must be weighed against the broader public interest in protecting public health and maintaining trade stability. Avian influenza is a virus capable of causing serious harm to both animals and humans, with significant implications for Canada's poultry businesses and international trade status. To combat threats like this virus, Parliament has authorized the CFIA to act decisively making swift decisions with far-reaching consequences, often under conditions of scientific uncertainty. This is a challenging mandate.

II. Background

A. *The parties*

[13] The Applicant operates a privately owned ostrich farm and research business located approximately ten kilometres outside Edgewood, British Columbia. The 65-acre operation is primarily managed by two principals with ostrich husbandry and selective breeding experience

dating back to the mid-1990s. Over the years, the Applicant has diversified its business portfolio to encompass operations in selling breeding stock, raising birds for slaughter, processing limited amounts of meat, offering agri-tourism tours, and, in recent years, focusing on extracting immunoglobulin Y from ostrich eggs for use in human-virus diagnostics.

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[14] The CFIA has the statutory authority granted by the *Act* and the *Canadian Food Inspection Agency Act*, SC 1997, c 6. While commonly associated with the regulation of food safety and quality in Canada, the Agency's broader mandate includes preventing and controlling communicable diseases in animals and plants that threaten public health, environmental integrity, or Canada's economic interests, including international trade in livestock and animal products. In furtherance of this mandate, the CFIA administers the *2022 ERP*, which is the latest formalization and operationalization of the Stamping-Out Policy. The Agency reports to the Minister of Health, except where the *Act* assigns powers, duties, or functions to the Minister of Agriculture and Agri-Food for matters unrelated to food safety.

B. *The avian influenza virus*

[15] Avian influenza, also known as bird flu, is caused by influenza A viruses. Like all viruses, avian influenza viruses cannot replicate on their own and must infect hosts to do so. Their usual hosts are wild birds. Migratory waterfowl, particularly wild ducks, serve as natural hosts, potentially returning from their overwintering grounds each year with new viral variants. These viruses can also occasionally spread to domestic birds and, more rarely and sporadically, to mammals like humans.

[16] For domestic birds, transmission of the virus can occur through direct contact with infected wild or domestic birds, as well as through indirect exposure to contaminated environments. The ability of avian influenza to persist in the environment contributes to its transmission. It can persist outside of hosts in feces, grass, and soil. It can remain viable for months or even years in fresh water at low temperatures, creating long-lasting sources of infection or re-infection. On small holding operations like the Applicant's ostrich farm, common risk factors for transmission include direct contact between domestic and wild birds, proximity to environments such as wetlands, ponds, swamps, lakes, rivers, and grain fields, and the acquisition of birds with unknown health status.

[17] Human infection with avian influenza is rare but potentially deadly. Infection typically occurs through close contact with infected birds or contaminated environments, particularly where appropriate personal protective equipment and hygiene measures are lacking. Some strains of the virus are particularly lethal. For instance, approximately half of the more than 900 reported cases of human H5N1 infection worldwide since 1997 have resulted in death.

[18] Each strain of the avian influenza is identified by two special proteins on its surface: hemagglutinin, designated "H," and neuraminidase, designated "N." Hemagglutinin helps the virus bind to and enter host cells, while neuraminidase enables release and propagation of the virus from the host cells. The combination of H and N proteins plays a large role in deciding which specific animals the virus can infect, how easily it spreads, and how the host immune system recognizes and reacts to it. To date, sixteen hemagglutinin subtypes, H1-H16, and nine neuraminidase subtypes, N1-N9, have been documented in birds, producing the familiar binomial viral strain names such as "H5N1" or "H7N9."

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[19] However, knowing the H and N subtypes of an avian influenza strain alone does not sufficiently reveal how harmful it is for birds. The avian influenza ability to cause serious disease, or its "pathogenicity," strongly depends on a small section of the hemagglutinin protein called the "cleavage site." At this site, certain host enzymes must cut the hemagglutinin to activate the virus. Depending on the sequence of amino acids at the cleavage site, the virus may either spread systematically throughout the host's body and damage multiple organs, or stay limited to the lungs, kidneys, or gastrointestinal tract and cause less serious consequences. In other words, the level of pathogenicity of avian influenza in birds depends heavily on the molecular structure of its cleavage site, as revealed by the amino acid sequence there.

[20] To find out the pathogenicity of a particular strain of avian influenza, one performs pathotyping. This usually involves testing three things: the subtype of hemagglutinin, the subtype of neuraminidase, and the amino acid sequence at the cleavage site. To do this, the laboratory technique called real-time reverse-transcription polymerase chain reaction [RRT-PCR] is used to detect the genes for hemagglutinin and neuraminidase and identify their subtypes, such as "H5" and "N1." To analyze the cleavage site, the part of the hemagglutinin gene containing the cleavage site is amplified and then sequenced to see whether it has the amino acid pattern linked to high or low pathogenicity avian influenza [LPAI].

C. *Avian influenza outbreaks in Canada*

[21] Canada first confronted a major HPAI outbreak in 2004 in British Columbia. In February of that year, an LPAI H7N3 virus was detected in the Fraser Valley region. By March, the virus had mutated into an HPAI, spreading rapidly across both commercial and non-commercial premises. To contain the virus, over 14 million birds were disposed of. Two human cases were

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reported, both presenting with conjunctivitis and mild influenza-like symptoms. Both individuals recovered fully. The outbreak was declared over by June 2004.

[22] Several smaller HPAI events occurred between 2004 and the current outbreak. The most significant occurred in 2015, when North America faced widespread outbreaks of H5N2 and H5N8 HPAI strains. In Canada, the impact was concentrated primarily in commercial poultry flocks in Ontario.

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[23] The current nationwide HPAI outbreak began in November 2021 and has affected every province except Prince Edward Island. The outbreak started with detection of clade 2.3.4.4b H5N1 in wild bird populations in Canada before spreading to domestic poultry. Since then, HPAI has been confirmed on 527 domestic premises across the country, with British Columbia reporting the highest number of cases and some premises experiencing repeated infections. The outbreak has affected operations ranging from small backyard flocks to large scale commercial farms. Canada also recorded its first domestically acquired human case in late 2024, when a British Columbia teenager became critically ill and required intensive care. The individual has since made a full recovery.

III. Facts

A. *The Applicant's ostrich operation*

[24] The Applicant's property features open-air enclosures with shared facilities and proximity to wildlife. The farm is arranged with fenced and cross-fenced areas intended to separate groups of ostriches for breeding and care, while also providing a degree of biosecurity. No roofed barns

segregate ostriches of different age groups. A large natural pond, routinely visited by wild ducks and other waterfowl, lies near the centre, in between two of the outdoor bird pens.

[25] The Applicant has developed what it considers a uniquely large strain of ostriches through selective breeding since the 1990s. The ostriches are allegedly selected for body size and favourable genetic traits, with surplus birds not meeting these standards being discarded or culled. Some ostriches currently on the farm trace back to early imports from Africa and remain part of the breeding stock.

[26] From approximately 2020 onward, the Applicant shifted its primary commercial focus to extracting and studying antibodies, notably immunoglobulin Y, from ostrich eggs. For the Applicant, these antibodies have lucrative commercial and research values, especially in the development of diagnostics or therapeutics relevant to human viruses, such as the COVID-19 causing virus of SARS-CoV-2. To advance this antibody-based venture, the Applicant has collaborated with both domestic and international partners, including scientific researchers and private sector entities. Despite this strategic shift, some level of ostrich sales, along with sales or planned sales of products derived from ostrich fat and eggshells, continued through to at least December 2024.

[27] By early December 2024, the farm reportedly housed about 450 ostriches, including older breeding stock and newly introduced birds.

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B. *Infections, investigations, and CFIA interventions*

[28] In February 2020, the Applicant's ostriches experienced a significant illness, reportedly resulting in roughly ten deaths. Laboratory tests confirmed bacterial infections caused by *Proteus spp.*, *Pseudomonas aeruginosa*, and *Escherichia coli*. Although unsupported by laboratory findings, the farm's principals speculated in hindsight that avian influenza might have contributed to the illness. Most ostriches were said to have recovered within weeks, leading the principals to suspect survivors might have developed natural immunity to future outbreaks of HPAI.

[29] In early December 2024, a new outbreak of respiratory symptoms emerged shortly after wild duck exposure. The Applicant observed respiratory or "flu-like" symptoms among a subset of ostriches, reminiscent of the 2020 illness. According to the farm's principals, those symptoms appeared roughly one week after "300-500 ducks … landed on the premises." By late December, mortalities began increasing, particularly among newer ostriches, prompting consultation with a local veterinarian. Approximately 25 to 30 ostriches died within a three-week period.

[30] The CFIA intervened on December 28, 2024, following an anonymous report of multiple ostrich deaths at the Applicant's premises. The Agency promptly contacted the Applicant and imposed a verbal quarantine order on the premises, with formal documentation to follow. The next day, the Applicant requested that a CFIA veterinarian assess the flock for avian influenza. Four additional ostriches died that same day.

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[31] On December 30, 2024, CFIA inspectors visited the premises, collected swab samples from two carcasses suitable for laboratory testing, noted wild-bird activity at the pond, and observed that staff and equipment were shared and moved freely among open pens. That same day, the CFIA sent the Applicant a Declaration of Infected Place pursuant to section 22 of the *Act* and a Requirement to Quarantine per section 91.4 of the *Health of Animals Regulations*, CRC, c 296. These orders imposed movement controls and established biosecurity measures aimed at containing the HPAI outbreak on the Applicant's premises by preventing access to infected birds, carcasses, and contaminated areas by wild birds, other animals, and people.

[32] On December 31, 2024, the Canadian Animal Health Surveillance Network laboratory in Abbotsford, British Columbia, reported positive test results for the H5 avian influenza subtype. On January 3, 2025, the National Centre for Foreign Animal Disease in Winnipeg, Manitoba, confirmed through genome sequencing that the pathogen was a HPAI subtype, H5N1 clade 2.3.4.4b, and noted the virus's cleavage-site motif with amino acids "PLREKRRKR/GLF" was "compatible with HPAI viruses that came to Canada via the Pacific's flyway."

[33] The CFIA issued the Notice to Dispose on December 31, 2024, immediately after receiving confirmation of a positive test result for H5 avian influenza. Just 41 minutes after obtaining the test result, the CFIA issued the Notice to Dispose as guided by the *2022 ERP* and pursuant to subsection 48(3) of the *Act*. The CFIA set February 1, 2025, as the deadline for disposal of all affected birds and related materials.

[34] On January 2, 2025, the CFIA Case Officer assigned to the Applicant's case contacted its principals to introduce herself, provide an overview of the situation, and establish a line of

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communication to guide them through the multi-step administrative process. Their first interaction was a phone call, during which the principals first raised their theory that the older ostriches may have developed herd immunity because of the unreported 2020 "flu-like" illness, and expressed interest in seeking an exemption from depopulation. The Case Officer explained the exemption application process, emphasized its time-sensitive and document-intensive nature, and highlighted the need to submit a formal "Distinct Unit Request" in a package that the Agency would provide.

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[35] Later that same day, the Case Officer sent two follow-up emails. The first email [the Process Introduction Email] was provided three hours following the call. This introductory email included several important attachments: the Notice to Dispose, the Declaration of Infected Place, the Requirement to Quarantine, and a document titled *What to Expect – Steps on How CFIA Will Work Through the Process on Your Farm*. This last document explained that the entire administrative process of depopulation is "fluid" in that while it consists of well-defined discrete steps, these may overlap in practice. It also detailed the anticipated procedural steps, including discussions with the Case Officer, a lengthy Premises Investigation Questionnaire interview, biocontainment assessment, depopulation, disposal, cleaning and disinfection, and compensation.

[36] The second email [the Exemption Process Overview Email] detailing exemption requirements was sent four hours after the call. It outlined various requirements, including official guidance on exemptions for birds with "rare and valuable genetics," and reiterated that the process is "document heavy." It provided information on how to apply for an exemption from depopulation on this basis. The email reproduced relevant policy content regarding this

category of exemption and explained that the assessment is based on both the submission of a completed *Distinct Unit Request Package*, which was attached to the email, and supporting evidence demonstrating the genetic value of the birds.

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[37] Open and frequent communication between the Applicant and CFIA continued after the initial intake process. Following January 2, 2025, communications included virtual meetings, phone calls, emails, and a further on-site inspection. These interactions facilitated discussion and assessment of several key issues, including ostrich immunity, the genetic distinctiveness of the flock, the potential to identify an epidemiologically unexposed subgroup, and the farm's biosecurity conditions.

[38] On January 3, 2025, CFIA officials held a virtual meeting with the Applicant's principals to assist them in completing the Premises Investigation Questionnaire and to gather more information about the property. During the meeting, the son of one principal reported observing a neighbour entering areas already designated as an Infected Place. The Case Officer reminded the Applicant's principals of the importance of managing public perception, noting that their neighbours continued to contact the Agency with concerns about mortality management. The Case Officer emphasized the situation's urgency throughout the meeting, stressing the need for the Applicant to promptly submit evidence supporting their claimed relationship with Kyoto University and the asserted special genetic characteristics of the flock.

[39] On January 7, 2025, CFIA inspectors conducted another site visit at the Applicant's premises, which revealed further concerns with the biosecurity conditions at the farm. Inspectors observed wild ducks following them into the quarantine zone and noted the presence of weasels

in the barns. More than 50 wild ducks were seen within one of the ostrich enclosures. Although the Applicant's principals had attempted to fence off a nearby pond, they explained that the wild ducks continued to access the ostrich feed dishes by flying in. The principals also sought guidance from the inspectors on completing the *Distinct Unit Request Package*. The inspectors reiterated the importance of submitting as much supporting evidence as possible to strengthen their exemption request.

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[40] Between January 4 and 9, 2025, the Applicant submitted several documents to support its exemption application while ostrich deaths continued. The main document was the completed *Distinct Unit Request Package*. Other supporting documents included letters of support, and information detailing its business selling ostrich antibodies and other commercial ventures as support for the Applicant's claim that its ostriches should be exempted for their "rare and valuable genetics" worthy of preservation.

[41] On January 10, 2025, the CFIA issued the Exemption Denial. It concluded that the Applicant had failed to demonstrate the existence of any distinct epidemiological unit free from exposure risk. Additionally, the CFIA found that the Applicant had not submitted sufficient evidence to support its claims of genetic rarity and value qualifying the flock for an exemption.

[42] By mid-January 2025, the spread of illness had reportedly plateaued, although some ostriches remained ill or continued to die. CFIA officials continued to monitor the situation. By the end of January 2025, total ostrich mortalities tied to flu-like illness reportedly reached 69 birds. The Applicant alleges that the last death occurred on January 15, 2025, with the

surviving majority appearing healthy or recovered. This reinforced its belief in the flock's attainment of at least partial herd immunity against H5N1.

[43] Late in January 2025, the Applicant requested permission to conduct or arrange additional tests on apparently healthy ostriches to confirm whether they were shedding virus. The Applicant also sought to have recognized genetic experts examine the flock. The record indicates the CFIA did not approve further testing at that stage. It focused instead on the confirmed H5N1-positive test results and reiterated the infection risk associated with an open-air ostrich operation like that of the Applicant's.

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IV. Decisions Below

[44] This judicial review arises from the CFIA's Notice to Dispose and its Exemption Denial. The Notice to Dispose mandates the destruction and disposal of the Applicant's ostriches, while the Exemption Denial refuses the Applicant's request that some or all the birds be spared. Together, these two decisions illustrate the CFIA's position that the Applicant's entire ostrich flock must be culled due to H5N1, with no exemption warranted. The underlying record includes not only the formal instruments themselves, but also supporting documentation such as meeting minutes, telephone call summaries, email correspondence, and internal memoranda. These materials together form the pertinent decision record before this Court.

[45] Before highlighting key aspects of the decision record, it is helpful to situate these decisions within the CFIA's broader administrative process that implements the disposal of animals and things contemplated by subsection 48(1) of the *Act*. The Notice to Dispose and Exemption Denial are two steps in the multi-step process for containing and eradicating the

current wave of HPAI, as set out in the *2022 ERP*, which operationalizes the Stamping-Out Policy pursuant to the statutory discretion provided by subsection 48(1). The Notice initiates destruction of affected flocks based on established epidemiological criteria. The Exemption Denial serves as a secondary review that evaluates whether specific circumstances justify departing from the primary disease-control protocol.

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A. *Notice to Dispose*

[46] On December 31, 2024, the CFIA issued the Notice to Dispose requiring destruction of all poultry on the premises. This Agency did this through a Form 4202 Requirement to Dispose of Animals or Things, citing statutory authority under section 48 of the *Act*. This Order stated that "Avian Influenza" had been "determined or suspected" on the premises and required "all poultry and poultry carcasses along with other material approved by CFIA disposal crew" to be destroyed. The operative period ran from the date of the order to February 1, 2025. The Order treated ostriches as "poultry" for disease-control purposes. At this initial stage, the CFIA did not consider whether any portion of the flock might be exempted.

[47] On January 12, 2025, the CFIA issued an Amended Notice to Dispose, revoking and replacing the initial order of December 31, 2024, to correct several technical details without changing the ordered depopulation. This amendment corrected certain updated quarantine details, primarily the GPS coordinates, while leaving unchanged the substantive requirement to depopulate all ostriches and the original disposal timeline. The amended Order reaffirmed that ostriches fall under the classification of "poultry" for HPAI control purposes and reiterated that all listed animals and items remained subject to destruction. An accompanying explanatory note confirmed that the effective date of the original Notice to Dispose remained December 31, 2024.

[48] Immediately following the issuance of the original Notice to Dispose, the CFIA communicated with the Applicant providing further details regarding movement restrictions, quarantine measures, and the CFIA's avian influenza Stamping-Out Policy. While these additional communications did not add any new formal reasons, they clarified the administrative processes and reinforced the CFIA's position that full flock depopulation was mandatory unless an exemption was explicitly approved. On January 3, 2025, the CFIA Compensation Unit contacted the Applicant to provide information regarding compensation for the ordered destruction of the ostriches pursuant to *Compensation for Destroyed Animals and Things Regulations*, SOR/2000-233 [the *Compensation Regulations*].

B. *Exemption Denial*

[49] Following receipt of the Notice to Dispose, the Applicant sought exemption from depopulation claiming, first, that there is a distinct epidemiological unit within its flock that was either unexposed or at reduced risk and, second, that the flock contained "rare and valuable poultry genetics," which warranted preservation from complete depopulation. On January 10, 2025, the CFIA denied both exemption requests. Three sets of documents within the record are particularly significant in illustrating the CFIA's reasoning and decision-making process in evaluating and rejecting the Applicant's exemption request.

[50] The first set of documents consists of the Exemption Process Overview Email with the attached *Distinct Unit Request Package*, both dated January 2, 2025. This Email from the Case Officer and its attachment detailed the criteria for qualifying as a distinct epidemiological unit and listed the type of supporting documentation required for exemption under the "rare and valuable genetics" category. According to the Email, examples of acceptable documentation

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included historical records of genetic investment, evidence that the flock consists of high-quality purebred birds, and proof of genomic testing for specific traits.

[51] These documents were sent shortly after the Case Officer's initial intake phone call with the Applicant's principals, during which the principals expressed interest in seeking an exemption. In the Exemption Process Overview Email, the Case Officer invited the Applicant to submit supporting documentation for the exemption request, characterizing the application process as "document heavy." The Email reads:

> Hello Again,
>
> Sorry for the multiple emails!
>
> This process is document heavy, but I'm here to help you navigate the process!
>
> Based on the information we've gathered, you fall into the "birds classified as having rare and valuable genetics" category. I've copied CFIA's description here:
>
> Rare and valuable genetics in poultry refers to uncommon genetic lines of poultry that hold a high economic value. *Genetic breeding of poultry involves the creation of multi-generation genetically diverse populations on which selection is practiced to create adapted animals with new combinations of specific desirable traits. It is this combination of an uncommon breed or line of poultry, which undergoes a selection process to create specific desirable traits which leads to its high economic value.*
>
> ***3.1 Initial screening to classify birds as having rare and valuable genetics***
>
> *The genetics of the flock can be demonstrated to be distinctive from standard commercial flocks with criteria such as but not limited to the following:*
>
> - *There is historical evidence of genetic investment (e.g. breeding books, use of closed flocks of breeding pure line birds for a prolonged period, a selection program from trained geneticists is implemented);*

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> - *The flock consists of high quality pure-bred birds (e.g. are recognized by breed associations, 3rd party national/international organizations or by the poultry industry as top producers/prized genetics/suppliers of genetics);*
>
> - *Genomics testing for specific traits has been undertaken*
>
> Here's what we need from you at this time to get started:
>
> - We need documented proof that these birds are distinctive from standard commercial flocks. The highlighted section above gives good examples of the types of documents we're looking for.
>   - If you have any documentation of the agreement between you and the university – that'd be really helpful to send to us.
> - I'll also need you guys to fill out the attached document Distinct Unit Package that will need to be completed and sent back to me.
>
> Thanks,
> [bold and italic in the original]

[52] The second set of documents comprises the Applicant's submissions supporting their exemption request. These documents, submitted to the CFIA Case Officer between January 2 and 10, 2025, included business plans highlighting research into ostrich antibodies, the potential commercialization of specific genetic lines, and assertions about the flock's unique African genetic heritage. They also contained diagrams illustrating the farm's physical layout, depicting fenced partitions and a large central natural pond, as well as letters from collaborators affirming the distinctiveness and commercial or research value of the flock.

[53] The third set of documents consists of the CFIA's formal communication of the denial and reasoning. This includes the Case Officer's January 10, 2025, email communicating the denial, the attached Response Letter providing formal reasons, and an Internal Recommendation

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Memorandum that formalized internal decision-making discussions. The email acknowledged the emotional distress that the Applicant's principals may experience and offered follow-up discussion opportunities with CFIA officials. The attached Response Letter explained that ostriches are "poultry" under its existing policy and the WOAH definitions, that selective disposal of birds would conflict with Canada's Stamping-Out obligations, and that the evidence did not satisfy the distinct epidemiological unit exemption threshold and the criteria for the "rare and valuable genetics" exemption. It concluded: "This decision is final and is not subject to appeal" [emphasis in the original].

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[54] Informing the Exemption Denial was the Internal Recommendation Memorandum prepared and reviewed by the Exemption Committee. This Memorandum forms part of the Exemption Denial decision, as administrative decision-makers are entitled to adopt the reasoning of recommending bodies, such as the Exemption Committee, with the adopted reasoning being treated as that of the decision-makers: Canada (Attorney General) v *Sketchley*, 2005 FCA 404 at para 37−39.

[55] The Exemption Committee reviewed the Applicant's submissions and the Agency's internal policies and concluded there was "no evidence of a subset of birds existing as a distinct unit or at a different level of risk." This finding was based on site visits and documentation confirming that the Applicant's ostriches roamed outdoors across multiple pens, shared feed and staff, and frequently interacted with wild birds attracted to the central pond. Given the open layout of the farm, the shared equipment and staff, and the uniform risk of H5N1 transmission, the Committee concluded it was impractical to subdivide the flock for biosafety purposes, finding no distinct epidemiological units that could qualify for exemption.

[56] The Committee also determined that the Applicant failed to show the genetic uniqueness or economic value of the flock. The Exemption Committee highlighted that the Applicant had "a significant burden of proof… to demonstrate the high economic value the flock provides to the broader Canadian poultry industry" and the nature of the "robust processes … to actively select and breed for specific desirable traits." The Committee concluded that the Applicant had not met either requirement based on the evidence it had provided. Additionally, the Committee conducted an analysis on trade implications of non-adoption or non-implementation of the Stamping-Out Policy and wrote about a preliminary scientific literature review indicating that ostriches can harbour and spread sub-clinical H5N1 and potentially facilitate further viral mutations and reassortments.

[57] Collectively, these documents articulate this rationale: ostriches, classified as poultry under Canadian avian influenza control policies, must be destroyed pursuant to the WOAH-supported Stamping-Out Policy upon confirmation of HPAI infection unless strict exemption criteria are met. Based on this rationale, the CFIA determined the Applicant's flock was uniformly exposed to risk and concluded the Applicant failed to supply sufficient evidence to satisfy the exemption criteria.

C. *Injunction*

[58] The Applicant filed a motion to enjoin the CFIA from enforcing the Notice to Dispose and the Requirement to Quarantine. By Order dated January 31, 2025, this Court stayed the Notice to Dispose "until a decision is rendered in the underlying application for judicial review." The Requirement to Quarantine was left untouched.

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V. Issues

[59] The Applicant identifies five issues in their written submissions:

1) The applicable standard of review;
2) Whether the CFIA properly exercised its discretion in issuing the Notice to Dispose;
3) Whether the CFIA breached procedural fairness in making the Exemption Denial;
4) Whether the CFIA properly applied its own exemption criteria; and
5) Whether the CFIA properly exercised its discretion in issuing the Exemption Denial.

[60] At the hearing, the Applicant raised two novel issues, both bearing on the reasonableness of the CFIA's implementation of the Stamping-Out Policy in the Applicant's specific circumstances. First, whether the CFIA relied on an incorrect factual assumption about the pathogenicity of the virus in deciding to apply the Policy. Second, whether the CFIA's classification of the farm's ostriches as "poultry" was incorrect and, if so, whether that misclassification rendered its application of the Policy unreasonable.

[61] The Respondent proposes a different three-part framing of the issues:

1) Should portions of the five expert reports filed by the Applicant be struck;
2) Was the Notice reasonable and issued in a procedurally fair manner; and
3) Was the Exemption Refusal reasonable and made in a procedurally fair manner.

[62] Although neither party's framing fully captures the scope and complexity of the issues in this judicial review, I find two submissions made by the Respondent's counsel at the hearing particularly helpful in structuring the analysis. First, the Respondent correctly points out that the

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Applicant devotes significant attention to challenging the reasonableness of the Stamping-Out Policy itself. Hence, addressing the reasonableness of the Policy as a distinct issue yields a clearer and more logical analysis. Second, the Respondent's conceptual distinction between the formulation and implementation of the Stamping-Out Policy strikes at the heart of this case. Treating these as distinct parts to be analyzed, each subject to different contextual factors and judicial review considerations, provides a more coherent and analytically sound framework.

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[63] Accordingly, this Court frames the issues as follows:

1. Whether the CFIA's Stamping-Out Policy, as currently operationalized through the *2022 ERP* policy document, is reasonable in law?

2. Whether the CFIA's implementation of the Stamping-Out Policy was reasonable and procedurally fair given the Applicant's specific circumstances?

    2.1. Whether the Notice to Dispose was made through a fair process, unfettered, and reasonable?

    2.2. Whether the Exemption Denial was made through a fair process and reasonable?

[64] Finally, this Court also needs to address several evidentiary objections raised by both parties. These include admissibility and weight to be afforded to portions of each other's expert reports, certain challenged parts of the affidavit of Dr. Cathy Furness submitted by the Respondent, and the challenge to the reliability of the Respondent's Report of Inspector, authored and signed by Inspector Dykstra on January 31, 2025.

VI. Standard of Review

A. *The fundamentals*

[65] The parties submit that the applicable standard for review of procedural fairness is correctness. However, based on the jurisprudence, I find a more accurate characterization to be one that resembles the correctness standard but shifts the focus from determining the correct procedure to assessing "whether the procedure was fair having regard to all of the circumstances": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*] at para 54; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107. The goal of the procedural fairness review should always be investigating "the ultimate question [of] whether the applicant knew the case to meet and had a full and fair chance to respond": *Canadian Pacific* at para 56.

[66] For substantive review, I agree with the parties that the CFIA's decisions to issue the Notice to Dispose and Exemption Denial are reviewable on the standard of reasonableness, as articulated by the Supreme Court of Canada in *Vavilov*.

[67] Reasonableness review is one single deferential yet robust standard: *Vavilov* at paras 12-13 and 89. The Court must give considerable deference to the decision-maker, recognizing that this entity is empowered by Parliament and equipped with specialized knowledge and understanding of the "purposes and practical realities of the relevant administrative regime" and "consequences and the operational impact of the decision" that the reviewing court may not be attentive towards: *Vavilov* at para 93. Judicial intervention is warranted only when the flaws or shortcomings are "sufficiently serious… such that [the

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decision] cannot be said to exhibit the requisite degree of justification, intelligibility and transparency:" *Vavilov* at para 100. Absent exceptional circumstances, reviewing courts must not interfere with the decision maker's factual findings and cannot reweigh and reassess evidence considered by the decision-maker: *Vavilov* at para 125.

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[68] However, reasonableness review is not a mere "rubber-stamping" process: *Vavilov* at para 13. It is the reviewing court's task to assess whether the decision as a whole is reasonable; that is, it is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at para 85.

[69] A court conducting reasonableness review is not, and must not become, an "academy of science": *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 [*Coldwater First Nation*] at para 119; *Inverhuron & District Ratepayers Ass. v Canada (Minister of The Environment)*, 2001 FCA 203 [*Inverhuron*] at para 40. When conducting reasonableness review of decisions involving highly scientific and technical subject matters, courts must pay careful attention to the decision-maker's expertise: *Vavilov* at paras 92 and 93. This expertise warrants judicial deference in the assessment of facts: *Vavilov* at para 125; *Safe Food Matters Inc. v Canada (Attorney General)*, 2023 FC 1471 [*Safe Food Matters*] at para 121; *Dias v. Canada (Attorney General)*, 2018 FCA 126 at para 8. Similarly, deference is also warranted in the interpretation of law, particularly when it pertains to the decision-maker's home statutes: *Safe Food Matters* at paras 8 and 111; *Balogh v. Canada (Citizenship and Immigration)*, 2022 FC 447 at para 18. However, such expertise must be demonstrated by the decision-makers for the judiciary to afford it deference: *Vavilov* at para 93; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 70.

[70] In addition to considering the administrative decision-maker's demonstrated expertise, the relevant evidentiary record, and the applicable legal framework, reviewing courts must also pay attention to the impact of the decision on those affected by its consequences. This dimension of judicial scrutiny has been brought to the forefront of reasonableness review by the Supreme Court in paragraphs 133 to 135 of *Vavilov*: "concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable."

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B. *Reasonableness review of policy decisions*

[71] The context of administrative decisions shapes what constitutes reasonable decision-making, even though it does not alter the standard of review itself. As established in *Vavilov* at paragraph 89, although context does "not modulate the standard or the degree of scrutiny by the reviewing court," it does "constrain […] what will be reasonable for an administrative decision maker to decide in a given case." This distinction means that while courts must apply consistent analytical rigour for judicial reviews of all administrative decisions, the outcomes of a reasonableness review will necessarily vary depending on the decision-making context, with "some decisions [being] more likely to survive reasonableness review because they are relatively unconstrained," while "other decisions may be less likely to survive because they are relatively more constrained": *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 [*Entertainment Software*] at para 25.

[72] Policy decisions fall into the "very much unconstrained" category and therefore are "harder to set aside": *Entertainment Software* at paras 24-28 and 31. They typically require

balancing of complex social, scientific, economic, and public interest considerations, which are better left for the executive branch of the government and its various administrative arms. This is particularly true for policy decisions establishing general frameworks "without reference to particular cases," as they are even less adjudicative and administrative in nature. Importantly, courts should not recast such decisions as administrative acts merely because certain actors may experience a sharper economic impact than others: *South Shore Trading Co. Ltd. v Canada (Fisheries, Oceans and Coast Guard),* 2025 FC 174 [*South Shore*] at paras 44–48.

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[73] Historically, judicial intervention in policy decisions has been limited to specific, narrow grounds. Precedents such as *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2 [*Maple Lodge Farm*], have established that courts may interfere only where the policy is tainted by bad faith, breaches an express requirement of statutory natural justice, or relies on considerations that are "irrelevant or extraneous" to the statute's purpose: *South Shore* at para 50, citing *Maple Lodge Farms* at pp 7-8.

[74] The Supreme Court of Canada has now folded these traditional grounds for intervention into *Vavilov*'s unified reasonableness framework. In *Auer v. Auer*, 2024 SCC 36 [*Auer*], the Supreme Court established that subordinate legislation, such as regulations, is presumptively reviewed for reasonableness. The "irrelevant, extraneous or completely unrelated" test from *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, 2013 SCC 64, now functions merely as a reminder that subordinate rules must remain within the enabling statute's boundaries, rather than as a separate threshold distinct from *Vavilov*'s framework: *Auer* at paras 29–36, 41–47 and 50–65. At paragraphs 59 to 65 of *Auer,* the Supreme Court stressed that "the governing statutory scheme, other applicable statutory or common law and the principles of statutory

interpretation are particularly relevant constraints" under reasonableness review. The central question for reviewing courts is whether the impugned instrument can plausibly be located within the purpose, text, and overall architecture of the enabling statute. Weighing the substantive merits of policymaking is strictly off limits: *Auer* at paras 55-58.

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[75] Although *Auer* addressed specifically decisions to make subordinate legislation, its reasoning logically extends to policymaking decisions. The key connective tissue is the source of authority: in both contexts, the decision-maker exercises broad, delegated discretionary power to pursue legislative objectives. *Vavilov* has identified the governing statute, other relevant law, and factual context as the "legal and factual constraints" on every administrative act: *Vavilov* at paras 105-135. Therefore, whether discretion manifests through formal regulations or through general policy directives, administrative decision-makers must always interpret their enabling provisions purposively, act within statutory boundaries, and demonstrate that their legislative or quasi-legislative actions advance the statutory objectives given the available legal and factual constraints.

[76] Consequently, the core reasonableness review considerations articulated in *Auer* should also apply to policymaking decisions. The analytical framework should not turn on the formal label of "regulation." What matters most is the nature of the decision itself. Specifically, whether it creates generally applicable rules on statutory authority to be applied by more frontline decision-makers in the administrative decision-making chain. This description encompasses ministerial directives, Cabinet guidelines, and disease-control policies no less than regulations. Accordingly, the analytical framework in *Auer* that includes the principles of presumption of validity, purposive interpretation, and prohibition on merits review should also

guide courts reviewing any policymaking decision. Ultimately, the inquiry remains whether the decision to adopt the policy instrument is grounded in a rational, purposive interpretation of the enabling statute and respects all relevant procedural, substantive, and contextual limits.

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[77] Deference is particularly warranted for policy decisions intended to safeguard animal and public health from high-risk disease. Case law has shown this principle consistently. In *Kohl v Canada (Department of Agriculture),* [1995] FCJ No. 1076 (FCA) [*Kohl*], the Federal Court of Appeal described a ministerial order made under section 48 of the *Act* as a "policy decision obviously not subject to the requirements of the rules of natural justice or procedural fairness," reviewable solely for abuse or misuse of power: *Kohl* at para 18.

[78] The teaching from *Kohl* is clear. Where a policy decision ordering blanket disposal of affected animals and things is made in good faith, reviewing courts should confine their reasonableness analysis to whether the destruction advances the objectives of the *Act* and whether there is some evidence to support the underlying suspicion. Following *Vavilov*, the threshold for finding sufficient support today is undoubtedly reasonableness, meaning the question is whether the suspicion is reasonably supported by the evidence and consistent with applicable legal constraints. Substituting a different view of the scientific and operational determinations underlying the policy decision would risk treading on the executive's policy prerogative: *Kohl* at paras 20–22.

[79] *Entertainment Software*, *South Shore*, *Kohl* and *Auer* converge into a single guiding principle: courts serve as guardians of legality, not arbiters of the wisdom of policy. When the legislature explicitly delegates public interest decisions, such as the management of animal and

public health, to administrative actors, courts must leave assessment of policy merits, especially the nuanced balancing of scientific, economic, and social factors, to decision-makers tasked by Parliament with those responsibilities. Judicial review of policy decisions should only target compliance with legal and factual constraints, and verification of whether the alleged exercise of technical expertise in formulating the policy decisions has been sufficiently demonstrated.

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VII. Legal Framework

A. *The law and policy on disposal of affected or contaminated animals and things*

(1) The Statutory and Regulatory Scheme

[80] Under the *Act*, the Minister of Agriculture and Agri-Food [the Minister] holds significant powers to manage diseases in animals. These powers advance the *Act*'s core objectives by proactively preventing and controlling animal diseases and reducing the risk of transmission to humans, thereby protecting public health and preserving Canada's international trade status: *River Valley Poultry Farm Ltd v Canada (Attorney General)*, 2009 ONCA 326 [*River Valley Poultry Farm*] at para 68; *Paradis Honey Ltd v Canada (Agriculture and Agri-Food)*, 2024 FC 1921 [*Paradis Honey*] at para 23; *Jerram v Canada (Minister of Agriculture) (T.D.)*, [1994] 3 FC 17 [*Jerram*] at para 30; *Kohl* at paras 7-12.

[81] The *Act* provides multiple tools for containing disease outbreaks, including infected place declarations, quarantines, and control zones. The Minister and their delegates have authority to declare infected places under sections 22 to 23, impose quarantines per section 25, and establish primary control zones pursuant to section 27. These declarations trigger strict prohibitions against the movement of animals or related items within or out of affected areas without a licence to facilitate swift containment of potential outbreaks. Notably, Parliament has

anticipated the need for broad and proactive containment measures. As such, under subsection 22(2), control orders automatically extend not only to directly affected premises but also to adjacent lands, buildings, or properties owned or occupied by the same individual.

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[82] Central to this judicial review is section 48 of the *Act*. Subsection 48(1) empowers the Minister and their delegates to order the destruction of animals or things in three scenarios: (a) if the animal is infected, suspected of infection, or contaminated by a disease or toxic substance; (b) if the animal has been in contact with or in proximity to an infected animal or thing; or (c) if the animal itself is a vector, causative agent, or toxic substance. Enforcement is governed by subsection 48(3), which mandates a written "Notice to Dispose" specifying the timeline and method of destruction. Compliance is compulsory, as failure to act permits authorities to directly dispose of the animals. Subsection 48(2) offers an alternative to destruction, allowing treatment instead, but only where the Minister is satisfied that treatment will "eliminate or prevent the spread" of the disease or toxic substance.

[83] Parliament has clearly conferred broad discretion on the Minister and their delegates under section 48 of the *Act*. The Federal Court of Appeal has confirmed that even a mere suspicion of exposure, without confirmed contamination, is sufficient to justify issuing a Notice to Dispose under the *Act*: *Kohl* at para 20. This broad latitude is also reflected in Parliament's use of the permissive language "may." However, this discretion is limited to a functional binary of destruction and treatment. Within this framework, the discretion focuses on two key decisions: (1) whether to order destruction or authorize treatment; and (2) how to carry out the chosen course of action. The statute leaves no room for a third "wait-and-see" approach. Interpreting section 48 to allow for such an option would violate the "well established principle

of statutory interpretation that the legislature does not intend to produce absurd consequences," which include situations where an interpretation "is incompatible with other provisions or with the object of the legislative enactment": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 27. Given the *Act*'s objectives of proactive disease prevention and control, a "wait-and-see" approach, unless it can be reasonably nested under a destruction or treatment plan, would undermine those core mandates and result in precisely the kind of incompatible interpretation the law forbids.

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[84] Moreover, discretion under the treatment option is narrowly circumscribed by scientific and operational realities. Subsection 48(2) explicitly limits treatment to situations "where the Minister considers that the treatment will be effective in eliminating or preventing" the spread of disease. This means that the Minister and their delegates' discretion to authorize treatment is therefore limited by scientific and operational realities: they must have confidence that treatment is both scientifically viable and practically feasible. Consequently, where the Minister and their delegates determine that treatment provided by subsection 48(2) of the *Act* cannot reliably eradicate or prevent the spread of a high-risk disease, the *Act* effectively compels the ordering of destruction contemplated by subsection 48(1).

[85] Recognizing that the CFIA's mandate is protective rather than punitive, the *Act* also balances depopulation requirements with compensation to affected animal owners. Specifically, under subsection 51(1) of the *Act*, owners whose animals are destroyed or die after being required to be destroyed are entitled to compensation calculated based on the animal's market value prior to destruction, less any residual value in the carcasses. Nevertheless, this market valuation is subject to regulatory caps provided by the *Compensation Regulations*. Specifically,

pursuant to subsection 2(a) and the associated Schedule, compensation for an ostrich is limited to a maximum of $3,000 per animal. The compensation framework also extends beyond the value of the animals themselves. Subsection 51(4) of the Act permits additional compensation for disposal-related costs, which, as specified by subsection 3(1) of the *Compensation Regulations*, may include reasonable costs of transportation, slaughter, cleaning and disinfection, disposal services, and personal labour expended by the owner.

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[86] Importantly, this compensation scheme is no-fault in nature and tied to compliance with CFIA directives. Compensation becomes payable after destruction pursuant to section 48 of the *Act*. In this way, the framework encourages timely cooperation with the Agency's disease control measures while recognizing the significant economic impact borne by owners whose flocks must be sacrificed in the interest of protecting the broader public good.

(2) The Jurisprudence on the *Act*'s Objective and the Decision-Maker's Discretion

[87] This Court has long recognized that, when faced with urgent threats to animal health, public safety, or economic interests, the Minister and their delegates are entitled to adopt drastic measures that may seriously and adversely impact individuals affected by the decision, particularly in economic terms. As Justice Cullen recognized in *David Hunt Farms Ltd v Canada (Minister of Agriculture),* 1994 CarswellNat 1859 (FC TD) [*David Hunt FC*] at para 51, the authorities may legitimately pursue an "admittedly draconian approach," provided it is pursued in good faith and for legitimate public-interest objectives. In such circumstances, the broader public interest in disease-control prevails over individual property rights, especially given the statutory compensation mechanisms available under section 51 of the Act: *David Hunt FC* at para 52.

[88] The jurisprudence further makes clear that the Minister's discretion under subsection 48(1) includes the power to develop general policy directives, the implementation of which is delegated to subordinate officials: *David Hunt FC* at para 43, aff'd *David Hunt Farms Ltd v Canada (Minister of Agriculture)*, 1994 CarswellNat 1876 (FCA) [*David Hunt FCA*] at paras 4-5, leave to appeal to the Supreme Court of Canada refused [1994] SCCA No. 353; *Carpenter Fishing Corp. v. Canada*, [1997] FCJ No 1811 (FCA) [*Carpenter Fishing*] at paras 28-29. This principle reflects the recognized distinction between two types of discretion under the *Act:* a broad discretion involving the formulation of general policy, and a constrained discretion exercised by officials responsible for implementing that policy.

[89] This distinction gives rise to a two-phase framework for understanding the exercise of discretion under subsection 48(1). In the first phase, at the ministerial level, the Minister exercises broad discretion to formulate general policies governing the control of animal diseases. As Justice Cullen noted in paragraph 43 of *David Hunt FC*, "section 48(1) vests the discretion to require the disposal of animals in the Minister, not in a person such as an inspector, or a District Veterinarian." In the second phase, at the administrative level, frontline officials implement the policies established by the Minister, typically exercising little to no independent discretion. This division mirrors the approach identified by the Federal Court of Appeal in *Carpenter Fishing* at paragraph 28, where the Court explicitly distinguished between "the imposition of a quota policy" as "a discretionary decision in the nature of policy or legislative action" and "the granting of a specific license" as an administrative action.

[90] This two-phase structure aligns with established administrative law principles and ensures operational feasibility. The structure conforms with principles distinguishing between

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the more permissible delegation of administrative tasks and the more problematic delegation of quasi-legislative or judicial functions: *The Queen v Harrison*, [1977] 1 SCR 238 at p 245*; Re Peralta and the* Queen, [1985] OJ No 2304 at paras 63-73; *The Dene Nation v The Queen*, [1984] 2 FC 942 at p 947. Practically, requiring the Minister to personally make every decision concerning animal health across the country would be unworkable and inconsistent with the need for an efficient and effective animal disease response system. By allowing the Minister and their delegates to set general policy and entrust its routine implementation to officials, the two-phased statutory scheme promotes operational feasibility and consistency in a large tribunal like the Agency, which exercises discretionary powers with significant consequences for Canadians: *Canada (Citizenship and Immigration) v Thamotharem*, 2007 FCA 198 [*Thamotharem*] at para 60. As the case law recognizes, the adoption and application of general policies are both permissible and desirable, provided such policies are not applied blindly and the decision-maker remains attentive to specific circumstances: *Carpenter Fishing* at para 29.

[91] The distinction between policy formulation and implementation has real impacts on judicial review. First, reviewing courts must carefully differentiate between the review of general policy decisions, which are more quasi-legislative in nature, and the review of specific decisions implementing those policies, which are more administrative in nature. As the Federal Court of Appeal emphasized in *Carpenter Fishing* at paragraph 29, courts must not apply the standards of review appropriate to administrative decisions when assessing legislative policy-making. The Federal Court of Appeal further instructed that, where a challenge to an administrative decision indirectly attacks an underlying policy, courts should isolate the policy component and apply standards appropriate to legislative action. Consequently, courts afford

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greater deference to general policy decisions, while applying more rigorous scrutiny to their specific administrative application.

[92] Second, the obligations of procedural fairness also vary depending on whether the exercise of administrative discretion involves general policy formulation or specific administrative implementation. Decisions grounded in high-level policy formulation, especially at ministerial or institutional levels, and aimed explicitly at the public interest typically trigger minimal procedural protections for individuals, with the generally viable route being challenges on grounds of abuse of discretion: *David Hunt FC* at para 52, citing *Martineau v Matsqui Disciplinary Board*, [1980] 1 SCR 602 at 628-629; *Kohl* at paras 19-21. In contrast, decisions that are "not of a legislative nature," delegated to frontline officials, and directly "affect[ing] the rights, privileges, or interests of an individual," attract heightened procedural fairness obligations: *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643 [*Cardinal*] at para 14; *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at p. 670; *Blois v. Onion Lake Cree Nation*, 2020 FC 953 at para 69.

(3) The "Stamping-Out" Policy

(a) *Overview*

[93] The Stamping-Out Policy is Canada's adaptation of internationally recognized and applied principles for managing HPAI outbreaks. It prioritizes swift elimination of infected populations rather than individual testing and disposal of affected animals. Adopted during and developed following Canada's first HPAI outbreak in British Columbia in 2004, the Policy aligns with three sequential steps of the stamping-out approach outlined by the World Organisation for Animal Health, *Terrestrial Animal Health Code* (Paris: WOAH, 2024)

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[*Terrestrial Code*]: killing affected animals and those suspected of exposure, disposing of carcasses, and cleansing and disinfecting establishments. Rather than prescribing detailed operational procedures, the Stamping-Out Policy sets only high-level guidance, with specific implementation protocols developed through instruments that translate the broader Policy into individual processes and actionable steps at the field level. This approach has been maintained as a directive of general applicability across different outbreak scenarios, with implementation triggered by specific conditions. Currently, the trigger is defined in the *2022 ERP* as laboratory confirmation of H5-subtype HPAI detection in domestic birds within a defined epidemiological unit.

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[94] Since its inception, the Stamping-Out Policy has been consistently implemented by the CFIA as its primary strategy for managing HPAI outbreaks. Previously formalized in the 2007 and 2013 *Notifiable Avian Influenza Hazard-Specific Plans* [the *NAI HSPs*] and now operationalized through the *2022 ERP*, the Policy has been found by the Agency to be the most successful method for eradicating viruses, eliminating environmental contamination, halting transmission, and reducing public health risks. The *2022 ERP* sets out a flexible set of guidelines informed by past decisions, and is intended to: 1) cover situations not addressed by an existing policy; 2) allow deviation from or modification of an existing policy; 3) clarify existing policy; or 4) provide a range of adaptable policy options in varying decision-making contexts. Along with other guidelines, this instrument is regularly refined and amended, particularly when sufficiently unique situations necessitate more tailored response mechanisms.

[95] The Stamping-Out Policy's legal foundation rests in both subsection 48(1) of the *Act* and the long-established administrative law principle that agencies may use "soft law" instruments to

guide the exercise of their discretion without requiring an express statutory mandate: *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 45, citing *Thamotharem* at para 56. Scientifically and operationally, the Policy is informed by international standards, particularly those set by WOAH, and by scientific research and practical considerations tailored to Canada's agricultural, biosafety, and economic realities. Canada's international commitments and trade agreements also guide the design of the Stamping-Out Policy. They also further reinforce and incentivize the consistent domestic application of the Policy to protect its international reputation and maintain market access.

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[96] The Stamping-Out Policy operates as an automatic response protocol once triggered, with discretion reserved for exemptions. The overall process of administering the Policy is multi-stepped. In practice, the very first step of exercising discretion granted under subsection 48(1) to decide whether to destroy or to treat HPAI-infected animals has already been done at the stage when the CFIA, as a delegate of the Minister, decided to develop and adopt the Stamping-Out Policy. As a result, once a triggering laboratory result arises, the Policy functions more as an automatic response protocol rather than an occasion for fresh discretionary judgment. At that point, the roles of relevant CFIA officials are to implement the established procedures for the depopulation and destruction of animals and things, not to decide anew how to respond. As part of this process, the CFIA must define the epidemiological unit, which by default encompasses birds on the entire premises unless scientific evidence justifies a narrower designation. Once such unit is determined, all remaining steps follow according to the prescribed protocol: depopulation, disposal, and disinfection of the entire unit, along with the surveillance periods consistent with WOAH standards. Discretion remains available, however, through the

exemption process, where the CFIA evaluates on a case-by-case basis whether certain birds can be exempted under one of three narrow categories.

[97] This predominantly automatic approach, with discretion reserved for case-specific exemptions, reflects the scientific and operational realities of managing HPAI outbreaks: to counteract a virus with high transmissibility, capacity for rapid spread prior to visible clinical symptoms, and potential to seriously harm Canada's animal health, human health, and international trade interests. This unique decision-making context drives the Stamping-Out Policy's prioritization of immediate containment and depopulation to prevent further spread. It also explains why both Parliament and the judiciary have consistently endorsed the proactive, preventive philosophy underpinning both the *Act* and the relevant jurisprudence such as the *David Hunt* cases, *Kohl*, *Paradis Honey*, and *River Valley Poultry Farm*.

(b) *International Obligations and Trade Implications*

[98] The adoption and operationalization of the Stamping-Out Policy reflects Canada's commitment to fulfill binding international obligations, rather than mere domestic policy preference. Annex A(3)(b) of the World Trade Organization's *Agreement on the Application of Sanitary and Phytosanitary Measures* has designated the WOAH as the authoritative international standard-setting body for animal health. Unsurprisingly, Canada's major trade agreements, including Article 9.6 of the *Canada-United States-Mexico Agreement* and Chapter 5 of the *Canada-European Union Comprehensive Economic and Trade Agreement*, explicitly incorporate selected WOAH standards and condition market access to Canada's trading partners on demonstrated compliance with specific WOAH protocols.

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[99] Non-compliance with the Stamping-Out Policy can cause severe national economic consequences through extended trade restrictions in at least two ways. First, Article 10.4.3 of the *Terrestrial Code* establishes dramatically different waiting periods for regaining HPAI-free status: only 28 days after completing stamping-out and disinfection, versus a minimum of 12 months if stamping-out is not implemented. If the Policy is not adopted or observed, this extended trade restriction period can devastate not just individual farming operations but potentially a significant portion of Canada's agricultural export sector.

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[100] Second, proper adoption and observation of the Stamping-Out Policy are the bedrocks of Canada's negotiated regional containment zoning agreements, which limit trade impacts to specific geographical areas during outbreaks while allowing exports to continue from unaffected regions. Dr. Suminder Sawhney, Senior Director of Animal Import and Export at CFIA, confirms that deviations from the Policy, even for smaller-scale outbreaks involving uncommon species, could invalidate entire agreements. The resulting comprehensive trade bans could impose economic costs far exceeding the immediate costs of containing individual outbreaks and harm the broader Canadian poultry industry, not just the affected premises.

(c) *Operationalization through the 2022 ERP: Trigger and Implementation*

[101] The *2022 ERP* is the latest instrument that operationalizes the Stamping-Out Policy. Section 7.1 of the *2022 ERP* sets out the triggering mechanism for implementing the Stamping-Out Policy, which varies depending on whether the case is the first occurrence, known as an index case, in a province or a subsequent detection in the same province. For an index case, the policy requires both H5 detection and pathotyping confirmation of the level of pathogenicity at the National Centre for Foreign Animal Disease in Winnipeg. For any subsequent cases within

the same province, any H5 RRT-PCR positive result from a Canadian Animal Health Surveillance Network approved laboratory immediately activates the Policy without requiring pathotyping.

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[102] When triggered, the Policy applies uniformly to all domestic birds susceptible to avian influenza, regardless of species characteristics. Section 7.3 of the *2022 ERP* states: "The classification of an IP [Infected Premises] as non-poultry does not change the eradication actions required on the IP. These will be the same as for an IP classified as non-commercial (small holding) poultry." While the *2022 ERP* does distinguish between "Commercial poultry," "Non-commercial poultry," and "Non-poultry," these classifications of Infected Premises affect only trade reporting, zoning requirements, and surveillance protocols. They do not alter the fundamental eradication measures applied to the premises itself. As section 7.6 of the *2022 ERP* confirms, "Regardless of the classification of an IP (7.3), individual IP actions include application of stamping out measures." Susceptibility to avian influenza - not size, commercial value, rarity, or expected lifespan - is the sole determining factor for whether a particular species falls within the Policy's scope. Consequently, all susceptible birds - from common farm species like chickens and turkeys to less frequently domesticated birds like emus and ostriches - face the same depopulation protocol when H5 or H7 is detected in an epidemiological unit.

[103] Critical to proper implementation of the Stamping-Out Policy is the determination of the "epidemiological unit," which the *2022 ERP* defines in Section 7.2 as: "A group of animals with the same likelihood of exposure to the pathogenic agent." By default, this encompasses the entire premises, unless evidence demonstrates that smaller units maintain physical and functional separation. In essence, this determination of an epidemiological unit represents a scientific

assessment of exposure risk, not individual animal infection status. Once the CFIA defines the unit, every bird within it must be destroyed, except for three strictly defined exemption categories, and the environment must undergo the depopulation, disposal, and disinfection measures prescribed in the *2022 ERP* Sections 7.6 through 7.8.

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[104] Once triggered, the Stamping-Out Policy mandates a structured sequence of three operational phases that closely mirror those described by the *Terrestrial Code*. Sections 7.6 to 7.8 of the *2022 ERP* outline these steps. First, depopulation requires humanely destroying all birds in the identified epidemiological unit using CFIA-approved methods. Second, disposal requires securely eliminating all carcasses and contaminated materials through biosecure methods that prevent environmental contamination. Third, premises must undergo primary cleaning and disinfection or, where infeasible, an extended 120-day fallow period at temperatures below 4°C for natural viral inactivation. These steps progress through a structured sequence: 1) completing the destruction phase permits disposal operations; 2) properly disposing of carcasses reduces airborne risk sufficiently to allow bird placement outside infected premises and begins a 14-day surveillance period in the surrounding control zone; 3) finishing the cleaning and disinfection phase triggers duty to notify WOAH of outbreak closure and initiates a 28-day surveillance period in the broader control area; and 4) either a 14-day post-cleaning vacancy period or 120-day fallow period permits lifting all restrictions and quarantine orders.

(d) *Exemption Framework and Assessment Criteria*

[105] The *2022 ERP* permits three narrow exemptions from depopulation required by the Stamping-Out Policy under specific scientifically defensible circumstances: “distinct units,” “rare and valuable genetics,” and “pet birds.” Conceptually speaking, this exemption does not

constitute a detachment of the birds in question from the Policy itself, but rather excludes said birds from the epidemiological unit to which depopulation must be applied. Pursuant to sections 7.2.1 and 7.6 as well as the *Exemptions from depopulation* appendix of the *2022 ERP*, these exemptions all share a common threshold requirement: the birds must constitute a distinct epidemiological unit with no exposure to the virus.

[106] In addition to the basic requirement of a distinct epidemiological unit, each of the three exemption categories also has specific qualifying criteria. For "distinct units," a portion of an infected premises may qualify for exemption if it maintains both physical and functional separation from the rest of the premises. This requires demonstrating separation through factors such as dedicated ventilation systems, physical barriers, separate staff, and biosecurity protocols preventing cross-contamination. For "rare and valuable genetics," poultry lines must demonstrate high economic or genetic value and maintain status as a distinct epidemiological unit. For "pet birds," exemptions may apply where birds are kept indoors, remain clinically healthy, and form a distinct epidemiological unit separate from the exposed population.

[107] A brief clarification is warranted to avoid confusion of the similarly named terms of "distinct unit" and "distinct epidemiological unit." While closely related, these terms are not interchangeable, and thus have important differences in application. Unlike "distinct unit," which typically requires physical and infrastructural separation, "distinct epidemiological unit" turns on demonstrated epidemiological independence. This can be shown through strict health monitoring, assigned staff, and rigorous biosecurity protocols that prevent exposure to the pathogen. In practice, however, achieving this level of epidemiological independence will often require many of the same physical and functional separations associated with a "distinct unit."

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[108] Assessment of exemption requests follows a rigorous, evidence-based, and discretionary process. Interdisciplinary committees like the Exemption Committee evaluate applications filled out by applicants against twenty distinct criteria related to physical separation, operational biosecurity, and risk management. As indicated on the self-assessment questionnaire in the *Distinct Unit Request Package* itself, any "NO" answers to these criteria likely precludes exemption. Additionally, the committees also weigh international trade and public health implications before granting an exemption. Furthermore, any exemption granted is automatically void if subsequent testing detects infection in the exempted birds, triggering the immediate application of the full Stamping-Out Policy to the previously exempted birds.

[109] The CFIA has strictly observed this distinct epidemiological unit threshold requirement in its evaluation of exemption applications. To date, it has granted only one exemption during the current outbreak: a March 2022 decision on a turkey production facility [the March 2022 Exemption]. In that case, CFIA ordered the destruction of turkeys in only two barns, while sparing those in other barns on the same premises. This limited exemption was justified by multiple biosafety measures establishing demonstrated epidemiological separation: 1) each grow-out barn maintained "distinct/separate air space in regards to ventilation"; 2) the facility implemented "various biosecurity measures...to mitigate the risk of transmission between other flocks/barns," including "shower in/shower out procedures, dedicated clothing, footwear, equipment"; and 3) "official CFIA control mechanisms… have been placed on the premise." Only after establishing the existence of a distinct epidemiological unit did the CFIA proceed to evaluate whether the facility qualified for the "rare and valuable genetics" exemption. It concluded that the spared turkeys met this criterion, as they were "high value pedigree birds that are the genetic cornerstone for the further production of commercial turkeys."

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B. *The law on fettering*

[110] Fettering is a serious flaw in administrative decision-making. It unlawfully removes or abandons the discretion that legislatures intended to be exercised in relation to individual cases: *Vavilov* at para 108, citing *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para 18. Fettering occurs when decision-makers blindly follow soft law instruments as if they were binding law, without genuinely considering how to exercise their discretion in the specific circumstances: *Thamotharem* at para 62; *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 [*Stemijon Investments*] at para 22, citing *Maple Lodge Farms* at p 6.

[111] However, merely showing that decision-makers were "influenced significantly by… policy and its objectives" falls short of establishing the requisite "blindness" to constitute fettering, as influence alone does not show that decision-makers "afforded no consideration to the possibility of" pursuing an alternative course: *Publicover v. Canada (Attorney General)*, 2023 FC 659 at para 54; *Thamotharem* at para 59. Applicants bear the burden of showing that the decision-maker treated the policy as binding, ignoring their duty to exercise independent judgment based on the facts of each case: *Shin v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1106.

[112] Once a court finds that discretion has been fettered, the decision must be set aside, as "a decision that is the product of a fettered discretion must *per se* be unreasonable:" *Stemijon Investments* at para 24; *Barco v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 421 at para 20; *Gordon v Canada (Attorney General)*, 2016 FC 643 at para 28. No degree of deference can cure the flaw that flows from fettering.

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[113] The prevailing view is that fettering does not engage a standard of review analysis in the usual sense. While some cases, such as *Singh Bajwa v. Canada (Citizenship and Immigration)*, 2012 FC 864 at para 46 have suggested that correctness may apply, the now prevailing view in the Federal Courts is that the core question is simply whether the decision was, in fact, the result of fettered discretion: *Desgagnés Transarctik Inc. v. Canada (Attorney General)*, 2014 FCA 14 at para 65; *Austin v. Canada (Citizenship and Immigration)*, 2018 FC 1277 at para 16*; Matharoo v Canada (Citizenship and Immigration)*, 2020 FC 664 at para21; *Yanasik v Canada (Citizenship and Immigration)*, 2021 FC 1319 at para 25.

[114] The Federal Courts have identified key factors to watch for within policy instruments for distinguishing between permissible guidance and impermissible fettering. In paragraph 64 of *Thamotharem*, the Federal Court of Appeal endorsed the approach from *Ainsley Financial Corp. v Ontario Securities Commission*, [1994] OJ No 2966 [*Ainsley*], which examines: 1) the language of the instrument; 2) the practical effect of non-compliance; and 3) the expectations of the agency and its staff regarding implementation. A policy that uses mandatory language, prescribes detailed procedures, threatens sanctions for non-compliance, and is treated by staff as binding law, is more likely to amount to fettering. The key question is whether a decision is made "solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts:" *Thamotharem* at para 62.

[115] Two Federal Court cases applying section 48 of the *Act* have further clarified the distinction between permissible policy guidance and impermissible fettering in the multi-step decision-making of infected animal disposal. In *David Hunt FC*, Justice Cullen found that fettering cannot arise where no independent judgment remained at the implementation level.

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That case involved a district veterinarian tasked with destroying cattle imported from the United Kingdom. The destruction decision followed a pre-established blanket policy directing that all cattle imported before 1990 be culled. Because the Minister had already made a categorical policy decision at the national level, the field officer's role was purely mechanical. Justice Cullen held that because no individual discretion survived at the field level, there was nothing left to fetter, a conclusion upheld on appeal: *David Hunt FC at* paras 33-37, aff'd *David Hunt FCA* at paras 3-7.

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[116] In *Jerram*, the exercise of the same statutory power was upheld for the opposite reason: Justice Noël found that the regional inspector had residual discretion and genuinely exercised it. Specifically, the inspector "personally ascertained the circumstances of the subject bull," and then, during cross-examination, "referred to the decision… as his own" and "confirmed his conviction that the bull had to be destroyed": *Jerram* at para 35. Justice Noël emphasized that while the national policy strongly favoured destruction, it did not compel that outcome in every case. Therefore, what proved determinative was that the inspector's suspicion was genuinely formed and supported by evidence specific to the individual animal in question: *Jerram* at paras 42-52.

[117] These animal disease-control cases yield two foundational principles for analyzing fettering in multi-step administrative processes guided by a policy instrument. First, discretion must be understood as a unified whole across the entire process. Whether discretion of the overall process is fettered cannot be judged by looking at individual decision points in isolation. It must instead be assessed holistically, considering whether, when aggregated across the process, the appropriate overall level of discretion is preserved. Second, varying levels of

discretion at different stages are permissible, provided that the process preserves the proportional discretionary authority mandated by statute. This framework explains why the outcomes in the *David Hunt* cases and *Jerram* align despite differing levels of in-field discretion. In the former, discretion was concentrated at earlier, ministerial stages, leaving implementation largely mechanical. For the latter, the policy left field-level officials with some meaningful discretionary power to assess the situation before them. Neither caused fettering because the decision-makers in each case properly exercised the discretion allocated to them within the respective policy frameworks.

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[118] To summarize, when reviewing fettering claims in multi-phase administrative processes, courts should make two key considerations:

1) Evaluate the architecture of the entire administrative process to determine whether it as a whole preserves sufficient discretion for case-specific judgment or unlawfully diminishes discretion. This is a qualitative assessment of whether the overall process maintains discretionary power proportionate to what is granted by the statute or improperly removes or abandons discretion; and
2) Examine the specific decision-making step under review to determine how much discretion, if any, was left to the decision-maker at that step, and whether the individual properly exercised that discretion. This is the more traditional fettering inquiry, centered on whether the decision-maker treated non-binding soft law as legally binding.

C. *The law on legitimate expectation*

[119] The doctrine of legitimate expectation is a core part of the procedural fairness principle. If an applicant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*] at paras 94-95.

[120] To establish a legitimate expectation, applicants must demonstrate that the relevant public authority has made clear, unambiguous, and unqualified representations about the procedure it will follow, or have consistently adhered to certain procedural practices in the past: *Canada (Attorney General) v Mavi*, 2011 SCC 30 [*Mavi*] at para 68. Moreover, the representations must be within the authority's power to make, and applicants must have reasonably relied on the representations: *Agraira* at para 94.

[121] Applicants are entitled to rely on the administrative body's established procedures and publicly available policies, even if they are in general not legally binding. A failure by the decision-maker to follow its own procedures, or a unilateral departure from established practices without notice, may constitute a breach of procedural fairness: *Tafreshi v Canada (Citizenship and Immigration)*, 2022 FC 1089 at para 18; *Kandiah v Canada (Citizenship and Immigration)*, 2018 FC 1096 [*Kandiah*] at paras 25-27.

[122] When an administrative body changes or deviates from its procedures in a way that affects applicants, procedural fairness may require that affected individuals be given notice of the changes and an opportunity to adjust or comply with the new procedures, especially if the

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changes or deviations could have significant or "fatal" consequences: *Kandiah* at paras 26-27; *Popova v Canada (Citizenship and Immigration)*, 2018 FC 326 at para 11.

[123] However, the law is clear that the doctrine of legitimate expectation creates only procedural rights, not substantive ones: *Agraira* at para 97; *Chelsea (Municipality) v Canada (Attorney General)*, 2024 FCA 89 at para 36. Even if an individual had "a legitimate expectation that a particular outcome will be reached, that expectation is not enforceable": *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 [*JP Morgan*] at para 75; *Jennings-Clyde, Inc. (Vivatas, Inc.) v. Canada (Attorney General)*, 2024 FC 1141 [*Jennings-Clyde*] at para 40.

VIII. Analysis

A. *Evidentiary issues: expert reports, affidavit, and Report of Inspector*

(1) There is No Need to Rule on the Admissibility and Weight of the Expert Reports

[124] I do not need to rule on the admissibility or weight of the challenged portions of the parties' expert reports, as the issues in this judicial review do not require weighing the scientific or technical insights they offer to properly conduct the reasonableness analysis. In fact, since the parties have marshalled their expert reports specifically to attack or defend the merits of the Stamping-Out Policy, examining and weighing these reports would lead to assessment of the Policy's merits. As described in the Legal Framework section, courts at all levels have consistently held that the merits of policy decisions are strictly off limits in a reasonableness review: *Entertainment Software*; *South Shore*; *Kohl*; *Auer*.

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[125] The parties, especially the Applicant, have staked much of their respective cases on competing visions of the science and practice of avian-influenza control, and each vision is carried almost entirely through expert opinion. The Applicant's expert suite consists of three individuals drawn from outside of public service. Collectively, their reports are deployed by the Applicant attempting to show that the measures offered by the Stamping-Out Policy are neither scientifically supported nor the least-intrusive means available and, therefore, unreasonable in law.

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[126] I summarize below in very broad strokes the key opinions offered in the expert reports submitted by both sides.

[127] Dr. Steven Pelech, a UBC professor and biochemist with years of training and experience in immunology and virology, supplies in his two reports the central thesis that the H5N1 detected at the Applicant's farm behaved phenotypically like a low-pathogenic strain. He cites as evidence the low mortality of adult birds, short-lived viral shedding, and the flock's likely attainment of immunity to the virus by mid-January. Dr. Pelech's conclusion goes to the heart of the Applicant's claim that CFIA's response failed to consider the disproportionality of implementing the Stamping-Out Policy on its premises as well as the lack of consideration of monitoring and further research, and therefore is unreasonable.

[128] Dr. Byram Bridle, an immunologist at the University of Guelph with research focused on virology, also furnishes microbiology and immunology opinions. He argues that detecting an H5 gene by RRT-PCR is not, without full pathotyping, proof of a highly pathogenic virus. Faced

with a novel genotype, he opines, CFIA should first have performed a fresh risk assessment and considered vaccination or natural-immunity studies.

[129] Dr. Jeff Wilson, a current director of a veterinary science and infectious disease management consulting firm and former senior epidemiologist and manager at the Public Health Agency of Canada, overlays Dr. Pelech and Dr. Birdle's microbiology and immunology opinions with his epidemiological knowledge. Ostriches, Dr. Wilson says, live longer, range farther, and populate at far lower densities than conventional poultry, so close surveillance and targeted culling would have met international obligations with less collateral loss. Dr. Wilson further frames CFIA actions in adopting and implementing the Stamping-Out Policy as a policy failure when benchmarked against proper pandemic-response principles.

[130] The Respondent's scientific foundation rests on a single report by Dr. Shannon French, a CFIA veterinary epidemiologist who completed her doctorate research on the wildlife disease ecology of parasites and received various post-graduate trainings on epidemiology, virology, and poultry health management. Dr. French traces the full-genome sequencing that identified the virus on the Applicant's premises as a new HPAI H5N1 lineage, reviews international outbreak data illustrating silent but intense viral shedding in ratites, and explains why neither vaccination nor a "burn-out" strategy has gained WOAH endorsement for commercial poultry.

[131] Unsurprisingly, each side seeks to narrow the evidentiary footprint of the other, and asks this Court to rely on the opinion of their experts should opinions diverge. For the Respondent's expert report, the Applicant takes issue with Dr. French's impartiality, arguing that she joined CFIA as a doctoral student in 2020, and claiming her report strays into advocacy by endorsing

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the very policy under review. They also attempt to undermine the accuracy and credibility of her opinion on the characterization of the virus found on the Applicant's premises as an HPAI by pointing to her lack of specialized qualifications and experience focused on virology or immunology. The Applicant's counsel has not pinpointed any specific portions or paragraphs of Dr. French's affidavit that they ask to be struck or given no weight.

[132] For its part, the Respondent launches a two-pronged counterattack. It moves to strike 24 different portions of the Pelech, Wilson, and Bridle reports on the grounds that: 1) none of the authors have ever worked with ostrich production under outbreak conditions; 2) they rely on post-decision data and speculative modelling rather than contemporaneous evidence; and 3) their "herd-immunity" thesis sits well outside mainstream peer-reviewed literature. The Respondent also underlines that Drs. Pelech and Bridle have been criticized by courts in other legal proceedings for advocacy masquerading as expertise and have had their reports rejected. Concurrently, the Respondent defends Dr. French's credibility by pointing to her systematic review of relevant peer-reviewed literature, her concessions where data are uncertain, and the fact that her conclusions line up with WOAH manuals and with the culling protocol upon HPAI outbreaks in ostriches in South Africa, where the Applicant's line of flock reportedly originated.

[133] As previewed in the beginning of this section, I do not need to resolve the parties' battle over the admissibility and weight of their expert material. The dispute they invite the Court to referee is, in substance, a contest over whose science on the virus in question is "better" and therefore whose preferred animal and public health policy is "wiser." To decide a winner in this contest will cause this Court to commit two cardinal sins in reasonableness review. First, it will prompt this Court to reach beyond the legitimate scope of reasonableness review of a broad

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policy decision. Second, it will effectively make this Court an academy of science and an arbiter of truth in immunology and animal and public health.

[134] To reiterate, under *Vavilov*, this Court's task on this judicial review is to decide whether the Stamping-Out Policy, when read considering its enabling statute, falls within a range of outcomes that can be said to be rational, intelligible and justified. As the Federal Court of Appeal explained in *Entertainment Software,* decisions "very much unconstrained" by tight statutory language or adjudicative methodology, namely policy decisions with broad public interest implications, are correspondingly "harder to set aside" because merits-based disagreement is not a ground for intervention. The Stamping-Out Policy under review is precisely of that character. Like the policy decisions examined in *South Shore* and *Kohl,* it is a preventative, nationwide disease-control measure adopted to proactively manage and eradicate a serious threat to animal and public health, as well as international trade. As *Auer* teaches us, for such decisions, the reviewing court asks whether the policy can plausibly be located within the text, purpose and architecture of the *Act*, not whether it represents the optimal balance of virological, economic, or public health considerations.

[135] The rivalling expert reports add fuel to precisely such an inadmissible balancing exercise. The Applicant's evidence says the Stamping-Out Policy is economically wasteful, scientifically unnecessary, and ineffective, especially when it comes to the less studied situation of ostriches. The Respondent's evidence says it has been effective, epidemiologically indispensable, and trade-critical. Accepting either view would require me to adjudicate the substantive merits of the policy and, as support, to resolve contested matters of viral pathogenicity, host biology, export-

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market tolerance of policy changes and the like, a task the case law forbids: *Coldwater First Nation* at 119; *Inverhuron* at 40.

[136] Nor is it necessary to parse the expert evidence for the limited purpose of checking whether the CFIA had *some* evidentiary foundation to support its suspicion of HPAI infection and implementation of the Stamping-Out Policy during this wave of HPAI outbreak, including in the Applicant's situation specifically. The record already contains unchallenged factual materials, such as the existence of positive RRT-PCR results, whole-genome sequencing report, and information on contemporaneous HPAI outbreaks, on which the reasonableness of the suspicion and continuation of the Policy can be assessed. Whether different scientists might have drawn different risk conclusions, and which assessment this Court might prefer, is irrelevant to the reasonableness review at hand.

[137] In short, the parties' expert reports, however scientifically accurate, provide opinions on scientific truth, the weighing of which lies with the specialized administrative bodies, which are better positioned to assess the comparative prudence, efficacy, or proportionality of animal disease-control measures of general applicability. These are questions of policy merit and have no role in the reasonableness analysis of administrative decisions. For that reason, I decline to rule on the admissibility of the expert reports and afford them no weight in my reasons.

(2) Dr. Cathy Furness' Affidavit is Admissible as Factual Narrative

[138] I find Dr. Cathy Furness' affidavit, tendered by the Respondent, admissible. To the extent that her affidavit refers to scientific concepts, these statements provide factual context for understanding CFIA's regulatory decisions rather than offering scientific or technical

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conclusions that would require expert qualification. Additionally, I treat those statements as factual narrative explaining what the CFIA understands and considers in its decision-making, not as definitive statements of scientific truth. I therefore find no basis to exclude Dr. Furness' affidavit or disregard portions of it as impermissible expert evidence.

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[139] Dr. Furness is the Deputy Chief Veterinary Officer of the CFIA. Her affidavit offers background on the CFIA's understanding of the current HPAI outbreak that began in November 2021, the HPAI H5N1 virus detected at the Applicant's premises, and Canada's international obligations to implement the Stamping-Out Policy upon detection of HPAI. It also explains how the Stamping-Out Policy facilitates a faster return to disease-free status according to relevant international treaty, protects Canada's export markets through negotiated trade agreements, and supports coordinated global efforts to reduce public health risks from this zoonotic disease. The affidavit further details the Agency's legal authority under the *Act*, the specific application of these policies to the UOF case including the denial of their exemption request, and the coordinated federal-provincial response framework between CFIA and British Columbia authorities.

[140] The Applicant's counsel first raised their objection to the admissibility of this affidavit at the hearing. They insist that Dr. Furness' affidavit is inadmissible because it contains statements that offer opinion on technical and scientific matters, but is never tendered as an expert report properly qualified under Rule 52.2 of the *Federal Courts Rules*, SOR/98-106. However, they did not identify any specific paragraphs or portions of the affidavit they sought to have struck or disregarded.

[141] The Respondent's counsel objected to the Applicant's challenge, noting that the case management judge had directed the parties identify any admissibility objections in advance of the hearing. Respondent's counsel argued that raising the challenge for the first time at the hearing was contrary to that direction. Respondent's counsel also asked for the specific parts of Dr. Furness' affidavit which the Applicant's counsel had challenged, so that they could address it in their submission. I agreed with the Respondent at the hearing on the request for clarification and pressed the Applicant to identify the challenged portions. In response, Applicant's counsel stated: "it is quite obvious when you read [Dr. Furness'] report where she is offering virology or immunology opinions."

[142] I am of the view that the Applicant's evidentiary challenge here must fail, if not for the fact that it did not observe case management procedures, than for the fact that, contrary to what the Applicant's counsel claims, Dr. Furness' affidavit does not obviously contain the type of statement that veers into expert evidence on virology and immunology.

[143] Having carefully reviewed Dr. Furness' affidavit in detail, I find this characterization inaccurate. The statements contained therein predominantly consist of facts that one would expect a Deputy Chief Veterinary Officer to possess through her official position, responsibilities, and direct involvement in Canada's HPAI response. Jurisprudence is clear that such information does not constitute "expert information, since it was not the kind of information that could only be acquired and understood with special training or expertise," but rather information gained through knowledge, observation, and experience in the ordinary course of one's position: *R. v Millard*, 2023 ONCA 426 at para 108; *R. v Hamilton*, 2011 ONCA 399 at para 277.

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[144] For example, when Dr. Furness describes avian influenza variants being categorized into HPAI and LPAI strains or identifies which subtypes are listed in the *Reportable Diseases Regulations*, SOR/91-2, she is stating factual information learned from her responsibilities, not offering specialized scientific opinions that require specialized training. Similarly, when describing the current outbreak timeline, detection of specific virus subtypes, or international standards for response, Dr. Furness is stating facts directly accessible in her role. Her statements about the absence of effective treatments for HPAI in birds represent factual declarations about available options within CFIA's policy framework, not scientific opinions on treatment efficacy. These are matters that would reasonably be known to anyone in her position without requiring special expertise beyond what is necessary for her role. It is particularly telling that, when making these statements, she cites and attaches supporting documentation as exhibits, which include fact sheets and publications from authorities such as the Public Health Agency of Canada and the World Health Organization. In other words, Dr. Furness is recounting and relaying information from these established sources, rather than communicating her opinions on scientific matters.

[145] The remaining portions of Dr. Furness' affidavit similarly consist of factual statements, such as descriptions of relevant WOAH standards, CFIA internal processes, and federal-provincial coordination frameworks, all of which fall within the realm of factual narrative. Her account of the Stamping-Out Policy's requirements and the consequences for disease-free status restates international standards that guide the CFIA's work. Her descriptions of the CFIA's emergency response framework, hazard-specific plans, and operational procedures reflect institutional knowledge directly linked to her official role. When detailing the coordinated response with British Columbia authorities, including the liaison officer structure, weekly

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meetings, and information-sharing protocols, Dr. Furness provides facts about administrative arrangements known to her through ordinary professional experience, not through specialized scientific training. These are precisely the kinds of statements expected from a senior public official addressing matters within her regulatory and operational mandate, not scientific opinions based on specialized training and expertise.

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(3) The Respondent's Report of the CFIA Inspector is Admissible Under the Business Record Exception

[146] The last piece of evidentiary dispute I must address before turning to the substance of the reasonableness analysis is whether the one-page "Inspection Report" dated January 31, 2025, and tendered as Exhibit O to the affidavit of Dr. Cathy Furness, may be received as evidence of what occurred during CFIA Inspector Dykstra's onsite visit of and the testing done at the Applicant's premises on December 30, 2024. I find that it is, based on the business record exception provided by section 30 of the *Canada Evidence Act*, RSC 1985, c C-5 [the *CEA*].

[147] The Inspection Report is a formal summary of the site visit of the Applicant's premises conducted by Inspector Dykstra, with particular focus on the availability of carcasses for sampling and the applicable biosecurity measure. The Report shows that Inspector Dykstra explained that "he would like to swab up to ten mortalities," but the Applicant's principal who accompanied him "stated there were only two mortalities in good enough condition to be sampled" since "the remaining mortalities had either been scavenged on by wild animals or were in later stages of decomposition." The Applicant contests this account, alleging that Inspector Dykstra refused additional carcasses despite being offered more. Based on this alternative version of events, the Applicant argues that the CFIA failed to comply with section 4 of the *2022*

ERP, which requires sampling of *all* available dead birds up to ten at maximum, and therefore lacked a sufficient factual foundation for reasonably issuing the Notice to Dispose.

[148] The Applicant submits that the Report of Inspector should be struck as inadmissible hearsay that falls outside of the business record exception, applying evaluative frameworks in *Ares v Venner*, [1970] SCR 608 [*Ares*] and *Eli Lilly Canada Inc. v Teva Canada Limited*, 2017 FC 88 [*Eli Lilly*]. The Applicant advances three main arguments in support of this position. First, the Report lacks contemporaneity, as it was signed a month after the site visit without explanation for the delay. Second, the way the Report is tendered does not satisfy the personal knowledge element, since Inspector Dykstra did not provide direct evidence about the circumstances surrounding its creation. Third, the Report lacks independence, asserting that it was prepared "in contemplation of litigation," given that the CFIA had been notified of the Applicant's intention to seek judicial review of the Notice to Dispose shortly before the Report was finalized.

[149] The Applicant's objections rest on a misunderstanding of the law and a failure to read the Report of Inspector in conjunction with other similar reports furnished by the Respondent. The legal error concerns the requirement for personal knowledge. The Applicant's counsel specifically emphasized during the hearing that "we have no evidence from… Dykstra… the inspector, as to how and why he created the record a month later, the circumstances surrounding his creation of it." This submission misstates what is required to satisfy the personal knowledge requirement. The correct inquiry is whether the author of the document, in this case Inspector Dykstra, had personal knowledge of the matters being recorded, not whether the document must be tendered and supported by a direct attestation from that author personally.

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[150] As the Supreme Court held in *Ares*, the reliability of business records arises from the circumstances of their creation, not the presence of the author:

> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein.

[151] The Supreme Court explicitly rejected the notion that the author's testimony is required to validate such records, pointing to the impracticality of demanding testimony from specific individuals in large organizations where "clerks and servants are changed from time to time, whose evidence may be difficult and often impossible to obtain": *Ares* at p 619, citing *Ashdown Hardware Co. v Singer et al* (1951), 3 WWR (NS) 145 (AD CA). This understanding of the personal knowledge element has not been modified by this Court in *Eli Lilly*, nor by the Federal Court of Appeal on appeal: *Eli Lilly Canada Inc. v Teva Canada Limited*, 2018 FCA 53. Accordingly, the relevant inquiry here is whether the author of the record, Inspector Dykstra, had firsthand knowledge of the events recorded. Whether he provided a direct attestation about the context in which the report was created is irrelevant. That function was properly fulfilled by Dr. Furness, who has explained in her affidavit about how the preparation of such reports are done in the ordinary course of business at the CFIA.

[152] The business record exception exists because institutional safeguards enhance reliability. The Applicant's insistence on requiring direct evidence from Inspector Dykstra misapprehends this underlying rationale of the exception. It is neither practical nor necessary to call every author of a record when institutional practices ensure its trustworthiness. In a national agency like the CFIA, where frontline officers like Inspector Dykstra routinely document field

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observations as part of their statutory duties, the absence of an affidavit from the author, who clearly had personal knowledge presented in the Report, does not undermine its reliability. This is particularly so where Dr. Furness, a senior CFIA official with institutional knowledge, has provided an affidavit situating the Report within the broader decision-making and operational context of the Agency.

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[153] The Applicant's failure to consider the Report of Inspector within the context of the record undermines its submission regarding its contemporaneity and independence. Parties do not dispute that the Report, as presented in Exhibit O, although documenting events from a site visit on December 31, 2024, was created and signed on January 31, 2025. The difference in dates is apparent. Equally apparent, however, as noted the Respondent, are the detailed, timestamped entries throughout the Report. A comparison with two other Reports of Inspector reinforces this pattern: one was again prepared and signed by Inspector Dykstra on January 20, 2025, to describe another site visit on January 7, 2025, and another by the Applicant's Case Officer on January 23 to record all interactions with the Applicant between January 2 and 10, 2025. All three reports use the same forms and format, include detailed entries that were timestamped, and are prepared and signed weeks after the events they describe.

[154] The central concern underlying the requirements of contemporaneity and independence is the reliability of the tendered documentation: *Cowichan Tribes v Canada (Attorney General)*, 2020 BCSC 357 paras 29-40; *R. v Farhan*, 2013 ONSC 7094 at para 12, citing *Performing Rights Organization of Canada Ltd. v Lion d'or (1981) Ltée*, [1987] FCJ No 934 at p 3. In my view, the consistent use of standardized forms, the inclusion of detailed and timestamped entries, and the common institutional practice of preparing and signing reports after the events described

are strong indicators of reliability. These features, which are all present in the Report of Inspector in dispute, demonstrate contemporaneous notetaking with formal compilation into the report-format occurring later, and thus they enhance the reliability of evidence that the business records exception is intended to ensure.

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[155] Moreover, there is no evidence that the Report was prepared "in contemplation of litigation," aside from its date. Strategically, there would have been little reason for the Respondent to fabricate information about the number of carcasses available, since section 7.1 of the *2022 ERP* sets the key trigger for the issuance of a Notice to Dispose as the detection of "H5 Avian Influenza by RRT-PCR," not by the number of carcasses swabbed or number of samples collected. The Respondent gains nothing by claiming only two carcasses were available rather than more. In short, the Report of Inspector is not necessary to justify the reasonableness of issuing the Notice to Dispose. Its evidentiary necessity lies more in describing the occurrence of carcass decomposition and scavenging, which, along with other epidemiological evidence, demonstrates the transmission pathways and poor biosafety practices on the Applicant's farm, and informs the broader risk assessment underpinning the CFIA's decision-making in the Applicant's case.

[156] On a balance of probabilities, I am satisfied that the Report of Inspector is "made in the usual and ordinary course of business" as required by section 30 of the *CEA*, and is therefore admissible.

B. *The Stamping-Out Policy is reasonable*

[157] I agree with the Respondent that the Stamping-Out Policy is reasonable in law, for it aligns with the text, structure, and purpose of the *Act*. As explained in the Legal Framework section, Parliament has delegated broad power to the Minister and their delegates under section 48 to protect public health and preserve the health of humans and animals in Canada as well as Canada's international trade status by proactively preventing and controlling animal disease outbreaks and reducing the risk of zoonotic transmission. The Stamping-Out Policy represents a legitimate policy-level exercise of this discretion, grounded in a science-informed framework that mandates swift depopulation following laboratory confirmation of H5 avian influenza. The Policy is further operationalized by measures aimed at halting viral amplification, permitting sanitization of affected premises, and facilitating the rapid restoration of disease-free status. Additionally, the CFIA complements these measures by providing operators with post-depopulation biosecurity guidance tailored to minimize future infection risks, further promoting the *Act*'s proactive approach to disease control.

[158] Since the Applicant does not allege any inconsistency between the Stamping-Out Policy and the text or scheme of the pertinent provisions of the *Act*, the central inquiry is whether the Policy remains consistent with the *Act*'s legislative purposes. It is important to remember that ongoing outbreaks among wild or domestic birds do not, by themselves, render the Policy incompatible with statutory objectives. The jurisprudence has made clear that the *Act* does not demand instantaneous or perfect eradication of specific pathogens. Rather, Parliament expects regulatory measures that can significantly mitigate disease spread, limit viral amplification, and reduce mutation and cross-species transmission risks. It is through this lens of mitigation and

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risk reduction, not absolute eradication, that this Court must assess the Applicant's challenges regarding the Policy's consistency with the *Act*'s purpose and, by extension, its reasonableness.

[159] Although the Applicant has not explicitly categorized its arguments under a specific heading such as "Policy Unreasonableness," two core claims challenging the reasonableness of the Stamping-Out Policy can be synthesized from various parts of its submissions. In essence, the Applicant's position is that, first, the Policy has demonstrably failed to achieve its legislative objectives and, second, the scientific basis underpinning the Policy is outdated and thus cannot advance the objectives of the *Act* as intended. On this basis, the Applicant contends that the Policy must be rejected as unreasonable under *Vavilov*, even considering the significant deference typically paid to broad policy decisions involving public interest considerations.

[160] On the flaw of empirical ineffectiveness, the Applicant submits that the Stamping-Out Policy has not achieved its stated goals and thus cannot advance the statutory mandate of the *Act*. The Applicant highlights the destruction of approximately 14.5 million birds since early 2022, alongside Canada's ongoing reports of hundreds of new H5N1 detections, including repeated infections on previously cleared premises. In the Applicant's submission, this shows the Policy has failed to meaningfully contain or eradicate HPAI and therefore no longer constitutes a measure within the defensible range of reasonableness.

[161] Concerning outdated scientific assumptions, the Applicant argues the CFIA has inappropriately adopted the Stamping-Out Policy based on the unscientific assumption that any detection of H5N1 indicates uniformly high pathogenicity and therefore requires immediate depopulation. According to the Applicant, this approach disregards emerging scientific research

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regarding subclinical or silent infection in ratites, the polyphyletic group that includes ostriches, and neglects the CFIA's own data showing brief viral shedding periods among these birds. Additionally, the Applicant emphasizes that such approach completely neglects the novel genotype of the avian influenza virus detected on its farm, which its experts describe as being associated with lower adult mortality rates and quicker recovery times. Since the Stamping-Out Policy was formulated before these recent scientific developments and clinical observations, and has not been substantively revised in response, the Applicant submits that the Policy's foundational scientific assumptions are outdated, undermining its reasonableness as a continuing mechanism to advance the statutory objectives of the *Act*.

[162] I cannot accept the Applicant's positions. Both of the Applicant's core policy-level criticisms invite this Court to engage in precisely the kind of assessment that *Vavilov*, *Entertainment Software*, *South Shore*, *Kohl*, and *Auer* say reviewing courts must not do: arbitrating scientific disputes, reassessing social and economic trade-offs, and pronouncing on the empirical effectiveness of broad public-interest policies. Those are tasks that are better left to the agencies like the CFIA that wield administrative and technical expertise. This Court's role, by contrast, is confined to determining whether the CFIA's Stamping-Out Policy fits rationally within the *Act*'s text, scheme, and purpose, given the legal and factual constraints that bear on the Minister and their delegates. It is not to decide whether the CFIA's chosen balance of virology, trade protection, public-health precaution and animal-health logistics is the *best* or the *most up-to-date*, or whether the Applicant's proposed policy changes are the *better* or *more up-to-date* ones.

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[163] First, the allegation of "empirical ineffectiveness" improperly invites the Court to substitute its own metric of success and understanding of science for those of the CFIA. Questions about the overall success of the CFIA's Stamping-Out Policy, its comparative effectiveness against alternative disease-control strategies, or how to interpret epidemiological data, lie beyond judicial review and are not for this Court to answer. So long as the CFIA's adoption of the Stamping-Out Policy remains linked to the *Act*'s objectives, this Court must refrain from second-guessing the policy choices of the Agency to which Parliament has assigned responsibility for managing animal health and disease control.

[164] Evaluated within this proper scope of judicial review, the record supports the conclusion that the CFIA's application of the Stamping-Out Policy continues to advance the objectives of the *Act*. In his affidavit and during cross-examination, Dr. Harchaoui, Laboratory Network Director in the CFIA's Science Branch, affirmed that the Agency tracks key performance indicators such as timeliness of detection, speed of depopulation, viral clearance, duration of movement controls, and re-listing of zones for trade purposes. These indicators, he stated, have improved consistently since 2004. He also confirmed that Canada, like most WOAH member countries, continues to regard stamping-out as the most effective approach for rapidly regaining disease-free status and lowering mutation risks. Dr. Furness similarly confirmed during cross-examination that, through application of the Policy combined with robust biosecurity measures, the CFIA limited H5N1 outbreaks during the current wave to 527 of more than 30,000 poultry premises. These points were not disputed by the Applicant's counsel during cross-examination or at the hearing. On this record, I find no basis to conclude that the Stamping-Out Policy is incompatible with the purposes of the *Act*.

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[165] Second, the Applicant's contention regarding "outdated science" similarly calls upon the Court to engage in an impermissible reassessment of the CFIA's scientific and policy determinations. The Applicant contends that the CFIA's continued reliance on a policy developed in 2004, with little efforts to update it to "accord with what's actually happening," is unreasonable, especially when recent scientific literature undermines the effectiveness of mass culling. However, this assertion is not supported by the record. The record, particularly as developed during cross-examination of CFIA officials by the Applicant's counsel, clearly demonstrates that the CFIA has continually refined and updated the Stamping-Out Policy since its initial formulation.

[166] For instance, the *2013 NAI HSP* revisions incorporated lessons from prior outbreaks and drew upon multidisciplinary expertise, extensive literature reviews, international coordination, most notably with U.S. counterparts, and consultations with Canadian poultry industry stakeholders. These continuous updates and refinements have persisted through to the current *2022 ERP* instrument, which integrates ongoing decision records, regular multidisciplinary reviews, and international expert consultations, including with the U.S. Department of Agriculture's Animal & Plant Health Inspection Service [APHIS].

[167] Besides refinements to specific policy guides, the CFIA has also consistently explored alternatives to the Stamping-Out Policy itself throughout the years, including vaccination, containment strategies such as "burn out," and selective culling. The *2013 NAI HSP* specifically contemplated a "burning out" option for LPAI strains in remote, non-commercial premises with inadequate resources, though this option was removed from the *2022 ERP* due to the greater risks to animal health, public health and the environment caused by the spread of HPAI. In

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December 2022, the CFIA conducted extensive consultations in response to requests from poultry producers in British Columbia to apply selective killing rather than complete stamping out. These consultations were both internal and external. The Agency weighed the benefits and harms of selective killing, specifically factors such as increased prevalence of HPAI, the immediate loss of some international markets, and a potential increase in resources required in the longer term for surveillance, and delayed depopulation procedures. Ultimately, the CFIA concluded that the Stamping-Out Policy remained the most effective in controlling the spread of highly infectious HPAI to other flocks, wild birds and mammals, including humans, while also maintaining alignment with the internationally accepted approach to HPAI management and control.

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[168] All these extensive, iterative, and consultative review and update processes directly address the only question properly before this Court on this point: whether the CFIA has remained responsive to evolving scientific and policy developments, and nonetheless determined, on reasoned grounds and with material factors considered, that continued application of the Stamping-Out Policy properly advances the objectives of the *Act*. The record before me supports a resounding answer in the affirmative. Whether the Applicant's experts might weigh scientific data differently, or prefer alternative policy approaches, is irrelevant to the reasonableness review that this Court must conduct here.

[169] In sum, the Applicant's arguments are in substance disagreements about the scientific foundations and policy merit judgments underpinning the Stamping-Out Policy, rather than a demonstration of statutory incompatibility. Applying *Vavilov* and *Auer*, I am satisfied that the

Stamping-Out Policy, as operationalized by the *2022 ERP*, remains reasonable and consistent with the *Act*.

C. *The implementation of the Stamping-Out Policy in this case withstands judicial scrutiny*

(1) The Applicant's Two New Arguments Raised at the Hearing Are Unpersuasive

[170] At the hearing, when challenging the reasonableness of applying the Stamping-Out Policy to the Applicant's case, counsel for the Applicant raised two arguments that were not included in their memorandum of fact and law. First, they argued that the CFIA's decisions were premised on a mistaken factual assumption. Namely, that the virus present on the farm was indeed HPAI under the definition of WOAH's *Terrestrial Code*, rather than what the *Code* defines to be an "emerging disease." If that assumption were mistaken, counsel argued, the decisions would necessarily be unreasonable, as the issuance of the Notice to Dispose under the Stamping-Out Policy is triggered specifically by the detection of HPAI. Second, they contended that the CFIA misinterpreted the definition of "poultry" in the *Terrestrial Code*, leading to the improper classification of the ostriches as poultry subject to the Policy. But for that misclassification, counsel argued, the Stamping-Out Policy would not have applied to the ostriches, and the CFIA's subsequent decisions dependent on that misclassification would therefore be unreasonable.

[171] I reminded counsel of the basic principle in Federal Courts practice that "only arguments included in a party's memorandum should be advanced in oral argument": *Bridgen v Canada (Correctional Service)*, 2014 FCA 237 [*Bridgen*] at para 35; *Sandhu v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 902 (FCA) at para 4; *Sibomana v Canada*, 2020 FCA 57 at para 6. In response, counsel submitted that one of the arguments could be inferred

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from one sentence in the Statement of Facts section of their memorandum, while notice of the other had been communicated to the Respondent prior to the hearing.

[172] Neither of these two submissions comes close to meeting the bright line threshold set by the jurisprudence for arguments that may be advanced during oral submissions. If an argument is not set out in argumentative form in a party's memorandum of fact and law, it is not properly before the Court at the hearing. I advised counsel at the hearing that I could decline to consider these arguments on that basis alone.

[173] However, I find that it is in the interests of justice to entertain the new arguments. Whether such new arguments should be considered is a discretionary decision to be guided by the balancing of the interests of justice as they affect all parties: *Quan v Cusson*, 2009 SCC 62 at paras 36–37; *President's Choice Bank v Canada*, 2024 FCA 135 at para 47; *Koch v Borgatti Estate*, 2022 FCA 201 at para 67; *Kaiman v. Graham*, 2009 ONCA 77 at para 18.

[174] Three considerations support engaging with the new arguments. First, addressing the substance of these arguments allows for a necessary clarification of the relationship between the CFIA's Stamping-Out Policy and the WOAH's *Terrestrial Code*, and a better understanding of the precise triggering mechanism for issuing a Notice to Dispose under the *2022 ERP*. This clarification not only assists in resolving the issues raised in this case, but also may provide guidance for future judicial reviews involving the CFIA's Stamping-Out Policy. Second, the Respondent has already presented extensive counterarguments during the hearing and expressly stated that its position could succeed based solely on the existing evidentiary record. Notably, the Respondent did not object when the Applicant's counsel devoted considerable time in oral

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submissions to advancing their new arguments. Third, the record before this Court provides a sufficient factual foundation for ruling on these issues without requiring further evidentiary submissions from either party. In these circumstances, and considering the significant consequences the CFIA's decisions have had and may continue to have on the Applicant, I determine that the Applicant's case should be adjudicated fully on the merits and not be prejudiced by its counsel's procedural fouls.

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[175] In my view, these two new arguments have little merit. The flaw in both is the same: the Applicant's counsel assumes that CFIA's Stamping-Out Policy is operationalized by adopting relevant portions of the *Terrestrial Code*, leading to their conclusion that the *Code*'s definitional distinctions between (a) "highly pathogenic" and "emerging" influenza and (b) "poultry" and "non-poultry" are what guide the CFIA in its implementation of the Stamping-Out Policy. This assumption is baseless. Canada's current domestic response to the avian flu is executed through the *2022 ERP*. While the *Terrestrial Code* is an influential reference, it is not adopted by law or policy in its entirety and does not directly structure the CFIA's outbreak response.

[176] A quick review of the cross-examination transcript of Dr. Harchaoui shows that the Applicant's counsel should have known that their assumption is baseless:

> **Q.** Now, did WOAH itself have any input in the creation of the policy?
>
> Let me clarify. I know that there's the terrestrial animal health and it was a general policy, but was there any actual -- were there meetings with representatives or was there kind of a sample policy or anything like that that you adopted from WOAH?
>
> **A.** So the role of WOAH is not to dictate any type of policy, but they have recommendations in their terrestrial code. One element where WOAH intervened, it was in the past through what we call

> the PVS. It's the evaluation of the veterinary structure in any of the countries…
>
> [emphasis added]

When reading this testimony alongside the *2022 ERP*, there can be no doubt that the instrument operationalizing the Stamping-Out Policy and guiding the CFIA's decision-making process is the *2022 ERP*, not the *Terrestrial Code*.

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[177] A review of the relevant sections in the *2022 ERP* confirms that the Policy applies to the Applicant's situation. Section 7.1 sets the trigger for confirmed case response as the confirmation that the sample yields a RRT-PCR H5 positive result for all cases that are not the first in that province. No further pathogenicity determination or "poultry" classification is required. Section 7.3 explicitly states:

> The classification of an [infected premises] as non-poultry does not change the eradication actions required on the [infected premises]. These will be the same as for an [infected premises] classified as non-commercial (small-holding) poultry.
>
> [emphasis added]

[178] Section 7.3 further clarifies that distinguishing poultry from non-poultry affects only international reporting and zoning calculations. It does not alter the core measures of depopulation, disposal, and disinfection. Accordingly, even if the ostriches were "non-poultry" or the virus could be characterized as an "emerging disease" pursuant to the *Terrestrial Code*, a confirmation of H5-positive RRT-PCR result would still unambiguously guide the CFIA to initiate the same response.

(2) The Notice to Dispose Withstands Judicial Scrutiny

(a) *The Notice to Dispose was Issued in a Procedurally Fair Manner*

[179] I find that the issuance of the Notice to Dispose did not breach procedural fairness. The duty of fairness the CFIA owed to the Applicant in issuing the Notice to Dispose lies on the lower end of the spectrum described in *Baker*. In the context of disease control, the urgency and emergency inherent to such situations justify a uniquely minimal duty of fairness that, as the Supreme Court recognized in *Cardinal*, may exclude prior notice or participatory rights. The CFIA's issuance of the Notice did not violate this minimal level of duty.

[180] The Applicant contends that the CFIA's issuance of the Notice to Dispose violated both the common law duty of procedural fairness and the Agency's own Open and Transparent Agency Policy [the Transparency Policy]. The Applicant highlights that the Transparency Policy commits the CFIA to "open-by-design" decision-making and timely release of information. In its view, the inspector who issued the Notice, fell short of that commitment by offering no explanation beyond checking statutory boxes on the form. On this footing, the Applicant submits that the applicable duty of fairness was moderate to robust, requiring a more participatory process before subsection 48(1) of the *Act* was invoked and the Stamping-Out Policy applied. In particular, the Applicant argues that fairness entitled it to an advance notice of the decision, disclosure of relevant materials, and more extensive participatory opportunities in reviewing and contesting the laboratory results, proposing alternative mitigation strategies such as selective culling, vaccination, or burn-out, submitting evidence of the flock's natural immunity, and receiving more detailed reasons than those provided in the standard-form Notice.

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[181] The Respondent submits that, at the initial notice stage of this multi-step administrative process, the duty of procedural fairness is minimal, if it exists at all. In its view, the Notice to Dispose constitutes a mechanical implementation of a standing emergency policy, involving little to no discretionary judgment and therefore attracting a very low fairness threshold. On the Transparency Policy, the Respondent argues it is aspirational and non-binding. Even so, it maintains that real-time disclosure of evolving emergency-response data and documents during an active investigation is neither practical nor required. In the Respondent's view, the only procedural requirement at this stage, particularly given the urgency inherent in disease-control decisions, is to issue a subsection 48(3) compliant notice that sets out the legal basis and substantive instructions for disposal without the need for prior notice or participatory opportunities. According to the Respondent, requiring advance notice or adversarial participation before issuing the Notice would frustrate the statutory purpose of enabling rapid containment of serious disease threats.

[182] Applying the factors outlined in *Baker* at paragraphs 23 and 27, I find that the procedural fairness does exist at this stage of the multi-step decision-making process, but it lies on the lower end of the spectrum. First, as the Respondent correctly observes, the issuance of a Notice to Dispose is a largely mechanical act guided by clear triggering criteria and procedural steps outlined in the *2022 ERP*. It is further removed from a judicial model of decision-making and involves limited discretion on the part of individual inspectors. As this Court recently reaffirmed, the narrower the discretion is afforded to the decision-maker, the lower the level of procedural fairness is required: *Osakwe v Canada (Public Safety and Emergency Preparedness)*, 2023 CanLII 111754 (FC) at para 9.

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[183] Second, the Notice to Dispose does not represent a final determination of the Applicant's legal rights or entitlements. The Stamping-Out Policy contemplates an immediate follow-up opportunity to apply for an exemption, which the CFIA promptly extended to the Applicant. The existence of this subsequent participatory opportunity within the broader process supports the conclusion that a lower level of fairness is owed at this initial stage.

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[184] Third, issuing the Notice to Dispose undoubtedly carries significant adverse consequences for the Applicant. The ostrich operation appears to be the entirety, or at the very least the core, of the Applicant's business, and the principals have devoted considerable time, financial resources, and labour into developing the flock. A full depopulation of the farm will seriously disrupt the Applicant's business operation, producing a long-lasting, if not permanent, economic consequence. Although the Applicant may be entitled to some compensation under the *Compensation Regulations*, the extent and sufficiency of this relief is disputed. In all, the magnitude and irreversibility of the impact raises the level of procedural fairness owed in this case.

[185] Fourth, as discussed in the Legal Framework section, Parliament has delegated broad discretionary power to the Minister and their delegates under section 48 of the *Act*. It has prescribed only minimal procedural entitlements with the requirement to issue notices pursuant to subsection 48(3). While I agree with the Respondent that the CFIA's Transparency Policy is not legally binding, I do not accept that it is irrelevant to the procedural fairness analysis. The Supreme Court in *Baker* has made clear that reviewing courts should "take into account and respect the choices of procedure made by the agency," especially when "the agency has an expertise in determining what procedures are appropriate in the circumstances": *Baker* at

para 27. However, the Transparency Policy sets out only broad aspirational principles and offers no concrete procedural directives applicable to the implementation of the Stamping-Out Policy. For instance, its commitment to "open-by-design" provides general value statements rather offering concrete procedural measures. As such, it cannot represent a deliberate procedural choice made by the CFIA in the way that the *2022 ERP* and the *What to Expect – Steps on How CFIA Will Work Through the Process on Your Farm* document do, neither of which contemplate document disclosure or participatory elements at this stage of the administrative process. Hence, this factor also supports a lower duty of fairness.

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[186] Weighing these factors cumulatively, I determine that the overall procedural fairness owed to the Applicant is minimal. In fact, this very limited duty of fairness applicable here does not require either prior notice or participatory rights before the issuance of the Notice to Dispose, nor does it demand detailed substantive reasons. As the Respondent rightly notes, the Supreme Court has established in *Cardinal* at paragraphs 15 and 16 that even where a duty of fairness exists, urgent or emergency situations may mean that the duty of fairness involves no requirement for notice or participation before the decision. This is precisely the scenario Parliament anticipated the Minister and their delegates, including the CFIA, would encounter in daily operations, and accordingly enacted sections 22 and 48 of the *Act* to authorize immediate action based on mere "suspicion" of a reportable disease to achieve rapid and proactive disease mitigation and prevention. On this uniquely minimal standard, I find that the CFIA met its procedural obligations. Before issuing the Notice, Agency officials had communicated with the Applicant and conducted an on-site inspection. These interactions informed the Applicant of the essential basis for the Agency's action and gave its principals an opportunity to comment on

sampling logistics and demonstrate biosafety conditions. No further advance notice, participation, or detailed reasons were legally required.

[187] The issuance of the Notice to Dispose itself also properly complied with subsection 48(3) of the *Act*. The Notice, delivered on December 31, 2024, cited subsection 48(1) as the legal authority, ordered the destruction of all birds within the defined epidemiological unit, outlined the procedures for carcass disposal, and set a compliance deadline of February 1, 2025.

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[188] Because the CFIA had discharged the procedural obligations applicable at this initial stage of an extended decision-making process, the Applicant's challenge to the Notice to Dispose on procedural fairness grounds cannot succeed.

(b) *The Notice to Dispose was Unfettered*

[189] I find that Inspector Zhang was unfettered in making the decision to issue the Notice to Dispose. As explained in the Legal Framework section, fettering is only a concern when the decision-maker wields discretion in making the decision. In my view, the *2022 ERP* has structured the CFIA's statutory discretion into a multi-step process where issuing the Notice becomes a non-discretionary action following H5-positive detection through RRT-PCR. The discretionary element is reserved exclusively for the exemption evaluation step. Since Inspector Zhang had no discretion to exercise at the Notice issuance stage, he could not have been fettered in his decision-making.

[190] The Applicant argues that section 48 of the *Act* expressly permits treatment as an alternative to destruction, which the CFIA has not seriously pursued. According to the

Applicant, the CFIA expressly refused even to consider options such as selective depopulation, sentinel surveillance, vaccination trials or permitting naturally immune birds to remain on-site, which are approaches the Applicant's experts characterize as feasible for low-density, long-lived ostriches. In the Applicant's view, by slavishly mirroring non-binding WOAH guidance aimed mostly at avian species that do not resemble ostriches, Inspector Zhang, and by extension the Agency, was fettered by the Stamping-Out Policy.

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[191] I am not persuaded. To begin, the Applicant's argument again falsely equates WOAH policies with the Stamping-Out Policy. The operative instrument that implements the Policy is the *2022 ERP*. If any fettering were to be found, it would need to be traced to that document. Yet, a reading of the *2022 ERP* shows that the "case response trigger" stage functions in a mechanical manner: once an accredited laboratory confirms a positive H5 RRT-PCR result on a premises that is not the provincial index case, the issuance of a Notice to Dispose proceeds almost automatically.

[192] While this may, at first glance, appear to reflect the textbook definition of fettering, where a decision-maker applies a policy as legally binding without considering whether deviation is possible, such a conclusion does not withstand closer examination. The Applicant's submission that subsection 48(1) of the *Act* contemplates treatment and therefore requires the inspector to weigh alternative approaches ignores how the statutory discretion has been legitimately structured by the *2022 ERP*. Although subsection 48(1) does indeed vest broad discretion in the Minister and their delegates, the CFIA has operationalized that discretion by allocating it unevenly across different stages of the *2022 ERP*. As recognized in *Thamotharem* and *Ainsley*, such allocation is lawful, so long as the total discretion of the entire process is not

diminished. Here, the discretion is concentrated at the exemption stage, where CFIA officials evaluate case-specific facts and weigh multiple policy and scientific considerations in deciding whether to exempt an applicant from depopulation. Viewed holistically, the overall statutory discretion remains intact. It is not abolished, merely channelled. That allocation is operationally sensible given the urgency and importance of HPAI responses, and finds support in *Carpenter Fishing*, the *David Hunt* cases, and *Kohl*. Given that such allocation of discretion among different decision points in a multi-step administrative process is permissible in law, the lack of discretion in the issuance of the Notice to Dispose is legal. Consequently, because no discretion exists at this step, nothing can be unlawfully constrained.

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[193] Accordingly, the fettering claim fails. The jurisprudence and statute permit the CFIA to channel discretion through a policy of general application. The *2022 ERP* has done exactly that by allocating where that discretion is to be exercised based on the real urgency of disease-control and Inspector Zhang, having no discretion at the trigger stage, could not possibly have abdicated or fettered it.

(c) *The Notice to Dispose was Reasonable*

[194] I find that Inspector Zhang's decision to issue the Notice to Dispose was reasonable. He acted within the scope of his designated responsibilities in the broader disease-control process: not as an independent assessor of potential alternatives, but as an implementer of the Stamping-Out Policy as structured through the *2022 ERP*. At the stage of issuing the Notice, his role did not require individualized deliberation over alternative disease-management strategies, as those policy determinations had already been made upstream in the policymaking process. I also reject the Applicant's "common sense" argument that Inspector Zhang should have awaited further

confirmatory testing and weighed alternative options before acting. This submission is rhetorical, unsupported by evidence, and ignores the specialized nature of disease-control decision-making. What the Applicant portrays as "common sense" is not some self-evident truth but rather a policy preference masquerading as intuitive reasoning. This Court cannot replace science-based, expertise-driven judgments with counsel's appeals to lay intuition, particularly in a domain involving the management of potentially serious and fast-evolving animal and public health risk.

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[195] In challenging the reasonableness of the Notice to Dispose, the Applicant advances two primary arguments. The first closely mirrors its earlier submissions on fettering and takes issue with Inspector Zhang's decision to issue the Notice without considering alternatives to the Stamping-Out Policy. Framed within the reasonableness inquiry, the Applicant characterizes this as a failure to consider relevant evidence, such as the potential benefits and efficacy of selective depopulation, quarantine and surveillance, and vaccination treatments. The Applicant argues that this omission contravenes the requirement articulated in paragraph 126 of *Vavilov*, which obliges administrative decision-makers to engage with relevant evidence before them.

[196] The second, closely related argument was raised during oral submissions. It concerns whether Inspector Zhang acted unreasonably by issuing the Notice to Dispose without deliberating other options and awaiting confirmatory testing from the National Centre for Foreign Animal Disease in Winnipeg. According to the Applicant's counsel, proceeding in the absence of such deliberation and confirmation defied common sense. Faced with a novel or potentially altered pathogen, counsel argued, commonsense prudence demands that sufficient information be gathered and alterative routes be considered before issuing a consequential

decision like the Notice to Dispose. Acting in the absence of such information and deliberation, counsel asserted, reflected hasty decision-making driven by a lack of common sense. This, in turn, undermined the internal coherence of Inspector Zhang's reasoning and rendered the decision unreasonable: *Vavilov* at paras 102-104.

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[197] I do not find either argument persuasive. Regarding the first claim that the decision-maker failed to consider all relevant evidence, I reject it for reasons similar to why I found the fettering argument unconvincing. As outlined in the Legal Framework section and discussed in the fettering analysis, Inspector Zhang's role within the broader disease-control process was not to independently assess the situation, but to implement the Stamping-Out Policy as operationalized through the *2022 ERP*. His actions were governed by a decision-making framework that has been long adopted and developed by the CFIA pursuant to its statutory authority under section 48 of the *Act*. As I have already found the Stamping-Out Policy reasonable in its design, which does not require case-specific deliberation at the stage of issuing a Notice to Dispose, there is nothing unreasonable in Inspector Zhang's execution of the framework as provided.

[198] Even assuming that Inspector Zhang was required to exercise independent judgment based on the information available to him, I am not persuaded that he overlooked any relevant evidence that was before him. First, the material before Inspector Zhang did not include the alternative disease-control strategies now advanced by the Applicant. As outlined in the Overview, judicial review is confined to the record that was before the decision-maker at the time of the decision. As the Respondent correctly submits, the record before the Inspector consisted of the *2022 ERP*, laboratory test results confirming that the Applicant's ostrich herd

was positive for H5 via RRT-PCR, and information obtained by the CFIA during phone communications and an on-site inspection regarding the biosecurity practices at the premises.

[199] Given this evidentiary context, I agree with the Respondent that the Inspector's brief written reasons, when read together with the surrounding record, provide a justification that meets the standard of reasonableness. As *Vavilov* explains at paragraph 97, citing *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11, even where formal reasons are limited or absent, reviewing courts may connect the "dots on the page" if the record and outcome clearly suggest the underlying rationale. In this case, those dots are especially clear and easily connectable, given the nature of disease-control decision-making where officials are often required to act swiftly and decisively in response to rapidly evolving and potentially catastrophic threats.

[200] Even if the alternative strategies proposed by the Applicant were available to Inspector Zhang at the relevant time, I would still find no basis to conclude that his decision to issue the Notice to Dispose was unreasonable. My exploration of the pertinent statutory and regulatory framework in the Legal Framework section demonstrates that the scheme under section 48 of the *Act* outlines a functional binary of destruction and treatment, and treatment refers only to measures the Minister and their delegates deem "effective in eliminating or preventing the spread of the disease or toxic substance." The legislative scheme does not contemplate a third "wait-and-see" option. Accordingly, if the Minister's delegates like Inspector Zhang do not consider a proposed treatment effective, destruction is the only reasonable route prescribed by the statute.

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[201] Here, Inspector Zhang opted for destruction, indicating that he did not consider the alternative measures sufficient to prevent the spread of or eliminate the disease. That determination rests on making scientific and technical judgments, tasks Parliament has entrusted to CFIA officials like Inspector Zhang. It is not the function of this Court to doubt the scientific merits of such expert assessments, particularly in the context of infectious disease-control where decisions often must be made quickly and decisively in the face of uncertainty.

[202] Concerning the "common sense" submission advanced by the Applicant's counsel at the hearing, I find it to be rhetorical in nature, unsupported by evidence, and unhelpful to this Court's analysis. Common sense arguments have their time and place. The Supreme Court has repeatedly acknowledged that judicial reasoning and fact-finding may necessarily require common sense and lived experience. For instance, as observed in paragraph 39 of *R. v S. (R.D.)*, [1997] 3 SCR 484, "the trier of fact is entitled simply to apply common sense and human experience in determining whether evidence is credible and in deciding what use, if any, to make of it in coming to its finding of fact."

[203] However, common sense is also a concept that is too often misused both in and outside of the courtroom. Sound commonsense reasoning must be sufficiently supported by the evidence and appropriately responsive to the context in which the decision is made. It cannot rest on pure speculation or assumption, especially in decision-making contexts that are not at all common in an ordinary person's lived experience. Indeed, the Supreme Court has recently cautioned against making common sense "a catch-all phrase that licenses any form of reasoning, no matter how faulty," since it "is not always 'common', does not always make 'sense', and worst of all, may be based on falsehoods or discriminatory beliefs": *R. v. Kruk,* 2024 SCC 7 at para 99.

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[204] With respect, the invocation of "common sense" reasoning in the present case reveals a fundamental misunderstanding, or neglect, of the complexities involved in scientific and technical decision-making performed by the Agency. What the Applicant's counsel characterizes as "common sense," the idea that Inspector Zhang, and by extension the CFIA, should have waited for confirmatory testing before acting, is a policy preference masquerading as self-evident truth. It presupposes that the "wait-and-see" strategies proposed by the Applicant are inherently the more rational or common choices when facing a rapidly spreading disease with unknown attributes that was actively killing the Applicant's ostriches. Even setting aside the fact that established epidemiological protocols such as the *ERP 2022* often dictate precisely the opposite, I am not convinced that reasonable individuals without specialized training in virology, epidemiology, or public health would instinctively view a "wait-and-see" approach as the commonsense response to such a pathogen.

[205] Moreover, as explained, common sense in decision-making only becomes truly "common" and "sensible" when ordinary individuals are familiar with or routinely exposed to the type of decision being made. That is not the case here. The complex, science-driven, and high-stakes decisions involved in managing the spread of avian influenza fall well outside the realm of commonly shared lived experience. To be clear, I do not suggest that the course of action proposed by the Applicant's counsel is inherently wrong or unworthy of consideration. I merely observe that it is not as self-evidently "common" or "sensible" as counsel suggest.

[206] What concerns me more is the "common sense" reasoning proposed by counsel seems to suggest, without any support, that there exists a universal layperson standard of rational decision-making in disease-control that should override the need for specialized expertise. As I have

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repeatedly emphasized throughout my reasons, this Court cannot replace the technical judgment of officials, nor accept counsel's rhetorical appeals to intuition, in place of the expertise exercised within a well-established policy framework for managing potential disease outbreaks that carry significant implications for public and animal health across Canada. Indeed, the Supreme Court in paragraph 93 of *Vavilov* expressly cautioned against such an approach:

> Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[207] Considering the facts and law before me, I conclude that the "common sense" argument is rhetorical in nature and not suitably responsive to the scientific and institutional context in which the CFIA operates. Inspector Zhang's issuance of the Notice to Dispose does not suffer from such a defect and therefore must stand.

(3) The Exemption Denial Withstands Judicial Scrutiny

(a) *The Exemption Denial was Issued in a Procedurally Fair Manner*

[208] I conclude that the CFIA has fulfilled the high level of duty of fairness it owed to the Applicant in the exemption evaluation process. The Applicant asserts that it held a legitimate expectation of outcome, but in law such expectation cannot give rise to substantive rights. Even when viewed from a procedural perspective, no legitimate expectation could have arisen because the CFIA never made any clear, unambiguous, or unqualified representations about procedure to the Applicant. The Applicant further did not suffer unfairness from the claimed disclosure defects, as the "significant burden of proof" language in the final decision merely restated the

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consistently communicated evidentiary threshold, and all material content from the *Exemptions from depopulation* appendix relevant to the Applicant's situation had already been provided. Throughout the eight-day evaluation process, CFIA officials engaged extensively with the Applicant, emphasizing the specific documentation requirements and the urgency of the process. I am convinced that the process left the Applicant with full awareness of the case it needed to meet and adequate opportunities to do so.

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[209] The Applicant submits that a high level of fairness applied to the CFIA's exemption evaluation process. Unlike the effectively automatic issuance of a Notice to Dispose, the exemption decision was discretionary and, importantly, expressly contemplated participatory opportunities under the *2022 ERP*. The Applicant argues that the duty was further heightened considering the gravity of the Exemption Denial's consequences: the decision has effectively sealed the fate of some 400 ostriches, threatened the livelihoods of the principals, and jeopardized ongoing antibody research projects.

[210] The Applicant contends that this high standard of fairness was breached in two main ways. First, it argues that it had a legitimate expectation that the exemption would either be granted or, at the very least, seriously considered in a flexible and open-ended manner. This expectation, according to the Applicant, was grounded in the Exemption Process Overview Email sent by the Case Officer on January 2, 2025, which the Applicant interpreted as indicating that its ostriches had already been accepted into a specific procedure that led toward the "rare and valuable genetics" exemption, and that the evaluative process was an open-ended one. The Applicant says that such impression was further reinforced during a meeting on the next day, when, in response to a question from one of the principals about whether the ostriches would be

culled, the Case Officer reportedly stated that the Agency "would have told UOF at the outset of the meeting if they had made that decision." From the Applicant's perspective, these interactions had established a legitimate expectation for a favourable outcome:

> …in [Case Officer's January 2, 2025] email it seemed to us that CFIA had already placed the UOF's ostriches into the "bird classified as having rare and valuable genetics" category. We were just told to send in some documents to show what we had been doing.

The Applicant asserts that this legitimate expectation was breached when: 1) the Agency unilaterally shifted from an open-ended process to a narrow one requiring specific documentation, without notice; and 2) the Agency imposed a brand new "significant burden of proof" standard, which was only disclosed to the Applicant in the Exemption Denial decision itself, and thus constituted an unannounced deviation from the procedure that the Applicant expected.

[211] Second, the Applicant argues that the CFIA's failure to make necessary disclosures prevented it from knowing the case it had to meet. Specifically, the Applicant takes issue with two items that were not provided: 1) the evidentiary standard of "significant burden of proof;" and 2) the *Exemptions from depopulation* appendix to the *2022 ERP*, which outlines and explains the exemption criteria. The Applicant contends that, without being informed of the applicable evidentiary threshold and exemption criteria, it did not know the case it had to meet and was unable to properly prepare its case. As a result, it did not gather or submit expert opinions, genetic data, or business documentation that it otherwise would have provided to meet the standard. The Applicant further submits that these disclosure failures were aggravated by the

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CFIA's breach of its own Transparency Policy, which commits to the timely provision of relevant information.

[212] The Respondent does not dispute the level of duty owed to the Applicant, but maintains that the process was fair, and in any event, no additional procedural safeguards could have changed the outcome. In its view, the Exemption Process Overview Email from the Case Officer, when appropriately examined in context, clearly sets out the case the Applicant needed to meet. The email described upfront that the process was "document heavy," explained in detail the "rare and valuable genetics" exemption category, and included the *Distinct Unit Request Package*, which detailed the relevant exemption criteria and provided a self-reporting checklist for biosafety measures. The email also instructed the Applicant to submit "documented proof" of distinct genetics and gave specific examples of acceptable evidence, such as historical breeding records, genomic testing results, or third-party valuations. According to the Respondent, the Applicant failed to provide any of the requested documentation and, in completing the *Distinct Unit Request Package*, answered "no" to 13 of the 20 biosecurity-related self-reporting questions that would support a finding of distinct epidemiological status. As such, the Respondent argues that the refusal should not have come as a surprise and confirms that the process was fair.

[213] The Respondent also denies that any new standard was introduced. The use of the phrase "significant burden of proof" in the written decision, it argues, simply reiterated what the term "documented proof" had already conveyed. It was not an unexpected or new evidentiary threshold introduced at the last moment, especially given the repeated detailed list of sample

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documents and the detailed explanation of the exemption process set out in the *Distinct Unit Request Package*.

[214] The Respondent further rejects the notion that the Transparency Policy or staff communications created enforceable procedural rights. According to the Respondent, a general transparency commitment cannot give rise to binding obligations, and no applicant can reasonably expect a particular procedure or favourable decision based solely on general assurances without clear operational promises. Legitimate expectations, it argues, concern procedural fairness, not the outcome itself.

[215] Lastly, the Respondent contends that even if there had been a procedural shortcoming, such as a failure to disclose all documentation in advance, it would not have affected the result. The record shows that every ostrich in the flock had shared the same exposure risk, and under the *2022 ERP* and its appendix *Exemptions from depopulation*, no flock in such circumstances could qualify as a distinct epidemiological unit.

[216] I agree with the Applicant that the procedural fairness owed here is high for the factors it has listed: an inherently discretionary process, the contemplation of participatory elements, and the serious impact of the decision on the Applicant. However, I reject the Applicant's claim that the CFIA breached this heightened duty.

[217] The Applicant's first claim of fairness breach is unpersuasive, because its position on legitimate expectation lacks legal foundation and factual support. It is trite law that legitimate expectations cannot give rise to substantive entitlements or outcomes: *JP Morgan* at para 75;

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Jennings-Clyde at para 40. If the Applicant's counsel erred in submission and instead intended to assert a procedural legitimate expectation, I nevertheless find no basis for it. The Exemption Process Overview Email from the Case Officer does not contain any representation capable of generating a procedural expectation.

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[218] To ground a legitimate expectation, the Applicant must show that the Agency made a clear, unambiguous, and unqualified representation as to the procedure it would follow, or that it has consistently adopted a particular procedural practice in similar contexts: *Mavi* at para 68. The Applicant relies on the former basis and builds its arguments primarily upon two sentences from the Exemption Process Overview Email. The first sentence reads: "Based on the information we've gathered, you fall into the 'birds classified as having rare and valuable genetics' category." The Applicant asserts that this is a clear confirmation from the CFIA that its ostriches had been locked into the procedure leading to exemption based on "rare and valuable genetics." Even when read in isolation, this statement does not rise to the level of a clear, unambiguous, and unqualified representation about the procedure the CFIA would follow. At best, and even under the most generous interpretation, it is only suggesting that, based on the information available at that time, the Applicant *might* be eligible for consideration under that category.

[219] When viewed in context, there should be no reasonable doubt left about what the Case Officer meant by this sentence, that the Applicant's exemption request, based on the CFIA's understanding of the preliminary information it has gathered, falls into the "rare and valuable genetics" category, and to fully qualify for the exemption the Applicant needed to provide the

requested information to support its case. Two contextual clues are especially illuminating. The first one comes within the Email itself:

> Here's what we need from you at this time to get started:
>
> - We need documented proof that these birds are distinctive from standard commercial flocks. The highlighted section above gives good examples of the types of documents we're looking for.

I find the phrases "to get started" and "we need documented proof" both convey that the process was at a preliminary stage and exemption was conditional on the Applicant's provision of specific supporting materials. The reference of "to get started" expressly signals that the evaluation process had not yet concluded, while the request for "documented proof" reveals that the burden was on the Applicant to substantiate its exemption claim. Given this analysis, CFIA officials' statement that they "would have told UOF at the outset of the meeting if they had made that decision" also clearly indicates that the Agency was still in the process of gathering information and had not yet reached a conclusion, rather than that the exemption approval was forthcoming or that the process would be open-ended. The language used in the email or at the meeting does not support any inference that the CFIA had already committed the Applicant's exemption application to a specific procedural route.

[220] The second contextual clue is found in the phone log documenting the Case Officer's first interaction with the Applicant's principals, some four hours before the Exemption Process Overview Email was sent. That log contains a key portion that describes how the Case Officer briefed the principals on the exemption process:

> It was indicated December 31, 2024, after CFIA informed Mr. [Principal] of the positive Avian Influenza (AI) test result that Mr. [Principal] was interested in a [*sic*] exemption from depopulation for his ostriches. CO…

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> briefed Mr. [Principal] on the process, that a Distinct Unit Request (DUR) would have to be submitted to CFIA to start the process. Mr. [Principal] requested his business partner… to be in the call and a three-way phone call was started to include Mrs. [Principal]… CO… further explained that the DUR process is very time sensitive and document heavy, stressed the importance of submitting everything to CFIA in time and would further explain in an email and attach the DUR template.
>
> [emphasis added]

The underlined parts directly undermine the Applicant's argument. First, the Case Officer explicitly explained to the Applicant's principals that a "Distinct Unit Request… would have to be submitted to CFIA to start the process." This alone dispels any notion that, at the time the Exemption Process Overview Email was received, the process had been set on a procedural track leading toward exemption, because that very Email was the one that provided the *Distinct Unit Request Package* necessary to initiate the process. Second, the Case Officer emphasized to the principals that the exemption process would be "very time sensitive and document heavy," stressing the importance of "submitting everything to CFIA in time." This unequivocally conveyed the provisional and conditional nature of the exemption process, reinforcing that the responsibility to meet the requirements rested with the Applicant. These statements cannot reasonably be interpreted as creating an expectation of the procedure sought by the Applicant.

[221] Viewed alone or collectively, these two contextual clues put to rest any dispute that a legitimate expectation could somehow have arisen from this: "Based on the information we've gathered, you fall into the 'birds classified as having rare and valuable genetics' category."

[222] The second sentence relied on by the Applicant to assert its legitimate expectation claim that the evaluative process was promised to be an open-ended one: "The Exemption Email went

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on to state that '*[t]he genetics of the flock can be demonstrated to be distinctive from standard commercial flocks* <u>*with criteria such as but not limited*</u> *to the following…*'" [italics in the original; emphasis added by the Applicant]. However, apart from doing underlining, the Applicant has offered no explanation, either in written or oral submissions, on how this sentence establishes a procedural commitment to an open-ended procedure.

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[223] With respect, I am of the view that, again, when properly read in context, this sentence conveys precisely the opposite of what the Applicant suggests. The relevant excerpt from the Email reads:

> *The genetics of the flock can be demonstrated to be distinctive from standard commercial flocks with criteria such as but not limited to the following:*
>
> - *There is historical evidence of genetic investment…;*
> - *The flock consists of high quality pure-bred birds…;*
> - *Genomics testing for specific traits has been undertaken*
>
> Here's what we need from you at this time to get started:
>
> - We need documented proof that these birds are distinctive from standard commercial flocks. <u>The highlighted section above gives good examples of the types of documents we're looking for</u>.
>   - If you have <u>any documentation of the agreement between you and the university – that'd be really helpful to send to us</u>.
>
> [emphasis added]

The language "The highlighted section above gives good examples of the types of documents we're looking for" links the request for documentation directly to the previously listed criteria. This indicates that while the Applicant's underlined "<u>*with criteria such as but not limited*</u>" signals that the list is not strictly exhaustive, it does not support the Applicant's interpretation of

an open-ended process in which its submitted documents will be sufficiently probative. Rather, it clarifies that the CFIA was seeking materials of a comparable nature and probative value, which are documents capable of substantiating the distinctive genetic characteristics of the flock. Similarly, the request for "any documentation of the agreement between you and the university – that'd be really helpful to send to us" points to the Agency's interest in targeted, relevant information, not an invitation for the Applicant to define the expected procedure and submit evidence according to its wants and wishes. These communications reflect a structured procedural framework, not an undefined or open-ended process.

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[224] Beyond the Email's plain language, other contextual indicators further undermine the Applicant's interpretation. The exemption application required completion of a self-reporting form with predefined criteria, and the Case Officer repeatedly requested specific documents, including those supporting the Applicant's alleged collaboration with Kyoto University and evidence of the flock's purportedly unique genetic profile. Additionally, the *What to Expect – Steps on How CFIA Will Work Through the Process on Your Farm* document attached to the Process Introduction Email overwhelmingly reinforces this conclusion. Although the document acknowledges some "fluidity" in terms of overlapping of procedural steps, it lays out clear, defined, and sequential steps in the overarching administrative process. Taken together, these materials show that the exemption process was tightly structured and driven by specific criteria, not open-ended as the Applicant suggests.

[225] The Applicant's second claim of fairness breach is also unconvincing, because its submissions on disclosure defects are misguided. Regarding the alleged omission of the "significant burden of proof" that was ultimately imposed on the Applicant and, it says, resulted

in its inability to meet the case because it had no knowledge of the case it had to meet, I find it to be mostly a claim that plays on semantics. While there is no doubt that the exact wording of "significant burden of proof" only appeared for the first time in the Exemption Denial, they add no substantive hurdle beyond what the Applicant had already been told from January 2, 2025 and onwards.

[226] The Exemption Process Overview Email warned that an exemption request is "document heavy" and must include documented proof that the birds are genetically distinct. The attached Distinct Unit Request Package stated only "in some exceptional circumstances, a distinct population of birds may be recognized," and explained the CFIA may exercise its discretion to exempt it from depopulation. It also warned "any 'no' responses" to the twenty self-reporting biosecurity questions "will likely result in a denial of the request."

[227] The CFIA's subsequent communications made it even more evident that the Applicant was or should have been aware of the high evidentiary threshold it needed to meet. Over eight days, CFIA officials held virtual meetings and made phone calls to discuss the situation with the Applicant, conducted another on-farm assessment, answered questions about completing the package, and repeatedly urged the owners to supply "as much supporting evidence as possible." These interactions emphasized the need for specific kinds of documentation and made it clear that a heavy evidentiary burden rested on the Applicant.

[228] In my view, both the plain language of the Exemption Process Overview Email and the surrounding contextual communications made it sufficiently clear that the Applicant bore a substantial onus to present persuasive documentation aligned with the exemption criteria. The

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phrase “significant burden of proof,” as used in the *Exemption Denial*, simply restated that existing and obvious obligation in more concise terms. While I acknowledge that the CFIA could have provided greater clarity by using that exact wording from the outset, I do not find the Agency’s later use of this language introduced or imposed a new, higher evidentiary threshold that would amount to a breach of procedural fairness.

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[229] The Applicant’s second claim of disclosure failure is similarly unconvincing, because the alleged failure neither was an actual failure nor prevented the Applicant from understanding the case it needed to meet. I find it puzzling why the Applicant insists that it was entitled to receive the full *Exemptions from depopulation* appendix, when all content relevant and material to its exemption request from that appendix had already been conveyed through the Exemption Process Overview Email.

[230] Two examples suffice to illustrate this point. First, the Exemption Process Overview Email reproduced in full the key part of the appendix concerning the “rare and valuable genetics” category of exemption, which was the very category that the Applicant expressed interest in pursuing and did pursue. Second, the attached *Distinct Unit Request Package* clearly outlined the criteria for establishing a distinct epidemiological unit. In fact, together, these two sources provided the entirety of the core requirements that the Applicant needed to satisfy to obtain an exemption: the threshold of distinct epidemiological units and the documentary evidence necessary to support a claim under the rare genetics category.

[231] Apart from the already addressed argument regarding the “significant burden of proof,” the Applicant has identified no specific omission in the material disclosed to it that impaired its

ability to make its case. At the hearing and in its written submissions, it failed to point to any particular section or passage from the *Exemptions from depopulation* appendix that was relied upon in the exemption evaluation process but was withheld from it. Instead, the Applicant simply asserts in broad terms that the entire appendix should have been disclosed. The Applicant does cite again the Transparency Policy in support of this argument. But, as explained above, the Transparency Policy is aspirational in nature and contains no specific procedural commitments relevant to the administration of exemptions under the Stamping-Out Policy. It does not entitle the Applicant to receive internal policy guidelines in full, especially where the CFIA has already disclosed the material operative criteria and evidentiary expectations relevant to the request at hand.

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(b) *The Exemption Denial was Reasonable*

[232] I find that the CFIA's Exemption Denial was reasonable. Most of the Applicant's arguments on Exemption Denial are more accurately understood as challenges to the reasonableness of the Stamping-Out Policy and have therefore already been addressed in my above analysis on the Policy's reasonableness. Accordingly, I have consolidated the remaining relevant objections and distilled them into three arguments that directly concern the reasonableness of the Exemption Denial.

[233] First, the Applicant argues that the Exemption Denial was rendered when a pivotal piece of scientific input was still outstanding. This evidence was Dr. French's rapid literature review on avian influenza in ostriches, which the Exemption Committee had itself commissioned on the morning of January 10, 2025. The Applicant notes that the Agency asked for this review because it acknowledged that the Stamping-Out Policy had primarily been developed based on

experience with chickens and turkeys, not ostriches. Yet, the Exemption Denial was finalized and sent roughly five hours before Dr. French submitted her report. The Applicant contends that the Committee's failure to wait even just one day for the results of a report it had commissioned and acknowledged as important constitutes a fatal flaw. In its view, by proceeding without this key scientific input, the Exemption Committee acted on an incomplete record and thereby reached an unreasonable decision.

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[234] Second, the Applicant submits that the Exemption Committee misconstrued its own exemption framework by improperly welding together the two distinct exemption pathways of "rare and valuable genetics" and "distinct unit." According to the Applicant, the Agency's internal Decision Record titled *Updates to Distinct Unit Recognition Process* lists these as separate, disjunctive categories for exemptions. The Exemption Denial, however, treated "distinct unit" status as a pre-requisite to the genetics exemption and rejected the request on the basis that there was no physically and epidemiologically segregated subgroup. The Applicant contends that this conflation led the Committee to apply the policy incorrectly, making the Exemption Denial unreasonable.

[235] Third, the Applicant contends that the Exemption Committee failed to consider relevant evidence that bears on its decision. This evidentiary neglect manifested in two major ways. First, the Committee ignored operation-specific factors that distinguished the Applicant's situation from other more common poultry farms: the ostriches' documented natural immunity following recovery from a 2020 "flu-like" illness; their uniquely long lifespan when compared to more common poultry; the relative difficulty of replacing ostriches once depopulated; the farm's isolation from other commercial poultry operations; a 30-year breeding program conferring

exceptional research value; and expert testimony that maintaining a naturally immune flock posed less risk than introducing new stock. Second, the Committee disregarded a central piece of contradictory evidence that undermined its trade-impact justification for rejecting exemption. Namely, that the granting of the March 2022 Exemption had caused no trade disruptions, suggesting that "evidently the exemption was not as impactful as" the Agency asserts. By selectively ignoring this evidence that directly challenged its reasoning, the Applicant argues, the Committee's decision is not justified considering the evidentiary record before them: *Vavilov* at para 126. For the Applicant, this neglect renders the Exemption Denial unreasonable.

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[236] I will first explain, in turn, why I find each of the three arguments unpersuasive. Then, I will assess whether the CFIA's reasons for denying the exemption appropriately reflect the gravity of its decision on the Applicant. Although the Applicant did not advance a focused argument on this specific point, it repeatedly emphasized, in written and oral submissions, that the ordered depopulation could result in the operational collapse of the farm and significant financial hardship for its principals. Cognizant of the substantial consequences of the Exemption Denial and in keeping with *Vavilov*'s instruction that administrative decisions must reflect the stakes of the decisions, I consider it this Court's obligation to examine whether the CFIA gave adequate consideration to those consequences in its reasoning.

(i) The Applicant's Argument on Dr. French's Rapid Literature Review Fails

[237] The Applicant's first argument is that the Exemption Denial was unreasonable because it was made without awaiting Dr. French's scientific inputs. I find, on close review, that this outstanding piece of information was not so essential to the CFIA's decision that proceeding without it rendered the decision unreasonable. I accept the Applicant's submission that the

Exemption Committee had not reviewed Dr. French's report at the time the Exemption Denial was issued. However, this omission is not the fatal flaw the Applicant makes it out to be.

[238] The record shows that the Exemption Committee properly set its central task as assessing whether any ostriches on the Applicant's premises met two criteria: 1) that they formed a distinct epidemiological unit; and 2) that they possessed "rare and valuable genetics" warranting preservation. Those twin criteria, laid out in the *Distinct Unit Request Package* and repeatedly explained to the Applicant's principals, turn on proper biosecurity practices, documentary pedigree and third-party recognition of genetic worth, rather than on a preliminary survey of avian influenza in ostriches. Indeed, the formal reasons for denial found both the Response Letter and the Internal Recommendation Memorandum show that the Committee focused primarily on the evidence directly relevant to those criteria: repeated on-site observations of wild bird and weasel ingresses into ostrich enclosures, the continued practice of shared feed sources, equipment, and personnel, the Applicant's predominantly negative responses to the twenty-question biosecurity checklist, unrestricted human movement into areas designated as an Infected Place, and the absence of genomic testing or registry evidence demonstrating a unique and commercially valuable genetic line.

[239] With this gathered information, the Exemption Committee gave serious consideration to whether a subset of the Applicant's ostriches might be spared. However, after "significant debate," the Committee ultimately rejected this possibility. Their decision was driven by two key factors: the Applicant's poor biosecurity conditions and practices, and the lack of sufficient documentation to support the Applicant's claims regarding the genetic rarity and value of its ostriches. In that context, Dr. French's review—which found that ostriches are classified as

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poultry under WOAH, that South Africa implements stamping-out measures for HPAI in ostriches, and that avian influenza can mutate spontaneously in ostriches to facilitate interspecies transmission—would have provided no evidence to contradict, let alone alter, the Committee's denial of exemption.

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[240] Nor was the rapid literature review a necessary piece of science on ostriches for the Exemption Committee to make an informed decision. First, contrary to the Applicant's claim, its own cross-examination of Dr. Furness confirms that the Stamping-Out Policy was not designed solely for chickens or turkeys, but applies to "all avian species susceptible to highly pathogenic avian influenza, which includes ostriches and emus." This undermines the suggestion that the Agency lacked any foundational consideration of ostriches in its policy framework. Second, prior to issuing the Exemption Denial on January 10, 2025, the Committee had already consulted both internal experts and international counterparts, including officials at the U.S. Department of Agriculture's APHIS, on HPAI management in ostriches. All confirmed that the stamping-out approach continued to apply to ostriches without modification. In short, while Dr. French's report undoubtedly would have provided more extensive scientific understanding on the matter, the Committee did have access to current scientific and policy input on the issue and was not relying on an incomplete or outdated understanding.

[241] Even if I were to accept the Applicant's premise that Dr. French's rapid literature review was indispensable to the exemption assessment, the CFIA's decision would not be rendered unreasonable. If anything, it would be reinforced; that Dr. French's key conclusions, delivered later that evening, confirmed that ostriches are classified as poultry, that South Africa includes ostriches in its stamping-out approach, and that mutations of avian influenza in ostriches are

spontaneous and can increase interspecies transmissibility. Had the Committee waited, this information could only have further supported the decision to deny the exemption. Consistent with *Vavilov*'s teaching that judicial review is not a "line-by-line treasure hunt for error," it would be unreasonable for this Court to fault the Agency for not waiting for a document that would have led to the same result, especially given the time-sensitive decision-making context within which it operates.

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[242] With the above observations, I am satisfied that the CFIA's decision to deny the exemption was not unreasonable simply because it was rendered without examining the contents of Dr. French's rapid literature review. The Agency had done an extensive evidence-gathering process focusing on evidence going to the exemption criteria set out in the *2022 ERP*, and then turned its attention to the evidence it had gathered and the Applicant had submitted. The Supreme Court instructs that decision-makers must meaningfully grapple with "key issues or central arguments raised by the parties," not pursue "every… line of possible analysis": *Vavilov* at para 128. Here, the CFIA had properly focused its assessment on the core issues: the ostriches' exposure to the virus, the Applicant's biosecurity conditions and practices, as well as the documentation of genetic rarity and value. These corresponded directly to the two criteria at the heart of the exemption request and engaged with the very evidence submitted by the Applicant. This demonstrates that the Agency was, in the language of *Vavilov*, "alert and sensitive to the matter before it." It was not required to delay its decision for a report that ultimately contributed no outcome-altering information. Instead, the Committee appropriately grappled with relevant and material evidence and submissions, striking the proper balance between decision-making thoroughness and administrative efficiency, as *Vavilov* envisions.

[243] The Applicant's assertion that the Exemption Committee was obliged to await Dr. French's literature review also fundamentally misunderstands how administrative agencies operate in time-sensitive and high-stakes decision-making contexts. This argument incorrectly assumes that information described as "important" and "informing the decision" becomes indispensable to a reasonable decision-making process. Agencies like the CFIA routinely draw on multiple sources to build as complete an understanding as possible within limited timeframes. Dr. Furness' acknowledgment during cross-examination that Dr. French's rapid review was "important" and would help inform the Exemption Denial does not make it a determinative piece of evidence. It was still one of many documents that may be "important" in building a better understanding without being decisive to the outcome. As the statutory authority entrusted by Parliament to handle the high-stakes role of animal disease-control, the CFIA has the expertise and discretion to determine when its evidentiary foundation is sufficient to justify acting.

[244] Therefore, although it may seem counterintuitive for the Exemption Committee to request a scientific review and then proceed without waiting even a single day for its completion, this course of action aligns with the practical reality and operational urgency of disease-control. As the Supreme Court emphasized at paragraph 93 of *Vavilov*, an administrative decision must be evaluated against specific purpose, context, and operational demands of the administrative regime, and what may seem puzzling in isolation often becomes reasonable when properly contextualized. On January 10, 2025, the date of the Exemption Denial, the Agency was managing an active outbreak of avian influenza at the Applicant's premises with ongoing ostrich deaths. Beyond commissioning Dr. French's rapid literature review, the Agency had already consulted internal experts and international counterparts, who all confirmed that stamping-out measures applied to ostriches, collected extensive on-site evidence of poor biosecurity, and

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determined that the Applicant had failed to substantiate claims of genetic rarity or value. In this context, it was open to the CFIA to conclude that the Stamping-Out Policy needed to be implemented at the Applicant's premises, and thus the exemption request must be denied without further waiting.

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[245] I repeat—judicial review must never be conducted with the benefit of hindsight. Although the infection had later abated with many ostriches surviving, that could not have been foreseen at the time. The Stamping-Out Policy guided the Agency to depopulate the entire exposed epidemiological unit without delay. In such circumstances, the Agency was entitled, indeed compelled by its statutory mandate under the *Act*, to act decisively once it had gathered sufficient information to make a sound determination. In my view, this approach of soliciting information from multiple sources and proceeding when receiving adequate rather than all solicited information reflects a demonstrated expertise of properly balancing thoroughness and urgency that characterizes effective disease control. Accordingly, I conclude that the Agency acted reasonably in finalizing the Exemption Denial when it did.

(ii) The Applicant's Argument on Conflation of Exemption Criteria Fails

[246] The Applicant's second argument is that the Exemption Denial was unreasonable because the Exemption Committee allegedly misread "rare and valuable genetics" and "distinct unit" as conjunctive requirements. I find the misunderstanding instead lies with the Applicant, not with the Committee. A brief review of the record clarifies this point.

[247] I agree with the Applicant that the *2022 ERP*, its *Exemptions from Depopulation* appendix, and the *Distinct Unit Request Package*, shared with it via the Exemption Process

Overview Email, all list the "rare and valuable genetics" and "distinct unit" as separate, alternative exemption categories. However, the Exemption Committee never bolted these two categories together. Instead, the concepts the Committee paired in its reasons were "rare and valuable genetics" and distinct *epidemiological* unit. The Applicant's objection rests on a mix-up between "distinct unit," which is a standalone exemption category, and "distinct epidemiological unit," which is a threshold criterion applicable to all exemption requests.

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[248] As I explained in the Legal Framework section, the exemption regime is clear that all three available exemption categories of "distinct unit," "rare and valuable genetics," and "pet birds" share the same initial threshold of demonstrating distinct epidemiological status. In fact, the very Decision Record the Applicant cites in support of its argument, *Updates to Distinct Unit Recognition Process*, explicitly confirms this common threshold:

> 1. Policy to be included as part of the ERP
>
> In some exceptional circumstances, the CFIA may assess domestic birds on an [Infected Premise] <u>to determine if they can be classified as a distinct epidemiological unit</u>, and therefore not considered part of the susceptible population. <u>Populations that are considered a distinct epidemiological unit may be exempt from depopulation</u>.
>
> There are three categories for the recognition of a distinct epidemiological unit:
>
> - Distinct units
> - Rare and valuable genetics
> - Pet birds
>
> Criteria for evaluation of each of the above categories is available in ERP Appendix - Exemptions from depopulation
>
> [emphasis added]

[249] While the Applicant's confusion is not entirely unexpected given the similarity between "distinct unit" and "distinct epidemiological unit," any ambiguity should have been resolved by a review of the *Distinct Unit Request Package* provided to it. The cover page of that document clearly states: "If a group of birds are physically and functionally separate from the rest of an infected [epidemiological] unit, the CFIA may exercise its discretion to consider this group of birds as a distinct unit and exempt it from depopulation."

[250] Both the formal reasons set out in the Response Letter and the accompanying Internal Recommendation Memorandum demonstrate that the Exemption Committee applied the correct exemption criteria. The Committee first assessed whether any subgroup of the Applicant's flock qualified as a distinct epidemiological unit. Based on substantial evidence of inadequate biosecurity at the Applicant's facility, it reasonably concluded that none did. Since demonstrating distinct epidemiological status is a threshold requirement for all exemption categories, that finding alone was sufficient to justify denying the application. The Committee's additional analysis of "rare and valuable genetics" were supplementary comments, or justification in the alternative, not a sign of an analysis that conflated criteria.

[251] In any event, even if the "rare and valuable genetics" category of exemption were to be assessed independent of the distinct epidemiological unit threshold, the Applicant's submissions would still fall well short of demonstrating the required criteria. The documentation provided by the Applicant fundamentally misunderstood what constitutes "rare and valuable poultry genetics" within the regulatory framework. Rather than presenting evidence of genomic distinctiveness, pedigree documentation, breed registry verification, or third-party scientific validation of unique genetic characteristics, the Applicant submitted materials primarily focused on commercial

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applications of ostrich antibodies, business plans, and proposed research projects. These materials spoke to potential commercial value of ostrich products generally rather than demonstrating any genetically unique characteristics of the specific birds in the Applicant's flock. Moreover, the Applicant's submissions addressed the herd as a whole rather than identifying particular birds with exceptional genetic traits of significance to the broader poultry industry. The Response Letter correctly noted that "robust processes must be in place (ex. genomic testing) to actively select and breed for specific desirable traits," yet the Applicant provided neither evidence of such systematic genetic selection nor molecular-level proof of genetic uniqueness. Simply put, the Applicant's documentation has failed to establish the fundamental premise that its birds possessed genetics that are both rare and valuable, regardless of their epidemiological status.

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[252] In short, it was the Applicant, not the Exemption Committee, that confused the exemption category of "distinct unit" with the threshold concept of "distinct epidemiological unit." The Committee adhered to the exemption framework as set out in policy and applied it correctly. Therefore, the Applicant's second unreasonableness allegation cannot succeed.

(iii) The Applicant's Argument on Inadequate Engagement with Evidence Fails

[253] The Applicant's third argument is that the Exemption Committee ignored operation-specific factors unique to the Applicant's situation and neglected a key precedent exemption that allegedly contradicts the Committee's reasoning on trade. I find that this argument is an improper invitation for this Court to reweigh evidence and a misreading of the facts and policy surrounding the precedent. While reasonableness review must be robust, reviewing courts cannot nitpick and fault a decision-maker for not cataloguing every fact and argument the

Applicant considers important. That is not what *Vavilov* expects. Reasons in administrative decisions are required to show that the decision maker grappled with the determinative issues and stayed attuned to the relevant evidence before them, but they do not need to read like a treatise addressing every factor deemed important by the applicants: *Vavilov* paras 91-93 and 125-128.

[254] I am satisfied that the content of the Response Letter and Internal Recommendation Memorandum demonstrates that the Exemption Committee did turn its mind to many of the operation-specific factors the Applicant highlights. It records the on-site inspection and the Premises Investigation Questionnaire, noting shared personnel and equipment, the central pond attracting hundreds of wild birds, and outdoor pens. Those observations go directly to the claim that the operation-specific conditions of natural immunity and efforts of isolation rendered selective depopulation feasible and shows to this Court the facts that the Committee deemed important in evaluating these alternative measures. The Memorandum then addresses the correct threshold question under the 2022 ERP: could any subgroup be "separated from an infected susceptible population such that they are not considered exposed." The answer that "all birds on the infected premises were under the same risk of HPAI exposure" shows that the Committee rejected the Applicant's on-premise condition as meeting the threshold of epidemiological separation that underpins every exemption pathway. Moreover, the Memorandum records that "a significant policy deviation was considered (i.e. to employ selective culling … rather than stamping-out)" but was declined after multidisciplinary consultation because of domestic-disease, public-health, and trade risks. This explicit reference confirms that alternatives such as retaining a naturally immune flock were examined and even debated, not ignored.

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[255] *Vavilov* cautions that a specialized agency's demonstrated expertise may justify treating some issues in less detail, and that such an agency's reasons will often rely on concepts and language specific to its field: *Vavilov* at paras 92-93. Many of the "unique" factors the Applicant presses, including longer lifespan, relative difficulty of repopulation, and remoteness of the premises from commercial poultry operations, are precisely the kind of scientific, medical, and veterinary risk variables the CFIA is equipped to weigh. Here, the Committee's heavier focus on explaining about exposure pathways, biosecurity realities, and international obligations reflects a proper exercise of the Agency's expertise. As such, its decision to focus less, or not at all, on each individual factor deemed important by the Applicant aligns squarely with the principles set out in *Vavilov*.

[256] When situated in the context of the full record, the Committee's chosen focus is even more reasonable. Beyond what is listed by the Committee in the Internal Recommendation Memorandum regarding shared personnel and equipment, the central pond, and outdoor pens, the record also shows that the Applicant's farm also exhibited sick ostriches being moved to treatment pens in contravention of quarantine requirements, dead ostriches dragged through pens populated with living ones without robust separation measures, and unauthorized individuals walking inside the infected zone. Seeing the many issues with the biosecurity conditions at the Applicant's premises, I find no basis to interfere with the Exemption Committee's approach of engaging more substantively with epidemiological and trade considerations and not providing lengthy elaboration and addressing every point that the Applicant deems more important.

[257] As to the Exemption Committee's alleged failure to address "contradictory" evidence that the March 2022 Exemption did not cause trade disruptions, I find this submission unpersuasive.

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In my view, the suggestion that the earlier exemption contradicts the Committee's present reasoning on trade rests on two fundamental errors in logic.

[258] The first error is a flawed analogy. For the March 2022 exemption to serve as a contradiction, it must be meaningfully analogous to the present case. Only then could the Applicant plausibly argue that the CFIA's concern about trade consequences in this instance is inconsistent with and thus contradicted by its past practice. However, the factual circumstances in these two cases cannot be more different. The March 2022 Exemption was granted only after the barns of turkeys in question met the strict distinct epidemiological unit threshold: they were fully enclosed, ventilated independently, staffed separately, and never exposed to the virus. No comparable epidemiological segregation exists on the Applicant's open-air ostrich premises, where wild ducks, weasels, and shared staff had roamed without much hindrance. Given these substantial differences, the March 2022 Exemption simply does not meaningfully contradict the Exemption Committee's analysis or conclusions in the present matter.

[259] The second error is a defect in causal reasoning. Specifically, the Applicant appears to conflate the absence of negative trade consequences in a prior case with the absence of risk in its own. This reasoning is faulty. The fact that one exemption under materially different circumstances did not result in adverse outcomes does not imply that a different exemption under weaker biosecurity conditions poses no risk. The Internal Recommendation Memorandum records the Exemption Committee's consultation with experts both internal and international, who confirmed that major partners, such as the United States, have "and would continue to, apply a stamping-out approach to the detection of HPAI on ostrich farms." This expert

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assessment directly supports the Exemption Committee's conclusion regarding potential international implications for this specific case.

[260] Properly understood, the March 2022 Exemption is not contradictory evidence but rather complementary evidence that reinforces the importance of strict biosecurity conditions for any exemption consideration. True contradictory evidence would need to demonstrate either that similarly situated premises received different treatment or that international partners had explicitly indicated acceptance of exemptions for premises with compromised biosecurity. The Applicant offered neither. Instead, it has relied on a factually and epidemiologically distinct precedent that does not demand explicit engagement by the Exemption Committee. Its omission from the Committee's reasons does not render the Exemption Denial unreasonable.

(iv) The CFIA's Reasons Properly Reflect the Impact of Its Decision on the Applicant

[261] The law is clear that near-draconian measures may be justified when necessary to safeguard broader public interests, even where such measures may negatively impact private property or economic interests: *David Hunt FC* at para 52. However, this principle does not license the imposition of such measures without due regard for their impact on those affected. Indeed, the central tenet of Canadian administrative law, and the animating purpose of judicial review, is to ensure that administrative decision-makers remain accountable and do not exercise "absolute and untrammelled 'discretion':" *Roncarelli v Duplessis*, [1959] SCR 121 at p 140.

[262] Since the Supreme Court's decision in *Vavilov*, there has been an increased emphasis on engaging with the perspective of the individuals affected by administrative decisions. Reasons must not only be coherent with legal interpretation and institutional logic, but must also reflect

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meaningful, humane engagement with the lived realities and consequences for those whose rights, livelihoods, liberty, or dignity are at stake. In practical terms, administrative decision-makers must remain responsive to the applicants' specific circumstances and the gravity of the decision's impact, and their reasons must be calibrated accordingly. This obligation is particularly important where decisions result in harsh or irreversible impacts, as is the case here, because it is in such moments that the administrative decision-maker's duty to explain "why its decision best reflects the legislature's intention" becomes most acute.

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[263] Having reviewed the reasons provided to the Applicant, including the email communicating the denial and the attached Response Letter, I find that the CFIA's explanation has met this standard. The reasons adequately responded to the Applicant's circumstances, and articulated, in a transparent and clear manner, why the decision aligned with Parliament's intent. The Agency's communication demonstrated a humane engagement with the gravity of its decision and the impact it would have on the Applicant and its principals.

[264] The email, likely the first communication read by the Applicant, recognizes "the tremendous amount of stress" the decision may cause, and provides mental health resources while offering opportunities for continued dialogue with "the necessary parties from the CFIA." This overt acknowledgment of human impact reflects precisely the responsive justification that *Vavilov* calls for in paragraphs 133 to 135 when a decision threatens an individual's livelihood. I couple this language with the extensive and continuous communications the CFIA had maintained with the Applicant's principals through virtual meetings, phone calls, emails, and on-site visits throughout the entire process. I am convinced that the Agency did not treat the

Applicant's case as just another routine bureaucratic exercise, but recognized the severe economic and emotional consequences for the Applicant's principals.

[265] On a substantive level, the Response Letter explicitly ties the Exemption Denial to the legislative purpose set out in the *Act*. It first explains that the Stamping-Out Policy "reflects the risks posed by HPAI infected poultry flocks to humans, domestic animals, and wildlife," and then states that implementation was necessary "for Canada to mitigate the risks posed by HPAI infected poultry, maintain its international obligations and the expectation of our trading partners." This directly addresses the *Act*'s core purposes of proactive disease management, protection of public health, and preservation of Canada's international trade status, as recognized in the *David Hunt* cases, *River Valley Poultry Farm*, *Paradis Honey*, and *Kohl*. The Agency's explanation clearly indicates that the decision was made to fulfil the statutory mandate, not as a whimsical punishment. This level of specific reasoning satisfies *Vavilov*'s demand that the decision-maker justify how the outcome aligns with the legislature's purpose when the stakes are high.

[266] The CFIA's reasons also demonstrate substantive engagement with the Applicant's specific circumstances rather than merely providing generic justifications. The Response Letter acknowledged the Applicant's submission of a *Distinct Unit Request Package* and addressed the specific exemption category the Applicant had attempted to meet with the documents it had provided. The Letter provided clear explanations why the Applicant's premises failed to qualify as a distinct epidemiological unit and why the claimed genetic value did not meet the threshold for the "rare and valuable poultry genetics" exemption.

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IX. The Applicant's *Charter*, *Bill of Rights,* and jurisdictional arguments have been abandoned

[267] The Applicant's Notice of Application and Amended Notice of Application both raised arguments that were not pursued in its memorandum of fact and law. These included claims that the CFIA's decisions interfered with provincial jurisdiction over health, property rights, and animal genetic development, and that the decisions violated the Applicant's right to property under the *Canadian Bill of Rights* and infringed unidentified *Charter* rights.

[268] During the hearing, Respondent's counsel noted these arguments were absent from the Applicant's memorandum. When questioned on this point, Applicant's counsel acknowledged the *Charter* issue was abandoned, but suggested the jurisdictional issue should still somehow work its way into the reasonableness analysis, despite admitting it was not in their memorandum.

[269] I deem all these grounds to have been abandoned by virtue of the Applicant counsel's failure to include them in their memorandum of fact and law. Counsel cannot expect this Court to address and resolve an unsupported jurisdictional argument. For a case that is of such urgency and significance to both parties, issues and arguments should be clearly presented so they can be properly addressed and assessed on their merits. Hearings are no places for surprises, and counsel, I note, brought more than one to this hearing.

X. Conclusion

[270] For the reasons provided, these applications for judicial review are dismissed.

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[271] The parties agreed that if the Respondent was successful, a lump sum award of costs in its favour of $15,000 would be appropriate. I agree with this assessment and hereby award costs to the Respondent in that amount.

[272] I apologize for the length of these Reasons. The Applicant advanced many issues and made detailed submissions over two days of hearing. Although none was successful, they were deserving of detailed consideration and assessment.

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JUDGMENT IN T-294-25 and T-432-25

THIS COURT'S JUDGMENT is that these applications are dismissed, the injunction dated January 31, 2025 is vacated, and the Respondent is awarded costs of $15,000, all in.

"Russel W. Zinn"
Judge

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ANNEX

Health of Animals Act, SC 1990, c 21

Infected Places and Control Zones	**Lieux contaminés et zones de contrôle**
Declaration of infected place	**Déclaration**
22 (1) Where an inspector or officer suspects or determines that a disease or toxic substance exists in a place and is of the opinion that it could spread or that animals or things entering the place could become affected or contaminated by it, the inspector or officer may in writing declare that the place is infected and identify the disease or toxic substance that is believed to exist there, and such a declaration may subsequently be amended by the inspector or officer.	**22 (1)** L'inspecteur ou l'agent d'exécution peut, par écrit, déclarer contaminé tout lieu où il soupçonne ou constate la présence d'une maladie ou d'une substance toxique qu'il estime susceptibles soit de se propager, soit de contaminer les animaux qui s'y rendent ou les choses qui y sont apportées; il doit alors préciser la nature de la maladie ou de la substance. Il peut ensuite, de la même manière, modifier la déclaration.
Delivery of declaration	**Effet**
(2) When the declaration is delivered to the occupier or owner of the place to which it relates, the place, together with all contiguous lands, buildings and other places occupied or owned by the occupier or owner, constitutes an infected place.	**(2)** Sur remise de la déclaration au propriétaire ou à l'occupant, le lieu visé par celle-ci et les terrains, bâtiments et autres lieux qui lui sont contigus et sont occupés par la même personne, ou dont celle-ci est propriétaire, constituent des lieux contaminés.
…	[…]
Prohibition — infected place	**Interdiction — lieu contaminé**
25 (1) No person shall, without a licence issued by an inspector or officer, remove	**25 (1)** Il est interdit, sans permis signé par un inspecteur ou un agent d'exécution, de

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from or take into an infected place any animal or thing.

sortir tout animal ou toute chose d’un lieu contaminé ou de l’y introduire.

Return

(2) Where an inspector or officer believes on reasonable grounds that any animal or thing has been removed from or taken into an infected place in contravention of subsection (1), the inspector or officer may, whether or not the animal or thing is seized,

(a) return it to or remove it from the infected place, or move it to any other place; or

(b) require its owner or the person having the possession, care or control of it to return it to or remove it from the infected place, or move it to any other place.

Renvoi

(2) L’inspecteur ou l’agent d’exécution peut soit renvoyer du lieu contaminé ou y rapporter tout animal ou toute chose — saisis ou non — qui ont été déplacés, à son avis fondé sur des motifs raisonnables, en contravention avec le paragraphe (1), soit les transférer dans un autre lieu; il peut aussi ordonner au propriétaire de l’animal ou de la chose, ou à la personne qui en a la possession, la responsabilité ou la charge des soins, de le faire.

Notice

(3) A requirement under paragraph (2)(b) shall be communicated by personal delivery of a notice to the owner or person having the possession, care or control of the animal or thing or by sending the notice to the owner or person, and the notice may specify the period within which and the manner in which the animal or thing is to be returned or removed.

Avis

(3) L’ordre est signifié au propriétaire ou à la personne concernée, soit en mains propres, soit par envoi postal ou autre, sous forme d’avis en précisant éventuellement le délai ou les modalités d’exécution.

…

[…]

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Primary control zone

27 (1) If the Minister believes that a disease or toxic substance exists in an area, he or she may, by order, declare the area to be a primary control zone, in which case the Minister shall describe the zone and identify the disease or toxic substance.

Zone de contrôle primaire

27 (1) Le ministre peut, par ordonnance, déclarer comme zone de contrôle primaire toute région où, à son avis, sévit la maladie ou existe la substance toxique dont il précise la nature; il doit alors délimiter cette zone.

Designated animal or thing

(2) The Minister may, by order, designate any animal or thing that is capable of being affected or contaminated by the disease or toxic substance in respect of which the primary control zone is declared.

Animal ou chose désignés

(2) Le ministre peut, par ordonnance, désigner tout animal ou toute chose susceptibles d'être contaminés par la maladie ou la substance en cause.

Prohibition — primary control zone

(3) No person shall remove from, move within or take into the primary control zone a designated animal or thing except in accordance with a permit issued by the Minister.

Interdiction — zone de contrôle primaire

(3) Il est interdit, sauf en conformité avec un permis délivré par le ministre, de sortir de la zone de contrôle primaire tout animal ou toute chose désignés, de les y introduire ou de les y déplacer.

Secondary control zone

27.1 (1) If the Minister makes an order under subsection 27(1), he or she may — for the purpose of preventing the spread of the disease or toxic substance identified in the order or monitoring that disease or toxic substance — by order, declare any area that he or she considers necessary

Zone de contrôle secondaire

27.1 (1) S'il prend l'ordonnance prévue au paragraphe 27(1) et afin d'empêcher la propagation de la maladie ou de la substance toxique qui y est précisée ou de surveiller cette maladie ou cette substance toxique, le ministre peut, par ordonnance, déclarer comme zone de

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to be a secondary control zone, in which case the Minister shall describe the zone.

Disease outside Canada

(2) If the Minister believes that a disease or toxic substance exists in an area outside Canada, he or she may — for the purpose of preventing the spread of that disease or toxic substance into Canada or monitoring that disease or toxic substance — by order, declare any area in Canada that he or she considers necessary to be a secondary control zone, in which case the Minister shall describe the zone and identify that disease or toxic substance.

Designated animal or thing

(3) The Minister may, by order, designate any animal or thing that is capable of being affected or contaminated by the disease or toxic substance in respect of which the secondary control zone referred to in subsection (2) is declared.

Conditions

(4) The Minister may, by order, prohibit or impose conditions on — including requiring a permit for — removing from, moving within or taking into a

contrôle secondaire toute région qu'il estime nécessaire; il doit alors délimiter cette zone.

Maladie hors du Canada

(2) S'il est d'avis qu'une maladie sévit ou qu'une substance toxique existe dans une région à l'étranger, le ministre peut, par ordonnance, afin d'empêcher la propagation au Canada de cette maladie ou de cette substance toxique, ou de surveiller cette maladie ou cette substance toxique, déclarer comme zone de contrôle secondaire toute région du Canada qu'il estime nécessaire; il doit alors délimiter cette zone et préciser la nature de la maladie ou de la substance toxique en cause.

Animal ou chose désignés

(3) Le ministre peut, par ordonnance, désigner tout animal ou toute chose susceptibles d'être contaminés par la maladie ou la substance à l'égard de laquelle la zone visée au paragraphe (2) a été déclarée.

Conditions

(4) Le ministre peut, par ordonnance, interdire l'entrée, la sortie ou le déplacement dans toute zone de contrôle secondaire d'animaux ou de choses désignés, ou y imposer

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secondary control zone a designated animal or thing.

Compliance

(5) Any person to whom an order made under subsection (4) applies shall comply with it.

Permits

27.2 A permit referred to in subsection 27(3) or 27.1(4) may be issued as a general permit to owners or persons having the possession, care or control of a designated animal or thing.

Order amended

27.3 The Minister may, by order, amend or revoke an order made under subsection 27(1) or (2) or one made under any of subsections 27.1(1) to (4).

Measures

27.4 The Minister may take all reasonable measures that are consistent with public safety to remedy any dangerous condition or mitigate any danger to life, health, property or the environment that results, or may reasonably be expected to result, from the existence of a disease or toxic substance in a primary control zone.

des conditions, notamment l'obtention d'un permis.

Obligation de se conformer à l'ordonnance

(5) Toute personne visée par l'ordonnance prise en vertu du paragraphe (4) doit s'y conformer.

Permis

27.2 Les permis visés aux paragraphes 27(3) et 27.1(4) peuvent être délivrés, à titre de permis d'application générale, aux propriétaires ou aux personnes qui ont la possession, la responsabilité ou la charge des soins d'animaux ou de choses désignés.

Modification

27.3 Le ministre peut, par ordonnance, modifier ou révoquer l'ordonnance prise en vertu des paragraphes 27(1) ou (2) ou de l'un des paragraphes 27.1(1) à (4).

Mesures

27.4 Le ministre peut prendre les mesures compatibles avec la sécurité publique en vue de remédier à toute situation dangereuse ou de réduire les risques que constitue — ou peut normalement constituer — pour la vie, la santé, les biens ou l'environnement, la présence d'une maladie ou d'une substance toxique dans la zone de contrôle primaire.

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Regulations

27.5 The Minister may make regulations prohibiting or regulating the movement of persons or designated animals or things from, within or into a primary or secondary control zone for the purpose of controlling or eliminating a disease or toxic substance, in respect of which the primary control zone or a secondary control zone referred to in subsection 27.1(2) was declared, or preventing its spread.

Règlements

27.5 Le ministre peut, par règlement, régir ou interdire l'entrée, la sortie ou la circulation dans une zone de contrôle primaire ou secondaire des personnes ou des animaux ou choses désignés, en vue de lutter contre la maladie ou la substance toxique en cause, de les en éliminer ou d'éviter leur propagation.

Treatment or disposal

27.6 (1) The Minister may, in respect of a designated animal or thing that is or has been in a primary or secondary control zone,

(a) treat that animal or thing or require its owner or the person having the possession, care or control of it to treat it or to have it treated if the Minister considers that the treatment will be effective in eliminating the disease or toxic substance or preventing its spread; or

(b) dispose of that animal or thing or require its owner or the person having the

Traitement ou disposition

27.6 (1) Le ministre peut, à l'égard des animaux ou des choses désignés se trouvant dans une zone de contrôle primaire ou secondaire, ou s'y étant trouvés, prendre les mesures suivantes :

a) les soumettre à un traitement ou ordonner à leur propriétaire ou à la personne qui en a la possession, la responsabilité ou la charge des soins de les traiter, ou de les faire traiter, s'il estime que le traitement sera efficace pour éliminer la maladie ou la substance toxique ou prévenir leur propagation;

b) prendre toute mesure de disposition, notamment de destruction, ou ordonner à leur propriétaire ou à la personne qui en a la

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possession, care or control of it to dispose of it.

possession, la responsabilité ou la charge des soins de le faire.

Return animal or thing

Renvoi d’animaux ou de choses

(2) If an inspector or officer believes on reasonable grounds that a designated animal or thing has been removed from, moved within or taken into a primary control zone in contravention of subsection 27(3) — or a secondary control zone in contravention of an order made under subsection 27.1(4) — the inspector or officer may, whether or not that animal or thing is seized, move it to any place or require its owner or the person having the possession, care or control of it to move it to any place.

(2) L’inspecteur ou l’agent d’exécution peut transférer dans un autre lieu tout animal ou toute chose désignés — saisis ou non — qui, à son avis fondé sur des motifs raisonnables, ont été sortis d’une zone de contrôle primaire ou introduits ou déplacés dans cette zone en contravention avec le paragraphe 27(3) ou ont été sortis d’une zone de contrôle secondaire ou introduits ou déplacés dans cette zone en contravention avec une ordonnance prise en vertu du paragraphe 27.1(4); il peut aussi ordonner au propriétaire de l’animal ou de la chose, ou à la personne qui en a la possession, la responsabilité ou la charge des soins, de le faire.

Notice

Avis

(3) A requirement under subsection (1) or (2) shall be communicated by the personal delivery of a notice to the owner or person having the possession, care or control of the animal or thing, or by sending the notice to the owner or person. The notice shall specify the period within which and the manner in

(3) L’ordre donné en vertu du paragraphe (1) ou (2) est signifié au propriétaire ou à la personne concernée, soit à personne, soit par envoi postal ou autre, sous forme d’avis en précisant éventuellement le délai ou les modalités d’exécution.

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which the requirement is to be met.

…

[…]

Disposal and Treatment

Disposition et traitement

Disposal of affected or contaminated animals and things

Mesures de disposition

48 (1) The Minister may dispose of an animal or thing, or require its owner or any person having the possession, care or control of it to dispose of it, where the animal or thing

48 (1) Le ministre peut prendre toute mesure de disposition, notamment de destruction, — ou ordonner à leur propriétaire, ou à la personne qui en a la possession, la responsabilité ou la charge des soins, de le faire — à l'égard des animaux ou choses qui :

(a) is, or is suspected of being, affected or contaminated by a disease or toxic substance;

a) soit sont contaminés par une maladie ou une substance toxique, ou soupçonnés de l'être;

(b) has been in contact with or in close proximity to another animal or thing that was, or is suspected of having been, affected or contaminated by a disease or toxic substance at the time of contact or close proximity; or

b) soit ont été en contact avec des animaux ou choses de la catégorie visée à l'alinéa a) ou se sont trouvés dans leur voisinage immédiat;

(c) is, or is suspected of being, a vector, the causative agent of a disease or a toxic substance.

c) soit sont des substances toxiques, des vecteurs ou des agents causant des maladies, ou sont soupçonnés d'en être.

Treatment

Traitement

(2) The Minister may treat any animal or thing described in subsection (1), or require its

(2) Le ministre peut par ailleurs soumettre ces animaux ou choses à un

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owner or the person having the possession, care or control of it to treat it or to have it treated, where the Minister considers that the treatment will be effective in eliminating or preventing the spread of the disease or toxic substance.

traitement, ou ordonner à ces personnes de le faire ou d'y faire procéder, s'il estime que celui-ci sera efficace dans l'élimination de la maladie ou de la substance toxique ou la prévention de la propagation.

Notice

(3) A requirement under this section shall be communicated by personal delivery of a notice to the owner or person having the possession, care or control of the thing or by sending a notice to the owner or person, and the notice may specify the period within which and the manner in which the requirement is to be met.

Avis

(3) L'ordre est signifié au propriétaire ou à la personne concernée, soit en mains propres, soit par envoi postal ou autre, sous forme d'avis en précisant éventuellement le délai ou les modalités d'exécution.

…

[…]

Compensation

Indemnisation

Compensation to owners of animals

Indemnisation : animal

51 (1) The Minister may order compensation to be paid from the Consolidated Revenue Fund to the owner of an animal that is

51 (1) Le ministre peut ordonner le versement, sur le Trésor, d'une indemnité au propriétaire de l'animal :

(a) destroyed under this Act or is required by an inspector or officer to be destroyed under this Act and dies after the requirement is imposed but before being destroyed;

a) soit détruit au titre de la présente loi, soit dont la destruction a été ordonnée par l'inspecteur ou l'agent d'exécution mais mort avant celle-ci;

(b) injured in the course of being tested, treated or

b) blessé au cours d'un examen ou d'une séance de

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identified under this Act by an inspector or officer and dies, or is required to be destroyed, as a result of the injury; or

traitement ou d'identification effectués, au même titre, par un inspecteur ou un agent d'exécution et mort ou détruit en raison de cette blessure;

(c) reserved for experimentation under paragraph 13(2)(a).

c) affecté à des expériences au titre du paragraphe 13(2).

Amount of compensation

(2) Subject to subsections (3) and (4), the amount of compensation shall be

(a) the market value, as determined by the Minister, that the animal would have had at the time of its evaluation by the Minister if it had not been required to be destroyed

minus

(b) the value of its carcass, as determined by the Minister.

Montant de l'indemnité

(2) Sous réserve des paragraphes (3) et (4), l'indemnité payable est égale à la valeur marchande, selon l'évaluation du ministre, que l'animal aurait eue au moment de l'évaluation si sa destruction n'avait pas été ordonnée, déduction faite de la valeur de son cadavre.

Maximum value

(3) The value mentioned in paragraph (2)(a) shall not exceed any maximum amount established with respect to the animal by or under the regulations.

Plafond

(3) La valeur marchande ne peut dépasser le maximum réglementaire correspondant à l'animal en cause.

Additional compensation

(4) In addition to the amount calculated under subsection (2), compensation may include such costs related to the disposal of the animal as

Indemnité supplémentaire

(4) L'indemnisation s'étend en outre, lorsque les règlements le prévoient, aux

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are permitted by the regulations.	frais de disposition, y compris de destruction.

***Compensation for Destroyed Animals and Things Regulations*, SOR/2000-233**

Maximum Amounts	**Plafond de la valeur marchande**
2 For the purpose of subsection 51(3) of the Act, the amount that is established as the maximum amount with respect to an animal that is destroyed or required to be destroyed under paragraph 27.6(1)(b) or subsection 48(1) of the Act is	**2** Pour l'application du paragraphe 51(3) de la Loi, la valeur marchande d'un animal qui est détruit ou qui doit l'être en application de l'alinéa 27.6(1)b) ou du paragraphe 48(1) de la Loi ne peut dépasser :
(a) if the animal is set out or included in column 1 of an item of the schedule, the amount set out in column 3 of that item; and	**a)** le montant prévu à la colonne 3 de l'annexe, pour tout animal visé à la colonne 1;
(b) in any other case, $30.	**b)** 30 $, dans tout autre cas.
Compensation for Costs of Disposal	**Indemnisation pour frais de disposition**
3 (1) Compensation for the following costs related to the destruction of an animal or the disposal of a carcass or thing may be paid to the owner:	**3 (1)** En cas de destruction d'un animal, de la disposition d'un cadavre ou de la disposition d'une chose, une indemnité pour les coûts ci-après peut être versée à son propriétaire :
(a) subject to subsection (2), if the animal is destroyed or required to be destroyed under paragraph 27.6(1)(b) or subsection 48(1) of the Act by slaughter at an abattoir and it is transported to the abattoir within the period and in the manner	**a)** sous réserve du paragraphe (2), dans le cas d'un animal qui, en application de l'alinéa 27.6(1)b) ou du paragraphe 48(1) de la Loi, est détruit ou doit l'être à un abattoir et qui y est transporté selon le délai et les modalités

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specified in the notice of requirement delivered or sent under subsection 27.6(3) or 48(3) of the Act,

d'exécution précisés dans l'ordre de destruction signifié conformément au paragraphe 27.6(3) ou 48(3) de la Loi :

(i) the reasonable costs of transporting it to the abattoir that were paid or incurred by the owner of the animal, to a maximum amount equal to the amount that a commercial trucker would normally charge for transporting it to the abattoir if it had not been required to be destroyed,

(i) les frais raisonnables payés ou engagés par le propriétaire pour le transport de l'animal à l'abattoir, à concurrence du prix qu'une entreprise exigerait normalement pour ce service si la destruction n'avait pas été ordonnée,

(i.1) the reasonable costs of labour for the owner's personal labour in transporting the animal to the abattoir, to a maximum amount equal to the amount that a local agricultural worker would normally be paid for the work, and

(i.1) les coûts raisonnables de main-d'oeuvre pour le travail qu'a effectué lui-même le propriétaire relativement au transport de l'animal à l'abattoir, à concurrence de la somme qu'un travailleur agricole exigerait normalement pour ce travail,

(ii) the reasonable costs of slaughtering it at the abattoir that were paid or incurred by its owner and that are related to the reason for which it was required to be destroyed; and

(ii) les frais raisonnables payés ou engagés par le propriétaire pour l'abattage de l'animal liés au motif sur lequel est fondé l'ordre de destruction;

(b) subject to subsection (3), if the animal is destroyed or required to be destroyed under paragraph 27.6(1)(b) or subsection 48(1) of the Act other than by slaughter at an abattoir and it is destroyed or its carcass or

b) sous réserve du paragraphe (3), dans le cas d'un animal qui, en application de l'alinéa 27.6(1)b) ou du paragraphe 48(1) de la Loi, est détruit ou doit l'être ailleurs qu'à un abattoir et qu'il est

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the thing is disposed of within the period and in the manner specified in the notice of requirement delivered or sent under subsection 27.6(3) or 48(3) of the Act,	effectivement détruit, ou que la disposition du cadavre de l'animal ou d'une chose, dans le délai et selon les modalités d'exécution précisés dans l'ordre de destruction signifié conformément au paragraphe 27.6(3) ou 48(3) de la Loi :
(i) the reasonable costs of transporting the animal to the place of destruction or transporting the carcass or thing to the place of disposal that were paid or incurred by the owner, to a maximum amount equal to the amount that a commercial trucker would normally charge for that service,	**(i)** les frais raisonnables payés ou engagés par le propriétaire pour le transport de l'animal au lieu de destruction ou le transport du cadavre ou de la chose au lieu de disposition, à concurrence du prix qu'une entreprise exigerait normalement pour ce service,
(ii) the reasonable costs that were paid or incurred by the owner for cleaning and disinfecting the conveyance used to transport the animal, carcass or thing, to a maximum amount equal to the amount that a commercial service would normally charge for that service,	**(ii)** les frais raisonnables payés ou engagés par le propriétaire pour le nettoyage et la désinfection du véhicule ayant servi au transport de l'animal, du cadavre ou de la chose, à concurrence du prix qu'une entreprise exigerait normalement pour ce service,
(iii) the reasonable costs, to a maximum amount equal to the amount that a commercial service would normally charge to destroy the animal or dispose of the carcass or thing, that were paid or incurred by the owner	**(iii)** les frais raisonnables payés ou engagés par le propriétaire pour la destruction de l'animal ou la disposition du cadavre ou de la chose, à concurrence du prix qu'une entreprise exigerait

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	normalement pour ce service :
(A) if the owner destroyed the animal or disposed of the carcass or thing, for the supplies, equipment and labour expended to do so, or	**(A)** soit pour le matériel, l'équipement et la main-d'oeuvre utilisés par le propriétaire pour ce faire,
(B) if a commercial service was used to destroy the animal or dispose of the carcass or thing, for that service, and	**(B)** soit pour les services fournis par une entreprise pour ce faire,
(iv) the reasonable costs of labour, to a maximum amount equal to the amount that a local agricultural worker would normally be paid for the work, for the owner's personal labour in	**(iv)** les coûts raisonnables de main-d'oeuvre pour le travail qu'a effectué lui-même le propriétaire relativement aux tâches ci-après, à concurrence du montant qu'un travailleur agricole local exigerait normalement pour ce faire :
(A) transporting the animal to the place of destruction or transporting the carcass or thing to the place of disposal,	**(A)** le transport de l'animal au lieu de destruction ou le transport du cadavre ou de la chose au lieu de disposition,
(B) cleaning and disinfecting the conveyance used to transport the animal, carcass or thing, or	**(B)** le nettoyage et la désinfection du véhicule ayant servi à transporter l'animal, le cadavre, ou la chose,
(C) destroying the animal or disposing of the carcass or thing.	**(C)** la destruction de l'animal ou la disposition du cadavre ou de la chose.

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(2) The maximum amount of compensation that may be paid under paragraph (1)(a) is an amount equal to

(a) if the carcass of the animal has not been condemned, the value of the carcass according to paragraph 51(2)(b) of the Act; and

(b) if the carcass of the animal has been condemned, the value that the carcass would have had according to paragraph 51(2)(b) of the Act had it not been condemned.

(3) Compensation for costs related to the disposal of a thing may be paid only with respect to the following:

(a) animal food;

(b) refrigerators, refrigerator-freezers and freezers intended primarily for use in a dwelling, but not commercial or walk-in refrigerators, refrigerator-freezers and freezers;

(2) Le plafond de l'indemnité qui peut être versée au titre de l'alinéa (1)a) est :

a) dans le cas où le cadavre de l'animal n'a pas été condamné, la valeur du cadavre déterminée conformément au paragraphe 51(2) de la Loi;

b) dans le cas où le cadavre de l'animal a été condamné, la valeur du cadavre qui aurait été déterminée conformément au paragraphe 51(2) de la Loi si le cadavre n'avait pas été condamné.

(3) L'indemnisation pour les frais liés à la disposition d'une chose ne s'applique qu'aux choses suivantes :

a) tout aliment pour animaux ;

b) tout réfrigérateur, tout réfrigérateur-congélateur ou tout congélateur, conçu principalement pour être utilisé dans une habitation, à l'exclusion d'un réfrigérateur commercial, réfrigérateur-chambre commerciale, d'un réfrigérateur-congélateur commercial, d'un congélateur commercial ou un congélateur-chambre commercial;

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(c) cages, crates and nesting boxes; and	**c)** toute cage, tout cageot ou tout nichoir;
(d) feed troughs.	**d)** toute mangeoire.

SCHEDULE

(Section 2)

Item	Column 1 Animal	Column 2 Family	Column 3 Maximum Amount ($)
ANIMALS NOT LISTED BY ORDER			
…			
Farm Animals			
…			
51	Ostrich (*Struthio camelus*)	Struthionidae	3,000
…			

ANNEXE

(article 2)

Article	Colonne 1 Animal	Colonne 2 Family	Colonne 3 Montant maximal ($)
ANIMAUX CLASSÉS AUTREMENT QUE SELON LES ORDRES DU RÈGNE ANIMAL			
[...]			
Animaux de ferme			
[…]			
51	Autruche (*Struthio camelus*)	Struthionidés	3,000
[…]			

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-294-25 AND T-432-25
STYLE OF CAUSE:	UNIVERSAL OSTRICH FARMS INC v CANADIAN FOOD INSPECTION AGENCY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 15 AND 16, 2025
JUDGMENT AND REASONS:	ZINN J.
DATED:	MAY 13, 2025

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APPEARANCES:

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Federal Court of Appeal | Cour d'appel fédérale

Date: 20250821

Docket: A-205-25

Citation: 2025 FCA 147

CORAM: **GLEASON J.A.**
LEBLANC J.A.
HECKMAN J.A.

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

Appellant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

Heard at Ottawa, Ontario, on July 15, 2025.

Judgment delivered at Ottawa, Ontario, on August 21, 2025.

REASONS FOR JUDGMENT OF THE COURT BY: THE COURT

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REASONS FOR JUDGMENT OF THE COURT

[1] The appellant, Universal Ostrich Farms Inc., appeals from the judgment of the Federal Court in *Universal Ostrich Farms Inc. v. Canada (Food Inspection Agency)*, 2025 FC 878 (*per* Zinn J.) [the *FC Decision*]. In that judgment, the Federal Court dismissed an application for judicial review of two related decisions of the respondent, the Canadian Food Inspection Agency (the CFIA).

[2] The first decision, a Notice to Dispose issued on December 31, 2024, required the appellant to dispose of all the ostriches on its farm by February 1, 2025, after laboratory testing confirmed infection of two dead ostriches with the H5N1 strain of highly pathogenic avian influenza (HPAI). The second decision, an Exemption Denial dated January 10, 2025, denied the appellant's request to exempt at least some of its ostrich flock from destruction. The two decisions were made under section 48 of the *Health of Animals Act*, S.C. 1990, c. 21 [the *Act*] and in accordance with the CFIA's Stamping-Out Policy, which was operationalized through the CFIA's Highly Pathogenic Avian Influenza 2022 Event Response Plan (the 2022 ERP).

[3] The appellant has not yet complied with the Notice to Dispose decision because the Federal Court stayed that decision, pending determination of the judicial review application in the Federal Court, and thereafter a single judge of this Court further stayed the decision pending disposition of this appeal in this Court: *Universal Ostrich Farms Inc. v. Canada (Food Inspection Agency)*, 2025 FCA 122 at paras. 2, 12.

[4] The appellant has also brought a motion to adduce fresh evidence before this Court.

[5] For the reasons that follow, we have concluded that both the motion to adduce fresh evidence and this appeal must be dismissed. In so concluding, we recognize that our decision might lead to the death of over 400 ostriches owned by the appellant, an outcome that would doubtless be very difficult, both financially and emotionally, for the appellant's principals. While we have considerable sympathy for them, the law we are bound to apply inevitably leads to the conclusion that this appeal must be dismissed.

[6] In this regard, it is not the role of this Court to set, vary, or grant exemptions from governmental policy. Rather, our sole role is to determine whether the decisions at issue in this appeal were reasonable in accordance with the deferential standard of review set out in the case law of the Supreme Court of Canada, this Court, and other Canadian courts. Because the Stamping-Out Policy, which underlies the two decisions, the Notice to Dispose, and the Exemption Denial, are all reasonable in accordance with that case law, we have unanimously concluded that this appeal cannot succeed.

I. Factual and Regulatory Background

[7] The Federal Court's reasons provide a thorough summary of the relevant factual and regulatory background. We accordingly review only those facts and details of the regulatory background necessary for the disposition of this appeal.

A. *Avian influenza and Canada's response*

[8] HPAI is a highly infectious disease caused by a virus that spreads through infected hosts. It continues to be of particular concern to Canadian and international authorities. While HPAI mostly affects wild birds, it does spread, through direct and indirect contact, to domestic birds and sometimes to mammals, including occasionally to humans*: FC Decision* at para. 16. Canada has experienced numerous HPAI outbreaks since 2004, including the current outbreak of the H5N1 strain of HPAI (HPAI caused by the H5N1 virus), which commenced in 2021: *FC*

Decision at paras. 21–23. HPAI viruses may persist in infected environments for months or even years*: FC Decision* at para. 16.

[9] The Minister has authority under the *Act* to manage diseases in animals. Central to this appeal is section 48 of the *Act*, which reads as follows:

Disposal of affected or contaminated animals and things	**Mesures de disposition**
48 (1) The Minister may dispose of an animal or thing, or require its owner or any person having the possession, care or control of it to dispose of it, where the animal or thing	**48 (1)** Le ministre peut prendre toute mesure de disposition, notamment de destruction, — ou ordonner à leur propriétaire, ou à la personne qui en a la possession, la responsabilité ou la charge des soins, de le faire — à l'égard des animaux ou choses qui :
(a) is, or is suspected of being, affected or contaminated by a disease or toxic substance;	**a)** soit sont contaminés par une maladie ou une substance toxique, ou soupçonnés de l'être;
(b) has been in contact with or in close proximity to another animal or thing that was, or is suspected of having been, affected or contaminated by a disease or toxic substance at the time of contact or close proximity; or	**b)** soit ont été en contact avec des animaux ou choses de la catégorie visée à l'alinéa a) ou se sont trouvés dans leur voisinage immédiat;
(c) is, or is suspected of being, a vector, the causative agent of a disease or a toxic substance.	**c)** soit sont des substances toxiques, des vecteurs ou des agents causant des maladies, ou sont soupçonnés d'en être.
Treatment	**Traitement**
(2) The Minister may treat any animal or thing described in subsection (1), or require its owner or the person having the possession, care or control of it to treat it or to have it treated, where the Minister considers that the treatment will be effective in eliminating or preventing the spread of the disease or toxic substance.	**(2)** Le ministre peut par ailleurs soumettre ces animaux ou choses à un traitement, ou ordonner à ces personnes de le faire ou d'y faire procéder, s'il estime que celui-ci sera efficace dans l'élimination de la maladie ou de la substance toxique ou la prévention de la propagation.
…	[…]

[10] Section 48 of the *Act* grants the Minister substantial discretion in deciding when disposal is required. The CFIA, as a delegate of the Minister, has exercised that discretion through its Stamping-Out Policy, which requires depopulation of animals that risk transmitting HPAI: *FC Decision* at para. 96. The CFIA first adopted that policy in 2004, and it is now operationalized through the 2022 ERP, which has been continuously updated by the CFIA since its adoption. The 2022 ERP sets out guidelines based on international standards and the CFIA's scientific knowledge: *FC Decision* at paras. 93–95.

[11] Due to the risks associated with HPAI, the CFIA determined that the only viable alternative when there is laboratory detection of HPAI infection is to stamp out the virus by culling all potentially exposed birds susceptible to infection. The Stamping-Out Policy also responds to Canada's international commitments, and failing to adhere to it would have important negative international trade ramifications for Canada because other nations might refuse to accept exports of some or all Canadian poultry, at least for a time: *FC Decision* at paras. 95, 98–100.

[12] The 2022 ERP is updated based on lessons learned from past outbreaks in Canada. This case was the first time the CFIA applied the 2022 ERP to an outbreak in ostriches. To be clear, however, the Stamping-Out Policy as conceived applies to any susceptible bird: *FC Decision* at para. 102. Ostriches are such a bird. HPAI is not as lethal in ostriches, especially older birds, as in other domesticated flocks, like chickens or turkeys, where most will die of an infection. However, according to the CFIA's evidence, infection in ostriches raises particular risks. Exposed and infected ostriches may show no clinical signs of disease but yet be shedding the

virus and act as a reservoir for the further spread of infection to people, livestock, and wildlife. Moreover, ostriches may contribute genetic mutations to avian influenza viruses that increase its adaptability to mammals.

[13] Under the 2022 ERP, the laboratory confirmation of the H5-subtype HPAI in infected premises triggers the application of the Stamping-Out Policy. The CFIA's inspectors are directed to issue a Notice to Dispose of all the susceptible animals in the same "epidemiological unit", a group of animals with the same likelihood of exposure to HPAI: *FC Decision* at paras. 96–97, 102–104. The 2022 ERP lays out protocols for the disposal of animals as well as for cleaning and disinfection of the premises after disposal. These may include a requirement to remove the soil and other contaminated materials and a period during which lands must remain fallow, with no animals on them: *FC Decision* at para. 104.

[14] The CFIA, through a specialized Exemption Committee, exercises some case-by-case discretion in considering whether certain exemptions apply. Those exemptions allow animals to be spared despite being on the same farm as the animals designated for depopulation as long as the exempted animals are part of a distinct epidemiological unit and meet certain criteria: *FC Decision* at paras. 96–97, 105–109.

B. *The December 2024 outbreak at the appellant's farm*

[15] The appellant has operated its farm for over 30 years as a family business. A pond at the heart of the premises and the frequent visits to it by wild ducks, sometimes numbering in the

hundreds, render the farm particularly vulnerable to virus transmission to and from the ostriches, HPAI infection, and long-term contamination: *FC Decision* at paras. 16, 24. By early December 2024, the appellant reportedly housed approximately 450 ostriches in outdoor pens at the farm: *FC Decision* at para. 27.

[16] In February 2020, the appellant's flock experienced an illness, confirmed at the time through testing to be a bacterial infection, but which the appellant (without any confirmatory testing) now alleges might have been avian influenza: *FC Decision* at para. 28.

[17] In December 2024, within a week of many wild ducks landing on the premises, numerous ostriches experienced "flu-like" symptoms. Around 25 to 30 ostriches died over a three-week period. The appellant did not report these deaths to a CFIA designated veterinary inspector. The currently circulating version of HPAI is a reportable disease under the *Reportable Diseases Regulations*, SOR/91-2, and subsection 5(1) of the *Act* requires notification to the nearest veterinary inspector in cases of a suspected reportable disease.

[18] The CFIA intervened on December 28, 2024, following an anonymous tip to its sick bird call line and imposed quarantine measures: *FC Decision* at paras. 29–30. On December 30, 2024, and in the weeks that followed, the CFIA's inspectors visited the site and noted various biosecurity risks, including wild bird activity, staff and equipment moving between open pens, and breaches of quarantine protocols, as well as ostrich carcasses laying dead in the pens or being dragged between pens without proper precautions: *FC Decision* at paras. 31, 256.

[19] On December 31, 2024, the samples collected from two carcasses the previous day came back positive for HPAI, later confirmed on January 3, 2025 as the H5N1 strain of HPAI. Some 41 minutes after the initial positive result, a CFIA inspector issued a Notice to Dispose of all the ostriches, pursuant to section 48 of the *Act* and in accordance with the 2022 ERP. The deadline for compliance was February 1, 2025: *FC Decision* at paras. 32–33. The CFIA and the appellant continued to discuss an application for exemption in the days that followed. The CFIA's Exemption Committee denied that application on January 10, 2025: *FC Decision* at paras. 34–41.

[20] According to the appellant, the spread of the illness plateaued in mid-January with the last of the 69 confirmed ostrich deaths occurring on January 15, 2025. The appellant has sought to adduce fresh evidence before this Court that it alleges confirms the continued recovery of the flock. In late January, the appellant requested the CFIA undertake additional testing, but this request was denied: *FC Decision* at paras. 42–43.

II. The Decision of the Federal Court

[21] In reviewing the Federal Court's reasons, we provide a high-level summary and will address the elements of the Federal Court's decision that are attacked on appeal in greater detail throughout our reasons.

[22] The Federal Court upheld the Stamping-Out Policy as a reasonable exercise of the CFIA's discretion within the confines of the *Act*'s text and purpose, the available science, and international trade considerations: *FC Decision* at para. 157. The Federal Court also confirmed

the reasonableness of the Notice to Dispose since the Stamping-Out Policy dictated that result: *FC Decision* at para. 197. The Federal Court further found that no impermissible fettering of the Minister's discretion occurred since the CFIA, acting as the delegate of the Minister and pursuant to the Minister's discretion under section 48 of the *Act*, could dictate the process to follow in the Stamping-Out Policy in response to a positive test result for HPAI. In addition, the overall process permitted sufficient circumstantial discretion at the exemption stage: *FC Decision* at para. 192. The Exemption Denial was also held to be reasonable as the Exemption Committee's reasons demonstrated that it properly understood the relevant criteria, adequately engaged with the evidence, accounted for its decision's impact on the appellant, and the outcome it reached was defensible: *FC Decision* at paras. 232–266.

III. Analysis

A. *Should the fresh evidence be admitted?*

[23] We commence our analysis by considering the appellant's motion to adduce fresh evidence. The appellant seeks to adduce an affidavit from one of its principals, which speaks to two matters: first, the alleged ineffective assistance of counsel who represented the appellant before the Federal Court, and, second, the allegedly healthy state of the flock since January 2025.

(1) The current health status of the flock

[24] We deal first with the second matter and note that the general theme of this portion of the fresh evidence and its proposed use is that the flock's alleged recovery negates the need for culling, which the appellant contends means that the Minster's decisions are unreasonable. Putting aside the strength of this evidence, which is not independent scientific proof, this proposed use is contrary to this Court's role on judicial review.

[25] The general rule is that "only the evidence that was before the administrative decision-maker is relevant and, thus, admissible. As a result, post-decision evidence is normally irrelevant and, thus, inadmissible" (*Coldwater First Nation v. Canada (Attorney General)*, 2019 FCA 292 [*Coldwater 2019*] at para. 23. See also *Association of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 F.T.R. 297 [*Access Copyright*] at paras. 18–19.)

[26] The bar on admitting additional evidence on judicial review recognizes that it is not the role of the courts to engage in fact-finding or to otherwise re-decide the merits of an administrative decision: *Access Copyright* at paras. 17–19; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at para. 52. Exceptions to the general rule may be available where admitting the evidence would not frustrate the differing roles of administrative decision-makers and reviewing courts: see *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189 at paras. 14–18; *Andrews v. Public Service Alliance of Canada*, 2022 FCA 159 at para. 21, leave to appeal to SCC refused, 40451 (16 February 2023).

[27] The appellant is encouraging the Court to use the fresh evidence to re-decide the CFIA's decisions based on what it claims is the situation today. That is not our role. We are only tasked with reviewing the reasonableness of the CFIA's decisions at the time they were made, which is the essence of the judicial review remedy.

[28] Few decisions are of such a nature as to require a court to use the most up-to-date evidence available in undertaking its review: for examples of exceptional circumstances, see *Coldwater 2019* at para. 27; *Singh Brar v. Canada (Public Safety and Emergency Preparedness)*, 2024 FCA 114 at paras. 57–58, leave to appeal to SCC refused, 41386 (27 February 2025) and 41388 (27 February 2025) [*Singh Brar*]. Both cases are distinguishable as in *Coldwater 2019*, the Crown was subject to an ongoing duty to consult with Indigenous peoples, and in *Singh Brar*, the ongoing reasonableness of the no-fly list was at issue.

[29] Conversely, in the present case, the Notice to Dispose and the Exemption Denial do not call for a constant reconsideration by the courts over time. Had the Federal Court not granted a stay of the Notice to Dispose, the appellant's flock would have been culled months ago. In our view, the stays granted by the Federal Court and by a single judge of this Court in the present case cannot be used as a mechanism aimed at giving the appellant the chance to ask this Court for a reconsideration that would effectively undo the application of the Stamping-Out Policy. Should the appellant wish to have the Notice to Dispose re-examined in light of the fresh evidence, its recourse is to ask the CFIA or the Minister to do so.

[30] The only potentially relevant exception in this case to the general rule that prevents fresh evidence in a judicial review application would be one that recognizes that fresh evidence may be admitted for the exercise of remedial discretion by courts where "no practical purpose would be served by quashing and sending the matter back" (*Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149 at para. 10(d). See also *Coldwater 2019* at paras. 25, 28.)

[31] However, that principle has no application here. Even if we were to find the decisions unreasonable, this is not a case where it would be appropriate for this Court to quash the proceedings. The apparent current health status of the flock does not change the fact that it is for the Minister or the CFIA to decide the response to an HPAI outbreak, and there is no forgone conclusion as to what any re-examination decision might be.

[32] Thus, we find that the fresh evidence as to the current health status of the appellant's flock is inadmissible.

(2) Evidence of ineffective assistance

[33] We also decline to admit the evidence of ineffective assistance of counsel due to the nature of this appeal, where the alleged ineffectiveness occurred before a lower court hearing an application for judicial review.

[34] The affidavit the appellant wishes to tender outlines that the appellant's counsel before the Federal Court took a security interest for unpaid legal fees in the proceeds that the appellant

would receive under the *Compensation for Destroyed Animals and Things Regulations*, SOR/2000-233 [*Compensation Regulations*] if the flock were destroyed. Attached as exhibits to the affidavit are copies of the security agreement as well as email communications between the appellant's principals, its counsel before the Federal Court, and another lawyer who acted as independent counsel to the appellant regarding the security agreement. The appellant alleges this security interest created a conflict of interest.

[35] In *Mediatube Corp. v. Bell Canada*, 2018 FCA 127, 156 C.P.R. (4th) 289 [*Mediatube*], a case involving a trial—as opposed to an application for judicial review—where ineffective assistance of trial counsel was alleged, Justice Stratas explained at paragraph 58 that "[i]n adducing evidence, the appellant does not need to satisfy the stringent test for fresh evidence in *Palmer v. The Queen*, [1980] 1 S.C.R. 759". Subsequent case law provides that "the evidence being adduced 'must be admissible (applying the usual rules of evidence), relevant to the issue raised on appeal, and credible'" (*Nguyen v. 1108911 B.C. Ltd.*, 2024 BCCA 48 [*Nguyen*] at para. 15, citing *Boone v. Jones*, 2023 BCCA 215 at para. 34, *R. v. Aulakh*, 2012 BCCA 340, 326 B.C.A.C. 177 at paras. 59–67, and *Beaulieu v. Winnipeg (City of)*, 2021 MBCA 93 at paras. 28–35, 54–63).

[36] As for what is required for the appellant to succeed on this ground, "the appellant must show that counsel's acts or omissions constituted incompetence and a miscarriage of justice resulted" (*Mediatube* at para. 29, citing *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520). In the context of an appeal, an actual conflict that affected counsel's performance is generally

sufficient; typically, it need not have affected the result of the trial: *Mediatube* at para. 57. See also *Nguyen* at para. 54.

[37] The foregoing statements regarding admissibility on appeal of evidence of alleged incompetence of counsel before a lower court must be modified in the context of an allegation of ineffective counsel before a lower court presiding over an application for judicial review, rather than a trial, due to the different standard of review applied in a judicial review appeal as opposed to other appeals.

[38] On appeal in a judicial review application, like the present one, this Court must determine whether the Federal Court identified the proper standard of review to be applied to the CFIA's decisions and whether it properly applied that standard: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 [*Agraira*] at paras. 45–47; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 3 S.C.R. 107 [*Horrocks*] at paras. 10–12. Therefore, this Court essentially steps into the shoes of the Federal Court, performs a *de novo* review of the CFIA's decisions, and accords "no deference to the reviewing judge's application of the standard of review" (*Horrocks* at para. 10.)

[39] This Court has previously held that what is in essence a "do-over" on appeal effectively cures breaches of procedural fairness that occur before the Federal Court in a judicial review application: see *Haynes v. Canada (Attorney General)*, 2023 FCA 158 at paras. 14–16, leave to appeal to SCC refused, 41047 (6 June 2024); *Whitelaw v. Canada (Attorney General)*, 2025 FCA 68 at paras. 10, 16; *Jagadeesh v. Canadian Imperial Bank of Commerce*, 2024 FCA 172 at

para. 40. That logic applies equally to allegations of ineffective assistance of counsel before the Federal Court in a judicial review application.

[40] An exception would arise only if an appellant raises errors in the court below for matters to which appellate standards of review apply, namely, "findings of fact or mixed fact and law based on the consideration of evidence at first instance" (*Apotex Inc. v. Canada (Health)*, 2018 FCA 147, 157 C.P.R. (4th) 289 at para. 57) or in its exercise of remedial discretion (see e.g., *Makivik Corporation v. Canada (Attorney General)*, 2021 FCA 184 at para. 65). The appellant does not allege that the Federal Court erred in respect of any such matters.

[41] Thus, the appellant's ability to directly challenge the CFIA's decisions before us means that the evidence of ineffective assistance is not relevant on appeal and should not be admitted: see *Nguyen* at para. 15.

[42] We also wish to note, having reviewed the affidavit of the appellant's principal to determine its admissibility, that the evidence falls far short of what is required to prove ineffective assistance because it does not establish a conflict of interest. Notably, counsel's security interest also extended to all the appellant's present and after acquired personal property. The appellant failed to adduce evidence demonstrating that the compensation received from the Minister was the only, or even the most feasible way, for counsel to collect their fees. Additionally, the appellant did not provide any case law or guidance from a provincial law society suggesting that this type of security interest would be inappropriate. Based on the Federal

Court decision and record before us, there is nothing that in any way impugns the integrity or performance of counsel before the Federal Court.

[43] We therefore dismiss the appellant's motion to adduce fresh evidence.

B. *Standard of review*

[44] As noted, on appeal, this Court must determine whether the Federal Court identified the proper standard of review to be applied to the CFIA's decisions and whether it properly applied that standard: *Agraira* at paras. 45–47; *Horrocks* at paras. 10–12. The parties agree with the Federal Court's selection of the reasonableness standard but disagree on its application.

[45] The appellant focuses much of its submissions on errors it alleges were made by the Federal Court in detailing the applicable principles. For that reason, we address those concerns and explain the approach to be taken in light of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the leading authority on judicial review. Thereafter, we assess afresh the reasonableness of the CFIA's decisions.

C. *The approach to reasonableness review in this matter*

[46] We start the discussion by noting that the Federal Court largely adopted the general approach to reasonableness review, as outlined by the Supreme Court of Canada in *Vavilov*, to

the review of the CFIA's two decisions and to the CFIA's adoption of the Stamping-Out Policy: see *FC Decision* at paras. 72–74.

[47] Prior to the decision in *Vavilov*, the approach to reviewing policy decisions framed reasonableness around whether a decision was made in "bad faith, did not conform with the principles of natural justice, or if reliance was placed upon considerations that are irrelevant or extraneous to the legislative purpose" (*Malcolm v. Canada (Fisheries and Oceans)*, 2014 FCA 130, 460 N.R. 357 at para. 32, leave to appeal to SCC refused, 36012 (20 November 2014), citing *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2, 1982 CanLII 24 [*Maple Lodge*] and *Carpenter Fishing Corp. v. Canada* (1997), 155 D.L.R. (4th) 572, 1997 CanLII 26668 (F.C.A).)

[48] Neither party contests that *Vavilov* has overtaken the *Maple Lodge* categories of unreasonableness. The parties did not refer us to any decision of this or another appellate court that has ruled on this question. We note, however, that the Federal Court has split on the issue of the continued relevance of the *Maple Lodge* categories: *Mowi Canada West Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2022 FC 588, 48 C.E.L.R. (4th) 122 at para. 240; *Saltstream Engineering Ltd. v. Canada (Fisheries, Oceans and Coast Guard)*, 2022 FC 621 at para. 59, *Barry Seafoods NB Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2021 FC 725 at para. 35; *South Shore Trading Co. Ltd. v. Canada (Fisheries, Oceans and Coast Guard)*, 2025 FC 174 [*South Shore*] at paras. 49–51; *Munroe v. Canada (Attorney General)*, 2021 FC 727 at paras. 40, 43–45; *Fortune Dairy Products Limited v. Canada (Attorney General)*, 2020 FC 540

at para. 105; *Prince Edward Island Fishermen's Association Ltd. v. Canada (Attorney General)*, 2025 FC 737 at paras. 81–84.

[49] We agree with the parties and the Federal Court in the instant case that *Vavilov* requires reformulation of how reasonableness review applies to discretionary policy decisions and that the approach in *Maple Lodge* has been overtaken.

[50] In this regard, we see no principled reason why the reasonableness review of a discretionary policy decision should not be framed in the manner set out in *Vavilov*, which asks whether a decision "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision": *Vavilov* at para. 99.

[51] *Vavilov* is the starting point for undertaking a judicial review and sets out a holistic approach. Earlier case law on conducting reasonableness review can provide insight but must be aligned with the *Vavilovian* approach: *Vavilov* at para. 143. Discretionary policy decisions should not be an exception. The Supreme Court in *Vavilov* noted the existence of decisions by "ministers" and matters of "high policy" (at para. 88). Yet, it held that "reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court" but instead act as constraints (at para. 89).

[52] This Court in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2021] 1 F.C.R. 374 [*Entertainment Software*] at

paragraphs 25–30, aff'd 2022 SCC 30, [2022] 2 S.C.R. 303 outlined a variety of policy-laden decisions, subject to review for reasonableness that are unconstrained in nature and are thus very hard to set aside, and noted that, unless an exception applies, reasonableness as mandated by *Vavilov* is the correct approach to reviewing policy-laden decisions. Thus, the categories listed in *Maple Lodge* now serve as examples of when a discretionary policy decision would be unreasonable but do not fully categorize unreasonable policy decisions. Rather, the requisite analysis is that mandated by *Vavilov.*

[53] Pursuant to *Vavilov*, reasonableness review is deferential, and the reviewing court does not ask itself what decision it would have made or whether the decision under review is correct (at para. 83). Rather, the reviewing court is limited to considering whether the outcome of an administrative decision is transparent, intelligible, and justified in light of the reasons, if any, that may have been given by the administrative decision-maker and in light of the legal and factual constraints that bear on the decision: *Vavilov* at paras. 85, 99. Where no reasons are given for a decision, as is often the case when a policy is adopted, reasonableness review requires a reviewing court to consider the reasonableness of the policy in light of the record before the administrative decision-maker and the relevant constraints, including the applicable statutory provisions: *Vavilov* at paras. 137–138.

[54] In the present case, no reasons were given for the adoption of the Stamping-Out Policy or the Notice to Dispose decision. Thus, we are called upon to determine if they were reasonable in light of the *Act* and, in particular, the broad discretion afforded to the Minister or ministerial delegates under section 48, and in light of the relevant contextual factors, which include the prior

case law of this Court and of the Federal Court in similar cases and the record that was before the CFIA. Reasons were provided for the Exemption Denial decision; its reasonableness must therefore be assessed in light of those reasons and the relevant contextual factors, which also include the *Act* and the broad discretion afforded to the Minister or ministerial delegates under section 48, the prior case law of this Court and of the Federal Court in similar cases, and the record before the Exemption Committee, including the appellant's submissions to it.

[55] Fact-based determinations may be reviewed pursuant to the formulation established by *Vavilov*, but the bar for establishing unreasonableness is high. For a decision to be unreasonable on a factual basis, an applicant must demonstrate that the "decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at para. 126), or in the words of paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it". See also *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161 [*Best Buy*] at paras. 114, 121–123. Where there was factual evidence before the decision-maker that is capable of supporting its decision (unless the decision-maker is shown to have ignored crucial evidence going the other way), the decision will generally be reasonable: *Best Buy* at paras.123, 129–130.

[56] Discretionary policy decisions are also reviewable for reasonableness, but, once again, the bar for establishing unreasonableness is high, often requiring an applicant to establish that the decision fails to respect the provisions in the statute pursuant to which the discretionary decision was made, which may provide constraints on the way in which discretion was exercised:

Entertainment Software at paras. 31–33. See also Donald J.M. Brown et al., *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters Canada, 2009) (looseleaf release 2025-02) (WL) at § 15:63.

D. *The Appellant's Arguments*

[57] As noted, the appellant focused almost the entirety of its submissions on errors it alleges that the Federal Court made in its articulation of the applicable legal principles and made little submissions on whether the decisions at issue are reasonable. To the extent such submissions were made, they largely focussed on the appellant's disagreement with the application of the Stamping-Out Policy to ostriches, which it alleges were not considered by the CFIA when it adopted the Stamping-Out Policy and which it contends are different from other domestic flocks due to their higher survival rates when infected with HPAI. The appellant also alleges that the CFIA's decisions should be re-evaluated by this Court in light of the current circumstances, but, as already noted, that is not something this Court can do on an appeal from a decision dismissing a judicial review application or that, more generally, any reviewing court may do.

[58] We turn next to consideration of the various errors that the appellant alleges the Federal Court made.

(1) Did the Federal Court err in limiting its analysis of the reasonableness of the Stamping-Out Policy by focussing exclusively on whether the Policy bore some connection to the disease control objectives in the *Act*?

[59] The appellant first contends that, instead of following the approach in *Vavilov*, the Federal Court improperly relied on the decision in *Auer v. Auer*, 2024 SCC 36, 497 D.L.R. (4th) 381 [*Auer*] to limit its analysis of whether the Stamping-Out Policy was reasonable by asking only whether that policy "bore some connection to disease control objectives" in the *Act*: Appellant's Memorandum of Fact and Law, at para. 42.

[60] In *Auer*, the Supreme Court of Canada determined that the reasonableness standard of review applies to the review of regulations adopted under a statute. In assessing the reasonableness of the regulations at issue, the Supreme Court focused on the relevant contextual factors in that case, namely the constraints contained in the legislation pursuant to which the regulations were promulgated: see *Auer* at paras. 59–60.

[61] In the decision under appeal, the Federal Court applied the reasoning in *Auer* by analogy: see *FC Decision* at para. 75. However, contrary to what the appellant contends, the Federal Court did not limit its analysis of the reasonableness of the Stamping-Out Policy only to consideration of whether that policy bore some connection to the disease control objectives in the *Act*. Its analysis was broader and included consideration of relevant factual constraints, albeit with appropriate deference and recognition that it is not up to a reviewing court to re-weigh or re-decide factual matters, particularly when the facts are scientific in nature. This is evident at several places in the Federal Court's reasons.

[62] For example, at paragraphs 75–79, the Federal Court wrote:

> [75] Although *Auer* addressed specifically decisions to make subordinate legislation, its reasoning logically extends to policymaking decisions. The key connective tissue is the source of authority: in both contexts, the decision-maker exercises broad, delegated discretionary power to pursue legislative objectives. *Vavilov* has identified the governing statute, other relevant law, and factual context as the "legal and factual constraints" on every administrative act: *Vavilov* at paras 105-135. Therefore, whether discretion manifests through formal regulations or through general policy directives, administrative decision-makers must always interpret their enabling provisions purposively, act within statutory boundaries, and demonstrate that their legislative or quasi-legislative actions advance the statutory objectives given the available legal and factual constraints.
>
> [76] Consequently, the core reasonableness review considerations articulated in *Auer* should also apply to policymaking decisions. The analytical framework should not turn on the formal label of "regulation." What matters most is the nature of the decision itself. Specifically, whether it creates generally applicable rules on statutory authority to be applied by more frontline decision-makers in the administrative decision-making chain. This description encompasses ministerial directives, Cabinet guidelines, and disease-control policies no less than regulations. Accordingly, the analytical framework in *Auer* that includes the principles of presumption of validity, purposive interpretation, and prohibition on merits review should also guide courts reviewing any policymaking decision. Ultimately, the inquiry remains whether the decision to adopt the policy instrument is grounded in a rational, purposive interpretation of the enabling statute and respects all relevant procedural, substantive, and contextual limits.
>
> [77] Deference is particularly warranted for policy decisions intended to safeguard animal and public health from high-risk disease. Case law has shown this principle consistently. In *Kohl v Canada (Department of Agriculture)*, [1995] FCJ No. 1076 (FCA) [*Kohl*], the Federal Court of Appeal described a ministerial order made under section 48 of the *Act* as a "policy decision obviously not subject to the requirements of the rules of natural justice or procedural fairness," reviewable solely for abuse or misuse of power: *Kohl* at para 18.
>
> [78] The teaching from *Kohl* is clear. Where a policy decision ordering blanket disposal of affected animals and things is made in good faith, reviewing courts should confine their reasonableness analysis to whether the destruction advances the objectives of the *Act* and whether there is some evidence to support the underlying suspicion. Following *Vavilov*, the threshold for finding sufficient support today is undoubtedly reasonableness, meaning the question is whether the suspicion is reasonably supported by the evidence and consistent with applicable legal constraints. Substituting a different view of the scientific and operational

> determinations underlying the policy decision would risk treading on the executive's policy prerogative: *Kohl* at paras 20–22.
>
> [79] *Entertainment Software*, *South Shore*, *Kohl* and *Auer* converge into a single guiding principle: courts serve as guardians of legality, not arbiters of the wisdom of policy. When the legislature explicitly delegates public interest decisions, such as the management of animal and public health, to administrative actors, courts must leave assessment of policy merits, especially the nuanced balancing of scientific, economic, and social factors, to decision-makers tasked by Parliament with those responsibilities. Judicial review of policy decisions should only target compliance with legal and factual constraints, and verification of whether the alleged exercise of technical expertise in formulating the policy decisions has been sufficiently demonstrated.
>
> (emphasis added.)

[63] In concluding that the Stamping-Out Policy was not unreasonable due to its adoption of what the appellant alleged was outdated science, the Federal Court also held at paragraphs 166–168:

> […] These continuous updates and refinements have persisted through to the current *2022 ERP* instrument, which integrates ongoing decision records, regular multidisciplinary reviews, and international expert consultations, including with the U.S. Department of Agriculture's Animal & Plant Health Inspection Service [APHIS].
>
> [167] Besides refinements to specific policy guides, the CFIA has also consistently explored alternatives to the Stamping-Out Policy itself throughout the years, including vaccination, containment strategies such as "burn out," and selective culling. The [*2013 Notifiable Avian Influenza Hazard-Specific Plans*] specifically contemplated a "burning out" option for [low pathogenic avian influenza] strains in remote, non-commercial premises with inadequate resources, though this option was removed from the *2022 ERP* due to the greater risks to animal health, public health and the environment caused by the spread of HPAI. In December 2022, the CFIA conducted extensive consultations in response to requests from poultry producers in British Columbia to apply selective killing rather than complete stamping out. These consultations were both internal and external. The Agency weighed the benefits and harms of selective killing, specifically factors such as increased prevalence of HPAI, the immediate loss of some international markets, and a potential increase in resources required in the longer term for surveillance, and delayed depopulation procedures. Ultimately,

> the CFIA concluded that the Stamping-Out Policy remained the most effective in controlling the spread of highly infectious HPAI to other flocks, wild birds and mammals, including humans, while also maintaining alignment with the internationally accepted approach to HPAI management and control.
>
> [168] All these extensive, iterative, and consultative review and update processes directly address the only question properly before this Court on this point: whether the CFIA has remained responsive to evolving scientific and policy developments, and nonetheless determined, on reasoned grounds and with material factors considered, that continued application of the Stamping-Out Policy properly advances the objectives of the *Act*. The record before me supports a resounding answer in the affirmative. Whether the Applicant's experts might weigh scientific data differently, or prefer alternative policy approaches, is irrelevant to the reasonableness review that this Court must conduct here.
>
> (emphasis added.)

[64] Thus, the Federal Court assessed whether there was a factual basis before the CFIA to support its suspicion that HPAI might be present in epidemiological units to which the Stamping-Out Policy applies and also considered whether the Stamping-Out Policy advances the policy objectives of the *Act*. We see no error in this approach and, in any event, for the reasons noted below in our fresh consideration of the Stamping-Out Policy, have also come to the conclusion that the Stamping-Out Policy is reasonable.

(2) Did the Federal Court err in being overly deferential to the evidence from the CFIA scientists?

[65] The appellant next contends that the Federal Court was overly deferential to the expertise of the CFIA's scientists, suggesting that the so-called "academy of science" case law is no longer good law, post-*Vavilov*.

[66] Throughout its reasons, the Federal Court emphasized that in undertaking reasonableness review, courts cannot resolve scientific disputes or otherwise re-decide the scientific merits of a decision: *FC Decision* at paras. 6, 69, 84, 133, 162–163, 165, 168, 201. The appellant argues that this framing amounts to impermissible "rubber-stamping", excessively defers to the decision-maker's expertise, and is thus contrary to the approach in *Vavilov*.

[67] We disagree and find that the Federal Court appropriately applied *Vavilov* to the scientific issues the appellant raised. As noted, *Vavilov* mandates that courts consider whether a decision "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision": *Vavilov* at para. 99. The required considerations apply to all decisions, including those that involve the assessment and weighing of scientific evidence.

[68] However, reasonableness review does not call for courts to become the merits-decider: *Safe Food Matters Inc. v. Canada (Attorney General)*, 2022 FCA 19, 46 C.E.L.R. (4th) 185 [*Safe Food*] at para. 37. Courts cannot reweigh the evidence, second-guess the exercise of discretion, or undertake their own statutory interpretation exercise: *Safe Food* at para. 39. Rather, they are limited to determining whether the administrative decision-maker's determinations were reasonable.

[69] In addition, some determinations based on the assessment and weighing of scientific evidence, like the adoption of the Stamping-Out Policy, may arise in the context of relatively unconstrained decisions that are harder to set aside: *Entertainment Software* at para. 30.

[70] We note that the Federal Courts have often framed deference to science-based determinations around the courts not being an "academy of science": see *Greenpeace Canada v. Canada (Attorney General)*, 2016 FCA 114, 2 Admin. L.R. (6th) 1 at paras. 60–61; *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, 444 D.L.R. (4th) 298 at para. 119, leave to appeal to SCC refused, 39111 (2 July 2020); *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of The Environment)* (2000), 191 F.T.R. 20, 2000 CanLII 15291 (T.D.) at para. 71; *Inverhuron & District Ratepayers Ass. v. Canada (Minister of The Environment)*, 2001 FCA 203, 206 F.T.R. 318; *Ontario Power Generation Inc v. Greenpeace Canada*, 2015 FCA 186, 388 D.L.R. (4th) 685 at para. 126, leave to appeal to SCC refused, 36711 (28 April 2016); *South Shore* at para. 58; *Shelburne Elver Limited v. Canada (Attorney General)*, 2025 FC 566 at para. 68; *Canadian Committee For a Sustainable Eel Fishery Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2024 FC 1951 at para. 31; *Georgia Strait Alliance v. Canada (Environment and Climate Change)*, 2025 FC 54, 65 C.E.L.R. (4th) 319 at para. 150; *Peguis First Nation v. Canada (Attorney General)*, 2021 FC 990, 47 C.E.L.R. (4th) 26 at para. 171, aff'd 2023 FCA 163, 59 C.E.L.R. (4th) 1; *Citizens Against Radioactive Neighbourhoods v. BWXT Nuclear Energy Inc.*, 2022 FC 849, 51 C.E.L.R. (4th) 125 at para. 80.

[71] As noted by the Supreme Court at paragraph 143 of *Vavilov*, principles relating to reasonableness review developed pre-*Vavilov*, such as the "academy of science" jurisprudence, must be aligned with the reasons in *Vavilov*. Such alignment recognizes that some administrative decision-makers, like the CFIA, are required to assess and weigh scientific evidence and that reviewing courts must refrain from reweighing and reassessing this evidence. Thus, a reviewing court may intervene only if an applicant for judicial review establishes that the decision-maker

has fundamentally misapprehended or failed to account for the evidence before it: *Vavilov* at paras 125–126.

[72] This approach is the correct one and is precisely what the Federal Court did in the instant case.

(3) Did the Federal Court err in its interpretation of section 48 of the *Act*?

[73] The appellant next says that the Federal Court erred in its interpretation of section 48 of the *Act*.

[74] The Federal Court explained that section 48 of the *Act* grants the Minister broad discretion but only within the confines of a "functional binary of destruction and treatment", leaving "no room for a third 'wait-and-see' approach" (at para. 83). The Federal Court added that the possibility of treatment is "limited by scientific and operational realities", such as scientific viability and scientific feasibility, meaning that destruction is the only option where treatment is not available: at para. 84. The Federal Court also recognized the possibility for compensation under the *Compensation Regulations* as being in line with the *Act*'s protective rather than punitive purpose: at para. 85.

[75] The appellant argues that this "binary" interpretation is contrary to the permissive "may" language in section 48 of the *Act* as well as the possibility of quarantine, treatment, or destruction under subsection 5(1) of the *Health of Animals Regulations*, C.R.C., c. 296 [*Regulations*]. The

appellant also submits that the Federal Court's approach frustrates the *Act*'s dual purpose of controlling animal disease and protecting Canada's animal resource base by only focusing on the former.

[76] The respondent concedes that section 48 of the *Act* may provide the Minister more than the binary option of destroying or treating animals. We agree and thus find that the Federal Court did err in suggesting that only two options are available to the Minister under section 48 of the *Act* when confronted with a possible transmissible illness in an animal. However, nothing turns on this because the appellant's argument misunderstands the nature of this Court's review. In addition, its other submissions misunderstand the statutory scheme established by the *Act.*

[77] This Court is not sitting in appeal of the Federal Court's reasons. Instead, as already noted, this Court must, itself, determine whether the CFIA's decisions should be set aside.

[78] The Federal Courts have already held that section 48 of the *Act* allows the Minister to exercise discretion to establish a blanket policy that provides for the destruction of animals that fall within its ambit: *David Hunt Farms Ltd v. Canada (Minister of Agriculture)* (1994), 74 F.T.R. 270, [1994] F.C.J. No. 314 (Q.L.) (T.D.) [*Hunt*], aff'd (1994), 170 N.R. 75, [1994] F.C.J. No. 677 (Q.L.) (F.C.A.), leave to appeal to SCC refused, 24281 (2 February 1995). See also *Jerram v. Canada (Minister of Agriculture)*, [1994] 3 F.C. 17, 1994 CanLII 3471 (T.D.) [*Jerram*].

[79] As such, it is permissible that the Stamping-Out Policy itself, rather than its implementation by ground-level employees, would ultimately determine the fate of the appellant's flock. The question thus becomes whether, in adopting the Stamping-Out Policy, the Minister adequately considered the discretion under section 48 of the *Act* to order or not the disposal of animals who are contaminated by a disease or have been in close proximity to an animal that was or is suspected of having been contaminated by a disease, such as animals in the same epidemiological unit as animals that have tested positive for HPAI. For the reasons set out below, we have determined that this option was adequately considered and that the Stamping-Out Policy is reasonable.

[80] As for the options available to inspectors under section 5 of the *Regulations*, the Federal Court at paragraph 43 of its decision in *Hunt* explains that the authority under section 48 of the *Act* is vested in what is now the Minister of Agriculture and Agri-Food rather than the inspectors. Quarantine under section 5 of the *Regulations* plays only a temporary role in the process. Accordingly, the *Regulations* do not constrain the Minister's authority to establish the Stamping-Out Policy.

[81] Another key element of the statutory scheme is that actual infection is not a prerequisite for destruction. Section 48 explicitly allows for destruction in the face of mere suspicion of infection or exposure to suspected infection. In *Jerram* at page 30, the Federal Court upheld the Minister's "very low level of risk tolerance" in destroying animals that may not be infected. Similarly, at paragraph 29 of *Hunt*, the Federal Court upheld the Minister's consideration of "the possibility that these animals may not be affected by the disease, but that this circumstance was

not sufficient to change the decision being made". In *Kohl v. Canada (Department of Agriculture)* (1995), 185 N.R. 149, [1995] F.C.J. No. 1076 (Q.L.) (F.C.A.) [*Kohl*] at paragraph 20, this Court explained that the *Act* gives the Minister significant discretion and "directs him to act on the basis of mere suspicion".

[82] As will soon become apparent, the foregoing case law and the breadth of the discretion afforded to the Minister under section 48 of the *Act* means that there is very limited room for finding the Stamping-Out Policy to be unreasonable.

(4) Did the Federal Court err in concluding that the Minister had not improperly fettered the discretion available under section 48 of the *Act*?

[83] The appellant next contends that the Federal Court erred in declining to find that the Stamping-Out Policy impermissibly fettered the Minister's discretion. We disagree and find that neither the Notice to Dispose nor the Exemption Denial were the result of fettering. As explained earlier, *Hunt* determines that it is permissible for the Minister to establish blanket destruction policies under section 48 of the *Act* based on identified criteria which leave no discretion to individual inspectors. The appellant erroneously suggests that the inspector in the present case could or should have deviated from the Stamping-Out Policy. This argument cannot succeed in light of the holding in *Hunt*.

[84] We also agree with the Federal Court that the overall process was not blind to the appellant's circumstances. The possibility of an exemption introduces discretion in the process. In this case, the appellant did not satisfy the exemption criteria in the 2022 ERP. However, the

CFIA considered the appellant's request. The decision record for the Exemption Denial shows that the CFIA considered but ultimately rejected a "significant policy deviation" in the form of selective culling following additional testing.

[85] We accordingly see no error in the Federal Court's conclusion that none of the decisions at issue were inappropriately fettered.

(5) Did the Federal Court err in failing to consider the reasonableness of the CFIA's refusal to conduct testing after the flock allegedly recovered from HPAI?

[86] The appellant further submits that the Federal Court erred in failing to consider the CFIA's refusal to allow for additional testing of the flock. The appellant says that the denial of ongoing testing should have been considered by the Federal Court as part of the "ongoing conduct" under review, citing *David Suzuki Foundation v. Canada (Health)*, 2018 FC 380, 34 Admin. L.R. (6th) 21 at para. 173.

[87] The simple answer to this alleged error is that these arguments were not made to the Federal Court nor raised in the appellant's Notices of Application for Judicial Review. The Federal Court cannot be faulted for failing to consider arguments that were not made.

[88] We accordingly conclude that none of the errors the appellant alleges the Federal Court made in the decision below provide any basis for our intervention.

E. *Were the impugned decisions reasonable?*

[89] We turn next to assessing the ground that is most relevant in this appeal, namely, the reasonableness of the CFIA's decisions, and conclude that they were all reasonable.

[90] As noted, before this Court, the appellant primarily attacks the Stamping-Out Policy for the CFIA's alleged failure to consider the particularities of ostriches and its failure to provide for retesting or reconsideration of alternatives after the ostriches allegedly recovered. Neither ground is convincing.

[91] Contrary to what the appellant claims, the CFIA had evidence before it about ostriches prior to promulgating the Stamping-Out Policy. The record supports that, although the CFIA may not have directly consulted with ostrich owners in developing that policy, it possessed evidence demonstrating that ostriches were susceptible to infection and could transmit the infection to other ostriches or various types of birds. This included published scientific research on the susceptibility of ostriches to avian influenza conducted in South Africa, where the appellant's flock reportedly originated. Susceptibility is the key criterion triggering the application of the Stamping-Out Policy: *FC Decision* at para. 102. Moreover, the appellant's situation and that of the ostriches were specifically considered by the CFIA before it issued the Exemption Decision: see *FC Decision* at paras. 239–240.

[92] The appellant claims the survival rate of ostriches compared to other poultry, such as chickens and turkeys, should have led to a different result in its case. We disagree. Section 48 of

the *Act* does not limit the Minister (or the CFIA, the ministerial delegate) to ordering the destruction of only infected animals. As noted in *Hunt*, *Jerram* and *Kohl*, the Minister may proceed with destruction on the basis of mere suspicion and may make destruction decisions through a general policy. Moreover, the imposition of the Stamping-Out Policy on ostriches is consistent with Canada's international trade obligations, which is a relevant consideration in developing a policy under section 48 of the *Act*: *Hunt* at para. 49; *Jerram* at 30.

[93] As concerns, more generally, the reasonableness of the Stamping-Out Policy, the Minister and CFIA are afforded very broad discretion under section 48 of the *Act*, which allows them to require destruction of animals based on mere suspicion of infection. The case law of this Court and the Federal Court, as noted, has recognized the breadth of that discretion and endorsed policies like the Stamping-Out Policy.

[94] Moreover, there was significant evidence before the CFIA, when it adopted the Stamping-Out Policy, about the risks of HPAI to domestic disease control, public health, and Canada's ability to export poultry to its international trading partners. This evidence amply supports the choice of stamping out as a reasonable response to those risks.

[95] More specifically, the CFIA possessed evidence that:

- stamping out effectively controls the spread of HPAI to other sites or species by stopping virus amplification, caused by the multiplication of the virus in infected

hosts and its excretion into the environment, thereby reducing opportunities for other susceptible animals to become exposed;

- decontamination, after the animals are removed from the site, also prevents the spread of the virus, which can survive for months in cold and moist environments;

- controlling the spread of HPAI preserves animal resources and reduces impacts on Canadians' food supply by reducing the number of birds infected by HPAI, which is important because HPAI outbreaks in chickens and turkeys may result in the death of large proportions of exposed flocks and require the culling of hundreds of thousands of birds;

- stamping out is recognized as the international standard for achieving domestic disease control of HPAI. In this regard, Canada is a member of the World Organization for Animal Health (WOAH), a science-based organization recognized by its 183 member states as the global authority on matters of animal health and by the World Trade Organization as the international standard setting organization for animal health and zoonoses (diseases transmissible from animals to humans). One of the WOAH's roles is to identify the most appropriate strategies and measures for disease prevention and control. The WOAH supports the implementation of a stamping out policy in response to HPAI outbreaks in poultry, including ostriches, and a majority of WOAH members recognize this policy as the international standard;

- stamping out responds to the risks posed by HPAI to public health since transmission of HPAI to humans, though rare, can occur, and close to half of the 900 or so human cases of avian influenza (H5N1) reported in the past few decades have been fatal; and

- stamping out effectively responds to the risks posed by HPAI to Canada's ability to export poultry to international trading partners. Trade agreements with the United States, Mexico, and the European Union require Canada to adhere to international animal health standards. Canada's most important trading partners, including the United States, recognize stamping out as the international standard disease response to HPAI. Under WOAH standards, countries who apply a stamping out policy in response to HPAI detections in poultry may regain disease-free status a minimum of 28 days after the stamping-out process is complete. Where such a policy is not implemented, disease-free status may be recognized only when there has been an absence of detection of HPAI in poultry for a minimum of 12 months. Before poultry exports can resume following an HPAI outbreak, importing countries require disease-free status at the level of the entire country or at the level of a province, depending on the importing country. In response to the current HPAI outbreak, Canada has, in compliance with WOAH standards, established HPAI control zones and can export poultry from outside of these control zones to trading partners who recognize Canada's zoning. Their recognition of zoning is based on their expectation that stamping out will be implemented in control zones according to WOAH standards. Canada's failure to apply the policy would put at risk recognition of its zoning by trading partners,

> jeopardize Canada's access to export markets for its poultry and poultry products and damage Canada's reputation as a country able to successfully control, contain and eliminate diseases in accordance with its international commitments.

[96] In light of this evidence, like the Federal Court, we conclude that the CFIA reasonably chose as its preferred measure the timely destruction of any type of bird that was both susceptible to HPAI and exposed to it: *FC Decision* at para. 102.

[97] Nor did the Stamping-Out Policy have to provide for additional testing or a more targeted approach to culling. The record put before this Court demonstrates that the CFIA considered but rejected at various points the possibility of a "burn out" strategy or more targeted responses to avian flu outbreaks: *FC Decision* at para. 167. That choice was supported by the risk to international trade and the scientific realities of how avian flu is transmitted, both of which are acceptable considerations under section 48 of the *Act*: see *Jerram* at 30; *Hunt* at paras. 49–51.

[98] In addition, it was reasonable for the Policy to provide for the culling of the entire flock without selective testing and despite the fact that part of the flock would not succumb to the illness. As explained, section 48 of the *Act* explicitly allows for destruction in the face of a mere suspicion of infection or exposure to suspected infection. The decisions in *Jerram*, *Hunt*, and *Kohl* all recognized this reality. This conclusion is also relevant to the appellant's emphasis on the fact that only two ostriches were tested. This argument also overlooks the fact that a significant number of ostriches died in the outbreak, in addition to the fact that the biosecurity measures maintained by the appellant on the premises at the time placed all ostriches under the

same risk of exposure to HPAI and that, as a result, the positive test result of just one bird subjected the entire flock to destruction without exception. In any event, the number of samples is irrelevant under the 2022 ERP: *FC Decision* at para. 155.

[99] Given that the Stamping-Out Policy is reasonable, we also find that the Notice to Dispose and Exemption Denial were reasonable. The inspector had to issue the Notice to Dispose once the criteria were met.

[100] From the reasons given and in light of the record, it is apparent that the Exemption Committee considered the health status of the flock, the biosecurity measures in place, and the importance of the flock to the appellant and its principals. After considering whether it could allow the appellant to keep a subset of the ostriches, the Committee determined that it was just too risky to undertake "selective culling" or otherwise allow the infection to "burn out" on the farm as the appellant proposed. It held as follows:

> While a significant policy deviation was considered (i.e. to employ selective culling of this HPAI infected non-commercial poultry premises, rather than stamping-out), internal consultation with other branches (ie. Science, International Affairs, Policy and Programs) highlighted the substantial risks in not adhering to current policy, including: the domestic disease control risks, the threat to public health, and the anticipated trade implications given our trading partners expectation that Canada adhere to a stamping-out policy. Maintaining a large population of outdoor birds infected with HPAI would delay Canada's ability to regain disease freedom status, with a minimum one-year delay from the closure of the last outbreak rather than 28 days associated with a stamping-out policy. Communications between [International Affairs Branch] and the United States Department of Agriculture (USDA) also clearly identified that the USDA has, and would continue to, apply a stamping out approach to the detection of HPAI in ostrich farms. The risk for further HPAI transmission to humans, other domestic livestock, and wildlife, in a large population of HPAI infected outdoor birds that

> may harbour subclinical infections was notable. (Exemption Committee Decision Record, CFIA Certified Tribunal Record at p. 312).

[101] Thus, we find that the Exemption Committee reasonably concluded that the flock did not qualify for exemption under any of the categories in the 2022 ERP and reasonably refused to pursue the alternatives proposed by the appellant.

IV. Disposition

[102] We accordingly dismiss this appeal, with costs, which we would fix in the agreed-upon all-inclusive amount of $7,000.00. We agree this is an appropriate figure given the issues and the need for counsel to travel to the expedited hearing in Ottawa.

"Mary J.L. Gleason"
J.A.

"René LeBlanc"
J.A.

"Gerald Heckman"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-205-25
STYLE OF CAUSE:	UNIVERSAL OSTRICH FARMS INC. v. CANADIAN FOOD INSPECTION AGENCY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JULY 15, 2025
REASONS FOR JUDGMENT OF THE COURT BY:	GLEASON J.A. LEBLANC J.A. HECKMAN J.A.
DATED:	August 21, 2025

APPEARANCES:

Umar A. Sheikh	FOR THE APPELLANT
Aileen Jones Paul Saunders	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Federal Court of Appeal | Cour d'appel fédérale

Date: 20250821

Docket: A-205-25

Ottawa, Ontario, August 21, 2025

CORAM: **GLEASON J.A.**
LEBLANC J.A.
HECKMAN J.A.

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

Appellant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

JUDGMENT

The appeal is dismissed, with costs fixed in the all-inclusive amount of $7,000.00.

"Mary J.L. Gleason"
J.A.

Federal Court Cour fédérale

Date: 20250217

Docket: T-294-25

Citation: 2025 FC 303

2025 FC 303 (CanLII)

Toronto, Ontario, February 17, 2025

PRESENT: The Honourable Justice Battista

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

ORDER AND REASONS

[1] On December 31, 2024, the Respondent issued a Notice directing the Applicant to cull the ostriches on its farm on or before February 1, 2025. The Notice was issued after some ostriches tested positive for Avian Influenza.

[2] This Notice was the subject of an application for judicial review filed with the Court on January 30, 2025, and on the following day, the Notice was the subject of an injunction ("Stay Order") and it was stayed pending a disposition on the application for judicial review. The Stay Order has been appealed to the Federal Court of Appeal.

[3] In the present motion, the Respondent requests the Court to clarify the injunction pursuant to Rule 397 of the *Federal Courts Rules*, SOR/98-106, to indicate whether the Stay Order enjoins the Minister from exercising its authority under subsection 48(1) of the *Health of Animals Act*, SC 1990, c 21, to dispose of the ostriches. Further, the Respondent requests an order for an expedited hearing of the underlying application if the Court finds that the order enjoins the Minister, or if the request falls outside of Rule 397.

[4] The Applicant argues that the clarification request falls outside the scope of Rule 397 because the Stay Order is clear and there was no "slip, error or oversight". The Applicant also argues that there is no urgency or justification for abridging the timelines for the application for judicial review.

[5] The motion for clarification of the Stay Order combined with the fact that the Stay Order is under appeal places the Court in a delicate position. The question of whether the Stay Order enjoins the Minister from culling the ostriches is one of the grounds of appeal. The impression could be created that in clarifying the Stay Order, the Court is attempting to insulate the Stay Order from appellate review.

[6] In any case, I agree with the Applicant that the request for clarification is outside of the scope of Rule 397. The scope of the Rule is narrow, and the Respondent has not identified any matter that was overlooked or accidentally omitted; moreover, the Stay Order reflects the Court's intention (*Canada (Citizenship and Immigration) v Asphall*, 2024 FC 911).

2025 FC 303 (CanLII)

[7] Finally, there is no ambiguity in the Stay Order. It clearly stayed the operation of the Respondent's Notice dated December 31, 2024, until a decision was rendered in the underlying application for judicial review. The Notice was a notice issued by the Respondent requiring the Applicant to dispose of the ostriches in its possession, care or control. Both parties are in agreement that the Stay Order relieved the Applicant from compliance with the Notice pending a decision on the underlying application for judicial review.

[8] In response to the Respondent's request for an expedited timeline for the hearing of the application for judicial review, the Applicant denies the need for urgency and argues that it will be prejudiced by the loss of time needed to cross-examine the Respondent's agents and experts.

[9] I am satisfied that the Respondent's request is reasonable given its mandate to address risks to public health and safety and its concerns in the present case. The Applicant's concerns about being prejudiced by an expedited process can be addressed and resolved by requiring the proceeding to be specially managed pursuant to Rule 384.

2025 FC 303 (CanLII)

ORDER in T-294-25

THIS COURT'S ORDER is that:

1. The Respondent's request for clarification pursuant to Rule 397 is dismissed.

2. Pursuant to Rule 384, file T-294-25 shall continue as a specially managed proceeding and is referred to the office of the Chief Justice for the appointment of a Case Management Judge or Associate Judge.

"Michael Battista"
Judge

2025 FC 303 (CanLII)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-294-25
STYLE OF CAUSE:	UNIVERSAL OSTRICH FARMS INC. v. CANADIAN FOOD INSPECTION AGENCY

MOTION IN WRITING CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULES 397 AND 384 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	BATTISTA J.
DATED:	FEBRUARY 17, 2025

APPEARANCES:

Michael D. Carter	FOR THE APPLICANT
Banafsheh Sokhansanj	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cleveland Doan LLP White Rock, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT

2025 FC 303 (CanLII)

Federal Court of Appeal | Cour d'appel fédérale

Date: 20250620

Docket: A-205-25

Ottawa, Ontario, June 20, 2025

Present: **ROUSSEL J.A.**

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

Appellant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

ORDER

THIS COURT ORDERS that:

1. The appellant's motion for a stay is granted;

2. The execution and enforcement of the notice to dispose issued by the Canadian Food Inspection Agency (CFIA) on December 31, 2024 is hereby stayed pending the disposition of the appeal;

3. The request for an order permitting the appellant to conduct diagnostic testing on its ostrich flock while the birds remain under quarantine and for an order suspending the operation of any CFIA directive or policy that currently prohibits independent or non-CFIA diagnostic testing of the quarantined ostriches is denied;

4. The appeal shall proceed on an expedited basis as follows:

    a. The appellant is not required to prepare and file an appeal book, but instead shall file a copy of the application records that were before the Federal Court with the Registry no later than July 2, 2025;

    b. The appellant shall serve and file the appellant's memoranda of fact and law and book of authorities no later than July 4, 2025;

    c. The respondent shall serve and file the respondent's memoranda of fact and law and book of authorities no later than July 11, 2025;

    d. As an aid to argument, the parties may file a compendium or daybook consisting of documents already filed before the Court no later than two days before the day of the hearing of the appeal;

    e. For the convenience of the parties and the Court, all documents shall be served and filed electronically unless otherwise ordered;

5. The parties shall advise the Judicial Administrator of their availability no later than June 25, 2025, for a hearing to be conducted during the weeks of July 14, 2025, or

July 21, 2025, at the latest, the estimated length of hearing as well as their preference for the hearing to be conducted in person in Ottawa or by videoconference.

"Sylvie E. Roussel"
J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20250620

Docket: A-205-25

Citation: 2025 FCA 122

Present: **ROUSSEL J.A.**

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

Appellant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

Motion dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 20, 2025.

REASONS FOR ORDER BY: ROUSSEL J.A.

Federal Court of Appeal Cour d'appel fédérale

Date: 20250620

Docket: A-205-25

Citation: 2025 FCA 122

Present: **ROUSSEL J.A.**

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

Appellant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

REASONS FOR ORDER

ROUSSEL J.A.

[1] The appellant, Universal Ostrich Farms Inc., has appealed a judgment of the Federal Court dated May 13, 2025 (2025 FC 878), dismissing its applications for judicial review of two related decisions made by the Canadian Food Inspection Agency (CFIA) under section 48 of the *Health of Animals Act*, S.C. 1990, c. 21 (HAA). The first decision was issued on December 31, 2024, and required the appellant to dispose of all the ostriches on the appellant's farm by February 1, 2025, after laboratory testing confirmed infection with H5N1 highly pathogenic

avian influenza (HPAI). The second decision, dated January 10, 2025, denied the appellant's request for an exemption to depopulation. In the judgment under appeal, the Federal Court found that the CFIA's two decisions were reasonable and made in a procedurally fair manner.

[2] The appellant has brought a motion seeking an order staying the execution and enforcement of the notice to dispose issued by the CFIA on December 31, 2024, and/or otherwise prohibiting and restraining the CFIA from "culling" the ostriches until such time as this Court renders a final determination in the appeal. The appellant also seeks an order permitting the appellant to conduct diagnostic testing on its ostrich flock while the birds remain under quarantine. Finally, the appellant seeks an order suspending the operation of any CFIA directive or policy that currently prohibits independent or non-CFIA diagnostic testing of the quarantined ostriches.

[3] To succeed in its motion, the appellant must demonstrate that it meets the requirements of the conjunctive tripartite test for granting a stay or interlocutory injunction set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Specifically, the appellant must establish that the appeal raises a serious issue, that it will suffer irreparable harm if the stay is not granted, and that the balance of convenience favours granting the stay.

[4] Regarding the first element of the test, the appellant raises several grounds of appeal in the notice of appeal. In particular, the appellant submits that the Federal Court erred in its analysis of the CFIA's "stamping-out" policy and the CFIA's mandate, that it improperly

deferred to the CFIA's expertise in conducting its reasonableness review and failed to fully consider the consequences of the decisions on the appellant, the ostrich herd and the public interest in scientific research, and that it erred in refusing to consider relevant evidence relating to the CFIA's decisions to restrict or deny testing and in concluding that the CFIA's dealings with the appellant met the requisite degree of procedural fairness. The appellant further asserts that the Federal Court's decision should be set aside due to the "ineffective assistance" of the appellant's former counsel at the hearing of the applications.

[5] The threshold for establishing a serious issue is generally a low one and will be met if the issues raised in the notice of appeal are not frivolous or vexatious (*RJR-MacDonald* at 348). I am satisfied that the appellant has established that the appeal raises a serious issue.

[6] With respect to the second element of the test, the appellant submits that it will suffer irreparable harm if the stay is not granted. The appellant alleges that the disposal of the ostriches would mean the closure of the appellant's 25-year-old business, the loss of the appellant's decades-long efforts in cultivating a unique flock of ostriches and the end of the appellant's scientific and commercial ventures to harvest antibodies from the ostriches' blood or eggs to create a biomedical product for treating or diagnosing avian influenza.

[7] As the Supreme Court of Canada noted in *RJR-MacDonald*, irreparable harm refers to the nature of the harm suffered, as opposed to its magnitude. It is "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (*RJR-MacDonald* at 341). The Supreme Court of Canada provided that

such harm could include instances where the party seeking the stay will be put out of business by the court's decision or will suffer permanent market loss or irreversible damage to its business reputation (*RJR-MacDonald* at 341).

[8] I accept that the depopulation of the appellant's farm will have a real and negative impact on the appellant. It will undoubtedly seriously disrupt the appellant's business operations and cause the appellant severe economic loss. Although the appellant may be entitled to compensation under the *Compensation for Destroyed Animals and Things Regulations*, S.O.R./2000-233, the compensation for an ostrich is limited to a maximum of $3,000 per animal, an amount that is lower than the alleged average price of approximately $7,500 per ostrich. This Court held in *David Hunt Farms Ltd. v. Canada (Minister of Agriculture)* (C.A.), [1994] 2 FC 625, that where the "amount of the recoverable loss is restricted by statute, and that amount is significantly less than the actual loss to be incurred if the injunction does not issue, irreparable harm is established" (*David Hunt Farms* at 633).

[9] Likewise, I accept that a refusal to grant the stay will likely render the appeal moot as the very subject matter of the appeal will be destroyed.

[10] I am therefore satisfied that the appellant will be exposed to irreparable harm if the stay is not granted.

[11] With respect to the third element of the test, I note that a stay was granted by the Federal Court on February 1, 2025, and that the respondent has agreed not to proceed with the disposal

of the ostriches pending the determination of the stay motion. That said, I accept that further delay can potentially increase the risks posed by the HPAI virus and cause harm to Canada's international trade agreements. I also agree that the public interest in the CFIA being able to carry out its mandate of mitigating risks posed by infectious animal diseases is of central importance in determining the balance of convenience. Conversely, the appellant is also entitled to a meaningful right of appeal. I am satisfied that in this case, an expedited hearing of the appeal can achieve an appropriate balance between these two competing interests.

[12] Accordingly, an expedited hearing will be ordered and the stay will thus be granted, but only in respect to the notice dated December 31, 2024, requiring the appellant to dispose of the ostriches pursuant to subsection 48(1) of the HAA. The other two orders sought by the appellant are denied. The stay will be in effect pending the disposition of the appeal, or until another date should the Court order otherwise.

[13] The appeal shall proceed on an expedited basis as follows:

a. The appellant is not required to prepare and file an appeal book, but instead shall file a copy of the application records that were before the Federal Court with the Registry no later than July 2, 2025;

b. The appellant shall serve and file the appellant's memoranda of fact and law and book of authorities no later than July 4, 2025;

c. The respondent shall serve and file the respondent's memoranda of fact and law and book of authorities no later than July 11, 2025;

d. As an aid to argument, the parties may file a compendium or daybook consisting of documents already filed before the Court no later than two days before the day of the hearing of the appeal;

e. For the convenience of the parties and the Court, all documents shall be served and filed electronically unless otherwise ordered;

f. The parties shall advise the Judicial Administrator of their availability no later than June 25, 2025, for a hearing to be conducted during the weeks of July 14, 2025, or July 21, 2025, at the latest, the estimated length of hearing as well as their preference for the hearing to be conducted in person in Ottawa or by videoconference.

"Sylvie E. Roussel"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-205-25
STYLE OF CAUSE:	UNIVERSAL OSTRICH FARMS INC. v. CANADIAN FOOD INSPECTION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	ROUSSEL J.A.
DATED:	JUNE 20, 2025

WRITTEN REPRESENTATIONS BY:

Umar Sheikh	FOR THE APPELLANT
Aileen Jones Banafsheh Sokhansanj Paul Saunders	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sheikh Law Victoria, British Columbia	FOR THE APPELLANT
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT

Federal Court of Appeal | Cour d'appel fédérale

Date: 20250912

Docket: A-205-25

Ottawa, Ontario, September 12, 2025

Present: HECKMAN J.A.

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

Appellant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

ORDER

THIS COURT ORDERS that, for reasons released concurrently, the appellant's motion for a stay is dismissed.

"Gerald Heckman"
J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20250912

Docket: A-205-25

Citation: 2025 FCA 164

Present: **HECKMAN J.A.**

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

Appellant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 12, 2025.

REASONS FOR ORDER BY: HECKMAN J.A.

Federal Court of Appeal Cour d'appel fédérale

Date: 20250912

Docket: A-205-25

Citation: 2025 FCA 164

Present: **HECKMAN J.A.**

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

Appellant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

REASONS FOR ORDER

HECKMAN J.A.

I. Introduction

[1] The appellant, Universal Ostrich Farms Inc., seeks a stay of proceedings with respect to the judgment of this Court in *Universal Ostrich Farms Inc. v. Canadian Food Inspection Agency*, 2025 FCA 147 (the Judgment). On August 21, 2025, this Court dismissed the appellant's appeal (the Appeal) of a judgment of the Federal Court (2025 FC 878) dismissing the

appellant's application for judicial review of two decisions of the respondent, the Canadian Food Inspection Agency (CFIA). These decisions were made under section 48 of the *Health of Animals Act*, S.C. 1990, c. 21 (the *Act*) in accordance with the CFIA's Highly Pathogenic Avian Influenza 2022 Event Response Plan [HPAI 2022 ERP].

[2] Under the HPAI 2022 ERP, laboratory confirmation of the H5-subtype highly pathogenic avian influenza (HPAI) in infected premises triggers the application of a "Stamping-out Policy". The policy, designed to eliminate outbreaks by "stamping out" the HPAI virus, provides for the issuance of a notice to dispose of all susceptible animals in the same "epidemiological unit" (a group of animals with the same likelihood of exposure to HPAI), the safe disposal of the animal carcasses and the cleaning and disinfection of the affected premises.

[3] In the first decision, the CFIA issued a notice to dispose on December 31, 2024 (the Notice to Dispose), requiring the appellant to dispose of all the ostriches on its farm by February 1, 2025, after laboratory testing confirmed infection of two dead ostriches with the H5N1 strain of HPAI. In the second decision, an exemption denial dated January 10, 2025 (the Exemption Denial), the CFIA denied the appellant's request to exempt some of its ostrich flock from destruction.

[4] The appellant has not yet complied with the Notice to Dispose because the Federal Court stayed that decision, pending determination of the judicial review application in the Federal Court (*Universal Ostrich Farm Inc. v. Canadian Food Inspection Agency*, 2025 FC 303). Thereafter, a single judge of this Court further stayed the decision pending disposition of the

appeal in this Court (*Universal Ostrich Farms Inc. v. Canadian Food Inspection Agency*, 2025 FCA 122 [*FCA Stay Decision*]).

[5] The appellant has brought a motion seeking an order that proceedings be stayed with respect to the Judgment under subsection 65.1(2) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and paragraph 50(1)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Stay Motion). Specifically, the appellant seeks an order restraining the CFIA from enforcing the Notice to Dispose and from taking steps to depopulate the flock pending: (i) the disposition of the appellant's impending application for leave to appeal to the Supreme Court of Canada and, if leave is granted, the final disposition of the appeal; and (ii) the Minister of Agriculture and Agri-Food's (the Minister) reconsideration of the Notice to Dispose in light of changed circumstances. In the alternative, the appellant seeks a stay of 30 days to permit the appellant to file its leave application and, if necessary, seek further relief from the Supreme Court.

[6] On September 6, 2025, this Court granted an interim stay restraining the CFIA from enforcing the Notice to Dispose until it rendered its decision on the Stay Motion on the basis of a full record and written arguments from both parties.

[7] Having considered the arguments of the parties and the evidence filed with the Court in support of the Stay Motion, and for the following reasons, I am dismissing the appellant's motion for a stay.

II. Issues and Analysis

A. *Preliminary issue – admissibility of the reply affidavits in the appellant's reply*

[8] Before considering the merits of the Stay Motion, I must first address a preliminary question that relates to the reply filed by the appellant.

[9] In the order granting the appellant an interim stay pending disposition of the Stay Motion, I provided that the appellant could file a reply on September 10, 2025. Rule 369.2(3) of the *Federal Courts Rules*, SOR/98-106 provides that a moving party to a motion may reply to a responding motion record by serving and filing written representations in reply. The Rule does not allow for reply evidence to be filed and a party seeking to do so must therefore seek leave of the Court. The filing of reply evidence is permitted only in unusual circumstances (*Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 121, 2016 CarswellNat 1363 at para. 11 [*Amgen*]):

> [9] Sometimes upon the filing of a responding motion record on a motion in writing, new issues arise. Or sometimes the responding motion record causes certain issues, understandably glossed over in the moving party's motion record, to assume markedly greater importance or to be transformed.
>
> [10] In such circumstances, considerations of procedural fairness and the need to make a proper determination can require the Court to allow the filing of reply evidence in a motion in writing:
>
> - *Procedural fairness*. Sometimes a party has to be given the opportunity to file evidence on an issue that it could not practically or meaningfully address earlier.
>
> - *The need to make a proper determination*. Where an issue in the motion might determine its outcome, sometimes the Court

> must allow additional evidence to be filed so that it can decide that issue on the basis of all proper and relevant facts, not just one side's version of the facts.

[10] The requirement that new issues be raised in the responding motion record or assume markedly greater importance because of that record reflects "a well-known rule of evidence that a plaintiff cannot split its case by adducing evidence that is merely confirmatory of its case in-chief" and that "reply evidence must relate to issues raised in the defence's case that were not raised in the plaintiff's case in-chief" (*Amgen* at para. 12).

[11] On this Stay Motion, the appellant bears the burden of establishing, through evidence, that it would suffer irreparable harm if the stay were refused and that it, not the respondent (and the public interest), would suffer the greatest harm from the granting or refusal of a stay. The appellant's motion record therefore clearly raises the issues of what harm the appellant will suffer if the stay is refused and what will be the harm to the public interest if the stay is granted.

[12] The evidence filed in the respondent's motion record addressed these issues. It did not raise new issues. I have carefully read and considered the appellant's reply affidavits. I find that they adduce evidence that is confirmatory of the appellant's case in-chief: that it and not the respondent will suffer the greater harm. By including them in its reply, the appellant impermissibly attempts to split its case. The unusual circumstances set out in *Amgen* do not apply here. Accordingly, while I have considered the appellant's reply submissions, I have not taken the reply affidavits into account.

[13] I note, however, that even if I had found the evidence in the reply affidavits to be admissible, that evidence would not have changed my conclusions, laid out in the following section, on the presence of irreparable harm or on the balance of convenience.

B. *Should this Court grant a stay under section 65.1 of the Supreme Court Act?*

[14] The appellant must meet the requirements of the tripartite test for granting a stay or interlocutory injunction set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*]. Specifically, it must establish that there is a serious issue to be determined, that it will suffer irreparable harm if the stay is not granted, and that the balance of convenience favours granting the stay. There are important and considerable interconnections between these three factors, which form the framework within which the Court must assess whether a stay is warranted (*Mosaic Potash Esterhazy Limited Partnership v. Potash Corporation of Saskatchewan Inc.*, 2011 SKCA 120). The fundamental question is whether granting a stay is just and equitable in all the circumstances of the case (*Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824 at para. 25). Nonetheless, while the strength in one factor may balance out weakness in another, a stay will not be issued where a prong of the test is not met (*College of Physicians and Surgeons of Ontario v. Kilian*, 2023 ONCA 281 at para. 8, citing *Haudenosaunee Development Institute v. Metrolinx*, 2023 ONCA 122 at para. 6).

[15] However, where an application for a stay is brought under section 65.1 of the *Supreme Court Act*, the framework to decide the application is adjusted by adding two preliminary or

threshold steps and by adapting the requirement of a serious question to be tried in the *RJR-MacDonald* framework. Section 65.1 confers jurisdiction to grant a stay upon a judge of the court appealed from (*Merck & Co. v. Nu-Pharm Inc.*, 2000 CarswellNat 747, 255 N.R. 383 at para. 3 [*Merck*]). In the case at bar, where the appellant has not yet filed an application for leave to appeal to the Supreme Court, that jurisdiction is conferred by subsection 65.1(2):

Stay of Execution	**Sursis d'exécution**
…	[…]
Additional power for court appealed from	**Pouvoir de la juridiction inférieure**
(2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.	**(2)** La juridiction inférieure ou un de ses juges, convaincu que la partie qui demande le sursis a l'intention de demander l'autorisation d'appel et que le délai entraînerait un déni de justice, peut exercer le pouvoir prévu au paragraphe (1) avant la signification et le dépôt de l'avis de demande d'autorisation d'appel.

[16] The test to be met for granting a stay under subsection 65.1(2) was set out by Cromwell J.A., as he then was, in *Nova Scotia (Minister of Community Services) v. F.(B.)*, 2003 NSCA 125, 2003 CarswellNS 613 at paras. 10-12 [*F.(B.)*]. Under this test, two preliminary steps precede consideration of the *RJR-MacDonald* factors.

[17] The first of these steps is a requirement that the appellant establish that it intends to seek leave to appeal the Judgment to the Supreme Court of Canada. Based on the affidavit evidence submitted by the applicant, I am satisfied that it intends to do so by October 3, 2025.

[18] Second, the appellant must demonstrate that delay – waiting to consider the stay application until after the leave application has been filed – would result in a miscarriage of justice. In *F.(B.)* at paragraph 16, Cromwell J.A. appears to adopt a test of irreparable harm in assessing whether a miscarriage of justice would result: "if a stay is found to be appropriate, it could come too late [to avoid injustice] if delayed until after the leave application has been filed" (see also *Lamouche v. Calaheson*, 2016 ABCA 227, 2016 CarswellAlta 1410 at para. 11). Assuming, without deciding, that this interpretation of miscarriage of justice – one that benefits the appellant – is correct, and for the reasons set out below in the analysis of irreparable harm, I conclude that destruction of the appellant's ostriches before the leave application is filed would cause the appellant irreparable harm.

[19] Having fulfilled the preliminary steps, the appellant must satisfy the *RJR-MacDonald* factors, adapted to the context of an application for leave to appeal to the Supreme Court.

(1) Has the appellant demonstrated a serious issue to be tried?

[20] Since this is a stay application pending appeal to the Supreme Court of Canada, the appellant must demonstrate, under the first *RJR-MacDonald* criterion, that the appeal raises a serious or arguable issue considering the criteria for leave to appeal set out in subsection 40(1) of the *Supreme Court Act* (*Merck* at para. 11):

Appellate Jurisdiction	**Juridiction d'appel**
…	[…]
Appeals with leave of Supreme	**Appel avec l'autorisation de la Cour**

Court

40 (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.	**40 (1)** Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout jugement, définitif ou autre, rendu par la Cour d'appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l'affaire en question, ou par l'un des juges de ces juridictions inférieures, que l'autorisation d'en appeler à la Cour ait ou non été refusée par une autre juridiction, lorsque la Cour estime, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou importance à tout égard, qu'elle devrait en être saisie et lorsqu'elle accorde en conséquence l'autorisation d'en appeler.

[21] In other words, the appellant must show that the appeal raises "an arguable issue of public importance, an important issue of law or mixed law and fact, or that the matter is otherwise of such a nature and significance as to warrant decision by the Supreme Court as required for leave to appeal to that Court under s. 40 of its *Act*" (*F.(B.)* at para.11).

[22] As observed by the Alberta Court of Appeal, applying for a stay to the court appealed from under section 65.1 of the *Supreme Court Act* is "somewhat of an awkward fit":

> The dominant question on an application for leave to the Supreme Court, particularly in civil cases, is whether, in the opinion of that Court, the appeal

> presents an issue of public importance. I do not purport to know the opinion of the Supreme Court. I can only assess public importance through the lens of my own judgment. I must apply my own judgment; otherwise the "serious question" factor in the *RJR* analysis would reduce to one of theoretical possibility.
>
> (*Cabin Ridge Project Limited v. Alberta*, 2025 ABCA 109 at para. 15)

[23] Having set out the parameters of the serious issue criterion, I turn to the appellant's submissions on this point. The appellant claims that three questions of public or national importance arise from the Judgment.

[24] First, according to the appellant, this Court itself identified a question of public or national importance in its reasons for judgement. The Court noted, at paragraph 47, that before the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the leading authority on judicial review of administrative action, courts assessed the reasonableness of discretionary policy decisions by focusing on whether they were made in bad faith, did not conform with principles of natural justice or relied on considerations that were irrelevant or extraneous to the legislative purpose. These categories of unlawful decisions, referred to as "nominate categories" (*Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245 at paras. 66-69), were set out in *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2, 1982 CanLII 24 [*Maple Lodge*].

[25] The Court observed that, following *Vavilov*, Federal Court judges had expressed differing views on the role of the nominate categories in the reasonableness review of discretionary policy decisions. Some judges had held that policy decisions would only be found unreasonable if made in bad faith, for considerations extraneous to the legislative purpose, or if they were irrational,

incomprehensible or an abuse of discretion. In other words, judicial intervention on a reasonableness standard was restricted to decisions that fell within the nominate categories. Some judges held that judicial intervention was not limited in this manner and that reasonableness review should proceed according to the approach laid out by the Supreme Court in *Vavilov*. The Court held as follows:

> [49] We agree with the parties and the Federal Court in the instant case that *Vavilov* requires reformulation of how reasonableness review applies to discretionary policy decisions and that the approach in *Maple Lodge* has been overtaken.
>
> [50] In this regard, we see no principled reason why the reasonableness review of a discretionary policy decision should not be framed in the manner set out in *Vavilov*, which asks whether a decision "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision": *Vavilov* at para. 99.
>
> [51] *Vavilov* is the starting point for undertaking a judicial review and sets out a holistic approach. Earlier case law on conducting reasonableness review can provide insight but must be aligned with the *Vavilov*ian approach: *Vavilov* at para. 143. Discretionary policy decisions should not be an exception. The Supreme Court in *Vavilov* noted the existence of decisions by "ministers" and matters of "high policy" (at para. 88). Yet, it held that "reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court" but instead act as constraints (at para. 89).
>
> [52] This Court in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2021] 1 F.C.R. 374 [*Entertainment Software*] at paragraphs 25–30, aff'd 2022 SCC 30, [2022] 2 S.C.R. 303 outlined a variety of policy-laden decisions, subject to review for reasonableness that are unconstrained in nature and are thus very hard to set aside, and noted that, unless an exception applies, reasonableness as mandated by *Vavilov* is the correct approach to reviewing policy-laden decisions. Thus, the categories listed in *Maple Lodge* now serve as examples of when a discretionary policy decision would be unreasonable but do not fully categorize unreasonable policy decisions. Rather, the requisite analysis is that mandated by *Vavilov*.

[26] The appellant submits that, in the passage quoted above, the Court acknowledged "fundamental uncertainty" regarding the applicable legal framework for reviewing discretionary decisions and raised the following question of national importance in administrative law that transcends the immediate parties:

> When this Court acknowledges that the legal framework for reviewing discretionary administrative decisions requires "reformulation" post-*Vavilov*, how should lower courts proceed in the interim, and what level of deference is owed to administrative interpretations of discretionary powers?

[27] With respect, this is at best a tortured interpretation of the Court's reasons. As is readily apparent from the passage quoted above, the Judgment does not acknowledge that "the Law" requires reformulation, as claimed by the appellant. Paragraph 49 of the Judgment states that the Supreme Court's decision in *Vavilov* demands a reformulation of how reasonableness review applies to discretionary policy decisions. Paragraphs 50-52 set out that required reformulation: *Vavilov* provides that reasonableness review focuses on whether a decision exhibits justification, transparency and intelligibility and is justified in relation to the relevant factual and legal constraints that bear on it; an approach that restricts reasonableness review of discretionary policy decisions to the nominate categories in *Maple Lodge*, rather than treating these categories as examples of unreasonable decisions, is inconsistent with *Vavilov*. As recently observed by the Supreme Court, "*Vavilov* recognized the continued relevance and application of prior jurisprudence insofar as that jurisprudence is consistent with *Vavilov*'s framework for determining the appropriate standard of review and its principles governing robust reasonableness review" (*Auer v. Auer*, 2024 SCC 36 at para. 35, emphasis added).

[28] To put the matter plainly, there is no uncertainty. *Vavilov* supplies the clarity that the appellant claims is lacking, and to the extent that there was a conflict in the Federal Court jurisprudence on the application of reasonableness review to discretionary policy decisions, the Judgment has resolved it.

[29] The Supreme Court's objective, in *Vavilov*, was to develop a coherent and unified approach to judicial review that applies to a spectrum of administrative decision-makers, including ministers, making decisions that run the gamut from "matters of 'high policy' on the one hand and 'pure law' on the other" (para. 88). This includes the CFIA decisions reviewed by the Court. Reasonableness review remains a single standard, requiring decisions to be justified by the decision-maker in light of the applicable legal and factual constraints. Lower courts, including this Court, must follow the approach to reasonableness review set out in *Vavilov*. That is why this Court emphatically declared, at paragraph 5 of the Judgment, that "the law we are bound to apply inevitably leads to the conclusion that this appeal must be dismissed".

[30] In any event, I agree with the respondent that the continued relevance of the *Maple Lodge* factors is not germane to the disposition of the appellant's case, since accepting that reasonableness review is restricted to fitting the decision under review into one of the nominate categories would make a finding that the CFIA's decisions are unreasonable even less likely. As noted by the Ontario Court of Appeal, "if there is little or no prospect that the findings or the outcome will be altered in a given case, leave to appeal may be denied regardless of the fact that issues of public importance are addressed in the case" (*R. v. Theriault*, 2021 ONCA 554 at para. 37).

[31] I therefore find that it is not reasonably arguable that the Supreme Court may conclude that the first question raised by the appellant warrants the granting of leave to appeal under the criteria set out in section 40 of the *Supreme Court Act*.

[32] The appellant submits that a second question of national importance warranting a decision by the Supreme Court arises from alleged internal contradictions in the judgment of the Federal Court:

> Can an administrative body properly claim "no discretion" exists under permissive statutory language ("may") when exercising emergency powers that affect fundamental property and livelihood interests?

[33] I note first that the appellant's submissions on this question do not engage with the reasons of the Court. It stands to reason that an application to the Supreme Court for leave to appeal from the judgment of a court of appeal should be anchored in the reasons of that court. That is particularly true in the circumstances of this case, where the Court conducted a fresh assessment of the reasonableness of the CFIA's decisions and accorded no deference to the Federal Court's application of that standard of review (Judgment at paras. 38, 45).

[34] Secondly, and most importantly, the appellant's proposed second question mischaracterizes both the respondent's position in the Appeal and the Court's reasons for judgement. The Respondent did not argue that "no discretion exists" in the Minister's exercise of the authority to order the disposal of animals under section 48 of the *Act*. Rather, it submitted that the Minister had reasonably exercised this discretion, in the specific context of responding to the detection of the H5N1 strain of HPAI in poultry operations, such as the appellant's ostrich

farm, by adopting a policy of general application requiring the issuance of a notice to dispose but allocating residual discretion to a specialized committee to exempt from depopulation some of the poultry covered by the notice.

[35] The Court concluded that, in light of the broad discretion afforded to the Minister and the CFIA under section 48 of the *Act* (as confirmed in its prior jurisprudence), the evidence in the CFIA's possession relating to the susceptibility of poultry, including ostriches, to avian influenza and the risks of HPAI to domestic disease control, public health and Canada's ability to export poultry to its international trading partners, it was reasonable for the CFIA to exercise its discretion under section 48 by implementing a policy requiring the timely destruction of any type of bird that was both susceptible to HPAI and exposed to it rather than employing a more targeted response to avian flu outbreaks (Judgment at paras. 93-96).

[36] It follows that the Judgement does not raise the abstract question formulated by the appellant; it applies *Vavilov*'s approach to reasonableness review in order to determine whether the solution adopted by the CFIA was allowed by the legal and factual constraints that applied to the exercise of its discretion under section 48 of the *Act*. These comprise the governing statutory scheme, judicial decisions that have interpreted it and the evidentiary record before the CFIA in this specific case. I am not convinced that the questions raised by the Judgment go beyond the interests of the parties.

[37] For the foregoing reasons I am of the view that it is not reasonably arguable that the Supreme Court may conclude that the second question raised by the appellant warrants the granting of leave to appeal under the criteria set out in section 40 of the *Supreme Court Act*.

[38] The appellant proposes a third question for determination by the Supreme Court:

> What obligations, if any, do administrative decision-makers have to reconsider or reassess emergency orders when the factual foundation for those orders has fundamentally changed.

[39] The problem with this question is that it was not raised on the Appeal. The appellant did invite the Court, as part of its review of the reasonableness of the CFIA's decisions, including the HPAI 2022 ERP, to admit and consider evidence relating to the health status of its flock that postdated these decisions. The Court declined this invitation, relying on well-established case law that provides that, on a judicial review application of an administrative decision, only the evidence that was before an administrative decision-maker is relevant and, thus, admissible. The Court explained its decision as follows:

> [27] The appellant is encouraging the Court to use the fresh evidence to re-decide the CFIA's decisions based on what it claims is the situation today. That is not our role. We are only tasked with reviewing the reasonableness of the CFIA's decisions at the time they were made, which is the essence of the judicial review remedy.
>
> [28] Few decisions are of such a nature as to require a court to use the most up-to-date evidence available in undertaking its review: for examples of exceptional circumstances, see *Coldwater 2019* at para. 27; *Singh Brar v. Canada (Public Safety and Emergency Preparedness)*, 2024 FCA 114 at paras. 57–58, leave to appeal to SCC refused, 41386 (27 February 2025) and 41388 (27 February 2025) [*Singh Brar*]. Both cases are distinguishable as in Coldwater 2019, the Crown was

> subject to an ongoing duty to consult with Indigenous peoples, and in *Singh Brar*, the ongoing reasonableness of the no-fly list was at issue.
>
> [29] Conversely, in the present case, the Notice to Dispose and the Exemption Denial do not call for a constant reconsideration by the courts over time. Had the Federal Court not granted a stay of the Notice to Dispose, the appellant's flock would have been culled months ago. In our view, the stays granted by the Federal Court and by a single judge of this Court in the present case cannot be used as a mechanism aimed at giving the appellant the chance to ask this Court for a reconsideration that would effectively undo the application of the Stamping-Out Policy. Should the appellant wish to have the Notice to Dispose re-examined in light of the fresh evidence, its recourse is to ask the CFIA or the Minister to do so.

[40] The Court did not purport to decide whether the CFIA or Minister was subject to a legal obligation to reconsider its decisions in light of new evidence. It could not do so because, as the respondent argues, the existence of such an obligation was not properly before the Court: it was neither an issue on the Appeal nor the subject of argument before it. At paragraph 28 of the Judgment, the Court clarified, as it did at paragraph 6, that the role of a reviewing court is limited to determining the reasonableness of the CFIA's decisions based on the record that was before it when it made those decisions. Accordingly, there is no basis to claims that the Court decided, in the Appeal, that the appellant has a legal right to a ministerial reconsideration or that reconsideration is a "Court-endorsed remedy".

[41] As the appellant's third question was not raised, argued or decided on the Appeal, I find that it is not reasonably arguable that the Supreme Court may conclude that it warrants the granting of leave to appeal under the criteria set out in section 40 of the *Supreme Court Act*.

[42] In addition to the three questions discussed in the preceding paragraphs, identified by the appellant as fundamental questions warranting leave to appeal by the Supreme Court, the

appellant resurrects the argument, made before this Court, that the Federal Court was overly deferential to the expertise of the CFIA in assessing the effectiveness of its policies and interpreting scientific data. The appellant argues that the Federal Court's approach insulates agency decisions from judicial review, contrary to the approach to reasonableness review set out in *Vavilov*, and constitutes an issue of national importance.

[43] Once again, the appellant's proposed issue focuses on alleged deficiencies in the Federal Court's reasons for judgment and ignores the Court's fresh application on the Appeal of the reasonableness standard to the CFIA's decisions. In the Judgment, the Court reiterated (at para. 71) and applied the *Vavilov* guidance that reviewing courts must refrain from reweighing and reassessing evidence, including scientific evidence, and intervene only if an applicant for judicial review establishes that the decision-maker has fundamentally misapprehended or failed to account for the evidence before it. Moreover, the Court held that the Federal Court appropriately applied this approach to the scientific concerns raised by the appellant.

[44] Since the Court reaffirmed and applied this *Vavilov*ian approach to review the CFIA's weighing and assessment of evidence – an approach the appellant accepts is correct – I find that it is not reasonably arguable that the Supreme Court may conclude that this final issue warrants the granting of leave to appeal under the criteria set out in section 40 of the *Supreme Court Act*.

[45] Since the appellant has not satisfied the Court that its proposed appeal raises a serious or arguable issue considering the criteria for leave to appeal set out in section 40 of the *Supreme Court Act*, the appellant's motion for a stay under subsection 65.1(2), whether pending the filing

of its application for leave to appeal to the Supreme Court, the disposition of that application or final disposition of its appeal, must be denied. Although it is not strictly necessary, I consider the remaining two factors of the *RJR-MacDonald* test, irreparable harm and balance of convenience, because they were fully argued by the parties.

(2) Has the appellant demonstrated irreparable harm if the stay is denied?

[46] Irreparable harm is unavoidable harm that, by its quality, cannot be redressed by monetary compensation (*Canada (Attorney General) v. Oshkosh Defense Canada Inc.*, 2018 FCA 102 at para. 24 [*Oshkosh*]). To establish irreparable harm, the appellant must demonstrate "in a detailed and concrete way that it will suffer real, definite, unavoidable harm—not hypothetical and speculative harm—that cannot be repaired later" (*Oshkosh* at para. 25).

[47] The appellant argues that the destruction of its flock would result in irreparable harm with multiple dimensions. First, the appellant submits that its flock includes ostriches that are the product of continuous selective breeding and have an irreplaceable genetic and biological heritage. Moreover, it claims that the birds remaining in its flock, having survived exposure to HPAI, are invaluable subjects for pandemic preparedness research. The appellant has also provided evidence that destruction of its flock would prevent it from supplying ostrich eggs for antibody research and production, under exclusive agreements, to biotechnology companies with which it partners, and would deprive it of substantial investment revenue contingent on its ability to supply eggs from its flock. Finally, the appellant submits that destruction of the flock would

eliminate the very subject matter of the legal dispute and render moot any subsequent Supreme Court proceedings.

[48] The respondent argues that, since there is no realistic prospect that the issues advanced by the appellant as the basis of its application for leave to appeal could disturb the Judgment, denying the stay would cause it no irreparable harm. It submits that if the Court were to accept that irreparable harm flows automatically from an appeal rendered moot because a stay is not granted, then it would deprive courts of their discretion to decide questions of irreparable harm. Finally, the respondent argues that the appellant has submitted no evidence establishing that it has ever been engaged in a profitable antibody production business and that its evidence of irreparable harm relates to speculative future profits.

[49] In the *FCA Stay Decision*, the Court held that the appellant had provided evidence to the effect that the compensation to which it would be entitled for the destroyed ostriches under the *Compensation for Destroyed Animals and Things Regulations*, S.O.R./2000-233 would be significantly lower than their alleged average market value, establishing irreparable harm (*Universal Ostrich Farms Inc v. Canadian Food Inspection Agency*, 2025 FCA 122 at para. 8, citing *David Hunt Farms Ltd. v. Canada (Minister of Agriculture)* (C.A.), 1994 CanLII 3464 (FCA), [1994] 2 FC 625). Accordingly, I am satisfied that the destruction of the appellant's flock would seriously disrupt its business operations, cause it severe economic loss and render moot any subsequent proceedings before the Supreme Court. The appellant has in my view established that, unless a stay is granted, it will be exposed to irreparable harm.

(3) Does the balance of convenience favour granting a stay?

[50] The final component of the test to decide whether to grant interim relief involves "a determination of which of the two parties will suffer the greatest harm" from the granting or refusal of the stay (*Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110, 1987 CarswellMan 176 at para. 36). Where a party applies for interim relief in the context of proceedings opposing an administrative agency, the "interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of private litigants" (*Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280 at 303-4, cited with approval in *RJR-MacDonald* at para. 69). Where a stay restrains the actions of an administrative agency charged with the duty of promoting or protecting the public interest and where its actions were undertaken pursuant to that responsibility, irreparable harm to the public interest is nearly always established (*RJR-MacDonald* at para. 76). In this context, the role of the court in assessing the balance of convenience is circumscribed:

> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. (*RJR-MacDonald* at para. 77)

[51] The appellant argues that the balance of convenience favours granting a stay. It submits that, throughout the period of CFIA-ordered quarantine, it has maintained "comprehensive biosecurity" under CFIA supervision pursuant to a protocol including "property quarantine with

restricted access, disinfection stations, daily health monitoring with written logs, separation of bird groups, no off-site movement, and regular CFIA compliance inspections." It claims that since January 15, 2025, there have been "zero transmission events," "zero clinical signs" of HPAI in its flock, zero ostrich deaths and "zero bio security breaches," and submits that the quarantine has "proven completely effective for over 8 months," and that its "proven effectiveness" demonstrates that "public safety is fully protected through continuation of existing measures."

[52] Accordingly, the appellant submits that the CFIA suffers no prejudice, particularly because the stay would apply for a limited and defined period. It argues that since it is seeking a stay pending determination by the Supreme Court of its application for leave to appeal, a process that typically requires 3-6 months, and it undertakes to file its application by October 3, 2025, the stay would extend at the latest to the end of March, 2026.

[53] The appellant provides undertakings that it claims "ensure that all regulatory objectives are protected while preserving the Appellant's right to Supreme Court review." It undertakes to: maintain all current biosecurity and quarantine measures without reduction or modification; not sell, transfer, move, release, or allow any birds to leave quarantine; provide weekly written health reports to CFIA documenting the status of all birds; immediately report any signs of illness in any bird to CFIA; file its leave application by October 3, 2025; accept any additional reasonable conditions the Court deems appropriate; and abide by any order this Court makes as to damages should CFIA suffer any compensable harm as a result of the stay.

[54] The appellant concludes that the balance of convenience favours granting a stay, because while these undertakings would maintain the *status quo*, ensure that the CFIA suffers no prejudice and protect the CFIA's regulatory objectives while the stay is in effect, refusing the stay would expose the appellant to the irreparable harm previously outlined in these reasons.

[55] The respondent counters that there is ample evidence before the Court that issuing a stay would risk significant harm to animal and public health, and to the Canadian poultry industry. Some of this evidence was not contested by the appellant and was accepted by the Court in the Appeal and summarized in its reasons for judgment. For example, this Court found that avian influenza is highly infectious and can be transmitted from wild birds, who serve as natural reservoirs and vectors for its spread, to domestic birds, and spread to other animals, including mammals and, less commonly, humans (Judgment at para. 8). Ostriches may contribute genetic mutations to avian influenza viruses that increase its adaptability to mammals (Judgment at para. 12). This Court also found that transmission of HPAI to humans, though rare, can occur, and close to half of the 900 or so human cases of H5N1 avian influenza reported in the past few decades have been fatal (Judgment at para. 95).

[56] On this motion, the respondent filed evidence that was not previously available and was not considered by the Federal Court or by this Court when they were seized with the appellant's previous requests for a stay. The appellant objects to this new evidence on the grounds that it cannot be used to retroactively justify the CFIA's decisions. This objection is without merit. The respondent's evidence is not aimed at providing justification for the CFIA's decisions, which the

Court has already ruled are reasonable. They are aimed at convincing the Court that it should not issue a stay because the balance of convenience does not favour the appellant.

[57] The respondent's evidence regarding the risks posed by a stay to animal and human health can be summarized as follows:

- The virus detected at the applicant's farm (the genotype D1.3 virus) was a unique, previously undetected in Canada, genotype of HPAI H5N1 virus with enhanced pathogenicity. In experiments on mice, scientists at Canada's National Microbiology Laboratory have determined that it is among the most virulent viruses of its type tested at that laboratory.

- Analyses conducted by the CFIA's National Centre for Foreign Animal Disease strongly support the inferred migration of genotype D1.3 viruses to the United States, which seeded significant outbreaks of HPAI in Ohio and Indiana, impacting millions of poultry and leading to the hospitalization of an Ohio poultry worker in February 2025 following infection with the genotype D1.3 virus.

- Ostriches can shed virus without showing clinical signs of infection.

- Avian influenza viruses can survive for months or even years in fresh water, wetlands, muddy ground and manure at low temperatures. There is a high likelihood that the entire area to which the appellant's ostriches have access – approximately 20 acres of pasture, including muddy areas and manure piles, to which wild birds and animals enjoy unrestricted access – remains contaminated with active HPAI virus.

Because the ostriches remain on the farm, it is expected that food and water are still easily available, encouraging continued contact of wild birds and animals with contaminated water, soil and other organic materials. This poses a high level of risk of transmission to wild birds and other animals.

- This risk of transmission has recently increased because the Fall migration of wild birds has begun, with many birds transiting over and through the appellant's farm, potentially bringing with them different strains of HPAI virus and picking up any HPAI virus that remains on the infected premises. This produces an increased risk of new re-assortments of HPAI virus from and within these migratory wild birds as they are exposed to the HPAI virus likely present at the appellant's farm. Historically, over the past two Fall/Winter periods, the poultry industry in British Columbia has been substantially affected by HPAI, with over 8 million domestic birds impacted.

- The appellants have not taken steps, despite being required to do so since January 2025, to prevent interactions between ostriches and wild birds, resulting in direct contact between wild birds and ostriches and indirect contact through manure contamination of feed tubs and the environment. During a CFIA inspection in late February, upon observing the presence of wild birds flying in and out of the ostrich pens, the appellant's principals told inspectors that they believed their ostriches were able to build resiliency through contacts with wild birds.

- The CFIA is aware of numerous breaches of its quarantine measures by the appellant, including continued contact of wild animals and birds with the ostriches, failure to

perform proper disinfection of equipment and vehicles and failure to report ostrich deaths.

- While testing of the ostriches could provide additional evidence of current risk, it could not address the unknown risks that the ostriches become reinfected nor the risks associated with the contaminated environment at the appellant's farm. Protective immunity gained by ostriches following an infection of HPAI virus is temporary and may last between 2 to 6 months; birds may therefore be at risk of reinfection with the same strain of H5N1 circulating at the farm and shed the virus while appearing healthy.

- The fact that the appellants have allowed visitors supportive of the farm to camp on the property and allowed people close access to the infected herd raises additional concerns about the risk of transmission of the virus to people.

- The CFIA has not sent employees to the appellant's farm since February 26, 2025 due to safety concerns associated with the presence of protesters. Numerous threats against CFIA employees have been made on social media by members of the public who oppose the presence of CFIA oversight and the destruction of the ostriches, including from protesters currently residing on the premises.

[58] The respondent also submitted evidence on the likely impact of a stay on Canadian poultry exports to its trading partners and, by extension, on Canada's poultry industry. The control zone established by the CFIA around the appellant's premises on January 3, 2025 has been, since April 1, 2025, the only active control zone in British Columbia. As a result, poultry

producers are unable to export poultry products originating or transiting through British Columbia to numerous trading partners that require HPAI-free status at the level of the province, including Mexico and the Russian Federation, whose 2024 imports of Canadian poultry products were valued at close to $35 million.

[59] At the outset of my assessment of the balance of convenience, I note that Parliament has entrusted the CFIA with the responsibility to protect the public interest by ensuring the health of animals and humans and by safeguarding the agricultural industry on which Canadians depend for their livelihood and food security. In seeking to apply the Stamping-out Policy to eliminate the HPAI outbreak on the appellant's farm, the CFIA was engaging in an activity undertaken pursuant to that responsibility. In the circumstances of this case, the stay sought by the appellant would restrain the CFIA from carrying out this responsibility, causing irreparable harm to the public interest (*RJR-MacDonald* at para. 76).

[60] Indeed, I am of the view that granting a further stay, as requested by the appellant, would likely invite similar applications for stays from individuals or corporations whose poultry operations are subjected to a notice to dispose under the *Act*. As noted at paragraph 29 of the Judgment, this would have the practical effect of suspending the CFIA's application of the HPAI 2022 ERP, including the Stamping-out policy, which this Court emphatically upheld as a reasonable exercise of the CFIA's authority under the *Act* to protect the health of animals and humans and to preserve Canada's ability to export its poultry products. Such an outcome could seriously threaten the CFIA's ability to discharge its protective mandate under the *Act*.

[61] To assess the magnitude of the harm to the public interest posed by the granting of a further stay and the balance of convenience, I turn to the evidence adduced by the parties.

[62] I am satisfied, on the evidence before me, that there is a high likelihood that the entire area to which the appellant's ostriches have access is contaminated with active HPAI virus and that wild birds, which are prime natural reservoirs and vectors for the spread of HPAI, enjoy unrestricted access to the premises. Moreover, I am satisfied that the appellant's principals have failed to prevent interactions between their ostriches and wild birds. I find that these conditions create a high level of risk of transmission of what scientists have determined is a very virulent virus with enhanced pathogenicity which, as shown by outbreaks of that virus in the United States, can inflict severe harm on poultry and infect and harm humans. I find that these conditions also produce an increased risk of new re-assortments of HPAI virus, some of which may be more adaptable to mammals, including humans.

[63] Moreover, I find that this high level of risk of transmission is increasing with the Fall migration of wild birds and that HPAI has historically substantially impacted the poultry industry in British Columbia in the Fall and Winter periods. Whether for 30 days pending filing of the appellant's application for leave or for 3 to 6 months pending disposition of that application, the appellant is seeking to stay the application of the HPAI 2022 ERP during a period of time where an already high level of risk of transmission of HPAI is increasing.

[64] I am not satisfied that the appellant's undertaking to "maintain all current biosecurity and quarantine measures without reductions or modifications" will "ensure that all regulatory

objectives" of the CFIA are protected because, by failing to address the significant likelihood of HPAI contamination of the farm environment, unrestricted access to that environment by wild birds and the interaction between the ostriches and wild birds, it does not eliminate the high level of risk of transmission of HPAI and the risk of new virus re-assortments.

[65] I also find that the CFIA's inability to eliminate the HPAI outbreak on the appellant's farm, due to the stays granted over 8 months of litigation before the federal courts, has required the CFIA to maintain a control zone in British Columbia, significantly harming the poultry industry in that province by preventing the export of poultry produced in or transiting from British Columbia. I am satisfied that ordering the stay requested by the appellant would cause that industry further harm.

[66] I find that an additional stay of up to 6 months, as requested by the appellant, would jeopardize Canada's access, for its poultry and poultry products, to the export markets of its most important trading partners, including the European Union and the United States. Under negotiated zoning arrangements with these countries, Canada can export poultry from outside HPAI control zones, but these arrangements are predicated on Canada's application of the Stamping-out Policy in the control zones (Judgment at para. 95).

[67] Finally, I note that when the Court decided that the balance of convenience favoured the appellant in the context of its application for a stay pending the Appeal, it observed that the appellant's entitlement to a meaningful right of appeal counterbalanced the harm to the public interest, albeit if the hearing of the Appeal were expedited (*FCA Stay Decision* at para. 11). The

appellant was afforded the meaningful right to appeal before this Court. It was unsuccessful. Moreover, it has failed to establish that its proposed appeal to the Supreme Court raises a serious or arguable issue considering the criteria for leave to appeal set out in section 40 of the *Supreme Court Act*.

[68] In light of these findings, I find that the balance of convenience favours the respondent.

[69] The Court may only issue a stay where the appellant establishes that it meets all the requirements of the tripartite test for granting a stay or interlocutory injunction set out in *RJR-MacDonald*. It has failed to do so. Accordingly, I would decline to issue the stay requested by the appellant, whether pending the filing of its application for leave to appeal to the Supreme Court, the disposition of that application or final disposition of its appeal.

C. *Should this Court grant a stay under paragraph 50(1)(b) of the Federal Courts Act?*

[70] The appellant has also requested that the Court grant a stay under subsection 50(1) of the *Federal Courts Act* pending its request for reconsideration to the Minister. This provision confers on the Court a broad power to grant a stay of proceedings:

Procedure	**Procédure**
…	[…]
Stay of proceedings authorized	**Suspension d'instance**
50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any	**50 (1)** La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les

cause or matter	procédures dans toute affaire :
…	[…]
(b) where for any other reason it is in the interest of justice that the proceedings be stayed.	**b)** lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[71] Rule 398 of the *Federal Courts Rules* governs the issuance of the stay under subsection 50(1):

Orders	**Ordonnances**
…	[…]
Stay of order	**Sursis d'exécution**
398 (1) On the motion of a person against whom an order has been made,	**398 (1)** Sur requête d'une personne contre laquelle une ordonnance a été rendue :
(a) where the order has not been appealed, the court that made the order may order that it be stayed;	**a)** dans le cas où l'ordonnance n'a pas été portée en appel, la Cour qui a rendu l'ordonnance peut surseoir à l'ordonnance;

[72] The respondent submits that a ministerial reconsideration process based on fresh evidence, should one be available, would be entirely separate from the Appeal, that the existence of such a process was not properly before the Court on the Appeal and that it is irrelevant to the appellant's proposed appeal of the Judgement to the Supreme Court. As a result, the respondent argues, it does not fall within the supervisory jurisdiction of the Federal Court of Appeal, which grounds the Court's authority to grant a stay under subsection 50(1).

[73] Referring once more to paragraph 29 of the Judgment, the appellant replies that the Court has inherent jurisdiction to preserve the efficacy of its own guidance.

[74] Even assuming that the Court has the requisite jurisdiction to grant the stay requested by the appellant under subsection 50(1), I am of the view that a stay should not be issued given my conclusion that the appellant has failed to satisfy two of the three elements of the *RJR-MacDonald* test: that there is a serious question to be tried and that the balance of convenience favours the appellant.

[75] In order to succeed on its application for a stay pending ministerial reconsideration, and specifically, to demonstrate the existence of a serious question to be tried, the appellant must establish that its purported entitlement to a ministerial reconsideration has a source in law. As the Supreme Court observed in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196 at para. 25, an injunction is a remedy, "not a cause of action, in the sense of containing its own authorizing force."

[76] There are no provisions in the *Act* that expressly provide for reconsideration (*contra Adam v. United States of America*, 2003 CanLII 31874 (ON CA), 64 O.R. (3d) 268) and, as I have previously observed, the Court, at paragraph 29 of the Judgment, did not find that the appellant was legally entitled to a ministerial reconsideration on fresh evidence.

[77] Having failed to demonstrate a legal entitlement to ministerial reconsideration, the appellant has not satisfied the Court that there is a serious question to be tried on its application for a stay under subsection 50(1) of the *Federal Courts Act*.

[78] Moreover, my finding that the balance of convenience favours the respondent in view of the irreparable harm to the public interest that would ensue from granting a further stay also applies to the appellant's stay application under the *Federal Courts Act*.

[79] For the foregoing reasons, I would decline to issue the stay requested by the appellant under subsection 50(1) of the *Federal Courts Act*.

III. Disposition

[80] Judges don't have hearts of stone. Like all people, we understand the emotional bonds that grow between people and the animals they care for. We recognize the hard work and sacrifice that go into establishing a business and the pride a business owner feels in this achievement. I have sympathy for the appellant's principals, who are facing difficult circumstances.

[81] Canada's Parliament, through the *Act*, conferred on a specialized agency the authority to protect the health of people and animals in this country and thereby to safeguard international trade in agricultural products. The CFIA has exercised this authority by developing a policy designed to rapidly eliminate HPAI outbreaks through the timely destruction of birds that are

both susceptible to HPAI and exposed to it. The appellant was afforded a full and meaningful opportunity to challenge the lawfulness of this policy before this Court and the Federal Court. It did not succeed. Both levels of court determined that the CFIA had reasonably exercised its authority in the circumstances of this case and that its policy was lawful.

[82] A stay is an exceptional remedy. The appellant has failed to meet its burden on this motion. It has not established that its proposed appeal to the Supreme Court raises a serious or arguable issue considering the criteria for leave to appeal set out in the *Supreme Court Act*. It has not established that there is a serious question to be tried on its application for a stay, pending ministerial consideration, under the *Federal Courts Act*. Finally, it has not established that the harm it will suffer from the refusal of a stay outweighs the harm to the public interest resulting from the granting of a stay.

[83] The CFIA must now be allowed to discharge the mandate conferred on it by Parliament and implement its lawful policy.

[84] The application for a stay is dismissed.

"Gerald Heckman"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-205-25
STYLE OF CAUSE:	UNIVERSAL OSTRICH FARMS INC. v. CANADIAN FOOD INSPECTION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	HECKMAN J.A.
DATED:	SEPTEMBER 12, 2025

WRITTEN REPRESENTATIONS BY:

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Aileen Jones Banafsheh Sokhansanj Paul Saunders	FOR THE RESPONDENT

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IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

MEMORANDUM OF ARGUMENT
Applicant in Application for Leave to Appeal
(*Supreme Court Act,* Section 40)

Universal Ostrich Farms Inc.

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This application addresses a recurring administrative-law problem: emergency powers are implemented through general policies while facts evolve. Here, the Canadian Food Inspection Agency (CFIA) applied a stamping-out policy to premises governed by section 48 of the *Health of Animals Act*, SC 1990, c 21 (HAA), which confers discretion through permissive language ("may") and contemplates treatment alternatives in section 48(2). The case asks what *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 requires of policy-structured discretion, and how the law should respond when dynamic facts materially alter the underlying risk.[1]

2. At paragraph 48 of its August 21, 2025 decision in *Universal Ostrich Farms Inc. v. CFIA*, 2025 FCA 147, the Federal Court of Appeal noted: "The parties did not refer us to any decision of this or another appellate court that has ruled on this question. We note, however, that the Federal Court has split on the issue of the continued relevance of the *Maple Lodge* categories."[2] At paragraph 49, the Court stated: "We agree with the parties and the Federal Court in the instant case that *Vavilov* requires reformulation of how reasonableness review applies to discretionary policy decisions made under statutory powers and that the approach in *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2 has been overtaken."[3] [4]

3. The Federal Court of Appeal held that, post-*Vavilov*, reasonableness review of discretionary, policy-laden decisions must be undertaken within Vavilov's unified framework, displacing the *Maple Lodge* "nominate categories".[5] The Court also recorded that according to the appellant the last of 69 ostrich deaths occurred on

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[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]; *Universal Ostrich Farms Inc. v. CFIA*, 2025 FCA 147 [FCA Decision]; *Health of Animals Act*, SC 1990, c 21, s 48 (vaccines, movement restriction, monitoring and surveillance).
[HAA];
[2] FCA Decision at para. 48.
[3] FCA Decision at para. 49.
[4] FCA Decision at paras. 50-53.
[5] FCA Decision at paras. 49-52.

January 15, 2025.[6] The December 31, 2024 Notice to Dispose remained outstanding, though stayed, in the Federal Court and then in the FCA until the appeal was dismissed on August 21, 2025 and the Court later refused a further stay on September 12, 2025.[7] The FCA emphasized that any reassessment based on post-decision developments is for the CFIA or the Minister, not for ongoing judicial reconsideration.[8]

4. The Court stated that "fresh evidence" of changed circumstances is not for the reviewing court on judicial review; any re-examination lies with the CFIA or the Minister.[9] In subsequent stay reasons, the Court clarified that it had not decided there is any legal obligation to reconsider and noted the HAA contains no express reconsideration provision; the appellant therefore failed to establish a legal entitlement to ministerial reconsideration to ground a stay.[10] As a result, while parties may request administrative reconsideration, there is presently no recognized right or structured mechanism to compel reassessment when emergencies evolve, an issue the Court left unsettled.[11]

B. The Regulatory Framework

5. Section 48(1) of the HAA provides:

> "The Minister may dispose of an animal or thing, or require its owner or any person having the possession, care or control of it to dispose of it, where the animal or thing
>
> (a) is, or is suspected of being, affected or contaminated by a disease or toxic substance;
>
> (b) has been in contact with or in close proximity to another animal or thing that was, or is suspected of having been, affected or contaminated by a disease or toxic substance at the time of contact or close proximity; or

[6] FCA Decision at para. 20.
[7] FCA Decision at paras. 2-4, *Universal Ostrich Farms Inc. v. CFIA*, 2025 FCA 164 [FCA Stay Decision] at paras. 1,4,6-7.
[8] FCA Decision at paras. 27-29.
[9] FCA Decision at paras. 27-29.
[10] FCA Stay Decision at paras. 40-41, 75-77.
[11] FCA Stay Decision, at paras. 72–74, 77; see also FCA Decision, at para. 29.

(c) is, or is suspected of being, a vector, the causative agent of a disease or a toxic substance."[12]

6. Section 48(2) states the Minister "may treat any animal or thing described in subsection (1), or require its owner or the person having the possession, care or control of it to treat it or to have it treated, where the Minister considers that the treatment will be effective in eliminating or preventing the spread of the disease or toxic substance." This permissive language contrasts with mandatory provisions elsewhere in the Act using "shall."[13]

7. CFIA applies its Event Response Plan (ERP) which defaults to stamping-out (immediate destruction) for highly pathogenic avian influenza (HPAI). The ERP acknowledges alternatives including vaccination and treatment but treats stamping-out as the primary response.[14]

8. The regulatory framework reveals a graduated response ladder. Sections 27-27.6 provide for primary control zones and surveillance as first-line measures.[15] Section 48 then enables graduated responses ranging from treatment to destruction as circumstances warrant.[16] Sections 48.1-51.2 address compensation only after these anterior steps.[17] This statutory architecture contemplates individualized assessment rather than automatic policy application.

C. Facts Leading to the Destruction Order

9. Universal Ostrich Farms ("UOF") operates a commercial ostrich farm that, by early December 2024, housed approximately 450 ostriches.[18] UOF has asserted that its flock comprises "rare and valuable genetics" developed through a decades-long selective breeding program and that it supplies eggs for antibody research under exclusive

[12] HAA, s 48(1).
[13] HAA, s 48(2).
[14] FC Decision at para. 94
[15] HAA, ss 27-27.6.
[16] HAA, s 48.
[17] HAA, ss 48.1-51.2.
[18] FCA Decision at para 15.

agreements with biotechnology partners.[19]

10. On December 28, 2024, CFIA intervened following reports of ostrich deaths and imposed a verbal quarantine; four additional ostriches died on December 29. On December 30, inspectors collected samples from two carcasses. On December 31, the Abbotsford laboratory reported H5 positive results; on January 3, 2025, the Winnipeg laboratory confirmed H5N1 HPAI by sequencing. Forty-one minutes after the initial positive result on December 31, CFIA issued the Notice to Dispose on December 31.[20]

11. According to UOF, the outbreak plateaued in mid-January and the last of 69 deaths occurred on January 15, 2025; UOF sought additional testing in late January, which CFIA declined.[21] The Federal Court of Appeal declined to admit post-decision evidence about subsequent flock health and emphasized that reasonableness is assessed on the record before CFIA when it decided.[22]

12. CFIA issued the December 31, 2024 Notice to Dispose with a compliance deadline of February 1, 2025, and denied UOF's request for an exemption on January 10, 2025 under the 2022 Event Response Plan.[23].

13. CFIA has not sent employees to UOF's farm since February 26, 2025 and no on-site inspections have occurred there since that date.[24]

D. Procedural History

14. UOF obtained an interlocutory stay from the Federal Court on February 18, 2025, preserving the status quo pending judicial review in *Universal Ostrich Farms Inc. v. CFIA*, 2025 FC 303.[25]

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[19] FC Decision at paras. 52,55-56.
[20] FC Decision, paras. 29–33, FCA Decision at para 18-20.
[21] FC Decision at pars. 42-43; see also FCA Decision at para 20.
[22] FCA Decision at paras. 24-32.
[23] FCA Decision at paras. 13-14,19.
[24] FCA Stay Decision at para. 57.
[25] *Universal Ostrich Farms Inc. v. CFIA*, 2025 FC 303 [FC Stay Order].

15. On May 13, 2025, the Federal Court dismissed the application for judicial review, *Universal Ostrich Farms Inc. v. CFIA*, 2025 FC 878, upholding the CFIA's Stamping-Out Policy as reasonable under the HAA, finding the Notice to Dispose reasonable because the Policy dictated that outcome, and concluding there was no impermissible fettering because any necessary case-specific discretion was accommodated at the exemption stage. [26]

16. The Court emphasized the limited role of judicial review in this science-laden context, noting that debates about the overall success of the Stamping-Out Policy, the comparative effectiveness of alternative disease-control strategies, or the interpretation of epidemiological data lie beyond judicial review.[27]

17. At the same time, the Federal Court explained that section 48 operates as a functional binary of destruction or treatment, leaving no room for a third "wait-and-see" option at the issuance stage and treated the inspector's determinations as involving scientific and technical judgments.[28]

18. On June 20, 2025, Justice Roussel of the Federal Court of Appeal granted a stay pending appeal in *Universal Ostrich Farms Inc. v. CFIA*, 2025 FCA 122, finding irreparable harm and preserving a meaningful right of appeal on an expedited basis. [29]

19. On August 21, 2025, the Federal Court of Appeal dismissed the appeal. As part of its reasons, the Court confirmed that post-*Vavilov* reasonableness review governs policy-structured exercises of discretion and proceeded on that basis. [30]

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[26] *Universal Ostrich Farms Inc. v. CFIA*, 2025 FC 878 [FC Decision].
[27] FC Decision at para 163.
[28] FC Decision at paras. 83, 200-201.
[29] *Universal Ostrich Farms Inc. v. CFIA*, 2025 FCA 122 [FCA Stay Pending Appeal]; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.
[30] FCA Decision.

20. On September 12, 2025, the Federal Court of Appeal dismissed the Applicant's motion for a further stay pending a proposed leave application to the Supreme Court. The Court held there is "no uncertainty", *Vavilov* supplies the applicable framework and clarified it had not recognized any legal duty on the CFIA or the Minister to reconsider based on post-decision evidence; it also found that the balance of convenience now favoured allowing the CFIA to proceed. [31]

E. The Federal Court of Appeal Decision

21. The Federal Court of Appeal observed that the parties identified no appellate decision resolving whether *Vavilov* displaced *Maple Lodge*'s "nominate categories" for reviewing discretionary policy decisions and noted a split in the Federal Court on that point. [32]

22. At paragraph 49, the Court stated: "We agree with the parties and the Federal Court in the instant case that *Vavilov* requires reformulation of how reasonableness review applies to discretionary policy decisions and that the approach in *Maple Lodge* has been overtaken."[33]

23. The Court then set out its reformulation: reasonableness asks whether the decision "bears the hallmarks of reasonableness, justification, transparency and intelligibility, and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision," and earlier case law must be aligned with this unified *Vavilov* approach (including *Entertainment Software Association v. SOCAN,* 2022 SCC 30) rather than treated as rigid categories. [34] In subsequent stay reasons, Justice Heckman put it plainly: "There is no uncertainty. *Vavilov* supplies the clarity that the appellant claims is lacking," and to the extent there had been a conflict in Federal Court jurisprudence, "the Judgment has resolved it"; lower courts, including the Federal Court, "must follow the approach to

[31] *Universal Ostrich Farms Inc. v. CFIA*, 2025 FCA 164 [FCA Stay Decision].
[32] FCA Decision at para 48.
[33] FCA Decision at para 49.
[34] FCA Decision at para 50.

reasonableness review set out in *Vavilov.*" [35]

24. Applying that framework to this case, the Court accepted that international-trade considerations and alignment with World Organisation for Animal Health (WOAH) standards were relevant constraints supporting the CFIA's choice of stamping-out under s. 48.[36] Those considerations inform reasonableness by reference to the statute and record; they do not displace the obligation of justification within the governing statutory scheme.[37]

25. Consistent with *Vavilov*'s record-based review, the Court held that "fresh evidence" of later developments is inadmissible on judicial review, and that any re-examination in light of new facts lies with the CFIA or the Minister.[38] In later stay reasons, the Court clarified that it did not decide there is a legal duty to reconsider and emphasized that the Health of Animals Act contains no express reconsideration provision; whether any right to reconsideration exists was not before the Court.[39]

PART II – QUESTIONS IN ISSUE

26. Leave Standard. Each question below raises an issue of public and national importance within s. 40(1) because it sets the governing approach to (i) reviewing policy-structured discretion post-Vavilov, (ii) dealing with dynamic post-decision facts and reconsideration, (iii) minimum reasons under s. 48 of the HAA and (iv) mootness for short-lived emergency orders across multiple regulatory sectors. The Federal Court of Appeal recognized that no appellate decision had yet squarely addressed whether *Vavilov* displaced *Maple Lodge* for discretionary policy decisions; it stated the law "requires reformulation" and provided its own operational approach at paras. 50–52.[40] In a subsequent stay ruling, the Court added that "there is no uncertainty," emphasizing that

[35] FCA Stay Decision at para 28.
[36] FCA Decision at paras. 93-99.
[37] FCA Decision at para. 51.
[38] FCA Decision at paras. 27,29,32.
[39] FCA Stay Decision at paras. 40, 76.
[40] FCA Decision at paras 48-52.

Vavilov supplies the applicable clarity, underscoring the national significance of guidance from this Court.[41]

27. The proposed questions of public importance are:

(a) Policy-Structured Discretion post-*Vavilov*: When an appellate court states the legal framework for reviewing discretionary administrative decisions "requires reformulation" post-*Vavilov*, what is the proper approach to reviewing policy-based exercises of statutory discretion?

(b) Statutory Discretion and National Operational Clarity. Can an administrative body maintain that "no discretion" exists under permissive statutory language ("may") when exercising emergency powers, that results in mandatory outcomes once criteria are met while at the same time operating an exemption process that calls for case-by-case discretionary assessment and how should courts assess allegations of fettering in that structure?[42]

(c) Dynamic-Facts Reconsideration Gap. What mechanism exists for reconsidering emergency orders when circumstances transform from active outbreak to extended stability with asserted immunity markers, and what are the legal parameters? The Federal Court of Appeal held "fresh evidence" on current health is inadmissible on judicial review and belongs with the CFIA/Minister, while confirming it did not decide there is any legal obligation to reconsider, and the Act contains no express reconsideration provision.[43]

(d) Emergency-Order Mootness. Do emergency orders that typically operate on compressed timelines, and have arisen hundreds of times in the ongoing HPAI outbreak, fall within the "capable of repetition yet evading review" exception?[44]

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[41] FCA Stay Decision at paras. 27-28.
[42] FC Decision at para. 83 (functional "binary" of treatment or destruction); FCA Decision at para. 14 (recognizing Exemption Committee's case-specific discretion, citing FC Decision paras. 96–109)).
[43] FCA Decision at para. 29 (fresh evidence belongs with CFIA/Minister); FCA Stay Decision at paras. 40–41 (no duty to reconsider decided or before the Court)).
[44] FC Decision at para 23 (527 domestic premises since 2021)).

PART III – SUBMISSIONS

A. The Post-*Vavilov* Framework for Policy-Based Discretion

28. The Federal Court of Appeal recorded that neither party could identify any appellate ruling deciding whether *Vavilov* displaced *Maple Lodge* for discretionary policy decisions; it therefore held that *Vavilov* "requires reformulation" of how reasonableness applies and supplied its own approach at paras. 50–52. [45] That acknowledgment, coupled with the Federal Court of Appeal's subsequent statement that "there is no uncertainty" and *Vavilov* provides the operative clarity, highlights the need for this Court to settle the framework to be applied across emergency, policy-structured decisions.[46]

29. The Federal Court of Appeal's reformulation anchors review in *Vavilov*'s single standard: whether the outcome is justified, transparent, and intelligible in relation to the legal and factual constraints, rejecting the *Maple Lodge* categories as controlling.[47] But difficult questions remain where agencies argue that a general policy eliminates discretion at one stage while preserving discretion at another (the exemption stage). The risk is that *Vavilov*'s "responsive justification" requirement becomes attenuated when individualized considerations are deferred or displaced.[48] Further guidance from this Court is needed to ensure policy instruments are not applied in a manner that eclipses individualized justification, especially where stakes are high.

30. Section 48's permissive language ("may") denotes discretion. In this case, the Federal Court characterized s. 48 as a functional binary of destruction or treatment that leaves no "wait-and-see" option, while the administrative regime simultaneously includes an exemption process requiring discretionary, case-specific assessment.[49] That internal tension warrants appellate clarification regarding where discretion resides and how it must be exercised and explained.

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[45] FCA Decision at paras 48-52.
[46] FCA Stay Decision at paras. 27-28.
[47] FCA Decision at paras. 50-53.
[48] *Vavilov*, 2019 SCC 65 at paras. 85, 99, 108.
[49] FC Decision at para. 83, 96-109; FCA Decision at para. 14.

31. *Vavilov* also affirms that decision-makers must be responsive to the evidentiary record and general factual matrix: "It is well established that decision makers must take the evidentiary record and the general factual matrix that bears on their decision into account, and that failure to do so may render a decision unreasonable."[50] The record here includes the appellant's position, recited by the FCA, that the last of the 69 deaths occurred on January 15, 2025.[51] How *Vavilov*'s factual-matrix requirement operates when an agency defaults to a one-size policy warrants guidance.

32. Without clear guardrails, a broad "policy-choice" category risks functionally unreviewable discretion and undermines *Vavilov*'s culture of justification. Recent decisions, *Auer v. Auer*, 2024 SCC 36; *TransAlta Generation Partnership v. Alberta*, 2024 SCC 37, re-emphasize that responsive, proportionate reasons remain integral to reasonableness even where highly technical or policy-laden decisions are concerned. [52] The Federal Court of Appeal itself recognized that some policy determinations may be relatively "unconstrained" and harder to set aside, heightening the need for principled constraints and reasons.[53]

B. Dynamic Facts and the Reconsideration Gap

33. The Federal Court of Appeal held that fresh evidence about post-decision developments belongs with ministerial/CFIA reconsideration rather than judicial review: "Should the appellant wish to have the Notice to Dispose re-examined in light of the fresh evidence, its recourse is to ask the CFIA or the Minister to do so."[54] In the subsequent stay decision, the Federal Court of Appeal confirmed it did not decide whether there is any legal obligation to reconsider; no reconsideration right was before the Court and the Health of Animals Act contains no express reconsideration provision.[55]

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[50] *Vavilov*, 2019 SCC 65 at para. 108.
[51] FCA Decision at para. 20.
[52] *Auer v. Auer*, 2024 SCC 36; *TransAlta Generation Partnership v. Alberta*, 2024 SCC 37.
[53] FCA Decision at para. 69.
[54] FCA Decision at para 29.
[55] FCA Stay Decision at paras. 40-41.

34. The timing illustrates the gap: after lab confirmation on December 31, 2024, a Notice to Dispose issued 41 minutes later.[56] The Federal Court of Appeal recorded the appellant's position that the last death occurred January 15, 2025 , yet the December 31 Notice remained outstanding (stayed) until the appeal was dismissed August 21, 2025.[57] This multi-month divergence between initial risk assessment and evolving facts underscores the reconsideration problem.

35. The serial litigation path. Federal Court stay (2025 FC 303), Federal Court merits (2025 FC 878), FCA stay pending appeal (2025 FCA 122), FCA merits (2025 FCA 147), and FCA stay pending leave (2025 FCA 164), occurred without any duty on the decision-maker to revisit its order in light of materially changed circumstances, consuming judicial resources and impeding responsive governance while the "fresh evidence" rule foreclosed record-updating on review.[58]

36. A principled reconsideration framework would (i) establish timelines when facts materially change; (ii) oblige consideration of new evidence; (iii) require reasons explaining why the original outcome still holds (or not); and (iv) specify criteria for "material change." See *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 (structuring soft-law use and renewal of discretion). *Safe Food Matters Inc. v. Canada (Attorney General)*, 2022 FCA 19, also shows how courts can channel fresh information to the administrator while respecting review boundaries. [59]

C. Minimum Reasons Under Section 48

37. Section 48(2) requires the Minister to "consider" whether treatment would be effective before ordering destruction. This statutory requirement for consideration necessarily implies reasons demonstrating that consideration occurred.[60] *Commission scolaire*

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[56] FCA Decision at para 19; FC Decision at paras. 32-33.
[57] FCA Decision at paras. 2-3.
[58] FCA Stay Decision at paras. 4, 40-41.
[59] *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at para 42; *Safe Food Matters Inc. v. Canada (Attorney General)*, 2022 FCA 19.
[60] HAA, s 48(2).

francophone des Territoires du Nord-Ouest v. Northwest Territories, 2023 SCC 31 reinforces this principle.[61]

38. The approach below risks permitting conclusory invocations of policy without demonstrating the statutorily required consideration. The Federal Court treated s. 48 as a binary that leaves no "wait-and-see" option, even while the regime recognizes an exemption process requiring case-specific judgment.[62] Where an agency asserts it has "no discretion" at the trigger stage, while discretion is later exercised at the exemption stage, the reasons must still demonstrate that s. 48(2)'s "treatment" consideration was not nullified by policy default.[63] Clear reasons are therefore required to demonstrate where and how discretion was exercised, including why treatment was not considered effective on these facts.

39. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, requires reasons that show the decision-maker was "alert, alive and sensitive" to the statutory factors. [64] A blanket invocation of policy that forecloses the s. 48(2) treatment inquiry cannot satisfy that standard. The Federal Court of Appeal recognized international-trade and WOAH constraints (including disease-free status 28 days after stamping-out; otherwise 12 months) as relevant, but those constraints cannot override the statute's individualized assessment requirement.[65]

40. Minimum adequate reasons under section 48 must:
    (a) acknowledge discretion exists;
    (b) identify relevant constraints (legal, factual, policy);
    (c) explain why treatment was not considered effective in the specific case;

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[61] *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories*, 2023 SCC 31 at paras 75-78.
[62] FC Decision at para. 83; FCA Decision at para. 14, citing FC Decision paras. 96–109;
[63] FC Decision at paras. 192-197; FCA Decision at paras. 22, 97-99.
[64] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 43-44.
[65] FCA Decision at paras. 94-95.

(d) demonstrate responsiveness to the particular circumstances rather than automatic policy application.[66] In addition, because the FCA's stay reasons collected the risk-matrix (migration, environmental persistence, compliance frictions, and zone/trade constraints), reasons must engage those constraints where s. 48's exceptional measures are invoked.[67]

These requirements ensure statutory obligations are met without imposing undue burden on emergency response, providing a workable framework for administrators and reviewing courts alike.

41. This is not an invitation to courts to second-guess science; it is a call for demonstrable statutory compliance through reasons. Absent such reasons, especially where decisions follow a default policy in minutes (here, 41 minutes: 2025 FCA 147 at para. 19; FC 878 at paras. 32–33), meaningful *Vavilov* review is undermined.

D. Mootness and the "Capable of Repetition" Doctrine

42. This case is emblematic of matters "capable of repetition yet evading review." *Borowski v. Canada (AG)*, [1989] 1 S.C.R. 342. Emergency orders like the Notice to Dispose operate on accelerated timelines, often extinguishing appellate review before merits can be reached absent stays. [68]

43. Since 2021, Canada has recorded hundreds of HPAI events; the Federal Court noted 527 domestic premises affected nationwide, illustrating recurrence across contexts and jurisdictions.[69]

[66] *Vavilov*, supra note 1 at paras 125-126; *Mason*, supra note 39 at paras 69-74.
[67] FCA Stay Decision at paras 72-79 (risk-matrix constraints).
[68] *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353-365 [*Borowski*]; *Borowski* at 358-361.
[69] FC Decision at para. 23.

44. The ordinary litigation sequence (stay → merits → appeal → leave) rarely fits within the lifespan of such orders. Here, stays preserved the status quo, creating the unusual record necessary to address recurring issues that otherwise evade review.[70]

45. That preserved record captures the evolution from initial crisis to asserted stability, enabling principled guidance on policy-structured discretion and reconsideration under s. 48. The Federal Court of Appeal's merits and stay rulings supply a clean vehicle to resolve questions that transcend this case (animal health; public health; trade; administrative law).

46. Without guidance, the same issues will continue to evade review despite obvious national importance for biosecurity, federal-provincial coordination, trade, and the limits of emergency powers. The Federal Court of Appeal recognized that policy decisions may be relatively unconstrained yet remain reviewable for reasonableness under *Vavilov*, making Supreme Court clarification timely.[71]

E. Additional Considerations Supporting Leave

47. Pure Questions of Law. The proper interpretation of "may" versus "shall" in section 48 raises questions of statutory interpretation reviewable on a correctness standard. Whether agencies can claim "no discretion" under permissive language is a pure question of law. *Access Copyright v. York University*, 2021 SCC 32, is among the authorities that reinforce principled statutory interpretation in administrative contexts.[72] *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 confirms this approach.[73]

48. National Impact. CFIA's emergency response framework applies nationwide to all reportable diseases, not just HPAI. The legal framework governs responses to African Swine Fever, Foot and Mouth Disease, and other diseases with billions in economic impact. Similar frameworks exist in environmental protection (emergency environmental

[70] FCA Decision at paras. 2-3.
[71] FCA Decision at paras. 52, 69.
[72] *Vavilov*, supra note 1 at paras 108, 115-116; *Access Copyright v. York University*, 2021 SCC 32.
[73] *Mason*, supra note 39 at para 8.

orders), public health (quarantine orders), and transportation safety (grounding orders). The approach to reviewing policy-based emergency discretion affects multiple regulatory contexts.[74]

49. Federal Court Split. The Federal Court of Appeal acknowledged at paragraph 48 that "the Federal Court has split on the issue" of post-*Vavilov* application to discretionary policy decisions. The Court cited decisions reaching opposite conclusions: *Mowi Canada West Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2022 FC 588 applied strict *Vavilov* constraints to policy decisions, while *South Shore Trading Co. Ltd. v. Canada (Fisheries, Oceans and Coast Guard)*, 2025 FC 174 maintained broader deference under a modified *Maple Lodge* approach. Other decisions fell between these positions (*Munroe v. Canada (Attorney General)*, 2021 FC 727; *Fortune Dairy Products Limited v. Canada (Attorney General)*, 2020 FC 540). [75]

50. Precedential Effect. The Federal Court of Appeal's reformulation is now binding on all Federal Courts, affecting every challenge to policy-based administrative decisions. The September 12 stay decision confirmed this immediate precedential impact.[76]

51. Complete Factual Record. The exceptional stays created a complete factual record from January 15, 2025,[77] through the present, documenting the transformation from active outbreak to sustained disease-free status with demonstrated immunity. This comprehensive record provides an unusual opportunity for appellate review of how emergency orders should respond to changed circumstances, a question that typically evades review due to the short lifespan of such orders.[78]

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[74] HAA, ss 48-51 (applicable to all reportable diseases); FCA Decision at paras 10-14.
[75] FCA Decision at para 48, citing *Mowi Canada West Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2022 FC 588; *South Shore Trading Co. Ltd. v. Canada (Fisheries, Oceans and Coast Guard)*, 2025 FC 174; *Munroe v. Canada (Attorney General)*, 2021 FC 727; *Fortune Dairy Products Limited v. Canada (Attorney General)*, 2020 FC 540.
[76] FCA Stay Decision at paras 14-21, 28.
[77] FCA Decision at para 23
[78] FCA Decision at para 17; Complete record includes: FC Stay Order; FC Decision; FCA Stay Pending Appeal; FCA Decision; FCA Stay Decision.

PART IV – SUBMISSIONS ON COSTS

52. The Applicant does not seek costs and submits that no costs should be awarded given the public importance of the issues raised.

PART V – ORDER SOUGHT

53. The Applicant respectfully requests that this Court:

    (a) Grant leave to appeal from the judgment of the Federal Court of Appeal dated August 21, 2025 (2025 FCA 147);

    (b) If leave is granted, expedite the appeal and permit a condensed record focused on the administrative record and reasons;

    (c) Grant such further relief as this Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

This 19th day of September, 2025

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PART VI – TABLE OF AUTHORITIES

Supreme Court of Canada

Authority	Citation	Para #
Access Copyright v. York University	2021 SCC 32	47
Auer v. Auer	2024 SCC 36	32

Authority	Citation	Para #
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TransAlta Generation Partnership v. Alberta	2024 SCC 37	32

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Fortune Dairy Products Limited v. Canada (Attorney General)	2020 FC 540	49
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Munroe v. Canada (Attorney General)	2021 FC 727	49
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South Shore Trading Co. Ltd. v. Canada (Fisheries, Oceans and Coast Guard)	2025 FC 174	49

Authority	Citation	Para #
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PART VII – STATUTORY PROVISIONS

Health of Animals Act, S.C. 1990, c. 21 / Loi sur la santé des animaux, L.C. 1990, ch. 21

Section 48 – Disposal of affected or contaminated animals and things / Article 48 – Destruction d'animaux ou de choses contaminés

48(1) The Minister may dispose of an animal or thing, or require its owner or any person having the possession, care or control of it to dispose of it, where the animal or thing

(a) is, or is suspected of being, affected or contaminated by a disease or toxic substance;

(b) has been in contact with or in close proximity to another animal or thing that was, or is suspected of having been, affected or contaminated by a disease or toxic substance at the time of contact or close proximity; or

(c) is, or is suspected of being, a vector, the causative agent of a disease or a toxic substance.

48(1) Le ministre peut ordonner que soient détruits, ou peut détruire lui-même, les animaux ou choses qui, selon le cas :

a) sont contaminés par une maladie ou une substance toxique, ou sont soupçonnés de l'être;

b) ont été en contact avec des animaux ou choses — ou se sont trouvés dans leur voisinage immédiat — qui, au moment du contact ou du voisinage, étaient contaminés par une maladie ou une substance toxique, ou étaient soupçonnés de l'être;

c) sont des vecteurs — ou sont soupçonnés de l'être — ou des agents causant une maladie ou une substance toxique.

48(2) The Minister may treat any animal or thing described in subsection (1), or require its owner or the person having the possession, care or control of it to treat it or to have it treated, where the Minister considers that the treatment will be effective in eliminating or preventing the spread of the disease or toxic substance.

48(2) Le ministre peut traiter ou ordonner que soient traités les animaux ou choses visés au paragraphe (1) s'il estime que le traitement en détruira l'infection ou la contamination, ou en préviendra la propagation.

48(3) A requirement under this section shall be communicated by personal delivery of a notice to the owner or person having the possession, care or control of the thing or by sending a notice to the owner or person, and the notice may specify the period within which and the manner in which the requirement is to be met.

48(3) L'ordre est communiqué par remise, à son destinataire, en mains propres ou par envoi, d'un avis précisant éventuellement le délai et les modalités d'exécution.

Supreme Court Act, R.S.C. 1985, c. S-26 / Loi sur la Cour suprême, L.R.C. 1985, ch. S-26

Section 40 – Leave to appeal / Article 40 – Autorisation d'appeler

40(1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.

40(1) Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout jugement, définitif ou autre, rendu par la Cour d'appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l'affaire en question, ou par l'un de ses juges, que l'autorisation d'en appeler à la Cour ait ou non été refusée par une autre cour, lorsque la Cour estime, eu égard à l'importance de l'affaire pour le public, ou à l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou eu égard à sa nature ou importance à tout égard, qu'elle devrait en être saisie et lorsqu'elle accorde en conséquence l'autorisation d'en appeler.