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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)

Universal Ostrich Farms Inc.

Sheikh Law

PO Box 24062 Broadmead RPO
Victoria, BC V8X 0B2

Per: Umar Sheikh

Tel: 250-413-7497

Email: usheikh@sheikhlaw.ca

Counsel for the Applicant

Canadian Food Inspection Agency

Attorney General of Canada

Department of Justice Canada
British Columbia Region - National Litigation Sector
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Per: Aileen Jones, Banafsheh Sokhansanj, and
Paul Saunders

Tel: (604) 666-2061 | Fax: (604) 666-2760

Email: Aileen.Jones@justice.gc.ca

Banafsheh.Sokhansanj@justice.gc.ca

Paul.Saunders@justice.gc.ca

Counsel for the Respondent

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MEMORANDUM OF ARGUMENT
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Per: Umar Sheikh

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900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Per: Aileen Jones, Banafsheh Sokhansanj, and
Paul Saunders

Tel: (604) 666-2061 | Fax: (604) 666-2760

Email: Aileen.Jones@justice.gc.ca

Banafsheh.Sokhansanj@justice.gc.ca

Paul.Saunders@justice.gc.ca

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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

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

¹⁹ [FC Decision](#) at paras. [52,55-56](#).

²⁰ [FC Decision](#), paras. [29-33](#), [FCA Decision](#) at para [18-20](#).

²¹ [FC Decision](#) at paras. [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

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

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.

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

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*

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 WOAHP 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;

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

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

Umar A. Sheikh

UMAR A. SHEIKH

Sheikh Law — Umar Sheikh Personal Law Corporation
 PO Box 24062 Broadmead RPO
 Victoria, BC V8X 0B2
 Tel: 250-413-7497
 Email: usheikh@sheikhlaw.ca
 Counsel for the **Applicant**

PART VI – TABLE OF AUTHORITIES

Supreme Court of Canada

Authority	Citation	Para #
<i>Access Copyright v. York University</i>	2021 SCC 32	47
<i>Auer v. Auer</i>	2024 SCC 36	32

Authority	Citation	Para #
<i>Baker v. Canada (Minister of Citizenship and Immigration)</i>	[1999] 2 S.C.R. 817	39
<i>Borowski v. Canada (Attorney General)</i>	[1989] 1 S.C.R. 342	42
<i>Canada (Minister of Citizenship and Immigration) v. Vavilov</i>	2019 SCC 65	1, 2, 19, 20-23, 25-29, 31, 40, 41, 46, 47, 49
<i>Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories</i>	2023 SCC 31	37
<i>Entertainment Software Association v. SOCAN</i>	2022 SCC 30	23
<i>Mason v. Canada (Citizenship and Immigration)</i>	2023 SCC 21	40, 47
<i>Maple Lodge Farms Ltd. v. Government of Canada</i>	[1982] 2 S.C.R. 2	2, 3, 21, 22, 26, 28, 29, 49
<i>R. v. Daoust</i>	2004 SCC 6	29
<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i>	[1994] 1 S.C.R. 311	18
<i>TransAlta Generation Partnership v. Alberta</i>	2024 SCC 37	32

Federal Courts

Authority	Citation	Para #
<i>Fortune Dairy Products Limited v. Canada (Attorney General)</i>	2020 FC 540	49
<i>Mowi Canada West Inc. v. Canada (Fisheries, Oceans and Coast Guard)</i>	2022 FC 588	49
<i>Munroe v. Canada (Attorney General)</i>	2021 FC 727	49
<i>Safe Food Matters Inc. v. Canada (Attorney General)</i>	2022 FCA 19	36
<i>South Shore Trading Co. Ltd. v. Canada (Fisheries, Oceans and Coast Guard)</i>	2025 FC 174	49

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<i>Universal Ostrich Farms Inc. v. CFIA</i> (“FC Stay Order”)	2025 FC 303	14, 35, 51
<i>Universal Ostrich Farms Inc. v. CFIA</i> (“FC Decision”)	2025 FC 878	7, 9-11, 15-17, 27, 30, 35, 38, 41, 43, 51
<i>Universal Ostrich Farms Inc. v. CFIA</i> (“FCA Stay Pending Appeal”)	2025 FCA 122	18, 35, 51
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<i>Universal Ostrich Farms Inc. v. CFIA</i> (“FCA Stay Decision”)	2025 FCA 164	3, 4, 13, 20, 26, 28, 33, 35, 40, 50, 51

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Authority	Citation	Para #
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Authority	Citation	Para #
<i>Health of Animals Act</i> , s. 48 (EN/FR)	R.S.C. 1990, c. 21	1, 5, 6, 8, 15, 26, 37, 48
<i>Supreme Court Act</i> , s. 40 (EN/FR)	R.S.C. 1985, c. S-26	26

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.