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Court File No.			
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FEDERAL COURT

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

APPLICANT

- and -

CANADIAN FOOD INSPECTION AGENCY

RESPONDENT

APPLICATION UNDER THE *FEDERAL COURTS ACT*,
R.S.C. 1985, C. F-7, S. 18.1

NOTICE OF APPLICATION

TO THE RESPONDENT:

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

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at (*place where Federal Court ordinarily sits*).

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

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

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

February 7, 2025

Issued by: _____

Address of local office:
BOX 10065
701 West Georgia Street,
Vancouver, BC V7Y 1B6

TO: CANADIAN FOOD INSPECTION AGENCY

Department of Justice Canada

Attention: Aileen Jones and Paul Saunders

900 – 840 Howe Street

Vancouver, BC V6Z 2S9

AND TO: Minister of Justice and Attorney General of Canada

c/o Deputy Attorney General of Canada

Office of the Deputy Attorney General of Canada

284 Wellington Street

Ottawa, ON K1A 0H8

This is an application for judicial review in respect of:

1. A decision issued by the Canadian Food Inspection Agency (“CFIA”) dated January 10, 2025, stating that the Applicant, Universal Ostrich Farms Inc. (“UOF”), does not meet any exemption criteria from the Requirement to Dispose of Animals or Things issued on December 31, 2024.

The Applicant makes an application for:

1. An order of certiorari and mandamus to quash the January 10, 2025 decision issued by the CFIA that UOF was not exempt from the Requirement to Dispose of Animals or Things issued on December 31, 2024, and giving directions to CFIA to consider all of the unique, valuable, and rare factors concerning UOF's ostriches when making a decision with respect to whether UOF should qualify for any exemption from the Requirement to Dispose of Animals or Things; and
2. Costs.

The grounds for the application are:

1. The Applicant relies on the following statutes and statutory provisions:
 - i. *Federal Courts Act* (R.S.C., 1985, c. F-7) s.18.1;
 - ii. *Federal Courts Rules* (SOR/98-106) part 5;
 - iii. *Health of Animals Act* (S.C. 1990, c. 21) s. 48;
 - iv. *Animal Health Act* (SBC 2014, c. 16); and
 - v. *The Canadian Charter of Rights and Freedoms*

Universal Ostrich Farms Inc. (“UOF”) and CFIA’s Stamping-out Order

2. UOF raises ostriches on a 58 acre parcel of land located about 10 kilometres outside of Edgewood, British Columbia (the “Property”).
3. The principals of UOF are Karen Espersen (“Ms. Espersen”) and David Bilinsky (“Mr. Bilinsky”).
4. Ms. Espersen and Mr. Bilinsky have been raising ostriches since the early 1990s.
5. Mr. Bilinsky, who has training in genetics, entered the ostrich industry in 1993 with Dr. Robert Church, who was a pioneer of molecular genetics and embryo transfer technology at the University of Calgary.

6. They started a company that began importing specially selected, large ostriches from Africa. They grew the company into the largest ostrich farm in Canada and it became the leading producer of large body ostriches.
7. Ostriches are different from other “poultry” in that, amongst other things, they:
 - i. are flightless;
 - ii. have red meat;
 - iii. weigh up to 350 pounds;
 - iv. measure up to 12 feet in height;
 - v. run up to 70km/hour;
 - vi. live up to 75 years of age;
 - vii. take about three and a half years for ostrich hens to become good breeders;
 - viii. have a robust immune system; and
 - ix. have a high, individual economic value.
8. Ms. Espersen began working with Mr. Bilinsky in 1995 and UOF was formed in the early 2000s.
9. Together they spent the next 32 years selectively breeding the ostriches and improving the genetics to create a large, healthy bloodline of ostrich.
10. When the Covid 19 pandemic began in March 2020 it essentially shut down UOF’s business.
11. Mr. Bilinsky and Ms. Espersen then became involved in scientific research that was being conducted on antibodies appearing in ostrich eggs.
12. Ostrich eggs are uniquely suited for developing antibodies because the yolks are large and a high concentration of antibodies appears in the yolks after an immune reaction occurs.
13. UOF then began working with a company that was developing protocols to produce antibodies for Covid 19. From there the scientific research led to developing many other opportunities for utilizing antibodies in the egg yolks.
14. UOF also began working closely with Dr. Tsukamoto and a group of researchers from Kyoto Prefecture University in Japan. This research was directed towards

producing and extracting IgY (immune globin yolk) antibodies from the UOF ostrich eggs.

15. From there UOF began a venture with Struthio Bio Science Inc. and entered into an agreement to provide Struthio with ostrich eggs, which would then be used to extract antibodies.
16. Since 2020 UOF has been entirely dedicated to the production of antibodies with its ostrich herd. It is not a commercial poultry facility and it does not produce any ostrich meat or eggs for human consumption.
17. UOF had approximately 450 ostriches as of early December, 2024.
18. In mid-December, 2024 some of UOF's ostriches were showing signs of illness, and then some began to die.
19. On December 30, 2024 CFIA tested two dead ostriches with swab samples and took them for analysis.
20. On December 31, 2024 CFIA issued a quarantine order (the "First Quarantine Order"), and later advised UOF that the test was positive for H5N1 (Avian Influenza).
21. On January 2, 2025 CFIA issued a Requirement to Dispose of Animals or Things dated December 31, 2024 (the "December Decision") to UOF, requiring UOF to dispose of all poultry and poultry carcasses along with other material approved by the CFIA disposal crew from the UOF's premises, pursuant to s.48(1) of the *Health of Animals Act*, by February 1, 2025.
22. Vaccinations were available for the UOF ostriches but CFIA would not permit UOF to treat or test the ostriches.
23. On January 2, 2025 a CFIA case officer told UOF that, based on the information CFIA had gathered, the UOF ostriches fall into the "birds classified as having rare and valuable genetics" category, which provided an exemption from the December Decision.
24. The CFIA case officer told UOF to send documents regarding UOF's agreement with the Kyoto Prefecture University in Japan and a Distinct Unit Request Package, which UOF did.
25. On January 10, 2025, the CFIA issued a letter stating that UOF did not meet the criteria for being exempt from the December Decision (the "January Decision").

26. In particular, CFIA said UOF did not meet the test for being a Distinct Epidemiological Unit (the “Distinct Unit Decision”) and failed to meet the test of having rare and valuable poultry genetics (the “Rare and Valuable Genetics Decision”).
27. In commenting on the Rare and Valuable Genetics Decision, CFIA stated that this consideration required a “significant burden of proof” and “[r]obust processes must be in place”.
28. CFIA had not disclosed to UOF the test or burden of proof it had to meet. Instead, UOF was made to believe that CFIA had already placed the ostriches in the “birds classified as having rare and valuable genetics” category and therefore UOF qualified for an exemption from the December Decision.
29. If CFIA had told UOF about the “significant burden of proof” then UOF would have changed its approach to the exemption process.
30. Although 69 ostriches died, by mid-January 2025 the remaining ostriches recovered from the illness and are healthy. The last ostrich to die from HPAI-type symptoms was on January 15, 2025.
31. Ostriches have robust immune systems, and it is safer to keep the ostriches that have immunity, rather than killing them and bringing in new naïve ostriches without immunity.
32. The January Decision, and CFIA’s refusal to exempt UOF from the December Decision, would result in all of the remaining, healthy ostriches being killed.

CFIA Breached the Principles of Natural Justice and Procedural Fairness

33. The CFIA failed to observe the principles of natural justice and procedural fairness in making the January Decision.
34. Administrative decision-makers, generally, must also observe procedural fairness in the implementation of statutes (*Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at para 138.).
35. Where a decision involves the potential for significant impact or harm on the party whose conduct is at issue, greater procedural protection is required (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653, at para 133).
36. The CFIA’s Distinct Unit Decision and its Rare and Valuable Genetics Decision will have a significant impact and cause significant financial harm to UOF and its employees. Both decisions would also have a significant negative impact on 1)

UOF's ongoing research collaborations, 2) on virology and immunology research advancements that specialize in HPAI, IgY antibodies, and avian research, and 3) negatively impact and impede CFIA's and the Government of Canada's own progress with respect to its goals and response strategies to HPAI.

37. A decision-maker should consider the following factors to ensure procedural fairness, summarized in *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504 at paragraph 42:
- i. the nature of the decision being made and the process followed in making it;
 - ii. the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates;
 - iii. the importance of the decision to the individual or individuals affected;
 - iv. the legitimate expectations of the person challenging the decision; and
 - v. the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.
38. The simple overarching requirement in administrative decision-making is fairness (*Mavi*, 2011 SCC 30 at para 42).
39. A party's legitimate expectation is a further aspect to procedural fairness, which is engaged where a decision-maker makes representations that a certain procedure will be followed, or a certain outcome will result. Where that occurs, a party may seek review where that procedure was not followed, or where the expected outcome did not result.
40. In its January 2, 2025 email CFIA led UOF to believe that its ostriches fell into the "birds classified as having rare and valuable genetics" category (the "Rare and Valuable Category") and outlined a brief list of documents that UOF would need to provide to CFIA for the purpose of completing the "exemption from depopulation" process. UOF provided the CFIA with the requested documentation within a matter of days.
41. The CFIA gave UOF a legitimate expectation that the ostriches qualified under the Rare and Valuable Category, and would be exempt from the December Decision.

42. As well, in its January 2, 2025 email CFIA gave UOF a legitimate expectation with respect to the procedure CFIA would follow in making its Rare and Valuable Genetics Decision, and the finding CFIA would make with respect to the ostriches qualifying under an exemption.
43. Despite making these representations and advising UOF what documents it must provide to the CFIA, the CFIA failed to follow its own procedure.
44. In their January 2, 2025 email to UOF, the CFIA case officer asked UOF to fill out a document titled "Distinct Unit Request Package" and return it.
45. The CFIA failed to advise UOF what process would be used, or what criteria were required, in determining whether or not the ostriches would qualify under the Distinct Epidemiological Unit exemption.
46. CFIA breached the principles of procedural fairness by failing to notify UOF of the requirements it would need to meet in order to qualify for any exemption to the December Decision, it failed to outline the procedure that would be followed by CFIA in making the exemption decisions, and it failed to specify the significant burden of proof UOF had to satisfy in order to qualify under the Rare and Valuable Category.
47. The CFIA breached the principles of procedural fairness by applying the exemptions to the December Decision too narrowly and without considering the unique circumstances of the UOF's ostriches.

CFIA Failed to Follow its Own Policy of "Transparent and Open by Design"

48. The CFIA published an Open and Transparent Agency Policy (the "Policy"). In its Policy statement, CFIA claims that one of its guiding principles is being "open by design", and its commitment to offering stakeholders and CFIA staff with clear, plain language explanations and a commitment to "transparent decision making" and "accessible and timely information".
49. Under the Policy, requirement 7.2 states that "information must be released in a timely manner that allows users to derive maximum benefit from them for decision-making purposes".
50. Despite committing to offering stakeholders with transparent decision making, the CFIA has failed to follow its own Policy by failing to publish the requirements its stakeholders would need to meet in order to qualify under any exemption from a stamping-out order, and by failing to publish the internal decision-making process it follows in making its stamping-out exemption decisions.

51. CFIA also failed to follow its own Policy by failing to communicate its “transparent decision making” process to UOF in making its January Decision.
52. In making its January Decision, CFIA was neither open by design, transparent, nor accessible. Its decision making process, and the requirements that must be met in order for a stakeholder’s animals to qualify for any exemption are unclear, inaccessible, concealed, and incomprehensible.

The January Decision was Unreasonable

53. Under s.48(2) of the *Health of Animals Act* the Minister of Agriculture and Agri-Food (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.
54. The Minister has the discretion to order the UOF to treat its ostriches against HPAI rather than to impose a stamping-out order. The CFIA acted unreasonably by failing to exercise this discretion in deciding whether UOF qualified under any exemption and failing to consider treatment as an alternative to stamping-out the ostriches, when making its January Decision.
55. The CFIA also acted unreasonably in making the January Decision by construing its exemptions to “stamping out” too narrowly. It both 1) construed its existing exemptions too narrowly in the circumstances, and 2) failed to consider whether any exemptions to the December Decision should apply based on the unique circumstances of the UOF’s ostriches, the value the ostriches could provide to the scientific community, and the impact that would have on developing a response to HPAI.
56. The CFIA’s January Decision, which reinstates stamping-out of the UOF’s ostriches fails to adequately address the CFIA’s main concern of HPAI transmission to humans, domestic animals, and wildlife. Instead, stamping-out may further propagate this disease, whereas keeping the UOF’s ostriches alive, with the appropriate CFIA restrictions in place, would assist in fighting against the spread of HPAI.

The January Decision Interferes with Provincial Jurisdiction

57. Provinces have significant jurisdiction over health, including property and civil rights, as well as some jurisdiction over animal genetic development and animal labs.
58. The UOF's ostriches do not serve as food and they are not bred for human consumption of any kind. Nor are they a threat to the human, avian, or wildlife population.
59. The UOF operates as a farm and genetic laboratory for the purposes of producing immunoglobulin yolk known as IgY antibodies (the "Antibodies"), meant to advance genetic development and is thus primarily subject to the provincial authority.
60. The UOF's property and its research are subject to British Columbia's *Animal Health Act*.
61. Despite the UOF's operations being subject to the provincial authority, an inspector under the *Animal Health Act* has not been offered an opportunity to attend the UOF property, to conduct an inspection of its premises and laboratories, or to take samples and perform analyses and tests, pursuant to Part 4 and s. 24 and s.26 of the *Animal Health Act*.
62. Studying the affected ostriches provides the Province of British Columbia with an important opportunity to study immunity to HPAI and protect the interests of British Columbians. The provincial authority should be afforded an opportunity to inspect UOF and to issue an order and exemptions based on its findings.
63. Pursuant to s.29(2) of the *Animal Health Act*, the provincial authority has the right to determine whether or not preventative measures would be adequate to protect animal health or public health, in relation to diseases that may be transmissible from animals to humans, when making a decision with respect to issuing an order for the slaughter or destruction of an animal.
64. Pursuant to s.39 and s.40 of the *Animal Health Act*, the provincial authority has the right to make an order based on a diagnostic examination being conducted on the animal, and make an order that a person do anything that the inspector reasonably believes is necessary for the purposes of (a) determining the presence of a notifiable or reportable disease; (b) to identify, prevent, control or eradicate a notifiable or reportable disease; (c) to bring the person into compliance with this Act or a regulation made under it, or a term or condition of that person's license or permit.

65. Pursuant to s.41(f) of the *Animal Health Act*, the provincial authority has the right to have an animal, an animal product or by product, or a thing examined by a specified person or under the supervision or instructions of a specified person. If a diagnostic examination of the animal or animal product or by product is ordered, the inspector must include with their order an instruction to the examiner to provide a copy of the results of the examination to the person responsible for the animal.
66. The province has legislation in place, which provides a detailed breakdown of the steps the province may take if it becomes aware of an animal that is affected or is suspected to be affected by a notifiable or reportable disease.
67. The *Animal Health Act* grants the province with a certain level of discretion to vary or terminate its orders, to order further testing and examination of an animal, and to make general orders to do anything reasonably necessary.
68. The Province of British Columbia should be granted an opportunity to weigh in on available exemptions to the December Decision given the Province's interest in studying the ostriches' immune response and developing effective measures to combat HPAI.
69. This matter presents a division of powers issue, and a constitutional challenge pending the determination of the jurisdiction of the CFIA.

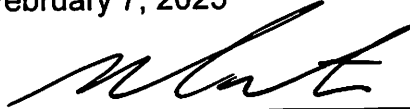
The January Decision Violates UOF's Charter Rights

70. Under the statutory *Canadian Bill of Rights*, everyone has the right to property.
71. The ostriches, which are the subject of the January Decision, are considered UOF's property.
72. By making the January Decision and thus imposing a stamping-out order on the UOF's ostriches, rather than considering other viable and scientifically-proven alternatives to addressing the HPAI concern, CFIA is wrongfully infringing on UOF's right to use and enjoy its property.

This application will be supported by the following material:

1. Affidavit of David Dilinski sworn January 29, 2025;
2. Affidavit of Karen Espersen sworn January 29, 2025;
3. Affidavit of Dr. Steve Pelech sworn January 30, 2025;
4. Affidavit of Katrina Jones sworn January 30, 2025; and

February 7, 2025



Signature of solicitor for the Applicant

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