

F I L E D	FEDERAL COURT COUR FÉDÉRALE	D É P O S É
	30-JAN-2025	
	Jessica Lorch	
Ottawa, ONT	1	

Court File No. T-294-25**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.

January 30, 2025

Jessica Lorch
Issued by: Registry Officer

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

TO: CANADIAN FOOD INSPECTION AGENCY

Department of Justice Canada

Attention: 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

Application

This is an application for judicial review in respect of:

1. A notice issued by the Canadian Food Inspection Agency ("CFIA") dated December 31, 2024, requiring the Applicant, Universal Ostrich Farms Inc. 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.

The Applicant makes an application for:

1. An order of certiorari to quash the decision of the Canadian Food Inspection Agency ("CFIA") dated December 31, 2024, requiring the Applicant to dispose of its animals or things by February 1, 2025 (the "December Decision"); 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. and the December Decision

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 globulin 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, and later advised UOF that the test was positive for H5N1 Avian Influenza.
21. On January 2, 2025 CFIA issued the December Decision, which was dated December 31, 2024.
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 representative told UOF that, based on the information CFIA had gathered, the UOF ostriches fall into the "birds classified as having rare and valuable genetics", which provided an exemption from the December Decision.
24. The CFIA representative told UOF to send documents regarding their cooperation with Dr. Tsukamoto, which UOF did.
25. On January 10, 2025 CFIA denied the exemption saying the exemption requires a "significant burden of proof" and "robust processes must be in place".
26. CFIA had not disclosed to UOF the test or burden of proof. Instead, UOF thought CFIA had already placed the ostriches in the "bird classified as having rare and valuable genetics category".
27. If CFIA had told UOF about the "significant burden of proof" then it would have changed UOF's approach to the exemption process.

28. Ostriches have robust immune systems, and by mid-January 2025 the herd had recovered from the illness.
29. Although 69 ostriches died, the last ostrich to die from H5N1 type symptoms was on January 15, 2025.
30. A term of the quarantine order prohibits UOF from testing or treating the ostriches. However, based on expert opinions obtained, it is highly likely the ostriches have reached herd immunity, and it is extremely unlikely they would be shedding the virus to each other, or people, birds, and other animals.
31. In fact, the opinion suggests it is safer to keep the ostriches with herd immunity, rather than killing them and bringing in ostriches without the immunity.
32. There are approximately 390 ostriches that are now healthy, but the December Decision mandates that they be killed.

CFIA Breached the Principles of Natural Justice and Procedural Fairness

33. On January 2, 2025, the CFIA case officer advised the UOF that its ostriches fell into the “birds classified as having rare and valuable genetics” category and outlined a brief list of documents that UOF would need to provide to CFIA for the purposes of completing the “exemption from depopulation” process. UOF provided the CFIA with the requested documentation within a matter of days.
34. In its decision letter dated January 10, 2025, CFIA advised that UOF’s request for an exemption to depopulation of its ostriches based on them having “rare and valuable poultry genetics” was denied (the “Exemption Decision”).
35. The CFIA failed to observe procedural fairness in making its Exemption Decision.
36. 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.).
37. 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).
38. The CFIA’s Exemption Decision and December Decision will result in significant financial harm to UOF and its employees, as well as have a significant negative impact on UOF’s ongoing research collaborations and on bio-medical research advancements that specialize in HPAI, IgY antibody, and ostrich research.

39. 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.
40. The simple overarching requirement in administrative decision-making is fairness (*Mavi*, 2011 SCC 30 at para 42).
41. 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.
42. The CFIA made representations in its January 2, 2025 email to UOF that a certain procedure would be followed to substantiate that UOF's ostriches fall into the "birds classified as having rare and valuable genetics" category (the "Rare and Valuable Category"), and as a result they may be exempt from stamping-out based on qualifying under that category. CFIA gave UOF a legitimate expectation with respect to the procedure and result.
43. The CFIA led UOF to believe that CFIA had a formal procedure in place that it would follow in making its decision with respect to whether UOF's ostriches qualified under the Rare and Valuable Category.
44. The CFIA led UOF to believe that because its ostriches qualified under the Rare and Valuable Category, they would be exempt from stamping-out.
45. Despite making these representations and advising UOF what documents it must provide to the CFIA, the CFIA failed to follow its own procedure, and rejected the exemption request.

46. CFIA breached the rules of procedural fairness by failing to notify UOF of the requirements that it would need to meet in order to qualify under the Rare and Valuable Category, and it failed to outline the procedure that would be followed in making the decision with respect to the exemption.

CFIA Failed to Follow its Own Policy of “Transparent and Open by Design”.

47. 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”.
48. 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”.
49. 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 to qualify under the Rare and Valuable Category and failing to publish the internal decision-making process CFIA follows in making its stamping-out exemption decisions.
50. CFIA also failed to follow its own Policy by failing to communicate its “transparent decision making” process to UOF in making its Exemption Decision.
51. In making its Exemption 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 under the Rare and Valuable Category are unclear, inaccessible, and incomprehensible.

The December Decision was Unreasonable

52. The World Organisation for Animal Health (WOAH) is the international standard-setting organization for the safe trade in animals and animal products under the SPS Agreement of the World Trade Organization. This agreement allows member countries, including Canada, to adopt their measures necessary to protect human, animal, and plant life and health, provided these measures are not applied in a discriminatory manner or as a disguised restriction on international trade.

53. The CFIA is Canada's national animal health authority and the lead authority for the prevention, detection, response and management of reportable diseases in domestic mammals and poultry in Canada.
54. The WOAHA standards influence the CFIA's regulations and practices, ensuring that Canadian measures align with international standards to facilitate safe trade and protect animal health.
55. The CFIA is the liaison with the WOAHA. Through its legislative authority under the *Health of Animals Act*, the CFIA implements WOAHA's standards to manage the importation and health of animals in Canada.
56. The Applicant relies on the following standards published by WOAHA:
- i. The World Organisation for Animal Health Terrestrial Animal Health Code (2024) (the "WOAHA Health Code"); and
 - ii. The World Organisation for Animal Health Manual of Diagnostic Tests and Vaccines for Terrestrial Animals (the "WOAHA Manual").
57. In Article 10.4.1 of the WOAHA Health Code, WOAHA acknowledges that the use of vaccination against the high pathogenicity avian influenza virus ("HPAI") may be recommended under specific conditions.
58. In the glossary of the WOAHA Health Code, vaccination is defined as the administration of a vaccine, in accordance with the manufacturer's instructions and the Terrestrial Manual (the WOAHA Manual), when relevant, with the intention of inducing immunity in an animal or group of animals against one or more pathogenic agents.
59. In the WOAHA Manual, WOAHA states that vaccination against HPAI has previously been used during outbreaks in Mexico, Pakistan, and Hong Kong. Additional countries have also implemented emergency and/or preventative vaccination programs for HPAI control, including several European Union countries, which have permitted preventative vaccination to be used against HPAI for outdoor poultry and zoo birds in the 2000s.
60. The WOAHA Manual states that experimental work for HPAI has shown that potent and properly administered vaccines increase resistance to, or prevent infection, protect against clinical signs and mortality, prevent drops in egg production, reduce virus shedding from respiratory and intestinal tracts, protect from diverse field viruses within the same haemagglutinin subtype, protect from low and high challenge exposure, and reduce excretion and thus prevent contact transmission of challenge virus.

61. The CFIA, on the Government of Canada's webpage, also acknowledges that vaccination has and can be used as an effective tool to fight against HPAI. CFIA states that vaccination has been used in various poultry species, and its effectiveness in preventing clinical signs and mortality is well documented.
62. CFIA has even formed the Highly Pathogenic Avian Influenza Vaccination Task Force in June 2023 to study the development and implementation of an HPAI vaccination program in Canada, recognizing vaccination as a viable means of fighting against HPAI.
63. Despite being presented with an optimal opportunity to utilize the vaccination alternative and order UOF to vaccinate its ostriches against HPAI, the CFIA acted unreasonably by failing to consider vaccination as an option and instead resorting to the ill-suited method of stamping-out the herd.
64. 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.
65. 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 and failing to consider treatment as an alternative to stamping-out the ostriches.
66. "Stamping out" the UOF ostriches does not adequately address CFIA's concerns of the HPAI infecting humans, domestic animals and wildlife.
67. Dr. Pelech states that it is extremely unlikely that the ostriches would be shedding the virus to each other or to humans, other birds, and animals. The longer the ostriches remain healthy, the lower the risk is of potential transmission of HPAI.
68. By stamping-out the UOF's ostriches and bringing in naïve ostriches (that have had no previous exposure to HPAI and thus may not have the naturally acquired immunity) it would simply re-create a geographical location for potential transmission of HPAI virus via the wild birds that visit the UOF property.
69. Once the ostriches achieve natural immunity to HPAI, the flock may actually offer some protection to wild birds from future infection of HPAI. Wild birds that come onto the UOF property would be less likely to visit neighbouring sites and

infect the birds or other animals located there, which may be naïve to HPAI and thus vulnerable to getting sick and further propagating the spread of the disease.

70. The CFIA's decision to impose 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 December Decision Interferes with Provincial Jurisdiction

71. Provinces have significant jurisdiction over health, including property and civil rights, as well as some jurisdiction over animal genetic development and animal labs.
72. 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.
73. 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.
74. The UOF's property and its research are subject to British Columbia's *Animal Health Act*.
75. 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 and to conduct an inspection of its premises and laboratories, pursuant to Part 4 and s. 24 and s.26 of the *Animal Health Act*.
76. Studying the affected ostriches provides the Province of British Columbia with an important opportunity to study immunity to H5H1 and protect the interests of British Columbians. The provincial authority should be afforded an opportunity to inspect UOF and to issue an order based on its findings.
77. This matter presents a division of powers issue, and a constitutional challenge pending the determination of the jurisdiction of the CFIA.

The December Decision Violates UOF's Charter Rights

78. Under the statutory *Canadian Bill of Rights*, everyone has the right to property.

79. The ostriches, which are the subject of the December Decision, are considered UOF's property.
80. By 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

January 30, 2025



Signature of solicitor
MICHAEL D. CARTER
1321 Johnston Road
White Rock, BC V4B 3Z3
Telephone: 604-536-5002
Fax: 604-536-5007

Email: michael@clevelanddoan.com

I HEREBY CERTIFY that the above document is a true copy of the original filed in the Court./

JE CERTIFIE que le document ci-dessus est une copie confirme
À l'original déposé au dossier de la Cour fédérale.

Filing Date 30-JAN-2025
Date de dépôt : _____

Dated 31-JAN-2025
Fait le : _____

Jessica Lorch
Registry Officer