Federal Court Cour fédérale

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Citation: 2025 FC 878

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

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.

[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.

[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."

[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.

[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."

[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

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.

[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.

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.

[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

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.

[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.

[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.

[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.

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.

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

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);*

- *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

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].

[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.

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

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.

[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

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.

[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."

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.

[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.

[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.

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.

[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.

[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.

[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

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

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)

[*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.

[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.

[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.

[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.

[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.

[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.

[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."

[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."

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.

[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.

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.

[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.

[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

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*.

[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.

[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

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

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-

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

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.

[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.

[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

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.

(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.

[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

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.

[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.

[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

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

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.

[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*.

[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

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.

[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

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

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.

[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*.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

[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

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

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.

[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

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

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;

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.

[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…

> 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

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.

[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.

[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

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.

[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.

(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.

[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.

[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

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.

[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.

[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

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.

[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.

[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

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.

[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.

[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.

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

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

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.

[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.

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.

[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.

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

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

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.

…

[…]

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

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

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.

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

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.

which the requirement is to be met.

…

Disposal and Treatment

Disposal of affected or contaminated animals and things

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.

Treatment

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

[…]

Disposition et traitement

Mesures de disposition

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

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

Traitement

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

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

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

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

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

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

	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.

(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;

(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
[…]			

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-294-25 AND T-432-25
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