Federal Court of Appeal | Cour d'appel fédérale

Date: 20250821

Docket: A-205-25

Citation: 2025 FCA 147

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

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

Appellant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

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

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

REASONS FOR JUDGMENT OF THE COURT BY: THE COURT

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REASONS FOR JUDGMENT OF THE COURT

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

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

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

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

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

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

I. Factual and Regulatory Background

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

A. *Avian influenza and Canada's response*

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

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

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

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

… […]

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

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

[12] The 2022 ERP is updated based on lessons learned from past outbreaks in Canada. This case was the first time the CFIA applied the 2022 ERP to an outbreak in ostriches. To be clear, however, the Stamping-Out Policy as conceived applies to any susceptible bird: *FC Decision* at para. 102. Ostriches are such a bird. HPAI is not as lethal in ostriches, especially older birds, as in other domesticated flocks, like chickens or turkeys, where most will die of an infection. However, according to the CFIA's evidence, infection in ostriches raises particular risks.

Exposed and infected ostriches may show no clinical signs of disease but yet be shedding the virus and act as a reservoir for the further spread of infection to people, livestock, and wildlife. Moreover, ostriches may contribute genetic mutations to avian influenza viruses that increase its adaptability to mammals.

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

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

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

[15] The appellant has operated its farm for over 30 years as a family business. A pond at the heart of the premises and the frequent visits to it by wild ducks, sometimes numbering in the hundreds, render the farm particularly vulnerable to virus transmission to and from the ostriches, HPAI infection, and long-term contamination: *FC Decision* at paras. 16, 24. By early December 2024, the appellant reportedly housed approximately 450 ostriches in outdoor pens at the farm: *FC Decision* at para. 27.

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

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

[18] The CFIA intervened on December 28, 2024, following an anonymous tip to its sick bird call line and imposed quarantine measures: *FC Decision* at paras. 29–30. On December 30, 2024, and in the weeks that followed, the CFIA's inspectors visited the site and noted various

biosecurity risks, including wild bird activity, staff and equipment moving between open pens, and breaches of quarantine protocols, as well as ostrich carcasses laying dead in the pens or being dragged between pens without proper precautions: *FC Decision* at paras. 31, 256.

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

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

II. The Decision of the Federal Court

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

[22] The Federal Court upheld the Stamping-Out Policy as a reasonable exercise of the CFIA's discretion within the confines of the *Act*'s text and purpose, the available science, and international trade considerations: *FC Decision* at para. 157. The Federal Court also confirmed the reasonableness of the Notice to Dispose since the Stamping-Out Policy dictated that result: *FC Decision* at para. 197. The Federal Court further found that no impermissible fettering of the Minister's discretion occurred since the CFIA, acting as the delegate of the Minister and pursuant to the Minister's discretion under section 48 of the *Act*, could dictate the process to follow in the Stamping-Out Policy in response to a positive test result for HPAI. In addition, the overall process permitted sufficient circumstantial discretion at the exemption stage: *FC Decision* at para. 192. The Exemption Denial was also held to be reasonable as the Exemption Committee's reasons demonstrated that it properly understood the relevant criteria, adequately engaged with the evidence, accounted for its decision's impact on the appellant, and the outcome it reached was defensible: *FC Decision* at paras. 232–266.

III. Analysis

A. *Should the fresh evidence be admitted?*

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

(1) The current health status of the flock

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

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

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

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

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

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

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

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

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

(2) Evidence of ineffective assistance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Standard of review*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. *The Appellant's Arguments*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. *Were the impugned decisions reasonable?*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Disposition

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

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

"René LeBlanc"
J.A.

"Gerald Heckman"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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