Federal Court of Appeal | Cour d'appel fédérale

Date: 20250912

Docket: A-205-25

Citation: 2025 FCA 164

Present: **HECKMAN J.A.**

BETWEEN:

UNIVERSAL OSTRICH FARMS INC.

Appellant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 12, 2025.

REASONS FOR ORDER BY: HECKMAN J.A.

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REASONS FOR ORDER

HECKMAN J.A.

I. Introduction

[1] The appellant, Universal Ostrich Farms Inc., seeks a stay of proceedings with respect to the judgment of this Court in *Universal Ostrich Farms Inc. v. Canadian Food Inspection Agency*, 2025 FCA 147 (the Judgment). On August 21, 2025, this Court dismissed the appellant's appeal (the Appeal) of a judgment of the Federal Court (2025 FC 878) dismissing the

appellant's application for judicial review of two decisions of the respondent, the Canadian Food Inspection Agency (CFIA). These decisions were made under section 48 of the *Health of Animals Act*, S.C. 1990, c. 21 (the *Act*) in accordance with the CFIA's Highly Pathogenic Avian Influenza 2022 Event Response Plan [HPAI 2022 ERP].

[2] Under the HPAI 2022 ERP, laboratory confirmation of the H5-subtype highly pathogenic avian influenza (HPAI) in infected premises triggers the application of a "Stamping-out Policy". The policy, designed to eliminate outbreaks by "stamping out" the HPAI virus, provides for the issuance of a notice to dispose of all susceptible animals in the same "epidemiological unit" (a group of animals with the same likelihood of exposure to HPAI), the safe disposal of the animal carcasses and the cleaning and disinfection of the affected premises.

[3] In the first decision, the CFIA issued a notice to dispose on December 31, 2024 (the Notice to Dispose), requiring 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 HPAI. In the second decision, an exemption denial dated January 10, 2025 (the Exemption Denial), the CFIA denied the appellant's request to exempt some of its ostrich flock from destruction.

[4] The appellant has not yet complied with the Notice to Dispose because the Federal Court stayed that decision, pending determination of the judicial review application in the Federal Court (*Universal Ostrich Farm Inc. v. Canadian Food Inspection Agency*, 2025 FC 303). Thereafter, a single judge of this Court further stayed the decision pending disposition of the

appeal in this Court (*Universal Ostrich Farms Inc. v. Canadian Food Inspection Agency*, 2025 FCA 122 [*FCA Stay Decision*]).

[5] The appellant has brought a motion seeking an order that proceedings be stayed with respect to the Judgment under subsection 65.1(2) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and paragraph 50(1)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Stay Motion). Specifically, the appellant seeks an order restraining the CFIA from enforcing the Notice to Dispose and from taking steps to depopulate the flock pending: (i) the disposition of the appellant's impending application for leave to appeal to the Supreme Court of Canada and, if leave is granted, the final disposition of the appeal; and (ii) the Minister of Agriculture and Agri-Food's (the Minister) reconsideration of the Notice to Dispose in light of changed circumstances. In the alternative, the appellant seeks a stay of 30 days to permit the appellant to file its leave application and, if necessary, seek further relief from the Supreme Court.

[6] On September 6, 2025, this Court granted an interim stay restraining the CFIA from enforcing the Notice to Dispose until it rendered its decision on the Stay Motion on the basis of a full record and written arguments from both parties.

[7] Having considered the arguments of the parties and the evidence filed with the Court in support of the Stay Motion, and for the following reasons, I am dismissing the appellant's motion for a stay.

II. Issues and Analysis

A. *Preliminary issue – admissibility of the reply affidavits in the appellant's reply*

[8] Before considering the merits of the Stay Motion, I must first address a preliminary question that relates to the reply filed by the appellant.

[9] In the order granting the appellant an interim stay pending disposition of the Stay Motion, I provided that the appellant could file a reply on September 10, 2025. Rule 369.2(3) of the *Federal Courts Rules*, SOR/98-106 provides that a moving party to a motion may reply to a responding motion record by serving and filing written representations in reply. The Rule does not allow for reply evidence to be filed and a party seeking to do so must therefore seek leave of the Court. The filing of reply evidence is permitted only in unusual circumstances (*Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 121, 2016 CarswellNat 1363 at para. 11 [*Amgen*]):

> [9] Sometimes upon the filing of a responding motion record on a motion in writing, new issues arise. Or sometimes the responding motion record causes certain issues, understandably glossed over in the moving party's motion record, to assume markedly greater importance or to be transformed.
>
> [10] In such circumstances, considerations of procedural fairness and the need to make a proper determination can require the Court to allow the filing of reply evidence in a motion in writing:
>
> - *Procedural fairness*. Sometimes a party has to be given the opportunity to file evidence on an issue that it could not practically or meaningfully address earlier.
>
> - *The need to make a proper determination*. Where an issue in the motion might determine its outcome, sometimes the Court

> must allow additional evidence to be filed so that it can decide that issue on the basis of all proper and relevant facts, not just one side's version of the facts.

[10] The requirement that new issues be raised in the responding motion record or assume markedly greater importance because of that record reflects "a well-known rule of evidence that a plaintiff cannot split its case by adducing evidence that is merely confirmatory of its case in-chief" and that "reply evidence must relate to issues raised in the defence's case that were not raised in the plaintiff's case in-chief" (*Amgen* at para. 12).

[11] On this Stay Motion, the appellant bears the burden of establishing, through evidence, that it would suffer irreparable harm if the stay were refused and that it, not the respondent (and the public interest), would suffer the greatest harm from the granting or refusal of a stay. The appellant's motion record therefore clearly raises the issues of what harm the appellant will suffer if the stay is refused and what will be the harm to the public interest if the stay is granted.

[12] The evidence filed in the respondent's motion record addressed these issues. It did not raise new issues. I have carefully read and considered the appellant's reply affidavits. I find that they adduce evidence that is confirmatory of the appellant's case in-chief: that it and not the respondent will suffer the greater harm. By including them in its reply, the appellant impermissibly attempts to split its case. The unusual circumstances set out in *Amgen* do not apply here. Accordingly, while I have considered the appellant's reply submissions, I have not taken the reply affidavits into account.

[13] I note, however, that even if I had found the evidence in the reply affidavits to be admissible, that evidence would not have changed my conclusions, laid out in the following section, on the presence of irreparable harm or on the balance of convenience.

B. *Should this Court grant a stay under section 65.1 of the Supreme Court Act?*

[14] The appellant must meet the requirements of the tripartite test for granting a stay or interlocutory injunction set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*]. Specifically, it must establish that there is a serious issue to be determined, that it will suffer irreparable harm if the stay is not granted, and that the balance of convenience favours granting the stay. There are important and considerable interconnections between these three factors, which form the framework within which the Court must assess whether a stay is warranted (*Mosaic Potash Esterhazy Limited Partnership v. Potash Corporation of Saskatchewan Inc.*, 2011 SKCA 120). The fundamental question is whether granting a stay is just and equitable in all the circumstances of the case (*Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824 at para. 25). Nonetheless, while the strength in one factor may balance out weakness in another, a stay will not be issued where a prong of the test is not met (*College of Physicians and Surgeons of Ontario v. Kilian*, 2023 ONCA 281 at para. 8, citing *Haudenosaunee Development Institute v. Metrolinx*, 2023 ONCA 122 at para. 6).

[15] However, where an application for a stay is brought under section 65.1 of the *Supreme Court Act*, the framework to decide the application is adjusted by adding two preliminary or

threshold steps and by adapting the requirement of a serious question to be tried in the *RJR-MacDonald* framework. Section 65.1 confers jurisdiction to grant a stay upon a judge of the court appealed from (*Merck & Co. v. Nu-Pharm Inc.*, 2000 CarswellNat 747, 255 N.R. 383 at para. 3 [*Merck*]). In the case at bar, where the appellant has not yet filed an application for leave to appeal to the Supreme Court, that jurisdiction is conferred by subsection 65.1(2):

Stay of Execution	**Sursis d'exécution**
…	[…]
Additional power for court appealed from	**Pouvoir de la juridiction inférieure**
(2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.	**(2)** La juridiction inférieure ou un de ses juges, convaincu que la partie qui demande le sursis a l'intention de demander l'autorisation d'appel et que le délai entraînerait un déni de justice, peut exercer le pouvoir prévu au paragraphe (1) avant la signification et le dépôt de l'avis de demande d'autorisation d'appel.

[16] The test to be met for granting a stay under subsection 65.1(2) was set out by Cromwell J.A., as he then was, in *Nova Scotia (Minister of Community Services) v. F.(B.)*, 2003 NSCA 125, 2003 CarswellNS 613 at paras. 10-12 [*F.(B.)*]. Under this test, two preliminary steps precede consideration of the *RJR-MacDonald* factors.

[17] The first of these steps is a requirement that the appellant establish that it intends to seek leave to appeal the Judgment to the Supreme Court of Canada. Based on the affidavit evidence submitted by the applicant, I am satisfied that it intends to do so by October 3, 2025.

[18] Second, the appellant must demonstrate that delay – waiting to consider the stay application until after the leave application has been filed – would result in a miscarriage of justice. In *F.(B.)* at paragraph 16, Cromwell J.A. appears to adopt a test of irreparable harm in assessing whether a miscarriage of justice would result: "if a stay is found to be appropriate, it could come too late [to avoid injustice] if delayed until after the leave application has been filed" (see also *Lamouche v. Calaheson*, 2016 ABCA 227, 2016 CarswellAlta 1410 at para. 11). Assuming, without deciding, that this interpretation of miscarriage of justice – one that benefits the appellant – is correct, and for the reasons set out below in the analysis of irreparable harm, I conclude that destruction of the appellant's ostriches before the leave application is filed would cause the appellant irreparable harm.

[19] Having fulfilled the preliminary steps, the appellant must satisfy the *RJR-MacDonald* factors, adapted to the context of an application for leave to appeal to the Supreme Court.

(1) Has the appellant demonstrated a serious issue to be tried?

[20] Since this is a stay application pending appeal to the Supreme Court of Canada, the appellant must demonstrate, under the first *RJR-MacDonald* criterion, that the appeal raises a serious or arguable issue considering the criteria for leave to appeal set out in subsection 40(1) of the *Supreme Court Act* (*Merck* at para. 11):

Appellate Jurisdiction	**Juridiction d'appel**
…	[…]
Appeals with leave of Supreme	**Appel avec l'autorisation de la Cour**

Court

40 (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.	**40 (1)** Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout jugement, définitif ou autre, rendu par la Cour d'appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l'affaire en question, ou par l'un des juges de ces juridictions inférieures, que l'autorisation d'en appeler à la Cour ait ou non été refusée par une autre juridiction, lorsque la Cour estime, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou importance à tout égard, qu'elle devrait en être saisie et lorsqu'elle accorde en conséquence l'autorisation d'en appeler.

[21] In other words, the appellant must show that the appeal raises "an arguable issue of public importance, an important issue of law or mixed law and fact, or that the matter is otherwise of such a nature and significance as to warrant decision by the Supreme Court as required for leave to appeal to that Court under s. 40 of its *Act*" (*F.(B.)* at para.11).

[22] As observed by the Alberta Court of Appeal, applying for a stay to the court appealed from under section 65.1 of the *Supreme Court Act* is "somewhat of an awkward fit":

> The dominant question on an application for leave to the Supreme Court, particularly in civil cases, is whether, in the opinion of that Court, the appeal

> presents an issue of public importance. I do not purport to know the opinion of the Supreme Court. I can only assess public importance through the lens of my own judgment. I must apply my own judgment; otherwise the "serious question" factor in the *RJR* analysis would reduce to one of theoretical possibility.
>
> (*Cabin Ridge Project Limited v. Alberta*, 2025 ABCA 109 at para. 15)

[23] Having set out the parameters of the serious issue criterion, I turn to the appellant's submissions on this point. The appellant claims that three questions of public or national importance arise from the Judgment.

[24] First, according to the appellant, this Court itself identified a question of public or national importance in its reasons for judgement. The Court noted, at paragraph 47, that before the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the leading authority on judicial review of administrative action, courts assessed the reasonableness of discretionary policy decisions by focusing on whether they were made in bad faith, did not conform with principles of natural justice or relied on considerations that were irrelevant or extraneous to the legislative purpose. These categories of unlawful decisions, referred to as "nominate categories" (*Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245 at paras. 66-69), were set out in *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2, 1982 CanLII 24 [*Maple Lodge*].

[25] The Court observed that, following *Vavilov*, Federal Court judges had expressed differing views on the role of the nominate categories in the reasonableness review of discretionary policy decisions. Some judges had held that policy decisions would only be found unreasonable if made in bad faith, for considerations extraneous to the legislative purpose, or if they were irrational,

incomprehensible or an abuse of discretion. In other words, judicial intervention on a reasonableness standard was restricted to decisions that fell within the nominate categories. Some judges held that judicial intervention was not limited in this manner and that reasonableness review should proceed according to the approach laid out by the Supreme Court in *Vavilov*. The Court held as follows:

> [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 *Vavilov*ian 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*.

[26] The appellant submits that, in the passage quoted above, the Court acknowledged "fundamental uncertainty" regarding the applicable legal framework for reviewing discretionary decisions and raised the following question of national importance in administrative law that transcends the immediate parties:

> When this Court acknowledges that the legal framework for reviewing discretionary administrative decisions requires "reformulation" post-*Vavilov*, how should lower courts proceed in the interim, and what level of deference is owed to administrative interpretations of discretionary powers?

[27] With respect, this is at best a tortured interpretation of the Court's reasons. As is readily apparent from the passage quoted above, the Judgment does not acknowledge that "the Law" requires reformulation, as claimed by the appellant. Paragraph 49 of the Judgment states that the Supreme Court's decision in *Vavilov* demands a reformulation of how reasonableness review applies to discretionary policy decisions. Paragraphs 50-52 set out that required reformulation: *Vavilov* provides that reasonableness review focuses on whether a decision exhibits justification, transparency and intelligibility and is justified in relation to the relevant factual and legal constraints that bear on it; an approach that restricts reasonableness review of discretionary policy decisions to the nominate categories in *Maple Lodge*, rather than treating these categories as examples of unreasonable decisions, is inconsistent with *Vavilov*. As recently observed by the Supreme Court, "*Vavilov* recognized the continued relevance and application of prior jurisprudence insofar as that jurisprudence is consistent with *Vavilov*'s framework for determining the appropriate standard of review and its principles governing robust reasonableness review" (*Auer v. Auer*, 2024 SCC 36 at para. 35, emphasis added).

[28] To put the matter plainly, there is no uncertainty. *Vavilov* supplies the clarity that the appellant claims is lacking, and to the extent that there was a conflict in the Federal Court jurisprudence on the application of reasonableness review to discretionary policy decisions, the Judgment has resolved it.

[29] The Supreme Court's objective, in *Vavilov*, was to develop a coherent and unified approach to judicial review that applies to a spectrum of administrative decision-makers, including ministers, making decisions that run the gamut from "matters of 'high policy' on the one hand and 'pure law' on the other" (para. 88). This includes the CFIA decisions reviewed by the Court. Reasonableness review remains a single standard, requiring decisions to be justified by the decision-maker in light of the applicable legal and factual constraints. Lower courts, including this Court, must follow the approach to reasonableness review set out in *Vavilov*. That is why this Court emphatically declared, at paragraph 5 of the Judgment, that "the law we are bound to apply inevitably leads to the conclusion that this appeal must be dismissed".

[30] In any event, I agree with the respondent that the continued relevance of the *Maple Lodge* factors is not germane to the disposition of the appellant's case, since accepting that reasonableness review is restricted to fitting the decision under review into one of the nominate categories would make a finding that the CFIA's decisions are unreasonable even less likely. As noted by the Ontario Court of Appeal, "if there is little or no prospect that the findings or the outcome will be altered in a given case, leave to appeal may be denied regardless of the fact that issues of public importance are addressed in the case" (*R. v. Theriault*, 2021 ONCA 554 at para. 37).

[31] I therefore find that it is not reasonably arguable that the Supreme Court may conclude that the first question raised by the appellant warrants the granting of leave to appeal under the criteria set out in section 40 of the *Supreme Court Act*.

[32] The appellant submits that a second question of national importance warranting a decision by the Supreme Court arises from alleged internal contradictions in the judgment of the Federal Court:

> Can an administrative body properly claim "no discretion" exists under permissive statutory language ("may") when exercising emergency powers that affect fundamental property and livelihood interests?

[33] I note first that the appellant's submissions on this question do not engage with the reasons of the Court. It stands to reason that an application to the Supreme Court for leave to appeal from the judgment of a court of appeal should be anchored in the reasons of that court. That is particularly true in the circumstances of this case, where the Court conducted a fresh assessment of the reasonableness of the CFIA's decisions and accorded no deference to the Federal Court's application of that standard of review (Judgment at paras. 38, 45).

[34] Secondly, and most importantly, the appellant's proposed second question mischaracterizes both the respondent's position in the Appeal and the Court's reasons for judgement. The Respondent did not argue that "no discretion exists" in the Minister's exercise of the authority to order the disposal of animals under section 48 of the *Act*. Rather, it submitted that the Minister had reasonably exercised this discretion, in the specific context of responding to the detection of the H5N1 strain of HPAI in poultry operations, such as the appellant's ostrich

farm, by adopting a policy of general application requiring the issuance of a notice to dispose but allocating residual discretion to a specialized committee to exempt from depopulation some of the poultry covered by the notice.

[35] The Court concluded that, in light of the broad discretion afforded to the Minister and the CFIA under section 48 of the *Act* (as confirmed in its prior jurisprudence), the evidence in the CFIA's possession relating to the susceptibility of poultry, including ostriches, to avian influenza and the risks of HPAI to domestic disease control, public health and Canada's ability to export poultry to its international trading partners, it was reasonable for the CFIA to exercise its discretion under section 48 by implementing a policy requiring the timely destruction of any type of bird that was both susceptible to HPAI and exposed to it rather than employing a more targeted response to avian flu outbreaks (Judgment at paras. 93-96).

[36] It follows that the Judgement does not raise the abstract question formulated by the appellant; it applies *Vavilov*'s approach to reasonableness review in order to determine whether the solution adopted by the CFIA was allowed by the legal and factual constraints that applied to the exercise of its discretion under section 48 of the *Act*. These comprise the governing statutory scheme, judicial decisions that have interpreted it and the evidentiary record before the CFIA in this specific case. I am not convinced that the questions raised by the Judgment go beyond the interests of the parties.

[37] For the foregoing reasons I am of the view that it is not reasonably arguable that the Supreme Court may conclude that the second question raised by the appellant warrants the granting of leave to appeal under the criteria set out in section 40 of the *Supreme Court Act*.

[38] The appellant proposes a third question for determination by the Supreme Court:

> What obligations, if any, do administrative decision-makers have to reconsider or reassess emergency orders when the factual foundation for those orders has fundamentally changed.

[39] The problem with this question is that it was not raised on the Appeal. The appellant did invite the Court, as part of its review of the reasonableness of the CFIA's decisions, including the HPAI 2022 ERP, to admit and consider evidence relating to the health status of its flock that postdated these decisions. The Court declined this invitation, relying on well-established case law that provides that, on a judicial review application of an administrative decision, only the evidence that was before an administrative decision-maker is relevant and, thus, admissible. The Court explained its decision as follows:

> [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.

[40] The Court did not purport to decide whether the CFIA or Minister was subject to a legal obligation to reconsider its decisions in light of new evidence. It could not do so because, as the respondent argues, the existence of such an obligation was not properly before the Court: it was neither an issue on the Appeal nor the subject of argument before it. At paragraph 28 of the Judgment, the Court clarified, as it did at paragraph 6, that the role of a reviewing court is limited to determining the reasonableness of the CFIA's decisions based on the record that was before it when it made those decisions. Accordingly, there is no basis to claims that the Court decided, in the Appeal, that the appellant has a legal right to a ministerial reconsideration or that reconsideration is a "Court-endorsed remedy".

[41] As the appellant's third question was not raised, argued or decided on the Appeal, I find that it is not reasonably arguable that the Supreme Court may conclude that it warrants the granting of leave to appeal under the criteria set out in section 40 of the *Supreme Court Act*.

[42] In addition to the three questions discussed in the preceding paragraphs, identified by the appellant as fundamental questions warranting leave to appeal by the Supreme Court, the

appellant resurrects the argument, made before this Court, that the Federal Court was overly deferential to the expertise of the CFIA in assessing the effectiveness of its policies and interpreting scientific data. The appellant argues that the Federal Court's approach insulates agency decisions from judicial review, contrary to the approach to reasonableness review set out in *Vavilov*, and constitutes an issue of national importance.

[43] Once again, the appellant's proposed issue focuses on alleged deficiencies in the Federal Court's reasons for judgment and ignores the Court's fresh application on the Appeal of the reasonableness standard to the CFIA's decisions. In the Judgment, the Court reiterated (at para. 71) and applied the *Vavilov* guidance that reviewing courts must refrain from reweighing and reassessing evidence, including scientific evidence, and 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. Moreover, the Court held that the Federal Court appropriately applied this approach to the scientific concerns raised by the appellant.

[44] Since the Court reaffirmed and applied this *Vavilov*ian approach to review the CFIA's weighing and assessment of evidence – an approach the appellant accepts is correct – I find that it is not reasonably arguable that the Supreme Court may conclude that this final issue warrants the granting of leave to appeal under the criteria set out in section 40 of the *Supreme Court Act*.

[45] Since the appellant has not satisfied the Court that its proposed appeal raises a serious or arguable issue considering the criteria for leave to appeal set out in section 40 of the *Supreme Court Act*, the appellant's motion for a stay under subsection 65.1(2), whether pending the filing

of its application for leave to appeal to the Supreme Court, the disposition of that application or final disposition of its appeal, must be denied. Although it is not strictly necessary, I consider the remaining two factors of the *RJR-MacDonald* test, irreparable harm and balance of convenience, because they were fully argued by the parties.

(2) Has the appellant demonstrated irreparable harm if the stay is denied?

[46] Irreparable harm is unavoidable harm that, by its quality, cannot be redressed by monetary compensation (*Canada (Attorney General) v. Oshkosh Defense Canada Inc.*, 2018 FCA 102 at para. 24 [*Oshkosh*]). To establish irreparable harm, the appellant must demonstrate "in a detailed and concrete way that it will suffer real, definite, unavoidable harm—not hypothetical and speculative harm—that cannot be repaired later" (*Oshkosh* at para. 25).

[47] The appellant argues that the destruction of its flock would result in irreparable harm with multiple dimensions. First, the appellant submits that its flock includes ostriches that are the product of continuous selective breeding and have an irreplaceable genetic and biological heritage. Moreover, it claims that the birds remaining in its flock, having survived exposure to HPAI, are invaluable subjects for pandemic preparedness research. The appellant has also provided evidence that destruction of its flock would prevent it from supplying ostrich eggs for antibody research and production, under exclusive agreements, to biotechnology companies with which it partners, and would deprive it of substantial investment revenue contingent on its ability to supply eggs from its flock. Finally, the appellant submits that destruction of the flock would

eliminate the very subject matter of the legal dispute and render moot any subsequent Supreme Court proceedings.

[48] The respondent argues that, since there is no realistic prospect that the issues advanced by the appellant as the basis of its application for leave to appeal could disturb the Judgment, denying the stay would cause it no irreparable harm. It submits that if the Court were to accept that irreparable harm flows automatically from an appeal rendered moot because a stay is not granted, then it would deprive courts of their discretion to decide questions of irreparable harm. Finally, the respondent argues that the appellant has submitted no evidence establishing that it has ever been engaged in a profitable antibody production business and that its evidence of irreparable harm relates to speculative future profits.

[49] In the *FCA Stay Decision*, the Court held that the appellant had provided evidence to the effect that the compensation to which it would be entitled for the destroyed ostriches under the *Compensation for Destroyed Animals and Things Regulations*, S.O.R./2000-233 would be significantly lower than their alleged average market value, establishing irreparable harm (*Universal Ostrich Farms Inc v. Canadian Food Inspection Agency*, 2025 FCA 122 at para. 8, citing *David Hunt Farms Ltd. v. Canada (Minister of Agriculture)* (C.A.), 1994 CanLII 3464 (FCA), [1994] 2 FC 625). Accordingly, I am satisfied that the destruction of the appellant's flock would seriously disrupt its business operations, cause it severe economic loss and render moot any subsequent proceedings before the Supreme Court. The appellant has in my view established that, unless a stay is granted, it will be exposed to irreparable harm.

(3) Does the balance of convenience favour granting a stay?

[50] The final component of the test to decide whether to grant interim relief involves "a determination of which of the two parties will suffer the greatest harm" from the granting or refusal of the stay (*Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110, 1987 CarswellMan 176 at para. 36). Where a party applies for interim relief in the context of proceedings opposing an administrative agency, the "interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of private litigants" (*Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280 at 303-4, cited with approval in *RJR-MacDonald* at para. 69). Where a stay restrains the actions of an administrative agency charged with the duty of promoting or protecting the public interest and where its actions were undertaken pursuant to that responsibility, irreparable harm to the public interest is nearly always established (*RJR-MacDonald* at para. 76). In this context, the role of the court in assessing the balance of convenience is circumscribed:

> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. (*RJR-MacDonald* at para. 77)

[51] The appellant argues that the balance of convenience favours granting a stay. It submits that, throughout the period of CFIA-ordered quarantine, it has maintained "comprehensive biosecurity" under CFIA supervision pursuant to a protocol including "property quarantine with

restricted access, disinfection stations, daily health monitoring with written logs, separation of bird groups, no off-site movement, and regular CFIA compliance inspections." It claims that since January 15, 2025, there have been "zero transmission events," "zero clinical signs" of HPAI in its flock, zero ostrich deaths and "zero bio security breaches," and submits that the quarantine has "proven completely effective for over 8 months," and that its "proven effectiveness" demonstrates that "public safety is fully protected through continuation of existing measures."

[52] Accordingly, the appellant submits that the CFIA suffers no prejudice, particularly because the stay would apply for a limited and defined period. It argues that since it is seeking a stay pending determination by the Supreme Court of its application for leave to appeal, a process that typically requires 3-6 months, and it undertakes to file its application by October 3, 2025, the stay would extend at the latest to the end of March, 2026.

[53] The appellant provides undertakings that it claims "ensure that all regulatory objectives are protected while preserving the Appellant's right to Supreme Court review." It undertakes to: maintain all current biosecurity and quarantine measures without reduction or modification; not sell, transfer, move, release, or allow any birds to leave quarantine; provide weekly written health reports to CFIA documenting the status of all birds; immediately report any signs of illness in any bird to CFIA; file its leave application by October 3, 2025; accept any additional reasonable conditions the Court deems appropriate; and abide by any order this Court makes as to damages should CFIA suffer any compensable harm as a result of the stay.

[54] The appellant concludes that the balance of convenience favours granting a stay, because while these undertakings would maintain the *status quo*, ensure that the CFIA suffers no prejudice and protect the CFIA's regulatory objectives while the stay is in effect, refusing the stay would expose the appellant to the irreparable harm previously outlined in these reasons.

[55] The respondent counters that there is ample evidence before the Court that issuing a stay would risk significant harm to animal and public health, and to the Canadian poultry industry. Some of this evidence was not contested by the appellant and was accepted by the Court in the Appeal and summarized in its reasons for judgment. For example, this Court found that avian influenza is highly infectious and can be transmitted from wild birds, who serve as natural reservoirs and vectors for its spread, to domestic birds, and spread to other animals, including mammals and, less commonly, humans (Judgment at para. 8). Ostriches may contribute genetic mutations to avian influenza viruses that increase its adaptability to mammals (Judgment at para. 12). This Court also found that transmission of HPAI to humans, though rare, can occur, and close to half of the 900 or so human cases of H5N1 avian influenza reported in the past few decades have been fatal (Judgment at para. 95).

[56] On this motion, the respondent filed evidence that was not previously available and was not considered by the Federal Court or by this Court when they were seized with the appellant's previous requests for a stay. The appellant objects to this new evidence on the grounds that it cannot be used to retroactively justify the CFIA's decisions. This objection is without merit. The respondent's evidence is not aimed at providing justification for the CFIA's decisions, which the

Court has already ruled are reasonable. They are aimed at convincing the Court that it should not issue a stay because the balance of convenience does not favour the appellant.

[57] The respondent's evidence regarding the risks posed by a stay to animal and human health can be summarized as follows:

- The virus detected at the applicant's farm (the genotype D1.3 virus) was a unique, previously undetected in Canada, genotype of HPAI H5N1 virus with enhanced pathogenicity. In experiments on mice, scientists at Canada's National Microbiology Laboratory have determined that it is among the most virulent viruses of its type tested at that laboratory.

- Analyses conducted by the CFIA's National Centre for Foreign Animal Disease strongly support the inferred migration of genotype D1.3 viruses to the United States, which seeded significant outbreaks of HPAI in Ohio and Indiana, impacting millions of poultry and leading to the hospitalization of an Ohio poultry worker in February 2025 following infection with the genotype D1.3 virus.

- Ostriches can shed virus without showing clinical signs of infection.

- Avian influenza viruses can survive for months or even years in fresh water, wetlands, muddy ground and manure at low temperatures. There is a high likelihood that the entire area to which the appellant's ostriches have access – approximately 20 acres of pasture, including muddy areas and manure piles, to which wild birds and animals enjoy unrestricted access – remains contaminated with active HPAI virus.

Because the ostriches remain on the farm, it is expected that food and water are still easily available, encouraging continued contact of wild birds and animals with contaminated water, soil and other organic materials. This poses a high level of risk of transmission to wild birds and other animals.

- This risk of transmission has recently increased because the Fall migration of wild birds has begun, with many birds transiting over and through the appellant's farm, potentially bringing with them different strains of HPAI virus and picking up any HPAI virus that remains on the infected premises. This produces an increased risk of new re-assortments of HPAI virus from and within these migratory wild birds as they are exposed to the HPAI virus likely present at the appellant's farm. Historically, over the past two Fall/Winter periods, the poultry industry in British Columbia has been substantially affected by HPAI, with over 8 million domestic birds impacted.

- The appellants have not taken steps, despite being required to do so since January 2025, to prevent interactions between ostriches and wild birds, resulting in direct contact between wild birds and ostriches and indirect contact through manure contamination of feed tubs and the environment. During a CFIA inspection in late February, upon observing the presence of wild birds flying in and out of the ostrich pens, the appellant's principals told inspectors that they believed their ostriches were able to build resiliency through contacts with wild birds.

- The CFIA is aware of numerous breaches of its quarantine measures by the appellant, including continued contact of wild animals and birds with the ostriches, failure to

perform proper disinfection of equipment and vehicles and failure to report ostrich deaths.

- While testing of the ostriches could provide additional evidence of current risk, it could not address the unknown risks that the ostriches become reinfected nor the risks associated with the contaminated environment at the appellant's farm. Protective immunity gained by ostriches following an infection of HPAI virus is temporary and may last between 2 to 6 months; birds may therefore be at risk of reinfection with the same strain of H5N1 circulating at the farm and shed the virus while appearing healthy.

- The fact that the appellants have allowed visitors supportive of the farm to camp on the property and allowed people close access to the infected herd raises additional concerns about the risk of transmission of the virus to people.

- The CFIA has not sent employees to the appellant's farm since February 26, 2025 due to safety concerns associated with the presence of protesters. Numerous threats against CFIA employees have been made on social media by members of the public who oppose the presence of CFIA oversight and the destruction of the ostriches, including from protesters currently residing on the premises.

[58] The respondent also submitted evidence on the likely impact of a stay on Canadian poultry exports to its trading partners and, by extension, on Canada's poultry industry. The control zone established by the CFIA around the appellant's premises on January 3, 2025 has been, since April 1, 2025, the only active control zone in British Columbia. As a result, poultry

producers are unable to export poultry products originating or transiting through British Columbia to numerous trading partners that require HPAI-free status at the level of the province, including Mexico and the Russian Federation, whose 2024 imports of Canadian poultry products were valued at close to $35 million.

[59] At the outset of my assessment of the balance of convenience, I note that Parliament has entrusted the CFIA with the responsibility to protect the public interest by ensuring the health of animals and humans and by safeguarding the agricultural industry on which Canadians depend for their livelihood and food security. In seeking to apply the Stamping-out Policy to eliminate the HPAI outbreak on the appellant's farm, the CFIA was engaging in an activity undertaken pursuant to that responsibility. In the circumstances of this case, the stay sought by the appellant would restrain the CFIA from carrying out this responsibility, causing irreparable harm to the public interest (*RJR-MacDonald* at para. 76).

[60] Indeed, I am of the view that granting a further stay, as requested by the appellant, would likely invite similar applications for stays from individuals or corporations whose poultry operations are subjected to a notice to dispose under the *Act*. As noted at paragraph 29 of the Judgment, this would have the practical effect of suspending the CFIA's application of the HPAI 2022 ERP, including the Stamping-out policy, which this Court emphatically upheld as a reasonable exercise of the CFIA's authority under the *Act* to protect the health of animals and humans and to preserve Canada's ability to export its poultry products. Such an outcome could seriously threaten the CFIA's ability to discharge its protective mandate under the *Act*.

[61] To assess the magnitude of the harm to the public interest posed by the granting of a further stay and the balance of convenience, I turn to the evidence adduced by the parties.

[62] I am satisfied, on the evidence before me, that there is a high likelihood that the entire area to which the appellant's ostriches have access is contaminated with active HPAI virus and that wild birds, which are prime natural reservoirs and vectors for the spread of HPAI, enjoy unrestricted access to the premises. Moreover, I am satisfied that the appellant's principals have failed to prevent interactions between their ostriches and wild birds. I find that these conditions create a high level of risk of transmission of what scientists have determined is a very virulent virus with enhanced pathogenicity which, as shown by outbreaks of that virus in the United States, can inflict severe harm on poultry and infect and harm humans. I find that these conditions also produce an increased risk of new re-assortments of HPAI virus, some of which may be more adaptable to mammals, including humans.

[63] Moreover, I find that this high level of risk of transmission is increasing with the Fall migration of wild birds and that HPAI has historically substantially impacted the poultry industry in British Columbia in the Fall and Winter periods. Whether for 30 days pending filing of the appellant's application for leave or for 3 to 6 months pending disposition of that application, the appellant is seeking to stay the application of the HPAI 2022 ERP during a period of time where an already high level of risk of transmission of HPAI is increasing.

[64] I am not satisfied that the appellant's undertaking to "maintain all current biosecurity and quarantine measures without reductions or modifications" will "ensure that all regulatory

objectives" of the CFIA are protected because, by failing to address the significant likelihood of HPAI contamination of the farm environment, unrestricted access to that environment by wild birds and the interaction between the ostriches and wild birds, it does not eliminate the high level of risk of transmission of HPAI and the risk of new virus re-assortments.

[65] I also find that the CFIA's inability to eliminate the HPAI outbreak on the appellant's farm, due to the stays granted over 8 months of litigation before the federal courts, has required the CFIA to maintain a control zone in British Columbia, significantly harming the poultry industry in that province by preventing the export of poultry produced in or transiting from British Columbia. I am satisfied that ordering the stay requested by the appellant would cause that industry further harm.

[66] I find that an additional stay of up to 6 months, as requested by the appellant, would jeopardize Canada's access, for its poultry and poultry products, to the export markets of its most important trading partners, including the European Union and the United States. Under negotiated zoning arrangements with these countries, Canada can export poultry from outside HPAI control zones, but these arrangements are predicated on Canada's application of the Stamping-out Policy in the control zones (Judgment at para. 95).

[67] Finally, I note that when the Court decided that the balance of convenience favoured the appellant in the context of its application for a stay pending the Appeal, it observed that the appellant's entitlement to a meaningful right of appeal counterbalanced the harm to the public interest, albeit if the hearing of the Appeal were expedited (*FCA Stay Decision* at para. 11). The

appellant was afforded the meaningful right to appeal before this Court. It was unsuccessful. Moreover, it has failed to establish that its proposed appeal to the Supreme Court raises a serious or arguable issue considering the criteria for leave to appeal set out in section 40 of the *Supreme Court Act*.

[68] In light of these findings, I find that the balance of convenience favours the respondent.

[69] The Court may only issue a stay where the appellant establishes that it meets all the requirements of the tripartite test for granting a stay or interlocutory injunction set out in *RJR-MacDonald*. It has failed to do so. Accordingly, I would decline to issue the stay requested by the appellant, whether pending the filing of its application for leave to appeal to the Supreme Court, the disposition of that application or final disposition of its appeal.

C. *Should this Court grant a stay under paragraph 50(1)(b) of the Federal Courts Act?*

[70] The appellant has also requested that the Court grant a stay under subsection 50(1) of the *Federal Courts Act* pending its request for reconsideration to the Minister. This provision confers on the Court a broad power to grant a stay of proceedings:

Procedure	**Procédure**
…	[…]
Stay of proceedings authorized	**Suspension d'instance**
50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any	**50 (1)** La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les

cause or matter	procédures dans toute affaire :
…	[…]
(b) where for any other reason it is in the interest of justice that the proceedings be stayed.	**b)** lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[71] Rule 398 of the *Federal Courts Rules* governs the issuance of the stay under subsection 50(1):

Orders	**Ordonnances**
…	[…]
Stay of order	**Sursis d'exécution**
398 (1) On the motion of a person against whom an order has been made,	**398 (1)** Sur requête d'une personne contre laquelle une ordonnance a été rendue :
(a) where the order has not been appealed, the court that made the order may order that it be stayed;	**a)** dans le cas où l'ordonnance n'a pas été portée en appel, la Cour qui a rendu l'ordonnance peut surseoir à l'ordonnance;

[72] The respondent submits that a ministerial reconsideration process based on fresh evidence, should one be available, would be entirely separate from the Appeal, that the existence of such a process was not properly before the Court on the Appeal and that it is irrelevant to the appellant's proposed appeal of the Judgement to the Supreme Court. As a result, the respondent argues, it does not fall within the supervisory jurisdiction of the Federal Court of Appeal, which grounds the Court's authority to grant a stay under subsection 50(1).

[73] Referring once more to paragraph 29 of the Judgment, the appellant replies that the Court has inherent jurisdiction to preserve the efficacy of its own guidance.

[74] Even assuming that the Court has the requisite jurisdiction to grant the stay requested by the appellant under subsection 50(1), I am of the view that a stay should not be issued given my conclusion that the appellant has failed to satisfy two of the three elements of the *RJR-MacDonald* test: that there is a serious question to be tried and that the balance of convenience favours the appellant.

[75] In order to succeed on its application for a stay pending ministerial reconsideration, and specifically, to demonstrate the existence of a serious question to be tried, the appellant must establish that its purported entitlement to a ministerial reconsideration has a source in law. As the Supreme Court observed in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196 at para. 25, an injunction is a remedy, "not a cause of action, in the sense of containing its own authorizing force."

[76] There are no provisions in the *Act* that expressly provide for reconsideration (*contra Adam v. United States of America*, 2003 CanLII 31874 (ON CA), 64 O.R. (3d) 268) and, as I have previously observed, the Court, at paragraph 29 of the Judgment, did not find that the appellant was legally entitled to a ministerial reconsideration on fresh evidence.

[77] Having failed to demonstrate a legal entitlement to ministerial reconsideration, the appellant has not satisfied the Court that there is a serious question to be tried on its application for a stay under subsection 50(1) of the *Federal Courts Act*.

[78] Moreover, my finding that the balance of convenience favours the respondent in view of the irreparable harm to the public interest that would ensue from granting a further stay also applies to the appellant's stay application under the *Federal Courts Act*.

[79] For the foregoing reasons, I would decline to issue the stay requested by the appellant under subsection 50(1) of the *Federal Courts Act*.

III. Disposition

[80] Judges don't have hearts of stone. Like all people, we understand the emotional bonds that grow between people and the animals they care for. We recognize the hard work and sacrifice that go into establishing a business and the pride a business owner feels in this achievement. I have sympathy for the appellant's principals, who are facing difficult circumstances.

[81] Canada's Parliament, through the *Act*, conferred on a specialized agency the authority to protect the health of people and animals in this country and thereby to safeguard international trade in agricultural products. The CFIA has exercised this authority by developing a policy designed to rapidly eliminate HPAI outbreaks through the timely destruction of birds that are

both susceptible to HPAI and exposed to it. The appellant was afforded a full and meaningful opportunity to challenge the lawfulness of this policy before this Court and the Federal Court. It did not succeed. Both levels of court determined that the CFIA had reasonably exercised its authority in the circumstances of this case and that its policy was lawful.

[82] A stay is an exceptional remedy. The appellant has failed to meet its burden on this motion. It has not established that its proposed appeal to the Supreme Court raises a serious or arguable issue considering the criteria for leave to appeal set out in the *Supreme Court Act*. It has not established that there is a serious question to be tried on its application for a stay, pending ministerial consideration, under the *Federal Courts Act*. Finally, it has not established that the harm it will suffer from the refusal of a stay outweighs the harm to the public interest resulting from the granting of a stay.

[83] The CFIA must now be allowed to discharge the mandate conferred on it by Parliament and implement its lawful policy.

[84] The application for a stay is dismissed.

"Gerald Heckman"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-205-25
STYLE OF CAUSE:	UNIVERSAL OSTRICH FARMS INC. v. CANADIAN FOOD INSPECTION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	HECKMAN J.A.
DATED:	SEPTEMBER 12, 2025

WRITTEN REPRESENTATIONS BY:

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