

## Fowl Play? A Look into Recent Canadian Reform Efforts for Backyard Chicken Legislation

By Heather Beyko

### Case Considered:

*R v Hughes*, [2012 ABPC 250](#)

The idea of local food sustainability is hard to argue with. Locally grown fresh food is valued among many and local food producers benefit greatly from community support and little to no operating or exporting costs. Yet the law can forbid certain actions that some may suggest are integral to advancing local food sustainability and the right to choose where your food comes from, or in this case, which chicken your eggs come from.

On June 30<sup>th</sup>, 2010, local food activist Paul Hughes was charged pursuant to section 27 of the City of Calgary's *Regulation, Licensing and Control of Animals Bylaw* (also known as the *Responsible Pet Ownership Bylaw*, [No. 23M2006](#)) which prohibits the keeping of livestock anywhere in the City of Calgary except where permitted under the City of Calgary's *Land Use Bylaw* ([No. 1P2007](#)) in an agricultural setting. Mr. Hughes had been keeping six live chickens in his private backyard for the purpose of acquiring their eggs for his own food supply, and decided on this day to call the City of Calgary's Animal and Bylaw Services to report his chickens. After the Peace Officers arrived to his residence, Mr. Hughes was issued a warning ticket indicating that he was to remove the chickens from his backyard within 30 days. Mr. Hughes immediately made it clear to the Peace Officers that he had no intention of complying with the ticket, and was therefore formally charged.

It soon became apparent that Mr. Hughes welcomed the charge so that he could bring a *Charter* challenge in a formal trial. As founder and president of the Calgary Liberated Urban Chicken Klub (CLUCK), Mr. Hughes, along with several other food advocates, believes that there are many benefits to raising hens in an urban setting such as improved local food security and the ability to contribute to a just and sustainable food system. Other advantages include the convenience of fresh eggs from your own backyard (straight from the chickens that you've raised yourself) and the fact that chickens reduce organic waste, produce fertilizer, eat bugs and reduce pests, and are generally "people-friendly" ([CLUCK Groups Online](#)). Not only did Mr. Hughes believe that these benefits were not being recognized by the City of Calgary, he also believed that his *Charter* rights were infringed, namely sections 2(a), 2(b), 2(d), 7, and 15(1).

### The Pro-Backyard Chicken Movement

CLUCK is certainly not the only pro-urban chicken group. Several of these groups have started across Canada and in the United States, and a "pro-backyard chicken movement" has been formed over the past years. One of the first major online portals for backyard chicken owners

and those contemplating the practice was created back in 1999 under the name BackyardChickens.com. It soon racked up more than 40,000 members who were adding up to 7,000 posts per day as of 2009 ([Shelley Arnusch, "Raising Chickens In Calgary," \*Avenue Calgary\* \(27 February 2010\)](#)). Several similar websites have since been conceived with the goal of educating members not only on how to raise a good backyard chicken, but also what the current laws are, how to lobby the government and how to avoid the sanctions of prohibitive legislation by avoiding the possibility of getting caught. Mr. Hughes of CLUCK, who now also spear-heads the public Calgary Food Policy Council group, has taken advantage of the online information sharing world by creating a [CLUCK Facebook page](#) which now has over 1,200 members, a [Calgary Food Policy Council Facebook page](#), as well as a [Twitter account](#), [Google groups pages](#) and a couple of food sustainability-related blogs (such as the [Calgary Food Policy Council Blog](#), and the [Paulin8 Blog](#)). CLUCK now has 28 chapters around the country ([Anthony A. Davis, "Is keeping hens in the city a charter right?," \*Maclean's\* \(12 March 2012\)](#)), and many now refer to it as the Canadian Liberated Urban Chicken Club (with Chapter name).

In 2008 and 2009, the economic recession brought higher prices for many essential commodities, food being one of them. Food activists began to complain about their food security while reinforcing their views that local food sovereignty should not only be tolerated, but encouraged ([Jacqueline Jolliffe, "Balking at Boeking: Urban Chicken Policy in Canada", \*Policy Comment prepared for JustFood Ottawa\* \(23 July 2010\)](#) at 1). An ongoing debate has since formed between food activists and regulatory bodies about the legal and practical effects of raising backyard chickens for local egg production.

### **The Great Debate: Advantages and Disadvantages of Raising Backyard Chickens and How Municipalities are Responding**

While municipalities recognize the many advantages to keeping urban egg-laying hens, it is also important to recognize the negative effects that this practice can have on the greater community, such as possible threats to our public health and welfare and the concern over the humane treatment of chickens. Those who support backyard chickens have argued that the government has either over-exaggerated the potential negative effects of backyard chickens or they simply do not understand that the benefits of raising urban hens outweigh the disadvantages, which the food activists argue are few.

Nevertheless, some Canadian cities have embraced the idea of backyard chickens. Currently, Canadian municipalities that allow backyard chickens include:

- City of Vancouver, BC (ss. 7.15-7.16, *Animal Control By-law*, [No. 9150](#));
- City of Victoria, BC ([Declaration](#))
- District of Saanich, BC (s. 38, *Animals Bylaw, 2002*, [No. 8556](#));
- District of Oak Bay, BC (ss. 26-28.2, *Animal Control Bylaw*, [No. 4013](#));
- Township of Esquimalt, BC (Part 6, *Animal Bylaw 2002*, [No. 2495](#));
- City of Richmond, BC (Part 3, *Animal Control Regulation Bylaw*, [No. 7932](#));
- Town of Gibsons, BC (not explicitly prohibited in bylaws);
- City of Surrey, BC (Part 4(B), s. 7, *Zoning By-law*, [No. 12000](#));
- City of New Westminster, BC (not explicitly prohibited in bylaws);
- City of Rossland, BC (s. 9.1, *Animal Control Bylaw*, [No. 2357](#));
- City of Airdre, AB (not explicitly prohibited in bylaws);

- City of Grand Prairie, AB (not explicitly prohibited in bylaws);
- Town of Peace River, AB (Part 1, s.1, *Animal Control Bylaw*, [No. 1832](#));
- City of Fort Saskatchewan, AB (“chicken” is included in the definition of “domestic animal”, *Animal Control Bylaw*, [C1-02](#));
- City of Waterloo, ON (s. 8 and Schedule “C”, *Animal Control By-law*, [No. 09-047](#));
- City of Guelph, ON (s. 1, *Exotic and Non-Domestic Animals By-law*, [No. \(1985\)-11952](#));
- City of Brampton, ON (s. 11, *Animal Control By-law*, [No. 261-93](#));
- City of Niagara Falls, ON (Schedule “C”, *Animal Control By-law*, [No. 2002-129](#));
- City of Quinte West, ON (*Backyard Hens Licensing and Control By-law*, [No. 11-138](#));
- City of Gatineau, QB (Chapter 6, *Animal Control Bylaw*, [No. 183-2005](#)) (in French only);  
and
- City of Whitehorse, YT (s. 49, *Animal Control Bylaw*, [No. 2001-01](#)).

The [City of North Vancouver](#) and the [City of Burnaby](#) are in the planning stages of amending their bylaws.

The municipalities listed above either do not explicitly prohibit backyard chickens in their respective animal bylaws or have embraced the movement by creating specific regulations allowing backyard chickens. These regulations may specify the maximum number of chickens, the size and dimensions of the coops, and provisions requiring the owner to properly nourish the chickens. While some of these bylaws are silent on whether residential owners can slaughter backyard chickens for their meat, it is generally prohibited as these chickens are meant to be kept for the purposes of local egg production only and not generally as “broiler” chickens. Roosters are also typically forbidden.

Some cities have opted to test the waters first with a pilot project, typically of one to two year’s length. These pilot projects are designed to enable municipalities to see for themselves the advantages of raising egg-laying hens while at the same time measuring the possible negative effects such as neighbour complaints, waste production, smell and possible disease transmission.

One example is Kingston, Ontario, where the municipality is currently in the final stages of their 18-month pilot project. The municipality of Kingston agreed to the pilot project after the Urban Agriculture Kingston group submitted a report to their City Council in April 2010 ([Urban Agriculture Kingston, “Kingston Backyard Hens: An Eggcellent Idea Whose Time Has Come”, Final Report \(April 2010\)](#)). The report sought to dispel the “myths” about backyard chickens commonly believed by those opposed to the practice. Some of these “myths” include the assertions that backyard chickens are smelly, noisy, attract pests, increase predator populations, increase the risk of avian flu transmission, affect water quality and decrease property value. The Urban Agriculture Kingston group argued that these beliefs were misguided (for example, chickens are not smelly – it’s their waste that creates the bad smells, which, if cleaned on a regular basis, would not be a problem). The report submits that the type of people who raise backyard chickens are the type to be especially concerned about the environment, food safety, self-sufficiency, cleanliness and maintenance and therefore would ensure that any negative effects of backyard chicken raising would be kept to a minimum. The municipality of Kingston was sure to include several property and maintenance requirements as set out in section 4.17(a) to 4.17(r) of their *By-law to Regulate Animals* ([No. 2004-144](#)) for the purposes of the pilot project.

While some municipalities such as Kingston have seemingly accepted the practice of raising backyard chickens, others have not been as receptive and have refused to amend their bylaws to allow for such an activity. In the community of Campbellford in Trent Hills, Ontario, neighbours had been complaining that a residence had six chickens in their backyard in June 2011. After being charged for keeping backyard chickens, and in hopes of convincing City Council to amend the current bylaw that prohibits the practice, the owners of that residence provided the municipality with a petition of 92 signatures supporting a change and asked City Council to hear their arguments. After hearing their arguments, the municipality of Trent Hills subsequently contracted a consulting company to conduct a policy review in order to explore the implications of allowing backyard chickens in an urban area.

However, after additional public consultation and close consideration of the policy review, the municipality of Trent Hills decided against amending their bylaws to allow for backyard chickens, citing that “there was ample opportunity for persons living in Trent Hills to live on a rural property where it is legal to raise livestock, including chickens, goats, sheep, ducks, etc.” ([“Livestock in Urban Areas – Compliance Achieved” Trent Hills Press Release \(27 June 2012\)](#)). The residential owners have since voluntarily removed their chickens and the charges were dropped.

As the goal of these municipalities is to provide safe and viable communities, the pilot projects have been and will likely continue to be the key ingredient required to convince Canadian municipalities whether or not to have a permanent bylaw exception allowing the general public to raise hens in their backyards.

### ***R v Hughes: The Decision***

The lack of judicial decisions on backyard chickens in Canada has put municipalities on the edge of their seats anticipating the release of the *R v Hughes* (*Hughes*) decision.

Prior to the *Hughes* case, the only notable related case was *R v Smedley*, ([2008 NSSC 397](#)), where a family had kept chickens in their backyard in very “luxurious” coops. The family was charged pursuant to section 4.12(a)(ii) of the *Land Use By-law for Beaver Bank, Hammonds Plains and Upper Sackville within Halifax Regional Municipality* ([PDF](#)). Section 4.12(a)(ii) stipulates that accessory buildings (such as coops) shall not be used for keeping livestock except where agriculture is a permitted use. The family argued that these chickens were their beloved “family pets” and although they did not keep them for the purposes of egg production, the eggs were a “happy coincidence”. The family had spent \$2,500.00 to build the coops and had put extreme efforts into ensuring the coops were aesthetically pleasing, and moreover, not a nuisance to their neighbours. On appeal, the Nova Scotia Supreme Court affirmed the decision from the Nova Scotia Provincial Court stating that “fowl”, a category of livestock prohibited in non-agricultural urban residences, included chickens, whether or not the owner saw them as “family pets”.

Although the *R v Smedley* case was primarily concerned with statutory interpretation rather than *Charter* rights, it has provided aspiring backyard chicken owners with an understanding of how to recognize the strict nature of urban livestock regulation that is inherent in every municipality. And now with the recent *Hughes* decision given on September 5th, 2012, those municipalities across Canada that have not yet legislated permissive backyard chicken provisions may rely on the Honourable Judge Skene’s 31 page decision to justify their position that backyard chickens will continue to be defined as livestock not appropriate for urban raising.

At trial, Mr. Paul Hughes argued that his charge pursuant to section 27 of the *Responsible Pet Ownership Bylaw* (the *Bylaw*) is *ultra vires* the jurisdiction of the City of Calgary (the City), infringed a number of his *Charter* rights, and that being restricted from raising backyard chickens was inconsistent with Article 25(1) of the *Universal Declaration of Human Rights*.

Mr. Hughes admitted that the charge was appropriately laid (chickens are included in the definition of “Livestock” under the *Bylaw*, and his residence is not considered an extensive agricultural area, which, under the City’s *Land Use Bylaw*, may allow this activity if an official permit was sought and granted). Nevertheless, Mr. Hughes saw this as an opportunity to challenge the law based on his rights, and the pro-backyard chicken community was by his side supporting him throughout the whole challenge.

After reviewing testimony from other backyard chicken owners and considering the fact that there had been minimal complaints in the City regarding this practice, the court first addressed Mr. Hughes’ claim that section 27 of the *Bylaw* is *ultra vires* the jurisdiction of the City. Mr. Hughes asserted that although the City has the power to pass bylaws, the pith and substance of section 27 and the definition of livestock in the *Bylaw* is consistent with the notion of “food” and therefore outside of the City’s ability to regulate. This was immediately dismissed by the court for lack of clarity, persuasiveness and authoritative support (para 88). Because the City, pursuant to section 7 of the *Municipal Government Act* ([RSA 2000, c M-26](#)), can regulate for the safety, health and welfare of people, the protection of people and property, nuisances, animals and activities in relation to them, Judge Skene determined that Mr. Hughes’ *ultra vires* claim was without validity as section 27 of the *Bylaw* is in fact *intra vires* (paras 91 and 92).

Following this, the court entered into a discussion regarding Mr. Hughes’ *Charter* claims. With respect to Mr. Hughes’ claim under section 2(a) of the *Charter* (freedom of conscience and religion), he claimed that section 27 of the *Bylaw* restricted him from exercising his chosen method of acquiring food and therefore infringed his section 2(a) rights by not allowing him to act on his own conscience. The court however ruled that Mr. Hughes is “not being compelled to agree with the appropriateness of the bylaw. Hughes has honestly held views, opinions and thoughts respecting what he believes are his rights as a citizen to raise urban hens, but that does not equate to an interference with his freedom of conscience” (para 102).

With respect to his claim regarding section 2(b) *Charter* rights (freedom of thought, belief, opinion and expression), Mr. Hughes argued that section 27 of the *Bylaw* suppressed or banned his expressive activity of raising backyard chickens. Judge Skene disagreed, stating that raising backyard chickens did not constitute expressive activity and therefore any infringement on his section 2(b) rights was non-existent (paras 111 to 113).

For the claim that section 27 of the *Bylaw* infringed his section 2(d) *Charter* rights (freedom of association), the court explained that Mr. Hughes did not provide a compelling explanation as to why this right was infringed. In essence, all that Mr. Hughes argued was that his choice of activity and his choice of food constituted an association with “food liberty” (para 114). The court was not prepared to characterize Mr. Hughes’ activities as “association” and therefore dismissed his section 2(d) claim, asserting that section 27 of the *Bylaw* did not have the purpose or effect of restricting Mr. Hughes’ freedom of association (para 121).

Subsequently, Judge Skene considered Mr. Hughes’ claim that his section 7 *Charter* rights (the right to life, liberty and the security of the person and the right not to be deprived thereof except



in accordance with the principles of fundamental justice) were also infringed. Mr. Hughes claimed that section 27 of the *Bylaw* violates his protective sphere of personal privacy by criminalizing his decisions around food and food liberty without evidence of harm of the activity (para 122). He also argued that raising backyard chickens was an activity that was central to his lifestyle, being an advocate for the poor and disadvantaged who are unable to afford commercially produced food available at local grocery stores. His choices of food, Mr. Hughes argued, is one of those fundamental life choices that goes to the core of what it means to be an autonomous human being (para 124).

The court referred to paragraphs 85 to 87 of *R v Malmo-Levine* (2003 SCC 74) where it was determined that the recreational use of marijuana does not constitute a lifestyle that attracts *Charter* protection. After using *R v Malmo-Levine* as an analogy, Judge Skene concluded that a restriction on Mr. Hughes' ability to raise backyard chickens does not interfere with fundamental life choices (para 127). With respect to his security of the person argument, Mr. Hughes did not prove that there was a state-imposed psychological stress or that his physical integrity was at risk, elements that are required to be proven in order to show an infringement on the security of the person (as C.J.C. Dickson defined in *R v Morgentaler*, [1988] 1 SCR 30). Although Mr. Hughes testified that there were several health benefits to consuming backyard eggs, this was not enough to show that his security of the person had been violated, and therefore the court concluded that he had failed to establish a section 7 *Charter* infringement (para 130).

Mr. Hughes' final *Charter* claim regarded section 15(1) (every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination). Mr. Hughes claimed that section 27 of the *Bylaw* discriminated against him on the basis of his poverty, or "financial disability". Judge Skene referred to the two-part test for establishing a section 15(1) infringement as conceived in *R v Kapp* (2008 SCC 41) and later confirmed in *Withler v Canada (Attorney General)* (2011 SCC 12). The test requires that 1) the law creates a distinction based on an enumerated or analogous ground, and that 2) the distinction creates a disadvantage by perpetuating prejudice or stereotyping (para 133). The court determined that Mr. Hughes could not establish the first part of the test, as "financial disability" is not an analogous ground, but rather can change depending on circumstances (para 134). The lack of evidence presented to the court that poverty could be recognized as an analogous ground (para 136) forced Judge Skene to dismiss Mr. Hughes' section 15(1) *Charter* claim stating that Mr. Hughes "has more work do" in order to prove a distinction that is based on a proven analogous ground worthy of *Charter* protection (para 148).

In the end, because Mr. Hughes failed to prove any *Charter* infringements, a section 1 *Oakes* analysis (as found in *R v Oakes*, [1986] 1 SCR 103), was unnecessary.

Regarding Article 25(1) of the *Universal Declaration of Human Rights*, which states that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, ..." (GA Res 217(111), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71), the court declined to provide an analysis on whether or not section 27 of the *Bylaw* was inconsistent with this provision. Perhaps this is due to the fact that Mr. Hughes merely referred to it in his arguments and did not specifically claim this issue. Also alluded to by Mr. Hughes but not analyzed at trial was his belief that his multicultural rights were being ignored, and that section 27 of the *Charter*, which states that the *Charter* "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians", should be an element of consideration.

## Public Protest and Public Consultation

It is interesting to note that Judge Skene asserted that much of what Mr. Hughes said at trial would have been more appropriate for presentation in front of the City Mayor and City Alderman as his submissions are parallel to the concept of lobbying and protest. However it was also determined that when Mr. Hughes did have the chance to speak to the Standing Policy Committee (SPC) on Community and Protective Services in 2010, he was given a mere five minutes of petitioning (para 12). Nevertheless, the City of Calgary did at one point consider a pilot project of one year where certain residents would be allowed to raise backyard chickens, and much of this was inspired by the push from local food activists, including Mr. Hughes. The City saw this as an opportunity to show their move towards strong support for local food sustainability and production while also having the chance to evaluate the risks and benefits of raising backyard chickens. Yet, after the City had drafted permit regulations and was ready to gear up for the pilot project, the SPC put a halt to the program without giving specific reasons on June 2<sup>nd</sup>, 2010. City Council followed suit by rejecting the proposal on June 19<sup>th</sup>, 2010.

The City's Chief Bylaw Officer testified at the *Hughes* trial that before the *Bylaw* was enacted in 2006, there was approximately two years of public consultation regarding the purposes and possible effects of the *Bylaw* (para 23). At no time during that consultation did the City liaise with existing backyard chicken owners specifically. The issue of keeping livestock on a residential property "came up", but all that was decided was that agricultural animals should remain on agricultural properties (para 24).

Although the Provincial Court of Alberta did not provide Mr. Hughes with the result he was hoping for, he has demonstrated that he is not giving up his fight for the ability to raise backyard chickens. Local governments and the greater community will be sure to continue to hear from him and other food activists until the lobbyists are satisfied that municipalities are doing all they can to accommodate the local food sustainability movement.

## Conclusions

The *Hughes* decision is an important one and will most definitely be considered by municipal governments when creating or amending legislation in this area. American municipalities are well ahead of Canada when it comes to permissive backyard chicken legislation, with 166 cities (and counting) that allow the practice ([Barbara Liston, "New pecking order for U.S. chickens: backyard city coops", Reuters, US Edition, \(May 15, 2012\)](#)). It must be recognized however that Canada is continuing to grow into a state of pro-food sustainability (more and more community gardens are popping up (see [here](#)), and Farmer's Markets are becoming the go-to place for fresh local food). Furthermore, as education and technology have allowed for greater advancements in urban food production, it has also been integral to Canadian backyard chicken advocates to voice their opinions and experiences in relation to the right to adequate food, the right to choose one's own food and the right to raise their own food. It has also become important to the urban chicken-raising community to educate the general public, and particularly their offspring, on how to raise a good backyard chicken.

Time will tell whether or not the backyard chicken movement will expand or deplete. But for now, Calgarians can be rest assured that their neighbours won't be managing their own backyard farms – legally, at least.

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