Hen-Pecking the Charter: The Constitutionality of Backyard Chickens

By Ola Malik and Heather Beyko



Introduction

Do you have a constitutional right to grow and produce your own food? If you do, does it follow that you have a guaranteed right to keep and raise egg-laying chickens in your backyard?

In the recent case of *R. v. Hughes*,[1] Paul Hughes, a well known Calgary food activist, was charged under a City of Calgary bylaw[2] for keeping six egg-laying hens in his backyard. The bylaw prohibits the keeping of livestock within the City unless land use approval has been obtained. Mr. Hughes admitted the charge but asserted that he had a constitutional right to produce his own food and that the bylaw provision infringed upon his protected *Charter*[3] rights of freedom of conscience, freedom of expression, freedom of association, right to life, liberty and security, and freedom of equality. Mr. Hughes' assertion of a constitutional right to "food liberty" or the right to produce and consume his own food was the first case of its kind in Canada. On September 5th 2012, the Honourable Judge Skene writing for the Alberta Provincial Court dismissed Mr. Hughes' *Charter* challenge in its entirety and found Mr. Hughes guilty as charged.

Unquestionably, the keeping of backyard chickens has gained popularity across North America, where over a dozen Canadian municipalities including Vancouver,[4] Guelph,[5] Waterloo[6] and Brampton[7], and 166 (and counting) cities in the U.S. including New York,[8] Seattle,[9] Los Angeles,[10] Miami[11] and Denver[12] have adopted permissive backyard chicken legislation.[13] Some of these municipalities have placed no limitations on backyard chicken raising while others have enacted regulations which specify the maximum number of chickens which any person can keep, the size and dimensions of the coops and provisions requiring proper nourishment and care for backyard chickens. While most municipalities are silent on whether backyard chickens can be raised for their meat, some municipalities in the U.S. such as Albuquerque,[14] Austin[15] and Memphis[16] have made it lawful to raise backyard chickens for slaughter and meat consumption.

The Rise of the Backyard Chicken

The practice of raising backyard chickens in an urban environment is not a novel concept, but has recently become a credible public policy issue. For years, pro-food sustainability activists have been raising backyard poultry in hidden coops while sharing information with one another about how to obtain or purchase chickens for backyard raising, how to raise chickens in order to yield exceptionally "tasty" eggs, and how to avoid "getting caught" under prohibitive legislation by employing techniques that minimize the appearance, smell, and sound of a backyard poultry farm.

In the past few years, food advocates have begun demanding change to municipal legislation and local ordinances to legalize backyard chickens and other livestock. Local food activist groups have formed in most municipalities and with the support of petitions, consultation reports and presentations, have pressured municipal governments to acknowledge the fact that more needs to be done in order to achieve local and sustainable food production. Far from resisting this pressure, many municipalities have responded by devel-

oping corporate policies on sustainable food action plans as well as policies which might, as part of the broader goal of promoting a local and sustainable source of food, involve the legalization of backyard chickens.

Other municipalities have opted for a more incremental approach by testing the impacts of backyard chickens through various forms of pilot projects. These pilot projects typically last one to two years and grant citizens a temporary permit to raise backyard chickens. The purpose of these pilot projects is to determine, through public consultation, the impact that backyard chickens have on close neighbours and the greater community as a result of noise, faeces and waste, odour, the attraction of pests and predators, bio-hazards, and other effects upon community liveability. Municipalities are determining whether they have the facilities, expertise, resources and appropriate enforcement measures to ensure that backyard chickens are humanely fed, raised, housed, and otherwise taken care of.

The Canadian municipality of Kingston, for example, is currently in the final stages of an 18-month pilot project which explores the feasibility of backyard chickens. The municipality agreed to enter into a pilot project after the Urban Agriculture Kingston group submitted a report[17] to Kingston's City Council in April 2010 which sought to dispel the "myths" of backyard chickens. Some of these "myths" were 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 report suggested that the type of people who raise backyard chickens are more likely to be conscious about their impact upon the environment, food safety, self-sufficiency, cleanliness and maintenance, and would therefore ensure that any negative effects of backyard poultry raising would be kept to a minimum.

While Kingston represents the experience of a municipality which has been receptive to allowing backyard chickens, the Canadian community of Campbellford in Trent Hills represents the contrasting view. There, neighbours complained about a resident who kept six chickens in his backyard. After being charged, the owner of the residence provided city officials with a petition of 92 signatures supporting a change to the bylaw and asked City Council to hear his arguments. Following public consultations, Trent Hills refused to legalize backyard chickens on the basis 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."[18]

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The debate over backyard chickens is an often polarizing and divisive public policy issue. Those who favour allowing backyard chickens argue that people have a right to make sustainable food choices and that chickens can be raised in an urban environment without undermining community liveability. On the other hand, opponents believe that chickens and other livestock are not appropriate in a densely populated urban environment and that allowing them would cause property values to decline and nuisance complaints to rise.

The Court's Decision in R. v. Hughes

Section 27 of The City of Calgary's *Responsible Pet Ownership Bylaw* (the "*Bylaw*")[19] states that "No personal shall keep Livestock in any area of the City except where the keeping of Livestock is allowed under The City of Calgary *Land Use Bylaw*". The definition of "Livestock" includes a list of animals typically thought of as livestock including horses, llamas, sheep, bovine and avian species, and all other animals which are kept for agricultural purposes but does not include dogs, cats or other domesticated animals. At the trial, Mr. Hughes admitted that he had not sought or obtained approval for his six chickens under Calgary's *Land Use Bylaw*,[20] that the keeping of Livestock is not a permitted use under the *Land Use Bylaw* and that he was therefore in breach of section 27 of the *Bylaw*. However, Mr. Hughes advanced the argument that the *Bylaw* infringed upon his constitutional rights guaranteed by the *Canadian Charter of Rights and Freedoms*,[21] notably his freedom of conscience, expression, association, equality and the right to life, liberty and security. Mr. Hughes also argued that section 27 of the *Bylaw* was

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not consistent with Article 25(1) of the *Universal Declaration of Human Rights*[22] which guarantees everyone's right to an adequate standard of living, including food.

It is critical to note that the *Bylaw* does not prohibit the keeping of livestock but requires that approval be obtained under the *Land Use Bylaw*. At the time of trial, Mr. Hughes had not sought land use approval for his chickens and could not state what the outcome of that process would have been. Indeed, the City argued that Mr. Hughes could not establish that any of his constitutional rights had been impaired other than in the most trivial fashion if he had not even applied for a permit.

Mr. Hughes is a self-professed advocate for the poor and disadvantaged who believes that he has a right to "food liberty"— the right to grow and produce his own food (including eggs from backyard chickens). He promotes the importance of developing local and sustainable food sources and for years has actively championed the urban hen movement. Mr. Hughes did not present any admissible evidence supporting the health or medical benefits to be derived from consuming backyard raised eggs and conceded that he also consumed non-organic food sold at regular supermarkets. The evidence indicated that for Mr. Hughes, consuming organic food products was not a medical necessity but rather a personal lifestyle choice.

As a preliminary matter, the court found that Calgary was within its statutory jurisdiction when it enacted the *Bylaw*. In reaching her conclusions, the court referred to the Alberta *Municipal Government Act*[23] which expressly confers upon municipalities the jurisdiction to regulate matters relating to the safety, health and welfare of people and the protection of people and property, nuisances, and wild and domestic animals and activities in relation to them. The court also recognized the deference which must be granted to municipalities when enacting their own legislation.[24]

Mr. Hughes argued that the *Bylaw* infringed upon his right to freedom of conscience as provided for in section 2(a) of the *Charter* because he was prohibited from practicing his belief in raising chickens for egg consumption. However, the court dismissed his challenge. Canadian courts that have examined the right to freedom of conscience have, like the court in *Mackay v. Manitoba*,[25] made it clear that the mere fact that a person might be offended by legislation does not prevent them from maintaining their own views and exercising their own freedoms. Indeed, the legislative process would come to a halt if every minority viewpoint was a sufficient basis for successfully challenging and overturning legislation. The court found that the *Bylaw* did not compel Mr. Hughes to change his views or beliefs regarding his right to raise urban chickens and that the *Bylaw* was not a real and substantial coercive burden on his conscience.[26]

Mr. Hughes argued that the Bylaw infringed upon his right to freedom of conscience as provided for in section 2(a) of the Charter because he was prohibited from raising chickens for egg production, a practice he truly believed in.

With respect to Mr. Hughes' argument that the *Bylaw* infringed upon his right to freedom of expression as guaranteed by section 2(b) of the *Charter*, the court found on the evidence that Mr. Hughes raised chickens to feed himself and his family and not as any form of protest. Although the *Bylaw* prevented Mr. Hughes from carrying on this activity legally, it did not prevent him from continuing to advocate for, or pursue changes in, food policy. The court concluded that Mr. Hughes' activities were not in the nature of protest and therefore did not convey expressive meaning such as to attract the protection of the *Charter*.[27]

The court dismissed Mr. Hughes' argument that the *Bylaw* infringed upon his section 2(d) *Charter* right to freedom of association as little evidence and few submissions were made by Mr. Hughes on this point.[28]

Mr. Hughes also argued that the *Bylaw* infringed upon his right to life, liberty and security as guaranteed by section 7 of the *Charter* because the *Bylaw* unjustifiably restricted his personal autonomy and his personal choice to raise backyard chickens. He asserted that the keeping of chickens to consume eggs was an inherently fundamental personal choice which went to the core of what it meant for him to be an autonomous human being. The court disagreed. The court referred to the Supreme Court of Canada case of *R. v. Malmo-Levine*[29] and pointed out that personal lifestyle choices, hobbies and preferences are not protected by the *Charter* because they do not go to the core of what it means to enjoy individual dignity and independence.[30] Indeed, the court cited from Justice Wilson's dissenting judgment in *Reference re Motor Vehicle Act (British Columbia) s 94(2)*[31] which recognized that all regulatory offences impose some restriction on liberty and that it would trivialize the *Charter* if every restriction, no matter how slight, were to trigger *Charter* protection.[32] The court also held that the *Bylaw* did not infringe upon Mr. Hughes' right to security as there was no evidence that the *Bylaw* interfered with his bodily integrity or otherwise caused him psychological stress.[33]

Finally, Mr. Hughes argued that the *Bylaw* infringed upon his section 15 *Charter* equality rights because the *Bylaw* discriminated against those with limited financial means and prohibited them from raising home-grown food at a lower cost than that available commercially. In order to be successful with this argument, Mr. Hughes would have to prove that the *Bylaw* created a distinction based on enumerated or analogous grounds.[34] Canadian courts have held that not every differential treatment

results in unconstitutional discrimination. Mr. Hughes did not provide any evidence as to how the *Bylaw* discriminated against those living in poverty or those with limited means. Further, Mr. Hughes was unable to convince the court that being "financially disabled" constituted an analogous ground. It is clear law that, similar to those enumerated grounds such as race, nationality, ethnic origin, colour, religion, sex, age, or mental and physical disability which are unalterable and which serve as the basis for stereotypical treatment, analogous grounds must comprise immutable characteristics which cannot be changed or varied.[35] The problem with impecuniosity is that it is not immutable or permanent but can be changed depending on personal circumstances. Absent any evidence from Mr. Hughes that limited financial means are an analogous ground and attract discriminatory treatment, the court had no alternative but to dismiss his challenge to the *Bylaw* based upon section 15 of the *Charter*.[36]

Having dismissed Mr. Hughes' arguments that the *Bylaw* infringed upon his *Charter* rights, it was unnecessary for the court to proceed with a section 1 analysis.[37] In the result, the court convicted Mr. Hughes under section 27 of the *Bylaw* and imposed the minimum fine of $100.00.

Conclusions

The Hughes trial is a harbinger of things to come as the local and sustainable food movement gathers momentum. Recent immigrants to Canada are starting to assert their rights to raise culturally important food sources such as backyard goats (for slaughter), just as Latino and other immigrant communities have done for some time in the U.S. The right to raise backyard chickens is a complex issue, involving the unpredictability of municipal politics, local and sustainable food policy, multicultural rights, land use issues, and the liveability of affected neighbourhoods. While Mr. Paul Hughes may have lost at trial, his fight to raise backyard chickens is far from over, with future chapters of this story yet to come.

Notes

1. 2012 ABPC 250 (2012).
2. Calgary, AB, Bylaw No. 23M2006.
3. Part I of the *Constitution Act* (1982), being Schedule B to the *Canada Act* (1982), ch. 11.
4. Vancouver, B.C, By-law No. 9150 § 7.15 (2012).
5. Guelph, ON, By-law No. (1985)-11952 § 1 (1985).
6. Waterloo, ON, By-law No. 09-047 § 8 (2009).
7. Brampton, ON, By-law No. 261-93 § 11.1, 13 (2009).
8. N.Y.C Mun. Code § 65-23 (1990).
9. Seattle Mun. Code § 23.42.052 (2011).
10. L.A Mun. Code § 12.01, 12.05-12.09 (2011).
11. Miami Code of Ordinances § 6-1(b) (2011).
12. Denver Mun. Code § 8-91 (2011).\
13. Barbara Liston, *New pecking order for U.S. chickens: backyard city coops*, Reuters, US Edition, (May 15, 2012), http://www.reuters.com/article/2012/05/15/us-usa-chickens-idUSBRE84E0YE20120515.
14. Albuquerque Code of Ordinances § 9-2-4-3 (2011).
15. Austin Code of Ordinances tit. III, ch. 3.1.1 (2011).
16. Memphis Code of Ordinances § 8-8-1 (2009).
17. Urban Agriculture Kingston, *Kingston Backyard Hens: An Eggcellent Idea Whose Time Has Come*, Backyard Hens Final Report, (April 2010), http://uakingston.webs.com/backyardhens.htm.
18. *Livestock in Urban Areas – Compliance Achieved*, Trent Hills Press Release (June 27, 2012), http://www.trenthills.ca/en/services/resources/PressRelease-June272012.pdf.
19. *Ibid* note 2.
20. Calgary, AB, Bylaw No. 1P2007.
21. *Ibid* note 3.
22. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
23. RSA 2000, c. M-26.
24. *Ibid* note 1, ¶ 88-92.
25. 1985 CarswellMan 227, [1986] 2 W.W.R. 367, 24 D.L.R. (4th) 587.
26. *Ibid* note 1, ¶ 94-103.
27. *Supra*, ¶ 104-113.
28. *Supra*, ¶ 114-121.
29. 2003 SCC 74, 2003 CarswellBC 3133, 2003 S.C.J. No. 79, 233 D.L.R. (4th) 415.
30. *Ibid* note 1, ¶ 125.
31. 1985 CarswellBC 398, 69 B.C.L.R. 145, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536.
32. *Ibid* note 1, ¶ 126-127.
33. *Supra*, ¶ 128-129.
34. *Supra*, ¶ 132-136.
35. *Supra*, ¶ 137-138. Judge Skene quoted *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) at ¶ 7-9 and 13 for the analysis of this concept.
36. *Supra*, ¶ 147-148.
37. Section 1 of the *Canadian Charter of Rights and Freedoms* states that the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This section provides government bodies the ability to justify certain *Charter* infringements if all requirements of a complex test, commonly known as the "*Oaks* test," are met. **ML**

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