THE FREEDOM TO FARM IN AN URBAN ENVIRONMENT: A CONSTITUTIONAL REVIEW OF SASKATOON'S PROHIBITION ON URBAN MICRO-LIVESTOCKING

A Thesis Submitted to the College of

Graduate Studies and Research

In Partial Fulfillment of the Requirements

For the Degree of Master of Laws

In the College of Law

University of Saskatchewan

Saskatoon

By

JONATHAN EDWARD STOCKDALE

PERMISSION TO USE

In presenting this thesis in partial fulfillment of the requirements for a Postgraduate degree from the University of Saskatchewan, I agree that the Libraries of this University may make it freely available for inspection. I further agree that permission for copying of this thesis in any manner, in whole or in part, for scholarly purposes may be granted by the professor or professors who supervised my thesis work or, in their absence, by the Head of the Department or the Dean of the College in which my thesis work was done. It is understood that any copying or publication or use of this thesis or parts thereof for financial gain shall not be allowed without my written permission. It is also understood that due recognition shall be given to me and to the University of Saskatchewan in any scholarly use which may be made of any material in my thesis.

Requests for permission to copy or to make other use of material in this thesis in whole or part should be addressed to:

Dean
College of Law
University of Saskatchewan
Law Building
15 Campus Drive
Saskatoon, SK S7N 5A6
Canada

OR

Dean
College of Graduate Studies and Research
University of Saskatchewan
107 Administration Place
Saskatoon, SK S7N 5A2
Canada

DISCLAIMER

The author of the report is not at the time of writing a licensed or practicing member of any Law Society within Canada, and therefore, the contents of this thesis are provided for academic and informational purposes only. If you are seeking legal advice, please consult a lawyer.

ABSTRACT

This work considers the legal impediments to farming in an urban environment with a particular focus on the municipal bylaws that prohibit the keeping of hens in Saskatoon. The jurisdictional competency of Saskatoon to prohibit the keeping of urban hens is challenged under both municipal law and constitutional law, and more broadly, under the general premise that liberty interests should often prevail where a bylaw is arbitrary, misinformed, and restricts the pursuit of truth and human flourishing. Saskatoon's urban hen prohibition is argued to be premised more on a form of moral reasoning that unnecessarily distinguishes between rural and urban environments, and less, if at all, on empirical evidence.

Urban agriculture is often undertaken to address the environmental and social shortfalls of the global food system, such as the system's connection with climate change, animal welfare issues, and challenges associated with the distribution of food. Moreover, urban agriculture is a means of protecting the rights of producers and consumers, as articulated by the food sovereignty movement. In this work, a claimant's desire to advance food rights (including food sovereignty) through the keeping of urban hens is argued to engage the guarantee to freedom of expression and freedom of conscience under Canada's *Charter of Rights and Freedoms.*[1]

This work explores the possibility of protecting the manifestation of social and environmental action through the guarantee to freedom of conscience. This work develops a cursory test for determining where a claimant's guarantee to freedom of conscience is violated, drawing on the well established protection of freedom of expression and freedom of religion.

[1] *The Constitution Act, 1982*, being Schedule B to *The Canada Act 1982* (UK), 1982, c 11, Part I.

ACKNOWLEDGMENTS

I would like to thank my supervisor, Professor Sarah Buhler, for her consistent support and encouragement throughout this project. I would also like to thank other committee members Patricia Farnese and Mark Carter for their wisdom and guidance. Also from the College of Law, I would like to thank Professor Felix Hoehn for his generous input in the municipal law section. Finally, I would like to thank Professor Lucinda Vandervort for sparking my interest in academic writing and providing me with the foundational analytical skills that I use every day as an advocate.

This work is dedicated to my family and friends, and to all of those whose struggle and strife, and meaning of life, is sustainable agriculture.

TABLE OF CONTENTS

CHAPTER 1 - INTRODUCTION

1.1 The *Crime* Scene

One sweltering hot afternoon in June of 2009, I was tending to my month-old hens while chatting with reporter Charles Hamilton in my backyard in Saskatoon, Saskatchewan.[2] My hens, innocently roaming about and pecking at the grass, were *illegal hens*[3] being kept contrary to Saskatoon's zoning and animal control bylaws.[4] I raised the hens from chicks as an experiment in becoming more food self-sufficient and eating from more local sources. My community of friends, neighbours, and relatives were curious and supportive of my endeavors.

I was never fined for keeping the hens, and as far as I know, my hen keeping was never reported. To my surprise, the hens did not even excite the one hundred plus pound hounds living next door. While my hens appeared to be welcomed by all in the neighbourhood, others have not been so lucky. For example, Ms. Massier of Regina, mother of two, was recently fined for keeping four hens in her backyard. Ms. Massier had kept the hens for nearly three years. One of her supportive neighbours told reporters that the hens taught Ms. Massier's and others' kids a lot about animals, and further, that the hens were "[n]ever loud, never dirty", but rather, they were "perfect neighbour chickens."[5] There was no suggestion in the complaint against Ms. Massier's leading to the apprehension of the hens that the hens had ever caused a nuisance.[6]

---

[2] Charles Hamilton, "Pro-Poultry Protesters Raising Chickens Despite Council's Condescending Clucks", Planet S: Saskatoon's City Magazine, Vol 12 Iss 9, 2009. Online: Planet S <www.planetsmag.com/story.php?id=51>. [Hamilton]

[3] Sarah B. Schindler, "Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores", 87 Tul L Rev 231 2012-2013 at 233 [Schindler]

[4] Hamilton, *supra* note 2.

[5] Steve Silva, "City forces woman to get rid of backyard chickens", Global News (Regina), online: globalnews.ca/news/1591437/city-forces-woman-to-get-rid-of-backyard-chickens/.

[6] *Ibid*.

Debbie Johnson, a retired librarian of Saskatoon, was also fined for keeping hens. She kept her hens as pets – pets that created nutritious eggs.[7] She encouraged city council to change its bylaws that prohibit hens, twice.[8] On both occasions, the city did not give thorough reasons as to why her motion to amend the urban hen prohibition should not be granted.[9]

This work aims to provide a legal opportunity for those willing to brave the judicial route for change in the face of councils unwilling to change their urban micro-livestocking prohibitions.

1.2 Bringing Hen Prohibitions to Court

When the hearts and minds of municipal legislators are closed to urban hen reform, some people challenge hen-keeping prohibitions bylaws in court.[10] In *R. v Smedley*,[11] Mr. Smedley of Halifax, Nova Scotia was unluckily charged for keeping 13 chickens in his backyard. Mr. Smedley, his wife, and his children, kept the chickens as pets – pets that produced eggs as a "happy coincidence".[12] The Court ultimately convicted Mr. Smedley on the basis that chickens were covered under the definition of "fowl" in the local land-use bylaw, which prohibits the keeping of fowl. Mr. Smedley did not raise any jurisdictional or *Charter* defences. Notwithstanding the conviction, the Honourable Judge Jamie Campell made several noteworthy findings of fact:

---

[7] Hamilton, *supra* note 2.
[8] Hamilton, *supra* note 2; David Hutton, "Council balks at backyard chickens – again", 14 September 2010, online: < blogs.thestarphoenix.com/2010/09/14/council-balks-at-backyard-chickens-again/>.
[9] *Ibid.*
[10] See e.g. *R v Smedley*, 2008 NSPC 9; 262 NSR (2d) 375 [*Smedley*], where the defendants were unsuccessful at classifying their chickens as pets as opposed to fowl; *Kamloops (City) v Plante*, 2008 BCSC 32.
[11] *Ibid* (*Smedley*).
[12] *Ibid* at 1-5.

> In summary, the chickens kept by this family are pets. They are in virtually every way inoffensive. There is no evidence that they are now creating excessive or even noticeable noise. There is no offensive odour. The way in which they are kept is not unsightly. The chickens remain on their own property seemingly doing no harm to either the aesthetic qualities of the neighbourhood nor to the quiet enjoyment of the property of the immediate neighbours. As compared to some other activities that might be legally undertaken on a residential property, the keeping of these pet chickens seems relatively benign. No allegation has been made and no evidence has been adduced to suggest that these chickens attract vermin.[13]

While there would be no strong issue to be taken with the determination in *Smedley* that chickens might reasonably be construed as "fowl", the comments by Campell J. provides some insight into why many want to change urban hen prohibitions; if keeping urban hens can be "in virtually every way inoffensive", then on what basis, other than an *assumed* power to do so by municipal decision-makers, can keeping hens be maintained as a regulatory offence?

R v Hughes,[14] a case of the Alberta Provincial Court in 2012 is closely considered throughout this work. Mr. Hughes self-reported his chicken keeping to the city and was subsequently charged with keeping livestock (to wit, six chickens) contrary to Calgary's zoning and pet bylaws.[15] There was no evidence led by the city that anyone had ever complained of Mr. Hughes' challenged activity, or, as with the cases of Ms. Messier, Ms. Johnson, and the Smedleys, above, that his violation had caused a nuisance.[16] Nonetheless, Mr. Hughes was fined and the chickens appre*hen*ded and subsequently relocated.

---

[13] *Ibid* at 15.
[14] *R v Hughes,* 2009 ABCA 11, 446 AR 351.
[15] *Ibid* at para 5. See also ss 27 and 2(1)(n)(v) of the City of Calgary's *Responsible Pet Ownership Bylaw* 23M2006 ["*RPO Bylaw*"]
[16] *Ibid* at para 70.

Mr. Hughes was characterized by the presiding trial judge, the Honourable Madam Judge Catherine M. Skene.[17], as a responsible urban hen owner.[18] Skene J. observed that Mr. Hughes is a veteran from the Canadian infantry and receives social assistance payments.[19] The hens' eggs were consumed within Mr. Hughes' household and never sold for financial gain.[20]

Mr. Hughes is a vocal advocate for many causes, one of them being local food production. He is the founder of the advocacy group CLUCK (Canadian Liberated Urban Chicken Klub).[21] He tries to live as sustainably as possible, producing as much food as he could on his residential lot.[22] His efforts to live sustainably are also observed in his effort to change local bylaws.

Following Mr. Hughes unsuccessful attempt at judicial intervention, this work considers the legal recourse that people like Mr. Hughes or Debora Johnson should have with the courts when city councils deny the implementation of pilot projects and maintain the prohibition of urban hens based on thin or speculative empirical evidence. Specifically, this work considers the scope of municipal jurisdiction to prohibit urban hens with a focus on municipal law, freedom of expression, and freedom of conscience.

1.3 General Premises

This work argues that it is outside the scope of municipal authority to prohibit the keeping of urban chickens unless such measures are undertaken or justified pursuant to their provincially delegated powers and the powers incidental thereto. The argument that chickens belong in rural

---

[17] While this work takes many issues with Skene J.'s judgement, such departures were only made possible because of Skene J.'s thorough attention and recital of the facts of Mr. Hughes case, and accordingly, Skene J.'s work is deserving of a considerable amount of respect.
[18] *Ibid* at para 81.
[19] *Ibid* at paras 15, 19.
[20] *Ibid* at para 14.
[21] *Ibid* at para 15.
[22] *Ibid* at para 18.

areas, on its own, is suggested to be a form of moral reasoning that is outside municipal jurisdiction and therefore insufficient to justify the prohibition of keeping small livestock. As such, this work advocates for a restriction on moral reasoning by municipal decision makers in relation to urban food production.

This work proposes that the judiciary may be required, from time to time, to strike down otherwise valid municipal bylaws on the basis of a claimant's moral reasoning in relation to a restrictive municipal bylaw. The protection of fundamental freedoms under the *Charter of Rights and Freedoms*,[23] such as freedom of conscience and freedom of expression, can require the court to consider whether the claimant is engaged in activity premised on a subjectively held conscientious or moral position. Accordingly, urban farming, if undertaken in connection with a subjectively held moral position, may attract *Charter* protection.

This work provides examples of opportunities presented by various legal tests to implore the liberty of peoples to manifest their social and environmental beliefs. Specifically, this work uses the paradigm of food sovereignty, and the associated considerations of global climate change and distributive challenges within the global industrial food system, to justify the keeping of chickens in urban environments. What is generally assumed throughout this work is that agriculture is required for survival. At the same time, those support systems that allow for agriculture, like an appropriate climate, are at risk.

While this work is focused primarily on the keeping of urban hens, as was at issue in *Hughes*, the general principles and themes explored throughout this work are equally applicable to the keeping of other micro-livestock, such as goats, sheep, pigs, rabbits, or other small

---

[23] *The Constitution Act, 1982,* being Schedule B to *the Canada Act 1982* (UK), 1982, c 11, Part I [*Charter of Rights and Freedoms*].

animals. *Hughes* is used as a contextual aid for discussing Saskatoon's urban livestock prohibition. The similarities between Saskatchewan and Alberta's municipal legal frameworks assist in drawing similarities between Saskatoon's bylaws and those considered in *Hughes*.

This project relies considerably on the observations of municipal land-use made by Mariana Valverde, Director of Criminology at the University of Toronto. Valverde's works suggest that municipal governance is premised on physical unity and conformity as a desirable feature of urban spaces.[24] Accordingly, municipal support for diversity, liberty and nature is habitually compromised by preferences for uniformity.[25]

A very important topic not directly considered in this work is the animal-human nexus or other issues concerning animal rights, which should be considered when regulating animals. This work largely assumes the possibility of raising, nurturing, harvesting from and slaughtering animals as part of a sustainable human-ecological food system. It is also assumed throughout this work that it is generally more socially and environmentally friendly to raise animals in one's backyard when using simplistic modes of production than it is to raise animals in conditions common to intensive livestock operations.

This work criticizes the lack of consideration of empirical evidence relating to the safety of keeping a nominal number of chickens in urban environments. Somewhat hypocritically, the consideration of empirical evidence on the safety of keeping urban chickens is limited in this work. That being said, this work does seek to challenge some of the popular arguments against keeping chickens in urban spaces. Constraints on space and time make it impractical to consider all scientific authorities on the safety of keeping chickens, and other empirical issues raised in

---

[24] Mariana Valverde, *Everyday law on the street: city governance in an age of diversity*, (Chicago : The University of Chicago Press, 2012), [Valverde, *Everyday law on the street*].
[25] *Ibid*.

this work. However, this work does claim that most of the issues addressed in this work are not significantly contentious from an empirical vantage, and therefore, the cursory overview of the empirical issues considered in this work may very well lead the reader to confidently form an opinion.

1.4 Overview

Following this section, Chapter 2, "Background on Bylaws, Agriculture, and the Environment", provides an overview of the history of some of Saskatoon's bylaws that relate to the keeping and management of animals in the city. Chapter 2 concludes with an overview of Saskatoon's urban agriculture scene, the modern food system, and climate change. Overall, this Chapter identifies some of the historical and modern trends that are used to contextualize food rights movements.

Chapter 3, "The Theory of Food Rights in Canada", provides a cursory social and environmental theoretical framework for advancing food rights claims. This section draws on a variety of sources, such as international human rights treaties, as well as grass roots movements, such as food sovereignty, which is a constitutionally entrenched principal in some countries. These theories and principals provide language and moral associations that could assist a claimant in establishing a valid, subjective opposition to laws that restrict food production.

Chapters 4 and 5 analyze Saskatoon's prohibitive bylaws and their validity pursuant to constitutional principles of municipal jurisdiction and the *Charter*. As required by these analyses, Chapter 4, "Municipal Authority and Urban Chickens" undertakes a cursory review of some of the most common nuisance-based arguments that are used to support prohibitive bylaws. The urban livestock prohibitions are often defended in relation to concerns of noise, smell, rodents, and disease. However, a review of the empirical evidence suggests that there is no connection

between these concerns and keeping a few small animals on an urban residential plot. It is observed that the reason for prohibiting urban micro-livestocking is based on the social conscription that keeping food in urban settings is immoral. It is argued that this type of reasoning is beyond the jurisdiction of municipalities. This argument is buttressed by Valverde's observations on the hierarchal nature of urban zoning, which is also explored in Chapter 4.

Chapter 5, "The Charter's Protection of Urban Micro-livstocking" focuses primarily on *Hughes* and Mr. Hughes' arguments that freedom of conscience and expression allows him to keep urban hens in prescribed conditions. The rare but emerging idea of freedom of conscience is reviewed in conjunction with its counterpart, freedom of religion, in an attempt to delineate the potential scope of freedom of conscience in relation to the claims made by Mr. Hughes. It is suggested that the scope of freedom of conscience likely overlaps significantly with freedom of expression. In the case of Hughes, and most potential litigants, it would be unlikely that his keeping of urban hens is not expressive, given that it served as a demonstration site and model to others wishing to live more sustainably.

CHAPTER 2 - BACKGROUND ON BYLAWS, AGRICULTURE, AND THE ENVIRONMENT

2.1 Saskatoon's Bylaws

Saskatoon's Animal Control Bylaw, 1999

Chickens are prohibited pursuant to Section 22(1) of Saskatoon's *The Animal Control Bylaw, 1999*[26] ("*Animal Control Bylaw*"). Section 22(1) is titled "Owning and Harbouring Exotic and Wild Animals" and makes it an offence to own or harbour the animals listed in Schedule No. 5. That schedule includes many animals that are known to cause nuisances or are potentially dangerous to humans, such as skunks, scorpions, crocodilians, gorillas, venomous reptiles and amphibians, pythons, boa constrictors, bears, and hyenas.[27] The list also includes animals that are not as readily associated with danger and nuisance, such as:

> (b) all Artiodactylus Ungulates (such as goats, sheep, cattle, pigs and llamas);
> …
> (r) all Galliformes (such as chickens, turkeys, grouse, quails and pheasants);
> …
> (s) all Anseriformes (such as ducks and geese);[28]

The animals that are expressly not prohibited in Schedule No. 5 include: domestic dogs and cats, domestic ferrets, some types of tarantulas.[29] The *Animal Control Bylaw* also permits the keeping of pigeons and bees[30] and appears silent with respect to the keeping of sea creatures and rabbits. The purpose of the bylaw is discussed more in section 4.2 below.

Section 23(1) provides exemptions to owning and harbouring exotic and wild animals for listed organizations, such as the Animal Control Agency, the Saskatoon Forestry Farm, the

---

[26] City of Saskatoon, *Animal Control Bylaw, 1999, Bylaw No 7860*, Codified to Bylaw No 8990 (December 19, 2011). [*Animal Control Bylaw, 1999*]
[27] *Ibid*, Schedule No 5.
[28] *Ibid* [emphasis added].
[29] *Ibid*.
[30] *Ibid*, s 19-21.

Saskatoon Society for the Prevention of Cruelty to Animals and licensed veterinarians. It also permits Schedule No. 5 animals to be kept as research subjects at the University of Saskatchewan or the Saskatchewan Institute of Applied Science and Technology, or anyone holding a license under any statute of the Legislature of Saskatchewan or the Government of Canada.[31] Furthermore the 4-H club, petting zoos and other such agencies can keep animals for public display provided that the animals are not displayed for more than 72 hours and that a number of other strict animal welfare and public health precautions are followed.[32]

Violators of the *Animal Control Bylaw* are subject to the general penalty provision of the bylaw, which provides that anyone who contravenes the bylaw is liable on summary conviction to a fine not less "than the mandatory minimum fine prescribed in Schedule No. 7 and not more than $2,000."[33] Interestingly, there is no mandatory minimum in Schedule No. 7 for the offence of harbouring an animal listed in Schedule No. 5. The penalty provision of the Bylaw goes on to suggest that in default of a fine, that a Court may order "imprisonment of an individual for a term not exceeding one year".[34] While a court would not routinely impose a term of imprisonment under this bylaw for a first time chicken-keeper in default, the bylaw suggests that such a penalty is open to be imposed on the most heinous of serial chicken-keepers.

---

[31] *Ibid,* s 23(1)(a) –(f).
[32] *Ibid,* s 23.1.
[33] *Ibid* s 24(1)(a).
[34] *Ibid,* s 24(1).

Saskatoon's Zoning Bylaw

The keeping of livestock is prohibited in Saskatoon's residential zones. Section 2 of *Zoning Bylaw No. 8770 of The City of Saskatoon* (*Zoning Bylaw*)[35] defines livestock as: cattle, sheep, swine, goats, llamas, horses, chickens, turkeys, waterfowl and similar animals.[36] Section 5.23 of the *Zoning Bylaw* prohibits the keeping of livestock in all districts of the city except for agricultural and future urban development districts.[37] Section 5.23 also makes several exceptions similar to section 23(1) of the *Animal Control Bylaw*, such as the keeping of livestock on the premise of the SPCA, in a veterinary clinic or hatchery, or by anyone specifically licensed to do so under stated conditions.[38] In contrast to livestock, the keeping of domestic animals is permitted in all districts, subject to laws governing noise and public health.[39]

Other Jurisdictions

Many Canadians might be surprised to learn that the United States' most populated cities including New York, Los Angeles, and Chicago[40] all permit keeping urban chickens.[41] A survey

---

[35] City of Saskatoon, *Zoning Bylaw No 8770*, Codified to Bylaw No 9162, January 6, 2014. [*Zoning Bylaw*]

[36] *Ibid* s 2.

[37] *Ibid* s 5.23(2)(a)-(b).

[38] *Ibid* s 5.23 (2)(c)-(g)

[39] *Ibid* s 5.23(3).

[40] See e.g. Municipal Code of Chicago, Chapter 7-12 on Health and Safety, Animal Care and Control, Current through Council Journal of September 10, 2014, online: American Legal Publishing Corporation <amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il>. [Municipal Code of Chicago]

[41] See e.g. Josh Marcellin, "Fight for your right to poultry Dozens of North American cities allow backyard chickens, so what the cluck Edmonton?", 14 January 2014, online: vueweekly.com <www.vueweekly.com/fight-for-your-right-to-poultry/>.

conducted in 2012 indicates that 84% of America's largest 100 cities allow chickens in residential areas, and only three of America's 100 largest cities prohibit keeping chickens.[42]

In Canada, you can also find cities from coast to coast that permit the keeping of hens in urban residential areas.[43] There are at least 24 Canadian urban municipalities that permit keeping urban hens.[44] However, unlike the U.S., most of Canada's largest cities prohibit chickens from residential areas. Chickens are not permitted in residential areas of Toronto, Montreal, Calgary,

---

[42] Jaime M. Bouvier, "Illegal Fowl: A Survey of Municipal Laws Relating to Backyard Poultry and a Model Ordinance for Regulating City Chickens", Environmental Law Reporter, Sept, 2012, Vol.42(9), p.10888-10920 at 10899 [*Bouvier*].

[43] See e.g. Kouri Research, "Towards a Food Strategy for Saskatoon: Saskatoon Regional Food System Assessment and Action Plan", CHEP, December 2013, online: <www.chep.org>. [Kouri Research]

[44] Heather Beyko "Fowl Play? A Look into Recent Canadian Reform Efforts for Backyard Chicken Legislation", 19 September 2012, online: ablawg.ca <ablawg.ca/2012/09/19/fowl-play-a-look-into-recent-canadian-reform-efforts-for-backyard-chicken-legislation>, which lists the following bylaws and cities that regulate chickens as opposed to prohibiting them: "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)"; See also Monique Beaudin, "Chickens make their way back to Montreal"16 July 2011, online: <montrealgazette.com/news/local-news/chickens-make-their-way-back-to-montreal>; Red Deer, AB, *Bylaw No. 3517/2014 - Being A Bylaw Of The City Of Red Deer, In The Province Of Alberta, To Regulate The Keeping Of Chickens In Urban Areas*; Kingston "City of Kingston Rules and Regulations Pertaining to Backyard Hens", online: City of Kingston <https://www.cityofkingston.ca/documents/10180/26367/Backyard%20Hens%20Rules/2dcab1c0-d76f-4187-a15b-fa49bcd878b2>.

Ottawa, Quebec, Winnipeg, Hamilton, Halifax, Oshawa, Saskatoon, and Regina. Vancouver, London, Waterloo and Victoria are the largest centers that permit keeping chickens. Some cities are in transition, such as Edmonton, where a pilot project has been implemented to gather more information needed to decide if they will amend their prohibitive bylaws.[45] Certainly, the trend in Canada is towards allowing chickens back into the city. For example, Red Deer (AB),[46] St. John (NB)[47] and Fredericton (PEI),[48] have amended their bylaws since 2012 to permit keeping urban hens in residential areas.

Chickens are usually allowed in urban areas either by way of detailed guidelines and regulations, or by simply not prohibiting or regulating them (i.e. deregulation). Vancouver is one example of where the keeping of hens is significantly regulated. Vancouver's *Animal control Bylaw 9150*[49] prohibits keeping chickens subject to permitted conditions as set out by the bylaw. A maximum of four (4) hens can be kept[50] provided that they are registered (online or in person),[51] and that the hens are kept in detailed conditions. At section 7.16, these conditions control important aspects of a hen's life, including the minimal permissible coop size; perch dimensions; required access to earth or vegetated floors; provisions for food, water, shelter, light, ventilation and "opportunities for essential behaviours such as scratching, dust bathing and

---

[45] See e.g. Elise Stotle, "City hall approves chicken pilot project", Edmonton Journal, 19 August 2014, online: <www.edmontonjournal.com>.
[46] See e.g. CBC News, "Should Edmonton Allow Chickens?", CBC, Jul 02, 2014, online: www.cbc.ca/news/canada/edmonton/should-edmonton-allow-backyard-chickens-1.2694029
[47] City of Saint John, *Zoning Bylaw*, December 2014, s 9.10 titled "General provisions, Uses permitted in multiple Zones".
[48] City of Fredericton, *By-Law No. Z-5, A Zoning By-Law For The City Of Fredericton* , 24 June 2013, s 7.3(9).
[49] City of Vancouver, British Columbia, *Bylaw 9150*, consolidated to January 31, 2013.
[50] *Ibid* at s 7.5(c)
[51] *Ibid* at s 7.15.

roosting"; the removal or composting of manure; and that residents may keep "hens for personal use only, and may not sell eggs, manure, meat, or other products derived from hens."[52]

In Victoria, there is no limit on the number of hens that can be kept,[53] so long as the number is consistent with household egg consumption.[54] As in Vancouver, roosters are prohibited in Victoria.[55] Victoria's bylaws are notably less involved than those of Vancouver. Animal welfare and nuisance interests are presumably protected by other bylaws. Many cities in the United States, such as Chicago, share similar means of permitting urban poultry as Victoria does.[56] Saint John, New Brunswick, provides an example of a regulatory context that is in between Vancouver and Victoria. In Saint John, some of the main regulations include: a limitation of six (6) hens (i.e. no roosters), coops must be three (3) meters from rear lots or neighbour's property lines, manure stored on site must be sealed, and dead chickens are to be disposed of with abattoirs or veterinarians.[57]

2.2 History of Saskatoon's Animal bylaws

Over the past century, most North American cities have flip-flopped between allowing urban chickens and prohibiting them. Many cities, including Saskatoon, were encouraged in patriotic language to increase local food production as a response to food shortages during World

---

[52] *Ibid* at s 7.16.
[53] City of Victoria, *Bylaw NO. 11-044, Animal Control Bylaw*
[54] see City of Victoria, "Backyard Chickens", Victoria Animal Control Services Ltd., online: <www.vacs.ca/bylaw-regulations/backyard-chickens/register-your-chickens>.
[55] *Ibid*, 27(1)(b).
[56] See e.g. Municipal Code of Chicago, *supra* note 40.
[57] Saint John Zoning Bylaw, *supra* note 47.

War I and II, and during the great depression.[58] Following WWII, chickens were pushed out of cities in concert with the building of supermarkets and the industrialization of food and agriculture. As such, the historical account of the chicken leaving the city appears to correlate strongly with changes in the food system. None of the materials reviewed suggested that nuisance concerns or changes in understanding of health risks drove the decisions to prohibit chickens in the city.

The keeping of chickens, or even gardening for that matter, is not frequently referenced in Saskatoon's historical records,[59] and accordingly, this section tries to glean from the bylaws what was happening in the city with regard to animals. The prevalence of livestock and urban gardening during the early years may have simply been too commonplace to make special note of in historical literature.[60] Geographers Jennifer Blech and Helga Letiner suggest that "less is known about the shifting presence of smaller animals—honeybees, rabbits, and poultry—but it can be presumed that these also were present in considerable number, replaced as food became easier to purchase than produce."[61] The prevalence of keeping small animals in Saskatoon may have been less than in other cities at the turn of the 20th century, given that many of the early

---

[58] Carol Martin, *A History of Canadian Gardening* (Toronto: McArthur and Company, 2000) at 129; William W Thomson, "Gardening in Saskatchewan" Saskatchewan Ministry of Agriculture, Bulletin No 55, Regina, 1917. Retrieved on microfilm, online: <archive.org/details/cihm_84714>.

[59] There may be several factors contributing to the lack of historical record. First, tending to small animals and vegetable plots was traditionally a role undertaken by women and children; see eg. Carol Martin, *A History of Canadian Gardening* (Toronto, ON: McArthur and Company, 2000) at page 51-53. Don Kerr, an influential historian on Saskatoon, writes in Don Kerr & Stan Hanson, *Saskatoon: The First Half-Century*, (Edmonton: Newest Press, 1982) at page 65 [Kerr & Hanson] that the recorded history of Saskatoon is focused on men.

[60] Jennifer Blech and Helga Leitner, "Reimagining the food system, the economy, and urban life: new urban chicken-keepers in US cities", Urban Geography, 2014, 35:1, 86-108.

[61] *Ibid* at page 87.

British-colonial settlers of Saskatoon had "laughable" skills in farming,[62] and purchased gardening produce from local Sioux who were confined to what is now Whitecap Dakota First Nation.[63]

Early Bylaws

In 1906, the City of Saskatoon enacted its first *Public Health Regulations*[64] concerned with a wide range of public health and nuisance related issues, including *inter alia*: contagious diseases (e.g. small pox and typhoid fever),[65] slaughter houses,[66] and nuisances arising from butchers, dead animals and animal waste,[67] animal stables,[68] and privies (outhouses)[69]. The bylaw regulated the frequency that stables needed to be cleaned, the handling of dead animals, [70] and the maximum proximity of wells from slaughterhouses, privies and stables.[71] Under these regulations, stables housing one cow for more than two hours were required to be located at least 100 feet from any dwelling (for more than six cows, the distance increased to 300 feet).[72] The bylaw is notably focused on ways of minimize the risk of water contamination and human exposure to hazardous concentrations of animal and human waste.

---

[62] Kerr & Hanson, *supra* note 59 at page 49.
[63] *Ibid,* page 33.
[64] City of Saskatoon, *Bylaw 80*, *A Bylaw relating to Public Health,* 12 September, 1906. [Saskatoon – Public Health]; Saskatoon implemented regulations dealing with the control of animals even before it became a city. See Town of Saskatoon, *Bylaw #15,* December, 1903 required the owners of "herds of horses" and "droves of cattle" to have full control over them if moving them through the streets; Similarly, Town of Saskatoon *Bylaw 27,*9 June 1904 prohibited animals from running at large within the city limits.
[65] *Ibid* at s 5-24.
[66] *Ibid* at s 25-30.
[67] *Ibid* at s 34-45.
[68] *Ibid* at s 49-52.
[69] *Ibid* at s 69.
[70] *Ibid* at s 34.
[71] *Ibid* at s 58(b).
[72] *Ibid* at s 50-52.

The Advent of Zoning

The Saskatoon planning board established its first comprehensive zoning bylaws in 1930.[73] The 1930 Zoning Bylaw contained many of the same provisions that are found in today's zoning bylaw. The bylaw regulated land use within the city and also incorporated many of the pre-existing public health regulations. For example, the bylaw defined *private stables* as stables:

> with capacity for not more than two (2) horses, one (1) cow, two (2) goats, or poultry for private use. However, on sites having an area of more than five thousand (5000) square feet, the capacity of a stable may be increased by one horse, or one cow for every twenty-five hundred square feet of site area[74]

"Stables" were permitted in residential neighborhoods provided they could be set back from the house by fifty feet and the rear lane by four feet.[75] *Private stables,* which specified a permissible number of horses, cows, goats and poultry that could be kept on city lots, became prohibited following a series of amendments to Saskatoon's zoning bylaws in the 1960s.[76] Interestingly, the 1930 Zoning Bylaw was more welcoming to cows than was Saskatoon's 1906 *Public Health Regulations*. The relaxation of the 1930s bylaw from early bylaws coincided with the great depression and demonstrates that eventual removal of livestock from the city was not linear.

During WWI, the Great Depression and WWII, urban agriculture occurred on grand scales as resilience to "extreme shock to urban food and energy supplies".[77] For example, nearly 1,000

---

[73] City of Saskatoon, *Bylaw # 2051, Zoning Bylaw*, 19 May 1930 [Saskatoon – Zoning 1930].
[74] *Ibid*, s 2(30).
[75] *Ibid*, s 7.
[76] See *Zoning Bylaw, supra* note 35 s.5.23(4) requires that kennel enclosures be set back 1 metre
[77] Kyle Clark and Kimberly A. Nicholas, "Introducing urban food forestry: a multifunctional approach to increase food security and provide ecosystem services" Landscape Ecol (2013) 28:1649–1669 at page1651. See also MacRae Rod et al."Could Toronto provide 10% of its fresh vegetable requirements from within its own boundaries? Matching consumption requirements with growing spaces". Journal of Agriculture, Food Systems, and Community Development, 2010 1(2): 105–127 at page 108 where MacRae noted that in 1944, victory

of Saskatoon's empty lots were under cultivation during WWI.[78] Generally, livestock were invited back into cities throughout North America where they had previously been pushed out during this era.[79] Chickens were primarily farmed for their eggs; meat was a byproduct.[80] It was common in North America during this period to have a few chickens in the backyard to supplement local consumption during this period. Simultaneously, there was a growing tendency of establishing larger-scale poultry facilities to feed soldiers overseas.[81]

1950s – 1980s

A major period in agricultural policy changes followed WWII and continued through the 70s.[82] The 1960s brought an increase in urbanization and mass-produced foods resulting in the pervasion of supermarkets.[83] On the global scene, US food aid was used to encourage industrialization and market liberalization in select developing countries. In Asia, the Green Revolution extended market relations into the countryside.[84]

---

gardens produced 46% of the fresh vegetable supply in the U.S. In Canada, there was a total of 200,000 WWII wartime and Victory Gardens that produced 52 million kg of vegetables.

[78] Kerr & Hanson, *supra* note 59 at page 254.

[79] Jennifer Blecha, *Urban life with livestock: Performing alternative imaginaries through small-scale urban livestock agriculture in the United States*, Doctoral dissertation, University of Minnesota, July 2007 at 14; William Butler, "Welcoming animals back to the city: Navigating the tensions of urban livestock through municipal ordinances." Journal of Agriculture, Food Systems, and Community Development, 2012 2(2), 193–215 at 196.

[80] Pew Environmental Group. "Big Chicken: Poultry and Industrial Poultry Production in America", 2011, Washington, DC: The Pew Environmental Group. [Pew Environmental]

[81] Pat McNight, "Urban-chicken History". Urban Farm Online, 7 March 2014, online: <www.urbanfarmonline.com/urban-livestock/chickens/chicken-history.aspx>

[82] Philip McMichael, "A food regime genealogy", The Journal of Peasant Studies, 36:1, 139-169 (2009) at 141 [McMichael].

[83] See e.g. Tony Weis, *The Global Food Economy: The Battle for the Future of Farming*, (London: Fernwood Publishing, 2007) at 89-127.

[84] McMichael, *supra* note 82 at 141.

This period was marked by increasing capitalization of the food chain and also brought changes at the municipal level. History Professor Andrea Gaynor in her book *Harvest the Suburbs*[85] explains the prevalence of prohibitive zoning bylaws implemented during the 1960's:

> [T]he increasing restriction on the keeping of productive animals was based as much on the abandonment of a perceived out dated rural era in favor of a progressive urban ideology' as it was on concerns for health or the obviation of nuisances. This 'urban ideology' – part of the 'modern outlook' – included an element which lauded consumption and disparaged at least some types of production. Margo Huxley has proposed that such 'by-laws' can be seen to support consumerist trends in domestic life by regulating the amount of (non-horticultural) food production which can be undertaken on suburban blocks.[86]

The allowance of stables on urban lots, as provided for in the original 1930 Zoning Bylaw survived zoning amendments made in 1953.[87] However, by 1967, stables were prohibited within the city limits, even in the urban agricultural zones or in future urban development zones.[88] As discussed in the following section, there is some indication that the city intended this change as a means of prohibiting livestock in the city.

2.3 Modern Agricultural Policy

The Global Food System

Henry Bernstein, a professor emeritus at the London School of Economics, and founding editor of the Journal of Agrarian Change from 2001-2008 describes trends in the global food system as follows:

- the increasing concentration of global corporations in both agri-input and agro-food industries;

---

[85] Andrea Gaynor, *Harvest of the Suburbs* (Perth: University or Western Australia Press, 2006) [Andrea Gaynor].
[86] *Ibid* at page 113.
[87] City of Saskatoon, Zoning Bylaw No 3307, July 1953.
[88] City of Saskatoon, Zoning Bylaw No 4637, May 1967.

- the growth of obesity and obesity-related illness, together with continuing, possibly growing, hunger and malnutrition;
- the environmental costs of all of the above, including loss of biodiversity, increasing levels of fossil-fuel use and their associated carbon emissions[89]

The modern era of agricultural policy is characterized by deepening global supply chains[90] and a dominance of supermarkets.[91] The influence of transnational corporations and their ability to achieve favorable local policies,[92] including subsidies,[93] is pervasive. Notably, the economic concentration held by agricultural firms tends to be increasing.[94] In Canada this results in big farms are getting bigger. In contrast, the number of small farms is also increasing. The family or middle size farm, however, is disappearing.[95] The increasing economic concentration of

---

[89] Henry Bernstein, "Food Sovereignty: A Skeptical View", Food Sovereignty: A Critical Dialogue International Conference, Program in Agrarian Studies at Yale University and the Journal of Peasant Studies, September 14-15, 2013, online:<www.yale.edu/agrarianstudies/foodsovereignty/pprs/1_Bernstein_2013.pdf > at 2-3 citing Henry Bernstein, *Class dynamics of agrarian change* (Halifax, NS, 2010: Fernwood) at 82-84.

[90] See e.g. Lawrence Busch, "Performing the Economy, Performing Science: From Neoclassical to Supply Chain Models In the Agrifood Sector", Economy and Society 2007, 36(3):439-468.

[91] McMichael, *supra* note 82 at 142.

[92] See e.g. Diana Stuart & Michelle Worosz's,"Risk, Anti-Reflexivity, and Ethical Neutralization in Industrial Food Processing", 2012, Agriculture and Human Values 29(3):287-301. See also Grace Skogstad, *Internationalization and Canadian Agriculture* (Toronto: University of Toronto Press, 2008) in chapter 2, which discusses the role of farmer and NGO lobbyists.

[93]Evan Fraser and Elizabeth Fraser, "10 things you need to know about the global food system", 1 May 2014, the Guardian, online: <www.theguardian.com/sustainable-business/food-blog/10-things-need-to-know-global-food-system>, [Fraser].

[94] William H. Friedland "Agrifood Globalization and Commodity Systems." International Journal of Sociology of Agriculture and Food, 2004 12: 5-16. Michael Carolan, *The Sociology of Food and Agriculture* (London: Routledge, 2012) at 40 [Carolan]. See also John Wilkinson, "The Globalization fo Agribusiness and Developing World Food Systems in Fred Magdoff & Brian Tokar, *Agriculture and Food in Crisis: Conflict, Resistance, and Renewal* (New York: Monthly Review Press, 2010) 155-169, at 157-159.

[95] André Magnan, "New Avenues of Farm Corporatization in the Prairie Grains Sector: Farm Family Entrepreneurs and the Case of One Earth Farms." Agriculture and Human Values 2012 29:161-175 at page 165.

agricultural firms occurs in contrast and tension with movements that take on various forms of localism discussed more below.

The themes of the global agricultural system identified by Bernstein also typify the poultry industry.[96] In the early 1990s, chicken surpassed beef and pork as the most consumed animal in America.[97] The number of chicken farmers has decreased by 98% since 1950[98] meaning that chicken farm sizes have increased dramatically. Growers are rarely independent and work for few companies who typically also sell the feed used by the growers.[99] This also creates environmental issues as waste is concentrated in specific geographic locations.[100]

Many of the counter trends to the capitalization of agriculture also caught hold during this period of agricultural intensification. One of the earlier local events includes the opening of Saskatoon Farmers' market in 1975.[101] One author suggests that "the movement to farmers markets can be seen arising from three aspects of the environmental movement – the desire for fresher foods, concern over the use of pesticides and a desire for energy savings by shortening the supply chain."[102]

---

[96] See e.g. Francisco Martinez-Gomez, Gilberto Aboites-Manrique & Douglas H. Constance, "Neoliberal restructuring, neoregulation, and the Mexican poultry industry", Agric Hum Values (2013) 30:495–510.
[97] Pew environmental, *supra* note 80 at 1.
[98] *Ibid* at page 3.
[99] *Ibid* at page 4-5.
[100] *Ibid* at page 9-16.
[101] Micheal Basil, "A history of farmers' markets in Canada." Journal of Historical Research in Marketing, 2012, Vol 4 No 3, 387-407 at 396.
[102] *Ibid*, internal citations omitted.

Urban Agriculture Revival

The United Nations defines Urban Agriculture as "the production of food and nonfood plant and tree crops, and animal husbandry, both within and fringing urban areas."[103] The term *urban agriculture* has only recently emerged into the popular lexicon,[104] although the practice of urban gardening and micro-livestocking is ancient and has persisted through time, space and social context.[105]

Urban agriculture can be characterized by different modes of organization and management, scale, function and purpose, labour and market engagement.[106] In Saskatoon, urban agriculture is often used to describe residential gardens, community allotment plots (e.g. City Park Community Garden[107]), collective community gardens (e.g. Riversdale community

---

[103] Rod MacRae et al. "Could Toronto provide 10% of its fresh vegetable requirements from within its own boundaries? Matching consumption requirements with growing spaces". Journal of Agriculture, Food Systems, and Community Development, 2010 1(2): 105–127 at page 106. See also : Luc J.A. Mougeot, "Urban agricutlutre: Definition, presence, potential and risks", 1-42 in Bakker et al (eds.). *Growing Cities, Growing Food: Urban Agriculture on the Policy Agenda: A Reader on Urban Agriculture* (Feldafing, Germany, 2010: German Foundation for International Development) at 10. Mougeot offers criteria to determine whether an activity can be described as urban agriculture, such as: the use of urban residents for labour, the use of urban resources (e.g. waste as compost and water for irrigation), links with urban consumers, impacts on urban ecology (both positive and negative), competition for land with other urban functions, and the influence of urban policies and plans.

[104] UN FAO "Urban agriculture: an oximoron? In: The state of food and agriculture 1996", UNFAO, Rome, 1996 43-57; Jac Smit, Joe Nasr and Annu Ratta, *Urban Agriculture: Food, Jobs and Sustainable Cities*, 2001, The Urban Agriculture Network, Inc. [Smit]

[105] Smit, *ibid* at page 10. Paris in the early 1800s had 8,500 urban farmers cultivating approximately one sixth of the city's land area. Paris is often credited by some for developing "square-foot gardening", a technique still used by many today. See e.g Cockrall-King, Jennifer, *Food and the City: Urban Agriculture and the New Food Revolution* (Amherst, NY: Prometheus Books 2010) at page 90.

[106] Nathan McClintock, "Radical, reformist, and garden-variety neoliberal: coming to terms with urban agriculture's contradictions", Local Environment: The International Journal of Justice and Sustainability, 201419:2, 147-171 at page 150.

[107] City of Saskatoon, "Current Allotment, Community, and Backyard Gardens in Saskatoon", September 2013, online: City of Saskatoon

garden[108]), informal or *guerilla* gardening on boulevards and other non-allocated spaces, non-profit gardens (e.g. Saskatoon Food Bank's Garden Patch[109]), commercial operations (e.g. Spin Farming[110] and EcoBain Farms[111]), and the keeping of backyard chickens (as in the case of Deborah Johnson and others).

Generally speaking, Western urban dwellers are significantly disconnected from the production of their food, largely in response to the international restructuring of agribusiness and the associated commodification of food.[112] Urban agriculture can assist in reconnecting urban dwellers with their food production, and nature more generally.[113] This sort of reconnection is noted in the literature as providing significant physical, mental,[114] and for some, even spiritual benefits.[115] Urban agriculture also assists urban consumers in developing and maintaining food producing and processing skills that are quickly being lost in the context of greater consumption

---

<www.saskatoon.ca/DEPARTMENTS/Community%20Services/Communitydevelopment/Documents/Garden_Locations.pdf>.

[108] *Ibid*; See also CHEP, "Backyard Gardening Program", online: <www.chep.org/en/programs/backyardgardeningprogram>

[109] Saskatoon Food Bank and Learning Centre, "Urban Agriculture – Garden Patch", online: <saskatoonfoodbank.org/gardenpatch/>

[110] Wally's Urban Market Garden, "Vive La Niche", SPIN Farming, 15 September 2014, online: <spinfarming.com/tips/tag/sk/>.

[111] Jenn Sharp "Brian and Roberta Bain are farming for the future" The Leader Post, 14 January 2014, online: Leader Post <www.leaderpost.com/life/Brian+Roberta+Bain+farming+future/9385521/story.html>

[112] Bethaney Turner, "Embodied connections: sustainability, food systems and community gardens", Local Environment: The International Journal of Justice and Sustainability, (2011) 16:6, 509-522 at 511.

[113] *Ibid*. See also at Pierrette Hondagneu-Sotelo, "Cultivating Questions for a Sociology of Gardens", Journal of Contemporary Ethnography 2010 39: 498 at 499.

[114] See e.g. Nathan McClintock, "Why farm the City?" Cambridge Journal of Regions, Economy and Society 2010, 3, 191-207.

[115] *Ibid*. See also Melissa Raphael, "At the East End of Eden: A Feminist Spirituality of Gardening: Our Way Past the Flaming Sword", Feminist Theology 1993 2:101.

of fast and easy food.[116] Saskatoon's prohibition on micro-livestock thereby misses an important opportunity, not only for increased urban agricultural activity, but also social wellbeing.

Kouri Research, a local policy consultancy, completed a report focused on local and regional food system trends, which suggested that Saskatoon is an increasingly educated and food conscious population.[117] The number of community gardens is steadily increasing to fulfill a growing demand for locally produced food. [118] Moreover, Kouri's report suggests that Saskatoon has a significant opportunity to grow more food locally, having an estimated 2,500 acres of vacant land, most of which consists of parks.[119] It is estimated that 50-75% of Saskatoon's food needs could be met by local and regional production without Saskatoonians having to significantly having to change their diet.[120]

If the prevalence of community gardening is any indication of the prevalence of urban micro-livestocking, then recent trends would suggest that the latter is on the rise. In Saskatoon, the number of community gardens has increased from 12 to 32 since 2008.[121] The increase in community gardens during this time coincides with the increase in global food prices during 2007/2008 and with a growing awareness of the energy consumed in the conventional agricultural system. The growing prevalence of community gardens should come as no surprise

---

[116] See generally JoAnn Jaffe and Michael Gertler, "Victual vicissitudes: Consumer deskilling and the (gendered) transformation of food systems" Agriculture and Human Values (2006) 23: 143–162

[117] Kouri Research, *supra* note 43 at iv.

[118] *Ibid* at page 22.

[119] *Ibid* at page 23.

[120] *Ibid* at page 19.

[121] City of Saskatoon. "Community Garden Locations", website: <www.saskatoon.ca/DEPARTMENTS/Community%20Services/Communitydevelopment/Documents/Garden_Locations.pdf>".

given that gardening is one Canadians' favorite pastimes.[122] This is highlighted by unpublished 2011 survey data from Statistics Canada, which suggests that 80% of surveyed households "have a garden or areas with trees, shrubs, flowers or vegetables outside." The survey results found that 56% of households "grew vegetables, herbs, fruits or flowers for *personal use*",[123] indicating a prevalence of self-sustaining tendencies among Canadians.[124]

The energy and interest in local food growing is further manifested in the wave of urban municipalities creating local food system policy frameworks.[125] Saskatoon has yet to move towards creating such a policy framework, notwithstanding the adoption in principle of the *Saskatoon Food Charter*,[126] which is discussed more in Chapter 3's section on "Food Sovereignty". While it may be difficult to estimate how food trends would change if micro-

---

[122] Loretto Lambe, "Gardening: a multisensory experience" in Hogg, James and Judith Cavet. Making Leisure Provision for People with Profound Learning and Multiple Disabilities" (1995) Springer Science Business Media Dordrecht 113-130; Allan Loram, et al, "Urban Domestic Gardens: The Effects of Human Interventions on Garden Composition" Environmental Management (2011) 48:808–824; Cinda Chavich, "From orchids and tropical songbirds to healing plants and a canopy walk, Canadian public gardens are a feast for the senses". Canadian Tourism Commission, 19 March 2014, online: <encorporate.canada.travel/content/travel_story_ideas/10-things-canada-gardens Canadian Tourism Commission>.

[123] *Ibid* [Emphasis Added]. This would imply that 70 percent (56% /80%) of gardeners reap material benefits from their labour (self-provision), while the remaining 30 percent of gardens are established for aesthetic, kinesthetic, spiritual or other purposes.

[124] Of the 56% of households that grew for personal use, 82% produced outdoors, 14% indoors, and 2.3% in community gardens. It was not possible at this point to delineate rural from urban households (although, 81% of households are urban according to Statistics Canada). The survey results likely provide some insight into the prevalence of agriculture in Saskatoon given that the majority of households in Canada undertook some level of self-provisioning/sustanence in 2011.

[125] See e.g. Kimberley Hodgson, "Planning for food access and community-based food systems: A National Scan and Evaluation of Local Comprehensive and Sustainability Plans", American Planning Association, November 2012, online: <www.planning.org/research/foodaccess/pdf/foodaccessreport.pdf> [Hodgson].

[126] City of Saskatoon, Saskatoon Food Charter, adopted in principle 2002, online <www.saskatooncommunityclinic.ca/pdf/Saskatoon_Food_Charter.pdf>.

livestocking was permitted in Saskatchewan – the province with the highest provincial rate of volunteerism[127] – the direct and indirect impacts, at least in theory, could be appreciable.

[127] Statistics Canada, Mireille Vézina and Susan Crompton, "Volunteering in Canada",23 April 2014, online: <www.statcan.gc.ca/pub/11-008-x/2012001/article/11638-eng.htm>.

CHAPTER 3 - THE THEORY OF FOOD RIGHTS IN CANADA

In Mr. Hughes' testimony at trial, and to the media,[128] he framed his case as the "Canadian Right to Food Trial".[129] In so doing, Mr. Hughes suggested that there is something so fundamentally important about keeping urban hens that it was outside the scope of government action to prohibit this activity. This Chapter briefly explores how some of the social and environmental rights-based frameworks assists in contextualizing the objective or subjective beliefs of Mr. Hughes or other potential claimants who argue against restrictive urban agricultural laws.

3.1 Climate Justice

Climate injustice describes how the most marginalized groups, and concurrently the lowest carbon emitters, are disproportionately impacted by climate change.[130] The reduction of agricultural emissions and sustainable agricultural alternatives are at the forefront of climate justice initiatives.[131] Urban agriculture and localized modes of food production are often put forward as measures to mitigate and adapt to climate change and other associated issues such as local and global deteriorations in biodiversity and soil fertility. While there are many environmental dimensions of agriculture, this work considers only the narrow argument that

---

[128] See e.g. Anthony A. Davis, "Is keeping hens in the city a charter right?", MacLean's Magazine, 12 March 2012, online: <www.macleans.ca/news/canada/running-a-fowl-of-the-constitution/>.

[129] *Hughes, supra* note 14 at para 109.

[130] J. Timmons Roberts "Globalizing environmental justice" 285-307 in Ronald Sandler & Phaedra C. Pezzullo, eds, *Environmental justice and environmentalism: The social justice challenge to the environmental movement* (Cambridge, MA: MIT Press, 2007) at 295; See also Vito De Lucia, "The Climate Justice Movement and the Hegemonic Discourse of Technology" 66-83, in Matthias Dietz & Heiko Garrelts, eds, *Routledge Handbook of the Climate Change Movement* (Routledge, 2013) at 69.

[131] *Ibid* at 273.

climate change should be taken into consideration when evaluating the acceptability of urban agricultural solutions as measure of climate change mitigation. These considerations are especially important in Saskatchewan, given that Saskatchewan is the most intensive producer of greenhouse gases per capita in Canada.[132]

Empirical basis for Climate Justice

The USDA says that "climate change poses unprecedented challenges to U.S. agriculture because of the sensitivity of agricultural productivity." They predict that "major adjustments in production practices over the next 30 years" [133] will be required. Even more stark, if emission levels continue to rise unchecked, the conditions for human habitation on earth are at risk.[134] Former U.S. Secretary of Energy and Nobel Prize winning physicist Steven Chu said, "I don't think the American public has gripped in its gut what could happen… We're looking at a scenario where there's no more agriculture in California… I don't actually see how they can keep their cities going either."[135] Globally, agriculture and its associated impacts on land, such as deforestation, account for upwards of 25% of anthropogenic greenhouse gas emissions.[136]

---

[132] CBC News, "Sask. has highest per capita greenhouse gas emissions: report", 9 August 2014, online:<www.cbc.ca/news/canada/saskatchewan/sask-has-highest-per-capita-greenhouse-gas-emissions-report-1.1192868>.

[133] Chales J Walthall et al,. *Climate Change and Agriculture in the United States: Effects and Adaptation*, 2012, USDA Technical Bulletin 1935, Washington, DC. 1.

[134] J. W. Rocksrtöm et al., "A Safe Operating Space for Humanity", Nature, Vol 461, 24 September 2009, 472 at 473. See also: World Bank, "Turn Down the Heat: Why a 4°C Warmer World must be Avoided", The World Bank, November 2012 at ix, online: <www.worldbank.org/en/topic/climatechange> , at 1 [World Bank]; UN Daily News, "Doha meeting must take decisive action to tackle growing crisis of climate change", 4 December 2012, online: <www.un.org/news/dh/pdf/english/2012/04122012.pdf>, at 2, citing speech by Ban Ki Moon wherein he sates "[Global warming] is an existential challenge for the whole human race – our way of life, our plans for the future."

[135] Jim Tankersley, Chu: 'Economic Disaster'from Warming, LA Times, 7 February2009, online: <latimesblogs.latimes.com/greenspace/2009/02/chu- economic-di.html>, quoted in Maggie

In some regions, the potential for agricultural production may increase over the short term as a result of longer and warmer growing seasons.[137] Over time, however, the potential for greater yields will be challenged by yield-reducing risk factors. Regardless of any measures taken to reduce climate change in the future, by the end of the 21st century, weather will be even more characterized by the extremes; there is a *very likely* going to be more regular and intense flooding[138] and there is *likely* going to be more intense and lengthy droughts.[139] Given that agriculture's reliance on water,[140] hydrological fluctuations will challenge agricultural production. Some empirical evidence already exists to suggest that some of these changes are

---

Ellinger-Locke, "Food Sovereignty is a Gendered Issue", 18 Buff Envtl LJ 157, 2010-2011 at 184. Allison et al, "The Copenhagen Diagnosis: Updating the World on the Latest Climate Science", University of New South Wales Climate Change Research Center, 2009.

[136] Working Group III contribution to the IPCC 5th Assessment Report "Climate Change 2014: Mitigation of Climate Change" that was accepted but not approved in detail by the 12th Session of Working Group III and the 39th Session of the IPCC on 12 April 2014 in Berlin, Germany, online:< mitigation2014.org/report/final-draft/final-draft-fgd-17122013>; Sonja J Vermeulen, Bruce M Campbell & John Ingram, "Climate Change and Food Systems, Annu. Rev Environ. Resour. 37, 195–222 (2012), at 198 online: <www.annualreviews.org/doi/pdf/10.1146/annurev-environ-020411-130608>. The report notes that emissions occurring directly from agricultural production include emissions from agricultural soils, enteric fermentation (cow burps), manure decomposition, synthetic fertilizers and rice patty emissions, all of which account for 10-12% of global GHG emissions. See also UNEP, *The Emissions Gap Report 2013 – Emissions trends, pledges and their implementation*, 2013, United Nations Environment Programme (UNEP), Nairobi, online: <www.unep.org/emissionsgapreport2013> at xvi.

[137] Lower latitude regions are expected to experience more severe impacts sooner.

[138] IPCC, *Climate Change 2013: The Physical Science Basis Summary for Policymakers, Working Group I Contribution to the IPCC Fifth Assessment Report*, Intergovernmental Panel on Climate Change, October 2013, online: <www.climatechange2013.org/> at 23. "Very likely" conveys a confidence interval of 90-100%

[139] *Ibid*. "Likely" conveys a confidence interval of 66-100%.

[140] UNEP, *Global Environmental Outlook 5 (GEO5): Environment for the future we want*, DEW/1417/NA (2012), online: <www.unep.org/geo/> at 104.

already taking effect on the prairies.[141] Warmer weather and eco-systems stressed by changing climatic conditions may also increase the risk of pests and biodiversity loss.[142]

The scientific opinion is that global warming must be limited to 1.5°C to 2°C in order to avoid dangerous climate change,[143] which means, according to the International Energy Agency, that "no more than one-third of proven reserves of fossil fuels can be consumed prior to 2050 if the world is to achieve the 2 °C goal."[144] All of this is to say quite simply that: the agriculture sector is a significant source of greenhouse gas emissions; greenhouse gas emissions, the cause of climate change, will have near and far reaching impacts; and, that to avoid the potentially stark consequences of climate change, greenhouse gas emissions need to be significantly reduced or eliminated in the near term. Agricultural reform is an urgent and important matter.

Climate Justice and Urban Agriculture

Urban agriculture will be part of the solution to climate justice. It is largely intuitive that produce grown on intensively labored backyard plots would likely have less embodied carbon

---

[141] David Sauchyn, Harry P Diaz & Suren Kulshreshtha, eds., *The new normal: the Canadian prairies in a changing climate*, (Regina : CPRC Press, 2010); John Vandall, Norm Henderson & Jeff Thorpe, "Suitability and adaptability of current protected area policies under different climate change scenarios: the case of the Prairie Ecozone", 2006, Saskatchewan Prairie Adaptation Research Collaborative (Saskatchewan Research Council Publication 11755-1E06), online: <www.parc.ca>; Dave Sauchyn et al., "Saskatchewan's Natural Capital In a Changing Climate: An Assessment for Impacts and Adaption", Saskatchewan Prairie Adaptation Research Collaborative, April 2009, online: <www.parc.ca>.

[142] Frank Maes, eds, Biodiversity and climate change: linkages at international, national and local levels (Cheltenham, UK : Edward Elgar, 2013).

[143] See e.g. UNFCCC, "Report of the Conference of the Parties on its seventeenth session", COP 17, Durban, 2011, FCCC/CP/2011/9/Add.1, at preface; Meinshausen et al, "Greenhouse gas emission targets for limiting global warming to 2 C, Nature", 2009, April 30, vol 458, 1158-1162; *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, December 11, 1977, 2303 UNTS 148, (1998), 37 ILM 22 (in force February 16, 2005, entry into force for Canada February 16, 2005).

[144] IEA, "World Energy Outlook, 2012: Executive Summary", France, 2012, online: www.iea.orgat 3.

emissions than industrially produced food grown thousands of miles away. It is often argued, however, that transportation accounts for a relatively minor portion of the lifecycle carbon emissions associated with most industrially grown produce.[145] While a greenhouse gas accounting comparison between eggs or meat from urban hens and industrially produced hens is outside the scope of this work, it is noted that low energy alternatives are available for backyard chickens, such as passive solar coops. In an effort to reduce emissions, it often matters far more what you eat than where it was grown.[146] This has led some to choose vegetarianism and for those who do not wish to cut meat from their diet, to choose to eat chicken, eggs or fish over industrially produced beef as more climate friendly choices.[147]

While the City of Saskatoon has acknowledged the issue of climate change, it has yet to implement budgetary commitments that would reduce greenhouse gas emissions in amounts called for by the IPCC.[148]

---

[145] See e.g. Bret C. Birdsong "From "Food Miles" to "Moneyball": How We Should Be Thinking About Food and Climate", University of Nevada, Las Vegas, William S. Boyd School of Law, (2013), Paper 776, online:<scholars.law.unlvedu/facpub/776>.

[146] See e.g. Gidon Eshel et. al,"Land, irrigation water, greenhouse gas, and reactive nitrogen burdens of meat, eggs, and dairy production in the United States", Proceedings of the National Academy of Science, 19 August 2014, vol 111, no 33, online: <www.pnas.org/cgi/doi/10.1073/pnas.1402183111>.

[147] Statistics Canada, "Food availability in Canada", table 002-0011, CANSIM (Statistics Canada's key socioeconomic database), online:< www5.statcan.gc.ca/cansim/pick-choisir?lang=eng&p2=33&id=0020011>; See also *Kouri*, *supra* note 43 at page 14.It is noted in Canada that average quantity of beef consumption declined from 14.6 to 12.0 kgs/person/year from 1992-2002. During that same period, the average consumption of chicken rose from 8.1 to 11.0 kgs/person/year. Milk consumption nearly halfed, while processed milk products increased, as did eggs.

[148] City of Saskatoon, "2014 Preliminary Corporate Business Plan and Detailed Budget for City Coucnil Review", December 3-4, 2013", online: <www.saskatoon.ca/DEPARTMENTS/Corporate%20Services/Office%20of%20the%20Finance%20Branch/Documents/2014-preliminary-corp-bus-plan-and-budget.pdf>.

3.2 Food Rights

Food rights, food sovereignty and food security frameworks aim to ensure that everyone has enough food to eat. Rights based paradigms are also concerned with the economic and social interests of the producers, as well as the rights of consumers to quality and nutritious food.

Global to Local Food Security

The Rome Declaration on World Food Security and the World Food Summit Plan of Action of 1996 described food security as existing "when all people at all times have access to sufficient, safe, nutritious food to maintain a healthy and active life."[149] Notwithstanding continued efforts by nations to achieve food security, starvation and food insecurity persist.

There is enough food to feed the world's population, yet over 800 million suffer from chronic hunger.[150] In 2000, 36 million people died from causes linked directly or indirectly to undernourishment and hunger.[151] In 2007 and 2008, millions took to the streets to protest rising food prices while "agribusinesses were riding a wave of near-record profits".[152] These are major shortfalls of the global food system.

---

[149] UNFAO, "Rome Declaration on World Food Security and World Food Summit Plan of Action, Rome, 13 November 1996, online: FAO.org <www.fao.org/docrep/003/w3613e/w3613e00.HTM>. See also, Hodgson, *supra* note 125 at 6.

[150] FAO, IFAD and WFP, *The State of Food Insecurity in the World 2013, The multiple dimensions of food security*, (Rome: UNFAO, 2013) at 8.

[151] Jean Ziegler "The Right to Food: Report by the Special Rapporteur on the Right to Food, Mr. Jean Ziegler, Submitted in Accordance with Commission on Human Rights Resolution 2000/10" United Nations, February 7, 2001, at p 5. "On average, 62 million people die each year, of whom probably 36 million (58 per cent) directly or indirectly as a result of nutritional deficiencies, infections, epidemics or diseases which attack the body when its resistance and immunity have been weakened by undernourishment and hunger.". Globally, hunger is decreasing in absolute numbers and prevalence (% of global population), although continually increasing in absolute numbers in the developing world.

[152] Carolan, *supra* note 94 at 42.

In 1981, political philosopher Amartya Sen highlighted that resolving food insecurity is more complex than simply producing more food; it requires concern for "distribution, empowerment, entitlement, nutritional value, and the ability to withstand socio-economic and political instabilities".[153] Much of the food that is produced is spoiled before it reaches the consumer[154] and an increasing proportion of agriculture production is undertaken to produce animal feed (at much lower return per kCal)[155] and biofuels.[156] Further, many of the calories consumed across the globe are increasingly "empty" calories, resulting in increasing rates of diabetes, obesity and among other nutritional concerns.[157] Empty calories are generally less expensive; accordingly, obesity is transpiring as a new function of poverty and food insecurity.[158]

---

[153] Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation*, (Oxford New York: Clarendon Press Oxford University, 2011) at 123. See also See e.g. Scanlan, Stephen J. 2013, "Feeding the Planet or Feeding Us a Line? Agribusiness, 'Grainwashing' and Hunger in the World Food System." International Journal of Sociology of Agriculture & Food 20(3):357-382 at 358; Carolan, *supra* note 94 at page 66-68; Laura Niada, in "Hunger And International Law: The Far- Reaching Scope Of The Human Right To Food", 22 Conn J Int'l L 131 2006-2007, at 136, describes when issues of food security arise: political disinterest and unaccountability, disguised natural disasters, ingrained inequality, corruption, resource exploitation by foreign countries and transnational corporations (TNCs), hostile international trade and financial regimes, and armed conflicts.

[154] Fraser, *supra* note 93 citing FAO, *Global Food Losses and Waste: Extent Causes and Prevention,* Rome 2011, online:<www.fao.org/fileadmin/user_upload/suistainability/pdf/Global_Food_Losses_and_Food_Waste.pdf>.

[155] Geoffrey Lawrence & Philip McMichael, "The Question of Food Security", Int. Jrnl. of Soc. of Agr. & Food, Vol. 19, No. 2, pp. 135–142, at 137.

[156] Ibid. See also, FAO, WFP and IFAD, *The State of Food Insecurity in the World 2012. Economic growth is necessary but not sufficient to accelerate reduction of hungerand malnutrition.* (Rome: FAO, 2012) at 30.

[157] Bernstein, *supra* note 89.

[158] Carolan, *supra* note 94 at page 14.

In 2012, Special Rapporteur on the right to food, Olivier De Schutter, visited Canada and produced a report outlining Canada's performance in relation to the Right to Food.[159] Given that the availability and access to food is often a function of poverty, De Schutter considered some of Canada's economic indicators.[160] He found that 7.7 % of households in 2007/08 experienced moderate or severe food insecurity; one in ten families with a child under six were food insecure;[161] and, approximately 900,000 Canadians accessed food banks.[162]

The report completed by Kouri Research, follows a series of previous reports that delineate Saskatoon's *food deserts* (areas without access to supermarkets, and consequently, access to less nutritious food).[163] As Kouri's report highlights, urban agriculture as a part of local and regional production also plays an important role in food policy and minimizing food insecurity. In the 2013 growing season, the Saskatoon Food Bank's garden patch produced approximately 19,000 pounds of food.[164] The garden also provided 500 people with an opportunity to learn gardening techniques, which could foreseeably increase food production at other locations by having a more skilled population.

---

[159] UNHRC, "Report of the Special Rapporteur on the right to food, Olivier De Schutter: Mission to Canada", Presented to the United Nations General Assembly, 24 December 2012, A/HRC/22/50/Add.1, online: Office of the high commissioner on human rights, <www.ohchr.org/>.

[160] *Ibid* at 4, showing that the top 10% of earners brought home $103,500 and the bottom 10% only $10,260.

[161] *Ibid*.

[162] *Ibid*. These rates were found to be much higher among First Nations groups.

[163] Kouri Research, *supra* note 43 at page 6. See also Saskatoon Health Region, "Summary: Food Access in Saskatoon", Public Health Observatory, October 2010; T Kershaw et al., "Food Access in Saskatoon Community Report", Saskatoon Health Region, Cushon et al., "Deprivation and food access and balance in Saskatoon, Saskatchewan", October 2010, online: <www.phac-aspc.gc.ca/publicat/cdic-mcbc/33-3/ar-05-eng.php>

[164] Saskatoon Food Bank, 2014 Annual Report, online <issuu.com/yxefoodbank/docs/2014_food_bank_annual_report_issuu_?e=12834557/8696182> at 6.

Justiciability of the Right to Food

Food rights discourse ties food security to globally supported norms and treaties.[165] Canada is a signatory to several international treaties that recognize the right to adequate food, such as the *International Covenant on Economic, Social and Cultural Rights* (*UNICESCR*)[166] Many modern constitutional texts such as the *Charter of Rights and Freedoms* have their roots in these treaties.[167] In Canada, Saskatchewan was the first to implement legislation reciting provisions akin to such treaties with *Saskatchewan Human Rights Code.*[168]

Article 11 of *UNICESCR* recognizes the right of everyone to "an adequate standard of living for himself and his family, including adequate food, clothing and housing".[169] *UNICESCR* also recognizes the fundamental right of everyone to be free from hunger and that nation-states shall take measures to improve methods of production, conservation and distribution of food "by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources."[170] Strict compliance with the latter would leave little room to prohibit safe and effective urban agricultural practices, such as urban hen keeping.

---

[165] See Chaia Heller, *Food, Farms and Solidarity* (Durham & London: Duke University Press, 2013) at 91.
[166] (1976) 993 UNTS 13 [*UNICESCR*].
[167] See also Brian Dickson, "The Canadian Charter of Rights and Freedoms: Context and Evolution", 3-24 in Errol Mendes and Stéphane Beaulac, eds, *The Canadian Charter of Rights and Freedoms*, 5th Ed (Markham, ON : LexisNexis, 2013) [Mendes & Beaulac], at 6. See also The Honourable Beverley McLauchlin in Mendes & Beaulac, 25-45, at 31 quoting *Reference re Public Service* [1987] 1 SCR 313.
[168] SS 1979, c S-24.1.
[169] *Ibid,* article 11(1).
[170] *Ibid,* article 11(2)(a). See also *Convention on the Elimination of All Forms of Discrimination against Women* (1981) 1249 UNTS 13.. in the preamble states that "in situations of poverty women have the least access to food, health, education, training and opportunities for

UNICESCR provides an unambiguous agreement to reduce hunger. Notwithstanding the treaty's laudable goals to reduce hunger, the justiciability of the treaty is questioned. Mr. De Schutter has expressed concerns about the "the growing gap between Canada's international human rights commitments and their implementation domestically".[171]

Former UN special rapporteur on the right to food, Jean Ziegler, suggests that some people object on conceptual and theoretical grounds to the justiciability of the right to food for the following reasons:

> [F]irstly, the right to food was imprecise; secondly, the right to food was subject to the limit of progressive realization; thirdly, the right to food required resources to be provided; and fourthly, that, in the absence of precise national legislation on the right to food, it was difficult for the judiciary to fill the gap that properly belonged to the legislative branch of the State. All these arguments have been used in the past to suggest that the right to food could not be justiciable.[172]

Economic, social and cultural rights are often characterized as "positive rights", meaning that the state is required to do something in order to recognize the rights. Positive rights are often seen as political goals as opposed to enforceable rights. They are associated with state goodwill to be balanced with other competing goals as opposed to binding legal obligations. In contrast, civil and political rights (i.e. freedom and liberties) are often characterized as "negative rights", meaning that the state is limited in stopping people from exercising such rights.[173] Urban agriculture is likely an instance where a cultural and social right could characterize the right as a

---

employment and other needs"; *Convention on the Rights of the Child* [1992] Can. TS No 3, article 24 section 2(c).

[171] *Ibid* at 5.

[172] UNESC, Jean Ziegler, "The Right to Food: The right to food Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2001/25", Economic and Social Council, Commission on Human Rights, E/CN.4/2002/58, 10 January 2002 at para 35.

[173] *Ibid* at para 36.

positive or negative right, given that it relates to the aspiration for food security, but is also related to an activity restricted by government.

In Canada, the right to food is treated primarily as a political goal aside from cases of child neglect. Specifically, it is a crime to fail to provide the *necessities* of life for one's children. In defending our implementation of *UNICESCR,* Canada has suggested the following:

> [w]hile the guarantee of security of the person under section 7 of the Charter might not lead to a right to a certain type of social assistance, it ensured that persons were not deprived of the basic necessities of life.[174]

The advent of the *Charter* marked the entrenchment of many of the values and norms contained in international treaties, such as the *Universal Declaration of Human Rights,*[175] and *UNICESCR,*[176] although, the *Charter* itself does not contain any substantive provisions protecting the right to food.[177] Even without the *Charter,* it is a principle of Canadian law that "international human rights norms constitute persuasive sources for constitutional and statutory interpretation".[178] However, as noted above, the government's interpretation of *UNICESCR,* is that there is no substantive right to food in Canada. The courts' have effectively followed this interpretation as well.[179] According to some scholars, Canada alongside Argentina, Comoros and

---

[174] United Nations Economic and Social Council, "Summary record of the 5th meeting : Canada. 25/05/93", Committee on Economic, Social and Cultural Rights, 13 E/1994/104/Add.17, at para 21.
[175] GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948).
[176] *UNICESCR, supra* note 166.
[177] *Brian Dickson*, *supra* note 167 at 5.
[178] *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, at page 1056; [1989] SCJ No 45 (QL).
[179] The Poverty and Human Rights Center, "Victoria (City) v Adams: Advancing the Right to Shelter Law Sheet", 2009, online: vihrc.org/doc/advancing_the_right_to_shelter.pdf, at 6.

Yemen, has the lowest level of constitutional protection of the right to food[180] as Canada has no legislative protections or case law explicitly recognizing the right to food.[181]

Food Sovereignty

Food sovereignty is a rights-based approach[182] to organizing food systems at local and international levels. Drawing on the concepts of food security and the right to food, food sovereignty challenges the conventional model of agricultural trade, which favours export-oriented and industrial agriculture and "displaces peasant and family agriculture."[183] According to Ziegler, "the right to food … provides an important legal basis for the fight for food sovereignty."[184]

The concept of food sovereignty was popularized by groups such as La Via Campesina in 1996 and further in 2007 during the Forum for Food Sovereignty, held in Sélingué, Mali. The final declaration of the Forum for Food Sovereignty reads:

> Food sovereignty is the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems. It puts those who produce, distribute and

---

[180] Margaret Vidar, "State Recognition of the Right to Food at the National Level", UNU-WIDER 2006, Research Paper No. 2006/61, online:<www.rrojasdatabank.info/unurp06/rp2006-61_1.pdf>, See also UNFAO, "Recognition of the Right to Food at the National Level", Information Paper, Rome, IGWG RTFG INF/2, online: <www.fao.org/docrep/meeting/007/j0574e.htm>.

[181] *Ibid*.

[182] See e.g. Michael Windfuhr & Jennie Jonsén, "Food Sovereignty: Towards democracy in localized food systems" FIAN-International, ITDG Publishing, 2005, online: <www.ukabc.org/foodsovereignty_itdg_fian_print.pdf>

[183] UN, Jean Ziegler, "The Right to Food: The right to food Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2003/25", Economic and Social Council, Commission on Human Rights, E/CN.4/2004/10, 9 February 2004 at para 24 [Jean Ziegler, 2004].

[184] *Ibid* at para 34.

> consume food at the heart of food systems and policies rather than the demands of markets and corporation.[185]

Food sovereignty prioritizes "food production for domestic and local markets, based on peasant and family farmer diversified and agro-ecologically based production systems"[186] as well as fair prices for producers, access and community control over land and other environmental resources, promotion of gender equality, protecting genetic (seed) diversity, and public investment in sustainable food systems.[187] As summarized by Jean Ziegler, food sovereignty envisions a decentralization of the power and resources within the food system:

> Food sovereignty also embodies a call for greater access to resources by the poor, especially women, challenging what is perceived as a growing concentration of ownership of resources. … Food sovereignty calls for equitable access to land, seeds, water, credit and other productive resources so that people can feed themselves.[188]

During De Shutter's visit to Canada, he suggested that the emergence of food policies in some jurisdictions, such as Toronto, as a positive trend. De Schutter suggests that "[s]uch participatory models of food system management deserve support from the provincial, territorial and federal levels, in order to integrate them into a national level framework."[189]

Annette Desmarais and Hannah Wittman, two of Canada's foremost food sovereignty academics, suggest that there is a range of stakeholders using food sovereignty language in Canada. While the adoption of the framework is in its infancy in Canada, Desmarais and Wittman suggest that there is "a shared aim to reclaim a public voice in shaping the food system

---

[185] See eg. Claire Provost, "La Via Campesina celebrates 20 years of standing up for food sovereignty", The Guardian, 17 June 2013 citing the *Declaration Of Nyéléni*, 27 February 2007, Nyéléni Village, Sélingué, Mali, online: nyeleni.org <http://nyeleni.org/spip.php?article290>. [*Declaration Of Nyéléni*]
[186] Jean Ziegler, 2004, *supra* note 183 at para 26.
[187] *Ibid* at para 26.
[188] *Ibid* at para 31.
[189] De Schutter, supra note 159 at 6.

and a growing convergence around ideals of social justice, environmental sustainability and diversity"[190] among food sovereignty advocates.

Incorporation and implementation of Food Sovereignty

Food sovereignty is incorporated into the national legislation or Constitutional texts of Venezuela, Nicaragua, Senegal, Mali, Nepal, Ecuador, and, most recently, Bolivia.[191] Of these countries that support food sovereignty at a constitutional or legislative level, there is a varying degree of implementation of the principle into justiciable law or policies. Following the incorporating the concept of food sovereignty into Venezuela's constitution in 1999 and several national laws in 2008, the country has implemented extensive food sovereignty focused programs focused on "cooperatives, subsidized food distribution (Mecal and PDVAL), communal councils, land reform, and agroecology institutes and research."[192] Other countries, such as Bolivia, have incorporated the principle into their constitution with tangible implementation measures yet to be observed.[193]

---

[190] Annette Desmarais & Hannah Wittman, "Farmers, Foodies & First Nations: Getting to Food Sovereignty in Canada", Food Sovereignty: A Critical Dialogue International Conference, Program in Agrarian Studies at Yale University and the Journal of Peasant Studies, September 14-15, 2013, online: <www.yale.edu/agrarianstudies/foodsovereignty/pprs/3_Desmarais_Wittman_2013.pdf> at 1. See also Hannah Wittman, Annette Aurélie Desmarais & Netty Wiebe, eds., *Food Sovereignty: Reconnecting Food, Nature and Community* (Oakland, CA: Food First Books, 2010).

[191] Sadie Beaugard "Food Policy for People: Incorporating Food Sovereignty Principles into State Governance." Senior Comprehensive Report, Urban and Environmental Policy Institute, Occidental College, Los Angeles, April, 2009, online: <ieham.org/html/docs/Incorporating%20food%20sovereignty%20principles%20into%20State%20governance.pdf> at 26 -27. [Sadie Beaugard].

[192] *Ibid* at 28.

[193] *Ibid*.

Other countries that are not listed above, such as the United States, provide examples where municipal governments have implemented food sovereignty ordinances. For example, there are approximately 10 towns in Maine that have implemented food sovereignty-like ordinances,[194] some of which have resulted in legal battles where the ordinances conflict with state-level milk safety laws.[195] Blue Hill, Maine, for example, passed a "Local Food and Community Self-Governance Ordinance" in 2011, exempting "producers and processors of local foods from state licensing and inspection requirements as long as their products are sold directly to consumers for personal consumption."[196]

At the state level, Wyoming has recently passed the bipartisan *Food Freedom Act*,[197] which allows for the sale of "processed produce, poultry, eggs and unpasteurized milk direct from the cook or farmer".[198] Representative Lindholm, the bill's sponsor, says "[t]his law will take local foods off the black market. It will no longer be illegal to buy a lemon meringue pie from your neighbor or a jar of milk from your local farm."[199]

---

[194] Nathan Bellinger and Michael Fakhri, "The Intersection Between Food Sovereignty and Law", American Bar Association, Natural Resources & Environment Volume 28, Number 2, Fall 2013 at 2 [Bellinger & Fakhri].

[195] See State of *Maine v Dan Brown*, 2014 ME 79 (Maine Supreme Judicial Court), online: <courts.maine.gov/opinions_orders/supreme/lawcourt/2014/14me79br.pdf>; See also Jess Bigood, "Maine Court Fight Pits Farmers Against State and One Another", New York Times, 18 June 2014, online: <www.nytimes.com>.

[196] Bellinger & Fakhri, *supra* note 194 at 2.

[197] 15LSO-0276, HEA0077, Chapter 121.

[198] Melodie Edwards, "After Food Freedom Act Passes, Raw Milk Controversy Lingers", 17 April, 2015, Wyoming Public Radio, online: <wyomingpublicmedia.org/post/after-food-freedom-act-passes-raw-milk-controversy-lingers>.

[199] Farm-to-Consumer Legal Defense Fund, "Wyoming Food Freedom Act Moves Toward Passage"17 February 2015, online: <www.farmtoconsumer.org/wyoming-food-freedom-act-moves-toward-passage/>.

In Saskatchewan, First Nations are at the forefront of implementing food sovereignty projects. In 2009, Flying Dust First Nation began farming a twenty-acre plot, which provides fresh produce to Flying Dust and other First Nations using a community supported agriculture (CSA) model for distribution. It is also a source of formal education in horticulture, and employs 18 people.[200]

Food sovereignty research, organizing and support are advanced by organizations such as the National Farmers Union, who are notably one of the founding members of Via Campesina and actively involved internationally with food sovereignty and alternative trade.[201] Food Secure Canada[202] and the People's Food Policy Project[203] are two other groups involved in promoting food sovereignty related principles.

The Saskatoon Food Bank's garden patch, discussed above, is an excellent example of movement towards tangible implementation of Saskatoon's Food Charter and local food sovereignty.[204] Saskatoon's Food Charter was adopted in principle by the City of Saskatoon in

---

[200] Paul Hanley, "Fist Nation Growing its Way to Food Sovereignty", 12 March 2015, Star Phoenix, online: <www.thestarphoenix.com/life/First+Nation+growing+food+sovereignty/10882492/story.htm>

[201] Sadie Beaugard, *supra* note 191 at 60 citing: National Farmers Union. 2009. "About Us." Retrieved March 2009. (www.nfu.ca/about.html)

[202] See e.g. Food Secure Canada, "Food Democracy and Governance: Towards a People's Food Policy Process", Discussion Paper, available online: foodsecurecanada.org <http://foodsecurecanada.org/resources-news/newsletters/10-food-democracy-and-governance>.

[203] See e.g. People's Food Policy Project, "Resetting the Table: A People's Food Policy for Canada", Creative Commons, April 2011, available online: <http://peoplesfoodpolicy.ca/files/pfpp-resetting-2011-lowres_1.pdf>.

[204] Saskatoon Food Charter, *supra* note 126.

2002.[205] The charter includes objectives aligned with food sovereignty including: "the right of all residents to adequate amounts of nutritious, safe, accessible, culturally acceptable food"; "partnerships and programs that support rural-urban food links and the availability of locally grown", and "protection of agricultural lands".[206] As such, the Food Charter is an important reference in claims such as those advanced by Mr. Hughes, although faces challenges of justiciability as it is adopted only in principle.[207]

Other food rights frameworks

Food sovereignty is similar to other food rights frameworks, such as *food independence*, *food justice,* and *food democracy.* Food independence advocates for "the right of the individual to exercise their personal judgment for the purpose of qualifying the food they eat", and that the right "to secure their preferred food through peaceful, private contractual trade without permission from the majority."[208] Similarly, food justice, an urban and peri-urban agricultural advocacy platform, targets "the industrial agricultural and concentrated land ownership pattern, the exploitation of those who work the land or in the food production factories, and the hazards and inequities embedded in our dominant food growing and production system."[209]

Finally, according to Neva Hassanein, food democracy is the concept that "people can and should be actively participating in shaping the food system, rather than remaining passive

---

[205] *Ibid*. See also Rachel Engler-Stringer, Justin Harder & The Saskatoon Food Coalition "Toward Implementation of the Saskatoon Food Charter: A Report", Community-University Institute for Social Research, University of Saskatchewan, 2011.
[206] *Ibid*.
[207] See e.g. *0759594 B.C. Ltd. v. 568295 British Columbia Ltd.,* 2013 BCCA 381 at 69 for discussion of justiciability of documents approved in principle.
[208] David E. Gumpert, *Life, Liberty and the Pursuit of Food Rights: The Escalating Battle Over Who Decides What We Eat*, (White River Junction: Chelsea Green Publishing, 2013), at 327.
[209] Robert Gottlieb & Anupama Joshi, *Food Justice* (Cambridge: The MIT Press, 2010) at 149.

spectators on the sidelines.... [It is about] citizens having power to determine agro-food policies and practices locally, regionally, nationally and globally."[210]

Summary

What is consistent among these rights-based frameworks is that they contend with the status quo of how agriculture is organized. They provide an articulation of a desire to have a social and environmentally just food system, and how the current arrangement falls short. Food sovereignty and the other alternative food rights frameworks are motivated by largely communitarian objectives seeking to "re-establish moral economies that are informed by a larger set of social and cultural values."[211] Accordingly, food rights solutions require local solutions, formulated in a global context. This form of reflexive localism encourages holistic analysis of food systems to ensure that the dogma of localism or organic is not being used to create or maintain social exclusion, economic inequality or injustice.[212] Accordingly, the food-rights frameworks such as food sovereignty seek practical solutions premised on justice, equality, and fairness. What is distinctive about food systems that exist in tension with industrialized agriculture is that the relationships between the producer and consumer "are framed by 'fairness'"[213] as opposed to economics.

The question remains as to whether there are other justiciable measures to protect food rights under the Canada's constitution. The following sections suggest that there are.

---

[210] Chaia Heller, *Food, Farms and Solidarity* (Durham & London: Duke University Press, 2013).
[211] David Goodman, Melanie E. Dupuis & Michael K. Goodman. *Alternative food networks: Knowledge, practice and politics* (New York: Routledge, 2012).
[212] Ibid at page 31. See also Nathan McClintock *supra* note 106; Graeme Hamilton, "Food activists' 'Eat Organic' slogans spelling disaster in Africa, author warns", National Post, 19 October 2012, online: <news.nationalpost.com/2012/10/19/eat-organic-slogans-dont-belong-in-africa>.
[213] *Ibid* at 46.

CHAPTER 4 - MUNICIPAL AUTHORITY AND URBAN CHICKENS

This chapter challenges the power of municipalities to *prohibit* the keeping of backyard hens on urban residential plots. This chapter begins with an overview of the scope of municipal jurisdiction. As discussed below, the scope of municipal jurisdiction is limited by the *reasonableness* standard and bad faith acts. These principles are then applied to the reasoning in *R v Hughes* and to Saskatoon's *Zoning Bylaw* and *Animal Control Bylaw*. It is argued that the prohibition on urban chickens relies strongly on moral governance, a form of governance that is strictly beyond the scope of municipal government's mandate.

4.1 Overview of municipal power

Source of municipal power

The rule of law provides that "state power must be exercised in accordance with the law."[214] Municipalities do not hold any direct power under the Constitution; they possess only the powers that are delegated to them by provincial legislatures[215] and the power implicit and necessary to achieve the purposes of municipal government.[216] Accordingly, when municipalities make decisions or pass bylaws that extend beyond the legislative constraints imposed upon them, such decisions or bylaws "fall outside of the law," and can be set aside by the courts.[217]

---

[214] *Catalyst Paper Corp. v North Cowichan (District),* [2012] 1 SCR 5, 2012 SCC 2 at 10. [*Catalyst Paper*]

[215] *Ibid* at 11; *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town),* 2001 SCC 40, [2001] 2 SCR 241 at para 20. [*Spraytech*]

[216] E.g. *East York (Borough) v Ontario* (1997), 34 OR (3d) 789, 43 OTC 287 (Gen. Div), aff'd (1997), 36 OR (3d) 733, 153 DLR (4th) 299 (CA), leave to appeal to SCC refused [1998] 1 SCR 797-98 citing *Smith v London (City)* (1909), 20 OLR 133 (Div Ct) at 160-61 (as suggested in class notes provided by Felix Hoehn).

[217] *Ibid* at 10-11.

Municipalities' delegated powers are broad, and their purpose expansive, providing them with significant deference from the courts[218] and consequently, real discretionary power.[219] Deference is afforded to municipal decision-making, in part, because municipal councils are made up of elected representatives accountable to their constituents.[220]

Scope of municipal power

Marianna Valverde notes that "[f]ew legal scholars have reflected on the fact that only municipalities can force homeowners to fix up their yards, even if the risks to neighbors are purely aesthetic."[221] While municipal power is constitutionally delegated from provinces, it is often manifested to effect private property issues that provincial or federal levels of government might have difficulty regulating.

Broad grants of power are often given to municipalities in the form of 'omnibus' clauses. These clauses are worded to include all matters falling within the spheres of health and safety or peace, order and good government.[222] Examples of omnibus grants exist in Saskatchewan's

---

[218] *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 SCR 485 at 493, 2004 SCC 19; *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 SCR 141 at 41 [*Québec Inc*]. See also Felix Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Government* (Purich Publishing: Saskatoon, 1996) at 8 [Hoehn].

[219] Anna Pratt and Lorne Sossin, "A Brief Introduction of the Puzzle of Discretion" (2009) 24(3) Canadian Journal of Law and Society 301-312, at 301, which suggests that "discretion arises when an official is empowered to exercise public authority and afforded scope to decide how that authority should be exercised in particular circumstances." At page 302, the authors suggest:

> [W]hat we have termed the conventional paradigm of discretion is captured by the observation that where the law ends, discretion begins: whereas the rule of law is seen as intimately connected to notions of justice, discretion is more open-ended.

[220] *Ibid* at 47. *Pacific National Investments Ltd. v Victoria (City)*, 2000 SCC 64, [2000] 2 SCR 919, at para 33.

[221] Valverde, *Everyday law on the street*, *supra* note 24 at 25.

[222] See, *infra* note 225.

Municipalities Act[223] and *Cities Act*[224], which provide for the power to pass bylaws for purposes expedient to:

> (a) the peace, order and good government of the municipality.
> (b) the safety, health and welfare of people and the protection of people and property;
> …[225]

Examples of more explicit grants (although still quite broad) in the *Municipalities* and the *Cities* acts include the delegated authority to regulate:

> (d) nuisances, including property, activities or things that affect the amenity of a neighbourhood; …
> (k) wild and domestic animals and activities in relation to them;[226]

Arguments could be made, as they were in *Hughes'*, that the power to regulate chickens could fall under any of the above listed delegations.

Notwithstanding the great deference afforded to municipalities, "omnibus" grants do not confer unlimited power upon a municipality.[227] Open-ended delegations, such as "to provide good government"[228] do not permit municipalities to pass bylaws in bad faith, or that are unreasonable, [229] both of which are discussed in the following sections. While limited from

---

[223] SS 2005, c M-36.1 [*Municipalities Act*].
[224] SS 2002, c C-11.1 [*Cities Act*].
[225] *Municipalities Act* at s 8(1) and *Cities Act* at s 8(1).
[226] *Ibid*.
[227] *R v Greenbaum*, [1993] 1 SCR 674, 100 DLR (4th) 183; *Spratech, supra* note 215 at para 20. Issues of federalism also limit municipal powers as provided for in *Multiple Access Ltd. v McCutcheon,* [1982] 2 SCR 161; 138 DLR (3d), although becoming subjected to the principle of subsidiarity as discussed in Dwight Newman "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity", 74 Sask L Rev 21 2011.
[228] Québec Inc., *supra* note 218 at 41; *Catalyst Paper, supra* note 214 at 24. *The Cities Act*, SS 2002, c C-11.1provides that:
> (2) The purposes of cities are the following:
> (a) to provide good government;
> (c) to develop and maintain a safe and viable community;
> (d) to foster economic, social and environmental well-being;
> (e) to provide wise stewardship of public assets.

[229] *Ibid*.

unreasonableness or bad faith decision-making, the powers of municipal laws often go unquestioned.

Authority to Prohibit

In Saskatchewan, municipalities and cities can pass bylaws that "regulate or prohibit" [230] matters that fall within the municipality's or city's jurisdiction. Given that municipally sanctioned prohibitions are not uncommon or unlawful in Saskatchewan, the prohibitive nature of the impugned bylaws alone would not provide a remedy to litigants combatting the validity of the bylaws. However, the prohibitive nature of a bylaw may give some indication as to the bylaw's purpose or underlying moral foundation.

Other jurisdictions do not give municipalities the power to prohibit land uses unless specifically authorized to do so by statute. In Quebec, there is no delegated authority for municipalities to prohibit activities that are otherwise legal. For example, in *Spraytech,*[231] a chemical company argued that a bylaw prohibiting the use of conventional pesticides for aesthetic use was outside the scope of the municipality's jurisdiction. The Court found that the bylaw was not prohibitory in nature because it allowed organic pesticides to be used for aesthetic purposes, and therefore not outside the scope of the municipality's jurisdiction.[232]

In *Dollard-des-Ormeaux (City of) c. Sasson*[233], the prosecution of the accused who was ticketed for playing street hockey was dismissed. The municipal court provided that the City had

---

[230] *Cities Act, supra* note 224at s 8(3)(a); *Municipalities Act, supra* note 223 at s 8(3)(a).
[231] *Spraytech, supra* note 215.
[232] *Ibid.*
[233] 2011 QCCM 82.

the "power to *regulate* the playing of street-hockey in a manner so as to guarantee safety."[234] It did not, however, have the power to absolutely prohibit such activity. This case highlights how municipalities should consider reasonable alternatives to achieving the purpose of the legislation (in this case, safety) when exercising powers that restrict liberty.

Unreasonableness Limitation

In the context of this work, the unreasonableness limitation has very little application[235] given that section 322 of *The Cities Act*[236] provides that "[n]o bylaw or resolution enacted in good faith may be challenged on the ground that it is unreasonable."[237] However, the test for unreasonableness is reviewed in order to enable future litigants in another jurisdiction to better articulate why the bylaw should be set aside.

At common law, municipal decisions cannot be unreasonable, although context specific meaning of reasonableness or the reasonable person is elusive. American scholar of Administrative Law, Kenneth Culp Davis, suggests that the exercise of administrative discretionary decision-making "may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness."[238] A determination of reasonableness always contains an element of bias and subjectivity of the person making the determination. Against the backdrop of broad municipal power enforced by a slippery concept of reasonableness, it is not

---

[234] *Ibid* at 15. See also *Montréal (Ville) c. 177380 Canada Inc.*, 2003 CanLII 47989 (QC CA) at 46; [2003] RJQ 2378.
[235] See e.g. *Duffield v City of Prince Albert*, 2014 SKQB 203 at 6.
[236] *Cities Act*, *supra* note 220.
[237] *Ibid* at s 322.
[238] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*, (Baton Rouge: Louisiana University Press, 1969) at 3 cited in Pratt & Sossin, *supra* note 219 at 303

surprising that Valverde determines, "the most striking feature of the law at the local level is its heterogeneity and lack of clear organizing rationales".[239]

The test for unreasonableness articulated by the Supreme Court in *Catalyst Paper Corp. v North Cowichan (District)*[240] provides that a bylaw will be set aside if it is one that *no reasonable body* would implement the bylaw when informed by the broad social, economic and political issues that could be considered by elected municipal counselors.[241] This test has roots in century old case law, where *unreasonableness* describes municipal acts that are aberrant or overwhelming,[242] involving "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of"[243] a reasonable person.[244]

The test in *Catalyst Paper* also follows the ruling *Dunsmuir v New Brunswick,*[245] where the Supreme Court of Canada articulated the qualities of unreasonableness:

---

[239] *Ibid* at 7. See also Lucinda Vandervort, "Access to Justice and the Public Interest in the Administration of Justice" (2012) 63 University of New Brunswick Law 124-144.

[240] *Ibid*.

[241] *Catalyst Paper*, *supra* note 214 at 11, 32; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. See also *Québec Inc*, *supra* note 218 at pp. 404-5, where the Supreme Court of Canada adopted the classic statement of Lord Russell in *Kruse v Johnson*, [1898] 2 QB 91 (Div Ct), at p. 99-100, that if a municipal bylaw involves "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires'" (emphasis added).

[242] *Catalyst Paper*, *supra* note 214 at 20.

[243] *Kruse v Johnson*, [1898] 2 QB 91 (Div Ct) citing *Bailey v Williamson* [(1873), LR 8 QB 118, at 124.

[244] On the definition of oppression see *e.g. Whitehead v Taber* 20 ACWS (2d) 230 (AB QB) at para 5: "…deliberate acts of moral, although not necessarily legal, delinquency such as an unfair abuse of power by the stronger party in order that a weaker party may be put in difficulties in obtaining his just rights, as found at page 889 of Daphne A Dukelow, *the Dictionary of Canadian Law* (Toronto, 2011: Thomas Reuters). Binnie J. in *Québec Inc.*, *supra* note 218 at 109. to described a noise bylaw as oppressive because it had no regard to the potential for disturbance or annoyance.

[245] 2008 SCC 9, [2008] 1 SCR 190.

> [R]easonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[246] [emphasis added]

That a bylaw affects one person's business or land-use interests more harshly than another's is insufficient for determining that it is unreasonable.[247] The Supreme Court of Canada has long held that zoning bylaws are inherently discriminatory, and as such, certain types of discrimination are permitted.[248] For example, section 8(3)(b) of *The Cities Act*, provides cities in Saskatchewan with the power to "deal with developments, activities, industries, businesses or things in different ways, and, in so doing, to divide each of them into classes or subclasses, and deal with each class or sub-class in different ways."[249]

Given that bylaws are allowed to be unreasonable in Saskatchewan, more is needed than a simple oppressive or gratuitous interference.

Bad Faith and Invalid Purpose Limitation

Municipalities hold power in relation to a broad scope of regulatory purposes. In *Shell Canada Products Ltd. v Vancouver (City),*[250] Sopinka J. for the majority held that the purpose of municipal government is to render services to residents "with a view to advancing their health, welfare, safety and good government."[251] These purposes are also found in Saskatchewan's *Municipalities* and *Cities* acts.[252] Notwithstanding the broad scope of municipal governance, municipalities are limited from bad faith reasoning, which includes passing legislation for an

---

[246] *Ibid* at 47.
[247] *Scarborough (Township) v Bondi*, [1959] SCR 444, 18 DLR (2d) 161
[248] *Ibid*.
[249] *The Cities Act, supra* note 224 s 8(3)(b).
[250] *Shell Canada Products Ltd. v Vancouver (City),* [1994] 1 SCR 231; [1994] 3 WWR 609.
[251] *Ibid* at 26.
[252] See sections reproduced above on page 48.

invalid purpose. An invalid purpose is held to be one that is outside the jurisdiction of the municipality, [253] which includes, *inter alia*, moral reasoning.

In *Prince George (City) v Payne*[254] the Supreme Court of Canada overturned the licensing refusal of an adult boutique because the refusal was found to be motivated by moral considerations. Dickson C.J., (as he was then) for the Court held that it was outside the municipality's discretion to refuse to license the adult boutique on moral, and therefore extraneous, grounds.[255] Dickson C.J. stressed that it was not the Court's task to consider the wisdom of the council's decision, but rather, to assess whether it fell within the four corners of the council's jurisdiction.[256] Of course, as mentioned above in relation to the discussion of unreasonableness above, the Court can assess the unreasonableness of an administrative decision, although municipalities are often provided great deference.

In *Xentel DM Inc. v Windsor (City)*[257] the Ontario Superior Court quashed an anti circus bylaw.[258] The city suggested that the purpose of the bylaw was to protect the public from animal attacks.[259] However, upon review the Court found that the intentions in passing the bylaw were marred by the City's desire to protect the animals, not the public.[260] Council had recently been

---

[253] See e.g. *Spraytech, supra* note 215.
[254] [1978] 1 SCR 458, 75 DLR (3d) 1.
[255] *Ibid* at page 463. See *contra Banach v La Ronge*, [1985] 6 WWR 285, 42 Sask R 64 (SK QB) [*Banach*] where the Court upheld a denial of a business license where town council gave the reasons that the "majority of service clubs and charitable organizations in town object to a bingo hall." In the Court's opinion, this was not moral reasoning.
[256] *Ibid*.
[257] (2004) 243 DLR (4th) 451;123 CRR (2d) 137 (ON SC) [*Xentel*].
[258] John Jaffey, "Anti-circus bylaw quashed", The Lawyers Weekly Vol. 24, No. 20 (October 1, 2004).
[259] *Xentel, supra* note 257 at para 5.
[260] *Ibid* at para 43.

lobbied extensively by animal rights groups,[261] and were given legal advice that the bylaw would pass muster if it was passed under the banner of the protection of the public.[262] The Court reasoned "the process by which Council reached its decision to ban the performance of exotic animals was marked by the absence of frankness and impartiality, which are indicia of good faith."[263]

The decisions in *Prince George (City) v Payne* and *Xentel* highlight that the process and rationale for municipal decision-making matters greatly if not more than the substance of municipal decisions. Both cases relied on evidence of the city's intentions that were revealed during the *process* of enabling the bylaws, not intentions that were necessarily apparent on the plain text reading of the bylaw. Accordingly, the rule against moral reasoning consigns municipalities with instrumental or utilitarian management of municipal purposes as opposed to moral, religious or ideological reasoning. As such, the municipal decisions in *Prince George (City) v Payne* and *Xentel* would likely have been upheld but for the lack of reasoning pertaining the communities' benefit in health, welfare, safety or good government. Empirical evidence pertaining to municipal purposes, therefore, is important to the defence of municipal decisions. This is because lack of evidence relating to a municipal purpose may suggest moral as opposed to empirical or logic-based decision making premises.

The Saskatchewan Court of Appeal recently reviewed the law on bad faith and invalid purpose in *Duffield v Prince Albert (City)*,[264] a case where the appellant sought to quash a bylaw

---

[261] *Ibid* at paras 6, 14.
[262] *Ibid* at para 53.
[263] *Ibid* at 43.
[264] 2015 SKCA 46. [*Duffield*]

that prohibited taxi drivers from driving their taxicabs through drive-thru liquor outlets.[265] The purpose of the bylaw was found to be "to mitigate the safety risks to taxicab operators arising from their patrons' use of drive-thru off-sale liquor outlets … [or] to prevent individuals from using taxicabs to circumvent existing requirements of provincial regulation governing the sale of alcohol."[266]

At paragraph 15, the Court adopted passages from Stanley Makuch, Neil Craik and Signe Leisk's, *Canadian Municipal and Planning Law*,[267] which provide that "the term "bad faith" can also characterize conduct which is unreasonable, arbitrary and without the degree of fairness, openness and impartiality required of a municipal council."[268] Further, "in cases where the evidence demonstrates a lack of candour or impartiality on council's behalf, the courts have been willing to draw a negative implication that such behaviour indicates an ulterior purpose not related to the legitimate purpose of power granted." Accordingly, findings of bad faith might be premised on arbitrariness, and lack of candour, and do not necessarily require positive evidence of deception as was admitted in *Payne* and *Xentel*.

The passages adopted from Makuch, Craik and Leisk further explore the difference between the closely related concepts of bad faith and improper purpose:

> Unlike the bad faith doctrine, where a municipal enactment may *prima facie* appear valid (such as passing a zoning by-law), but loses its validity due to the improper motives of Council, a by-law which is passed for an improper or impermissible purpose is simply *ultra vires*, regardless of council's motives.[269]

---

[265] *Ibid* at 2.
[266] *Ibid* at para 28.
[267] (Toronto: Thomson Carswell, 2004).
[268] *Duffield, supra* note 264 at 15.
[269] *Ibid*.

In short, improper purpose relates to the municipality exceeding their jurisdiction on the basis that the bylaw does not fit within the four corners of their delegated power, such as, where the municipality might be legislating vis-à-vis a strictly federal matter. Bad faith, however, concerns motives and provides an opportunity to attack otherwise *intra vires* legislation on the basis of its arbitrariness.

Notwithstanding the opportunity to attack bylaws in relation to their purpose, the Court in *Duffield* reinforced the deference and "softer scrutiny" owed to municipal decision makers, as articulated by McLachlin J. (as she was then) in her dissent in *Shell Canada*.[270] The court cites Professor Felix Hoehn's explanation for McLauchlin J.'s softer scrutiny:

> First, she considered it important for local democracy that municipalities be able to reflect local values, and this requires that courts respect this responsibility. Second, it would avoid the costs and uncertainty associated with excessive litigation when municipalities have to defend the validity of the exercise of their powers. Third, it would be more consistent with municipalities' expanding range of responsibilities, so they would not be confined "in the straight-jacket of tradition.[271]

The approach, while practical in many respects, might be cautioned where the bylaw prohibits or reduces the opportunity to partake in otherwise legal activities. For example, the justification theory advocated by American constitutional scholar, Sonu Bedi[272] holds that when it comes to questions of liberty, normative attention should be on the state to justify infringements.[273] Bedi puts the onus on government to justify the reason or rationale for

---

[270] *Ibid* at para 32.
[271] *Ibid* at para 33.
[272] Sonu Bedi, *Rejecting Rights*, (New York: Cambridge University Press, 2009) [Sonu Bedi].
[273] *Ibid* at 4.

acting.[274] Applied in the context of this work, a municipality should bear some onus in justifying laws that restrict liberties.

The established approach of softer scrutiny to municipal decision-making referenced in *Duffield* provides a significant barrier to litigants claiming improper purpose or bad faith reasoning. In addition to a lack of empirical evidence, a claimant would benefit from leading evidence pertaining to the arbitrariness of the municipal decision. As discussed in subsequent sections, the absence of empirical evidence and the illogical premises of Saskatoon's decision to prohibit chickens is `suggestive of arbitrariness and moral reasoning. It is argued below that the arbitrary and misinformed empirical basis, as well as, comments coming from the mayor suggesting a moral impurity of housing chickens may be sufficient in establishing a claim based in invalid purpose and moral reasoning.

4.2 Evaluation of jurisdiction to ban hens pursuant to *Animal Control Bylaw*

This section evaluates the purpose of the *Animal Control Bylaw* and determines that the animal control bylaw is drafted in such a way that the inclusion of livestock does not relate to the purpose of the bylaw, and even if it did, the pith and substance of the bylaw does not relate to a municipal purpose; and further, that the bylaw relates to an improper purpose. Specifically, this section argues that the purpose of the bylaw does not relate to the regulation of health, safety, nuisance or animals, but rather, the purpose of the bylaw is to regulate urban farming and urban self-determination, and to prevent the immoral impurity of rural behavior from occurring within urban boundaries.

---

[274] *Ibid* at 5. It is noted that Bedi says that the only justification that would be available to governments is one of harm minimization.

Drafting of the Animal Control Bylaw

As noted in section 2.1 above, hens are included in a list of otherwise exotic and wild animals in Schedule 5 of the *Animal Control Bylaw.* Also, the section 22(1) effectively prohibiting the keeping of Schedule 5 animals for micro-livestocking purposes falls under the heading of "Owning and Harbouring Exotic and Wild Animals". While the headings are not intuitive and appear misplaced in relation to the regulation of chickens, this alone would likely not be detrimental to the validity of the bylaw. Saskatchewan's *The Interpretation Act, 1995*,[275] provides that headings are not part of the legislation and have no legal meaning.[276] However, the bylaw also has another flaw, namely, that the purpose section does not clearly appear to exert jurisdiction over livestock.

Section 2 provides that the purpose of the *Animal Control Bylaw* is as follows:

> 2. The purpose of this Bylaw is as follows:
>
> (a) to provide for the licensing of cats and dogs;
> (b) to control and regulate cats and dogs;
> (c) to provide for the impounding of cats and dogs that are at large;
> (d) to control and regulate pigeons; and
> (e) to control and regulate exotic and wild animals.[277]

The purpose section articulates an intention to regulate cats, dogs, pigeons and wild and exotic animals. It is tenuous to see how chickens might fall within this list. The list is not open and does not suggest a fully sweeping intention to control all animals. The best argument that could be made to suggest that this bylaw is intended to apply to chickens would be to suggest that chickens are "wild animals".

---

[275] SS 1995, c I-11.2,
[276] *Ibid* at s 12.
[277] *Animal Control Bylaw*, *supra* note 26 at s 2.

Chickens are often thought of as livestock, as was the determination in *Smedley*, above, where Campell J. found that chickens were "fowl" (fowl that were in every way inoffensive). The Saskatchewan Court of Queen's Bench used the following definition of livestock in *R v Raycraft*[278] to establish that cows are livestock:

> [25] The appellants are correct in identifying a range of definitions of "livestock". Definitions include:
>
> (a) …. animals kept for domestic use but not as pets, esp on a farm" (*Collins English Dictionary*, Canadian Edition, 2005, HarperCollins Publishers); and
>
> (b) …. "Domestic animals generally; any animals kept or dealt in for use or profit" (*Shorter Oxford English Dictionary*, 3d ed., 1973, Oxford University Press).

There is a theme of thinking of livestock as domesticated animals, which runs in direct contrast to being exotic and wild.

As noted in Chapter 2, livestock were added to Schedule No 5 of the *Animal Control Bylaw* in 2007. What is more likely than chickens being wild is that when amending the bylaw to include livestock in 2007, the city did not make any changes to its "purpose" section, and simply included hens in the list of otherwise "exotic and wild" animals.

The Bylaw to amend the previous version of the *Animal Control Bylaw* was brought forward by the Development Services Branch on the following basis:

> From time to time, the Development Services Branch receives nuisance complaints about livestock and other animals being kept in residential areas. The ability to regulate the keeping of animals has become increasingly important due to concerns over the transmittal of disease, including Avian Influenza (Bird Flu). A recent court decision regarding one such enforcement file revealed a discrepancy between the Zoning Bylaw and the Animal Control Bylaw. For this reason, amendments to these bylaws are required in order to effectively manage livestock and domestic animals in all areas of the city.[279]

---

[278] 2007 SKQB 98.

[279] Saskatoon Community Services Department Proposal, "Zoning Bylaw Text Amendment; The Keeping of Animals", December 27, 2006.

There are no records available from the office of the City Clerk to suggest that council reviewed any information other than the text above before amending the *Animal Control Bylaw* to prohibit chickens. An article from the local Star Phoenix provides the opinion of a local city planner that the restrictions stem from problems decades ago where some homeowners kept cows, pigs and chickens in their backyard.[280]

The "recent court decision" referred to by the city in the above may have been the case of R *v Morelli*,[281] where a Saskatoon man successfully defended against a ticket for keeping a pet sheep pursuant to Saskatoon's zoning bylaws.[282] The Court was not convinced that it was the intention of the zoning bylaw to prohibit sheep. It was a significant factor for the appellate Court in *Morelli* that the accused was not charged for having created a nuisance.[283]

The argument that the bylaw does not intend to regulate chickens might be futile for longer term change, given that the city could easily amend the bylaws to accord with any semantic shortfalls that exist.

Prohibitive nature of the RPO and Animal Control Bylaw

The purpose of the *Animal Control Bylaw,* as noted above, is to control, regulate, and impound cats and dogs;[284] to control and regulate pigeons;[285] and to "control and regulate wild

---

[280] David Hutton, "Council Balks at Chickens" StarPhoenix, 27 April 2010, online: <www.pressreader.com/canada/the-starphoenix/20100427/281479272621308/TextView>
[281] 2002 SKQB 294 [*Morelli*].
[282] *Ibid* at para 3.
[283] *Ibid* at para 21.
[284] *Animal Control Bylaw*, *supra* note 26 at s 2 (a)-(c).
[285] *Ibid,* s 2(d).

and exotic animals".[286] Further, as noted, the bylaw provides a list of prohibited animals in Schedule No. 5.

There is a regulatory quality to the *Animal Control Bylaw* in that it permits some animals in the city – mostly for pets – while it only prohibits the pets and other animals listed in Schedule No. 5. This would be analogous to the Court's reasoning in *Spraytech* where some pesticides were permitted, whereas others were suggested as posing undue risk. However, it should be remembered that the desired activity and use in *Spraytech* was the application of conventional pesticides for residential and aesthetic purposes. As organic pesticides were allowed the bylaw did not restrict residents from a means to their desired ends (i.e. they could use organic pesticides to control pests), but rather regulated how they ought to achieve their goals.[287] The same cannot be said for the *Animal Control Bylaw* because it does not provide opportunity to grow animals for food in the city.

Aside from the collection of honey, the *Animal Control Bylaw* prohibits residents from rearing livestock animals for food products or by products within the city. Accordingly, as with the *Zoning Bylaw*, the *Animal Control Bylaw* effectively prohibits the rearing of animals in the city for food provisioning purposes.

---

[286] *Animal Control Bylaw, supra* note 26 at 2(e).

[287] See also *Vann Niagara Ltd. v Oakville (Town),* [2003] 3 SCR 158, 2003 SCC 65, where a bylaw banning billboards was characterized as regulating the permissible size of signs. See also *Hoehn, supra* note 218 at 330-343.

The assumed purpose of the RPO Bylaw in Hughes

Mr. Hughes argued that the "City does not have the jurisdiction to regulate activity pertaining to household food [security], in this case exemplified by backyard chickens."[288] Notice that Hughes' argument is not that the City does not have the jurisdiction to regulate animals, or even urban hens, but rather that the City does not have the jurisdiction to regulate activities pertaining to household food security. This is a subtle but important distinction relating to an inquiry of the purpose of the bylaw.

In *R v Hughes,* Skene J. found that the source of authority for the *RPO Bylaw* was *Alberta's Municipal Government Act*,[289] which states:

> A council may pass bylaws for municipal purposes respecting the following matters:
> (a) the safety, health and welfare of people and the protection of people and property;. . .
> (c) nuisances, including unsightly property; . . .
> (h) wild and domestic animals and activities in relation to them;[290]

This compares closely to Saskatchewan's *Municipalities* and *Cities* acts, above, and describes the scope of municipal jurisdiction relating to the regulation or prohibition of animals in cities. The authority of Municipalities to act in relation to these purposes is not challenged, nor did it appear to be challenged by Mr. Hughes.

After identifying the *possible* purposes of municipal bylaws – safety, health, nuisance and wild and domestic animals, Skene J. rightly considered whether the pith and substance of the bylaw fit within one of those heads of municipal jurisdiction. At paragraph 91 Skene J. finds that "the pith and substance of the RPO Bylaw, and in particular ss. 27 and 2(1)(n)(v) are valid

---

[288] *Hughes, supra* note 14 at para 88. The decision actually says "household food scrutiny". I assume that this was a typo on the part of Mr. Hughes or in writing the judgment.
[289] RSA 2000, c M-26.
[290] *Ibid* at s. 7.

exercises of municipal powers being well within the jurisdiction of the City of Calgary, and fall under any or all of the above matters."[291]

With respect, Skene J.'s analysis of the pith and substance of the provisions is limited in depth and scope. It may be observed that Skene J. quite simply assumes that the pith and substance of the bylaws, or their purpose, relates to a municipal purpose because there is an assumed nexus between "chickens", and the heads of power identified by Skene J., above. However, in the *Xentel*[292] case, the anti-circus bylaw may have just as easily been assumed to relate to the valid head of jurisdiction of protection of public or regulation of animals. However, a closer look by the courts in that case revealed that the actual purpose was quite different from what the city thought the assumed purpose might be.

Indicia of moral or improper reasoning

In rejecting a bid to consider the softening of Saskatoon's prohibition of chickens from residential areas, Saskatoon's Mayor Don Atchison suggests: ""I just think that chickens belong in a rural setting, and if people want that... that's where they should be"[293] Similarly, Councillor Eric Olauson suggested that people who want to raise chickens "should go live on a farm".[294]

---

[291] *Hughes, supra* note 14 at para 91.

[292] *Xentel, supra* note 257.

[293] CBC News, "Chicken request going to Saskatoon city council", 26 April 2010, online: <www.cbc.ca/news/canada/saskatchewan/chicken-request-going-to-saskatoon-city-council-1.902837>.

[294] Betty Ann Adam, "Councilor says chickens can be deadly", The StarPhoenix, 22 August 2014, online: <www.thestarphoenix.com/life/Councillor+says+chickens+deadly/10138654/story.html> [Betty Ann Adam – Chickens can be deadly]. This type of reasoning is not unique to Saskatoon. See e.g. Paulette Forhan , "I don't want chickens in my urban neighbourhood City officials are not doing their job, and are turning a blind eye to Fred Connors' coop", The Coast, 4 July 2013, online: <www.thecoast.ca/halifax/i-dont-want-chickens-in-my-urban-

Councillor Olauson also suggested that City Hall would also somehow be liable for food-borne illnesses arising from the consumption of backyard eggs, or if chickens froze during the winter.[295] He also suggested that chickens can be deadly.[296] These claims were not empirically supported, and the liability of municipalities for livestock freezing or causing illness to its owners upon consumption of the animal does not appear to be a legal opinion, but rather a misinterpretation or speculation as to what the law might be. Another city counsellor equated the keeping of a few backyard chickens to the nuisance concerns caused by keeping hundreds of chickens. [297] One might anticipate during litigation that additional statements revealing moral reasoning in relation to this hen-keeping might become available through the disclosure of various documents from the city, such as committee meeting minutes or other transcribed material.

Assuming for the moment that all of these comments are arbitrary and empirically false (which would require more expert opinion than I am able to provide) and do not disclose the requisite candour or impartiality, would that, alone, be sufficient to quash the *Animal Control Bylaw?* Challenging the bylaw based on the above may be possible, but would be supported by indicia of moral reasoning. In order to explore, whether comments of council disclose moral reasoning, an incredibly brief framework for contextualizing the discussion of moral reasoning is provided.

Morality in the Oxford Dictionary of English defined as follows:

---

neighbourhood/Content?oid=3927124; Jill Richardson, "How to get your city to allow backyard chickens", Grist.org, 6 January 2011, online:<grist.org/article/food-2011-01-05-how-to-get-your-city-to-allow-backyard-chickens/>.

[295] *Ibid.*

[296] *Ibid.*

[297] Betty Ann Adam – Chickens can be deadly, *supra* note 294.

1. principles concerning right and wrong or good and bad behaviour matters of public/private morality.
2. the degree to which something is right or wrong, good or bad, etc. according to moral principles.
3. a system of moral principles followed by a particular group of people.[298]

Jonathan Haidt, a social psychologist recently named as one of the world's "top global thinkers",[299] suggests in his seminal work that "[m]orality is about more than harm and fairness",[300] suggesting that morality is also concerned with notions of "ingroup/loyalty, authority/respect, and purity/sanctity."[301] The latter, purity/sanctity, appear to relate to the phrase "moral welfare"[302] which is often used in cases such as *Payne*, where the city was concerned over the licensing of an adult boutique. Absent credible concerns for health, safety, or nuisance, a prohibition tends to be based on moral reasoning.

The keeping of chickens is not a case like *R. v Malmo-Levine; R. v Caine,*[303] where a majority of the Supreme Court of Canada upheld the prohibition of possessing marijuana as a means of protecting those who may be particularly vulnerable to its consumption. In that case, the Court referenced expert evidence that characterized marijuana as a psychoactive drug that causes alteration of mental function.[304] In relation to keeping chickens, a prohibition is consistent with favouring the city as a place of manicured uniformity. This type of moral reasoning would

---

[298] Oxford Advanced Learner's Dictionary, online: <www.oxforddictionaries.com/definition/learner/morality>.

[299] See e.g. Prospect, "World Thinkers 2013", May 2013, online: <www.prospectmagazine.co.uk/magazine/world-thinkers-2013>.

[300] Jonathan Haidt, "The New Synthesis in Moral Psychology", Science 18 May 2007, Vol 316 No 5827 at 998-1002.

[301] Jess Graham, Jonathan Haidt,& Brian Nosek, "Liberals and conservatives rely on different sets of moral foundations" Journal of Personality and Social Psychology, Vol 96(5), May 2009, 1029-1046.

[302] See also, *Banach, supra* note 255.

[303] [2003] 3 SCR 571, 2003 SCC 74.

[304] *Ibid* at para 77.

not be legitimate even within criminal law, one of the more common forums that is legitimately concerned with moral welfare:

> Morality has traditionally been identified as a legitimate concern of the criminal law (Labatt Breweries, supra, at p. 933) although today this does not include mere "conventional standards of propriety" but must be understood as referring to societal values beyond the simply prurient or prudish.[305]

The exclusion of chickens from the city, even if they are pets, is aligned with Valverde's observation of the regulation of aesthetics in cities. According to Valverde, "urban aesthetic regulation does not only empower certain groups of persons. It also ranks activities and spaces along a kind of moral 'chain of being'".[306] Chickens are not typically associated with courage or intelligence; they are feathered as opposed to furred, and in urban Saskatchewan, they are often associated with grandparents' life on the farm. From council's perspective, chickens would not rank highly in relation to a manifesto focused on economic growth and prosperity. Rather, according to some councilors, chickens belong in the country, and if you want to keep chickens, so do you. This line of reasoning, absent a valid purpose, does not consider the pluralism of urban moral welfare, but rather falls squarely within "conventional standards of propriety". In sum, the reasoning by city council tends to confirm Professor Andrea Gaynor's observation that urban hen prohibitions relate closely to "a perceived out dated rural era in favor of a progressive urban ideology"[307]

Claimants could argue that the focus of the prohibition on urban hens is based on a moral assumption that the desired purity of urban living requires that cities be aesthetically and socially

---

[305] *Ibid.*
[306] Valverde, *Everyday law on the street, supra* note 24 at 50.
[307] Andrea Gaynor, *supra* note 85 at 113.

distinct from rural environments.[308] The extremeness of prohibiting urban hens indicates that the reason for passing the bylaws is not for nuisance or health and safety related reasons, but rather for aesthetic or moral reasons. While the Supreme Court has stated that bylaws can have more than one purpose,[309] it is not evident from the sections that follow that the pith and substance of the prohibition would fit into the categories of nuisance or health and safety.

4.3 No empirical evidence of nuisance and prohibiting backyard chickens in *R v Hughes*

In 2006, the City of Calgary passed the *RPO Bylaw* banning livestock in residential areas. However, the bylaw consultation leading up to the enactment of the bylaw was largely concerned with the regulation of cats and dogs. [310] Testimony from Calgary's Chief Bylaw Officer in *Hughes* provides that "there was no active concern, discussion or action with respect to the appropriateness or consistency of urban hens as pets and egg-layers in residential areas in the two years prior to the passing of the *RPO Bylaw* and the inclusion of chickens as prohibited livestock."[311] The Chief Bylaw Officer, Mr. Bruce, further testified that it was ultimately City Administration that determined that "keeping livestock in residential areas was inappropriate" and that the ban on chickens "probably more rightly belongs in Community Standards [Bylaw], but at the time, this [RPO] was the document open for amendment."[312] Accordingly, it was city administration, not the Chief Bylaw officer that determined that "[l]ivestock in the city, particularly residential areas, is generally inappropriate and creates nuisance issues."[313]

---

[308] Jennifer Blecha & Helga Leitner, "Reimagining the food system, the economy, and urban life: new urban chicken-keepers in US cities", (2014) Urban Geography, 35:1, 86-108 at 88.
[309] *Québec Inc., supra* note 218 at para 50.
[310] *Ibid* at para 32.
[311] *Hughes, supra* note 14 at para 26. [Emphasis added]
[312] *Ibid* at para 31.
[313] *Ibid* at para 30.

In *Hughes*, the prosecution led no evidence that urban hens had ever caused a nuisance or that other hens had caused a nuisance since the passing of the bylaw.[314] If this evidence existed in a reliable and persuasive form, one might reasonably assume that the prosecution would have presented this evidence. Even the City's Chief Bylaw officer testified that "there was an absence of scientific research of the small backyard urban hen operation. The fear of harm and nuisance was speculative."[315]

Accordingly, prior to Mr. Hughes self-reporting his keeping of chickens and the ensuing prosecution of him for doing so, Mr. Bruce, with the assistance of local scientists and Mr. Hughes, designed a pilot project for the city of Calgary to measure the smell, odour, noise and health risks, if any, associated with urban chickens. The pilot project was ultimately turned down by the city's policy committee and city council. No reasons were provided as to why the project should be rejected.[316]

Justice Skene held that the impugned provisions of the *RPO Bylaw* were validly enabled under "safety, health and welfare of people; the protection of people and property; nuisances; and animals and activities in relation to them."[317] If Skene J. is correct, the same might reasonably be said for Saskatoon's *Animal Control Bylaw* in relation to the provisions listed in the *Municipalities* or *Cities* Acts.

Skene J's judgment appears to follow this logic: The impugned bylaws regulate chickens. Chickens are animals. Therefore, the *purpose* of the bylaw is to regulate animals, in this case, chickens. Calgary has the authority to regulate animals. Therefore, the bylaws are within

---

[314] *Ibid* at para 77.
[315] *Ibid* at para 46.
[316] Betty Ann Adam – Chickens can be deadly, *supra* note 294.
[317] *Hughes, supra* note 14 at para 91.

Calgary's jurisdiction. In short, the purpose is presumed from the sphere of jurisdiction to which it might relate. The reasoning is questionably circular, and certainly self-reinforcing.

In any event, the merits of assuming that a chicken prohibition is unreasonable are discussed in the following sections.

Avian Influenza

In passing the prohibition on keeping urban chickens in Saskatoon pursuant to the *Animal Control Bylaw*, the Community Services Department cited concerns over Avian Influenza. While it is outside the scope of this paper to fully analyze the risk of avian influenza from backyard chickens in Saskatoon, the breadth of evidence reviewed suggests that the risk is negligible. Concerns over influenza might be overstated in consideration of the fact that there has never been a reported case of an urban backyard chicken having avian influenza, and the transmission of the disease occurs when animals are in contact with waterfowl or other infected chickens.[318] Urban chickens are very unlikely to come into contact with waterfowl or other infected chickens given that they are in an urban setting.

Since 2013, the vast majority of cases of avian influenza occurred in China, and incidences of influenza are largely correlated with legal and illegal live chicken markets.[319] More recently, there have been cases in B.C., but those correspond primarily to large corporate farms.[320] The

---

[318] Centres for Disease Control and Prevention, "Avian Influenza in Birds", online: <www.cdc.gov/flu/avianflu/avian-in-birds.htm>.

[319] World Health Organization, "WHO RISK ASSESSMENT: Human infections with avian influenza A(H7N9) virus" 27 June 2014, online: <www.who.int/influenza/human_animal_interface/influenza_h7n9/riskassessment_h7n9_27june14.pdf?ua=1 WHO RISK ASSESSMENT>.

[320] See e.g. Jeremy Hainsworth, "Seven countries to impose restrictions on Canadian poultry due to avian influenza" The Globe and Mail, 06 December 2014, online: <www.theglobeandmail.com/news/british-columbia/fifth-bc-poultry-farm-under-quarantine-

risk exists but is lesser in smaller commercial or hobby farms.[321] Sometimes governments and media will suggest that there are risks of avian influenza associated with "backyard chickens" but these risks are relate to peri-urban or rural flocks of dozens to hundreds of chickens.[322] I was unable to find any reports of avian influenza in urban backyard chickens.

Common sense dictates that there is a nexus between animals and human health and safety. There is also a nexus between people and human health and safety, quite a stronger one, but the balancing of interests prevents a prohibition on people. A nexus, while important, does not always mean that there is a real or sufficient danger to prohibit a certain activity, and the interests of others stakeholders also need to be taken into account.

Other health concerns

It should also be recalled that Saskatoon's first bylaws limiting the keeping of animals were on the basis of health and safety. That being said, those bylaws did not regulate poultry. Furthermore, they regulated animals in the city, as opposed to prohibiting them as the current bylaws do.

In a recent article published by the StarPhoenix, a veterinarian from the University of Saskatchewan suggests that he knows of one case where an illness in a child might have been

---

due-to-avian-flu/article21982344/ www.theglobeandmail.com/news/british-columbia/fifth-bc-poultry-farm-under-quarantine-due-to-avian-flu/article21982344/>.

[321] CBC News, "Backyard chickens raise avian flu risk, say experts" 13 March 2008, CBC News online: <www.cbc.ca/news/canada/british-columbia/backyard-chickens-raise-avian-flu-risk-say-experts-1.765428>.

[322] Mary MacArthur, "Bird flu found in second backyard flock", The Western Producer, 12 February 2015, The Western Producer, online: <www.producer.com/2015/02/bird-flu-found-in-a-second-backyard-flock>; See also Ellen Garrison, "Sacramento backyard chickens at risk for catching 'bird flu'" The Sacramento Bee, 21 January 2015, online: <www.sacbee.com/news/local/article7899636.html>.

caused by maintaining close contact with chickens.[323] A professor in animal health and poultry science also commented in the article that we should not be fearful of having chickens in the city.[324]

The article was posted following a debate in city council, where a city counselor posited that someone could die from a food borne illness from eggs from backyard chickens, or that a child could die from playing in manure.[325] Interestingly, the veterinarian was not quoted for raising any concerns of the same risks occurring in relation to cats or dogs. Presumably, he was satisfied by the safety measures built into the *Animal Control Bylaw* and people's general best practices. At the moment, the *Animal Control Bylaw* restricts residents from allowing animal feces to accumulate on the property as to create a health hazard.[326] On point, another city counselor asked for specific examples of when people have died or become ill from backyard chickens as he had never heard any negative feedback from anyone living beside people with chickens.[327]

Many of those cautious of urban agriculture suggest that it may be unsafe for toxicological reasons.[328] This is not surprising because most research into the risk of toxins presented by farming urban sites is focused on the risks posed by farming on marginalized and vacant lots, such as brownfields or abandoned industrial lots.[329] These would undoubtedly be some of the riskiest sites to garden in a city.

---

[323] Betty Ann Adam – Chickens can be deadly, *supra* note 294.
[324] *Ibid*.
[325] *Ibid*.
[326] *Animal Control Bylaw, supra* note 26 at s 14(1).
[327] Betty Ann Adam – Chickens can be deadly, *supra* note 294.
[328] Matthew Bradshaw, "The Rise Of Urban Agriculture: A Cautionary Tale--No Rules, Big Problems" William & Mary Business Law Review 4.1 (2013).
[329] Nathan McClintock, "Assessing soil lead contamination at multiple scales in Oakland,

Surely, good regulation is based on good empirical information. It may be preferred to quantify the local risks before proceeding. This would give "prior justification" to the release of animal wastes as opposed to assuming that they are acceptable.[330] Accordingly, it could serve municipalities that are hesitant to allow chickens into the city to implement pilot projects to identify and measure the seriousness of any potential health or nuisance risks. While this would require resources and could not be something imposed on council, it might be a good compromise between litigation and persisting with paternalistic bylaws.

Saskatoon has denied a pilot project,[331] mostly on risks of health and safety (which ironically the project would aim to measure), and the notion that "chickens belong in the country".

Again, there was no evidence led in *R v Hughes* to suggest that Mr. Hughes' chickens posed a health and safety concern. Moreover, Mr. Hughes led evidence that urban chickens are safe, if kept in small numbers and with consideration to sanitation.

Nuisance and Backyard Chickens

"Nuisance" is a legal term that can attract slightly different legal definitions depending on the context, and very different legal applications, even in the same context given that it often calls a trier of fact to make a determination of reasonableness. Nuisance is a term that is given a

---

California: Implications for urban agriculture and environmental justice", Appl. Geogr. 35:460–473. 2012. Sam E Wortman & Sarah T Lovell, "Environmental Challenges Threatening the Growth of Urban Agriculture in the United States", J. Environ. Qual. 42:1283–1294 (2013).

[330] Michael R M'Gonigle, et al, "Taking Uncertainty Seriously: From Permissive Regulation to Preventative Design in Environmental Decision Making" Osgoode Hall Law Journal 32.1 (1994) : 99-169, online: <digitalcommons.osgoode.yorku.ca/ohlj/vol32/iss1/4>.

[331] David Hutton, "Council balks at backyard chickens – again", 14 September 2010, The StarPhoenix, online: <blogs.thestarphoenix.com/2010/09/14/council-balks-at-backyard-chickens-again>.

definition by almost every municipality. For example, the City of Saskatoon's *The Property Maintenance & Nuisance Abatement Bylaw, 2003*[332] defines a nuisance as including property or things that, "(a) affect the safety, health and welfare of people in the neighbourhood; or (b) affect the amenity of a neighbourhood."[333]

The Supreme Court of Canada in *Tock v St. John's Metropolitan Area Board*[334] provided the following definition and exploration of the term in the context of nuisance as an actionable tort:

> … the very existence of organised society depended on a generous application of the principle of "give and take, live and let live". It was therefore appropriate to interpret as actionable nuisances only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes. In effect, the law would only intervene to shield persons from interferences to their enjoyment of property that were unreasonable in the light of all the circumstances.[335]

What is often consistent between the common law and statutory definition of nuisance is that both will require a determination of the standard of unreasonableness and whether the act, omission, property, or thing in question exceeded the standard.

Skene J. notes in *Hughes* that the sky has not fallen on other cities that changed their bylaws to permissively regulate chickens.[336] Mr. Hughes safely composted his hens' waste, which was then used to fertilize his vegetable production, which is suggested to have reached yields as high as 260 pounds in one season.[337]

---

[332] City of Saskatoon, *Bylaw No 8175, The Property Maintenance & Nuisance Abatement Bylaw, 2003*, Codified to Bylaw 8992 (December 19, 2011).
[333] *Ibid*, s 2.
[334] [1989] 2 SCR 1181; 64 DLR (4th) 620.
[335] *Ibid*.
[336] *Hughes*, *supra* note 14 at 9.
[337] *Ibid* at para 72.

Similarly, chickens are not deemed to be a nuisance in Saskatoon pursuant to the *Animal Control Bylaw*.[338] The bylaw read as a whole regulates nuisances related to other animals, such as cats, dogs, and pigeons.[339] The question then becomes whether chickens are implicitly characterized as a nuisance, and whether it is reasonable to do so.

The American Planning Association in their Zoning Practice bulletin suggest that the keeping of urban chickens rarely causes a nuisance.[340] The potential for chicken related nuisances is mitigated if roosters are absent, there are limited numbers of hens, and slaughtering is not permitted within the city.[341]

Perhaps one of the greatest hurdles to convincing people that backyard hens are not a nuisance would be to disentangle the way that decision-makers associate larger livestock operations and backyard micro-livestocking. The World Health Organization provides three distinct groupments of urban livestock: (1) subsistence backyard (or personal use); (2) semi-commercial (including community gardens); and (3) large-scale commercial systems.[342]

---

[338] *Markwart v Prince Albert (City*), 2005 SKQB 143 at 27 giving nuisance a broad definition.

[339] *Animal Control Bylaw*, *supra* note 26 at s 10(3) assists in defining when a dog becomes a nuisance at an off-leash dog-park. This makes the bylaw easier as a citizen to understand, and less arbitrary as a bylaw enforcement officer to enforce. At s. 14, the bylaw requires that owners of a cat or dog prevent the accumulation of feces as to prevent health hazards, and at s. 15, that dogs barking or howling can constitute a nuisance.

[340] Nina Mukherji & Alfonso Morales, "Zoning for Urban Agriculture", American Planning Association, March 2010 <https://www.planning.org/zoningpractice/2010/pdf/mar.pdf> at page 6.

[341] *Ibid*.

[342] John E. Mogkt, Sarah Kwiatkowski & Mary J. Weindorf, "Promoting Urban Agriculture as an Alternative Land Use for Vacant Properties In The City of Detroit: Benefits, Problems And Proposals For A Regulatory Framework For Successful Land Use Integration" 56 Wayne L. Rev 1521 2010 at 1544.

Unsurprisingly, larger scale commercial systems are suggested to be "the most problematic because they produce large amounts of waste such as excrement and urine."[343]

While it is not within the scope of this paper to fully survey and weigh the empirical data relating to whether backyard chickens could constitute a nuisance, the following section takes a limited view of how the nuisance related risks such as noise, odour and attraction of pests and predators may routinely be overstated.

Noise

British Columbia's Ministry of Agriculture reports that the noise level within a layer breeder house is at about 66dB when roosters are not crowing.[344] This is similar to the noise level of an office.[345] Accordingly, the noise level of a hen laying an egg is about the same as or less than a person talking. A hen laying an egg would be at its loudest. A dog bark is louder than a person talking, and can be louder than a person shouting.[346]

Odour

Feces smell, chickens do not. In rejecting a presentation to city counsel to revamp the *Animal Control Bylaw,* one city counselor noted that he grew up on a farm with over one to three hundred chickens – and they stunk.[347] It is undoubted that one to three hundred chickens living in

---

[343] *Ibid*.

[344] British Columbia Ministry of Agriculture and Food, "Management of Noise on Poultry Farm", August 1999, online: <www.al.govbc.ca/poultry/publications/documents/noise.pdf>, at page 2.

[345] *Ibid* at page 1. See also Gregg Vanderheiden, "About Decibles (dB)", University of Wisconsin-Madison, online: trace.wisc.edu/docs/2004-About-dB/

[346] Dr. Leslie Ross, "A barking dog never bites", online: <www.veddermountainvetclinic.com/articles/article_-a-barking-dog-never-bites---by-dr--lesl_21.aspx>.

[347] Betty Ann Adam – Chickens can be deadly, *supra* note 294.

close courters would stink, especially if the waste is not dealt with on a routine basis. It is undoubted that the keeping of any animal in numbers of one to three hundred would result in odour. However, this information does not apply to the keeping of a few free ranging hens, cats, or dogs in a backyard.

John Wolforth, Planning and Zoning Director in Jefferson County, Colorado has this to say about minimizing the risk of odours from back yard chickens:

> Chickens themselves do not smell. Any possible odor would be from feces, but five small hens generate less manure than one medium-sized dog. The manure is not likely to accumulate because it's a source of free fertilizer for the garden. Once tilled into the soil, manure no longer causes objectionable odors. Dog and cat feces cannot be used as fertilizer or composted because they contain pathogens that can infect humans. Therefore, dog and cat waste is more likely to accumulate and smell.[348]

Referring back to the World Health Organizations groupments of urban chicken keeping, it must be kept in mind that not all henhouses are the same. There were no findings in this research project of instances where the keeping of nominal number of chickens in a coop that was regularly cleaned resulted in odour to neighbours greater than background environmental smells.

Pests and predators

Some fear that chickens attract pests. Chicken excrement might increase local bioactivity, which could produce environments conducive to pests. At the same time, it is noted that chickens eat ticks, slugs, and mice.[349] The compostibility of chicken waste, especially relative to other animals such as cats and dogs, minimizes this potential for attracting pests. Bridgid McCrea, a PhD who specializes in poultry extension, suggests that backyard bird feeders and waterers are

---

[348] John Wolforth, "Jefferson County, Chickens and "Your Backyard"", online: <jeffco.us/roller/jeffcoblog/entry/jefferson_county_chickens_and_your>.
[349] Patricia Formeman, "The 7 False Myths About Urban Chickens" online: <jandeligans.com/hens/7MythsReChickens.pdf>.

the greatest potential for an increase in pest activity associated with backyard chickens.[350] Given that many house cats, if well fed, will stop hunting for pests, it appears that the notion of chickens attracting pests is less logically related to empirical evidence than the notion that cats or dogs attract pests.

Cities are filled with garbage bins, cats, wild birds and rabbits, and other scents that might attract predators, such as coyotes. Cities are also filled with people, cars and other disincentives for predators, and it would appear that the latter is the determining factor in the relative absence of predators in urban environments. What *is* known is that predators are more prevalent in rural areas in comparison to urban areas.[351] No sources were available to suggest that a backyard chicken will attract pests or predators into cities, and it is outside the scope of this initiate a study on this issue.

That chickens are associated with the presence of predators could have more to do with the fact that chickens are relatively defenseless, and accordingly, there is more evidence when a predator does visit a coop relative to when a predator visits a backyard with a nimble cat. However, some suggest that this alone does not mean that chickens attract predators into the space anymore than other rabbits, birds, or small pets would.

From an owner's perspective, chickens can be protected by ensuring that coops are well built, and that chickens are housed in their coop overnight.

---

[350] Andy Schneider & Brigid McCrea, *The Chicken Whisperer's Guide to Keeping Chickens*, (Beverley Massachusetts: Quarry Books, 2011); See also: The Frugal Family, "Chickens Eat Mice", online video: <https://www.youtube.com/watch?v=7JbXMLT8mZ8>.

[351] *Bouvier, supra* note 42 at 10897.

Summary

The indicia of nuisance explored in this chapter – noise, odour and attraction of pests – suggest that the keeping of cats and dogs poses a greater risk to nuisance than does the keeping of a few chickens. A complete prohibition on urban hens appears to be empirically arbitrary when attempts are made to anchor the prohibition in relation with the municipal authority to regulate nuisance. It makes little sense then to prohibit an animal unless it is a nuisance animal, or unless there are health and safety issues associated with the animal. This is not to say that chickens should not be regulated. Rather, the conclusion drawn here is that a small number of hens cannot credibly be said to pose a nuisance risk in consideration of the existing animals that are permitted to be kept in backyards.

4.4 Nexus to the regulation of animals

It is difficult to imagine a situation where a city or municipality would be able to articulate a reason for passing an animal related bylaw that was not also in relation to either health and safety or nuisance. As noted in the introductory chapter, the earliest regulations concerning animals in Saskatoon were under the banner of health and safety, and they also addressed nuisance concerns.

One of the few cases turning on the heading of "wild and domestic animals and activities in relation to them" is *Churchill (Town) v Ladoon*[352] from the Manitoba Provincial Court, where the court highlighted that the bylaw was passed in relation to nuisance and health and safety concerns:

> [9] The by-law passed in 2005 replaced an earlier existing by-law which did not address rottweiler and pit-bull breeds that were becoming a safety issue for the town. The new by-law also addressed two other issues which were absent in the old by-law; kennels

[352] (2008) 232 Man R (2d) 39, 2008 CanLII 39414 (MB PC).

> and dog teams. The new by-law was developed in response to concerns expressed by community members over the increased number of dog teams being kept by residents. With the large number of dogs in one area, residents began to complain about the noise (from barking and howling) and the bad smell generated as a result of owners failing to keep the area clean.[353]

There was no case law found on the constitutionality of the authority to regulate "wild and domestic animals and activities in relation to them". This authority largely goes unquestioned.[354] This could be because most animal control bylaws are invariably focused on the prevention of nuisances or health safety issues, which is a superfluous and welcomed power for municipalities to have.

As discussed above in relation to the *Xentel* case,[355] which resulted in the quashing of the anti-circus bylaw, when animal control bylaws are not focused on a real issue pertaining to health and safety, nuisance or the regulation of animals, they may very well exceed municipal jurisdiction.[356]

The power to prohibit chickens could be undertaken pursuant to the power to regulate animals, although, the purpose of doing so would be difficult to articulate absent health, safety or nuisance concerns, much in the same way that it would be difficult to articulate a reason for prohibiting pets.

4.5 Evaluation of jurisdiction to ban hens pursuant to Saskatoon's *Zoning Bylaw*

Zoning bylaws differ somewhat from other bylaws in that they are concerned largely with development standards and maintaining the amenity of a neighbourhood as to encourage environmental, cultural and economic prosperity. Marianna Valverde suggests that zoning and

---

[353] *Ibid* at para 9.
[354] *Ibid* at para 24.
[355] *Xentel, supra* note 257.
[356] *Ibid*.

standards are the two key instruments of municipal sovereignty over private property.[357] At some point, she argues, we should question our agreeableness to municipalities having so much power over private interests.[358]

Saskatoon's first zoning bylaw was passed in the 1930s.[359] The bylaw defined zones, lot sizes, and permissible allowances for structures and roads. The zoning bylaw, in many respects, codified the gridiron design of the city. Gridiron, which is characterized by a series of parallel streets placed perpendicular to a series of perpendicular avenues, maximization of lot frontages and transportation infrastructure. This way of planning towns and cities was common in the prairies during the era of railway engineers doubling as city planners.[360] The gridiron design is contrasted with the *radio centric* design of common to medieval cities, which some argue, has social consequences:

> Max Weber praised medieval cities because people could easily identify with the city as their social world. Today's tall gridiron cities work against such positive identification – preoccupied with 'how much is it worth (the street, the house, the job)… other human concerns – maintaining the old neighborhood, religious ties and an identification of the city as a whole – have fallen by the wayside.[361]

In the view of sociologists Artibise and Stetler, zoning bylaws demonstrated the emergence of "the narrow view of beauty as orderliness", which "quite ignored that central criterion of city beautiful thinkers: the avoidance of visual monotony."[362]

---

[357] Valverde, *Everyday law on the street, supra* note 24 at 44.
[358] *Ibid*.
[359] Saskatoon – Zoning 1930, *supra* note 73.
[360] Roger Kemble, *The Canadian city: St. John's to Victoria: A critical commentary* (Montreal: Harvest House, 1989) at 39-41.
[361] John Macionis and Vincent Parillo, *Cities and urban life (2nd ed.)*, (Upper Saddle River, N.J.: Prentice Hall, 2001) at 201-203.
[362] Gilbert A Stelter & Alan F. J Artibise, eds, *The Canadian city: essays in urban and social history* (Ottawa: Carleton University Press, 1977) at 179.

Zoning plans were prolific during this era and they were brought forward from local councils – not from the state level – as state level planning in this regard would have been perceived as "bad" or "socialist".[363] Accordingly, they were defended as descriptive rather than prescriptive.[364] Zoning was defended as an exercise of land classification and the question of the manipulation of property rights were not presented during the discourse.[365] This may be because initial zoning bylaws, as suggested by Valverde, were implemented to further the economic goals of middle-class families and business leaders "who dominated (and still dominate) municipal politics".[366] As cited above, Valverde suggests that, "urban aesthetic regulation does not only empower certain groups of persons. It also ranks activities and spaces along a kind of moral "chain of being"".[367]

As noted in the introduction, section 5.23 of the *Zoning* bylaw prohibits the keeping of livestock in all districts within the city,[368] with the exception of livestock confined to agricultural districts, future urban development districts, pound keepers, the SPCA, veterinary clinics, hatcheries or other specially approved locations and circumstances.[369] These exceptions effectively exclude the keeping of chickens in backyards. The Zoning Bylaw defines livestock as

---

[363] Marianna Valverde, "Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance", 9 Law Text Culture 34 2005 at 287. [*Valverde* – Seeing Like a City]
[364] *Ibid*.
[365] *Ibid* at 288.
[366] *Valverde* – Seeing Like a City, *supra* note 363; Valverde, *Everyday law on the street, supra* note 24 at 32.
[367] *Ibid* at 50.
[368] *Zoning Bylaw, supra,* note 35 at , s 5.23 (1)
[369] *Ibid*, s 5.23 (2)(a)-(g).

"cattle, sheep, swine, goats, llamas, horses, chickens, turkeys, water fowl and similar animals."[370]

The following section argues that it is outside the scope of Saskatoon's jurisdiction to prohibit livestock using its zoning power.

Land Use and Zoning in Saskatchewan

The *Planning and Development Act, 2007*[371] provides that the purpose of zoning is "to control the use of land for providing for the amenity of the area within the council's jurisdiction and for the health, safety, and general welfare of the inhabitants of the municipality."[372] Notably this does not include a power to regulate nuisances directly. The majority of the Supreme Court in *Québec Inc.,* held that zoning powers should not be used to define nuisances:

> Recourse to the power to define is helpful because it simplifies the task of those who must apply a by−law. Thus, when an activity is defined as a nuisance, a citizen, a municipal officer or a judge, as the case may be, knows exactly what obligations are imposed by the municipal by−law. The standard is clear. However, this does not mean that the power to define is unlimited. For example, a municipality may not use its power to define a nuisance in place of its zoning power, thereby indirectly prohibiting an activity that would otherwise be authorized[373]

Zoning bylaws control development standards (e.g. building heights and setbacks), and the location and separation of land uses.[374] The *Planning and Development Act, 2007* gives municipalities the power to define "a permitted use, a discretionary use, or a prohibited use in a district according to the intensity of use."[375]

---

[370] *Ibid,* s 2
[371] Planning and Development Act, 2007, SS 2007, c P-13.2.
[372] *Ibid* at s 47.
[373] *Québec Inc., supra* note 218 at 42.
[374] This is taken from class notes obtained from lectures in Municipal Law provided by Felix Hoehn.
[375] *Planning and Development Act, 2007* s. 52(1)(b). See also, *Regina (City of) v Cunningham,*

While provinces have administrative and supervisory powers to regulate land use,[376] municipalities undertake the breadth of zoning decisions and regulation. This is because municipalities are those most closely impacted by the long-term and often irreversible consequences that zoning decisions have on both the environment and private property rights.

Community Plan's aspiration for sustainability inconsistent with Zoning Bylaw prohibition

In Saskatchewan, "any part of a zoning bylaw that is inconsistent with the official community plan has no effect insofar as it is inconsistent."[377] However, community plans themselves are interpreted with a high degree of deference to municipalities. The courts refer to community plans as "mere guidelines and policies rather than rules".[378] There is case law to support courts showing "deference to the decisions of municipalities and authorities such as the Director of Community Planning even if it disagrees with its policy or factual findings."[379] While

---

110 DLR (4th) 640; 120 Sask R 117 (SKCA), where s 52(1)(b) was interpreted to allow municipalities to prohibit uses in all districts. That being said, *Regina (City of) v Cunningham* has been criticized as being wrongly decided. See e.g. *R v Konakov*, 69 OR (3d) 97; [2004] OJ No 114 (QL) (ONCA) at para 22, citing Hoehn, *supra* note 218 at 166:

> Similarly, if a general ban of a use is motivated by considerations of morality, then it may be ultra vires as an infringement of the criminal law power. One might, for instance, speculate that an absolute prohibition of strip clubs may be motivated more by moral objections to the use than by objections strictly related to land use planning. This point was not argued in Cunningham and it appears that no evidence of council's motivation was presented to court.

[376] Law Professor Felix Hoehn notes that provinces exercise their jurisdiction over land use regulation in two main ways. First, provinces can supervise the implementation of zoning bylaws, and intervene only if and when they desire to do so. For example, section 47(1) of *The Planning and Development Act* allows the province to require a municipality to change a zoning bylaw. Secondly, provinces often direct municipalities to undertake certain planning activities, such as the general requirement of municipalities to implement community plans and corresponding zoning bylaws. See e.g. sections 34-38 of *Planning and Development Act, 2007,* SS 2007, c P-13.2.

[377] *Ibid* at s34(2).

[378] *Lane v La Ronge (Town)* 2011 SKQB 160 at para 12.

[379] *Ibid* at para 13, citing *Palmer v Saskatchewan (Director of Community Planning)* 2011 SKQB 119, [2011] SJ No 196 (QB) at para. 31:

a municipal council's perspective on what is consistent with a community plan is given deference by the courts,[380] a bylaw can still be struck down if it shows a clear contradiction with a community plan.[381]

Section 1.2 of Saskatoon's *Zoning Bylaw No 8770*[382] provides that the purpose of the Bylaw is "to regulate development in the City of Saskatoon to provide for the amenity of the area and for the health, safety, and general welfare of the inhabitants of the municipality in accordance with the provisions of the *Official Community Plan.*" [383] Following s.1.2, *The Official Community Plan* serves as a source of authority for Saskatoon's *Zoning Bylaw*,[384] as well as an interpretive aid.

The *Official Community Plan* is enacted to ensure that the development of Saskatoon "takes place in an orderly and rational manner, balancing the environmental, social, and economic needs of the community"[385] The act provides the "fundamental values" that will guide Saskatoon as it grows to a city of 500,000. "Saskatoon as a Sustainable City" is the first fundamental value listed by the Plan, which is further described in the Plan as follows:

> A sustainable community is one that meets its needs today without limiting the ability of future generations to meet their needs. This means a community that sustains its quality of life and accommodates growth and change by balancing long term economic, environmental and social needs. This Plan recognizes the following principles in building a community with a sustainable quality of life:
>
> a) economic diversity, economic security, and fiscal responsibility;
>
> b) environmental protection and stewardship;

---

[380] *Marner and Kellough v. Regina (City) (1993),* 1993 CanLII 8985 (SK QB), 112 Sask R 73.
[381] *Hoffman v Regina Beach (Town)* (1993), 114 Sask R 226, 17 MPLR (2d) 105 (QB).
[382] *Zoning Bylaw, supra* note 35.
[383] City Of Saskatoon, *Official Community Plan Bylaw No. 8769 With amendments up to and including Bylaw No. 9147,* (Deputy Minister Approved January 21, 2014).
[384] *Zoning Bylaw, supra* note 35.Note that the scope of Bylaw 8770, as described in s.1.3 of the Bylaw, appears to describe the scope of authority of the act being founded by the Official Community Plan, and The Planning and Development Act, 2007.
[385] *Official Community Plan, supra* note 383 at s 1.2.

> c) equity in land use decisions and a fair distribution of community services;
> d) efficient use of land, infrastructure and other resources in managing the City and accommodating growth and change;
> e) decision making based on democratic institutions and public consultation; and
> f) community safety through the application of the principles of Crime Prevention Through Environmental Design (CPTED) …[386]

To the extent that urban agriculture relates to Saskatoon being a sustainable community, the official community plan might be interpreted as supporting urban agriculture. The need to meet the needs of future generations, environmental stewardship and balancing long term economic, environmental and social needs would, on face, lend to support of locally and sustainably produced food. Drawing on Valverde, the environmentally slanted interpretation is unlikely, given that the implementation and interpretation of zoning bylaws typically favours convention, normalcy and control.[387]

Notwithstanding the above, the high threshold required in proving that a bylaw is inconsistent with the community is likely not met in the case of the urban hen prohibition. The above argument, however, could buttress other claims that rely on determinations of reasonableness. Insofar as the *Community Plan* supports urban agriculture, urban agriculture should be interpreted as reasonable.

The de minimums impact of a chicken on the amenity of a neighborhood

A zoning bylaw banning cats (or hens) would likely need to relate to the omnibus zoning grant to regulate land in concern for "the amenity of the area" and "for the health, safety, and general welfare of the inhabitants of the municipality"[388] as opposed to a specific grant. Issues pertaining to health and safety were addressed in relation to Saskatoon's *Animal Control Bylaw*

[386] *Ibid* at s 2.1.
[387] *Valverde* – Seeing Like a City, *supra* note 363; Valverde, *Everyday law on the street, supra* note 24 at 32.
[388] *Ibid* at s 47.

and do not need to be recited as they apply equally to zoning with regard to unreasonableness and moral reasoning. Accordingly, this section is focused on if and to what degree an urban hen would affect the amenity of a neighborhood.

Mariana Valverde characterizes the regulation of amenity as the regulation of taste and culture:

> [Municipalities] regulate taste not only by banning certain sights and sounds and smells but also – in contrast to John Stuart Mill's theory of law – by using law to compel people to maintain aesthetic standards, not only in public spaces but even in their own private property. Aesthetic standards are obviously culturally specific (and to some extent also generation- and gender-specific)…[389]

Following Valverde's normative portrayal of amenity, a city would be hard pressed to justify a ban on cats or dogs pursuant to its limited zoning power, largely because we accept dogs and cats. However, they should also be hard pressed to ban hens because zoning powers are limited; the inability to prohibit dogs and cats from cities should lead to the same conclusion for urban hens.

Amenity is not defined in Saskatoon's *Zoning Bylaw*. In *Karagic v Calgary (City)*,[390] the Alberta Court of Appeal found that the use of a boulevard relates to amenity. The Court therein acquiesced to the Wikipedia definition of amenity: "tangible or intangible benefits of a property, especially those that increase its attractiveness or value, or that contribute to its comfort or convenience." [391] Again, as with many of the concepts and definitions reviewed throughout this work, amenity is a concept that occurs on a continuum and ultimately requires a determination of reasonableness. This definition of amenity is also subjective and therefore limited on its own to

---

[389] Valverde, *supra* note 24 at 70.
[390] 2012 ABCA 309.
[391] *Ibid* at para 12.

assist in determining of the type of activity or scope of physical attributes of that could fall within the scope of amenities lawfully subject to the zoning power.

The most obvious way that the *Zoning Bylaw* regulates the amenity of a neighborhood is through the regulation of the *permanent* and *physical* features of neighborhood. Examples include: set backs, building heights and the like.[392] These standards will affect the amenity of a neighbourhood for decades if not centuries.[393] The *Zoning Bylaw* also regulates landscaping of more permanent fixtures, such as hospitals, schools, civic centers, and businesses.[394]

The provisions in the *Zoning Bylaw* banning livestock from non-agricultural portions of the city have merit when applied in certain contexts. The amenity of downtown Saskatoon would certainly be impacted by introducing intensive livestock densities. The separation of intensive agricultural land uses from residential land uses is reasonable for the same reasons that industrial zones should not overlap with residential or commercial zones. What Mr. Hughes and others are proposing, however, is entirely distinct from this context and any attempts by council to compare the two should be corrected. As many urban hen owners would attest, one, two or three hens are not "intensive" or distinct in any way from another pet when it comes to the amenity of the neighbourhood.

Where Saskatoon's impugned zoning provisions come into conflict with the scope of their zoning powers is that a single (or two, or three) hen(s) in each back yard does not affect the amenity of a neighbourhood beyond *di minimus*. The current acceptability of dogs, cats, pigeons and the like provide a pet presence that would mask any effects that a hen would have in a neighbourhood.

---

[392] Felix Hoehn, *supra* note 374
[393] *Ibid.*
[394] *Zoning Bylaw, supra* note 35.

Returning for a moment to the introductory chapter of this work, I recall what it was like keeping several hens in my backyard. They were quiet and I am unsure if all of my neighbours knew they were there. In contrast, one of my neighbours kept two dogs that exceeded 80 lbs and would bark frequently. You could not miss them. While I am unsure of the appropriateness of keeping large dogs in the city, insofar as they are there, their presence will certainly minimize any effect that a few hens would have in connection with the amenity of a neighbourhood.

4.6 Other prohibitive considerations

Restrictive covenants

Some local lawyers who have practiced in real estate law for some years suggest that decades old restrictive covenants exist in Saskatoon that prohibit the keeping of urban hens. None of the lawyers could remember the description of the specific land titles burdened with the covenants, and therefore, their existence could not be confirmed.

In *Everyday Law on the Streets*, Valverde discusses how gated communities have "more exorbitant aesthetic rules."[395] She questions to what extent these communities "should be allowed to impose all manner of culturally specific rules on their members."[396] In so doing, she is questioning the scope and reach of property related restrictive covenants.

Restrictive covenants are contracts that run with the land.[397] They most often take form of limiting land use and aesthetics of buildings, for example, the colour of shingles, or in relation to

---

[395] *Valverde*, *supra* note 24 at 54.
[396] *Ibid*.
[397] *Dundee Realty Corporation v Harvard Developments Inc.*, 2011 SKQB 74 citing *Hi-Way Housing (Sask.) Ltd. v Mini-Mansion Construction Co.,* (1980) 4 Sask R 415, [1980], 5 WWR 367 (SK CA) at para 12.

this case, the restriction of hens.[398] A restrictive covenant stipulates an easement-like restriction on the property rights of a subservient party for the benefit of the dominant tenement.[399] Restrictive covenants can pass from the original contractors to their respective assignees.[400] Covenants can be challenged on the basis that i) the neighbourhood has changed to the extent that the covenant is no longer relevant, ii) the covenant is spent or unworkable, or iii) its enforcement would be vexatious.[401]

There are many examples of legislatures overriding restrictive covenants in relation to real property in order to protect other interests deemed to be more important. For example, the *Residential Tenancies Act, 2006*[402] overrides any contractual clause that restricts the rights of a tenant contrary to the Act.[403] As indicated by Valverde, another example is the Nova Scotia's *Clothesline Act,*[404] which provides that: "No Act, by-law, covenant, agreement or contract prevents or prohibits the installation, placement or use of a clothesline outdoors at a single family dwelling or on the ground floor of a multi-unit residential building."[405]

While there may be many examples of legislation used to override restrictive covenants that pertain to real property, it is less evident whether the *Charter* or fundamental principles of municipal law could be used given that the covenants arise from contract and property law. At this point in my analysis, save legislative action, it is difficult to discern how these might be

---

[398] See e.g. *McNeice v BC (Govt)*, 1987 CanLII 2787 (BC SC) at para 10, 13 BCLR (2d) 288.
[399] *Dundee Development Corp. v Westfair Properties Ltd*., 2000 SKQB 444, 200 Sask R 161 at para 6.
[400] *Ibid*
[401] *Barker v Palmer*, 2005 ABQB 815 at 32.
[402] SS 2006, c R-22.0001.
[403] *Ibid* at 6.
[404] SNS 2010, c 34.
[405] *Ibid* 4(1).

challenged. Perhaps the only way would be to suggest that the nature and quality of the neighbourhood, or perhaps society, has changed in such a way that the covenant is no longer relevant.

The Precautionary Principle

The precautionary principle is often associated with *Spraytech,*[406] *supra*, where the Supreme Court of Canada was tasked with determining whether a bylaw limiting the use of pesticides was *ultra vires* the jurisdiction of the municipality. At paragraph 31, the Court defined the precautionary principle as follows:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[407]

The bylaw in issue allowed organic pesticides to be used in instances where the purpose of the pesticide application was residential and aesthetic. The bylaw did not allow conventional pesticides to be used in the same context. No evidence was led to confirm or deny that the use of conventional pesticides posed a health risk to human.[408] It was sufficient that the bylaw be upheld as a preventative and precautionary measure to preventing environmental degradation.[409]

The impugned bylaw was found to be within the jurisdiction of the municipality, in part, because the bylaw was regulatory as opposed to prohibitory in nature. At paragraph 55, Lebel J. in his concurring opinion states that it is a longstanding principle of municipal law that "a by-law

---

[406] *Spraytech, supra* note 215.
[407] *Ibid* at 31
[408] *Ibid* at 13.
[409] *Ibid* at 31-32.

may not be prohibitory and may not discriminate unless the enabling legislation so authorizes."[410]

It is unlikely that the precautionary principle could be used to prevent the keeping of chickens in urban environments. As already discussed, arguments are often made that livestock waste will attract pests and are vectors for disease, and create nuisances by way of odor and noise. While all of the above are theoretically possible, there is little empirical evidence to prove they pose a significant risk. It must be kept in mind that the precautionary principle applies "where there are threats of serious or irreversible damage".[411] I have found no evidence to suggest that I have found to suggest that keeping a few chickens poses a threat of serious or irreversible environmental damage.

Rather than a shield for the City, the precautionary principle may act as a sword for the claimant. Keeping a few chickens likely improves the local biodiversity by improving soil quality. Furthermore, with respect to environmental externalities, keeping urban livestock has the advantage of creating a waste stream that can be used for vegetable production as opposed to importing such resources; it reduces the prevalence of intensive livestock operations and their associated environmental harms; and, it reduces the 'food-miles' required for eating protein intensive foods. These outcomes of keeping chickens all point towards mitigating the serious and irreversible damage likely to be caused by climate change. Accordingly, the precautionary principle may work more in favour of keeping chickens than against it. From a broad perspective, it is doubtful that the perceived and actual risks and nuisances presented by urban agriculture outweigh the potential benefits, such as: increased food security, decrease in food

---

[410] *Ibid* at 55.
[411] *Spraytech, supra* note 215 at 31.

deserts, decreased obesity, reduction of food miles and climate change impacts, increased biodiversity through a reduced dependence on monocultures, decreased eutrophication, and improved animal welfare.[412]

Summary of Municipal Jurisdiction

Based on the relatively weak empirical evidence of nuisance, and the arguably *de minimus* impact that keeping chickens would have on the amenity of a neighbourhood, it is unsurprising that the judge in *Smedley*, noted at the outset of this work, determined the following with regard to Mr. Smedley's chicken keeping:

> In summary, the chickens kept by this family are pets. They are in virtually every way inoffensive. There is no evidence that they are now creating excessive or even noticeable noise. There is no offensive odour. The way in which they are kept is not unsightly. The chickens remain on their own property seemingly doing no harm to either the aesthetic qualities of the neighbourhood nor to the quiet enjoyment of the property of the immediate neighbours. As compared to some other activities that might be legally undertaken on a residential property, the keeping of these pet chickens seems relatively benign. No allegation has been made and no evidence has been adduced to suggest that these chickens attract vermin.[413]

While this was but one judge's observations in relation to one family's keeping of chickens, it was similarly determined in *Hughes* that his chickens were not reported as a nuisance, nor was there any evidence led in that regard.

Without any credible evidence of the purpose of the prohibition relating to a valid municipal purpose, it is argued that the prohibition is arbitrary, and the City's reasoning for upholding the prohibition is respectfully argued as lacking candour. All of the above is suggestive of moral, and therefore unjustifiable, reasoning. However, municipalities are given great deference in undertaking their duties. Deference to municipalities would be the greatest

---

[412] See e.g. Schindler, *supra* note 3.
[413] *Smedley*, *supra* note 10 at 15.

hurdle to succeeding on an *ultra vires* claim, although, the lack of defensibility of the prohibition would assist in tipping the scales in favour of a claimant who established a *Charter* violation, as discussed in the following Chapter.

CHAPTER 5 - THE CHARTER'S PROTECTION OF URBAN MICRO-LIVESTOCKING

5.1 The Charter of Rights and its Fundamental Freedoms

Overview

The issue at stake in this work is broader than the liberty to eat locally produced free range eggs, but rather a claimant's power to self-provision, to survive, and to choose how he or she engages with life-supporting systems, such as the climate and personal food production. In this way, this section draws on food sovereignty's prioritization of producers' interests in food systems, which is captured in the *Declaration of Nyéléni,* which is quoted above in section 3.2 and repeated for ease of reference:

> Food sovereignty is the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems. It puts those who produce, distribute and consume food at the heart of food systems and policies rather than the demands of markets and corporations[414]

In the context of urban hen prohibitions, protection of conscience and expression may arise because of a deeply held environmentally based belief that obliges someone to act or forgo acting in a certain way. This obligation may arise in a claimant's position in relation to the global food system and its perceived (or actual) environmental and socially unjust consequences, which is exemplified by the food sovereignty framework.

This Chapter considers two fundamental freedoms to Canadian democracy, namely the freedom of expression and the freedom of conscience and religion, and how these freedoms might be used to challenge urban hen prohibitions. As a starting point, the following section

---

[414] *Declaration of Nyéléni, supra* note 185.

considers how courts balance legislative programs with fundamental freedoms and some of the general mechanics of raising a *Charter* claim.

The Mechanics of Claiming a Fundamental Charter Right or Freedom

Distinctively Canadian, the *Charter of Rights and Freedoms*[415] provides protections to "phases of Canadian life which should normally be beyond the reach of any majority, save by constitutional amendment."[416] In Canadian jurisprudence, the primary role of policy development belongs to Parliament.[417] Habitual deference to the legislature on economic and social policy decisions is warranted based on the resources and training available to lawmakers to choose between competing interests.[418] Similarly, the doctrine of subsidiarity provides that democratically elected municipal decision-makers have a closer view of local governance issues, and therefore should be afforded greater deference in dealing with them.[419] Notwithstanding legislative deference, the fundamental role of the courts is to remind government from time to time of the limitations to which state activities are subject.[420]

Charter analyses first ask whether either the purpose or the effect of the government activity or legislation in issue infringes the right or freedom being analysed. Dickson C.J. provides that "Canadian courts must deny effect to any federal or provincial statute that offends the rights and freedoms guaranteed by the Charter."[421] In proving a violation, it is not enough for a person to say that his or her rights have been infringed; the claimant must provide objective

---

[415] *The Charter of Rights and Freedoms, supra* note 23.
[416] Brian Dickson, *supra* note 167 at 3.
[417] *Ibid* at 19.
[418] *Ibid* at 22-23.
[419] Newman, *supra* note 227.
[420] Brian Dickson, *supra* note 167 at 24.
[421] *Ibid*, at *3*.

proof of interference on a balance of probabilities.[422] In the context of this work, applicants would need to meet an evidentiary burden to explain how the keeping of backyard hens in urban environments infringes a fundamental right or freedom.

When *Charter* rights are interpreted as giving a broad scope, it is easier for claimants to establish that a government action infringes them, and the focus naturally turns to the government to justify legislation that infringes the rights. Accordingly, where rights (such as the freedom of expression) are given a broad scope, the Canadian legal system steps closer to the justification theory discussed above by Sonu Bedi,[423] which requires the state to provide reasons when justifying infringements of liberty. This should be kept in mind when reading the decision of Skene J. in *Hughes* who interprets Mr. Hughes' rights narrowly.

Fundamental Freedoms

Section 2 of the *Charter* provides:

Fundamental freedoms

2. Everyone has the following fundamental freedoms:
(*a*) freedom of conscience and religion;
(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(*c*) freedom of peaceful assembly; and
(*d*) freedom of association.

---

[422] *SL v Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 SCR 235 See also: *MacKay v Manitoba* [1989] 2 SCR 357 at paras 61-62:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. … A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[423] Sonu Bedi, *supra* note 272.

Fundamental freedoms are not absolute.[424] They are limited by Section 1 of the *Charter* to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[425] If a provision or government action is found to infringe a protected right or freedom, then the analysis proceeds to determine whether the infringement is justified as a reasonable limitation.[426]

5.2 The Charter's Section 2(b) Freedom of Expression

Geographer and legal commentator Nicholas Blomely provides a provocative yet astute narrative of the intrinsically *expressive* and deeply personal quality of land use.

> The [Pollan's] front lawn symbolized the collective face of suburbia, the backyard its private aspect. In the back, you could do pretty much whatever you wanted, but out in front you had to take account of the community's wishes and its self-image. Fences and hedges were out of the question: they were considered antisocial, unmistakable symbols of alienation from the group.
> …
> [Pollan] celebrates his father's refusal to mow his lawn as a "clear message to our neighbors". As his father "owned the land, he could do whatever he wanted to do with it". Before long, the "grasses grew tall enough to flower and set seed; the lawn rippled in the breeze like a flag. There was beauty here, I'm sure, but it was not visible in this context. Stuck in the middle of a row of tract houses on Long Island, the lawn said turpitude, rather than meadow.... It also said, to the neighbors, fyou.[427]

While the message intended by Mr. Hughes hen keeping is vastly different from that of Pollan's father, and is expressed in Mr. Hughes' backyard as opposed to front, Mr. Hughes message is equally expressive and would be interpreted as equally controversial by many.

---

[424] *Amselem*, *infra* note 490 at para 1. *R v Oakes* [1986] 1 SCR 103 at para 65. *P(D) v S(C),* [1993] 4 SCR 141 at p. 182, *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772 at 29.

[425] *Charter*, *supra* note 23 at s 1.

[426] See e.g. *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA at para 28, 327 DLR (4th) 669. [*Re Marriage Commissioners*]

[427] Nicholas Blomley, "The borrowed view: Privacy, propriety, and the entanglements of property," Law and Social inquiry, vol 30 no 4 (2006) , 617-661 at 629.

In *Hughes,* Skene J. notes that Mr. Hughes characterized the trial as the "Canadian Right to Food Trial".[428] In his trial, Mr. Hughes argued that that his keeping of urban hens was expressive and therefore that Calgary's RPO Bylaw violated Mr. Hughes' *Charter* guarantee to freedom of expression. Skene J. rejected this argument, notwithstanding the broad scope of freedom of expression.[429] This section argues that Hughes' actions were expressive and that Skene J. should have proceeded to analyse whether the Bylaw was saved only by imposing a reasonable limitation on Hughes' expressive action.

The Legal Test for Freedom of Expression

The freedom of speech and expression is firmly accepted "as a *necessar*y feature of modern democracy."[430] *Irwin Toy Ltd. v Québec (Attorney General),*[431] another landmark decision by Dickson C.J., developed the test for determining whether a government action violates a claimant's guarantee to freedom of expression.[432] A recent rehearsal of the *Irwin Toy* sets out three steps for analyzing section 2(b) claims. [433]

The first step asks whether the action in question was expressive, and is generally an easy threshold to pass. The second step asks if "the method or location of this expression remove that protection".[434] Violent expression, for example, is not protected by s. 2(b) because it undermines the values that the *Charter* seeks to protect. Upon determining that the expression is protected,

---

[428] *Hughes, supra* note 14 at 15
[429] *Ibid* at 111.
[430] *Québec Inc., supra* note 218 at para 51.
[431] *Irwin Toy, supra* note 441.
[432] *Ibid* at page 978-979
[433] *Quèbec Inc., supra* note 218 at para 56; *R v Banks* 2007 ONCA 19, 84 OR (3d); See also *Baier v Alberta*, [2007] 2 SCR 673, 2007 SCC 31 at para 19; *Canadian Broadcasting Corp. v Canada (Attorney General),* [2011] 1 SCR 19, 2011 SCC 2 at paras 33-34.
[434] *Ibid* at paras 33-34, 73.

the third step of the analysis considers whether the government act limits expression, either directly or indirectly, in a manner that is more than trivial or insubstantial.[435] If the government's purpose was not to limit expression, but does so in effect, the claimant then needs to establish how their expression is related to the values that s. 2(b) seeks to protect.[436] Such values include: (1) democratic discourse, (2) truth finding and (3) self-fulfillment.[437] While this work does not consider whether food sovereignty might be a *Charter* principle itself, it argues below that a subjective desire to advance the goals of food sovereignty is aligned with *Charter* values.

These steps are analysed below, in relation to the *Hughes* decision, concluding that Mr. Hughes was demonstrating a non-violent mode of self-provisioning and land-use predicated on his commitments to environmental sustainability and social justice.

1. The Expressiveness of Keeping a Chicken

Freedom of expression provides a broad scope of protection to expression, covering activities such as: advertising tobacco products, advertising to children, and adult pornography.[438] It has unsurprisingly been noted that "[t]he constitutional guarantee extends not only to that which is pleasing, but also to that which to many may be aesthetically distasteful or morally offensive; it is indeed often true that 'one man's vulgarity is another's lyric."[439]

In *R v Keegstra*, the Supreme Court of Canada held that "all activities conveying or attempting to convey meaning are considered expression for the purposes of s. 2(b); the content

---

[435] *Ibid*.
[436] *Ibid* at para 72.
[437] *Ibid* at para 74
[438] Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution* (LexisNexus, Markham, Ontario: 2013) at 591 [Régimbald & Newman].
[439] *Re Information Retailers Association and Metropolitan Toronto*, (1985) 52 OR (2d) 449, 22 DLR (4th) 161 (ON CA).

of expression is irrelevant in determining the scope of this Charter provision."[440] Accordingly, subject to some important limitations, such as violent expression, expressive content is presumptively protected under section 2(b).[441] The contextual values and factors that will determine whether an infringement of a claimant's freedom of expression is justified are saved for the section 1 analysis.[442]

Dickson C.J. contemplated even day-to-day tasks, such as parking a car, as potentially having expressive content: "an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource."[443] The breadth of activities covered by freedom of expression is also exemplified in the Ontario Court of Appeal's decision in *R v Banks,* [444] which held that the act of begging is "evidently" expressive and that the activity of squeegeeing is essentially an act of begging.[445] With squeegeeing, even though words are not spoken, the message conveyed is that of requesting assistance and invites participation of the community in providing assistance.

In *Banks*, by broadly characterizing the communication in issue as begging rather than as something narrower in relation to squeegeeing, the impugned bylaw was easily classified as regulatory as opposed to prohibitive. The ban on squeegeeing was upheld by section 1 on the basis that the bylaw did not prohibit expressing the need for help.[446] This reasoning follows the

---

[440] *R v Keegstra*, [1990] 3 SCR 697 at page 732, [1991] 2 WWR 1. [*Keegstra*]
[441] *Irwin Toy ltd. v Quebec (Attorney general),* [1989] 1 SCR 927, 1989. [*Irwin Toy*].
[442] *Keegstra*, *supra* note 440 at page 734.
[443] *Irwin Toy*, *supra* note 441 at page 970.
[444] *R v Banks*, *supra* note 433.
[445] *Ibid* at 112-113.
[446] *Ibid* at para 129-132.

courts' tendency of upholding legislation that is characterized as regulatory as opposed to prohibitive.[447]

In *Bell v Toronto (City)*,[448] the appellant, Sandra Bell, was successful in overturning a conviction under a municipal by-law that effectively prohibited naturalized gardens by way of prohibiting "excessive growths of weeds and grass".[449] She argued that the prohibition violated her freedom to express her environmental beliefs, which were manifested through her "environmentally sound wild garden".[450] Fairgrieve J. stated unequivocally that Ms. Bell's practice was expressive:

> There can be no doubt that the appellant's act of growing a naturalistic garden that included tall grass and weeds had expressive content and conveyed meaning. As an environmentalist, Ms. Bell implemented a landscaping form intended to convey her sincerely held beliefs concerning the relationship between man and nature. It also implicitly conveyed a critique of the prevailing values reflected in conventional landscaping practices. She testified that she meant to show her son, and presumably the public at large, that one could coexist with nature in a peaceful, nurturing way. In *Ross v School District No. 15*, *supra* at p. 865, La Forest J. repeated that "the unpopularity of the views espoused" is not relevant to determining whether their expression falls within the guarantee of freedom of expression. The fact that many people evidently do not share the appellant's environmental beliefs and disapprove of the way she chose to manifest them does not remove her chosen form of expression from the protection of s. 2(b).[451]

In balancing the community's purported interest in conventional uniformity with Ms. Bell's interest in expressing her view of the relationship between people and nature, Fairgrieve J. had no hesitation in siding with Ms. Bell. Fairgrieve J. sees Ms. Bell's activity as important, and

---

[447] See e.g. *Ramsden v Peterborough (City)* [1993] 2 SCR 1084, 106 DLR (4th) 233 [*Ramsden*] where a bylaw prohibiting posters was struck down.
[448] [1996] OJ No 3146 [*Bell*].
[449] *Ibid* at para 7-9. The court was also live to a supplementary bylaw that limited the growth of "grass and weeds" on private property to less than 20 centimeters in height which was held to be motivated by purely aesthetic considerations.
[450] *Ibid* at para 14.
[451] *Ibid* at para 52.

the views of the community as less reasonable. The nuisance-like analysis undertaken by Fairgrieve provides an example of where the *Charter* can override municipal wisdom.

In what might be regarded as one of the more contentious parts of Skene J.'s judgment in *Hughes,* Skene J. suggests that Mr. Hughes' practice was not expressive.[452] With respect, this determination is difficult to reconcile with the broad scope of freedom of expression and the characteristics of Mr. Hughes' practice.

In *Hughes,* Skene J. acknowledged that Mr. Hughes submitted that his activity was undertaken to convey meaning to others. Hughes submitted that "the raising of urban hens is an expression of his ability to raise his own food and act as a role model for others in food production and sustainability."[453] Mr. Hughes submitted that he was "leading by example" thereby "showing others they too can participate in local food sustainability and healthy eating."[454] Skene J. acknowledged Hughes' community activism goals were to "continue to encourage other Calgarians and Canadians to lead healthy food sustainability lives."[455] He also noted that Hughes is the founder of the advocacy group CLUCK (Canadian Liberated Urban Chicken Klub)[456] and that he tries to live as sustainably as possible, which results in his efforts to produce as much food as possible from his urban plot.[457] Further, Skene J. did not suggest that any of Mr. Hughes' submissions were not credible. Nonetheless, Skene J. focused on a narrow

---

[452] *Hughes, supra* note 14 at 111.
[453] *Ibid* at para 109. See also paras 8, 15, 39, 94, and 108.
[454] Hughes, *supra* note 14 at para 108.
[455] *Ibid* at para 111-112.
[456] *Ibid* at para 15.
[457] *Ibid* at para 18.

aspect of Mr. Hughes goal, which was "to produce eggs to feed himself and his family"[458], in finding that it was not expressive.

Skene J. held that Mr. Hughes' practice was not expressive because it was not an activity of protest.[459] Skene notes that an activity could have multiple purposes, leaving open the possibility that Mr. Hughes' activity could have been undertaken for the purpose of feeding his family, and as a protest to an unjust bylaw or food system, but did not give any weight to the latter. In the end, Skene does not clearly articulate why Hughes' activity is not expressive, but rather just says that it is not. Furthermore, Skene J.'s conclusion appears to ignore Mr. Hughes's submissions on all of his other *Charter* claims that focused on the content of his actions.

Skene J. arguably ignored that positive actions undertaken to "lead by example" are typically expressive because it is activity undertaken with a view of influencing others. In accepting Mr. Hughes' submission that he was leading by example and therefore undertaking a form of expression and finding that he was not expressive, Skene J. could be setting a dangerous precedent of characterizing expressive self-actualizing as having meaningless or non-expressive content.

Mr. Hughes' involvement with CLUCK had the purpose of supporting urban chicken growers. In Mr. Hughes' case, both promoting other urban hen owners, and his own urban hen growing, arguably have the same expressive content: resistance against "an unfair, illogical and unhealthy ban on a healthy activity"[460] as Mr. Hughes suggested. Skene J.'s determination that hen-keeping was not expressive might have resulted from perceiving hen keeping as a semi-

---

[458] *Ibid* at para 111.
[459] *Ibid.*
[460] *Hughes, supra* note 14 at para 109.

lucrative hobby, rather than Mr. Hughes' manifestation of his commitment to achieving social and environmental goals through his urban land-use and community involvement.

2. Does the method or location of this expression remove that protection?

Internal limits to freedom of expression include a limit on the permitted method and location of expression. [461] The limitation of expression with regard to location is typically concerned with expression on public or state property, which can either limit or encourage expressive activity depending on the context.[462]

If the expression in question occurs on private property there may be questions as to whether a state act has occurred as to engage *Charter* scrutiny. [463] In the private property context, the *Charter* will only be engaged if it is the government act or legislation that limits the claimant's expression (as opposed to, say, the person who owns or operates the property in question).[464] Sara Hamill suggests that, for better or worse, freedom of expression is privileged by those who own private property.[465]

In *Hughes*, the internal limits on the method and location did not exclude keeping of urban hens. Rather, as the case law discussed below demonstrates, the private context of keeping urban hens assist in attracting *Charter* protection.

An example of the protection of freedom of expression on private property was demonstrated in *R v Guignard*[466] in relation to a bylaw banning signs in a residential area. The bylaw was struck down as constitutionally invalid for violating the accused's freedom of speech.

---

[461] *Québec Inc.*, *supra* note 218 at para 58.
[462] *Ibid* at para 71.
[463] *Ibid* at para 60.
[464] *Ibid* at para 62.
[465] Sarah E. Hamill "Location Matters: How Nuisance Governs Access to Property for Free Expression", (2014) 47 UBC L Rev 129 – 165.
[466] 2002 SCC 14, [2002] 1 SCR 472 [*Guignard*].

Guignard's sign portrayed Guignard's dismay for an insurance company. The Court in *Guignard* characterized the sign put up by the defendant as "counter-advertising." This type of advertising was suggested by the Court as having an important effect on the social and economic life of society: "The need for such expression derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information."[467]The Court reaffirmed the ruling in *Ramsden*[468] of the importance of signs as an inexpensive, accessible and effective means of public communication, especially for those who do not have the resources to undertake media campaigns.[469]

In *Guignard*, at paragraph 26, the Court implicitly supported economic and private property rights both as they related to freedom of expression:

> This infringement impacts especially on the freedom of expression of a person who does not have access to substantial financial resources. A limitation of this nature can in fact deprive that person of the only means of expression that are truly accessible to him or her. Even when a legislative or regulatory provision is neutral in appearance, it can have a major impact on the ability of a person or group to engage in expressive activity (see Irwin Toy, at pp. 974-75).[470]

On the facts of *Hughes, Guignard* is parallel in that both complainants used their private property as a location for expressing their viewpoints. Mr. Hughes noted his financial limitations and that part of the reason he was keeping hens was to feed his family. Mr. Hughes' practice of

---

[467] *Ibid* at para 22.
[468] *Ramsden, supra* note 447.
[469] *Guignard, supra* note 466 at para 25.
[470] *Ibid* at para 26. See also para 30 in relation to the minimal impairment test: "The by-law severely curtails Guignard's freedom to express his dissatisfaction with the practices of his insurance company publicly. It forces him to use advertising methods that presuppose the availability of adequate financial resources. Alternatively, it restricts him to private or virtually private communications such as distributing leaflets in the neighbourhood around his property, which is undoubtedly a less effective means to convey to the public his opinion about the quality of his insurer's services."

keeping hens was also demonstrative; the private property context provided Mr. Hughes with a means of displaying his sustainability based practice that he would not have otherwise had the opportunity to do. Mr. Hughes demonstrative practice could be characterized as a form of "counter-advertising" by raising awareness of alternatives to the mainstream food system, which relate to its indicia of expressiveness.

3. Purpose and effect

The third step in the freedom of conscience analysis is concerned with determining whether the purpose or effect of the state act or legislation restricts the claimant's freedom of expression. It was not obvious whether this was considered at all in *Hughes*.

In *Irwin Toy,* Dickson C.J. held that if a state act was meant to "control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee." If the government's purpose was genuinely not to restrict expression, the Court is to then consider whether the effect of the government act restricted expression. If the government acts unintentionally restricted expression, the plaintiff is required to "at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.[471] According to Dickson C.J., the principles and values underlying the right are premised on the following observations:

> (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be

[471] *Ibid* at page 978-979.

> cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.[472]

In *Québec Inc.*, for example, the purpose of the exotic dancing related bylaw was found by the majority to be benign. However, the bylaw was found to infringe the claimant's rights in effect. The court then considered the values underlying the expression, stating that, "engaging in lawful leisure activities promotes such values as individual self-fulfillment and human flourishing. The disputed value of particular expressions of self-fulfillment, like exotic dancing, does not negate this general proposition."[473]

In *Bell v Toronto (City),*[474] *supra* Fairgrieve J. compared the importance of Ms. Bell's expressive activity to other *Charter* protected activities, such as pole dancing, and concluded that Ms. Bell's "activity cannot be dismissed as too trivial or insubstantial to warrant constitutional protection."[475] Fairgrieve suggests that " the appellant's expressing her environmental beliefs, conveying a statement about living in harmony with nature, and seeking self-fulfillment in her gardening practices come much closer to the "core values" underlying s. 2(b) than the forms of expression given protection in those cases."[476]

Following *Bell*, Mr. Hughes would likely not have difficulty establishing that his activity falls closer to the core values underlying the *Charter* and s. 2(b) in comparison to other cases that that have received *Charter* protection. Mr. Hughes' activity, given that it is demonstrative, is a form of community discourse on food systems and the relevant justice related issues. He

---

[472] *Ibid* at page 976-77 citing to *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, 54 DLR (4th) 577.
[473] *Québec Inc.*, *supra* note 218 at para 84.
[474] *Bell*, *supra* note 448.
[475] *Ibid* at para 53.
[476] *Ibid*.

demonstrates a localized and more sustainable way of producing eggs that also addresses many of the animal welfare concerns associated with industrial practices.

Section 1 Considerations

The Saskatchewan Court of Appeal in *Marriage Commissioners Appointed Under The Marriage Act (Re),*[477] succinctly outlines the two step test for analysing whether a *Charter* violation can be saved under section 1 of the *Charter*.

> [68] The basic framework of analysis to be conducted in connection with s. 1 was set out by Dickson C.J.C. in *R. v. Oakes,* [1986] 1 S.C.R. 103 at pp. 138-39. The first requirement is that the objective of the impugned law be of sufficient importance to warrant overriding a Charter right or freedom. The second requirement involves the satisfaction of a form of "proportionality" test. Three factors are considered in determining if a law is proportional in this sense: (a) the particulars of the law must be rationally connected to its objective, (b) the law must impair the right or freedom in question as minimally as possible, and (c) there must be an overall proportionality between the deleterious effects of the law and its object.

In *Bell*, Fairgrieve J. found that the purpose of the bylaw was to "minimize aesthetic blight and avoid health and fire hazards and an environmental nuisance."[478] This was found to be an objective that could be seen as sufficient to justify interference with *Charter* rights. Similarly, its prohibition of "excessive growths of weeds and grass" was determined to be rationally connected to these objectives.[479]

Relying on *Ramsden, supra,* the bylaw in *Bell* was found to not have minimally impaired the claimant because the city could have achieved these objectives without prohibiting naturalized gardens:

> While the negation of a right or freedom does not necessarily require that such an infringement not be upheld under s. 1, the distinction between a limit that permits no exercise of a guaranteed right or freedom in a limited area of its potential exercise and

[477] *Re Marriage commissioners, supra* note 426 at 68
[478] *Ibid* at para 58-60.
[479] *Ibid* at para 56.

> one that permits a qualified exercise of it may be relevant to the test of proportionality under s. 1. In Ford, the court held that a complete prohibition on the use of languages other than French on commercial signs could not meet the requirements of the proportionality test, particularly the rational connection and minimal impairment branches. … It will therefore be more difficult to justify a complete ban on a form of expression than time, place or manner restrictions.[480]

The Court held that while some of the goals of the bylaw were important enough to override a constitutional right, the appellant's objective of "creating neat, conventionally pleasant residential yards"[481] did not warrant overriding "the right to express a differing view of man's relationship with nature."[482] The Court anticipated that some are likely to find such gardens ugly and offensive, but nevertheless maintained, "some offence must be tolerated."[483]

Similarly, in the Saskatchewan Court of Queen's Bench case, *R v Morelli*[484] the Court held that there are no implied community standards with regard to the keeping of animals:

> The respondent also contends that the court should use common sense and in effect take notice that the keeping of a pet sheep is inconsistent with community standards in urban residential districts. I agree that court decisions must make sense and be consistent with the objectives of the legislation, particularly where those objectives are broadly viewed by a community as establishing desirable standards to promote its general welfare. But no evidence was adduced at trial as to what kinds of animals are considered by the community to be acceptable as pets in the city. The term "domestic animals" is surely not restricted to dogs and cats. It likely covers a host of animals such as turtles, hamsters, caged birds, and possibly even more unusual pets such as pot bellied pigs.[485]

On the facts of *Hughes,* the purpose of livestock prohibitions appears to be on similar grounds to *Bell*: nuisance, health and safety. Also, as with *Bell,* a complete prohibition of keeping livestock is unlikely required to meet these objectives. The regulation of animals, such

---

[480] *Ramsden, supra* note 447 at 248. [internal citations omitted, emphasis added].
[481] *Bell, supra* note 448 at para 60.
[482] *Ibid*.
[483] *Ibid*. See distinguishing case of *Counter v Toronto (city)* 2002 CanLII 26796 (ON SC), 99 CRR (2d) 302 where the prohibition of natural gardens on boulevards was found to be proportional.
[484] *Morelli, supra* note 281.
[485] *Ibid* at para 22.

as cats and dogs, would be a suitable way of minimizing the risks of small livestock. Further, as indicated in *Bell*, to the extent that keeping chickens is socially unacceptable, the community is required to have a moderate level of tolerance of the unconventional. Following *Morelli*, we should be hesitant to ascribe conventionality in the absence of evidence. It should be kept in mind that U.S. largest cities permit keeping chickens, and Canada is arguably unconventional in its prohibitive tendencies.

Summary

In the three-step test for freedom of expression, finding that an activity attempts to convey meaning is an easy threshold to pass. Still, Skene J. found that Mr. Hughes' activity was not expressive. Based on the discussion above, this is likely the strongest ground for appealing *Hughes*. Further, upon finding Mr. Hughes' activity is expressive, a court would be hard pressed to articulate why the prohibition should be maintained under section 1. There are less intrusive ways of maintaining public welfare without prohibiting small livestock. Further, on the balance of interests, keeping chickens likely advances human flourishing more than the intolerance promoted by the prohibition.

5.3 Developing a Test for Freedom of Conscience

Introduction

Section 2(a) of the *Charter* provides that "freedom of conscience and religion" is a fundamental freedom. The Supreme Court of Canada has yet to provide a comprehensive interpretation of the meaning and scope of "conscience" in the context of the freedom of conscience and religion. This interpretive gap provides some room to anticipate how a claim based on freedom of conscience might advance.

This section considers the principled works of Canadian constitutional scholars such as Richard Moon and others who discuss the possible boundaries to freedom of conscience. In determining the merits of a claim for freedom of conscience, this section closely follows the well-established s. 2(a) counterpart, freedom of religion. One of Moon's arguments is that freedom of religion and freedom of conscience are at the very least parallel rights. Based on this argument we can assume that the scope of freedom of religion could provide an initial framework for determining the scope of freedom of conscience.[486]

This section argues that freedom of conscience, like freedom of religion and section 7 (life, liberty, and security of the person), would include the freedom to hold and manifest deeply held personal beliefs that relate to a conscientious framework. These factors are then applied to *R v Hughes* and the desire to live sustainably. This section concludes by suggesting that freedom of conscience could protect Mr. Hughes' practice.

Section 2(a)'s freedom to "hold and manifest"

In *R v Big M Drug Mart Ltd.*,[487] a case permitting a store to carry on business on a Sunday contrary to the *Lord's Day Act*, and the first case to interpret section 2 of the *Charter,* Dickson C.J. explains that the values underlying our political and philosophic traditions "demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates."[488] Dickson C.J. held that the freedom includes the freedom to act and the freedom from being compelled to act, stating that freedom "embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices… no one is to be forced to

[486] Richard Moon, "Freedom of Conscience and Religion", 339-428 [Moon] in Mendes & Beaulac, *supra* note 167 at 339-428.

[487] [1985] 1 SCR 295; [1985] 3 WWR 481 [*Big M*].

[488] *Ibid* at 123. [emphasis added].

act in a way contrary to his beliefs or his conscience…"[489] The ability to manifest and act (or not act) based on a belief gives substance to our fundamental freedoms. Without this quality, our section 2 would amount to a rather inconsequential protection of thought.

Protection of subjectively held beliefs

Freedom of religion protects subjectively held beliefs, as might freedom of conscience. In 2004, the Supreme Court of Canada in *Syndicat Northcrest v Amselem*[490] was split 5-4 on the scope of religious rights.[491] The majority found that Mr. Amselem's religious interest of setting up his own "succah" on the balcony of his condominium during the nine-day Jewish Succot holiday outweighed the interest of the respondent's bylaw that precluded such activity.

The dissent relied on expert evidence that the practice of setting up one's own succah was not a religious requirement and that a communal succah, as preferred by the condominium authority, would have sufficed, and therefore, they opined that Mr. Amselem's practice should not be afforded *Charter* protection.[492] On the point of expert opinion, the majority was satisfied with Mr. Amselem's subjective belief in the importance of the practice.[493] The majority's non-requirement of an activity's objective relation to a religion flowed from its definition of religion. The Court defined religion as:

---

[489] *Ibid* at 95.
[490] 2004 SCC 47, [2004] 2 SCR 551. [*Amselem*]
[491] *Amselem* case was not strictly a *Charter* case, but rather a case that proceeded under Québec's *Charter of Human Rights and Freedoms, CQLR c C-12*. Nevertheless the court explicitly stated that the principles discussed were equally applicable to the *Charter*, *ibid at* 37, 47, 52 and 57.
[492] *Ibid* at 162. Strictly speaking, the decision made within the private law context under the jurisdiction of the Québec's *Charter of Human Rights and Freedoms,* RSQ, c. C-12. However, the Court explicitly broadened the reach of the decision as to apply, when appropriate, to the *Charter* (para 490, para 37).
[493] *Ibid* at para 56.

> [F]reely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.[494]

The Court's definition of religion parallels what we think of as "conscience". The Oxford Dictionary of English defines conscience as "a person's moral sense of right and wrong, viewed as acting as a guide to one's behavior."[495] The Manitoba Court of Appeal in *Mackay v. Manitoba*[496] gave a similar definition. Both the definition of religion and conscience are concerned with guides to conduct. Consistent with Professor Hogg's anticipated content of a freedom of conscience claim, the primary difference between conscience and religion appears to be that the source of religious conduct is religious in nature whereas the source of conscience is non-theological guides to conduct.

The rationale for protecting subjectively obligated practices without expert approval

In *Amselem*, the Supreme Court of Canada held that "subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials."[497] The court discussed at paragraph 56-57 why it was not necessary that the practice was obligatory or objectively held, holding that official religious positions often impose hierarchal determinations that can conflict with *Charter* values:

> Jewish women, for example, strictly speaking, do not have a biblically mandated "obligation" to dwell in a succah during the Succot holiday. If a woman, however, nonetheless sincerely believes that sitting and eating in a succah brings her closer to her Maker, is that somehow less deserving of recognition simply because she has no strict "obligation" to do so? … Should an individual Jew, who may personally deny the

---

[494] *Ibid* at para 39.
[495] Angus Stevenson, eds, *Oxford Dictionary of English (3 ed.)*, (Oxford University Press: 2013).
[496] [1986] 2 WWR 367, 24 DLR (4th) 587 (MB CA). [*Mackay*]
[497] *Amselem, supra* note 490 at 62 [emphasis added].

> modern relevance of literal biblical "obligation" or "commandment", be precluded from making a freedom of religion argument despite the fact that for some reason he or she sincerely derives a closeness to his or her God by sitting in a succah? Surely not.[498]

Further, the court explicitly stated that expert opinion is not required in proving a religious obligation. The Court reasoned on this point that "Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect."[499] In excluding the need for expert evidence, the majority emphasizes that the protected right is the claimant's personally affirmed religious practice.[500] The test for freedom of religion appears to be moving towards protecting religious beliefs more on the basis that they are deeply and personally held, not because of any attachments to the importance of religious institutions.

Conscience as an extension of (moral) liberty

Moon argues that s. 2(a) has force to protect secular and non-religious practices "as a dimension of basic liberty of thought and action."[501] Like religion, liberty is an important aspect of life – not only as it relates to absence of state coercion – but also as it relates to the autonomy to make important life choices. Moon's argument is premised on protecting the conscientious activity based on the merits and moral quality of the practice that is to be protected, not on how closely the impugned activity relates to a religious practice.

---

[498] *Ibid* at para 68.
[499] *Ibid* at para 54-55.
[500] *Ibid.* The dissent at paragraphs 139-140 call for expert evidence especially where the religious precept in question is new or not well known; See also *Régimbald & Newman*, supra note 338 at 576
[501] *Ibid* at 422. This was, after all, the reason for initially protecting freedom of religion.

Wilson J.'s concurring judgment in *R v Mortgentaler*[502] was one of the earlier decisions to consider the applicability of conscience under s. 2(a). Wilson J. interpreted s. 2(a) as providing equal protection to religious and non-religious yet moral and conscientious beliefs. In her view, the state should not enter into decisions that enforce "one conscientiously-held view at the expense of another" because to do so would: "deny freedom of conscience to some, to treat them as means to an end, to deprive them, as Professor MacCormick puts it, of their "essential humanity".[503]

Wilson J.'s opinion in *Morgentaler* draws from the works of Professor Cyril E. M. Joad, who suggested that "the role of the state in a democracy is to establish the background conditions under which individual citizens may pursue the ethical values which in their view underlie the good life."[504] Throughout her analysis, she accentuates the liberty considerations underlying the *Charter*:

> I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric -- to be, in to-day's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way". This, he believed, we should be free to do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it".
>
> He added:
>
> > Each is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest. Liberty in a free and democratic society does not require the state to approve the

---

[502] [1988] 1 SCR 30, 63 OR (2d) 281. [*Morgentaler*]
[503] *Ibid* at page 179
[504] *Ibid* at page 178.

> personal decisions made by its citizens; it does, however, require the state to respect them. [505]

In the above passage, adopted by Wilson J., Mills relates liberty to issues of body, psychology and spirituality, and argues that the state should be reticent to interfere with decisions falling within these domains.

Moon highlights how inevitably some views in a democratic system will prevail over others, thereby restricting the liberty interests of some to the benefit of others. He suggests that "it cannot be enough that the conscientious (or religious) objector is committed to views or values that are inconsistent with state policy." Moon suggests that freedom of conscience should be reserved for a certain class of conscientious beliefs that "stand outside ordinary political debate" or "that are at odds with the most basic moral or factual assumptions of the general community." [506] The protection of claimants who are at odds with assumptions of the general community would assist claimants such as Ms. Finley, who, in *R v Finley*,[507] objected to completing the long census form on the basis of the role played by Lockheed Martin in the Census and that company's activities in relation to armaments.[508] Ms. Finley did not claim that the forced government activity violated her freedom of conscience, although she might have benefited from such a claim. In the end, she was granted an absolute discharge, suggesting that even though she did not lead a successful defence, her conduct was not worthy of even nominal punishment.

---

[505] *Ibid* at 166-167.
[506] Moon, *supra* note 486 at 421.
[507] 2013 SKCA 47; application for leave to SCC dismissed in S*andra Finley v Her Majesty the Queen*, 2013 CanLII 64672 (SCC).
[508] *Ibid* at para 8.

However, limiting freedom of conscience to these particular classes might provide otherwise valid claims from succeeding. One might imagine working for a publicly funded transportation company before the abolition of slavery in the United States and objecting on the basis of conscience to transporting slaves to plantations. A contemporary example would be the recent proceedings initiated by the Christian Medical and Dental Society of Canada to have a policy overturned that would require them to partake in abortion or assisted suicide.[509] Without weighing in on whether their claim should succeed, I would suggest that these types of claims would at least engage freedom of conscience. That doctors subjectively believe that they are participating in unethically ending of life, whether on account of religious or non-religious beliefs, arguably violates and more certainly relates to doctors' freedom of conscience. Whether the balancing of rights and interest in the section 1 analysis should favour doctors in this case is quite another question.

In any event, Moon holds that deeply held beliefs should not just be *"*fundamental to the individual but that they are part of a distinctive worldview,[510] and this more generalized formulation would cover both Ms. Finley and the doctors not wishing to participate in activities that they perceive as unethical, subject of course to section 1.

Protecting the pursuit of truth and human flourishing

Haigh and Bowal also provide some insight into factors used to determine freedom of conscience claims. They suggest that freedom of conscience claims should (i) have some

---

[509] See e.g. Allison Jones, "Christian doctors challenge Ontario college's new referral policy", The Associated Press, 24 March 2015, online: <www.ctvnews.ca/health/christian-doctors-challenge-ontario-college-s-new-referral-policy-1.2294808>.

[510] Moon, *supra* note 486 at 421.

connection to morality, and (ii) that the strongest claims evince some form of compulsion."[511] However, as the authors discuss, determining morality may be problematic because any given action can be undertaken for moral or immoral reasons:[512] Haigh and Bowal identify one of the challenges of adopting Wilson J.'s position in *Mortgentaler*, discussed above, which subtly equates liberty to morality is that morality can be difficult to identify:

> For example: washing hands before eating or prayer, for some religious adherents, is a matter of morality because it stems from a command from God. On the other hand, one can easily imagine decisions to terminate a pregnancy not based on morality--because having a child would, for example "cramp my single lifestyle," or would add to the "four children I already have and I don't need any more." A person's right to choose can all too easily become any decision made [conscientiously]; thus, the right to choose may not relate to morality, nor does the significance or insignificance of an act necessarily point us toward its morality.[513]

The above passage highlights the subjectivity of morality, which might be addressed by restricting freedom of conscience claims to those that can relate to *Charter* values in a manner similar to arise the third stage of the freedom of expression analysis analysed above. Freedom of conscience would not protect every act that a citizen feels is a conscience-based decision. The claimant would need to articulate how the impugned activity relates not only to morality, but also to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing. *Charter* values were also held in *R v Oakes*[514] to include:

> [T]he inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[515]

---

[511] Richard Haigh & Peter Bowal, "Environmental Goals and Sustainable Prosperity Act: Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis," Law Journal (Spring, 2012) 35 Dalhousie LJ 89 at pages 15-17.
[512] *Ibid* at 16.
[513] *Ibid*.
[514] [1986] 1 SCR 103; 53 OR (2d) 719.
[515] *Ibid* at 64.

Unlike Mr. Hughes' claim, Moon suggests that many attempts to claim rights under s. 2(a) are simply challenging the legitimacy of paternalistic laws and state authority:

> The conscientious objection is based not on the value the objector attaches to the particular practice but instead on the value of liberty and autonomy and the illegitimacy of state power. Such a claim may be too sweeping or too fundamental, for the court to contemplate under subsection 2(a).[516]

The infringement of certain liberty interests can be justification when balanced against legitimate government interest. For example, in *R v Locke*,[517] the Alberta Provincial Court found that legislation requiring wearing a seatbelt was justified on grounds of public safety. The Court found that the claimant's opposition to the legislation was based on a different judgment on the safety of not wearing a seatbelt – not on a different value of safety.[518]

This paper does not aim to weigh in on the issues presented in *Mortgentaler* or *Locke,* but suggests that these cases highlight the Court's capacity to identify the purpose of a claim and determine whether it receive *Charter* protection. Smith J. suggests, "at the very least, the protection of s. 2(a) of the *Charter*, like s. 2(b) encompasses a range of activities that diminish, as they recede from a fundamental core, in constitutional value.[519] In *Locke,* a differing value of a well-established safety concern such as wearing seat belts may be unlikely to fall within the scope of *Charter* values.

In *Hughes,* there is also a legitimate government interest in safety, but that interest is not supported by empirical evidence. The liberty interests in *Hughes,* as Mr. Hughes acknowledges, relate to the right to grow one's own food and is fundamentally aligned with the principles of food sovereignty. These are facets of Mr. Hughes' conduct that the Court could consider in

---

[516] *Ibid*.
[517] 2004 ABPC 152 at 24-27; 375 AR 49.
[518] *Ibid* at 24-27. Moon, *supra* note 486 at 426.
[519] *Re Marriage commissioners, supra* note 426 at para 146.

determining whether the activity was undertaken in connection with a conscientious paradigm worthy of *Charter* protection.

Protection of conscientious practices that resemble common religious practices

Another argument advanced by Moon is that certain conscientious practices are sufficiently akin to religious practice and therefore must be worthy of protection as to avoid complete arbitrariness.[520] Protection of non-religious practice may be limited to such practices that resemble religious practices in both content and structure.[521] Professor and constitutional scholar Dwight Newman also suggests that freedom of conscience may have application to protect religious-like beliefs, and that this right could become increasingly important given that an "increasing number of Canadians call themselves 'spiritual but not religious'."[522] Moon suggests that a conscientiously held belief may fall within the scope of s. 2(a) when it resembles a pragmatic religious belief/practice (a faith-based commitment) that is fundamental in significance, specific in content, peremptory in force and perceived by non-believers as inaccessible or unreasonable.[523]

While there is limited case-law and academic commentary on the freedom of conscience[524] pursuant to s. 2(a), perhaps the only case in which a court has relied solely on conscience, *Maurice v Canada*,[525] supports Moon's conclusion that conscience protection might be related to protection of practices akin to religious ones. Jack Maurice, a federal inmate and former follower

---

[520] *Ibid*.
[521] Moon, *supra* note 486 at 340.
[522] See Régimbald & Newman, *supra* note 438 at 591; Tom de Castella, "Spiritual but not Religious", BBC News Magazine, 3 January 2013, online <www.bbc.com/news/magazine-20888141>.
[523] Moon, *supra* note 486 at 423-424.
[524] *Ibid* at 419.
[525] [2000] FCJ No 1565, ACF No 1565.

of the Hare Krishna Faith, requested and was provided a vegetarian diet on religious grounds while he still belonged to the faith. After he renounced his faith, so too was his vegetarian diet denied to him. [526] In protest, Mr. Maurice refused to eat all of the food that was given to him because eating it was contrary to his conscience.[527] He also appealed Corrections Canada's refusal to provide him with a vegetarian diet on the basis that it violated his freedom of conscience.

The court found that Corrections Canada's decision to deny Mr. Maurice his vegetarian diet violated his freedom of conscience. The Court's written decision did not significantly engage in a theoretical analysis of freedom of conscience. Rather, it applied what might be described as matter of fact or common sense reasoning, highlighting the arbitrariness that would arise if s. 2(a) only assisted Mr. Maurice's vegetarianism while he belonged to a specific faith and not when he held a strong moral conviction. Moon notes that the practice protected in *Maurice* was specific, similar to a religious obligation, and that the practice is something that is ordinarily regarded as private. This may have helped the courts in accepting his claim. The state typically has no involvement in the dietary choices of individuals, but inherently does in this instance, and was exercising their involvement somewhat arbitrarily.[528]

Based on the analysis in *Maurice* and freedom of religion precedent, Moon suggests that conscience claims that have no link to a cultural or religious group may be less likely to succeed.[529] Newman also suggests that part of the protection of religious freedoms might stem

---

[526] *Ibid* at para 3.
[527] *Ibid.*
[528] Moon, *supra* note 486 at 425.
[529] *Ibid* at 424.

from their collective character.[530] According to Newman, if the claim is based on equality concerns (i.e. "on preventing the marginalization of particular identity groups resulting from state interference with their practices") in addition to liberty concerns (i.e. "reducing the situations in which an individual must choose between obeying the law or following her conscience"), then it would be more readily received by the courts.

Another decision worth reviewing is that of *Mornington (Township) v Kuepfer*.[531] In *Kuepfer*, Trachy J.P. of the Ontario Provincial Court applied *Big M* to the context of the two accuseds of Old Order Amish faith charged with "the offence of keeping a horse in a building (barn)."[532] The alleged offence occurred on the properties of the defendants in a hamlet near Waterloo, Ontario.[533] The Court accepted that it is against the practice and culture of Old Order Amish to drive cars, and accordingly, horseback and buggy is the primary mode of transportation for many Old Order Amish living in the area.[534] According to one of the witnesses who was an Old Order Amish community member, anyone who broke this rule risked excommunication from the Old Order church.[535]

The decision considered whether i) the bylaw was coercive to the lifestyles of the Old Order Amish, and, ii) whether the practice of keeping horses could be tolerated in light of the horses being kept in a hamlet.[536] The courts found that they bylaws were indirectly coercive, notwithstanding that their primary purpose was to regulate health and safety in the context of

---

[530] *Ibid at* 341 See also *SL v Commission scolaire des Chênes*, [2012] 1 SCR 235, 2012 SCC 7 at para 68.
[531] [1996] OJ No 1724. [*Kuepfer*]
[532] *Ibid* at para 2.
[533] *Ibid* at para 1-15.
[534] *Ibid* at para 44-48, 58.
[535] *Ibid* at para 49.
[536] *Ibid* at paras 77, 86.

land use.[537] In a manner consistent with Valverde's works, the Court refused to disentangle the "use" of land and the people that live there:

> To use the words of the Crown, "In this country we cannot zone land based on people as opposed to use. Land is zoned on the basis of use and not people." I'm not so sure that position is correct. Land use practices are made by humans beings and are made with human beings in mind as well as land resources.[538]

Accordingly, the case relates s. 2(a) issues to land-use and people, in a manner similar to that attempted by Mr. Hughes. For some, urban agriculture may be one of the few opportunities available to them to practice conscientious living in a Canadian cityscape, and therefore, it would be inappropriate to prioritize land use over the people who live there.

Limits on conscience acts

Like Newman, Moon suggests that freedom of conscience would need to have internal limits so as to assure its legitimacy against any reasonable state incursion.[539] Some of these limitations might be adapted from other freedoms, such as freedom of expression's preclusion of violence. For example, the Saskatchewan Court of Appeal in *Owens v Saskatchewan (Human Rights Commission)*[540] highlighted that religious speech and practice that harm others are not protected.[541] It largely goes without saying the freedom of conscience would only protect non-violent action, except in perhaps extreme circumstances.

Other internal limitations articulated in *Big M* and *Amselem* concerning freedom of religion could be applied to freedom of conscience. For example, as with other fundamental freedoms, once freedom of religion is triggered, the claimant must then demonstrate the alleged

---

[537] *Ibid* at para 87.
[538] *Ibid* at para 77.
[539] *Ibid* at 422.
[540] 2006 SKCA 41, 267 DLR (4th) 733.
[541] *Ibid* at para 61.

infringement "interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial."[542] In examining whether the interference is more than trivial or insubstantial, the Court provides that each case is to be examined in its own context. The contextual analysis considers the impacts of the claimants' activity on the rights of others, and acknowledges that no rights are absolute.[543] The Saskatchewan Court of Appeal has held that in determining if a measure goes beyond trivial or insubstantial interference requires an "examination of the degree to which the freedom is burdened by the measure in question."[544] At this stage of the analysis, the question is not how significant the freedom is to the claimant, but rather how meaningfully the freedom can be exercised in light of the legislative measure being imposed.[545]

From *Big M*, Dickson's judgment incorporates some fundamental limits on section 2 that are comparable to nuisance law. The court noted the freedoms are "subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others"[546] and that "such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own."[547] Similarly, in 2004, the Supreme Court of Canada *Amselem*[548] held that "[t]he ultimate protection of any particular

---

[542] *Ibid* at para 59.
[543] *Ibid* at paras 60-61.
[544] *Marriage Commissioners Appointed Under The Marriage Act (Re), 2011 SKCA 3* at para 64 referring to *R v Jones*, [1986] 2 SCR 284 at pp 313-14; 6 WWR 577
[545] *Ibid.*
[546] *Big M, supra* note 487 at 95.
[547] *Ibid* at 123 See also Moon, *supra* note 486 at 339, where he suggests: "the centrality of the individual conscience and the inappropriateness of governmental intervention to compel or constrain its manifestation."
[548] *Amselem, supra* note 490.

Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises."[549]

In *Amselem*, the court justified the applicant's religious practice noting that it takes place only nine days of the year, can conform to safety bylaws, and that the intrusion must "conform as much as possible with general aesthetics of the property."[550] Similarly, in *Kuepfer*, the scope of the decision was restricted to the context of the particular hamlet and to the keeping of one horse in a sanitary manner and for the sole purpose of transportation.[551] Resident testimony, as well as the prevalence of Old Order Amish in the area, demonstrated that the "injury" from horse manure was not overbearing on the local residents.[552] The tolerance of horses appeared in part to be because of their transportation function. The court noted that transportation is something otherwise available to the public at large, and that the bylaw indirectly restricts the transportation of the Amish.[553] In the Court's view, hamlets, as opposed cities or towns, "are designed as an asset to the rural countryside and to provide an alternative residential environment for the members of the rural community."[554]

In sum, the requirement of non-violence, the balancing of interests on a nuisance style of analysis, triviality, and the availability of other means of practicing the conscience act are all ways in which the courts could limit conscience claims.

---

[549] *Ibid* at para 62. In the same vein, at para 61 the court cited the words of John Stuart Mill: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it".
[550] *Ibid* at para 3.
[551] *Ibid* at para 90.
[552] *Ibid* at para 79.
[553] *Ibid* at para 87.
[554] *Ibid* at para 88 The Court appears to suggest that the legislation would have otherwise been valid if it had allowed the Old Amish Order to keep a horse in accordance with s 15 of the *Charter* (para 83) or if allowed anyone to keep a horse (para 80).

Developing a list of factors for freedom of conscience

In summary of the preceding sections that consider the test for freedom of religion, the test for freedom of expression, and the theoretical works of Moon and others, the potential success for a claim based on freedom of conscience may be greatest where:

1. The contentious practice is subjectively compelled or ascribed by a deeply held moral belief or commitment.
2. The contentious practice promotes the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.
3. The claimant sincerely holds this moral belief or commitment.
4. The legislation in question interferes with the claimant's ability to act in accordance with his or her moral belief or commitment in a manner that is more than trivial or insubstantial; and,
5. The practice does not materially interfere with the safety, health and welfare of others.

The first three factors are used to characterize the right and the claimant's relationship to the moral position or belief in question. The fourth factor establishes a state impediment to practicing the morally compelled belief. The fifth factor is used to balance the claimant's rights against others and society's at large. These factors are provided only as a starting point in what would need to be a much more focused and theorized discussion of freedom of conscience than what is available here.

Finally, and as a more general proposition of law, claims to freedom of conscience would be more likely to succeed where the law being challenged is prohibitive in nature. When an activity that would otherwise be protected by a fundamental freedom is prohibited by a government decision or legislative action, it is less likely that prohibition will be justified under the minimal impairment stage of the section 1 analysis, unless a full prohibition is required to achieve the government's objective.

The factors outlined above are applied to the case of *R v Hughes* in the following section with a view of inviting the Court to undertake a more rigorous analysis of freedom of conscience

claims. Given that factor 5 above was largely addressed in Chapter 4, issues of nuisance and the balancing of rights are not addressed in this Chapter.

5.4 Application of Freedom of Conscience Test to Hughes

Skene J's analysis focused primarily on whether the bylaw had coercive impact and more than trivial or insubstantial impact on Mr. Hughes' desire to grow chickens, which would correspond to the fourth factor listed above. Having found that the bylaw did not impede his desire to raise urban hens and produce eggs from those hens on his residential property, Skene J. concluded that the *RPO Bylaw* was not coercive and did not impair Mr. Hughes' rights. There was little analysis in *Hughes* that would relate to factors 1-3 above. As discussed in the paragraphs that follow, this section argues that the Court's analysis did not address Hughes' interest, which was focused on producers' rights and sovereignty. Further, the Court arguably applied a freedom of belief test to Mr. Hughes' freedom of conscience interest.

Factors 1-3: Characterization of the Right the Moral Belief or Practice at Issue

Skene J. summarized Hughes' claim that the *RPO Bylaw* violates his freedom of conscience by not allowing him to " raise urban hens and produce eggs from those hens on his residential property."[555] Hughes claimed that he believed the practice of keeping hens was best for him and his family, and that it related to his sustainability related activism.[556] He further stated that the bylaw was "cruel and unusual" as it denied him the right to eat the food that he wants to consume – the right to decide what he gets to put into his body.[557] He also cited his concern of "caged, factory farming practises" as being inconsistent with his "deep respect for

[555] *Ibid* at 94.
[556] *Ibid.*
[557] *Ibid* at 95.

life".[558] Referring back to chapter 2, Hughes' view is consistent with the definition of food sovereignty, an ecological and sustainable food system focused on the rights of those who produce, distribute and consume food. [559]

Hughes is not only growing food; Hughes is challenging the norm of urban land-use by demonstrating an alternative way of relating to urban spaces. While not articulated in the freedom of conscience part of Hughes' claim, Mr. Hughes was keeping chickens to demonstrate discontent with the state of affairs pertaining to the environment and the global food system. He is not challenging the right to grow chickens just anywhere; he has specified his urban backyard as ground zero for Canada's trial on the right to food. Accordingly, he is challenging how land is used in urban areas in relation to his environmental goals described above. In a setting preserved for material accumulation and consumption (the opposite of sustainability), as well as for aesthetic uniformity and predictability (the opposite of a hen-house), Hughes conscience compels him to use this environment for sustainable food growing practices, *marred* by life and nature. It is likely that his conscience compelled him to express this discontent in the way that he did; not only did he educate others, he challenged the bylaw so that others would have an opportunity to engage in the provisioning of urban protein legally.

Hughes' claim, especially as a self-represented litigant, appears to reasonably fall within the gambit of factors 1-3 above, which consider whether the practice is i) compelled or ascribed by a deeply held moral belief or commitment; ii) promotes the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing, and iii) that the claimant is sincere.

---

[558] *Ibid.*
[559] *Declaration of Nyéléni, supra* note 185.

Mr. Hughes describes a deep commitment to controlling what he consumes. For a conscientious being such as Mr. Hughes, it is hard to see how food consumption could be anything but deeply personal. Hughes takes his claim a step further, connecting his practice to broader environmental principles of sustainability, animal rights, and respect for life, and would therefore satisfy the second commitment. Satisfying the second step was discussed in relation to the freedom of expression test in Section 5.2. The latter, respect for life, clearly makes his claim analogous to a religious claim. In the same vein, given that most environmental claims relate to respect for life, it might be loosely acknowledged that environmental claims have at least some semblance to religious ones. Finally, in relation to the third factor, there is nothing to indicate that Mr. Hughes is insincere in holding his personal convictions.

Factor 4: Subjectively Held Coercive Burden and Trivial or Insubstantial Impact

Skene J. held that the purpose of the *RPO Bylaw* was the "prevention or control of potential residential nuisance sources, safety and liveability issues."[560] The effect of the bylaw was found to be that Mr. Hughes could not grow chickens for consumption, and that he would have to purchase eggs from the store or a farmer.[561] Skene J. held that the bylaw did not create a coercive burden on his conscience that would not be trivial or insubstantial.[562]

For the most part, Skene J. provides a rather progressive and defensible review of law relating to freedom of conscience. However, Skene J.'s decision appears to turn on a dissenting

---

[560] *Ibid* at para 142.
[561] *Ibid* .
[562] *Hughes, supra* 14 note at para 102 referring to *Roach v Canada (Minster of State for Multiculturalism & Culture)* 2 FC 406 (Fed CA) at para 47, which drew on the plurality decision of Dickson in *R v Edwards Books and Art Ltd,* [1986] 2 SCR 713 para 97; 58 OR (2d) 2.

opinion from the Manitoba Court of Appeal, which I would argue is inconsistent with the rest of his analysis for reducing conscience to thought.

Skene J. cites Wilson J.'s minority decision in *Morgentaler*[563] for the proposition that ""conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning" and cites a lower court case which suggests that "claimant to show that his or her conscientiously-held moral view might reasonably be threatened by the legislation in question, and that the coercive burden on his or her conscience would not be trivial or insubstantial."[564]

Skene J. referred to the Manitoba Court of Appeal's reasoning in *Mackay v Manitoba,*[565] a decision that engages the complex issue of the morality of taxation, and more specifically, the expenditure of money to aid political candidates based on the shares of votes they receive. He cites the majority's reasoning:

> The Constitution does not guarantee that the state will not act inimically to a citizen's standards of proper conduct; it merely guarantees that a citizen will not be required to do, or refrain from doing, something contrary to those standards … The support given by the government to political causes hostile to the general, or a minority, viewpoint cannot induce in anyone a pang on conscience for the moral quality of their own conduct or lack of it.[566] [emphasis added]

This passage does not necessarily conflict with the factors set out above.

Interestingly Skene J. goes on to cite and apply the dissenting opinion of the same decision, *Mackay v Manitoba,*[567] and it is at this juncture that I would depart from Skene J.'s analysis:

> The legislative program of a government does not constitute an interference with one's freedom of conscience, nor one's freedom of thought, belief or opinion. Whatever the

---

[563] *Morgentaler, supra* note 502.
[564] *Ibid* at para 99.
[565] *Mackay, supra* note 496.
[566] *Hughes, supra* note 14 at para 100 citing *Mackay, ibid* at para 31.
[567] *Ibid.*

> legislative direction of our parliamentarians or legislators, a citizen is free to think and believe and give expression to contrary ideas. His freedoms are not compromised. He is free to work towards different objectives, and the election of persons who will better reflect his views in the next election. . . .[568]

While most government programs will not constitute an interference with one's fundamental freedoms, to state that a claimant's remedy is to vote flies in the face of the *Charter*. It must be recalled that the purpose of the *Charter* is in many respects to limit government action. Accordingly, to rely on this passage sets a dangerous precedent, or more likely, a reviewable error in law. Further, it could be argued the dissenting judge equated freedom of conscience to freedom of belief.

In any event, Skene J. appears to hold that Hughes was not required to agree with the legislation, and therefore it was not coercive. Skene J. found that Hughes was not compelled to agree with the appropriateness of s. 27 of the *RPO 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."[569] The above is inclusive of Skene J's analysis. Skene J.'s analysis rightly considers whether Hughes' was coerced by s. 27 of the RPO *Bylaw*. However, the judgment is silent as to whether the *Bylaw* violates Hughes guarantee to freedom of conscience and religion by having him 'refrain' from conduct that Hughes' alleges is central to his freedom of conscience.

Reading between the lines, Skene J.'s selection of case law and brevity of analysis may have been undertaken with a view of avoiding some of the messy and challenging unanswered questions pertaining to the meaning of "conscience" in the context of s. 2(a)'s "freedom of conscience". As noted in some of the more recent and comprehensive treatises on Constitutional

---

[568] *Hughes, supra* note 14 at para 101.
[569] *Ibid* at para 102.

law in Canada, there is very little appellate level case law to draw guidance from on the meaning and scope of "conscience".

One of the challenges of Mr. Hughes' claim would be to establish that his practice is premised on a *deeply held* belief and therefore worthy of protection. While his commitment to the environment and social justice would be undeniable, it would likely be argued for proponents of the *RPO Bylaw* that its burden on Hughes' commitments is trivial and insubstantial. Proponents might argue that there are numerous ways of promoting environmental and social objectives, not all of which require that Mr. Hughes' break the law. While true, the nature in which individuals can attempt to address a systems-level issue – such as the food system – typically requires them to undertake small and sometimes even tokenistic measures of change that if, and only if, they are adopted by larger groups can there be measurable impact. Accordingly, when considering whether Hughes' practice is trivial or insubstantial, the Court should give some consideration to the potential cumulative effect of the claimant's activity being adopted by others.

The *RPO Bylaw* necessarily narrows the scope of what Mr. Hughes can eat, and thereby coerces him to purchase from alternative sources or to move outside of the city. It is likely that the *RPO Bylaw* is coercive because it reduces his choice of what he eats. The net impact is that Mr. Hughes has to purchase animal protein from a larger and more distant farming operation. One might argue that Mr. Hughes could achieve most of his environmental goals by purchasing eggs from a local conscientious farmer. However, whether that operation is industrial or large scale organic, it is not his own chickens from his own backyard. While it is possible that the practices of some of the local farmers are consistent with the demands of Hughes' conscience,

such compromise only captures part of Mr. Hughes' interests of changing how we relate to urban environments.

As mentioned above, Mr. Hughes is demonstrating a suitable and safe use of urban space that works towards an environmental goal. While some would suggest that he could raise them outside the city, it should be kept in mind that in *Amselem* the Court did not require the claimants to relocate in order to set up their succah simply because doing so would be an alternative suitable to the condominium corporation. That Hughes could satisfy his conscience in food production somewhere else is largely irrelevant to his claim. His claim advocates for a new approach to land use that recognizes his environmental and social beliefs – his conscience. Accordingly, Hughes' practice could likely be defended on either an objective or subjective basis on the fourth factor.

CHAPTER 6 - CONCLUSION

This work has focused on three ways of advancing the freedom to farm in an urban environment.

First, under the application of municipal law, freedom to farm in an urban environment is advanced by establishing a basis for alleging arbitrary and moral reasoning. In the case of hen-keeping, the gap between the perceived risk of harm from urban agricultural activities and the empirical evidence of harm caused by urban agriculture assists in making this claim.

In Saskatoon, challenging urban agricultural laws requires a challenge to urban norms. Looking at the history of North American cities' bylaws, including Saskatoon's, the inclusion or exclusion of animals correlates with the concentration of agricultural industries and the industrialization of agriculture. As discussed in relation to the works of Valverde, the ideology of uniformity in urban environments is deeply rooted in our culture and municipal decision-making processes, such as those promoting the use of urban spaces for sustainable purposes. These ideologies can be challenged through litigation as was demonstrated in *Bell v Toronto (City),* and to some extent, in *R v Hughes.* The common theme in these cases is that the interests of food growing should take precedent over the desire for uniformity in urban environments, especially when food growing does not pose any significant risks in relation to others' health, safety and nuisance interests.

Second, the inherently expressive nature of personal property use, in conjunction with the progressive goals and policies of food sovereignty, support a challenge of urban agricultural restrictions on the basis that they violate the guarantee to freedom of expression under the *Charter*. A prohibition on keeping urban hens, an activity that would largely go unnoticed,

parallels interests that have already been protected in other cases involving counter-advertising on private property where signs are prohibited, and the keeping of a naturalized garden.

Finally, this work investigates the potential to further freedom of conscience in the context of food production in an urban environment. Agriculture impacts significantly on our local and global environmental, social and economic systems. In order to succeed on a claim related to freedom of conscience related to urban agriculture, the claimant may be tasked by the Court with developing a framework for establishing a freedom of conscience argument. Mr. Hughes' presents as an ideal candidate for advancing the freedom of conscience claim because of his articulated conscientiously based reasoning for challenging the bylaw and his personal record of following his conscience. Mr. Hughes' subjective reasoning for deregulating urban chickens parallels a viewpoint premised on the objectives of food sovereignty. Accordingly, a win for Mr. Hughes or a similarly placed future litigant would entrench the subjective belief of food sovereignty as a framework that advances *Charter* values in Canadian case law.

From a social perspective, food sovereignty recognizes the importance of food rights and the rights of producers to participate in the development of food policy. At a local level, food sovereignty aims to protect producers from the overbearing governments and corporations who often hold a disproportionate amount of power in decision making. This generalized viewpoint is applicable to the context of Saskatoon where the prohibition on an otherwise legal food growing activity is upheld with little regard to the interests of those who aim to benefit from deregulation. Further, the need to re-think how land is used in urban environments is highlighted by the urgency to address climate change issues and other social and environmental facets of the global food system. To push small animals out of the city is disproportionate to the largely unnoticed negative impacts that hen keeping would cause. Agriculture and its distribution form the fabric

of the greatest environmental and social issues of our time, and therefore some of the greatest ethical and moral questions.

BIBLIOGRAPHY

Legislation

Alberta's Municipal Government Act, RSA 2000, c M-26.

Charter of Human Rights and Freedoms, RSQ, c. C-12.

Cities Act, SS 2002, c C-11.1.

City of Calgary, *Responsible Pet Ownership Bylaw* 23M2006.

City of Fredericton, *By-Law No. Z-5, A Zoning By-Law For The City Of Fredericton* , 24 June 2013, s 7.3(9).

City of Saint John, *Zoning Bylaw*, December 2014.

City of Saskatoon, *Animal Control Bylaw, 1999, Bylaw No 7860*, Codified to Bylaw No 8990 (December 19, 2011).

City of Saskatoon, *Bylaw # 2051, Zoning Bylaw*, 19 May 1930.

City of Saskatoon, *Bylaw 80, A Bylaw relating to Public Health*, 12 September, 1906.

City Of Saskatoon, *Official Community Plan Bylaw No. 8769 With amendments up to and including Bylaw No. 9147*, (Deputy Minister Approved January 21, 2014).

City of Saskatoon, *Zoning Bylaw No 3307*, July 1953.

City of Saskatoon, *Zoning Bylaw No 4637*, May 1967. 1 City of Saskatoon, *Bylaw No 8175, The Property Maintenance & Nuisance Abatement Bylaw, 2003*, Codified to Bylaw 8992 (December 19, 2011).

City of Saskatoon, *Zoning Bylaw No 8770*, Codified to Bylaw No 9162, January 6, 2014.

City of Vancouver, British Columbia, *Bylaw 9150*, consolidated to January 31, 2013.

City of Victoria, *Bylaw NO. 11-044, Animal Control Bylaw.*

Clothesline Act, SNS 2010, c 34.

Municipalities Act, SS 2005, c M-36.1

Red Deer, AB, *Bylaw No. 3517/2014 - Being A Bylaw Of The City Of Red Deer, In The Province Of Alberta, To Regulate The Keeping Of Chickens In Urban Areas*.

Reference re Public Service [1987] 1 SCR 313.

Residential Tenancies Act, 2006, SS 2006, *c R-22.0001*

Saskatchewan Human Rights Code SS 1979, c S-24.1

The Cities Act, SS 2002, c C-11.1.

The Constitution Act, 1982, being Schedule B to *the Canada Act 1982* (UK), 1982, c 11, Part I.

The Interpretation Act, 1995, SS 1995, c I-11.2,

Town of Saskatoon *Bylaw 27*,9 June 1904.

Town of Saskatoon, *Bylaw #15*, December 1903.

Case Law

0759594 B.C. Ltd. v 568295 British Columbia Ltd., 2013 BCCA 381

Baier v Alberta, [2007] 2 SCR 673, 2007 SCC 31.

Bailey v Williamson [(1873), LR 8 QB 118.

Banach v La Ronge, [1985] 6 WWR 285, 42 Sask R 64 (SK QB).

Barker v Palmer, 2005 ABQB 815.

Bell v Toronto (City), [1996] OJ No 3146.

Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40, [2001] 2 SCR 241.

Canadian Broadcasting Corp. v Canada (Attorney General), [2011] 1 SCR 19, 2011 SCC 2.

Catalyst Paper Corp. v North Cowichan (District), [2012] 1 SCR 5, 2012 SCC 2.

Churchill (Town) v Ladoon, 232 Man R (2d) 39, 2008 CanLII 39414 (MB PC).

Counter v Toronto (city) 2002 CanLII 26796 (ON SC), 99 CRR (2d) 302.

Dollard-des-Ormeaux (City of) c. Sasson 2011 QCCM 82

Duffield v City of Prince Albert, 2014 SKQB 203

Duffield v Prince Albert (City), 2015 SKCA 46.

Dundee Development Corp. v Westfair Properties Ltd., 2000 SKQB 444, 200 SaskR 161.

Dundee Realty Corporation v Harvard Developments Inc., 2011 SKQB 74.

Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190.

East York (Borough) v Ontario (1997), 34 OR (3d) 789, 43 OTC 287 (Gen. Div)

Ford v Quebec (Attorney General), [1988] 2 SCR 712, 54 DLR (4th) 577.

Hi-Way Housing (Sask.) Ltd. v Mini-Mansion Construction Co., 4 Sask R 415, [1980], 5 WWR 367 (SK CA).

Hoffman v Regina Beach (Town) (1993), 114 Sask R 226, 17 MPLR (2d) 105 (QB).

Irwin Toy ltd. v Quebec (Attorney general), [1989] 1 SCR 927, 1989.

Kamloops (City) v Plante, 2008 BCSC 32.

Karagic v Calgary (City), 2012 ABCA 309.

Kruse v Johnson, [1898] 2 QB 91 (Div Ct),

Lane v La Ronge (Town) 2011 SKQB 160.

MacKay v Manitoba 1989 26 (SCC); 61 DLR (4th) 385 (SCC)

Mackay v Manitoba, [1986] 2 WWR 367, 24 DLR (4th) 587 (MB CA)

Markwart v Prince Albert (City), 2005 SKQB 143.

Marner and Kellough v. Regina (City) (1993), 1993 CanLII 8985 (SK QB), 112 Sask R 73.

Marriage Commissioners Appointed Under The Marriage Act (Re), 2011 SKCA, 327 DLR (4th) 669.

Maurice v Canada, [2000] FCJ No 1565, ACF No 1565.

McNeice v BC (Govt), 1987 CanLII 2787 (BC SC), 13 BCLR (2d) 288.

Montréal (City) v 2952-1366 Québec Inc., 2005 SCC 62, [2005] 3 SCR 141.

Montréal (Ville) c. 177380 Canada Inc., 2003 CanLII 47989 (QC CA); [2003] RJQ 2378..

Mornington (Township) v Kuepfer, [1996] OJ No 1724.

Multiple Access Ltd. v McCutcheon, [1982] 2 SCR 161; 138 DLR (3d).

Owens v Saskatchewan (Human Rights Commission), 2006 SKCA 41, 267 DLR (4th) 733.

P(D) v S(C), [1993] 4 SCR 141.

Pacific National Investments Ltd. v Victoria (City), 2000 SCC 64, [2000] 2 SCR 919.

Palmer v Saskatchewan (Director of Community Planning), 2011 SKQB 119, [2011] SJ No. 196 (QB).

Planning and Development Act, 2007, SS 2007, c P-13.2

Prince George (City) v Payne, [1978] 1 SCR 458, 75 DLR (3d) 1.

R v Banks 2007 ONCA 19, 84 OR (3d).

R v Big M Drug Mart Ltd., [1985] 1 SCR 295; [1985] 3 WWR 481.

R v Edwards Books and Art Ltd, 1986] 2 SCR 713; 58 OR (2d) 2.

R v Finely 2013 SKCA 47; application for leave to SCC dismissed in S*andra Finley v Her Majesty the Queen,* 2013 CanLII 64672 (SCC).

R v Greenbaum, [1993] 1 SCR 674, 100 DLR (4th) 183;

R v Guignard 2002 SCC 14, [2002] 1 SCR 472.

R v Hughes, 2009 ABCA 11, 446 AR 351.

R v Jones, [1986] 2 SCR 284; 6 WWR 577.

R v Locke, 2004 ABPC 152; 375 AR 49.

R v Morelli, 2002 SKQB 294.

R v Oakes, [1986] 1 SCR 103; 53 OR (2d) 719.

R v Raycraft, 2007 SKQB 98.

R v Smedley, 2008 NSPC 9; 262 NSR (2d) 375.

R v Morgentaler, [1988] 1 SCR 30, 63 OR (2d) 281.

R. v Keegstra, [1990] 3 SCR 697, [1991] 2 WWR 1.

R. v Malmo-Levine; R. v Caine, [2003] 3 SCR 571, 2003 SCC 74 .

Ramsden v Peterborough (City) [1993] 2 SCR 1084, 106 DLR (4th) 233.

Re Information Retailers Association and Metropolitan Toronto, (1985) 52 OR (2d) 449, 22 DLR (4th) 161 (ON CA).

Regina (City of) v Cunningham, 110 DLR (4th) 640; 120 Sask R 117.

Roach v Canada (Minster of State for Multiculturalism & Culture) 2 FC 406 (Fed CA).

Scarborough (Township) v Bondi, [1959] SCR 444, 18 DLR (2d) 161.

Shell Canada Products Ltd. v Vancouver (City), [1994] 1 SCR 231; [1994] 3 WWR 609.

SL v Commission scolaire des Chênes, [2012] 1 SCR 235, 2012 SCC 7.

Slaight Communications Inc. v Davidson, [1989] 1 SCR 1038; [1989] SCJ No 45 (QL).

Smith v London (City) (1909), 20 OLR 133 (Div Ct).

Syndicat Northcrest v Amselem, 2004 SCC 47, [2004] 2 SCR 551.

Tock v St. John's Metropolitan Area Board [1989] 2 SCR 1181; 64 DLR (4th) 620.

Trinity Western University v British Columbia College of Teachers, 2001 SCC 31, [2001] 1 SCR 772.

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 SCR 485, 2004 SCC 19.

Vann Niagara Ltd. v Oakville (Town), [2003] 3 SCR 158, 2003 SCC 65.

Whitehead v Taber 20 ACWS (2d) 230 (AB QB).

Xentel DM Inc. v Windsor (City), (2004) 243 DLR (4th) 451; 123 CRR (2d) 137 (ON SC).

International Legal Sources

Convention on the Elimination of All Forms of Discrimination against Women (1981) 1249 UNTS 13.

Convention on the Rights of the Child [1992] CanTS No 3.

International Covenant on Economic, Social and Cultural Rights (1976) 993 UNTS 13.

Declaration Of Nyéléni, 27 February 2007, Nyéléni Village, Sélingué, Mali, online: nyeleni.org <http://nyeleni.org/spip.php?article290>.

Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 11, 1977, 2303 UNTS 148, (1998), 37 ILM 22 (in force February 16, 2005, entry into force for Canada February 16, 2005).

Municipal Code of Chicago, Chapter 7-12 on Health and Safety, Animal Care and Control, Current through Council Journal of September 10, 2014, online: American Legal Publishing Corporation <amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il>.

State of Maine v Dan Brown, 2014 ME 79 (Maine Supreme Judicial Court), online: <courts.maine.gov/opinions_orders/supreme/lawcourt/2014/14me79br.pdf>.

State of Wyoming, *Food Freedom Act*, 15LSO-0276, HEA0077, Chapter 121.

Universal Declaration of Human Rights GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948).

Secondary Sources

Allan Loram, et al, "Urban Domestic Gardens: The Effects of Human Interventions on Garden Composition" Environmental Management (2011) 48:808–824.

Allison et al, "The Copenhagen Diagnosis: Updating the World on the Latest Climate Science", University of New South Wales Climate Change Research Center, 2009.

Allison Jones, "Christian doctors challenge Ontario college's new referral policy", The Associated Press, 24 March 2015, online:www.ctvnews.ca/health/christian-doctors-challenge-ontario-college-s-new-referral-policy-1.2294808

Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation*, (Oxford New York: Clarendon Press Oxford University, 2011).

André Magnan, "New Avenues of Farm Corporatization in the Prairie Grains Sector: Farm Family Entrepreneurs and the Case of One Earth Farms." Agriculture and Human Values 2012 29:161-175.

Andrea Gaynor, *Harvest of the Suburbs* (Perth: University or Western Australia Press, 2006).

Andy Schneider & Brigid McCrea, *The Chicken Whisperer's Guide to Keeping Chickens*, (Beverley Massachusetts: Quarry Books, 2011).

Angus Stevenson, ed, *Oxford Dictionary of English (3 ed.),* (Oxford University Press: 2013).

Anna Pratt and Lorne Sossin, "A Brief Introduction of the Puzzle of Discretion" (2009) 24(3) Canadian Journal of Law and Society 301-312.

Annette Desmarais & Hannah Wittman, "Farmers, Foodies & First Nations: Getting to Food Sovereignty in Canada", Food Sovereignty: A Critical Dialogue International Conference, Program in Agrarian Studies at Yale University and the Journal of Peasant Studies, September 14-15, 2013, online: <www.yale.edu/agrarianstudies/foodsovereignty/pprs/3_Desmarais_Wittman_2013.pdf>.

Anthony A. Davis, "Is keeping hens in the city a charter right?", MacLean's Magazine, 12 March 2012, online: <www.macleans.ca/news/canada/running-a-fowl-of-the-constitution/>.

Bethaney Turner, "Embodied connections: sustainability, food systems and community gardens", Local Environment: The International Journal of Justice and Sustainability, (2011) 16:6, 509-522.

Betty Ann Adam, "Councilor says chickens can be deadly", The StarPhoenix, 22 August 2014, online: <www.thestarphoenix.com/life/Councillor+says+chickens+deadly/10138654/story.html>.

Bret C. Birdsong "From "Food Miles" to "Moneyball": How We Should Be Thinking About Food and Climate", University of Nevada, Las Vegas, William S. Boyd School of Law, (2013), Paper 776, online:<scholars.law.unlvedu/facpub/776>.

Brian Dickson, "The Canadian Charter of Rights and Freedoms: Context and Evolution", 3-24 in Errol Mendes and Stéphane Beaulac, eds, *The Canadian Charter of Rights and Freedoms*, 5th Ed (Markham, ON : LexisNexis, 2013)

British Columbia Ministry of Agriculture and Food, “Management of Noise on Poultry Farm”, August 1999, online: <www.al.govbc.ca/poultry/publications/documents/noise.pdf>.

Carol Martin, *A History of Canadian Gardening* (Toronto, ON: McArthur and Company, 2000).

CBC News, “Backyard chickens raise avian flu risk, say experts” 13 March 2008, CBC News online: <www.cbc.ca/news/canada/british-columbia/backyard-chickens-raise-avian-flu-risk-say-experts-1.765428>.

CBC News, “Chicken request going to Saskatoon city council”, 26 April 2010, online: www.cbc.ca/news/canada/saskatchewan/chicken-request-going-to-saskatoon-city-council-1.902837

CBC News, “Sask. has highest per capita greenhouse gas emissions: report”, 9 August 2014, online:<www.cbc.ca/news/canada/saskatchewan/sask-has-highest-per-capita-greenhouse-gas-emissions-report-1.1192868>.

CBC News, “Should Edmonton Allow Chickens?”, CBC, Jul 02, 2014, online: www.cbc.ca/news/canada/edmonton/should-edmonton-allow-backyard-chickens-1.2694029

Centres for Disease Control and Prevention, “Avian Influenza in Birds”, online: www.cdc.gov/flu/avianflu/avian-in-birds.htm

Chaia Heller, *Food, Farms and Solidarity* (Durham & London: Duke University Press, 2013).

Chales J Walthall et al,. *Climate Change and Agriculture in the United States: Effects and Adaptation*, 2012, USDA Technical Bulletin 1935, Washington, DC. 1.

Charles Hamilton, “Pro-Poultry Protesters Raising Chickens Despite Council’s Condescending Clucks”, Planet S: Saskatoon’s City Magazine, Vol 12 Iss 9, 2009. Online: Planet S <www.planetsmag.com/story.php?id=51>.

CHEP, “Backyard Gardening Program”, online: <www.chep.org/en/programs/backyardgardeningprogram>

Cinda Chavich, “From orchids and tropical songbirds to healing plants and a canopy walk, Canadian public gardens are a feast for the senses”. Canadian Tourism Commission, 19 March 2014, online: <encorporate.canada.travel/content/travel_story_ideas/10-things-canada-gardens Canadian Tourism Commission>.

City of Saskatoon, “2014 Preliminary Corporate Business Plan and Detailed Budget for City Coucnil Review”, December 3-4, 2013”, online:

<www.saskatoon.ca/DEPARTMENTS/Corporate%20Services/Office%20of%20the%20Finance%20Branch/Documents/2014-preliminary-corp-bus-plan-and-budget.pdf>

City of Saskatoon, "Current Allotment, Community, and Backyard Gardens in Saskatoon", September 2013, online: City of Saskatoon <www.saskatoon.ca/DEPARTMENTS/Community%20Services/Communitydevelopment/Documents/Garden_Locations.pdf>

City of Saskatoon, Saskatoon Food Charter, online <www.saskatooncommunityclinic.ca/pdf/Saskatoon_Food_Charter.pdf>.

City of Victoria, "Backyard Chickens", Victoria Animal Control Services Ltd., online: <www.vacs.ca/bylaw-regulations/backyard-chickens/register-your-chickens>.

Claire Provost, "La Via Campesina celebrates 20 years of standing up for food sovereignty", The Guardian, 17 June 2013.

Cockrall-King, Jennifer, *Food and the City: Urban Agriculture and the New Food Revolution* (Amherst, NY: Prometheus Books 2010).

Daphne A Dukelow, *the Dictionary of Canadian Law* (Toronto, 2011: Thomas Reuters).

Dave Sauchyn et al., "Saskatchewan's Natural Capital In a Changing Climate: An Assessment for Impacts and Adaption", Saskatchewan Prairie Adaptation Research Collaborative, April 2009, online: <www.parc.ca>.

David E. Gumpert, *Life, Liberty and the Pursuit of Food Rights: The Escalating Battle Over Who Decides What We Eat*, (White River Junction: Chelsea Green Publishing, 2013).

David Goodman, Melanie E. Dupuis & Michael K. Goodman. *Alternative food networks: Knowledge, practice and politics*. New York: Routledge, 2012.

David Hutton, "Council balks at backyard chickens – again", 14 September 2010, online: < blogs.thestarphoenix.com/2010/09/14/council-balks-at-backyard-chickens-again/>.

David Sauchyn, Harry P Diaz & Suren Kulshreshtha, eds., *The new normal: the Canadian prairies in a changing climate*, (Regina : CPRC Press, 2010);

Diana Stuart & Michelle Worosz's,"Risk, Anti-Reflexivity, and Ethical Neutralization in Industrial Food Processing", 2012, Agriculture and Human Values 29(3):287-301.

Don Kerr & Stan Hanson, *Saskatoon: The First Half-Century*, (Edmonton: Newest Press, 1982)

Dr. Leslie Ross, “A barking dog never bites”, online:www.veddermountainvetclinic.com/articles/article_-a-barking-dog-never-bites---by-dr--lesl_21.aspx

Dwight Newman “Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity”, 74 Sask L Rev 21 2011.

Elise Stotle, “City hall approves chicken pilot project”, Edmonton Journal, 19 August 2014, online: <www.edmontonjournal.com>.

Ellen Garrison, “Sacramento backyard chickens at risk for catching ‘bird flu’” The Sacramento Bee, 21 January 2015, online: <www.sacbee.com/news/local/article7899636.html>.

Evan Fraser and Elizabeth Fraser, “10 things you need to know about the global food system”, 1 May 2014, the Guardian, online: <www.theguardian.com/sustainable-business/food-blog/10-things-need-to-know-global-food-system>.

FAO, IFAD and WFP, *The State of Food Insecurity in the World 2013, The multiple dimensions of food security*, (Rome: UNFAO, 2013).

FAO, WFP and IFAD, *The State of Food Insecurity in the World 2012. Economic growth is necessary but not sufficient to accelerate reduction of hungerand malnutrition.* (Rome: FAO, 2012)

Farm-to-Consumer Legal Defense Fund, “Wyoming Food Freedom Act Moves Toward Passage”17 February 2015, online: <www.farmtoconsumer.org/wyoming-food-freedom-act-moves-toward-passage/>

Felix Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Government* (Purich Publishing: Saskatoon, 1996).

Food Secure Canada, “Food Democracy and Governance: Towards a People’s Food Policy Process”, Discussion Paper, available online: foodsecurecanada.org <http://foodsecurecanada.org/resources-news/newsletters/10-food-democracy-and-governance>.

Francisco Martinez-Gomez, Gilberto Aboites-Manrique & Douglas H. Constance, “Neoliberal restructuring, neoregulation, and the Mexican poultry industry”, Agric Hum Values (2013) 30:495–510.

Frank Maes, eds, Biodiversity and climate change: linkages at international, national and local levels (Cheltenham, UK : Edward Elgar, 2013).

Fraser, *supra* note 93 citing FAO, *Global Food Losses and Waste: Extent Causes and Prevention,* Rome 2011, online: <www.fao.org/fileadmin/user_upload/suistainability/pdf/Global_Food_Losses_and_Food_Waste.pdf>

Geoffrey Lawrence & Philip McMichael, "The Question of Food Security", Int. Jrnl. of Soc. of Agr. & Food, Vol. 19, No. 2, pp. 135–142.

Gidon Eshel et. al,"Land, irrigation water, greenhouse gas, and reactive nitrogen burdens of meat, eggs, and dairy production in the United States", Proceedings of the National Academy of Science, 19 August 2014, vol 111, no 33, online: <www.pnas.org/cgi/doi/10.1073/pnas.1402183111>.

Gilbert A Stelter & Alan F. J Artibise, eds, *The Canadian city: essays in urban and social history* (Ottawa: Carleton University Press, 1977).

Grace Skogstad, *Internationalization and Canadian Agriculture* (Toronto: University of Toronto Press, 2008) in chapter 2, which discusses the role of farmer and NGO lobbyists.

Graeme Hamilton, "Food activists' 'Eat Organic' slogans spelling disaster in Africa, author warns", National Post, 19 October 2012, online: <news.nationalpost.com/2012/10/19/eat-organic-slogans-dont-belong-in-africa> .

Gregg Vanderheiden, "About Decibles (dB)", University of Wisconsin-Madison, online: <trace.wisc.edu/docs/2004-About-dB/>

Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution* (LexisNexus, Markham, Ontario: 2013).

Hannah Wittman, Annette Aurélie Desmarais & Netty Wiebe, eds., *Food Sovereignty: Reconnecting Food, Nature and Community* (Oakland, CA: Food First Books, 2010).

Heather Beyko "Fowl Play? A Look into Recent Canadian Reform Efforts for Backyard Chicken Legislation", 19 September 2012, online: ablawg.ca <ablawg.ca/2012/09/19/fowl-play-a-look-into-recent-canadian-reform-efforts-for-backyard-chicken-legislation>.

Henry Bernstein, "Food Sovereignty: A Skeptical View", Food Sovereignty: A Critical Dialogue International Conference, Program in Agrarian Studies at Yale University and the Journal of Peasant Studies, September 14-15, 2013, online:<www.yale.edu/agrarianstudies/foodsovereignty/pprs/1_Bernstein_2013.pdf >.

Henry Bernstein, *Class dynamics of agrarian change* (Halifax, NS, 2010: Fernwood).

IEA, “World Energy Outlook, 2012: Executive Summary”, France, 2012, online: <www.iea.orgat 3>.

IPCC, *Climate Change 2013: The Physical Science Basis Summary for Policymakers, Working Group I Contribution to the IPCC Fifth Assessment Report*, Intergovernmental Panel on Climate Change, October 2013, online: <www.climatechange2013.org/>.

J. Timmons Roberts “Globalizing environmental justice” 285-307 in Ronald Sandler & Phaedra C. Pezzullo, eds, *Environmental justice and environmentalism: The social justice challenge to the environmental movement* (Cambridge, MA: MIT Press, 2007)

J. W. Rocksrtöm et al., “A Safe Operating Space for Humanity”, Nature, Vol 461, 24 September 2009, 472.

Jaime M. Bouvier, “Illegal Fowl: A Survey of Municipal Laws Relating to Backyard Poultry and a Model Ordinance for Regulating City Chickens”, Environmental Law Reporter, Sept, 2012, Vol.42(9), p.10888-10920.

Jean Ziegler “The Right to Food: Report by the Special Rapporteur on the Right to Food, Mr. Jean Ziegler, Submitted in Accordance with Commission on Human Rights Resolution 2000/10” United Nations, February 7, 2001.

Jenn Sharp “Brian and Roberta Bain are farming for the future” The Leader Post, 14 January 2014, online: Leader Post <www.leaderpost.com/life/Brian+Roberta+Bain+farming+future/9385521/story.html>

Jennifer Blech and Helga Leitner, “Reimagining the food system, the economy, and urban life: new urban chicken-keepers in US cities”, Urban Geography, 2014, 35:1, 86-108.

Jennifer Blecha, *Urban life with livestock: Performing alternative imaginaries through small-scale urban livestock agriculture in the United States*, Doctoral dissertation, University of Minnesota, July 2007.

Jeremy Hainsworth, “Seven countries to impose restrictions on Canadian poultry due to avian influenza” The Globe and Mail, 06 December 2014, online: <www.theglobeandmail.com/news/british-columbia/fifth-bc-poultry-farm-under-quarantine-due-to-avian-flu/article21982344/ www.theglobeandmail.com/news/british-columbia/fifth-bc-poultry-farm-under-quarantine-due-to-avian-flu/article21982344/>

Jess Bigood, “Maine Court Fight Pits Farmers Against State and One Another”, New York Times, 18 June 2014, online: <www.nytimes.com>.

Jess Graham, Jonathan Haidt,& Brian Nosek,"Liberals and conservatives rely on different sets of moral foundations" Journal of Personality and Social Psychology, Vol 96(5), May 2009, 1029-1046.

Jill Richardson, "How to get your city to allow backyard chickens", Grist.org, 6 January 2011, online:<grist.org/article/food-2011-01-05-how-to-get-your-city-to-allow-backyard-chickens/>;

Jim Tankersley, Chu: 'Economic Disaster'from Warming, LA Times, 7 February2009, online: <latimesblogs.latimes.com/greenspace/2009/02/chu- economic-di.html>.

JoAnn Jaffe and Michael Gertler, "Victual vicissitudes: Consumer deskilling and the (gendered) transformation of food systems" Agriculture and Human Values (2006) 23: 143–162

Johm Wilkinson, "The Globalization fo Agribusiness and Developing World Food Systems in Fred Magdoff & Brian Tokar, *Agriculture and Food in Crisis: Conflict, Resistance, and Renewal* (New York: Monthly Review Press, 2010) 155-169.

John E. Mogkt, Sarah Kwiatkowski & Mary J. Weindorf, "Promoting Urban Agriculture as an Alternative Land Use for Vacant Properties In The City of Detroit: Benefits, Problems And Proposals For A Regulatory Framework For Successful Land Use Integration" 56 Wayne L. Rev 1521 2010.

John Jaffey, "Anti-circus bylaw quashed", The Lawyers Weekly Vol. 24, No. 20 (October 1, 2004).

John Macionis and Vincent Parillo, Cities and urban life (2nd ed.), (Upper Saddle River, N.J.: Prentice Hall, 2001).

John Vandall, Norm Henderson & Jeff Thorpe, "Suitability and adaptability of current protected area policies under different climate change scenarios: the case of the Prairie Ecozone", 2006, Saskatchewan Prairie Adaptation Research Collaborative (Saskatchewan Research Council Publication 11755-1E06), online: <www.parc.ca>.

John Wolforth, "Jefferson County, Chickens and "Your Backyard"", online: <jeffco.us/roller/jeffcoblog/entry/jefferson_county_chickens_and_your>

Jonathan Haidt, "The New Synthesis in Moral Psychology", Science 18 May 2007, Vol 316 No 5827.

Josh Marcellin, "Fight for your right to poultry Dozens of North American cities allow backyard chickens, so what the cluck Edmonton?", 14 January 2014, online: vueweekly.com <www.vueweekly.com/fight-for-your-right-to-poultry/>.

Kimberley Hodgson, “Planning for food access and community-based food systems: A National Scan and Evaluation of Local Comprehensive and Sustainability Plans”, American Planning Association, November 2012, online:<www.planning.org/research/foodaccess/pdf/foodaccessreport.pdf> .

Kingston “City of Kingston Rules and Regulations Pertaining to Backyard Hens”, online: <https://www.cityofkingston.ca/documents/10180/26367/Backyard%20Hens%20Rules/2dcab1c0-d76f-4187-a15b-fa49bcd878b2>.

Kouri Research, “Towards a Food Strategy for Saskatoon: Saskatoon Regional Food System Assessment and Action Plan”, CHEP, December 2013, online: <www.chep.org>.

Kyle Clark & Kimberly A. Nicholas, “Introducing urban food forestry: a multifunctional approach to increase food security and provide ecosystem services” Landscape Ecol (2013) 28:1649–1669.

Laura Niada, in “Hunger And International Law: The Far- Reaching Scope Of The Human Right To Food”, 22 Conn J Int'l L 131 2006-2007.

Lawrence Busch, “Performing the Economy, Performing Science: From Neoclassical to Supply Chain Models In the Agrifood Sector”, Economy and Society 2007, 36(3):439-468.

Loretto Lambe, “Gardening: a multisensory experience” in Hogg, James and Judith Cavet *Making Leisure Provision for People with Profound Learning and Multiple Disabilities* (1995) Springer Science Business Media Dordrecht 113-130.

Luc J.A. Mougeot, “Urban agricutlutre: Definition, presence, potential and risks”, 1-42 in Bakker et al (eds.). *Growing Cities, Growing Food: Urban Agriculture on the Policy Agenda: A Reader on Urban Agriculture* (Feldafing, Germany, 2010: German Foundation for International Development)

Lucinda Vandervort, “Access to Justice and the Public Interest in the Administration of Justice” (2012) 63 University of New Brunswick Law 124-144.

MacRae Rod et al. “Could Toronto provide 10% of its fresh vegetable requirements from within its own boundaries? Matching consumption requirements with growing spaces”. Journal of Agriculture, Food Systems, and Community Development, 2010 1(2): 105–127.

Maggie Ellinger-Locke, “Food Sovereignty is a Gendered Issue”, 18 Buff Envtl LJ 157, 2010-2011.

Margaret Vidar, “State Recognition of the Right to Food the National Level”, UNU-WIDER 2006, Research Paper No. 2006/61, online:<www.rrojasdatabank.info/unurp06/rp2006-61_1.pdf>.

Mariana Valverde, *Everyday law on the street: city governance in an age of diversity*, (Chicago : The University of Chicago Press, 2012).

Marianna Valverde, “Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance”, 9 Law Text Culture 34 2005.

Mary MacArthur, “Bird flu found in second backyard flock”, The Western Producer, 12 February 2015, The Western Producer, online: <www.producer.com/2015/02/bird-flu-found-in-a-second-backyard-flock>.

Matthew Bradshaw, “The Rise Of Urban Agriculture: A Cautionary Tale--No Rules, Big Problems” William & Mary Business Law Review 4.1 (2013).

Meinshausen et al, “Greenhouse gas emission targets for limiting global warming to 2 C, Nature”, 2009, April 30, vol 458, 1158-1162;

Melissa Raphael, “At the East End of Eden: A Feminist Spirituality of Gardening: Our Way Past the Flaming Sword”, Feminist Theology 1993 2:101.

Melodie Edwards, “After Food Freedom Act Passes, Raw Milk Controversy Lingers”, 17 April, 2015, Wyoming Public Radio, online: <wyomingpublicmedia.org/post/after-food-freedom-act-passes-raw-milk-controversy-lingers>.

Michael Carolan, *The Sociology of Food and Agriculture* (London: Routledge, 2012).

Michael R M'Gonigle, et al, “Taking Uncertainty Seriously: From Permissive Regulation to Preventative Design in Environmental Decision Making” Osgoode Hall Law Journal 32.1 (1994) : 99-169, online: <digitalcommons.osgoode.yorku.ca/ohlj/vol32/iss1/4>

Michael Windfuhr & Jennie Jonsén, “Food Sovereignty: Towards democracy in localized food systems” FIAN-International, ITDG Publishing, 2005, online: <www.ukabc.org/foodsovereignty_itdg_fian_print.pdf>

Micheal Basil, “A history of farmers’ markets in Canada.” Journal of Historical Research in Marketing, 2012, Vol 4 No 3, 387-407.

Monique Beaudin, “Chickens make their way back to Montreal”16 July 2011, online montrealgazette.com/news/local-news/chickens-make-their-way-back-to-montreal;

Nathan Bellinger and Michael Fakhri, “The Intersection Between Food Sovereignty and Law”, American Bar Association, Natural Resources & Environment Volume 28, Number 2, Fall 2013.

Nathan McClintock, “Assessing soil lead contamination at multiple scales in Oakland, California: Implications for urban agriculture and environmental justice”, Appl. Geogr. 35:460–473. 2012.

Nathan McClintock, “Radical, reformist, and garden-variety neoliberal: coming to terms with urban agriculture's contradictions”, Local Environment: The International Journal of Justice and Sustainability, 201419:2, 147-171.

Nathan McClintock, “Why farm the City?” Cambridge Journal of Regions, Economy and Society 2010, 3, 191-207.

Nicholas Blomley, “The borrowed view: Privacy, propriety, and the entanglements of property,” Law and Social inquiry, vol 30 no 4 (2006) , 617-661.

Nina Mukherji & Alfonso Morales, “Zoning for Urban Agriculture”, American Planning Association, March 2010 <https://www.planning.org/zoningpractice/2010/pdf/mar.pdf>.

Oxford Advanced Learner’s Dictionary, online: <www.oxforddictionaries.com/definition/learner/morality>

Pat McNight, “Urban-chicken History”. Urban Farm Online, 7 March 2014, online: <www.urbanfarmonline.com/urban-livestock/chickens/chicken-history.aspx>

Patricia Formeman, “The 7 False Myths About Urban Chickens” online: <jandeligans.com/hens/7MythsReChickens.pdf>.

Paul Hanley, “Fist Nation Growing its Way to Food Sovereignty”, 12 March 2015, Star Phoenix, online: <www.thestarphoenix.com/life/First+Nation+growing+food+sovereignty/10882492/story.htm>

Paulette Forhan , “I don’t want chickens in my urban neighbourhood City officials are not doing their job, and are turning a blind eye to Fred Connors’ coop”, The Coast, 4 July 2013, online: <www.thecoast.ca/halifax/i-dont-want-chickens-in-my-urban-neighbourhood/Content?oid=3927124>.

People’s Food Policy Project, “Resetting the Table: A People’s Food Policy for Canada”, Creative Commons, April 2011, available online: <http://peoplesfoodpolicy.ca/files/pfpp-resetting-2011-lowres_1.pdf>.

Pew Environmental Group. “Big Chicken: Poultry and Industrial Poultry Production in America”, 2011, Washington, DC: The Pew Environmental Group.

Philip McMichael, “A food regime genealogy”, The Journal of Peasant Studies, 36:1, 139-169 (2009).

Pierrette Hondagneu-Sotelo, “Cultivating Questions for a Sociology of Gardens”, Journal of Contemporary Ethnography 2010 39: 498.

Prospect, “World Thinkers 2013”, May 2013, online: <www.prospectmagazine.co.uk/magazine/world-thinkers-2013; >

Rachel Engler-Stringer, Justin Harder & The Saskatoon Food Coalition “Toward Implementation of the Saskatoon Food Charter: A Report”, Community-University Institute for Social Research, University of Saskatchewan, 2011.

Richard Haigh & Peter Bowal,“Environmental Goals and Sustainable Prosperity Act: Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis,” Law Journal (Spring, 2012) 35 Dalhousie LJ 89.

Robert Gottlieb & Anupama Joshi, *Food Justice* (Cambridge: The MIT Press, 2010).

Rod MacRae et al. “Could Toronto provide 10% of its fresh vegetable requirements from within its own boundaries? Matching consumption requirements with growing spaces”. Journal of Agriculture, Food Systems, and Community Development, 2010 1(2): 105–127.

Kemble, *The Canadian city: St. John's to Victoria: A critical commentary* (Montreal: Harvest House, 1989).

Sadie Beaugard “Food Policy for People: Incorporating Food Sovereignty Principles into State Governance.” Senior Comprehensive Report, Urban and Environmental Policy Institute, Occidental College, Los Angeles, April, 2009, online: <ieham.org/html/docs/Incorporating%20food%20sovereignty%20principles%20into%20State%20governance.pdf>.

Sam E Wortman & Sarah T Lovell, “Environmental Challenges Threatening the Growth of Urban Agriculture in the United States”, J. Environ. Qual. 42:1283–1294 (2013).

Sarah B. Schindler, “Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores”, 87 Tul L Rev 231 2012-2013.

Sarah E. Hamill “Location Matters: How Nuisance Governs Access to Property for Free Expression”, (2014) 47 UBC L Rev 129 – 165.

Saskatoon Community Services Department Proposal, “Zoning Bylaw Text Amendment ; The Keeping of Animals”, December 27, 2006.

Saskatoon Food Bank and Learning Centre, “Urban Agriculture – Garden Patch”, online: <saskatoonfoodbank.org/gardenpatch/>

Saskatoon Food Bank, 2014 Annual Report, online: <issuu.com/yxefoodbank/docs/2014_food_bank_annual_report_issuu_?e=12834557/8696182>

Saskatoon Health Region, “Summary: Food Access in Saskatoon”, Public Health Observatory, October 2010.

Scanlan, Stephen J. 2013, “Feeding the Planet or Feeding Us a Line? Agribusiness, ‘Grainwashing’ and Hunger in the World Food System.” International Journal of Sociology of Agriculture & Food 20(3):357-382.

Sonja J Vermeulen, Bruce M Campbell & John Ingram, “Climate Change and Food Systems, Annu. Rev Environ. Resour. 37, 195–222 (2012), online: <www.annualreviews.org/doi/pdf/10.1146/annurev-environ-020411-130608>.

Sonu Bedi, *Rejecting Rights*, (New York: Cambridge University Press, 2009).

Stanley Makuch, Neil Craik and Signe Leisk’s, *Canadian Municipal and Planning Law* (Toronto: Thomson Carswell, 2004)

Statistics Canada, “Food availability in Canada”, table 002-0011, CANSIM (Statistics Canada's key socioeconomic database), online:< www5.statcan.gc.ca/cansim/pick-choisir?lang=eng&p2=33&id=0020011>.

Statistics Canada, Mireille Vézina and Susan Crompton, “Volunteering in Canada”,23 April 2014, online: <www.statcan.gc.ca/pub/11-008-x/2012001/article/11638-eng.htm>.

Steve Silva, “City forces woman to get rid of backyard chickens”, Global News (Regina), online: <globalnews.ca/news/1591437/city-forces-woman-to-get-rid-of-backyard-chickens/>.

T Kershaw et al., “Food Access in Saskatoon Community Report”, Saskatoon Health Region, Cushon et al., “Deprivation and food access and balance in Saskatoon, Saskatchewan”, October 2010, online: <www.phac-aspc.gc.ca/publicat/cdic-mcbc/33-3/ar-05-eng.php>.

The Frugal Family, “Chickens Eat Mice”, online video: <https://www.youtube.com/watch?v=7JbXMLT8mZ8>.

The Honourable Beverley McLauchlin in Errol Mendes and Stéphane Beaulac, eds, *The Canadian Charter of Rights and Freedoms*, 5th Ed (Markham, ON : LexisNexis, 2013)

The Poverty and Human Rights Center, "Victoria (City) v Adams: Advancing the Right to Shelter Law Sheet", 2009, online: <vihrc.org/doc/advancing_the_right_to_shelter.pdf>.

Tom de Castella, "Spiritual but not Religious", BBC News Magazine, 3 January 2013, online <www.bbc.com/news/magazine-20888141>.

Tony Weis, *The Global Food Economy: The Battle for the Future of Farming*, (London: Fernwood Publishing, 2007).

UN Daily News, "Doha meeting must take decisive action to tackle growing crisis of climate change", 4 December 2012, online: <www.un.org/news/dh/pdf/english/2012/04122012.pdf>.

UN FAO "Urban agriculture: an oximoron? In: The state of food and agriculture 1996", UNFAO, Rome, 1996 43-57; Jac Smit, Joe Nasr and Annu Ratta, *Urban Agriculture: Food, Jobs and Sustainable Cities*, 2001, The Urban Agriculture Network, Inc.

UN, Jean Ziegler, "The Right to Food: The right to food Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2003/25", Economic and Social Council, Commission on Human Rights, E/CN.4/2004/10, 9 February 2004.

UNEP, *Global Environmental Outlook 5 (GEO5): Environment for the future we want*, DEW/1417/NA (2012), online: <www.unep.org/geo/>.

UNEP, *The Emissions Gap Report 2013 – Emissions trends, pledges and their implementation*, 2013, United Nations Environment Programme (UNEP), Nairobi, online: <www.unep.org/emissionsgapreport2013> .

UNESC, Jean Ziegler, "The Right to Food: The right to food Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2001/25", Economic and Social Council, Commission on Human Rights, E/CN.4/2002/58, 10 January 2002.

UNFAO, "Recognition of the Right to Food at the National Level", Information Paper, Rome, IGWG RTFG INF/2, online: <www.fao.org/docrep/meeting/007/j0574e.htm>.

UNFAO, "Rome Declaration on World Food Security and World Food Summit Plan of Action, Rome, 13 November 1996, online: FAO.org <www.fao.org/docrep/003/w3613e/w3613e00.HTM>.

UNFCCC, "Report of the Conference of the Parties on its seventeenth session", COP 17, Durban, 2011, FCCC/CP/2011/9/Add.1.

UNHRC, “Report of the Special Rapporteur on the right to food, Olivier De Schutter: Mission to Canada”, Presented to the United Nations General Assembly, 24 December 2012, A/HRC/22/50/Add.1, online: Office of the high commissioner on human rights, <www.ohchr.org/>.

United Nations Economic and Social Council, “Summary record of the 5th meeting: Canada. 25/05/93”, Committee on Economic, Social and Cultural Rights, 13 E/1994/104/Add.17.

Vito De Lucia, “The Climate Justice Movement and the Hegemonic Discourse of Technology” 66-83, in Matthias Dietz & Heiko Garrelts, eds, *Routledge Handbook of the Climate Change Movement* (Routledge, 2013).

Wally’s Urban Market Garden, “Vive La Niche”, SPIN Farming, 15 September 2014, online: <spinfarming.com/tips/tag/sk/>

William Butler, “Welcoming animals back to the city: Navigating the tensions of urban livestock through municipal ordinances.” Journal of Agriculture, Food Systems, and Community Development, 2012 2(2), 193–215.

William H. Friedland “Agrifood Globalization and Commodity Systems.” International Journal of Sociology of Agriculture and Food, 2004 12: 5-16.

William W Thomson, “Gardening in Saskatchewan” Saskatchewan Ministry of Agriculture, Bulletin No 55, Regina, 1917. Retrieved on microfilm, online: <archive.org/details/cihm_84714>.

Working Group III contribution to the IPCC 5th Assessment Report "Climate Change 2014: Mitigation of Climate Change" that was accepted but not approved in detail by the 12th Session of Working Group III and the 39th Session of the IPCC on 12 April 2014 in Berlin, Germany, online:< mitigation2014.org/report/final-draft/final-draft-fgd-17122013>

World Bank, “Turn Down the Heat: Why a 4°C Warmer World must be Avoided”, The World Bank, November 2012, online: <www.worldbank.org/en/topic/climatechange>.

World Health Organization, “WHO RISK ASSESSMENT: Human infections with avian influenza A(H7N9) virus” 27 June 2014, online: <www.who.int/influenza/human_animal_interface/influenza_h7n9/riskassessment_h7n9_27june14.pdf?ua=1 WHO RISK ASSESSMENT>.