

**IN THE MATTER OF AN APPEAL BY
MATHEW J AULTMAN O/A OCTANE ART
Pursuant to 179 of the Consumer Protection Act**

Hearing Panel: Anna Lund, Hearing Chair
Caren Mueller, Panel Member
Joanne Pawluk, Panel Member

Appeal by: Mathew J Aultman o/a Octane Art

Held on: September 13, 2019

Held at: 3rd Floor (Boardroom 3A), Commerce Place, 10155 – 102 Street,
Edmonton, AB

Orders Appealed: April 8, 2019 Director of Fair Trading (as delegated):

That Mathew J Aultman, operating as Octane Art, and any other employee, representative or agent to immediately cease engaging in the automotive auto body repair/specialty service shop business within the Province of Alberta until properly licensed as per section 104(1) of the *Consumer Protection Act*.

Persons Attending:

For the Director: Paula Hale, Counsel for the Director
[REDACTED] Investigator with Alberta Motor Vehicle
Industry Council ("AMVIC") (witness)

For the Appellant: Mathew Aultman, Appellant on his own behalf
Janna Ireland, Spouse of the Appellant (witness and agent)

Documents Received:

From the Director: Exhibit Binder
Written submissions on jurisdiction of the Board

From the Appellant: E-mail response to request for written submissions on
jurisdiction of the Board

JURISDICTION

[1] This appeal is pursuant to section 179 (1)(d) of the *Consumer Protection Act*, RSA 2000 c C-26.3.

Appeal
179(1) A person

- (a) who is refused a licence or renewal of a licence,
- (b) whose licence is made subject to terms and conditions,
- (c) whose licence is cancelled or suspended under section 127,
- (d) to whom an order under section 129 or 157 is directed, or
- (e) to whom a notice of administrative penalty is given under section 158.1(1)

may appeal the decision, order or administrative penalty by serving the Minister with a notice of appeal within 30 days after being notified in writing of the decision or order or being given the notice of administrative penalty.

- [2] Pursuant to section 179(4) of the *Consumer Protection Act*, Cynthia Farmer, Deputy Minister, Service Alberta appointed an Appeal Board to hear the Appellant's Appeal. The appointment is dated June 3, 2019.
- [3] The Appeal Board hearing took place on September 13, 2019. It was conducted by a three person board: Anna Lund (chair), Caren Mueller (member), and Joanne Pawluk (member).
- [4] There were no objections to the composition of the Appeal Board.

Appeal filed

- [5] Mr. Aultman wrote a letter to Nate Gublish, the Minister of Service Alberta, dated May 10, 2019. This letter was treated as a Notice of Appeal by Service Alberta. The letter raised a number of grounds of appeal:
 - He was not required to apply for a licence, because the licensing regime set out in the *Consumer Protection Act* and administered by AMVIC should only apply to corporations and not individuals. Mr. Aultman had not incorporated a business.
 - He was not required to apply for a licence, because the licensing regime set out in the *Consumer Protection Act* and administered by AMVIC does not apply to individuals who are engaged in the activities stipulated in the *Designation of Trades and Businesses Regulation*, AR 178/99 when done solely for non-commercial purposes. Mr. Aultman was engaged in the stipulated activities solely for non-commercial purposes.
 - By requiring Mr. Aultman to apply for a licence, AMVIC was violating his rights, including his right to freedom of expression and freedom of association, as set out in the *Charter of Rights and Freedoms*, ss 2(b), 2(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK) 1982, c 11 and departing from the rule of law.

Scope of the Board to Consider Constitutional Issues

- [6] In a letter to the parties, dated August 7, 2019, the Chair invited Mr. Aultman and Counsel for the Director to make submissions about the jurisdiction of the Board to decide the constitutional issues raised in Mr. Aultman's Notice of Appeal having regard for section 11 of the *Administrative Procedures and Jurisdiction Act*, RSA 2000 c A-3. Section 11 reads:

Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so.

- [7] No regulation has conferred jurisdiction on the Appeal Board to determine a question of constitutional law.
- [8] On August 27, 2019, Mr. Aultman provided a short written response by email indicating that, as a lay person, he was unfamiliar with the *Administrative Procedures and Jurisdiction Act*.
- [9] On September 6, 2019, Counsel for the Director provided the Appeal Board with a three-page written submission and enclosed a copy of the Supreme Court of Canada's decision in *Doré v Barreau du Québec* [2012] 1 SCR 395 ("*Doré*").

- [10] In *Doré*, the Supreme Court of Canada held:

(42) ...decision-makers are called upon to exercise their statutory discretion in accordance with *Charter* protections...

(55) How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives....

(56) Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.

- [11] The Alberta Court of Appeal has applied *Doré* in the specific context of Alberta, where an administrative decision-maker's constitutional jurisdiction is explicitly circumscribed by section 11 of the *Administrative Procedures and Jurisdiction Act*. In *United Food and Commercial Workers, Local 401 v Alberta (Attorney General)*, 2012 ABCA 13 aff'd 2013 SCC 62, the Alberta Court of Appeal held:

(42) The *Administrative Procedures and Jurisdiction Act* should not be viewed as a direction to Alberta tribunals that they should ignore *Charter* values. As *Doré*

states at para. 35 “administrative decisions are always required to consider fundamental values”.

[12] During the hearing, Mr. Aultman and Counsel for the Director both made oral submissions regarding the jurisdiction of the Appeal Board to decide matters related to the *Charter*. Mr. Aultman indicated that if the Appeal Board could not hear *Charter* arguments, they should decide this matter with respect to his arguments regarding the rule of law. Counsel for the Director advised the Appeal Board that it was precluded from granting charter remedies, such as excluding evidence collected in breach of a *Charter* right or invalidating legislation, but that it must take account of *Charter* values in reaching its decision.

[13] The Appeal Board determined it has jurisdiction to hear this Appeal. With respect to the constitutional issues raised by Mr. Aultman in his Notice of Appeal, the Appeal Board accepted Ms. Hale’s submission that it was unable to grant constitutional remedies, but that, consistent with *Doré*, it was required to consider *Charter* values in reaching its decision.

PROCEDURE

[14] Mr. Aultman requested to appear at the hearing by telephone given that he would not be in Edmonton on the day of the hearing. The Chair granted this request. The Chair requested that:

- Mr Aultman provide copies of any documents he planned to rely upon to the Chair prior to the hearing so that they could be distributed to the Appeal Board members. Mr. Aultman did not submit any documents.
- Counsel for the Director provide copies of any documents that she planned to rely upon to Mr. Aultman prior to the hearing. Counsel for Director emailed him a copy of the Exhibit Binder prior to the hearing.

[15] An appeal under section 179 of the *Consumer Protection Act* is a new trial of the issues that resulted in the Director’s order. The Director must prove all the elements of its case. Thus, the Director’s case was heard first.

[16] At the outset of the hearing, Counsel for the Director indicated that they would consent to an adjournment of the hearing if Mr. Aultman wished to seek legal counsel. Mr. Aultman indicated he wished to proceed without legal counsel.

[17] Oral evidence was called by the Director and the Appellant. All oral evidence at the hearing was sworn. All witnesses were subject to cross examination and questions from the Board. The hearing was open to the public.

[18] A brief oral submission was heard from the parties at the end of the hearing.

[19] Parties were advised they would be provided with a decision within 45 days of the hearing.

DECISION

[20] The Appeal is denied and the Director's order is confirmed, in accordance with section 179(6) of the *Consumer Protection Act*:

An appeal board that hears an appeal pursuant to this section may confirm, vary or quash the decision, order or administrative penalty that is being appealed.

EVIDENCE SUBMITTED

[21] Counsel for the Director submitted a binder containing the director's exhibits and had her witness authenticate each document at various times during the hearing, without any objection. This binder is marked as Exhibit Binder 1, Tabs 1-6.

[22] Mr. Aultman did not submit any documentary evidence.

Testimony of [REDACTED] investigator with AMVIC (Director's Witness)

[23] [REDACTED] is a peace officer and investigator with AMVIC. She has held this position for 5 years. Prior to her current position, she worked as a private investigator, investigating insurance fraud.

[24] Her duties at AMVIC include investigating possible breaches of the *Consumer Protection Act*.

[25] [REDACTED] advised that AMVIC may be alerted to breaches of the *Consumer Protection Act* through consumer complaints, however, they also initiate their own investigations to ensure that Alberta businesses comply with the licensing regime set out in the *Consumer Protection Act*. There is a staff person at the Industry Standards Branch of AMVIC who carries out periodic searches of the internet looking for evidence of unlicensed business activity.

[26] AMVIC's involvement with Mr. Aultman started after a staff person at the Industry Standards Branch discovered an advertisement on the websites Kijiji and Facebook where Mr. Aultman appeared to be offering auto services to the public.

[27] On June 12, 2018, Candace C. [REDACTED] an Industry Standards Administrator, sent an email to Mr. Aultman advising him that he appeared to be carrying out an auto business that required a licence under the *Consumer Protection Act*. The email included a link to information about applying for a licence.

[28] On June 17, 2018, Mr. Aultman responded to Ms. C. [REDACTED] email explaining that he had not yet applied for a licence because he had not yet started operating his business in Alberta.

[29] One June 18, 2018, Ms. C [REDACTED] responded to Mr. Aultman's email indicating that the fact he was advertising his services to the public was sufficient to trigger the licensing requirement under the *Consumer Protection Act*. Mr. Aultman did not respond to this email. A copy of the email correspondence between Ms. C [REDACTED] and Mr. Aultman is contained in Exhibit Binder 1 at Tab 5.

[30] The information collected by the Industry Standards Branch was forwarded to Ms. [REDACTED]. She carried out her own investigations.

[31] Ms. [REDACTED] did an internet search and located an advertisement on Kijiji. A print-out of this advertisement, dated January 21, 2019, is contained in Exhibit Binder 1 at Tab 3. The advertisement indicated:

- That the offeror "Mathew" is located in Blackfalds, Alberta,
- That the offeror has "over 15 years of automotive repair and refinishing experience", though it does not explicitly say that these activities are being offered for sale, and,
- That more information is available on the offeror's website or by calling the offeror at a telephone number.

[32] Ms. [REDACTED] did an internet search and located a page on the social media site Facebook for Octane Art. Print-outs from the Facebook page are contained in Exhibit Binder 1 at Tab 4. The print-outs are undated, but Ms. [REDACTED] advised that they had been captured in 2019. The pages included:

- Reference to the same website and telephone number as referenced in the Kijiji advertisement,
- An indication that the Facebook page belonged to a professional service in Eckville Alberta, and,
- Images posted in February and March 2019 showing work done by Octane Art, including:
 - custom painting of multiple trucks,
 - custom bumper installation on a truck,
 - "tons of new parts and chrome" added to a truck, and,
 - "half-off frame restoration" on a truck.

[33] Ms. [REDACTED] located the website referenced in the Kijiji advertisement and the Facebook page for Octane Art (www.octaneart.ca). Print-outs from the website, dated April 5, 2019, are contained in Exhibit Binder 1 at Tab 2. The print-outs of the website pages:

- Reference activities that Ms. [REDACTED] considered to be activities that would require a licence under the *Consumer Protection Act* including:

- restoration work on vehicles,
 - collision repair on vehicles,
 - rust and dent repair on vehicles, and,
 - painting vehicles.
- Reference to how Alberta's elements are particularly tough on vehicles, and,
 - Lists an hourly rate for "restoration, rust repair, collision repair, airbrushing" and other services of \$70.00 CDN.

[34] Ms. [REDACTED] attempted to locate a physical address for Mr. Aultman's business so that she could carry out further investigations into the scope of his activities. She was unsuccessful in locating a physical address for his business:

- She carried out a search of the address on his Driver's Licence. The search provided an address in Blackfalds. She contacted the Town of Blackfalds and asked about any listing for Mr. Aultman or Octane Art, but there was none.
- She contacted municipalities in the area around Blackfalds including the City of Red Deer, Red Deer County and the Country of Clearwater and asked them if they had any listing for Mr. Aultman or Octane Art. There were none.
- She performed a corporate search and uncovered a tradename registration for Octane Art registered to Mr. Aultman. A copy of this search dated April 5, 2019 is contained in Exhibit Binder 1 at Tab 1. It provides an address for Mr. Aultman in Blackfalds.

[35] Ms. [REDACTED] contacted Mr. Aultman using a pseudonym and asked him if he would be willing to perform work on a 1972 Volkswagen Bug that required rust and dent repair, as well as a new paint job. Mr. Aultman indicated that he could perform this work on her vehicle. She made an appointment with him to show him some pictures of the vehicle. He provided her with directions to an acreage located southwest of Eckville.

[36] Prior to attending at Mr. Aultman's property, Ms. [REDACTED] obtained a summons charging Mr. Aultman with violations for carrying out business activities without the proper licence, as well as a Director's Order, which is the subject of this Appeal. She served both documents on Mr. Aultman when she attended at his property.

[37] During Ms. [REDACTED] conversation with Mr. Aultman, prior to her visit, he made some comments that caused Ms. [REDACTED] to be concerned about her safety, so she arranged to have a police escort when she attended at Mr. Aultman's property. She confirmed that Mr. Aultman did not ever directly threaten her.

[38] During her attendance at Mr. Aultman's property, Mr. Aultman offered to show Ms. [REDACTED] around his shop. Because of her concerns for her safety, she declined this offer.

[39] In response to questions from Mr. Aultman and his wife, Ms. Ireland, who acted as his agent, Ms. [REDACTED] clarified:

- She did not record her conversations with Mr. Aultman,
- She never showed an actual vehicle to Mr. Aultman, and,
- Mr. Aultman never provided her with a statement of repair or an invoice.

[40] In response to questions from the Appeal Board, Ms. [REDACTED] clarified that:

- She and Mr. Aultman never discussed the specific price of the work she wanted done on her (imaginary) vehicle. Mr. Aultman indicated it would be very expensive and she responded that she was willing to put money into it.
- Mr. Aultman did tell her that she could come and do some of the work on her vehicle because he did not mind when customers helped out and he liked to have them involved in the process.
- The process for a business to get a licence from AMVIC includes
 - Filling out an online form,
 - Being matched with a licensing service advisor,
 - Being sent a business package,
 - Providing information to AMVIC including a business plan, cash flow projections, and evidence of necessary approvals from the municipality where the business will be licensed,
 - For some licence categories, the business must provide evidence that services are being provided by a trained individual. For example, they may need to provide proof that repair services are being provided by a licensed Automotive Service Technician,
 - For some licence categories, the business must provide proof of insurance, and,
 - Paying a fee, which Ms. [REDACTED] believed was \$175.
- The licensing of automotive business set out in the *Consumer Protection Act* and administered by AMVIC has a public protection purpose:
 - To protect consumers involved in specific transactions and industries. The licensing regime protects consumers against two types of risks:
 - Safety risks, by ensuring that services provided to automobiles are being carried out by properly trained people,
 - Financial risks, by providing consumers with access to the compensation fund administered by AMVIC. The fund reimburses consumers who have suffered a loss as a result of engaging in business with a licensed business. Consumers who suffer losses as a result of doing business with an

unlicensed business do not have access to the compensation fund, and,

- To ensure compliance by businesses through education and enforcement.

Testimony of Mathew Aultman (Appellant)

[41] Mr Aultman has experienced significant hardship in the past 5 years. He suffered a [REDACTED] in 2016. Subsequently, he was unable to continue his employment painting cars with a business in Red Deer. He had 20 years of experience painting cars and hoped to one day go into a business painting cars commercially.

[42] His mother and father bought an acreage near Eckville and allowed him to locate his shop there, but did not want him to carry out a business on their property. AMVIC's enforcement activities have strained his relationship with his parents. The property in Eckville is now for sale.

[43] While working on the acreage, he provided car restoration, repair and painting services for friends and family, but he did everything for free, to build up his portfolio and his reputation, so that he might start a business someday. Sometimes, he has helped people as they do their own work, so that they can learn automotive repair skills. He likened the operation on his Eckville property to a "co-op."

[44] He does exemplary work.

[45] He is very frustrated with AMVIC and the licensing regime in Alberta. He has relocated to Arizona and has no plans to return to Alberta.

[46] Neither Counsel for the Director nor the Appeal Board had any questions for Mr. Aultman.

Testimony of Janna Ireland (Appellant's Witness)

[47] Janna Ireland is the Appellant's wife. She handles the marketing for Octane Art on the internet.

[48] Although the photos on Octane Art's Facebook page were posted recently, the work depicted was done earlier, while Mr. Aultman was operating a business in Ontario.

[49] Neither Counsel for the Director nor the Appeal Board had any questions for Ms Ireland.

LEGAL SUBMISSIONS

Submissions by Director's Counsel

[50] Section 104(1) of the *Consumer Protection Act* requires people engaged in designated businesses to have a licence:

No person may engage in a designated business unless the person holds a licence under this Act that authorizes the person to engage in that business

[51] Automotive businesses are a designated business under s 1(2) of the *Designation of Trades and Businesses Regulation*, AR 178/99. It reads:

In this section,

- (a) "automotive business" means the activities of
 - (i) buying or selling vehicles, whether as a retailer or wholesaler, including the selling of vehicles on consignment,
 - (ii) leasing vehicles when the term of the lease is for more than 120 days,
 - (iii) negotiating or conducting on a consumer's behalf an agreement in which the consumer buys, sells or leases a vehicle,
 - (iv) recycling or dismantling vehicles, or
 - (v) installing parts or equipment in, repairing or servicing vehicles;

[52] Mr. Aultman was installing parts or equipment in, repairing or servicing vehicles, and therefore should have applied for a licence.

[53] Even if one accepts the evidence that the photographs on Mr. Aultman's social media sites were of work done in Ontario, Mr. Aultman was still required to apply for a licence in Alberta because he was:

- Advertising services that constituted an automotive business, and,
- Prepared to provide services that constituted an automotive business to a member of the public, who was neither a friend nor family member, namely Ms. [REDACTED]

[54] The licensing regime is mandatory, and not only for people who see a benefit to getting a licence. It promotes transparency, accountability and consumer protection. It performs a modest gatekeeping function, requiring certain assurances from people who wish to carry out designated businesses. The licensing requirements are not particularly burdensome.

- [55] Mr. Aultman had opportunities during AMVIC's investigation to comply. This hearing has provided him with the opportunity to put his entire story before the Appeal Board in a new trial.
- [56] The Director's Order did not contain any penalty, just a direction to stop engaging in activities that require a licence until Mr. Aultman applied for a licence.
- [57] Ms. Hale submitted that the licensing regime does not infringe any *Charter* values. Requiring businesses to apply for licences is no more burdensome than requiring drivers to apply for a driver's licence.
- [58] Ms. Hale noted that if Mr. Aultman has moved to Arizona permanently, he is complying with the Director's Order, yet, she allowed that he was still entitled to challenge it.
- [59] In response to questions from the Appeal Board, Director's Counsel advised:
- a. The term "person" in s 104 of the *Consumer Protection Act* includes individuals operating sole proprietorships as well as corporations.
 - b. The decision the Appeal Board makes in this matter will have no legal implications for the summons proceedings against Mr. Aultman and will not impact his obligation to attend court with respect to the summons.

Submissions by Appellant

- [60] The Appellant does not believe that he should be required to get a licence, because he never carried on an automotive business. He only provided services, for free, to friends and family.
- [61] He does not see any benefit to getting a licence from AMVIC. In fact, he would rather not be associated with AMVIC. He understands that AMVIC is currently the defendant in a class action lawsuit. He does not believe that AMVIC does a sufficient job of protecting consumers through its enforcement activities. He would like to see someone hold AMVIC accountable. He would like to see a better system of regulating businesses in Alberta.
- [62] He believes that legislation which requires him to get a licence from AMVIC, despite his desire not to be connected to AMVIC, violates his freedom of association.
- [63] He believes that AMVIC's licensing regime violates his freedom of expression, because it limits his ability to engage in artistic work. His artistic work includes painting vehicles.
- [64] He believes that AMVIC's licensing regime violates the rule of law, because it imposes a hardship on him without providing any benefit, and not everyone benefits equally under the regime.

REASONS

[65] The Appeal Board is unanimously of the view that the Director has satisfied its burden of establishing that Mr. Aultman was engaged in activities that necessitated a licence under the *Consumer Protection Act*.

[66] Mr. Aultman did not contest that he had been “installing parts or equipment in, repairing or servicing vehicles” while in Alberta, but rather, he took the position that his activities were more like a hobby than a business.

[67] The Board accepts the submission of the Counsel for the Director that Mr. Aultman’s activities were sufficiently commercial in nature to trigger the licensing requirements of the *Consumer Protection Act*. In particular the Appeal Board notes:

- Mr. Aultman advertised his services to the public,
- Mr. Aultman was prepared to provide his services to an otherwise unknown member of the public, and,
- Mr. Aultman included a price list for his services on his website.

[68] In his correspondence with AMVIC, Mr. Aultman took the position that he did not require a licence yet because his business was not operational. The Appeal Board finds that his business was sufficiently operational to trigger the licensing requirements of the *Consumer Protection Act* for the reasons set out in the previous paragraph.

[69] The Appeal Board finds that the licensing regime applies to “persons” including both natural persons, like Mr. Aultman, and artificial persons, like corporations. Mr. Aultman is not excused from the licensing requirements despite operating as a sole proprietor as opposed to a corporation.

[70] The Appeal Board finds that AMVIC did not unfairly target Mr. Aultman in its enforcement activities, but rather its investigation resulted from standard information gathering undertaken by personnel in its Industry Standards Branch. Prior to starting enforcement activities against Mr. Aultman, personnel from the Industry Standards Branch contacted Mr. Aultman and provided him with an opportunity to comply with the licensing requirements.

[71] Mr. Aultman contends that the licensing regime violates his freedom of expression and association. The Appeal Board finds that any infringement on his freedoms of expression and association are relatively minor, given the evidence from Ms. [REDACTED] that AMVIC’s licensing process is not overly burdensome. And in any event, when weighed against the compelling public purpose of the licensing regime, namely protecting consumers from safety risks and financial risks, the Appeal Board finds that notwithstanding any such infringement, it is consistent with *Charter* values to confirm the Director’s Order.

[72] Mr. Aultman contends that the licensing regime violates the rule of law because he is required to get a licence despite seeing no benefit to holding such a licence. The

Appeal Board does not accept that the mandatory nature of the licensing regime is a violation of the rule of law. The mandatory nature of the licensing regime is rationally connected to its consumer protection purpose – a purpose that would be undermined if business licences were merely voluntary.

- [73] Mr. Aultman contends that the licensing regime violates the rule of law because not everyone benefits equally from it. Conversely, the Appeal Board notes that one of the goals of the *Consumer Protection Act*, as articulated in its preamble, is to create an equal playing field for all businesses in Alberta:

WHEREAS businesses that comply with legal rules should not be disadvantaged by competing against those that do not

Allowing some businesses to operate without a licence would undermine this goal and erode the notion of equal treatment before the law that is central to the concept of the rule of law.

- [74] This decision should not be taken as a negative reflection on the quality of Mr. Aultman's workmanship. The evidence before the Appeal Board suggests that he does good work for his clients and has generously shared his expertise with his friends and family.

- [75] Mr. Aultman has raised a number of concerns with AMVIC which are beyond the scope of this Appeal Board's mandate and the Appeal Board offers no comment on these matters.

This is a ~~unanimous~~ decision of the Appeal Board signed at Edmonton

"original signed by"

✓ Anna Lund, Chair / // /

Oct 16, 2019
Date

"original signed by"

Caren Mueller, Member

Oct 15, 2019
Date

"original signed by"

Joanne Pawluk, Member

Oct 10, 2019
Date