



ALBERTA MOTOR VEHICLE  
INDUSTRY COUNCIL

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July 28, 2016



Administrative Review – 16-04-002

THE GALLERY OF FINE CARS INC.  
c/o Registered Office  
UNIT 15, 1305 33 STREET NE  
CALGARY, AB T2A 5P1

Attention: Adriano Aprile and Sadrudin Devani

Dear Sirs:

Re: The Gallery of Fine Cars Inc.  
Automotive Business Licence #B1019391

As the Director of Fair Trading (as delegated), I am writing to you pursuant to section 158.1 of the *Fair Trading Act* (FTA). This letter will detail the action being taken under section 158.1.

There is no requirement within the legislation to convene an in-person administrative hearing as it relates to these matters. The Director of Fair Trading, (as delegated), has the obligation to provide notice of a proposed administrative penalty and allow the Supplier an opportunity to respond. These obligations have been met.

#### Facts

Taking into consideration your representations and the information collected by AMVIC, I find the facts to be as follows:

#### LICENCEE STATUS

1. The Supplier (The Gallery of Fine Cars Inc.), referred to interchangeably as "the Supplier" and as "GOFC", holds an Automotive Business licence and carries on business as an automotive sales and automotive repair business.

#### RECENT AMVIC PUBLICATIONS

2. AMVIC issues quarterly newsletters on its website. The newsletter is written for all of AMVIC's licensed businesses and registered salespeople. These same publications and back issues are also posted on AMVIC's website [www.amvic.org](http://www.amvic.org) and are readily available free of charge. Prior to 2014, these newsletters were mailed by post to licensees and registrants.

3. AMVIC has issued multiple impact newsletters which contain articles reminding licensees and registrants of their advertising obligations under the FTA and its regulations. Recent articles can be found in the following publications:
  - June 2011: "What's your advertising IQ?"
  - March 2013: "AMVIC takes action on advertising"
  - June 2013: "Advertising program sparks increased compliance"
  - February 2014: "Be an ad superstar and Need some help sorting through advertising rules"
  - June 2014: "Advertising tips for service & repair"
  - September 2014: "Tips for RV ads"
  - December 2014: "Advertising – lease"
  - June 2015: "Extra fees: Disclose what you charge"
4. AMVIC also issues regular industry bulletins. These bulletins are sent by email to any licensee or registrant who wishes to subscribe. These same bulletins and back issues are also posted on AMVIC's website and are readily available free of charge.
5. The following industry bulletins remind dealers of their advertising obligations under the FTA and its regulations:
  - December 14, 2013: "Shop smart this holiday season"
  - March 28, 2014: "Online and website advertising rules"
  - October 31, 2014: "Attn: RV sales – Important reminder before you place an ad"
  - December 14, 2015: "Check this list before you advertise"
  - January 21, 2016: "Quiz: do you know the automotive advertising laws?"
6. AMVIC also maintains an advertising link on its website. The link contains tools and resources to help licensees and registrants comply with advertising laws and regulations. The resources include an advertising checklist which was first posted in or around October 2014, an advertising webinar and an advertising quiz. These resources are also available free of charge.

#### **DIRECT COMMUNICATIONS WITH THE SUPPLIER AND ITS REPRESENTATIVES**

7. The representations were made to me by Nicole L – AMVIC Manager of Industry Standards and Stephen V. – AMVIC Industry Standards Officer ("ISO") and taken into consideration. Attached as Schedule "A" is AMVIC Industry Standards Application Report.
8. On or about March 10, 2016, an ISO became aware of a non-compliant advertisement in the [REDACTED] magazine (edition current until March 21, 2016, front cover and pages 18-23). Attached as Schedule "B" is a copy of the subject advertisements. The following issues were identified:
  - (1) The print advertisement published on the front cover of the magazine failed to indicate, in a conspicuous manner, that the business operator holds an automotive business licence under the FTA, contrary to section 11(1)(b) of the Automotive Business Regulation, AR 192/99 ("ABR");
  - (2) The advertisements did advertise specific vehicles but did not include the stock number of the specific vehicle advertised as being available for sale at the time the advertisement was placed, contrary to section 11(2)(m) of the ABR;



- (3) The advertisements offered credit and stated the amount of any payment, but failed to disclose the Annual Percentage Rate (APR), contrary to section 76(1) of the FTA and section 6(2)(a) of the Cost of Credit Disclosure Regulation, Alta Reg. 198/1999 ("COC");
  - (4) The advertisements offered credit and stated the amount of any payment, but failed to disclose the term, contrary to section 76(1) of the FTA and 6(2)(b) of the COC; and
  - (5) The advertisement stated that no interest is payable for six months, offered special promotions and/or payment deferrals, but failed to disclose whether the transactions were unconditionally interest-free during the period or whether interest accrues during the period but will be forgiven under certain conditions, contrary to section 76(2) of the FTA and section 7(1)(a) and 7(1)(b) of the COC.
9. On or about March 10, 2016, the ISO viewed the Supplier's online advertisements on Kijiji and autoTRADER.ca. The said advertisements indicated that they were posted on March 9, 2016. Attached as Schedule "C" are two of the subject advertisements. The ISO identified the following issue:
  - (1) The advertisements offered credit and stated the interest rate. However, the advertisement for credit sale in connection with the non-interest finance charge failed to disclose the term, notwithstanding that there were no time or space limitations which would not make such disclosure possible, contrary to section 76(1) of the FTA and 6(2)(b) of the COC.
  - (2) The advertisement stated that no interest is payable for 90 days, offered special promotions and/or payment deferrals, but failed to disclose whether the transactions were unconditionally interest-free during the period or whether interest accrues during the period but will be forgiven under certain conditions, contrary to section 76(2) of the FTA and section 7(1)(a) and 7(1)(b) of the COC.
10. On or about March 10, 2016, the ISO visited the Supplier's Facebook page at [Facebook.com/galleryoffinecars](https://www.facebook.com/galleryoffinecars). The ISO viewed advertisements in relation to specific vehicles. Attached as Schedule "D" is a copy of these advertisements. The ISO identified the following issues:
  - (1) The advertisements offered credit and stated the amount of any payment, but failed to disclose the APR, contrary to section 76(1) of the FTA and section 6(2)(a) of the COC;
  - (2) The advertisements offered credit and stated the amount of any payment, but failed to disclose the term, contrary to section 76(1) of the FTA and 6(2)(b) of the COC;
  - (3) The advertisements offered credit and stated the amount of payment. The advertisements for credit sale in connection with the non-interest finance charge failed to disclose the total cost of credit notwithstanding that there were no time or space limitations which would not make such disclosure possible, contrary to section 76(1) of the FTA and 6(3)(b) of the COC; and
  - (4) The advertisements did advertise specific vehicles but did not include the stock number of the specific vehicle advertised as being available for sale at the time the advertisement was placed, contrary to section 11(2)(m) of the ABR.
11. The ISO contacted the Supplier via email, specifically by sending correspondence to the General Manager, Director, and salesperson registered to the Supplier, Mr. Adriano Aprile ("Aprile"). The ISO's email of March 10, 2016 identified numerous advertisements and the advertising violations contained therein. Attached as Schedule "E" is a copy of this email.
12. The Supplier and Aprile failed to respond to the ISO's March 10, 2016 email.



13. The ISO then sent a further email to the Supplier on March 21, 2016 (the March 21, 2016 email). The second email acts as a final warning and repeats concerns as set out in the ISO's March 10, 2016 email. However, and in addition, the March 21, 2016 email identifies still further non-compliant advertisements and describes the further violations contained in those advertisements.
14. Aprile then responded to the ISO's March 21, 2016 email on behalf of the Supplier. Aprile advised that the advertisements in the [REDACTED] magazine would be adjusted in a later March 22, 2016 - April 4, 2016 issue. Aprile failed to address online advertisements in his correspondence. Attached as Schedule "F" is a copy of the email exchange.
15. On March 21, 2016, the Supplier's legal counsel contacted the ISO via email expressing her interpretation of the FTA and related regulations. Attached hereto as Schedule "G" is a copy of that March 21, 2016 email correspondence.
16. On March 24, 2016, there was an additional exchange of emails between ISO and the Supplier's legal counsel. Attached hereto as Schedule "G1" is a copy of the Supplier's response dated June 27, 2016 that includes a copy of the March 24, 2016 email exchange.
17. The April 4, 2016 issue of the [REDACTED] magazine provides that the subsequent print advertisements remained non-compliant. The [REDACTED] is a magazine dedicated to selling automobiles and is printed and posted online two week prior to the posted expiry date. The April 4, 2016 edition of the [REDACTED] would have been available to the public two weeks earlier than the posted expiry date. Attached hereto as Schedule "H" is a copy of the April 4, 2016 advisements. The ISO again identified the following advertisement issues:
  - (1) The print advertisement published on the front cover of the magazine failed to indicate, in a conspicuous manner, that the business operator holds an automotive business licence under the FTA, contrary to section 11(1)(b) of the ABR;
  - (2) The advertisement stated that no interest is payable for six months, offers special promotions and/or payment deferrals, but failed to disclose whether the transaction was unconditionally interest-free during the period or whether interest accrues during the period but will be forgiven under certain conditions, contrary to section 76
  - (3) (2) of the FTA and sections 7(1)(a) and 7(1)(b) of the COC

Moreover, the ISO identified new non-compliance issues with respect to the Supplier's print and online advertisements, namely:

- (4) The April 4, 2016 advertisements failed to comply with the all in pricing requirements of the ABR. Specifically, the advertisements stated that "*prices exclude taxes and fees plus GST only.*" The advertisement is accordingly in breach of the FTA and section 11(2)(1) of the ABR;
- (5) Inconsistencies contained in the Supplier's advertisements with respect to warranties. The Supplier's online advertisements on Kijiji and autoTrader.ca, and available on April 4, 2016, contain the following representation:

*"Drive with ease as **all our vehicles** come fully inspected with warranty included."*

The Supplier's April 4, 2016 print advertisements in [REDACTED] magazine state:  
"Warranty extra."

Cumulatively, the advertisements representations as set out in paragraph 16 (4) regarding warranties make representations, statements or claims that are not true or are likely to mislead a consumer and also make representations that an advantage exists where they do not exist, contrary to sections 12(a) and 12(f) of the ABR, respectively.

## PROCEEDURAL HISTORY

18. On May 31, 2016, the proposed Administrative Penalty dated May 30, 2016, together with disclosure, was served personally on a representative at The Gallery of Fine Cars Inc. at the registered office address of the business. Additionally, on June 1, 2016 at 3:25 p.m. the Administrative Penalty Proposal was emailed to Adriano Aprile at the email address provided by him to AMVIC: [REDACTED]
19. The proposed Administrative Penalty required the Supplier to provide a written response in accordance with section 158.2 of the FTA. The deadline was set for 12:00 p.m. on June 27, 2016. The Supplier failed to meet this deadline and later provided a written response dated June 27, 2016. The late response contained various statements and representations respecting disclosure. AMVIC then sent correspondence to GOFCs counsel on dated July 12, 2016 which, amongst other things, reviews disclosure issues now raised by GOFC, inquires whether GOFC is requesting further disclosure and offers GOFC an extension of time should it wish to make further submissions in relation to disclosure. Attached hereto and marked as Exhibit 'I' is a copy of the AMVIC correspondence dated July 12, 2016. GOFC replied through its legal counsel on July 19, 2016 and the same is attached hereto and marked as Exhibit 'J'. GOFC confirmed that no further disclosure was being pursued that its submissions are as set out in its June 27, 2016 written response. Further, and attached hereto as Exhibit 'K' is AMVIC's reply to GOFC's letter of July 19, 2016.
20. The responses were reviewed and taken into consideration, as well all of the evidence before the Director of Fair Trading (as delegated), before making the final decision. That review will be provided in further detail later in this decision.

## APPLICABLE LEGISLATION

### Automotive Business Regulation (ABR)

#### Advertising

##### Section 11

- (1) Every business operator must ensure that the business operator's advertising indicates in a conspicuous manner
  - (b) in the case of print and television advertising, that the business operator holds an automotive business licence under the Act.
- (2) A business operator must ensure that every advertisement for an automotive business that promotes the use or purchase of goods



or services

(l) includes in the advertised price for any vehicle the total cost of the vehicle, including, but not limited to, all fees and charges such as the cost of accessories, optional equipment physically attached to the vehicle, transportation charges and any applicable taxes or administration fees, but not including GST or costs and charges associated with financing, and

(m) includes the stock number of the specific vehicle that is advertised as being available for sale at the time the advertisement is placed.

#### **General codes of conduct**

##### **Section 12**

Every business operator must comply with section 6 of the Act and in addition must

(a) not make any representations, statements or claims that are not true or are likely to mislead a consumer,

(f) not make any representation that savings, price benefits or advantages exist if they do not exist or if there is no evidence to substantiate the representation,

#### **Advertising for fixed credit (FTA)**

##### **76(1)**

Every advertisement that offers credit and that states that the interest rate or amount of any payment must disclose information provided by the regulations.

##### **76(2)**

An advertisement that states or implies that no interest is payable for a certain period in respect of a transaction must, in the form and manner referred to in the regulations, disclose the information prescribed by the regulations.

#### **Cost of Credit Disclosure Regulation (COC)**

#### **Advertisements**

##### **Section 6**

(2) The information required to be disclosed for the purposes of section 76(1) of the Act is

(a) the APR, and

(b) the term.

(3) In addition to the information required under subsection (2),

(b) an advertisement for a credit sale in connection with which any non-interest finance charge would be payable must disclose

(ii) the total cost of credit,

except that an advertisement on radio, television or a billboard or other media with similar time or space

limitations is not required to disclose the total cost of credit.

#### **Advertising interest-free periods**

##### **Section 7**

- (1) The information required to be disclosed for the purposes of section 76(2) of the Act must disclose whether
- (a) the transaction is unconditionally interest-free during the period, or
  - (b) interest accrues during the period but will be forgiven under certain conditions.

#### ***Fair Trading Act***

#### **Administrative Penalties**

##### **Notice of administrative penalty**

##### **Section 158.1**

- (1) If the Director is of the opinion that a person
- (a) has contravened a provision of this Act or the regulations,
  - or
  - (b) has failed to comply with a term or condition of a licence issued under this Act or the regulations,
- the Director may, by notice in writing given to the person, require the person to pay to the Crown an administrative penalty in the amount set out in the notice.
- (2) Where a contravention or a failure to comply continues for more than one day, the amount set out in the notice of administrative penalty under subsection (1) may include a daily amount for each day or part of a day on which the contravention or non-compliance occurs or continues.
- (3) The amount of an administrative penalty, including any daily amounts referred to in subsection (2), must not exceed \$100 000.
- (4) Subject to subsection (5), a notice of administrative penalty shall not be given more than 3 years after the day on which the contravention or non-compliance occurred.
- (5) Where the contravention or non-compliance occurred in the course of a consumer transaction or an attempt to enter into a consumer transaction, a notice of administrative penalty may be given within 3 years after the day on which the consumer first knew or ought to have known of the contravention or non-compliance but not more than 8 years after the day on which the contravention or non-compliance occurred.

#### **Right to make representations**

##### **Section 158.2**

Before imposing an administrative penalty in an amount of \$500 or more, the Director shall

- (a) advise the person, in writing, of the Director's intent to



impose the administrative penalty and the reasons for it,  
and  
(b) provide the person with an opportunity to make  
representations to the Director.

#### **ANALYSIS – DID THE SUPPLIER FAIL TO COMPLY WITH THE PROVISIONS OF THE FTA, ABR and COC?**

AMVIC has been very diligent with the industry in requiring full compliance in automotive advertising. Information pertaining to advertising is contained in numerous AMVIC newsletters and bulletins, and on the AMVIC website. These materials are available to all licensees and registrants.

The Gallery of Fine Cars Inc. has been repeatedly contacted by AMVIC and has been specifically advised that its advertisements are in breach of the FTA, the ABR and the COC. However, the Supplier continues to be non-compliant with applicable advertising laws and regulations.

The Supplier raised a number of concerns in its responding materials that will be addressed:

##### ***I. Representations taken into consideration by the Executive Director***

First paragraph:

*"Gallery has the right to know the case against it and to be given the opportunity to present its side before a penalty is imposed."*

The case against GOFC is set out in the proposed Administrative Penalty dated May 30, 2016 and the attached disclosure. The Supplier first raised the issue of disclosure in its out-of-time reply dated June 27, 2016. AMVIC allowed the Supplier's late submissions. AMVIC thereafter wrote to the supplier to (a) clarify disclosure issues; (b) offer additional time to the Supplier to complete its submissions, as needed, in relation to such disclosure. GOFC later confirmed that it is not pursuing additional disclosure and that its submissions to the Director of Fair Trading (as delegated) are complete.

The Supplier accordingly has confirmed that it does not wish to pursue further disclosure and that it has presented its side through its June 27, 2016 letter.

The right to make representations is prescribed by section 158.2 of the FTA if the fine is more than \$500 (which is the case here). This is precisely what has been afforded to GOFC. Significant time was given to make such representations. GOFC has confirmed that it does not seek further disclosure and that its submissions to the Director of Fair Trading (as delegated) are complete. The proposed administrative penalty was served upon GOFC on May 31, 2016 and representations were to be made in full by June 27, 2016.

*"Based on the forgoing, all information relied upon by the Director in proposing an administrative penalty has not been disclosed to Gallery. As such, it is our position that the Director has no jurisdiction to hold the Administrative Review until all of the information relied upon by the Director has been disclosed to Gallery."*

The authority to impose administrative penalties is derived from section 158.1(1) of the Act "If the Director is of the opinion....the Director may, by notice in writing given to the person, require the person to pay".



AMVIC recognizes that the principles of natural justice and procedural fairness applies to these proceedings. The duty of fairness requires consideration of the nature of the decision being made and its impact on the Supplier. In *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 SCC, at paragraph 22, Justice L'Heureux-Dube explains that "...the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected."

These proceedings arise from section 158.1(1) of the FTA which provides:

*158.1(1) If the Director is of the opinion that a person  
(a) has contravened a provision of this Act or the regulations, or  
(b) has failed to comply with a term or condition of a license issued under this Act or regulations,*

*the Director may, by notice in writing given to the person, require the person to pay to the Crown an administrative penalty in the amount set out in the notice.*

These provisions are aimed towards compliance not sanction. They are regulatory and not criminal/quasi-criminal in nature. The economic sanctions are administrative and oriented towards correcting conduct to maintain discipline within a limited sphere of economic activity, namely conduct amongst automotive business licensees. Conversely, these proceedings are not punitive. They do not arise from criminal or quasi-criminal charges, nor can it lead to the imposition of true penal consequences.

AMVIC imposes administrative penalties in relation to its functions as an industry regulator. The decision to impose an administrative penalty, taken in isolation and in and of itself, will not automatically impact upon GOFC's license and entitlement to carry on business.

As such, I find that the Director of Fair Trading (as delegated) is within its jurisdiction to impose an administrative penalty if of the opinion that GOFC has contravened this act or its regulations or has failed to comply with a term or condition of a licence issued under the Act or regulation. As further elaborated below, the duty of fairness in relation to these proceedings has been satisfied.

Second paragraph:

*"We note that paragraph 7 of the AMVIC Letter refers to an AMVIC Industry Standards Application Report, which is attached as Schedule "A". That Application refers to a 1-2 page chronology which was not provided to Gallery, but was likely provided to you."*

GOFC has not been denied the opportunity to respond to the chronology and indeed does so through their letter to the Director. As stated by Watt, J.A., in the Ontario Court of Appeal decision of *R. v. Spackman*, 2012 ONCA 905 (CanLII), 295 C.C.C. (3d) 177, at para 11.1, insofar as his statement relates to prejudice arising from non-disclosure:

*A breach of the Crown's disclosure obligations, without more, does not constitute a breach of s. 7 of the Charter. To demonstrate constitutional infringement, and thus entitlement to a just and appropriate remedy, an accused must show actual prejudice to his or her right to make full*

*answer and defence resulted from the infringement: R. v. O'Connor, 1995 CanLII (SCC), [1995] 4 S.C.R. 411, at para. 74; Bjelland, at para 21."*

The Chronology of events is set out in the proposed administrative penalty dated May 30, 2016. There is no prejudice because the Supplier was still advised of the chronology and thus the case against it.

#### **Additional disclosure issues raised by the Supplier:**

Further, the proposed Administrative Penalty dated May 30, 2016 was served together with AMVIC's disclosure. The Supplier chose to remain silent on the issue of disclosure until it submitted its written response of June 27, 2016.

*R. v. McQuaid, 1998 CanLII 805 (SCC), [1998] 1 S.C.R. 244, 122 C.C.C. (3d) 1, discusses what is required of Defence in regards to disclosure. The Supreme Court of Canada explains, at paragraph 37, that:*

*The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclosure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure.*

AMVIC promptly replied to disclosure issues, once it appeared to be raised by the Supplier in its written submissions, by inquiring whether the Supplier indeed requires additional disclosure and by also offering the Supplier further time to make additional submissions if needed.

The Supplier response makes clear that it does not seek disclosure. The Supplier confirmed that submissions are as set out in its June 27, 2016 written response. The Supplier's approach to disclosure weighs against their position on non-disclosure and resultant prejudice.

#### **Warning Letters**

The Supplier's submissions suggest that AMVIC must provide a certain, though unidentified, number of warnings with respect to breaches of the legislation. The FTA does not provide for such freebee warning letters and the licensee is not entitled to such cautions. AMVIC exercises its discretion to enforce the Act through warnings or prescribed actions (e.g., administrative penalties) as necessary and in the public interest. This approach is evidenced by AMVIC's use of various tools at its disposal (e.g., online newsletters/bulletins, letters, ISO to assist licensees and registrants in relation to their compliance obligations, the issuance of cautions if appropriate). The phone calls and email communication from AMVIC ISO prior to the proposed Administrative Penalty are a courtesy only and used, at AMVIC's discretion, to facilitate legislative compliance before determining whether further action is warranted.

It bears emphasizing that the FTA and its regulations are remedial in nature. AMVIC has an obligation to enforce this legislation. To ignore that responsibility and offer licensees a "free pass" to violate the Act and its regulations would undermine AMVIC's responsibility to consumers and the public and further undermine the authority of the regulator.



GOFC is operating in a highly regulated industry and has a license to operate in this environment. As such, it should have knowledge of the applicable advertising laws and regulations. GOFC has not suggested that they are not aware of these obligations. GOFC only took steps to remedy some individual issues once specifically brought to their attention by AMVIC. This strongly suggests that the Supplier's contraventions were intentional or the result of reckless or negligence.

#### **Part 9 of the FTA, the Cost of Credit Disclosure Regulation**

The Supplier, through counsel, asserts that the COC only applies to "Credit Grantor" as defined by section 58(m) of the FTA. Because GOFC is not a Credit Grantor, it is their position that the regulations do not apply. I disagree with this interpretation.

The Supplier has chosen to cherry-pick sections of the FTA for interpretive purposes. The exercise was done without proper consideration of the overall purpose and scheme of the FTA. The approach is inconsistent with established rules of statutory interpretation.

GOFC's interpretation is overly technical and would frustrate the public protection/industry regulation objectives of the Act and the Regulations. One cannot read the sections of the legislation and/or its regulations in isolation. The FTA and its regulations must be considered as a whole and in a manner that is consistent with its legislative intent.

The FTA is remedial in nature and should be interpreted broadly and purposefully so as to achieve its objectives. The COC, as it relates to advertisements at section 76(1), are intended to provide transparency regarding the advertised cost of vehicles. This transparency is consistent with, *inter alia*, the objectives of section 6 of the FTA (in particular, prescribed requirements relating to misleading representations made by Suppliers) and section 11(2)(l) of the ABR (all-in pricing provisions).

As such, I note that Part 9, Division 1, section 58(m) of the FTA defines "credit grantor" as:

- (i) the party to a credit agreement or prospective credit agreement who extends or will extend credit to the other party, or
- (ii) an assignee of the rights of the original credit grantor, if the borrower has been given notice of the assignment.

The remainder of the Division does, at various sections, make specific use of this specifically defined term. Section 76, however, has nothing to do with credit agreements and indeed does not even use the defined term "credit grantor". The expressly stated purpose of Section 76 is "advertising for fixed credit". If the section was to only apply to "credit grantors" then the legislation would have so stated.

For the foregoing reasons, I find that GOFC has advertised for fixed credit and as such, the section applies.

GOFC further argues that "*it is trite that regulations must be consistent with the purpose of the enabling regulations*" and refers to the Ontario Superior Court decision of *Shoppers Drug Mart Inc. v. Ontario*, 2011 ONSC, with specific reference to the following passage, as an authority for that position:

*A regulation that is not consistent with the purpose of its parent statute is ultra vires. Even in the broadest regulation-making powers are constrained by this principle – they*

must be exercised in a manner consistent with the purpose of the enabling statute, or they will be invalid. This is a concept so fundamental as to be considered a rule of law."  
(emphasis added)

Respectfully, the decision cannot function as a persuasive authority as it was reversed on appeal by the Ontario Court of Appeal in *Shoppers Drug Mart Inc. v. Ontario*, (Health and Long-term Care), ONCA 830 (Released December 23, 2011). In that decision, MacPherson and Karakatsanis JJ.A. stated that: "As a general principle, subordinate legislation should be construed in a manner that renders it *intra vires*." (emphasis added)

On November 22, 2013 the Supreme Court of Canada unanimously upheld the decision of the Ontario Court of Appeal (*Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, 2013 SCC 64). In that binding court judgment, Abella, J explains that:

[25] *Regulations benefit from a presumption of validity* (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 458). *This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them* (John Mark Keyes, *Executive Legislation* (2nd ed. 2010), at pp. 544-50); *and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner which renders it intra vires* (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (loose-leaf), at 15:3200 and 15:3230).

[26] *Both the challenged regulation and the enabling statute should be interpreted using a "broad and purposive approach consistent with this Court's approach to statutory interpretation generally"* (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), [2004] 1 S.C.R. 485, at para. 8; see also Brown and Evans, at 13:1310; Keyes, at pp. 95-97; *Glykis v. Hydro-Québec*, 2004 SCC 60 (CanLII), [2004] 3 S.C.R. 285, at para. 5; Sullivan, at p. 368; *Legislation Act*, 2006, S.O. 2006, c. 21, Sch. F, s. 64). (Emphasis added)

The COC benefits from the presumption of validity and the Supplier has failed to meet its burden to demonstrate invalidity. As reviewed above, AMVIC's broad and purposive approach to interpreting these regulations is consistent the legal framework of the FTA and the COC. AMVIC's approach is also consistent with the rules of statutory interpretation.

It bears emphasis that there is an obligation on all automotive business licensees and salesperson registrants must be aware of, and to comply, with their legal obligations. GOFC entitlement to be engaged in automotive business is governed by the FTA and its applicable Regulations. Once licensed, GOFC is expected at law to comply with the entire legal framework governing its authorized activity.

#### Automotive Business Regulation (ABR)

Section 11(1) of the ABR provides:

11(1) Every business operator must ensure that the business operator's advertising indicates in a conspicuous manner

- (a) the name of the business operator as set out in the licence or the trade name of the business operator as set out in the licence, and;



- (b) in the case of print and television advertising, that the business operator holds an automotive business licence under the Act.

GOFC's submissions argues that *"there is no requirement that section 11(1)(b) of the ABR requiring an 'AMVIC logo or mention.'"* GOFC is correct in so stating, however, that is not the offence alleged in the proposed administrative penalty.

The proposed administrative penalty is alleging non-compliance with section 11(1)(b) because of the GOFC's advertisements failed to indicate, in a conspicuous manner, that it holds an automotive business license under the Act.

The disclosure on its face provides that the GOFC advertisements at issue did not set out, in a conspicuous manner, that it holds an automotive business licence under the FTA. The failure to do so is contrary to section 11(1)(b) of the ABR.

#### ██████████ advertisements

Further, and in respect to section 11(1)(b), GOFC argues:

*"Most importantly, section 11(1)(b) applies to 'the business operator's advertising' and not the advertising of a third party, ██████████. The front page of ██████████ is not Gallery's advertising, but is the advertising of ██████████. The front cover is taken from a compliant advertisement contained in the magazine. Any non-compliance with the section is through the act of an unrelated third party."*

GOFC's position that ██████████ is responsible for its advertising ignores the clear language of the ABR.

Section 11(1) states:

*"Every **business operator must ensure** that the **business operator's** advertising indicates in a conspicuous manner ... (b) in the case of print and television advertising, that the business operator holds an automotive business licence under the Act."* (emphasis added)

The ABR, at section 1(1)(c) Definitions defines a Business operator as: *"means a person who is engaged in the automotive business"*.

The ABR, at section 1(1)(b) Definitions defines an "automotive business" as: *"means the business designated as the automotive business under the Designation of Trades and Businesses Regulation."*

*The Designation and Business Regulations*, Alberta Regulation 178/1999 defines an "automotive business" at section 1(2) and reads:

In this section,

- (a) "automotive business" means the activities of
  - (i) Buying or selling vehicles, whether 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 to 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.

GOFC is the business operator and accordingly must ensure that its advertisements are compliant with section 11(1)(b) the ABR. GOFC may not assign this responsibility to [REDACTED]. Allowing GOFC to do so would be contrary to the clear language and legislative intent of the FTA and its regulations.

AMVIC's interpretation of a business operator's obligations in the context of advertisements published in third party materials is consistent with the recent Ontario Motor Vehicle Industry Counsel (OMVIC) discipline decision *Registrar Motor Vehicle Dealers Act, 2002 v. Platinum Cars Inc. and Mr. Shaun Jalili* (April 10, 2014) Discipline Committee of the Ontario Motor Vehicle Industry Counsel. Although not binding, the case is on point and persuasive. In that case, online advertisements were published on behalf of a registered Ontario motor vehicle dealer. The advertisements were not compliant with prescribed obligations of *Motor Vehicle Dealers Act, 2002* (MVDA, 2002) and its regulations. The registrants, Platinum Cars and Mr. Jalili raised several defences including that "(h)e cannot take 'full blame' for the non-compliance, given Boost's failure to change the information on the websites" (at page 8 of 16)

The applicable regulation in Ontario, being section 36(7) of Ontario Regulation 333/08, provides that:

Advertising:

36(1) A registered motor vehicle dealer to whom this section applies shall ensure that any advertisement placed by the dealer complies with this section.

36(7) If an advertisement indicates the price of a motor vehicle, the price shall be set out in a clear, comprehensive and prominent manner and shall be set out as the total of,

- (a) the amount that a buyer would be required to pay for the vehicle; and
- (b) subject to subsections (9) and (10), all other charges related to the trade in the vehicle, including, if any, charges for freight, charges for inspection before delivery of the vehicle, fees, levies and taxes.

The language in the MVDA, 2002 is not identical to the language found in the FTA and the ABR. However, I find that the use of the terms "must ensure" as set out in section 11(1) of the ABR and "shall ensure" as set out in section 36(1) of the O.Reg 333/08 to have the same purpose and effect. In both, the obligation falls upon the licensee (in Alberta) or registrant (in Ontario) to ensure compliance with the applicable industry advertising laws and regulations. The obligation is not that of the third party publisher. As per *Jalili*, at page 8:

*As a Registered dealer, it is Mr. Jalili (sic) responsibility to know the Regulations that govern the trade of motor vehicles in Ontario.*

*The wording of subsection 36(1) of Ontario Regulation 333/08 (Advertising) under the Motor Vehicle Dealers Act, 2002 is clear and states that dealers "shall ensure that any advertisement placed by the dealer complies with this section." Subsection 36(7) goes on to state that advertisement "shall be set out as the total of" the amount that a buyer would be required to pay for the vehicle including any charges like "fees".*

*Delegating the activities of placing ads on multiple websites to a third party doesn't alleviate the Registrant's responsibilities under the Act.*



I find that GOFC may not eschew its advertising obligations by placing obligations on third party advertisers. The language of section 11(1)(b) of the ABR is clear. GOFC, as a licensee, must ensure that its advertisements are compliant. The Supplier bears this obligation irrespective of any arrangement it may have with any other third party. The disclosure on its face shows that GOFC failed to comply with its prescribed obligations under section 11(1)(b) of the ABR.

#### Action

In accordance with section 158.1(a) of the FTA and based on the above facts, I am requiring The Gallery of Fine Cars Inc. pay an administrative penalty. This is based on my decision that The Gallery of Fine Cars Inc. contravened sections 11(1)(b), (2)(l)(m) and 12(a)(f) of the ABR and sections 6(2)(a), 6 (2)(b) and 6(3)(b)(ii) and 7(1)(a) and 7(1)(b) of the COC.

Taking into consideration all of the representations made by legal counsel for the Supplier, and the representations made by Nicole L. - AMVIC Manager of Industry Standards and Stephen V. – AMVIC Industry Standards Officer, the administrative penalty amount is **\$5,000.00**. The amount takes into consideration the principles referenced in *R v Cotton Felts Ltd., (1982), 2 C.C.C (3d) 287 (Ont. C.A.)* and particularly the following:

1. Size of GOFC (not a low volume dealer);
2. Scope of economic activity (automotive business is a major economic driver);
3. Actual and potential harm to the public and industry (consumers who were misled or could be, driving business away from competitors who are law abiding, etc);
4. Maximum penalty of the statute; and
5. Absence of intent of business to become compliant once notified.

Advertising is one of the key ways a business can attract consumers to their place of business. Misleading ads are unlawful and unfair to consumers and law abiding automotive businesses. The FTA was designed to help stop such misleading practises. The Supplier chose to ignore the legislation and not be in compliance over a considerable period of time and the administrative penalty reflect that.

**The amount of the administrative penalty is \$5,000.00**

Pursuant to section 3 of the *Administrative Penalties (Fair Trading Act) Regulation*, this administrative penalty must be paid within 30 days of service of this notice. Payment may be made payable to the Government of Alberta and sent to AMVIC at:

Suite 303, 9945 – 50th Street  
Edmonton, AB T6A 0L4.

Section 179 of the FTA allows a person who has been served a notice of administrative penalty to appeal the penalty. To appeal the penalty, the person must serve the Minister of Service Alberta

Minister of Service Alberta  
103 Legislature Building  
10800 - 97 Avenue NW  
Edmonton, AB  
Canada T5K 2B6

with a notice of appeal within 30 days after receiving the notice of administrative penalty. The appeal notice must contain your name, your address for service, details of the decision being appealed and your reasons for appealing.

Pursuant to section 180(4) of the FTA, service of a notice of appeal operates to stay the administrative penalty until the appeal board renders its decision on the appeal or the appeal is withdrawn.

Under section 4 of the *Administrative Penalties (Fair Trading Act) Regulation*, the fee for appealing an administrative penalty is the lesser of \$1000 or half the amount of the penalty. As such, the fee for an appeal of this administrative penalty, should you choose to file one, would be \$1,000.00.

Yours truly,

"original signed by"

John Bachinski  
Director of Fair Trading (as Delegated)

JB/rv

Encls.

cc: E. Maishlish, AMVIC Counsel