



Reference: *Commissioner of Competition v. P.V.I. International Inc.*, 2002 Comp. Trib. 24

File no.: CT2001001

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IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF an inquiry pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* relating to the marketing practices of P.V.I. International Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act*.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

P.V.I. International Inc.
Michael Golka
Darren Golka
(respondents)

Date of Hearing: 20010820 to 20010823

Member: McKeown J. (Chairman)

Date of reasons and order: 20020530

Reasons and order signed by: McKeown J.



REASONS AND ORDER

[1] The respondents are alleged to have engaged in reviewable conduct contrary to the provisions of Part VII.1 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”) by engaging in misrepresentations to the public for the purposes of promoting a product and misrepresentation as to the performance of a product that is not based upon adequate and proper tests thereof.

[2] In October 1998, the respondents began marketing and selling in Canada a device called the “Platinum Vapor Injector” (the “PVI”), which the respondents claim will increase your gas or diesel mileage by 22 percent or more and which will dramatically reduce the level of various noxious exhaust emissions. The issue is whether the PVI actually works in the way the respondents claim.

I. FACTS

[3] On March 1, 2001, the Commissioner of Competition (the “Commissioner”) filed an application alleging that the respondents P.V.I. International Inc. (“P.V.I.”), Michael Golka and Darren Golka had engaged in various forms of reviewable conduct contrary to paragraphs 74.01(1)(a) and (b) and section 74.02 of the Act. These provisions are contained within Part VII.1 of the Act. Paragraphs 74.01(1)(a) and (b) read as follows:

74.01 (1) **Misrepresentations to the public** - A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

- (a) makes a representation to the public that is false or misleading in a material respect;
- (b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or...

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

No submissions were made with respect to section 74.02.

[4] The gas PVI is described by the respondents as follows:

One PVI consists of a 4 x 7 inch plastic dispenser which is mounted inside the engine compartment with a self-locking tie strap. The dispenser is filled with a specially formulated, non freezing solution that is suitable for summer and winter conditions. The PVI concentrate (platinum, rhodium, rhenium) is then added. A T-shaped metering connector joins the dispenser to the best vacuum line common to all cylinders...One PVI comes with 5 vials of PVI concentrate.

You simply add one vial for every 10,000km for most vehicles, therefore each PVI unit lasts 50,000km (31,000miles)... (Applicant's Book of Documents, Volume 1. Tab 1, PVI website.)

The diesel PVI is identical to the gas PVI, except that it comes with a 12-volt vacuum pump and contains 7 vials of "platinum solution" as opposed to 5.

[5] The respondents used a variety of means to promote the PVI, including newspaper advertisements, radio advertisements, the Internet, promotional literature, and mass distribution facsimile. In these advertisements representations were made with respect to three areas: fuel savings, emissions reduction, and government approval. I will now review the representations for each of these three areas.

A. FUEL SAVINGS REPRESENTATIONS

[6] The respondents' advertising indicated that the PVI would lead to substantial fuel savings. For example, in the respondents' newspaper advertisements, which Mr. Golka agreed were "representative of the advertisement response right across Canada from July 1999 onward", the respondents made numerous representations regarding the PVI's capacity to decrease fuel consumption, including:

...PVI International Inc. has introduced a low cost automotive accessory called the...PVI ...which is guaranteed to increase gas mileage and reduce emissions.;

Platinum May Cut Gasoline Costs by 22%

PVI International has introduced a low cost automotive accessory called the...

(P.V.I.) which increases gas mileage by 22% while reducing pollution...

After a five year review the U.S. government concluded: "Independent testing shows greater fuel savings with the P.V.I. than the 22% claimed by the developer."; and

What would you say if you were told a compact device exists that will...save you 22% in fuels costs...

(Applicant's Book of Documents, Volume 2, Tab E, three advertisements: undated, February 10, 2000, and June 18, 1999, respectively.)

[7] In addition, the respondents' newspaper advertisements regularly featured a table showing "test data" from a fleet of 15 vehicles which indicated that those vehicles achieved, on average, an improvement of 27.4 percent in fuel savings. Above that table, the following representation appeared:

TEST DATA

The U.S. Government confirmed fuel saving test data on vehicles using the P.V.I. Listed below is their data from a fleet of 15 identical 5.0L vehicles.

(Applicant's Book of Documents, Volume 2, Tab E, February 10, 2000.)

[8] On their website, the respondents represent:

Breakthrough Technology for Global Emission Reduction and Consumer Savings

GASOLINE BENEFITS SUMMARY

FUEL SAVINGS (as per customer testimonials):

- **15% to 30% fuel savings**
With potentially more complete combustion using platinum, rhodium and rhenium, it can take less gas to drive the same distance. Everyone likes to improve gas mileage and save on fuel.

(Applicant's Book of Documents, Volume 1, Tab A, subtab 3.)

[9] The respondents' website also features the results of a test showing that the installation of the PVI resulted in average fuel savings of 18.8 percent and an "Spring Car Care Guide Editorial" from the Toronto Sun dated April 15, 1999, containing the following representation:

What would you say if you were told a compact device exists that will ...save you 15 to 30% in fuels costs...? The answer is likely to be one of skepticism, but the facts support the claims.

(Applicant's Book of Documents, Volume 1, Tab A, subtab 16.)

[10] Through their radio advertisements, the respondents represented as follows:

Next time you reach for the gas pump, how would you like to save up to \$00.20 cents on every litre of gasoline you buy.

Now in Canada, the Platinum Vapour Injector.

A simple, inexpensive device that's been proven to dramatically reduce fuel costs. The P[B]I injects platinum vapour directly into your engine to improve fuel combustion up to 30 percent.

The results: our customers report up to a 30 percent savings in gas. That's money in your pocket...

Call 877-LESSGAS now and start saving today.

877-LESSGAS, your best defence against high gas prices.

(Applicant's Book of Documents, Volume 2, Tab G.)

[11] The respondents' representations also created the general impression that the installation of the gas or diesel PVI, as appropriate, resulted in substantial fuel savings.

[12] For example, 3 of the 5 newspaper advertisements before the Tribunal stated after providing a lengthy description of the benefits of the PVI, including fuel savings, “P.V.I. is also available for diesel engines.”

[13] In these advertisements, there is no distinction drawn between the gas and diesel PVI.

[14] In one of the respondents’ newspaper advertisements the distinction was made between gas and diesel. Rather than using the language above, “P.V.I. is also available for diesel engines.”, the following words appear: “The P.V.I. is also available for diesel pollution control.” (Applicant’s Book of Documents, Volume 2, Tab E.)

B. EMISSIONS REDUCTION REPRESENTATIONS

[15] The respondents took the position at least with respect to the diesel PVI, that their representations related primarily to emissions reduction. The general impression that the respondents’ representations have is that the installation of the gas or diesel PVI in an internal combustion engine will result in substantial emissions reduction.

[16] Such representations were contained in brochures that the respondents distributed directly and through their dealers, in radio ads, on the respondents’ Internet site, in ads circulated by mass distribution facsimile and in newspaper advertisements.

[17] An example of the respondents’ representations on the website is the following:

Will PVI help me pass emissions tests?

YES. PVI will drastically reduce the toxic HC, CO and NOx emissions to acceptable levels to pass the emission portion of the test...For emission test data, please visit that area on the website. (Applicant’s Book of Documents, Volume 1, Tab A, subtab 8.)

“...As the test data demonstrates, PVI drastically reduces toxic emissions on any vehicle.” The test results which follow that statement show that with the installation of the PVI, emissions reduced on average in excess of 80 percent. (Applicant’s Book of Documents, Volume 1, Tab A, subtab 6.)

PVI can “...lower your vehicle’s emissions to satisfy North America’s toughest standards...” (Applicant’s Book of Documents, Volume 1, Tab A, subtab 16.)

With respect to diesel, “...By improving combustion, PVI drastically reduces toxic pollution and airborne contaminants...” (Applicant’s Book of Documents, Volume 1, Tab A, subtab 17.)

Also with respect to diesel:

Reduce soot (opacity) 50 to 90%.

Reduce NOx pollution 30 to 90%.

Reduce CO pollution 25 to 90%.

Reduce exhaust smell and eye irritation and potential health care costs. Provide a healthier atmosphere where diesel engines operate. . . (Applicant's Book of Documents, Volume 1, Tab A, subtab 18.)

[18] The respondents' newspaper ads represented that the PVI will "...lower your vehicle's emissions to satisfy North America's toughest standards..." and that the PVI "...continuously dispenses microscopic amounts of platinum into the combustion chambers through the engine's vacuum line, creating an increase in fuel-burning efficiency which results in a substantial reduction in toxic emissions..." (Applicant's Book of Documents, Volume 2, Tab E, advertisement dated June 18, 1999.)

C. GOVERNMENT APPROVAL REPRESENTATIONS

[19] The respondents have also represented to the public that the government has endorsed or approved the PVI over a relevant period. The impression is that the U.S. government has approved the PVI and, in particular, has confirmed the PVI's capacity to increase fuel efficiency, reduce emissions and increase the octane level of regular gasoline.

[20] For example, the following representations are contained in the respondents' newspaper advertising:

After a five year review the U.S. government concluded: "Independent testing shows greater fuel savings with the P.V.I. than the 22% claimed by the developer."

U.S. Consumer Protection has determined that the fuel saving claims of this advertisement are 100% accurate.

U.S. Consumer Protection has confirmed the accuracy of the fuel saving claims in this advertisement.

(Applicants's Book of Documents, Volume 2, Tab E.)

TEST DATA

In its study of the fuel saving claims of the P.V.I., the U.S. Government produced the following test data from a fleet of 15 identical 5-liter vehicles.

(Applicant's Book of Documents, Volume 2, Tab E, advertisement dated June 18, 1999.)

TEST DATA

The US. Government confirmed fuel saving test data on vehicles using the P.V.I.. Listed below is their data from a fleet of 15 identical 5.0L vehicles.

(Applicant's Book of Documents, Volume 2, Tab E, advertisement dated February 10, 2000.)

[21] The respondents' website also shows similar representations:

Has this product been studied by the Government?

YES. It was studied by U.S. Federal Consumer Protection for four years. In the end, it was confirmed that the PVI provided greater fuel savings than the 22% claimed by the developer...

(Applicant's Book of Documents, Volume 1, Tab 8, subtab 8.)

II. ANALYSIS

A. PARAGRAPH 74.01(1)(a)

[22] There is no real dispute that the first two elements of subsection 74.01(1) are met, that is that the respondents made representations regarding the PVI to the public and that those representations were made for the purpose of promoting the supplier use of PVI or the business interest. The third element is contained in paragraph (a). This is where the real issue between the parties arises, that is whether the representation is false or misleading in a material respect.

1. Fuel Savings and Emissions Reduction

[23] The PVI is sold as a fuel saving/reducing device, and as a device which can reduce harmful emissions. Therefore, the respondents' express claims of representations regarding fuel savings and emissions are highly material.

[24] Both parties suggested that the applicable law is set out in *F.T.C. v. Sterling Drug, Inc.* (1963) 317 F. 2d 669 at 674, which is cited with approval by the Alberta Supreme Court, Appellate Division, in *R. v. Imperial Tobacco Products Ltd.*, (1971), 4 C.C.C. (2d) 423 at 441:

It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately. "The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied."

The Court in *Sterling Drug* also stated, before this passage:

...since the purpose of the statute is not to punish the wrongdoer but to protect the public, the cardinal factor is the probable effect which the advertiser's handiwork will have upon the eye and mind of the reader.

[25] The respondents have agreed to stop making the fuel saving representations with respect to the diesel PVI, and I fail to see why the Commissioner is still pursuing that aspect of this case. In applying the *Sterling Drug* test set out above, I am of the view that the general impression is that the same representations were being made with respect to diesel as were being made for gas, albeit in a less specific way. However, I do not intend to deal with the diesel claims in detail, given that the respondents have agreed to stop making their representations. I will include a cease and desist order with respect to the diesel claims in my order.

[26] Two experts testified on behalf of the Commissioner. Dr. Omer Gulder was qualified by the Tribunal as an expert in internal combustion engines, combustion generally and scientific methodologies as it relates to the testing of internal combustion engines. Mr. Peter Barton was qualified by the Tribunal as an expert in testing emission and fuel consumption in gas and diesel-powered vehicles and an expert in testing methodology.

[27] At the core of the respondents' case is the fundamental notion that it is the installation of the PVI in the vehicle which results in a much higher percentage of fuel which enters the vehicle's combustion chamber being burned. Since the respondents claim that a car with an internal combustion engine without the PVI burns approximately 68 percent of the fuel which enters the vehicle's combustion chamber, at least 32 percent of the fuel exits the combustion chamber unburned, according to the respondents. Dr. Gulder, on the other hand, states that the internal combustion engine has a combustion efficiency of approximately 98 percent. (Transcript, August 22, 2001, Volume 3, page 250, lines 4-7.) This leaves only 2 percent of the fuel unburned, as opposed to the 32 percent that the respondents claim is left unburned in a vehicle without the PVI. Mr. Robinson, who testified on behalf of the respondents, agreed that the major question is what is the percentage of unburned fuel.

[28] In my view, Dr. Gulder was a credible and knowledgeable witness with respect to the internal combustion engine.

[29] Dr. Gulder testified that the four-stroke reciprocating gasoline engine used in automobiles is the most common internal combustion engine. In this mechanism, mechanical power is generated by the combustion of gasoline. During first stroke the piston moves away from the closed end of the cylinder, an intake valve opens, and an air-fuel mixture enters the cylinder. During the second stroke, the piston moves upwards toward the closed end of the cylinder to compress the air-fuel mixture. As the piston is nearing the end of the second stroke, a spark from a spark plug ignites the mixture, and in the next instant, the stroke is completed and the piston is forced down in what is called the "combustion" stroke. During the final stroke, the piston moves back toward the closed end of the cylinder and an exhaust valve opens to vent the burned gas as the piston moves up. (Affidavit of Dr. Omer Gulder, July 20, 2001, pages 4 to 5.)

[30] Dr. Gulder further explained that the air-fuel mixture is ignited by a spark-plug at precisely the right time during the second stroke and that a subsequent “combustion wave” travels through the combustion chamber burning the air-fuel mixture. However, he explained that the conditions in the combustion chamber are not ideal for burning 100 percent of the air-fuel mixture. (Affidavit of Dr. Omer Gulder, July 20, 2001, pages 5 to 6.)

[31] Dr. Gulder testified that, for vehicles built in the last 15 to 20 years, approximately 2 percent of the hydrocarbons entering the combustion chamber would remain unburned. In other words, the combustion efficiency of gasoline powered vehicles is in the order of 98 percent. (Affidavit of Dr. Omer Gulder, July 20, 2001, page 8.) He flatly rejected the proposition advanced by the respondents that the combustion efficiency of internal combustion engines is in the order of 68 percent. He stated that if 32 percent of the air-fuel mixture left the combustion chamber unburned and was burned in a vehicle’s catalytic converter, it would “explode” or “destruct” in light of the high temperatures which would be occasioned by burning that quantity of fuel.

[32] Dr. Gulder indicated that even if an engine is not tuned regularly and therefore does not operate at its optimum level, its combustion efficiency will not decrease markedly. He set out that if the timing of the spark is off he would still get 98 percent combustion efficiency. He was then asked what would be the impact if there is a misfiring. He agreed that the fuel economy will decrease, or in other words the fuel consumption will increase, but said you would still have the same combustion efficiency.

[33] The Commissioner’s case is stronger with respect to the diesel PVI since Dr. Gulder testified that the combustion efficiency of a diesel engine is even higher than that of a gas engine’s, in light of the manner in which the combustion occurs in a diesel engine. Furthermore, this was confirmed by Mr. Barton who performed a series of tests using the diesel PVI. His test with respect to the gasoline PVI was struck from evidence at the hearing. His expert opinion confirmed Dr. Gulder’s opinion that the PVI does not reduce emission or increase fuel burning by a statistically significant amount.

[34] Dr. Gulder concluded his report, at page 20, with the following observations regarding the gas and diesel PVI:

Based on my 27 years of research and development experience with internal combustion engines, exhaust emissions, and fuels, it is my opinion that it is not possible to improve the combustion efficiency of the internal combustion engines by a significant amount, because their combustion efficiencies are already about 98% or better. As noted above, this fact is relatively non-controversial and is very well established in the internal combustion engine literature: in university textbooks, scholarly journal papers, and papers published in conference proceedings in the field of internal combustion engines. (Affidavit of Dr. Omer Gulder, July 20, 2001.)

[35] When the respondents suggested to Dr. Gulder in cross-examination that in particular gasoline vehicles as much as 20 percent of hydrocarbons entering the combustion chamber may exit the chamber unburned he replied:

If the 20 percent of the energy is coming out unburned and going to the catalytic converter and burned in the catalytic converter, this catalytic converter will not last more than 10, 20 minutes because the temperature, upper temperature limit of today's catalytic converter is 1,000 degrees Celsius...

If you put 20 percent of the energy that propels the vehicle into the catalytic converter, it melts its structure, it destructs it. You cannot operate it. (Transcript, August 22, 2001, volume 3, page 341, lines 14-20 and lines 22-25.)

Dr. Gulder testified that in view of that fact, the 20 percent figure put to him "...cannot be right." (Transcript, August 22, 2001, volume 3, page 342, line 7.) He further stated that, in his expert opinion, the number suggested to him by Mr. Robinson "...defies the basic principles of physics and chemistry." (Transcript, August 22, 2001, volume 3, page 343, lines 15-16.)

[36] I prefer the evidence of Dr. Gulder and Mr. Barton to that of the respondents' documents which were put in. There was no evidence put in by the respondents showing that their tests were done in a neutral setting or what the interest of the testers were in the outcome of the test, nor were the qualifications of the people who did the tests before the Tribunal.

[37] In summary:

--the functioning of the PVI, both in terms of fuel savings and emissions reduction, is predicated on the fundamental notion that internal combustion engines operate at 68 percent combustion efficiency;

--expert evidence introduced by the Commissioner establishes that internal combustion engines, whether gas or diesel, operate at a level of in excess of 95 percent combustion efficiency (no credible evidence was introduced by the respondent to contradict that proposition); and

--expert evidence introduced by the Commissioner establishes that only 20 to 25 percent of the thermal energy generated in the combustion chamber is ultimately converted into mechanical energy which can be used to propel a vehicle. Therefore, to generate fuel savings in the order of 20 percent, the installation of the PVI would have to result in 80 percent more thermal energy being generated in a given vehicle's combustion chamber (the respondents did not introduce any documentary evidence to contradict that proposition and did not challenge the "distribution" proposition in their cross-examination of Dr. Gulder).

(Final Argument, Commissioner of Competition, page 32.)

[38] In addition, tests performed on the diesel PVI in accordance with the applicable standards demonstrate that the installation of that device would have no effect, in terms of improved fuel economy or reduced emissions levels, on diesel vehicles.

[39] Much of the respondents' defence was based on a U.S. court decision in July 1985 wherein U.S. government claims of false advertising were dismissed on similar representations as were before this Court. While American decisions are not binding on this Tribunal, they are of obvious interest to it. I will quote the respondents' submissions in this regard and then review the claims. The respondents submitted:

65. ...Twenty-one years ago in 1980 the Consumer Protection Division of the U.S. Postal Service questioned the truthfulness of our claims and chose to litigate.
66. At the conclusion of the litigation in July, 1985 the Solicitor General of the United States, the government's top attorney, agreed with the Federal Court decision handed down six months earlier that the entire five years was spent harassing us because there was no justification to the government's allegations and accusations.
67. Once the Solicitor General agreed with the Federal Court decision in July of 1985 ...a fee award of \$22,000 was paid to us by the U.S. government accepting that both our actions and our words met the highest standards of honesty.
68. There is no other company in the United States that has met this high a level of truth in advertising. As I mentioned earlier, that fee can only be awarded if we were a hundred percent honest in our advertising. If it could be shown that we were only 99 percent honest, we would still prevail in the litigation but that fee could not have been awarded, according to the law under which it was awarded, a law entitled: Equal Access to Justice. (Respondent's Final Argument, filed November 14, 2001, pages 22-23.)

[40] I will now review what Skinner D.J. stated in *Robinson d/b/a National Fuelsaver Corporation v. United States Postal Service* Civil Action No. 83-2306-S U.S. District Court, District of Massachusetts, February 28, 1984 ("U.S. District Court Decision"). He stated at page 1 that:

The plaintiff...seeks a declaratory judgment voiding a decision of the United States Postal Service which concluded that the plaintiff engaged in a scheme to obtain money through the mail by means of materially false statements. He also seeks injunctive relief from a "postal stop order" preventing the plaintiff's use of the United States mail in connection with the marketing of his product. Both parties have moved for summary judgment.

[41] A product called a GASAVER “...which brings about more complete combustion and better gas mileage in automobile engines by means of platinum catalysis.” was the product in question. The judge went on to discuss the findings of the administrative law judge (“ALJ”) on August 13, 1981, where the ALJ found that:

...“it is more probable than not that GASAVER would produce a 5% improvement in fuel economy”...but ordered the issuance of a postal stop order (Order No. 83-74) on the basis that three misrepresentations at issue were false. The three alleged misrepresentations were:

- (a) The installation of GASAVER on an automobile will cause a dramatic increase in gas mileage of up to 48% or better;
- (b) GASAVER has passed the Environmental Protection Agency’s (“EPA”) H-74 test (emission reduction) and was granted the EPA’s approval to market GASAVER;
- (c) The fuel economy claims for GASAVER are supported by scientific research tests. (Page 2 of U.S. District Court Decision.)

On September 23, 1983, Skinner D.J. “...found that the plaintiff had a likelihood of success on the merits and issued a preliminary injunction against enforcement of the postal stop order.” (Page 2 of U.S. District Court Decision.)

Skinner D.J. goes on to say at page 3 of the U.S. District Court Decision:

The applicable standard of review in this case require affirmance of the ALJ’s ruling if it is supported by substantial evidence...I have concluded that the ALJ’s findings regarding the misrepresentations alleged by the Postal Service are not supported by substantial evidence.

I would point out that no evidence was before me on what evidence the Postal Service provided in this matter. He goes on to discuss the three representations. Skinner D.J. states:

The ALJ accepted the Postal Service’s argument that the plaintiff claimed that GASAVER “will cause a dramatic increase in gas mileage of up to 48% or better”. The primary basis for this conclusion is a chart representing results of a test conducted by the plaintiffs and others. The chart shows that vehicles adding the GASAVER mechanism obtained on average a 28.3% fuel savings, with results ranging from[a] 48.3% increase in efficiency to a 12.4% decrease...The Postal Service does not suggest that the test was fraudulent.

I note that there is no similar evidence before me and certainly in this case the Commissioner never did agree that the respondents' evidence was acceptable. The Commissioner put in its own evidence of Dr. Gulder indicating that the savings are not even close to 28 percent. In the American case the judge did not find the government's assumption "...that vehicles get only eight to sixteen miles per gallon." was shown. In fact Skinner D.J. states: "This assumption is pulled out of thin air..." (Page 4 of U.S. District Court Decision.)

[42] Skinner D.J. then went on to discuss the EPA claim and stated at pages 4 and 5:

The ALJ found that the plaintiff had represented that GASAVER had passed the EPA H-74 emission reduction test, and that EPA had approved the system for marketing. He also found that these representations were false.

Skinner D.J. found that the dispute between the parties concerned: "...whether the plaintiff's statements are a fair characterization of the EPA's practices and actions." and did not make any decision on this issue because: "...it is both trivial and moot." He further noted that the plaintiff had voluntarily stopped making the claim long before the Postal Service objected to it.

[43] Skinner D.J. then went on to deal with the scientific research test representation and stated at pages 5 and 6:

The government's entire defense of the ALJ's finding on this issue reads as follows:

A fair reading of the Boston Phoenix (R. 389) and In Business (R. 402) articles reveals that Robinson ties the research activities of Mobil and the Brookhaven Laboratory into the efficacy of the GASAVER.

Unless this court is prepared to substitute its judgment for that of the administrative agency, the decision of Judge Dicus should be affirmed.

Skinner D.J. found that the ALJ's decision was "...unsupported by substantial evidence." (Page 6 of U.S. District Court Decision.) He further found that "The Postal Service has not put forward one shred of evidence which even suggests that the plaintiff misrepresented the nature of his tests." In the case before the Tribunal, the Commissioner has put before the Tribunal evidence which suggests that the respondents misrepresented the nature of the tests. The evidence before me is different than that before Skinner D.J. and, therefore, his decision is of not much assistance to the issues in question before the Tribunal.

[44] The evidence of Mobil before Skinner D.J. was before the Tribunal in the form of a research paper delivered by the Mobil Research and Development Corporation to the American Chemical Society in 1979 entitled *CO Oxidation Promoters in Catalytic Cracking*, (Respondent's Book of Documents, Tab 5). In the case before the Tribunal, Dr. Gulder indicated that the conditions in a catalytic cracker are much different than in a vehicle combustion engine (especially the operating temperatures, which are lower in catalytic crackers), and thus this evidence does nothing to support the respondents' claims. Dr. Gulder pointed out that the catalytic cracking involves "cracking", not combustion. He stated that while platinum may help carbon monoxide (CO) to convert to carbon dioxide (CO₂) at lower temperatures, this does not constitute proof that the same thing occurs in the combustion engine, thereby reducing CO emissions, as P.V.I. claims. (Transcript, August 22, 2001, volume 3, page 360, lines 2-9.) I prefer Dr. Gulder's evidence.

[45] I would point out as well that the respondents' submission that the fee award of \$22,000 that was paid to them by the U.S. government would not have been awarded unless the court found that they were "100 percent honest" is wrong. The law under which this award was made says nothing about 100 percent accuracy. Rather, it provides that costs would be awarded unless the court finds that "the position of the U.S. was substantially justified or that special circumstances make an award unjust". (See the *U.S. Equal Access to Justice Act*, 28 U.S.C., section 2412(d)(1)(A).)

[46] In my view the general impression created by the respondents' representations regarding fuel savings and emissions reductions is false or misleading in a material respect.

2. Government Approval

[47] I will now analyse why the representations regarding government approval are false and misleading in a material respect. In terms of materiality, in the fiscal year ending June 30, 1999, the respondents did not make claims in their advertisements regarding government approval. After that date, they did make such claims. The respondents' sales for the year ending June 30, 2000, were approximately 600 percent higher than they were for the year ending June 30, 1999. Even taking into account the fact that the respondents were not in business for the entire 1999-2000 fiscal year, the change in sales volume is dramatic. In my view it could be inferred that with an otherwise unknown technology being promoted by unknown individuals, P.V.I. International Inc. and the Golkas, the endorsement or approval of a large and credible institution such as the U.S. government would be highly material to prospective purchasers.

[48] Mr. Michael Golka was questioned by counsel for the Commissioner on whether it was reasonable to say that a paraphrase of a decision of the District Court in Massachusetts could be said to be a U.S. government approval of the PVI. He admitted that the phrase used in the respondents' advertisements which stated:

After a five-year review the U.S. government concluded: 'Independent testing shows greater fuel savings with the PVI than the 22% claimed by the developer'.
(Transcript, August 23, 2001, volume 4, page 672, lines 2-7.)

was a "...paraphrase of a combination of Judge Skinner's decision." (Transcript, August 23, 2001, volume 4, page 672, lines 12-13.) Mr. Golka stated that Mr. Robinson was the source of information that this representation was a paraphrase of Justice Skinner's decision. After being pressed further by counsel on cross-examination, Mr. Golka stated:

I'm not familiar whether he represents the U.S. government. I do not believe that he is. He's an independent court so I doubt that that's the case. (Transcript, August 23, 2001, volume 4, page 680, lines 6-9.)

In my view the quote referred to above about the U.S. government conclusion is false and misleading in three respects. First of all, it is not a quote as there is no evidence before the Tribunal that any person ever wrote or uttered these words. Secondly, it is not an accurate paraphrase of what Judge Skinner or any other independent person wrote. Third, the quote is attributed to the U.S. government and in fact the "paraphrase" was cobbled together by selectively taking things from the judgment of Judge Skinner.

[49] Mr. Golka was also questioned about several newspaper ads in which the respondents featured fleet "test data". Mr. Syme posed the question:

It says there under the words in bold "Test Data":

"The U.S. government confirmed fuel saving test data on vehicles using the P.V.I. listed below as their data from a fleet of 15 identical 5.0 litre vehicles."

Then there's a whole list of vehicles showing an average of fuel savings of 27.4 percent. Do you see that?

MR. GOLKA: Yes

MR. SYME: Did the U.S. government – is this data from a test that the U.S. government did?

Mr. GOLKA: No. (Transcript, August 23, 2001, volume 4, page 695, line 21 to page 696, line 12.)

Mr. Golka then explained:

This was information that was testing done by TMC or TM Corporation. This was information that the government had or I guess was produced at the hearing as the complainant's Exhibit number 5, and one of the hearings that Mr. Robinson was in – I can't quote you the exact hearing – this information was the information that the government produced at their Court litigation. So, that is the same information that we use. (Transcript, August 23, 2001, volume 4, page 697, line 19 to page 698, line 3.)

[50] Mr. Golka basically took the position that although the U.S. government did not do the tests it became their data. In my view the advertisements give the general impression that the U.S. government actually conducted tests of the PVI and concluded that it works. Both Mr. Golka and Mr. Robinson were cross-examined on a study performed by the U.S. EPA in 1991 which concluded that the Platinum GASAVER did not produce greater than 20 percent fuel economy benefits claimed by the manufacturer. However, this was not accepted by Mr. Golka who said he took their findings with a grain of salt.

[51] In my view the general impression created by the respondents' representations regarding government approval is false or misleading in a material respect. Thus, the respondents have engaged in reviewable conduct contrary to paragraph 74.01(1)(a).

B. PARAGRAPH 74.01(1)(b)

[52] The Commissioner also makes a case under paragraph 74.01(1)(b) of the Act which reads as follows:

74.01 (1) **Misrepresentations to public** - A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or

[53] This aspect of the case involves performance claims such as the 22 percent fuel savings and the claim that the PVI will dramatically reduce vehicle emissions. The Commissioner takes the position that these types of claims fall under both paragraphs 74.01(1)(a) and (b). The burden of proof is the balance of probabilities and the onus under paragraph 74.01(1)(b) of the Act requires the applicant to demonstrate that the representations alleged to be reviewable were made. Once the applicant does that, the onus shifts to the respondent to demonstrate that the relevant statement, warranty or guarantee has been substantiated by an "adequate and proper" test.

[54] There are two criminal cases which deal with the onus under the earlier paragraph 52(1)(b) of the Act, the criminal counterpart to paragraph 74.01(1)(b), and they correctly state that once the Commissioner has proven that certain representations were made then the onus shifts to the accused. In *R v. Envirosoft Water Inc.*, [1995] 62 C.P.R. (3d) 365 (Alta. Prov. Ct.), the Court stated at 371:

...With respect to the charges under s. 52(1)(b), after the Crown proves certain representations were made by the two accused, the onus of proof and the standard of proof lies with the two accused to prove, on a balance of probabilities, that those representations were based on adequate and proper tests.

To the same effect, in *R. v. Batt*, 53 C.P.R. (2d) 152 (B.C. Prov. Ct.) at 153, the Court stated:

The section requires an accused to lead evidence in support of the tests and that upon so doing, it is open to the Crown to lead evidence to show such testing was not adequate and proper. Clearly, the section casts an onus on the accused to make adequate and proper tests on the product...

[55] The onus is important in this case because the Commissioner's expert witness, Mr. Barton, who had done gasoline PVI tests had his expert report on this part of the case struck because the tests were done on a car which does not exist according to the manufacturer. The respondents put before the Tribunal tests that were done in conjunction with the U.S. litigation involving the PVI. The respondents described three tests done: one baseline, one with the exhaust gas recirculation valve disconnected and the PVI installed and a third test with the PVI installed. The last test was done at a later time and on a different vehicle of the same make. In my view there were several problems with these tests and I am in agreement with Mr. Barton's evidence with respect to the tests.

[56] First, only one baseline test was conducted which means that there is a good chance that the test results would be influenced by variability. In standard EPA and Canadian testing, several baseline tests are done so that any unrepresented variations are not taken as representative of the vehicle's average performance and emission rates. Second, the second test involved the alteration of two variables (the disconnection of the exhaust gas recirculation valve, for some inexplicable reason) and the installation of the PVI. Anyone who studied this scientific method can only conclude this test is invalid, because it is impossible to determine which variable caused any change in the results as compared to the baseline test results. Mr. Robinson apparently went back and conducted a third test on a different vehicle of the same make and year in order to prepare for the final litigation of this matter in the U.S. He apparently used this data to compare with the data from the previous baseline, and determined that the emissions from the third test were reduced and fuel efficiency improved. Mr. Barton testified that this third test is also highly unreliable, as one cannot draw any conclusions by comparing this test to the first two tests, which were done on a different vehicle. According to Mr. Barton, new baseline tests would have to be done on the new vehicle before one could compare potential vehicle emissions reductions and fuel efficiency improvements resulting from the installation of the PVI.

[57] The Commissioner also claims that there is case law which indicates that the adequate and proper tests demonstrating the impugned representation must be made before the actual representation is made to the public. I have some doubt whether this case law is applicable herein because no representations were made in Canada until 1999 based on the evidence before me. Accordingly, I do not rely on this submission with respect to my findings.

[58] The respondents submit that the standard testing done by the EPA (and the Commissioner's experts) is done on the "perfectly tuned vehicle", not the "average vehicle" and that the perfectly tuned vehicle burns only 80 percent of its fuel. In support of their claims, the respondents cite a research paper delivered by the Mobile Research and Development Corporation to the American Chemical Society in 1979, entitled *CO Oxidation Promoters in Catalytic Cracking*. However, as already discussed, Dr. Gulder indicated that the conditions in a catalytic cracker are much different than in a vehicle combustion engine, and thus this evidence does nothing to support P.V.I.'s claims.

[59] The respondents also relied on a report prepared by the Champion Spark Plug Company in 1975-76 which concluded that the fuel economy of gasoline-powered vehicles can be improved and emissions reduced when "...cars judged to be in need of a tune-up were tuned according to manufacturers' specifications..." (Respondent's Book of Documents, Tab 3, page R-3(c).) However, Dr. Gulder noted that it is the combustion efficiency of internal combustion engines which is clearly distinct from fuel efficiency. He stated:

Combustion efficiency has nothing to do with the firing time of the spark. You can fire very early or very late but still the mixture will be converted to combustion products, but the mechanical energy will change, the mechanical energy obtained will change because of the duration of combustion with respect to the piston position. (Transcript, August 21, 2001, volume 2, page 196, line 22 to page 197, line 4.)

Accordingly, the Champion Spark Plug Company study does not assist the respondents. I note that the respondents did not introduce any expert evidence at this hearing. The respondents have made numerous representations to the public to the effect that the installation of a gas or diesel PVI on a vehicle will result in substantial fuel savings and a substantial reduction in emissions. The respondents have not met the onus to adduce evidence to prove that the representations were based on adequate and proper tests. Thus, the respondents have engaged in reviewable conduct contrary to paragraph 74.01(1)(b).

[60] I place no reliance on the summary of the EPA Federal Test Procedures produced by Mr. Robinson since it is hearsay evidence and I give it no weight. Furthermore, Mr. Barton and Dr. Gulder both pointed out certain shortcomings in the tests.

C. REMEDY

[61] Having found that the respondents have engaged in reviewable conduct contrary to paragraphs 74.01(1)(a) and (b), I must now determine the appropriate relief.

[62] Section 74.1 of the Act sets out the available remedies. Section 74.1 reads as follows:

- 74.1 (1) **Determination of reviewable conduct and judicial order** - Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person
- (a) not to engage in the conduct or substantially similar reviewable conduct;
 - (b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
 - (i) a description of the reviewable conduct,
 - (ii) the time period and geographical area to which the conduct relates, and
 - (iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and
 - (c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding
 - (i) in the case of an individual, \$50,000 and, for each subsequent order, \$100,000, or
 - (ii) in the case of a corporation, \$100,000 and, for each subsequent order, \$200,000.
- (2) **Duration of order** - An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.
- (3) **Saving** - No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.
- (4) **Purpose of order** - The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

(5) **Aggravating or mitigating factors** - Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

- (a) the reach of the conduct within the relevant geographic market;
- (b) the frequency and duration of the conduct;
- (c) the vulnerability of the class of persons likely to be adversely affected by the conduct;
- (d) the materiality of any representation;
- (e) the likelihood of self-correction in the relevant geographic market;
- (f) injury to competition in the relevant geographic market;
- (g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and
- (h) any other relevant factor.

[63] The Commissioner seeks basically three remedies: an order from the Tribunal requiring the respondents to pay an administrative penalty in the amount of \$50,000 for the individual respondents and \$100,000 for the corporation respondent; an order requiring the respondents to publish a corrective notice; and an order prohibiting the respondents from making representations to the public with respect to the PVI which are contrary to Part VII.1 of the Act. As indicated above, the respondents at the hearing were prepared to cease making representations with respect to the diesel PVI. In light of this I will not consider the diesel PVI with respect to any administrative penalty or publishing of a corrective notice since it was unnecessary to proceed with this part of the case. In my view the diesel advertisements were not as calculated to mislead as the representation with respect to the gasoline PVI.

[64] In light of the false or misleading general impression given by P.V.I. in a variety of advertisements with respect to fuel savings, emission reductions, government endorsement and the lack of any test to substantiate the same, it is appropriate to issue prohibition orders in the form set out in the order herein in paragraphs 69 to 72.

[65] In my view this is not an appropriate case for a corrective advertising order. In the United States the F.T.C. uses corrective advertising in only a minority of the cases. In this case, the complexity of the claims and the evidence showing that they were false or misleading would make it very difficult for a consumer to understand in a couple of paragraphs in an advertisement why the previous claims were false or misleading. I am also concerned about the unusual nature of this case because of the U.S. District Court decision, albeit on different evidence. For this latter reason, I also do not think it is appropriate to award the maximum administrative monetary penalty. The two individual defendants, Messrs. Michael and Darren Golka were not involved in the U.S. proceeding in any way and Mr. Robinson deliberately misinterpreted the effect of the District Court judge's finding to them. As stated

earlier, certainly they understood that the U.S. government had not approved the advertisements and it was a District Court ruling which refused to allow the government an injunction against the continuing publication of these advertisements. In my view, each of the individual respondents should be given an administrative monetary penalty of \$25,000 and the corporate respondent, P.V.I. International Inc., should be given an administrative monetary penalty of \$75,000 because the company accepted Mr. Robinson's representations without question. In my view in the circumstances of this case there can be a distinction between the actions of the company and the individuals. This distinction is implied under subsection 74.1(3) which indicates that no order should be made against the person under paragraph 1 (b) or (c) "...where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring." There was no evidence presented before me by the respondents with respect to anyone exercising due diligence to prevent the reviewable conduct in this case. I also note in this case that the advertisements in Canada only took place over less than a two year period. The advertisements seem to have been around in the United States over a twenty year period but, as stated, there is no indication that any successful action has been taken there to preclude the advertising.

[66] The Consultative Panel on Amendments to the *Competition Act* had the following to say with respect to the issue of penalties:

Civil Monetary Penalties

- 15) The adjudicators should have the authority to order the payment of a civil monetary penalty in an amount appropriate in the circumstances giving rise to the breach of the relevant provision.
- 16) A maximum penalty \$100,000 in respect of a first breach (e.g. a number of separate advertisements involving the same misrepresentation in various media over a period of months would constitute one "breach") and \$200,000 in respect of a second or subsequent breach involving similar conduct should be available. [Emphasis added.]
- 17) The criteria for establishing an appropriate fine level within the *maxima* should be: the projected reach of the representation in the relevant market; the vulnerability of the target audience; the number of times that the representation was repeated and the duration of the representation; the materiality of the deception; the likelihood of marketplace self-correction; evidence of harm to the marketplace/competition; and, the advertiser's compliance history. The Bureau should consider whether these criteria should be established by means of guidelines or in the legislation.

(*Report of Consultative Panel on Amendments to Competition Act*, to the Director of Investigation and Research, *Competition Act*, Mr. George N. Addy, March 16, 1996, page ix.)

[67] I note that there was no evidence with respect to the projected reach of the representation in the relevant market nor the vulnerability of the target audience. I also note that elsewhere the Panel considered that “a number of separate advertisements involved in the same misrepresentation in various media over a period of months” would constitute one breach. I do not agree that there were a number of separate advertisements here involving different representations over a period of years. Although the advertisements were not all identical, as stated in the findings with respect to false or misleading representations, they related to fuel savings, emission reductions and government endorsement. This is not a case where a number of separate advertisements involving different representations were made over a period of years. At the most, the representations in Canada were made over a two year period. I have already stated that the number of years they were put out in the United States is irrelevant in this case in light of the finding of District Court Judge Skinner.

[68] I do not find that it necessary in this case to decide as to whether the case of *Biller v. British Columbia Securities Commission* (2001) 199 D.L.R. (4th) 124 (B.C.C.A.) is applicable to the administrative monetary penalty provisions of the Act. The Tribunal has some doubt about the relevance of the purpose section of the Act with respect to administrative and monetary penalties, which are more akin to fines. Furthermore, I do not agree that following the *Biller* interpretation would interfere with the object of providing Canadian “...consumers with competitive prices and product choices.” In my view there is nothing to prevent the Commissioner from seeking prompt injunctive relief and this is one of the reasons why a prohibition order is appropriate in this case.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[69] The respondents and any person acting on their behalf or for their benefit, including all directors, officers, employees, agents or assigns of the respondents, or any other person or corporation acting on behalf of any or all of the respondents, shall for a period of 10 years from the date of this order, cease making, causing to be made, or permitting to be made, by any means whatsoever, false or misleading representations to the public for the purpose of promoting the use of a device known as the PVI or any similar allegedly gas-saving, emission-reducing and/or performance-enhancing device; and, without limiting the generality of the foregoing, the respondents, or any of them, shall cease making, causing to be made, or permitting to be made by any means whatsoever, representations to the public that create a false or misleading general impression regarding the PVI's or any similar device's capacity:

- (a) to increase the gasoline mileage or efficiency or diesel mileage or efficiency of vehicles, boats, or other machines which are propelled by or powered by internal combustion engines; and
- (b) to reduce or eliminate certain harmful emissions or “pollution” emitted by vehicles, boats, or other machines which are propelled by or powered by internal combustion engines.

[70] The respondents or any of them, shall for a period of 10 years from the date of this order, cease making, causing to be made, or permitting to be made, by any means whatsoever, any false or misleading representations for the purpose of promoting the use of the PVI or any similar allegedly gas-saving, emission-reducing and/or performance-enhancing device, which create the general impression that the PVI, or a similar device, has been endorsed or tested and approved as a fuel-saving, emission-reducing and/or performance-enhancing device, by any governmental authority, including courts of law in the United States or elsewhere.

[71] The respondents shall for a period of 10 years from the date of this order, cease making, causing to be made, or permitting to be made, by any means whatsoever, any representations to the public for the purpose of promoting the use of the PVI, or any similar allegedly gas-saving, emission-reducing and/or performance-enhancing device, in the form of a statement, warranty or guarantee of the performance or efficacy of the PVI or any similar device, unless and until the Respondents perform such adequate and proper tests as are necessary to substantiate such statements, warranties or guarantees. Without limiting the generality of the foregoing, such representations regarding the PVI's or any similar device's capacity:

- (a) to increase the gasoline mileage or efficiency or diesel mileage or efficiency of vehicles, boats or other machines which are propelled by or powered by internal combustion engines;
- (b) to increase the percentage of fuel burnt in the average engine from 68 percent of each litre to 90 percent;
- (c) to make non-burning fuel burn;
- (d) to substantially or dramatically reduce or entirely eliminate certain harmful emissions or "pollution" emitted by vehicles, boats, or other machines which are propelled by or powered by internal combustion engines;
- (e) to increase the octane level of regular gasoline and eliminate the need to use high octane gasoline with certain internal combustion engines;
- (f) to increase the "pulling power" of vehicles equipped, propelled or powered by internal combustion engines;
- (g) to eliminate engine "knock and ping" in internal combustion engines;
- (h) to generally improve the performance of internal combustion engines;
- (i) to extend the engine life of internal combustion engines;
- (j) to extend the life expectancy of catalytic converters installed on vehicles with internal combustion engines; and
- (k) for the diesel version of the PVI, to reduce oil consumption by up to 75 percent; to increase the mileage between required vehicle servicing or maintenance; and, to extend engine life.

[72] The respondents or any of them, shall for a period of 10 years from the date of this order, not represent to the public for the purpose of promoting the use of the PVI, or any similar gas-saving, emission-reducing and/or performance-enhancing device, that a test has been made as to the performance and efficacy of the PVI or any similar device, unless they can establish that:

- (a) such representation was previously made or published by the person by whom the test was made; or
- (b) such representation was, before being made or published, approved and permission to make or publish it was given in writing by the person by whom the test was made; and
- (c) that the representation made by the respondents accords with the representation previously made, published or approved.

[73] The respondents Michael Golka and Darren Golka shall each pay an administrative monetary penalty of \$25,000, payable within 30 days from the date of this order.

[74] The corporate respondent, P.V.I. International Inc., shall pay an administrative monetary penalty of \$75,000, payable within 30 days from the date of this order.

DATED at Ottawa, this 30th day of May, 2002.

SIGNED on behalf of the Tribunal by the presiding Judicial member.

(s) W.P. McKeown

APPEARANCES:

For the applicant:

The Commissioner of Competition

John Syme

For the respondents:

P.V.I. International Inc.

Michael Golka and Darren Golka

Michael Golka

Joel Robinson