

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260121

Docket: A-346-24

Citation: 2026 FCA 10

**CORAM: WOODS J.A.
MACTAVISH J.A.
WALKER J.A.**

BETWEEN:

CINEPLEX INC.

Appellant

and

COMMISSIONER OF COMPETITION

Respondent

Heard at Toronto, Ontario, on October 8, 2025.

Judgment delivered at Ottawa, Ontario, on January 21, 2026.

PUBLIC REASONS FOR JUDGMENT BY:

MACTAVISH J.A.

CONCURRED IN BY:

**WOODS J.A.
WALKER J.A.**



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PUBLIC REASONS FOR JUDGMENT

This is a public version of confidential reasons for judgment issued to the parties. The two are identical, there being no confidential information disclosed in the confidential reasons.

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MACTAVISH J.A.

[1] Moviegoers who want to see a film at a theatre operated by Cineplex Inc. have two options: they can purchase a ticket at the theatre, or they can purchase their ticket online through Cineplex’s website or mobile application (or “app”). If the moviegoer chooses this latter option, their ticket purchase may be subject to an “Online Booking Fee”.

[2] The Commissioner of Competition filed an application with the Competition Tribunal alleging that Cineplex had engaged in reviewable conduct by making pricing representations to the public that were false or misleading in a material respect. That is, Cineplex promoted movie tickets to the public on its website and on its app at prices that were not attainable because consumers purchasing tickets online had to pay the Online Booking Fee in addition to the represented ticket price. According to the Commissioner, Cineplex’s conduct breached the

prohibition on false or misleading representations contained in the *Competition Act*, R.S.C. 1985, c. C-34, as well as the prohibition on so-called “drip” pricing.

[3] In careful and detailed reasons, the Competition Tribunal found that Cineplex had misled consumers with respect to the price of movie tickets by adding a fixed obligatory fee to tickets sold online, contrary to the drip pricing provisions of the *Competition Act*. The Tribunal further found that representations with respect to ticket prices appearing on Cineplex’s website and app were false or misleading in a material respect, again contrary to the *Competition Act*. Consequently, the Tribunal allowed the Commissioner’s application and ordered that Cineplex cease engaging in its reviewable conduct for a period of 10 years. The Tribunal further ordered that Cineplex pay an administrative monetary penalty in the amount of \$38,978,000.00 within 30 days of its Order, and that it pay the Commissioner’s costs of the Tribunal proceeding.

[4] Cineplex appeals from the Competition Tribunal’s order, submitting that the Tribunal erred in its assessment of the general impression conveyed by, and the literal meaning of the representations made by Cineplex on its website and app. Cineplex also argues that the Tribunal erred in concluding that Cineplex’s representations were false and misleading, and in its interpretation of the drip pricing provisions of the *Competition Act*. Finally, Cineplex asserts that the Tribunal’s remedy was inconsistent with the text and purpose of the *Competition Act*, and that it was punitive, disproportionate and unprecedented.

[5] For the reasons that follow, I have not been persuaded that the Competition Tribunal made any error that warrants this Court’s intervention. Consequently, I would dismiss the appeal.

I. Background

[6] Cineplex is a top-tier Canadian brand that operates in the film entertainment and content, amusement and leisure, and media sectors, and it is Canada's largest and most innovative film exhibitor. As of December 31, 2023, Cineplex owned, leased or was part of a joint venture in 1,631 screens in 158 theatres across Canada.

[7] Cineplex's website is located at www.cineplex.com. It displays information about Cineplex's entertainment offerings. Consumers can also use the website to access information about films, theatres and showtimes.

[8] Cineplex also has a mobile app that displays similar information. Both the website and the app allow consumers to purchase movie tickets online via the website (on a computer or a mobile phone) or on the app (using a mobile phone), to buy tickets well in advance of a showtime and to reserve specific seats in the theatre.

[9] Moviegoers can also purchase tickets in person at Cineplex theatres, at the box office or at a concession or kiosk located at the theatre.

[10] On June 15, 2022, Cineplex implemented an Online Booking Fee as a service fee that applies only to tickets purchased on Cineplex's website or app. Generally, the fee was fixed at \$1.50 per ticket, to a maximum of four tickets, with no fee being payable for additional tickets if more than four tickets are purchased in one transaction. In addition, no fee is charged for

members of Cineplex’s CineClub, which is Cineplex’s movie subscription program, and members of the Scene+ loyalty program are charged a reduced Online Booking Fee of \$1.00 per ticket.

[11] The amount of the Online Booking Fee has not changed since it was introduced in 2022, and it generated just under \$11.7 million in revenue for Cineplex in 2022 and \$27.3 million in 2023, being the period under review by the Tribunal.

II. The Statutory Scheme

[12] As the Tribunal observed, the purpose of the *Competition Act* is to promote vigorous and fair competition in Canada, and to discourage certain types of commercial behaviour that are viewed as detrimental to Canada and the Canadian economy: Tribunal reasons at para. 224, citing *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 676; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at pp. 190, 198, 199 (*per* Chief Justice Lamer) and pp. 256-257 (*per* Justice Iacobucci); *Alex Couture Inc. v. Canada (Attorney General)* (1991), 38 C.P.R. (3d) 293 (Qué. C.A.), at pp. 320, 321*b*, 324*c-d*. See also section 1.1 of the *Competition Act*.

[13] Insofar as the deceptive marketing provisions contained in section 74.01 of the Act are concerned, this Court has observed that their objective is to “incite firms to compete based on lower prices and higher quality”, so as to achieve the objective identified in section 1.1 of providing consumers with competitive prices and product choices: *Canada (Commissioner of*

Competition) v. Premier Career Management Group Corp., 2009 FCA 295, at para. 61; Tribunal reasons at para. 227.

[14] As this Court further observed in *Premier Career Management*, when consumer information is distorted by misleading representations “the proper functioning of the market is necessarily harmed, and the Act is rightly engaged, given its stated goals” above, at para. 62; Tribunal reasons at paras 226-233, 269. See also *R. v. Stucky*, 2009 ONCA 151 at para. 39.

[15] It also bears noting that the *Competition Act* is not consumer protection legislation. While both types of statutes address false or misleading representations made to the public, they do not serve the same underlying purposes. Self-evidently, provincial consumer protection legislation is aimed at protecting the consumer. In contrast, the *Competition Act* is aimed at “maintaining the proper functioning of the market in order to preserve product choice and quality”: *Premier Career Management*, above at para. 63. See also Tribunal reasons at para. 233.

[16] Similarly, as the Tribunal observed in *Commissioner of Competition v. Sears Canada Inc.*, 2005 Comp. Trib. 2, (albeit in the context of the ordinary price provision in subsection 74.01(3)), the *Competition Act* “seeks to encourage and maintain competition and the objective of the impugned legislation is to do this by improving the quality and accuracy of marketplace information and by discouraging deceptive marketing practices”: at para. 82. It further seeks to protect competition from the anti-competitive effects and inefficiencies that result from deceptive representations: at para. 93.

[17] Section 74.01(1)(a) of the *Competition Act* provides that a person will engage in reviewable conduct if they make “a representation to the public that is false or misleading in a material respect”, if they do so 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”.

[18] There was no real dispute before the Tribunal that Cineplex had made “representations” with respect to the price of its movie tickets, and that the purpose of these representations was to promote a business interest. There was, however, disagreement as to what should be considered to be “the representations”. There was also a dispute before the Tribunal with respect to the materiality of Cineplex’s representations, although it did not vigorously pursue these arguments in this Court.

[19] As noted earlier, the Tribunal concluded that the way movie ticket prices were displayed on Cineplex’s website and app was false or misleading in a material respect, amounting to reviewable conduct contrary to section 74.01(1)(a) of the *Competition Act*.

[20] The Tribunal further found that Cineplex had engaged in a second form of reviewable conduct, namely “drip pricing”, contrary to section 74.01(1.1) of the Act. This provides that “[f]or greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation”. The section creates an exception for matters such as the addition of sales taxes to purchase prices, stating that drip pricing will not occur where “the obligatory charges or fees represent only an amount

imposed on a purchaser of the product referred to in subsection (1) by or under an Act of Parliament or the legislature of a province”.

[21] Also relevant to this appeal is section 74.1(1) of the *Competition Act*, which deals with the remedial authority of the Competition Tribunal. This section provides that where the Tribunal determines that a person is engaging in or has engaged in reviewable conduct under the deceptive marketing practices provisions of the *Competition Act*, the Tribunal may, amongst other things, order the person not to engage in the conduct or substantially similar reviewable conduct for a period of up to 10 years.

[22] The Tribunal may also order a corporation to pay an administrative monetary penalty, in any manner that the Tribunal specifies, in an amount not to exceed the greater of \$10,000,000.00 (and, for each subsequent order, \$15,000,000.00) and three times the value of the benefit derived from the deceptive conduct. If that latter amount cannot be reasonably determined, section 74.1(1) authorizes the Tribunal to order an administrative monetary penalty of up to 3% of the corporation’s annual worldwide gross revenues.

[23] The full text of the relevant statutory provisions is attached as Appendix 1 to this decision.

III. The Standard of Review

[24] Subsection 13(1) of the *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), provides that an appeal lies to this Court from a Competition Tribunal decision or order “as if it were a judgment of the Federal Court”. The parties are thus agreed that the normal appellate standard of review applies to the issues raised by this appeal. That is, correctness for questions of law or questions of mixed fact and law where there is an extricable question of law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[25] *Housen* further provides that questions of fact and questions of mixed fact and law where no question of law is extricable are reviewable on the palpable and overriding error standard of review. An error is palpable when it is plainly seen and overriding when it affects the result: *Canadian Imperial Bank of Commerce v. Canada*, 2021 FCA 10 at para. 55. Indeed, as this Court stated in *Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2023 FCA 16, “on factually suffused questions of mixed fact and law, we defer to the [Competition] Tribunal, in fact quite significantly”. To interfere in such findings, this Court must find a palpable and overriding error on the part of the Tribunal that goes “to the very core of the outcome of the case”: at para. 7.

[26] That said, this Court has cautioned against grounds of appeal being “expressed in an artful way to make them appear to raise legal questions when they do not”: *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140 at para. 51; *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at para. 29. As will be explained

further on in these reasons, the issues in this appeal relate primarily to the Tribunal's fact-specific application of the law to Cineplex's conduct, matters that merit significant deference.

[27] Finally, subsection 13(2) of the *Competition Tribunal Act* provides that a party may only appeal from a decision or order of the Competition Tribunal on a question of fact with leave of this Court. Cineplex has not sought leave to appeal any of the factual findings made by the Tribunal, characterizing all the issues that it raises in this appeal as involving errors of law. Consequently, Cineplex contends that the correctness standard should apply to all the matters at issue in this appeal. The accuracy of Cineplex's characterization of the issues will be addressed as each issue is considered.

IV. The Tribunal's Assessment of the General Impression Conveyed by, and the Literal Meaning of the Representations made by Cineplex

[28] Cineplex asserts that the Tribunal erred in law in its assessment of the characteristics of the consumer to whom the representations were directed. The Tribunal further erred in law, Cineplex says, in confining its analysis to the pricing information that is displayed at the top of the tickets page, without any scrolling down the page on the part of the customer (the "above the fold" issue).

[29] Each of these arguments will be addressed below.

A. *The Characteristics of the Consumer to Whom the Representation was Directed*

[30] The Tribunal noted the Commissioner's submission that the attributes of a consumer looking at an advertisement are a fundamental issue in any misrepresentation case: Tribunal reasons at para. 245.

[31] The Tribunal thus spent considerable time discussing the characteristics of the consumer to whom Cineplex's representations were directed. It concluded that it should not adopt the "credulous and inexperienced" consumer standard espoused in *Richard v. Time Inc.*, 2012 SCC 8 (a case brought under provincial consumer protection legislation) as the legal standard to be used for the general impression test under section 74.01 and subsection 74.03(5) of the *Competition Act*. In coming to this conclusion, the Tribunal held that the legal standard should be appropriate in light of the objectives of the *Competition Act* and the purposes of the deceptive marketing provisions in it: Tribunal reasons at para. 278.

[32] This led the Tribunal to conclude that "[t]he legal perspective for the general impression test should remain that of the ordinary consumer of the product or service, which may be refined according to the nature of the representation at issue, the characteristics of the members of the public to whom the representation was made, directed or targeted, the nature of the product or service involved, and the particular circumstances of the case": Tribunal reasons at para. 278.

[33] While the characteristics of the consumer to whom the representation was directed was a matter of some debate before the Tribunal, the issue was narrowed significantly before us, with

Cineplex's submissions focusing primarily on whether the average consumer would be tech-savvy enough to know that they should scroll to the bottom of the page to see additional pricing information.

[34] Cineplex notes that in addressing the attributes, characteristics and skill level of consumers using its website and app, the Tribunal referred to past cases which had described the "ordinary citizen" as "possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal...": Tribunal reasons at para. 251, citing *Sears Canada*, above at paras. 325-327; *Commissioner of Competition v. Gestion Lebski inc.*, 2006 Comp. Trib. 32 at paras. 153, 191.

[35] Cineplex submits that in the modern digital environment, the "ordinary citizen" ought to be understood as having some experience with the internet, and to understand the concept of scrolling through a website or app. This is particularly true, Cineplex says, for the consumers in this case, as customers will have had to navigate several webpages on the cineplex.com website prior to arriving at the tickets page, and that these earlier webpages would require some optional scrolling, for example, to identify and select the preferred movie title and theatre location.

[36] Cineplex contends that its argument does not offend the principle described in the case law of the ordinary citizen "lacking any relevant expertise". While acknowledging that the ordinary citizen may not have expertise in e-commerce, Cineplex submits that treating the ordinary citizen as having no experience at all in navigating websites or apps is inappropriate in the *Competition Act* context. According to Cineplex, the Tribunal's failure to ascribe some basic

understanding of websites and apps to the ordinary citizen (specifically including knowledge of and familiarity with the scrolling function), led it to err in its consideration of the general impression created by its website and app.

[37] I am not persuaded that the Tribunal erred in this regard. As I read the Tribunal's decision, and as will be further explained in the next section of these reasons, its concern was not that the ordinary consumer would not know how to scroll through a website or app. Rather, the Tribunal found as a fact that the design of Cineplex's digital platforms was such that there would be no obvious reason or incentive for the consumer to scroll down beyond the pricing information that would initially appear on the consumer's screen displaying the ticket prices (identified by the Tribunal at para. 296 as "Tickets Page A").

[38] This takes us to what became known before the Tribunal as the "above the fold" question.

B. *The "Above the Fold" Question*

[39] There was a debate before the Tribunal as to what information should be considered to be "the representation" for the purpose of the Tribunal's analysis. That is, should the Tribunal examine only the pricing information that would appear on a consumer's screen when the consumer first arrived at the tickets page, without scrolling down, as the Commissioner contends? Or should the Tribunal have regard to the entire body of the webpage, including the text that the consumer would have to scroll down to reach, as Cineplex would have it?

[40] Using language adopted from the newspaper business, the information appearing above the scroll point on a webpage is described as information appearing “above the fold”. Information only seen by scrolling down through the webpage is described as information appearing “below the fold”.

[41] This issue is important, as most of the information regarding the Online Booking Fee only appears “below the fold”.

[42] Appendices 2, 3 and 4 of these reasons contain screenshots from video evidence presented at trial. The selected images show what a consumer would see after they have logged in to complete their purchase, both before they add tickets to their cart (Tickets Page A) and afterwards (Tickets Page B). Appendix 2 illustrates this process on the Cineplex website as accessed through a computer. Appendix 3 shows the website purchase process as seen through a mobile phone. Appendix 4 demonstrates the purchase process through the mobile app.

(1) The Legal Argument

[43] Cineplex argues that the Tribunal erred in law by artificially severing the pricing representations contained on its website and app into two separate parts: the information appearing above the fold and the information set out below the fold.

[44] That is, Cineplex submits that the Tribunal erred by limiting its analysis to the pricing representations that appear above the fold, rather than examining the entire Tickets Page in

context, including the “below the fold” disclosures and the dynamic price representations on the “floating ribbon” that appears at the bottom of the consumers’ screens. Because of the Tribunal’s threshold decision to focus exclusively on content that appeared above the fold, Cineplex submits that its analysis of the pricing information on the Cineplex website and app was “conducted improperly in an alternate reality”.

[45] Cineplex acknowledges that courts should not review representations “like a commercial contract”, nor should they “go [...] over every detail to make sure they understand all its subtleties”: citing *Richard*, above at para. 56. That said, it is an error of law to entirely disregard certain parts of a representation, and “[t]he entire mosaic should be viewed rather than each tile separately”: *The Queen v. Viceroy Construction Co. Ltd.*, 1975 CanLII 606 (ONCA) at p. 7, citing *FTC v. Sterling Drug, Inc.*, (1963), 317 F.2d 669 at p. 674.

[46] In support of its argument, Cineplex points to a long line of false and misleading advertising cases that have consistently held that a disclaimer is an “integral part” of an advertisement and must be considered in the general impression analysis.

[47] Cineplex notes that the Supreme Court has held that in assessing whether a representation is false or misleading, the analysis “must take account of the entire advertisement rather than merely portions of its content”: *Zanin v. Ooma, Inc.*, 2025 FC 51 at para. 467, citing *Richard*, above at para. 56. See also *R. v. International Vacations Ltd.*, 1980 CanLII 1828 (ONCA) at pp. 8-9; *R. v. Pepsi-Cola Canada Ltd.*, 1991 CarswellOnt 680 (Ont. Gen. Div.), 40 C.P.R. (3d) 242

at paras. 5, 16. This includes having regard to parts of the document that are not immediately visible when evaluating the literal meaning and general impression of a representation.

[48] According to Cineplex, expecting customers to scroll to the bottom of a webpage is no different than requiring them to look to the fine print at the bottom of a newspaper advertisement (as in *International Vacations*, above), to turn to the second page of a representation (as in *Richard*, above), or to turn over a package of potato chips to read the disclaimer printed in small print on the back of the package (as in *Pepsi-Cola*, above).

[49] Cineplex also notes that in refusing to grant an injunction for an alleged violation of section 52 of the *Competition Act*, the British Columbia Court of Appeal considered the fact that a television advertisement contained a website address that contained further information: *Bell Mobility Inc. v. Telus Communications Company*, 2006 BCCA 578 at paras. 27-28. Similarly, in a passing off case, the British Columbia Supreme Court concluded that a “difficult to read” disclaimer displayed for seven seconds on a television advertisement was sufficient to dispel any consumer confusion: *National Hockey League v. Pepsi-Cola Canada Ltd.*, 1992 CanLII 2324 (BCSC) at pp. 27-29.

[50] Cineplex contends that having regard to the entirety of a representation is especially important in drip pricing cases that increasingly turn on representations made in dynamic digital environments. As noted earlier, drip pricing occurs when a vendor advertises one price for a good or service but later reveals other charges as shoppers go through the purchasing process:

citing *Zanin*, above at para. 433; *Gomel v. Ticketmaster Canada LLP*, 2019 BCSC 2178 at para. 15; *Abihsira c. StubHub*, 2020 QCCS 139, at para. 21.

[51] Cineplex says that drip pricing prohibitions are not intended to police price representations that appear “in a one-time splash on a single page”: *Zanin*, above at para. 433. According to Cineplex, the Tribunal impermissibly read the dynamic Tickets Page as being comprised of two static representations—those appearing above the fold and those below. In so doing, the Tribunal artificially manufactured a dripping effect even though the Tickets Page is not a static representation but is, rather, a dynamic webpage.

[52] It is important to start by observing that much of the jurisprudence that Cineplex relies on in support of its contention that the entire webpage must be considered in determining whether a representation is false or misleading or amounts to drip pricing, relates to representations made in the context of print media or packaging and does not involve dynamic, web-based representations.

[53] For example, *Richard* involved a document described as a two-page “Official Sweepstakes Notification” that took the form of a letter supposedly signed by the manager responsible for the sweepstakes. The back side of the letter informed consumers (including Mr. Richard) that they would qualify for a \$100,000.00 bonus prize if they validated their entry within five days. The mailing also contained a coupon and a return envelope on which the official rules of the sweepstakes appeared in small print. The question before the Supreme Court was whether, by mailing a document entitled “Official Sweepstakes Notification”, the

respondents had engaged in a practice prohibited by the *Consumer Protection Act*, R.S.Q., c. P-40.1.

[54] It was in this context that the Supreme Court held that the analysis must consider the entire advertisement and not just portions of its content: *Richard*, above at para. 56. In *Richard*, this included both pages of the letter, as well as the coupon and the return envelope.

[55] Similarly, the representation at issue in *Zanin*, above, involved an advertisement published in a magazine produced by Costco, whereas the representation at issue in *International Vacations* appeared in a newspaper advertisement and the representation at issue in *Pepsi-Cola* was contained on a package of potato chips.

[56] The question for the Tribunal in this case was whether this jurisprudence was equally applicable to representations made in dynamic, interactive media such as websites and mobile apps.

[57] In submitting that cases arising in the internet context are distinguishable from those arising in print media, the Commissioner referred to the decision of the Ontario Superior Court of Justice in *Bell Canada v. Cogeco Cable Canada*, 2016 ONSC 6044. In *Cogeco*, Bell Canada sought an interlocutory injunction against Cogeco in connection with an advertising campaign that Cogeco had launched on the internet, which contained two allegedly false and/or misleading representations.

[58] In issuing an interlocutory injunction restraining Cogeco from making one of the representations in issue, the Court observed that the case raised a question as to what constitutes “looking at the advertisement as a whole” in the internet context. While it was not necessary to finally resolve this question for the purpose of the motion, the Court stated that it did not accept Cogeco’s submission that it should “proceed on the basis that the entirety of what a consumer can scroll down to or link to should be considered”: both quotes from *Cogeco*, above at para. 26.

[59] The Court observed that Cogeco’s homepage consisted of “five pages of text, graphics and hyperlinks and two pages of terms and conditions in the seemingly inevitable fine print”: at para. 26. The Court had some difficulty accepting Cogeco’s submission that the consumer would or should view all of this material, observing that “[t]his sort of Internet homepage is not comparable to an ad published within a single page of a print newspaper or magazine”, citing *Richard*, above, as an example of this latter type of representation: *Cogeco*, above at para. 26.

[60] Thus, while not finally deciding the question, the Court nevertheless found in *Cogeco* that it was at least arguable that what the consumer would see on a single screen should be considered in deciding whether a representation is false or misleading in a material respect: at para. 27.

[61] I will return to this issue once I address the evidence that was before the Tribunal regarding the operation of the Cineplex website and app, and the findings of fact that the Tribunal made in this regard.

(2) The Fact and Video Evidence

[62] In considering what information should be considered to be “the representation” for the purpose of its analysis in this case, the Tribunal had regard to the evidence of fact witnesses, including videos they provided depicting the operation of Cineplex’s website, and to the expert evidence adduced by the parties as to how the website functioned and how it would be perceived by consumers.

[63] Insofar as the fact witnesses were concerned, the Tribunal focused primarily on the evidence of Adam Zimmerman and Daniel McGrath. Mr. Zimmerman is a senior competition law officer who conducts investigations at the Competition Bureau. He provided evidence with respect to the operation of Cineplex’s website and app. His evidence included nine video recordings that depicted his movement through the cineplex.com website and app on a mobile phone and on a computer.

[64] Mr. McGrath serves as the Chief Operating Officer of Cineplex, and he oversaw the conceptualization, decision-making and implementation processes for the Online Booking Fee at issue in this proceeding. He also provided video evidence with respect to the working of the Cineplex website and app.

[65] The Tribunal preferred the evidence of Mr. Zimmerman to that of Mr. McGrath, finding that Mr. Zimmerman had provided careful and objective evidence in his witness statement, in the videos that were attached to his statement, and during his oral testimony. Mr. Zimmerman was,

moreover, straightforward and responsive to questions posed to him, leading the Tribunal to conclude that his evidence was both credible and reliable: Tribunal reasons at para. 18.

[66] The Tribunal found that Mr. McGrath “was appropriately diligent” in many of his responses, and that he had acknowledged that his witness statement did not disclose certain facts about the preparation of his video evidence, including the fact that he had not prepared the video himself.

[67] That said, the Tribunal also found that there were several occasions in cross-examination when Mr. McGrath was reluctant to acknowledge certain things, or did not respond to the question posed. Rather, Mr. McGrath made arguments or counterpoints back to counsel, and in one instance, counsel had to ask him a question several times before getting a direct and responsive answer. The Tribunal further found that the cross-examination of Mr. McGrath revealed that some pertinent facts had been left out of his witness statement, and that “some aspects of his witness statement amounted to a restatement of Cineplex’s corporate position in this proceeding”. As a result of these concerns, the Tribunal found that it had to approach Mr. McGrath’s evidence with some caution and care: Tribunal reasons at paras. 18–21.

[68] The Tribunal’s credibility findings are factual in nature and would thus be subject to review on the palpable and overriding error standard. However, as noted earlier, subsection 13(2) of the *Competition Tribunal Act* requires that a party seek leave from this Court to appeal factual findings made by the Competition Tribunal. Cineplex did not seek leave to appeal these (or any

other) factual findings made by the Tribunal in this case, nor did it argue that there were any errors in the Tribunal's credibility analysis.

[69] Insofar as the substance of the video evidence was concerned, the Tribunal once again preferred the video evidence adduced by the Commissioner to that adduced by Cineplex.

[70] The voiceover to Mr. Zimmerman's videos described the settings he used and the steps he took as he navigated through both the Cineplex website and the app. In some videos, Mr. Zimmerman did not scroll to the bottom of webpages, whereas in other videos he did scroll down, which demonstrated the contrast in what a customer would see in each scenario. The Tribunal found that the videos attached to Mr. Zimmerman's witness statement were "helpful and accurate in depicting what a user would see in the circumstances of each video": Tribunal reasons at para. 22.

[71] The Tribunal also provided detailed reasons as to why it found that the video evidence introduced by Cineplex through the evidence of Mr. McGrath was not reliable evidence of a consumer's experience visiting the Cineplex website: Tribunal reasons at para. 26.

(3) The Expert Evidence

[72] The video evidence discussed above provided a foundation for the expert evidence adduced by the parties. The Commissioner called two expert witnesses, Jay Eckert and Dr. Vicki Morwitz, and Cineplex called one, Dr. On Amir.

[73] Mr. Eckert was qualified as an expert in website design and development, with his core areas of expertise including website strategy development, user experience design, conversion rate optimization and user interface design (user experience and user interface) for software on computerized devices, including websites and mobile applications.

[74] The Tribunal found that Mr. Eckert's evidence regarding Cineplex's website design and user experience was relevant and necessary, that he testified in a straightforward and helpful manner, and that his testimony was responsive to questions, careful and candid. Consequently, the Tribunal had no concerns about Mr. Eckert's integrity or his ability to perform the professional duty he owed to the Tribunal. The Tribunal concluded that Mr. Eckert's expert opinion evidence was admissible, and that he was a credible witness: Tribunal reasons at paras. 37–47.

[75] The Commissioner also called Dr. Vicki Morwitz, who was qualified as an expert in marketing, consumer psychology and behavioural economics, with specialized knowledge of the consumer behavioural aspects of pricing, including drip and partitioned pricing. Her evidence addressed matters such as how the manner of presenting pricing information by merchants affects consumers, and how drip pricing (or similar pricing practices) affects consumers in terms of their perception of the price to be paid for a given product, and their behaviour.

[76] Dr. Morwitz's evidence also explained concepts such as "partitioned pricing" and "shrouded attributes", and she addressed the impact that Cineplex's representations with respect

to the price of movie tickets on its website and app could be expected to have on consumers' perception of the price to be paid for movie tickets, and their purchasing decisions.

[77] The Tribunal found that Dr. Morwitz's testimony was candid and that she "was a very good and credible witness": Tribunal reasons at para. 93.

[78] Cineplex called Dr. On Amir, who was qualified as an expert in marketing, consumer behaviour and psychology, business analytics and market research and surveys. While the Tribunal was prepared to consider Dr. Amir's evidence inasmuch as it concerned the application of marketing principles to the Cineplex website, it found that his opinions and comments on website design, website design interface or user design interface issues, as well as his opinion regarding whether the Cineplex website or app reflects best practices in those areas, went beyond the scope of his core expertise. The Tribunal determined that Dr. Amir had much less expertise and experience in these areas, compared to that of Mr. Eckert, and that he was thus less able to assist the Tribunal with these matters, with the result that Mr. Eckert's evidence was to be preferred: Tribunal reasons at para. 106.

[79] The Tribunal further found that Dr. Amir's reports and his testimony were less objective and less helpful than those of Dr. Morwitz and Mr. Eckert, and that his reports contained material content that was more argument than objective expert opinion, in both substance and tone. From this, the Tribunal found that less weight should be attributed to Dr. Amir's evidence: Tribunal reasons at paras. 108–109.

[80] Once again, the Tribunal's findings as to the relative weight to be attributed to the evidence of the expert witnesses are factual in nature and would have been subject to review on the palpable and overriding error standard, had they been in issue on this appeal. Cineplex did not, however, seek leave to appeal these findings, nor did it argue that there were any errors in the Tribunal's assessment of the expert evidence.

(4) The Tribunal's Findings with Respect to the "Above the Fold" Issue

[81] As noted earlier, Cineplex submits that the Tribunal erred in law by limiting its analysis of the Cineplex website and app to the pricing representations that appear above the fold, rather than examining the entire Tickets Page in context, including the "below the fold" disclosures and the dynamic price representations on the "floating ribbon" appearing at the bottom of the consumers' screens.

[82] I do not accept that the Tribunal erred in this regard. As will be seen from a review of the Tribunal's reasons, its conclusion as to what information should be considered to be within the four corners of "the representation" for the purpose of its analysis is grounded in the factual findings that it made with respect to the operation of the Cineplex website and app.

[83] As previously noted, the videos provided by Mr. Zimmerman simulated the ticket purchase process on the Cineplex website and app, with and without the customer scrolling down to the bottom of each webpage.

[84] Mr. Eckert's evidence (which was accepted by the Tribunal) was that the website configuration used by Cineplex was designed to quickly move the customer from the Tickets Page to the next webpage (which deals with seat selection) and to then advance the customer to the next step in the "sales funnel": Tribunal reasons at para. 182.

[85] Mr. Eckert explained that like the display of newspapers on a newsstand, the concept of a "fold" on a webpage also applies to digital marketing and website design. Obviously, webpages do not fold the way newspapers do, but in the digital context, the "fold line" refers to the point at the bottom edge of the screen where the web browser cuts off the page content, requiring users to scroll down the webpage to view the rest of the page content. Everything after that scroll point is considered to be "below the fold": Tribunal reasons at para. 172.

[86] As I previously observed, the location of pricing information on the Tickets Page on the Cineplex website and app is important, as most of the information regarding the Online Booking Fee only appears "below the fold".

[87] The one exception to this appears on Tickets Page A as viewed from a computer (see Appendix 2) or a mobile device (see Appendix 3), where Cineplex advertises the benefits of joining the CineClub, one such benefit being the waiving of any Online Booking Fee. However, the amount of such Fee is not disclosed on the page. At this stage, the amount of the Online Booking Fee is also not displayed on the floating ribbon appearing at the bottom of the customer's screen, and the subtotal still reads "CA\$0.00" because no ticket has yet been selected.

[88] However, the Tribunal rejected Cineplex's claim that the mention of an Online Booking Fee appearing in the CineClub advertisement at the top right corner of Tickets Page A should alert the consumer to the fact that such a Fee will be charged. The Tribunal accepted that an ordinary consumer would likely notice the CineClub advertisement, and that some consumers might pause long enough to notice the third bullet point in the list of CineClub benefits, which refers to there being no Online Booking Fees for CineClub members. The Tribunal nevertheless observed that the ordinary consumer "would see no information about the quantum of the Online Booking Fee or how it affects movie ticket prices for the vast majority of moviegoers". Indeed, the Tribunal found that the advertisement provided "only a small morsel of information about the Online Booking Fee": Tribunal reasons at para. 304.

[89] The Tribunal accepted Mr. Eckert's evidence that the concept of the "fold" is important in website design, as scrolling requires an extra action on the part of customers to access content. Regardless of what screen size or type of device is used, online marketing best practices suggest that "anything of primary importance is placed in that first viewable area of the web page before the user has to scroll down to reveal more information". Mr. Eckert further cited research finding there to be a dramatic drop-off in user attention at the position of the page fold, with information immediately above the fold being viewed 102% more often than the information immediately below it: Tribunal reasons at para. 173.

[90] Cineplex argued that the placement of the "fold" is not consistent from computer to computer, or from smartphone to smartphone, and that due to varying and evolving devices, screen sizes and resolutions, vendors may not know which content will appear above the fold and

which will appear below. Moreover, customers may see information that appears partially above the fold and that this may encourage them to scroll further down the page.

[91] The Tribunal did not accept Cineplex's argument, relying instead on the expert evidence of Mr. Eckert, who testified with respect to standard screen dimensions and resolutions, based on industry-wide accepted screen resolution metrics. Mr. Eckert stated that website designers note that 69.33% of all users of the internet use a maximum screen resolution with a fixed height of up to 1,080 pixels or smaller, while 2.97% of web users have a maximum resolution of 1,440 pixels or smaller (with the remaining 28.13% being undetermined). The placement of information regarding the Online Booking Fee on the Cineplex Tickets Page is well beyond what common web browsers can display above the page fold, positioned 1,330 pixels below the top of the browser: Tribunal reasons at para. 186.

[92] Based on the same common screen resolution data, Mr. Eckert demonstrated that over 69% of viewers using computers would not readily see the Online Booking Fee information located below the fold, near the bottom of the Tickets Page on cineplex.com. The Online Booking Fee information is also beyond the maximum viewable area of contemporary mobile phones, meaning that users of the mobile version of the website or the app would not see it without scrolling down. The Tribunal further noted that one of Dr. Amir's screen captures of the app showed that what he saw on the Tickets Page was consistent with Mr. Eckert's evidence: Tribunal reasons at para. 187.

[93] The Tribunal found that upon arriving at the home page on the Cineplex website or app, the customer is presented with information about movie titles. Customers may then navigate through webpages that provide information about the films currently being shown and as well as those that are upcoming, theatre locations, and other information such as the date and time that a film will be shown—all before reaching the Tickets Page: Tribunal reasons at para. 133.

[94] To purchase a movie ticket on Cineplex’s website or app, a customer must have a “Cineplex Connect Account”. This account is created by the user by providing their name, email address and phone number to Cineplex. Customers can only see ticket prices once they have logged in to their Cineplex Connect Account and have entered an authentication code that is either texted to their mobile phone or is shared by automated voice message on their phone. Once they enter the authentication code, customers can see the ticket prices that are displayed on Tickets Page A, on both the website and the app. A “floating ribbon” will appear at the bottom of the screen once the consumer signs in. The ribbon displays a countdown timer, a subtotal for the selected tickets (which will read CA\$0.00 until the customer selects the number and category of tickets being purchased), and a button marked “PROCEED”.

[95] There are different categories of ticket prices available, such as a regular adult price (or General Admission price), as well as reduced prices for senior citizens and children. When a customer adds one or more tickets to their online shopping cart, the number to the right of the word “Subtotal” on the floating ribbon changes from “CA\$0.00” to display an amount equal to the sum of the price of the ticket(s) plus any applicable Online Booking Fees. This display—

what the consumer sees once the tickets have been added to their cart—is referred to by the Tribunal as Tickets Page B.

[96] The floating ribbon remains visible to customers at the bottom of their screens at all times on Tickets Page A and B, regardless of whether they scroll up or down on the page.

[97] The Tribunal noted that the subtotal depicted on the floating ribbon on Tickets Page B does not break out the aggregate cost of the tickets and the aggregate cost of the Online Booking Fees. Thus, consumers would not know that the subtotal represents the sum of the price of the ticket or tickets selected, together with the applicable Online Booking Fees. They may only figure this out if they took time to perform the necessary arithmetic and compared the subtotal provided on the ribbon at the bottom of Tickets Page B with the advertised price of tickets selected: Tribunal reasons at paras. 151–153.

[98] This arithmetic is not simple: indeed, Mr. McGrath evidently struggled at the hearing to determine whether the Online Booking Fee had been included in the subtotal displayed on a sample webpage: Tribunal reasons at para. 294.

[99] The Tribunal found that the factual evidence before it led to the conclusion that “the ticket price representations on the Cineplex website and the App were false or misleading”: Tribunal reasons at para. 416. The Tribunal further found that consumers had neither the need nor any incentive to scroll down to the bottom of the Tickets Page (where most of the

information about the Online Booking Fee may be found), and that the design of the website and app actually discouraged such scrolling: Tribunal reasons at paras. 157, 182 and 416.

[100] Indeed, the Tribunal found that “Cineplex’s website was designed to dissuade (and, on a balance of probabilities, likely had the effect of dissuading) the ordinary consumer from scrolling down”. The Tribunal went on to find that the website “enables and encourages the ordinary consumer to click the PROCEED button on the floating ribbon and to continue with the purchase of movie tickets without scrolling down”. The result of this is that consumers would not see the information about Online Booking Fees located “below the fold”, once the tickets have been selected on Tickets Page A: Tribunal reasons at para. 298.

[101] In coming to this conclusion, the Tribunal found that the floating ribbon constitutes a “false floor”, creating the illusion that the webpage displayed on the screen is complete: Tribunal reasons at para. 134. The Tribunal further accepted the evidence of Mr. Eckert, who testified that this “false floor” encourages customers to proceed without scrolling as there is no apparent need for them to do so because they have all the information needed to proceed forward, presented above the fold: Tribunal reasons at para. 183.

[102] The Tribunal also found that there were several important features of the website process leading to the Tickets Page, and ultimately to the ticket purchase by a consumer, which may be likened to what Dr. Amir described as a “consumer purchase funnel”.

[103] The experts referred to the “PROCEED” button appearing on the floating ribbon as being a “call to action” prompt button. When the primary “call to action” prompt button is included “above the fold”, it encourages customers to convert (that is, to proceed with the transaction) without scrolling down the webpage any further. Indeed, the Tribunal found that the placement of the PROCEED button on the floating ribbon at the bottom of the user’s screen “discourages scrolling as users can select their tickets and convert without having to scroll down”: Tribunal reasons at para. 182.

[104] The Tribunal further found that this effect was enhanced by the presence of a countdown timer on the floating ribbon, as it suggests to the ordinary consumer that there is some degree of urgency or the necessity to proceed swiftly with the transaction: Tribunal reasons at para. 293(c).

[105] Importantly, the Tribunal accepted Dr. Morwitz’s expert opinion as a basis for its finding that Cineplex’s price representations were false or misleading under paragraph 74.01(1)(a) of the *Competition Act*. Dr. Morwitz testified that the Online Booking Fee is a “shrouded attribute” as described in the academic literature. That is, it is a fee separated from the price of the ticket and presented sequentially (i.e., the ticket price is presented first, and the fee is added later): Tribunal reasons at para. 406.

[106] Amongst other things contributing to the “shrouding” or obfuscation of the Online Booking Fee, Dr. Morwitz pointed to the number of steps that a customer must take to find information about the per-ticket Online Booking Fee as a result of the absence of any reference to the Fee next to the displayed ticket price, and the placement of information about the Online

Booking Fee at the bottom of the Tickets Page (below the fold). Dr. Morwitz also referred to the need to do the necessary arithmetic to figure out that the Online Booking Fee was included in the subtotal reflected on the floating ribbon, as well as the size of the font used to display it and the need to click the blue encircled “i” at the bottom of the Tickets Page to get information about the added Fee.

[107] The Tribunal also accepted Dr. Morwitz’s description of the effect on consumers of separating different elements of the overall price to be paid. In particular, she stated that the way in which the ticket prices and the Online Booking Fee were presented on the Cineplex website and the app lowers consumers’ perceptions of the total price of the tickets and affects their buying behaviour by leading them to underestimate the total price of purchasing the tickets: Tribunal reasons at para. 407.

[108] It is also noteworthy that Dr. Amir testified that websites can be designed to require consumers to scroll to the bottom of a webpage before clicking a button to advance to the next page. However, people find this to be inconvenient, and that it is more convenient to have the button allowing them to proceed available at any point, as it currently is on the Cineplex website: Tribunal reasons at para. 170.

[109] This led the Tribunal to find that the design of the Cineplex website (which does not require a consumer to scroll down and therefore see all pricing information prior to proceeding with the purchase) was a deliberate design choice. Cineplex could have required consumers to scroll down to the bottom of the webpage (where the information about the Online Booking Fee

is located) before they could click on the PROCEED button if it had wanted to do so: Tribunal reasons at para. 170.

[110] The Tribunal further accepted Dr. Amir's evidence that customers making ticket purchases on mobile phones can go through the entire online purchase process without ever seeing information with respect to the Online Booking Fee and without realizing that they ultimately paid more than the originally represented ticket price, plus applicable taxes: Tribunal reasons at paras. 169, 403.

[111] The Tribunal observed that its analysis was not, however, based on the non-disclosure of the Online Booking Fee, but on what it calls "two related instances of inaccurate and misleading information displayed on the Tickets Page". It found that the initial display of ticket prices was inaccurate or deceptive on its face, and that the Tickets Page remained misleading, even after the subtotal was displayed on the floating ribbon. This was "because the subtotal appears inaccurate when viewed with the per-ticket displayed prices, without additional information [being provided as to] the quantum per ticket of the Online Booking Fee": Tribunal reasons at para. 404.

[112] The Tribunal noted that Tickets Page A does not, on its face, "distinguish between at-theatre and online ticket prices and [it] does not state expressly either that the prices are 'at-theatre' prices or 'online' prices": Tribunal reasons at para. 284. The Tribunal further determined that Tickets Page A "does not otherwise draw the consumer's attention to the fact that prices may vary depending on the medium used for the purchase": Tribunal reasons at para. 284. The

Tribunal also found that “the display of the subtotal on the floating ribbon (which incorporates any applicable Online Booking Fee) does not rescue the situation”: Tribunal reasons at para. 419.

[113] The Tribunal concluded that the inaccuracy of the represented ticket prices on Tickets Page A and “the deceptive and unexplained gap between the sum of the represented per-ticket prices and the represented subtotal on Tickets Page (B) [were] both related to Cineplex’s omission of information about the Online Booking Fee on the Tickets Page (both above the fold and at all)”: Tribunal reasons at para. 404.

[114] The Tribunal thus carefully considered the entirety of the Cineplex tickets webpage and app, in detail, including information appearing both above and below the fold. However, its assessment of the video and expert evidence with respect to the operation of the website and app led it to conclude that consumers would likely not notice or pay attention to information appearing below the fold. As a result, the Tribunal concluded that the price representations relating to the price for individual tickets for movies (General Admission, Seniors or Children) that should be addressed in determining whether Cineplex has made false or misleading representations in a material respect or has engaged in drip pricing were those set out on Tickets Page A: Tribunal reasons at paras. 239–240.

[115] That is, the Tribunal determined that, “for the purposes of the general impression of the ordinary consumer, the information within the ‘four corners’ of the advertisement is what the ordinary citizen sees on the Tickets Page, above the fold and without scrolling”: at para. 299.

[116] Absent a palpable and overriding error, the Tribunal's findings must be granted deference by this Court.

[117] Cineplex has not identified any palpable or overriding errors in the Tribunal's analysis of the evidence summarized above. Rather, it takes issue with the Tribunal's approach to the general impression analysis, which was to consider how the dynamic and interactive nature of Cineplex's website and mobile app inform what a consumer sees and understands to be the price representation. In Cineplex's view, this approach de-emphasizes the information about the Online Booking Fee below the fold, resulting in a misapplication of the jurisprudence that requires courts to look at the "entire representation".

[118] The question, then, is whether the Tribunal erred in law in the methodology it used in assessing whether the pricing representations made by Cineplex were false or misleading.

(5) Conclusion with Respect to the "Above the Fold" Issue

[119] I understand the parties to agree that while there is jurisprudence dealing with representations made in print media as well as in radio and television advertisements, there is little jurisprudence directly addressing representations such as those displayed on the Cineplex website and app, apart from the *Cogeco* decision referenced earlier. That said, and as discussed above, the Tribunal made a series of factual findings with respect to the design and operation of the Cineplex website and app that support its determination that consumers are unlikely to see the information about the Online Booking Fee below the fold.

[120] These findings include the fact that Cineplex has control over its website and each of its webpages, including the information that is presented on each page, the order in which it is presented, the flow as the customer navigates through the website, the design of each page, and what is presented above and below the fold: Tribunal reasons at para. 293(a).

[121] The Tribunal further found that as a commercial website, cineplex.com is specifically designed to operate as a “funnel”, with objectives that include assisting users in identifying movies of interest and then converting them into customers by purchasing one or more tickets. The website was also designed to facilitate a user’s easy and speedy movement through it and to encourage the user’s conversion into a ticketholder: Tribunal reasons at para. 293(b).

[122] In addition, the Tribunal found that the presence of a countdown clock on the floating ribbon suggests to the ordinary consumer that there is some degree of urgency or the necessity to proceed swiftly with the transaction, and that a customer who purchases tickets on the Cineplex website spends about three minutes in total on the site: Tribunal reasons at paras. 293(c) and (d). The speed at which the transactions proceed is enhanced by the relatively small amount of money involved in purchasing theatre tickets: Tribunal reasons at para. 293(e).

[123] Finally, the Tribunal found that Cineplex has made it difficult for consumers to find or process information about the Online Booking Fee on its website and app. That is, the website and app were specifically designed to “shroud” or obfuscate information with respect the Online Booking Fee by placing that information “below the fold”, where the customer would be unlikely to see it: Tribunal reasons at paras. 170, 406.

[124] There is no question that the application of precedent is “a foundational principle of the common law”: *Janssen Inc. v. Canada (Attorney General)*, 2021 FCA 137 at para. 67, citing Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 168. That is, in accordance with the vertical convention of the doctrine of *stare decisis*, lower courts and administrative tribunals must follow decisions of higher courts.

[125] This is because “the values of certainty and consistency lie close to the heart of the orderly administration of justice in a system of law and government based on the rule of law”: *Miller v. Canada (Attorney General)*, 2002 FCA 370, at para. 8; see also *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.*, 2005 CanLII 21093, 76 O.R. (3d) 161 (ONCA) at para. 119.

[126] That said, the doctrine of vertical *stare decisis* “is not a straitjacket that condemns the law to stasis”: *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 44. There are exceptions to the doctrine of *stare decisis*, and it is indeed of the one of the strengths of the common law it can evolve as circumstances change.

[127] One exception to the doctrine of vertical *stare decisis* arises where cases are factually distinguishable one from the other. Indeed, it has been said that “[b]y the genius of distinguishing facts the courts escaped the folly of perpetuating to eternity, principles unsuited to modern circumstances”: Sharpe, above at 150, citing Brian Dickson, “The Role and Function of Judges” (1980) 14 L. Soc'y. Gaz. 138 at 182.

[128] Moreover, as the Supreme Court observed in *R. v. Nur*, 2015 SCC 15: “*stare decisis* does not prevent a court from looking at different circumstances and new evidence that was not considered in the preceding case”: at para. 71.

[129] The Tribunal made extensive factual findings with respect to the design and operation of the Cineplex website and app that justified its conclusion that information appearing “below the fold” was hidden from consumers. This was the product of features that were deliberately designed by Cineplex to funnel consumers quickly towards the completion of the ticket purchase. These factual findings provided a clear and logical basis for the Tribunal’s conclusion that for the purposes of the general impression analysis, the four corners of “the representation” should be confined to the pricing representations appearing on the Tickets Page above the fold and without scrolling, and that the earlier jurisprudence dealing with print media (and the importance of the entire representation) was not applicable in modern dynamic digital environments.

C. *The Tribunal’s Alleged Reliance on Expert Evidence to make Findings as to the General Impression Created by and the Literal Meaning of the Pricing Representation*

[130] It will be recalled that the general impression and literal meaning tests are a part of the analysis that the Tribunal must undertake in determining whether a representation constitutes “reviewable conduct” under section 74.01 of the *Competition Act*, whether it relates to the prohibition on false or misleading representations contained in section 74.01(1)(a) or the prohibition on drip pricing contained in section 74.01(1.1) of the Act. In both cases, the Tribunal must also be satisfied that the false or misleading representation in question “is false or misleading in a material respect”: section 74.01(1)(a). (my emphasis)

[131] The legal test for the literal meaning of a representation is uncontroversial. The Tribunal must look at what is said and interpret the words in their ordinary sense: Tribunal reasons at para. 242, citing *Richard*, above at para. 47.

[132] Insofar as the materiality of a misrepresentation is concerned, the Court observed in *Cogeco* that a representation will be “misleading in a material respect if an ordinary citizen would likely be influenced by that impression in deciding whether or not to purchase the product or service”: above at para. 24, citing *Canada (Commissioner of Competition) v. Yellow Page Marketing B.V.*, 2012 ONSC 927, at para. 34, aff’d 2013 ONCA 71. See also *Apotex Inc. v. Hoffman La-Roche Ltd* (2000), 195 D.L.R. (4th) 244 (Ont. CA), at para. 16. See also *Premier Career Management*, above at paras. 20 (quoting *Apotex*), 65, 80; *Sears Canada*, above at paras. 333-336 (a “material influence on the mind of a consumer”); *Gestion Lebski inc.*, above at paras. 154, 163, 288.

[133] The Tribunal found that the representations at issue in this case were material, and that their literal meaning was that tickets for a particular movie “at a selected time, date and theatre location ‘can be purchased at the per-ticket prices for General Admission, Seniors and Children as displayed on the Tickets Page’”: Tribunal reasons at para. 284.

[134] The Tribunal further found that on its face, the Tickets Page “does not distinguish between at-theatre and online ticket prices and does not state expressly either that the prices are “at-theatre” prices or “online” prices”. The Tribunal went on to observe that Tickets Page “does

not otherwise draw the consumer's attention to the fact that prices may vary depending on the medium used for the purchase": Tribunal reasons at para. 284.

[135] The test for reviewable conduct under section 74.01(1)(a) also requires a court to identify the general impression conveyed by the representation in question, and to then determine whether the representation is false or misleading in a material respect. Subsection 74.01(1.1) further provides that a representation will be false or misleading if it is not attainable due to fixed or obligatory charges or fees. The general impression test is thus an integral part of false and misleading advertising cases, under both the civil recourse provisions in section 74.01 of the *Competition Act*, and under the criminal provisions at section 52 of the Act.

[136] The Tribunal proceeded on the basis that sections 74.01(1)(a) and 74.01(1.1) both required it to first identify the general impression conveyed by the price representation, before proceeding to determine whether it was false or misleading in a material respect for the purpose of section 74.01(1)(a), or whether it was deemed to be false or misleading under section 74.01(1.1).

[137] According to Cineplex, the Tribunal erred in law by relying on expert evidence in analyzing the general impression created by, and the literal meaning of the pricing representations at issue in this case. Specifically, the Tribunal erred by using expert evidence to justify ignoring information displayed below the fold. This led it to artificially truncate the representation, with the result that it erroneously confined its general impression analysis to only a portion of the advertisement. As noted earlier, Cineplex says that this is contrary to the case

law’s explicit admonition that “when dealing with a written advertisement, courts must make an objective determination of the overall impression conveyed by the entire advertisement (rather than portions of it)”: *Zanin*, above at para. 467, citing *Richard*, above at para. 56. [my emphasis]

[138] In support of this argument, Cineplex relies on the decision of the British Columbia Court of Appeal in *Bell Mobility Inc.*, above. There, the Court stated that it is for the trial judge to determine the general impression conveyed to consumers “based only on the representations actually made in the advertisements”: at para. 16. [my emphasis]

[139] Cineplex also cites the decision of the Supreme Court of Nova Scotia in *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163. There, the Court held that extraneous evidence may be considered in determining if an advertisement is false or misleading in a material respect, but it may not be used “for the purpose of altering the general impression already arrived at”: at para. 39.

[140] Cineplex points to two paragraphs in the Tribunal’s decision where, it says, the Tribunal improperly relied on expert evidence, specifically that of Mr. Eckert, in ascertaining the general impression created by the pricing representations appearing on Tickets Page A.

[141] The first of the paragraphs identified by Cineplex is paragraph 281 of the Tribunal’s Reasons. This paragraph appears in a section of the reasons entitled “Methodology and Evidence for General Impression”: Tribunal reasons paras. 279–283. As the title suggests, this section

reviews the jurisprudence dealing with the methodology to be used by decision-makers in assessing the general impression created by representations.

[142] Cineplex takes issue with a single sentence in paragraph 281 of the Tribunal's reasons.

Paragraph 281 states:

I note that in some circumstances, the Tribunal has used expert evidence to analyze whether a representation is false or misleading in a material respect: see, e.g., *PVI International Inc.*, at paras 190–191, 213–219, 247–249; *Sears*, [above] at paras 203, 211, 341. I do not exclude the possibility that expert evidence may assist with general impression in some cases, as it may be used in determinations of trademark confusion under the *Trademarks Act*: see *Richard*, at para. 57 and the cases cited therein. However, there is no suggestion in the case law determining liability under section 74.01 (or section 52) of the *Competition Act* that expert evidence is necessary or required for these purposes. [my emphasis]

[143] Cineplex accepts that the first and third sentences in this paragraph represent correct statements of the law. It submits, however, that the Tribunal erred in law in stating that it “do[es] not exclude the possibility that expert evidence may assist with general impression in some cases, as it may be used in determinations of trademark confusion under the *Trademarks Act*”.

[144] I do not accept Cineplex's argument in this regard.

[145] I would first observe that in *Richard*, the Supreme Court stated that the test for general impression under the Quebec *Consumer Protection Act*, C.Q.L.R. c. P-40.1, is in fact “similar to the one that must be applied under the *Trade-marks Act*, R.S.C. 1985, c. T-13, to determine whether a trade-mark causes confusion”, citing *Veuve Clicquot Ponsardin v. Boutiques Cliquot*

Ltée, 2006 SCC 23, at para. 20 and *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27 at para. 41 as support for this proposition.

[146] Moreover, the Tribunal did not make a finding one way or another on this question. It simply stated that it did not exclude the possibility that expert evidence could be used in evaluating the general impression created by a representation made in a given case.

[147] More importantly, as will be explained below, the Tribunal did not use expert evidence as a substitute for a detailed analysis of the general impression conveyed by the representations. Rather, it appropriately used expert evidence to ascertain the likelihood that the information about the Online Booking Fee would be visible to the consumer, a factual finding that it was entitled to make.

[148] Cineplex has not identified any other alleged error in the Tribunal's discussion of the methodology to be applied in assessing the general impression created by a representation. It does, however, point to paragraph 293 of the Tribunal's reasons where it identified a series of factors as the "circumstances of the making of the price representations [that] are relevant for general impression purposes". Cineplex submits that this paragraph demonstrates that the Tribunal used the expert evidence to assist it in identifying the general impression created by the price representations on its website and app.

[149] These factors were discussed at paragraphs 101 to 115 of these reasons, and they include matters such as the fact that Cineplex's ticket price representations were made on its website,

which is an interactive medium somewhat different from a static print advertisement. The Tribunal also noted features of the website design, including its “funnel” effect, the sense of urgency created by the inclusion of a countdown timer on the floating ribbon, and the brief time spent on the site when purchasing tickets.

[150] It is true that paragraph 293 of the Tribunal’s reasons appears in a section of the decision where the Tribunal says that it is applying the relevant legal tests to the facts of this case, here, the test for “General Impression”. That said, a careful review of the entire section, and of paragraph 293 in particular, reveals that the Tribunal relied on the expert evidence to assist it in assessing how consumers would interact with the website or app, in determining what should be considered “the representation(s)” for the purpose of its analysis, and whether the consumer would likely ever see the information regarding the Online Booking Fee appearing below the fold. These are matters that are properly the subject of expert evidence.

[151] That is, the jurisprudence holds that where a representation contains a disclaimer or a qualifying statement, courts are entitled to consider expert evidence regarding consumer behaviour and the relevance of the medium in question in shaping a consumer’s understanding of the representation. Expert evidence may also assist in assessing the impact of layout or design aspects on the intelligibility of disclaimers in order to determine the effect of that disclaimer on the general impression conveyed by the representation: see, for example, *Purolator Courier Ltd. v. United Parcel Service Canada Ltd.*, [1995] O.J. No. 876, 1995 CanLII 7313 at paras. 43–62.

[152] As discussed in the previous section of these reasons, the Tribunal had regard to the expert evidence in determining what should be considered to be the four corners of “the representations” in this case. This evidence supported its finding that the “four corners” of the pricing representation should be limited to the information appearing above the fold on the Tickets Page, for the purposes of the general impression analysis in the particular circumstances of this case.

[153] Having made that finding, however, the Tribunal did not then go on to continue using the expert evidence to assist it in determining what the general impression created by that representation should be.

[154] At paragraph 286 of its reasons, the Tribunal found that “the general impression of the ordinary citizen moviegoer navigating Tickets Page (A) is that they can purchase tickets on the website and the [a]pp for the stated prices on that page”. That is, “the ordinary citizen would form the impression that Cineplex is offering movie tickets for online purchase, both on the website and on the [a]pp, at the per-ticket prices represented on the Tickets Page beside each of General Admission, Seniors and Children”. The Tribunal goes on to state that “[t]he general impression of an ordinary consumer would be that the stated ticket prices are the whole or entire price charged by Cineplex (subject to applicable taxes)”, and that “[t]he general impression conveyed to the ordinary consumer is consistent with the literal meaning of the displayed prices”.

[155] The Tribunal then goes on to explain how it arrived at this finding, first addressing submissions made by the parties with respect to the attributes of a member of the targeted audience (at paragraphs 287–292 of the Tribunal’s reasons). Cineplex does not take issue with these paragraphs.

[156] We then get to paragraph 293, which is the other paragraph (along with paragraph 281) with which Cineplex takes issue.

[157] In this passage, the Tribunal lists what it says are the “circumstances of the making of the price representations [that] are relevant for general impression purposes” [my emphasis]. That is, the Tribunal is looking at the operation of the website and app and how pricing information is presented, rather than the meaning of the words contained on the platforms.

[158] The Tribunal then lists a number of the factual findings that it had previously made about the operation of the Cineplex website and app. These include the fact that Cineplex had control over its web platforms and their design; that the web purchase process was designed as a “funnel” to channel users through to a purchase as quickly as possible; the presence of a countdown timer on the floating ribbon that created a sense of urgency, encouraging consumers to proceed swiftly with the transaction; that users spent an average of three minutes on the website; and that, unlike the situation in *Maritime Travel*, above, the amount of money involved in the transaction was relatively small.

[159] The Tribunal goes on to find in the next paragraph that “[t]hese circumstances would not cause the ordinary consumer to scrutinize carefully or pay any heightened attention to the represented ticket prices or any other information displayed on the Tickets Page”: Tribunal reasons at para. 294.

[160] I accept that the factual findings listed at paragraph 293 of the Tribunal’s reasons were indeed informed by the expert evidence presented at the hearing. However, these findings once again pertain to how consumers would navigate the Cineplex website and app, the prominence of the information about the Online Booking Fee, and the likelihood that the average consumer would see that information. They do not substitute extraneous evidence for the Tribunal’s own detailed general impression analysis, rather they enrich it.

[161] This understanding of the Tribunal’s thought process is confirmed when regard is had to its findings at paragraphs 298 and 299 of its reasons. There, the Tribunal reviews the evidence of Mr. Eckert justifying its finding that “[t]he general impression of the ordinary consumer should be determined by using the information located above the fold—what is visible to most consumers on arrival at the Tickets Page, before selecting a ticket”: Tribunal reasons at para. 298.

[162] This demonstrates that the Tribunal used Mr. Eckert’s evidence to determine what constitutes the representation made to the ordinary consumer, and not what the general impression of that representation should be.

[163] This understanding is further confirmed by the Tribunal’s finding in the next paragraph that “for the purposes of the general impression of the ordinary consumer, the information within the ‘four corners’ of the advertisement is what the ordinary citizen sees on the Tickets Page, above the fold and without scrolling”: Tribunal reasons at para. 299.

[164] Having come to this conclusion, however, the Tribunal then decided for itself what the general impression of the ordinary consumer would be, based on the relevant price representations. It found that “[l]ooking at the Tickets Page objectively and neutrally, the natural impression conveyed is that movie tickets are available for purchase at the represented prices on the website or the App where the consumer sees them”: Tribunal reasons at para. 302.

[165] The Tribunal also explicitly rejected Cineplex’s contention that the price representations appearing on Tickets Page A only concern prices where tickets are purchased in person at the selected theatre. As the Tribunal observed, “Cineplex has already told the consumer that she can buy tickets on the website or the [a]pp where the prices are being represented and where the consumer sees those prices”. As a consequence, the Tribunal found that the general impression created by the price representations on Tickets Page A “is that tickets can be purchased in those online channels for the prices displayed on the Tickets Page”: Tribunal reasons at para. 303.

[166] In other words, it was the Tribunal’s view that since the ticket prices displayed on Tickets Page A did not indicate that the prices were only the “at-theatre” price, the ordinary consumer would likely conclude that the represented price was the price for tickets purchased online, and

not the price that they would be charged if they decided to buy their tickets in person at the theatre.

[167] Therefore, I do not accept Cineplex’s contention that the Tribunal erred in law by relying on expert evidence in analyzing the general impression created by, and the literal meaning of the pricing representations at issue in this case.

D. *Conclusion as to Whether the Tribunal erred in Finding that Cineplex had engaged in Reviewable Conduct, contrary to Section 74.01(1)(a) of the Competition Act*

[168] For these reasons, I conclude that the Tribunal did not err in finding that Cineplex had engaged in reviewable conduct, contrary to section 74.01(1)(a) of the *Competition Act*, by making a representation to the public that is false or misleading in a material respect.

[169] This takes us to the Tribunal’s finding that Cineplex had also engaged in reviewable conduct contrary to section 74.01(1.1), that is, the drip pricing provision of the Act. This issue will be addressed next.

V. Did the Tribunal Err in Finding that Cineplex had engaged in Drip Pricing?

[170] It will be recalled that section 74.01(1.1) of the *Competition Act* provides that “[f]or greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation”. This provision thus

creates a specific sub-category of false or misleading price representations and is aimed at pricing representations that have been divided into parts (or “partitioned”).

[171] The Tribunal found that section 74.01(1.1) “provides a specific means to support the achievement of the statutory goals: it simplifies the Tribunal’s assessment by removing any need to analyze and determine separately whether a price representation that meets the stated conditions is false or misleading under paragraph 74.01(1)(a)”. That is, representations that satisfy the requirements of the section will be considered false or misleading, thereby relieving the Commissioner of the burden of having to prove that this is so: Tribunal reasons at para. 333.

[172] Indeed, as the Tribunal put it, “the purpose of subsection 74.01(1.1) is to facilitate proof of one of the elements of paragraph 74.01(1)(a)”: Tribunal reasons at para. 387.

[173] The Tribunal further observed that section 74.01(1.1) advances the objectives of the *Competition Act* and of the deceptive marketing provisions in two ways. First, it describes the price representations that Parliament has determined are false or misleading. By doing so expressly, Parliament has provided guidance about non-permissible conduct to persons making commercial representations to the public in order to sell their products and services. The section further seeks to engender trust by consumers in the price representations that they see, through clarity and transparency: Tribunal reasons at para. 333.

[174] Cineplex submits that the Tribunal was required to interpret and apply three key parts of the statutory text of section 74.01(1.1). That is, it had to decide whether the price representation

at issue was “not attainable” due to “obligatory” “fixed charges or fees”. According to Cineplex, the Tribunal erred in law in its interpretation of each of these words and phrases.

[175] In support of this contention, Cineplex repeats many of the arguments addressed in the previous section of these reasons. That is, it submits that the Tribunal erred in confining its analysis to the representations appearing above the fold, and by failing to recognize that the ordinary citizen knows how to scroll and would therefore have seen the information about the Online Booking Fee below the fold. I have already addressed these arguments earlier in this decision and there is no need to repeat my conclusions with respect to the merits of these arguments here.

[176] Cineplex further argues that Parliament’s focus on whether a price representation is “not attainable due to fixed obligatory charges or fees” should be understood to require that a consumer have no choice but to pay a charge or fee (which is knowable in advance) in order to obtain a product or service. Cineplex says that this reading is consistent with the objectives identified in section 1.1 of the Act, one of which is to “provide consumers with competitive prices and product choices”.

[177] In examining whether Cineplex’s price representations were “not attainable due to fixed obligatory charges or fees”, as contemplated by section 74.01(1.1) of the *Competition Act*, the Tribunal engaged in a careful analysis of the statutory provision, having regard to the text, context and purpose of misleading advertising provisions of the Act generally, and section 74.01(1.1) in particular. The Tribunal was, moreover, mindful of the fact that this was the first

time that section 74.01(1.1) had been applied in a proceeding heard on the merits: Tribunal reasons at paras. 328–335.

[178] The Tribunal concluded that section 74.01(1.1) “does not create a separate reviewable practice for the purposes of section 74.1”: Tribunal reasons at para. 331. Rather, the provision replicates the two elements required for a finding of reviewable conduct under section 74.01(1)(a): the making of a representation, and the requirement that the representation be false or misleading. As noted earlier, section 74.01(1.1) contemplates that if certain factual conditions are met—that the represented price is “not attainable due to fixed obligatory charges”—then the second element of the reviewable conduct in paragraph (1)(a) will have been met, and the representation will be found to have been false or misleading.

[179] The Tribunal concluded, however, that given the scope of sections 74.01(1)(a) and 74.01(1.1) and the broad and diverse range of commercial representations to which they may apply, it should not endeavour to define the contested terms in the abstract, or for all possible purposes. Rather, the Tribunal decided that it should use a fact-based, contextual approach in assessing whether the requirements of the section had been met, grounding its analysis in its factual findings: Tribunal reasons at para. 335.

[180] That is, the Tribunal turned to the detailed evidentiary record before it to examine whether the Online Booking Fee was fixed and obligatory, and whether Cineplex’s represented prices were attainable in the channel in which they were made. These are determinations that are based on the Tribunal’s interpretation of the evidence as a whole.

[181] Consequently, the Tribunal’s analysis with respect to each of the contested words and phrases will be addressed next, keeping in mind that “where the issue on appeal involves the trial judge’s interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error”: *Housen*, above at para. 36.

A. *The Represented Prices were not “Attainable”*

[182] The Commissioner submits that the ticket price representations made on Tickets Page A of Cineplex’s website and app were not “attainable” for purchases that were made on the website or the app due to the addition of the Online Booking Fee to the purchase price. According to the Commissioner, Cineplex cannot avoid the application of subsection 74.01(1.1) of the Act because a consumer can purchase tickets at a theatre without the Online Booking Fee being applied.

[183] For its part, Cineplex asserts that the ticket prices set out on Tickets Page A were always “attainable” within the meaning of section 74.01(1.1) of the *Competition Act*, as customers could attend at the selected theatre to purchase their ticket or tickets without having to pay the Online Booking Fee. Indeed, Cineplex observes that the vast majority of users who visited its website in the last six months of 2022 exited the website before purchasing tickets, and that nearly half of all movie tickets are purchased at Cineplex theatres at what it calls the “base ticket price”.

[184] According to Cineplex, the presence of additional fees for purchases made in an online medium does not mean the ticket price is not attainable at all, it merely reflects the difference between the in-person and online aspects of the ticket purchasing experience.

[185] Cineplex says that the Tribunal responded to this evidence by improperly reading into the section a requirement that the price representation be attainable in “the channel in which the representations are made”: Tribunal reasons at paras. 379–380. There is, it argues, no indication in the words of section 74.01(1.1) that Parliament intended the provision to be confined in such a manner.

[186] Cineplex further submits that the represented price for movie tickets is “attainable” because the total pre-tax price of the transaction (including any applicable Online Booking Fee(s)) was shown on the floating ribbon at the bottom of the screen on Tickets Page B.

[187] Not only that, Cineplex says, tickets can be purchased for the represented ticket price in the online channel without payment of the \$1.50 Online Booking Fee, as consumers can reduce the Fee by becoming Scene+ members or avoid it entirely by joining the CineClub.

[188] According to Cineplex, the CineClub membership is no different than a retailer offering to waive delivery fees if a consumer spends \$50 or more on an order. Just as a consumer may decide to add an extra item to their online cart to avoid paying a delivery fee, a consumer may decide to become a CineClub member to avoid paying the Online Booking Fee. In both cases,

Cineplex says, the advertised ticket price is attainable because consumers can make choices that would enable them to avoid paying the Fee.

[189] Mr. McGrath and Dr. Amir also noted in their evidence that consumers who use certain promotional coupons are also not charged the Online Booking Fee.

[190] In my view, the Tribunal interpreted and applied section 74.01(1.1) in a manner that would promote market function, which is one of the purposes of the *Competition Act*. It carefully considered all of the evidence before it, as well as the context in which the representations were made—namely, the online setting.

[191] The Tribunal's findings are, moreover, amply supported by numerous factual findings that it made, including its determination that the Tickets Page was designed to promote conversion to yield a ticket sale transaction online. Indeed, the Cineplex website and app give no indication to consumers that the prices that are displayed online do not apply to purchases made in the very medium in which the representations are made.

[192] The Tribunal further found that neither the literal meaning nor the general impression conveyed by the price representations on Tickets Page A of the Cineplex website and app would suggest to customers that the prices displayed on the website and app were only available where tickets were purchased at movie theatres, and that they did not apply to online purchases:

Tribunal reasons at para. 380.

[193] The Tribunal came to the logical conclusion that when determining whether Cineplex's represented prices were "attainable" (*i.e.* whether consumers were able to purchase tickets online for the price represented by Cineplex on its website and app), the analysis should focus on the impugned price representations and the channel in which the representations were made. The prices displayed on the Cineplex website and app are represented to be the prices that consumers must pay to purchase a ticket in those same channels, as that is where the price representations are made, where they are seen and where they may be acted upon: Tribunal reasons at paras. 379–380 [my emphasis].

[194] As a result, the Tribunal concluded that the fact that the prices represented on the Cineplex website or app for movie tickets were attainable if the consumer bought them in person at the theatre was not relevant to the question of whether they were "attainable" under section 74.01(1.1) of the *Competition Act* in the channel where the price representations were made: Tribunal reasons at para. 381.

[195] I do not accept Cineplex's contention that section 74.01(1.1) is not infringed as consumers can purchase tickets at theatres without having to pay the Online Booking Fee. Indeed, I agree with the Tribunal that the ticket prices advertised on the Cineplex website or app were not "attainable" in either of those channels due to the application of the Online Booking Fee, and that the focus of the Tribunal's attention was properly on the channel where the representation was made.

[196] Here once again, Cineplex did not challenge the factual findings on which the Tribunal based its findings but instead presented many of the same arguments that the Tribunal considered and rejected when it determined that Cineplex's ticket prices were "not attainable" due to the imposition of the Online Booking Fee.

[197] As the Commissioner observes, consumers must be able to trust that the price representation that they see online is the price they will pay when they purchase the ticket in that channel. I further agree with the Commissioner that the Tribunal's finding that the ticket prices represented on the Cineplex website and app are unattainable is logically consistent with the purpose of subsection 74.01(1.1), which is to engender consumers' trust in the price representations they see, through clarity and transparency.

[198] Cineplex has thus failed to persuade me that the Tribunal erred in finding that the ticket prices represented on the Cineplex website and app were unattainable.

B. *The Online Booking Fee is a Fixed Charge or Fee*

[199] Cineplex submitted that "fixed" essentially means "knowable in advance" and "not variable". It further argues that the requirement that the charge or fee be "fixed" clearly distinguishes amounts caught by the provision from charges or fees that are variable and dependent on choices made by the consumer. According to Cineplex, the Online Booking Fee is variable based on the type of consumer involved (Regular, Scene+ or CineClub), how many tickets the consumer chooses to purchase, and whether a promotional code or voucher applies.

[200] Moreover, the Online Booking Fee only applies to a maximum of four tickets per transaction, meaning that the maximum Fee on any order is \$6.00. Because of this cap, Cineplex says that the amount of the Fee cannot be calculated on a “per ticket” basis that is known in advance. Representing the fee on a “per ticket” basis can only be done once the customer confirms how many tickets they wish to purchase.

[201] Cineplex further submits that the four-ticket cap is effectively a volume discount. Just like a retailer who offers discounted shipping for large orders, Cineplex reduces the online booking fee (on a per-ticket basis) when consumers purchase in high volumes.

[202] The Commissioner submits that in order to decide whether a charge or fee is “fixed” within the meaning of section 74.01(1.1), the question is whether the advertiser determined the amount of the fee prior to making the price representation. If that is the case, the fee is fixed.

[203] In contrast, the Commissioner contends that a fee or charge will not be “fixed” where the existence or amount of the charge is not known to the advertiser before it makes the price representation. This would be the case, for example, where the charge will vary depending on the method and location of delivery.

[204] While it was not prepared to define the word “fixed” as it appears in section 74.01(1.1) for all purposes by trying to anticipate every possible kind of charge or fee that may be levied by a person making a price representation, the Tribunal was nevertheless satisfied on the evidence

before it that Cineplex's Online Booking Fee is a "fixed" charge or fee: Tribunal reasons at para. 348.

[205] In coming to this conclusion, the Tribunal noted that when the Online Booking Fee was introduced in June of 2022, Cineplex set the Fee at \$1.50 for regular consumers and \$1.00 for Scene+ members, and that these amounts have not varied since their implementation. While no Online Booking Fees are payable for CineClub members, the vast majority of online ticket purchasers pay the full regular \$1.50 Online Booking Fee: Tribunal reasons at para. 349.

[206] The Tribunal further found that Cineplex knows the amount of the Online Booking Fees that will be charged in a particular transaction well before the consumer first sees the price representations on the website or the app. Consumers who reach the Tickets Page must have already logged into their Cineplex Connect Account, as they cannot see ticket prices without having done so. Once the customer has logged in to their account, Cineplex is able to categorize the consumer as a regular consumer, a Scene+ member or a CineClub member, and will be able to determine the quantum of the Online Booking Fee that applies to that specific consumer: Tribunal reasons at para. 350.

[207] The Tribunal was further satisfied that the fact that some consumers pay a different, pre-determined and set amount as an Online Booking Fee (depending on their category) does not alter the fact that the fee is "fixed" for each consumer and for each category of consumer. Indeed, as the Tribunal observed, whether the fee is characterized as discounted or waived, Scene+ members simply pay a different fixed amount than those who are not Scene+ members,

and there is no charge or fee for CineClub members. As the Tribunal observed, Cineplex cannot avoid the application of subsection 74.01(1.1) to the price representations on its website and app by creating different categories of consumers for whom the fee is discounted or waived: Tribunal reasons at para. 352.

[208] The Tribunal's finding that Cineplex's Online Booking Fee is a "fixed" fee is largely a factual one, and Cineplex has not persuaded me that the Tribunal erred in finding that the Fee was indeed a "fixed" one.

[209] It was Cineplex's choice to impose an Online Booking Fee on certain categories of customers, fixing the amount at \$1.50 for most, and \$1.00 for some. It was also Cineplex's choice to exempt one category of customers (CineClub members) from the Fee. That is, it pre-determined the amount of the Online Booking Fee, and to whom it would apply.

[210] Moreover, the Online Booking Fee was established and its quantum set by Cineplex for consumers in the categories to which it applied before it made any representations to consumers with respect to ticket prices on its website and app: Tribunal reasons at para. 349. Cineplex thus controls the operation of the Fee.

[211] There is also nothing in the wording of section 74.01(1.1) that suggests that an advertiser can avoid the application of the provision merely by creating two or more levels of fixed charges or fees and charging them to different categories of consumers.

[212] Indeed, I agree with the Tribunal that Cineplex cannot avoid the application of section 74.01(1.1) simply by creating different categories of consumers for whom the fee is discounted or waived. The fact that some categories of consumers pay a different, pre-determined amount for the Online Booking Fee than others does not mean that the Fee is not “fixed” for each consumer and for each category of consumer created by Cineplex: Tribunal reasons at para. 352.

[213] The fact that the aggregate total of the Online Booking Fees that are payable in a given transaction may vary, depending on the number of tickets purchased, does not affect the applicable per-ticket fixed fee that Cineplex adds to the represented price for each ticket. In other words, the four ticket cap on the aggregate Online Booking Fees at does not affect whether or not the fees are “fixed”.

[214] The Tribunal thus did not err in finding that the Online Booking Fee is a “fixed” charge or fee for the purposes of section 74.01(1.1) of the *Competition Act*.

C. The Online Booking Fee is Obligatory

[215] The Tribunal further found on the evidence that the Online Booking Fee charged for ticket purchases made on Cineplex’s website or app was an “obligatory” charge or fee under subsection 74.01(1.1) of the *Competition Act*: Tribunal reasons at paras. 365, 375. This is a finding of mixed fact and law to which deference is owed by this Court.

[216] The Tribunal's analysis on this issue was similar to the question of whether the represented price was attainable.

[217] As was the case with respect to the question of "attainability", Cineplex once again submits that the Online Booking Fee is not obligatory because the Tribunal unjustifiably limited the application of section 74.01(1.1) to the channel in which the representation was made. Cineplex says that there was no basis for the Tribunal to separate its analysis into two distinct purchase channels (in-person and online). The question that the Tribunal ought to have asked was whether consumers could avoid paying the Online Booking Fee, which they can do by purchasing tickets in person at theatres.

[218] Cineplex also says that the Tribunal erred further by ignoring consumers' ability to reduce or eliminate the Online Booking Fee by becoming Scene+ or CineClub members, respectively. A fee cannot be "obligatory" if a consumer can proceed with the transaction without any obligation to pay it. According to Cineplex, the Tribunal erred by looking only at the consumers to whom the fee applied, ignoring the fact that some consumers make choices that result in the fee not applying (or being reduced).

[219] The Commissioner submits that the Online Booking Fee is obligatory for consumers purchasing tickets in an online channel, contending that once the consumer starts the purchase process, a charge or fee will be mandatory if it must be paid for the consumer to be able to complete the purchase process in the channel in question.

[220] In finding that the Online Booking Fee was “obligatory”, the Tribunal weighed the evidence before it and made a number of findings of fact that have not been challenged by Cineplex.

[221] In particular, the Tribunal found that Cineplex’s argument that consumers could exercise a choice to avoid the Online Booking Fee by purchasing tickets in person at a theatre was completely negated by the fact that there was an absence of materially relevant information above the fold on the Tickets Page, the result of which was that consumers were unable to exercise an informed choice to avoid paying the Fee: Tribunal reasons at para. 373.

[222] That is, the Tribunal found as a fact that the display of ticket prices on Tickets Page A would lead the ordinary consumer to believe that the prices they were seeing on the website or the app were the prices to be paid for tickets purchased online. Neither the website nor the app displayed ticket prices as being “in-theatre” prices, nor did they advise consumers that the represented ticket prices (that is, without the inclusion of an Online Booking Fee) were only available if the customer abandoned the online purchase process and proceeded to purchase the tickets in person at the theatre: Tribunal reasons at para. 368.

[223] While consumers may well be aware that tickets can be purchased at the theatre box office, the relevant question was whether they would be aware that they had a choice to buy online and pay the additional fee or buy at the theatre without paying it. The Tribunal found that this question properly reflected the objectives of the *Competition Act* and the purposes of the

deceptive marketing provisions. The Tribunal then found as a fact that the Tickets Page does not make that choice clear: Tribunal reasons at para. 369.

[224] The Commissioner argued that “[a] consumer can never purchase a movie ticket online without paying the Online Booking Fee unless they are a CineClub member, in which case it is waived”. That is, the consumer must pay the applicable fee in order to complete a ticket purchase online: Tribunal reasons at para. 359.

[225] The Tribunal rejected Cineplex’s argument that the Online Booking Fee is “completely avoidable” because a consumer can decide at any time to leave the website or app and complete the transaction in person at the theatre. In the Tribunal’s view, the proper characterization of the issue was whether the charge was obligatory for consumers who want to complete the purchase of a movie ticket on the website or app: Tribunal reasons at para. 367.

[226] Given that Cineplex does not make clear the consumer’s choice between purchasing a ticket online and paying an additional fee or completing the purchase in person and avoiding the fee, the Tribunal found that the objectives of the statute were supported by the interpretation that the fee is obligatory for any consumer who purchases a ticket online: Tribunal reasons at para. 369.

[227] Finally, the Tribunal found that the fact that the Online Booking Fee has an aggregate maximum per transaction (based on four tickets) for regular consumers and Scene+ members did

not affect whether the Fee was obligatory, given that only a very small number of tickets purchased online exceed this cap limit: Tribunal reasons at para. 374.

[228] Based on these findings of fact, the Tribunal concluded that the Online Booking Fee on Cineplex’s website and app was an “obligatory” charge or fee under subsection 74.01(1.1) of the *Competition Act*: Tribunal reasons at para. 375.

[229] Once again, Cineplex has not challenged the factual findings underlying the Tribunal’s conclusion that the Online Booking Fee is obligatory, and it has failed to identify an extricable legal error in the Tribunal’s analysis.

[230] Given the Tribunal’s findings of fact, I agree that the Online Booking Fee must be paid by those consumers to whom it applies (regular consumers and Scene+ members) who want to complete the purchase of movie tickets on the Cineplex website or app. It is not optional, but is, rather, obligatory.

[231] There is thus no basis to interfere with the Tribunal’s finding that the Online Booking Fee is “obligatory” within the meaning of section 74.01(1.1).

D. *Conclusion as to Whether the Tribunal erred in Finding that Cineplex had engaged in Drip Pricing*

[232] As noted earlier, this Court is required to defer to the Competition Tribunal on factually suffused questions of mixed fact and law, and may only interfere where there is a palpable and

overriding error on the part of the Tribunal that goes “to the very core of the outcome of the case”: *Rogers Communications Inc.*, above at para. 7.

[233] The Tribunal’s application of section 74.01(1.1) to the facts before it was careful and deliberate. It took all the evidence presented into account and provided a considered response to an issue of mixed fact and law. There is no palpable or overriding error in its analysis with the result that its finding with respect to drip pricing must stand.

[234] This then takes us to Cineplex’s final argument, which is that the Tribunal erred in law by imposing an Administrative Monetary Penalty on it in the amount of \$38.978 million.

VI. Did the Tribunal Err in the Remedy it Granted?

[235] Upon finding that a party has engaged in reviewable conduct contrary to the deceptive marketing practices provisions of the *Competition Act*, section 74.1(1) of the Act authorizes the Tribunal to make a variety of remedial orders, including an order that the party not engage in the conduct in question, or substantially similar reviewable conduct, for a period of up to ten years. Cineplex does not challenge the Tribunal’s order that it not engage in its reviewable conduct for a period of ten years.

[236] Section 74.1(1)(c) of the *Competition Act* further authorizes the Tribunal to order that an individual or corporation that has engaged in reviewable conduct pay an administrative monetary penalty in any manner that the Tribunal specifies. Insofar as corporations are concerned, the Act

provides that the administrative monetary penalty must not exceed the greater of \$10,000,000.00 (and, for each subsequent order, \$15,000,000.00), and three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues.

[237] As noted earlier, after concluding that Cineplex had engaged in reviewable conduct contrary to the deceptive marketing provisions of the *Competition Act*, the Tribunal ordered that Cineplex pay an administrative monetary penalty in the amount of \$38.978 million within 30 days of its Order, and that it pay the Commissioner's costs of the Tribunal proceeding.

[238] Cineplex submits that the Tribunal erred in law by imposing a remedy that was inconsistent with the text and purpose of the *Competition Act*, insofar as the administrative monetary penalty is concerned. That is, Cineplex contends that the Tribunal made a reversible error of law in ordering it to pay an administrative monetary penalty of \$38.978 million, this being the entire amount of the Online Booking Fees collected by Cineplex during the period at issue in the proceeding before the Tribunal (June 2022–December 2023).

[239] Cineplex further contends that the administrative monetary penalty imposed by the Tribunal was “punitive, disproportionate and unprecedented”.

[240] As Cineplex observes, section 74.1(4) of the Act states that the terms of an order under paragraph 74.1(1)(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”. Nevertheless,

Cineplex contends that the Tribunal's analysis and the magnitude of the administrative monetary penalty it imposed implies that Cineplex's conduct was akin to deliberate deception, even though the Tribunal had expressly found that the display was not designed to deliberately deceive customers: Tribunal reasons at para. 479(a).

[241] Cineplex says that the Tribunal made three fundamental errors in determining the size of the administrative monetary penalty that it imposed in this case. First, the Tribunal erred in determining the appropriate range of penalties available to it. Second, it levied a punitive, disproportionate and unprecedented penalty by requiring Cineplex to disgorge the entire amount of the Online Booking Fee collected between June of 2022 and December of 2023. Finally, Cineplex says that the Tribunal erred in assessing the aggravating and mitigating factors identified in section 74.1(5) in determining the appropriate level of the penalty, giving the mitigating factors insufficient weight.

[242] In the alternative, Cineplex argues that if this Court is of the view that an administrative monetary penalty is appropriate in this case, it ought to significantly reduce the penalty ordered by the Tribunal to reflect the circumstances of this case.

[243] The imposition of a remedy, including an administrative monetary penalty, is a highly discretionary decision—one that warrants deference from the reviewing court: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 at para. 87. See also *Kish v. Sobchak Estate*, 2016 BCCA 65 at para. 34, citing *Friends of the Oldman*

River Society v. Canada (Minister of Transport) 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3 at p. 76–77.

[244] Indeed, section 74.1(1) of the *Competition Act* contains language indicative of the discretionary nature of the Tribunal’s powers to issue a remedy. As a result, absent a palpable and overriding error by the Tribunal, this Court should not interfere with the chosen remedy.

[245] However, if the reviewing Court determines that there has been a wrongful exercise of discretion in that no weight, or insufficient weight, was given to relevant considerations, then the reversal of the order on appeal may be justified: *Friends of the Oldman River*, above at pp. 76–77.

[246] With this in mind, I turn now to address each of Cineplex’s arguments regarding the administrative monetary penalty imposed by the Tribunal.

A. *The Determination of the Appropriate Range of Administrative Monetary Penalties Available to the Tribunal*

[247] The Tribunal determined that the maximum administrative monetary penalty that could be imposed on Cineplex in this case was the greater of \$10 million and three times the benefit derived from the reviewable conduct (which it identified as being three times \$38.978 million or approximately \$116.9 million). The possible range for an administrative monetary penalty was therefore \$0 to \$116.9 million: Tribunal reasons at para. 459.

[248] Cineplex submits that the Tribunal erred in its calculation of the possible range for an administrative monetary penalty and that this error infected the balance of its reasoning.

[249] According to Cineplex, the Tribunal misinterpreted the phrase “the value of the benefit derived from the deceptive conduct” as it appears in section 74.1(1)(c)(ii)(B) to permit an order requiring the disgorgement of the gross revenue derived by Cineplex from imposition of the Online Booking Fee over the relevant period. According to Cineplex, had Parliament wanted this to be the measure of an administrative monetary penalty, it would have used language to that effect. Instead, the provision refers to the “value of the benefit derived” from the conduct in question, which, Cineplex submits, is a shorthand for a “but-for” test.

[250] Cineplex further notes that the Tribunal’s conclusion that the benefit it had derived from the deceptive conduct was the total amount of the Online Booking Fees collected over the period under review was predicated on the assumption that had the Tickets Page disclosed the Online Booking Fee “above the fold”, no customers would have proceeded with their ticket purchase and paid the Fee.

[251] Cineplex submitted before this Court that the proper approach would have been for the Tribunal to engage in a cost-benefit analysis in order to determine price elasticity and demand, to allow it to approximate how many consumers would still have gone forward with their ticket purchase, had they known about the Online Booking Fee.

[252] Cineplex says that since the total cost of the ticket purchase transaction was disclosed on the floating ribbon on the Tickets Page, the Tribunal's assumption that no one would have proceeded to buy tickets once they became aware of the Online Booking Fee is not grounded in the facts of this case. Cineplex further observes that it had not received any customer complaints about the Online Booking Fee, and that there was therefore no basis for concluding that no one would have purchased their tickets, had the Fee been disclosed above the fold.

[253] In the absence of any findings as to the actual impact that the website design had on consumer purchases, Cineplex contends that the Tribunal should have determined that the "value of the benefit" could not reasonably be determined. As a result, the cap on the administrative monetary penalty should have been 3% of either \$1.269 billion (Cineplex's annual worldwide gross revenues for 2022) or \$1.389 billion, (representing Cineplex's annual worldwide gross revenues for 2023). That is, that is \$38.07 million or \$41.67 million.

[254] Based on this, Cineplex submits that the \$38.978 million the Tribunal imposed by way of an administrative monetary penalty either exceeded the cap or was at the top end of the permissible range. While denying any wrongdoing under the *Competition Act*, Cineplex nevertheless says that given that the Tribunal ordered a penalty towards the lower end of the incorrect range it had assumed (\$0–\$116.9 million), this Court should, at the very least, adjust the penalty to place it towards the lower end of the correct range (\$0–\$41.67 million).

[255] I start by observing that this argument does not appear to have been advanced before the Tribunal. Nor did Cineplex adduce any evidence before the Tribunal to demonstrate that the

value of the benefit that it derived from the Online Booking Fee was less than the gross revenue it received from the Fee, and that the quantum of the Administrative Monetary Penalty should be reduced to take this factor into account. Indeed, the absence of such evidence was specifically noted by the Tribunal: Tribunal reasons at para. 463.

[256] There was, however, evidence before the Tribunal led by the Commissioner as to the impact that Cineplex's web design had on consumer purchases. Dr. Morwitz's expert report directly addressed this topic, and she testified that Cineplex's conduct increased the prospect that consumers would purchase tickets online and pay the Online Booking Fee. As noted earlier, Dr. Morwitz's evidence was accepted by the Tribunal: Tribunal reasons at paras. 407, 416 and 419.

[257] In light of the above, Cineplex has not persuaded me that the Tribunal erred in law in its assessment of the Administrative Monetary Penalty by failing to consider that some customers would have proceeded to purchase movie tickets, had they had been made aware that they would be paying an Online Booking Fee.

B. *The Proportionality of the Administrative Monetary Penalty and the Tribunal's Consideration of the Aggravating and Mitigating Factors*

[258] Subsection 74.1(5) of the *Competition Act* identifies the aggravating and mitigating factors that are to be considered by the Tribunal in determining the amount of an administrative monetary penalty. These factors are:

- (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) the effect on competition in the relevant market;
- (g) the gross revenue from sales affected by the conduct;
- (h) the financial position of the person against whom the order is made;
- (i) the history of compliance with this Act by the person against whom the order is made;
- (j) any decision of the court in relation to an application for an order under paragraph (1)(d);
- (k) any other amounts paid or ordered to be paid by the person against whom the order is made as a refund or as restitution or other compensation in respect of the conduct; and
- (l) any other relevant factor.

[259] As noted, Cineplex contends that the administrative monetary penalty imposed by the Tribunal was “punitive, disproportionate and unprecedented”. Given that the Tribunal erred in determining the appropriate range of penalty, Cineplex submits that it similarly erred in concluding its “overall order” was proportional.

[260] Cineplex starts by noting that the purpose of a remedial order under the *Competition Act* is to promote conduct that conforms to the Deceptive Marketing Practices provisions of the Act. Consequently, the amount of any administrative monetary penalty must be proportionate to the nature of the person whose conduct the Court seeks to change, and general deterrence is not a factor to be considered in assessing a penalty under subsection 74.1(4): *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2014 ONSC 1146 at paras. 12, 16.

[261] Cineplex makes several submissions asserting that it disclosed the Online Booking Fee on the same webpage where it identified in-theatre ticket prices. It argues that as there was no representation of a price that was not attainable, it was reasonable for Cineplex to conclude that its website complied with the *Competition Act*. Suffice it to say that Cineplex’s submissions as to

the adequacy of the disclosure of the Online Booking Fee run contrary to the findings of fact made by the Tribunal in this regard.

[262] Cineplex also contends that the administrative monetary penalty imposed by the Tribunal in this case unduly penalizes Cineplex for not accepting the Commissioner's interpretation of the statute, on a case of first impression, and that the penalty levied in this case dwarfs the penalties imposed in other misleading advertising cases. In support of this contention, it points to the decision of the Ontario Superior Court of Justice in *Chatr*, above, where the Court determined that a \$500,000.00 penalty was appropriate in a case where there was, at best, technical non-compliance with the Act, with no resulting harm to consumers.

[263] The Tribunal was well-aware of the *Chatr* decision, discussing it at some length in the remedial section of its reasons: see, for example, paras. 426, 461, 474 and 479. It further observed that while some guidance can be obtained from prior cases in applying the factors listed by Parliament to reach an appropriate quantum for the administrative monetary penalty, none of these cases considered the current monetary range of such penalties authorized by the 2022 amendments to the *Competition Act*. Moreover, several were decided before the amendments to the Act in 2009 that raised the maximum administrative monetary penalty from \$100,000 to \$10 million: S.C. 2009, c. 2, subs. 424(2); Tribunal reasons at para. 461.

[264] The Tribunal further observed that none of these earlier decisions involved making or analyzing a possible concurrent order under paragraph 74.1(1)(d): citing *Chatr*, above at paras. 54–77; *Canada (Commissioner of Competition) v. Yellow Page Marketing B.V.*, 2012 ONSC

927, at paras. 57–69; *Commissioner of Competition v. Premier Career Management Group Corp and Minto Roy*, 2010 Comp Trib 17; *Commissioner of Competition v. Sears Canada Inc*, 2005 Comp. Trib. 13; *PVI International Inc*, above at paras. 65–66; *Gestion Lebski inc*, above at paras 310–313, 318–319: Tribunal reasons at para. 461.

[265] Cineplex also contends that the administrative monetary penalty levied in this case dwarfs those agreed to by the Commissioner in settling multiple drip pricing cases in different industries, where the parties had agreed to penalties ranging from less than \$1 million up to \$5 million. This was a fact of which the Tribunal was well aware: Tribunal reasons at para. 327. However, as the Commissioner observes, not only are negotiated consent agreements of limited relevance to an adjudicated remedial award, Parliament had also amended the *Competition Act* after many of these cases were settled to increase the maximum penalty above the previous \$10 million cap.

[266] The Tribunal had regard to Cineplex’s argument as to its subjective belief that it was in compliance with the provisions of the *Competition Act*, and the absence of customer complaints that would have alerted it to a problem in this regard. In giving this argument little weight, the Tribunal observed that the responsibility for complying with the *Competition Act* was on Cineplex, and not on its customers: Tribunal reasons at para. 470.

[267] The Tribunal also observed that Cineplex did not change its conduct after the Commissioner commenced this proceeding, finding that it was, therefore, doubtful that Cineplex

would have done anything different in response to customer complaints: Tribunal reasons at para. 470.

[268] Indeed, although it chose not to make any order specifically in this regard, the Tribunal had regard for the fact that Cineplex continued to make the false or misleading price representations and to collect Online Booking Fees after December 31, 2023, right up to the time of the hearing. There was also no suggestion at the hearing that Cineplex had stopped collecting Online Booking Fees, or that it would stop doing so after the hearing, and the evidence before the Tribunal justified the inference that these amounts would have been significant in quantum: Tribunal reasons at para. 456.

[269] Moreover, the Tribunal expressly considered whether the penalty that it was imposing was proportional, and whether it respected Parliament's directions in subsection 74.1(4) of the *Competition Act*. In concluding that this was the case, the Tribunal had regard to a number of aggravating factors that, in its view, warranted the levying of a substantial administrative monetary penalty in this case. These included the severity of Cineplex's reviewable conduct, as well as its frequency, duration and materiality. The Tribunal also had regard to the number and proportion of Cineplex consumers that were affected by its conduct, the quantum of Online Booking Fees collected by Cineplex and its financial position: Tribunal reasons at para. 479.

[270] The Tribunal identified the following additional aggravating factors that, in its view, justified the imposition of a substantial administrative monetary penalty in this case. These included the fact that the reviewable conduct:

- (a) Affected consumers across Canada and in all of Cineplex's theatres, and that, as of December 31, 2023, Cineplex owned, leased or had a joint venture in 1,631 screens in 158 theatres;
- (b) Occurred every day starting in mid-June 2022 and continued up to the commencement of the hearing; and that it
- (c) Affected tens of thousands of consumers: Tribunal reasons at para. 462.

[271] The Tribunal also identified mitigating factors operating in Cineplex's favour. These included the fact that:

- (a) This was not a case in which the conduct was designed deliberately to deceive members of the public, nor were the representations directed at a vulnerable segment of the public;
- (b) Cineplex will suffer harm to its reputation and, as was the case in *Chatr 2014*, will likely take steps to end the reviewable conduct;
- (c) No evidence suggested that Cineplex had any history of non-compliance with the *Competition Act*; and
- (d) While the reviewable conduct had been occurring for more than 19 months at the time of the hearing, Cineplex had requested a prompt hearing on the merits of the Commissioner's application, which occurred: Tribunal reasons at para. 479.

[272] The Tribunal was also well aware of the fact that this case involved matters of first impression, and that, while denying any wrongdoing, Cineplex had argued that the Tribunal should not impose an administrative monetary penalty as this was the first case heard by the Tribunal involving section 74.01(1.1) of the *Competition Act*, and amounted to the first interpretation of that provision: Tribunal reasons at para. 426. Indeed, the Tribunal expressly took this into account in fashioning the remedy in this case: Tribunal reasons at para. 480.

[273] The Tribunal additionally had regard to the purpose behind recent statutory amendments, which significantly raised the monetary maximum for administrative monetary penalties. It noted the need to ensure that non-compliance with the provisions of the *Competition Act* not be treated as a licence fee or a cost of doing business, as this would "undermine, rather than advance, the

objectives of the deceptive marketing provisions and would not promote conformity with the statute”: Tribunal reasons at para. 439.

C. *Conclusion with respect to the Remedy Granted by the Tribunal*

[274] As noted earlier, section 74.1(1)(c) of the *Competition Act* authorizes the Tribunal to order that an individual or corporation that has engaged in reviewable conduct pay an administrative monetary penalty in any manner that the Tribunal specifies, subject to the monetary caps set out in the Act.

[275] A review of the Tribunal’s reasons justifying the administrative monetary penalty that it imposed in this case reveals that it carefully considered all of Cineplex’s submissions. It examined the factors favouring Cineplex, and those operating against it: Tribunal reasons at paras. 458–480.

[276] The Tribunal did not misdirect itself to the applicable law, and no palpable and overriding error on the part of the Tribunal is alleged. At the end of the day, Cineplex essentially asks this Court to reweigh the factors operating in its favour and those operating against it and to impose a lesser administrative monetary penalty on it from that imposed by the Tribunal. It is simply not our role in an appeal such as this to substitute our own exercise of discretion for that exercised by the Tribunal.

VII. Overall Conclusion

[277] For these reasons, I have concluded that the Tribunal did not err in law, as alleged by Cineplex. Consequently, I would dismiss Cineplex's appeal, with costs.

"Anne L. Mactavish"

J.A.

"I agree.

Judith Woods J.A."

"I agree.

Elizabeth Walker J.A."

Appendix 1: Legislative provisions

Competition Act, R.S.C., 1985, c. C-34

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

[...]

74.01(1) 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; [...]

(1.1) For greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the obligatory charges or fees represent only an amount imposed on a

Loi sur la concurrence, L.R.C., 1985, ch. C-34

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[...]

74.01(1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :

a) ou bien des indications fausses ou trompeuses sur un point important; [...]

(1.1) Il est entendu que l'indication d'un prix qui n'est pas atteignable en raison de frais obligatoires fixes qui s'y ajoutent constitue une indication fausse ou trompeuse, sauf si les frais obligatoires ne représentent que le montant imposé sous le régime d'une

purchaser of the product referred to in subsection (1) by or under an Act of Parliament or the legislature of a province.

loi fédérale ou provinciale à l'acquéreur du produit visé au paragraphe (1).

[...]

[...]

74.03(5) In proceedings under sections 74.01 and 74.02, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.

74.03(5) Dans toute poursuite intentée en vertu des articles 74.01 et 74.02, pour déterminer si le comportement est susceptible d'examen, il est tenu compte de l'impression générale donnée par les indications ainsi que du sens littéral de celles-ci.

[...]

[...]

74.1(1) If, on application by the Commissioner or a person granted leave under section 103.1, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

74.1(1) Le tribunal qui conclut, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, qu'une personne a ou a eu un comportement susceptible d'examen visé à la présente partie peut ordonner à celle-ci :

(a) not to engage in the conduct or substantially similar reviewable conduct;

a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;

(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

b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :

(i) a description of the reviewable conduct,

(i) l'énoncé des éléments du comportement susceptible d'examen,

(ii) the time period and geographical area to which the conduct relates, and

(ii) la période et le secteur géographique auxquels le comportement est afférent,

(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;

(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

(c) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding

c) de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale :

(i) in the case of an individual, the greater of

(i) dans le cas d'une personne physique, correspondant au plus élevé des montants suivants :

(A) \$750,000 and, for each subsequent order, \$1,000,000, and

(A) 750 000 \$ pour la première ordonnance et 1 000 000 \$ pour toute ordonnance subséquente,

(B) three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined, or

(B) trois fois la valeur du bénéfice tiré du comportement trompeur, si ce montant peut être déterminé raisonnablement,

(ii) in the case of a corporation, the greater of

(ii) dans le cas d'une personne morale, correspondant au plus élevé des montants suivants :

(A) \$10,000,000 and, for each subsequent order, \$15,000,000, and

(A) 10 000 000 \$ pour la première ordonnance et 15 000 000 \$ pour toute ordonnance subséquente,

(B) three times the value of the benefit derived from the

(B) trois fois la valeur du bénéfice tiré du

deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues; and

comportement trompeur ou, si ce montant ne peut pas être déterminé raisonnablement, trois pour cent des recettes globales brutes annuelles de la personne morale;

(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate.

d) s'agissant du comportement visé à l'alinéa 74.01(1)a), de payer aux personnes auxquelles les produits visés par le comportement ont été vendus — sauf les grossistes, détaillants ou autres distributeurs, dans la mesure où ils ont revendu ou distribué les produits — une somme — ne pouvant excéder la somme totale payée au contrevenant pour ces produits — devant être répartie entre elles de la manière qu'il estime indiquée.

(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.

(3) No order may be made against a person under paragraph (1)(b), (c) or (d) if the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

(3) L'ordonnance prévue aux alinéas (1)b), c) ou d) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher le comportement reproché.

(4) The terms of an order made against a person under paragraph (1)(b), (c) or (d) 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.

(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b), c) ou d) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non pas à le punir.

(5) Any evidence of the following shall be taken into account in

(5) Pour la détermination du montant de la sanction administrative

determining the amount of an administrative monetary penalty under paragraph (1)(c):

pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

- | | |
|--|---|
| <p>(a) the reach of the conduct within the relevant geographic market;</p> | <p>a) la portée du comportement sur le marché géographique pertinent;</p> |
| <p>(b) the frequency and duration of the conduct;</p> | <p>b) la fréquence et la durée du comportement;</p> |
| <p>(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;</p> | <p>c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;</p> |
| <p>(d) the materiality of any representation;</p> | <p>d) l'importance des indications;</p> |
| <p>(e) the likelihood of self-correction in the relevant geographic market;</p> | <p>e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;</p> |
| <p>(f) the effect on competition in the relevant market;</p> | <p>f) l'effet sur la concurrence dans le marché pertinent;</p> |
| <p>(g) the gross revenue from sales affected by the conduct;</p> | <p>g) le revenu brut provenant des ventes sur lesquelles le comportement a eu une incidence;</p> |
| <p>(h) the financial position of the person against whom the order is made;</p> | <p>h) la situation financière de la personne visée par l'ordonnance;</p> |
| <p>(i) the history of compliance with this Act by the person against whom the order is made;</p> | <p>i) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;</p> |
| <p>(j) any decision of the court in relation to an application for an order under paragraph (1)(d);</p> | <p>j) toute décision du tribunal à l'égard d'une demande d'ordonnance présentée au titre de l'alinéa (1)d);</p> |
| <p>(k) any other amounts paid or</p> | <p>k) toute somme déjà payée par la</p> |

ordered to be paid by the person against whom the order is made as a refund or as restitution or other compensation in respect of the conduct; and

personne visée par l'ordonnance ou à payer par elle en vertu d'une ordonnance, à titre de remboursement, de restitution ou de toute autre forme de dédommagement à l'égard du comportement;

(1) any other relevant factor.

1) tout autre élément pertinent.

[...]

[...]

Competition Tribunal Act, R.S.C., 1985, c. 19 (2nd Supp.).

Loi sur le Tribunal de la concurrence, L.R.C. (1985), ch. 19 (2^e suppl.).

13(1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court.

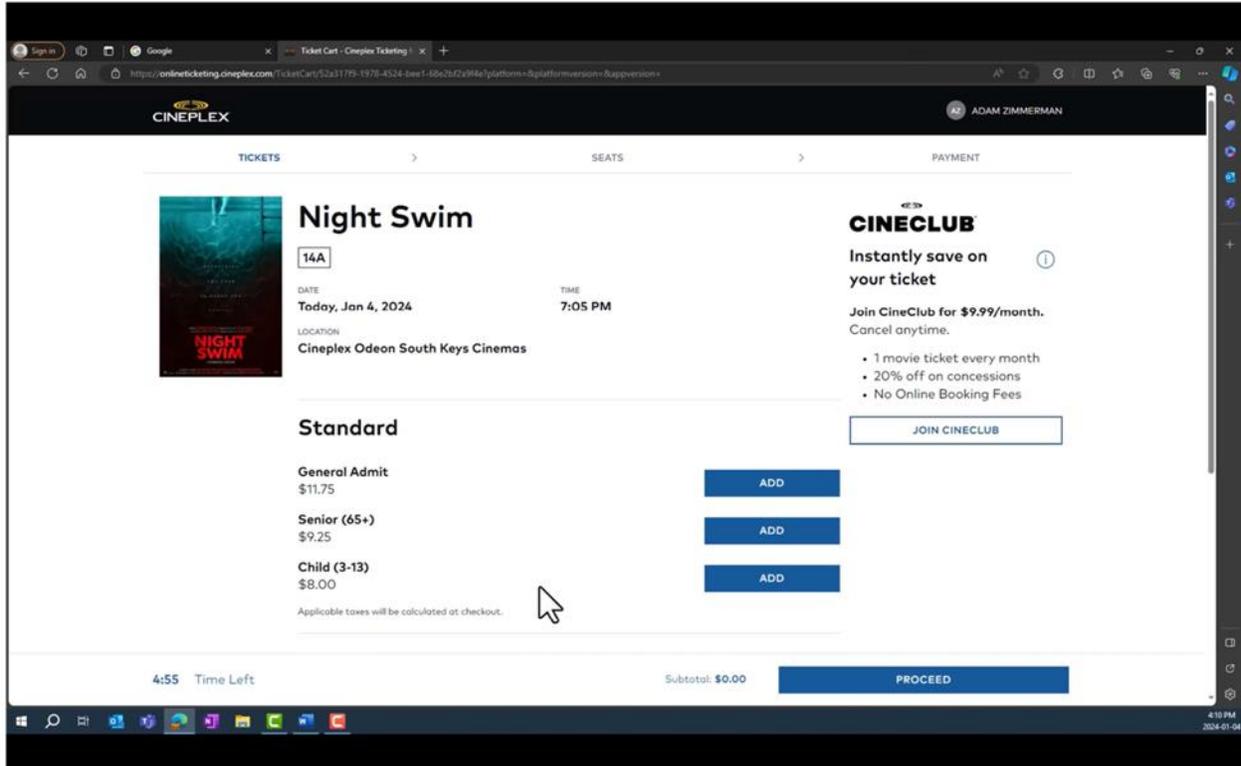
13(1) Sous réserve du paragraphe (2), les décisions ou ordonnances du Tribunal, que celles-ci soient définitives, interlocutoires ou provisoires, sont susceptibles d'appel devant la Cour d'appel fédérale tout comme s'il s'agissait de jugements de la Cour fédérale.

(2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.

(2) Un appel sur une question de fait n'a lieu qu'avec l'autorisation de la Cour d'appel fédérale.

Appendix 2: Movie ticket purchase process on cineplex.com accessed through a computer

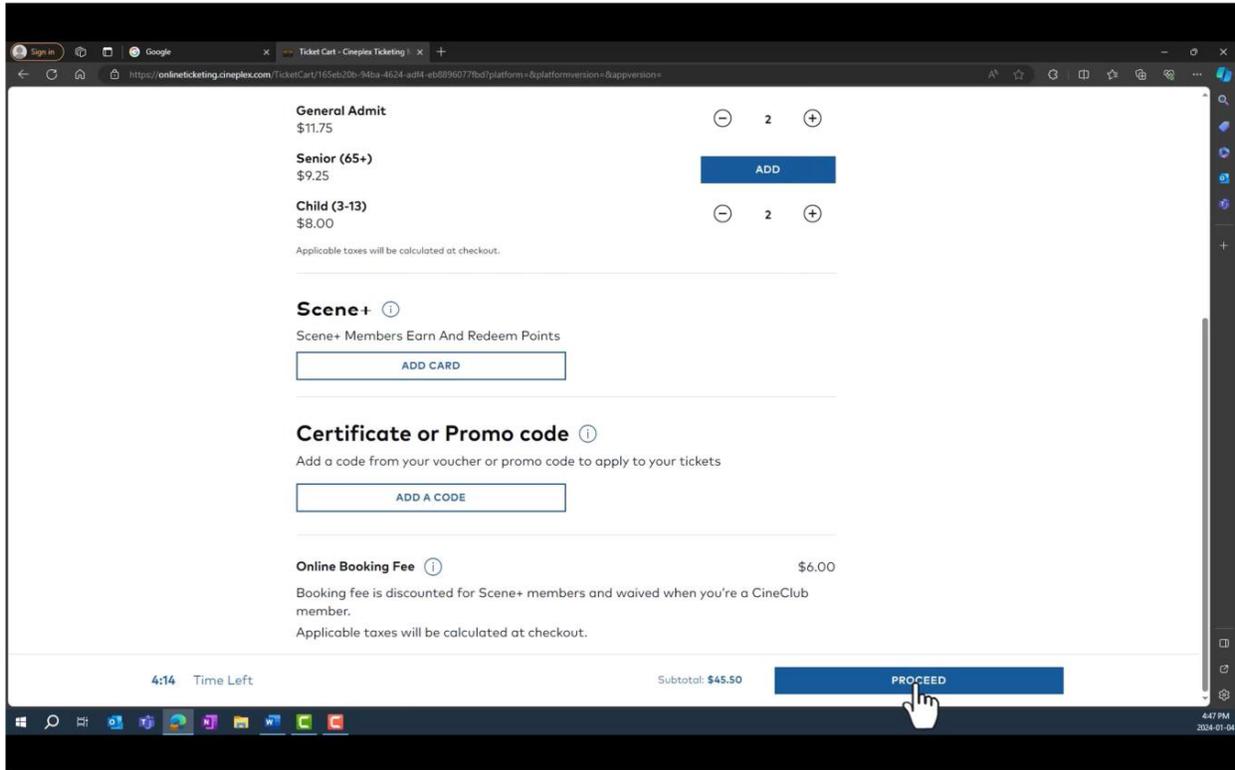
Tickets Page A



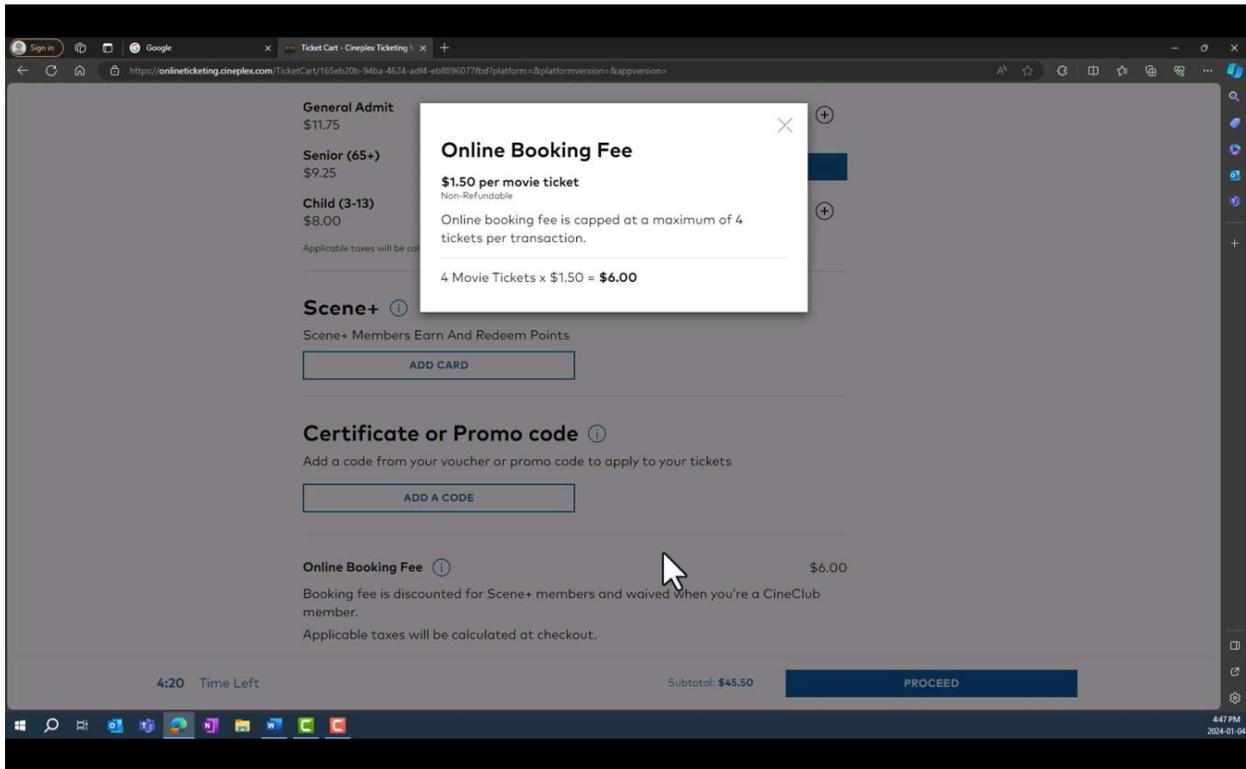
Tickets Page B (above the fold)

The screenshot shows a web browser window displaying the Cineplex online ticketing interface. The browser's address bar shows the URL: <https://onlineticketing.cineplex.com/TicketCart/52a317f9-1978-4524-bee1-69c2bf2a94e7?platform=&platformversion=&appversion=>. The Cineplex logo is visible in the top left, and the user's name, ADAM ZIMMERMAN, is in the top right. The navigation bar includes 'TICKETS', 'SEATS', and 'PAYMENT'. The main content area features a movie poster for 'Night Swim' on the left. To the right of the poster, the movie title 'Night Swim' is displayed in large text. Below the title, the selected seat '14A' is shown in a box. The date is 'Today, Jan 4, 2024' and the time is '7:05 PM'. The location is 'Cineplex Odeon South Keys Cinemas'. On the right side of the page, there is a 'CINECLUB' promotion: 'Instantly save on your ticket'. It offers a 'Join CineClub for \$9.99/month. Cancel anytime.' with benefits: '1 movie ticket every month', '20% off on concessions', and 'No Online Booking Fees'. A 'JOIN CINECLUB' button is located below the promotion. The 'Standard' ticket category is selected. The ticket list includes: 'General Admit \$11.75' with a quantity of 2, 'Senior (65+) \$9.25' with an 'ADD' button, and 'Child (3-13) \$8.00' with a quantity of 2. A note states 'Applicable taxes will be calculated at checkout.' At the bottom of the page, a '4:44 Time Left' timer is on the left, and a 'Subtotal: \$45.50' is on the right. A blue 'PROCEED' button is highlighted with a hand cursor. The Windows taskbar is visible at the very bottom, showing the time as 4:10 PM on 2024-01-04.

Tickets Page B (below the fold)

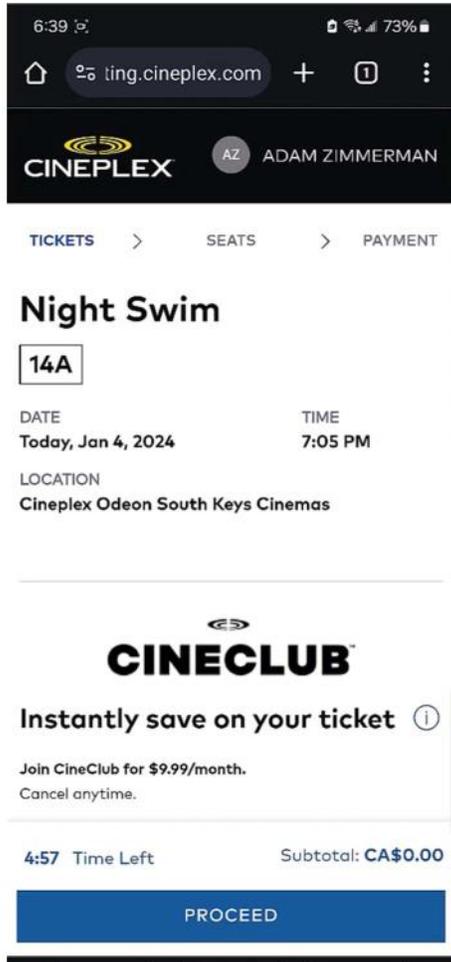


Tickets Page B (below the fold) (Online Booking Fee info pop-up)

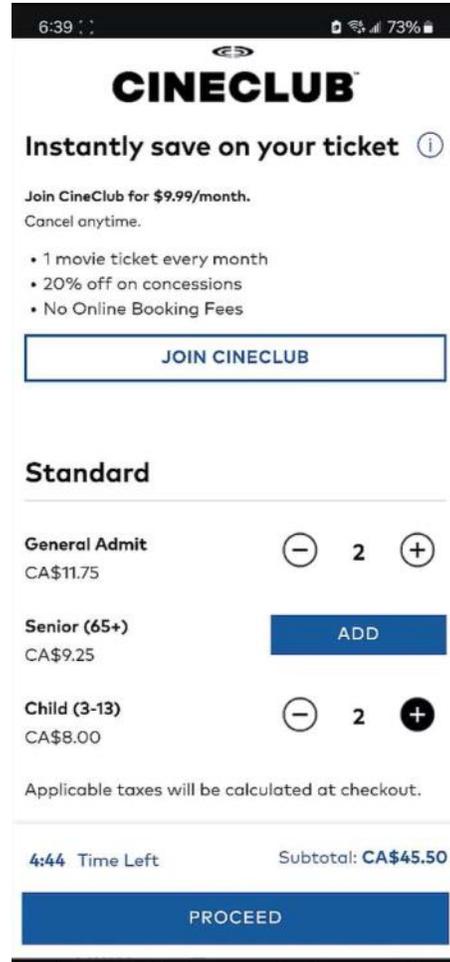


Appendix 3: Movie ticket purchase process on cineplex.com accessed through a mobile device

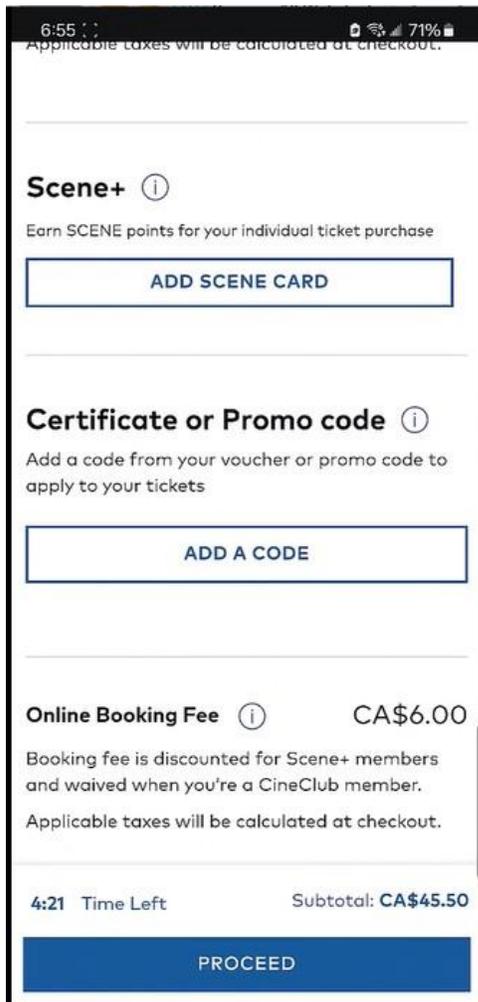
Tickets Page A



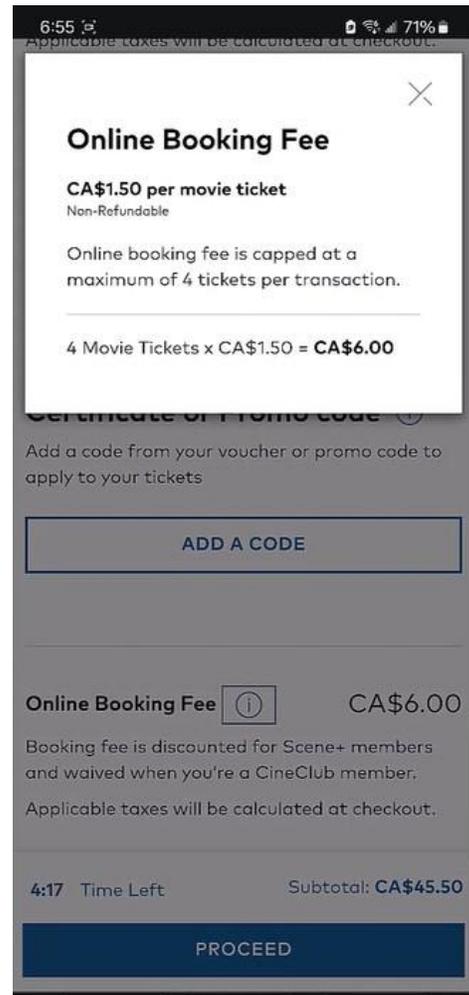
Tickets Page B (above the fold)



Tickets Page B (below the fold)

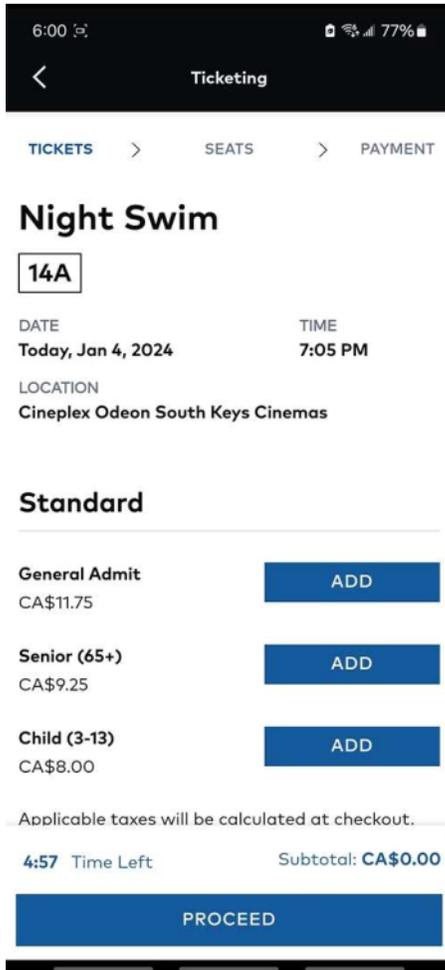


Tickets Page B (Online Booking Fee info pop-up)

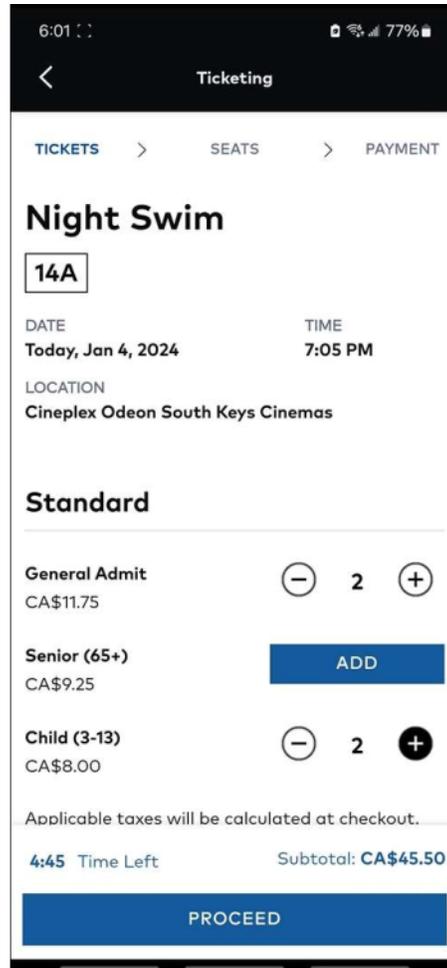


Appendix 4: Movie ticket purchase process on the Cineplex app

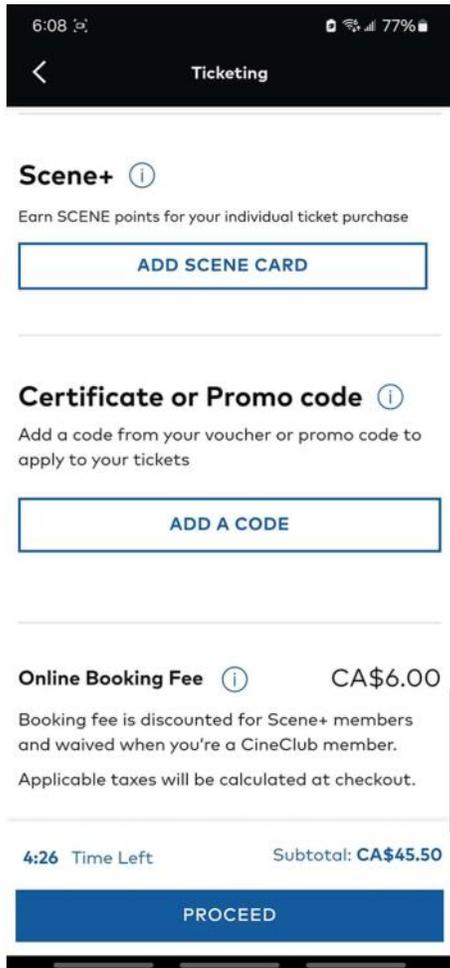
Tickets Page A



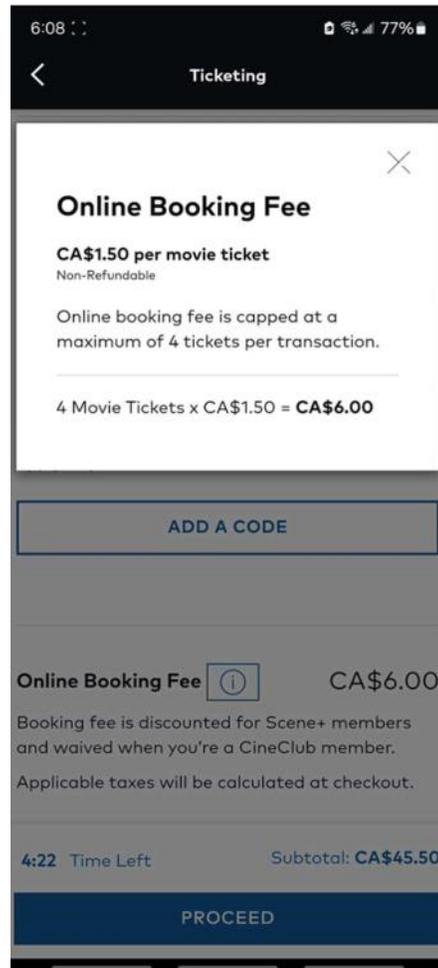
Tickets Page B (above the fold)



Tickets Page B (below the fold)



Tickets Page B (below the fold) (Online Booking Fee info pop-up)



FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-346-24

STYLE OF CAUSE: CINEPLEX INC. v.
COMMISSIONER OF
COMPETITION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 8, 2025

PUBLIC REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: WOODS J.A.
WALKER J.A.

DATED: JANUARY 21, 2026

APPEARANCES:

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