

FILED / PRODUIT

Date: May 18, 2023

CT- 2023-003

Annie Ruhlmann for / pour
REGISTRAR / REGISTRAIRE

CT-2023-

OTTAWA, ONT.

1

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and as clarified for greater certainty by subsection 74.01(1.1) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

CINEPLEX INC.

Respondent

NOTICE OF APPLICATION

TAKE NOTICE that the Commissioner of Competition (the “**Commissioner**”) will make an application (the “**Application**”) to the Competition Tribunal (the “**Tribunal**”) for an order pursuant to section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “**Act**”), in respect of conduct reviewable pursuant to paragraph 74.01(1)(a) and as clarified for greater certainty by subsection 74.01(1.1) of the Act.

AND TAKE NOTICE that the Commissioner relies on the following Statement of Grounds and Material Facts in support of this Application and on such further or other material as counsel may advise and the Tribunal may permit.

AND TAKE NOTICE that if you do not file a Response with the Registrar of the Tribunal within 45 days of the date upon which this Application is served upon you, the Tribunal may, upon application by the Commissioner and without further notice, make such order or orders as it may consider just, including the order sought in this Application.

TO: Cineplex Inc.
1303 Young Street
Toronto, Ontario
M4T 2Y9

APPLICATION

1. The Commissioner makes this Application pursuant to section 74.1 of the Act for:
 - a. a declaration that the Respondent, Cineplex Inc. (“**Cineplex**”), has engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(a) and as clarified for greater certainty by subsection 74.01(1.1) of the Act;
 - b. an order prohibiting Cineplex from engaging in the reviewable conduct or substantially similar reviewable conduct in Canada for a period of ten years from the date of such order;
 - c. an order requiring Cineplex to publish or otherwise disseminate notices of the determinations made herein pursuant to paragraph 74.1(1)(b) of the Act in such manner and at such times as the Commissioner may advise and this Tribunal may permit;
 - d. an order requiring Cineplex to pay such an administrative monetary penalty as the Tribunal deems appropriate;
 - e. an order requiring Cineplex to pay an amount, not exceeding the total amounts paid to Cineplex for the products in respect of which the reviewable conduct was engaged in, to be distributed among those persons to whom the products were sold, in an amount and manner to be assessed by the Tribunal;
 - f. costs; and
 - g. such further and other relief as the Commissioner may advise and this Tribunal may permit.

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. OVERVIEW

2. Cineplex, which describes itself as Canada’s largest theatre operator, sells tickets to movies and alternative programming (i.e. concerts, operas, etc.) (collectively “**Movie Ticket(s)**”) through its website Cineplex.com (the “**Website**”), and its mobile application, Cineplex Mobile (the “**App**”). Cineplex has made, and is continuing to make, representations to the public on its Website and in its App that are false or misleading in a material respect about the price consumers must pay to buy Movie Tickets.
3. Specifically, as described below, Cineplex promotes its Movie Tickets to the public on its Website and in its App at prices that are unattainable (the “**Unattainable Price Representations**”). The prices are unattainable because consumers purchasing Movie Tickets on the Website or in its App must also pay a fixed obligatory fee (the “**Online Booking Fee**”) in addition to the price represented for the ticket.
4. Cineplex started this deceptive marketing practice in June of 2022. That month, the amendments to the Act that were introduced that April came into force to explicitly confirm that the making of a representation of a price that is not attainable due to fixed obligatory charges or fees (drip pricing) constitutes a false or misleading representation, unless the obligatory charges or fees represent only an amount imposed by or under an Act of Parliament or the legislature of a province.
5. Cineplex’s fixed obligatory Online Booking Fee is not a charge or fee that has been imposed by or under an Act of Parliament or the legislature of a province. Rather, the Online Booking Fee is a source of revenue for Cineplex, having generated nearly \$17 million in revenues in the nine

months since its implementation. Further, the Online Booking Fee continues to generate significant revenues for Cineplex.

I. THE PARTIES

6. The Commissioner is an officer appointed by the Governor in Counsel under section 7 of the Act and is responsible for the administration and enforcement of the Act.
7. Cineplex is a corporation incorporated pursuant to the laws of Ontario. It describes itself as a leading media and entertainment company, being Canada's largest exhibitor with 158 theaters across Canada. Its registered head office is located at 1202 Young Street, Toronto, Ontario, M4T 2Y9.

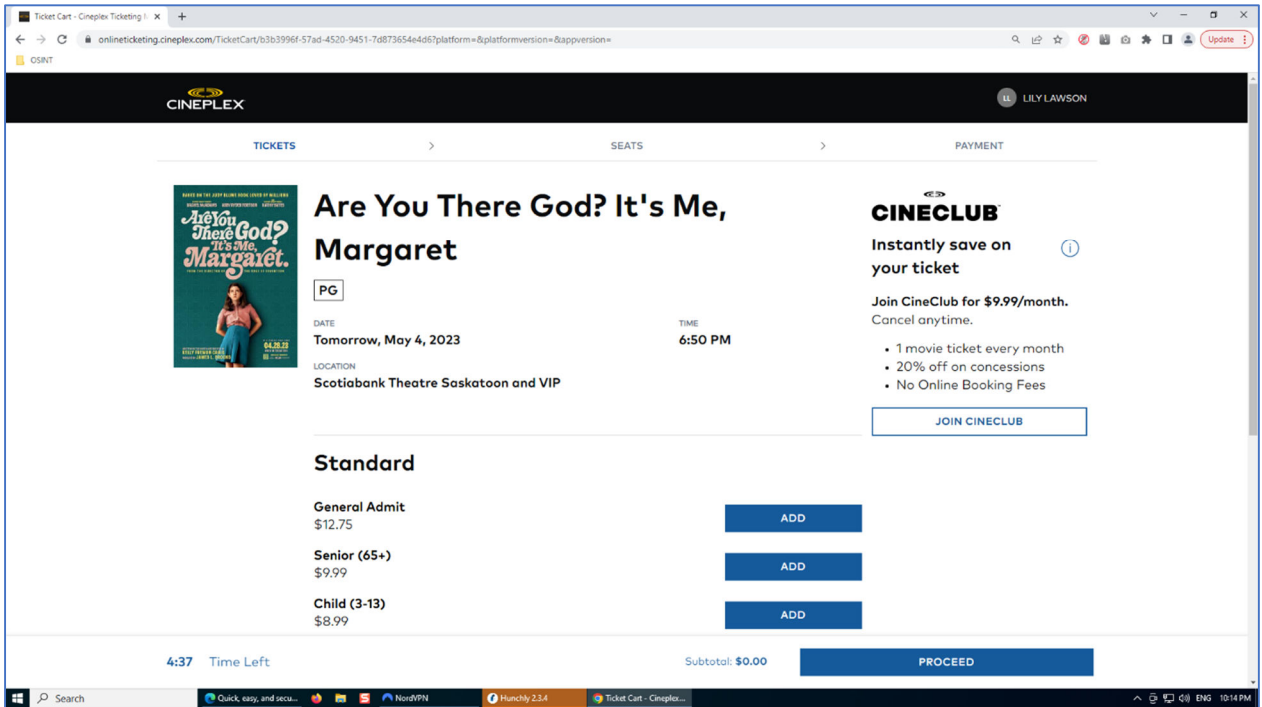
II. CINEPLEX'S DECEPTIVE MARKETING PRACTICES

8. Cineplex has made, and continues to make materially false or misleading representations to the Canadian public for the purposes of promoting the supply or use of Movie Tickets and its business interests more generally, contrary to paragraph 74.01(1)(a) of the Act.
9. Specifically, as part of the sale of its Movie Tickets on its Website and in its App, Cineplex has made, and continues to make, materially false or misleading representations regarding prices that are not attainable due to fixed obligatory charges or fees (drip pricing). The Act specifically provides in subsection 74.01(1.1) that, 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 by or under an Act of Parliament or the legislature of a province, which the Online Booking Fee is not.

10. Even absent subsection 74.01(1.1) of the Act, the price representations were and continue to be materially false or misleading and contrary to the Act.

The Unattainable Price Representations

11. Regardless of whether a consumer purchases a Movie Ticket through the Website or the App, Cineplex makes similar representations.
12. When consumers initially launch the Website or the App, they first have to select the movie that they want to see. While the sequence may vary, consumers are then required to pick the date, time, theater location, video format or any speciality theater options for that movie. Next, consumers have to log into their Cineplex account, which takes consumers to the “Tickets” page. As part of this page, consumers are presented with Cineplex’s Movie Ticket prices for their selection, and are asked to select the number of Movie Tickets they would like to purchase, with Movie Ticket prices varying primarily by age.
13. The “Tickets” page is both the first time that consumers are presented with any pricing information, and where Cineplex makes its Unattainable Price Representations. See the following example:



The fixed obligatory fees

14. After consumers select the number of Movie Tickets they want, they are invited to proceed with the purchase. A non-refundable fixed Online Booking Fee of \$1.50 per Movie Ticket is subsequently added to the cost of the purchase.
15. For regular moviegoers who are not Scene+ or CineClub members (collectively “**Club Members**”), the full amount of the Online Booking Fee is obligatory in order to purchase the Movie Tickets, and is added to each ticket, to a maximum of four Online Booking Fees, or \$6.00.
16. Consumers who have a Scene+ membership (Cineplex’s rewards program) receive a discount of \$0.50 off the Online Booking Fee, such that an Online Booking Fee of \$1.00 is added to each Movie Ticket to a maximum of four Online Booking Fees, or \$4.00.

17. Only CineClub members, who pay to join that program, have the Online Booking Fee waived in its entirety when purchasing Movie Tickets through the Website or the App.
18. Cineplex has designed its Website and App to require consumers to log into their Cineplex account in order to initiate the purchase process before it presents consumers with Movie Ticket prices. Therefore, Cineplex is aware of whether the consumer is a regular moviegoer or a Club Member. As such, the fees have been fixed before the Unattainable Price Representations are made.

Not an amount imposed by or under an act of parliament or the legislature of a province

19. The fixed obligatory Online Booking Fee is not imposed by or under an Act of Parliament or the legislature of a province. Rather, Cineplex has generated millions of dollars of revenues from the fee, which it claims is used to pay for its own costs related to its digital infrastructure.

The Unattainable Price Representations are false or misleading to consumers

20. The Unattainable Price Representations are false or misleading in any event, and subsequent disclosure of the fee is inadequate to cure the deception that ensues to the consumer. Moreover, the design of the purchase process is such that consumers may never become aware of the Online Booking Fee, as detailed below.
21. On the "Tickets" page, Cineplex prominently displays the Unattainable Price Representations near the top of the page. Conversely, Cineplex places the Online Booking Fee at the bottom of the page, such that consumers are required to scroll to the bottom of the page to find the fee. However, the inclusion of a "proceed" button in a floating ribbon, which

always remains visible on screen, negates the need to scroll down to the bottom of the page when buying Movie Tickets.

22. Cineplex does not reveal the fact that there is an Online Booking Fee or the amount of that fee when presenting consumers with the Unattainable Price Representation. Rather, it has incorporated the fee into the subtotal displayed using small print in the floating ribbon. When consumers select the number of tickets they wish to purchase, the subtotal increases.
23. Without scrolling to the bottom of the page, consumers may not realize they have been charged additional fees unless they complete some mental arithmetic. Specifically, they would need to add up the prices of their selected tickets and then realize that the displayed total is higher than the Unattainable Price Representation.
24. Further, the issue of separating the Online Booking Fee from the Unattainable Price Representations persists even at the final stage of the purchase process, when consumers pay for their purchase. The “Subtotal” in the floating ribbon is replaced with the “Total”, again using a smaller font size than the rest of the text on screen, next to a prominently displayed “proceed” button. Clicking “proceed” will prompt the consumer to enter their payment information in order to complete their purchase.
25. Moreover, Cineplex’s use of urgency cues, in the form of a countdown timer displayed on screen at each stage of the purchase process, increases pressure on consumers to complete their purchase as quickly as possible before time runs out. This may inhibit consumers from noticing that the total cost actually increased more than it should have, or from scrolling down to the bottom of the page.
26. As such, the disclosures are wholly inadequate to prevent the Unattainable Price Representations from being false or misleading to the consumer.

The Unattainable Price Representations are material to consumers

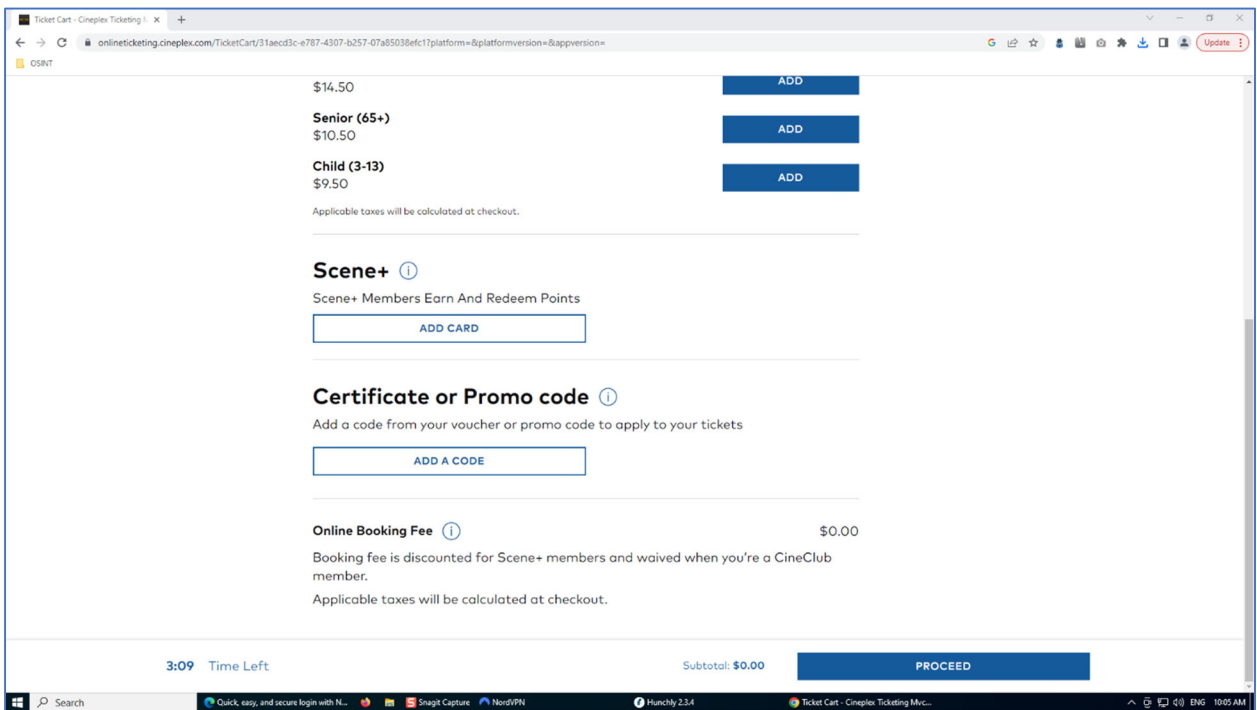
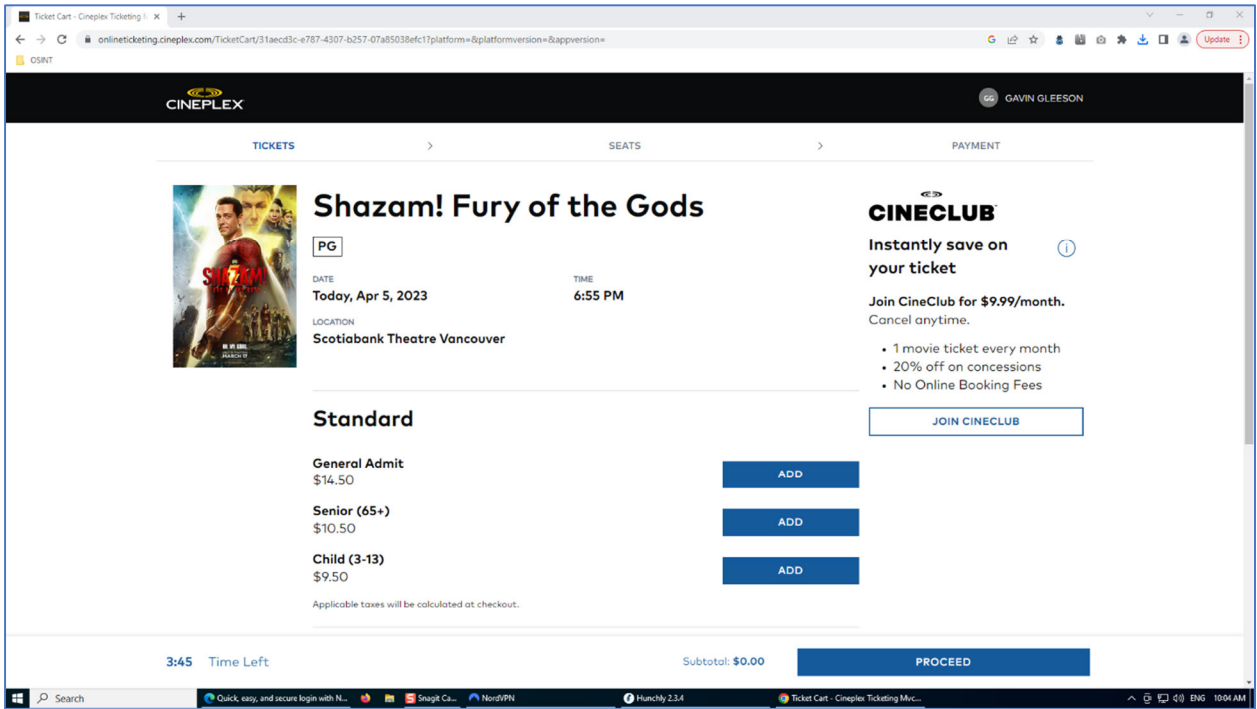
27. Price is an essential element in every consumer purchase transaction, and is invariably material to a consumer’s decision-making. That includes consumer decisions about whether to buy Movie Tickets from Cineplex, purchase entertainment elsewhere, or decide not to purchase anything.

III. EXAMPLES OF CINEPLEX’S MATERIALLY FALSE OR MISLEADING REPRESENTATIONS

28. Cineplex has made, and continues to make, Unattainable Price Representations on its Website and in its App promoting the sale of its Movie Tickets. Cineplex’s Unattainable Price Representations have reached, and continue to reach, the Canadian public countless number of times on a daily basis. A few examples of Cineplex’s materially false or misleading Unattainable Price Representations from across Canada are set out below.

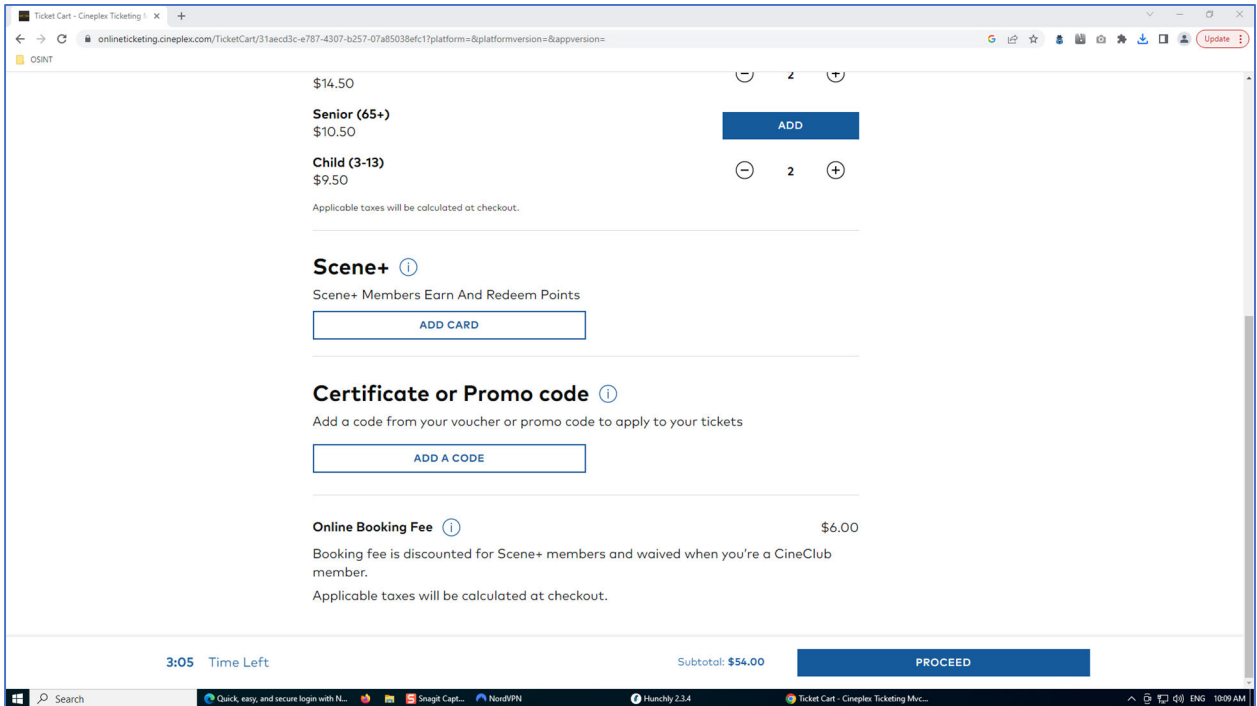
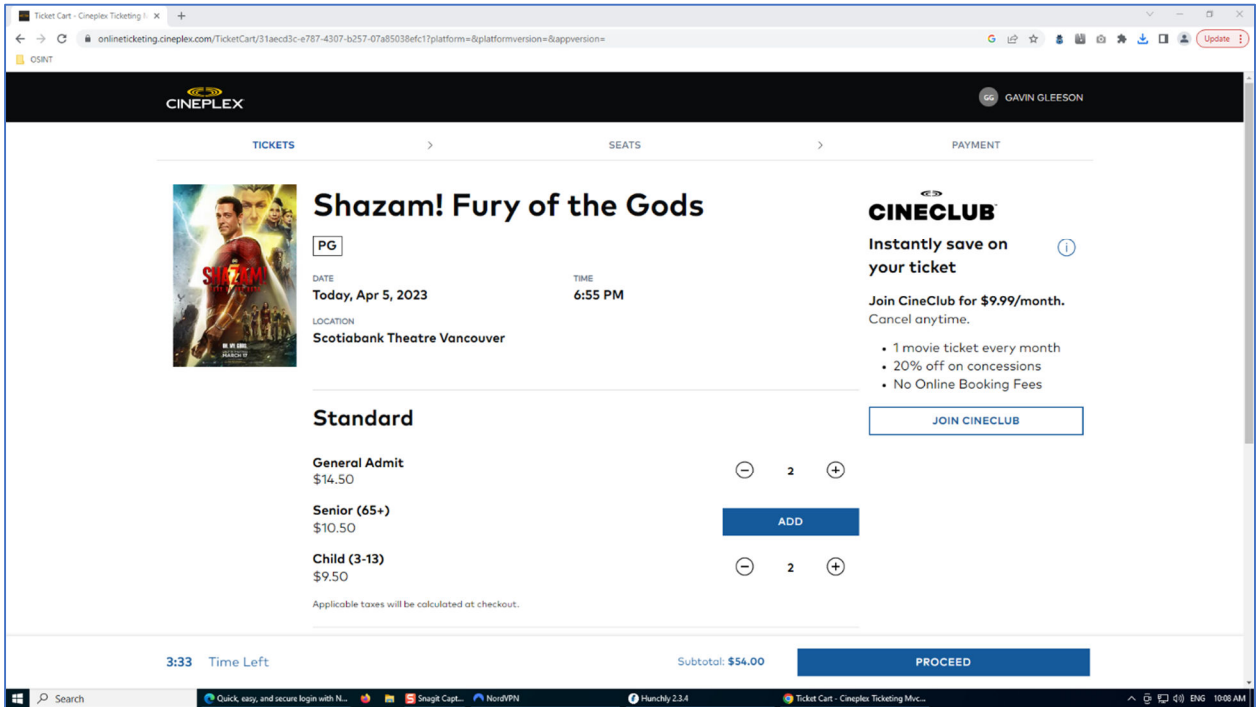
Website Example 1 – April 5, 2023, *Shazam! Fury of the Gods*

29. The images below depict an example of how the Unattainable Price Representations appear on Cineplex’s Website when the “Tickets” page of the purchase process is initiated for the 6:55 pm showing of *Shazam! Fury of the Gods* at the Scotiabank Theater Vancouver in British Columbia. Cineplex made the following Unattainable Price Representations for its \$14.50 General Admit, \$10.50 Senior (65+) and \$9.50 Child (3-13) Movie Tickets. These are a pair of consecutive images of the Website “Tickets” page and they illustrate the additional information displayed on screen as the consumer scrolls down the page.



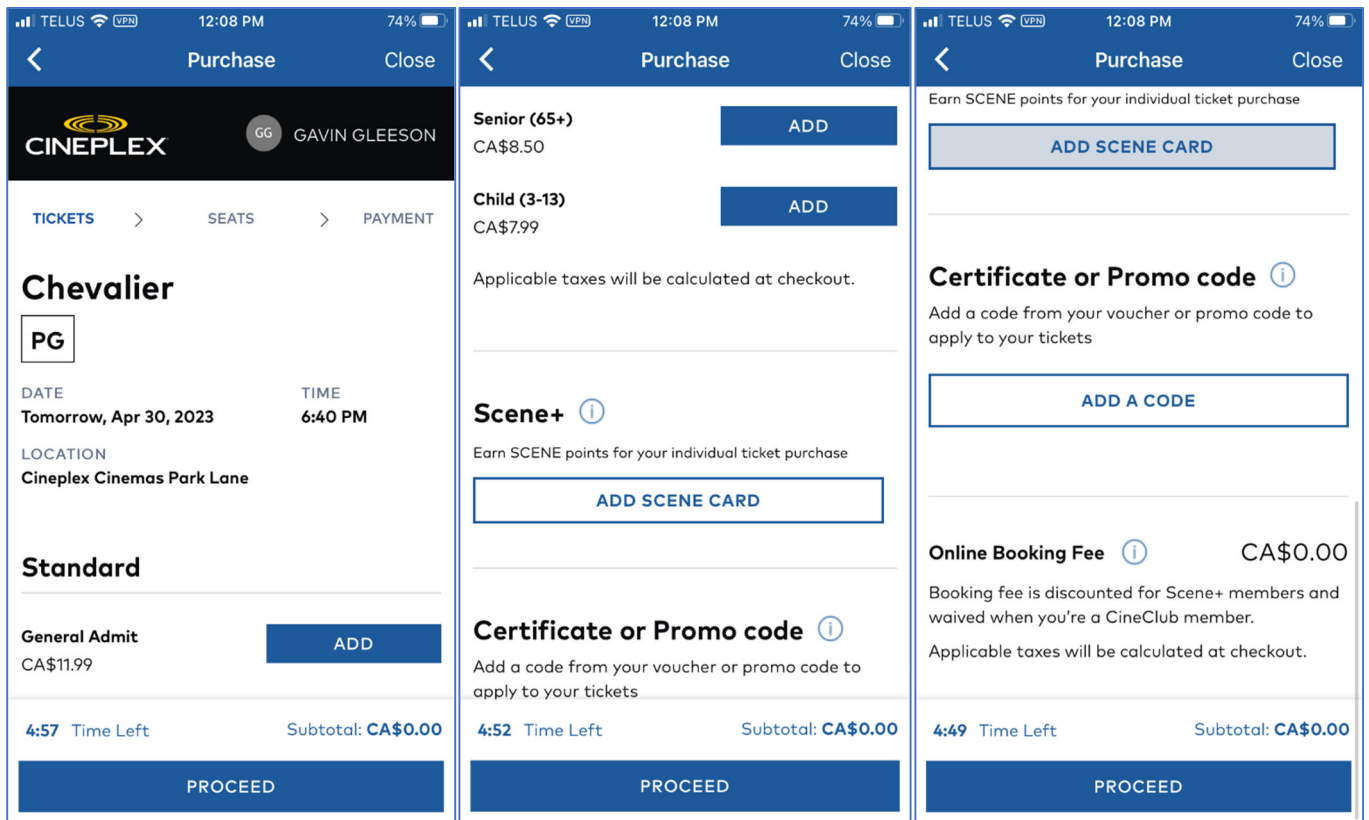
30. The following images reveals the full cost of the Movie Tickets *after* Cineplex has added the fixed obligatory Online Booking Fee to the

Unattainable Price Representations featured in the image above. Again, these are a pair of consecutive images.

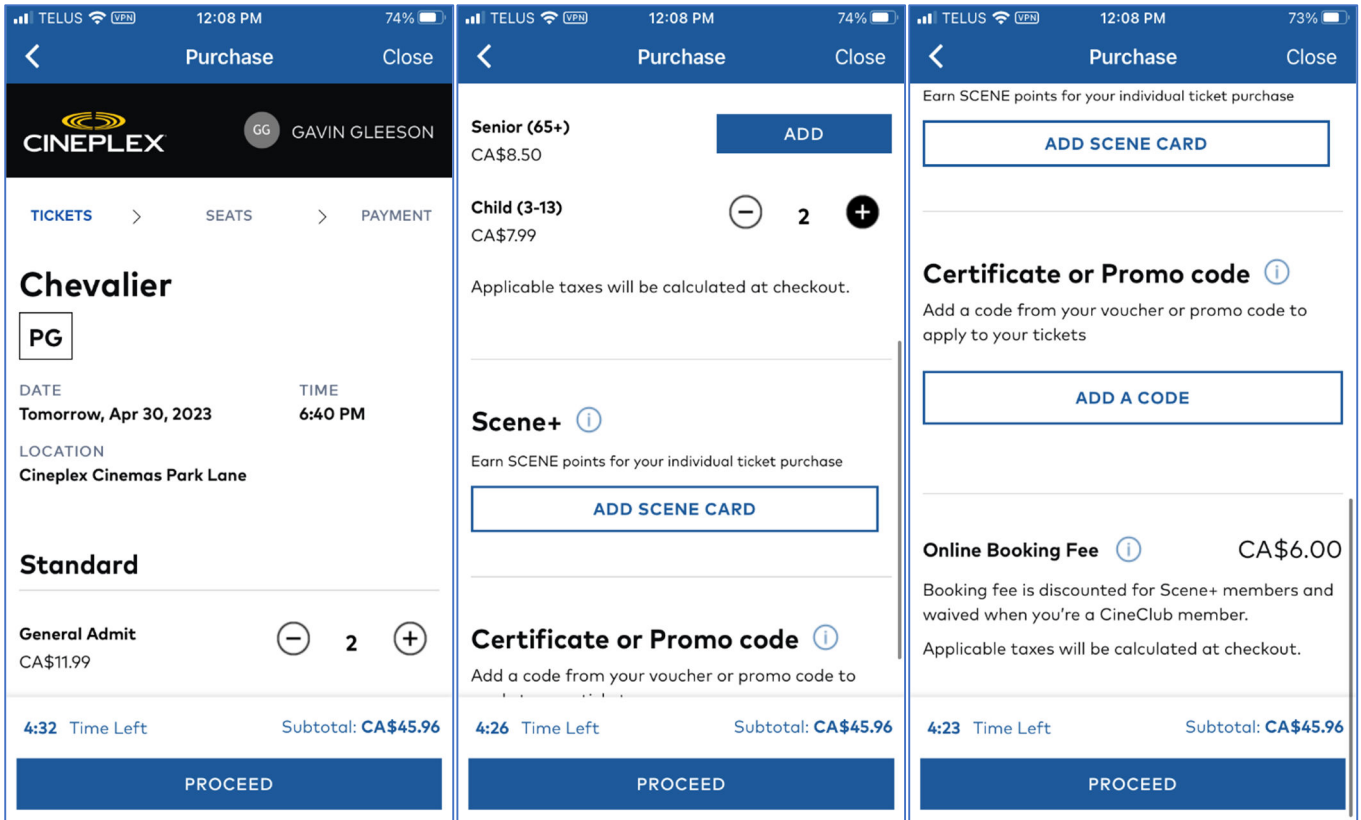


App Example 2 – April 30, 2023, *Chevalier*

31. The images below depict the Unattainable Price Representations made in-App when promoting the sale of Movie Tickets for the 6:40 pm showing of *Chevalier* at the Cineplex Cinemas Park Lane in Halifax, Nova Scotia. Cineplex made the following Unattainable Price Representations for its \$11.99 General Admit, \$8.50 Senior (65+) and \$7.99 Child (3-13) Movie Tickets. These are a series of consecutive images of the in-App “Tickets” page and they illustrate the additional information displayed on screen as the consumer scrolls down the page.



32. The following images reveal the full cost of the Movie Tickets *after* Cineplex has added the fixed obligatory Online Booking Fee to the Unattainable Price Representations featured in the images above. Again, they are a series of consecutive images.



IV. AGGRAVATING FACTORS

33. The deceptive conduct described herein is aggravated by the factors referred to in subsection 74.1(5) of the Act, including (but not limited to) the following:

- a. Cineplex is the largest and only national movie exhibitor carrying on business in Canada and the Unattainable Price Representations have been made and continue to be made across Canada;
- b. Cineplex engages in the conduct at issue on a daily basis, and has continued to engage in it for over eleven months as of the time of filing this Application;

- c. Cineplex’s reviewable conduct of misrepresenting the cost of Movie Tickets has a material impact on consumer behaviour;
- d. While the Act was only recently amended to expressly recognize drip pricing as a harmful business practice, the Commissioner has treated the practice as a contravention of the Act for many years;
 - i. The Bureau first publicly signalled its concerns about the practice of drip pricing in 2015, in an article entitled *Online advertising in Canada*, published in volume 1 of the Bureau’s Deceptive marketing Practices Digest. That same year, the Bureau took public enforcement action on drip pricing in Canada’s car rental industry. Enforcement efforts culminated in consent agreements that were announced publicly in 2016, 2017 and two in 2018. The Bureau reiterated its position on drip pricing in 2020 in an article entitled *Changing the status quo for car rental pricing practices: ensuring that the prices you see are the prices you pay*, published in Volume 5 of the Competition Bureau’s Deceptive Marketing Practices Digest;
 - ii. In 2017, the Commissioner focused on the ticketing industry, starting with a public warning to all ticket vendors about drip pricing. The warning urged ticket vendors to avoid drip pricing and display the real price of tickets upfront whenever the additional fees are mandatory for consumers. This was followed by enforcement efforts that culminated in two consent agreements with ticket vendors that were made public in 2019 and 2020;
 - iii. In October 2021, Senator Wetston launched a public consultation, inviting Canadians to comment on Canada’s

policy framework, including possible amendments to the Act. As part of the Commissioner's February 2022 response, he recommended that drip pricing be explicitly recognized as harmful in the Act. Shortly thereafter, in April 2022, Parliament introduced Bill C-19 *Budget Implementation Act, 2022* ("**BIA**"). Public commentary was readily available before the amendments to the Act came into force in June 2022 and expressly recognized drip pricing as a deceptive business practice under the law;

Yet despite the information available, Cineplex engaged in and continues to engage in the conduct at issue. As such, it is unlikely that Cineplex will cease the conduct at issue and self-correct; and

- e. Cineplex's quarterly and annual reports indicate that between June 23, 2022, and March 31, 2023, Cineplex generated over \$385 million in combined Box Office and Online Booking Fee revenues, with almost \$17 million from the Online Booking Fee alone.

V. RELIEF SOUGHT

- 34. The Commissioner claims the relief set out in paragraph 1, above.

VI. PROCEDURAL MATTERS

35. The Commissioner requests that this proceeding be conducted in English.
36. The Commissioner requests that this Application be heard in the City of Ottawa.

DATED AT Gatineau, this 17th day of May 2023.

Matthew Boswell
Commissioner of Competition

For the purposes of the Application, service of all documents on the Commissioner may be served on:

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AND TO : **The Registrar**
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