

**FILED / PRODUIT**

Date: July 14, 2023  
CT- 2023-003

Annie Ruhlmann for / pour  
REGISTRAR / REGISTRAIRE

**CT-2023-003**

OTTAWA, ONT.

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**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**

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**REPLY OF THE COMMISSIONER OF COMPETITION**

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## **I. OVERVIEW**

1. Notwithstanding its Response, Cineplex advertised, and continues to advertise unattainable Movie Ticket prices on its Website and in the App contrary to the *Competition Act* (the "**Act**").
2. The Commissioner repeats and relies upon the allegations in his Notice of Application and, except as hereinafter expressly admitted, denies the allegations in the Response. Unless otherwise indicated, defined terms in the Reply have the meaning ascribed to them in the Notice of Application.

## **II. CINEPLEX INVENTS A DRIP PRICING TEST**

3. To absolve itself of misleading consumers, Cineplex frames a test for drip pricing that ignores the plain language of subsection 74.01(1.1) which states that “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”. Cineplex instead substitutes its own definition for drip pricing as being whether “...the customer is drawn into the purchase process without full disclosure of overall pricing or cost...”. Cineplex’s test is not what subsection 74.01(1.1) of the Act states.
4. Cineplex cannot avoid that it advertises Movie Ticket prices on its Website and in the App for an unattainable price because of a subsequent fixed obligatory charge or fee that is added to the price. Dripping the Online Booking Fee onto the price of a Movie Ticket immediately after the consumer selects the type of ticket they want to purchase does not cure the misleading conduct. The Act draws no distinction between prices that are dripped on the initial page of a website or app and prices that are dripped on subsequent pages: they are all prohibited.
5. Having framed the test for drip pricing incorrectly, Cineplex then attempts to set out a factual basis for concluding that it has not engaged in its

definition of drip pricing, arguing that it fully disclosed the existence and/or amount of the Online Booking Fee. However, these facts, which are disputed in any event, are not relevant to whether Cineplex has engaged in drip pricing as set out in the Act.

### **III. CINEPLEX MISCHARACTERISES THE CONSUMER PURCHASE FLOW**

6. The purchase flow that consumers go through to purchase Movie Tickets on the Website and in the App involves a number of steps, which the Response acknowledges in paragraphs 28 through 34 and 36. While the sequence of the first five can vary, these steps include:

Step 1 – selecting a theatre;

Step 2 – selecting the movie they want to see;

Step 3 – selecting their preferred theatre experience;

Step 4 – selecting the date and preferred showtime;

Step 5 – signing in to their Cineplex account;

Step 6 – selecting the type of Movie Tickets to purchase;

Step 7 – selecting their seats; and

Step 8 – finally paying for the Movie Tickets.

7. Each of these eight steps is an indispensable part of using the Website or App to purchase Movie Tickets. However, Cineplex treats the first five steps (all of which occur before a consumer is presented with any pricing information) as somehow separate and distinct from the last steps of the purchase flow. At paragraph 35 of the Response Cineplex then asserts that the purchase price (including the Online Booking Fee) on the Website and the App “is prominently shown on every page” throughout the

purchase process. However, even if relevant, this is only true if the first five steps of the purchase process are ignored, an approach that reflects a completely artificial reimagining of the consumer purchase flow on the Website and in the App.

8. Contrary to Cineplex’s assertion in paragraph 6 of the Response, consumers are not presented with the price of a Movie Ticket “on the **very first page** of the Website and App”. [Emphasis in the original.] By its own admission in paragraph 29, “[i]mmediately after signing in, the first page the customer sees is the ‘**Tickets**’ page [at step 6], which lists the types of tickets available for purchase and their corresponding price”. [Emphasis in the original].
9. In order to reach the “Tickets” page on the Website or in the App, consumers must first navigate multiple pages designed to collect the information derived from the first five steps of the purchase flow described above. Despite asserting that the price of a Movie Ticket is based on the information identified in the first five steps of the purchase flow, Cineplex also states that this information is not part of the purchase process in an effort to suggest that consumers are presented with the full price of a Movie Ticket on the very first page of the Website and App.
10. Cineplex also glosses over the fact that when the price of a Movie Ticket is disclosed on the “Tickets” page, Cineplex does not actually adjust each price representation to show the full price; rather it adds up the cost of each Movie Ticket and the cost of the Online Booking Fee (which can be charged up to four times per transaction) all together, leaving it to consumers to figure out that the per-ticket cost has increased.

#### **IV. CINEPLEX MISCHARACTERIZES A MOVIE TICKET ON THE WEBSITE AND IN THE APP AS TWO DIFFERENT PRODUCTS**

11. Cineplex claims that “in essence, there are two separate services or products being purchased in the on-line booking system: the ticket for the

show and the advance seat reservation for that show.” However, regardless of where a consumer purchases their Movie Ticket, it has always included a seat in an auditorium to watch the movie – the introduction of the Online Booking Fee has not changed that fact. Furthermore, the suggestion that the Online Booking Fee was introduced to provide consumers with their choice of seat does not align with the fact that Cineplex has offered advanced seat selection since at least August 2018.

12. Cineplex makes much of the “distinct additional benefits” that are obtained by consumers purchasing through the Website or App and paying the Online Booking Fee, pointing to the seat selection that is available on the Website and in the App. However, there is in fact no distinction between what is available on the Website or in the App and what is available to consumers purchasing Movie Tickets at the theatre. In all instances, consumers are able to select their seats in advance and they can purchase Movie Tickets as close to a movie's showtime or as far in advance as Cineplex is offering Movie Tickets.

**V. CINEPLEX CONTINUES TO MAKE REPRESENTATIONS OF PRICES THAT ARE UNATTAINABLE ON THE WEBSITE OR IN THE APP DUE TO THE FIXED OBLIGATORY ONLINE BOOKING FEE**

13. By its own admission in paragraphs 29 and 31 of its Response as well as the accompanying figures, Cineplex is presenting consumers with Movie Ticket prices that do not include its fixed obligatory Online Booking Fee.

**A) The Prices Represented are Unattainable on the Website or in the App**

14. Cineplex argues that the prices it represents are in fact attainable because the Online Booking Fee is not obligatory. Specifically, Cineplex argues that the addition of the Online Booking Fee is not drip pricing because consumers can obtain the prices represented if consumers

decide to stop using the Website or App to complete their purchase and proceed instead to the theatre to start their purchase process anew.

15. The fact that consumers, after deciding to purchase a Movie Ticket through the Website or App and assuming they become aware that Cineplex has dripped the Online Booking Fee, can then choose to avoid the Online Booking Fee does not change the fact that Cineplex has made a price representation to the public that is unattainable on the Website or in the App due to the fixed obligatory Online Booking Fee.
16. Even if this choice is relevant, Cineplex ignores the fact that the Website and App are designed to encourage consumers to “proceed” with their purchase. It also ignores the fact that consumers who do attend at the theatre may be greeted with signs encouraging them to buy their Movie Tickets through the Website or the App, such as the one reproduced below.



17. Cineplex has framed the option of abandoning the Website or in-App purchases and proceeding to the theatre instead as a matter of consumer choice, indicating that the Website and App provide the consumer with information regarding movies playing at theatres, the locations, times, and prices for which Movie Tickets can be purchased.
18. Cineplex ignores that neither the Website nor the App direct the consumer nor inform them that there is a choice to be made between paying the Online Booking Fee or buying at the theatre and avoiding the additional Online Booking Fee.
19. Further, the existence and amount of the Online Booking Fee is not readily displayed to consumers, as it is located at the bottom of the webpage. Nor are consumers informed that the cost can be avoided by purchasing Movie Tickets at the theatre. As such, there is no indication that consumers are even made aware that they are making a choice not to save money at the theatre by clicking on the “proceed” button on the Website or in the App.

**B) The Online Booking Fee is Fixed**

20. The Online Booking Fee is fixed despite Cineplex’s offer to discount the Online Booking Fee depending on the consumers status. Offering a promotional discount does not change the fact that the full regular price of the Online Booking Fee is \$1.50.
21. In addition, Cineplex argues that the Online Booking Fee is not fixed out of interactive necessity of allowing for various possible customer selections. However, as particularised in both the Application and the Response, consumers will have already selected the movie, date, time, theatre, their “preferred theatre experience” and logged into their Cineplex account before Cineplex presents them with any Movie Ticket pricing information. As such, the Online Booking Fee is indeed fixed by the time the impugned unattainable price representations are made to the public.

**C) The Online Booking Fee is Obligatory**

22. Cineplex also incorrectly states that the Online Booking Fee is not obligatory for consumers using a promotional coupon. The Response neglects to point out that even this carve-out has exceptions, as there are a number of promotional certificates, including those that can be purchased at establishments such as Costco, for movie tickets that in fact do require consumers to pay the Online Booking Fee.
23. Cineplex also argues that the Online Booking Fee is not obligatory for CineClub members. This glosses over the fact that the Online Booking Fee must be paid by everyone who is not a CineClub member and that CineClub members pay a monthly subscription fee for membership. Notwithstanding that Cineplex has chosen to waive the Online Booking Fee for these members, it remains part of the purchase process.

**VI. CINEPLEX'S DISCLOSURES ARE INADEQUATE TO PREVENT THE PRICE REPRESENTATIONS FROM BEING MATERIALLY FALSE OR MISLEADING**

24. Pursuant to subsection 74.01(1.1) of the Act, disclosure of the Online Booking Fee after advertising the initially unattainable price is wholly irrelevant. However, the Commissioner's Application contends that even without the benefit of subsection 74.01(1.1) of the Act, the price representations would still be false or misleading in a material respect.
25. In this regard, while the Commissioner and Cineplex disagree on when the purchase process begins on the Website and in the App, it is agreed that the Movie Ticket prices initially displayed on the "Tickets" page (that is before the consumer selects the number and type of Movie Tickets they want to purchase) is not the full price of a Movie Ticket purchased through the Website or the App for all but CineClub member consumers. Throughout its Response, Cineplex repeatedly stresses that the Online



Booking Fee is “immediately” added as soon as the consumer selects the number and type of Movie Ticket that they want to purchase.

26. Disclosing and adding the Online Booking Fee after consumers have received and acted upon the initial unattainable pricing information displayed in the “Tickets” page cannot prevent or cure the deceptive conduct at issue, as consumers will have already been influenced in their decision-making.
27. Moreover, as revealed in Figure 1(a) of the Response, Cineplex does not disclose the *amount* of the Online Booking Fee to consumers before a Movie Ticket has been added to their order. Even the *existence* of the fee is not readily discernable to consumers. In this regard, Cineplex relies on an advertisement (that only appears on the Website) in the upper right hand side of the “Tickets” page inviting consumers to join CineClub as disclosure of the existence of the Online Booking Fee, as well as a line on the bottom of the page that indicates that there is an amount of \$0 dollars payable for the Online Booking Fee. This is wholly inadequate to disclose even the existence of such a fee, and does nothing at all to set out the quantum of that fee.
28. Once consumers select their Movie Tickets, as detailed in the Commissioner’s Application, the Online Booking Fee is incorporated into the subtotal displayed in a floating ‘ribbon’ along the bottom of the page. When consumers select the number of Movie Tickets they wish to purchase, the subtotal increases. Without scrolling to the bottom of the page, they may not realize that they have been charged the Online Booking Fee multiple times. Again, this falls well short of ensuring that consumers are not materially misled about the cost of Movie Tickets.

**VII. CINEPLEX MISCHARACTERIZES THE BUREAU'S GUIDANCE ON DRIP PRICING**

29. Cineplex incorrectly states that its representations also do not contravene the Competition Bureau's (the "**Bureau**") own definition of drip pricing, alleging that the Bureau defined drip pricing as the practice of offering attractive headline prices and then adding additional mandatory fees later in the transaction. It then argues that the fee is not dripped "later in the transaction" because it happens on the same page as the impugned price representations, suggesting that as such, the conduct is not reviewable.
30. This is a misinterpretation of the guidance. The guidance makes it clear that the question is whether mandatory fees are included in the advertised price or whether they are added later in the purchase process. If it is the latter, then the question of how much later is irrelevant. Further, the guidance cited by Cineplex are not the Bureau's guidance about the law as amended, but rather statements made by the Bureau about drip pricing in general *prior to* the amendments to the Act.
31. Cineplex fails to reference that the Bureau published guidance about the amendments immediately after they came into force in June of 2022 entitled: *Guide to the 2022 Amendments to the Competition Act*. This guidance makes no reference at all to the concept of 'later in the transaction', but rather advises that "[d]rip pricing involves offering a product or service at a price that is unattainable, because consumers must also pay additional non-government-imposed charges or fees to buy the product or service."<sup>1</sup> As can be seen, the guidance the Bureau offered after the amendments mirrors the test set out in the Act, and deals exactly with the conduct at issue in this matter.

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<sup>1</sup> [Guide to the 2022 amendments to the Competition Act \(canada.ca\)](https://www.canada.ca/en/competition-bureau/2022/06/guide-to-the-2022-amendments-to-the-competition-act.html)

32. In any event, the question is not how the Bureau describes drip pricing; rather, the question to be answered is whether the conduct engaged in by Cineplex contravenes the specific test set out in the language of the Act.

DATED AT Gatineau, Quebec, this 14 day of July, 2023.

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