CT-2023-003

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

WRITTEN SUBMISSIONS OF THE RESPONDENT CINEPLEX INC.

I. INTRODUCTION

1. On May 18, 2023, the Commissioner of Competition ("Commissioner") filed a Notice of Application (the "**Application**") for an order pursuant to section 74.1 of the *Competition Act*, R.S.C 1985, c. C-34, as amended (the "***Act"***) seeking various grounds of relief as particularized in the Application.

2. The Application alleges that Cineplex has engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(a) and subsection 74.01(1.1) of the *Act*. Specifically, the Application focuses on purchases that are made on Cineplex.com (the "**Website**") and the Cineplex Mobile App (the "**App**") and the application of a contingent and contemporaneous online booking fee ("**the online booking fee**").

3. Cineplex filed a Response to the Application on June 30, 2023. Cineplex denied –and continues to deny- the allegations in the Application or any wrongdoing at all ("**Cineplex's Response**").

4. The Commissioner filed a Reply to Cineplex's Response on July 14, 2023 (the "**Commissioner's Reply**"). Cineplex denies all allegations in the Commissioner's Reply except as expressly admitted and continues to deny any breach of the *Act* or any wrongdoing at all.

5. Cineplex submits that the Commissioner's assertion in both the Application and the Commissioner's Reply, that Cineplex engages in drip pricing by promoting its movie tickets to the public on its Website and App, at prices that are said by the Commissioner to be obligatory and unattainable, is based on a mischaracterization of the Website and App purchase process, and a misapprehension and misapplication of the law.

6. Cineplex accordingly seeks that the Application be dismissed in its entirety, with costs awarded to Cineplex.

FACTS NOT IN DISPUTE

7. Cineplex is a film and entertainment company with head offices at 1303 Yonge Street in Toronto, Ontario, Canada.

8. On June 15, 2022, Cineplex introduced an online booking fee.

9. As implied by its name, the online booking fee strictly and only applies to certain purchases made online, i.e. to certain Advance e-Tickets. The introduction of the online booking fee did not impact the pricing of tickets that could be purchased at theatres.

10. The online booking fee charged for an online purchase can vary in amount as follows: $0.00 per transaction for a consumer redeeming certain promotional coupons; $0.00 per transaction for members of the CineClub subscription program; $1.00 per ticket per transaction for Scene+ members (up to a maximum of $4.00 per transaction for four tickets); and $1.50 per ticket per transaction for everyone else purchasing online (up to a maximum of $6.00 per transaction for four tickets).

11. The online booking fee does not apply to movie tickets purchased at Cineplex's theatres (i.e. at a concession stand, kiosk or box office).[1] The base price displayed on the "Tickets" page of the Website and App is therefore attainable. In fact, approximately 48% of all movie tickets are purchased at theatres at the base ticket price.[2]

II. OVERVIEW

Variability of Ticket Pricing: The Importance of Choices

12. Consumers can purchase tickets either in person (at the theatre) or online (using the Website or the App.)

---

[1] **P-A-0047**, Agreed Statement of Facts, para 21, Tab 1.
[2] **P-R-0027**, Witness Statement of Dan McGrath, para 29, Tab 2.

13. Importantly, there is no single price for a movie ticket, whether purchased in person or online. There is multiple variability: Prices vary according to the age of the moviegoer, the theatre experience (IMAX, VIP, 4DX, ScreenX, UltraAVX, D-BOX, Clubhouse or regular), the day of the week, the theatre location, whether the moviegoer is a member of either CineClub or the Scene+ loyalty program, and whether the consumer wants to purchase a ticket at the theatre or proceed with an advance ticket purchase and advanced seat reservation through an online purchase.[3]

The Website and App: Information Gathering and Certainty of Advance Seat Selection

14. The Website and the App have a dual function. First, they provide information about various products and services that lead to informed decisions about the choices available online and otherwise. Second, the consumer can use the information to customize a movie ticket selection, by selecting their preferred title, theatre, experience, and seat, and then instantaneously securing that selection by proceeding with the online purchasing process.[4]

15. The Website and App are the predominant sources of information as to what movies are available, where those movies are playing, when the movies are playing, the experience in which the movies are available (3D, IMAX, VIP, 4DX, ScreenX, UltraAVX, D-BOX, Closed Captioning, Described Video etc.) and the price, based on the consumer's selections, including whether the movie ticket is purchased at theatres or purchased online.[5] The importance of the information component of the Website and App is underscored by Cineplex data which shows that, in 2022, 88 percent of visits to the Website ended before reaching the "Tickets" page (the first page where prices are shown).[6] This suggests that 88 percent of visits to the Website and App are purely to gather

[3] **P-R-0027**, Witness Statement of Dan McGrath, paras 34-35, Tab 3.
[4] **P-R-0027**, Witness Statement of Dan McGrath, para 18, Tab 4.
[5] **P-R-0027**, Witness Statement of Dan McGrath, para 9, Tab 5.
[6] **P-R-0027**, Witness Statement of Dan McGrath, para 67, Tab 6.

information (which is free of charge to consumers), one of the central dual functions of both Website and App.

16. The Website and App also provide the availability of, and the ability to make, online advanced seat reservations and the online purchase of movie tickets ("**Advance e-Ticket**").

17. Fundamental to this case is the final choice that a consumer must make with respect to the purchase of movie tickets. At the end of the information and choices provided to the consumer with respect to date, time, venue and movie experience, the consumer ends up on the page where prices are first displayed on the Website or App. At this point, the consumer, after customizing their movie going experience based on the choices available to them in the preceding pages, faces an important choice and trade-off with respect to pricing and convenience. The consumer has the choice of purchasing the tickets at the selected theatre shown above the base price, or alternatively, the consumer can select the number of tickets the consumer wishes to purchase online at the online price.[7]

18. Instantaneously, upon selecting the tickets that the consumer wishes to purchase online, the price of the ticket, including the online booking fee (if the online booking fee applies), is displayed prominently and immediately to the left of the "Proceed" button. The consumer cannot proceed to the subsequent page without making a ticket selection. Making the ticket selection causes the online price, which includes the price of the online booking fee (if the online booking fee applies), to be displayed immediately to the left of the "Proceed" button and before the "Proceed" button is operative.[8]

19. Once an online seat reservation is made, that seat will be held for the consumer and will not be available to those purchasing tickets at theatres (i.e., at a concession stand, kiosk or box office).[9]

---

[7] **P-R-0027**, Witness Statement of Dan McGrath, para 19, Tab 7; McGrath Evidence, Public Transcript, Vol 3, February 16, p. 421:11-22, Tab 8.
[8] **P-R-0027**, Witness Statement of Dan McGrath, para 20, Tab 9.
[9] **P-R-0027**, Witness Statement of Dan McGrath, para 10, Tab 10.

The Website and App accordingly provide the certainty of an instantaneous seat selection reflecting the choices offered to the consumer and the customized selections made by the consumer from the information presented.

20. An Advance e-Ticket can also be instantly gifted or forwarded without having to incur the cost of physically attending at the theatre and can also be used to ensure instant seat selection for groups that wish to sit together.[10]

The Online Booking Fee is Variable: Not Fixed and Not Obligatory

21. On June 15, 2022, Cineplex introduced an online booking fee that applied only to tickets purchased online. This did not impact the pricing of tickets that could be purchased at the theatre.

22. The online booking fee does not apply to movie tickets purchased at Cineplex theatres (i.e. at a concession stand, kiosk or box office).[11] The base price displayed on the "Tickets" page of the Website and App is therefore attainable. In fact, approximately 48% of all movie tickets are purchased at theatres at the base ticket price.[12]

23. Further and in any event, the online booking fee is variable.[13]The online booking fee is variable based on a number of factors such as the club membership or loyalty program the consumer belongs to, promotional coupons and the number of tickets purchased. CineClub members are not charged the online booking fee and Scene+ members who are not CineClub members are charged an online booking fee of $1.00 (up to a maximum of $4.00). Further, the online booking fee is not charged for certain promotional coupons.[14]

The Consumer Flow: From Information to the Online Purchasing Process

---

[10] **P-R-0027**, Witness Statement of Dan McGrath, para 41, Tab 11.
[11] **P-A-0047**, Agreed Statement of Facts, para 21, Tab 1.
[12] **P-R-0027**, Witness Statement of Dan McGrath, para 29, Tab 2.
[13] Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 765:21-23, Tab 12.
[14] **P-A-0019**, Commissioner of Competition's Read-ins, Response of Cineplex Inc. to Commissioner of Competition's Request to Admit (October 5, 2023) at p. 201, paras 10-11, Tab 13.

24. Consumers wishing to view movie availability and pricing using the Website begin by either selecting a theatre or a movie from the navigation bar. Once they select their preferred theatre location, the movie they want to see, their preferred theatre experience, and their preferred showtime, consumers are asked to sign into their Cineplex account.

25. Immediately after signing in, the first page that the consumer sees is the "**Tickets**" page, which lists the types of tickets available for purchase and their corresponding prices when purchased at the theatre for the applicable date and theatre experience.[15] Consumers who want to purchase tickets at the theatre and simply visit the Website to determine the availability of a movie, can determine the price and availability at the theatre of their choice immediately and then exit the Website. According to Cineplex data, out of the 97 million visits to the website in 2022, 11.8 percent proceeded to the Tickets page. This suggests that most visits to the Website are for informational purposes only. Out of those 11.8 percent of visits, 42.3 percent completed the ticket purchase transaction; thus only 4.99% of total visitors completed a ticket purchase transaction.[16]

26. Consumers are locked out of the online purchasing process until they make a ticket selection (i.e. clicking on the "Proceed" button without making a ticket selection results in an error message that prevents the consumer from entering the online purchasing process.)[17] No price for online purchases is shown before the consumer makes the selection of the type of ticket they want to purchase. Prior to ticket selection, the subtotal for an online purchase at the bottom of the page is **$0.00**.[18]

27. Instantaneously, upon selecting the tickets that the consumer wishes to buy online, the online booking fee is separately displayed and the price of the ticket, including the online booking

---

[15] **P-R-0027**, Witness Statement of Dan McGrath, para 64, Tab 14.
[16] **P-R-0027**, Witness Statement of Dan McGrath, para 67, Tab 6.
[17] **P-A-0047**, Agreed Statement of Facts, para 31, Tab 15; **P-R-0027**, Witness Statement of Dan McGrath, para 68, Tab 16.
[18] **P-R-0027**, Witness Statement of Dan McGrath, para 72, Tab 17.

fee (if the online booking fee applies), is displayed prominently and immediately to the left of the "Proceed" button, or “call-to-action" button.[19]

28. By clicking on the "Proceed" button, the consumer then enters the online purchasing process and is taken to the "**Seats**" page, where they are able to make seat selection and reservation in advance, and with the added convenience of doing this online. A total price is shown at the bottom of the page, which includes the online booking fee (if applicable) and tax.[20]

29. Once the consumer has made a seat selection, the consumer is taken to the "**Payments**" page, where the consumer is provided with an "Order Summary" that provides a clear breakdown of the purchase price. Consumers can then select their payment method and proceed to enter their payment information.[21]

30. Throughout the course of the transaction, the consumer has the opportunity to review the purchase price at four separate, consecutive stages.

Cineplex's Mobile App

31. The process for purchasing tickets on the App is similar to the purchasing process on the Website described above. The only difference is that after App users select their preferred movie and showtime, they are taken to the Tickets page without signing in (where they are already signed into their account). The remainder of the purchasing process is the same as on the Website.[22]

The Law

Section 74.01 (1.1)

---

[19] **P-R-0027**, Witness Statement of Dan McGrath, para 20, Tab 9.
[20] **P-R-0027**, Witness Statement of Dan McGrath, para 76, Tab 18.
[21] **P-R-0027**, Witness Statement of Dan McGrath, para 77, Tab 19.
[22] **P-R-0027**, Witness Statement of Dan McGrath, para 79, Tab 20.

32. This case is about the application of the new drip pricing provision found in subsection 74.01(1.1)

> **Misrepresentations to public**
>
> 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;
> …
>
> **Drip pricing**
>
> (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 by or under an Act of Parliament or the legislature of a province.

33. The Application brought by the Commissioner alleges (an allegation that Cineplex denies) that Cineplex has engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(a), as clarified by 74.01(1.1) of the Act. Specifically, the Application focuses on purchases that are made the Website and the App and the application of a contingent and contemporaneous online booking fee.

34. Subsection 74.01 (1.1) is **straightforward and clear**. It requires no interpretation.

35. First, it makes it clear that it is **definitional** as to what drip pricing means under s.74.01 by the use of the phrase "for greater certainty".

36. Secondly, it clearly indicates that it is focused on whether **"a price is attainable"** - the key element of the offence.

37. Thirdly, any lack of attainability must be **due to "fixed obligatory charges or fees"**. In other words, it is not attainability at large. For example, the fact that a product, or in this case

ticket, is sold out, is not caught by s.74.01. These words are clearly intended to avoid an overly broad application of ss. 74.01 (1.1).

38. Therefore s. 74.01(1.1):

a) Is definitional for the purposes of s.74.01;

b) Is clear in terms of the element of the offence that must be established by the Commissioner; and

c) Is self limiting in terms of its application.

39. The fact that ss.74.01(1.1) uses both the words attainable and obligatory, underscores the requirement that an alternative is not available to the consumer. The requirement that the section uses the word fixed clearly distinguishes fees that are variable and dependent on choices by the consumer.

STATUTORY CONSTRUCTION

40. Statutory construction or interpretation is unnecessary unless the Court finds and ambiguity. The Supreme Court of Canada in Canada Trustco Mortgage Co.[23] has held that when "the words of a statute are unequivocal, the ordinary meaning plays a dominant role in the interpretative process".

41. This rule of statutory construction related to ordinary meaning and its predominance as a role of statutory interpretation is trite law. The rule has been stated in a number of ways:

[23] *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, at para 10, Tab 21; see also *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, para 88, Tab 22; *Mohr v National Hockey League,* 2022 FCA 145, para 23, Tab 23.

a) Legislative provisions must be read harmoniously with objectives and scheme of the legislation, but if the language of the statute is clear and unambiguous, no interpretation is necessary.[24]

b) Where interpretation is necessary, the plain and ordinary meaning of the words govern the interpretive process[25].

c) The judicial function in considering and applying statutes is one of interpretation alone. In every case, the duty of the court is to endeavour to ascertain the intention of the legislature by reading and interpreting the language the legislature has selected for the purpose of expressing its intention.[26]

d) It is trite law that if the legislature has explained its own meaning too unequivocally to be mistaken, the court must adopt that meaning. The court has only to declare what the law is, not what it ought to be.[27]

---

[24] *Pries v Economical Mutual Insurance Co.*, 2012 CarswellOnt 12509 (FSCO Arb), para 42, Tab 24; reversed on other grounds (2013), 2013 CarswellOnt 9902 (F.S.C.O. App.).
[25] *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, at para 10, Tab 21; see also *Mohr v National Hockey League*, 2022 FCA 145, paras 13 and 23, Tab 22.
[26] *R v Dubois*, [1935] SCR 378, 3 DLR 209, at p. 381, Tab 25; *Thomson v. Canada (Department of Agriculture)* (1992), [1992] 1 S.C.R. 385 (S.C.C.), pp. 399-400 and 416, Tab 26; see also *R v Morgentaler, Smoling and Scott*, [1985] OJ No 2662, 52 OR (2d) 353 (CA), para 66, Tab 27; reversed in part on other grounds (1988), [1988] 1 S.C.R.30 (S.C.C.) (in interpreting abortion provisions of Criminal Code, open to court to determine what meaning words able to bear); *McIntyre Porcupine Mines Ltd. v Morgan*, [1921] OJ No 128, 49 OLR 214 (CA), at pp. 624 to 625, Tab 28; *R v Church of Scientology of Toronto*, [1974] OJ No 2013, 4 OR (2d) 707 (Co Ct), para 18, Tab 29 (ordinary rules of construction should be applied in interpreting statute prior to determining existence of ambiguity); *Manitoba Hydro v Dvorak*, [1981] 2 WWR725 (Man CA), 119 DLR (3d) 173, at p. 734, Tab 30; *R v Coates*, [1981] SJ No 1151, 15 MVR 70 (Sask QB), paras 9-12, Tab 31; *R v Blackham's Construction*, [1980] BCJ No 1265, 10 CELR 115 (BCCA), para 22, Tab 32 (regulation under Fisheries Act); *Saskatchewan Action Foundation for the Environment Inc. v Saskatchewan (Minister of the Environment & Public Safety*, [1992] 2 WWR 97, 86 DLR (4th) 577 (Sask CA), para 70, Tab 33 (cases of statutory interpretation should be resolved by courts unless authority to make such decision expressly conferred upon some other body).
[27] *Canadian Pacific Railway v James Bay Railway*, [1905] SCJ No 28, 36 SCR 42 (SCC), p. 88, Tab 34.

e) When the words of a statute are unequivocal, the ordinary meaning plays a dominant role in the interpretative process"[28]

f) The court will not make any alteration to the plain words in legislation.[29]

g) However regrettable the legislation may appear to be, if the legislative purpose is clear, the courts can neither disregard it nor decline to carry it out.[30]

42. When the statutory interpretation is necessary, the application of the principle of strict construction is amplified in respect of statutory provisions which are penal in nature. In *Bell ExpressVu* the SCC held that: "The principle of strict construction of penal statutes exists as a subsidiary interpretive device applicable only where there is a finding of a genuine ambiguity as to the meaning of a provision".[31]

43. Furthermore, and without prejudice to the foregoing position that ss.74.01(1.1) is clear and unambiguous as a complete code for drip pricing. However, if statutory interpretation were

---

[28] *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, at para 10, Tab 21; *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5, [2019] 1 S.C.R. 150, para 88, Tab 22; *Mohr v National Hockey League*, 2022 FCA 145, para 23, Tab 23.

[29] *Royal Trust Co v Minister of National Revenue*, [1953] Ex CR 287, 54 DTC 1001, at paras 11-17, Tab 35; *Metropolitan Toronto (Municipality) v Paul Magder Furs Ltd. (CA)*, [1990] OJ No 351, 72 OR (2d) 155 (CA), para 15, Tab 36; see also *R v Tuttle*, [1951] OWN 750, 101 CCC 249, paras 10-13, Tab 37.

[30] *Boulter-Waugh & Co. v. Phillips*, (1919), 58 S.C.R. 385 (S.C.C.), at pp. 396-397, Tab 38; *Clitheroe v. Hydro One Inc.*, 96 O.R. (3d) 203, paras 58-61, Tab 39; affirmed (2010), 2010 CarswellOnt 4030 (Ont. C.A.); leave to appeal refused (2010), 2010 CarswellOnt 9687 (S.C.C.) (legislature showed clear intention to retroactively limit pension entitlement); *Pries v Economical Mutual Insurance Co.*, 2012 CarswellOnt 12509 (FSCO Arb), para 42; reversed on other grounds (2013), 2013 CarswellOnt 9902 (F.S.C.O. App.), Tab 24; reversed on other grounds (2013), 2013 CarswellOnt 9902 (F.S.C.O. App.) (legislative provisions must be read harmoniously with objectives and scheme of legislation but if language of statute clear and unambiguous, no interpretation necessary); see also *Canadian Performing Right Society Ltd. v. Famous Players Canadian Corp*. (1929), [1929] A.C. 456, p. 3, Tab 40; *Dale v Blanchard (Township)* (1910), [1910] OJ No. 154, 21 OLR 497, affirmed (1911), 23 OLR 69 (CA), para 11, Tab 41; affirmed (1911), 23 O.L.R. 69 (Ont. C.A.); *Smith v. London (City)* (1909), 20 O.L.R. 133 (Ont. Div. Ct.), paras 21-23, Tab 42; 43. Doyle Clinic Ltd. v. Newton (1943), [1943] O.W.N. 411 (Ont. Div. Ct.), para 10, Tab 43 ; *McIntyre Porcupine Mines Ltd. v Morgan*, [1921] OJ No 128, 49 OLR 214 (CA), at pp. 624 to 625, Tab 28.

[31] See also: *Mohr v National Hockey League*, 2022 FCA 145, para 71, Tab 23; R. Sullivan, *Sullivan on the Construction of Statutes* (7th ed. 2014), at §15.05, Tab 44; *Canada (Commissioner of Competition) v Chatr Wireless Inc.*, 2013 ONSC 5315, para 397, Tab 45; R v McIntosh, [1995] 1 SCR 686, at 702 and 705, Tab 46; Marcotte v. Canada (Deputy Attorney General) (1974), [1976] 1 S.C.R. 108(S.C.C.), at p. 115, Tab 47.

necessary, the Hansards also support this interpretation, where parliamentary debates focused on enacting a specific section for the determination of drip pricing.[32]

44. Not only is 74.01(1.1.) definitional and clear in its meaning, it is also complete and exhaustive in respect of drip pricing and must be read to situate and anchor the general section (74.01) that 74.01(1.1.) specifies and clarifies. It is trite law that where a specific provision clarifies a general, the specific prevails over the general."[33]

45. Further, the misleading advertising provisions of the Act should not be given an expanded meaning. The Supreme Court has previously held, and the Commissioner has in a previous case conceded, that prohibitions against engaging in commercial expression by advertising infringe upon the freedom of expression in s. 2(b)of the Charter. Any restrictions should be read narrowly to ensure that commercial expression is not unduly restricted. In this case Cineplex is advertising a choice that consumers can make to either purchase tickets at the theatre or purchase tickets online with the advantage of an advance seat reservation.[34]

Application of ss.74.1(1.1) to the Facts of This Matter

46. Not only is the interpretation of ss.74.01(1.1) very clear, the evidence in this case is also very clear. There is no price advertised by Cineplex which is unattainable- full stop. There is no dispute on the facts that the prices are attainable either at the theatre noted above the prices when

---

[32] Canada, Parliament, *House of Commons Debates*, 44th Parl,1st Sess, vol. 151, No. 065 (May 5, 2022) at 4835, Tab 48; House of Commons, *Senate Standing Committee on Industry and Technology*, Minutes of Proceeding and Evidence, 44th Parl., 1st Sess., No. 49 (May 19,2022) at 6, Tab 49; House of Commons, *Senate Standing Committee on Industry and Technology*, Minutes of Proceeding and Evidence, 44th Parl., 1st Sess., No.20 (May 20,2022) at 5, Tab 50.

[33] *R. v. Canadian Broadcasting Corp*., [1992] O.J. No. 957, 72 C.C.C. (3d) 545 (Ont. Gen. Div.), pp. 567-569, Tab 51, affirmed [1993] O.J. No. 2327, 84 C.C.C. (3d) 574 (Ont. C.A.); *Antigonish (County) v. Antigonish (Town)*, [2006] N.S.J. No. 85, 2006 NSCA 29, para 56, Tab 52.

[34] *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), para 58, Tab 53; *Commissioner of Competition v Sears Canada Inc.*, 2005 CACT 2, paras 31-35, Tab 54.

a consumer lands on the Ticket page or online at the total price shown, which includes any online booking fee if the customer choses to purchase an Advance e-Ticket online.

47. The Commissioner makes the alternative argument that if he cannot succeed under ss.74.1(1.1), there is a residual argument that drip pricing is materially misleading when the consumer is not aware of the amount of the online booking fee itself. To further this argument, he relies entirely on expert opinion evidence relating to concepts such as shrouded attributes, partition pricing and web design.

48. Subsection 74.1(1.1) leaves no room for this residual argument of the Commissioner. The words "for greater certainty" make it clear that drip pricing as set out in ss. 74.01 (1.1) is definitional and complete with respect to drip pricing. It is straightforward and clear that drip pricing *only* applies when the total price (excluding taxes) is not attainable and only then is it misleading under s.74.01. The converse is therefore that if the product is attainable at the total price, then that total price is not misleading under the drip pricing provisions. The residual argument of the Commissioner is contrary to ss.74.01(1.1) itself and contrary to the clear objectives of Parliament.

There Is No Misleading Aspect to the Disclosure of the Online Booking Fee or the Total Online Price

49. The total online price is shown immediately beside the "Proceed" button simultaneously as the consumer selects at least one ticket to purchase online. The online booking fee is also shown simultaneously on the ticket page as the consumer selects at least one ticket and is shown throughout the online purchase process.

50. The Commissioner argues that there is a temporal element for the disclosure of the online booking fee, but there is none. The Commissioner attempts to adopt the timing issues under the proposed Federal Trade Commission ("FTC") rule or the definition in the academic literature provided by Dr. Morwitz to suggest that it must be disclosed 'upfront'. However, even under those definitions it is the total price that must be shown upfront there is no requirement to separately disclose the fee in question and certainly no timing issue with respect to any such disclosure. In

any event, Cineplex *does* in fact disclose the amount of the online booking fee separately from the total online price at the very beginning and throughout the online purchase process including an itemized total including taxes before the consumer pays for their ticket.

There Is No Misleading Aspect with Respect to the Base Ticket Price

51. The base price is displayed on the ticket page immediately below the theatre selected by the consumer. It is distinguished from the online price, which prior to selection of a ticket is shown as $0.00. The base price accurately discloses the price at the theatre selected (prices differ between theatre locations) as well as the myriad of choices of the movie, the experience, the date and time of the showing.

52. As noted, the majority of consumers who end up at the ticket page do not go on to purchase a ticket online. In fact, 48 % of consumers purchase their tickets at the theatre.[35] For those consumers the prices shown on the ticket page are attainable at the specific theatre they have selected, which is shown immediately above the prices.

EVIDENCE RELATED TO SUBSECTION 74.01(1.1)

53. As indicated, the consumer is presented on the Tickets page with ticket prices that are attainable both online and offline. The tickets are attainable at a theatre at the base price shown on the Tickets page for the customized selections made in preceding pages for the theatre chosen.[36]

54. The Commissioner has admitted that the prices displayed on the Tickets page are attainable if purchased at the theatre.[37] Further, the Commissioner has admitted that the prices are also

[35] **P-R-0027**, Witness Statement of Dan McGrath, para 29, Tab 2.
[36] Zimmerman Evidence, Public Transcript, Vol 1, February 14, pp. 69:08-10, Tab 55; Zimmerman Evidence, Public Transcript, Vol 1, February 14, p. 72:05-13, Tab 56.
[37] Zimmerman Evidence, Public Transcript, Vol 1, February 14, p. 69:08-10, Tab 55

attainable online if the consumer is a CineClub member.[38] Those consumers using certain promotional coupons are also not charged the online booking fee.[39]

55. Fundamentally, the Commissioner's argument relies upon urging this Tribunal to ignore the fact that unlike any reported decision on drip pricing, Cineplex customers have an important choice: a) to either purchase their movie tickets at the theatre or b) to purchase them online. The evidence is clear that Cineplex customers make this choice. The evidence is also uncontroverted that Cineplex customers are not complaining that this choice is obscured or that they are misled in any respect.[40]

56. Whatever price the Commissioner points to on the Website or on the App, those prices are **attainable in fact.**

57. It is important to note that this is not a case like Ticketmaster where there was no alternative choice to consumers to purchase at a bricks and mortar location. This case is also not like the car rental cases where fees are added at the counter after the consumer had reserved or paid for the rental or the hotel resort fee cases where a consumer is confronted by additional fees when they check in.

58. The Website and App show consumers two separate prices once they have made their selections – one price for purchase at the theatre they have chosen and the online ticket prices for the theatre they have chosen. The uncontroverted fact is that the sale of tickets for movies at Cineplex theatres are sold **almost equally** at the theatre and through the online purchase process available on Cineplex's website or app. **52%** of tickets are sold online and **48%** of tickets are sold at the theatre.[41]

---

[38] Zimmerman Evidence, Public Transcript, Vol 1, February 14, p. 69:22-24, Tab 57.
[39] **P-R-0027**, Witness Statement of Dan McGrath, para 58, Tab 58.
[40] **P-R-0039**, Expert Report of Dr. On Amir dated January 12, 2024, para 33, Tab 59; **P-R-0027**, Witness Statement of Dan McGrath, para 80, Tab 60.
[41] **P-R-0027**, Witness Statement of Dan McGrath, para 29, Tab 2.

59. Although it is not necessary for Cineplex to succeed in its defence of this application, because all prices advertised by Cineplex are attainable, the facts also do not support the "**fixed obligatory charges or fees**" test in ss.74.01(1.1). The online booking fee is a variable fee and it is also not obligatory to purchase tickets for movies showing at Cineplex theatres.[42] Fixed fees are clearly distinguished from variable fees in ss.74.01(1.1). The clear Parliamentary intent was to avoid restricting sellers who advertise products which may have variable or optional fees such as shipping charges, insurance for the products purchase or in auction situations like eBay, variable commission rates.

60. The consumer choice either to purchase a ticket at the theatre or purchase a ticket online is within the stated purpose of the *Act* in Section 1.1. "to provide consumers with competitive prices and product choices".[43] The evidence is clear that many consumers value this choice because the online purchase provides not only the convenience of purchasing online, but also the ability to reserve their preferred seats in advance. The alternative would be for the consumer to drive to the theatre to purchase their ticket in advance or to take the risk that they may not get their preferred seating if they purchase on the day or time of the movie showing.[44]

61. This consumer choice is also clearly welfare enhancing, as noted by Dr. Amir and as admitted by the Commissioners' expert when raised by Dr. Amir.[45]

62. The argument from the Commissioner that the consumers should be shown only the total online price when they land on the ticket page would be contrary to Cineplex' right to be able to advertise both the price attainable at the theatre as selected by the consumer and the online price

---

[42] **P-R-0027**, Witness Statement of Dan McGrath, para 59, Tab 61.
[43] *Canada (Commissioner of Competition) v. Chatr Wireless Inc*., 2013 ONSC 5315, para 126, Tab 45; Canada, Parliament, *House of Commons Debates*, 33rd Parl, 1st Sess, vol. 8, 1986 (March 3, 1986) at 11927, Tab 62.
[44] McGrath Evidence, Public Transcript, Vol 3, February 16, p. 402:06-23, Tab 63.
[45] Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 701:15-23, Tab 64; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, p. 231:09-23, Tab 65.

for that particular theatre. As noted, this advertising only is this a protected constitutionally right it is clearly within the stated objectives of the *Act.*

63. As note above there are two choices that Cineplex customers make in almost equal number: a) purchase tickets at the theatre with no online booking fee (48%) or b) purchase online which includes an online booking fee (53%).

THE COMMISSIONER SIMPLY DOES NOT MEET THE CASE REQUIRED UNDER SECTION 74.01 (1.1) AND UNDER THE ACT

64. The foregoing evidence, as applied to the plain words of 74.01(1.1) as a complete and sufficient code for the determination of drip pricing under the *Act*, clearly and unmistakably dissolves the Commissioner's case. The prices advertised by Cineplex are all attainable. In addition, although not necessary once the first element of attainability is met, the online booking fee is not fixed, it is variable. It is not obligatory, is completely avoidable. That ends – or should end- the inquiry and analysis, in Cineplex's respectful submission.

65. Instead, almost all of the evidence from the Commissioner, including the expert evidence that the Commissioner relies upon, is related to extraneous and irrelevant criteria to the requirements under 74.01(1.1).

66. The Commissioner, unable to meet the case under 74.01(1.1), attempts to escape from the specificity and clarity of subsection 74.01(1.1) to focus instead on elements of web design or based upon definitions of drip pricing which where not adopted in the *Act.* The Commissioner's experts rely on concepts such as "shrouded attributes", "partitioned pricing" and "false floors", none of which are relevant to whether an advertised price is attainable or not under this subsection.

67. Throughout this proceeding, the evidence discloses that the Commissioner cannot avoid the inescapable conclusion that the prices displayed on the Website and App are attainable and:

a) The base price or at theatre price is attainable at the theatre chosen by the consumer.[46]

b) The fact that the fee in question is called an "online" booking fee makes it clear that it only applies to online purchases and distinguishes the higher online price from the base prices shown when the consumer first lands on the ticket page.[47]

c) The fact that a theatre location must be chosen by the consumer and that immediately above the prices shown when the consumer lands on the Tickets page are those prices for a movie ticket that are available at the specific theatre location.[48]

d) The fact that the online price shown beside the CTA (call-to-action) button or "Proceed" button is $0.00 indicating clearly that no online price has been presented until the remainder of the choices are made on this web page (membership, promotional coupons and the selection of one of the three categories of tickets (General, Senior or Child).[49]

68. The Commissioner takes the position that any price that Cineplex advertises on its website or App must be available in the "digital channel" or online. In essence, the Commissioner's position is that the base price or at theatre price must be attainable online. To support this position the Commissioner says that any other price shown, in particular the online price which includes the online booking fee, is essentially irrelevant, i.e. that the disclosure of the online booking fee is essentially relevant. The disclosure of the online booking fee is essentially irrelevant.

---

[46] Zimmerman Evidence, Public Transcript, Vol 1, February 14, pp. 69:08-10, Tab 55; Zimmerman Evidence, Public Transcript, Vol 1, February 14, p. 72:05-13, Tab 56.
[47] **P-R-0027**, Witness Statement of Dan McGrath, para 81, Tab 66.
[48] McGrath Evidence, Public Transcript, Vol 3, February 16, pp. 421:11-422:05, Tab 67.
[49] Eckert Evidence, Public Transcript, Vol 1, February 14, pp. 184:09-15, Tab 68*;* McGrath Evidence, Public Transcript, Vol 3, February 16, p. 421:1-10, Tab 69*;* Dr. Amir Evidence, Public Transcript, Vol 4, February 20, pp. 716:24-717:13, Tab 70.

69. The evidence is clear and uncontroverted that the base price or price shown under the theatre selected by the consumer is attainable in fact at that theatre, meeting the exact, plain meaning obligations under ss.74.01(1.1).

THE COMMISSIONER APPLIES DEFINITIONS OF DRIP PRICING OUTSIDE THE ACT THAT ARE IRRELEVANT AND INAPPLICABLE

70. The Commissioner attempts to import definitions of drip pricing not found in the Act: a *definition of drip pricing which depends on the timing* of whether a fee or any other addition to the price is *added later during the purchase process.* The Commissioner's proposed expert witness, Dr. Morwitz, and the academic literature she relies upon, use this definition. However, this definition was not adopted by Parliament for the definition of drip pricing found in the *Act.* Drip pricing under the Act is defined under subsection 74.01(1.1.), as when an advertised price is *not attainable* because of obligatory fees. There is no temporal component to the test in this subsection at all.

71. The definition of drip pricing being considered by the FTC and applied by Dr. Morwitz is as follows:

a) The FTC is considering a definition of drip pricing under its rule making authority as "a pricing technique in which firms advertise only part of a product's price **up front** and reveal other charges **later** as shoppers go through the buying process."[50]

b) The FTC proposed definition includes two temporal components:

   i. Only part of the price (absent taxes) is shown "up front"; and

   ii. And other charges are revealed "later as shoppers go through the buying process".

[50] **P-A-0013**, Vicki Morwitz Remarks, March 21, 2023, Tab 71.

c) The FTC proposed definition can be satisfied by either of two temporal components related to disclosure by the seller.

i. If the total online price is shown up front. (It is noteworthy that there is no requirement for the itemized breakdown to be shown up front); or

ii. If the fee or charge is disclosed upfront.

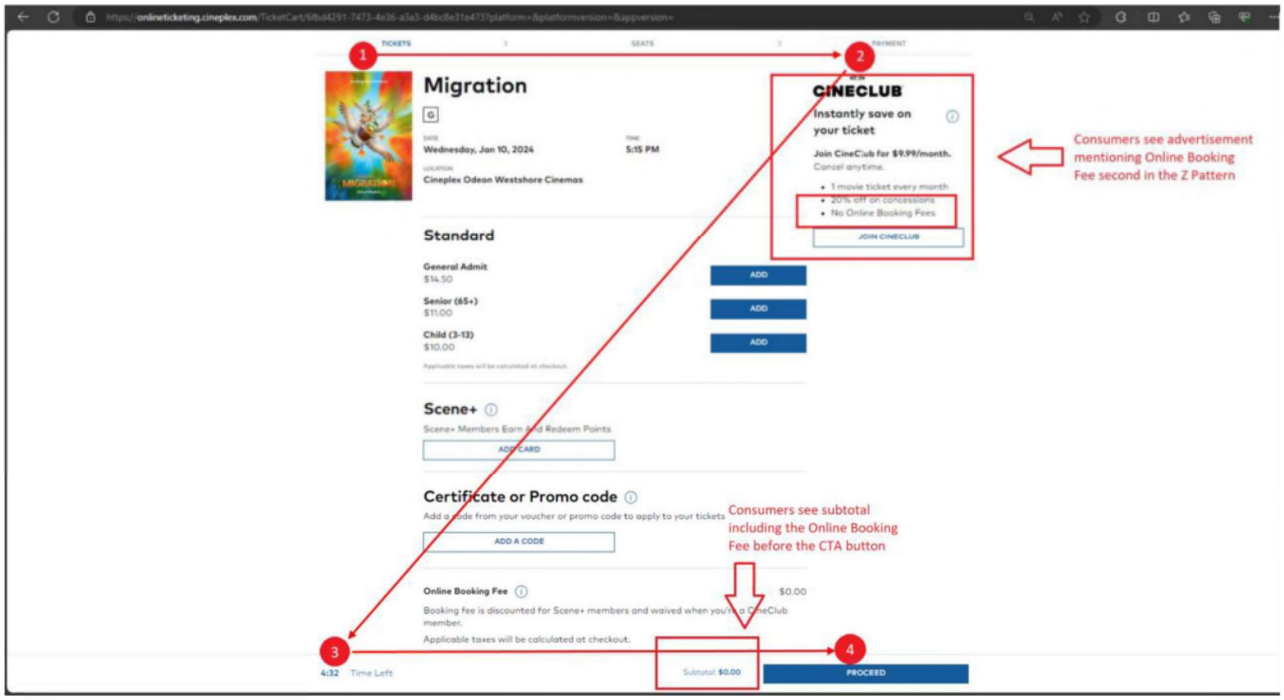
72. Therefore, even if the total price (absent taxes) is not shown up front if the fee or charge is disclosed up front the definition does not apply.

73. It is important to note that even if the definition that the Commissioner's expert (Dr. Morwitz) seeks to introduce were to be applied in this case, it would not fit at all: The total price, which includes any online booking fee that may be applicable, is shown on the *very first page* or "up front" in the online purchase process *simultaneously* when the consumer makes a selection to purchase online and the itemized online booking fee is shown on the ticket page simultaneously when the consumer makes a selection to purchase online. The online booking fee is not added later as shoppers go through the buying process and the total price is shown this is done in the most prominent and proximate manner possible.[51] As Dr. Amir testified:

> "So the total price that you are about to pay if you continue is always kind of *at maximum attention* next to the call-to-action button."[52] [emphasis added].

74. This is also reflected in Figure 1 below[53]:

[51] McGrath Evidence, Public Transcript, Vol 3, February 16, p. 422:08-21, Tab 72*;* Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 697:03-16, Tab 73*;* Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 701:06-11, Tab 74; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 716:18-23, Tab 75; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, pp. 856:19-857:11, Tab 76.
[52] Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 716:21-23, Tab 77.
[53] **P-R-0039**, Expert Report of Dr. On Amir dated January 1, 2024, p. 41, Tab 78.



[Figure 1]

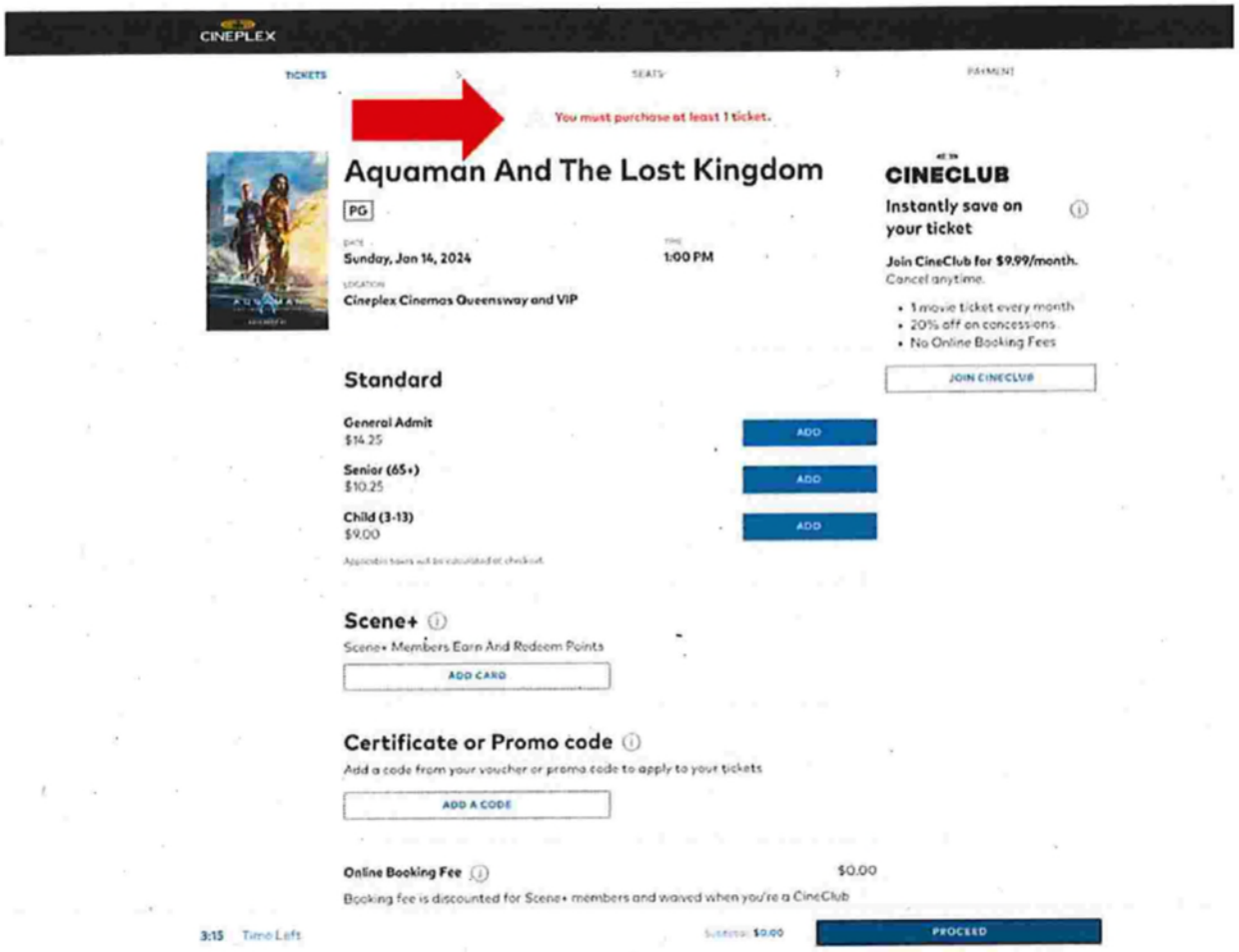
75. The itemized online booking fee is shown on the same Ticket page (where price representations are first shown to a consumer) simultaneously when the consumer makes a selection to purchase online.[54] It is not added later as shoppers go through the buying process.

76. Not only do the Website and App provide both the total price and itemized online booking fee up front, the Ticket page was designed to have a lock out feature that prevents the consumer from entering into the purchase process before they see the Total Price (absent taxes) for any online purchase, which includes any applicable online booking fee. No consumer can proceed into the online purchase process without first seeing the total online price which includes the online

[54] McGrath Evidence, Public Transcript, Vol 3, February 16, p. 422:08-21, Tab 72; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 857:12-25, Tab 79.

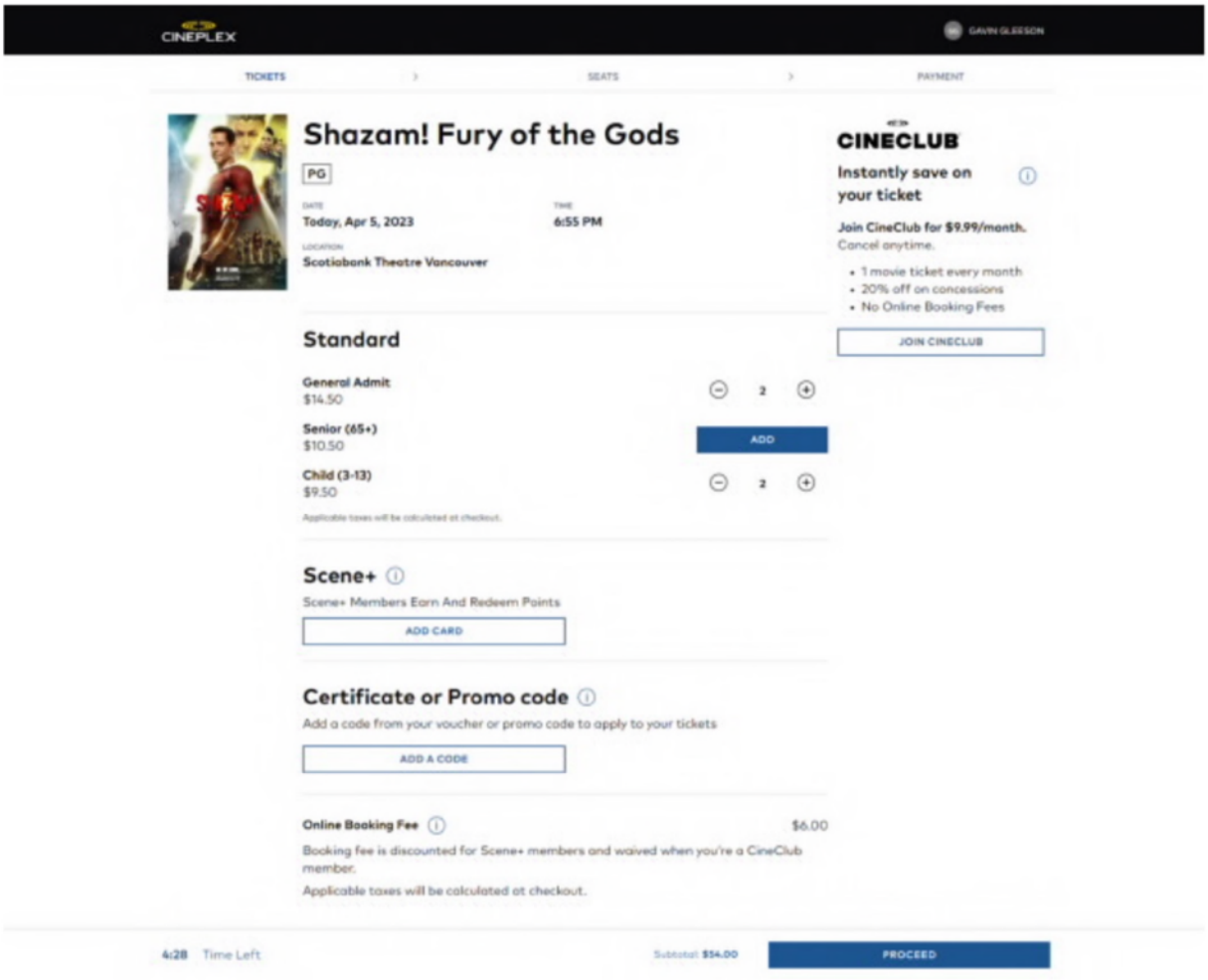
booking fee[55]: essentially the Tickets page is designed in a way to force the consumer to see[56] the full online price (which includes the online booking fee, where or of it applies) before entering the online purchasing process. The Figure below illustrates this lock-out feature with the resulting error message that the consumers sees when attempting to proceed into the online purchase process before making a ticket selection (i.e. before seeing an online purchase price, which includes the online booking fee.)

[55] McGrath Evidence, Public Transcript, Vol 3, February 16, p. 421:01-10, Tab 69*;* McGrath Evidence, Public Transcript, Vol 3, February 16, p. 498:10-17, Tab 80*;* Dr. Amir Evidence, Public Transcript, Vol 4, February 20, pp. 716:24-717:09, Tab 70.
[56] McGrath Evidence, Public Transcript, Vol 3, February 16, p. 421:06-10, Tab 81*;* Dr. Amir Evidence, Public Transcript, Vol 4, February 20, pp. 716:24-717:09, Tab 70.



[Figure 2][57]

[57] **P-R-0027**, Witness Statement of Dan McGrath, p. 16, Tab 82.



[Figure 2][58]

77. The evidence is again uncontroverted that the total online price is shown at the very beginning of the purchase process and that the online booking fee is fully broken out at the very beginning of the purchase process. Therefore, clearly, the Website and App would not fall within the definition of the Act under 74.01(1.1) and, would also not even meet the definitions relied upon

[58] **P-A-0004**, Tickets page for Shazam! Fury of the Gods dated April 5, 2023, Tab 83.

by Commissioner through the Commissioner's expert Dr. Morwitz's literature review or the proposed FTC rule cited by Dr. Morwitz[59].

78. The Commissioner attempts to deal with this problem in his argument by going beyond ss. 74.01(1.1) by distracting from the simplicity of 74.01(1.1) by introducing various extraneous and irrelevant issues:

a) Web design including alleged false floors and urgency because of countdown timers.[60]

b) Irrelevant concepts or allegations of shrouded attributes and partitioned pricing. Concepts that are intrinsically irreconcilable. On one hand the argument is that the ticket price and the online booking fee are separated or partitioned and on the other hand the complaint is that the online booking fee is 'shrouded' or hidden in the total online price. Neither concept is consistent with ss.74.01 (1.1),[61]

c) Alleged limitations arising from the technology utilized by consumers to view the Webpage or App:

   i. Consumers don't scroll;[62]

   ii. Consumers are restricted from seeing information because of zoom levels or screen resolution;[63] and

   iii. Consumers do not interact on an interactive webpage or app.[64]

---

[59] **P-A-0013**, Vicki Morwitz Remarks, March 21, 2023, Tab 71; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, p. 252:04-11, Tab 84.
[60] **P-A-0008**, Expert Report of Mr. Jay Eckhart dated January 5, 2024, paras 39-58, Tab 85.
[61] **P-A-0011**, Expert Report of Dr. Vicki Morwitz dated January 5, 2024, paras 57-70 Tab 86.
[62] **P-A-0008**, Expert Report of Mr. Jay Eckhart dated January 5, 2024, para 16 Tab 87.
[63] **P-A-0008**, Expert Report of Mr. Jay Eckhart dated January 5, 2024, paras 19 and 27, Tab 88.
[64] **P-A-0011**, Expert Report of Dr. Vicki Morwitz dated January 5, 2024, para 16 Tab 89.

79. Essentially, these arguments all boil down to a position that consumers do not see what is stated on the ticket webpage or before they complete their purchase. However, there is no evidence that has been tendered in this proceeding to support the effect or restriction on information that the Commissioner alleges. There is no evidence that consumers don't scroll. To the contrary, the use of computers or mobile phones requires scrolling as the navigation device for almost any software or apps utilized by consumers that employ those technologies.[65] [66] [67]

80. The Website is an information source for consumers for many products, but in respect of the selection of movies that they may want to view at the theatre, it is both informational and also provides an online purchase process. In every respect, whether for information or to engage in the online purchase process, consumers scroll.[68] As Dr. Amir has pointed out, scrolling is not an impediment, *it is a necessity* in our day and age.[69] It also provides the consumer to self-select the information they want to view. There is no controversy in the evidence that all of the relevant information is there. The point the Commissioner purports to rely upon, without any evidentiary foundation, is that some consumers may not scroll as much as others. Every webpage or app in existence would be subject to this same observation but it is not evidence of deception or an attempt to obscure information available to the consumer.

81. The issue of zoom level or screen resolution is also irrelevant for the same reason. The zoom level or screen resolution has nothing to do with the information on a webpage or app, it

---

[65] McGrath Evidence, Public Transcript, Vol 3, February 16, p. 418:11-15, Tab 90; McGrath Evidence, Public Transcript, Vol 3, February 16, p. 487:10-17, Tab 91; McGrath Evidence, Public Transcript, Vol 3, February 16, p. 497:09-14, Tab 92.
[66] Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 712:15-19, Tab 93; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 807:06-15, Tab 94; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 809:11-13, Tab 95.
[67] Eckert Evidence, Public Transcript, Vol 1, February 14, p. 164:13-15 and 21-22, Tab 96; Eckert Evidence, Public Transcript, Vol 1, February 14, p. 165:07-09, Tab 97; Eckert Evidence, Public Transcript, Vol 1, February 14, p. 165:19-23, Tab 98; Eckert Evidence, Public Transcript, Vol 1, February 14, p. 172:15-17, Tab 99; Eckert Evidence, Public Transcript, Vol 1, February 14, pp. 172:21-173:2, Tab 100; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, p. 287:15-23, Tab 101.
[68] **P-R-0028,** Exhibit A to Daniel Francis McGrath's Witness Statement, Tab 102.
[69] Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 807:06-15, Tab 94.

merely impacts the amount of scrolling the user may have to undertake. If you zoom out, you will need to scroll less. If you zoom in, you will have to scroll more.[70]

82. The idea that consumers are not interactive with the information provided is also not supported by the evidence. In order to arrive at the Tickets Page, the consumer is required to interact with the information provided on the website.

83. The selection process in the ticket purchase flow requires you to make a number of sections all of which can impact pricing of movie tickets including: theatre location; movie or event; theatre experience (Ultra AVX, VIP, IMAX, D-Box, Screen X, 4DX, Real 3D, Sensory friendly, Stars & Strollers and General); date; time; online purchase and advanced seat reservation.

a) Each one of these selections may require more or less scrolling.

b) All of these selections are interactive in the sense that information is provided on a given webpage to inform the consumer's choices and are selected by the consumer.

c) These choices are in turn required in order to display a particular ticket price.[71]

84. With respect to the Commissioner's argument that the failure to disclose the online booking fee separately is materially misleading, notwithstanding the clear elements of subsection 74.01 (1.1) is without substance. Quite apart from the fact that the Tribunal is being asked to essentially read-in this requirement, this argument by the Commissioner also requires the Tribunal to accept that such disclosure, itemizing the amount of the online booking fee, needs to be at the beginning of the purchase process. This idea is contrary to the very objectives of drip pricing legislation in Canada or even in other jurisdictions, like under the proposed FTC rule.[72]

---

[70] **P-R-0039**, Expert Report of Dr. On Amir dated January 12, 2024, para 86, Tab 103.
[71] **P-R-0028,** Exhibit A to Daniel Francis McGrath's Witness Statement, Tab 102.
[72] **P-A-0013**, Vicki Morwitz Remarks, March 21, 2023, Tab 71.

85. As an aside, it is instructive to note that the definition of drip pricing being considered by the U.S. Federal Trade Commission (the "FTC") and applied by Dr. Morwitz is "a pricing technique in which firms advertise only part of a product's price up front and reveal other charges later as shoppers go through the buying process[73]." Accordingly, the FTC proposed definition includes two temporal components: (i) Only part of the price (absent taxes) is shown "up front"; and (ii) other charges are revealed "later as shoppers go through the buying process[74]". The FTC proposed definition can be satisfied by either of two temporal components related to disclosure by the seller: (1) If the total online price is shown up front. It is noteworthy that there is no requirement for the itemized breakdown to be shown up front; or (2) If the fee or charge is disclosed upfront.
82. Total Price disclosure is the focus of both (Canadian and U.S.) approaches. There is no requirement to break out the fee and significantly no requirement that any such disclosure occur at the beginning of the purchase process.

86. That said, Cineplex provides information on the amount of the online booking fee on the Ticket page simultaneously with the selection of 1 ticket and the commencement of the online purchase process. It also provides this information again as the consumer proceeds to the check out page.

87. It is important to note that the Commissioner also tries to put a restriction on the term ‘up front’. He argues that it is not disclosed ‘up front’ even when it is provided on the first page where prices are shown (the Tickets page) and he further argues that it is insufficient when the total online price and online booking fee are instantaneously and the total online price is immediately shown prominently beside the “Proceed” button on that very first page. Again, this is an attempt to put another gloss or restriction on what is meant by ‘up front’. He tries to argue that there is a temporal delay between the selection of a ticket and the disclosure he argues should be made.

---

[73] **P-A-0013**, Vicki Morwitz Remarks, March 21, 2023, Tab 71.
[74] Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, p. 252:04-11, Tab 84.

88. Again, there is no dispute on the facts that all of this disclosure is provided. The argument of the Commissioner is based on the idea that consumers do not bother to look for the information that is provided or that they are somehow tricked into not looking at the information clearly provided. In order to do that, the Commissioner presents a number of untenable arguments:

a) Consumers using computers and mobile phones do not scroll;

b) Resolution and zoom levels differ from consumer to consumer and consumer behaviour does not compensate for this by scrolling;

c) The total price includes the online booking fee but it is "shrouded", which is just another way of saying the total price includes the online booking fee;

d) The base price and the online booking fee are partitioned prices, which is just another way of saying that the base price attainable at the theatre and the total price are different;

e) The floating ribbon, which includes Total Online price and CTA or “Proceed” button creates a "false floor", which the Commissioner argues prevents consumers or persuades consumers not to scroll down to look at other information on the page.

There is no relevant or admissible evidence which studies or examines this claim by the Commissioner other than unsupported conjecture by Dr. Morwitz and Mr. Eckert.

89. The fundamental flaw on all these extraneous points and arguments that the Commissioner seeks to introduce to obscure an otherwise simple and clear case is this: all of the allegations (most of which are disconnected to the requirements under 74.01(1.1)) that the Commissioner has advanced on liability depend on conjectures and hypotheses about the specific circumstances of

the Website and the App and none of those conjectures and hypotheses were tested.[75] That is fatal and lapidary to the Commissioner's attempt at an alternative run at the drip pricing case.

TRANSPARENCY THROUGHOUT THE PROCESS: NO FALSE OR MISLEADING PRICING

90. The design of both Website and App prioritizes the user experience. The layout is designed for transparency and user-friendliness, providing clear and consistent pricing information for the offering from the initial page throughout the purchase flow. Specifically, this is evidenced by the following on the Tickets page:

a) a specific representation as to the specific price for the specific movie selected.

b) explicit disclosures of the existence and quantum of the online booking fee, and;

c) disclosure of the circumstances in which the online booking fee will be charged.[76]

91. The Tickets page contains numerous references to the online booking fee, all on the same page and in proximity to the call-to-action button. In all cases, the references are sufficient in size, appropriately placed, and sufficiently clear to the consumer.

92. The Tickets page also allows consumers on the "i" information icon which is prominently placed in a contrasting blue color next to the online booking fee amount. Once a consumer clicks on the icon, a pop-up window appears on the screen, providing further information about the online booking fee, including a sample calculation of the online booking fee that a consumer will pay based on the number of tickets purchased and whether the consumer has a Scene+ or CineClub membership.[77]

---

[75] Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 705:08-21, Tab 104; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 712:02-06, Tab 105; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 724:23-25, Tab 106; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 809:15-21, Tab 107.
[76] **P-R-0028,** Exhibit A to Daniel Francis McGrath's Witness Statement, Tab 102
[77] **P-R-0027**, Witness Statement of Dan McGrath, para 74, Tab 108.

93. Similar disclosure is made throughout the online purchase process, allowing the consumer to discern and appreciate the online booking fee (and where or whether applicable), are made in the following two pages or screens and a comprehensive and itemized disclosure is made at the "Payment" page. At every instance, the online booking fee is apparent on the face of the pages.

94. Throughout the course of the transaction, the total cost including the online booking fee is prominently shown on every page. Consumers can review the purchase price at four separate, consecutive stages.[78]

95. Cineplex's position is reinforced by its expert Dr. On Amir, who concluded that the presentation of the online booking fee is consistent with marketing and user design best practices as well as industry standards and norms."[79] Dr. Amir stated that Cineplex's presentation of the pricing information is welfare enhancing as it allows consumers to properly evaluate alternatives. Importantly, Dr. Amir highlighted the limitations of including the online booking fee as part of a bundled or all-inclusive price. Specifically, Dr. Amr opined that if the online booking fee was not disclosed explicitly as a subcomponent of the subtotal:

> "additional clutter and caveats would be required at the final purchase page to indicate the possibility of waiving the Online Booking Fee for Scene+ or CineClub members. This would lead to consumer confusion as to whether the Online Booking Fee applied to their own transaction during the purchasing process."[80]

96. As noted to before, not only does the Tickets page on the Website and the App provide both the total price and itemized online booking fee up front, the Cineplex Tickets page has a ‘lock-out’ feature that prevents the consumer from entering into the purchase process before they see the Total Price (absent taxes) for any online purchase, which includes any applicable online

[78] **P-R-0027**, Witness Statement of Dan McGrath, para 78, Tab 109.
[79] **P-R-0039**, Expert Report of Dr. On Amir dated January 12, 2024, para 34, Tab 110.
[80] **P-R-0039**, Expert Report of Dr. On Amir dated January 12, 2024, para 34, Tab 110.

booking fee. No consumer can proceed into the online purchase process without first seeing the total online price which includes the online booking fee.[81]

97. Further, the all-inclusive price is always prominently displayed and presented sequentially throughout the online purchase process.[82]

98. Notably, neither the Commissioner nor his experts have provided any viable alternative options for displaying the prices on the Website or the App.

NO EVIDENCE OF RELEVANT COMPLAINTS

99. The Commissioner has failed to produce evidence of any complaints related to the online booking fee prior to the issuance of the Notice of Application and the press release by the Commissioner. Even with the publication of the Commissioner's complaint against Cineplex, the Commissioner only received seven complaints related to the online booking fee.[83] All seven complaints were received one year following the introduction of the online booking fee and well after the Notice of Application was filed. The percentage of complaints relative to visits to the Website for the period prior to issuance of the Notice of Application (about a year after the online booking fee was introduced) is accordingly *zero*.

100. Notably, the number of complaints received by the Commissioner after the issuance of the Notice of Application – to put this in perspective- would represent 0.0000072 percent of visits to the Cineplex Website.[84] The substance of the complaints was that some consumers did not like paying the online booking fee. These limited complaints only evidence that consumers were well aware of the existence of the online booking fee, not that consumers were misled.[85]

---

[81] McGrath Evidence, Public Transcript, Vol 3, February 16, p. 421:01-10, Tab 69; McGrath Evidence, Public Transcript, Vol 3, February 16, p. 498:10-17, Tab 80; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, pp. 716:24-717:09, Tab 70.
[82] Dr. Amir Evidence, Public Transcript, Vol 4, February 20, pp. 772:25-773:06, Tab 111.
[83] **P-A-0047**, Agreed Statement of Facts, para 24, Tab 112.
[84] **P-R-0039**, Expert Report of Dr. On Amir dated January 12, 2024, para 33, Tab 59.
[85] **P-A-0019,** Commissioner of Competition's Read-ins, CPX_0001659, p. 338, Tab 113.

101. Further, although the Commissioner asserts that consumers 'may' be confused by Cineplex's display of pricing information, he provides no analytical, empirical, or scientific data to support these claims. Specifically, neither of the Commissioner's experts conducted any empirical analysis to support these claims.[86]

DISCUSSION OF COMMISSIONER'S ALLEGATIONS UNDER 74.01(1)(a)

102. The Commissioner makes the alternative argument that if he can't succeed under ss.74.1(1.1), there is an argument that drip pricing is materially misleading when the consumer is not aware of the amount of the online booking fee itself.

103. Subsection 74.01(1.1) is straightforward and clear that drip pricing *only* applies when the total price (excluding taxes) is not attainable and then, and only then is it misleading under s.74.01.

104. Fundamentally, the Commissioner's argument relies upon urging this Tribunal to ignore the fact that unlike any reported decision [or even register consent agreements][87] on drip pricing, Cineplex consumers have an important choice: a) to either purchase their movie tickets at the theatre or b) to purchase them online. The evidence is clear that Cineplex consumers make this choice. The evidence is also uncontroverted that Cineplex consumers are not complaining that this choice is obscured or that they are misled in any respect.

105. Without prejudice to the foregoing arguments on 74.01(1.1), any allegation by the Commissioner on paragraph 74.01(1)(a) fails as well on the basis that the price representations and disclosures regarding the online booking fee are both on the same page, i.e. the disclosures with respect to the online booking fee's existence and application appear on the very same page where the price representations in issue are first made. The presence, prominence, and proximity of the disclosures on that same page are fatal to the Commissioner's residual

[86] Eckert Evidence, Public Transcript, Vol 1, February 14, p. 172:05-08, Tab 114; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 279:13-280:04, Tab 115.
[87] See, for example, *The Commissioner of Competition v. Aviscar Inc.*, CT-2015-001, Registered Consent Agreement, (2 June 2016), Tab 116.

argument as well. All of the relevant information is on the very same page where price representations are first made, on both Website and App.[88] (See Figure 2)

106. In deciding whether a representation was false or misleading, Courts consider the attributes of the intended audience and focus on what could reasonably be understood by the average consumer.[89] The average consumer varies depending on the audience that the advertisement is directed.[90]

107. Accordingly, and fundamentally, even under this alternative or residual basis, the Commissioner cannot make his case: there is no empirical analysis or test proffered by the Commissioner to support who the reasonable consumer of the Website or App is, the attributes of the intended audience, and what could reasonably be understood by consumers visiting the Website and App. As Dr. Amir testified, "…the typical consumer is an empirical question that no one actually tested in this case."[91]

NO REVIEWABLE CONDUCT UNDER THE ACT

108. Irrespective of which of these arguments advanced by the Commissioner is raised [all of which are irrelevant to section 74.01(1.1)], the Commissioner is confronted with the undisputed fact that the relevant information regarding the existence and application of the online booking fee is in fact available on the very first page where price representations are made, for the consumer to see. The analogy would be that if all of the information were on one sheet of paper the consumer has not bothered to read down through the page or read the page

---

[88] Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, p. 288:07-11, Tab 117.
[89] *The Commissioner of Competition v. Premier Career Management Group et al.,* 2008 CACT 18, para 208, Tab 118; see also Anita Banicevic, "*Assessing General Impression under the Competition Act: The Credulous Man Who Was Never There*" (2016) 29:2 CCLR.
[90] *Purolator Courier Ltd. v. United Parcel Service Canada Ltd.,* 1995 CanLII 7313 (ONSC); see also: *R. v. International Vacations Ltd*., 1980 CanLII 1828 (ON CA); *Tele-Mobile Co v Bell Mobility Inc*., 2006 BCSC 161, [2006] B.C.J. No. 392; *Maritime Travel Inc. v. Go Travel Direct Inc.,* 2008 NSSC 163 (CanLII); *Commissioner v Premier Career Management Group et al,* 2008 Comp Trib 18.
[91] Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 724:23-25, Tab 106.

fully. Clearly, the information is available within the four corners of the Website and App or in the analogy, on the one sheet of paper provided to the consumer.

109. In *Bell Mobility Inc. v. Telus Communications Co.*, the British Columbia Court of Appeal held that:

> On the authorities, as just set out, this impression is determined by the average consumer's perception of the information contained within the four corners of the impugned advertisements.[92]

110. In making these arguments, the Commissioner shrouds an important point. Section 74.01 deals with misleading conduct. The conduct must mislead; it is not enough that a consumer does not read the whole page. Further, the misleading conduct must be material. In the face of full price disclosure, the absence of a break-out of the online booking fee would have to be material. In this case, there is disclosure and if the consumer fails to observe the break-out of the online booking fee, which is available on that very page, materiality has to be considered in the context of the total price being displayed. In the case of Cineplex's Tickets page, the consumer is locked out from proceeding until they have clearly seen the total price including the online booking fee.

111. It is also noteworthy, if not determinative, that this residual approach suggested by the Commissioner and his expert Dr. Morwitz goes even beyond what is being considered by the FTC in respect of its proposed prohibition against Junk Fees and Drip Pricing and has not been accepted in any reported case on drip pricing.

112. The potential disruption of online commercial activity would be significant.

---

92 *Bell Mobility Inc. v. Telus Communications Co.*, 2006 BCCA 578, para 20, Tab 119; see also: *F.T.C v. Sterling Drug Inc.*, at para 674 as quoted in *R. v. Clark (J.) & Son Limited*, 1986 CanLII 5223, 71 NBR (2d) 257 (NB KB) at 267, Tab 120: "*It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately.*"

113. Respectfully, the approach by the Commissioner in this case is a blatant attempt to extend the scope of drip pricing outside of the specific provision Parliament adopted in the *Act* and in fact outside the guidance the Commissioner has given to the public.

THE EXPERT EVIDENCE PRESENTED BY THE COMMISSIONER IS IRRELEVANT, UNNECESSARY, UNRELIABLE AND BIASED

The Law

114. In *White Burgess Langille Inman v Abbott and Haliburton Co ("**White Burgess**")* the Supreme Court of Canada established a new and "tightened" approach to the admissibility of expert opinion evidence. The Court based the need for a tighter approached by recognizing the risk that unreliable expert opinion evidence can present and the need to "not to devolve to trial by expert"[93]. The Court noted that:

> Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. [94]

115. The Court in *White Burgess* set out a two-stage test for determining the admissibility of expert evidence. The first stage deals with the admissibility of the expert opinion evidence and the second stage deals with the judicial discretion as to the issues that the expert opinion evidence may address once the expert opinion is admitted. [95]

116. In the first stage review, the Court held that in order to be admissible, expert opinion evidence must first meet the four threshold requirements established in *R v Mohan*:

> We can take as the starting point for these developments the Court's decision in R. v. Mohan, [1994] 2 S.C.R. 9. That case described the potential dangers of expert evidence and established a four-part threshold test for admissibility. The dangers are well known.

---

[93] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 ("***White Burgess***"), para 18, Tab 121.
[94] *White Burgess*, para 1, Tab 121.
[95] *White Burgess*, paras 22-25, Tab 121.

One is that the trier of fact will inappropriately defer to the expert's opinion rather than carefully evaluate it. As Sopinka J. observed in Mohan:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. [p. 21] [96]

117. Citing *Abbey* the SCC in *White Burgess* set out the two part test:

> Abbey (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach…
>
> At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. **These are the four Mohan factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose**:. Relevance at this threshold stage refers to logical relevance. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement…
>
> At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. [97] [*emphasis added*]

118. Quite apart from affirming the tests found in *Mohan* and in *Abbey*, the SCC in *White Burgess* also established a new and "tightened" approach to the test for admissibility of expert testimony, in reference to the duty of expert witnesses to fulfill their "special duty to the court to provide fair, objective and non-partisan assistance". As noted by Justice Cromwell on behalf of the Court:

> As we have seen, there is a broad consensus about the nature of an expert's duty to the court. There is no such consensus, however, about how that duty relates to the admissibility of an expert's evidence. There are two main questions: Should the elements of this duty go to admissibility of the evidence rather than simply to its

[96] *White Burgess*, para 17, Tab 121.
[97] *White Burgess*, paras 22-24, Tab 121.

> weight?; And, if so, is there a threshold admissibility requirement in relation to independence and impartiality?
>
> In this section, I will explain my view that the answer to both questions is yes**: a proposed expert's independence and impartiality go to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty**.[98] [*emphasis added*]

119. The Court noted that: "Underlying the various formulations of the duty are three related concepts: **impartiality, independence and absence of bias**."[99] [emphasis added]

120. Expanding upon the need for this threshold test Cromwell, J. stated:

> There is little controversy about the broad outlines of the expert witness's duty to the court. As Anderson writes, **"[t]he duty to provide independent assistance to the Court by way of objective unbiased opinion has been stated many times by common law courts around the world"**: p. 227.
>
> One influential statement of the elements of this duty are found in the English case National Justice Compania Naviera S.A. v. Prudential Assurance Co., [1993] 2 Lloyd's Rep. 68 (Q.B.).
>
> > 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise . . . . **An expert witness in the High Court should never assume the role of an advocate**. [Emphasis added; citation omitted; p. 81.] …(These duties were endorsed on appeal: [1995] 1 Lloyd's Rep. 455 (C.A.), at p. 496.)…
>
> Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must **be impartial in the sense that it reflects an objective assessment of the questions at hand**. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 Alta. L. Rev. 635, at pp. 638-39. [100]

---

[98] *White Burgess*, paras 2, 33 and 34, Tab 121.
[99] *White Burgess*, para 32, Tab 121.
[100] *White Burgess*, para 26, 27 and 32, Tab 121.

121. It is important to note that the Court set out 3 separately defined tests in the formulation of the duty to the court and the application of this threshold test for admissibility:

a) Impartiality/Objectivity: "The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand".

b) Independence: "It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation."

c) Unbiased: "It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her." [101]

Independence

122. Independence was defined by the court as "having an interest or connection with the litigation" a personal connection or personal financial state in the litigation. The Court noted that lack of independence "is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it." [102] The Court cited a number of examples where there was "an interest in the litigation or relationship to the parties" as disqualifying lack or independence. [103]

Impartial and Objective

123. In the context of judicial decision making, impartiality has been defined by the SCC in in *R.v. S.(R.D.)* as:

---

[101] *White Burgess*, para 32, Tab 121.
[102] *White Burgess*, para 49, Tab 121.
[103] *White Burgess*, para 37, Tab 121.

> Impartiality can be described as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues. [104] [*emphasis added*]

124. The purpose of expert opinion evidence is to assist the court to make an impartial and objective decision. Therefore, the expert opinion evidence must meet the same standard impartiality or objectivity, if it is to be relied upon by the court or tribunal, otherwise it could distort the objectivity or impartiality of the court decision making.

125. An expert opinion at a very basic level, must report accurate and impartial results of the science or other basis upon which the opinion is based. Leaving out results from an experiment, a survey or a scientific literature review that would benefit the opposing party could not be considered an impartial or objective opinion evidence and cannot serve the decision making of the court or tribunal. Similarly, reporting on experiments and not pointing out the applicability of exceptions to the application of the experiment, cannot be considered impartial or objective and cannot serve the decision making or the court or tribunal. If there are two sides to an issue they must both be reported to the court or tribunal. If there are exceptions that are applicable to the issue they must be reported to the court or tribunal.

Unbiased

126. As noted by the Court in White Burgess expert opinion evidence must be "unbiased in the sense that it does not unfairly favour one party's position over another".[105] The Court endorsed the Statement by Cresswell J., in National Justice Compania Naviera S.A. which stated an "expert witness in the High Court should never assume the role of an advocate". Advocacy for one position over another is the hallmark of expert bias and lack of impartiality and objectivity.[106]

---

[104] *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484
[105] *White Burgess*, para 36, Tab 121.
[106] *White Burgess*, para 27, Tab 121.

Onus and Burden of Proof

127. Finally, the Court set out the burden of proof with respect to this threshold issue, noting that once challenged by the opposing party the burden remains with the party proposing to call the evidence to establish that the threshold issue has been met:

> Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the Mohan framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility. [107]

Application of the threshold test for admissibility in Mohan

The Opinion Evidence of Dr. Morwitz and Mr. Eckert is Not Relevant

128. The expert evidence proffered by the Commissioner is not relevant to this proceeding as it does not go to any of the elements of s.74.01(1.1), nor does it provide any input to the Tribunal in terms of any consideration regarding the application of the Drip Pricing in the Act.

a) The evidence of Dr. Morwitz is entirely based on questions that are irrelevant to the application of ss.74.01(1.1) and is based on definitions of drip pricing which include temporal components that are not part of the definition of drip pricing within the Act.

b) The evidence of Mr. Eckert is related to web design and used by the Commission to examine consumer awareness of aspects of Cineplex's Website or App which are not relevant to the application of ss.74.01(1.1).

---

[107] *White Burgess*, para 48, Tab 121.

129. The elements of ss.74.10(1.1) including 'attainability' and whether the fee in question is "fixed or obligatory' are questions of pure fact which opinion evidence, particularly the opinion evidence of Dr. Morwitz and Mr. Eckert do not assist the Tribunal. It is the Tribunal alone which must decide these questions of pure fact based upon the evidence and facts before the Tribunal.

130. All of the issues raised by Dr. Morwitz and Mr. Eckert are outside of the issues and facts necessary for a determination of whether the prices shown in Cineplex's Website or App are attainable and whether they are fixed or obligatory.

131. Dr. Morwitz does not even mention the elements of ss.74.01(1.1) such as 'attainability' of tickets at the prices shown by the Cineplex Website or App. Instead, Dr. Morwitz clearly states that her report specifically draws "conclusions regarding how this presentation affects consumer's perceptions of **how expensive a ticket purchased online would be**"[108]. This case is not about perceptions of how expensive online tickets are or what perceptions a consumer may have about the cost of a ticket, but rather whether the pricing displayed by Cineplex is attainable. Dr. Morwitz never even notes in passing whether any of the prices shown on the Website or App are attainable. The consumer perceptions that she studies have absolutely nothing to do with the application of ss.74.01(1.1).

132. Mr. Eckert is even farther removed from this case. Mr. Eckert's opinion evidence is entirely about web design. However, this case is not about web design. The Tribunal is not a regulator body that opines on optimal design of webpages. In addition, as is the case with Dr. Morwitz, Mr. Eckert does not consider any of the elements of drip pricing as found in ss.74.01(1.1) of the *Act.*

The Opinion Evidence of Dr. Morwitz and Mr. Eckert is Not Necessary

[108] **P-A-0011**, Expert Report of Dr. Vicki Morwitz dated January 5, 2024, para 8, Tab 122.

133. Expert testimony must meet the necessity test as articulated by the SCC "whether the trier of fact will be able to come to a satisfactory conclusion without the assistance of the expert." As countless authorities have held expert evidence is not permitted to supplant the fact-finding role of the Court or Tribunal. It is submitted that this rule is even more important in a specialized Tribunal such as the Competition Tribunal where judicial members and lay members are experts in their own right.[109]

134. In *Mohan* the SCC, (quoting Dickson J. in *R. v. Abbey* as he then was), stated that in terms of necessity:

> An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with **scientific information** which is likely to be outside the experience or a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary".[110] [*emphasis added*]

135. Again, the examination of whether the prices displayed in the Cineplex website fall within ss.74.01(1.1) does not require opinion evidence and is unnecessary. It is a clear factual determination and is a factual determination clearly with the expertise of this Tribunal.

The Opinion Evidence of Dr. Morwitz is not Reliable

136. The Supreme Court in *R v Mohan* stated that while mere logical or legal relevance was a threshold requirement, it did not end the inquiry. The SCC stated that the "reliability" of expert

---

[109] *R v Abbey*, No. 1, para 94, Tab 123: “It seems self-evident that an expert opinion on an issue that the jury is fully equipped to decide without that opinion is unnecessary and should register a "zero" on the "benefit" side of the cost-benefit scale. Inevitably, expert opinion evidence that brings no added benefit to the process will be excluded: see, for example, R. v. Batista (2008), 238 C.C.C. (3d) 97 (Ont. C.A.), at paras. 45-47; R. v. Nahar (2004), 181 C.C.C. (3d) 449 (B.C. C.A.), at paras. 20-21.

[110] *R v Mohan*, 1994 SCC 90, para 25.

evidence went both to the test of relevance as well as being an exclusionary rule. As stated at paragraph 22 of the decision:

> "**While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule** (see *Morris v. The Queen*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same." [111] [*emphasis added*]

137. With respect to reliability the SCC in White Burgess made particular note of the need for greater scrutiny when dealing with novel scientific evidence:

> The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order **to assure reliability, particularly of novel scientific evidence**. [112] [emphasis added]

138. In *Daubert v Merell* the Court noted that "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." [113]

139. As noted by Cineplex's expert Dr. On Amir, no statistical review or scientific study was conducted by either of the Commissioner's experts, which would be necessary to draw any conclusions other than the subjective conclusions of the Dr. Morwitz and Mr. Eckert themselves. [114]

The Opinion Evidence of Dr. Morwitz Does Not Meet the Additional Threshold Test for Admissibility in White Burgess

---

[111] *White Burgess*, para 22, Tab 121.
[112] *White Burgess*, para 16, Tab 121.
[113] *Daubert v Merell*, 509 US 579 at 593.
[114] Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 706:08-21, Tab 124; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 712:02-06, Tab 125; P-R-0039, Expert Report of Dr. On Amir dated January 12, 2024, paras 78 and 85-87, Tab 126.

140. As noted above, the SCC in *White Burgess* the determined that impartiality, independence and absence of bias was a threshold issue for admissibility of expert opinion evidence. The Court held that "[u]nderlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias".[115] Therefore, this threshold examination includes the requirements that the opinion evidence of Dr. Morwitz and Mr. Eckert must meet this test for admissibility on the basis that the opinion evidence is:

(i) independent;
(ii) impartial and objective; and
(iii) unbiased

Cineplex Does Not Take the Position That Dr. Morwitz Lacks Independence

141. Independence under this branch of the test for admissibility in White Burgess is whether the expert has a personal stake in the litigation or that there is a personal relationship with the parties in the litigation or their counsel. Cineplex does not take that position that Dr. Morwitz lack independence within the meaning set out by the Court in *White Burgess*. However, Cineplex does take the position that Dr. Morwitz's opinion evidence lacked impartiality and objectivity as defined by the Court. In addition, Cineplex also takes the position that Dr. Morwitz showed bias in the expert opinion evidence submitted to this court.

The Opinion Evidence of Dr. Morwitz Is Not Impartial or Objective

142. The Court held that the "expert's opinion must be impartial in the sense that it reflects **an objective assessment** of the questions at hand".[116] [emphasis added]

143. Dr. Morwitz did not provided an objective assessment of the questions at hand. The opinion evidence of Dr. Morwitz lacks impartiality and objectivity because it has been demonstrated

[115] *White Burgess*, para 32, Tab 121.
[116] *White Burgess*, para 32, Tab 121.

and admitted that it failed on a number of fronts to identify and analyze both sides of the issues that were raised in their opinion evidence.

144. Dr. Morwitz's opinion evidence failed to provide a balance or objective review of the literature upon which she relies including the fact that:

a) There were mixed results in her own research; [117]

b) There were mixed results in the academic literature that she said she relied upon; [118]

c) That there were exceptions or moderators noted in the research studies and academic literature that she stated she relied upon but she did not bring those exceptions or moderators to the attention of the Tribunal; [119]

d) She did not note that her opinion evidence was subject to researcher bias because the opinions were based on her own subjective review of the Cineplex website and app; [120] and

---

[117] Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, p. 309:07-17, Tab 127; **P-R-0039**, Expert Report of Dr. On Amir dated January 12, 2024, para 71, Tab 128; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 244:21-250:03, Tab 149; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 307:18-309:17, Tab 150.

[118] Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, p. 246:10-16 and pp. 249:22-250:03, Tab 129; CB-R-0015 (005618), Ajay T. Abraham and Rebecca W. Hamilton, "When Does Partitioned Pricing Lead to More Favorable Consumer Preferences? Meta-Analytic Evidence" (2018) 55:5 J. Mark. Res. 686, p. 699, Tab 151; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 309:18-310:22, Tab 152; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 314:10-316:16, Tab 153; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 316:17-320:11, Tab 154; Agreed Book of Documents 005595, Jennifer Brown, Tanjim Hossain & John Morgan, "Shrouded Attributes and Information Suppression: Evidence from the Field" (2006), Tab 155; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 328:07-329:09, Tab 156.

[119] Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, p. 320:03-11 and pp. 328:14-329:09, Tab 130; Agreed Book of Documents 005629, Greenleaf et al., The Price Does Not Include Additional Taxes, Fees, and Surcharges a Review, at pp. 105-124 and 109-111, Tab 157; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 304:24-307:17, Tab 158.

[120] Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 296:06-297:01, Tab 131; **P-R-0010,** Addendum Report of Dr. On Amir dated February 5, 2024, paras 21- 24, Tab 132; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 280:25-281:21, Tab 159.

e) She did not note that her opinion evidence did not rely upon any scientific information, empirical data or any scientific review of the Cineplex website or app or that she could have undertaken such an empirical or scientific review. [121]

f) She did not note in her expert opinion that a study would need to be undertaken of Cineplex's website and Cineplex's customers in order to test the opinion evidence she provided and that without such testing her opinion was no more than one hypotheses regarding the opinions she provided in her report.[122]

145. Both Dr. Morwitz's opinion evidence did not provide a balance or objective review of the website design including the fact that:

a) The fact that there was a time clock on each page; [123]

b) The fact that the time clock reset on each page; [124]

c) The fact that there was a total time of 30 minutes in the time clocks to complete the online transaction; [125]

d) The fact that the "Z pattern" analysis also directed the consumer to the total online price; [126]

---

[121] Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 279:13-280:04, Tab 133; **P-R-0039**, Expert Report of Dr. On Amir dated January 12, 2024, para 71, Tab 128; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 279:03-280:04, Tab 160; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, p. 274:19-21, Tab 161; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 276:04-277:25, Tab 162.
[122] P-**R-0039**, Expert Report of Dr. On Amir dated January 12, 2024, para 60, Tab 134; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 279:03-280:04, Tab 160.
[123] McGrath Evidence, Public Transcript, Vol 3, February 16, p. 428:12-15, Tab 135.
[124] McGrath Evidence, Public Transcript, Vol 3, February 16, p. 428:12-15, Tab 135.
[125] McGrath Evidence, Public Transcript, Vol 3, February 16, p. 428:16-20, Tab 136.
[126] Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 716:18-23, Tab 75; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, p. 259:03-12, Tab 163; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 280:25-286:21, Tab 159.

e) The fact that both the total online price and amount of the online booking fee was displayed simultaneously with the selection of a ticket and before the consumer moved on to the online purchase process; [127]

f) The fact that that the call-to-action button or proceed button had a lockout feature that prevented the consumer from proceeding into the online purchase process until they had made a ticket selection and seen the total online price. [128]

146. Despite failing to note the above elements of the Cineplex website Dr. Morwitz purported to opined on consumer behaviour related to:

a) Whether consumers were aware of the total online price; [129]

b) That consumers were rushed by the time clock; [130]

c) The timing on whether the consumer had entered the online purchase process; [131]

d) What the consumer is likely to have seen before proceeding into the online purchase process; [132]

e) Whether the consumer would have known about the separately itemized online booking fee before completing the transaction and in the case of Dr. Morwitz how this might

[127] McGrath Evidence, Public Transcript, Vol 3, February 16, p. 422:08-10, Tab 137; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 697:03-16, Tab 73; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 701:06-11, Tab 74; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 716:18-23, Tab 75; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, pp. 856:19-857:11, Tab 76; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, p. 362:02-19, Tab 164; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 288:25-290:16, Tab 165.
[128] McGrath Evidence, Public Transcript, Vol 3, February 16, p. 421:01-10, Tab 69; McGrath Evidence, Public Transcript, Vol 3, February 16, p. 498:10-17, Tab 80; Dr. Amir Evidence, Public Transcript, Vol 4, February 20, pp. 716:24-717:13, Tab 70; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 280:25-286:21, Tab 159.
[129] P-A-0011, Expert Report of Dr. Vicki Morwitz dated January 5, 2024, paras 131 and 133, Tab 139.
[130] P-A-0011, Expert Report of Dr. Vicki Morwitz dated January 5, 2024, para 141, Tab 140.
[131] P-A-0011, Expert Report of Dr. Vicki Morwitz dated January 5, 2024, para 120, Tab 141.
[132] P-A-0011, Expert Report of Dr. Vicki Morwitz dated January 5, 2024, paras 126, 129 and 133, Tab 142.

impact the application of whether there was partitioned pricing or drip pricing within the mean of the FTC proposed definition or the definition in the academic literature. [133]

147. The objectivity and impartiality of all of these elements of Dr. Morwitz's opinion evidence is tainted by the fact that she failed to provide an impartial and objective review of the literature and research she relied upon, she failed to set out the limitations of the review she undertook and she failed to note or consider important elements and information on the Website and App.

The Opinion Evidence of Dr. Morwitz is Biased

148. While noting the potential overlap, it is important to note that the Court also held that opinion evidence "must be unbiased in the sense that it does not unfairly favour one party's position over another".[134] In particular, the Court noted that an expert should never "assume the role of an advocate".[135]

149. The opinion evidence of Dr. Morwitz is inadmissible because it is subject to bias at three levels:

a) As noted, Dr. Morwitz's opinion is biased in that she failed to provide an impartial and objective review of the literature and research she relied upon, she failed to set out the limitations of the review she undertook and she failed to note or consider important elements and information on Cineplex's website. [136]

---

[133]P-A-0011, Expert Report of Dr. Vicki Morwitz dated January 5, 2024, para 145, Tab 143.
[134] *White Burgess*, paras 32, Tab 121.
[135] *White Burgess*, paras 27, Tab 121.
[136] **P-R-0039**, Expert Report of Dr. On Amir dated January 12, 2024, paras 67-80, Tab 144; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 305:23-306:01, Tab 166; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, p. 246:10-16, Tab 167; CB-R-0015, Ajay T. Abraham and Rebecca W. Hamilton, “When Does Partitioned Pricing Lead to More Favorable Consumer Preferences? Meta-Analytic Evidence” (2018) 55:5 J. Mark. Res. 686, Tab 151; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 314:10-316:16, Tab 153; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 287:15-288:11, Tab 168; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 251:18-253:07, Tab 169.

b) Dr. Morwitz is an advocate for laws and rules for drip pricing. [137]

Onus to Establish Admissibility

150. It is submitted that the Commissioner has not discharged the burden of establishing admissibility of the expert opinions or Dr. Morwitz or Mr. Eckert. He has failed to meet the tests of relevance, necessity or reliability as set out in Mohan and affirmed more recently in *White Burgess*. In addition, in respect of Dr. Morwitz opinion evidence the Commissioner has not discharged his burden of proof with respect to the threshold duties of "impartiality, independence and absence of bias" as set out by the SCC in *White Burgess.*

Dr. Amir's Expert Opinion Evidence

151. If this Tribunal determines that both Dr. Morwitz's opinion evidence do not meet the relevance and necessity tests for admissibility then Dr. Amir's expert opinion evidence would also be excluded on the same basis because it is a rebuttal opinion, with the exception of Dr. Amir's evidence that went to the objectivity, impartiality and bias which is relied upon for the purposes of admissibility of Dr. Morwitz's opinion evidence.

152. Alternatively, should the Tribunal find that Dr. Morwitz's and Mr. Eckert's opinion evidence does meet the relevance and necessity tests for admissibility, then Dr. Amir's report should be included on the same basis.

153. However, if this Tribunal were to find Dr. Morwitz's opinion evidence should be excluded based on the remaining tests found in White Burgess, Dr. Amir's opinion evidence should not be excluded, as his report did not suffer from the same failings related to reliability, impartiality, objectivity or bias. Dr. Amir, as stated in his evidence, provided a rebuttal report related to the evidence of Dr. Morwitz and he noted all of the restrictions and failings that Dr.

---

[137] **P-R-0010,** Addendum Report of Dr. On Amir dated February 5, 2024, para 21, Tab 145; P-A-0013, Vicki Morwitz Remarks, March 21, 2023, Tab 71; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, pp. 351:22-356:18, Tab 170; Dr. Morwitz Evidence, Public Transcript, Vol 2, February 15, p. 360:02-12, Tab 171.

Morwitz failed to note for the Tribunal, including how some those factors such as researcher bias or subjectivity of review that could also apply to the opinion evidence he was providing to the Tribunal. [138]

Remedies

154. Cineplex requests that the Application be dismissed, with costs.

155. In the alternative, if the Tribunal finds in favour of the Commissioner, this is not an appropriate case for an AMP. This is the first case heard by the Tribunal with respect to ss.74.01(1.1) and the first interpretation of that section. The Commissioner's approach was beyond the clear or obvious interpretation of the provision and beyond any guidance the Commissioner provided to the business community.

156. As noted in Section 74.1(4) the Tribunal's discretion to grant a remedy is for the purposes of "promoting compliance with the *Competition Act*" and not with a view to punishment".[139] [140]

> 74.1(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.[141]

---

[138] Dr. Amir Evidence, Public Transcript, Vol 4, February 20, p. 808:05-13, Tab 146; **P-R-0010,** Addendum Report of Dr. On Amir dated February 5, 2024, paras 6-24, Tab 147.
[139] *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2014 ONSC 1146 at para 51; see also Canada *Commissioner of Competition) v. Chatr Wireless Inc*., 2013 ONSC 5315 at para.556; House of Commons, Standing Committee on Finance, Minutes of Proceeding and Evidence, 44th Parl., 1st Sess., No 50 (May 24,2022) at 24, Tab 148; House of Commons, *Senate Standing Committee on Industry and Technology*, Minutes of Proceeding and Evidence, 44th Parl., 1st Sess., No. 49 (May 19,2022) at 6, Tab 49; House of Commons, *Senate Standing Committee on Industry and Technology*, Minutes of Proceeding and Evidence, 44th Parl., 1st Sess., No.20 (May 20,2022) at 5, Tab 50; House of Commons, *Senate Standing Committee on National Finance*, Minutes of Proceeding and Evidence, 44th Parl., 1st Sess., No.20 (June 8, 2022) at 20:7, Tab 150.
[140] *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2014 ONSC 1146 at para 51.
[141] *Competition Act*, RSC, 1985, c. C-34, s. 74.1(4)

157. Further, section 74.1(5) provides that a number of factors to be taken into account in determining the amount of any AMP. It is submitted that the following factors should be considered:

158.

a) Cineplex has not been found to have engaged in any unlawful conduct under the Act;

b) The evidence is uncontroverted that Cineplex intention was to provide a choice to consumers which is welfare enhancing;

c) The consumers who purchase online obtained value for their purchases, including the value of the advanced seat reservation;

d) There were no complaints that would have alerted Cineplex to the concerns raised by the Commissioner;

e) The evidence is uncontroverted that Cineplex believed that its web page was fully compliant and that it provided consumers with all applicable information, including locking consumers out from its online purchase process until it had seen the total price including the online booking fee.

Restitution

159. It is submitted that restitution would be in appropriate in this case. Consumers received the advantages that the online booking fee provided, including the Advance e-Ticket. This is not a junk fee where no value was received for the fee in question.

Penalties In Past Cases

160. In *Canada (Commissioner of Competition) v. Chatr Wireless Inc.,* 2014 ONSC 1146 (*Chatr Wireless*), after considering the jurisprudence and AMPs imposed in other cases, the court

ordered an AMP of $500,000[142]. Cineplex submits that an AMP is not warranted in this case; however, if the Tribunal is inclined to award an AMP, the amount should be no more than that awarded in *Chart Wireless Inc.*

ORDER SOUGHT

161. For the reasons set out above, Cineplex respectfully requests that the Commissioner's Application be dismissed with costs payable to Cineplex.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26TH DAY OF FEBRUARY

Robert S. Russell

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West, Suite 3400
Toronto ON M5H 4E3
T: 416.367.6000
F: 416.367.6749

[142] *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2014 ONSC 1146 at para 77.

Robert S. Russell (25529R)
rrussell@blg.com
T: 416-367-6256

Martin Abadi (53275J)
mabadi@blg.com
T: 416-367-6158

Raymond Ashurov (72806N)
rashurov@blg.com
T: 416-367- 6503

Joshua Abaki (75327L)
jabaki@blg.com
T: 416-367-6568

Erin Penney
epenney@blg.com

TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

Jonathan Hood
Tel: 416-954-5925
Jonathan.Hood@cb-bc-gc.ca

Irene Cybulsky
Tel: 613-316-5034
Irene.Cybulsky@cb-bc.gc.ca

8. CineClub is Cineplex's movie subscription program.

9. CineClub was launched in the third quarter of 2021.

10. CineClub provides benefits to its members such as one free movie ticket every month, discounts at concessions and no Online Booking Fees.

11. Consumers must be Scene+ members to join CineClub.

12. CineClub members currently pay a monthly fee of $9.99 plus tax or an annual fee of $119.88 plus tax.

13. On June 15, 2022, Cineplex introduced an Online Booking Fee.

14. The Online Booking Fee generated $11,678,336 in 2022.

15. The Online Booking Fee generated $5,200,872 during the first quarter of 2023.

16. The Online Booking Fee generated $7 million during the second quarter of 2023.

17. The Online Booking Fee generated $9.9 million during the third quarter of 2023.

18. The Online Booking Fee generated $5.2 million during the fourth quarter of 2023, for a total of $27.3 million in 2023.

19. The Online Booking Fee is waived for CineClub members.

20. When the Online Booking Fee was introduced, Scene+ members, who were not CineClub members, were unable to redeem Scene+ points towards the Online Booking Fee, a payment was required in order to proceed. As of August 11, 2022, Scene+ points could be redeemed towards the payment of the Online Booking Fee.

21. The Online Booking Fee does not apply to movie tickets purchased at Cineplex's theatres (box office, concessions and kiosks).

22. The Commissioner did not receive any complaints, from any members of the public, regarding the Online Booking Fee prior to the issuance of the Notice of Application.

23. The Commissioner does not have any written record of any complaints from any members of the public regarding the online booking fee received prior to issuance of the Notice of Application.

24. After the Notice of Application was filed, the Commissioner received seven complaints regarding the Online Booking Fee.

PUBLIC

28. The Website and the App are the primary source of information about Cineplex products and services. The consumer can turn to the Website and App to gather information on what, when, where and how particular products and services are offered.

29. One of the many services available on the Website and App is the information about the movies and events playing at Cineplex theatres. The multiplicity of choices extends to movie offerings, including titles, dates, time, location, venue, and type of auditorium and viewing experience, as further described in my statement below. The informational component of the Website and App is a valuable resource to Cineplex consumers. According to Cineplex data, about half of consumers purchase their tickets in person, and the other half purchase their tickets online, either via the Website or the App. In 2022, about 52 percent of consumers purchased their tickets online, while 48 percent purchased their tickets in person, at theatres.

30. Before any representation of price is made, both the Website and the App provide the consumer with information regarding movies playing at theatres, the locations, times, experience, and seat availability at a particular theatre.

B. Information, Choices, and Decision Making

31. Consumers can purchase tickets either in person at the theatre or online (using the Website or the App).

32. Due to the many viewing options available at Cineplex's theatres, there is no single price for a movie ticket, whether purchased in person or online.

33. Ticket prices are differentiated in several ways. The Website and the App are both interactive based on the consumer's choices on the plethora information made available. Despite the many choices, other than the online booking fee, the ticket price for identical options is the same whether purchased at a theatre or online.

34. Prices differ by theatre location -and within each location- and vary according to the age of the moviegoer, the theatre experience (e.g. 3D, IMAX, VIP, 4DX, ScreenX, UltraAVX, D-

PUBLIC

28. The Website and the App are the primary source of information about Cineplex products and services. The consumer can turn to the Website and App to gather information on what, when, where and how particular products and services are offered.

29. One of the many services available on the Website and App is the information about the movies and events playing at Cineplex theatres. The multiplicity of choices extends to movie offerings, including titles, dates, time, location, venue, and type of auditorium and viewing experience, as further described in my statement below. The informational component of the Website and App is a valuable resource to Cineplex consumers. According to Cineplex data, about half of consumers purchase their tickets in person, and the other half purchase their tickets online, either via the Website or the App. In 2022, about 52 percent of consumers purchased their tickets online, while 48 percent purchased their tickets in person, at theatres.

30. Before any representation of price is made, both the Website and the App provide the consumer with information regarding movies playing at theatres, the locations, times, experience, and seat availability at a particular theatre.

B. Information, Choices, and Decision Making

31. Consumers can purchase tickets either in person at the theatre or online (using the Website or the App).

32. Due to the many viewing options available at Cineplex's theatres, there is no single price for a movie ticket, whether purchased in person or online.

33. Ticket prices are differentiated in several ways. The Website and the App are both interactive based on the consumer's choices on the plethora information made available. Despite the many choices, other than the online booking fee, the ticket price for identical options is the same whether purchased at a theatre or online.

34. Prices differ by theatre location -and within each location- and vary according to the age of the moviegoer, the theatre experience (e.g. 3D, IMAX, VIP, 4DX, ScreenX, UltraAVX, D-

PUBLIC

BOX, Clubhouse (collectively "**Premium Auditoriums**" or regular, as depicted in the video at Exhibit A), the day of the week, movie release date and whether the moviegoer is a member of CineClub or the Scene+ loyalty.)

35. Prices also vary based on whether the consumer wants to purchase the ticket at the theatre or online with an advance seat reservation.

36. The Website and the App provide the consumer with price representations only after all informational selections are made. The attainable price for purchase at the theatre or purchase online is always prominently shown to the consumer based on the consumer's choice of purchase.

C. Securing a Choice: The Value and Convenience of Guaranteed Advanced e-Tickets

37. The ability to select and reserve seats in advance is important for moviegoers, and an important aspect of the online purchase process. As such, the importance of securing their preferred seat has become increasingly valuable to consumers.

38. As with other forms of entertainment, the seat location is often a critical determinant of the purchase process and a driver of attendance. Cineplex data shows that consumers who purchase their tickets on the Website spend the greatest amount of time (41.6% of their time) selecting a seat, while consumers who purchase their tickets on the App, spend about 33.4% of their time selecting a seat. This evidence is consistent with Cineplex's view that instantaneous seat selection is an important value-add service, as is the convenience of buying tickets anywhere and anytime with advance online purchases.

39. Consumers can purchase advance tickets, which come with a guaranteed seat, in more than one way. Consumers can purchase an advance ticket by attending in person at the theatre (at the box office or concession stand or at a kiosk) or through the added convenience of instantaneous access (from anywhere and at anytime) to the advance electronic ticket online, via the Website or the App ("**Advance e-Ticket**".)

PUBLIC

showing of movies at movie theatres there is no one price, but rather a broad array of differentiated prices depending on the choices of the consumer. The Website provides the information that outlines these choices for the consumer and then provides pricing dependent on those choices.

18. The Website and the App have accordingly a dual function. First, they provide access to information about products and services that lead to informed decisions about the choices available online and otherwise. Second, the consumer can use the information available to customize a movie ticket selection and then instantaneously secure that selection by proceeding with the online purchasing process.

19. Fundamental to this case is the final choice that a consumer must make with respect to the purchase of movie tickets. At the end of the information and choices provided to the consumer with respect to date, time, venue and movie experience, the consumer ends up on the page where prices are first displayed on the Website or App (I shall describe this further in my evidence as the "Tickets" page). At this point, the consumer, after customizing their movie going experience based on the choices available to them in the preceding pages, faces an important choice and trade off with respect to pricing and convenience. The consumer has the choice of purchasing the tickets at theatres at the base price, or alternatively, the consumer can select the number of tickets the consumer wishes to purchase online at the online price.

20. Instantaneously, upon selecting the tickets that the consumer wishes to purchase online, the price of the ticket, including the online booking fee (if the online booking fee applies), is displayed prominently and immediately to the left of the "Proceed" button. The consumer cannot proceed to the subsequent page without making a ticket selection. Making the ticket selection causes the online price, which includes the price of the online booking fee (if the online booking fee applies), to be displayed immediately to the left of the "Proceed" button and before the "Proceed" button is operative.

21. The choice between purchasing a ticket at theatres at the base price shown before any selection of tickets is made on the Tickets page and before the consumer can move to the seat reservation page (where the consumer derives the value and convenience of instantaneously securing a seat of their choice for the customized selection made).

PUBLIC

3. In preparing this witness statement, I have obtained and relied upon information from Cineplex's business records, and a number of other Cineplex employees. All of this information is typical of and consistent with the type of information I would use on a routine regular basis to make decisions in the normal course of my duties.

I. Background and Qualifications

4. I have a Bachelor of Business Administration from Brock University and I am a Certified Public Accountant.

5. I joined Cineplex Odeon Corp., a now-defunct Cineplex subsidiary, in 1987 and held various financial and operational roles from 1987 to 2000. In 2000, I joined Galaxy Entertainment, an entity which subsequently merged with Cineplex Odeon Corp, serving as Executive Vice President ("EVP"). In 2005, on the subsequent acquisition of Famous Players, I continued as EVP of the resulting entity, Cineplex Entertainment, a role I held until 2011 when I was appointed to my current role.

6. I have been the COO of Cineplex since 2011. As the COO of Cineplex, I oversee the Exhibition and Location Based Entertainment ("LBE") Department (theatre operations and food service), digital commerce (Cineplex Store), location-based entertainment (The Rec Room and Playdium), real estate, design and construction, strategic planning, Cineplex's media businesses, and Cineplex's amusement gaming business (Player One Amusement Group).

7. The online booking and advance seat reservation fee ("online booking fee"), as I will further describe in this statement, is managed by LBE Department. I therefore oversaw the conceptualization, decision-making, and implementation processes of the online booking fee.

II. Overview

8. Cineplex is a film and entertainment company that is headquartered in Toronto, Ontario, Canada.

9. Cineplex has a website Cineplex.com (the "**Website**") and a mobile app (the "**App**") which provides information to consumers regarding various entertainment products and services,

PUBLIC

including the availability of movies at Cineplex theatres across Canada. The Website and App have supplanted other forms of information such as advertisements in newspapers and have become the predominant source of information for consumers as to:

- what movies are available;
- where those movies are playing;
- when the movies are playing;
- what movie experience is available (3D, IMAX, VIP, 4DX, ScreenX, UltraAVX, D-BOX, Closed Captioning, Described Video etc.); and
- the prices based on these various consumer choices, including whether the movie ticket is purchased at theatres or purchased online.

10. The Website and App also provide the availability for online advanced seat reservations and the online purchase of movie tickets. Once an online seat reservation is made, that seat will be held for the consumer and will not be available to those purchasing tickets at theatres (e.g. box office, theatre concession stand or kiosk).

11. Cineplex is a partner in Scene+, Canada's largest entertainment and lifestyle loyalty program. Scene+ members earn points on a variety of purchases, not only at Cineplex theatres, but also at a large number of retailers or through the use of credit cards that are associated with the Scene+ loyalty program. The Scene+ program is free for members to join. Points collected through the Scene+ loyalty program can be used to purchase various products including tickets for movie theatres.

12. Cineplex offers its guests the opportunity to join CineClub, a paid movie subscription program, which provides members with benefits accessible across Cineplex's businesses nationwide including Cineplex theatres. Currently CineClub members pay a recurring monthly fee of $9.99 plus tax or an annual fee of $119.88 plus tax. Together with other benefits such as discounts for concession purchases, CineClub members receive one general admission movie

PUBLIC

66. Consumers who want to purchase tickets at the theatre may simply visit the Website to determine movie information, showtimes and determine the price and availability at the theatre of their choice and then exit the Website.

67. According to Cineplex data, out of the 97 million visits to the website in 2022, 11.8 percent proceeded to the "Tickets" page. This suggests that most visits to the Website are for informational purposes only. Out of those 11.8 percent of visits, 42.3 percent completed the ticket purchase transaction; thus only 4.99% of total visitors completed a ticket purchase transaction.

68. A consumer cannot proceed with the online purchase process until the consumer selects a ticket on the "Tickets" page and also clicks "Proceed". If a consumer clicks the "Proceed" button on the "Tickets" page without making one of the three selections identified in Figure 3, above, an error message is displayed requiring the selection of a ticket (as shown by the message in RED "You must purchase at least 1 ticket" in Figure 4, below) [RED colour in original screenshot].

PUBLIC

showing of movies at movie theatres there is no one price, but rather a broad array of differentiated prices depending on the choices of the consumer. The Website provides the information that outlines these choices for the consumer and then provides pricing dependent on those choices.

18. The Website and the App have accordingly a dual function. First, they provide access to information about products and services that lead to informed decisions about the choices available online and otherwise. Second, the consumer can use the information available to customize a movie ticket selection and then instantaneously secure that selection by proceeding with the online purchasing process.

19. Fundamental to this case is the final choice that a consumer must make with respect to the purchase of movie tickets. At the end of the information and choices provided to the consumer with respect to date, time, venue and movie experience, the consumer ends up on the page where prices are first displayed on the Website or App (I shall describe this further in my evidence as the "Tickets" page). At this point, the consumer, after customizing their movie going experience based on the choices available to them in the preceding pages, faces an important choice and trade off with respect to pricing and convenience. The consumer has the choice of purchasing the tickets at theatres at the base price, or alternatively, the consumer can select the number of tickets the consumer wishes to purchase online at the online price.

20. Instantaneously, upon selecting the tickets that the consumer wishes to purchase online, the price of the ticket, including the online booking fee (if the online booking fee applies), is displayed prominently and immediately to the left of the "Proceed" button. The consumer cannot proceed to the subsequent page without making a ticket selection. Making the ticket selection causes the online price, which includes the price of the online booking fee (if the online booking fee applies), to be displayed immediately to the left of the "Proceed" button and before the "Proceed" button is operative.

21. The choice between purchasing a ticket at theatres at the base price shown before any selection of tickets is made on the Tickets page and before the consumer can move to the seat reservation page (where the consumer derives the value and convenience of instantaneously securing a seat of their choice for the customized selection made).

MR. RUSSELL: Sir, when you're on the ticket page and before selecting a ticket, even one ticket, is there an online price shown?

MR. McGRATH: No, there's no online price. You haven't made a selection, so the online price is shown as zero. That's where we have what we call our lockout feature. If you decide to proceed from that point, you are locked out from proceeding any -- you're locked out from proceeding into the online purchasing process until you've actually made a ticket selection.

MR. RUSSELL: And the prices that we've seen a number of times in the category general admission, senior and child, which you refer to as the base price in the video, are those attainable at any theatre?

MR. McGRATH: Those are the ticket prices that are available at that theatre for that -- that's shown on that page.

MR. RUSSELL: When you say "that's shown on that page", where is it shown on that page?

MR. McGRATH: Sorry. It's on the ticketing page. It's just above the ticket prices where it shows the theatre name.

MR. RUSSELL: So above the three price categories that I referred to you, above that is the theatre where you can purchase those tickets. Is that

PUBLIC

showing of movies at movie theatres there is no one price, but rather a broad array of differentiated prices depending on the choices of the consumer. The Website provides the information that outlines these choices for the consumer and then provides pricing dependent on those choices.

18. The Website and the App have accordingly a dual function. First, they provide access to information about products and services that lead to informed decisions about the choices available online and otherwise. Second, the consumer can use the information available to customize a movie ticket selection and then instantaneously secure that selection by proceeding with the online purchasing process.

19. Fundamental to this case is the final choice that a consumer must make with respect to the purchase of movie tickets. At the end of the information and choices provided to the consumer with respect to date, time, venue and movie experience, the consumer ends up on the page where prices are first displayed on the Website or App (I shall describe this further in my evidence as the "Tickets" page). At this point, the consumer, after customizing their movie going experience based on the choices available to them in the preceding pages, faces an important choice and trade off with respect to pricing and convenience. The consumer has the choice of purchasing the tickets at theatres at the base price, or alternatively, the consumer can select the number of tickets the consumer wishes to purchase online at the online price.

20. Instantaneously, upon selecting the tickets that the consumer wishes to purchase online, the price of the ticket, including the online booking fee (if the online booking fee applies), is displayed prominently and immediately to the left of the "Proceed" button. The consumer cannot proceed to the subsequent page without making a ticket selection. Making the ticket selection causes the online price, which includes the price of the online booking fee (if the online booking fee applies), to be displayed immediately to the left of the "Proceed" button and before the "Proceed" button is operative.

21. The choice between purchasing a ticket at theatres at the base price shown before any selection of tickets is made on the Tickets page and before the consumer can move to the seat reservation page (where the consumer derives the value and convenience of instantaneously securing a seat of their choice for the customized selection made).

PUBLIC

including the availability of movies at Cineplex theatres across Canada. The Website and App have supplanted other forms of information such as advertisements in newspapers and have become the predominant source of information for consumers as to:

- what movies are available;
- where those movies are playing;
- when the movies are playing;
- what movie experience is available (3D, IMAX, VIP, 4DX, ScreenX, UltraAVX, D-BOX, Closed Captioning, Described Video etc.); and
- the prices based on these various consumer choices, including whether the movie ticket is purchased at theatres or purchased online.

10. The Website and App also provide the availability for online advanced seat reservations and the online purchase of movie tickets. Once an online seat reservation is made, that seat will be held for the consumer and will not be available to those purchasing tickets at theatres (e.g. box office, theatre concession stand or kiosk).

11. Cineplex is a partner in Scene+, Canada's largest entertainment and lifestyle loyalty program. Scene+ members earn points on a variety of purchases, not only at Cineplex theatres, but also at a large number of retailers or through the use of credit cards that are associated with the Scene+ loyalty program. The Scene+ program is free for members to join. Points collected through the Scene+ loyalty program can be used to purchase various products including tickets for movie theatres.

12. Cineplex offers its guests the opportunity to join CineClub, a paid movie subscription program, which provides members with benefits accessible across Cineplex's businesses nationwide including Cineplex theatres. Currently CineClub members pay a recurring monthly fee of $9.99 plus tax or an annual fee of $119.88 plus tax. Together with other benefits such as discounts for concession purchases, CineClub members receive one general admission movie

PUBLIC

40. By purchasing Advance e-Tickets, consumers can instantly derive the additional benefit, convenience, time savings, and service of a guaranteed seat of choice and avoid a sold-out showing or a poor seat location. In fact, in my experience, for experiences that have limited seating available, consumers particularly value the choice of purchasing in advance. For example, theatres that have limited seating capacity, such as VIP theatres and recliner seating locations, have a larger percentage of consumers who purchase tickets online.

41. An Advance e-Ticket can also be instantly gifted or forwarded digitally without having to incur the cost or time of physically attending at the theatre and can also be used to ensure instant seat selection for groups that wish to sit together. By contrast, tickets purchased in person at the theatre or at a kiosk cannot be digitally shared. An advanced eTicket is accordingly, the second distinct value of the Website and App (after information gathering).

42. There is no equivalent to the online platform. By instantaneously securing a guaranteed seat online, the consumer saves the costs of transportation or other means of attendance as well as the opportunity cost of time and effort in doing so. More importantly, there would be no guarantee for the consumer that their preferred selection of seat would be available by the time the consumer attends the theatre and purchases the ticket.

IV. The Online Booking Fee

Background

43. On June 15, 2022, Cineplex introduced the online booking fee for Advance e-Ticket purchases.

44. The introduction of the online booking fee did not impact the pricing of tickets that could be purchased at theatres. As implied by its name, the online booking fee strictly and only applies to certain purchases made online, i.e. to certain Advance e-Tickets.

765

"Instantly save on your ticket"; correct?

DR. AMIR: Yes.

MR. HOOD: And it advertises the cost for joining Cineplex -- or CineClub?

DR. AMIR: Yes.

MR. HOOD: It says there's three benefits. One movie ticket every month; correct?

DR. AMIR: Yes.

MR. HOOD: You get 20 percent off concession fees?

DR. AMIR: M'hmm.

MR. HOOD: No Online Booking Fees; correct?

DR. AMIR: Exactly.

MR. HOOD: It doesn't state the amount of the Online Booking Fee; correct?

DR. AMIR: Not yet.

MR. HOOD: Well, sorry. I'm just now asking questions about the advertisement.

The advertisement does not say the amount of the Online Booking Fee.

DR. AMIR: But the amount of the Online Booking Fee is already a wrong concept because there's no "the amount". The amount can vary.

MR. HOOD: Dr. Amir, in the advertisement --

DR. AMIR: Yes.

4. Cineplex denies item numbered 4 of the Request as stated. The more precise figure for Cineplex Inc.'s revenue in 2022 is $1,268,562,000.

5. Cineplex denies item numbered 6 of the Request as stated. Scene+ members earn points on a variety of purchases at among other places, Cineplex theaters.

6. Cineplex denies item numbered 7 of the Request as stated. CineClub is Cineplex's movie subscription program for customers.

7. Cineplex denies item numbered 9 of the Request as stated. The temporal span is not defined. Currently CineClub members pay a recurring monthly fee of $9.99 plus tax or an annual fee of $119.88 plus tax.

8. Cineplex denies item numbered 11 of the Request as stated. The more precise figure for revenue generated from the on-line booking fee in 2022 was $11,678,336.

9. Cineplex denies item numbered 12 of the Request as stated. The more precise figure for revenue generated from the on-line booking fee for the first quarter of 2023 was $5,200,872.

10. Cineplex denies item numbered 14 of the Request as stated, as it is incomplete. Specifically, in addition to Scene+ or CineClub members, the on-line booking fee of $1.50 for the first four tickets purchased for a movie using the Website or App, is also not charged for certain promotional coupons.

11. Cineplex denies item numbered 15 of the Request as stated, as it is incomplete. Specifically, Scene+ members who are also CineClub members are not charged the on-line booking fee and nor are Scene+ members who are using certain promotional coupons.

12. Cineplex denies item numbered 16 of the Request as stated. Scene+ members incur the on-line booking fee only if they redeem for an on-line ticket purchase and if they do not otherwise hold a CineClub membership or a promotional coupon. Scene+ members can redeem their points towards the amount of the on-line booking fee. The on-line booking fee does not apply at a theater or kiosk.

13. Cineplex denies item numbered 18 of the Request as stated. The landing page of Cineplex.com is for movie and event titles only, it does not include prices.

14. Cineplex denies item numbered 19 of the Request as stated. Consumers must be logged into a Cineplex account on the Website and App as part of the on-line purchasing process when using the Website or App.

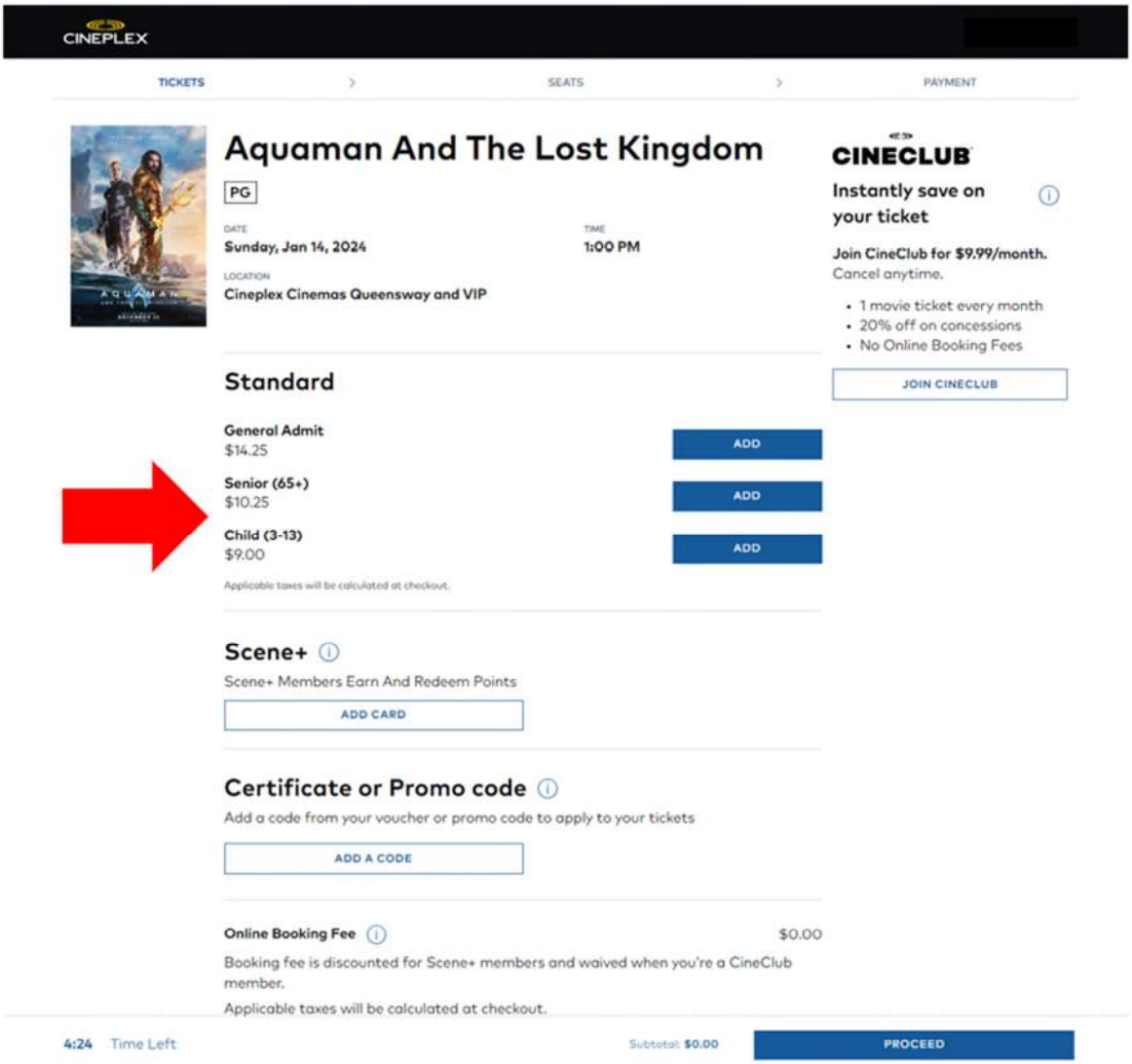
15. Cineplex denies item numbered 20 of the Request as stated, as it is incomplete with respect to what is meant by "Movie Ticket prices". The first place where ticket prices are displayed on the Website or App includes a number of choices that impact ticket pricing if tickets are

PUBLIC

The "Tickets" Page: The First Page Where a Price is Shown

64. Immediately after signing in, the consumer is shown the "**Tickets**" page, which lists the types of tickets available for purchase and their corresponding prices when purchased at the theatre for the applicable date and theatre experience.

65. The three prices shown by the RED arrow in the image below, for a particular movie offering (once a title, day, time, venue and auditorium experience are selected) are the same three prices that a consumer would pay for that exact same selection when purchased at theatres.



[Figure 3]

25. Cineplex advertises the movies and event cinema titles on the landing page of Cineplex.com, but movie ticket prices are not displayed on that page.

26. Consumers must create a “Cineplex Connect” account in order to access the webpages or the App that advertise movie ticket prices.

27. Before entering the “Tickets” page, consumers must select a movie, movie theatre, the date and time of the movie, an experience type (e.g. IMAX, 3D etc.) and log into or already be logged into their Cineplex Connect account .

28. The “Tickets” page, on the Website or in the App, is the first page where Cineplex advertises movie ticket prices.

29. Consumers may enter additional information on the Tickets page, such as their Scene+ membership number and any promotional code which they wish to use.

30. Upon clicking on the information icon on the “Tickets” page, a pop-up window comes up on the screen.

31. A consumer cannot proceed with an online movie ticket purchase until they select a movie ticket on the “Tickets” page and also click “PROCEED”.

32. If a consumer clicks the PROCEED button without selecting a movie ticket a warning pop-up appears, and the consumer may not proceed with the purchase transaction until a movie ticket is selected.

33. The timer automatically resets on each new page as the consumer progresses through the purchase transaction.

34. Consumers who click on the PROCEED button in the floating ribbon on the “Tickets” page proceed to the “Seat Selection” page.

35. Consumes who click on the PROCEED button in the floating ribbon on the “Seat Selection” page proceed to the “Payment Options” page.

36. Consumers who click on the PROCEED button in the floating ribbon on the “Payment Options” page proceed to the “Payment” page.

37. If a consumer adds their Scene+ membership number to their Cineplex Connect account, the consumer’s status as a Scene+ member will be known to Cineplex, whenever the account is used, unless the Consumer subsequently removes the number from their profile.

38. Cineplex does not admit that it has made representations that fall under subsection 74.01 of the Act, but does not contest that it makes representations as

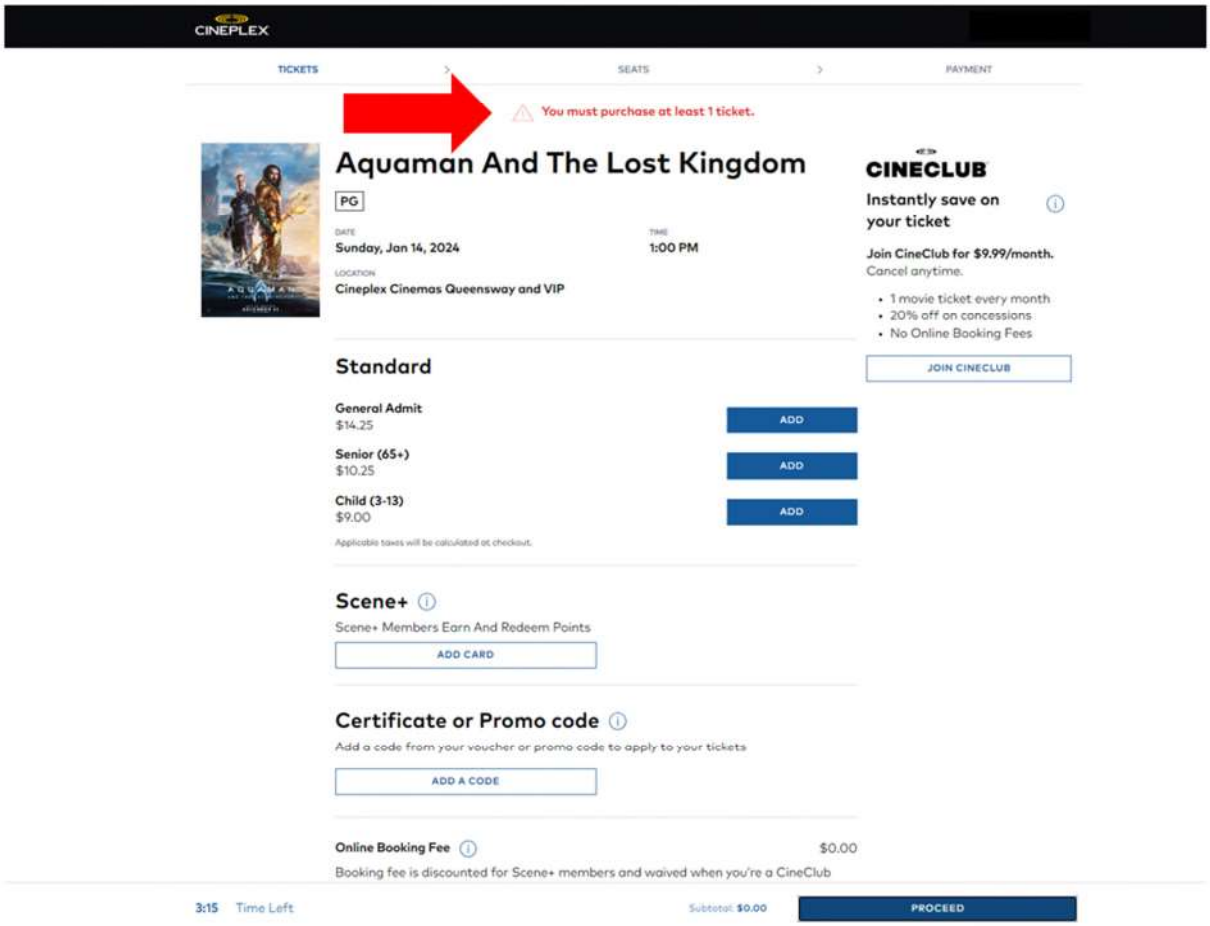
PUBLIC

66. Consumers who want to purchase tickets at the theatre may simply visit the Website to determine movie information, showtimes and determine the price and availability at the theatre of their choice and then exit the Website.

67. According to Cineplex data, out of the 97 million visits to the website in 2022, 11.8 percent proceeded to the "Tickets" page. This suggests that most visits to the Website are for informational purposes only. Out of those 11.8 percent of visits, 42.3 percent completed the ticket purchase transaction; thus only 4.99% of total visitors completed a ticket purchase transaction.

68. A consumer cannot proceed with the online purchase process until the consumer selects a ticket on the "Tickets" page and also clicks "Proceed". If a consumer clicks the "Proceed" button on the "Tickets" page without making one of the three selections identified in Figure 3, above, an error message is displayed requiring the selection of a ticket (as shown by the message in RED "You must purchase at least 1 ticket" in Figure 4, below) [RED colour in original screenshot].

PUBLIC

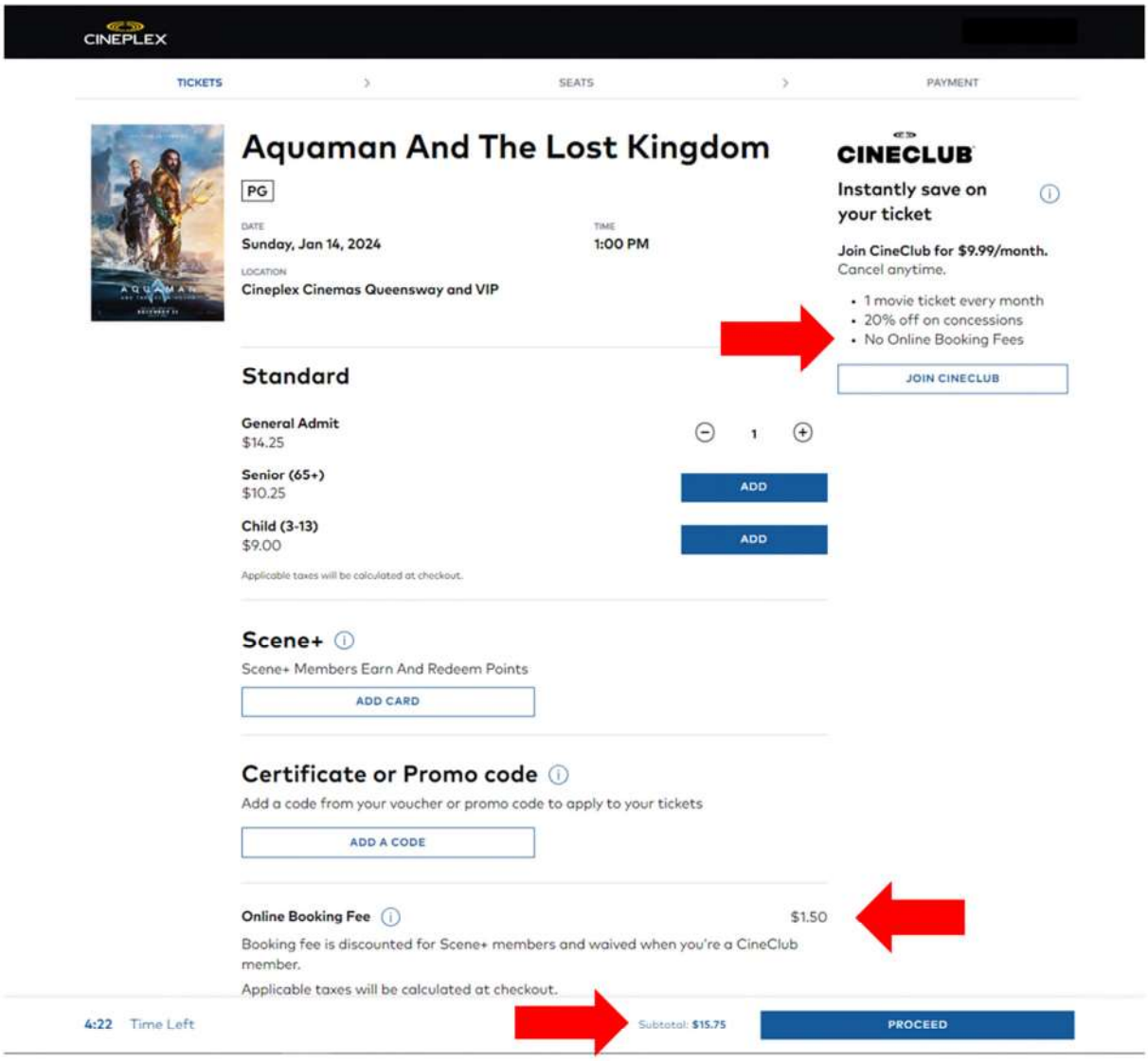


[Figure 4]

69. The "Tickets" page contains immediate contemporaneous information about the online booking fee ***before*** any selection is made to begin an online purchase. Specifically, the online booking fee is mentioned at the top and at the bottom of the "Tickets" page. This is also shown in Figure 5 below.

70. To proceed from the "Tickets" page to the next page, one has to select from the three prices shown on Figure 3. In addition, the online booking fee is now clearly shown as $1.50. Therefore, the resulting price that includes the online booking fee is shown.

PUBLIC

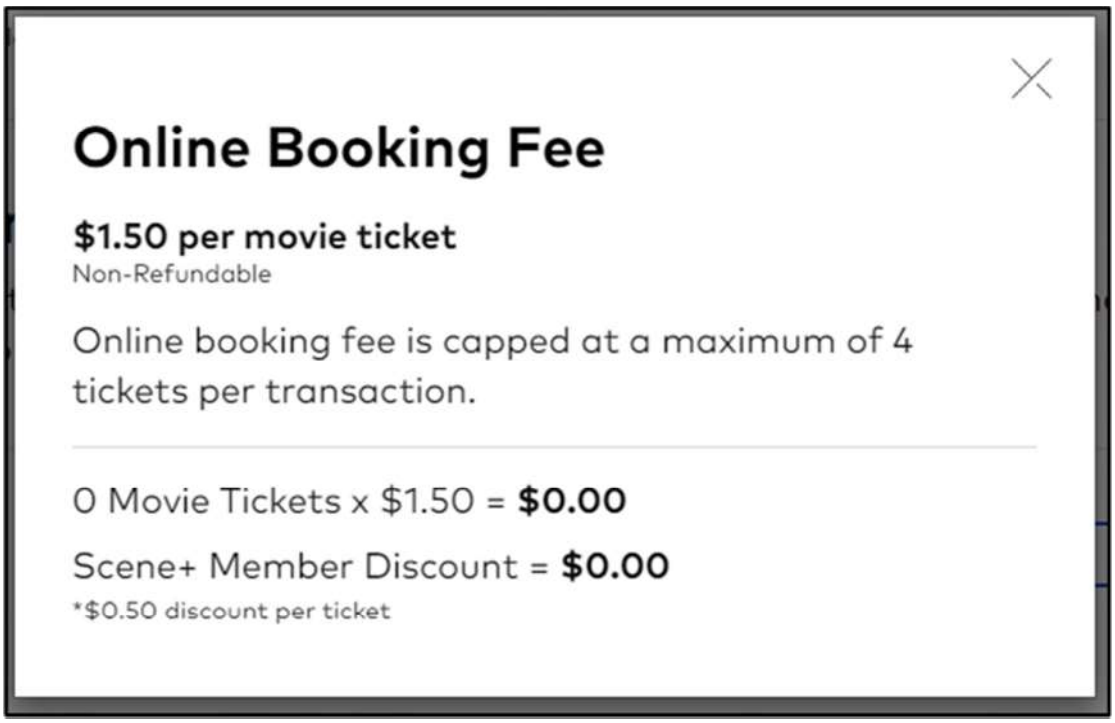


[Figure 5]

71. The Website is laid out so that the total price, including the online booking fee, is *immediately* and *contemporaneously* shown to the consumer, immediately to the left of the "Proceed" button, which when clicked, starts the online purchasing process.

72. No price for online purchases is shown before the consumer makes the selection of the type of ticket they want to purchase. Prior to ticket selection, the subtotal at the bottom of the page is $0.00, as shown at Figure 3, above. ***Immediately upon selection of the number and type of ticket, the subtotal reflects the total cost (other than taxes) that will be charged for an online purchase***, as shown in Figure 5, above.

PUBLIC

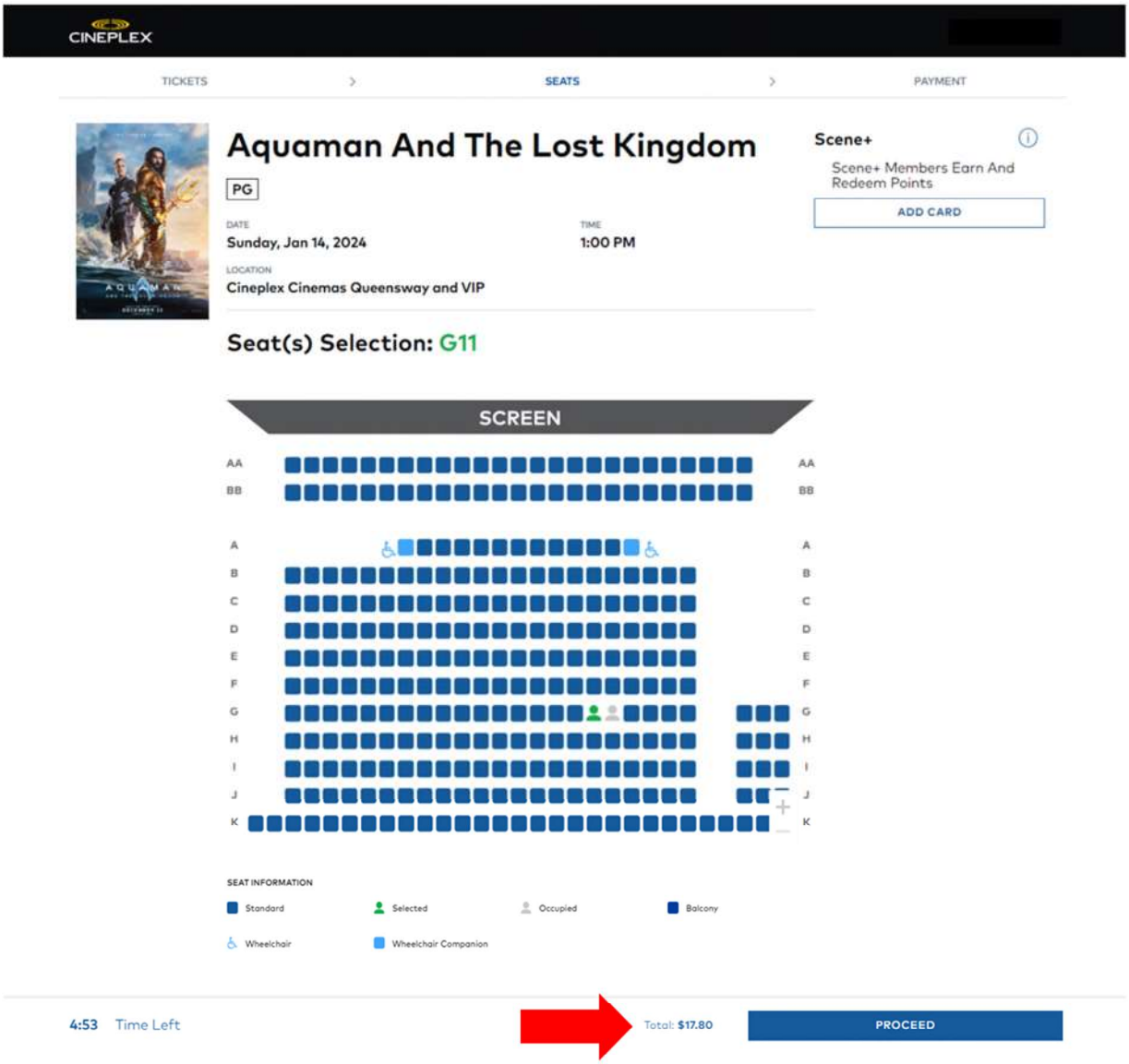


[Figure 7]

75. Before taking any steps to proceed with an online purchase, the consumer can either choose to purchase a movie ticket at the theatre for the price shown in the ticket category section (see Figure 3 above) or they can choose to proceed with an online purchase with the advantage of an advance seat reservation with the total transaction price, including the online booking fee (if applicable), clearly shown immediately to the left of the "Proceed" button before clicking the button to proceed with the online purchase. There are no subsequent or secondary add-ons to pricing except for taxes.

76. By clicking on the "Proceed" button, the consumer enters the online purchase process and is taken to the "**Seats**" page, where they are able to make seat selection and reservation in advance, and with the added convenience of doing this online. The total price is shown at the bottom of the page, including the online booking fee (if applicable) and tax, as particularized in Figure 8, below:

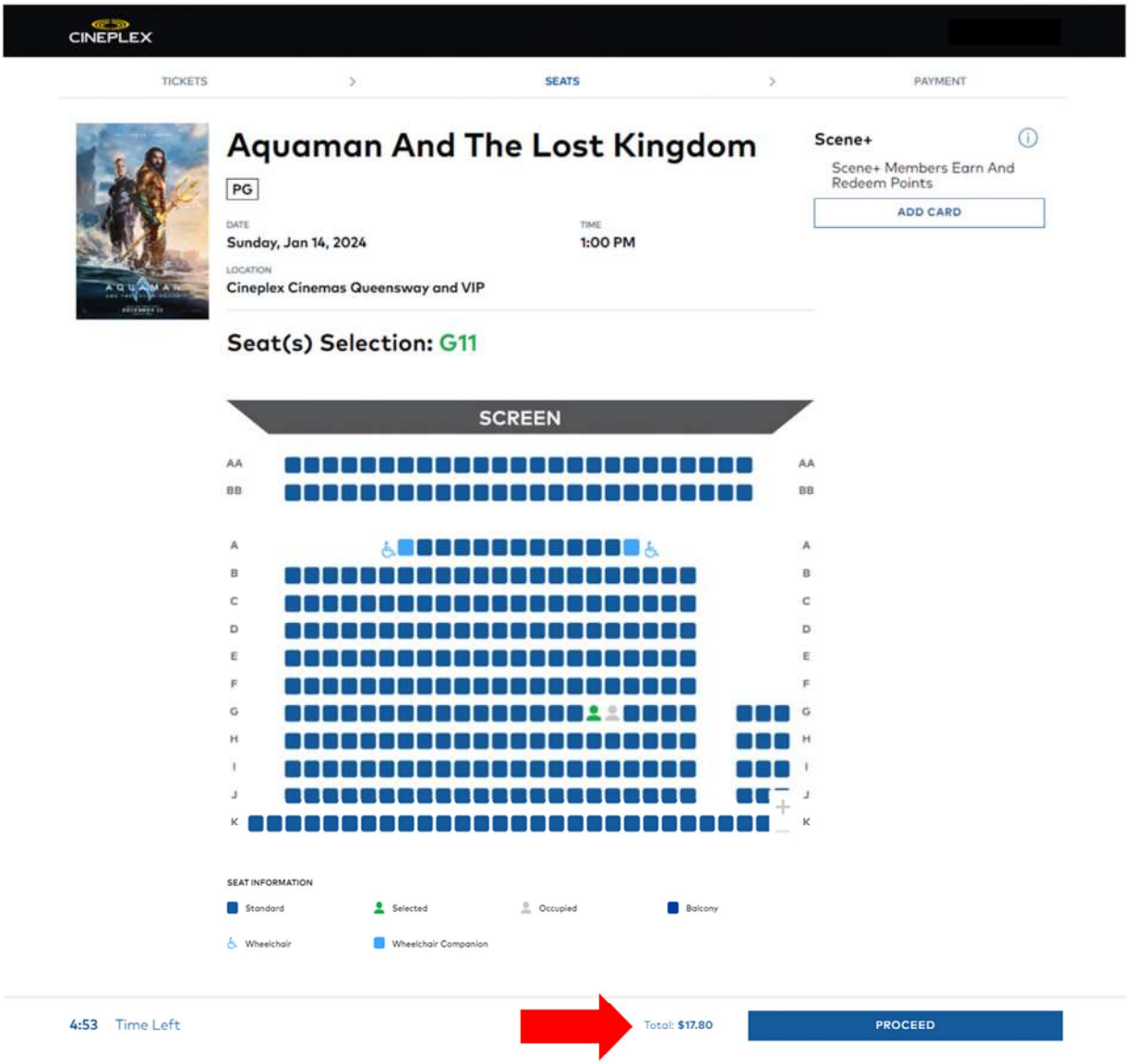
PUBLIC



[Figure 8]

77. Once consumers select their seat, they are taken to the "**Payment**" page, where they are provided with an "Order Summary" that provides a clear breakdown of the purchase price, with the online booking fee clearly shown as a separate line item from the movie tickets (see Figure 9 below). Consumers can then click on the "Proceed" button to select their payment method and enter their payment information.

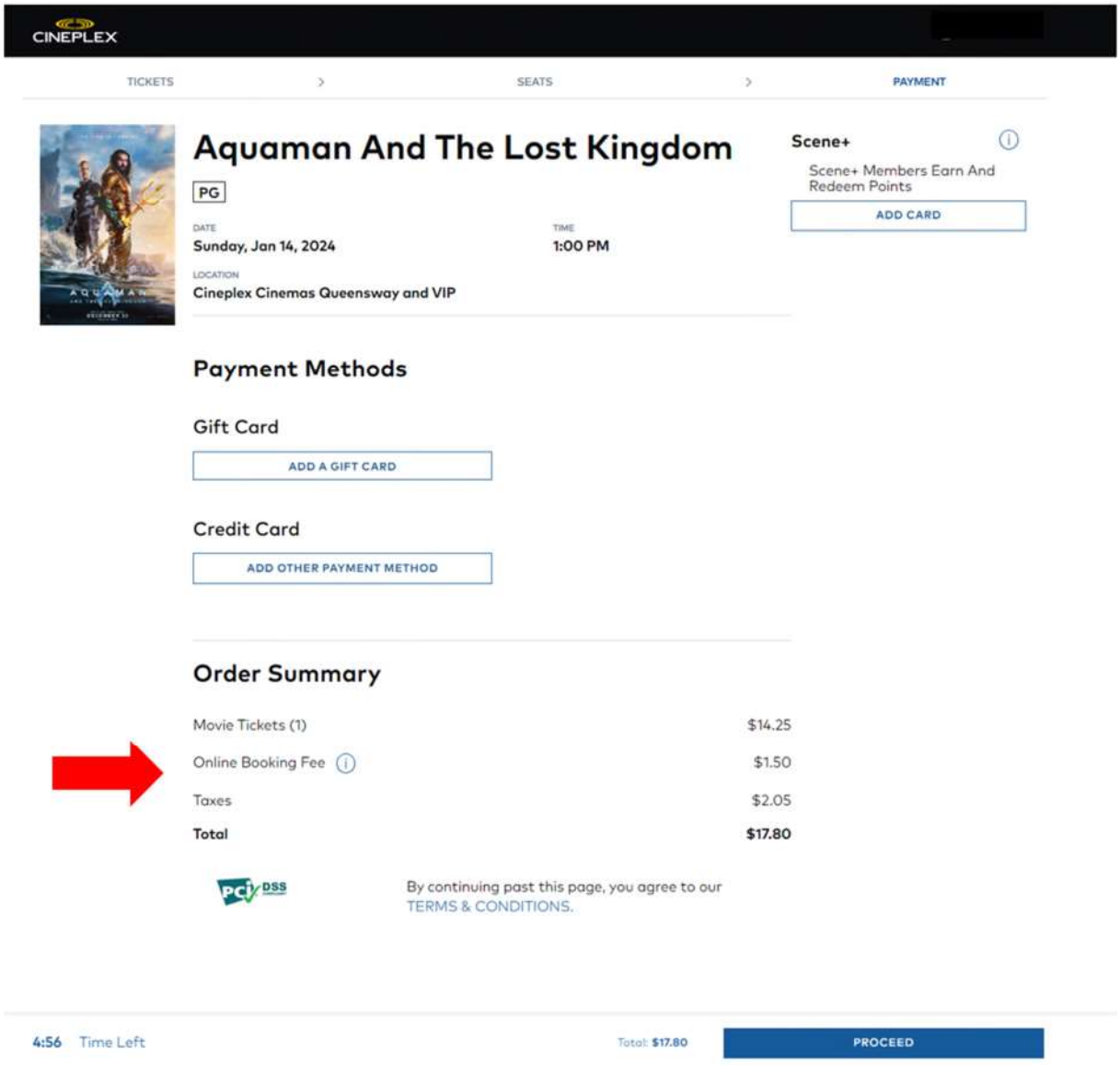
PUBLIC



[Figure 8]

77. Once consumers select their seat, they are taken to the "**Payment**" page, where they are provided with an "Order Summary" that provides a clear breakdown of the purchase price, with the online booking fee clearly shown as a separate line item from the movie tickets (see Figure 9 below). Consumers can then click on the "Proceed" button to select their payment method and enter their payment information.

PUBLIC



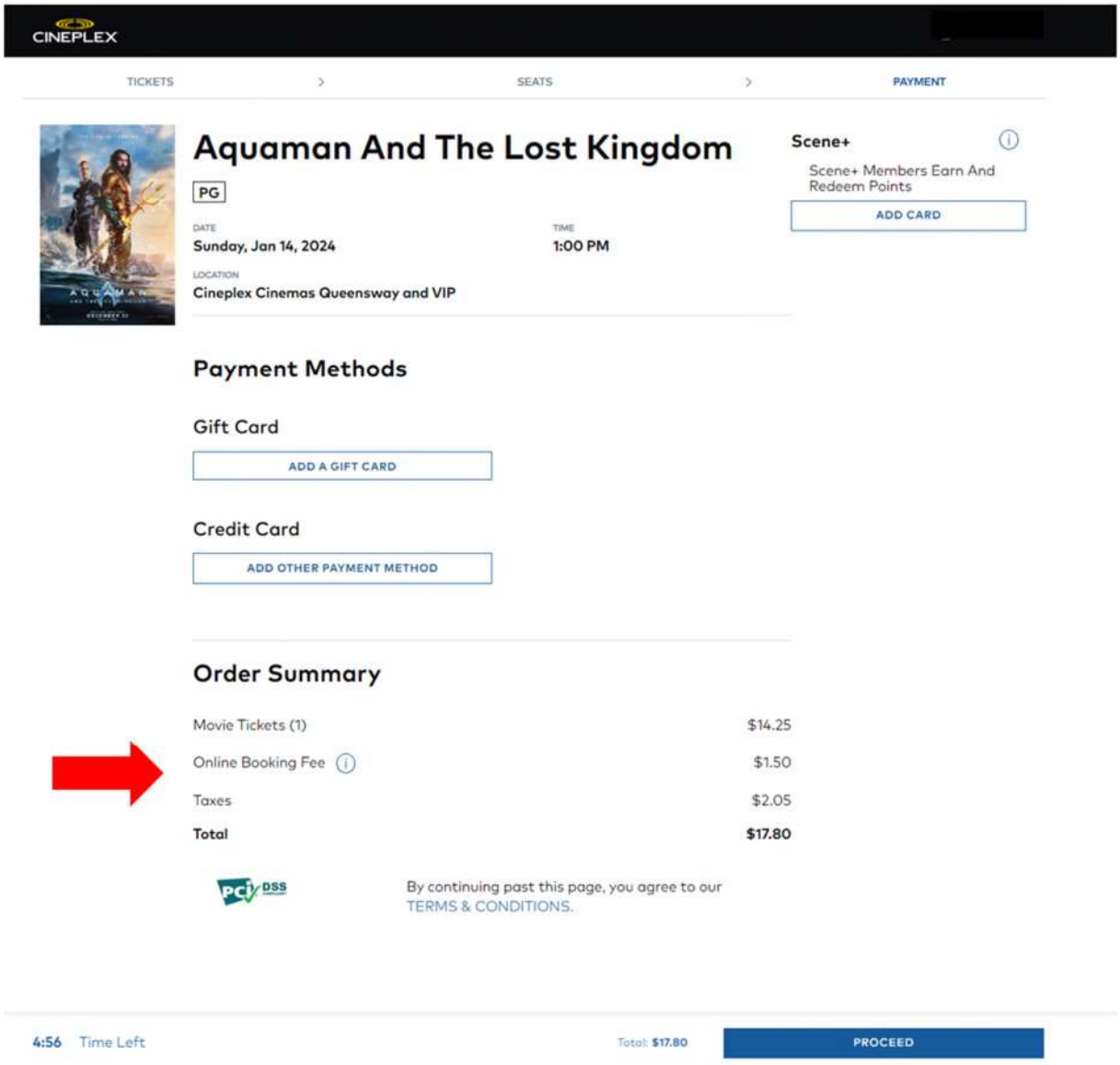
[Figure 9]

78. Throughout the course of the transaction, ***the total cost including the online booking fee is prominently shown on every page next to the "Proceed" button. The consumer has the opportunity to review the purchase price at four separate, consecutive stages.***

Cineplex's Mobile App

79. The process for purchasing tickets on the App is similar to the process for purchasing on the Website described above. However, in the App, App users select their preferred movie and

PUBLIC



[Figure 9]

78. Throughout the course of the transaction, ***the total cost including the online booking fee is prominently shown on every page next to the "Proceed" button. The consumer has the opportunity to review the purchase price at four separate, consecutive stages.***

Cineplex's Mobile App

79. The process for purchasing tickets on the App is similar to the process for purchasing on the Website described above. However, in the App, App users select their preferred movie and

PUBLIC

show time, they are taken to the "Tickets" page without signing in (where they are already signed into their account). The remainder of the purchasing process is the same as on the Website.

Transparency Throughout the Process: "No Complaints, No Confusion, No Misleading Pricing"

80. I am not aware of any complaints from consumers about confusion or being deceived by the online booking fee. The only complaints that I am aware of indicate that consumers were fully aware of the existence of the fee. I am also not aware of the Commissioner receiving any complaints prior to the filing of the Notice of Application, as produced in this matter.

81. Furthermore, naming the fee the "online booking fee" was intentional by Cineplex to ensure that there would be no confusion that the online booking fee applies only to online purchases and not to purchases made in theatre.

2005 SCC 54
Supreme Court of Canada

Canada Trustco Mortgage Co. v. R.

2005 CarswellNat 3212, 2005 CarswellNat 3213, 2005 SCC 54, [2005] 2 S.C.R. 601, [2005] 5 C.T.C. 215, [2005] S.C.J. No. 56, 142 A.C.W.S. (3d) 1075, 2005 D.T.C. 5523 (Eng.), 2005 D.T.C. 5547 (Fr.), 259 D.L.R. (4th) 193, 340 N.R. 1, J.E. 2005-1901

Her Majesty The Queen, Appellant v. Canada Trustco Mortgage Company, Respondent

McLachlin C.J.C., Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron JJ.

Heard: March 8, 2005
Judgment: October 19, 2005
Docket: 30290

Proceedings: affirming (2004), 2004 FCA 67, 2004 CarswellNat 305, [2004] 2 C.T.C. 276, 2004 CAF 67, 2004 CarswellNat 523, *(*sub nom. *R. v. Canada Trustco Mortgage Co.)* 2004 D.T.C. 6119 (F.C.A.); affirming *Canada Trustco Mortgage Co. v. R.* (2003), 2003 CCI 215, 2003 CarswellNat 5460, 2003 TCC 215, 2003 CarswellNat 1299, 2003 D.T.C. 587, [2003] 4 C.T.C. 2009 (T.C.C. [General Procedure])

Counsel: Graham Carton, Q.C., Anne-Marie Lévesque, Alexandra K. Brown, for Appellant
Al Meghji, Monica Biringer, Gerald Grenon, for Respondent

***Per curiam*:**

1. Introduction

1 This appeal and its companion case, *Mathew v. R.*, 2005 SCC 55 (S.C.C.) (hereinafter "*Kaulius*"), raise the issue of the interplay between the general anti-avoidance rule (the "GAAR") and the application of more specific provisions of the Income Tax Act, R.S.C. 1985, c.1 (5th Supp.). The Act continues to permit legitimate tax minimization; traditionally, this has involved determining whether the taxpayer brought itself within the wording of the specific provisions relied on for the tax benefit. Onto this scheme, the GAAR has superimposed a prohibition on abusive tax avoidance, with the effect that the literal application of provisions of the Act may be seen as abusive in light of their context and purpose. The task in this appeal is to unite these two approaches in a framework that reflects the intention of Parliament in enacting the GAAR and achieves consistent, predictable and fair results.

2. Facts

2 The respondent, Canada Trustco Mortgage Company ("CTMC"), carries on business as a mortgage lender. As part of its business operations, CTMC enjoyed large revenues from leased assets. In 1996 it purchased a number of trailers which it then circuitously leased back to the vendor, in order to offset revenue from its leased assets by claiming considerable capital cost allowance ("CCA") on the trailers in the amount of $31,196,700 against $51,787,114 for the 1997 taxation year. The essence of the transaction is explained in the memorandum of Michael Lough, CTMC's officer in charge of the recommendation to proceed: "The transaction provides very attractive returns by generating CCA deductions which can be used to shelter other taxable lease income generated by Canada Trust." This arrangement allowed CTMC to defer paying taxes on the amount of profits reduced by the CCA deductions which would be subject to recapture into income when the trailers were disposed of at a future date and presumably in excess of the amount claimed as CCA.

5.1 General Principles of Interpretation

10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. R.*, [1999] 3 S.C.R. 804 (S.C.C.), at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

11 As a result of the Duke of Westminster principle (*Inland Revenue Commissioners v. Duke of Westminster* (1935), [1936] A.C. 1 (U.K. H.L.)) that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes, including the Act, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

12 The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently. As stated at para. 45 of *Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.):

> [A]bsent a specific provision to the contrary, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way.
>
> [Emphasis added.]

See also *65302 British Columbia*, at para. 51, *per* Iacobucci J. citing P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 475-76:

> It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.

13 The *Income Tax Act* remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation. Onto this compendium of detailed stipulations, Parliament has engrafted quite a different sort of provision, the GAAR. This is a broadly drafted provision, intended to negate arrangements that would be permissible under a literal interpretation of other provisions of the *Income Tax Act*, on the basis that they amount to abusive tax avoidance. To the extent that the GAAR constitutes a "provision to the contrary" as discussed in *Shell* (at para. 45), the Duke of Westminster principle and the emphasis on textual interpretation may be attenuated. Ultimately, as affirmed in *Shell*, "[t]he courts' role is to interpret and apply the Act as it was adopted by Parliament" (para. 45). The court must to the extent possible contemporaneously give effect to both the GAAR and the other provisions of the *Income Tax Act* relevant to a particular transaction.

5.2 Interpretation of the GAAR

14 The GAAR was enacted in 1988, principally in response to *Stubart Investments Ltd. v. R.*, [1984] 1 S.C.R. 536(S.C.C.), which rejected a literal approach to interpreting the Act. At the same time, the Court rejected the business purpose test, which would have restricted tax reduction to transactions with a real business purpose. Instead of the business purpose test, the Court proposed guidelines to limit unacceptable tax avoidance arrangements. Parliament deemed the decision in *Stubart* an inadequate response to the problem and enacted the GAAR.

Orphan Well Association and Alberta Energy Regulator *Appellants*

v.

Grant Thornton Limited and ATB Financial (formerly known as Alberta Treasury Branches) *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association *Interveners*

Orphan Well Association et Alberta Energy Regulator *Appelants*

c.

Grant Thornton Limited et ATB Financial (auparavant connue sous le nom d'Alberta Treasury Branches) *Intimées*

et

Procureure générale de l'Ontario, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, procureur général de l'Alberta, Ecojustice Canada Society, Association canadienne des producteurs pétroliers, Greenpeace Canada, Action Surface Rights Association, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens *Intervenants*

INDEXED AS: ORPHAN WELL ASSOCIATION *v.* GRANT THORNTON LTD.

2019 SCC 5

File No.: 37627.

2018: February 15; 2019: January 31.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté and Brown JJ.

RÉPERTORIÉ : ORPHAN WELL ASSOCIATION *c.* GRANT THORNTON LTD.

2019 CSC 5

N° du greffe : 37627.

2018 : 15 février; 2019 : 31 janvier.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté et Brown.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Environmental law — Oil and gas — Oil and gas companies in Alberta required by provincial comprehensive licensing regime to assume end-of-life responsibilities with respect to oil wells, pipelines, and facilities — Provincial regulator administering licensing regime and enforcing end-of-life obligations pursuant to statutory powers — Trustee in bankruptcy of oil and gas company not taking responsibility for company's unproductive oil and gas assets and seeking to walk away from environmental liabilities

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Partage des compétences — Prépondérance fédérale — Faillite et insolvabilité — Droit de l'environnement — Pétrole et gaz — Sociétés pétrolières et gazières de l'Alberta tenues par le régime provincial complet de délivrance de permis d'assumer des responsabilités de fin de vie à l'égard de puits de pétrole, de pipelines et d'installations — Organisme de réglementation provincial administrant le régime d'octroi de permis et assurant le respect des obligations de fin de vie en vertu des pouvoirs que lui confère la loi — Syndic de faillite d'une société pétrolière et gazière refusant d'assumer la

the result of an act of "disclaimer" is the cessation of personal liability. No effect of "disclaimer" on the liability of the bankrupt estate is specified. Had Parliament intended to empower trustees to walk away entirely from assets subject to environmental liabilities, it could easily have said so.

[87] Additionally, as I have mentioned, s. 14.06(4)'s scope is not narrowed to a "disclaimer" in its formal sense. Under s. 14.06(4)(a)(ii), a trustee is not personally liable for an environmental order where the trustee "abandons, disposes of or otherwise releases any interest in any real property". This appeal does not, however, require us to decide what constitutes abandoning, disposing of or otherwise releasing real property for the purpose of s. 14.06(4), and I therefore leave the resolution of this question for another day. Nor does this appeal require us to decide the effects of a successful divestiture under s. 20 of the *BIA*. Section 20 of the *BIA* was not raised or relied upon by GTL as providing it with the authority to walk away from all responsibility, obligation or liability regarding the Renounced Assets.

[88] The dissenting reasons argue that certain other parts of the s. 14.06 scheme make the most sense if s. 14.06(4) limits estate liability. Other than s. 14.06(2), none of these provisions is in issue in this litigation, and none of them was relied on by GTL. Regardless, in view of the clear and unambiguous wording of s. 14.06(4), less weight should be given to its statutory context. This is particularly so given that the proposed alternative interpretation would require the Court to read words such as "personally" out of the subsection. As has been noted, when the words of a provision are precise and unequivocal, their ordinary meaning plays a dominant role in the interpretive process (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). Ultimately, the consequences of a trustee's "disclaimer" are clear — protection from personal liability, not from estate liability. There is no ambiguity on the face of s. 14.06(4). This Court has no

environnementales qui s'appliquent à eux. Bien au contraire, la disposition prévoit clairement que, si une ordonnance environnementale a été rendue, la « renonciation » emporte la cessation de la responsabilité personnelle. On ne fait état d'aucun effet de la renonciation sur la responsabilité de l'actif du failli. Si le Parlement avait voulu investir les syndics du pouvoir de délaisser entièrement les biens visés par des engagements environnementaux, il aurait pu le faire aisément.

[87] En outre, comme je l'ai mentionné, le par. 14.06(4) ne vise pas uniquement la « renonciation » au sens formel. D'après le sous-al. 14.06(4)(a)(ii), le syndic est dégagé de toute responsabilité personnelle à l'égard d'une ordonnance environnementale lorsqu'il « abandonne [. . .] tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit ». Le présent pourvoi ne nous oblige cependant pas à décider ce qui constitue l'abandon, la disposition ou le dessaisissement d'un bien réel pour l'application du par. 14.06(4), et je remets le règlement de ce point à une autre occasion. Le pourvoi ne nous oblige pas non plus à décider des effets d'une renonciation réussie en vertu de l'art. 20 de la LFI. GTL n'a pas invoqué cet article ni soutenu qu'il lui accordait le pouvoir d'abandonner toute responsabilité ou obligation ou tout engagement applicable aux biens faisant l'objet de la renonciation.

[88] D'après les juges dissidents, d'autres parties du régime de l'art. 14.06 sont plus sensées si le par. 14.06(4) limite la responsabilité de l'actif. À l'exception du par. 14.06(2), aucune de ces dispositions n'était en litige dans la présente affaire et aucune d'elles n'a été invoquée par GTL. Quoi qu'il en soit, étant donné le libellé clair et sans équivoque de ce paragraphe, le poids à accorder à son contexte législatif est amoindri. Cela est d'autant plus vrai que l'autre interprétation proposée obligerait la Cour à écarter des mots comme « personnelle » du paragraphe. Tel qu'il a été mentionné, lorsque le libellé d'une disposition est précis et sans équivoque, le sens ordinaire des mots joue un rôle primordial dans le processus d'interprétation (*Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10). En dernière analyse, les conséquences de la « renonciation » du syndic sont claires : l'immunité contre la responsabilité personnelle, et non celle de l'actif.

2022 CAF 145, 2022 FCA 145
Federal Court of Appeal

Mohr v. National Hockey League

2022 CarswellNat 3155, 2022 CarswellNat 5078, 2022 CAF 145, 2022 FCA 145, 2022 A.C.W.S. 2108, 472 D.L.R. (4th) 431

KOBE MOHR (Appellant) and NATIONAL HOCKEY LEAGUE, AMERICAN HOCKEY LEAGUE INC., ECHL INC., CANADIAN HOCKEY LEAGUE, QUEBEC MAJOR JUNIOR HOCKEY LEAGUE INC., ONTARIO HOCKEY LEAGUE, WESTERN CANADA HOCKEY LEAGUE AND HOCKEY CANADA (Respondents)

David Stratas, Donald J. Rennie, Anne L. Mactavish JJ.A.

Heard: January 12, 2022
Judgment: August 17, 2022
Docket: A-182-21

Proceedings: affirming *Mohr v. National Hockey League* (2021), 2021 CF 488, 2021 FC 488, 2021 CarswellNat 2810, 2021 CarswellNat 2809, Paul S. Crampton C.J. (F.C.)

Counsel: Edward J. Babin, Brendan Monahan for Appellant
Stephen J. Shamie, John C. Field, Sean M. Sells, Gabrielle Lemoine, Linda Plumpton for Respondent, National Hockey League
Jean-Michel Boudreau for Respondent, American Hockey League Inc.
Karine Chênevert, Alexander L. De Zordo for Respondent, ECHL Inc.
Eric C. Lefebvre, Christopher A. Guerreiro, Erika Woolgar for Respondents, Canadian Hockey League, Quebec Major Junior Hockey League Inc., Ontario Hockey League, Western Canada Hockey League
Casey Halladay, Akiva Stern for Respondent, Hockey Canada

***Donald J. Rennie J.A.*:**

Background

1 The Court is seized with two questions of statutory interpretation. The provisions in question are sections 45 and 48 of the Competition Act, R.S.C. 1985, c. C-34, the full text of which is found in Annex A to these reasons.

2 In broad terms, section 45 of the Competition Act prohibits conspiracies, agreements or arrangements between competitors to fix or maintain prices, allocate markets or customers, or restrict markets for the production or supply of a product. If established, the anti-competitive effect of the agreement is presumed, giving rise to both criminal sanctions and civil remedies.

3 Section 48 addresses conspiracies or arrangements in the context of professional sport. Again, in broad terms, section 48 prohibits agreements or arrangements which unreasonably limit the opportunities of a player to participate in professional sport, impose unreasonable terms on players, or unreasonably limit the ability of players to negotiate with and play with a team of their choice. The purpose of section 48 is to protect freedom of employment for players (John Barnes, *The Law of Hockey* (LexisNexis, 2010) at p. 322 [Barnes]). Like section 45, a breach of section 48 gives rise to criminal sanctions and civil remedies.

4 There are two key differences between conspiracies under sections 45 and 48. If established, a conspiracy under section 45 is deemed anti-competitive. In contrast, under section 48, a court must take certain matters into account before determining that a conspiracy has been established. This includes the desirability of maintaining a balance among teams competing in the same league. In effect, section 48 exempts certain agreements or arrangements made in the context of professional sport from the general prohibition against anti-competitive agreements in section 45 of the Competition Act.

5 The scope of these two provisions and their interrelationship lies at the heart of the interpretive questions before us.

6 The appellant commenced a class proceeding alleging that the respondents conspired, contrary to paragraphs 48(1)(a) and (b), to limit the opportunities of hockey players to play in Canadian major junior and professional hockey leagues. The appellant sought damages under paragraph 36(1)(a) of the Competition Act for economic losses suffered as a result of the alleged conspiracy.

7 The respondents moved to strike the appellant's statement of claim on the basis that it disclosed no reasonable cause of action. They argued that section 48 of the Act did not, and could not, apply to the facts as framed in the statement of claim.

8 In response to the motion to strike, the appellant moved to amend the statement of claim, adding an allegation of a conspiracy under section 45 of the Act. The notice of motion seeking leave to amend referred to "both intra- and interleague ... [conspiracies that] ... may perhaps be governed by one or the other of sections 45 and 48."

9 The Federal Court (*per* Crampton C.J., 2021 FC 488) found that it was plain and obvious that the appellant's claim did not disclose a cause of action under section 48. The Court also dismissed the motion for leave to amend to advance the claim under section 45 on the ground that the amendments did not plead a conspiracy within the scope of section 45.

10 In this context, questions of statutory interpretation are subject to a correctness standard of review, and I agree with the appellant that the Federal Court made errors (Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235; Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology, 2016 FCA 215, [2017] 1 F.C.R. 331 at para. 72). The Court misunderstood its role on a motion to strike. There were also errors in the method of statutory interpretation; to be precise, in the use of extrinsic evidence on a motion to strike and the role of ambiguity in statutory interpretation. The Court also erred in its understanding of a component of subsection 48(3).

11 I will discuss these errors later. However, it is sufficient to note at this point that they are of no consequence. The result reached by the Federal Court was nevertheless correct and so I would dismiss the appeal.

12 The statement of claim, alleging as it does a conspiracy between leagues and between leagues and other organizations, has no reasonable prospect of success. The prohibition on anti-competitive arrangements in section 48 is limited to arrangements or agreements between clubs or teams in the same league. The proposed amended statement of claim, asserting as it does a conspiracy with respect to the *purchase or acquisition* of players' services, also has no reasonable prospect of success. The prohibition in section 45 is restricted to agreements or arrangements with respect to the *supply or sale* of products.

The interpretation of section 48

13 A statute is to be read in its entire context, in its grammatical and ordinary sense, harmonious with the scheme and object of the statute. Sometimes legislative history can shed light on the matter. When the words of a statute are unequivocal, the ordinary meaning plays a dominant role in the interpretative process (Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10; Orphan Well Association v. Grant Thornton Ltd., 2019 SCC 5, [2019] 1 S.C.R. 150 at para. 88).

14 The Court's task is to discern the meaning of the words used by Parliament when it chose to enact its policy preferences. There is no room for the Court to inject its own policy preferences into the analysis. In this case, it is not for this Court to say whether section 48 is or is not a good thing. Our task is just to discern what Parliament chose to enact (TELUS Communications Inc. v. Wellman, 2019 SCC 19, [2019] 2 S.C.R. 144).

15 Section 48 cannot be read, consistent with these principles, to mean that the prohibitions against anti-competitive arrangements in subsection 48(1) apply to interleague conspiracies as pleaded in the statement of claim. To properly understand the scope of subsection 48(1) we must look to plain text of subsection 48(3) which reads as follows:

> **(3)** This section applies, and section 45 does not apply, to agreements and arrangements and to provisions of agreements and arrangements between or among teams and clubs engaged in professional sport as members of the same league and

23 To conclude, where the words are precise and unequivocal, as they are here, the ordinary meaning plays a dominant role in the interpretation. As I will explain, the arguments advanced by the appellant do not shake the conclusion that the conspiracy provisions of section 48, when given their ordinary meaning, are confined to intraleague agreements.

The appellant's arguments on the interpretation of section 48

24 The appellant contends that subsection 48(3) does not limit subsection 48(1) to intraleague conspiracies; rather, subsection 48(3) simply removes those types of conspiracies from the general conspiracy prohibition in section 45 and makes them subject to the mitigating considerations outlined in subsection 48(2). Consequently, "what has not been removed from section 45, namely conspiracies that are not confined to teams within a single league, remains within the purview of subsection 48(1)" (Reasons at para. 71).

25 This argument fails. I agree with the Federal Court when it concluded that to interpret subsection 48(1) in this manner would defeat the ordinary meaning of the language of subsection 48(3) which explicitly limits the application of section 48 to teams that are members of the same league. I also agree with the Federal Court that this interpretation would lead to an absurd bifurcation of the conspiracy provisions in the context of professional sport (Reasons at para. 74).

26 Next, the appellant argues that the Federal Court erred in its understanding of the requirement in subsection 48(3) that the agreement, arrangement or provision "relate exclusively to matters described in subsection (1)" (Competition Act, s. 48(3)). Here, I agree with the appellant that the Federal Court erred in striking the claim on the basis that allegations did not relate exclusively to the matters in subsection 48(1).

27 The general prohibition against conspiracies in subsection 48(1) is subject to a caveat in subsection 48(3), which requires that intraleague agreements, arrangements and provisions "relate exclusively to matters described in subsection (1)."

28 The aim of section 48 is to protect the economic freedom of hockey players (Barnes at pp. 322-24). To this end, section 48 identifies three behaviours that are anti-competitive: unreasonable limits on opportunities to participate (para. 48(1)(*a*)), unreasonable terms and conditions imposed on participants (para. 48(1)(*a*)), and unreasonable limits on the opportunity to negotiate with and play for the team of choice (para. 48(1)(*b*)). These are the anti-competitive practices to which the agreements or arrangements must relate exclusively.

29 The Federal Court referenced allegations in the statement of claim which, in its view, were beyond the remit of paragraphs 48(1)(a) and (b) and in so doing erred (Reasons at paras. 68, 70-75, 85).

30 A description of how the conspiracy works does not offend the requirement that the allegations "relate exclusively". The means are not to be confused with the effect. A description of the corporate, partnership and other organizations and the arrangements put in place by which the anti-competitive terms and conditions are imposed on the players does not fall within the scope of what must "relate exclusively". What must "relate exclusively" pertains to the asserted anti-competitive allegations. Concerns relating to the terms and conditions of the standard player agreement, including provisions for equipment, scholarships, travel (proposed amended statement of claim at para. 28.4), for training and development (at para. 47.5), provisions relating to trading of players, and consequences of non-performance all fall within the ambit of paragraphs 48(1)(a) or (b).

31 There remains a final argument raised by the appellant. He contends that the introductory words of subsection 48(1), which make it an offence for "[e]very one" to unlawfully conspire to limit the opportunities of players, demonstrate that Parliament intended to cast a wide net, including persons and corporations not part of the same league, but who or which have agreements with a league.

32 I do not agree. In the specific context of the *Competition Act*, "[e]very one" reflects Parliament's intention to make corporations, partnerships, individuals, leagues, clubs, teams, governing bodies, and umbrella organizations subject to the civil and criminal sanctions of the sports conspiracy provision. But the breadth of that word does not override subsection 48(3), where, by its plain terms, Parliament deliberately limited the sports conspiracy provision to intraleague agreements.

9-5(2) of the Supreme Court Civil Rules, B.C. Reg. 168/2009) provided that no evidence was admissible on a motion to strike a statement of claim for failure to disclose a reasonable cause of action. Nonetheless, the Court opined that courts "may" consider all evidence relevant to statutory interpretation in order to discern legislative intent (*Imperial Tobacco* at para. 128).

65 Two points can be said about *Imperial Tobacco*.

66 First, and at risk of repetition, if a court must resort to material beyond the statute and its legislative history to answer the question as to its scope and application, it is difficult to conclude that the interpretation which forms the foundation of the claim has no reasonable prospect of success. In this context, yellow lights should be flashing before any judge who needs extrinsic evidence to answer a question of statutory interpretation on a motion to strike.

67 Second, in *Imperial Tobacco*, the Supreme Court was not asked to consider the range of procedural options available to parties in the Federal Court to resolve preliminary legal issues, several of which provide for the admission of the type of extrinsic evidence in issue here. Put otherwise, the prohibition on the use of evidence in Rule 221(2) is best understood when situated in the broader architecture of the *Federal Courts Rules*.

68 Rule 221(1)(a) is the beginning point on a continuum of procedural options available to parties to resolve questions of interpretation. Rule 213 provides for summary judgment, Rule 220 allows for the determination of preliminary questions of law, and should a matter reach trial, a trial judge has the discretion to direct the parties to address a questions of law. Unlike Rule 221, evidence is admissible under each of these rules to determine a question of statutory interpretation, with all of the guarantees of completeness and credibility associated with the adversarial process. It is for the judge to determine whether there is a sufficient evidentiary foundation to answer the question.

Ambiguity and statutory interpretation

69 Sections 45 and 48 are dual provisions — they give rise to both civil remedies and criminal prosecutions. The fact that they may be enforced criminally was a factor in the Federal Court's interpretation:

> To the extent that the words in subsection 45(1) might somehow be said to permit a broader interpretation that would bring within its scope the sorts of agreements alleged in the Amended Statement of Claim, the penal nature of that provision would entitle the defendants to the benefit of any ambiguity: *R v McLaughlin*, [1980] 2 SCR 331 at 335*; R v McIntosh*, [1995] 1 SCR 686 at 702 and 705.
>
> (Reasons at para. 47)
>
> . . .
>
> To the extent that there is any ambiguity in section 48, which is a penal provision, the Responding Defendants are entitled to the benefit of their narrower interpretation: see paragraph 47 above.
>
> (Reasons at paras. 85 and 139)

70 There is no presumption or rule of interpretation that the benefit of the doubt on a question of statutory interpretation goes to the defendant.

71 The principle of strict construction of penal statutes exists as a subsidiary interpretive device applicable only where there is a finding of a genuine ambiguity as to the meaning of a provision (Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 28 [).

72 A genuine ambiguity arises only where there are two equally plausible interpretations to choose between following the interpretation exercise. A difficulty of interpretation is not necessarily an ambiguity (*Bell ExpressVu* at paras. 54-55). A restrictive interpretation may be warranted where an ambiguity cannot be resolved by means of the usual principles of interpretation. But it is a principle of last resort that does not supersede a purposive and contextual approach to interpretation.

Most Negative Treatment: Reversed
Most Recent Reversed: Pries v. Economical Mutual Insurance Co. | 2013 CarswellOnt 9902, [2013] O.F.S.C.D. No. 93 | (F.S.C.O. App., Jul 8, 2013)

2012 CarswellOnt 12509
Financial Services Commission of Ontario (Arbitration Decision)

Pries v. Economical Mutual Insurance Co.

2012 CarswellOnt 12509

Leroy Pries, Applicant and Economical Mutual Insurance Company, Insurer

John Wilson Member

Heard: August 10, 2012
Judgment: September 21, 2012
Docket: FSCO A11-002004

Counsel: David Donnelly, for Mr. Pries
Helen D.K. Friedman, for Economical Mutual Insurance Company

Subject: Insurance
Related Abridgment Classifications
Insurance
XII Automobile insurance
XII.5 No-fault benefits
XII.5.e Disability benefits (loss of income payments)
XII.5.e.ii Entitlement
XII.5.e.ii.A General principles
Headnote
Insurance --- Automobile insurance — No-fault benefits — Disability benefits (loss of income payments) — Entitlement — General principles
Table of Authorities
Cases considered by *John Wilson Member*:
Beattie v. National Frontier Insurance Co. (2003), 5 C.C.L.I. (4th) 1, 68 O.R. (3d) 60, 2003 CarswellOnt 4465, 233 D.L.R. (4th) 329, 179 O.A.C. 52 (Ont. C.A.) — considered
Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered
Boarelli v. Flannigan (1973), 1973 CarswellOnt 872, [1973] 3 O.R. 69, 36 D.L.R. (3d) 4 (Ont. C.A.) — considered
Cugliari v. White (1998), 159 D.L.R. (4th) 254, 109 O.A.C. 109, 38 O.R. (3d) 641, 1998 CarswellOnt 1789, 21 C.P.C. (4th) 213 (Ont. C.A.) — referred to
Kirkham v. State Farm Mutual Automobile Insurance Co. (1996), 1996 CarswellOnt 3339 (Ont. Insurance Comm.) — considered
Kirkham v. State Farm Mutual Automobile Insurance Co. (1997), 1997 CarswellOnt 1277 (Ont. Insurance Comm.) — referred to
Kirkham v. State Farm Mutual Automobile Insurance Co. (1998), 1998 CarswellOnt 2811 (Ont. Div. Ct.) — referred to
Kirkham v. State Farm Mutual Automobile Insurance Co. (1998), 1998 CarswellOnt 2799 (Ont. C.A.) — referred to

32 In the end I find that nothing meaningful can be read into the changes between the 1996 and the 2010 *Schedules*. At best it would be a clarification and reassertion of what went before.

33 In such a case, it would make sense that "payment" takes its immediate context from the repayment of a benefit and that the appropriate time frame for the notice requirement relates to the original payment of the benefit being reclaimed.

34 In the context of the limited jurisprudence to date on this issue, this is not without precedent.

35 Mr. Pries relies principally on the *Slater* [6] case, an arbitration decision by Arbitrator Ashby, dating from 2008. In that matter, Personal Insurance claimed a repayment of benefits due to an error in calculation. Although the reason for repayment was different, the provisions relating to notice of repayment by the Insurer are identical to those faced by Mr. Pries. Arbitrator Ashby held that "payment" in section 47(3) refers to the initial payment of the benefit to the insured by the insured. Accordingly, Mr. Pries' interpretation is not without precedent.

36 In *Trottier*, [7] Director's Delegate Draper also dealt with the repayment provisions in section 47. In that matter, the Director's Delegate found that "in my opinion that 'the payment' in s. 47(3) refers to the payment of the accident benefit, not the payment of collateral benefits."

37 Economical's principal argument against this interpretation is that it runs counter to the purpose of the repayment provisions and the collateral reduction. If the legislature has decided that certain collateral payments are deductible, then it makes no sense for an insured to be in a position to keep an overpayment just because of the manner in which the payment was made: a retrospective bulk payment in the case of Mr. Pries. Economical sees this as an interpretive absurdity conferring what can only be a windfall of double payment on Mr. Pries.

38 As Professor Ruth Sullivan has observed [8] :

> In a perfect world the legislature would create flawless legislation. Each statute would be drafted so that the effects of interpreting and applying it to an unfolding reality would match the goals sought by the legislature.

39 The *Schedule* exists in a very imperfect universe. It has been subject to continual revision, tinkering and titivation in an attempt to balance its political sensitivity with the realities of the insurance marketplace.

40 Professor Sullivan concluded her observation as follows:

> In an imperfect world there is often a divergence between the purpose of legislation on the one hand and the effects of applying it on the other. The language of particular provisions may turn out to be over or under inclusive: there may be a lacuna in the legislative scheme. [9]

41 If the sole purpose of the repayment provision is to prevent double payment, then there indeed is a logical dissonance if the provision of the payment by retroactive lump sum somehow succeeds in avoiding at least part of the effective deductibility of the collateral payment. Economical would have me change the meaning of "payment" in section 47(3) to facilitate the operation of the policy against double recovery. I am not convinced that it is either proper or appropriate to do so.

42 Lamer C.J., in *McIntosh* [10] , dealing with what he characterized as Criminal Code "provisions (that) overlap, and are internally inconsistent in certain respects", stated:

> In resolving the interpretive issue raised by the Crown, I take as my starting point the proposition that where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect. This is another way of asserting what is sometimes referred to as the "golden rule" of literal construction: a statute should be interpreted in a manner consistent with the plain meaning of its terms. Where the language of the statute is plain and admits of only one meaning, the task of interpretation does not arise

1934
*Nov. 20, 21.
1935
*May 13.

HIS MAJESTY THE KING (RESPONDENT) ..... APPELLANT;

AND

ALBERT DUBOIS AND ANTOINETTE DUBOIS (SUPPLIANTS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Liability of, for negligence of its servant "while acting within the scope of his duties or employment upon any public work" (Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c))—"Public work"—Alleged negligence of occupants of motor car used in detection and elimination of radio inductive interference.

A motor car owned by the Government of Canada, used by the Radio Branch of the Department of Marine in the detection and elimination of radio inductive interference, and specially equipped for that purpose, was, in such use, while returning to headquarters, stopped by its occupants (the driver and a radio electrician) on the highway, and was struck by another car, with fatal result to a passenger in the latter. Damages were claimed from the Crown on the ground that the collision and fatality were due to the negligence of the occupants of the Government car. The case was heard on certain questions of law.

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

(1) [1933] S.C.R. 509 at 514.

ject of a considerable number of decisions in the Exchequer Court and in this Court.

It will appear as we proceed that the most effectual way of ascertaining the import of the language we have to construe is to note the course of legislation upon the subject matter of the enactment from 1870 onward, and to examine with some care the course of judicial decision upon that legislation.

One general observation will not, I think, be superfluous. The judicial function in considering and applying statutes is one of interpretation and interpretation alone. The duty of the court in every case is loyally to endeavour to ascertain the intention of the legislature; and to ascertain that intention by reading and interpreting the language which the legislature itself has selected for the purpose of expressing it.

In this process of interpretation the individual views of the judge as to the subject matter of the legislation are, of course, quite irrelevant. To start with presumptions as to policy is, as Lord Haldane said in *Vacher & Sons Ltd.* v. *London Society of Compositors* (1), to enter upon a labyrinth for the exploration of which the judge is provided with no clue.

We have before us an enactment which presents certain peculiarities. There is a remedy given against the Crown in a limited class of torts; and the reasons which actuated the legislature in prescribing the limitations cannot be stated with any kind of certainty. That is no ground for ignoring the limitations, or for ascribing a non-natural meaning to the words in which they are stated in order to minimize the effect of those words. A particular enactment of the legislature is sometimes, as everybody knows, the result of compromise—a result which it would often be difficult to explain by reference to any broadly conceived principle of legislative action.

It is the duty of the courts to give effect to the language employed, having due regard to the judicial construction which it has received. The parent enactment of section 19 (*c*) of the *Exchequer Court Act,* R.S.C. (1927), cap. 34 (the section we have to construe and apply), was section 16 (*c*) of the statute of 1887 (50-51 Vict., ch. 16)

(1) [1913] A.C. 107, at 113.

Her Majesty The Queen, as represented by the Department of Agriculture, and the Deputy Minister of Agriculture *Appellant*

v.

Robert Thomson *Respondent*

and

Security Intelligence Review Committee *Intervener*

INDEXED AS: THOMSON *v.* CANADA (DEPUTY MINISTER OF AGRICULTURE)

File No.: 22020.

1991: October 28; 1992: February 13.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Public Service — Security clearance — Successful candidate denied requisite security clearance — Security Intelligence Review Committee recommending security clearance — Deputy Minister refusing to follow Committee's recommendation — Whether Deputy Minister required to follow Committee's recommendation — Canadian Security Intelligence Service Act, S.C. 1984, c. 21, ss. 42, 52(1), (2).

Statutes — Interpretation — Public Service — Security clearance — Successful candidate denied requisite security clearance — Security Intelligence Review Committee recommending security clearance — Deputy Minister refusing to follow Committee's recommendation — Meaning of word "recommendations" in Canadian Security Intelligence Service Act.

Administrative law — Natural justice — Right to be heard — Public Service — Security clearance — Successful candidate denied requisite security clearance — Security Intelligence Review Committee recommending security clearance — Deputy Minister refusing to follow Committee's recommendation — Candidate not given hearing by Deputy Minister — Whether denial of natural justice.

Sa Majesté la Reine, représentée par le ministère de l'Agriculture, et le sous-ministre de l'Agriculture *Appelante*

c.

Robert Thomson *Intimé*

et

Comité de surveillance des activités de renseignement de sécurité *Intervenant*

RÉPERTORIÉ: THOMSON *c.* CANADA (SOUS-MINISTRE DE L'AGRICULTURE)

N° du greffe: 22020.

1991: 28 octobre; 1992: 13 février.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Stevenson.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Fonction publique — Habilitation de sécurité — Refus d'accorder l'habilitation de sécurité au candidat retenu — Recommandation du comité de surveillance des activités de renseignement de sécurité d'accorder l'habilitation de sécurité — Refus du sous-ministre de suivre la recommandation du comité — Le sous-ministre est-il tenu de suivre la recommandation du comité? — Loi sur le Service canadien du renseignement de sécurité, S.C. 1984, ch. 21, art. 42, 52(1), (2).

Législation — Interprétation — Fonction publique — Habilitation de sécurité — Refus d'accorder l'habilitation de sécurité au candidat retenu — Recommandation du comité de surveillance des activités de renseignement de sécurité d'accorder l'habilitation de sécurité — Refus du sous-ministre de suivre la recommandation du comité — Sens du mot «recommandations» dans la Loi sur le Service canadien du renseignement de sécurité.

Droit administratif — Justice naturelle — Droit d'être entendu — Fonction publique — Habilitation de sécurité — Refus d'accorder l'habilitation de sécurité au candidat retenu — Recommandation du comité de surveillance des activités de renseignement de sécurité d'accorder l'habilitation de sécurité — Refus du sous-ministre de suivre la recommandation du comité — Le sous-ministre n'a pas entendu le candidat — Y a-t-il eu déni de justice naturelle?

As well, it is accepted that when the words used in the statute are clear and unambiguous, no other step is needed to identify the intention of Parliament. See, for example, *R. v. Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624, at p. 630.

The respondent argues that the word "recommendations" should not automatically be given its ordinary meaning. Rather, it should be interpreted in the context of the statute. Great reliance is placed on the Australian case *Myer Queenstown Garden Plaza Pty. Ltd. v. City of Port Adelaide* (1975), 11 S.A.S.R. 504. In that case, it was found that in the context of a statute empowering the Governor to make regulations "on the recommendation" of a municipal authority or council, that the Governor's regulations must closely conform with the recommended draft. The *Myer* case is readily distinguishable from the case at hand. The wording of the legislation challenged in that case made it very clear that the "recommendation" had to be followed. The statute in the *Myer* case specifically contemplated some action being taken by one party "on the recommendation of" another party. By contrast, s. 52(2) does not concern itself with any action by a deputy head "on the recommendation" of the Committee.

The contention of the respondent should not, in my view, be accepted. The simple term "recommendations" should be given its ordinary meaning. "Recommendations" ordinarily means the offering of advice and should not be taken to mean a binding decision. I agree with the conclusion of Dubé J. of the Trial Division who noted, at p. 92, that:

> The grammatical, natural and ordinary meaning of the word "recommendation" is not synonymous with "decision". The verb "to recommend" is defined in the *Oxford English Dictionary* as "to communicate or report, to inform". In *Webster's Third New International Dictionary* it is defined as "to mention or introduce as being worthy of acceptance, use, or trial; to make a rec-

L'intimé prétend que le mot «recommandations» ne doit pas nécessairement être interprété suivant son sens ordinaire. En fait, il estime que l'on doit tenir compte, à cette fin, du contexte dans lequel s'inscrit le texte législatif. Il s'appuie largement à cet égard sur le jugement australien *Myer Queenstown Garden Plaza Pty. Ltd. c. City of Port Adelaide* (1975), 11 S.A.S.R. 504. Dans cette affaire, le tribunal a statué que, dans le contexte d'une loi conférant au gouverneur le pouvoir de prendre des règlements [TRADUCTION] «sur la recommandation» de l'administration ou du conseil municipal, les règlements pris par le gouverneur doivent s'en tenir à la lettre aux dispositions recommandées. Une distinction peut facilement être établie entre cette affaire et la présente espèce. Dans l'affaire *Myer*, il ressortait en effet du texte législatif en cause que la «recommandation» devait être suivie, et la loi prévoyait expressément que certaines mesures devaient être prises par une partie «sur la recommandation» d'une autre. Par contre, dans la présente affaire, le par. 52(2) ne prévoit pas que l'administrateur général doit prendre quelque mesure «sur la recommandation» du comité.

On ne saurait, selon moi, faire droit à la prétention de l'intimé. Le terme «recommandations» doit être interprété suivant son sens ordinaire. «Recommandations» renvoie ordinairement au fait de conseiller et ne saurait équivaloir à une décision obligatoire. Je suis d'accord avec la conclusion du juge Dubé de la Section de première instance, à la p. 92:

> Dans son sens grammatical, naturel et courant, le mot «recommandation» n'est pas synonyme du mot «décision». L'*Oxford English Dictionary* définit comme suit le verbe «recommander»: [TRADUCTION] «communiquer ou faire état de; informer». Le *Webster's Third New International Dictionary* en donne la définition suivante: [TRADUCTION] «mentionner ou présenter comme

ommendatory statement; to present with approval; to advise, counsel".

There is nothing in either the section or the Act as a whole which indicates that the word "recommendations" should have anything other than its usual meaning. The Committee's recommendation constitutes a report put forward as something worthy of acceptance. It serves to ensure the accuracy of the information on which the Deputy Minister makes the decision, and it gives the Deputy Minister a second opinion to consider. It is no more than that. The wording of this section would be strained by giving the statute any wider scope. It should never be forgotten that it is the Deputy Minister who is responsible, not simply for the granting of security clearance, but for the ongoing security in his department. It is an onerous responsibility that is cast upon the Deputy Minister. Accordingly, it is reasonable and appropriate that the final decision as to security clearance is left to the Deputy Minister, notwithstanding the recommendations of the Committee. The conclusion that the words in the statute are clear and unambiguous is sufficient to dispose of the appeal. Nevertheless, I should make a brief reference to two of the other issues raised.

Harmonious Interpretation of "Recommendations" within the Sections and the Act.

There is another basis for concluding that "recommendations" should be given its usual meaning in s. 52(2).

The word is used in other provisions of the Act. Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an act. Section 52(1) directs the Committee to provide the Minister and Director of CSIS with a report containing the findings with regard to s. 41 investigations and any "recommendations" that the Committee considers appropriate. A section 41 investigation stems from a complaint to the Committee "with respect to any act or thing done by" CSIS.

étant digne d'acceptation, d'utilisation ou d'essai; faire une recommandation; présenter avec approbation; conseiller».

Ni la disposition en cause ni la Loi dans son ensemble ne permettent de conclure que le mot «recommandations» a un autre sens que son sens usuel. La recommandation du comité est un rapport présenté comme étant digne d'acceptation. Elle sert à garantir l'authenticité des renseignements sur lesquels le sous-ministre fonde sa décision et lui donne l'avantage d'une seconde opinion, rien de plus. Ce serait forcer le sens de la disposition en cause de conférer à la Loi une portée plus grande. Il importe de rappeler que c'est au sous-ministre qu'il incombe non seulement d'accorder les habilitations de sécurité, mais également d'assurer la sécurité de son ministère en général. Il s'agit là d'une lourde responsabilité. Par conséquent, il est raisonnable et opportun que la décision finale concernant l'habilitation de sécurité lui appartienne quelles que soient les recommandations du comité. La conclusion que le texte de la loi est clair et sans ambiguïté suffit à déterminer l'issue du pourvoi, mais je traiterai brièvement de deux des autres questions soulevées.

L'interprétation uniforme du mot «recommandations» dans les différentes dispositions et dans la Loi

Il existe un autre motif qui justifie de donner son sens ordinaire au mot «recommandations» au par. 52(2).

Ce mot est employé dans d'autres dispositions de la Loi et, à moins que le contexte ne s'y oppose clairement, un mot doit recevoir la même interprétation et avoir le même sens tout au long d'un texte législatif. Selon le par. 52(1), le comité envoie au ministre et au directeur du SCRS un rapport contenant ses conclusions concernant une plainte présentée en vertu de l'art. 41 et les «recommandations» qu'il juge indiquées. L'enquête visée à l'art. 41 découle d'une plainte présentée au comité «contre des activités du» SCRS.

Purpose of the Legislation

Finally, a judge's fundamental consideration in statutory interpretation is the purpose of legislation. Côté writes at p. 249:

> The function of all interpretation is to discover the meaning conveyed by the enactment, either explicitly or implicitly. If it has been written that courts must not add words to a law unless they are already implicit, it can be asserted, *a contrario*, that courts must also clarify what can be inferred from the context of the legal expression. A judge would be neglecting his duty were he to say: "I can see clearly what the statute intends, but its formulation is not appropriate".

Appellant's counsel argues that the almost exclusive purpose of the Committee is the internal regulation of CSIS. The Committee's recommendations to a Deputy Minister carry some persuasive force in terms of the final decision he or she will make, but he suggests that they function primarily as a commentary on the behaviour of CSIS's agents. In his view, since the Act does not explicitly relieve Deputy Ministers of their duty to ensure reliability and loyalty in their employees, no transfer of this power to the Committee may be inferred.

In my opinion, however, in setting up the review mechanism under s. 42, Parliament must have intended to provide a system of redress for parties who were unjustly deprived of employment due to erroneous or flawed CSIS reports. It would be illogical for Parliament to create the Committee and invest it with such extensive powers if, in the end, its conclusions could be ignored and complainants left in no better a position than they would have enjoyed had their complaints been unfounded. A Committee hearing involves a complete investigation of the complainant's character and history. It is difficult to see why an individual who had been denied a security clearance because of a CSIS report would go ahead with a complaint, if he or she had no assurance that a positive recommendation by the Security Committee would have any result whatsoever.

L'objet de la Loi

Enfin, il incombe fondamentalement au juge qui est appelé à interpréter un texte législatif de déterminer quel est l'objet de la loi en cause. Voici ce qu'écrit Côté à ce sujet, aux pp. 278 et 279:

> La fonction de tout interprète est de découvrir le sens qui se dégage du texte soit expressément, soit implicitement. Si on a pu écrire que les tribunaux n'ajoutent pas des termes à une loi s'ils n'y sont implicites, on peut affirmer, *a contrario*, qu'il est dans la fonction du tribunal d'expliciter ce qui ressort du contexte de la formule légale. Un tribunal ne remplirait pas sa fonction qui dirait: «Nous voyons très bien ce que la loi veut dire, mais la formule n'est pas tout à fait appropriée».

L'avocat de l'appelante fait valoir que le mandat du comité consiste presque exclusivement à assurer la réglementation interne du SCRS. Selon lui, les recommandations du comité au sous-ministre ont une certaine force de persuasion en ce qui a trait à la décision finale qui sera prise, mais il s'agit essentiellement d'observations sur la conduite des agents du SCRS. Comme la Loi ne relève pas expressément les sous-ministres de leur obligation de s'assurer de la fiabilité et de la loyauté de leurs employés, l'appelante soutient qu'on ne saurait conclure que ce pouvoir a été confié au comité.

J'estime, toutefois, qu'en établissant la procédure d'examen prévue à l'art. 42, le législateur doit avoir entendu mettre sur pied un mécanisme de redressement à l'intention des personnes qui se voient injustement refuser un emploi en raison d'un rapport inexact du SCRS. Il serait illogique que le législateur ait mis sur pied le comité en lui conférant des pouvoirs aussi étendus si, en fin de compte, ses conclusions pouvaient être mises de côté, le sort réservé au plaignant étant alors le même qu'une personne dont la plainte n'est pas fondée. La procédure d'audition du comité comprend une enquête complète sur la réputation et les antécédents du plaignant. Il est difficile d'imaginer pourquoi une personne qui s'est vu refuser une habilitation de sécurité sur le fondement d'un rapport du SCRS présenterait une plainte si elle n'était pas convaincue qu'une recommandation favorable du comité pouvait avoir quelque effet.

Most Negative Treatment: Reversed
Most Recent Reversed: R. v. Morgentaler | 1988 CarswellOnt 45, 1988 CarswellOnt 954, 31 C.R.R. 1, 26 O.A.C. 1, 82 N.R. 1, 62 C.R. (3d) 1, [1988] S.C.J. No. 1, EYB 1988-67444, 63 O.R. (2d) 281 (note), [1988] 1 S.C.R. 30, 3 W.C.B. (2d) 332, 44 D.L.R. (4th) 385, 37 C.C.C. (3d) 449, [1988] W.D.F.L. 727, J.E. 88-220 | (S.C.C., Jan 28, 1988)

1985 CarswellOnt 114
Ontario Supreme Court, Court of Appeal

R. v. Morgentaler

1985 CarswellOnt 114, 11 O.A.C. 81, 15 W.C.B. 67, 17 C.R.R. 223, 22 D.L.R. (4th) 641, 22 C.C.C. (3d) 353, 48 C.R. (3d) 1, 52 O.R. (2d) 353

R. v. MORGENTALER, SMOLING and SCOTT

Howland C.J.O., MacKinnon A.C.J.O., Brooke, Dubin and Martin JJ.A.

Heard: April 29 and 30 and May 1 to 3, 6 and 7, 1985
Judgment: October 1, 1985

Counsel: *W.J. Blacklock* and *B.J. Wein*, for the Crown.
M. Manning, Q.C., for respondents.
A. Pennington, Q.C., and *M.D. Steffen*, for Attorney General of Canada.

Subject: Criminal; Constitutional; Civil Practice and Procedure
Related Abridgment Classifications
Constitutional law
VIII Indirect legislation
VIII.1 Delegation of legislative power
VIII.1.c Delegation between federal government and provinces
VIII.1.c.i General principles
Criminal law
I General principles
I.3 Statutory interpretation
I.3.a Ambiguity
Criminal law
III Canadian Bill of Rights
III.4 Equality before law
Criminal law
IV Charter of Rights and Freedoms
IV.7 Freedom of religion [s. 2(a)]
Criminal law
IV Charter of Rights and Freedoms
IV.12 Life, liberty and security of person [s. 7]
IV.12.f Miscellaneous
Criminal law
IV Charter of Rights and Freedoms
IV.25 Cruel and unusual punishment [s. 12]
Criminal law

> You can keep speculating on all the things that have never been touched, but these are two very sensitive areas that we have to cope with as legislators and my view is that Parliament has decided a certain law on abortion and a certain law on capital punishment, and it should prevail and we do not want the courts to say that the judgment of Parliament was wrong in using the constitution.

Role of the Court

66 It is important to reiterate once again that it is not the role of the courts to pass on the policy or wisdom of legislation. That is a matter for Parliament and the legislatures of the provinces. Whether a woman should have a right to terminate her pregnancy and at what stage and subject to what safeguards are policy considerations. In the United States the Supreme Court of the United States has dealt with them and determined a three-trimester procedure. What has been done in the United States would appear to have really been done as a matter of substantive due process.

67 Under s. 52 of the Constitution Act, 1982, the courts have a broad constitutional jurisdiction to determine whether any statutory provision is inconsistent with the Charter. To the extent of that inconsistency the provision is of no force and effect.

68 It is necessary to determine whether "principles of fundamental justice" in s. 7 contemplate only a procedural review or whether they also include the right to make a substantive review of the legislation.

Principles of Fundamental Justice

69 The words "principles of fundamental justice" are used in s. 2(*e*) of the Canadian Bill of Rights. Section 2(*e*) provides in part that no law of Canada shall be construed or applied so as to:

> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations ...

In *Duke v. R.*, [1972] S.C.R. 917, 18 C.R.N.S. 302, 7 C.C.C. (2d) 474, 28 D.L.R. (3d) 129 [Ont.], the Supreme Court of Canada considered the interpretation of the words "a fair hearing in accordance with the principles of fundamental justice". Fauteux C.J.C., in delivering the judgment of the majority, stated at p. 479:

> Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.

The majority concluded that the failure of the Crown to furnish the accused with a sample of his own breath when it was not required by law to do so did not deprive the accused of a fair trial. This case is not really of assistance in considering the ambit of "principles of fundamental justice" in s. 7 of the Charter, as it was only interpreting these words in the context of a fair hearing.

70 A similar issue came before this court in *Re Potma and R.* (1983), 41 O.R. (2d) 43, 31 C.R. (3d) 321, 18 M.V.R. 133, 2 C.C.C. (3d) 383, 144 D.L.R. (3d) 620, 3 C.R.R. 252 (leave to appeal to the Supreme Court of Canada refused 17th May 1983 [noted 41 O.R. (2d) 43n, 33 C.R. (3d) xxv, 144 D.L.R. (3d) 620n, 4 C.R.R. 17, 50 N.R. 400]). On a charge that the appellant drove with over 80 milligrams of alcohol in his blood, the court had to consider whether the inability to conduct an independent test of the ampoule amounted to a denial of the right to make full answer and defence, and a denial of a fair trial. Robins J.A., in delivering the judgment of this court, stated at pp. 391-92:

> The submission that the inability to conduct an independent test of the ampoules amounts to a denial of the right to make full answer and defence and hence to the denial of a fair trial was fully canvassed in the *Duke* case, *supra*. The considerations applicable to this issue are no different now than they were before the Charter. The concepts of "fundamental justice" and "fair hearing" relevant here are the same whether considered under ss. 7 and 11(*d*) of the Charter, under s. 2(*e*) and (*f*) of the *Bill of Rights*, or under the common law. In so far as this case is concerned, while the Charter accords recognition to the well-established rights asserted by the appellant, it effects no change in the law respecting those rights. Sections 7

Re McINTYRE PORCUPINE MINES Ltd. and MORGAN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins, and Ferguson, JJ.A. January 31, 1921.

Ont.

App. Div.

RE McINTYRE PORCUPINE MINES LIMITED AND MORGAN.

Hodgins, J.A.

ch. 1, sec. 10, is that statutes shall "receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof." It is therefore open to the Court to adopt the larger or later meaning of the word in question, if it be true, as I think it is, that the Assessment Act in this particular aims at exempting such means as may be adopted at the mining location to aid in the concentration of the ore-mass, even if that progresses to the point of using chemical means as well as those mechanical, and in so doing draws within its scope some part of what may be alternatively described as amalgamation or reduction: see *Attorney-General* v. *Salt Union Limited*, [1917] 2 K.B. 488, *per* Lush, J. In this connection I refer to the language of Cozens-Hardy, M.R., in *Camden (Marquis)* v. *Inland Revenue Commissioners*, [1914] 1 K.B. 641, at pp. 647 and 648: "The duty of this Court is to interpret and give full effect to the words used by the Legislature, and it seems to me really not revelant to consider what a particular branch of the public may or may not understand to be the meaning of those words. It is for the Court to interpret the statute as best they can. In so doing the Court may no doubt assist themselves in the discharge of their duty by any literary help which they can find, including of course the consultation of standard authors and reference to well-known and authoritative dictionaries, which refer to the sources in which the interpretation which they give to the words of the English language is to be found. But to say we ought to allow evidence to be given as to whether there is any such technical meaning, to be followed up, of course, by evidence as to what that special meaning is, would I think be going entirely contrary to that which seems to be the settled rule of interpretation."

There is one point, however, in the judgment of the Board to which attention should be drawn so as to avoid misconception in the future. It is that which treats the whole question as one of fact and as not embracing any question of law. It is only upon questions of law that an appeal lies to this Court; and, while care should be taken not to trench upon the final authority of the Board upon questions of fact, it is equally important that the limited right of review should not be ignored or diminished.

The construction of the words of any statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its terms is a question of fact: *Elliott* v. *South Devon R.W. Co.* (1848), 2 Ex. 725; *Attorney-General for Canada* v. *Ritchie Contracting and Supply Co.*, [1919] A.C. 999, 48 D.L.R. 147. This distinction clearly runs through the decision of this Court in *Re Hiram Walker & Sons Limited and Town of Walkerville* (1917), 40 O.L.R. 154 where it is said (p. 156): "The case was argued by Mr. Anglin as if the legislation imposed taxation in respect of a 'distillery.' The question in such a case would be a very different one from that which arises when the taxation is in respect of 'the business of a distiller.' The Court cannot, I think, know judicially what such a business is, and the question of what it is must therefore be a question of fact."

The case just quoted is in line with the decision, upon somewhat similar words, in *Re S. H. Knox & Co. Assessment* (1909), 18 O.L.R 645. It is no doubt difficult to separate questions of law and fact in a case of this kind, where evidence which enables the Court to put itself in a position to construe the words of the Act is very often the same or practically the same as that which determines whether the statute covers the particular thing in question. But that is no reason for confusing two separate matters, in one of which an appeal lies and in the other the decision of the Board is final. See *Re Bruce Mines Limited and Town of Bruce Mines*, 20 O.L.R. 315, and the dissenting judgment of Meredith, J.A., in *Re S. H. Knox & Co. Assessment, supra.*

I would dismiss the appeals.

Appeals dismissed with costs.

Regina v. Church of Scientology of Toronto

(1975), 4 O.R. (2d) 707

ONTARIO
COUNTY COURT
JUDICIAL DISTRICT OF YORK
STORTINI, CO.CT.J.
17TH MAY 1974

Municipal law -- Building by-law -- Prosecution for violation of repair order by Commissioner of Buildings -- Accused unable to comply because building permit refused -- Permit refused because of improper zoning use -- Accused acquitted -- Commissioner required to issue permit to permit accused's compliance where repairs ordered -- Land use irrelevant to issuance of permit -- Interpretation Act, R.S.O. 1970, c. 225, s. 10.

Statutes -- Interpretation -- Strict construction of penal statutes -- Words of criminal or quasi-criminal statute creating ambiguity -- Ambiguity must be resolved in favour of liberty of subject -- Existence of ambiguity to be determined after regular rules of construction applied -- Interpretation Act, R.S.O. 1970, c. 225, s. 10.

[Dyke v. Elliott; The "Gauntlet" (1872), L.R. 4 P.C. 184; R. v. Eaves (1913), 21 C.C.C. 23, 9 D.L.R. 419, apld; R. v. Haggins, [1953] O.W.N. 833, 107 C.C.C. 225; R. v. Barabash (1951), 99 C.C.C. 399, 11 C.R. 319, 1 W.W.R. (N.S.) 539; R. v. Robinson (or Robertson) et al., [1951] S.C.R. 522, 100 C.C.C. 1, 12 C.R. 101, refd to]

the building in a safe condition at the expense of the owner. No building permit problem would then exist.

An issue arises as to the interpretation of the words contained in art. 7 of By-law 300-68 "and the proposed work complies with the provisions of all By-laws ..."

Section 10 of the Interpretation Act, R.S.O. 1970, c. 225, provides that every Act (and presumably every by-law) shall be deemed to be remedial and shall receive "such fair, large and liberal construction and interpretation" as will ensure the object of the Act.

On the other hand, the principle governing the construction of penal statutes was laid down by the Privy Council in Dyke v. Elliott; "The Gauntlet" (1872), L.R. 4 P.C. 184 at p. 191, as follows:

> ... all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.

The above principle was followed by Gale, J. (as he then was), in R. v. Haggins, [1953] O.W.N. 833, 107 C.C.C. 225, and by Graham, J., of the Saskatchewan King's Bench in R. v. Barabash (1951), 99 C.C.C. 399, 11 C.R. 319, 1 W.W.R. (N.S.) 539.

MANITOBA HYDRO v. DVORAK et al.

Manitoba Court of Appeal, Freedman C.J.M., Monnin and Matas JJ.A.

Heard — December 10, 1980.
Judgment — December 31, 1980.

province". Section 4(3) of the Manitoba Hydro Act specifically states that the corporation is an agent of Her Majesty. I take that to mean that for all purposes whatsoever, the Crown is an agent of Her Majesty and there is no limitation upon this agency. Therefore, reading these two sections, I can only conclude that Hydro, being an agent of Her Majesty in right of Manitoba, is entitled to the exemption granted to it by s. 189(2)(*a*)(i), namely, that Pt. X does not apply to Hydro since it is an agent of Her Majesty.

To do otherwise would be to import into the plain language of these sections the notion that if the transaction is merely a commercial one, then it is unfair that the Crown would have a priority over other creditors who also had commercial transactions with the debtors. The rhetorical question "how is this a Crown debt" offers to judges the possibility of many solutions. Attractive as that proposition may be, it cannot be accepted as laying a foundation for a new principle that ordinary commerce and debts due to the Crown are not to benefit from the exemption provided to whoever carries the status of agent of the Crown.

The language of the section provides no leeway. Parliament, in its wisdom, and if it is so minded, can decide that moneys owing to the Crown in commercial transactions should not attract the priority normally reserved to moneys which are the property of the public, but Parliament will have to legislate in that manner. It has not done so. In a case such as this I must apply the test of strict interpretation of the language.

I therefore conclude that Manitoba Hydro is an agent of Her Majesty for all purposes whatsoever including that of selling hydro-electric power. As a result, it is entitled to the benefit of s. 189(2)(*a*)(i) of the Bankruptcy Act and the debt of $174.40 owing to it by Mr. and Mrs. Dvorak is not to be included in the consolidation order.

The appeal is allowed. Since both counsel are representatives of the Crown, this is not a case for costs.

Appeal allowed.

Saskatchewan Court of Queen's Bench
Judicial Centre of Saskatoon

Citation: R. v. Coates
Date: 1981-12-04
Docket: D.C.C.A. No. 30

Between:
R.
and
Coates

Sirois, J.

Counsel:
D. Pelletier, for the appellant;
P. MacKinnon, for the respondent.

[1] Sirois, J.: Prior to arguments being presented on this appeal, the following admission of facts was filed by the respondent:

> 1. That the University of Saskatchewan Traffic Regulations were published in the Saskatchewan Gazette on September 29, 1978.
>
> 2. That the Unviersity (sic) of Saskatchewan Traffic Regulations have been approved by the Highway Traffic Board pursuant to Section 220 of the *Vehicles Act.*
>
> 3. That on the 18th day of December, A.D. 1980, a vehicle with License Plate No. KDZ 463 was parked, within the meaning of the University Traffic Regulations, on Gymnasium Road on the campus of the University of Saskatchewan in an area not designated for parking and which was not a bus stop, a loading zone or a metered zone contrary to Section 6.6.1 of the University of Saskatchewan Traffic Regulations.

At issue in this appeal is the ownership of the vehicle in question and more particularly whether a certified copy of the certificate of registration of said private passenger vehicle is admissible in evidence in proof of the said ownership.

[2] Counsel for the respondent took the position that we are faced with a clear legislative oversight that can only be corrected by the legislature. In specific instances the legislature has seen fit to provide for admission of certificates as prima facie evidence such as in the *Vehicles Act,* R.S.S. 1978, c. V-3, sec. 251; the *Liquor Licensing Act,* R.S.S. 1978, c. L-21, sec. 163; the *Vital Statistics Act,* R.S.S. 1978, c. V-7, sec. 42(1), he said. Sec. 220(1) of the *Vehicles Act* supra states in part: "No bylaw of a city, town, village or rural municipality heretofore or hereafter passed, regulating vehicles, the parking of vehicles or the use of public highways, shall have

things which ought to be changed from time to time. The enactment of the *Regional Municipality of Durham Act* 1973, providing that the region was a municipality for the purpose of s. 33 of the *Planning Act,* was one of those changes to the *Planning Act* which was contemplated when the *Condominium Act* was enacted and the region is a municipality within the meaning of s. 24 of the *Condominium Act.*

[7] I am satisfied that the regulations passed by the university once published and approved by the Highway Traffic Board are in effect a bylaw, (vide: *Foster v. Reno* (1910), 22 O.L.R. 413; re: *Maloney and Victoria* (1907), 6 W.L.R. 627) as mentioned in s. 220.

[8] S. 229(1) of the *Vehicles Act* which begins "No bylaw of a city, town, village or rural municipality . . ." has had the same opening words for the past 46 years. The University of Saskatchewan campus back in 1935 was still in its embronic stage. One could stand in the heart of the campus all day without seeing a single vehicle. The great transformation at the university occurred in the post-war years when the veterans came home and the student body grew to the 3000 figure in the mid-forties. It has never ceased to grow. A graduate of the dirty thirties needs a map and a guide to pilot him successfully around the university city today. And in spite of numerous and spacious parking lots to accommodate the thousands of vehicles roaming in the campus on working days, one is put to a considerable exercise in finding a parking place. I am satisfied that in giving the university the right to make its own parking regulations subject to the approval of the Highway Traffic Board, the legislature can be seen to have intended to place the university in the same position as a municipality with respect to the question of vehicle control within its limits. If the university is left without the means to enforce the regulations which the legislature has given it the power to make, the intent of the legislature is nullified. This power of enforcement can be said to be lacking if the evidentiary requirements of prosecuting for a violation of the regulations are so cumbersome as to make prosecution impractical. Does one suppose that the legislature intended one set of evidentiary rules to apply in cities, towns, villages and rural municipalities and another set of evidentiary rules to apply on the campus of the University of Saskatchewan? I do not for one moment believe this to have been the intention of the legislators. The *Vehicles Act* purports to, intends to, and indeed does control the operation of vehicles throughout the province of Saskatchewan. There is no exception to this in the *Act* hence the intent of the legislators is clear. To hold otherwise in my opinion leads to an absurdity.

[9] In the construction of statutes there are instances in which the courts will depart from the literal rule. Admittedly such instances are exceptional and it is impossible to lay down any categories of cases in which ordinary grammatical interpretation will inevitably be abandoned: the courts are very reluctant to substitute words in a statute or to add words to it, and it has been said that they will only do so where there is a repugnancy or something which is opposed to good sense. Vide: *Frederichs v. Payne* (1862), 1 H & C 584 per Bramwell B.

[10] On the general principle of avoiding injustice and absurdity, and construction

will, if possible, be rejected ("unless the policy of the act requires it) if it would enable a person by his own act to impair an obligation which he has undertaken, or otherwise to profit by his own wrong. A man may not take advantage of his own wrong. He may not plead in his own interest a self-created necessity: Vide: *Kish v. Taylor,* [1911] 1 K.S. 625, per Fletcher Moulton, L.J., at p. 634; *Maxwell on Interpretation of Statutes* (12th Ed.), p. 212. A person who is given the right to drive his vehicle on the property of the University of Saskatchewan, out of consideration for the thousands of other motorists on the premises who have exactly the same rights as he has, must be prepared to accept and submit to the regulations in full force and effect on the said premises. It is ridiculous to suggest otherwise.

[11] The language of a statute is generally extended to new things which were not known and could not have been contemplated when the act was passed, when the act deals with agencies and the thing which afterwards comes into existence was a species of it. For instance the provision of Magna Carta which exempted lords from the liability of having their carts taken for carriage was held to extend to degrees of nobility, not known when it was made, such as dukes, marquises and viscounts. Similarly, bicycles were held to be carriages within the provision of the *Highway Act* 1835 against furious driving and tricycles capable of being propelled by steam to be "locomotives" within the *Locomotives Act* 1861 and 1865 though not invented when these acts were passed. Similarly when in 1935 the *Vehicles Act* which came into existence had the relevant section commencing with the words . . . "No bylaw of a city, town, village or rural municipality", the University of Saskatchewan was not mentioned for vehicular problems in the confines of the latter area were unknown and nonexistent. The legislators have merely copied these words in every consolidation of the said statute down to the present, without giving attention to the changes taking place and their ensuing problems. However, should the language of the statute be extended to cover the situation of today? In spite of what I have just said, I do not believe that the language should be so extended. The words of an act will generally be understood in the sense which they bore when it was passed. Vide: *Gaslight and Coke Co. v. Hardy* (1886), 17 Q.B.D. 619 per Lord Eskan, M.R., at p. 621. Furthermore it is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. In *Thompson v. Goold & Co.,* [1910] A.C. 409, at 420 Lord Mersey said: "It is a strong thing to read into an act of parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do." Lord Loreburn L.C. said: "We are not entitled to read words into an act of parliament unless clear reason for it is to be found within the four corners of the act itself." Vide: *Vickers, Sons & Maxim Ltd. v. Evans,* [1910] A.C. 444, at 445. A case not provided for in a statute is not to be dealt with merely because there seems to good reason why it should have been omitted, and the omission appears in consequence to have been unintentional.

[12] I do not feel it is the court's function or duty in this case to read words in the *Vehicles Act* that are not there. It is up to the legislators to do this if they deem it desirable to do so.

R. v. Blackham's Construction Ltd.

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

McFarlane, Taggart and Hutcheon JJ.A.

Oral judgment: December 16, 1980.

Vancouver Registry No. CA 800055 [CA800055]

[1980] B.C.J. No. 1265 | 10 C.E.L.R. 115

Between Regina, appellant, and Blackham's Construction Ltd., respondent

(41 paras.)

On appeal from the decision of Grimmett Co. Ct. J. from a summary conviction appeal

Counsel

D.R. Kier, Q.C., appearing for the (Crown) appellant. J. Cram, appearing for the respondent.

The judgment of the Court was delivered by

McFARLANE J.A. (orally)

1 This is an application by the Crown for leave to appeal the acquittal of the respondent upon four counts contained in an Information to which I will refer more specifically in a moment. The proceedings were by way of summary conviction proceeding tried before a provincial Court Judge in Chilliwack, who acquitted the respondent.

2 On the Crown's appeal to the County Court of Westminster the Crown's appeal was dismissed by His Honour Judge Grimmett.

3 The application for leave to appeal is brought here from that decision.

4 The respondent was charged, so far as this appeal is concerned, under an Information containing four counts. The first and third (the second of which was called count number seven) related to offences alleged to have occurred, one on the 21st of November, 1978 and the second on the 23rd of that month and were laid under the provisions of a Regulation made by the Governor General in Council, under the authority of the Fisheries Act, being Chapter F14 of the Revised Statutes of Canada 1970. The particular regulation is known as the British Columbia Gravel Removal Order SOR/76-698, which, I think I said, was passed under the authority of that Act.

5 The other two counts which are involved were presented under Section 31, subsection (1) of the Fisheries Act.

6 The provisions are as follows:

"FISHERIES ACT

Section 31(1). 'No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.'

case enacted by Parliament and, on the other, passed by the Governor in Council without constitutional jurisdiction to enact them.

15 The County Court Judge, on appeal, appears to me to have given effect to the argument presented on behalf of the Respondent, that although the section of the Fisheries Act and the regulation be intra vires, they, nevertheless, are not expressed in such sufficiently clear language to apply to the respondent so as to prevent its carrying on what it considered its lawful business on property owned or leased by it.

16 The County Court Judge concluded his reasons for judgment with these words:

> "It of course must be presumed that the prohibition was enacted for 'the regulation and protection of Fisheries'. So too, and applying this principle, surely the Fisheries Act cannot, in the absence of express words, in effect prohibit the Appellant herein from carrying on its business of gravel removal from property over which it has exclusive rights of ownership."

17 I think the County Court Judge made a slip there. When he said "appellant" he meant "respondent".

18 In this court, when Counsel for the Crown opened his argument with the intention expressed of supporting his submission that the legislation and the regulation are intra vires, Mr. Cram, counsel for the respondent, helpfully, rose and informed the court that he did not contend that the legislation and the regulation were ultra vires. He conceded and, in my opinion, entirely correctly, that the section to which I have referred and the regulation, are intra vires. He told us also that he had never contended otherwise during the whole of this proceeding. He did proceed, however, consistently, to contend that the language used in the subsection and in the Gravel Removal Order were not sufficiently clear to apply to the respondent. He said that because, he contended, the effect of those provisions is, as he put it, to expropriate, or otherwise to prevent the lawful carrying on of a business of extracting gravel without any compensation being given to the person whose business and property rights were so affected.

19 His contention was based upon the principle, which I do not think anyone denied, that if the effect of legislation be to so interfere with the private rights of property it must be clear or that result must follow by necessary implication.

20 The question, therefore, is one of interpretation of the statutory provision and of the order.

21 The opening words of the relevant clause in the Gravel Removal Order are simply these:

> "No person shall remove gravel ..."

22 In my view, in their context, that language is perfectly clear and it allows of no suggestion of ambiguity or uncertainty. To suggest that the words "no person" must be read as excluding persons in the position of the respondent is, in my view, quite untenable, and that is particularly so when reference is made to clause number 4 of the same order which contains specific provisions regarding the effect of a permit which may be issued to an owner to remove gravel from an area to which otherwise the gravel removal order would apply.

23 I think this view of the language used in the order and, incidentally, also in the section, to which I will not refer more specifically, is in accord with the comment of Chief Justice Laskin, Chief Justice of Canada, in the comparatively recent decision, Interprovincial Co-operatives Ltd. v. The Queen *(1975) 5 W.W.R. 382*. At page 413 of that report, the Chief Justice, after referring to a decision in the case of The Queen and Robertson, which I will mention again in a moment, said this:

> "Federal power in relation to fisheries does not reach the protection of provincial or private property rights in fisheries through actions for damages or ancillary relief for injury to those rights. Rather, it is concerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner's right of utilization."

24 I think the opinion I have expressed on the interpretation of the relevant provisions here is also in accord with

Saskatchewan Court of Appeal

Citation: Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan (Minister of the Environment and Public Safety)
Date: 1992-01-02
Docket: File No. 667

Between:
Saskatchewan Action Foundation for the Environment Inc. (appellant/applicant)
and
Grant Milton Hodgins, Minister of the Environment and Public Safety, Saskatchewan (respondent/respondent) and Saskatchewan Power Corp., Souris Basin Development Authority and Saferco Products Inc. (intervenors/intervenors)

Cameron, Wakeling and Sherstobitoff, JJ.A.

Counsel:
H.R. Kloppenburg, Q.C., John Hardy and Ann Hardy, for the appellant
Barry Hornsberger, for the respondent Minister of Environment and Public Safety
L. Leblanc and L. Andrychuk, for the respondent Saferco Products Inc.
R.G. Kennedy, for the respondent Souris Basin Development Authority

[1] Sherstobitoff, J.A.: The main issue in this appeal is whether and to what extent members of the public have a right of access to documents in the possession of the Minister of the Environment and Public Safety, Saskatchewan, documents related to projects or developments which have undergone, or are undergoing, or are liable to undergo, assessment under the provisions of the *Environmental Assessment Act*, S.S. 1979-80, c. E-10.1.

[2] The appeal, taken by the Saskatchewan Action Foundation for the Environment Inc. ("SAFE") is from a decision in the Court of Queen's Bench dismissing an application by SAFE for an order in the nature of mandamus compelling the Minister of the Environment and Public Safety for Saskatchewan (the "Minister") to produce for public inspection all documents in his possession relating to each of four major projects which are at various stages of advancement: the Rafferty-Alameda Dam Project ("Rafferty-Alameda"), the Island Falls Dam Construction Project ("Island Falls"), the Meadow Lake Pulp Mill Project ("Meadpulp") and the Saferco Fertilizer Plant Project ("Saferco").

[3] In addition to the main issue, the appeal raises issues of standing, remedy, timeliness, and mootness.

The Facts

[4] SAFE is a nonprofit corporation established under the *Non-Profit Corporations Act*, S.S. 1979, c. N-4.1. It was established to promote the protection of the environment

authorizes the Minister to make a decision, in the case of a development, as to whether to grant authorization to proceed or not, it does not explicitly grant the power to determine whether or not a project is a development. And that decision is of great importance. If the Minister has the power suggested by the respondents, he has the power to exempt any project from the application of the *Act.*

[67] An examination of the rest of the *Act* does not support the position taken by the respondents. Section 5, which outlines the powers of the Minister for the purpose of administering and enforcing the *Act* and the regulations, is silent as to decision-making powers with respect to the question of what constitutes a development under the *Act.* Under s. 27 of the *Act*, the Lieutenant Governor-in-Council may make regulations with respect to certain matters, but the enumerated matters do not deal with the question of what constitutes a development under the *Act.* Furthermore, no regulations have been enacted.

[68] Section 4 of the *Act* which permits the Lieutenant Governor-in-Council, in the case of an emergency, to exempt any development, any class of developments, or any proponent from the application of all or any part of the *Act* or the regulations, does not support the position of the respondents. The section would be superfluous if the Minister had power under s. 8(1) to determine that any project was not a development within the meaning of the *Act.*

[69] Nor do the enforcement provisions of the *Act* support the position of the respondents. Section 18 permits the Minister to apply to the Court of Queen's Bench for an order enjoining any person from proceeding with a development contrary to the Act. Section 21 makes any person who contravenes s. 8(1) guilty of an offence and liable on summary conviction to a fine of not more than $5,000 and in the case of a continuing offence to a further fine of not more than $1,000 for each day during which the offence continues. Section 23 renders any person who proceeds with a development for which ministerial approval is required without being given ministerial approval or being exempted under s. 4 liable to any person who suffers loss, damage or injury as a result of the development without proof of negligence or intention to inflict loss, damage or injury. Under each of these enforcement provisions a court would have to determine whether or not there was a development within the meaning of the *Act.* There is no provision that a determination of the question by the Minister under the provisions of s. 8(1) would be binding on the Court or conclusive of the question. In the absence of such a provision, the legislators must be deemed to have left the question, in the case of a dispute, to be determined by the courts.

[70] All of the foregoing indicates that the issue of development or no development, in the case of a dispute between interested parties, should be resolved, as in all other cases of statutory interpretation, by the courts, unless the authority to make that decision has been expressly conferred upon some other body. Since the necessary authority has not been explicitly confided to the Minister under the terms of the *Act*, the decision must rest with the courts.

IN THE MATTER OF "AN ACT RESPECTING THE CANADIAN PACIFIC RAILWAY," 44 VICT. CH. 1, AND THE CONSTRUCTION OF THE SUDBURY BRANCH OF THE SAID RAILWAY.

1905

*Mar. 17, 20, 21.

*April 6.

THE CANADIAN PACIFIC RAILWAY COMPANY..... } APPLICANTS.

AND

THE JAMES BAY RAILWAY COMPANY..... } CONTESTANTS.

ON A REFERENCE FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Branch lines—Canadian Pacific Rway. Co's. charter—44 V. c. 1, (D), and schedules—Construction of contract—Limitation of time—Interpretation of terms—"Lay out", "Construct", "Acquire"—"Territory of Dominion"—Hansard debates—Construction of statute—"The Railway Act, 1903."

The charter of the Canadian Pacific Railway Company, [44 Vict. ch. 1, (D.)] and schedules thereto appended imposes limitations neither as to time nor point of departure in respect of the construction of branch lines;—they may be constructed from any point of the main line of the Canadian Pacific Railway between Callender Station and the Pacific Seaboard, subject merely to the existing regulations as to approval of location, plans, etc., and without the necessity of any further legislation.

On a reference concerning an application to the Board of Railway Commissioners for Canada for the approval of deviations from plans of a proposed branch line, under section 43 of "The Railway Act, 1903", it is competent for objections as to the expiration of limitation of time to be taken by the said Board, of its own motion, or by any interested party.

SPECIAL CASE submitted by the Board of Railway Commissioners for Canada for hearing and consideration, under the provisions of the forty-third section of The Railway Act, 1903.

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Nesbitt J.

ment as to the previous railway policy of the Parliament of Canada and the policy since in respect to other railways, and as to the public danger involved if a construction such as contended for by the Canadian Pacific Railway Company was adopted. We are not in one sense concerned with that construction. The purpose is expressed by the terms of the statute which are absolutely controlling as to the legislative intent, and while a construction which will produce a consequence so directly opposite to the whole spirit of our legislation ought to be avoided, if it can be avoided without a total disregard of those rules by which courts of justice must be governed, yet if Parliament has explained its own meaning too unequivocally to be mistaken the courts must adopt that meaning. We have only to declare what the law is, not what it ought to be, and I feel relieved from any doubt in this case which I might entertain (though I entertain none whatever) by the fact to which I attach considerable importance that successive Acts of Parliament have been passed by which Parliament itself has assumed as the correct one the construction I adopt. (I shall refer to these later.) The courts too have expressly in one case and by implication in another adopted one phase, viz., the right to build anywhere from the main line from Callander to the Pacific. I will also refer later to these more at length. On the question of the construction contended for by the James Bay Railway Company being likely to place the territory tributory to the main line from Callander to the Pacific in the grasp of a monopoly I would only say that in practice no such result has followed. Numerous railway charters have been obtained and railways actually built in many places where, if my construction of the charter and contract is correct, the fear of the right of the Canadian Pacific Railway

1953 CarswellNat 237
Exchequer Court of Canada

Royal Trust Co. v. Minister of National Revenue

1953 CarswellNat 237, [1953] Ex. C.R. 287, [1953] C.T.C. 438

THE ROYAL TRUST COMPANY OF THE CITY OF VANCOUVER, IN THE PROVINCE OF BRITISH COLUMBIA, EXECUTOR OF THE WILL OF ANDREW JACOBSON, and MINISTER OF NATIONAL REVENUE, Respondent

Cameron, J.

Judgment: October 21, 1953

Counsel: *R. D. Plommer*, for the Appellant.
R. V. Prenter, for the Respondent.

Subject: Estates and Trusts; Public; Tax — Miscellaneous

Headnote

Estates --- Estate tax and succession duties — Valuation — Ascertainment of aggregate value — Deductions
Statutes --- Interpretation — Role of court — Language clear
Succession duties — Dominion — Dominion Succession Duty Act, Statutes of Canada 1940-41, c. 14 — Section 11A — Credit in respect of provincial succession duties — Rules of construction.
In this appeal the sole issue was as to the proper interpretation of Section 11A of the *Dominion Succession Duty Act* which granted a right to deduct from the duties otherwise computed under the Act the lesser of:
"(a) The duty or duties payable by him under the laws of any province or provinces in respect of such succession, or
(b) Fifty per centum of the duty otherwise payable by him under this Act in respect of such succession."
The appellant claimed that the amount under (b) is one-half of the total duties payable by each successor under the Act and not limited to assets in his succession which have been taxed by a province as was contended by the respondent.
HELD:
(i) That the phrase "duties otherwise payable under this Act" in paragraph (b) means nothing more than the amount which, but for the provisions of Section 11A, would be payable under the Act;
(ii) That the computation under paragraph (b) is not restricted to that part of the succession on which duty has been paid to a province;
(iii) That the appeal is allowed.

***Cameron, J.*:**

1 This appeal is taken under the provisions of Part VI of the *Dominion Succession Duty Act*, Statutes of Canada, 1940-41, c. 14 as amended.

2 The appellant is the duly appointed executor of the estate of Andrew Jacobson, late of New Denver, British Columbia, who died on November 24, 1950.

3 The gross estate of the deceased amounted to $131,844.77, of which assets situated in the Province of British Columbia totalled $51,952.42. The balance of $79,892.36 was composed of assets situate without the Province of British Columbia and consisted of shares in corporations having their head offices in the Province of Ontario.

4 The liabilities of the deceased amounted to $1,228.92, leaving a net estate of $130,615.86. It is agreed that the total amount of Dominion Succession duties *before taking into consideration the provisions of Section 11A* is $21,390.56.

to permit the deduction therefrom of the lesser of (a), the provincial succession duties, or, (b) one-half of the duty otherwise payable by the individual successor under the Act.

10 The phrase "duties otherwise payable under this Act" means nothing more than the amount which, but for the provisions of this section, would be payable under the Act.

11 Were I to give effect to the interpretation placed by counsel for the respondent upon the concluding part of Section 11A, it would be tantamount to striking out of the last line thereof, the words "of such succession" and substituting therefor, "of that part of such succession only as had been subjected to the payment of a provincial succession duty", so that part (b) would then read, "50 per centum of the duty otherwise payable by him under this act in respect of that part of such succession only as had been subjected to the payment of a provincial succession duty".

12 To do so would be to do violence to the very words of the section, which, in my view, are clear and unambiguous.

13 The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention of Parliament which passed them. If the words of the section are themselves clear and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. (*Craies on Statute Law*, 5th Ed., at page 64.)

14 In my opinion the language used in Section 11A is so clear and explicit that it permits of one interpretation only. I can find nothing in part (b) which authorizes the respondent in making the computation therein provided for, to limit that allowance to that part of the succession on which duty has been paid to a province. It relates to the whole of the duty otherwise payable under the Dominion Act.

15 But it is submitted that if part (b) be interpreted in the manner I have indicated, inequities and inequalities may result. But when the words of an Act are plain, the Court will not make any alteration in them because injustice may otherwise be done. In *Warburton v. LoveLand* (1831), 2 D. & C., H. of L. 480 at page 489, it was stated:

> "Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature."

16 Again, in a more recent case, *King Emperor v. Benoari Lal Sarma*, [1945] Law Reports 72, Ind. App. 57 at page 71, Viscount Simon said in the Privy Council:

> "Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used."

17 It may well be that Parliament, in enacting Section 11A, considered that all successions under the Dominion Act would also be subject to duty under a Provincial Succession Duty Act, and therefore made no provision for cases, such as the instant one, in which a substantial part of a number of successions paid no provincial duty. But a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made.

18 In *London and India Docks v. Thames Steam Tug*, [1909] A.C. 15, Lord Atkinson said at page 23:

> "The intention of the Legislature, however obvious it may be, must, no doubt, in the construction of statutes, be defeated where the language it has chosen to use compels to that result, but only where the language compels to it."

19 Again, in *Attorney-General v. Earl of Selborne*, [1902] 1 K.B. 388, the Master of the Rolls said at page 396:

> "Therefore the Crown fails if the case is not brought within the words of the statute, interpreted according to their natural meaning; and if there is a case which is not covered by the statute so interpreted that can only be cured by legislation, and not by any attempt to construe the statute benevolently in favour of the Crown."

Re Municipality of Metropolitan Toronto and Paul Magder Furs Ltd. et al.

Indexed as: Metropolitan Toronto (Municipality) v. Paul Magder Furs Ltd.
(C.A.)

72 O.R. (2d) 155
[1990] O.J. No. 351
Action No. 804/89

ONTARIO
Court of Appeal
Morden, Grange and Carthy JJ.A.
March 8, 1990.

Statutes -- Interpretation -- Rules of interpretation -- Penal statutes -- Amendments to statute prohibiting opening of retail businesses on holidays but permitting municipal council to provide otherwise by by-law -- Providing for penalty for contravention of by-law -- Statute permitting Attorney-General or municipality to make application for order that businesses close on holidays to ensure compliance with Act or by-law -- Municipality entitled to seek order in absence of by-law -- Retail Business Holidays Act, R.S.O. 1980, c. 453, ss. 2(1), 4(1), 7(2), 8(1), (2).

The Retail Business Holidays Act, R.S.O. 1980, c. 453, was amended by S.O. 1989, c. 3. Of the amendments, s. 2(1) provides that no retail business may be open on a holiday; s. 4(1) allows a municipal council to enact a by-law to permit retail businesses to be open or closed on holidays; and s. 7(2) provides a penalty for contravention of such a by-law. The applicant municipality had not enacted a by-law, but applied under s. 8(1) of the Act for an order that the respondents close on Sundays. The section provides that the Attorney-

The legal regime contemplated by ss. 2, 3 and 4 of the Act is such that we do not think it can be called exclusively provincial or exclusively municipal. Municipalities which do not enact by-laws under s. 4(1) may be taken to have accepted, within their confines, the regime of the Act. If they enact by-laws these may have the effect of modifying the Act to some extent but not completely supplanting it. With these considerations in mind we can appreciate the sense of conferring jurisdiction on each of the Attorney-General and the municipality to enforce both the Act and by-laws made under it.

We think there is much force in the submission that, if it were intended that municipalities enforce only their own by-laws, the grammatical structure of s. 8(1) would have been different and reflected this intention -- probably in the form of separate clauses for the Attorney-General's and municipalities' powers.

For these reasons, we allow the appeal, set aside the order of Potts J. and direct that the application be remitted for hearing by a judge of the Supreme Court. The costs of the application and of this appeal will be paid by the respondent Paul Magder Furs Limited to the appellant.

Appeal allowed.

1951 CarswellOnt 310
Ontario District Court of the District of Parry Sound

R. v. Tuttle

1951 CarswellOnt 310, [1951] O.W.N. 750, 101 C.C.C. 249

Rex v. Tuttle

Little Co. Ct. J.

Judgment: August 21, 1951

Counsel: *A.G. Burbidge*, for the informant, appellant.
A.T. Smith, for the accused, respondent.

Subject: Criminal; Public

Headnote

Criminal Law -- General principles involving criminal law — Regulatory offences — Absolute liability
Fish and Wildlife --- Offences — Illegal possession — Wildlife
Game Laws — Offences — Mens rea — Possession of Beaver Carcass — Carcass Imported from Country where Acquisition Legal — The Game and Fisheries Act, R.S.O. 1950, c. 153, ss. 1(k), 30(1), 48(1).

An appeal by the informant from the acquittal of the respondent by a magistrate.

***Little Co. Ct. J.*:**

1 This is an appeal by the Crown in the form of a trial *de novo* following the acquittal of the respondent by Magistrate W.O. Langdon on 3rd October 1950 upon a charge of unlawfully possessing part of a beaver carcass, contrary to s. 27(1) of The Game and Fisheries Act, 1946 (Ont.), c. 33 (now s. 30(1) of R.S.O. 1950, c. 153), and regulations thereunder.

2 Shortly prior to 23rd September 1950 William A. Humphrey, conservation officer of the fish and wild life division of the Department of Lands and Forests, stationed at Powassan, received a complaint that the respondent was in possession of illegal quantities of partridge and pickerel and, after obtaining a search warrant, he proceeded on 23rd September to the summer residence of the respondent at Sunset Cove in the township of Nipissing in the district of Parry Sound. No illegal quantities of fish or game were found. On being informed that the respondent had a deep-freeze unit at Waltonian Inn on Lake Nipissing, Officer Humphrey, accompanied by Officers William St. Pierre and Ron Menzies, went to Waltonian Inn unaccompanied by the respondent, who did not wish to go, and there searched the deep-freeze unit in the name of the respondent. No fish or game whatsoever was found except a parcel which the three officers agreed contained part of a beaver carcass with the word "Beaver" written on the outside. The three officers returned to see the respondent, who admitted that the deep-freeze unit was his and also that he was the owner of the package of beaver-meat. He informed the officers that he had brought the beaver-meat from his home in the State of Pennsylvania, where he had obtained it legally from one Jesse Spragge. He suggested that the officers telephone to Mr. Spragge in the United States to check the authenticity of his statement, but they refused to do so, saying they were going to place all the facts before their superior officer. The result was the laying of the charge now before the Court.

3 The respondent gave evidence and on all material points confirmed the evidence of the conservation officers, Humphrey and St. Pierre. He also stated that he was a resident of Bradford, Pennsylvania, but had been a resident during the summer months and a taxpayer in the township of Nipissing for a period of 28 years. At no time during that period had he faced any charges of any kind and he had always observed the laws of the Province as far as he knew. He swore that he was much interested in conservation of wild life and, in fact, was vice-president of one of the largest conservation clubs in the State of Pennsylvania. Although not an expert qualified to advise the Court on the law in Pennsylvania, he stated that anyone who obtained a hunting

9 Urquhart J. further stated that in the particular case which he was trying, being for unlawful possession of beaver skins under The Game and Fisheries Act, though the above definition was not in itself applicable, it "expresses closely what is involved in the meaning of 'possession' under The Game and Fisheries Act".

10 Although it was not argued that the respondent was not in possession of a beaver carcass, nevertheless I am actually finding from the facts and from the above definition that the respondent did actually possess the beaver carcass on 23rd September 1950. Did he, however, possess it illegally? Section 27(1) [now s. 30(1)] of The Game and Fisheries Act, under which this charge was laid, reads as follows: "No person shall at any time trap, hunt, take or kill, or attempt to trap, hunt, take or kill, any beaver or possess the carcass, pelt or any part of any beaver, except during such period and on such terms and conditions as the Lieutenant-Governor in Council may prescribe." In interpreting this statute I am adopting the language used by Lord Atkinson in *The City of Victoria v. Bishop of Vancouver Island*, [1921] 2 A.C. 384 at 387, 59 D.L.R. 399, [1921] 2 W.W.R. 214:

> "In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense. In *Grey v. Pearson* (1857), 6 H.L. Cas. 61 at 106, Lord Wensleydale said: 'I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.'" Lord Atkinson points out that this passage was quoted with approval by Lord Blackburn in *Caledonian Railway Company v. North British Railway Company* (1881), 6 App. Cas. 114 at 131, and by Jessel M.R. in *Ex parte Walton; In re Levy* (1881), 17 Ch. D. 746 at 751.

11 I would also refer to the case of *The Canadian Pacific Railway Company v. The James Bay Railway Company* (1905), 36 S.C.R. 42, in which Nesbitt J. says, at p. 88: "The purpose is expressed by the terms of the statute which are absolutely controlling as to the legislative intent, and while a construction which will produce a consequence so directly opposite to the whole spirit of our legislation ought to be avoided, if it can be avoided without a total disregard of those rules by which courts of justice must be governed, yet if Parliament has explained its own meaning too unequivocally to be mistaken the courts must adopt that meaning."

12 Furthermore, in *The Canadian Northern Railway Company v. The City of Winnipeg*, 54 S.C.R. 589 at 593-4, 36 D.L.R. 222, [1917] 2 W.W.R. 100, Fitzpatrick C.J.C. says:

> It is reasonably clear what the legislature said and also what it intended; further that it did not say what it intended and that without disregarding the words of the statutes it is difficult to give effect to the intention.
>
> Although a statute is to be construed according to the intent of them that made it, if the language admits of no doubt or secondary meaning it is simply to be obeyed.

13 The Chief Justice also quoted the following passage from Lord Watson's speech in *Salomon v. A. Salomon and Company, Limited*, [1897] A.C. 22 at 38: "In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

14 In the case at bar there seems no question but that the intention of the Legislature was to protect wild life within the Province of Ontario, but in order to effect this purpose the Legislature has the power to pass such laws and regulations as it deems necessary. The Legislature has, therefore, enacted under s. 27 above that "no person shall ... possess the carcass, pelt or any part of any beaver". The important words to consider outside of the word "beaver" are "any part of any beaver". There can be no doubt as to the all-embracing meaning of these words. If the Legislature had wished to restrict this meaning to game which originated in Ontario, it could quite easily have done so; instead, however, it chose to use the words "any part" and "any

UNION BANK OF CANADA (DEFENDANT) ..... APPELLANT;

AND

FRANK C. PHILLIPS AND OTHERS—(DEFENDANTS) .....

AND

BOULTER WAUGH LIMITED (PLAINTIFF) ..... RESPONDENT.

1919
*Feb. 18,19.
*Mar. 17.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Statute—Construction—Agreement for sale—Assignment—Assignor giving mortgage—Caveat by assignee—Lapse of—Knowledge by mortgagee—Priorities—"The Land Titles Act," Sask. S., 1917, 2nd sess., c. 18, s. 194. R.S. Sask., 1909, c. 41, s. 162.

In April, 1912, the owner made an agreement to sell a lot of land to P. for a price payable by instalments, and in May, 1913, P. assigned to B. his interest in this agreement. This assignment was not registered, but in June, 1913, B. filed a caveat. In September, 1914, P., having paid the purchase price, was registered as owner of the land subject to the caveat. Subsequently P. executed a mortgage of the land, and when it was registered the mortgagee was made aware of B.'s caveat. In June, 1915, the registrar, under section 136 of "The Land Titles Act" of Saskatchewan, notified B., at the request of the mortgagee, that his caveat would lapse at the expiration of a certain delay, unless continued by order of the court; and, by a subsequent order, B.'s caveat was continued for 35 days from the 8th of October, 1915. As no action had been taken by B. within that time, the caveat was vacated.

Held that, under section 194 of "The Land Titles Act" of Saskatchewan and in the absence of fraud, B., having allowed his caveat to be vacated, could not invoke the knowledge by the mortgagee of the existence of the caveat in order to maintain its priority of claim.

Judgment of the Court of Appeal (11 Sask. L.R. 297; 42 D.L.R. 548; (1918) 3 W.W.R. 27, 196), reversed.

---

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

1919
UNION BANK OF CANADA
v.
PHILLIPS AND BOULTER WAUGH LIMITED.
Anglin J.

sub-sec. 1 of sec. 194. That which equity deems fraud, therefore, is by this enactment of a competent legislature declared not to be imputable as fraud.

A passage from my judgment in *Grace* v. *Kuebler* (1), is cited by the learned Chief Justice and by Lamont J. apparently as inconsistent with this view. All that that case decided was that the mere lodging of a caveat to protect an interest acquired subsequently to the making of an agreement for the sale of registered land does not affect the purchaser under such agreement, otherwise ignorant of them, with notice of the rights to protect which the caveat is lodged so as to render ineffectual as against the caveator payments on account of purchase money subsequently made by the purchaser to his vendor. Expressions of opinion in the judgment on any other point must, it is needless to say, be regarded as *obiter*. If anything I said in that case is really inconsistent with the views I have expressed above, I can only cry *peccavi* and plead that it was not so intended. I find in section 194 the "very explicit language" which I deem necessary to justify our regarding a statute as intended to render unenforceable such a wholesome doctrine as that of the effect of notice in equity. To give effect to a provision that a person is to be unaffected by notice, his rights and remedies must be the same as they would have been had he not had notice. However wholesome we may consider the equitable doctrine as to the effect of notice—however regrettable and even demoralizing in its tendency we may deem legislation rendering it inoperative—it is not in our power to disregard it. The legislative purpose being clear we have no right to decline to carry it out. Were we to do so consequences still more deplorable must

(1) 56 Can. S.C.R. 1, at p. 14; 39 D.L.R. 39, at pp. 47-8.

ensue. The court would occupy a wholly indefensible position, one of usurpation of an authority, sovereign within its ambit, which it is its imperative duty to uphold.

MIGNAULT J.—In my opinion the decision of the question submitted is entirely governed by the provisions of "The Land Titles Act" of Saskatchewan (ch. 41 of the Revised Statutes of Saskatchewan (1909)). (Sask. S., 1917, 2nd session, c. 18).

As briefly as they can be stated, the pertinent facts are as follows:—

In April, 1912, one J. H. Munson made an agreement to sell to Frank C. Phillips lot 10, block 6, plan E.M., town of Humboldt, Saskatchewan, for $1,750 payable by instalments.

In May, 1913, Phillips, being indebted to Boulter Waugh and Company, Limited (now represented by the respondent), assigned his interest in the agreement for sale to the said company, which immediately transferred its interest to its credit manager, Mr. Scott Barlow, in trust for the company. These assignments were not registered, but on the 5th June, 1913, Mr. Barlow filed a caveat in the district land titles office to protect the interest thus assigned by Phillips.

In September, 1914, Phillips, having paid to Munson the purchase price, received a transfer and was registered as owner of the land, subject to a mechanic's lien and to the Barlow caveat.

Subsequently Phillips became indebted to the appellant and executed a mortgage of the land in its favour, which mortgage was registered on the 24th March, 1915. When the appellant acquired this mortgage from Phillips, it was aware of the Barlow caveat, which was entered on the certificate of title, and of the rights represented by this caveat.

2009 CarswellOnt 3736
Ontario Superior Court of Justice

Clitheroe v. Hydro One Inc.

2009 CarswellOnt 3736, [2009] O.J. No. 2689, 178 A.C.W.S. (3d) 1047, 2009 C.E.B. & P.G.R. 8349 (headnote only), 76 C.C.P.B. 195, 96 O.R. (3d) 203

Eleanor R. Clitheroe (Plaintiff) and Hydro One Inc. (Defendant)

Mesbur J.

Heard: May 19-22, 2009
Judgment: June 26, 2009 *
Docket: 06-CV-307811PD1

Proceedings: additional reasons at *Clitheroe v. Hydro One Inc.* (2009), 2009 CarswellOnt 3881 (Ont. S.C.J.)

Counsel: Alan J. Lenczner, Q.C., for Plaintiff
Benjamin Zarnett, Peter Kolla for Defendant
Robin Basu, Robert Donato for Intervenor, Attorney General for Ontario

Subject: Corporate and Commercial; Constitutional; Public; Contracts; Employment; Human Rights
Related Abridgment Classifications
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.f Life, liberty and security
XI.3.f.ii Economic, commercial and proprietary rights
Pensions
I Private pension plans
I.2 Payment of pension
I.2.h Determination of benefits payable
I.2.h.ii Credited service
Public law
I Crown
I.1 Contractual principles regarding Crown
I.1.d Breach of individual covenants by Crown
Public law
IV Public utilities
IV.3 Actions by and against public utilities
IV.3.d Miscellaneous
Public law
IV Public utilities
IV.4 Termination, valuation and privatization
IV.4.e Privatization and deregulation
Statutes
III Retroactive and retrospective operation
III.3 Vested rights

52 The second limit is on what can be paid out of the supplementary plan. Bill 80 limits what can be paid out of the supplementary plan to what is payable to all members of the supplementary plan. What is payable to all members of the supplementary plan, including Ms. Clitheroe? All are entitled to the top up payment, calculated according to the terms of the supplementary plan. This is clear and unambiguous.

53 There is also no question that under the terms of the supplementary plan only Ms. Clitheroe has a special arrangement under that plan. Her special arrangement includes both the general top up available to all supplementary plan members, as well as significant, additional enhanced benefits. Since her additional enhanced benefits are available only to her, and exceed the amounts payable under the supplementary plan's calculations for all members of the supplementary plan, they cannot be paid out pursuant to the legislation.

54 It therefore follows, clearly and unequivocally, that the maximum pension and retirement income Ms. Clitheroe may receive under section 12 is the amount calculated pursuant to the terms RPP and the terms of the supplementary plan that apply to all its members.

55 Hydro One then asks whether accepting Ms. Clitheroe's position and using 21.75 years of credited service for the purpose of calculating her entitlement under the supplementary plan would yield an amount greater than the maximum calculated under section 12. Clearly it would. Ms. Vines explained that tab 16 of Exhibit 3 sets out the total of the amounts that would have been paid under the registered plan if there had been no limit under the *Income Tax Act*. The component of the total that relates to the supplementary plan is described as the difference between the pension payable under the plan, and what would have been payable if there were no *Income Tax Act* limit. That calculation has been made on the basis of 14.74 years, because the registered plan counts only one year of credited service for each year worked.

56 As Ms. Vines said, and as Mr. Clausen's calculations show, if the formula used more years of credited service than 14.74 years, it would result in a benefit that exceeded simply the top up amount under the supplementary plan, and would thus exceed the maximum described in section 12 of Bill 80.

57 Since using 21.75 years of credited service would exceed the maximum set out in section 12 of Bill 80, the next question is whether Ms. Clitheroe had a contractual entitlement to use 21.75 years of credited service in the calculation of her pension, and if so, has Bill 80 effectively cancelled that contractual entitlement. As the parties acknowledge, the legislature has the power to do so, but if and only if it does so in clear unambiguous terms.

Has the legislation cancelled Ms. Clitheroe's contractual rights?

58 Hydro One says first Bill 80 delineates a maximum payment of pension and retirement income for designated officers. By expressly authorizing a maximum, it excludes amounts exceeding that maximum. Beginning on January 1, 1999, and on every date after that date, no designated officer has a right to, or may claim any amount more than the maximum. January 1, 1999 is the first date Ms. Clitheroe had any rights against Hydro One, and therefore one looks only at that date forward, in terms of her rights with Hydro One. All of her prior pension rights were assumed by Hydro One as of that date, and it is only from that date forward she has any contractual rights with Hydro One. When I consider the clear wording of the maximum calculated in s. 12, and look at that provision in conjunction with sections 13, 14, and 16 of Bill 80 I must conclude the legislature clearly intended Ms. Clitheroe's contractual pension entitlements in excess of the maximum to be cancelled.

59 I say this because section 13 prohibits any person from paying an amount exceeding the amount authorized by Bill 80. The only amount that is authorized is the maximum under s. 12. This is clear.

60 Similarly, section 14 provides that if any person receives an amount in excess of the authorized amount, it must be repaid. Lastly, section 16 prohibits any proceedings being commenced in relation to the restrictions to compensation set out in section 12 (in addition to sections 9-11) of Bill 80. These provisions make it clear that the legislature intended that no person should receive or be permitted to claim any amount in excess of the maximum authorized under section 12.

61 I therefore agree with Hydro One's interpretation, and find the statute is clear and unambiguous. The provisions of the statute must therefore govern, unless Ms. Clitheroe can show that her constitutional rights have been infringed.

Does the legislation infringe Ms. Clitheroe's Charter rights?

62 Section 7 of the *Charter* says:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

63 Ms. Clitheroe frames her position on the *Charter* in fairly simple terms. She characterizes the s. 7 liberty interest as separate from the security interest. She says the courts have held that the liberty interest protected by the *Charter* is more than simply freedom from restraint. She suggests that the right to liberty has and must be construed broadly and says the liberty interest is broad enough to protect what she describes as the right to make fundamental life choices. She suggests her choices to work to Hydro One, Ontario Hydro and the Province of Ontario before that, with their particular pension entitlements, constitute such a fundamental life choice. She relies on a number of cases that she says frame the liberty interest in such broad terms.

64 For example, in *Morgentaler* [10], Wilson J (though speaking for herself alone) held section 251 of the *Criminal Code*, which limited a pregnant woman's access to abortion, violated her right to life, liberty and security of the person within the meaning of section 7 of the *Charter*, in a way that does not accord with the principles of fundamental justice. She interpreted the right to liberty to guarantee every individual a degree of personal autonomy over important decisions intimately affecting his or her private life. Wilson J. held that a woman's decision to terminate her pregnancy falls within this class of protected decisions. She described it as one that will have profound psychological, economic and social consequences for her. She characterized the decision to have an abortion is more than a medical decision; it is a profound social and ethical one as well.

65 The majority in *Morgentaler* did not embrace Wilson J's liberty analysis. Instead, they decided the case on the basis that section 251 infringes the right to security of the person, and not on the basis of an infringement of any liberty interest. Even accepting Wilson J's reasoning in the context of this case, I would be hard pressed to characterize Ms. Clitheroe's decision to work for Hydro One and negotiate her pension entitlement as a "profound social and ethical decision" on the same level as a woman's decision to terminate a pregnancy.

66 Ms. Clitheroe also relies on *New Brunswick (Minister of Health & Community Services) v. G. (J.)* [11]. It dealt with the issue of whether legal aid must be provided to parents in the context of a child welfare case where the parents faced the prospect of their children becoming crown wards. The case addressed whether the denial of legal aid in such circumstances breached the parents' guaranteed security of the person and liberty rights. There, the Supreme Court majority decided the parents' security of the person rights had been infringed and required the province to provide legal aid.

67 L'Heureux-Dube J, writing for the minority came to the same conclusion, but went further and found the parents' liberty interests had been infringed as well. She interpreted the s. 7 liberty interest more broadly and cited with approval the dissenting judgment of LaForest J in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [12] which said:

> Liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.

68 The minority held that wardship proceedings also implicated these fundamental liberty interests of parents, and ordered the state to provide legal aid funding. They stated that "the principles of fundamental justice require that a parent be able to participate in the hearing adequately and effectively." [13] It is noteworthy, however, that the majority was not prepared to extend the liberty analysis this far.

CAN. PERFORMING RIGHT SOC., Ltd. v. FAMOUS PLAYERS CAN. CORP., Ltd.

Imp.
P.C.
1929.

Judicial Committee of the Privy Council, Hailsham, L.C., Lord Buckmaster, Viscount Sumner and Lords Blanesburgh and Warrington.
February 1, 1929.

W. Greene, K.C., and *S. O. H. Collins,* for appellants.
W. N. Tilley, K.C., and *H. Douglas,* for respondents.

The judgment of the Board was delivered by

LORD WARRINGTON:—The appellants, the plaintiffs in the action, are the owners by assignment of the performing rights in Canada of a very large number of musical works, the copyright in which is still subsisting.

The action in which the present appeal arises was an action under the Copyright Act, 1921 (Can.), c. 24, against the respondents for an injunction and damages in respect of the infringement by the respondents of the exclusive performing rights in Canada of two of the said musical pieces.

The respondents, amongst other grounds of defence, alleged that the appellants could not maintain the action because of their failure to register the grants under which they claimed title as required by s. 39 of the above-mentioned Act.

The action was tried before Rose, J., [1927] 2 D.L.R. 928, who delivered judgment over-ruling the various grounds of defence other than that of failure to register, but allowing the latter ground. He therefore dismissed the action with costs.

and no grantee shall maintain any action under this Act, unless his and each such prior grant has been registered."

The appellants are indisputably "grantees," their "grant," *viz.*, the assignment to them executed by the British company, has not been registered, the action is an action under the Act; therefore, reading the words literally, they are precluded from maintaining the action. The above is the effect of the several judgments in Canada, and their Lordships can see no answer to the respondents' case as thus stated.

Strenuous efforts, however, have been made by counsel for the appellants to induce their Lordships to accept a construction other than the literal one, and it is necessary therefore to consider whether such a construction is the correct one.

Great stress is laid by the appellants on the extreme inconvenience of a literal construction. It may, it is said, be practically impossible, when occasion arises to register an assignment, to obtain a duplicate without which, as it would appear, registration is impossible.

One answer to this argument is that it ought to be addressed to the legislature and not to the tribunal of construction, whose duty it is to say what the words mean, not what they should be made to mean in order to avoid inconvenience or hardship. On this point it may be pointed out that though the Act received the Royal Assent on June 4, 1921, it did not come into operation until January 1, 1924, and there was ample time for persons interested to point out defects and endeavour to obtain their removal.

Of course, if it could be established that the provision in question is capable of two meanings, one of which would produce a reasonable and the other an unreasonable and unjust result much might be said in favour of adopting the former. But it is here that the appellants' difficulty arises. The main endeavour on the part of counsel for the appellants was to show that the concluding words are a complement to the earlier part of the subsection, and are to be confined to cases where the action is one between competing grantees, and stress was laid on the words "each such prior grant" as referring, they maintained, to the grant to which that of the "subsequent assignee" mentioned in the section, is subsequent in point of date. But in the first place "each such prior grant" suggests that there may be more than one, and in the second, there is a sensible meaning for the words which fits in with the wider construction adopted by the Courts in Canada. The words to be construed are "his," *i.e.*, the grantee's, "and each such prior grant," *viz.*, "his grant

1910 CarswellOnt 258
Ontario Divisional Court

Dale v. Blanchard (Township)

1910 CarswellOnt 258, 16 O.W.R. 349, 21 O.L.R. 497 at 502

Re Dale and Blanchard

Meredith, C.J.

Judgment: June 29, 1910

Proceedings: reversed *Dale v. Blanchard (Township)* ((1910)), 1910 CarswellOnt 205, 21 O.L.R. 497, 16 O.W.R. 86 ((Ont. Ex. Ct.))

Counsel: *C. C. Robinson*, for the appellant.
J. S. Fullerton, K.C., and *J. W. Graham*, for the respondent municipality.

Subject: Public
Related Abridgment Classifications
Municipal law
VIII By-laws
VIII.4 Enactment
VIII.4.b By plebiscite
VIII.4.b.ii Practice and procedure
VIII.4.b.ii.A Voters' lists
Statutes
II Interpretation
II.4 Construction
II.4.a Liberal
Headnote
Municipal Election — Voting on Money By-law — Revision of Voters' List — Assessment Act s. 62 — Voters' List Act — Quashing By-law.
An application to quash a money by-law of the Township of Blanchard, granting $20,000 aid to the St. Mary's and Western Ontario Rw. Co. At trial the objections in substance resolved themselves into two: (1) that the by-law did not receive a majority of the votes of persons qualified to vote thereon; (2) that the voting was not conducted in accordance with the principles laid down in the Municipal Act. The majority for the by-law was 4.
Mulock, C.J.Ex.D., *held*, that whether the Court omits to hold a legal meeting, or holding a legal meeting omits to try all complaints as required by s. 62 of the Assessment Act, in either case an appeal lies to the County Judge, and if no appeal is taken, the Voters' List Act applies. In this case no appeal was taken, therefore the objection to use of 1909 list failed. That it is not competent to the application to call in question the findings of the County Court Judge as to the qualifications of the persons whose names he placed upon the voters' list. This objection therefore failed; the evidence shewed that the election was conducted substantially in accordance with the principles laid down in the statute, and that the result of the election was not affected by any non-compliance, mistake, or irregularities. Motion dismissed, but, under the circumstances, without costs.
Divisional Court *held*, that it was unnecessary to express an opinion upon any of the grounds urged against the by-law except whether (1) the voters' list upon which the voting took place was by force of s. 24 of the Voters' Lists Act, or for any other reason, conclusive as to the right of the persons named in it to vote on the by-law; and whether (2), if it was not conclusive as to their right to vote, the appellant had succeeded in establishing that a sufficient number of unqualified persons voted to overcome the majority which was cast in favour of the by-law.

had not yet been done to a conveyance of the land, and such persons were held by the Court of Appeal not to be freeholders within the meaning of sec. 9 of the then Municipal Act, R. S. O. 1887, ch. 184.

10 Street, J., had decided after inquiry that the persons whose right to petition as freeholders was questioned were in a position to compel specific performance by their vendors and were therefore equitable freeholders and entitled to petition, so that the decision of the Court of Appeal reversing his decision is conclusive against the right of the three persons I have named to vote unless the case can be distinguished on the ground that in the enactment which was then under consideration the term "freeholder" is used in a sense different from that in which it is used in sec. 353, and I can find no reason for coming to that conclusion. The purpose of the petition in that case was to obtain the incorporation of a village, and the purpose of the by-law in question is to impose an indebtedness upon the municipality, in the one case on the initiative, and in the other by the vote of a part only of the ratepayers and against the will of a minority.

11 It is perhaps to be regretted that the Court was unable to put a more liberal construction on the statute, but that is now a matter for the legislature, if the construction given to it does not accord with the intention of the legislature in passing it.

12 The vote of R. C. Hunter is clearly bad. He had no estate in the land in respect of which he voted. It belonged to a company in which he was a shareholder, and that was his only interest in it; and Homer Doupe's vote was admittedly bad.

13 The by-law was carried by a majority of four only, and these five votes being bad, it follows that it did not receive the assent of the majority of the voters and must be quashed.

14 The appeal will therefore be allowed and there will be substituted for the order of the learned Chief Justice an order quashing the by-law with costs, and the respondents must pay the costs throughout.

1909 CarswellOnt 704
Ontario Divisional Court

Smith v. London (City)

1909 CarswellOnt 704, 14 O.W.R. 1248, 1 O.W.N. 280, 20 O.L.R. 133

Smith v. City of London

Boyd, C.

Judgment: December 16, 1909

Counsel: *E. F. B. Johnston, K.C.*, and *J. M. McEvoy* (London), for plaintiff, appellants.
E. E. A. DuVernet, K.C., for defendants, contra.
J. R. Cartwright, K.C., for Attorney-General for Ontario.

Subject: Public
Related Abridgment Classifications
Constitutional law
VII Distribution of legislative powers
VII.2 Nature of general federal powers
VII.2.a Principle of supremacy of Parliament
Constitutional law
VII Distribution of legislative powers
VII.3 Nature of general provincial powers
VII.3.a Principle of supremacy of legislature
Constitutional law
VII Distribution of legislative powers
VII.3 Nature of general provincial powers
VII.3.d Property and civil rights within province
VII.3.d.i General principles
Constitutional law
VII Distribution of legislative powers
VII.4 Areas of legislation
VII.4.h Municipal corporations
VII.4.h.ii Powers which province may confer on municipality
Constitutional law
VII Distribution of legislative powers
VII.4 Areas of legislation
VII.4.i Public utilities
Municipal law
III Powers of municipal corporation
III.1 Source of powers
Statutes
II Interpretation
II.1 General principles
II.1.a Role of court
Statutes
II Interpretation

these desiderata exclude the undertaking from the area of private enterprise and an ordinary business. It is removed within the range of municipal institutions. The proper user and enjoyment of such a service affects the citizens as a community and not merely as individuals. The self-interest of the few must give way to the common interests of the whole body of incorporated inhabitants represented by the vote of the majority. The general proposition as in effect expressed by the Massachusetts Bench may be adopted as a good working rule on this head, viz., that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with apart from the aid of powers and privileges derived from the legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them or may need them and may participate in them, and it is for the interest of each inhabitant that others as well as himself should possess and enjoy them. See opinion of Judges, 150 Mass. at p. 597 (1890).

16 The supply of light by means of gas or electricity, with the incidental advantages of heat and motive power connected therewith, appear to be a proper municipal function. The primary need, no doubt, is as to public places (streets and buildings, etc.): yet the vending of the commodity to private consumers is a convenient and comparatively inexpensive accompaniment. Both go far to promote the convenience, comfort and safety of all members of the municipality.

17 I have no difficulty in deciding that as to the main and central question here agitated, as to the power of the city of London to engage in the business of acquiring and distributing electric energy, that it is one of the incidents of municipal government, whether or not in competition with private concerns is of no material significance in the constitutional aspect of this legislation.

18 The provincial legislature has power to establish electrical works as a local work or undertaking under another clause of the Confederation Act, sec. 92 (10). Consequently it has power to delegate this undertaking to a competent municipal body.

19 The next questions may be considered together, and may be thus stated: Has the plaintiff, a ratepayer of the city, a right to be heard in seeking relief after the validation of the contract and by-law? He starts with a good cause of action. The terms of the contract being changed after the vote, prima facie the vote has been cast away, and there is no valid contract which binds the ratepayers, and the levy of rates based on contract and by-law is illegal. But comes the special Act as the Deus ex machina with double aspect not only to validate everything but to close the Court against the aggrieved ratepayer.

20 Now the legislature might have passed an Act to provide directly for the instalment of this electric plant and for the levy of rates upon the inhabitants for the outlay and the maintenance. There is no constitutional reason why the legislature might not resume part of the matter or proceeding delegated and take it out of the hands of the municipality if it thought proper; assuming that a majority vote was passed in favour of the project, and that the changes made in the contract were not of fundamental character or such as affected the proper realization of the scheme, and that the expense and delay of a further vote would not be likely materially to change the opinion of the ratepayers; such considerations as these might, well or ill-founded, induce the body of legislators, containing representatives of the city, to apply the drastic remedy now resented by the minority. It must also be noted that the mayor and council of the city authorized and approved of the execution of the contract so validated on that further popular vote. And the mayor and council are the legally constituted representatives of the inhabitants and are responsible to them at the polls.

21 However, the legislature, instead of letting the people vote again on the changed by-law, have in effect assumed or declared that no vote is necessary, and (that being so) no Court can change the situation. This legislative action is, no doubt, a violation pro tanto of the principle of local self-control, and is somewhat of a reversion to an older type of paternal or autocratic rule. But, whatever be its character or effect, the investigation is not for the Courts, but for the politician or the elector. The propriety of any interference with these rights of local self-government is a matter of legislative policy and ethics — not of constitutional law. Where the legislature has transcended its power the Courts may sit in judgment on the statute; where legislative power within its proper ambit is regarded as unreasonable or abused it is open for the Dominion to exercise the right of disallowance. The principle which is now fairly rooted in English law as to Acts of Parliament applies with equal force to Acts of provincial legislatures acting within the constitutional powers conferred upon them by the Imperial Statutes of 1867 — the British North America Act. When the provincial legislature exercises exclusive plenary power within the constitutional limits of the Imperial Federation Act, any statute so enacted is not to be revised or supervised by the judicial body. Blackstone deals with the large proposition that Acts of Parliament contrary to reason are void. But (he says) if the Parliament will positively enact a thing

to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it, and the examples usually alleged in support of this sense of the rule do none of them prove that when the main object of the statute is unreasonable the Judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government: Com. p. 91. And in Mr. Christian's note (it is added): "If an Act of Parliament is clearly and unequivocally expressed, it is neither void in its direct nor collateral consequences, however absurd and unreasonable they may appear. . . . When the signification of a statute is manifest, no authority less than that of Parliament can restrain its operation." Beyond the commentators the same thing was judicially expressed by Lord Campbell in Logan v. Bruslem, 4 Moore P. C. 296: "As to an Act of Parliament not binding if it is contrary to reason, that can receive no countenance from any Court of Justice whatever. A Court of Justice cannot set itself above the legislature; the whole is a question of construction (as to the meaning of the Act), and there is no power of dispensation from the words used." This case decided in a Vice-Admiralty appeal from Sierra Leone in 1842, was probably not seen by Robinson, C.J., when he used the language in 1848 which is found in Toronto and Lake Huron R. W. Co. v. Crookshank, 4 U. C. R. 309, 317. He adverts "to the law that even in a case where the legislature of the province have powers which are not controlled expressly by a higher authority than their own, it may yet be confined by some clear and undisputed constitutional principle." And at p. 318 he refers to the few instances in which Acts might be supposed to be passed so utterly at variance with natural justice and the inherent rights of individuals that Courts of Justice could refuse to treat them as binding.

22 The mistiness of view as to possible grounds on which an Act of Parliament might be avoided by the Courts has been cleared away by the modern doctrine as to the sovereign power resident in the legislature, and I do not know of any example even in early days when a concrete case arose of an Act of Parliament being overruled or displaced by the Judges.

23 I may revert to the modern view as laid down by Judges, and in judgments of the highest authority. Lord Halsbury says: "It is not competent to any Court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think the Court of Law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes:" Commissioners for Special Purposes of Income Tax v. Pemsel, [1891] A. C. p. 549. And again it is said: "When the sense of the language is unambiguous, the sense must prevail; we must take the law as we find it, and if it be unjust or inconvenient, we must leave it to the constitutional authority to amend it:" Per Coleridge, J., advising the Lords in Garland v. Carlisle, 4 Cl. & Fin. 705, 706. And finally in a Canadian appeal, Labrador Co. v. The Queen, [1893] A. C. 123, Lord Hannen summed up the situation tersely thus: "The Courts of Law cannot sit in judgment on the legislature, but must obey and give effect to its determination."

24 The power to stay actions by direct intervention of the legislature is but rarely exercised. The usual precedents are drawn from the region of martial law. It is a far call from high political offenders to the ratepayer who objects to a civic burden as irregularly imposed.

25 There is no analogy to be drawn from legislation as to limitation of actions. These usually give a certain period of time in which to assert rights in the Courts under penalty of being shut out from relief. Such a statute is one of repose — this, however, is one of repression. If litigation is to be barred because it is regarded as frivolous or vexatious, the well recognized plan is to leave it in the hands of the Judges, as, e.g., is provided in the English Vexatious Actions Act of 1896, by which the Attorney-General can apply for an order that no legal proceedings shall be instituted by one who has habitually and persistently instituted vexatious legal proceedings without any reasonable ground. In the United States a vested right of action is treated as a piece of property which is to be protected by the Courts against all arbitrary interference, even on the part of the legislature.

26 As to the peremptory stay of a pending or a vested cause of action, there is a salient distinction between American and English methods and law. Kent, C., said, in Dash v. Van Kleeck, 7 Johns 505 (1811): "There is no distinction in principle between a law punishing a person criminally for a past innocent act or punishing him civilly by divesting him of a lawfully acquired right." American jurists distinguish between judicial and legislative Acts thus, that a judicial Act determines what existing law is in respect to some existing thing already done or happened; while a legislative Act is a pre-determination of what the law shall be for regulation of all future cases falling under its provision. A retroactive law to stay a plenary action is not regarded as a legislative Act. In Ervine's Appeal, 16 Pa. St. 266, it is said: "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced."

1943 CarswellOnt 219
Ontario Seventh Division Court of the County of Essex

Doyle Clinic Ltd. v. Newton

1943 CarswellOnt 219, [1943] O.W.N. 411

Doyle Clinic Limited v. Newton

Gordon Co. Ct. J.

Judgment: May 27, 1943

Counsel: *Don Brown*, for the plaintiff.
L.H. Swartz, for the defendant.

Subject: Public
Related Abridgment Classifications
Health law
III Provincial matters
III.3 Regulation of health professionals
III.3.f Physicians
III.3.f.i Relationship with patient
Health law
III Provincial matters
III.3 Regulation of health professionals
III.3.f Physicians
III.3.f.ii Right to practice
Statutes
II Interpretation
II.1 General principles
II.1.b Ambiguity
Headnote
Health Law --- Physicians and surgeons — Organization of profession — Right to practice — Unlawful practice — Corporations
Health Law --- Physicians and surgeons — Relationship with patient — Fees — Right to sue
Statutes --- Interpretation — Role of court — Language clear
Medicine and Surgery — Right to Recover Professional Fees — Registration — Incorporated Clinic — The Medical Act, R.S.O. 1937, c. 225, s. 50 — The Interpretation Act, R.S.O. 1937, c. 1, s. 32(ze).

An action for "the amount owing on account of professional and medical services rendered".

The plaintiff was an incorporated company, and the defendant pleaded s. 50 of The Medical Act, R.S.O. 1937, c. 225, which reads in part as follows:

> 50. No person shall be entitled to recover any charge in any court for any medical or surgical advice, or for attendance, or for the performance of any operation, or for any medicine which he may have prescribed or supplied, unless he produces to the court a certificate that he was registered under the Act at the time the services were rendered.

Gordon Co. Ct. J. **[after quoting s. 50, *supra*]:**

1 The Interpretation Act, R.S.O. 1937, c. 1, provides, in s. 32(*ze*) that the word "person" shall include any body corporate.

2 No evidence was offered at the trial, but the plaintiff produced a certificate from the assistant secretary of the Ontario Medical Association, to the effect that "Drs. W.C. Doyle and John Weinstock were duly qualified medical practitioners, licensed to practise in the Province of Ontario in the year 1939". The alleged services were rendered during the year 1939.

3 There is no evidence to show any connection between Dr. Doyle and Dr. Weinstock and Doyle Clinic Limited, but that fact does not affect my judgment. I am assuming that both doctors are shareholders in the plaintiff corporation and that either or both of them rendered the services in question.

4 In my opinion the plaintiff cannot succeed, because it has not shown it was registered under the Act when the alleged services were rendered. Impossibility of such registration may be apparent, but that does not assist the plaintiff.

5 The plaintiff relies on *Calgary Associate Clinic v. Johnston*, 25 Alta. L.R. 470, [1931] 2 W.W.R. 716, [1931] 4 D.L.R. 247, but I feel that that case is clearly distinguishable. In that case the statement of claim alleged that the plaintiff was a partnership consisting of seven named doctors, "all of whom are members in good standing of the College of Physicians and Surgeons of the Province of Alberta, carrying on business as physicians and surgeons in the city of Calgary." It further alleged that the claim was for an account due the plaintiff for professional services *rendered by one of the named doctors*, at the defendant's request.

6 In my opinion the Alberta case simply reaffirms the right of partners to sue in the firm name. The defence in this connection seems to have been that the individual partners should have been named as plaintiffs, probably with this addition: "carrying on business in partnership under the firm name of Calgary Associate Clinic". The point is that in the above case the doctor who rendered the services was in fact a plaintiff regardless of which style of cause was employed. But it is entirely different where the plaintiff is a body corporate, not a partnership.

7 In his judgment in the Alberta case, Harvey C.J.A. says:

> But I am of opinion that the section does not mean that only a registered doctor can be plaintiff in an action for medical services. If it did, no assignee and no personal representative of a deceased doctor, unless himself a doctor, could recover for services performed by the assignor or the deceased.

8 I agree that an assignee of a doctor's account cannot successfully sue thereon, unless, of course, the doctor be a party to the action. But, with great respect, I cannot agree that the section (the corresponding section in the Alberta statute, The Medical Profession Act, R.S.A. 1922, c. 209, s. 63, is very similar to our s. 50) would prevent the executor or administrator of a doctor's estate from recovering books debts of the deceased doctor, although he might be required to show that the doctor was in good standing, etc., when he rendered the services. The personal representative of a deceased person is not in the same class as an assignee; in law he is the deceased.

9 In the present case I feel that the doctor who rendered the services should have been a party to the action, or should have sued in his own name.

10 *Johnston v. Pepler* (1932), 41 O.W.N. 207, is not in point but I refer to it because it involved s. 50, and the Court held that it was not at liberty to disregard the plain and unambiguous words of the section. I, too, feel that way. The words of the section are decidedly clear; if it was not intended that it should affect a case like this, then I think it might well be amended.

11 Action dismissed with costs.

[1] Presumption against implicit alteration of law

The Construction of Statutes, 7th Ed.

Ruth Sullivan

The Construction of Statutes, 7th Ed. (Sullivan) > CHAPTER 15 Presumed Legislative Intent > § 15.05 Strict Construction of Legislation that Derogates from Established Law

CHAPTER 15 Presumed Legislative Intent

§ 15.05 Strict Construction of Legislation that Derogates from Established Law

[1] Presumption against implicit alteration of law

It is presumed that the legislature does not intend to change existing law or to depart from established principles or practices. This point is made by the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. Ontario Public Services Employees Union*,[1] where Iacobucci J. wrote:

> To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, ... for example, Fauteux J. (as he then was) wrote that "a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed".[2] In *Slaight Communications Inc. v. Davidson*,[3] Lamer J. (as he then was) wrote that "in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law".[4]

On its face, this presumption makes little sense. If the legislature did not intend to change existing law or practice, why was it enacting legislation? To the extent this presumption reflects mere conservatism, or a preference for common law values over legislative ones, it is difficult to justify. But the presumption also reflects rule of law concerns. The stability of law is enhanced by rejecting vague or inadvertent change while certainty and fair notice are promoted by requiring legislatures to be clear and explicit about proposed changes. In addition, the common law has always placed a high value on the harmonization of sources of law. In any event, for better or worse, the presumption is frequently invoked by modern courts and does not seem to have been weakened by reliance on the *Bell ExpressVu* case: that is, it does not seem to be treated as a presumption of last resort.[5]

The justification for the presumption against change was explained by Cromwell J. in *R. v. W. (D.L.)*:

> There is also the related principle of stability in the law. Absent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law, including the common law.... This principle, if applied too strictly, may lead to refusal to give effect to intended legislative change. But it nonetheless reflects the common sense idea that Parliament is deemed to know the existing law and is unlikely to have intended any significant changes to it unless that intention is made clear:.... This principle is reflected in ss. 45(2) and 45(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provide that the amendment of an enactment does not imply any change in the law and that the repeal of an enactment does not make any statement about the previous state of the law.[6]

Footnote(s)

1 [2003] S.C.J. No. 42,[2003] 2 S.C.R. 157 (S.C.C.).

2 [1956] S.C.J. No. 37, [1956] S.C.R. 610 at 614 (S.C.C.).

3 [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 at 1077 (S.C.C.).

[1] Presumption against implicit alteration of law

4 *Parry Sound (District) Social Services Administration Board v. Ontario Public Services Employees Union*, [2003] S.C.J. No. 42, [2003] 2 S.C.R. 157 at paras. 39-40 (S.C.C.). See also *Canada (Attorney General) v. Thouin*, [2017] S.C.J. No. 46, 2017 SCC 46 at para. 19 (S.C.C.); *Lizotte v. Aviva Insurance Company of Canada*, [2016] S.C.J. No. 52, 2016 SCC 52 at paras. 56-57 (S.C.C.); *Heritage Capital Corp. v. Equitable Trust Co*., [2016] S.C.J. No. 19, 2016 SCC 19 at paras. 29-31 (S.C.C.); *Potter v. New Brunswick Legal Aid Services Commission*, [2015] S.C.J. No. 10, 2015 SCC 10 at para. 124 (S.C.C.); *R. v. Summers*, [2014] S.C.J. No. 26, 2014 SCC 26 at paras. 55-58 (S.C.C.); *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, *[2004] S.C.J. No. 19*, [2004] 1 S.C.R. 485 (S.C.C.); *R. v. T.(V.)*, [1992] S.C.J. No. 29, [1992] 1 S.C.R. 749 (S.C.C.).

5 For discussion of the *Bell ExpressVu* case, see above at §15.01[4].

6 *R. v. W. (D.L.)*, [2016] S.C.J. No. 22, 2016 SCC 22 at para. 21. See also para. 54. For a case in which the presumption was rebutted, see *Royal Bank of Canada v. Marmurra*, [2015] N.S.J. No. 44 , 2015 NSCA 12 at paras. 20*ff* (N.S.C.A.).

End of Document

CITATION: Canada (Competition Bureau) v. Chatr Wireless Inc., 2013 ONSC 5315
COURT FILE NO.: CV-10-8993-00 CL
DATE: 20130819

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
THE COMMISSIONER OF COMPETITION	)	J. Thomas Curry, Jaan Lilles, Paul-Erik Veel, for the Applicant
Applicant	)	
	)	
– and –	)	
	)	Kent E. Thomson, Anita Banicevic, James D. Bunting, Sean R. Campbell, Nicholas Van Exan, Andrew Carlson, for the Respondents
CHATR WIRELESS INC. AND ROGERS COMMUNICATIONS INC.	)	
Respondents	)	
	)	
	)	**HEARD:** November 21, 22, 23, 24, 25, 28, 29, 2011 August 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 24, 27, 28, 29, 30, 2012 March 20, 21, 22, 25, 26, 27, 28, April 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17 May 13, 14, 15 & 16, 2013

MARROCCO J.

care to observe that which is staring him or her in the face upon first entering into contact with an entire advertisement." The applicant cites *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265, at paras. 65-68, 71, as authority for its position.

[124] The *Richard v. Time Inc.* decision involved a representation by means of a direct mail campaign to the public at large, and not to a targeted group of consumers. Mr. Richard was convinced that he had been awarded a cash prize of $833,000, and that all he had to do was return a reply coupon to claim his prize. Time Inc. refused to pay. Mr. Richard commenced proceedings in the Québec Superior Court, alleging prohibited business practices contrary to Québec's *Consumer Protection Act*, R.S.Q. c. P-40.1. It is in this context that the Supreme Court of Canada determined that the average consumer contemplated by Québec's *Consumer Protection Act* was credulous and inexperienced.

[125] The respondents contend that in determining the general impression conveyed by the contentious advertisements, the court should consider the advertisements from the perspective of the average consumer to whom the statements were targeted.

[126] There is a difference between the purpose of Québec's *Consumer Protection Act* and the purpose of the *Competition Act*. The Québec legislation is intended to protect vulnerable persons from the dangers of certain advertising techniques: see *Richard v. Time Inc.*, at para. 72. The *Competition Act* is intended to maintain and encourage competition in Canada in order to "provide consumers with competitive prices and product choices": see s. 1.1 of the *Competition Act*.

[127] The difference in purpose between Québec's *Consumer Protection Act* and the *Competition Act* is a relevant consideration in determining the proper consumer perspective to be applied to the contentious representations.

[128] *Richard v. Time Inc.* defines the person considering the advertisement in three ways: credulous, inexperienced and a consumer. I take this as a starting point for determining the proper consumer perspective for the purposes of this Application.

[129] The consumer in *Richard v. Time Inc.* was less of a consideration because that case involved a representation made to the public at large. In this Application, a consideration of the mass media advertising leads to the conclusion that the consumer is a person wanting unlimited talking and texting wireless services, as well as cost certainty.

[130] Accepting that the consumer is credulous in the context of this Application means that the consumer is willing to believe the fewer dropped calls claim because it is contained in public representations to that effect.

[131] The requirement that the consumer be inexperienced is more difficult to apply. The consumer by definition resides in a segment of the wireless services market that wants unlimited talking and texting wireless services. Such a consumer cannot be

comparative nature of the fewer dropped calls claim invites consideration of calls dropped when Wind Mobile and Public Mobile customers are "zipping in and out" of their Wind Mobile and Public Mobile zones. Accordingly, filtering out such calls is not helpful for purposes of this Application.

[397] In addition, this Application carries serious reputational risks, as well as a significant administrative monetary penalty should it succeed. Accordingly, the claim should be somewhat strictly construed. The court should try to avoid altering genuine test results when trying to determine whether the representation is false or misleading.

[398] I am satisfied therefore that Rogers' drive test results after August 9, 2010, understated the difference between Rogers dropped call rate and the dropped call rates of Wind Mobile and Public Mobile during the drive tests because dropped calls due to hard handoffs were filtered out of the drive test results. This does not apply to the Montréal results for September 15-19, 2010, that included dropped calls resulting from hard handoffs.

[399] Mr. Berner testified that, if dropped calls attributed to hard handoffs are added back into the results for drive tests conducted after August 9, 2010, the respondents' network had fewer dropped calls than Wind Mobile and Public Mobile in every drive test conducted between June 16, 2010, and December 15, 2010. I accept his evidence in this regard. While the applicant challenged whether certain differences in dropped call rates were statistically significant, the mathematics of the exercise were not challenged.

[400] At the risk of belaboring the obvious, I have not referred to Videotron because, elsewhere in these reasons, I determined that Videotron would not be viewed by a credulous and technically inexperienced wireless services consumer in the Province of Québec as a new wireless carrier. I have not referred to Mobilicity because, elsewhere in these reasons, I have drawn an adverse inference concerning Mobilicity's dropped call rate during the relevant period. This inference is based on Mobilicity's refusal to cooperate with the Competition Bureau in this proceeding.

Are the drive test results statistically significant?

[401] The applicant also maintains that Rogers' drive test results do not show a statistically significant difference between Rogers' wireless network and the networks of the new wireless carriers. It is the applicant's position that, even if the court considers drive testing an adequate and proper test in principle, it is not sufficient for the court to look at raw drive test dropped call rates and determine that Chatr had the lower rate. It is submitted that the court must also determine whether the differences in dropped call rates are statistically significant.

Her Majesty The Queen *Appellant*

v.

Bevin Bervmary McIntosh *Respondent*

INDEXED AS: R. *v.* McINTOSH

File No.: 23843.

1994: November 28; 1995: February 23.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Defences — Self-defence — Accused charged with second degree murder after stabbing deceased in what he claimed was an act of self-defence — Trial judge instructing jury that words "without having provoked the assault" should be read into s. 34(2) of Criminal Code — Whether self-defence as defined in s. 34(2) is available to initial aggressors — Whether s. 37 outlining basic principles of self-defence should have been put to jury — Criminal Code, R.S.C., 1985, c. C-46, ss. 34(1), (2), 35, 37.

The accused, a disc jockey, had given the deceased, who lived in the same neighbourhood, some sound equipment to repair. Over the next eight months the accused made several attempts to retrieve his equipment, but the deceased actively avoided him. On the day of the killing, the accused's girlfriend saw the deceased working outside and informed the accused. The accused obtained a kitchen knife and approached the deceased. Words were exchanged. According to the accused, the deceased pushed him, and a struggle ensued. Then the deceased picked up a dolly, raised it to head level, and came at the accused. The accused reacted by stabbing the deceased with the kitchen knife. At his trial on a charge of second degree murder the accused took the position that the stabbing of the deceased was an act of self-defence. The trial judge instructed the jury, however, that the words "without having provoked the assault", which appear in the self-defence provision in s. 34(1) of the *Criminal Code*, should be read into s. 34(2), which provides for a self-defence justification for an aggressor who causes death or grievous bodily harm.

Sa Majesté la Reine *Appelante*

c.

Bevin Bervmary McIntosh *Intimé*

RÉPERTORIÉ: R. *c.* McINTOSH

N° du greffe: 23843.

1994: 28 novembre; 1995: 23 février.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Moyens de défense — Légitime défense — Accusé inculpé de meurtre au deuxième degré après qu'il eût poignardé la victime au cours d'un incident relativement auquel il invoque la légitime défense — Directives du juge du procès au jury selon lesquelles l'expression «sans provocation de sa part» devait être considérée comme incluse dans l'art. 34(2) du Code criminel — La légitime défense visée à l'art. 34(2) peut-elle être invoquée par l'agresseur initial? — Le jury aurait-il dû recevoir des directives sur les principes fondamentaux de la légitime défense énoncés à l'art. 37? — Code criminel, L.R.C. (1985), ch. C-46, art. 34(1), (2), 35, 37.

L'accusé, un disc-jockey, avait demandé à la victime, qui vivait dans le quartier, de réparer de l'équipement audio. Au cours des huit mois qui ont suivi, l'accusé a maintes fois tenté de récupérer son équipement, mais la victime faisait tout pour l'éviter. Le jour du meurtre, l'amie de l'accusé a vu la victime travailler à l'extérieur et en a informé l'accusé. Celui-ci s'est procuré un couteau de cuisine et s'est rendu chez la victime. Une altercation a suivi. Selon l'accusé, la victime l'a alors poussé et ils se sont battus. La victime aurait pris un chariot et l'aurait soulevé à la hauteur de la tête en direction de l'accusé. Ce dernier a réagi en poignardant la victime avec le couteau de cuisine. À son procès relativement à une accusation de meurtre au deuxième degré, l'accusé a invoqué la légitime défense. Dans les directives qu'il a données au jury, le juge du procès a cependant dit que l'expression «sans provocation de sa part», qui figure au par. 34(1) du *Code criminel*, devrait être incluse dans le par. 34(2), qui prévoit une justification de légitime défense pour un agresseur qui cause la mort ou des lésions corporelles graves. L'accusé a été déclaré coupa-

Section 34(2), as a defence, acts as a "subtraction" from the liability which would otherwise flow from the criminal offences contained in the *Criminal Code*. *Criminal Code* provisions concerning offences and defences both serve to define criminal culpability, and for this reason they must receive similar interpretive treatment.

28 This principle was eloquently stated by La Forest J.A. (as he then was) in *New Brunswick v. Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201, at p. 210:

> There is no doubt that the duty of the courts is to give effect to the intention of the Legislature as expressed in the words of the statute. And however reprehensible the result may appear, it is our duty if the words are clear to give them effect. This follows from the constitutional doctrine of the supremacy of the Legislature when acting within its legislative powers. The fact that the words as interpreted would give an unreasonable result, however, is certainly ground for the courts to scrutinize a statute carefully to make abundantly certain that those words are not susceptible of another interpretation. For it should not be readily assumed that the Legislature intends an unreasonable result or to perpetrate an injustice or absurdity.
>
> This scarcely means that the courts should attempt to reframe statutes to suit their own individual notions of what is just or reasonable.

29 It is a principle of statutory interpretation that where two interpretations of a provision which affects the liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation. By this same reasoning, where such a provision is, on its face, favourable to an accused, then I do not think that a court should engage in the interpretive process advocated by the Crown for the sole purpose of narrowing the provision and making it less favourable to the accused. Section 34(2), on its face, is available to the respondent. It was, with respect, an error for the trial judge to narrow the

Le paragraphe 34(2), à titre de moyen de défense, permet de «réduire» l'étendue de la responsabilité qui se rattacherait par ailleurs aux infractions criminelles prévues au *Code criminel*. Tant les dispositions du *Code criminel* relatives aux infractions que celles relatives aux moyens de défense visent à définir la responsabilité criminelle, et elles doivent de ce fait être interprétées de façon similaire.

Ce principe a été formulé de façon éloquente par le juge La Forest (maintenant juge de notre Cour) dans *New Brunswick c. Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201, aux pp. 230 et 231:

> [TRADUCTION] Il ne fait aucun doute que le devoir des tribunaux est de donner effet à l'intention du législateur, telle qu'elle est formulée dans le libellé de la Loi. Tout répréhensible que le résultat puisse apparaître, il est de notre devoir, si les termes sont clairs, de leur donner effet. Cette règle découle de la doctrine constitutionnelle de la suprématie de la Législature lorsqu'elle agit dans le cadre de ses pouvoirs législatifs. Cependant, le fait que les termes, selon l'interprétation qu'on leur donne, conduiraient à un résultat déraisonnable constitue certainement une raison pour motiver les tribunaux à examiner minutieusement une loi pour bien s'assurer que ces termes ne sont pas susceptibles de recevoir une autre interprétation, car il ne faudrait pas trop facilement prendre pour acquis que le législateur recherche un résultat déraisonnable ou entend créer une injustice ou une absurdité.
>
> Ce qui précède ne signifie pas que les tribunaux devraient tenter de reformuler les lois pour satisfaire leurs notions individuelles de ce qui est juste ou raisonnable.

En matière d'interprétation des lois, dans le cas où il est possible de donner deux interprétations à une disposition qui porte atteinte à la liberté d'une personne, dont l'une serait plus favorable à un accusé, il existe un principe voulant que la cour devrait adopter l'interprétation qui favorise l'accusé. Dans la même ligne de pensée, dans le cas où une disposition est, à première vue, favorable à un accusé, je ne crois pas qu'un tribunal devrait appliquer la méthode d'interprétation préconisée par le ministère public à la seule fin de restreindre la portée de la disposition et de la rendre ainsi moins favorable à l'accusé. À première vue, l'intimé peut

provisions, but there is no distinct "absurdity approach".

However, assuming for the moment that absurdity by itself is sufficient to create ambiguity, thus justifying the application of the contextual analysis proposed by the Crown, I would still prefer a literal interpretation of s. 34(2).

As stated above, the overriding principle governing the interpretation of penal provisions is that ambiguity should be resolved in a manner most favourable to accused persons. Moreover, in choosing between two possible interpretations, a compelling consideration must be to give effect to the interpretation most consistent with the terms of the provision. As Dickson J. noted in *Marcotte, supra*, when freedom is at stake, clarity and certainty are of fundamental importance. He continued, at p. 115:

> If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.

Under s. 19 of the *Criminal Code*, ignorance of the law is no excuse to criminal liability. Our criminal justice system presumes that everyone knows the law. Yet we can hardly sustain such a presumption if courts adopt interpretations of penal provisions which rely on the reading-in of words which do not appear on the face of the provisions. How can a citizen possibly know the law in such a circumstance?

The *Criminal Code* is not a contract or a labour agreement. For that matter, it is qualitatively different from most other legislative enactments because of its direct and potentially profound impact on the personal liberty of citizens. The special nature of the *Criminal Code* requires an interpretive approach which is sensitive to liberty interests. Therefore, an ambiguous penal provision must be interpreted in the manner most favourable

tenir compte dans l'interprétation de dispositions législatives ambiguës; cependant, il n'existe pas de méthode distincte d'«analyse fondée sur l'absurdité».

Toutefois, même en supposant pour l'instant que l'absurdité en soi suffit à créer l'ambiguïté, nous justifiant ainsi d'appliquer l'analyse contextuelle proposée par le ministère public, je préférerais quand même une interprétation littérale du par. 34(2). 37

Comme je l'ai mentionné, le principe suprême qui régit l'interprétation des dispositions pénales est que l'ambiguïté devrait être tranchée de la façon qui favorise le plus l'accusé. En outre, lorsqu'il faut choisir entre deux interprétations possibles, il est important de donner effet à l'interprétation la plus compatible avec le libellé de la disposition. Comme le juge Dickson l'a fait remarquer dans l'arrêt *Marcotte*, précité, lorsque la liberté est en jeu, la clarté et la certitude ont une importance fondamentale. Il a poursuivi, à la p. 115: 38

> Si quelqu'un doit être incarcéré, il devrait au moins savoir qu'une loi du Parlement le requiert en des termes explicites, et non pas, tout au plus, par voie de conséquence.

En vertu de l'art. 19 du *Code criminel*, l'ignorance de la loi n'est pas une excuse en matière de responsabilité criminelle. Notre système de justice criminelle repose sur le principe que nul n'est censé ignorer la loi. Cependant, nous ne pouvons guère faire valoir cette présomption si les tribunaux, dans leur interprétation des dispositions pénales, décident qu'elles incluent des termes qui, à leur lecture, ne s'y trouvent pas. Comment un citoyen est-il censé connaître la loi dans un tel cas?

Le *Code criminel* n'est pas un contrat ni une convention collective. Il est même qualitativement différent de la plupart des autres textes législatifs en ce qu'il peut entraîner des répercussions directes et vraisemblablement profondes sur la liberté personnelle des citoyens. Compte tenu de son caractère spécial, le *Code criminel* doit être interprété de façon à tenir compte des intérêts en matière de liberté. Par conséquent, il faut interpré- 39

Robert Stewart Pierre Marcotte *Appellant;*

and

The Deputy Attorney General for Canada

and

The Warden of Joyceville Federal Institution *Respondents.*

1974: November 13; 1974: November 27.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Statutes—Interpretation—Ambiguity—Legislative history—Forfeiture of remission on revocation of parole—Penitentiary Act, 1960-61 (Can.), ss. 22, 25—Parole Act, 1958 (Can), ss. 2, 16, 18.

The appellant was serving sentences totalling 15 years imposed on February 28, 1962. He was released on parole but the parole was suspended 45 days later and later revoked. There were 582 days of statutory remission to his credit at the time of his release but upon revocation this accumulated statutory remission was taken by the authorities to have been forfeited. An application for *habeas corpus* with *certiorari* in aid was granted but later set aside by the Court of Appeal.

Held (Martland, Judson, Ritchie and de Grandpré JJ. dissenting): The appeal should be allowed.

Per Laskin C.J. and Spence, Dickson and Beetz JJ.: Whether a paroled inmate whose parole is revoked thereby loses his entitlement to statutory remission standing to his credit at the time of his release on parole depends on the proper construction of the *Penitentiary Act*, as of the date of parole revocation. Section 22 of the Act contains an entire code governing grant and forfeiture of statutory remission. The credit of statutory remission is not a deferred credit but a real and immediate entitlement. Subsections (3) and (4) of s. 22 alone provide for forfeiture of such remission, but then only for conviction in a disciplinary court for a disciplinary offence or conviction in a criminal court for escape or attempted escape. Even in these cases the extent of the forfeiture is subject to certain limitations and controls. Thus a recommitted parolee is required to serve the term that remained unexpired at the time of parole but is

Robert Stewart Pierre Marcotte *Appelant;*

c.

Le sous-procureur général du Canada

et

Le Directeur de l'Institution fédérale de Joyceville *Intimés.*

1974: le 13 novembre; 1974: le 27 novembre.

Présents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz et de Grandpré.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Lois—Interprétation—Ambiguïté—Historique de la législation—Annulation de réduction de peine par révocation de libération conditionnelle—Loi sur les pénitenciers, 1960-61 (Can.), art. 22, 25—Loi sur la libération conditionnelle de détenus, 1958 (Can.), art. 2, 16, 18.

L'appelant purgeait une peine cumulative de 15 ans qui lui avait été infligée le 28 février 1962. Il a été mis en liberté conditionnelle mais celle-ci a été suspendue 45 jours plus tard et ensuite révoquée. Il y avait 582 jours de réduction statutaire de peine inscrits à son crédit au moment de sa mise en liberté, mais lorsque sa libération conditionnelle a été révoquée, cette réduction statutaire accumulée a été considérée par les autorités comme ayant été annulée. Une demande d'*habeas corpus* accompagnée d'un *certiorari* a été accordée, mais par la suite la Cour d'appel l'a écartée.

Arrêt (les juges Martland, Judson, Ritchie et de Grandpré étant dissidents): le pourvoi doit être accueilli.

Le juge en chef Laskin et *les* juges Spence, Dickson et Beetz: la solution du litige, à savoir si un libéré conditionnel dont la libération a été révoquée a ainsi perdu son droit à la réduction statutaire de peine inscrite à son crédit au moment de sa mise en liberté conditionnelle, dépend de la juste interprétation de la *Loi sur les pénitenciers* telle qu'elle existait à l'époque de la révocation de la libération conditionnelle. L'article 22 de la Loi constitue un code complet régissant l'octroi et le retrait de la réduction statutaire. Le crédit de réduction statutaire n'est pas un crédit différé mais un droit véritable et immédiat. Seuls les par. (3) et (4) de l'art. 22 prévoient le retrait d'une telle réduction mais uniquement dans le cas de déclaration de culpabilité prononcée par un tribunal disciplinaire en raison d'une infraction à la discipline ou de déclaration de culpabilité prononcée par un tribunal criminel en raison d'une infraction relative à l'éva-

ordinary meaning of the words used in s. 16(1) of the *Parole Act* (the earlier counterpart of which was s. 9(1) of the *Ticket of Leave Act*).

Even if I were to conclude that the relevant statutory provisions were ambiguous and equivocal—a conclusion one could reach without difficulty on reading *Re Morin*[3], *R. v. Howden*[4], *Ex Parte Hilson*[5], *Re Abbott*[6], and then reading *Ex Parte Kolot*[7] and *Ex Parte Rae*[8]—I would have to find for the appellant in this case. It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.

I would allow the appeal, set aside the judgment of the Court of Appeal and reinstate the judgment of Henderson J.

The judgment of Martland, Judson, Ritchie and de Grandpré JJ. was delivered by

MARTLAND J. (*dissenting*)—I agree with the reasons given by Martin J.A. in the Court of Appeal, with which Gale C.J.O. agreed. I would dismiss this appeal.

PIGEON J.—I agree with Dickson J.'s conclusion on his view that under the law in force when appellant's parole was revoked this did not involve

[3] (1968), 66 W.W.R. 566.
[4] [1974] 2 W.W.R. 461.
[5] (1973), 12 C.C.C. (2d) 343.
[6] (1970), 1 C.C.C. (2d) 147.
[7] (1973), 13 C.C.C. (2d) 417.
[8] (1973), 14 C.C.C. (2d) 5.

le Parlement n'a pas voulu inclure aucune mesure de déchéance dans les art. 22 à 25 de la nouvelle loi et que rien dans ces articles ne peut toucher le sens clair et ordinaire des mots employés au par. (1) de l'art. 16 de la *Loi sur la libération conditionnelle de détenus* (dont le par. (1) de l'art. 9 de la *Loi sur les libérations conditionnelles* était antérieurement l'équivalent).

Même si je devais conclure que les dispositions pertinentes sont ambiguës et équivoques—une conclusion à laquelle on peut arriver sans difficulté en lisant les arrêts *Re Morin*[3], *R. v. Howden*[4], *Ex Parte Hilson*[5], *Re Abbott*[6], et en lisant ensuite *Ex Parte Kolot*[7], et *Ex Parte Rae*[8]—je devrais conclure en faveur de l'appelant en l'espèce. Il n'est pas nécessaire d'insister sur l'importance de la clarté et de la certitude lorsque la liberté est en jeu. Il n'est pas besoin de précédent pour soutenir la proposition qu'en présence de réelles ambiguïtés ou de doutes sérieux dans l'interprétation et l'application d'une loi visant la liberté d'un individu, l'application de la loi devrait alors être favorable à la personne contre laquelle on veut exécuter ses dispositions. Si quelqu'un doit être incarcéré, il devrait au moins savoir qu'une loi du Parlement le requiert en des termes explicites, et non pas, tout au plus, par voie de conséquence.

Je serais d'avis d'accueillir l'appel, d'infirmer l'arrêt de la Cour d'appel et de rétablir le jugement du juge Henderson.

Le jugement des juges Martland, Judson, Ritchie et de Grandpré a été rendu par

LE JUGE MARTLAND (*dissident*)—Je souscris aux motifs énoncés par le juge d'appel Martin en Cour d'appel, motifs auxquels le juge en chef de l'Ontario, le juge Gale, a souscrit. Je suis d'avis de rejeter cet appel.

LE JUGE PIGEON—Je souscris à la conclusion du juge Dickson en adoptant son avis que, suivant le droit en vigueur lorsque la libération condition-

[3] (1968), 66 W.W.R. 566.
[4] [1974] 2 W.W.R. 461.
[5] (1973), 12 C.C.C. (2d) 343.
[6] (1970), 1 C.C.C. (2d) 147.
[7] (1973), 13 C.C.C. (2d) 417.
[8] (1973), 14 C.C.C. (2d) 5.

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

44th PARLIAMENT, 1st SESSION

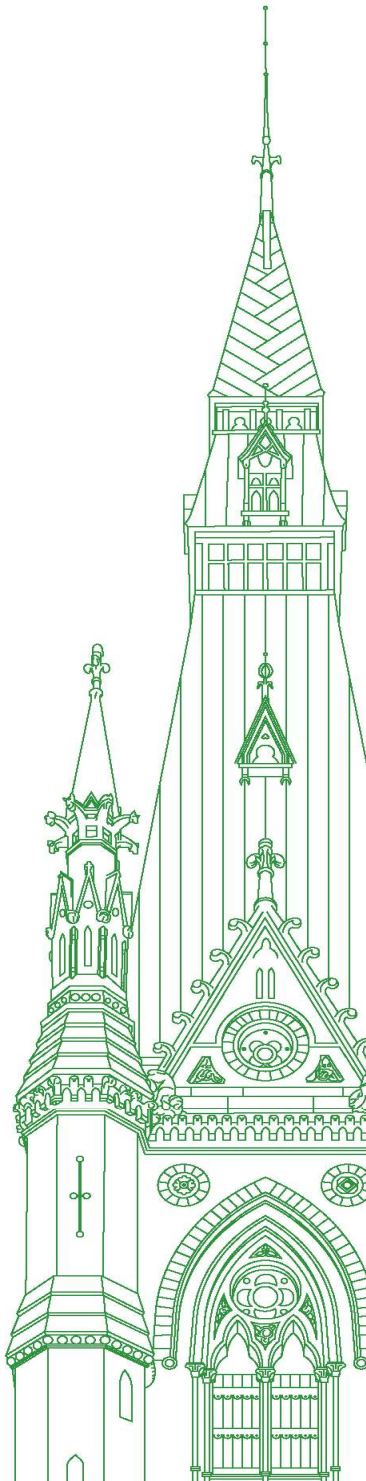
House of Commons Debates

Official Report

(Hansard)

Volume 151 No. 065

Thursday, May 5, 2022



Speaker: The Honourable Anthony Rota

Their goal is simple, which is to ensure that Canadians have a home, to create memories for them and their families. We need to build. That is what we will be doing, and that is what these individuals and these firms do. We will work with them and we will work with the municipalities to ensure that we increase the supply of new home construction across Canada and more than double housing construction over the next 10 years.

On my last topic, I am a strong believer in our free market economic system and in competition. Competition leads to innovation and, yes, disruption as well, but competition in our free market and our capitalist system has brought with it the highest standards of living and pulled literally billions of individuals across the globe out of poverty.

However, competition can be eroded. When anti-competitive practices take hold, and with that, I have long advocated for changes and the strengthening of Canada's Competition Act to ensure that business practices do not hold back innovation and competition, it can be detrimental to the interests of consumers and employees. We must hold back on that.

With that, I am pleased to see, in Bill C-19 significant amendments to the Competition Act, which I know are highly technical, but they are very important. They include a proposed criminal offence for so-called wage-fixing and no-poaching agreements between competitors; an explicit prohibition against drip pricing; private access to Canada's Competition Tribunal for abuse of dominance claims; an increase in administrative monetary penalties; an expansion of the scope of the competition bureau's evidence-gathering powers pertaining to section 7; an expansion of the list of factors that may be considered when assessing the prevention and lessening of competition for merger review and non-criminal competitor collaborations; and the amendment of the definition of anti-competitive act for abuse of dominance.

Competition is the essence of our free market and capitalist system. It is wonderful to see the Minister of Finance and Deputy Prime Minister, along with the Minister of Innovation and their teams, collaborating and working in unison to ensure that anti-competitor practices are both disallowed and that the Competition Act be modernized, which we will need to continue to work on for the penalties to be updated.

There is nothing more important to someone like me than to see healthy competition that leads to innovation, job creation and a growing and strong middle class, and there is nothing that makes me angrier and makes me speak out more than when I see anti-competitive practices take hold in any markets.

● (1240)

Mr. Dan Albas (Central Okanagan—Similkameen—Nicola, CPC): Mr. Speaker, I appreciate the hon. member's intervention today and his attendance at the occasional finance meeting, where we can discuss housing inflation, among other things.

He mentions, specifically, the so-called foreign buyers ban in Bill C-19. The minister has to, first of all, identify a particular property that falls outside the many loopholes and exemptions the government has given for all sorts of people, but if they legitimately find it, the minister has to go through a provincial court process, which can take years, and the ultimate slap on the wrist is $10,000.

Does the hon. member think that taking up court time and years of process to have someone who has violated the law of this country be fined $10,000 is sufficient? Does he think it should be much higher than that?

Mr. Francesco Sorbara: Mr. Speaker, I thank my hon. colleague and friend from the riding of Central Okanagan—Similkameen—Nicola, where they produce a lot of beautiful wine.

I will say this: We need to provide incentives to build and increase the supply of housing in Canada. We are going to be doing that, but we also need to restrain and lower the number of purchases being undertaken by foreigners. We need to have a plan for Canada's housing market to put Canadians first. That is what we are doing. We need to ensure middle-class Canadians and first-time homebuyers have the first opportunity to purchase homes here in the country where they live, work and pay taxes.

[*Translation*]

Mr. Sébastien Lemire (Abitibi—Témiscamingue, BQ): Madam Speaker, I am pleased that my colleague is interested in the housing issue, but it is the construction of homes that is the urgent issue. Supply and demand is a game. The problem is that the supply is inadequate, and this is causing prices to skyrocket. That is the case in major centres, but all too often we forget that this is also happening in the regions and rural areas.

Could my colleague take action to ensure that the funding does not all go to the Toronto region, as is often the case in the Canadian economy with government projects?

Could he take action to ensure that remote and rural regions get their share of the pie and ensure that supply increases in the regions?

We want to address the labour shortage, but the first problem is that people cannot find housing.

Mr. Francesco Sorbara: Madam Speaker, I thank my colleague from Abitibi—Témiscamingue for his question.

[*English*]

I will say this: Housing is an issue from coast to coast to coast. We will act in the interests of all Canadians, be it urban, rural or semi-urban. In whatever category and whatever city, we will work with all our municipal partners and all our provincial partners to ensure that housing gets built, to get shovels in the ground and to increase that supply, which we know we need to do. Supply has not kept up to the need for several years. We need to make those adjustments very quickly.

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

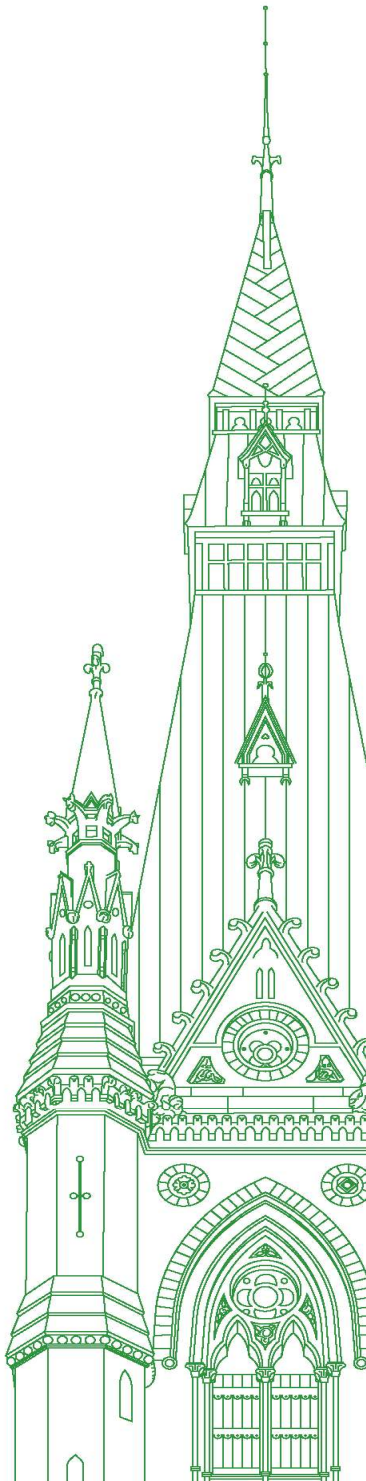
44th PARLIAMENT, 1st SESSION

Standing Committee on Finance

EVIDENCE

NUMBER 049

Thursday, May 19, 2022



Chair: Mr. Peter Fonseca

Let me just say that competition policy is a major focus of the provisions of Bill C-19. It's also a major focus for the C.D. Howe Institute, particularly of my colleague Ben Dachis, who has been introduced already. He's our internal lead on the institute's competition policy council, and I turn my remaining time over to Ben.

Mr. Benjamin Dachis (Associate Vice-President, Public Affairs, C.D. Howe Institute): Thank you very much, Bill.

The C.D. Howe Institute's competition policy council, which is comprised of top-ranked competition law academics and practitioners, noted support for the government's intention articulated in budget 2022 to consult broadly on the role and functioning of the Competition Act and its enforcement regime. However, the scope of changes to the Competition Act in the BIA does not fulfill that commitment. The BIA contains major changes that, even if in the right direction, consultation might have improved the outcome. Many more changes, especially on increasing administrative monetary penalties, will be harmful to the Canadian economy and may even be unconstitutional.

The government missed key opportunities to consult with the various constituencies affected by the legislation. The government and this committee should reconsider the BIA's approach on Competition Act amendments. Now, if carving division 15 isn't feasible, which is my recommendation, the committee should call for, at a minimum, setting the proclamation date for all provisions, not just some, for a year from passage.

We also need to hear more from government on their plans for further consultation, as they had promised, so that these proposed changes could then be seen in concert with other proposed changes that would come as part of a prompt second stage of the Competition Act amendments.

Given my limited time for opening remarks, I'll stop there and leave further discussion of specific problems for the questions.

● (1600)

The Chair: Thank you, Mr. Dachis.

Mr. Robson, I understand you're only here until 4:30. Is that correct?

Mr. William Robson: That's correct.

The Chair: Now we'll hear from the Canadian Labour Congress, please.

Ms. Siobhan Vipond (Executive Vice-President, Canadian Labour Congress): Good afternoon, Chair and honourable members.

My name is Siobhán Vipond. I am the executive vice-president of the Canadian Labour Congress. I am honoured to be joining you today from the traditional unceded territories of the Anishinabe and Algonquin peoples.

We at the CLC speak on behalf of working people in Canada in every industry, occupation and region of the country. The congress welcomes many aspects of the budget implementation bill. The introduction of a labour mobility tax deduction, improvements to Canada's trade remedy legislation and restoring the prohibition on wage-fixing in the Competition Act are all steps that Canada's unions have been urging the government to take.

However, there is a great deal that is missing from this bill. Budget 2022 provides an additional $2 billion one-time top-up to provinces and territories for health services, yet health workers are facing dire staffing shortages and growing burnout. The bill fails to take urgent action to improve the retention and recruitment needed to address this crisis.

Also missing is action to help Canada's care workers, including in early learning and child care and in long-term care. To appreciate the scale of this problem, in March, Statistics Canada estimated the value of unpaid care at between $515 billion and $680 billion.

The budget takes steps on housing affordability and transit shortfalls, but it falls short of addressing the affordability crisis facing working people. The cost of food, fuel and shelter has shot up while wages lag far behind. Workers' spending power is falling. Living standards are declining for workers whose real wages are dropping at the fastest rate in memory. Pensioners who lost inflation-protected pensions are seeing their fixed incomes quickly eroded by soaring inflation.

The government should be urgently responding to this crisis by taxing corporate superprofits, housing speculators and the concentrated wealth of the richest Canadians; allowing wages to rise by strengthening labour standards and removing barriers to unionization; and strengthening social programs by implementing national pharmacare and dental care, quickly getting child care fees down and expanding free high-quality public transit.

Instead, the government is ramping up employers' access to vulnerable migrant workers, while the Bank of Canada is preparing to hike interest rates in the hopes that it will cool inflation. These measures are going to hurt working-class households and worsen inequality while doing nothing to tackle the entrenched power and corporate greed responsible for price-gouging and pandemic profiteering.

Let me end with some specific recommendations for amending Bill C-19, starting with the EI board of appeal.

For many years, labour and community organizations have struggled to restore important elements of the EI boards of referees that were scrapped by Stephen Harper's government in 2012. EI appeals should be heard by worker and employer representatives: people who understand their communities and the realities of workplace life.

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

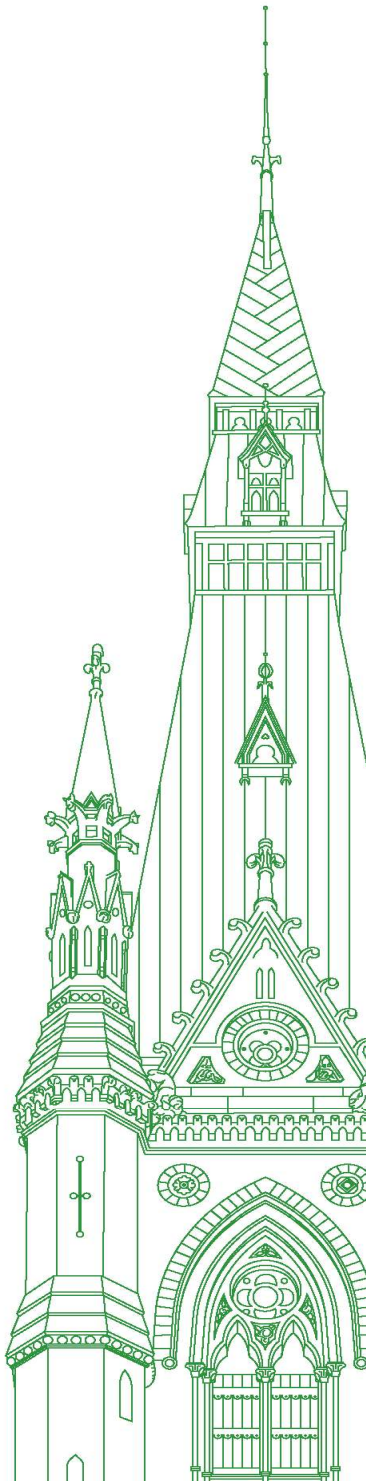
44th PARLIAMENT, 1st SESSION

Standing Committee on Industry and Technology

EVIDENCE

NUMBER 025

Friday, May 20, 2022



Chair: Mr. Joël Lightbound

On the modifications to the abuse of dominance provisions, I think these were proposed by Professor Iacobucci, who is very cautious about modifying the act, but he thinks there's a gap, and I tend to agree with him. Again, it's not perfect, and maybe we're going to restructure abuse of dominance completely differently after the consultation, but for now I'm not sure this is going to create a huge problem in the short term, as cases on abuse of dominance take time to bring together and analyze.

On the general anti-avoidance and the revisions to section 11, these were both requests by the commissioner, and I think we need to keep in mind that.... I can't substitute my judgment for what they think is necessary. Maybe this committee can ask them for further details and examples to give a dimension to the problem. Is there an anti-avoidance problem? I can't comment factually about whether this is an overreach or whether this is going to be a problem. I'm sure my friends from the CBA will have more to say on that.

I want to conclude—and I know I'm over time—by saying that this is step one. I'm trying to be practical and give you suggestions for how to get to step two, which is the really important game. We need this consultation; we need the substantive analysis.

● (1340)

[*Translation*]

I can't stress enough the importance of holding as broad of a consultation as possible.

Our economic policy and Competition Act must be updated, but it needs to be done in a way that helps define the main values we're seeking to promote through our economic policy. The creation of a robust governance architecture, particularly in terms of digital technology, and the passing of coherent laws are not possible without this essential step.

I'll stop here. I'm available to answer any questions from the members of the committee.

The Chair: Thank you very much, Ms. Quaid.

Mr. Wu, you now have the floor.

[*English*]

Mr. William Wu (Partner, Competition, Antitrust and Foreign Investment, McMillan LLP, As an Individual): Thank you very much for this opportunity to appear before the committee. My name is William Wu. I'm a partner in the competition and foreign investment group at McMillan in Toronto.

It has been almost 15 years since the last major review of Canadian competition law and competition policy. I think everybody here would agree that it is time for another review of Canadian competition law. In this regard, I applaud Minister Champagne for announcing a broad review of the Competition Act. That consultation will need to be broad and inclusive. I think everybody here would agree with that.

With that in mind, it is unclear to me why we need to have all these amendments done through this process right now, when the broader consultation is coming in the next couple of months, I believe. In relation to the wage-fixing and no-poaching provision in particular, in the bill itself that provision is only intended to come into force one year after the BIA receives royal assent. It already contemplates that something more needs to be done to that provision. With that delay already built in, I see no compelling reason why that provision in particular needs to be rushed through this regulatory process right now.

In terms of the substance of the no-poaching and wage-fixing provision, I share Professor Quaid's concern that using criminal law to deal with this issue may not be appropriate. Looking at the wage-fixing and no-poaching agreement, I think we can really conceive of it as a competition law issue or as a labour and employment law issue. To the extent that it is a competition law issue, the concern would be that employers are agreeing not to compete in their hiring or compensation practices. If that is a concern, I would say that using criminal law to create a per se prohibition is too blunt an instrument.

There are a lot of legitimate and pro-competitive reasons why employers might want to talk to each other about their hiring and compensation practices. I can speak to those in more detail later. It is not obvious at all that these types of agreements will always cause harm to employees by depriving them of higher wages or job opportunities. In that context, given that there can be harmful no-poaching and wage-fixing agreements and there can be legitimate ones as well, using the existing civil reviewable practices provision in section 90.1 of the act is an appropriate competition law framework to address these issues.

To the extent that the concern is the protection of workers, in particular low-wage workers, that is traditionally within the ambit of provincial labour and employment law and less of a competition law issue. I would submit that labour and employment law and labour and employment law regulators are better equipped and have better expertise and experience in dealing with those issues.

I will stop here for now, given the short time today. I would be happy to answer questions. I do have other views on other amendments, particularly the drip pricing provision, which I can speak to during questions.

● (1345)

The Chair: Thank you very much, Mr. Wu.

I will now move to Mr. Dachis.

Mr. Benjamin Dachis (Associate Vice-President, Public Affairs, C.D. Howe Institute): Thank you very much.

I have the great pleasure of working with the C.D. Howe Institute's competition policy council, which is comprised of top-ranked competition law academics and practitioners. Elisa Kearney, whom you will be hearing from later today in her role at the CBA, is the chair of the council.

The core concern of the council is that the scope of changes to the Competition Act and the BIA is not fulfilling the commitment articulated in budget 2022 to consult broadly on the role and functioning of the Competition Act and its enforcement regime. Let me address some of the problems that could have been fixed with consultation on the specifics of the bill.

First, the changes proposed in the BIA result in corporations now facing administrative monetary penalties, or AMPs, of up to 3% of annual worldwide gross revenues. The legal details really matter here. If an AMP is penal in nature rather than a deterrent, then it is effectively a criminal penalty. The alleged offender must be tried in accordance with the due process requirements of section 11 of the Charter of Rights and Freedoms. Neither the misleading advertising nor the abuse of dominance provisions that attract these significant penalties are criminal offences.

The burden of proof to be convicted is a lower balance of probability standard. The increase to the fines to be set on global revenues of a firm—this is a critical part—that are not directly related to the harms of the practice greatly raises the likelihood that the fines could be found as penal and therefore unconstitutional.

[*Translation*]

Mr. Sébastien Lemire (Abitibi—Témiscamingue, BQ): Thank you, Mr. Chair. This is the second time that the interpreter has mentioned problems with sound while the witness was speaking.

[*English*]

Mr. Benjamin Dachis: Is that any better?

The Chair: It seems to be a network issue, but if you can, speak a little more slowly, Mr. Dachis.

Mr. Benjamin Dachis: Sure. I'm sorry about that.

With such large potential penalties, there's a risk of over-deterrence, and firms may shy away from practices that may be beneficial for Canadians. These potential fines raise reputational risks for Canada as not being supportive of foreign investment, given that fines will be disproportionately large for foreign multinationals.

The risks of over-deterrence are magnified by the changes in the BIA to allow private parties access to the tribunal to make a complaint about abuse of dominance. Although private litigants do not have the ability to receive damages themselves, the defendants in a privately brought case of abuse of dominance will face a large potential fine that will be paid to the government. This goes well beyond the appropriate role—and there is an appropriate role for private litigation in abuse of dominance—and risks creating “private sheriffs”, where competitor-driven complaints before the tribunal may result in government levying disproportionate fines against parties.

Moving to wage-fixing and no-poach agreements, there are very sound legal and economic reasons to address them. Price-fixing and wage-fixing are economically similar. However, as we've heard a couple of times today, the language of the new amendment is overly broad and creates great uncertainty.

There is uncertainty about whether the term “employee” captures all categories of workers. There's no definition of “employer” and “employee” in the Competition Act. Given the changing nature of employment, as well as the varying provincial definitions of employee-employer relationships, the proposed amendments would benefit from proper consultation with employment law experts directly from the government, rather than what a single committee like this or a single senator like Senator Howard Wetston can manage on their own.

I can get to various approaches on how to deal with wage-fixing in the questions, but William Wu is a real expert on this, so I defer to him in particular.

The last thing on substance is that the identification of privacy as a specific characteristic of non-price competition, separate from product quality, raises particular questions. If privacy is distinct from product quality, what does this really mean? Will competition law cases—mergers, for example—turn on a privacy issue even if competition issues are otherwise unproblematic? Once again, the amendment would have benefited from broader consultation.

Let me close on the core problem, and that's process. The problems of the BIA are reminiscent of similar process concerns that accompanied the legislative changes to the Competition Act in 2009 via the budget process. Some of the proposed amendments in the BIA now reflect legislative fixes to fix that flawed process, yet by following the same flawed process, the inevitable result is an overcorrection and the need for legislative amendments in the future, which, more importantly, do not achieve the government's objective of improving the operation of the Competition Act.

What's the practical bottom line? Carving division 15 out of the BIA would be the right approach. If that isn't feasible, the committee should call for setting the proclamation date for all provisions—not just some—for a year from passage. We also need to hear more from the government on their plans for further consultation, as they promised.

These proposed changes can be seen in concert with other proposed changes that would come as part of a prompt second stage of Competition Act reviews. Proceeding right to these amendments, especially ones that may be unconstitutional, taking force without further consultation could be potentially reckless. We can work out the details of the implementation of changes before they take effect, with a later proclamation.

I'll leave my opening remarks there, and I look forward to your questions.

Thank you again for the invitation to speak on this issue.

● (1350)

The Chair: Thank you very much, Mr. Dachis.

Regina ex rel. Vezina v. Canadian Broadcasting Corp. et al.

[Indexed as: R. v. Canadian Broadcasting Corp.]

Ontario Court (General Division), Borins J. May 12, 1992.

ing system with a view to implementing the broadcasting policy enunciated in section 3". As a matter of broadcasting policy, s. 3(*d*) declares that "the programming provided by the Canadian broadcasting system . . . should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern . . .". Section 6(1)(*b*)(iii) empowers the C.R.T.C. to make regulations "respecting the proportion of time that may be devoted to broadcasting programs, advertisements or announcements of a partisan political character and the assignment of the time on an equitable basis to political parties and candidates". Section 8 of the *Television Broadcasting Regulations* made pursuant to s. 6(1)(*b*)(iii) of the Act states that a "licensee shall allocate time for the broadcasting of programs, advertisements or announcements of a partisan political character on an equitable basis to all accredited political parties and rival candidates represented in the election". Section 8 does not require that broadcasters provide time for partisan political broadcasting to the parties and their candidates; on the assumption that the broadcasters have provided such time, it requires that the time be allocated on an equitable basis among the parties.

However, with respect to federal elections the *Canada Elections Act* contains a complete code governing the duty of broadcasters to provide paid time and free time to each political party "for the transmission of political announcements and other programming produced by or on behalf of those parties" and contains a formula for the allocation of such time among the parties which is final and binding on the parties. Although the *Canada Elections Act* does not use the term "partisan political character", it is reasonable to conclude that a program "produced by on behalf of" a party will be a program the purpose of which is to advocate the platform and policies of that party and, therefore, constitute a program which can be characterized as a program of a "partisan political character". It follows that to the extent that s. 8 of the regulations is legislation requiring broadcasters to allocate on an equitable basis among political parties contesting a federal election time provided by them for partisan political programming it is in conflict with the provisions of the *Canada Elections Act* governing the allocation of paid time and free time for political broadcasting during the period of a federal election.

It is a well-established principle that where enactments in two statutes pertain to the same subject and are in conflict, a specific enactment takes precedence over a general enactment: see, *e.g.*, *Gatz v. Kiziw* (1958), 16 D.L.R. (2d) 215, [1959] S.C.R. 10; *Upper Canada College v. City of Toronto* (1916), 32 D.L.R. 246, 37

O.L.R. 665 (C.A.); *Ontario and Sault Ste. Marie R.W. Co. v. Canadian Pacific R.W. Co.* (1887), 14 O.R. 432 (Ch. Div.); *Re Regional Municipality of Ottawa-Carleton and Voyageur Colonial Ltd.* (1974), 51 D.L.R. (3d) 161, 5 O.R. (2d) 601 (Div. Ct.); *R. v. Greenwood* (1992), 70 C.C.C. (3d) 260, 10 C.R. (4th) 392, 7 O.R. (3d) 1 (C.A.).

This principle was discussed in *R. v. Greenwood*, *supra*, by Griffiths J.A. at pp. 265-6:

> It is a fundamental principle of statutory construction that in approaching the interpretation of two statutes in apparent conflict, the court should attempt, if possible, to resolve the contradiction and try to harmonize them. Parliament should be presumed consistent in its intention and any apparent repugnancy should be avoided by reconciling the two enactments where possible: see Côté, *The Interpretation of Legislation in Canada* (1984), at pp. 279 and 284-5.
>
> In *Greenshields v. The Queen* (1958), 17 D.L.R. (2d) 33, [1958] S.C.R. 216, [1959] C.T.C. 77, the Supreme Court of Canada was called upon to reconcile a statutory conflict. Locke J., although dissenting in the result, expressed the applicable principle of statutory construction at pp. 42-3 as follows:
>
> > "In the case of conflict between an earlier and a later statute, a repeal by implication is never to be favoured and is only effected where the provisions of the later enactment are so inconsistent with, or repugnant to, those of the earlier that the two cannot stand together. Unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal cannot be implied. Special Acts are not repealed by general Acts unless there be some express reference to the previous legislation or a necessary inconsistency in the two Acts standing together which prevents the maxim *generalia specialibus non derogant* being applied (Brooms's Legal Maxims, 10th ed., p. 349: Maxwell . . . *op. cit.*, p. 176)."
>
> The maxim *generalia specialibus non derogant* referred to by Locke J. means that, for the purposes of interpretation of two statutes in apparent conflict, the provisions of a general statute must yield to those of a special one. In *Re Township of York and Township of North York* (1925), 57 O.L.R. 644 (S.C.), Riddell J.A. states the principle at pp. 648-9:
>
> > "It is, of course, elementary that special legislation overrides general legislation in case of a conflict — the general maxim is *Generalia specialibus non derogant — see Lancashire Asylums Board v. Manchester Corporation*, [1900] 1 Q.B. 458, at p. 470, *per* Smith, L.J. — even where the general legislation is subsequent: *Barker v. Edgar*, [1898] A.C. 748, at p. 754, in the Judicial Committee. The reason is that the Legislature has given attention to the particular subject and made provision for it, and the presumption is that such provision is not to be interfered with by general legislation intended for a wide range of objects: Craies on Statute Law, 3rd ed., p. 317."
>
> Applying this maxim of construction, the provisions of the special statute are not construed as repealing the general statute but as providing an exception to the general. In the Supreme Court of Canada decision of *Ottawa*

v. Eastview, [1941] 4 D.L.R. 65 at p. 77, [1941] S.C.R. 448, 53 C.R.T.C. 193, Rinfret J. said:

> "The principle is, therefore, that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception of the subject matter of the rule from the general Act . . ."

By treating the special legislation as creating an exception to the general, the two statutes are then brought into harmony.

The question of what constitutes special legislation as opposed to general legislation must, in itself, be a matter of construction involving a careful examination of the over-all schemes of the two pieces of legislation to determine Parliament's intention.

As I have illustrated, it is the *Canada Elections Act* which is the special legislation as it governs federal elections and it is ss. 303 to 322 which govern all aspects of political broadcasting during and in respect to federal elections. The *Broadcasting Act* and Regulations made under it by the C.R.T.C., although in one sense special legislation in respect to the Canadian broadcasting system and broadcasting policy, is general legislation in respect to political broadcasting affecting federal elections.

Even though I have reached the conclusion that s. 8 of the regulations has no application to political broadcasts during a federal election campaign, I would agree with the opinion of the trial judge that properly interpreted s. 8 has no application to leadership debates. He based his conclusion on two grounds — s. 8 "applies to free or paid time allocated to each political party on an individual basis" and not to leadership debates and, in any event, a leadership debate is not a program of a partisan political character". It will be helpful to repeat s. 8:

> 8. During an election period, a licensee *shall allocate time* for the broadcasting of programs, advertisements or announcements *of a partisan political character* on an equitable basis to *all accredited political parties* and rival candidates represented in the election or referendum.

(Emphasis added.)

It is common ground that a leadership debate is a program within the definition of "program" in the regulations which I have reproduced on p. 20 [*ante*, p. 558]. The dispute between the appellant and the respondents is whether or not a leadership debate is a program "of a partisan political character". In my view, there is nothing ambiguous about this phrase. The key word in it is "partisan". In Black's Law Dictionary, 5th ed. (1979), St. Paul; West Publishing Co., at p. 1008, "partisan" is defined as follows: "An adherent to a particular party or cause as opposed to the

NOVA SCOTIA COURT OF APPEAL

Citation: *Antigonish (County) v. Antigonish (Town)*, 2006 NSCA 29

Date: 20060307
Docket: CA 242677
Registry: Halifax

Between:

Town of Antigonish

Appellant

v.

Municipality of the County of Antigonish

Respondent

Judges: Cromwell, Freeman and Oland, JJ.A.

Appeal Heard: September 23, 2005, in Halifax, Nova Scotia

Held: Appeal dismissed without costs per reasons for judgment of Oland, J.A.; Freeman and Cromwell, JJ.A. concurring.

Counsel: John MacPherson, Q.C. and Jack Innes, Q.C., for the appellant
Robert Grant, Q.C. and Nancy Rubin, for the respondent
Bruce Outhouse, Q.C., for the Nova Scotia Utility and Review Board, not present
Edward Gores, Q.C., for the Attorney General of Nova Scotia, not present
Gary Cusack in person, for the Antigonish Chamber of Commerce, not present

> legislation rather than on isolated words in specific provisions. When I read the **Sarnia-Lambton Act** as a whole and, in particular, those provisions specifically relating to the amalgamation of Old Sarnia and Clearwater, I am satisfied that it was intended that the two former municipalities should be rolled into one and continued as a single undertaking. In the language of Dickson, J., in **Black and Decker**, supra, at p. 421, "the end result is to coalesce to create a homogeneous whole". Or to use the words of Kelly, J.A., in **Stanward Corp. v. Denison Mines Ltd.**, [1966] 2 O.R. 585 (C.A.), at p. 592, the legislative intent was "to provide that what were hitherto two shall continue as one".

See also Rogers, *The Law of Canadian Municipal Corporations*, Vol. 1 (Toronto: Carswell, 2003) which states at p. 71:

> . . . An "amalgamation" has been defined as a fusion of two or more legal entities into a continued new union with the obligations, by-laws and assets of the former municipalities. . . .

[53] I am, however, not convinced that because the proposed amalgamation will result in the dissolution of the Town, the Board exceeded its jurisdiction by considering the Municipality's amalgamation application.

[54] After all, s. 358 begins "Municipalities may be amalgamated. . ." and, as set out earlier, the term "municipality" is defined at s. 3(aw) to "mean . . . a town". The Town's argument that s. 394 prevents amalgamations involving towns completely fails to acknowledge or to apply the statutory definition to the term "municipality" as established by the Legislature in the *Act*.

[55] As to the Town's submission that there is no precedent for the dissolution of a town being brought about by the amalgamation application made pursuant to s. 358 this, of course, is nothing more than the natural consequence of the fact that the Municipality's application for amalgamation is apparently the first under that provision.

[56] The Town then argues that the matter falls under the principle of construction that, within a statute, special provisions prevail over general ones. It says that consequently, s. 358 which deals with amalgamations should give way to s. 394 which deals with the dissolution of a town. Professor Sullivan set out the principle thus at p. 273:

> **Implied exception (generalia specialibus non derogant).** When two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.

[57] In my view, there is no conflict such as that put forward by the Town. Sections 358 and 394 have different purposes. The purpose of the former is to permit the Board to hear applications for the amalgamation or annexation of municipalities. The purpose of the latter is to permit it to hear applications for the dissolution of a town. As discussed earlier, an amalgamation results in the loss of the identities of the amalgamating entities and their continuation as a new one. Again, a conflict arises only if one refuses to ascribe to the term "amalgamation" in s. 358 its plain and ordinary meaning and refuses or fails to apply the statutory definition given to the term "municipality."

[58] In the result, I am not satisfied that the Board exceeded its jurisdiction because a s. 358 amalgamation would result in the dissolution of the Town.

Irrelevant Factors

[59] According to the Town, the Board considered irrelevant factors in reaching its preliminary conclusion that amalgamation, rather than annexation, was in the best interests of the inhabitants of the area and thus exceeded its jurisdiction. In particular, the Town says that the Board took into account the existence of the Village of Havre Boucher, and eligibility for equalization funding under the *Municipal Grants Act*, supra. I will address each in turn.

(a) The Village of Havre Boucher

[60] In order to appreciate the Town's argument regarding the Village, it would be helpful to set out the effect of the incorporation of a regional municipality and an order for the amalgamation of all municipalities in a county as it pertains to the Village. In the former situation, the "municipal governments" in the area to be incorporated as a regional municipality are dissolved and their assets and liabilities are vested in the regional municipality (s. 379(1) and (2) of the *Act)*. Since Havre Boucher Village Commission comprises a "municipal government" under s. 3(ar)

RJR-MacDonald Inc. *Appellant*

v.

The Attorney General of Canada *Respondent*

and

Imperial Tobacco Ltd. *Appellant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Attorney General for Ontario, the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, the Canadian Medical Association, and the Canadian Lung Association *Interveners*

INDEXED AS: RJR-MACDONALD INC. *v.* CANADA (ATTORNEY GENERAL)

File Nos.: 23460, 23490.

1994: November 29, 30; 1995: September 21.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Division of powers — Charter of Rights — Freedom of expression — Commercial advertising — Cigarette advertising banned — Whether or not legislation validly enacted under criminal law

RJR-MacDonald Inc. *Appelante*

c.

Le procureur général du Canada *Intimé*

et

Imperial Tobacco Ltd. *Appelante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

Le procureur général de l'Ontario, la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, l'Association médicale canadienne et l'Association pulmonaire du Canada *Intervenants*

RÉPERTORIÉ: RJR-MACDONALD INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

N^os^ du greffe: 23460, 23490.

1994: 29, 30 novembre; 1995: 21 septembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Partage des compétences — Charte des droits — Liberté d'expression — Publicité commerciale — Publicité de la cigarette interdite — Les dispositions législatives ont-elles été validement adop-

it has a marketing existence quite independent from tobacco. Thus, none of these exemptions serves in any way to confuse, or detract from, the category of acts Parliament has validly criminalized under the Act.

comme substituts du tabac. Une telle exemption est, bien entendu, tout à fait compatible avec l'objet sous-jacent de la Loi, qui est de protéger la santé publique. En ce qui concerne l'exemption pour les produits Dunhill établie au par. 8(3), il est évident que le Parlement tenait compte de la préoccupation légitime selon laquelle cette marque est unique parce qu'elle a une existence commerciale tout à fait indépendante du tabac. En conséquence, aucune de ces exemptions ne sert à embrouiller la catégorie des actes que le Parlement a validement criminalisés en vertu de la Loi ni à y porter atteinte.

For all the foregoing reasons, I am of the view that the Act is a valid exercise of the federal criminal law power. Having reached this conclusion, I do not find it necessary to address the Attorney General's further submission that the Act falls under the federal power to legislate for the peace, order and good government of Canada. Accordingly, I now proceed directly to a consideration of the Act's validity under the *Charter*.

Pour tous les motifs qui précèdent, je suis d'avis que la Loi constitue un exercice valide de la compétence fédérale en matière de droit criminel. C'est pourquoi j'estime inutile d'examiner l'autre argument du procureur général selon lequel la Loi relève de la compétence fédérale de légiférer pour la paix, l'ordre et le bon gouvernement du Canada. Par conséquent, je passerai immédiatement à un examen de la validité de la Loi sous le régime de la *Charte*.

2. *The Canadian Charter of Rights and Freedoms*

Introductory

The Attorney General conceded that the prohibition on advertising and promotion under the Act constitutes an infringement of the appellants' right to freedom of expression under s. 2(*b*) of the *Charter*, and directed his submissions solely to justifying the infringement under s. 1 of the *Charter*. In my view, the Attorney General was correct in making this concession. This Court has, on a number of occasions, held that prohibitions against engaging in commercial expression by advertising infringe upon the freedom of expression in s. 2(*b*) of the *Charter*; see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 766-67; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 976-78; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at pp. 241-45. On this general issue, then, there only remains the question whether this

2. *La Charte canadienne des droits et libertés*

Introduction

Le procureur général a admis que l'interdiction de publicité et de promotion prévue dans la Loi constitue une violation du droit à la liberté d'expression garanti aux appelantes par l'al. 2*b*) de la *Charte*, et il a orienté ses arguments seulement vers la justification de cette violation en vertu de l'article premier de la *Charte*. À mon avis, le procureur général a eu raison d'admettre ce fait. À plusieurs reprises, notre Cour a statué que les interdictions relatives à l'expression commerciale par la publicité portent atteinte à la liberté d'expression prévue à l'al. 2*b*) de la *Charte*; voir *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712, aux pp. 766 et 767; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, aux pp. 976 à 978; *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232, aux pp. 241 à 245. Relativement à cette question générale, il ne

PUBLIC

Reference: *Commissioner of Competition v. Sears Canada Inc*., 2005 Comp. Trib. 2
File no.: CT2002004
Registry document no.: 0158b

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

AND IN THE MATTER OF an inquiry pursuant to subparagraph 10(1)(*b*)(ii) of the *Competition Act* relating to certain marketing practices of Sears Canada Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.01 of the *Competition Act*.

B E T W E E N :

The Commissioner of Competition
(applicant)

and

Sears Canada Inc.
(respondent)

Dates of hearing: 20031020 to 20031024, 20031027 to 20031031, 20031103 to 20031107, 20031112 to 20031114, 20040116, 20040119 to 20040122, 20040202 to 20040203, 20040628 to 20040629, 20040819 to 20040820
Final written submissions filed: September 10, 2004; September 24, 2004 and October 1, 2004
Judicial Member: Dawson J. (presiding)
Date of Reasons: January 11, 2005

REASONS FOR ORDER

Public

Competition Tribunal ("Tribunal")) may, where it has determined that a person has engaged in reviewable conduct, order the person:

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

(b) to publish a corrective notice describing the reviewable conduct; and

(c) to pay an administrative monetary penalty.

[29] No order requiring the publication of a corrective notice or the payment of an administrative monetary penalty may be made where the person in question establishes that they exercised due diligence to prevent the reviewable conduct from occurring (subsection 74.1(3) of the Act).

[30] Sections 74.01, 74.09 and 74.1 are set out in their entirety in the appendix to these reasons.

IV. THE CONSTITUTIONAL CHALLENGE

[31] As noted above, Sears alleges, and the Commissioner concedes, that subsection 74.01(3) of the Act infringes Sears' fundamental right of freedom of expression guaranteed under subsection 2(*b*) of the Charter. In my view, this is an appropriate concession.

[32] The Supreme Court of Canada has held with respect to the analysis of freedom of expression and its infringement that:

(i) The first step is to discover whether the activity which the affected entity wishes to pursue properly falls within "freedom of expression". Activity is expressive, and protected, if it attempts to convey meaning. If an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the Charter guarantee (unless meaning is conveyed through a violent form of expression).

(ii) The second step in the inquiry is to determine whether the purpose or effect of the government action in question is to restrict freedom of expression.

See: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, particularly at pages 967-979.

[33] Applying this analysis, the Supreme Court has previously held that prohibitions against engaging in commercial expression by advertising infringe subsection 2(*b*) of the Charter. See: *RJR Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at paragraph 58.

[34] In the present case, Sears' OSP representations convey or attempt to convey meaning.

Public

Those representations therefore have expressive content so as to fall, *prima facie*, within the sphere of conduct protected by subsection 2(*b*) of the Charter. The purpose of subsection 74.01(3) of the Act is to restrict or control attempts by Sears and others to convey a meaning by proscribing reviewable conduct and by imposing restrictions and controls in relation to OSP representations.

[35] It follows, as the Commissioner has conceded, that the impugned legislation limits the freedom of expression guaranteed to Sears by subsection 2(*b*) of the Charter. The next inquiry therefore becomes whether the impugned legislation is justified under section 1 of the Charter.

(i) Applicable principles of law

[36] To be justified under section 1 of the Charter, a limit on freedom of expression must be "prescribed by law". A limit is not prescribed by law within section 1 if it does not provide "an adequate basis for legal debate". See: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at page 639. The onus of establishing that a limit is prescribed by law is on the state actor who claims that the limit is justified.

[37] The assessment of whether a limit prescribed by law is reasonable and demonstrably justified in a free and democratic society is to be conducted in accordance with the principles enunciated by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103. There are two central criteria to be met:

1. The objective of the impugned measure must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. To be characterized as sufficiently important, the objective must relate to concerns which are pressing and substantial in a free and democratic society.

2. Assuming that a sufficiently important objective is established, the means chosen to achieve the objective must pass a proportionality test. To do so, the means must:

    a. Be rationally connected to the objective. This requires that the means chosen promote the asserted objective. The means must not be arbitrary, unfair or based on irrational considerations.

    b. Impair the right or freedom in question as little as possible. This requires that the measure goes no further than reasonably necessary in order to achieve the objective.

    c. Be such that the effects of the measure on the limitation of rights and freedoms are proportional to the objective. This requires that the overall benefits of the measure must outweigh the measure's

MR. ABADI: And you agree that movie tickets are available for purchase at a kiosk; yes?

MR. ZIMMERMAN: Yes, I do.

MR. ABADI: And as part of your investigation, Mr. Zimmerman, you went through the ticket purchase process at a kiosk; yes?

MR. ZIMMERMAN: Yes, I did.

MR. ABADI: And based on this, you agree that the online booking fee is not charged at a kiosk; yes?

MR. ZIMMERMAN: Yes, I do.

MR. ABADI: You were not charged the online booking fee when attempting to purchase your tickets at a kiosk; yes?

MR. ZIMMERMAN: I did not actually purchase tickets at the kiosk, so I couldn't have been charged a fee, not having done the purchase.

MR. ABADI: When you went through the process, you agree that the online booking fee is not charged at the kiosk, though.

MR. ZIMMERMAN: Yes.

MR. ABADI: Thank you.

And you agree that the online booking fee is waived for CineClub members; yes?

MR. ZIMMERMAN: Yes.

MR. ABADI: So Mr. Zimmerman, the online

the three prices for each of the three options?

MR. ZIMMERMAN: Fourteen fifty (14.50) for general admit, 10.50 for senior 65 plus, and 9.50 for child 3 to 13.

MR. ABADI: Mr. Zimmerman, as someone who has investigated this matter at theatres' kiosks as was established, would you agree that these prices we see on the screen would be the same prices that a consumer would see for that same selection on this page if they were to purchase at the theatre, in this case, Scotiabank theatre Vancouver? Yes?

MR. ZIMMERMAN: If this is was what they were purchasing in theatre, yes, that would be the same price.

MR. ABADI: The same price. Yes, thank you.

Mr. Zimmerman, would you agree with me that the prices that you just read out loud are the prices that a Cineplex subscriber would pay if they were to purchase online. Yes?

MR. ZIMMERMAN: Yes.

MR. ABADI: Mr. Zimmerman, you would agree that the two examples we just covered are examples at which consumers can obtain tickets by paying the exact price that you read; correct?

MR. ZIMMERMAN: Apologies, the two examples were purchasing at the kiosk, and I forget what the second

MR. ABADI: And you agree that movie tickets are available for purchase at a kiosk; yes?

MR. ZIMMERMAN: Yes, I do.

MR. ABADI: And as part of your investigation, Mr. Zimmerman, you went through the ticket purchase process at a kiosk; yes?

MR. ZIMMERMAN: Yes, I did.

MR. ABADI: And based on this, you agree that the online booking fee is not charged at a kiosk; yes?

MR. ZIMMERMAN: Yes, I do.

MR. ABADI: You were not charged the online booking fee when attempting to purchase your tickets at a kiosk; yes?

MR. ZIMMERMAN: I did not actually purchase tickets at the kiosk, so I couldn't have been charged a fee, not having done the purchase.

MR. ABADI: When you went through the process, you agree that the online booking fee is not charged at the kiosk, though.

MR. ZIMMERMAN: Yes.

MR. ABADI: Thank you.

And you agree that the online booking fee is waived for CineClub members; yes?

MR. ZIMMERMAN: Yes.

MR. ABADI: So Mr. Zimmerman, the online

PUBLIC

57. The online booking fee also is contingent because CineClub members are not charged the online booking fee.

58. The online booking fee is also contingent because consumers using certain promotional coupons for a free admission, such as a "buy one – get one free" offer are also not charged the online booking fee.

59. The online booking fee is also variable because it is capped at 4 tickets ($4.00 for Scene+ members and $6.00 for consumers who are not Scene+ members).

V. The Ticket Purchasing Process: The Flow

60. As I stated before, consumers may purchase movie tickets at theatres or via the advance online purchase process on the Website or through the App. Both latter methods allow consumers to purchase tickets in advance and immediately select and reserve their preferred seats.

Cineplex's Website

61. Consumers wishing to view movie availability, pricing and experiences using the Website begin by either selecting a "movie" from the home page or either of the ticket or theatre links at the top right, as shown in Figure 1 and in the video in Exhibit A attached hereto.

C. A *De Minimis* Number of Consumers Registered Formal Complaints Regarding the Online Booking Fee.

33. I have reviewed the complaints said to be about the Online Booking Fee, as produced by the Competition Bureau in this Matter.[34] There were 97 million consumer visits to the Cineplex Website in the last year. Only seven complaints were produced by the Commissioner in this Matter. This represents 0.0000072 percent of visits to the Cineplex Consumer Flow. All of those seven complaints are dated after the Application was filed in this Matter, over one year after the Online Booking Fee was introduced. This suggests to me, from a scientific perspective, that consumers of the Cineplex Website did not find the Online Booking Fee misleading.

34. A low percentage of complaints, in particular complaints received over a year following the launch of the Online Booking Fee, is unsurprising given the analysis discussed throughout this report that Cineplex's website design, the Consumer Flow of a ticket, and presentation of the Online Booking Fee are consistent with marketing and user design best practices as well as industry standards and norms. If the Website adheres to industry norms, then consumers have learned to expect this structure. Picking various price options and components is summarized in real-time at the bottom of the screen. I note that there were zero complaints prior to the Application being filed against Cineplex.

VI. PRINCIPLES OF MARKETING SUPPORT THAT THE CINEPLEX TICKET CONSUMER FLOW IS TRANSPARENT AND EFFICIENT.

A. The Online Booking Fee Is Presented Openly and Simultaneously with Ticket Price Information.

35. As I discussed above, the Consumer Flow for Cineplex ticket buyers is well-engineered and consistent with best practices.[35] In this section I analyze the presentation of a specific step of the Consumer Flow, which is the presentation of the pricing information.

36. As described above in Section IV, the first time a consumer encounters pricing information is on the ticketing page, where the line items for ticket pricing and the Online Booking Fee are shown

[34] "REGF00036_000000001_native.pdf." (June 18, 2023) (REGF00036_000000001); "REGF00043_000000001 (Confidential Level B).pdf." (Aug. 7, 2023) (REGF00043_000000001); "REGF00043_000000002 (Confidential Level B).pdf." (July 20, 2023) (REGF00043_000000002); "REGF00043_000000003 (Confidential Level B).pdf." (Aug. 2, 2023) (REGF00043_000000003); "REGF00043_000000004 (Confidential Level B).pdf." (July 19, 2023) (REGF00043_000000004); "REGF00043_000000005 (Confidential Level B).pdf." (June 15, 2023) (REGF00043_000000005); "REGF00043_000000006 (Confidential Level B).pdf." (July 1, 2023) (REGF00043_000000006).
[35] *See supra* Section V.B.

show time, they are taken to the "Tickets" page without signing in (where they are already signed into their account). The remainder of the purchasing process is the same as on the Website.

Transparency Throughout the Process: "No Complaints, No Confusion, No Misleading Pricing"

80. I am not aware of any complaints from consumers about confusion or being deceived by the online booking fee. The only complaints that I am aware of indicate that consumers were fully aware of the existence of the fee. I am also not aware of the Commissioner receiving any complaints prior to the filing of the Notice of Application, as produced in this matter.

81. Furthermore, naming the fee the "online booking fee" was intentional by Cineplex to ensure that there would be no confusion that the online booking fee applies only to online purchases and not to purchases made in theatre.

PUBLIC

57. The online booking fee also is contingent because CineClub members are not charged the online booking fee.

58. The online booking fee is also contingent because consumers using certain promotional coupons for a free admission, such as a "buy one – get one free" offer are also not charged the online booking fee.

59. The online booking fee is also variable because it is capped at 4 tickets ($4.00 for Scene+ members and $6.00 for consumers who are not Scene+ members).

V. The Ticket Purchasing Process: The Flow

60. As I stated before, consumers may purchase movie tickets at theatres or via the advance online purchase process on the Website or through the App. Both latter methods allow consumers to purchase tickets in advance and immediately select and reserve their preferred seats.

Cineplex's Website

61. Consumers wishing to view movie availability, pricing and experiences using the Website begin by either selecting a "movie" from the home page or either of the ticket or theatre links at the top right, as shown in Figure 1 and in the video in Exhibit A attached hereto.

HOUSE OF COMMONS DEBATES

OFFICIAL REPORT

FIRST SESSION—THIRTY-THIRD PARLIAMENT

35 Elizabeth II

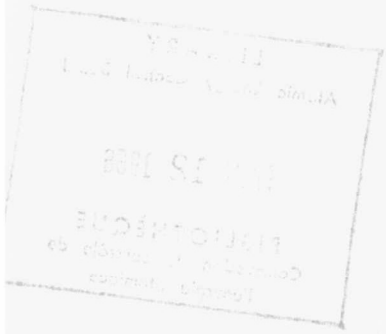
VOLUME VIII, 1986

COMPRISING THE PERIOD FROM THE THIRD DAY OF MARCH, 1986
TO THE EIGHTEENTH DAY OF APRIL, 1986

INDEX ISSUED IN A SEPARATE VOLUME

Published under authority of the Speaker of the House of Commons by the Queen's Printer for Canada

Available from Canadian Government Publishing Centre, Supply and Services Canada, Ottawa, Canada K1A 0S9.



HOUSE OF COMMONS

Monday, March 3, 1986

The House met at 11 a.m.

[*English*]

THE LATE PRIME MINISTER PALME

EXPRESSIONS OF SYMPATHY ON DEATH BY VIOLENCE

Right Hon. Brian Mulroney (Prime Minister): Mr. Speaker, I rise to mourn the loss of Olof Palme, the Prime Minister of Sweden, whose life was tragically cut short last Friday by an assassin's bullet. Olof Palme was not only a great Prime Minister of Sweden, he was a prince of peace and a champion of justice for all mankind. I had the honour of meeting with him on two occasions. I shall never forget his warmth, his vision and determination. It is thus with a personal sense of loss that I express the shock, the outrage and the grief of all Canadians.

Prime Minister Olof Palme was a rare and precious amalgam of idealism and action. His dreams were never idle. He had a vision of social justice in Sweden. He acted. He worked long and hard to help it come true for his own people. He had visions of international peace and progress, and he acted and worked to help those visions come true for all of the world's people.

[*Translation*]

Prime Minister Palme dedicated his intellect, his talents and his energies to the cause of social justice. He did so in his own country, where his passion for justice translated into a social system that has attracted the attention of many Canadians. He did so on the international scene, especially in the case of Third World countries, whose tenacious advocate he had become.

The economic and social development of these countries is one cause he championed at all international venues. The arms race was to him devoid of logic, because it deprived the Third World of resources that were absolutely essential to the well-being of so many people who were still deprived of social justice.

[*English*]

A peacemaker is dead, felled by an act of evil in a land where, until Friday night, a Prime Minister could walk the streets like any private citizen in freedom and complete safety. But though armed cowards have been able to end the life of this great man, they have not been able, and never will be able, to defeat his cause. The shining memory of Olof Palme and the legacy of his love and work will endure to inspire men and women of peace and goodwill throughout the world.

To his injured widow, to his family and to the people of Sweden, we extend our deepest sympathy. We share their grief. Sweden has lost a great Prime Minister. The world has lost a courageous statesman.

Some Hon. Members: Hear, hear!

Right Hon. John N. Turner (Leader of the Opposition): Mr. Speaker, on behalf of the Liberal Party of Canada, I rise to join with the Prime Minister (Mr. Mulroney) and with the Leader of the New Democratic Party (Mr. Broadbent) in offering words of condolence to the family of Olof Palme, to the Swedish Ambassador who is here in the Chamber, and to the people of Sweden for the tragic and yet unexplained shooting of their Prime Minister.

The world recoils in horror and shock that an eloquent voice for peace and human dignity has been so brutally silenced. It is doubly shocking that such an act could take place in one of the most highly civilized, progressive and peaceful nations on the face of the globe.

Mr. Palme, who I knew before and after he became Prime Minister of Sweden, was a dominant force in Swedish politics for the past two decades. He was also a dominant and leading force in that earnest yearning search for world peace. In fact, he shared the world's stage for a number of years with our former Prime Minister, the Right Hon. Pierre Trudeau, who was a close friend of Mr. Palme's, in their joint efforts to encourage the superpowers, the United States and the Soviet Union, to lessen tensions and seek common ground for a real and lasting peace.

I spoke to Mr. Trudeau this morning. He joins with me in sending his condolences to the family of Mr. Palme and to the people of Sweden in their loss. As Mr. Trudeau said, Sweden, under Olof Palme, was a neutral nation. It was non-aligned in the real sense of the word. Mr. Trudeau spoke of Mr. Palme as a "pioneer for peace" and I can only add my heartfelt agreement.

[*Translation*]

Olof Palme vigourously criticized U.S. intervention in Vietnam and had no hesitation in expressing his views on the subject. However, he also strongly denounced interference by the Soviet Union in various regions of the world, especially the invasion of Czechoslovakia and more recently, when the Soviet Union took part in the hostilities in Afghanistan.

[*English*]

Olof Palme was also a champion of the world's poor. Very few world leaders felt as passionately as he did that the plight of poor nations is one of the greatest challenges facing us today. In his own country, he led the fight during the last election in September 1985, to preserve and defend the social

Speaker, is that they recognize the need to take this opportunity, to roll up their sleeves, to amend the Act and to put an end to the uncertainty and the frustration this Act has caused them during the last 18 years.

[*English*]

As the Consumers' Association of Canada stated after I tabled this Bill in December: "The new Competition Act promises real progress for consumers and is a major improvement over current legislation".

The purpose of Bill C-91, as stated in the purpose clause in the Bill, is to maintain and encourage competition in Canada. However, the clause makes it abundantly clear that competition is not to be considered an end in itself. Rather, competition is sought for its effects on the Canadian economy.

There are four main objectives set out in the Bill. The first objective is to promote the efficiency and adaptability of the Canadian economy. This law will help the expansion of the economy and ensure that it can adapt to changing market conditions and create new jobs.

The second objective is to give us a law which allows Canadian companies to compete effectively in world markets and better meet foreign competition in the Canadian market. The Government is committed to making the Canadian economy world competitive.

The third objective in maintaining and promoting competition is to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and there is an urgent need for this, Mr. Speaker.

The fourth but not the least objective is to provide consumers with competitive prices and product choices. As such, this objective becomes the common denominator in what we are trying to achieve. This is the ultimate objective of the Bill.

It is a law which will benefit all Canadians. A competition law which measures up in these respects will benefit every sector of our economy. It will benefit small business by promoting fairness in the marketplace. It will benefit larger businesses by placing greater emphasis on efficiency and international competition. It will also benefit consumers by giving them a marketplace where there is a choice, which will result in better service, products and prices.

We do not have this kind of competition law now and there has been no such law for a long time. As I said when I tabled this Bill we now have before us, the existing law belongs in a museum, certainly not in the marketplace. Canada has changed tremendously since 1910, but not the Combines Investigation Act. Except for a few alterations, it is the same Act our predecessors passed in this House 76 years ago.

[*Translation*]

As for being different, Mr. Speaker, the world certainly was at that time, at least from an economic standpoint, as well as from all others, when the present legislation was originally developed. For instance, the population of Canada was only seven million, that of Montreal, 470,000, that of Vancouver, 124,000, and Canadian exports totalled only $274 million compared with $91 billion today.

However, Mr. Speaker, the economic context is not the only thing to have changed. There is also the legal environment. There was no Canadian Charter of Rights and Freedoms at the time.

In short, Mr. Speaker, that Act is now obsolete with respect to a number of important aspects, and this has become a very serious problem. Our prosperity as a nation depends on the quality of our economic participation in both domestic and external markets. We cannot afford the handicap of an "out of sync", inadequate Competition Act.

Those are the reasons why, Mr. Speaker, this Government has decided to revise the Competition Act, as indicated in the Throne Speech, in the budgets brought down by my colleague the Minister of Finance (Mr. Wilson), and in the statement made by the House Leader on regulatory reform. This legislation is the cornerstone of the Government initiatives designed to make Canada competitive internationally. For the first time, we will have a Competition Act that will reflect the special importance of international trade to the Canadian economy.

Canada is first and foremost a trading nation, and we must make sure that the Act accurately reflects that fact. This is why, Mr. Speaker, the preamble to Bill C-91 clearly states that the purpose of the Act is to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada. The importance of international competition is also emphasized in the proposals concerning mergers and specialization agreements. Moreover, unnecessary constraints resulting from the provisions relating to conspiracy would be abolished to encourage rather than hinder the establishment of export consortiums. Big is not necesseraly bad. In fact, when debating international markets and related goals, the bigger the stronger, the bigger the better.

Although they are strong in relation to the size of our economy, many Canadian businesses when involved on the global stage do not have the clout to compete efficiently with their foreign counterparts. The new provisions would indeed help Canadian businesses face up to their foreign competitors, both domestically and internationally. I would now like, Mr. Speaker, to turn to the major amendments put forward in this legislation—

• (1120)

[*English*]

In an area of law that relies so heavily on economics and business judgment it is very important to have a decision-making body that has the expertise to deal with complex competition cases while still providing the necessary legal protections. We propose to create an entirely new adjudicatory

the benefit of being able to book in advance, they don't get the benefit of a guaranteed seat reservation and seat that they like, and they would also have to incur costs of transportation to get there and also the cost of their time.

MR. RUSSELL: Just on that answer, you said they don't get it in advance. Could they not drive to the theatre, say, a week in advance, buy their ticket and get a reservation?

MR. McGRATH: True. They could. But they wouldn't have -- so they -- but they wouldn't have the certainty from when the time that they were looking up a showtime that they would have it. But you can go to the theatre and you can reserve the seat at the theatre.

MR. RUSSELL: If they don't go in advance, however, and they go on the day or time of the showing, will they be able to necessarily get the seats that they may have seen online?

MR. McGRATH: It depends on the time in between. So if somebody had booked -- they might have looked online early on and saw that seats were available in the middle of the auditorium. By the time they actually got to the theatre, those seats could be taken.

MR. RUSSELL: Your Honour, if I could ask the registrar to bring up P-R-28, which is Exhibit A to the

DR. AMIR: Yes.

MR. RUSSELL: Sir, if it is Cineplex's objective to ensure that those two prices are shown, do you believe that they provided it clearly in terms of a choice to consumers?

DR. AMIR: Yes. As I mentioned before, the total online price that you were going to pay with all of your particular circumstances is always shown next to the most important button on the screen, which is the call-to-action button. So consumers, when they make the decision, they know how much they're going to pay.

MR. RUSSELL: So you said, and you referred to it just a moment ago in your testimony, that the choice was welfare enhancing. What do you mean by that?

DR. AMIR: I state in my report and Professor Morwitz agrees with me that providing a menu of options, when the customers are heterogenous, they might have differences to pay different liking for movies. Providing them many options where you might want to pay more for a better experience, you might want to pay less for not getting the value of prebooking, that allows customers to self-select, and economists have shown that self-selection increases welfare.

MR. RUSSELL: So the remainder of your report is responsive to the reports of Dr. Morwitz and Mr. Eckert.

that. I believe maybe he's referring to one other case where I wrote an expert report and I made exactly the same argument in that case, that the complaints that are seen are only a small subset of all the complaints out there or even -- they're not necessarily relationships. There are just many complaints you never see.

MR. HOOD: If we can turn to page 14, please, Ms. Ruhlmann, paragraph 20?

And Dr. Amir's opinion is that Cineplex's conduct is welfare-enhancing because it allows the consumer to self-select the consumption experience that they would like. What's your response to this?

DR. MORWITZ: So, while I agree with Dr. Amir that it is welfare-enhancing for consumers to be able to select the experience they want at the price they want, in order for consumers to be able to do that, they need to have complete information.

So for example, if consumers -- in this particular case, the issue is consumers self-selecting into buying an online ticket that costs more money versus buying a ticket at a theatre, which costs less. In order to be able to accurately self-select into that, the consumer needs to clearly know the prices.

MR. HOOD: Return to page 21, please, Ms. Ruhlmann, paragraph 37?

PUBLIC

show time, they are taken to the "Tickets" page without signing in (where they are already signed into their account). The remainder of the purchasing process is the same as on the Website.

Transparency Throughout the Process: "No Complaints, No Confusion, No Misleading Pricing"

80. I am not aware of any complaints from consumers about confusion or being deceived by the online booking fee. The only complaints that I am aware of indicate that consumers were fully aware of the existence of the fee. I am also not aware of the Commissioner receiving any complaints prior to the filing of the Notice of Application, as produced in this matter.

81. Furthermore, naming the fee the "online booking fee" was intentional by Cineplex to ensure that there would be no confusion that the online booking fee applies only to online purchases and not to purchases made in theatre.

MR. RUSSELL: Sir, when you're on the ticket page and before selecting a ticket, even one ticket, is there an online price shown?

MR. McGRATH: No, there's no online price. You haven't made a selection, so the online price is shown as zero. That's where we have what we call our lockout feature. If you decide to proceed from that point, you are locked out from proceeding any -- you're locked out from proceeding into the online purchasing process until you've actually made a ticket selection.

MR. RUSSELL: And the prices that we've seen a number of times in the category general admission, senior and child, which you refer to as the base price in the video, are those attainable at any theatre?

MR. McGRATH: Those are the ticket prices that are available at that theatre for that -- that's shown on that page.

MR. RUSSELL: When you say "that's shown on that page", where is it shown on that page?

MR. McGRATH: Sorry. It's on the ticketing page. It's just above the ticket prices where it shows the theatre name.

MR. RUSSELL: So above the three price categories that I referred to you, above that is the theatre where you can purchase those tickets. Is that

correct?

MR. McGRATH: At that ticket price, yes.

MR. RUSSELL: And are they attainable at that price at that theatre?

MR. McGRATH: Yes, they are.

MR. RUSSELL: And sir, upon the selection of at least one ticket, is an online price then shown?

MR. McGRATH: Yes. As soon as you select a ticket, then instantaneously, we update the total price that's right beside the "Proceed" button. And then what we also do at the same time is we immediately show the online booking fee in a separate category as well, just above that.

MR. RUSSELL: So to deal with the temporal component here, as you click or after you click the ticket selection, does the price show up?

MR. McGRATH: Immediately upon clicking. It's exactly the same time. As soon as you make a selection, the total is updated with the price that includes the ticket price plus the online booking fee, and the online booking fee line is immediately populated as well.

MR. RUSSELL: So you said exactly at the time you push at least one ticket, the price is immediately shown, and I'm using your words, at the same time.

MR. McGRATH: That's correct.

to be interrupted in my questioning, so let me ask my question, please.

Sir, as I was saying, this is what you call the floating ribbon?

MR. ECKERT: Yes.

MR. RUSSELL: And you would say the fold is below this; correct?

MR. ECKERT: Correct.

MR. RUSSELL: Let's go down.

What is beside the call to action button here? What does it say?

MR. ECKERT: Subtotal zero dollars.

MR. RUSSELL: So a consumer is being told there isn't any price for anything online right now; correct?

MR. ECKERT: Correct.

MR. RUSSELL: The prices that we see, if we go down, what does it say here?

MR. ECKERT: Cineplex cinemas Lansdowne and VIP.

MR. RUSSELL: So it shows a specific location; right? And I pick D-box quickly here, right, and it shows these prices. So right below -- and you made me put my resolution up. Everybody wanted me to go from 100 percent to be to 150. I wouldn't be doing this, but it's fine to make the point.

MR. RUSSELL: Sir, when you're on the ticket page and before selecting a ticket, even one ticket, is there an online price shown?

MR. McGRATH: No, there's no online price. You haven't made a selection, so the online price is shown as zero. That's where we have what we call our lockout feature. If you decide to proceed from that point, you are locked out from proceeding any -- you're locked out from proceeding into the online purchasing process until you've actually made a ticket selection.

MR. RUSSELL: And the prices that we've seen a number of times in the category general admission, senior and child, which you refer to as the base price in the video, are those attainable at any theatre?

MR. McGRATH: Those are the ticket prices that are available at that theatre for that -- that's shown on that page.

MR. RUSSELL: When you say "that's shown on that page", where is it shown on that page?

MR. McGRATH: Sorry. It's on the ticketing page. It's just above the ticket prices where it shows the theatre name.

MR. RUSSELL: So above the three price categories that I referred to you, above that is the theatre where you can purchase those tickets. Is that

demonstrate the point you're making in your opinion at this point?

DR. AMIR: Yes.

MR. RUSSELL: So on Figure 13, sir, what you're pointing out with the arrows that are there, exactly the point, that it directs the consumer to the Call to Action button or "Proceed" button. Correct?

DR. AMIR: Let me clarify. It -- this website design structure directs consumers to exactly that. To --

MR. RUSSELL: And that's what Mr. Eckert said as well --

DR. AMIR: Yes.

MR. RUSSELL: -- in that Z-Pattern?

DR. AMIR: Yes.

MR. RUSSELL: And the total online price is shown right beside the call-to-action button or "Proceed" button. Correct?

DR. AMIR: Yes. And that, by the way, being a floating control, means that no matter how you scroll or what you do with a website, that Z-Pattern will always get you there. So the total price that you are about to pay if you continue is always kind of at maximum attention next to the call-to-action button.

MR. RUSSELL: Sir, you also state in your report or note in your report that there's a lockout

feature with respect to this call-to-action button or "Proceed" button. Could you describe that, please?

DR. AMIR: Yes. If you do not add tickets and you try to continue, the website will not let you do that and direct your attention to the zero, so to the total sum. And also, by the way, it prevents customers from making mistakes. So this is a positive feature that allows both direct -- and allows customers or consumers to do what they intend to do.

MR. RUSSELL: Prior to your response to Dr. Morwitz and Mr. Eckert's reports, do they even mention the lockout feature in their review of Cineplex's website?

DR. AMIR: No.

MR. RUSSELL: Thank you. Those are all my questions, Your Honour.

MR. JUSTICE LITTLE: Thank you, Mr. Russell.

Mr. Hood?

CROSS-EXAMINATION BY MR. HOOD

MR. HOOD: Registrar, can I bring up P-R-039, again? So turning to page 7, paragraph 6 of your report, Dr. Amir. Just let me know when you're there.

DR. AMIR: I'm there.

MR. HOOD: Is it fair to say, Dr. Amir, this contains your assignment?

DR. AMIR: Yes.

Columbia Business School
AT THE VERY CENTER OF BUSINESS™

Vicki G. Morwitz
Bruce Greenwald Professor of Business and Professor of Marketing

795 Kravis Hall
665 W 130th St, New York, NY 10027
New York, NY 10027

T. 212-854-1486
vicki.morwitz@columbia.edu

Vicki Morowitz Remarks for the
White House Convening on the Economic Case for Junk Fee Policies
March 21, 2023

Thank you for inviting me to speak on this important initiative of the Biden-Harris Administration. This is personally a very exciting time for me. I have been studying how consumers react when firms assess additional fees or surcharges for over 25 years. I have discussed this research in my classes, and I have given research seminars on this topic at universities around the world. And I have watched with much interest how regulators in different countries have dealt with these issues.

I am thrilled that my research is now shedding light on a topic of much interest to consumers, legislators, regulators, and well-intentioned organizations here at home.

In my remarks today, I will discuss two pricing practices that I have studied in depth that are central to the administration's agenda regarding junk fees: partitioned pricing and drip pricing.

Let me start with partitioned pricing. My co-authors and I coined the phrase and defined partitioned pricing as a strategy where firms deliberately decide to divide a product's price into two or more mandatory parts, a base price for the main product and one or more mandatory surcharges, rather than charging a single, all-inclusive price. For example, many hotels these days assess a mandatory fee on top of the daily room rate – these are sometimes called resort fees or facility fees or destination fees and range from $20 to over $50 a night on top of the daily room rate.

In general, what research has shown is that when firms separate out mandatory surcharges versus assessing one all-inclusive price, consumers tend to underestimate the total price they will have to pay, and are often more likely to complete the purchase. This happens even when the surcharges are fully disclosed. And these effects are larger when the surcharges are made difficult to process such as when they are framed as a percent of the base price vs. a flat dollar amount, or when they are hidden in the small print.

What academic research on partitioned pricing makes clear is that consumers make better decisions when firms use all-inclusive pricing.

A related pricing strategy is drip pricing. The FTC defines drip pricing as a pricing technique in which firms advertise only part of a product's price up front and reveal other charges later as shoppers go through the buying

process. The additional dripped charges are sometimes mandatory fees, like resort fees, but sometimes are fees for optional add-ons, such as paying for parking at a hotel.

Drip pricing is commonly used in industries like the ticketing industry. A consumer shopping for a ticket for a live event like a concert, a play, or a baseball game, might first see the price for different seats in the venue. After selecting a seat, the consumer might come to learn as they continue shopping and clicking through more web pages, that there is also a service fee, an order processing fee, a convenience fee, and a ticket delivery fee, even if the ticket is sent electronically. Other industries like the airline and the hospitality industry drip surcharges for popular optional add-ons, such as reserving a seat on a plane or checking a bag.

What research has shown is that when surcharges are dripped, consumers end up being more likely to buy a product that appears cheaper up front based only on the base price, but that is more expensive in total given the dripped mandatory fees and fees for the selected optional add-ons.

Notably, these effects happen even when consumers are provided with a total price before they complete their transactions. That is, it is not enough to show the total price before the consumer puts in their credit card information, because at that point they have already mentally committed to the purchase.

What the research on drip pricing makes clear is that consumers benefit when all-inclusive upfront pricing is used, and when fees for optional add-ons are disclosed up front and not dripped later in the shopping process.

More broadly what I have learned over these many years, from my own research and the research of others, is that there are many ways in which consumers can be misled in the shopping process. This is not because consumers are stupid or even careless, in fact consumers try to make good decisions for themselves and their families. At the same time, consumers, all of us, are busy and distracted, and may not notice or appropriately consider all information important to that purchase decision, especially when that information is not made salient in the shopping context.

The real reason why consumers are misled is because profit maximizing firms have figured out ways to display prices, like using partitioned and drip pricing, that are particularly difficult for consumers to process. These pricing strategies, lead consumers to make decisions that differ from what they intended and that are against their own interest.

And since I began studying these practices, I have seen their use accelerate with the growth of online shopping. I believe that firms will increasingly turn to practices like these, and that enhanced technology and better data and prediction models, will help firms to refine them in ways that will further increase their own profits, but to the detriment of consumers. The consequence will be that consumers will end up making choices that do not reflect their true desires or preferences, and will end up spending more money than they intended and than they needed to.

Firms often claim that when they separate fees, they are being more transparent about their costs, and consumers often believe this. However, this transparency can easily be achieved in ways that do not harm consumers, for example by providing a single total price, and then communicating how much of that total reflects specific costs.

As a scholar who has studied these pricing strategies for decades and who knows well how their use can be detrimental to consumers, I am very excited about the attention that the administration and many state legislators are paying to these issues. I am glad to see that policies are being promoted that address partitioned and drip pricing, where prices must be all inclusive and where all fees fully revealed upfront. This is exactly what the research suggests will be most beneficial to consumers.

Academic research makes clear that these initiatives are very much needed and will greatly help consumers.

correct?

MR. McGRATH: At that ticket price, yes.

MR. RUSSELL: And are they attainable at that price at that theatre?

MR. McGRATH: Yes, they are.

MR. RUSSELL: And sir, upon the selection of at least one ticket, is an online price then shown?

MR. McGRATH: Yes. As soon as you select a ticket, then instantaneously, we update the total price that's right beside the "Proceed" button. And then what we also do at the same time is we immediately show the online booking fee in a separate category as well, just above that.

MR. RUSSELL: So to deal with the temporal component here, as you click or after you click the ticket selection, does the price show up?

MR. McGRATH: Immediately upon clicking. It's exactly the same time. As soon as you make a selection, the total is updated with the price that includes the ticket price plus the online booking fee, and the online booking fee line is immediately populated as well.

MR. RUSSELL: So you said exactly at the time you push at least one ticket, the price is immediately shown, and I'm using your words, at the same time.

MR. McGRATH: That's correct.

paragraph 38 in that section?

DEPUTY REGISTRAR: It's on screen.

MR. RUSSELL: Sir, you state that there is never a page where the base price is shown without the mention of the OBF and further that the subtotal in the purchase process always includes the OBF. Is that correct?

DR. AMIR: Yes.

MR. RUSSELL: Do you believe the consumer is informed properly concerning their choices?

DR. AMIR: Yes. The choice the consumer has to make at this point is whether they want to buy once they added tickets online, and the total price they would need to pay is always shown next to the call-to-action button, which is the most important point in the screen, that is proceed or buy. And so, the consumer has all the information they need in order to make the decision.

MR. RUSSELL: If I could ask you to turn to paragraph 56?

DEPUTY REGISTRAR: It's on screen.

MR. RUSSELL: Sir, in this paragraph you speak to confusion that would arise at the ticket page where it displayed ticket prices in the aggregate. Is that correct?

DR. AMIR: Yes.

MR. RUSSELL: And your conclusion is:

"...had the Cineplex Website displayed

DR. AMIR: Yes.

MR. RUSSELL: Sir, if it is Cineplex's objective to ensure that those two prices are shown, do you believe that they provided it clearly in terms of a choice to consumers?

DR. AMIR: Yes. As I mentioned before, the total online price that you were going to pay with all of your particular circumstances is always shown next to the most important button on the screen, which is the call-to-action button. So consumers, when they make the decision, they know how much they're going to pay.

MR. RUSSELL: So you said, and you referred to it just a moment ago in your testimony, that the choice was welfare enhancing. What do you mean by that?

DR. AMIR: I state in my report and Professor Morwitz agrees with me that providing a menu of options, when the customers are heterogenous, they might have differences to pay different liking for movies. Providing them many options where you might want to pay more for a better experience, you might want to pay less for not getting the value of prebooking, that allows customers to self-select, and economists have shown that self-selection increases welfare.

MR. RUSSELL: So the remainder of your report is responsive to the reports of Dr. Morwitz and Mr. Eckert.

demonstrate the point you're making in your opinion at this point?

DR. AMIR: Yes.

MR. RUSSELL: So on Figure 13, sir, what you're pointing out with the arrows that are there, exactly the point, that it directs the consumer to the Call to Action button or "Proceed" button. Correct?

DR. AMIR: Let me clarify. It -- this website design structure directs consumers to exactly that. To --

MR. RUSSELL: And that's what Mr. Eckert said as well --

DR. AMIR: Yes.

MR. RUSSELL: -- in that Z-Pattern?

DR. AMIR: Yes.

MR. RUSSELL: And the total online price is shown right beside the call-to-action button or "Proceed" button. Correct?

DR. AMIR: Yes. And that, by the way, being a floating control, means that no matter how you scroll or what you do with a website, that Z-Pattern will always get you there. So the total price that you are about to pay if you continue is always kind of at maximum attention next to the call-to-action button.

MR. RUSSELL: Sir, you also state in your report or note in your report that there's a lockout

Ruhlmann so that they can officially be entered into the evidentiary record?

And just to alert you with respect to before we close off the evidentiary record, we are still working on an Agreed Statement of Facts that hopefully, I think, we're pretty close, if not -- if we can -- just to alert you we will be submitting that to the Tribunal so that is also part of the record.

MR. JUSTICE LITTLE: Okay. So you don't have any further questions for Dr. Amir.

MR. HOOD: No. Just as long as we've --

MR. JUSTICE LITTLE: Let's come back to housekeeping in a minute.

Let's turn to Mr. Russell, please.

RE-EXAMINATION BY MR. RUSSELL

MR. RUSSELL: Thank you, Your Honour.

If I could ask the registrar to bring up Exhibit 39, paragraph 31, please.

Sir, Mr. Hood read part of a sentence. I just want to read the entire sentence to you carefully that he read to you from this paragraph:

> "Cineplex helps consumers make this choice by presenting them, on the same page where prices are first shown (as shown above in Figure 5: Updated

Ticketing Page), with clearly displayed key relevant information, including, specifically, the amount of the itemized Online Booking Fee..."

And it incorporates into the subtotal immediately beside the "Proceed" button.

The first thing I see you say "on the same page". Do you mean the entire web page when you say that?

DR. AMIR: Yes.

MR. HOOD: Irrespective of scrolling.

DR. AMIR: Yes.

MR. RUSSELL: And then sir, when you talk about things that simultaneously happen -- now, you talked about when you click a ticket button, it simultaneously changes the total price beside the Call-to-Action button or "Proceed" button; correct?

DR. AMIR: Yes.

MR. RUSSELL: Does it also change the information with respect to the Online Booking Fee at the bottom of the page?

DR. AMIR: It does.

MR. RUSSELL: So it shows you the amount as you do that.

DR. AMIR: Yes.

MR. RUSSELL: Thank you, sir.

demonstrate the point you're making in your opinion at this point?

DR. AMIR: Yes.

MR. RUSSELL: So on Figure 13, sir, what you're pointing out with the arrows that are there, exactly the point, that it directs the consumer to the Call to Action button or "Proceed" button. Correct?

DR. AMIR: Let me clarify. It -- this website design structure directs consumers to exactly that. To --

MR. RUSSELL: And that's what Mr. Eckert said as well --

DR. AMIR: Yes.

MR. RUSSELL: -- in that Z-Pattern?

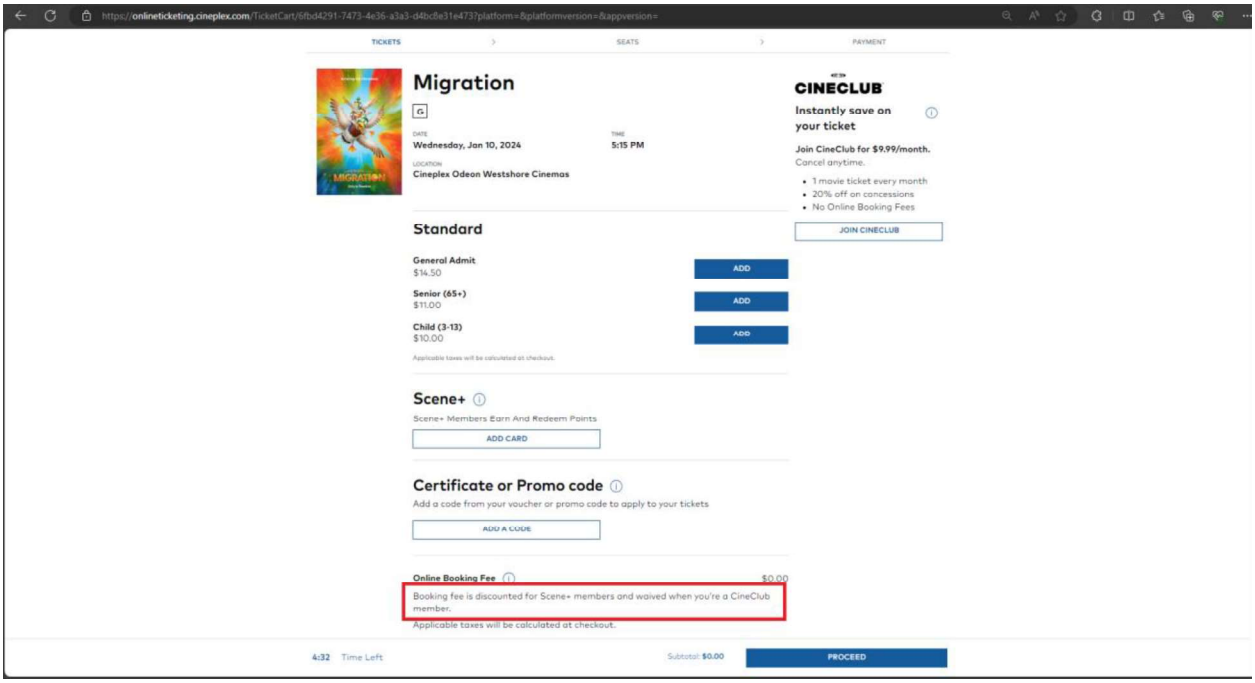
DR. AMIR: Yes.

MR. RUSSELL: And the total online price is shown right beside the call-to-action button or "Proceed" button. Correct?

DR. AMIR: Yes. And that, by the way, being a floating control, means that no matter how you scroll or what you do with a website, that Z-Pattern will always get you there. So the total price that you are about to pay if you continue is always kind of at maximum attention next to the call-to-action button.

MR. RUSSELL: Sir, you also state in your report or note in your report that there's a lockout

Figure 11: Online Booking Fee Information[39]



41. As a final check before the consumer completes an online ticket purchase, the order summary again presents the components of the transaction, itemizing the tickets and the amount of the Online Booking Fee, if applicable.[40] By again presenting the itemized cost of a ticket, the Consumer Flow double-checks with consumers that they are sure about proceeding with the online transaction (including the Online Booking Fee), that is, that they are okay with paying the fee for the value of convenience and certainty of prebooking their particular choice of seats. This final check occurs before paying. At any time, consumers have the choice of purchasing tickets in person at the movie theater (as many consumers have done for years and still nearly half do),[41] thus waiving the Online Booking Fee entirely because the purchase is no longer made online, while still benefiting from their online information search and consideration set stages in their decision-making process.

[39] "Tickets." *Cineplex*. <https://onlineticketing.cineplex.com/TicketCart/6fbd4291-7473-4e36-a3a3-d4bc8e31e473?platform=&platformversion=&appversion=> (accessed Jan. 3, 2024).
[40] *See supra* **Figure 7**: *Order Summary*.
[41] Cineplex's analysis of digital tickets as a percent of total tickets from June 1, 2022 through Dec. 31, 2022 showed that 48 percent of tickets were sold physically. "OBF700 – Online Booking Fees." *Cineplex* (June 1, 2022 – Dec. 31, 2022) (CNPLX_01077684_native).

Ticketing Page), with clearly displayed key relevant information, including, specifically, the amount of the itemized Online Booking Fee..."

And it incorporates into the subtotal immediately beside the "Proceed" button.

The first thing I see you say "on the same page". Do you mean the entire web page when you say that?

DR. AMIR: Yes.

MR. HOOD: Irrespective of scrolling.

DR. AMIR: Yes.

MR. RUSSELL: And then sir, when you talk about things that simultaneously happen -- now, you talked about when you click a ticket button, it simultaneously changes the total price beside the Call-to-Action button or "Proceed" button; correct?

DR. AMIR: Yes.

MR. RUSSELL: Does it also change the information with respect to the Online Booking Fee at the bottom of the page?

DR. AMIR: It does.

MR. RUSSELL: So it shows you the amount as you do that.

DR. AMIR: Yes.

MR. RUSSELL: Thank you, sir.

MR. McGRATH: I'm using my common sense. I can't tell you with data. That's correct.

MR. HOOD: One more small piece and I think it's probably time for lunch.

Can we turn to P-R-27, please, Mr. McGrath's witness statement, paragraph 6?

Page 15.

Here, paragraph -- just let me get there.

Paragraph 68:

> "A consumer cannot proceed with the online purchase process until the consumer selects a ticket on the "Tickets" page and then clicks "Proceed"."

Correct?

MR. McGRATH: That is correct. That's what we call that lockout feature.

MR. HOOD: And that's -- sorry. I didn't mean to --

MR. McGRATH: Sorry. That's what we call that lockout feature, yes.

MR. HOOD: You don't actually use the term "lockout" in this paragraph.

MR. McGRATH: No, not in here. Just for reference of what we've been talking about the last couple

MR. RUSSELL: Sir, when you're on the ticket page and before selecting a ticket, even one ticket, is there an online price shown?

MR. McGRATH: No, there's no online price. You haven't made a selection, so the online price is shown as zero. That's where we have what we call our lockout feature. If you decide to proceed from that point, you are locked out from proceeding any -- you're locked out from proceeding into the online purchasing process until you've actually made a ticket selection.

MR. RUSSELL: And the prices that we've seen a number of times in the category general admission, senior and child, which you refer to as the base price in the video, are those attainable at any theatre?

MR. McGRATH: Those are the ticket prices that are available at that theatre for that -- that's shown on that page.

MR. RUSSELL: When you say "that's shown on that page", where is it shown on that page?

MR. McGRATH: Sorry. It's on the ticketing page. It's just above the ticket prices where it shows the theatre name.

MR. RUSSELL: So above the three price categories that I referred to you, above that is the theatre where you can purchase those tickets. Is that

PUBLIC

CT-2023-003

THE COMPETITION TRIBUNAL

IN THE MATTER OF an Application by the Commissioner of Competition for an order under section 74.01 and 74.1 of the *Competition Act*, RSC 1985, c C-34.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

CINEPLEX INC.

Respondent

WITNESS STATEMENT OF DANIEL FRANCIS MCGRATH

I Daniel Francis McGrath, of the Town of Oakville, in the Province of Ontario, AFFIRM AS FOLLOWS:

1. I am the Chief Operating Officer ("**COO**") of Cineplex Inc. ("**Cineplex**") and make this witness statement in support of Cineplex's response to the application commenced by the Commissioner of Competition (the "Commissioner") for an order pursuant to section 74.01 and 74.1 of the *Competition Act*, R.S.C 1985, c. C-34, as amended (the "***Act***").

2. I have personal knowledge of the matters set out in this witness statement.

PUBLIC

3. In preparing this witness statement, I have obtained and relied upon information from Cineplex's business records, and a number of other Cineplex employees. All of this information is typical of and consistent with the type of information I would use on a routine regular basis to make decisions in the normal course of my duties.

I. Background and Qualifications

4. I have a Bachelor of Business Administration from Brock University and I am a Certified Public Accountant.

5. I joined Cineplex Odeon Corp., a now-defunct Cineplex subsidiary, in 1987 and held various financial and operational roles from 1987 to 2000. In 2000, I joined Galaxy Entertainment, an entity which subsequently merged with Cineplex Odeon Corp, serving as Executive Vice President ("EVP"). In 2005, on the subsequent acquisition of Famous Players, I continued as EVP of the resulting entity, Cineplex Entertainment, a role I held until 2011 when I was appointed to my current role.

6. I have been the COO of Cineplex since 2011. As the COO of Cineplex, I oversee the Exhibition and Location Based Entertainment ("LBE") Department (theatre operations and food service), digital commerce (Cineplex Store), location-based entertainment (The Rec Room and Playdium), real estate, design and construction, strategic planning, Cineplex's media businesses, and Cineplex's amusement gaming business (Player One Amusement Group).

7. The online booking and advance seat reservation fee ("online booking fee"), as I will further describe in this statement, is managed by LBE Department. I therefore oversaw the conceptualization, decision-making, and implementation processes of the online booking fee.

II. Overview

8. Cineplex is a film and entertainment company that is headquartered in Toronto, Ontario, Canada.

9. Cineplex has a website Cineplex.com (the "**Website**") and a mobile app (the "**App**") which provides information to consumers regarding various entertainment products and services,

PUBLIC

including the availability of movies at Cineplex theatres across Canada. The Website and App have supplanted other forms of information such as advertisements in newspapers and have become the predominant source of information for consumers as to:

- what movies are available;
- where those movies are playing;
- when the movies are playing;
- what movie experience is available (3D, IMAX, VIP, 4DX, ScreenX, UltraAVX, D-BOX, Closed Captioning, Described Video etc.); and
- the prices based on these various consumer choices, including whether the movie ticket is purchased at theatres or purchased online.

10. The Website and App also provide the availability for online advanced seat reservations and the online purchase of movie tickets. Once an online seat reservation is made, that seat will be held for the consumer and will not be available to those purchasing tickets at theatres (e.g. box office, theatre concession stand or kiosk).

11. Cineplex is a partner in Scene+, Canada's largest entertainment and lifestyle loyalty program. Scene+ members earn points on a variety of purchases, not only at Cineplex theatres, but also at a large number of retailers or through the use of credit cards that are associated with the Scene+ loyalty program. The Scene+ program is free for members to join. Points collected through the Scene+ loyalty program can be used to purchase various products including tickets for movie theatres.

12. Cineplex offers its guests the opportunity to join CineClub, a paid movie subscription program, which provides members with benefits accessible across Cineplex's businesses nationwide including Cineplex theatres. Currently CineClub members pay a recurring monthly fee of $9.99 plus tax or an annual fee of $119.88 plus tax. Together with other benefits such as discounts for concession purchases, CineClub members receive one general admission movie

ticket per month. As a result, the monthly membership cost is less than the cost of most Cineplex tickets for movie theatres.

13. A consumer must be a Scene+ member to purchase a CineClub membership.

14. The entertainment industry has evolved significantly over the past decade. With respect to the viewing of movies and other entertainment content, consumers have a broad array of choices including movies on demand that are available for rent or download or, most significantly, through online streaming services. As a result, traditional bricks and mortar theatre operators have to innovate and enhance the experience and choices for consumers in order to respond to this competition. There are now a myriad of choices that are available at movie theatres including expansive screens, premium viewing experiences, food and drinks delivered to a consumer's seat, sensory friendly screenings, baby friendly screenings, and indoor playgrounds for children to enjoy before showtime.

15. In addition to the showing of movies, theatres have also expanded to make other entertainment services available such as amusement gaming. Cineplex has also developed other types of entertainment venues such as The Rec Room and Playdium. The Website and App provide information with respect to all of these various products or services.

16. Cineplex determined that there was consumer demand for advance seat reservations. This eventually became the impetus for the online booking fee. This demand became even more apparent during the pandemic when theatres were permitted to resume operations. However, advance seat reservations represented a sunk cost for Cineplex in the sense that, if consumers did not show up for the theatres, the seat would remain empty. As tickets are refundable, Cineplex determined that it would at least partially protect this lost revenue by charging a fee for online reservations which provided also for advance seat reservations. Currently, slightly more than half of Cineplex movie theatres consumers purchase their tickets online and make an advanced seat reservation. The remainder of Cineplex movie goers purchase their tickets at theatres and do not pay the online booking fee.

17. This wide array of consumer choices means that the Website is constructed to provide information and pricing for a wide array of products or services. With respect to tickets for the

PUBLIC

showing of movies at movie theatres there is no one price, but rather a broad array of differentiated prices depending on the choices of the consumer. The Website provides the information that outlines these choices for the consumer and then provides pricing dependent on those choices.

18. The Website and the App have accordingly a dual function. First, they provide access to information about products and services that lead to informed decisions about the choices available online and otherwise. Second, the consumer can use the information available to customize a movie ticket selection and then instantaneously secure that selection by proceeding with the online purchasing process.

19. Fundamental to this case is the final choice that a consumer must make with respect to the purchase of movie tickets. At the end of the information and choices provided to the consumer with respect to date, time, venue and movie experience, the consumer ends up on the page where prices are first displayed on the Website or App (I shall describe this further in my evidence as the "Tickets" page). At this point, the consumer, after customizing their movie going experience based on the choices available to them in the preceding pages, faces an important choice and trade off with respect to pricing and convenience. The consumer has the choice of purchasing the tickets at theatres at the base price, or alternatively, the consumer can select the number of tickets the consumer wishes to purchase online at the online price.

20. Instantaneously, upon selecting the tickets that the consumer wishes to purchase online, the price of the ticket, including the online booking fee (if the online booking fee applies), is displayed prominently and immediately to the left of the "Proceed" button. The consumer cannot proceed to the subsequent page without making a ticket selection. Making the ticket selection causes the online price, which includes the price of the online booking fee (if the online booking fee applies), to be displayed immediately to the left of the "Proceed" button and before the "Proceed" button is operative.

21. The choice between purchasing a ticket at theatres at the base price shown before any selection of tickets is made on the Tickets page and before the consumer can move to the seat reservation page (where the consumer derives the value and convenience of instantaneously securing a seat of their choice for the customized selection made).

PUBLIC

22. The tickets are obtainable, either at the base price or at the online price, based on the consumer choice whether to purchase at theatres or to purchase online. There is no delay or late disclosure. Both prices are instantaneously displayed showing the options available to the consumer.

23. All of the above is expanded upon further in the remainder of my witness statement.

24. Attached as Exhibit A of this Witness Statement is a video which provides an overview of the Website and includes a demonstration of the online purchase flow.

III. The Value of Website and the App: Source of Information and Guaranteed Convenience

25. The Website and App prioritize the user experience and offer two unique services with distinct value: (1) information: easy-to access live information about a myriad of choices regarding Cineplex products and services, and (2) guaranteed convenience: the certainty and instantaneous convenience of securing an advance seat for the selections made based on all the choices for which seats are available. This is important for understanding the context in which consumers move from the plethora of information available to them to making informed choices before embarking on the online purchasing process.

26. The Website and the App have accordingly a dual function. First, the consumer can access information about products and services that lead to informed decisions about the choices available online and otherwise. Second, the consumer can use the information available to customize a ticket selection and then instantaneously lock in that selection by proceeding with the online purchasing process.

A. The Website and the App: Primacy Source of Information

27. Cineplex offers a myriad of products and services including (amongst others) movie and event offerings, amusement gaming, dining offerings, and a digital movie platform.

PUBLIC

28. The Website and the App are the primary source of information about Cineplex products and services. The consumer can turn to the Website and App to gather information on what, when, where and how particular products and services are offered.

29. One of the many services available on the Website and App is the information about the movies and events playing at Cineplex theatres. The multiplicity of choices extends to movie offerings, including titles, dates, time, location, venue, and type of auditorium and viewing experience, as further described in my statement below. The informational component of the Website and App is a valuable resource to Cineplex consumers. According to Cineplex data, about half of consumers purchase their tickets in person, and the other half purchase their tickets online, either via the Website or the App. In 2022, about 52 percent of consumers purchased their tickets online, while 48 percent purchased their tickets in person, at theatres.

30. Before any representation of price is made, both the Website and the App provide the consumer with information regarding movies playing at theatres, the locations, times, experience, and seat availability at a particular theatre.

B. Information, Choices, and Decision Making

31. Consumers can purchase tickets either in person at the theatre or online (using the Website or the App).

32. Due to the many viewing options available at Cineplex's theatres, there is no single price for a movie ticket, whether purchased in person or online.

33. Ticket prices are differentiated in several ways. The Website and the App are both interactive based on the consumer's choices on the plethora information made available. Despite the many choices, other than the online booking fee, the ticket price for identical options is the same whether purchased at a theatre or online.

34. Prices differ by theatre location -and within each location- and vary according to the age of the moviegoer, the theatre experience (e.g. 3D, IMAX, VIP, 4DX, ScreenX, UltraAVX, D-

PUBLIC

BOX, Clubhouse (collectively "**Premium Auditoriums**" or regular, as depicted in the video at Exhibit A), the day of the week, movie release date and whether the moviegoer is a member of CineClub or the Scene+ loyalty.)

35. Prices also vary based on whether the consumer wants to purchase the ticket at the theatre or online with an advance seat reservation.

36. The Website and the App provide the consumer with price representations only after all informational selections are made. The attainable price for purchase at the theatre or purchase online is always prominently shown to the consumer based on the consumer's choice of purchase.

C. Securing a Choice: The Value and Convenience of Guaranteed Advanced e-Tickets

37. The ability to select and reserve seats in advance is important for moviegoers, and an important aspect of the online purchase process. As such, the importance of securing their preferred seat has become increasingly valuable to consumers.

38. As with other forms of entertainment, the seat location is often a critical determinant of the purchase process and a driver of attendance. Cineplex data shows that consumers who purchase their tickets on the Website spend the greatest amount of time (41.6% of their time) selecting a seat, while consumers who purchase their tickets on the App, spend about 33.4% of their time selecting a seat. This evidence is consistent with Cineplex's view that instantaneous seat selection is an important value-add service, as is the convenience of buying tickets anywhere and anytime with advance online purchases.

39. Consumers can purchase advance tickets, which come with a guaranteed seat, in more than one way. Consumers can purchase an advance ticket by attending in person at the theatre (at the box office or concession stand or at a kiosk) or through the added convenience of instantaneous access (from anywhere and at anytime) to the advance electronic ticket online, via the Website or the App ("**Advance e-Ticket**".)

PUBLIC

40. By purchasing Advance e-Tickets, consumers can instantly derive the additional benefit, convenience, time savings, and service of a guaranteed seat of choice and avoid a sold-out showing or a poor seat location. In fact, in my experience, for experiences that have limited seating available, consumers particularly value the choice of purchasing in advance. For example, theatres that have limited seating capacity, such as VIP theatres and recliner seating locations, have a larger percentage of consumers who purchase tickets online.

41. An Advance e-Ticket can also be instantly gifted or forwarded digitally without having to incur the cost or time of physically attending at the theatre and can also be used to ensure instant seat selection for groups that wish to sit together. By contrast, tickets purchased in person at the theatre or at a kiosk cannot be digitally shared. An advanced eTicket is accordingly, the second distinct value of the Website and App (after information gathering).

42. There is no equivalent to the online platform. By instantaneously securing a guaranteed seat online, the consumer saves the costs of transportation or other means of attendance as well as the opportunity cost of time and effort in doing so. More importantly, there would be no guarantee for the consumer that their preferred selection of seat would be available by the time the consumer attends the theatre and purchases the ticket.

IV. The Online Booking Fee

Background

43. On June 15, 2022, Cineplex introduced the online booking fee for Advance e-Ticket purchases.

44. The introduction of the online booking fee did not impact the pricing of tickets that could be purchased at theatres. As implied by its name, the online booking fee strictly and only applies to certain purchases made online, i.e. to certain Advance e-Tickets.

PUBLIC

The Online Booking Fee is Primarily for the Convenience of Instantaneously Guaranteeing a Seat

45. Securing the experience that the consumer wants, including guaranteed and preferred seating, is an important value-add and convenience offering that the online booking system provides. This is particularly important for sought-after releases.

46. Accordingly, there are two separate products being purchased in the online booking system: the ticket for the show and the guaranteed advance seat reservation for that show. These products have separate value. These products have a separate price. And both are disclosed prominently and together on the very first page (on either Website or App) where prices are shown.

47. The online booking fee is not refundable. The main reason that the online booking fee is non-refundable is as follows: the consumer derives the benefit and utility of an instantaneous guarantee of preferred seat reservation, and the theatres incur the detriment of a seat that is no longer available to anyone else. The consumer buys, through the online booking fee, the instantaneous certainty of securing the customized selection of a preferred seat that follows all of the choices selected by the consumer from the myriad of choices available to the consumer on the Website and App.

48. At all times where a price representation for a selected ticket is made, whether on the Website or App, the disclosure of the price for the online booking fee is always present, prominent, and proximate and on the same page as the price for the offering.

49. There is no secondary payment (other than taxes) subsequently introduced on the pages that follow the very first page where a price representation is made on the Website or App (or at all).

Ticket Prices can be Attained as Advertised

50. As I will be illustrating in my evidence, as well as shown in the video attached as Exhibit A hereto and supporting diagrams further below, a plain review of the ticket purchase flow on

either the Website or the App, unmistakably discloses that each and every price representation made on the Website and App can be realized by the consumer.

51. The first page where a price representation is made is the "Tickets" page. This page displays prices for two distinct products. First, the price for the tickets reflecting the customized selection of the consumer following the choices made in the previous pages of the Website or App. Second, the prices of the online booking fee for the certainty and convenience of an instantaneous guaranteed e-Ticket for the consumer's seat of choice, should the consumer choose to proceed with the online purchasing process. In addition, the ticket price and online booking fee are displayed next to the "Proceed" button.

52. The base price for the movie ticket can be obtained at theatres. That base price can also be obtained online with a CineClub subscription and/or with the use of certain promotional coupons. The total price for both products, i.e., for the ticket and for the online booking fee (should the consumer choose to proceed with the online purchase process and instantaneously guarantee the consumer's preferred choice of seat), can be obtained as presented.

53. As I will be explaining in further detail below, before the online purchasing process begins, the consumer is clearly and prominently presented with the full all-inclusive price for the Advanced e-Ticket offering (except taxes).

54. The only other charges that are subsequently added to the price of Advance e-Tickets are taxes.

There is no Single Price for the Online Booking Fee

55. The online booking fee for advanced purchase and advance seat reservation is *contingent* and/or *variable* based on a number of factors.

56. Specifically, consumers who purchase their tickets in a theatre are not charged the online booking fee.

PUBLIC

57. The online booking fee also is contingent because CineClub members are not charged the online booking fee.

58. The online booking fee is also contingent because consumers using certain promotional coupons for a free admission, such as a "buy one – get one free" offer are also not charged the online booking fee.

59. The online booking fee is also variable because it is capped at 4 tickets ($4.00 for Scene+ members and $6.00 for consumers who are not Scene+ members).

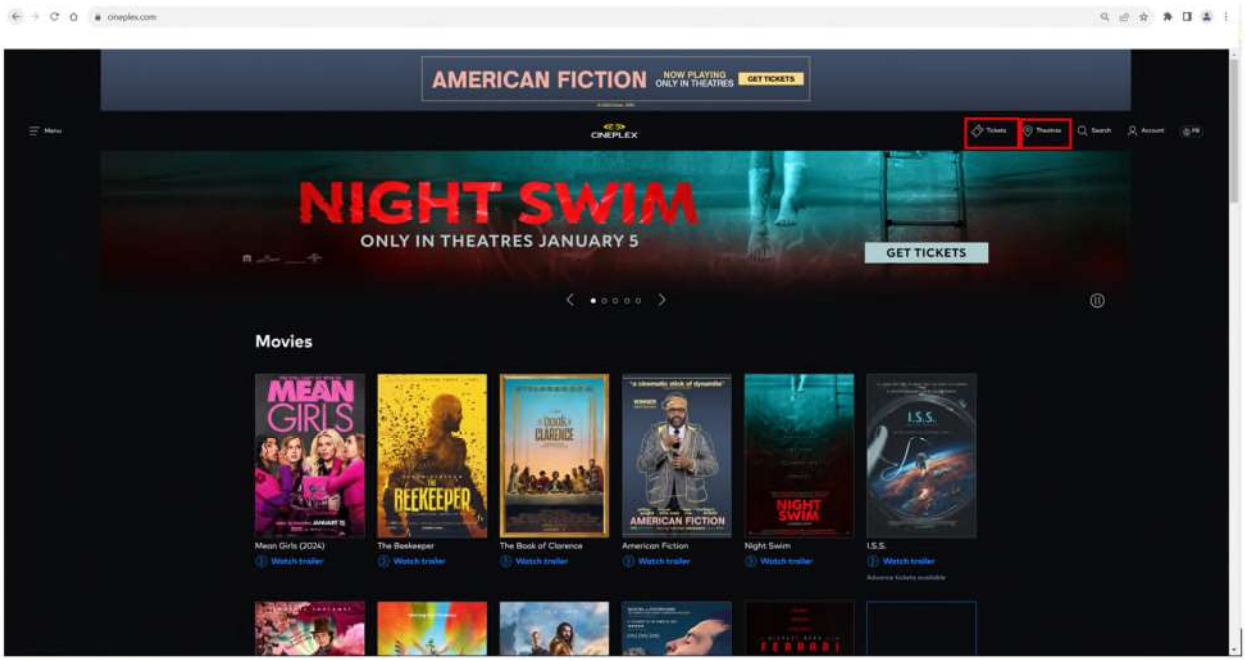
V. The Ticket Purchasing Process: The Flow

60. As I stated before, consumers may purchase movie tickets at theatres or via the advance online purchase process on the Website or through the App. Both latter methods allow consumers to purchase tickets in advance and immediately select and reserve their preferred seats.

Cineplex's Website

61. Consumers wishing to view movie availability, pricing and experiences using the Website begin by either selecting a "movie" from the home page or either of the ticket or theatre links at the top right, as shown in Figure 1 and in the video in Exhibit A attached hereto.

PUBLIC



[Figure 1]

62. Once consumers select their preferred theatre location, the date and the movie they want to see, they are able to preview seats for each available movie experience and preferred show time as indicated in Figure 2, and in the video in Exhibit A attached hereto.

[Figure 2]

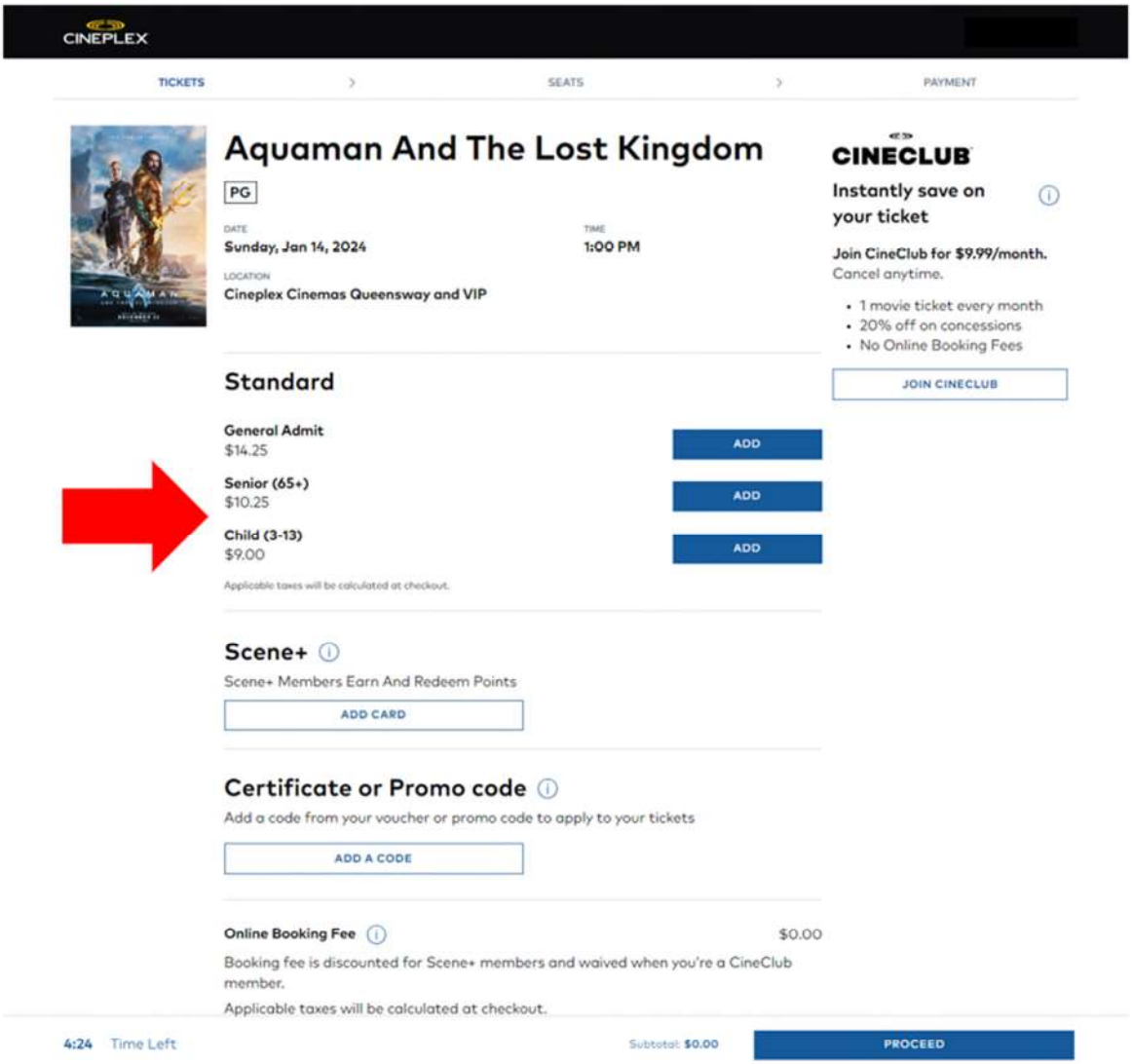
63. Thus, before any price representations are made, the consumer is able to make a number of individual choices that are important to their movie watching experience. Upon selecting the movie, the experience and preferred show time, consumers are asked to sign into their Cineplex account (if they are not already signed in) or create a new account.

PUBLIC

The "Tickets" Page: The First Page Where a Price is Shown

64. Immediately after signing in, the consumer is shown the "**Tickets**" page, which lists the types of tickets available for purchase and their corresponding prices when purchased at the theatre for the applicable date and theatre experience.

65. The three prices shown by the RED arrow in the image below, for a particular movie offering (once a title, day, time, venue and auditorium experience are selected) are the same three prices that a consumer would pay for that exact same selection when purchased at theatres.



[Figure 3]

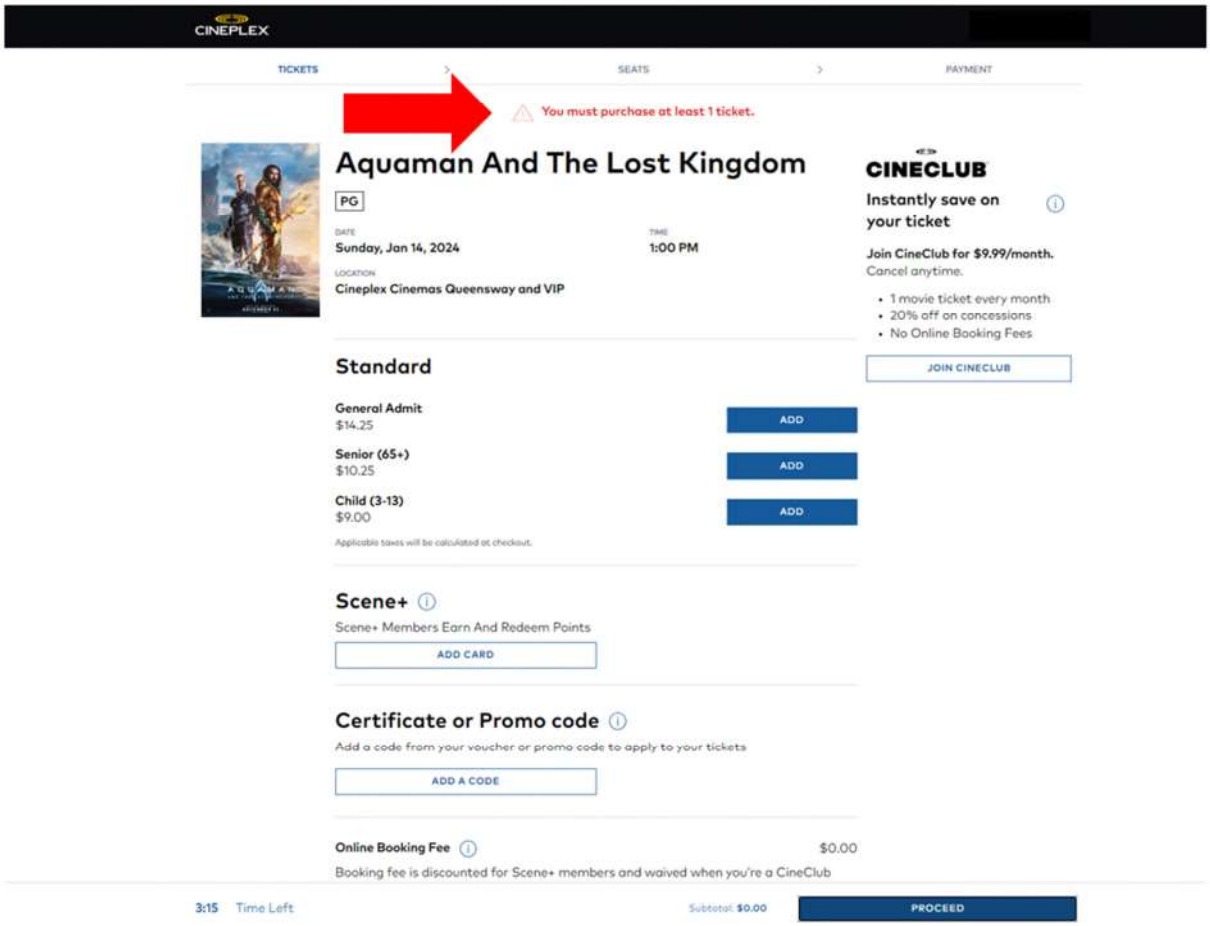
PUBLIC

66. Consumers who want to purchase tickets at the theatre may simply visit the Website to determine movie information, showtimes and determine the price and availability at the theatre of their choice and then exit the Website.

67. According to Cineplex data, out of the 97 million visits to the website in 2022, 11.8 percent proceeded to the "Tickets" page. This suggests that most visits to the Website are for informational purposes only. Out of those 11.8 percent of visits, 42.3 percent completed the ticket purchase transaction; thus only 4.99% of total visitors completed a ticket purchase transaction.

68. A consumer cannot proceed with the online purchase process until the consumer selects a ticket on the "Tickets" page and also clicks "Proceed". If a consumer clicks the "Proceed" button on the "Tickets" page without making one of the three selections identified in Figure 3, above, an error message is displayed requiring the selection of a ticket (as shown by the message in RED "You must purchase at least 1 ticket" in Figure 4, below) [RED colour in original screenshot].

PUBLIC

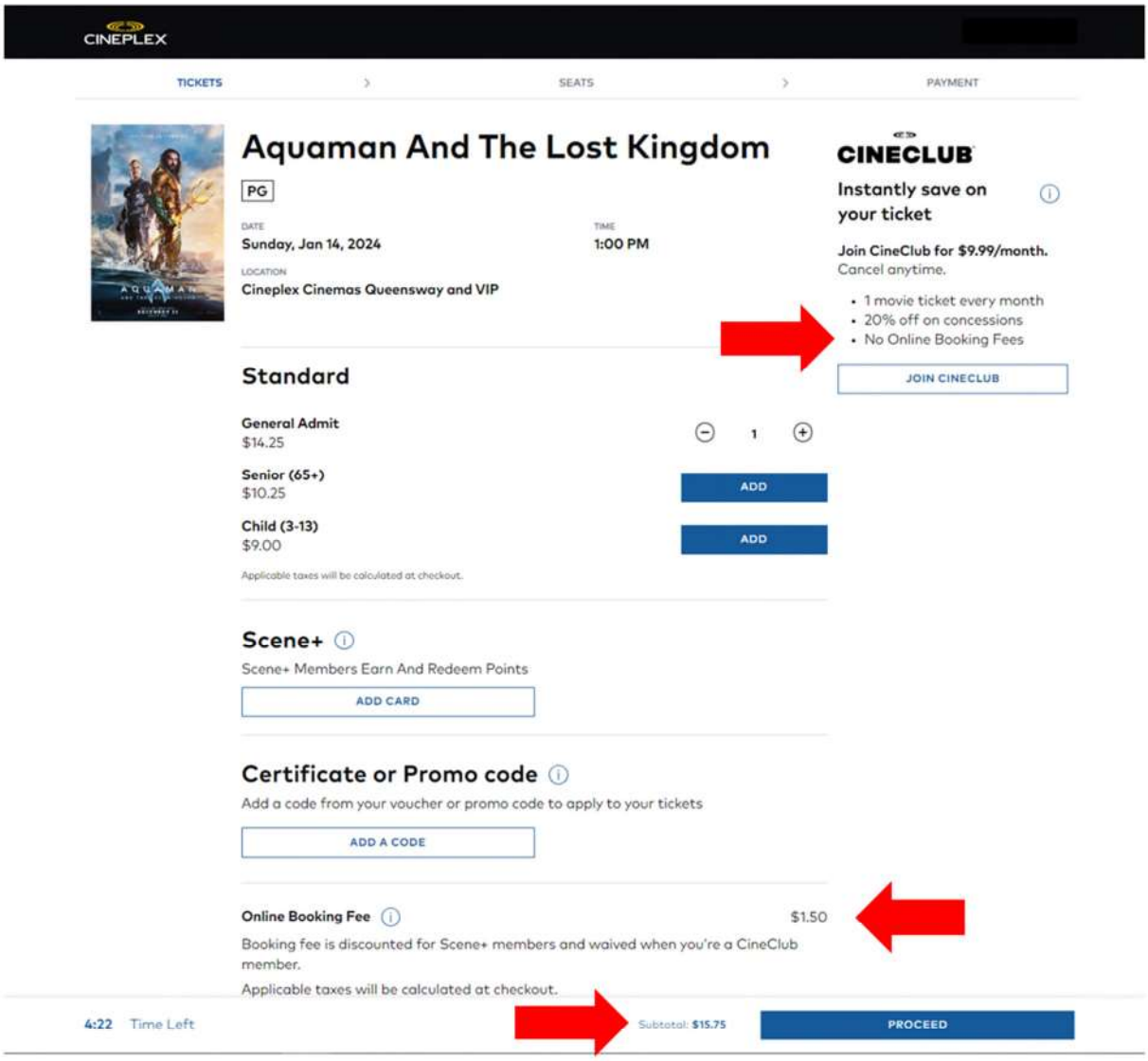


[Figure 4]

69. The "Tickets" page contains immediate contemporaneous information about the online booking fee ***before*** any selection is made to begin an online purchase. Specifically, the online booking fee is mentioned at the top and at the bottom of the "Tickets" page. This is also shown in Figure 5 below.

70. To proceed from the "Tickets" page to the next page, one has to select from the three prices shown on Figure 3. In addition, the online booking fee is now clearly shown as $1.50. Therefore, the resulting price that includes the online booking fee is shown.

PUBLIC



[Figure 5]

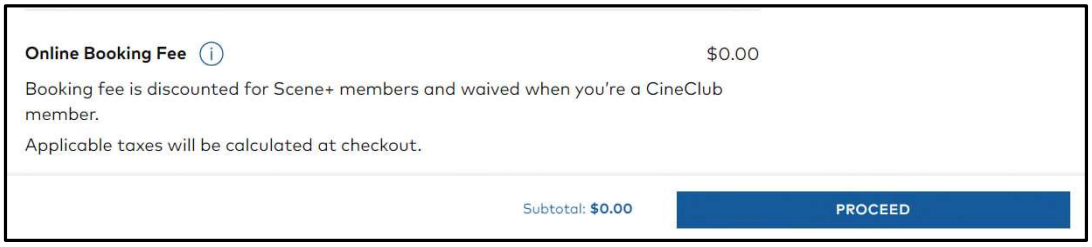
71. The Website is laid out so that the total price, including the online booking fee, is *immediately* and *contemporaneously* shown to the consumer, immediately to the left of the "Proceed" button, which when clicked, starts the online purchasing process.

72. No price for online purchases is shown before the consumer makes the selection of the type of ticket they want to purchase. Prior to ticket selection, the subtotal at the bottom of the page is $0.00, as shown at Figure 3, above. ***Immediately upon selection of the number and type of ticket, the subtotal reflects the total cost (other than taxes) that will be charged for an online purchase***, as shown in Figure 5, above.

PUBLIC

73. The consumer is therefore made aware of the online booking fee ***both before and after*** they first select their ticket, allowing the consumer to make an informed choice before proceeding with the online purchase.

74. Further, the "Tickets" page also provides additional information about the online booking fee. Consumers can click on the "i" information icon shown in Figure 6 below. A pop-up window comes up on the screen (as indicated in Figure 7 below), and provides further information on the online booking fee, including a sample calculation of the online booking fee that a consumer will pay based on the number of tickets purchased and whether the consumer has a Scene+ or CineClub membership (CineClub members are immediately identified on sign-in and are accordingly not subject to the online booking.)



[Figure 6]

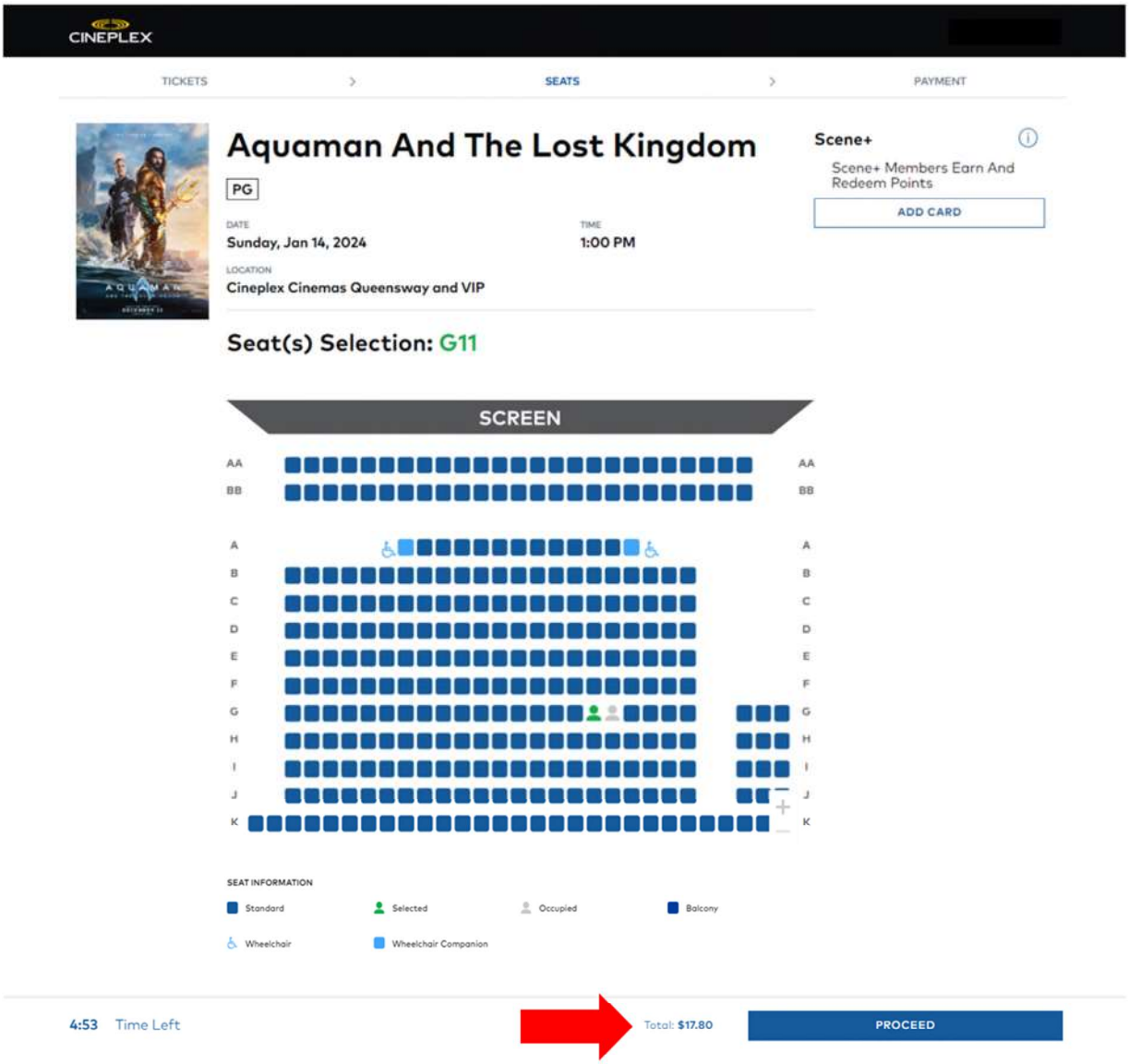
PUBLIC

[Figure 7]

75. Before taking any steps to proceed with an online purchase, the consumer can either choose to purchase a movie ticket at the theatre for the price shown in the ticket category section (see Figure 3 above) or they can choose to proceed with an online purchase with the advantage of an advance seat reservation with the total transaction price, including the online booking fee (if applicable), clearly shown immediately to the left of the "Proceed" button before clicking the button to proceed with the online purchase. There are no subsequent or secondary add-ons to pricing except for taxes.

76. By clicking on the "Proceed" button, the consumer enters the online purchase process and is taken to the "**Seats**" page, where they are able to make seat selection and reservation in advance, and with the added convenience of doing this online. The total price is shown at the bottom of the page, including the online booking fee (if applicable) and tax, as particularized in Figure 8, below:

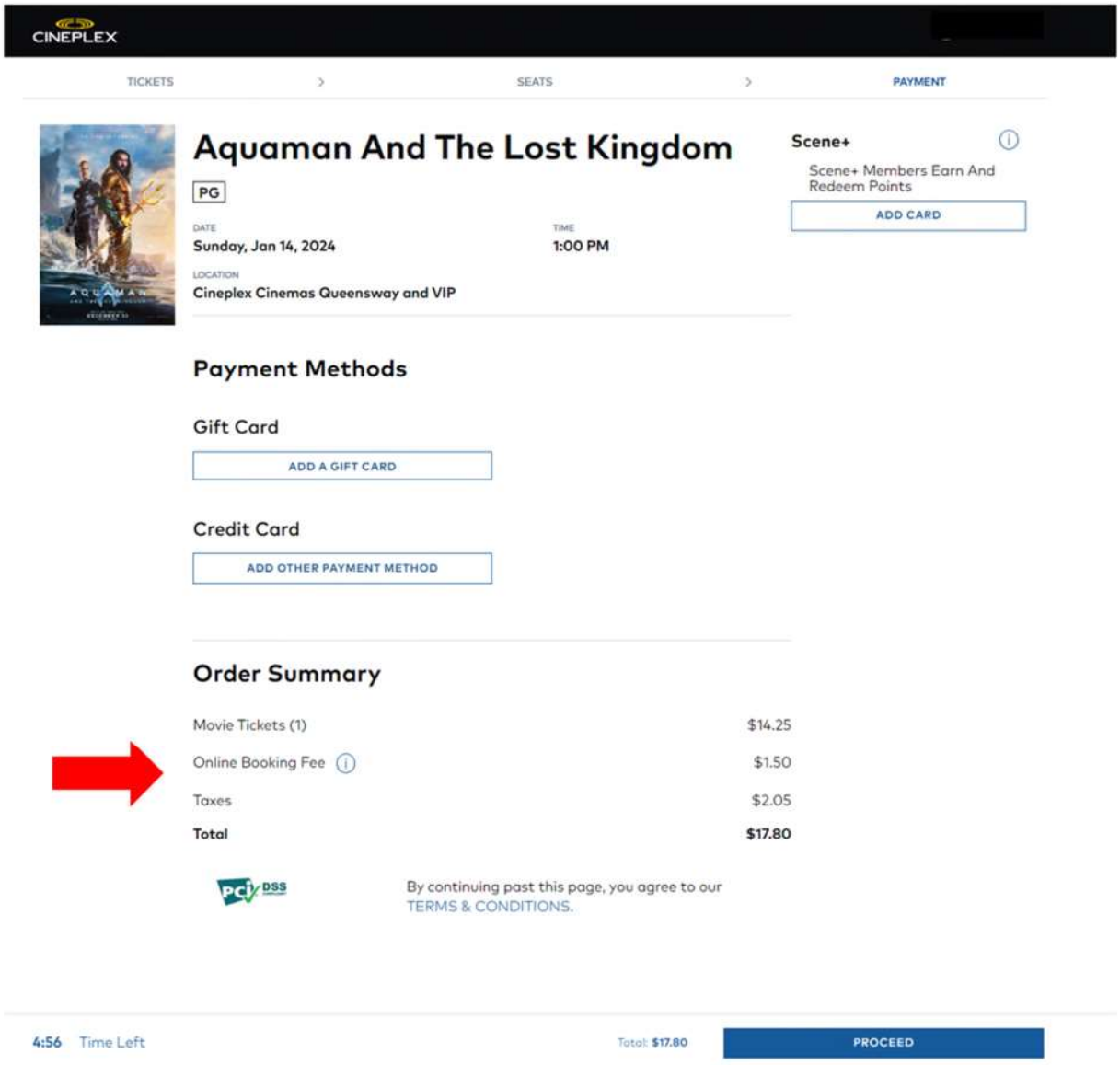
PUBLIC



[Figure 8]

77. Once consumers select their seat, they are taken to the "**Payment**" page, where they are provided with an "Order Summary" that provides a clear breakdown of the purchase price, with the online booking fee clearly shown as a separate line item from the movie tickets (see Figure 9 below). Consumers can then click on the "Proceed" button to select their payment method and enter their payment information.

PUBLIC



[Figure 9]

78. Throughout the course of the transaction, ***the total cost including the online booking fee is prominently shown on every page next to the "Proceed" button. The consumer has the opportunity to review the purchase price at four separate, consecutive stages.***

Cineplex's Mobile App

79. The process for purchasing tickets on the App is similar to the process for purchasing on the Website described above. However, in the App, App users select their preferred movie and

PUBLIC

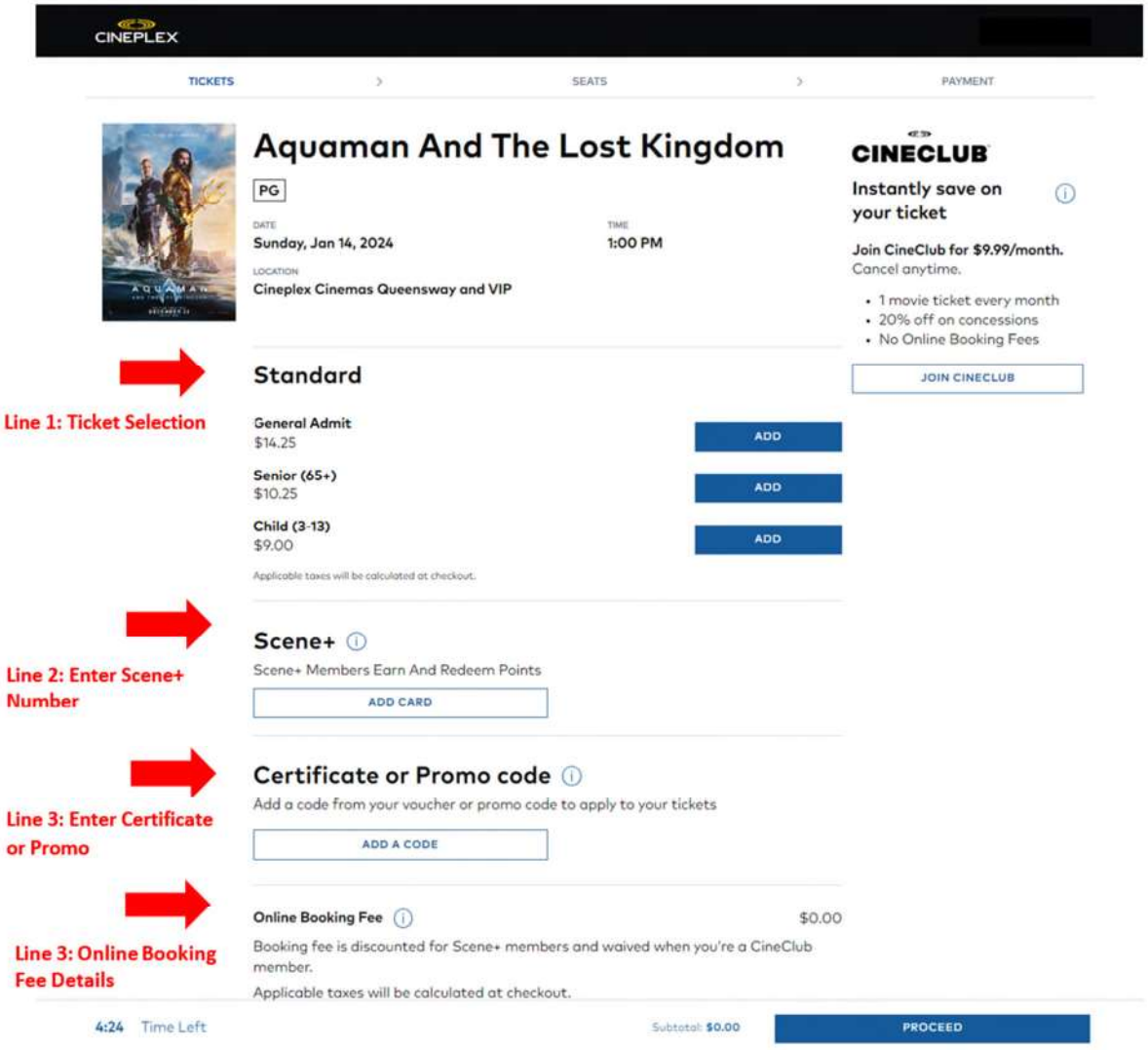
show time, they are taken to the "Tickets" page without signing in (where they are already signed into their account). The remainder of the purchasing process is the same as on the Website.

Transparency Throughout the Process: "No Complaints, No Confusion, No Misleading Pricing"

80. I am not aware of any complaints from consumers about confusion or being deceived by the online booking fee. The only complaints that I am aware of indicate that consumers were fully aware of the existence of the fee. I am also not aware of the Commissioner receiving any complaints prior to the filing of the Notice of Application, as produced in this matter.

81. Furthermore, naming the fee the "online booking fee" was intentional by Cineplex to ensure that there would be no confusion that the online booking fee applies only to online purchases and not to purchases made in theatre.

The Layout Prioritizes Clarity and Transparency



[Figure 10]

82. As I noted earlier, consumers face a range of choices when selecting a ticket type, such as picking a movie, a convenient date and time, a theatre location, and the desired experience. Lines 1-4, in Figure 10 above, follow the order in which users decide what ticket selections to make, whether they are a Scene+ member (to receive benefits), or whether they want to use a certificate or promotional code to redeem for ticket(s).

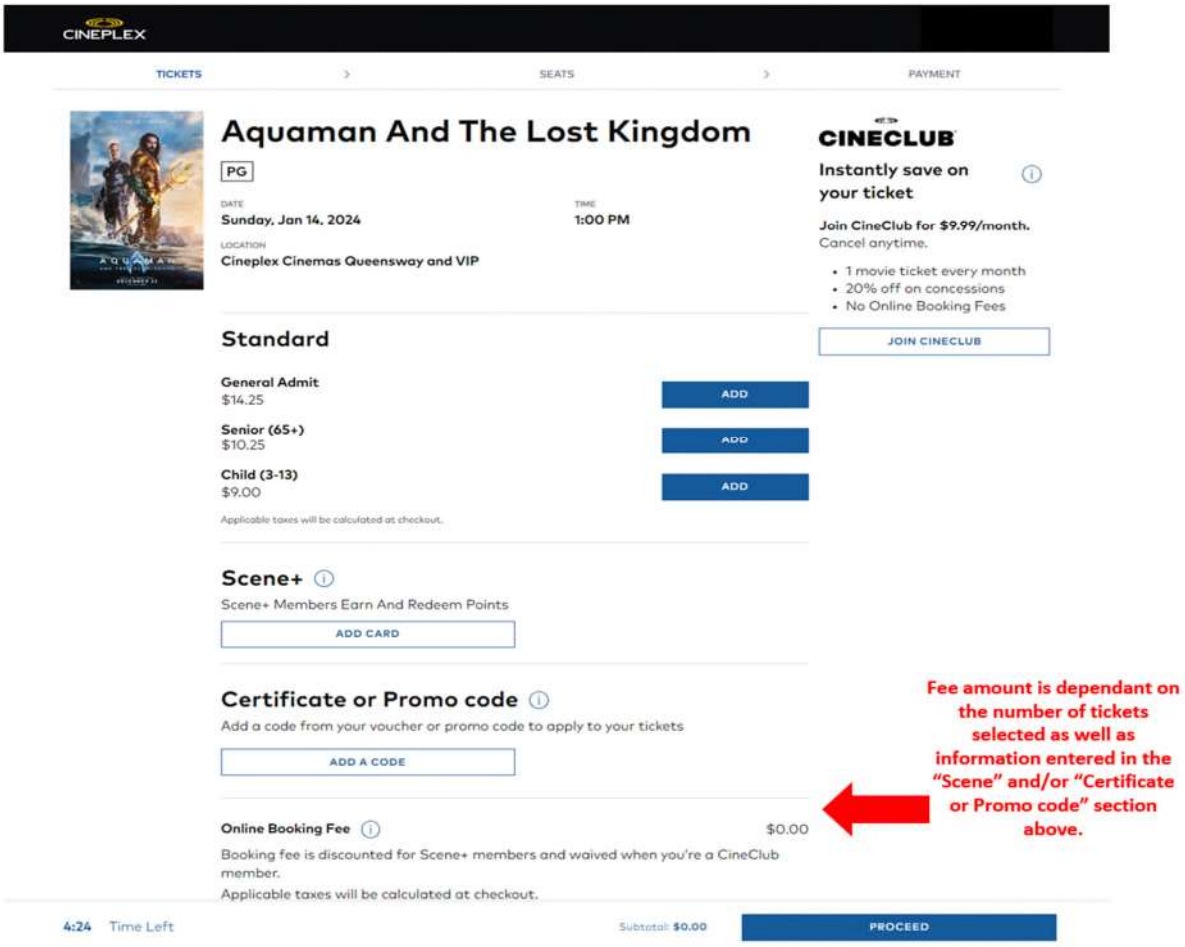
83. Consumers can customize their order in a number of ways, which may include selecting from the standard list (Line 1), as well as adding their Scene+ account number (Line 2) and

PUBLIC

promotional coupon (Line 3). Once all ticket selections are made, it is only then that the online booking fee (Line 4) can be ascertained to apply or not, and accordingly calculated (along with a determination of the 4-ticket cap) to provide a simultaneous presentation of the price for the ticket(s) immediately to the left of the "Proceed" button. The ordering (Lines 1-4, above) reflects the intuitively appealing order of operations in which a reasonable consumer would add tickets to their order.

84. The information that is presented on the "Tickets" page of the Website is clearly laid out using a large font that is consistent throughout. The layout is both intuitive and user-friendly to consumers. After selecting the number of tickets, consumers can enter their Scene+ Card number (if not already signed in to their Cineplex account) as well as any Certificate or promotional codes. Entering the information will affect the amount of the online booking fee, if any, as also illustrated in the video attached Exhibit A attached hereto. Next in the layout is the description of the online booking fee as indicated in Figure 11 below:

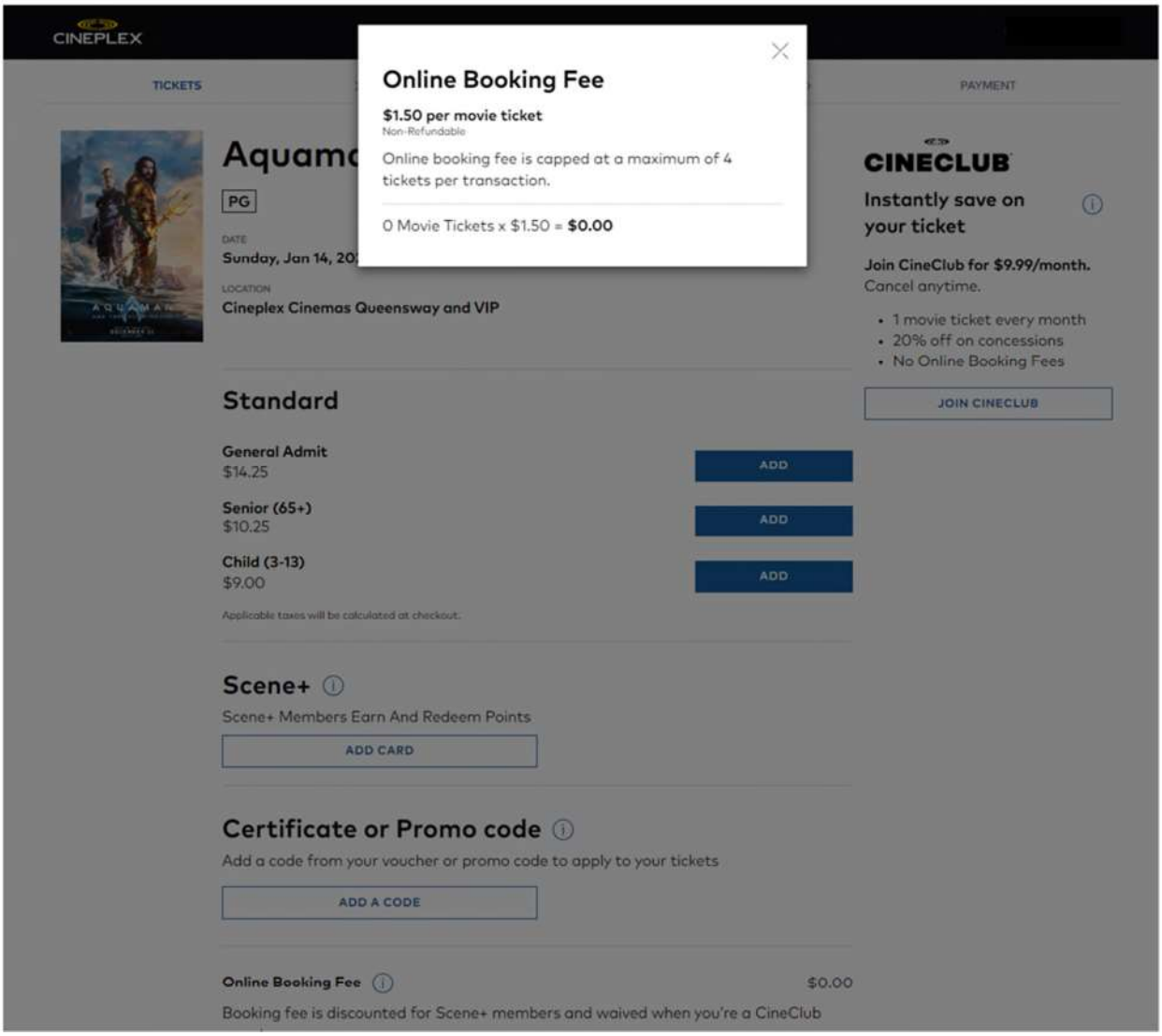
PUBLIC



[Figure 11]

85. Consumers can see the fee total and are able click on an "i" information icon for additional information on the fee as shown in Figure 12 below and as also illustrated in the video attached as Exhibit A hereto:

PUBLIC



[Figure 12]

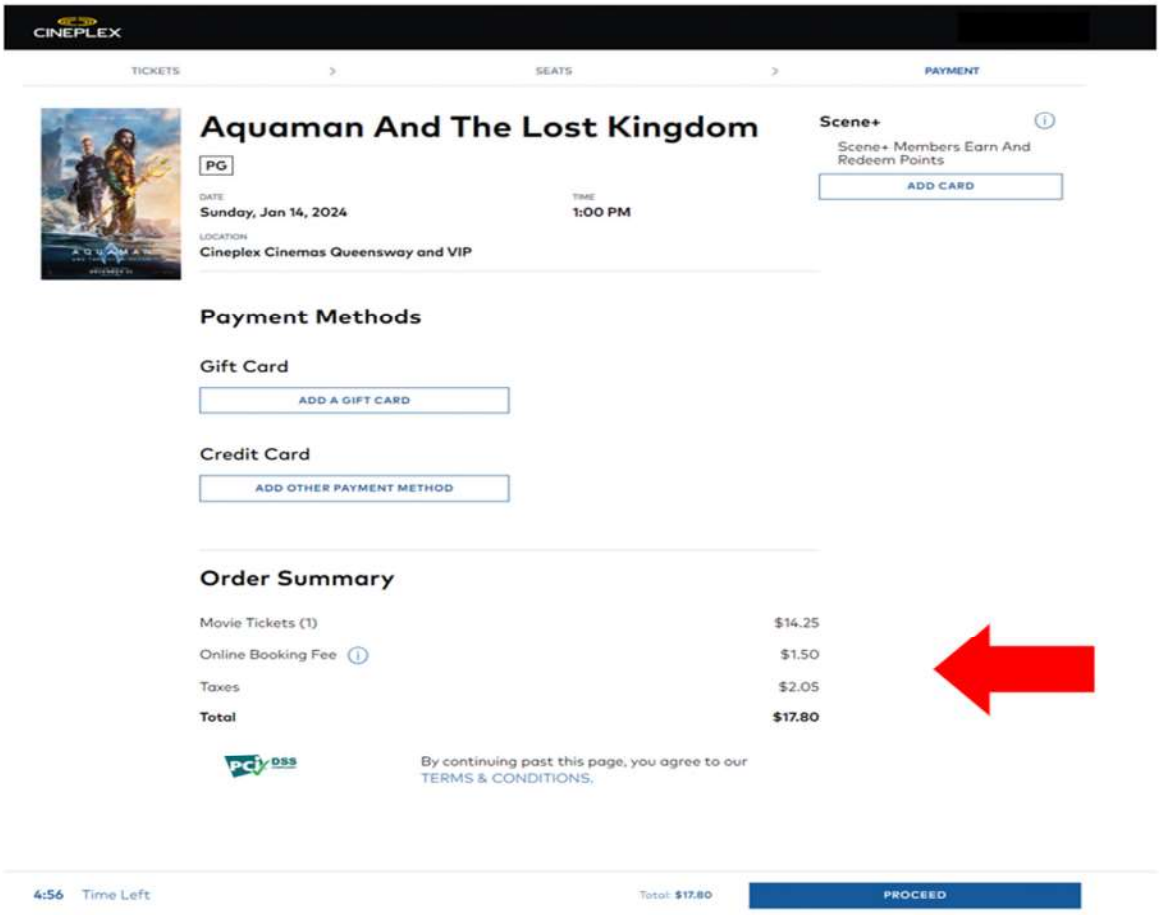
86. Further, at every step of the online purchase process, the online booking fee is apparent on the face of each page. On both the Website and the App, on the same page or screen at the first point of contact, there is: (a) a specific representation as to the specific price for the specific movie selected, (b) explicit disclosures of the existence and quantum of the online booking fee, and (c) disclosure of the circumstances in which the online booking fee will be charged.

87. Single disclosures of similar kind, allowing the consumer to discern and appreciate the online booking fee (and where or whether applicable) are made on the following two pages or screens; further, comprehensive disclosure is made at the "Payment" page.

PUBLIC

88. I have reviewed the Commissioner's allegations at paragraph 22 of the Application. Contrary to the Commissioner's allegations, both the Website and App use ***the same font*** and font size for pricing throughout the "Tickets" page. Further, the subtotal is shown in a more prominent bold blue font and appears directly beside the prominently displayed "Proceed" button.

89. Further, with respect to paragraph 24 of the Application, the Commissioner alleges that the "Subtotal" is replaced with the "Total" and the online booking fee is not separately shown to consumers before they pay for the purchase. In fact, a breakdown of the entire purchase is shown in an "Order Summary" on the "Payment" Page immediately before consumers are asked to pay for the purchase, as shown below:



[Figure 13]

PUBLIC

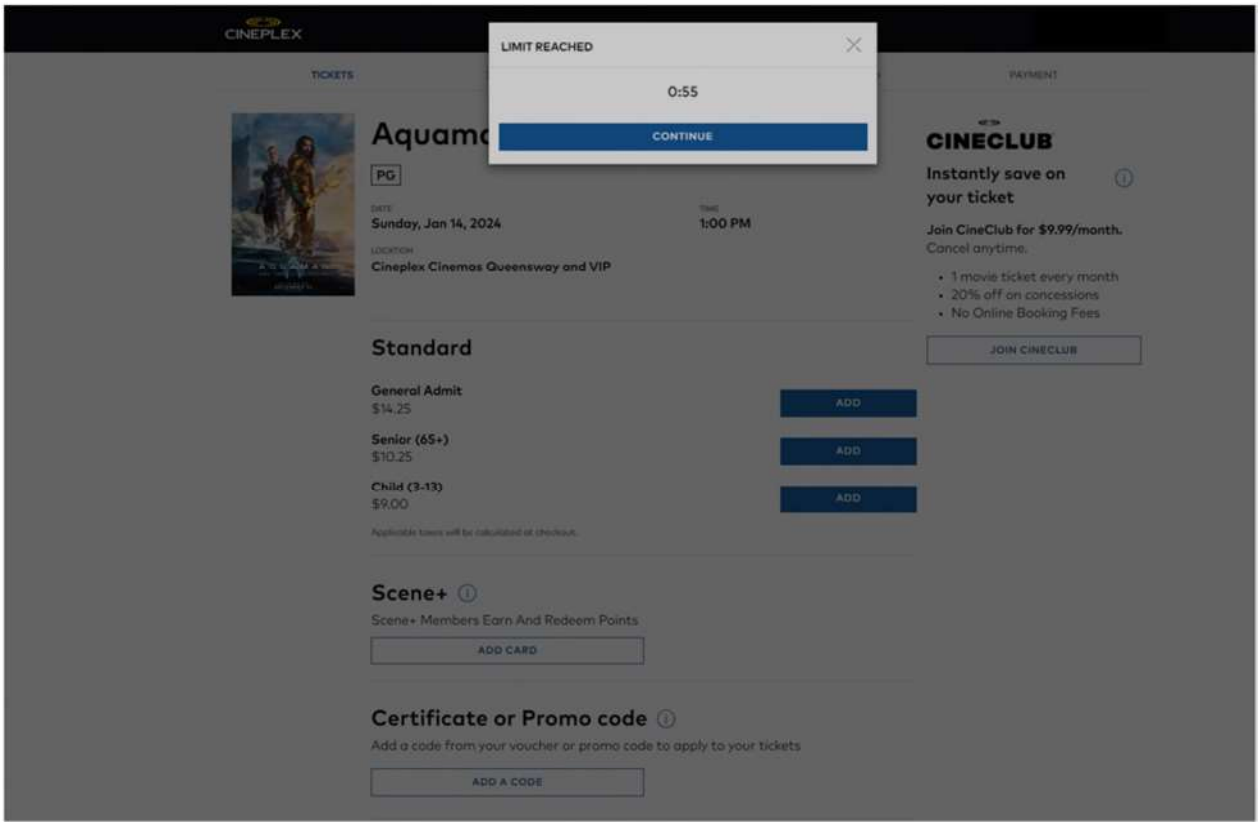
90. With respect to the countdown timers that the Commissioner mentions in paragraphs 25 of the Application, I note that a timer is part of the underlying architecture of the software Cineplex purchased to drive its online ticketing engine. The countdown timer has been part of the purchase flow long before the introduction of the online booking fee.

91. I also note that a timer is necessary to ensure that all consumers receive access to prime seats. A timer ensures that seats are not being held indefinitely in the purchase process and that they are released if a consumer is no longer interested in continuing with the purchase.

92. The countdown timer is set at 5 minutes beginning on the "Tickets" stage of the process and it re-sets if a consumer needs more time to make their ticket and seat selection. This provides ample opportunity for consumers to complete the task of selecting the number of tickets to purchase and to review the minimal amount of information on the "Tickets" page. According to Cineplex data, from start to finish, it takes consumers an average of 3 minutes and one second to complete a transaction on the Website and 2 minutes and 34 seconds to complete the transaction on the App.

93. Further, on both the Website and the App, consumers are given the opportunity to reset the timer once it reaches the 1-minute mark. This is done by a prominent pop up that appears on the screen, as shown in Figure 14 below:

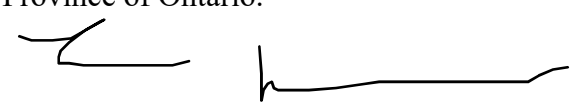
PUBLIC



[Figure 14]

94. When consumers click "Continue", the time is reset back to five minutes and the consumer is able to return to reviewing the information on the "Tickets" page. There is no limit as to how many times the timer can be reset. The procedure applies to the timer on every subsequent stage of the online purchase process.

AFFIRMED BEFORE ME REMOTELY)
this 12th day of January, 2024)
in accordance with Ontario Regulation)
431/20. The affiant was located in the)
City of Oakville, in the Province of)
Ontario, while the commissioner was)
located in the City of Toronto, in the)
Province of Ontario.)

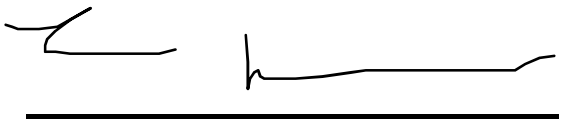


Commissioner for Taking Affidavits

Daniel Francis McGrath

PUBLIC

This is Exhibit “A” referred to in the Affidavit of Daniel Francis McGrath, affirmed before me this 12th day of January, 2024.



A Commissioner, etc

Virtually commissioned and electronically signed pursuant to O. Reg 431/20: Administering Oath or Declaration Remotely

PUBLIC

CT-2023-003

THE COMPETITION TRUBINAL

IN THE MATTER OF an Application by the Commissioner of Competition for an order under sections 74.01 and 74.1 of the *Competition Act*, RSC 1985, c C-34.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

CINEPLEX INC.

Respondent

WITNESS STATEMENT OF DANIEL FRANCIS MCGRATH

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West, Suite 3400
Toronto ON M5H 4E3
T: 416.367.6000
F: 416.367.6749

Robert S. Russell (25529R)
rrussell@blg.com
T: 416-367-6256

Martin Abadi (53275J)
mabadi@blg.com
T: 416-367-6158

Joshua Abaki (75327L)
jabaki@blg.com
T: 416-367-6568

Raymond Ashurov (72806N)
rashurov@blg.com
T: 416-367- 6503

CINEPLEX

GAVIN GLEESON

TICKETS > SEATS > PAYMENT

Shazam! Fury of the Gods

PG

DATE
Today, Apr 5, 2023

TIME
6:55 PM

LOCATION
Scotiabank Theatre Vancouver

Standard

General Admit
$14.50
2

Senior (65+)
$10.50
ADD

Child (3-13)
$9.50
2

Applicable taxes will be calculated at checkout.

Scene+

Scene+ Members Earn And Redeem Points

ADD CARD

Certificate or Promo code

Add a code from your voucher or promo code to apply to your tickets

ADD A CODE

Online Booking Fee $6.00

Booking fee is discounted for Scene+ members and waived when you're a CineClub member.

Applicable taxes will be calculated at checkout.

CINECLUB

Instantly save on your ticket

Join CineClub for $9.99/month.
Cancel anytime.

- 1 movie ticket every month
- 20% off on concessions
- No Online Booking Fees

JOIN CINECLUB

4:28 Time Left

Subtotal: **$54.00**

PROCEED

later as shoppers go through the buying..."

I can't see the rest.

MR. RUSSELL: So upfront and later is your reference to temporal component; right? There's a timing or temporal component to the -- although I'm not going to give you a hard time about the fact it hasn't been finalized as a definition. But what you expect to be the FTC definition which they put out in papers -- we're going to be coming to that as well -- has a temporal component?

DR. MORWITZ: Yes.

MR. RUSSELL: So the academic literature you rely on definitionally has a temporal component. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And the FTC proposed rule has a temporal component to it. Correct?

DR. MORWITZ: I haven't seen the details of the proposed rule.

MR. RUSSELL: The one you refer to in your remarks to the White House, the definition does, does it not? The one you just read to us?

DR. MORWITZ: The definition, yes.

MR. RUSSELL: Yes, that's all I'm saying, the definition. Have you examined the drip pricing provision under our legislation here in Canada?

scrolling. When the primary call to action is also included above the fold, it encourages users to convert without scrolling down the page any further.[10] Implementing the floating ribbon at the bottom of the web page that adapts to the user's screen dimensions introduces three issues.

a. The floating ribbon increases the amount of content hidden below the page fold by covering up an additional 80 pixels of screen real estate.

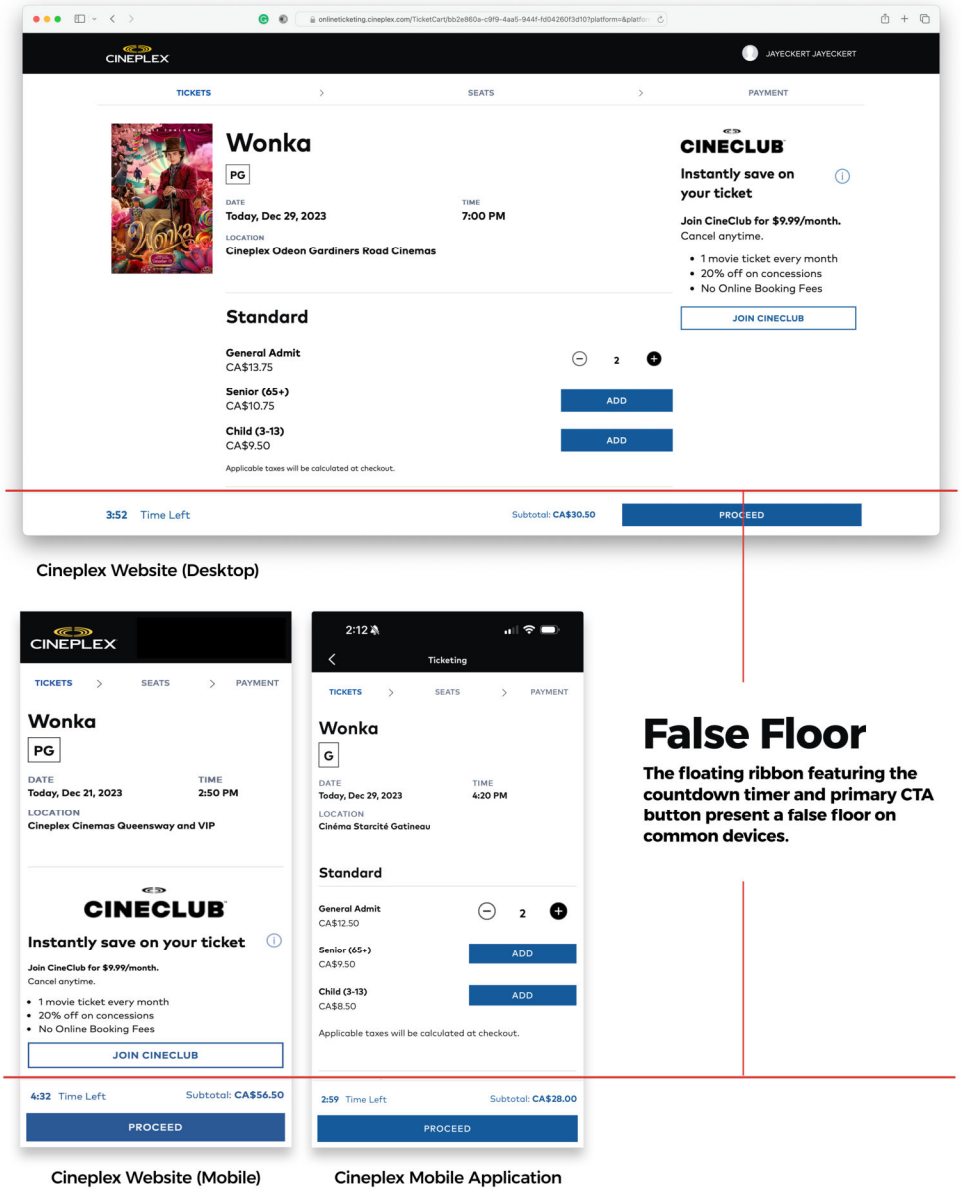
b. Including of a timer creates a sense of urgency for the user to select tickets and click on the Proceed button as quickly as possible before time runs out, discouraging users from taking the time to scroll down the page.

c. The placement of the primary call to action, the "PROCEED" button above the page fold, discourages scrolling as users can select their tickets and convert without having to scroll down.

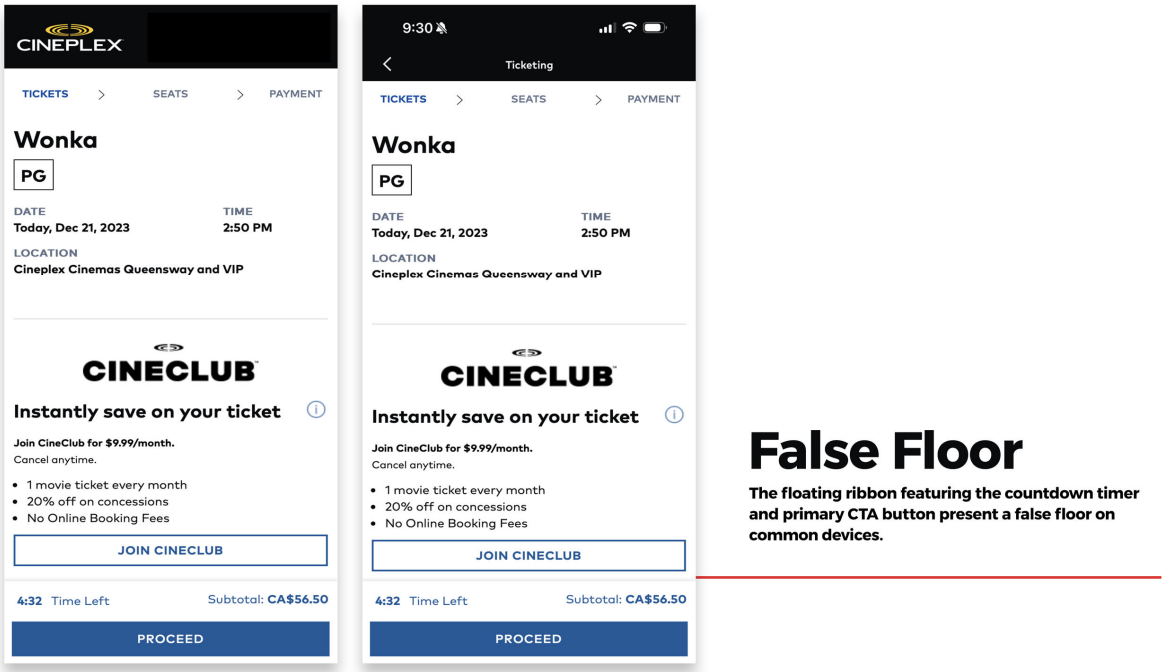
39. The False Floor problem may be created by the floating ribbon at the bottom of the user's screen. It is evident in both the desktop web page, the mobile version of the web page and in the Cineplex Mobile Application, as shown in Figure 2 using the most common mobile viewport of 360 pixels by 800 pixels and most common desktop viewport height of 1,080 pixels.[11]

[10] The Illusion of Completeness, *The Nielsen Norman Group:* https://www.nngroup.com/articles/illusion-of-completeness/
[11] What is the Ideal Screen Resolution for Responsive Design?, *Browserstack*: https://www.browserstack.com/guide/ideal-screen-sizes-for-responsive-design

40. Figure 2 – The False Floor problem on the Cineplex Tickets Page.[12]



[12] Figure 2 captured December 21 and 29, 2023 at most common mobile viewport (360px by 800px) using Safari and the Cineplex Mobile Application for iOS and most common desktop viewport height of 1,080 pixels using Safari for Mac OS.



Cineplex Website (Mobile)

Cineplex Mobile Application

Standard Screen Dimensions and Resolutions

41. As illustrated in the Discovery Phase of the web design process, understanding user behaviour and screen dimensions is paramount to making informed decisions about content placement within a web page design. The use of analytics data, for example from Adobe Analytics[13] provides clarity for designers as to which screen dimensions all visitors to the Cineplex.com website and mobile application use to view the Tickets Page. In the rare event that this data is unavailable to the designer, for example, when standard analytics applications are not monitoring the website, it is a best practice to rely on globally accepted standards provided by the StatCounter Global Stats, which publishes standard screen dimensions for public reference and allows users to refine data research by day, week, month or year. Widely-used website quality assurance testing

[13] Adobe Analytics is utilized by Cineplex as stated at Examination for Discovery of Mr. McGrath, page 287, line 1

platforms, such as BrowserStack rely on StatCounter Global Stats to provide real-time screen resolution metrics based on more than 5 billion page views per month across more than 1.5 million websites.[14]

42. Browser dimensions usually increase incrementally over time as technology evolves. Using the most recently published statistics from November 2023, designers will note that 69.33% of all users on the World Wide Web 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% undetermined.[15]

43. Referencing Figure 3 below, we can see the placement of the Online Booking Fee on the Tickets Page of Cineplex.com is well beyond what common web browsers can display above the page fold, positioned 1,330 pixels below the top of the browser.

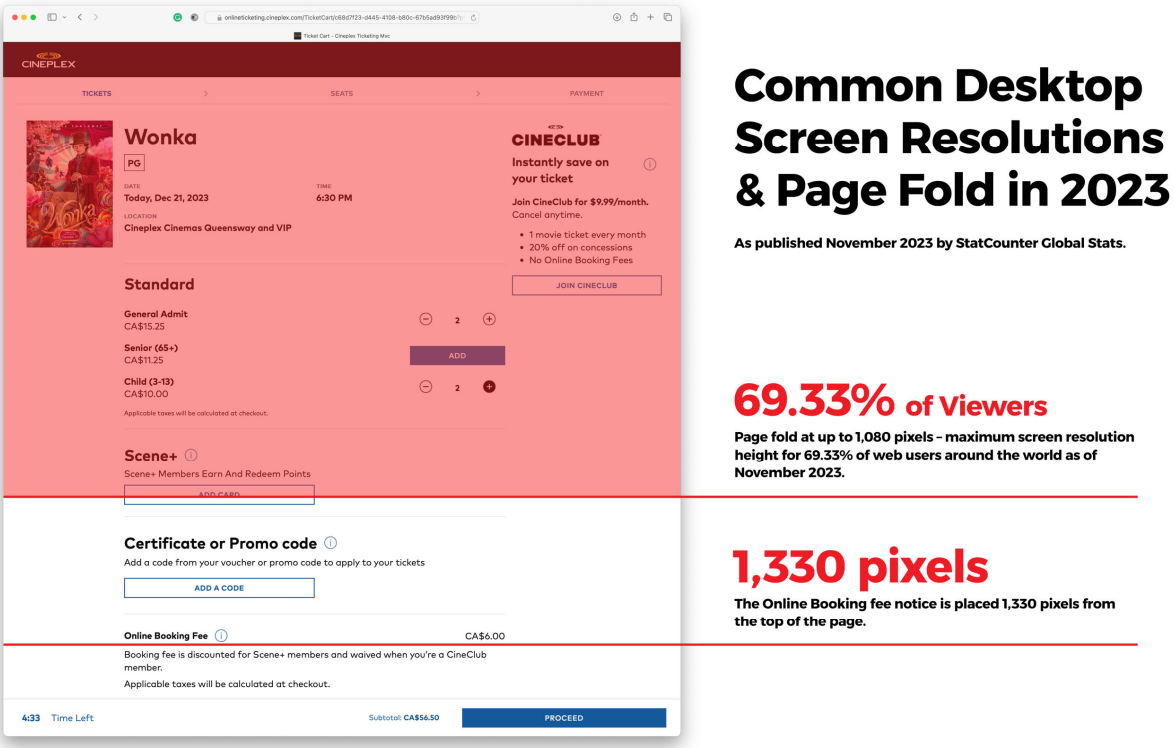
44. Browser toolbars (the application bar at the top of the browser that includes the address bar and other buttons) vary in height from 80 to 120 pixels on average, depending on user configurations. When the browser toolbar and the floating ribbon that contains the countdown timer and primary CTA button at the bottom of the browser are factored into determine the page fold the Online Booking Fee could be displayed up to 1,450 pixels from the top of the user's screen and would only be visible to the user if they chose to ignore the timer and floating call to action button and scroll down to the very bottom of the page.

---

[14] StatCounter Global Stats Fact Sheet: https://gs.statcounter.com/factsheet#:~:text=Our%20stats%20are%20based%20on,with%20a%20larger%20sample%20size.

[15] StatCounter Global Stats screen resolution data as of November 2023: https://gs.statcounter.com/screen-resolution-stats/desktop/worldwide/#monthly-202211-202311-bar

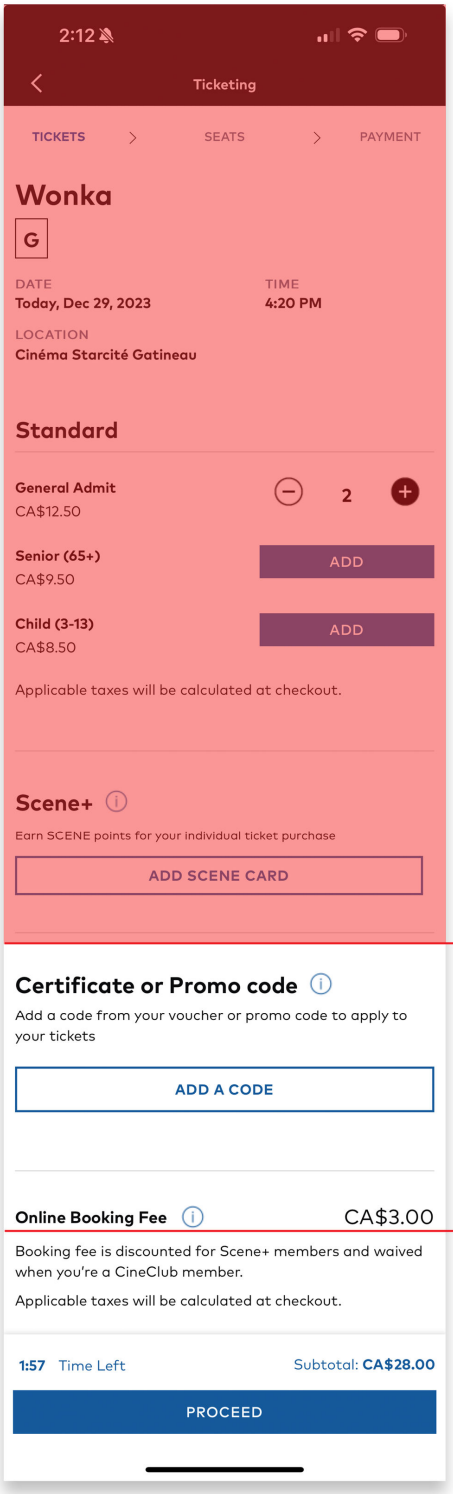
45. Figure 3 – Common Screen Resolutions in November 2023 as published by StatCounter Global Stats overlayed on the Cineplex.com Tickets Page.[16]



On the mobile application and mobile version of the website, the OBF is located even further down the page at a depth of 1,188 pixels which is beyond the maximum viewable area of contemporary mobile phones without requiring the user to scroll down.

46. Figure 4 – Common Mobile Screen Resolutions in November 2023 published by StatCounter Global Stats[17] overlayed on the Cineplex Mobile Application Tickets Page.[18]

[16] Figure 3 screenshot captured December 21, 2023 on Mac Studio Display using Safari Web Browser.
[17] StatCounter Global Stats mobile screen resolution data as of November 2023: https://gs.statcounter.com/screen-resolution-stats/mobile/worldwide#monthly-202211-202311-bar
[18] Figure 4 screenshot captured December 29, 2023 on Cineplex iOS Application.



Common Mobile Screen Resolutions & Page Fold in 2023

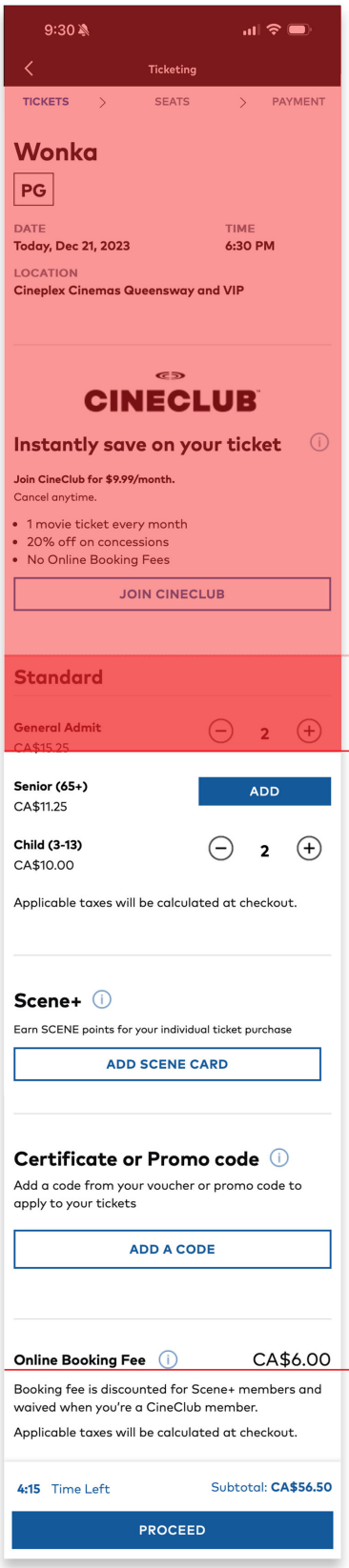
As published November 2023 by StatCounter Global Stats.

63.23% of Mobile Viewers

Page fold shown at 926 pixels – maximum viewable area for the most commonly used mobile devices as of November 2023.

1,188 pixels

The Online Booking fee notice is placed 1,188 pixels from the top of the page.



Common Mobile Screen Resolutions & Page Fold in 2023

As published October 2023 by Browserstack

***Indicates floating ribbon creating a False Floor by obscuring information.**

11.1% of Mobile Devices

Page fold at 800 pixels - maximum viewable area for the most commonly used mobile devices in 2023.

1,535 pixels

The Online Booking fee notice is placed 1,535 pixels from the top of the page.

User Attention and Scrolling Behaviour Studies

47. The Nielsen Norman Group conducted two comparative studies on how contemporary web users consume web page content and how often users scroll down to view more on a page. The research group first conducted a study in 2010, which showed that 80% of users viewing time was spent above the page fold.[19] A follow-up study was conducted in 2018 after the invention of responsive design and significantly larger monitors' capability of displaying websites and applications at much higher resolutions. The 2018 study revealed that users spent about 57% of their page-viewing time above the fold. 74% of the viewing time was spent in the first two screenfuls up to 2,160 pixels deep.[20] The results of both studies concluded that the pattern of a sharp decrease in attention below the page fold remained the same in 2018 as in 2010.

48. The design of the Cineplex.com Tickets page, which features a floating ribbon at the bottom including a countdown timer and a primary call to action button, creates a false floor on both the website and the mobile applications. The layout places important information regarding the additional fees charged for booking online below the maximum screen depth limitations of nearly all contemporary technologies. It is my opinion that the Cineplex.com Tickets page does not encourage users to scroll down below the fold. The floating ribbon is designed so that users can convert without scrolling down the page to uncover additional information.

---

[19] Scrolling and Attention (Original Study), *The Nielsen Norman Group:* https://www.nngroup.com/articles/scrolling-and-attention-original-research/
[20] Scrolling and Attention, *The Nielsen Norman Group*: https://www.nngroup.com/articles/scrolling-and-attention/

Alternative Options to Display the Online Booking Fee

49. I have been asked whether it is technically possible to initially display the price of a movie ticket with the price of the Online Booking Fee (OBF) included when the OBF is capped at a maximum of four movie tickets per transaction before any movie tickets are added to the basket.

50. It is my opinion that it is technically possible to initially display the price of a movie ticket with the price of the OBF included when the OBF is capped at a maximum of four movie tickets per transaction before any movie tickets are added to the cart.

51. It is technically possible to develop logistical code within the Tickets Page to present the first 4 tickets to the user at a price that includes the OBF and then offer subsequent tickets at a discounted price that does not include the OBF. This method of discounting product is commonplace in e-commerce websites and applications and could be considered a “bulk discount,” where a parameter is defined in the web page source code to count products added to the cart and then discount additional products once a specific volume is reached.

52. Aside from including the OBF in the price of a movie ticket, there are alternative design approaches that could be considered to enhance the awareness of the existence of the OBF

The Countdown Timer

53. I have been asked if the countdown timer on the “Tickets” page is technically necessary. After reading the discovery testimony, Cineplex Inc., COO, Daniel McGrath states that the Tickets Page does not reserve seat inventory until the user clicks on the primary call to action button labelled “PROCEED,” which

advances the user to the next page.[21] The Tickets page should, therefore become idle once it finishes loading and is not actively communicating with the ticket reservation system at this point in the online purchasing process.

54. When a web page is described as “idle,” it means that the page is not communicating with external or third-party sources to move, share or request information. All processes that happen within the idle page are contained within the page source (or source code) and do not require intervention or additional information from another source, such as the ticketing inventory system.

55. There are two common methods to measure product inventory in the e-commerce process. The first is to check product inventory when the product selection page is requested by the browser (this means when the web page is first loading) and then limit the volume of product displayed for the user. The second method, is to check the product inventory once the user entered the final checkout process and is no longer adding products to their cart.

56. The ticket select buttons that allow the user to choose the admission type and volume of tickets that they wish to purchase do not require information to be collected or sent to an external application or database at this point in the user journey. This function is self-contained within the Tickets Page. The selection information is then transferred to the next page in the sales funnel when the user clicks on the “PROCEED” button. As Mr. McGrath states in the discovery testimony, the website then references the seat inventory based on the ticket parameters the user defined in the previous step.

57. Consequently, it is my opinion that the Tickets Page does not require a countdown timer for the purpose of temporarily holding seat inventory for the user.

---

[21] Examination for Discovery of Mr. McGrath, page 303, lines 9-12

58. Alternative methods of communicating time-sensitive actions include displaying a temporary pop-up window if the user is idle for more than the desired amount of time or simply stating in plain language within the page content that the user has a limited amount of time to complete their selection and move forward to reserve seats on the next page or the web page will reset, or time out.

these pricing practices affect consumers in terms of (1) their perception of the price to be paid for a given product, and (2) their behavior.

4.1.2.1 Partitioned pricing leads consumers to underestimate the price

57. Partitioned pricing is a pricing strategy where a firm divides the price of a product into a base price and a separate mandatory fee rather than charging a single, all-inclusive price. Examples of partitioned pricing include (1) when a firm that sells its product via catalogs or the web presents the price of a product as a base price for the product and a separate fee for shipping and handling, (2) when an auction house requires that the total amount buyers have to pay if they win be their bid plus a buyer's premium, (3) when a cruise company prices a cruise package as a base price and port charges. In all these cases, the firm offering these goods could instead charge an all-inclusive price (i.e., the sum of the base price and the mandatory fee).

58. Although, as discussed above, literature on consumers' mental accounting habits suggests that consumers would be more likely to buy if presented with one all-inclusive price versus separate smaller charges that sum to the same total,[27] the academic literature on partitioned pricing has found the opposite. Specifically, this academic literature has shown that when firms use partitioned pricing, consumers tend to underestimate the total price of a purchase. This happens because consumers tend to pay less attention to additional fees than to base price information. The use of partitioned pricing has also been shown to increase consumer demand. Below is a brief

[27] Thaler, Richard (1985), "Mental Accounting and Consumer Choice," *Marketing Science*, 4, 199-214.

summary of research on partitioned pricing. A more comprehensive summary can be found in Greenleaf et al and also in Appendix C.[28]

59. Morwitz, Greenleaf, and Johnson were the first to examine how consumers process partitioned pricing.[29] We found through two experiments, that when a price is partitioned, it lowers consumers' average perceptions of the total price of the product and increases their demand.

60. In our first study, MBA students participated in an auction for a jar of pennies. Students were randomly given two sets of rules. One group was told if they won the auction, they would pay their bid plus an extra 15% fee (i.e., the partitioned price condition). The other group was told they would just pay their bid if they won. Everyone then guessed how much the jar of pennies was worth. We looked at how much each person was willing to pay compared to what they thought the jar was worth. If the first group understood the 15% fee, then the first group should bid lower so that in the end, both groups spend about the same amount for the jar of pennies.

61. However, what we found was that the group that had to pay the extra 15% fee ended up being willing to pay 88.5% of what they thought the jar was worth. The other group, without the extra fee, was only willing to pay 78.7% of the jar's value. This means that breaking down the price (by adding a fee) can increase how much consumers are willing to pay to obtain a good.

62. In our second study, we had college students pretend they were buying a phone. They had to choose between two phones: a Sony phone from the store and an AT&T phone from a catalogue. We randomly showed some students the AT&T phone's total price, including all costs ($82.90). Others saw the price split up (i.e., partitioned): the phone was $69.95 with an

[28] Greenleaf, Eric A., Eric J. Johnson, Vicki G. Morwitz, and Edith Shalev (2016), "The Price does not Include Additional Taxes, Fees, and Surcharges: A Review of Research on Partitioned Pricing," *Journal of Consumer Psychology*, 26 (1), 105-124.
[29] Morwitz, Vicki G., Eric Greenleaf, and Eric Johnson (1998), "Divide and Prosper: Consumers' Reactions to Partitioned Prices," *Journal of Marketing Research*, 25 (November), 453-463.

added charge of $12.95 for quick shipping. Some of these students saw the shipping charge as a dollar amount while others saw it as a percentage. We always made sure the prices were clear and easy to see. For comparison, the Sony phone's price was always shown as $64.95, including taxes.

63. Research participants who saw a partitioned price for the target phone, when later asked to recall the total price including shipping and handling, recalled a significantly lower total price ($78.27) than the actual total price of the phone ($82.90). The price they recalled was also lower than what was recalled by those who saw the all-inclusive price ($83.90, who slightly overestimated the total).

64. In this research, we also concluded that a significant percent of subjects either simply ignored or did not fully process the fee information, even though that information was fully disclosed. We found that when fee information was more difficult to process, it was more likely to be ignored or not be fully processed. Finally, we found in this study that partitioned pricing had a positive effect on intentions to purchase the target phone among those who held a favorable attitude toward the target brand.
Many studies in marketing, economics, and finance have built on our initial findings on partitioned pricing and corroborated or extended our findings.[30]

65. Abraham and Hamilton conducted a meta-analysis of partitioned pricing studies. On average across the studies, partitioned pricing had a positive effect on consumer preference (defined as an inclination toward the target product).[31] The results of their meta-analysis suggested that, on average, the use of partitioned pricing leads to a 9% increase in preference over the use of all-inclusive pricing.

---

[30] See for example - Lee, Yih Hwai and Cheng Yuen Han (2002), "Partitioned Pricing in Advertising: Effects on Brand and Retailer Attitudes," *Marketing Letters*, 13 (1), 27-40.
[31]Abraham, Ajay T. and Rebecca W. Hamilton (2018), "When Does Partitioned Pricing Lead to More Favorable Consumer Preferences?: Meta-analytic Evidence," *Journal of Marketing Research*, 55(5), 686-703.

66. Overall, the literature on partitioned pricing suggests that partitioned pricing will lead consumers to underestimate total prices and be more likely to buy a product than when all-inclusive pricing is used.

4.1.2.2 Price obfuscation and Shrouded attributes can make it more difficult for consumers to understand prices

67. Another body of research examines the effect of price obfuscation and shrouded attributes. Price obfuscation involves presenting price information in a way that makes it more difficult for consumers to understand.[32] When prices are obfuscated consumers may find shopping and finding price information complicated, difficult, or confusing. A related concept, a "shrouded attribute," refers to the specific information that firms obfuscate from their customers.[33] Ellison and Ellison show that obfuscation can lead to increased firm profits by making consumers less informed about prices. And because firms have made it difficult for consumers to obtain full price information, consumers' learning about prices is incomplete.

68. Sullivan summarized this related body of economic research that more broadly has focused on the impact of price transparency (or lack thereof), salience, and obfuscation on market structure and firms' use of fees.[34] While economic models that assume that consumers are perfectly rational suggest that consumers will not be harmed by the presence of fees,[35] subsequent models showed that if some consumers do not have rational

---

[32] Ellison, Glen and Sarah Fisher Ellison (2009), "Obfuscation, and Price Elasticities on the Internet," Econometrica, 77 (2), 427–452.
[33] Gabaix, Xavier, and David Laibson (2006), "Shrouded Attributes, Consumer Myopia, and Information Supression in Competitive Markets," *The Quarterly Journal of Economics*, 121 (2), 505-540.
[34] Sullivan, Mary W. (2017), "Economic Analysis of Hotel Resort Fees," Bureau of Economics, Federal Trade Commission. Economic Issues (January), https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503_hotel_resort_fees_economic_issues_paper.pdf.
[35] Grossman, Samuel J. (1981), "The Informational Role of Warranties and Private Disclosure About Product Quality," *The Journal of Law and Economics*, 24 (3), 461–483; Milgrom, Paul R. (1981), "Good News and Bad News: Representation Theorems and Applications," *The Bell Journal of Economics*, 12 (2), 380–391.

expectations (i.e., "myopes" or naïve consumers) and do not fully anticipate that there will be additional fees in addition to base prices,[36] or do not fully process additional fees, they will underestimate total costs[37] and can be harmed by paying higher prices than they otherwise would have.

69. While little empirical work in economics has examined whether these predictions actually manifest in the marketplace, as discussed in the next section, there is some empirical support for the notion that, when consumers are inattentive (which survey data by Seim and colleagues suggest a sizeable segment of consumers are with respect to fees) and the marketplace is competitive, firms have an incentive to use drip pricing with low base prices but high dripped fees to increase their profits.[38] Rasch, Thöne, and Wenzel similarly found that few consumers view, or adequately account for, fees that are dripped and that this leads to greater firm profits and lower consumer surplus.[39]

70. In my opinion, when firms first present information about base prices by presenting it earlier than other information, or when they show base price information on the initially visible part of a web or app page or make it more salient than other information, and when they only later provide information about additional surcharges, or when finding that information requires scrolling, search, and clicks, or when that information is made less salient, then that information is obfuscated and a shrouded attribute. Research on price obfuscation and shrouded attributes has largely shown that firms benefit and make more money when they make price information more

---

[36] Gabaix, Xavier, and David Laibson (2006), "Shrouded Attributes, Consumer Myopia, and Information Supression in Competitive Markets," *The Quarterly Journal of Economics*, 121 (2), 505-540.
[37] Chetty, Raj, Adam Looney, and Kory Kroft (2009), "Salience and Taxation: Theory and Evidence," *American Economic Review*, 99 (4), 1145-1177; Farrell, Joseph (2012), "Consumer and Competitive Effects of Obscure Pricing," Presentation, Conference on the Economics of Drip Pricing, May 21, Federal Trade Commission, Washington, DC;
[38] Seim, Katja, Maria Ana Vitorino, and David Muir (2017), "Drip Pricing When Consumers Have Limited Foresight: Evidence from Driving School Fees," Working paper.
[39] Rasch, Alexander, Miriam Thöne, and Tobias Wenzel (2020), "Drip Pricing and its Regulation: Experimental Evidence." *Journal of Economic Behavior & Organization*, 176, 353-370.

difficult for consumers to obtain and process. These practices also make it more difficult for consumers to compare prices.

4.1.2.3 Drip pricing increases costs

71. The academic literature refers to drip pricing as a pricing practice where a firm presents base price information early in the consumer decision making process, but only subsequently provides information about additional fees.

72. Academic research, some of which I describe in this opinion, finds that there are two costs drip pricing may impose on consumers:[40]

    (1) a monetary cost, which may result from making a product purchase that is more expensive than what would have been made if the prices of the additional surcharges had been known upfront (indeed, knowledge of the additional surcharges may have led the consumer to forego the purchase entirely), and

    (2) increased search costs for price comparisons.[41]

73. Huck and Wallace conducted an experiment to study the effects of the drip pricing of shipping and handling fees.[42] They compared research

[40] Huck, Stefan, and Brian Wallace (2010), "The Impact of Price frames on Consumer Decision Making," Report, Office of Fair Trading, London, UK; Santana, Shelle, Steven Dallas, and Vicki G. Morwitz (2019), "Consumers' Reactions to Drip Pricing," *Marketing Science*, 39 (1), 188-210; Seim, Katja, Maria Ana Vitorino, and David Muir (2017), "Drip Pricing When Consumers Have Limited Foresight: Evidence from Driving School Fees," Working paper; ACCC (2010), The Competition and Consumer Act., Legislation, Australian Competition & Consumer Commission, Australia, https://www.accc.gov.au/about-us/australian-competition-consumer-commission/legislation; Fletcher, Amelia (2012), "Drip Pricing UK Experience," Presentation, Conference on the Economics of Drip Pricing, May 21, Federal Trade Commission, Washington, DC; Sullivan, Mary W. (2017), "Economic Analysis of Hotel Resort Fees," Bureau of Economics, Federal Trade Commission. Economic Issues (January), https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503_hotel_resort_fees_economic_issues_paper.pdf.
[41] Sullivan, Mary W. (2017), "Economic Analysis of Hotel Resort Fees," Bureau of Economics, Federal Trade Commission. Economic Issues (January), https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503_hotel_resort_fees_economic_issues_paper.pdf.
[42] Huck, Stefan, and Brian Wallace (2010), "The Impact of Price frames on Consumer Decision Making," Report, Office of Fair Trading, London, UK.

15. To achieve a responsive design, modern web pages are built in a such a way that relies on special coding to make the user interface flexible. In concept, it's a bit like a rubber band that stretches or shrinks depending on the screen size. Pictures, text, and other media on the page can change their size and layout in real-time to ensure they fit neatly, no matter how big or small the screen is.

16. To understand responsive design, you may visit a website on your laptop and resize the web browser. You will notice that the web page components and general layout will adjust their position on the screen and even scale up or down in size to accommodate the change in browser dimensions. If you open the same website on your mobile phone you will notice that everything you see on your laptop rearranges itself to fit neatly within the smaller mobile phone screen. Text might get a bit smaller, or pictures might stack on top of each other instead of sitting side by side. This format adjustment makes it easier for the viewer to read and navigate the site without zooming in and out or scrolling sideways.

17. The flexibility and freedom that responsive design provides to web designers allows them to utilize the entire screen, edge-to-edge, and top-to-bottom to make data-driven decisions on how to structure information on the page for any screen size or device.

Discovery and Analytics Research

18. When a web designer undertakes a new design for a website, the first step in the web design process is analyzing the analytics data to collect important information about the people that have used the existing website to understand their behaviours and technologies they used to access the website.

19. Understanding user behaviour allows the designer to make educated decisions about navigational design and establish information hierarchy based on users interests and navigational patterns evident in the analytics. Understanding the

15. To achieve a responsive design, modern web pages are built in a such a way that relies on special coding to make the user interface flexible. In concept, it's a bit like a rubber band that stretches or shrinks depending on the screen size. Pictures, text, and other media on the page can change their size and layout in real-time to ensure they fit neatly, no matter how big or small the screen is.

16. To understand responsive design, you may visit a website on your laptop and resize the web browser. You will notice that the web page components and general layout will adjust their position on the screen and even scale up or down in size to accommodate the change in browser dimensions. If you open the same website on your mobile phone you will notice that everything you see on your laptop rearranges itself to fit neatly within the smaller mobile phone screen. Text might get a bit smaller, or pictures might stack on top of each other instead of sitting side by side. This format adjustment makes it easier for the viewer to read and navigate the site without zooming in and out or scrolling sideways.

17. The flexibility and freedom that responsive design provides to web designers allows them to utilize the entire screen, edge-to-edge, and top-to-bottom to make data-driven decisions on how to structure information on the page for any screen size or device.

Discovery and Analytics Research

18. When a web designer undertakes a new design for a website, the first step in the web design process is analyzing the analytics data to collect important information about the people that have used the existing website to understand their behaviours and technologies they used to access the website.

19. Understanding user behaviour allows the designer to make educated decisions about navigational design and establish information hierarchy based on users interests and navigational patterns evident in the analytics. Understanding the

technology used by the audience to visit the website is equally important in designing the user experience as these metrics provide clear insight as to which screen dimensions or screen resolutions are most commonly used to access the website. Using the largest common audience metrics will dictate the primary screen resolution the web designer focuses their design strategy on. This strategy will focus on where content is placed within each page of the website to ensure that the most important information is visible to the most viewers without requiring the user to perform additional actions after the page has loaded, including scrolling or clicking to open additional content.

The UX Design Process

20. Once the web designer understands their audience's behaviours and the technology used to access the current website, the designer will create a site map to plan out the navigation within the new website. The site map will serve as a map to indicate where each page within the website will live within the navigational flow and how pages will be linked together.

21. Next, the web or UX designer will design a complete set of wireframes. The wireframes serve as a blueprint for each unique page type within the website. The purpose of the wireframing exercise is to carefully plan out the information architecture of each web page and determine where all information and calls-to-action will be displayed in a specific location for the viewer.

22. *Call to action (CTA)* is a marketing term for any design to prompt an immediate response or encourage immediate action, usually resulting in the generation of a sales lead or sale of a product or service. A CTA most often refers to the use of words or buttons that are incorporated into advertising materials or web pages, which compel the audience to act in a specific way.

23. The decisions made during this phase of the website design project are crucial as they lay the foundation for how the website will communicate with all visitors, what information they will see, and what actions they will be prompted to take to convert.

24. It is important to note that the UX Design process is iterative during the strategy phase of any web design or mobile application interface design project as the designer and website owner review and discuss possible layouts, information architecture and placement of CTAs to effectively communicate with the intended audience or encourage the user to perform specific actions on each page. This iterative process continues after the deployment of the website or mobile application as analytics and user data are collected to provide the designer and website owner insights into activities, behaviours and interests of the audience. This information is used to make periodic adjustments to the design, layout or organization of elements within the web page or application interface to continually improve user experience or increase conversions.

The Page Fold

25. The term ‘above the fold’ has been around for a long time. The concept of the page fold originates from the early days of publishing newspapers.[6] Newspapers were printed on large sheets of paper and folded in half when displayed on newsstands. Above the fold refers to the content that appeared on the top half of the newspaper’s front page that was still visible after it was folded and stacked on display. This real estate was the most valuable to marketers as people could easily see this content before picking the newspaper up and unfolding it. The same applies in digital marketing and website design today.

---

[6] Optimization Glossary: Above the Fold, *Optimizely*: https://www.optimizely.com/optimization-glossary/above-the-fold/

26. This principle has evolved due to the transition from paper to online marketing and web design. Because web pages do not fold the way newspapers do, the fold line refers to the point at the bottom edge of the screen where the web browser cuts off the content and requires users to scroll to view the rest of the page content. Everything after that scroll point is considered ‘below the fold.’

27. No matter what screen size or device type 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. Understanding the user’s screen dimensions and designing the website or application interface for the largest common screen resolution of the total audience captured in the website analytics serves this core marketing principle.

28. The Nielsen Norman Group, world leaders in research-based user experience, have conducted numerous studies on the effect of the page fold dating back to 2010. The research indicates that what appears at the top of the page versus what is hidden below the fold will always influence the user experience – regardless of screen size. When users fail to see information of value, they stop scrolling. In usability testing, the occasional user does a “lay of the land” scroll to get a sense of what’s on a page before engaging, but this behaviour is far from standard. Users scroll when there is a reason to.

29. The fold matters because scrolling is an extra action that users must take to access content. Like waiting for a page to load, clicking through an image slideshow, or opening an expandable design element to reveal more information, scrolling adds an extra step that users must take to accomplish their goal.

30. Empirical data supports the page fold theory. In The Nielsen Norman Group’s study, researchers observed countless users’ behaviours in qualitative usability studies impacted by the fold – often for the worse, because websites didn’t

- **Partitioned Pricing:** When firms divide a price into a base price and one or more additional surcharges rather than charging a single, all-inclusive price.

- **Drip Pricing:** When firms present a base price first in the buying process, and subsequently reveal additional surcharges or fees.

- **Shrouded Attribute:** When firms make it difficult to find or process, or obfuscate product-related information from its customers.

15. Cineplex's decision to charge, on top of the advertised ticket price, an additional separate $1.50 online booking fee, or $1.00 for Scene+ members (Cineplex's reward program) on its website and app likely lowered consumers' perceptions of the total cost of purchasing tickets from Cineplex, which in turn increases the likelihood that they purchased tickets online from Cineplex versus exercising alternative options available to them. In general, consumers tend not to fully process fees when they are divided spatially or temporally from the base price of a product.

16. The manner in which prices are displayed to consumers is important and includes the following key considerations:

- Consumers who search on the Cineplex website or app see the ticket prices for the first time once they reach the "Tickets" page, before they select the tickets they want to purchase. These prices exclude the additional online booking fee. Consumers (all except CineClub members who instead pay a membership fee), only see information about the total costs, including additional online booking fees, after they have selected at least one ticket.

- Although Cineplex discloses a subtotal that includes the ticket prices and the additional online booking fees after a consumer selects the

number and type (i.e., age group) of tickets they want to purchase, consumers anchor on and are more influenced by numeric information they encounter first and/or that is visually salient, and fail to adequately adjust for information they see later in a search process and/or that is less salient.

- Despite the fact that information about the additional online booking fee is shown at the bottom of the Tickets page, in many cases it requires scrolling to the bottom to see it, so if it is seen at all, it is likely observed later and is less visually salient than the advertised ticket prices.

- The cost of the additional online booking fee is also set to $0.00 (at the bottom of the page, which may not be seen without scrolling) until a ticket is added to the order. Thus, consumers do not see information (if they see it at all) about the additional online booking fee until after they have selected a ticket.

- If consumers purchase more than one ticket, unless they access additional information displayed after clicking on an information button, they would not see information about the amount associated with the additional online booking fee on a per ticket basis, as they are only shown a total charge for the sum of all additional online booking fees at the bottom of the page.

- Although consumers ultimately are provided information that the total price for the tickets will be higher than the initially advertised ticket price and are shown the total amount charged for additional online booking fees, because of the way this information is presented consumers are unlikely to fully account for the entire magnitude of these additional charges.

to show the whole page so you could point out certain features. Is that correct?

MR. McGRATH: That is correct.

MR. RUSSELL: Okay.

--- Video presentation / Présentation vidéo

MR. RUSSELL: That is the video, Your Honour. Just a couple questions.

Sir, you described a lot of the content in Exhibit A. Is scrolling an impediment to consumers to see that content?

MR. McGRATH: No, not at all. We expect that people are going to scroll. It's something people naturally do both on websites and on a mobile phone. In fact, our entire website has been designed with scrolling in mind.

MR. RUSSELL: And sir, you showed at the end of the video the checkout where you put in your payment and obtain your tickets. Is there any receipt provided to the consumer?

MR. McGRATH: Once the checkout process is done, yes, the consumer gets an electronic receipt.

MR. RUSSELL: So they are sent an electronic receipt how; by email?

MR. McGRATH: By email. It will come by email, yes.

designed it to say, here's what your theatre price is -- as I said, you're showing the app, only 15 percent of the people who go to this page actually complete a ticket purchase. Once you've selected your information, entered in all the required information, then we can calculate the proper amount of the online booking fee.

I'm just explaining why we set it up the way we did. There's a flow here to do it. You make all your choices, your theatre to get you to this page, add your number of tickets, scroll down -- which we all know, and we talked about on a phone, everybody scrolls. So scrolling, as I said, it's start of standard practice -- it's inherent in the design of our website and our app, every app. People just are expected to scroll. There's a scroll bar on the side that shows it as well that you're not at the bottom of the page. You scroll down, you enter in all your information.

At that point you've now got a total beside the "Proceed" button that you can then decide, that's your final choice that you need to make before you decide if you want to turn to the online booking process. My understanding is our obligation is to show the total price to the consumer before they enter into the online booking process, and that's exactly what we do.

MR. HOOD: So Mr. McGrath, my question wasn't

why Cineplex designed it the way it did. I just want to make sure that we're clear.

So we've come to the "Tickets" page. Correct, in this video?

MR. McGRATH: Yes.

MR. HOOD: And before getting to the tickets page, the consumer has to have logged in to their Connect account. Correct?

MR. McGRATH: Yes.

MR. HOOD: And that Connect account has information as to whether they're a Scene+ member or not?

MR. McGRATH: If they've decided to enter that.

MR. HOOD: Decided. So based on the information that is provided to Cineplex before they display this, you could display the all-inclusive ticket price based on whether or not, in their Connect account, they're a Scene+ member or not. Correct?

MR. McGRATH: As I said, we could, but we thought that wouldn't be an accurate presentation because it varies depending on how many tickets they order at that point. So if we had all of that information, the amount still -- the ticket price still could change.

MR. HOOD: Is it now just because of the ticket cap? I take it you would agree with me it's in the middle of the process, you entered your Scene+ number, you can now

correct.

MR. HOOD: And Mr. McGrath, I think I heard you just say on the rare circumstances that no one scrolls; correct?

MR. McGRATH: That's correct.

MR. HOOD: Cineplex doesn't have analytical data about how many people are scrolling and where they're scrolling on their screens; correct?

MR. McGRATH: We don't. We have common sense data on using a phone that we all scroll. Even on the pages that you showed, it's pretty much impossible that -- the previous page that you just showed, nobody is going to go to that page and not scroll. It was cut off at a certain point.

You're not going to go to that page and not scroll down. So I wouldn't say that's a typical transaction.

MR. HOOD: That wasn't my question. I didn't ask you if it was a typical transaction. I was asking you whether or not Cineplex had analytical data with respect to whether or not consumers scroll.

MR. McGRATH: We don't have analytical data of people scrolling. No, we don't.

MR. HOOD: So you can't tell me with any data whether or not in fact this is a rare occurrence; correct?

smaller steps, perhaps.

So there was no empirical evidence relied upon by Dr. Morwitz with respect to her opinion on Cineplex's website.

DR. AMIR: Yes, and that's why I stated that her conclusions are, at best, hypotheses.

MR. RUSSELL: So Dr. Amir, has consumer behaviour evolved with respect to online purchasing?

DR. AMIR: Yes, I said.

MR. RUSSELL: Has it evolved even in recent years?

DR. AMIR: It has.

MR. RUSSELL: In your view, is scrolling an impediment to consumers?

DR. AMIR: No. Consumers scroll -- we have to think about this not just websites through a computer, we have to think about other devices that are growing quite fast, like Smartphones, where you have to scroll in order to do anything.

MR. RUSSELL: Sir, do you understand what researcher bias is?

DR. AMIR: Yes.

MR. RUSSELL: Could you explain it to the Tribunal, please?

DR. AMIR: Researcher bias happens when the

nearly everybody scrolls. It's almost like an instinctive thing people do. And you'd find a lot of the key information needed for a decision -- take Amazon, for example. Amazon reviews -- I don't buy something without looking at reviews -- always requires scrolling down.

So the scrolling has become in this day and age tantamount with viewing a page. You saw that Mr. Zimmerman in the video on the first page didn't even need to scroll down, but he started scrolling down to get to the movie. It was seen there from before. People scroll. It's not a mystery. I kind of took in the break, I took a look at this courtroom. I think every mouse in this courtroom has a scroll button. It would be hard to find a mouse without a scroll button. Kids two years old scroll on these tablets. It's part of using the technology, scrolling.

MR. HOOD: So I asked the question if you had done studies that answer the question if consumers are presented with a false floor, how many of them scroll, and if they scroll, how far down the page do they scroll? I think the answer to that is you haven't. Correct?

DR. AMIR: Well, I've done studies. I haven't done academic studies or written a paper. No reputable journal will publish a paper that says people scroll down. This is like, you know, it's not news to anybody. But I have replied that I have run studies with companies that

industry calls it. You here because the control is all the way to the bottom, you can call it a floating floor. Calling it a false floor already assumes a function; right? People in industry don't call it a false floor, they call it a floating floor.

MR. HOOD: Mr. Eckert testifies to what he calls a false floor and says it inhibits consumers from scrolling. Correct?

DR. AMIR: Yes, but my studies with companies shows that it doesn't inhibit, it actually helps people see the call-to-action button, it's always there. But people scroll because they want to find information that's relevant.

MR. HOOD: But none of this is in your report.

DR. AMIR: No, because I didn't do a study on Cineplex. I wanted to be specific to Cineplex, and my whole point here is that no one here did a proper study of Cineplex. And to make those statements that Mr. Eckert would like to make, you need to study the behaviour on the Cineplex website with Cineplex users or app or mobile web. He did none of that.

MR. HOOD: Dr. Amir, you've pointed the Tribunal to no other studies that the Tribunal should be aware of with respect to how many people are scrolling. Correct?

to you?

MR. ECKERT: Yes.

MR. RUSSELL: Does it have a scroll button on it?

MR. ECKERT: It does.

MR. RUSSELL: Is it a common thing to do on a computer, to scroll?

MR. ECKERT: Yes.

MR. RUSSELL: Do we scroll when we do all sorts of things, our email, Word documents? Whatever we're doing, we scroll all the time, don't we?

MR. ECKERT: We do.

MR. RUSSELL: Can you really imagine somebody who uses a computer not knowing how to scroll?

MR. ECKERT: No, I cannot.

MR. RUSSELL: You spend a lot of time about scrolling in this case and yet it's something -- would you see anybody on the subway who's not swiping through their social media like this? I

I'm just -- I should say the description is, scrolling on my phone. Do I scroll on social media?

MR. ECKERT: Yes.

MR. RUSSELL: Do you have clients who you design the graphics for their social media content?

MR. ECKERT: No.

MR. RUSSELL: You don't. It is a form of advertising for many companies, though, isn't it?

MR. ECKERT: Yes.

MR. RUSSELL: And when they place their ads and they go to Facebook, are they going to scroll?

MR. ECKERT: Yes.

MR. RUSSELL: Am I going to scroll on Instagram?

MR. ECKERT: Yes.

MR. RUSSELL: Am I going to scroll on TikTok?

MR. ECKERT: I've never used tick.

MR. RUSSELL: Do I scroll when I go to Google and search?

MR. ECKERT: To be --

MR. RUSSELL: Can you name one simple site or application where you don't scroll?

MR. ECKERT: I'd have to see analytics and it depends on the scale of the page.

MR. RUSSELL: You can't name one off the top of your head where you could say, "Mr. Russell, you don't scroll on this device and you don't scroll on this website". There's nothing you can tell me right now.

MR. ECKERT: No.

MR. RUSSELL: Web design insights. Boost your speed with Google.

MR. RUSSELL: You don't. It is a form of advertising for many companies, though, isn't it?

MR. ECKERT: Yes.

MR. RUSSELL: And when they place their ads and they go to Facebook, are they going to scroll?

MR. ECKERT: Yes.

MR. RUSSELL: Am I going to scroll on Instagram?

MR. ECKERT: Yes.

MR. RUSSELL: Am I going to scroll on TikTok?

MR. ECKERT: I've never used tick.

MR. RUSSELL: Do I scroll when I go to Google and search?

MR. ECKERT: To be --

MR. RUSSELL: Can you name one simple site or application where you don't scroll?

MR. ECKERT: I'd have to see analytics and it depends on the scale of the page.

MR. RUSSELL: You can't name one off the top of your head where you could say, "Mr. Russell, you don't scroll on this device and you don't scroll on this website". There's nothing you can tell me right now.

MR. ECKERT: No.

MR. RUSSELL: Web design insights. Boost your speed with Google.

look at the customers for Coca-Cola, if it was Coca-Cola, and you'd analysing the existing website analytics to understand the people that use that website?

MR. ECKERT: Yes.

MR. RUSSELL: You didn't do that here. You didn't look at Cineplex customers, did you? No analytics whatsoever?

MR. ECKERT: No analytics.

MR. RUSSELL: And no separate testing outside by you at all. You didn't test. You did no control group testing or anything like that to test the website as it exists?

MR. ECKERT: I did no control group testing, no.

MR. RUSSELL: So you don't know how much Cineplex customers scroll?

MR. ECKERT: I do not.

MR. RUSSELL: You don't know what they focus on?

MR. ECKERT: I do not.

MR. RUSSELL: So your report is entirely based on subjective information about what they might or might not look at, but it doesn't give any guidance to this Court about this website with the customers that visit this website?

look at the customers for Coca-Cola, if it was Coca-Cola, and you'd analysing the existing website analytics to understand the people that use that website?

MR. ECKERT: Yes.

MR. RUSSELL: You didn't do that here. You didn't look at Cineplex customers, did you? No analytics whatsoever?

MR. ECKERT: No analytics.

MR. RUSSELL: And no separate testing outside by you at all. You didn't test. You did no control group testing or anything like that to test the website as it exists?

MR. ECKERT: I did no control group testing, no.

MR. RUSSELL: So you don't know how much Cineplex customers scroll?

MR. ECKERT: I do not.

MR. RUSSELL: You don't know what they focus on?

MR. ECKERT: I do not.

MR. RUSSELL: So your report is entirely based on subjective information about what they might or might not look at, but it doesn't give any guidance to this Court about this website with the customers that visit this website?

MR. ECKERT: Based on their analytics? No, it does not do that.

MR. RUSSELL: When you say based on their analytics, you didn't look at any, did you?

MR. ECKERT: Not Cineplex's analytics, no.

MR. RUSSELL: Thank you. Now, in your examination-in-chief, you said they'll scroll if you give them a reason to scroll. Am I incorrect? That's what you said?

MR. ECKERT: Correct.

MR. RUSSELL: And you say -- you said also all the information is above the fold, as you describe it; right?

MR. ECKERT: Correct.

MR. RUSSELL: Now, sir, when you give evidence, you saw your Affidavit, you saw your acknowledgment, it has to be objective and impartial; correct?

MR. ECKERT: Yes.

MR. RUSSELL: You understand that. And does objective and impartial mean to note anything that might be related to the advice that you're giving?

MR. ECKERT: Sorry, can you rephrase that?

MR. RUSSELL: If I was addressing Justice Little on a point of law and there was a case that was against me and a case that was for me, I wouldn't be

DR. MORWITZ: I wouldn't say no trouble.

MR. RUSSELL: I wouldn't say no trouble --

DR. MORWITZ: We all have trouble.

MR. RUSSELL: All right. Obviously, I had some trouble, didn't I? So I get it.

But the point is, you don't have any trouble scrolling, I take it?

DR. MORWITZ: Generally, no. Sometimes the mouse sticks.

MR. RUSSELL: But, you see, I mean, just -- I just want to make sure that we're clear because this has been a big part of this case. This is a mouse. It's not unusual to have a scroll button on it, is it?

DR. MORWITZ: No.

MR. RUSSELL: And it's not unusual if I -- my phone happens to be hooked up because it's running the internet for that screen, but I could easily on a smartphone, people scroll. It's part of how you work a smartphone, isn't it? You scroll?

DR. MORWITZ: Yes.

MR. RUSSELL: So you wouldn't say the average consumer using that technology wouldn't know how to scroll?

DR. MORWITZ: No, I would not say that.

MR. RUSSELL: So you wouldn't say the scrolling itself is a factor in your opinion; what you're saying is

A. Mr. Eckert Fails to Adapt His Analysis To the Cineplex Consumer Flow and Fails to Consider Numerous Factors that Influence the Consumer Experience.

84. At multiple points in his report, Mr. Eckert provides reference to different website analytics, such as statistics on desktop and mobile screen resolutions and page fold,[92] and studies on user attention and the page fold.[93] However, Mr. Eckert fails to apply his descriptions of such analytics to actual Cineplex consumers.

85. As one example of this deficiency, Mr. Eckert asserts in his report that 69.33 percent of all users on the web use a "maximum screen resolution with a fixed height of up to 1,080 pixels or smaller[.]"[94] Citing the fact that the Online Booking Fee appears on the ticketing page 1,330 pixels below the top of the browser,[95] he concludes that the Online Booking Fee line item "would only be visible to the user if they chose to ignore the timer and floating call to action button and scroll down to the very bottom of the page."[96] Mr. Eckert preaches the use of analytics, but then uses none, as no claim made in these assertions is supported with data or empirical analysis. Moreover, Mr. Eckert fails a basic premise of demonstrating that his figures describe the appropriate consumer universe of Cineplex customers.

86. Mr. Eckert's approach does not consider the actual website using experience of Cineplex consumers, instead he merely cites general statistics about web users, regardless of whether they are actual Cineplex consumers or whether those same Cineplex consumers could or could not view the Online Booking Fee line item above the page fold. Mr. Eckert's approach also ignores several relevant considerations of consumers and their customized browsing experience, such as the zoom level, the font size, and browser and device selection. All of these directly impact the amount of text visible while browsing and thus impact whether the Online Booking Fee is visible above or below the fold. Moreover, these factors impact whether consumers are in the habit of scrolling down every page (such as in the case of high zoom levels, enlarged fonts, or tablet devices). Aggregate statistics on default screen resolution are thus not descriptive of the experience of actual Cineplex consumers. Mr. Eckert's conclusions based on such statistics are therefore unsupported and misleading.

87. Overall, Mr. Eckert's analyses are not validated, tested, or applied to actual Cineplex consumers. Further, Mr. Eckert offers several conclusions that are not supported by any analysis or supporting

[92] Eckert Report ¶¶ 42-46.
[93] *Id.* ¶¶ 30-31, 47.
[94] *Id.* ¶ 42.
[95] *Id.* Figure 3.
[96] *Id.* ¶ 44.

pricing."

Is that correct?

DR. AMIR: Yes.

MR. RUSSELL: So basically, you were stating that Cineplex's website and purchase flow does not meet the temporal component of these definitions. Is that correct?

DR. AMIR: Yes.

MR. RUSSELL: You note specifically that Dr. Morwitz did not study Cineplex's website scientifically; correct?

DR. AMIR: Yes.

MR. RUSSELL: Could you please explain?

DR. AMIR: Yes. So Dr. Morwitz's report summarizes literature, a lot of which is dated, even before there was even an internet or e-commerce arose and certainly before many Smartphones existed, and in very different contexts. And the context, Your Honour, is very important.

And so the only way to look at Dr. Morwitz's conclusions are as hypotheses that need to be tested in this particular context, and she doesn't do that.

MR. RUSSELL: Sir, in paragraph 70 you state: "...Dr. Morwitz merely assumes that she can apply to the Cineplex Consumer Flow findings made

smaller steps, perhaps.

So there was no empirical evidence relied upon by Dr. Morwitz with respect to her opinion on Cineplex's website.

DR. AMIR: Yes, and that's why I stated that her conclusions are, at best, hypotheses.

MR. RUSSELL: So Dr. Amir, has consumer behaviour evolved with respect to online purchasing?

DR. AMIR: Yes, I said.

MR. RUSSELL: Has it evolved even in recent years?

DR. AMIR: It has.

MR. RUSSELL: In your view, is scrolling an impediment to consumers?

DR. AMIR: No. Consumers scroll -- we have to think about this not just websites through a computer, we have to think about other devices that are growing quite fast, like Smartphones, where you have to scroll in order to do anything.

MR. RUSSELL: Sir, do you understand what researcher bias is?

DR. AMIR: Yes.

MR. RUSSELL: Could you explain it to the Tribunal, please?

DR. AMIR: Researcher bias happens when the

Can we turn to P-R-039, Section 4 of your report? It will start at page 9.

If we can put up the heading "The Consumer Flow for Cineplex Consumers, I just want to see if we can find some common ground.

Dr. Amir, I'm just going to wait until you're there.

DR. AMIR: Yes, I'm there.

MR. HOOD: The heading of this section is "The Consumer Flow for Cineplex Consumers".

DR. AMIR: Yes.

MR. HOOD: The purpose of this section is to describe, then, the consumer flow for Cineplex consumers?

DR. AMIR: Yes. I felt that if I'm going to respond to the experts in order to assist the Tribunal, I'm going to describe the whole customer -- the whole customer flow or consumer flow, especially because it starts in the information-gathering phase.

MR. HOOD: And Dr. Amir, would you agree with me that this section describes the steps that the consumer follows but is not purporting to represent what the typical consumer experience is on the website; correct?

DR. AMIR: Yeah, the typical consumer is an empirical question that no one actually tested in this case.

industry calls it. You here because the control is all the way to the bottom, you can call it a floating floor. Calling it a false floor already assumes a function; right? People in industry don't call it a false floor, they call it a floating floor.

MR. HOOD: Mr. Eckert testifies to what he calls a false floor and says it inhibits consumers from scrolling. Correct?

DR. AMIR: Yes, but my studies with companies shows that it doesn't inhibit, it actually helps people see the call-to-action button, it's always there. But people scroll because they want to find information that's relevant.

MR. HOOD: But none of this is in your report.

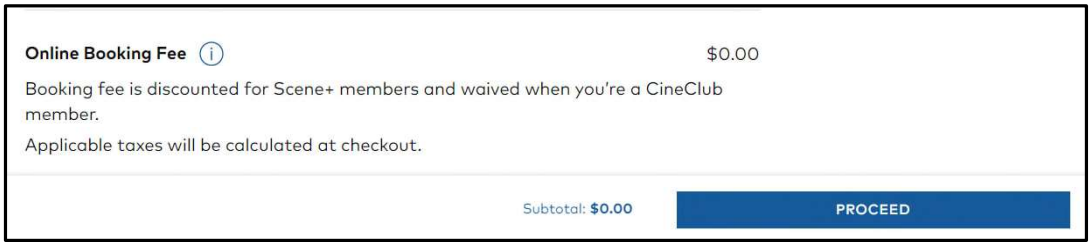
DR. AMIR: No, because I didn't do a study on Cineplex. I wanted to be specific to Cineplex, and my whole point here is that no one here did a proper study of Cineplex. And to make those statements that Mr. Eckert would like to make, you need to study the behaviour on the Cineplex website with Cineplex users or app or mobile web. He did none of that.

MR. HOOD: Dr. Amir, you've pointed the Tribunal to no other studies that the Tribunal should be aware of with respect to how many people are scrolling. Correct?

PUBLIC

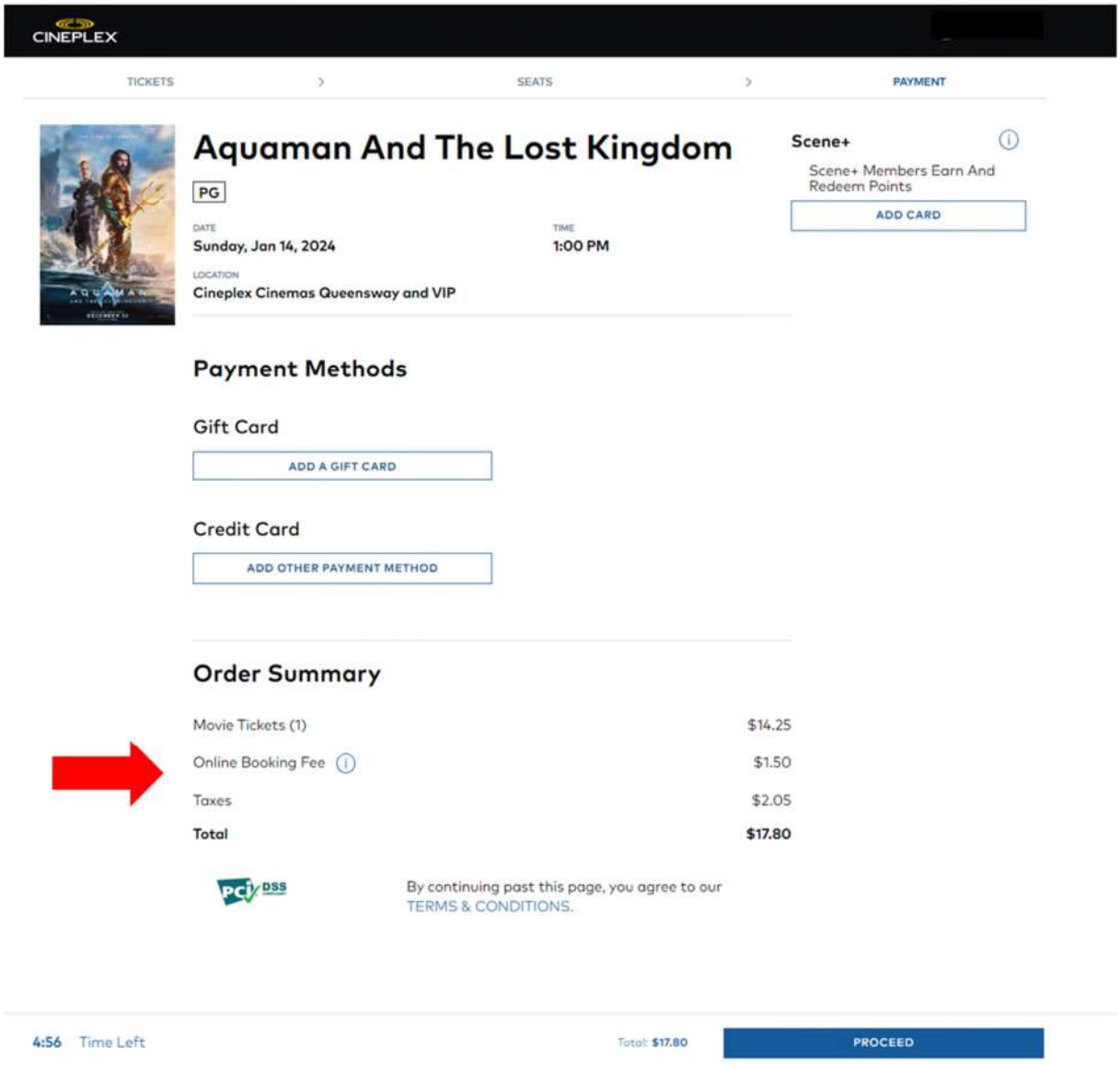
73. The consumer is therefore made aware of the online booking fee ***both before and after*** they first select their ticket, allowing the consumer to make an informed choice before proceeding with the online purchase.

74. Further, the "Tickets" page also provides additional information about the online booking fee. Consumers can click on the "i" information icon shown in Figure 6 below. A pop-up window comes up on the screen (as indicated in Figure 7 below), and provides further information on the online booking fee, including a sample calculation of the online booking fee that a consumer will pay based on the number of tickets purchased and whether the consumer has a Scene+ or CineClub membership (CineClub members are immediately identified on sign-in and are accordingly not subject to the online booking.)



[Figure 6]

PUBLIC



[Figure 9]

78. Throughout the course of the transaction, ***the total cost including the online booking fee is prominently shown on every page next to the "Proceed" button. The consumer has the opportunity to review the purchase price at four separate, consecutive stages.***

Cineplex's Mobile App

79. The process for purchasing tickets on the App is similar to the process for purchasing on the Website described above. However, in the App, App users select their preferred movie and

PUBLIC

show time, they are taken to the "Tickets" page without signing in (where they are already signed into their account). The remainder of the purchasing process is the same as on the Website.

Transparency Throughout the Process: "No Complaints, No Confusion, No Misleading Pricing"

80. I am not aware of any complaints from consumers about confusion or being deceived by the online booking fee. The only complaints that I am aware of indicate that consumers were fully aware of the existence of the fee. I am also not aware of the Commissioner receiving any complaints prior to the filing of the Notice of Application, as produced in this matter.

81. Furthermore, naming the fee the "online booking fee" was intentional by Cineplex to ensure that there would be no confusion that the online booking fee applies only to online purchases and not to purchases made in theatre.

C. A *De Minimis* Number of Consumers Registered Formal Complaints Regarding the Online Booking Fee.

33. I have reviewed the complaints said to be about the Online Booking Fee, as produced by the Competition Bureau in this Matter.[34] There were 97 million consumer visits to the Cineplex Website in the last year. Only seven complaints were produced by the Commissioner in this Matter. This represents 0.0000072 percent of visits to the Cineplex Consumer Flow. All of those seven complaints are dated after the Application was filed in this Matter, over one year after the Online Booking Fee was introduced. This suggests to me, from a scientific perspective, that consumers of the Cineplex Website did not find the Online Booking Fee misleading.

34. A low percentage of complaints, in particular complaints received over a year following the launch of the Online Booking Fee, is unsurprising given the analysis discussed throughout this report that Cineplex's website design, the Consumer Flow of a ticket, and presentation of the Online Booking Fee are consistent with marketing and user design best practices as well as industry standards and norms. If the Website adheres to industry norms, then consumers have learned to expect this structure. Picking various price options and components is summarized in real-time at the bottom of the screen. I note that there were zero complaints prior to the Application being filed against Cineplex.

VI. PRINCIPLES OF MARKETING SUPPORT THAT THE CINEPLEX TICKET CONSUMER FLOW IS TRANSPARENT AND EFFICIENT.

A. The Online Booking Fee Is Presented Openly and Simultaneously with Ticket Price Information.

35. As I discussed above, the Consumer Flow for Cineplex ticket buyers is well-engineered and consistent with best practices.[35] In this section I analyze the presentation of a specific step of the Consumer Flow, which is the presentation of the pricing information.

36. As described above in Section IV, the first time a consumer encounters pricing information is on the ticketing page, where the line items for ticket pricing and the Online Booking Fee are shown

[34] "REGF00036_000000001_native.pdf." (June 18, 2023) (REGF00036_000000001); "REGF00043_000000001 (Confidential Level B).pdf." (Aug. 7, 2023) (REGF00043_000000001); "REGF00043_000000002 (Confidential Level B).pdf." (July 20, 2023) (REGF00043_000000002); "REGF00043_000000003 (Confidential Level B).pdf." (Aug. 2, 2023) (REGF00043_000000003); "REGF00043_000000004 (Confidential Level B).pdf." (July 19, 2023) (REGF00043_000000004); "REGF00043_000000005 (Confidential Level B).pdf." (June 15, 2023) (REGF00043_000000005); "REGF00043_000000006 (Confidential Level B).pdf." (July 1, 2023) (REGF00043_000000006).
[35] *See supra* Section V.B.

on that page is the three prices that we see; correct?

DR. AMIR: The moment he adds one ticket, the pricing information in front of him changes because on the bottom here, when it says subtotal, it's going to be a different price than the 11.75. So by definition, the second price -- the second ticket he adds is based on more information that's visible right now on the screen here. Even if he's a person that doesn't know and didn't read about the Online Booking Fee and didn't scroll instantaneously, the price of the first ticket below is not going to match if this person is paying any booking fee, is not going to match the one listed there.

MR. HOOD: That was a very simple factual question again.

DR. AMIR: It wasn't simple.

MR. HOOD: The only pricing information that we see up on the screen, the actual tickets, are general admit CA 11.75, senior CA 9.25 and child CA $8; correct?

DR. AMIR: Yes.

MR. HOOD: So Mr. Zimmerman, assume for the moment, is going to select four tickets. The only pricing information that he is presented with before -- on the screen we're looking at before he selects the tickets is the 11.75, the 9.25 and the $8; correct?

DR. AMIR: For the first ticket. Tickets are

selected sequentially, and that's important. Tickets are selected sequentially. With every selection of ticket, the subtotal with the all-inclusive price is updated automatically. So for the first ticket, it's based on this information. The moment he clicks on the second ticket, there's more price information on the screen.

MR. HOOD: All right. So on the first ticket he is going to select, the only pricing information is up on the screen that we're looking at is $11.75, $9.25, and $8; correct?

DR. AMIR: Correct.

MR. HOOD: That does not include the Online Booking Fee. Correct?

DR. AMIR: Correct. By the way, when you say the Online Booking Fee, I think that's also not accurate because I would say an Online Booking Fee because there's not one price that people pay.,

MR. HOOD: Dr. Amir, in paragraph 66 of your report you state it's:

> "The sequential nature of pricing information [that] is thus definitional for drip pricing." Correct?

DR. AMIR: Yes.

MR. HOOD: If we can go back to the video, if you need to bring up this report --

8. CineClub is Cineplex's movie subscription program.

9. CineClub was launched in the third quarter of 2021.

10. CineClub provides benefits to its members such as one free movie ticket every month, discounts at concessions and no Online Booking Fees.

11. Consumers must be Scene+ members to join CineClub.

12. CineClub members currently pay a monthly fee of $9.99 plus tax or an annual fee of $119.88 plus tax.

13. On June 15, 2022, Cineplex introduced an Online Booking Fee.

14. The Online Booking Fee generated $11,678,336 in 2022.

15. The Online Booking Fee generated $5,200,872 during the first quarter of 2023.

16. The Online Booking Fee generated $7 million during the second quarter of 2023.

17. The Online Booking Fee generated $9.9 million during the third quarter of 2023.

18. The Online Booking Fee generated $5.2 million during the fourth quarter of 2023, for a total of $27.3 million in 2023.

19. The Online Booking Fee is waived for CineClub members.

20. When the Online Booking Fee was introduced, Scene+ members, who were not CineClub members, were unable to redeem Scene+ points towards the Online Booking Fee, a payment was required in order to proceed. As of August 11, 2022, Scene+ points could be redeemed towards the payment of the Online Booking Fee.

21. The Online Booking Fee does not apply to movie tickets purchased at Cineplex's theatres (box office, concessions and kiosks).

22. The Commissioner did not receive any complaints, from any members of the public, regarding the Online Booking Fee prior to the issuance of the Notice of Application.

23. The Commissioner does not have any written record of any complaints from any members of the public regarding the online booking fee received prior to issuance of the Notice of Application.

24. After the Notice of Application was filed, the Commissioner received seven complaints regarding the Online Booking Fee.

Message

From: Tim Das [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=5E406BAAFE27461998A483DD30972D99-TIM DAS]
Sent: 2022-06-20 2:33:36 PM
To: Kevin Watts [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=528e4e7784114c0a804b1f582fb4b650-Kevin Watts]
CC: Elaine Oei [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0bef156fa3c242e9a9f57563ba3127fd-Elaine Oei]
Subject: Re: UPDATE: Online Booking Fees

Hey Kevin

Completely valid question and there is a separate report that shows sales by channel. Its just not on the booking fee dashboard but perhaps something we can look to bring together. I'll take it back with the team and see what we can do. But something to note that some of these Power BI reports are broken and they are looking to fix that. Let me know if you have other questions. Hope that helps

Thanks

Tim

From: Kevin Watts <Kevin.Watts@cineplex.com>
Date: Monday, June 20, 2022 at 10:16 AM
To: Tim Das <Tim.Das@cineplex.com>
Cc: Elaine Oei <Elaine.Oei@cineplex.com>
Subject: RE: UPDATE: Online Booking Fees

Hi Tim,
I was looking at the OBF dashboard this morning and was wondering if there is a way by adjusting the filters to allow me to see what the sales mix by sale channel is?

I am curious to see if we are seeing a shift from off-site purchase to on-site purchases.
It is probably too early to tell anything but if things start to shift we are going to want to adjust our staffing deployment in box to ensure we are able to maintain guest service.

I apologize if this is an easy request as I am not very familiar with Power BI.

Let me know?

Kevin

From: Tim Das <Tim.Das@cineplex.com>
Sent: June 19, 2022 9:42 PM
To: Sean McKenna <Sean.McKenna@cineplex.com>; Sara Moore <Sara.Moore@cineplex.com>; Robert Cousins <Robert.Cousins@cineplex.com>; Christina Kuypers <Christina.Kuypers@cineplex.com>; Greg Ambrose <Greg.Ambrose@cineplex.com>; Scott Hughes <Scott.Hughes@cineplex.com>; Rana Bharania <Rana.Bharania@cineplex.com>; Dan McGrath <Dan.McGrath@cineplex.com>; Kevin Watts <Kevin.Watts@cineplex.com>; Elaine Oei <Elaine.Oei@cineplex.com>; Rayhan Azmat <Rayhan.Azmat@cineplex.com>; Samuel Leibel <Samuel.Leibel@cineplex.com>; Rishi Patel <Rishi.Patel@cineplex.com>; Bo Wang <Bo.Wang@cineplex.com>; Monique Binder <Monique.Binder@cineplex.com>; Nasir Khan <Nasir.Khan@cineplex.com>
Subject: Re: UPDATE: Online Booking Fees

Hi everyone

It has only been a couple of days but wanted to share some high level insights and some comments we are seeing on forums. As expected there might have been a slight sticker shock on Wednesday (launch day) and Thursday as guests were still digesting the change. But overall nothing major to report.

High level Insights:

1. Orders took a steep 35% drop on Wednesday but bounced back over the weekend to its normal levels (44k on Saturday). When compared to the previous two Wednesday's, the 15th represented a $5k drop from the average orders we typically see on weds.
2. Booking Fee Revenue has totalled (15/6 – 19/7) - $445k (Peak was on Saturday with $149k followed by $87k on Sunday)
3. Overall site Conversion Rate took a slight dip on launch day from a running average of 8.5% down to 7.6% but climbed back up over the weekend to just over 9.46%.
4. Cineclub registrations remained constant.

Some customer comments on Red Flag Deals, Reddit & Twitter:

1. As expected there is a group of people that are angry we are charging a booking fee and have indicated they will now go to Landmark
2. A lot of people have expressed genuine shock that we are charging a booking fee while promoting Scene for discounted booking fees & CineClub with no booking fees.
3. There were one or two posts on reddit by cast members indicating they and their manager were not aware that this change was taking place.
4. Also as expected, some guests have indicated they will pivot to purchasing tickets in the theatre since a booking fee will not be incurred
    a. *"Time to be disciplined and employ anti-ripoff tactics. Book and pay at the theatre on Tuesdays and sneak in your own snack"*
    b. *"I think everyone should now try to buy the tickets in person, as much as possible, creating long lines in person, so they'll regret this poorly implemented obvious cash grab decision."*

These are just some early high-level numbers. As we gather more data we will slice and dice the data and provide a bi-weekly update on how things are going overall. If there is anything specific you are looking to see, please let us know.

Thanks.

Tim.

From: Sean McKenna <Sean.McKenna@cineplex.com>
Date: Wednesday, June 15, 2022 at 10:48 PM
To: Sara Moore <Sara.Moore@cineplex.com>
Cc: Tim Das <Tim.Das@cineplex.com>, Robert Cousins <Robert.Cousins@cineplex.com>, Christina Kuypers <Christina.Kuypers@cineplex.com>, Greg Ambrose <Greg.Ambrose@cineplex.com>, Scott Hughes <Scott.Hughes@cineplex.com>, Rana Bharania <Rana.Bharania@cineplex.com>, Dan McGrath <Dan.McGrath@cineplex.com>, Kevin Watts <Kevin.Watts@cineplex.com>, Elaine Oei <Elaine.Oei@cineplex.com>, Rayhan Azmat <Rayhan.Azmat@cineplex.com>, Samuel Leibel <Samuel.Leibel@cineplex.com>, Rishi Patel <Rishi.Patel@cineplex.com>, Bo Wang <Bo.Wang@cineplex.com>, Monique Binder <Monique.Binder@cineplex.com>, Nasir Khan <Nasir.Khan@cineplex.com>
Subject: Re: UPDATE: Online Booking Fees

Great job, Tim & team!

Thanks!
S.

On Jun 15, 2022, at 10:37 PM, Sara Moore <Sara.Moore@cineplex.com> wrote:

Thank you to the D&T team for working so quickly and resolving this within 24 hours. This is great for our guests (and guest services!!).

Sara

From: Tim Das <Tim.Das@cineplex.com>
Sent: Wednesday, June 15, 2022 9:23:34 PM
To: Sean McKenna <Sean.McKenna@cineplex.com>; Robert Cousins <Robert.Cousins@cineplex.com>
Cc: Christina Kuypers <Christina.Kuypers@cineplex.com>; Greg Ambrose <Greg.Ambrose@cineplex.com>; Scott Hughes <Scott.Hughes@cineplex.com>; Rana Bharania <Rana.Bharania@cineplex.com>; Dan McGrath <Dan.McGrath@cineplex.com>; Sara Moore <Sara.Moore@cineplex.com>; Kevin Watts <Kevin.Watts@cineplex.com>; Elaine Oei <Elaine.Oei@cineplex.com>; Rayhan Azmat <Rayhan.Azmat@cineplex.com>; Samuel Leibel <Samuel.Leibel@cineplex.com>; Rishi Patel <Rishi.Patel@cineplex.com>; Bo Wang <Bo.Wang@cineplex.com>; Monique Binder <Monique.Binder@cineplex.com>; Nasir Khan <Nasir.Khan@cineplex.com>
Subject: Re: UPDATE: Online Booking Fees

Hello everyone,

Just an update that both the issues around manual refunds and voucher exclusions have now been resolved. We will look to send out an update towards the end of the week on key metrics in addition to some customer feedback we are noticing on various online forums.

Let me know if you have any questions.

Thanks!

Tim.

From: Tim Das <Tim.Das@cineplex.com>
Date: Wednesday, June 15, 2022 at 9:15 AM
To: Sean McKenna <Sean.McKenna@cineplex.com>, Robert Cousins <Robert.Cousins@cineplex.com>
Cc: Christina Kuypers <Christina.Kuypers@cineplex.com>, Greg Ambrose <Greg.Ambrose@cineplex.com>, Scott Hughes <Scott.Hughes@cineplex.com>, Rana Bharania <Rana.Bharania@cineplex.com>, Dan McGrath <Dan.McGrath@cineplex.com>, Sara Moore <Sara.Moore@cineplex.com>, Kevin Watts <Kevin.Watts@cineplex.com>, Elaine Oei <Elaine.Oei@cineplex.com>, Rayhan Azmat <Rayhan.Azmat@cineplex.com>, Samuel Leibel <Samuel.Leibel@cineplex.com>, Rishi Patel <Rishi.Patel@cineplex.com>, Bo Wang <Bo.Wang@cineplex.com>, Monique Binder <Monique.Binder@cineplex.com>, Nasir Khan <Nasir.Khan@cineplex.com>
Subject: Re: UPDATE: Online Booking Fees

Hi all,

Just a quick update. Online booking fees is now live! The team encountered an issue where specific vouchers are not getting excluded (Pizza Pizza, generic BOGO, etc). In terms of impact, these vouchers add up to about 300 a day. Team is actively working to address it and will look to deploy a fix in the next couple of hours.

In parallel, we are also looking to address the manual refunds piece mentioned below. Stay tuned for updates.

Let me know if you have any questions.

Thanks.

Tim.

From: Sean McKenna <Sean.McKenna@cineplex.com>
Date: Tuesday, June 14, 2022 at 8:01 PM
To: Robert Cousins <Robert.Cousins@cineplex.com>
Cc: Christina Kuypers <Christina.Kuypers@cineplex.com>, Greg Ambrose <Greg.Ambrose@cineplex.com>, Scott Hughes <Scott.Hughes@cineplex.com>, Rana Bharania <Rana.Bharania@cineplex.com>, Dan McGrath <Dan.McGrath@cineplex.com>, Sara Moore <Sara.Moore@cineplex.com>, Kevin Watts <Kevin.Watts@cineplex.com>, Elaine Oei <Elaine.Oei@cineplex.com>, Rayhan Azmat <Rayhan.Azmat@cineplex.com>, Samuel Leibel <Samuel.Leibel@cineplex.com>, Tim Das <Tim.Das@cineplex.com>, Rishi Patel <Rishi.Patel@cineplex.com>, Bo Wang <Bo.Wang@cineplex.com>, Monique Binder <Monique.Binder@cineplex.com>
Subject: Re: UPDATE: Online Booking Fees

Bo and I had aligned earlier if you were waiting for Finance and Treasury to say yes to money...

Thanks!
S.

> On Jun 14, 2022, at 7:52 PM, Robert Cousins <Robert.Cousins@cineplex.com> wrote:
>
> No objections here
>
> ---
>
> **From:** Christina Kuypers <Christina.Kuypers@cineplex.com>
> **Sent:** June 14, 2022 7:25 PM
> **To:** Greg Ambrose <Greg.Ambrose@cineplex.com>; Scott Hughes <Scott.Hughes@cineplex.com>
> **Cc:** Rana Bharania <Rana.Bharania@cineplex.com>; Dan McGrath <Dan.McGrath@cineplex.com>; Sara Moore <Sara.Moore@cineplex.com>; Kevin Watts <Kevin.Watts@cineplex.com>; Elaine Oei <Elaine.Oei@cineplex.com>; Rayhan Azmat <Rayhan.Azmat@cineplex.com>; Sean McKenna <Sean.McKenna@cineplex.com>; Robert Cousins <Robert.Cousins@cineplex.com>; Samuel Leibel <Samuel.Leibel@cineplex.com>; Tim Das <Tim.Das@cineplex.com>; Rishi Patel <Rishi.Patel@cineplex.com>; Bo Wang <Bo.Wang@cineplex.com>; Monique Binder

<Monique.Binder@cineplex.com>
Subject: Re: UPDATE: Online Booking Fees

No objections to moving ahead with tomorrow's launch per Scott's note on his team working on a fix.

Regards,
Christina

Christina Kuypers (She/Her)
Senior Vice President, Revenue Management, Exhibition & LBE
(GMT 5:00) Toronto

1303 Yonge Street, Toronto, ON,
M4T 2Y9, Canada
P: 416.323.5336 | C: 647.865.3865 | christina.kuypers@cineplex.com

Reach out on MS Teams

Cineplex.com
Canada's most admired corporate cultures - Waterstone Award

From: Greg Ambrose <Greg.Ambrose@cineplex.com>
Sent: Tuesday, June 14, 2022 7:15:06 PM
To: Scott Hughes <Scott.Hughes@cineplex.com>
Cc: Rana Bharania <Rana.Bharania@cineplex.com>; Dan McGrath <Dan.McGrath@cineplex.com>; Sara Moore <Sara.Moore@cineplex.com>; Christina Kuypers <Christina.Kuypers@cineplex.com>; Kevin Watts <Kevin.Watts@cineplex.com>; Elaine Oei <Elaine.Oei@cineplex.com>; Rayhan Azmat <Rayhan.Azmat@cineplex.com>; Sean McKenna <Sean.McKenna@cineplex.com>; Robert Cousins <Robert.Cousins@cineplex.com>; Samuel Leibel <Samuel.Leibel@cineplex.com>; Tim Das <Tim.Das@cineplex.com>; Rishi Patel <Rishi.Patel@cineplex.com>; Bo Wang <Bo.Wang@cineplex.com>; Monique Binder <Monique.Binder@cineplex.com>
Subject: Re: UPDATE: Online Booking Fees

Adding Monique.

> On Jun 14, 2022, at 7:03 PM, Scott Hughes <Scott.Hughes@cineplex.com> wrote:
>
> Thanks for the context Rana. I agree with moving forward with option 1 and keeping the launch as planned tomorrow morning. The team will be prioritizing a fix to limit the impact on Guest Services and will keep the group posted on timing.

From: Rana Bharania
Sent: Tuesday, June 14, 2022 6:51 p.m.
To: Dan McGrath; Sara Moore; Greg Ambrose; Christina Kuypers; Kevin Watts; Scott Hughes; Elaine Oei; Rayhan Azmat; Sean McKenna; Robert Cousins
Cc: Samuel Leibel; Tim Das; Rishi Patel; Bo Wang
Subject: UPDATE: Online Booking Fees

Hi Everyone,

We've uncovered an issue around manual refunding that is resulting in some complexities for launch tomorrow.
In short, an issue around Service Now is resulting in refunds not being passed through for processing.
Note, these manual refunds are related to past showtimes, gift card payments, split payments etc. Typically we would see 200 of these refunds come in daily.

We are unsure of the timing to resolve this issue, but the team is escalating with appropriate teams.

Our options:

1. We move forward with launch, continue to escalate the fix and take the hit on the GS side.
2. We delay launch and wait for a resolution. With this weekends' film slate, we forego a sizeable revenue opportunity with this option

Our recommendation is to move forward with launch tomorrow (Option 1) as the revenue upside outweighs the backlog we would encounter. We will offer support to GS team similar to what we did for December closures, but anticipate this to be significantly lower impact to manage.

Let us know if you have any further input on this decision.

Thanks
Rana

look at the customers for Coca-Cola, if it was Coca-Cola, and you'd analysing the existing website analytics to understand the people that use that website?

MR. ECKERT: Yes.

MR. RUSSELL: You didn't do that here. You didn't look at Cineplex customers, did you? No analytics whatsoever?

MR. ECKERT: No analytics.

MR. RUSSELL: And no separate testing outside by you at all. You didn't test. You did no control group testing or anything like that to test the website as it exists?

MR. ECKERT: I did no control group testing, no.

MR. RUSSELL: So you don't know how much Cineplex customers scroll?

MR. ECKERT: I do not.

MR. RUSSELL: You don't know what they focus on?

MR. ECKERT: I do not.

MR. RUSSELL: So your report is entirely based on subjective information about what they might or might not look at, but it doesn't give any guidance to this Court about this website with the customers that visit this website?

Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And then you say, "Based on my review of Cineplex's website"; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: So that's the study, along with the academic research. The two things that you're telling this Tribunal you did is I studied this website and I looked at the academic research and I provided an opinion.

DR. MORWITZ: Yes. And the app.

MR. RUSSELL: And the app. Sorry. I didn't mean to exclude that.

And you've said already you didn't do any experiments, you didn't do any surveys.

DR. MORWITZ: No.

MR. RUSSELL: Were you asked to do any?

DR. MORWITZ: No.

MR. RUSSELL: Could you have done an experiment or a study?

DR. MORWITZ: There, yes.

MR. RUSSELL: You could have; correct? You could have designed a study, an empirical study, of Cineplex's website and user experience, could you not?

DR. MORWITZ: One could.

MR. RUSSELL: You're one of the experts. You

could do it. That's all I'm asking.

DR. MORWITZ: Yes.

MR. RUSSELL: But you weren't asked to do it.

DR. MORWITZ: No.

MR. RUSSELL: So it would be equivalent to an economist appearing before this Tribunal to give views on academic literature without doing any econometric studies; correct?

DR. MORWITZ: Could you repeat that, please?

MR. RUSSELL: It would be equivalent -- we have economists testify in this Tribunal quite regularly. It would be equivalent for them to come and give an opinion to this Tribunal based on academic literature without doing any econometric studies, no surveys, no econometrics, no regression analysis. They would be coming and simply giving their opinion based on academic literature; correct?

DR. MORWITZ: That sounds similar, yes.

MR. RUSSELL: Now, when you examined the website -- and the fact that you're charged with giving an objective opinion to this Tribunal, I mean, you're the witness for the Tribunal, not for an advocate. The same as Dr. Amir is not my expert. He is the Tribunal's expert. I put him forward. You understand that's the role; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: So you understood that you should

CT-2015-001

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER of a Consent Agreement pursuant to section 74.12 of the *Competition Act* with respect to certain deceptive marketing practices of Aviscar Inc. and Budgetcar Inc. under paragraph 74.01(1)(a) and sections 74.05 and 74.011 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

AVISCAR INC. and BUDGETCAR INC. / BUDGETAUTO INC.

Respondents

CONSENT AGREEMENT

WHEREAS the Commissioner is responsible for the administration and enforcement of the *Competition Act*;

AND WHEREAS the Respondents Aviscar and Budgetcar operate a car rental services business across Canada and also offer Related Products such as GPS systems, child safety seats, insurance products and roadside assistance services;

AND WHEREAS the Respondents are indirect subsidiaries of ABC Rental and Avis Budget Group;

AND WHEREAS the Respondents made Representations to the public about the price at which consumers could rent cars and Related Products and also about percentage-off discounts;

AND WHEREAS one or both of the Respondents made these Representations to the public starting from at least 2009 on their Websites, Mobile Apps, and Emails, as well as in certain of their newspaper advertisements, television commercials, and flyers;

AND WHEREAS the Respondents charged consumers Non-Optional Fees in addition to the prices initially advertised;

AND WHEREAS the Commissioner has concluded that the Respondents' Non-Optional Fees may increase the cost of a car rental by 5% to 20%, depending on the rental location and vehicle type;

AND WHEREAS the Commissioner has concluded that certain of the Respondents' initial price representations created the general impression that consumers could rent cars and Related Products at prices that were not in fact attainable, because consumers were required to pay these additional Non-Optional Fees;

AND WHEREAS the Commissioner has concluded that certain of the Respondents' discount representations created the general impression that consumers could save on the cost of a car rental and Related Products at discounts that were not in fact attainable, because consumers were required to pay these additional Non-Optional Fees, certain of which were not discounted;

AND WHEREAS the Commissioner has concluded that the words chosen by the Respondents to describe certain of the Non-Optional Fees, where they were placed, and how they were combined with actual taxes, created the general impression that they were taxes, surcharges and/or fees that governments and authorized agencies required rental car companies to collect from consumers;

AND WHEREAS the Commissioner has concluded it was the Respondents who chose to impose Non-Optional Fees on consumers to recoup part of their own cost of doing business;

AND WHEREAS the Commissioner has concluded that the Respondents made Representations to the public that were false or misleading in a material respect for the purpose of promoting the supply or use of their rental cars and Related Products, and their business interests more generally;

AND WHEREAS the Commissioner has concluded that the Respondents engaged in conduct reviewable pursuant to paragraph 74.01(1)(a) and section 74.011 of the *Competition Act*;

AND WHEREAS the Commissioner acknowledges that the Respondents undertook a number of voluntary and proactive steps at least as early as December 2014 to address the conduct at issue, including changing many of their representations regarding certain Non-Optional Fees and redesigning certain of their Canadian websites in July 2015 so that consumers are shown the total estimated price for a rental, inclusive of Non-Optional Fees, the first time they are shown a price;

AND WHEREAS the Commissioner acknowledges that, since at least 2009, the Respondents informed consumers of the total estimated price for their rental before a car rental reservation was completed;

AND WHEREAS IT IS AGREED AND UNDERSTOOD that for the purposes of this Agreement only, including execution, registration, enforcement, variation or rescission of this Agreement, the Respondents do not contest the Commissioner's conclusions but nothing in this Agreement shall be taken as an admission or acceptance by the Respondents of any facts, wrongdoing, submissions, legal argument or conclusions for any other purpose nor shall it derogate from any rights or defences of the Respondents against third parties including any defences available under the *Competition Act*;

AND WHEREAS the Parties are satisfied that this matter can be resolved with the registration of this Agreement which, upon registration, shall have the same force and effect as an order of the Tribunal;

AND WHEREAS IT IS AGREED AND UNDERSTOOD that upon registration of this Agreement, these proceedings shall be terminated as against the Respondents, ABC Rental and Avis Budget Group pursuant to subsection 74.12(4) of the *Competition Act*;

NOW THEREFORE, in order to resolve the Commissioner's concerns, the Parties hereby agree as follows:

I. INTERPRETATION

1. For the purpose of the Agreement, the following definitions shall apply:

    a. "**ABC Rental**" means Avis Budget Car Rental Services, LLC, a limited liability corporation incorporated pursuant to the laws of Delaware;

    b. "**Affiliate**" means an affiliated corporation, partnership or sole proprietorship within the meaning of subsection 2(2) of the *Competition Act*;

    c. "**Agreement**" means this Consent Agreement entered into by the Parties pursuant to section 74.12 of the *Competition Act*, including Appendix "A" hereto;

    d. "**Avis Budget Group**" means Avis Budget Group, Inc., a corporation incorporated pursuant to the laws of Delaware;

    e. "**Aviscar**" means Aviscar Inc., a corporation incorporated pursuant to the laws of Canada, its directors, officers, employees, agents, representatives, successors and assigns, and all joint ventures, subsidiaries, divisions and Affiliates controlled by it within the meaning of subsection 2(4) of the

Competition Act, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

f. "**Base Rate**" means the price for a rental car and/or a Related Product for time and/or mileage only, exclusive of Non-Optional Fees and federal and provincial sales taxes;

g. "**Budgetcar**" means Budgetcar Inc. / Budgetauto Inc., a corporation incorporated pursuant to the laws of Canada, its directors, officers, employees, agents, representatives, successors and assigns, and all joint ventures, subsidiaries, divisions and Affiliates controlled by it within the meaning of subsection 2(4) of the *Competition Act*, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

h. "**Commissioner**" means the Commissioner of Competition appointed pursuant to section 7 of the *Competition Act*, and his or her authorized representatives;

i. "***Competition Act***" means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

j. "**Email**" means any electronic message sent by or on behalf of the Respondents to persons in Canada relating to car rental services or Related Products supplied directly by the Respondents;

k. "**Execution Date**" means the date on which the Agreement has been signed by both Parties;

l. *"**Interpretation Act**"*, means the *Interpretation Act*, R.S.C. 1985, c. I-21, as amended;

m. "**Mobile Applications**" means any Avis or Budget branded mobile application that display prices for rental cars or Related Products that the Respondents supply;

n. "**Non-Optional Fees**" means any charges, surcharges, fees, or other amounts, excluding applicable provincial and federal sales taxes, that are charged in addition to Base Rates and that consumers are required to pay to rent a car or Related Products. Non-Optional Fees include, but are not limited to, "Surtaxe Stationnement", "Surtaxe Emplacement Prestige", "Taxe de mise au rebut des pneumatiques", "Taxe environnementale de l'Ontario", "Taxe d'accise sur la climatisation", "Car Tax", "Vehicle License Fee/AC Excise Tax", "Ontario Environmental Fee", "Tire Management Fee", "Energy

Recovery Fee", "Parking Surcharge", "Concession Recovery Fee", "Premium Location Surcharge", "Other Charges", and "Fees";

o. "**Parties**" means the Commissioner and the Respondents collectively, and **"Party"** means any one of them;

p. "**Person**" means any individual, corporation, partnership, firm, association, trust, unincorporated organization, or other entity;

q. "**Related Products**" includes GPS systems, child safety seats, insurance products, and roadside assistance services;

r. "**Representations**" means any and all representations made, caused to be made, or permitted to be made by or on behalf of the Respondents including any representation on the Websites, Mobile Applications, and any Email, flyer, television commercial, or newspaper advertisement;

s. "**Respondents**" means Aviscar Inc., and/or Budgetcar Inc.;

t. "**Respondents' Marketing Personnel**" means all current and future Respondents' employees and Respondents' Senior Management who are materially involved in or responsible for the formulation or the implementation of advertising, marketing or pricing for products the Respondents supply;

u. "**Respondents' Senior Management**" means the current and future Chief Executive Officer, Chief Operating Officer, Chief Administrative Officer, Chief Financial Officer, Chief Accounting Officer, President, Vice Presidents, Secretary, Controller, General Manager, Managing Directors, and any individual who performs their functions;

v. "**Websites**" means Avis.ca, Avis.com, Budget.ca, and Budget.com, as used by those who identify themselves as residents of Canada; and

w. "**Tribunal**" means the Competition Tribunal established by subsection 3(1) of *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), as amended.

II. COMPLIANCE WITH THE DECEPTIVE MARKETING PRACTICES PROVISIONS OF THE *COMPETITION ACT*

2. Within 90 days of the Execution Date, the Respondents shall comply with Part VII.1 of the *Competition Act*.

3. Without limiting the generality of the foregoing, within 90 days of the Execution Date, the Respondents shall not make, cause to be made, or permit to be made on their behalf any representation to the public with respect to any product that

creates a materially false or misleading general impression that:

a. consumers can rent cars and Related Products at prices or percentage-off discounts that are not in fact attainable because of the existence of additional Non-Optional Fees; or

b. any Non-Optional Fees are taxes, surcharges or fees that governments and authorized agencies require rental car companies to collect from consumers, unless that is in fact the case.

4. If the Respondents become aware that there has been a breach or possible breach of any terms of this Agreement, the Respondents shall, within ten (10) days after becoming aware of the breach or possible breach, notify the Commissioner thereof, and shall provide details sufficient to describe the nature, date and effect (actual and anticipated) of the breach or possible breach, and the steps the Respondents have taken to correct the breach or possible breach.

III. PAYMENTS

ADMINISTRATIVE MONETARY PENALTY

5. The Respondents shall pay an administrative monetary penalty in the amount of $3,000,000 dollars.

COSTS

6. The Respondents shall pay $250,000 dollars for costs incurred by the Commissioner during the course of his investigation into this matter.

FORM AND TIME OF PAYMENT

7. The payments referred to in paragraphs 5 and 6 shall be made within 30 days after the Execution Date by certified cheque or by wire transfer payable to the Receiver General for Canada.

IV. CORPORATE COMPLIANCE PROGRAM

8. Within 90 days after the Execution Date, the Respondents shall establish, and thereafter maintain, a corporate compliance program, the goal of which will be to promote the compliance of the Respondents with the *Competition Act* generally, and Part VII.1 of the *Competition Act* specifically. The compliance program shall be framed and implemented in a manner consistent with the Commissioner's bulletin titled "Corporate Compliance Programs", as published (as of the Execution Date of this Agreement) on the Competition Bureau's website at www.competitionbureau.ca.

9. The Respondents' Senior Management shall fully support and enforce the compliance program and shall take an active and visible role in its establishment and maintenance.

10. Within 21 days after the establishment of the compliance program, each member of Respondents' Senior Management shall acknowledge his or her commitment to the compliance program by signing and delivering to the Commissioner a commitment letter in the form set out in Appendix "A" of this Agreement. Any individual that becomes a member of Respondents' Senior Management during the term of this Agreement shall sign and deliver to the Commissioner a commitment letter in the form set out in Appendix "A" of this Agreement, within 21 days of becoming a member of Respondents' Senior Management.

V. COMPLIANCE REPORTING AND MONITORING

11. The Respondents shall provide the Commissioner written confirmation that all Respondents' Marketing Personnel has received a copy of this Agreement, as required by paragraph 14, within 21 days after the registration of this Agreement.

12. For the purposes of monitoring compliance with this Agreement, the Respondents shall provide to the Commissioner information relating to any matters referred to in Parts II, IV and V of this Agreement that the Commissioner requests, within 30 days following receipt of a written request from the Commissioner.

13. No later than 120 days after the Execution Date, the Vice President and General Manager of the Respondents shall provide to the Commissioner a statement under oath or solemn affirmation that the compliance program required by Part IV of this Agreement has been implemented.

VI. GENERAL

14. During the term of this Agreement, (i) the Respondents shall provide a copy of this Agreement to all Respondents' Marketing Personnel within 14 days after the date of registration of this Agreement, and (ii) all future Respondents' Marketing Personnel will be provided with a copy of this Agreement within 14 days after his or her commencement of employment. Within 14 days after being provided with a copy of this Agreement, the Respondents shall secure from each such person a signed and dated statement acknowledging that he or she read and understood this Agreement and Part VII.1 of the Act.

15. Notices, reports and other communications required or permitted pursuant to any of the terms of this Agreement shall be in writing and shall be considered to be given if dispatched by personal delivery, registered mail or facsimile transmission to the Parties at the following addresses:

(a) <u>The Commissioner</u>:

Commissioner of Competition
Competition Bureau
Place du Portage, 21st Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9
Attention: Senior Deputy Commissioner of Competition, Cartels and Deceptive Marketing Practices Branch

Facsimile: (819) 956-2836

With a copy to:

Executive Director and Senior General Counsel
Competition Bureau Legal Services
Department of Justice
Place du Portage, 22nd Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9

Facsimile: (819) 953-9267

(b) <u>The Respondents</u>:

Aviscar Inc. and Budget Car Inc.
1 Convair Dr. E.
Etobicoke, ON M9W 6Z9
Attention: Vice President and General Manager

Facsimile: (416) 213-8505

With a copy to:

Kevin Ackhurst & D. Michael Brown
Norton Rose Fulbright Canada LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4

Facsimile: (416) 216-3930

16. This Agreement shall be binding upon the Respondents for a period of 10 years following its registration.

17. The Parties consent to the immediate registration of this Agreement with the Tribunal pursuant to section 74.12 of the *Competition Act*.

18. The Commissioner may, in his sole discretion and after informing the Respondents in writing, extend any of the time frames in Parts IV and V of this Agreement.

19. The Commissioner may, with the consent of the Respondents, extend any of the time frames in Part VI of this Agreement.

20. Nothing in this Agreement precludes a Respondent or the Commissioner from bringing an application under section 74.13 of the *Competition Act*. The Respondents will not, for the purposes of this Agreement only, including execution, registration, enforcement, variation or rescission, contest the Commissioner's conclusions as stated herein.

21. The Respondents shall not make any public statements that contradict the terms of this Agreement.

22. The Respondents attorn to the jurisdiction of the Tribunal for the purposes of this Agreement and any proceeding initiated by the Commissioner relating to this Agreement for variation or rescission.

23. In the event of a dispute regarding the interpretation, implementation or application of this Agreement, any of the Parties shall be at liberty to apply to the Tribunal for an order or directions. In no event shall any dispute suspend any time period under the Agreement. The Parties agree that the Tribunal has jurisdiction to make such order as is required to give effect to this Agreement.

24. This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English and French versions of this Agreement, the English version shall prevail.

25. The Agreement constitutes the entire and only agreement between the Parties and supersedes all previous negotiations, communications and other agreements, whether written or oral, unless they are incorporated by reference herein. There are no terms, covenants, representations, statements or conditions binding on the Parties other than those contained herein.

26. The computation of time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*. For the purpose of this Agreement, the

definition of "holiday" in the *Interpretation Act* shall include Saturday. For the purposes of determining time periods, the date of this Agreement is the last date on which it is executed by a Party.

27. The Agreement shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein, without applying any otherwise applicable conflict of law rules.

The undersigned hereby agree to the filing of the Agreement with the Tribunal for registration.

DATED at Buenos Aires, Argentina this 30th day of May, 2016.

for: Aviscar Inc. and
Budgetcar Inc. / Budgetauto Inc.

"William Boxberger"

William Boxberger
Vice President and General Manager
I have authority to bind the corporation.

DATED at Gatineau, in the Province of Quebec this 1st day of June, 2016.

"John Pecman"

John Pecman
Commissioner of Competition

"APPENDIX A"

ACKNOWLEDGEMENT BY SENIOR MANAGEMENT

[Corporate Company Letterhead]

[date], 2016

CONFIDENTIAL

Commissioner of Competition
Competition Bureau
Place du Portage, Phase 1
50 Victoria Street, 21st Floor
Gatineau (QC) K1A 0C9

RE: Commitment to Establishment and Maintenance of Compliance Program

Further to Paragraph 10 of the Consent Agreement between the Commissioner of Competition (the "Commissioner") and Aviscar Inc., Budgetcar Inc. / Budgetauto Inc. ("Avis/Budget"), dated May __, 2016, I hereby commit to the successful implementation of Avis/Budget's corporate compliance program for the purpose of promoting compliance with the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), including the deceptive marketing practices provisions in Part VII.1 of the Act. I will take an active and visible role in the establishment and maintenance of the corporate compliance program.

Sincerely,

_____

(Name and title)

cc: Executive Director and Senior General Counsel, Competition Bureau Legal Services

Deputy Commissioner of Competition, Deceptive Marketing Practices Directorate, Cartels and Deceptive Marketing Practices Branch

whether the consumer would be incented or prevented in some way in terms of the design from doing what they otherwise would know how to do, which is to scroll. Right?

DR. MORWITZ: I'm not saying they don't scroll. I'm saying that because they need to scroll, the information is seen later.

MR. RUSSELL: And you're also not saying if they do scroll, all of the information we're talking about is on that ticket page, right? It's in the four corners of the web page. It's just dependent on scrolling; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: Now, returning to paragraph 8 again of your report, you say -- I'll give you a moment to catch up. You've got it in front of you again?

DR. MORWITZ: I do.

MR. RUSSELL: It's just, you:

> "...drew conclusions how this presentation affects consumers' perceptions of how expensive a ticket purchased from Cineplex online would be..."

This is in your conclusions. That's what you say you're drawing for this Tribunal, that sentence?

DR. MORWITZ: Yes.

MR. RUSSELL: That's it. You said in your

Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Premier Career Management Group et al.*, 2008 Comp. Trib. 18
File No.: CT-2007-006
Registry Document No.: 0152

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

AND IN THE MATTER of an inquiry pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* relating to certain marketing practices of Premier Career Management Group Corp. and Minto Roy;

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

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Premier Career Management Group Corp. and Minto Roy
(respondents)

Dates of hearing: 20080414 to 20080418, 20080421 to 20080423, 20080429 and 20080501
Presiding Judicial Member: Simpson J. (Chairperson)
Date of Reasons and Order: July 15, 2008
Reasons and Order signed by: Madam Justice Sandra J. Simpson

REASONS FOR ORDER AND ORDER DISMISSING THE APPLICATION UNDER SECTION 74.1 OF THE COMPETITION ACT

[205] This statement does not assist the Commissioner for two reasons. First it is *obiter dicta*. Second, it is probably based on the Deeming Provision in 36(2)(*e*) which would have made Simpsons' conduct an offence if only one person saw the card. As discussed above, the Deeming Provision does not apply in this case.

[206] In conclusion on this issue, I find that the Commissioner has not met the onus of showing that the Representations were made to the public for the following reasons:

- Based on the Background Paper "to the public" means to the marketplace.
- The Deeming Provision in paragraph 74.03(1)(*d*) of the Act does not apply on the facts of this case.
- Personal matters were discussed: at the First Meeting, prospective clients reviewed personal matters including their employment histories, their expectations and their ability to pay PCMG's fees. In some situations, a partner or relative was invited to the Second Meeting in which similar personal topics were addressed.
- There was an expectation of privacy: both prospective clients and PCMG's Senior Career Consultants intended their discussions to be private. This mutual expectation of privacy was evidenced by the fact that the First and Second Meetings were held in offices behind closed doors.
- There was no public access: Mr. Wills confirmed that PCMG's practice was to invite candidates to First Meetings. They would usually be individuals who had not obtained positions after they had made their résumés available to PCMG via the internet. The First and Second Meetings were not accessible to the public. No one could pay a fee to receive, subscribe to overhear or in any way listen in on the conversations between the prospective clients and PCMG's Senior Career Consultants. In my view without accessibility, it cannot be said that misinformation was "fed into the marketplace".

[207] In view of this conclusion, the application will be dismissed. However, to provide a complete analysis, I will consider the remaining issues.

Issue 4 *Were the Representations False or Misleading?*

[208] The Commissioner's allegation is that the Representations were false and misleading. In considering this issue, I have focussed on what could reasonably have been understood by the average prospective PCMG client who heard the Representations during the First and Second Meetings. See: *Canada (Commissioner of Competition) v. P.V.I. International Inc.*, 2002 Comp. Trib. 24, 9 C.P.R. (4th) 129; aff'd (2004), 31 C.P.R. (4th) 331 (F.C.A.), at para. 24. The attributes of the intended audience are an important aspect of this consideration.

[209] The evidence from several of the Commissioner's witnesses discloses that prospective PCMG clients may urgently require employment. On the other hand, the Respondents' witnesses were all working when they approached PCMG. It therefore appears that PCMG has two categories of prospective clients – those who are unemployed and in need of work and those who are employed and want a change.

[210] In my view, it is reasonable to assume that urgency could exist in either situation.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Bell Mobility Inc. v. Telus Communications Company,*** 2006 BCCA 578

Date: 20061215
Docket: CA034616

Between:

Bell Mobility Inc.

Appellant
(Plaintiff)

And

Telus Communications Company

Respondent
(Defendant)

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine

Oral Reasons for Judgment

R.J. Deane P.G. Foy, Q.C.	Counsel for the Appellant
D.G. Cowper, Q.C. D. Ullrich	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 11 December 2006
Place and Date of Judgment:	Vancouver, British Columbia 15 December 2006

the advertisement, the impression is fixed as the impression of the average consumer.

[17] I agree with Mr. Deane. I would only add that s. 52(4) requires that the trial judge also examine the literal meaning of the representation in determining whether the advertisement is false or misleading.

[18] Next, Mr. Deane says the giving of a particular impression is only unlawful if the impression is false or misleading in a material respect. The second step of the test requires the court, having regard to extraneous facts if necessary, to gauge whether the impression conveyed to consumers by the representations is false or, alternatively, misleading in a material respect. Only at this stage is extraneous evidence considered, not to alter the general impression, but to gauge whether the impression is false or misleading.

[19] I agree and I do not take counsel for Telus to take issue with that iteration of the test.

Discussion

[20] Bell says that the force of its claim that Telus is in violation of s. 52 of the ***Competition Act*** depends upon the general impression conveyed by the advertisements in question. On the authorities, as just set out, this impression is determined by the average consumer's perception of the information contained within the four corners of the impugned advertisements. The thrust of Bell's argument is that the Chambers judge assessed the general impression conveyed by the advertisements not only in light of the representations made within the

advertisements themselves, but in light of the additional information made available to him in the affidavits filed on the application. Since none of that information is available to consumers viewing the advertisements, it was an error for the Chambers judge to bring that information to bear in the course of assessing the general impression conveyed by the advertisements.

[21] The Chambers judge, says counsel, revealed his error in para. 22 of his draft reasons for judgment. Before turning to it, the alleged offending paragraph must be set in context:

> [21] The Flexible Share Plan is the one Telus provides, so in the most technical sense it is only available from Telus. In that sense, Bell could say equally "Family Share Plan only from Bell Mobility". But that is only part of it. The product is also different from the Bell plan. Telus allows the customer to combine the individual share plans into flexible share plans. Bell does not. Whether this is significant or superior from the consumer's point of view is a question for the consumer, but the share plans are different in that respect.
>
> [22] The real complaint of Bell Mobility though is the implication. Telus conveys the message says Bell Mobility, that Bell and Rogers offer no flexibility. I do not agree that that is the message. It conveys the message that Telus is more flexible in that it offers more options. This does not seem to me to be "false" or "misleading in a material respect" (Competition Act, s. 52). Bell Mobility has five categories in its Family Share Plan. Telus has a product with more options which it says is more accommodating to the different needs of different persons. Whether it is, is a question for the consumer.
>
> [23] I am not persuaded that the plaintiff's case is a strong one.

[22] Counsel for Telus submitted, and I understood counsel for Bell to agree, that in paragraph 21 the Chambers judge was examining the literal meaning of the advertisements. Bell says, however, that in para. 22, when the Chambers judge went on to discuss the "implication" or "general impression" of the advertisements,

R. v. J. CLARK & SON LIMITED
(F/CR/5/85)

INDEXED AS: R. v. CLARK (J.) & SON LIMITED

New Brunswick Court of Queen's Bench
Trial Division
Judicial District of Fredericton
Stevenson, J.
May 9, 1986.

Counsel:
Douglas L. Smith, for the appellant;
Richard J. Scott and Sean McNulty, for the respondent.

This appeal was heard on February 21,

but to protect the public, -- that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions. Advertisements must be considered in their entirety, and as they would be read by those to whom they appeal.'

"On this point, the following passage appears in **F.T.C. v. Sterling Drug Inc.**, supra, [at p. 674]:

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

"And, in **Charles of the Ritz Distributors Corp. v. F.T.C.** (1944), 143 F. 2d 676, specifically referred to by the learned trial judge, it was said [at p. 679]:

'... and the "fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced".'

"As I have noted above, an offence in respect of advertising under the **Federal Trade Commission Act**, has somewhat different characteristics from the offence with which we are here concerned, but nevertheless it appears to me that the foregoing

experts mais pour protéger le public, -- cette vaste multitude qui comprend les ignorants, les irréfléchis et les crédules qui, lorsqu'ils achètent, ne s'arrêtent pas pour analyser mais se laissent trop souvent guider par les impressions générales et les apparences. Les annonces doivent être examinées dans leur totalité, en tenant compte de la façon dont elles seraient lues par ceux à qui elles s'adressent.'

"A ce sujet, le passage suivant se trouve dans **F.T.C. v. Sterling Drug Inc.**, précité, [à la p. 674]:

'Par conséquent, il est nécessaire dans ces cas d'examiner l'annonce dans sa totalité et de ne pas faire de dissection discutable. On devrait examiner toute la mosaïque plutôt que chaque pièce séparément. "Habituellement, le public acheteur n'étudie pas ou ne pèse pas soigneusement chaque mot d'une annonce. La dernière impression qui reste dans l'esprit du lecteur découle de l'ensemble non seulement de ce qui est dit mais également de ce qui est raisonnablement sous-entendu".'

"Et, dans l'arrêt **Charles of the Ritz Distributors Corp. v. F.T.C.** (1944), 143 F. 2d 676, auquel le savant juge du procès s'est référé spécifiquement, il a été dit [à la p. 679]:

'... et le "fait qu'une fausse déclaration soit manifestement fausse pour ceux qui sont avertis et qui ont de l'expérience ne change pas le caractère de la déclaration, pas plus qu'il ne lui enlève le pouvoir de tromper ceux qui ont moins d'expérience".'

"Comme je l'ai mentionné précédemment, une infraction relative à la publicité visée par la **Federal Trade Commission Act** a des caractéristiques quelque peu différentes de l'infraction qui nous est présentée dans la cause en l'espèce, mais il me semble

White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants and R. Brian Burgess *Appellants*

v.

Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, formerly Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. operating as T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited and Woodland Building Supplies Limited *Respondents*

and

Attorney General of Canada and Criminal Lawyers' Association (Ontario) *Interveners*

White Burgess Langille Inman, faisant affaire sous la raison sociale WBLI Chartered Accountants et R. Brian Burgess *Appelants*

c.

Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, auparavant Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. faisant affaire sous la raison sociale T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited et Woodland Building Supplies Limited *Intimées*

et

Procureur général du Canada et Criminal Lawyers' Association (Ontario) *Intervenants*

Indexed as: White Burgess Langille Inman *v.* Abbott and Haliburton Co.

2015 SCC 23

File No.: 35492.

2014: October 7; 2015: April 30.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Evidence — Admissibility — Expert evidence — Basic standards for admissibility — Qualified expert — Independence and impartiality — Nature of expert's duty to court — How expert's duty relates to admissibility of expert's evidence — Forensic accountant providing opinion on whether former auditors were negligent in performance of duties — Former auditors applying to strike out expert's affidavit on grounds she was not impartial expert witness — Whether elements of expert's duty to court go to admissibility of evidence rather than simply to its weight — If so, whether there is a threshold admissibility requirement in relation to independence and impartiality.

The shareholders started a professional negligence action against the former auditors of their company after they had retained a different accounting firm, the Kentville office of GT, to perform various accounting tasks and which in their view revealed problems with the former auditors' work. The auditors brought a motion for summary judgment seeking to have the shareholders' action dismissed. In response, the shareholders retained M, a forensic accounting partner at the Halifax office of GT, to review all the relevant materials and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out M's affidavit on the grounds that she was not an impartial expert witness.

The motions judge essentially agreed with the auditors and struck out M's affidavit in its entirety. The majority of the Court of Appeal concluded that the motions judge erred in excluding M's affidavit and allowed the appeal.

Répertorié : White Burgess Langille Inman *c.* Abbott and Haliburton Co.

2015 CSC 23

N° du greffe : 35492.

2014 : 7 octobre; 2015 : 30 avril.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Wagner et Gascon.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Preuve — Admissibilité — Preuve d'expert — Normes fondamentales d'admissibilité — Expert qualifié — Indépendance et impartialité — Nature de l'obligation de l'expert envers le tribunal — Rapport entre l'obligation de l'expert et l'admissibilité de son témoignage — Opinion d'une juricomptable sur la négligence possible des vérificateurs précédents dans l'exercice de leurs fonctions — Requête en radiation de l'affidavit de l'expert présentée par les vérificateurs précédents au motif que l'expert n'était pas un témoin expert impartial — Les éléments de l'obligation de l'expert envers le tribunal jouent-ils au regard de l'admissibilité du témoignage plutôt que simplement de la valeur probante de celui-ci? — Dans l'affirmative, l'indépendance et l'impartialité constituent-elles un critère d'admissibilité?

Les actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie après avoir engagé un autre cabinet comptable, GT, de Kentville, pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. En réponse, les actionnaires ont fait appel à M, une associée en juricomptabilité du cabinet GT de Halifax, pour qu'elle examine tous les documents pertinents et rédige un rapport de ses constatations. Son affidavit expose ces dernières, notamment que les vérificateurs, selon elle, ne se sont pas acquittés de leurs obligations professionnelles envers les actionnaires. Les vérificateurs ont présenté une requête en radiation de l'affidavit de M au motif qu'elle n'était pas un témoin expert impartial.

Le juge des requêtes s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié intégralement l'affidavit de M. Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit de M et ont accueilli l'appel.

Held: The appeal should be dismissed.

The inquiry for determining the admissibility of expert opinion evidence is divided into two steps. At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four factors set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 (relevance, necessity, absence of an exclusionary rule and a properly qualified expert). Evidence that does not meet these threshold requirements should be excluded. At the second discretionary gatekeeping step, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence.

Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her. These concepts, of course, must be applied to the realities of adversary litigation.

Concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework. A proposed expert witness who is unable or unwilling to fulfill his or her duty to the court is not properly qualified to perform the role of an expert. If the expert witness does not meet this threshold admissibility requirement, his or her evidence should not be admitted. Once this threshold is met, however, remaining concerns about an expert witness's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. Absent challenge, the

Arrêt : Le pourvoi est rejeté.

La démarche qui permet de déterminer l'admissibilité du témoignage d'opinion de l'expert est scindée en deux. Dans un premier temps, celui qui veut présenter le témoignage doit démontrer qu'il satisfait aux critères d'admissibilité, soit les quatre critères énoncés dans l'arrêt *R. c. Mohan*, [1994] 2 R.C.S. 9, à savoir la pertinence, la nécessité, l'absence de toute règle d'exclusion et la qualification suffisante de l'expert. Tout témoignage qui ne satisfait pas à ces critères devrait être exclu. Dans un deuxième temps, le juge-gardien exerce son pouvoir discrétionnaire en déterminant si le témoignage d'expert qui satisfait aux conditions préalables à l'admissibilité est assez avantageux pour le procès pour justifier son admission malgré le préjudice potentiel, pour le procès, qui peut découler de son admission.

L'expert a l'obligation envers le tribunal de donner un témoignage d'opinion qui soit juste, objectif et impartial. Il doit être conscient de cette obligation et pouvoir et vouloir s'en acquitter. L'opinion de l'expert doit être impartiale, en ce sens qu'elle découle d'un examen objectif des questions à trancher. Elle doit être indépendante, c'est-à-dire qu'elle doit être le fruit du jugement indépendant de l'expert, non influencée par la partie pour qui il témoigne ou l'issue du litige. Elle doit être exempte de parti pris, en ce sens qu'elle ne doit pas favoriser injustement la position d'une partie au détriment de celle de l'autre. Le critère décisif est que l'opinion de l'expert ne changerait pas, peu importe la partie qui aurait retenu ses services. Ces concepts, il va sans dire, doivent être appliqués aux réalités du débat contradictoire.

C'est sous le volet « qualification suffisante de l'expert » du cadre établi par l'arrêt *Mohan* qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter. Le témoin expert proposé qui ne peut ou ne veut s'acquitter de son obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. S'il ne satisfait pas à ce critère d'admissibilité, son témoignage ne devrait pas être admis. Or, dès lors qu'il y est satisfait, toute réserve qui demeure quant à savoir si l'expert s'est conformé à son obligation devrait être examinée dans le cadre de l'analyse coût-bénéfices qu'effectue le juge dans l'exercice de son rôle de gardien.

L'idée, en imposant ce critère supplémentaire, n'est pas de prolonger ni de complexifier les procès et il ne devrait pas en résulter un tel effet. Le juge de première instance doit déterminer, compte tenu tant de la situation particulière de l'expert que de la teneur du témoignage proposé, si l'expert peut ou veut s'acquitter de sa principale obligation envers le tribunal. En l'absence d'une

expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met. However, if a party opposing admissibility shows that there is a realistic concern that the expert is unable and/or unwilling to comply with his or her duty, the proponent of the evidence has the burden of establishing its admissibility. Exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

In this case, there was no basis disclosed in the record to find that M's evidence should be excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. The majority of the Court of Appeal was correct in concluding that the motions judge committed a palpable and overriding error in determining that M was in a conflict of interest that prevented her from giving impartial and objective evidence.

Cases Cited

Applied: *R. v. Mohan*, [1994] 2 S.C.R. 9; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; **adopted:** *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, leave to appeal refused, [2010] 2 S.C.R. v; **referred to:** *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *Graat v. The Queen*, [1982] 2 S.C.R. 819; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th)

contestation, il est généralement satisfait au critère dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte. Toutefois, si la partie qui s'oppose à l'admission démontre un motif réaliste de croire que l'expert ne peut ou ne veut s'acquitter de son obligation, il revient à la partie qui produit la preuve d'en établir l'admissibilité. La décision d'exclure le témoignage à la première étape de l'analyse pour non-conformité aux critères d'admissibilité ne devrait être prise que dans les cas manifestes où l'expert proposé ne peut ou ne veut fournir une preuve juste, objective et impartiale. Dans les autres cas, le témoignage ne devrait pas être exclu d'office, et son admissibilité sera déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission.

La notion d'apparence de parti pris n'est pas pertinente lorsqu'il s'agit de déterminer si le témoin expert pourra ou voudra s'acquitter de sa principale obligation envers le tribunal. Lorsque l'on se penche sur l'intérêt d'un expert ou sur ses rapports avec une partie, il ne s'agit pas de se demander si un observateur raisonnable penserait que l'expert est indépendant ou non; il s'agit plutôt de déterminer si la relation de l'expert avec une partie ou son intérêt fait en sorte qu'il ne peut ou ne veut s'acquitter de sa principale obligation envers le tribunal, en l'occurrence apporter au tribunal une aide juste, objective et impartiale.

En l'espèce, le dossier ne révèle aucun élément qui permette de conclure que le témoignage de M devrait être exclu parce que celle-ci ne pouvait ou ne voulait rendre devant le tribunal un témoignage juste, objectif et impartial. La majorité de la Cour d'appel a eu raison de conclure que le juge des requêtes avait commis une erreur manifeste et dominante en estimant que M était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial.

Jurisprudence

Arrêts appliqués : *R. c. Mohan*, [1994] 2 R.C.S. 9; *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3; **arrêt adopté :** *R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, autorisation d'appel refusée, [2010] 2 R.C.S. v; **arrêts mentionnés :** *Lord Abinger c. Ashton* (1873), L.R. 17 Eq. 358; *R. c. D.D.*, 2000 CSC 43, [2000] 2 R.C.S. 275; *Graat c. La Reine*, [1982] 2 R.C.S. 819; *R. c. Abbey*, [1982] 2 R.C.S. 24; *R. c. J.-L.J.*, 2000 CSC 51, [2000] 2 R.C.S. 600; *R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272; *Masterpiece Inc. c. Alavida Lifestyles Inc.*, 2011 CSC 27, [2011] 2 R.C.S. 387; *R. c. Trochym*, 2007 CSC 6, [2007] 1 R.C.S. 239; *R. c. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290; *R. c.*

396; *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68, rev'd [1995] 1 Lloyd's Rep. 455; *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456; *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187; *R. v. Docherty*, 2010 ONSC 3628; *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394; *Handley v. Punnett*, 2003 BCSC 294; *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (QL); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240; *Hutchingame v. Johnstone*, 2006 BCSC 271; *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19; *United City Properties Ltd. v. Tong*, 2010 BCSC 111; *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594; *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115; *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77; *R. v. Violette*, 2008 BCSC 920; *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367; *R. (Factortame Ltd.) v. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381; *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464; *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474; *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067; *FGT Custodians Pty. Ltd. v. Fagenblat*, [2003] VSCA 33; *Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500; *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (1993); *Tagatz v. Marquette University*, 861 F.2d 1040 (1988); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (2014); *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166; *R. v. Demetrius*, 2009 CanLII 22797; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44; *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284; *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97; *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385.

Statutes and Regulations Cited

Act to establish the new Code of Civil Procedure, S.Q. 2014, c. 1, arts. 22, 235 [not yet in force].

Civil Procedure Rules (Nova Scotia), rr. 55.01(2), 55.04 (1)(a), (b), (c).

C. (M.), 2014 ONCA 611, 13 C.R. (7th) 396; *National Justice Compania Naviera S.A. c. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68, inf. par [1995] 1 Lloyd's Rep. 455; *Fellowes, McNeil c. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456; *Royal Trust Corp. of Canada c. Fisherman* (2000), 49 O.R. (3d) 187; *R. c. Docherty*, 2010 ONSC 3628; *Ocean c. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394; *Handley c. Punnett*, 2003 BCSC 294; *Bank of Montreal c. Citak*, [2001] O.J. No. 1096 (QL); *Dean Construction Co. c. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240; *Hutchingame c. Johnstone*, 2006 BCSC 271; *Alfano c. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. c. Bank of Nova Scotia*, 2003 BCSC 617; *Gould c. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19; *United City Properties Ltd. c. Tong*, 2010 BCSC 111; *R. c. INCO Ltd.* (2006), 80 O.R. (3d) 594; *R. c. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115; *Gallant c. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77; *R. c. Violette*, 2008 BCSC 920; *Armchair Passenger Transport Ltd. c. Helical Bar Plc*, [2003] EWHC 367; *R. (Factortame Ltd.) c. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381; *Gallaher International Ltd. c. Tlais Enterprises Ltd.*, [2007] EWHC 464; *Meat Corp. of Namibia Ltd. c. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474; *Matchbet Ltd. c. Openbet Retail Ltd.*, [2013] EWHC 3067; *FGT Custodians Pty. Ltd. c. Fagenblat*, [2003] VSCA 33; *Collins Thomson c. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. c. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. c. Chipman*, [2003] FCA 796, 131 F.C.R. 500; *Rodriguez c. Pacificare of Texas, Inc.*, 980 F.2d 1014 (1993); *Tagatz c. Marquette University*, 861 F.2d 1040 (1988); *Apple Inc. c. Motorola, Inc.*, 757 F.3d 1286 (2014); *Agribrands Purina Canada Inc. c. Kasamekas*, 2010 ONSC 166; *R. c. Demetrius*, 2009 CanLII 22797; *International Hi-Tech Industries Inc. c. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership c. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44; *Prairie Well Servicing Ltd. c. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284; *Deemar c. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97; *Coady c. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348; *Fougere c. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385.

Lois et règlements cités

Loi instituant le nouveau Code de procédure civile, L.Q. 2014, c. 1, art. 22, 235 [non en vigueur].

Règles de la Cour du Banc de la Reine (Saskatchewan), règle 5-37.

Federal Courts Rules, SOR/98-106, r. 52.2(1)(*c*).
Queen's Bench Rules (Saskatchewan), r. 5-37.
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 4.1.01(1), (2), 53.03(2.1).
Rules of Civil Procedure (Prince Edward Island), r. 53.03 (3)(g).
Rules of Court, Y.O.I.C. 2009/65, r. 34(23).
Supreme Court Civil Rules, B.C. Reg. 168/2009, rr. 11-2(1), (2).

Authors Cited

Anderson, Glenn R. *Expert Evidence*, 3rd ed. Markham, Ont.: LexisNexis, 2014.
Béchard, Donald, avec la collaboration de Jessica Béchard. *L'expert*. Cowansville, Qué.: Yvon Blais, 2011.
Canadian Encyclopedic Digest, Ontario 4th ed., vol. 24. Toronto: Carswell, 2014 (loose-leaf updated 2014, release 6).
Chamberland, Luc. *Le nouveau Code de procédure civile commenté*. Cowansville, Qué.: Yvon Blais, 2014.
Corpus Juris Secundum, vol. 32. Eagan, Minn.: Thomson West, 2008.
Cross and Tapper on Evidence, 12th ed. by Colin Tapper. Oxford: Oxford University Press, 2010.
Freckelton, Ian, and Hugh Selby. *Expert Evidence: Law, Practice, Procedure and Advocacy*, 5th ed. Pyrmont, N.S.W.: Lawbook Co., 2013.
Halsbury's Laws of Canada: Evidence, 2014 Reissue, contributed by Hamish C. Stewart. Markham, Ont.: LexisNexis, 2014.
Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 4th ed. Markham, Ont.: LexisNexis, 2014.
McWilliams' Canadian Criminal Evidence, 5th ed. by S. Casey Hill, David M. Tanovich and Louis P. Strezos, eds. Toronto: Canada Law Book, 2013 (loose-leaf updated 2014, release 5).
Michell, Paul, and Renu Mandhane. "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635.
Ontario. *Civil Justice Reform Project: Summary of Findings & Recommendations* (Osborne Report). Toronto: Ministry of Attorney General, 2007.
Ontario. *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Goudge Report). Toronto: Ministry of the Attorney General, 2008.
Ontario. *The Commission on Proceedings Involving Guy Paul Morin: Report* (Kaufman Report). Toronto: Ministry of the Attorney General, 1998.

Règles de procédure, Y.D. 2009/65, règle 34(23).
Règles de procédure civile, R.R.O. 1990, Règl. 194, règles 4.1.01(1), (2), 53.03(2.1).
Règles de procédure civile (Nouvelle-Écosse), règles 55.01(2), 55.04(1)a), b), c).
Règles des Cours fédérales, DORS/98-106, règle 52.2 (1)*c*).
Rules of Civil Procedure (Île-du-Prince-Édouard), règle 53.03(3)(g).
Supreme Court Civil Rules, B.C. Reg. 168/2009, règles 11-2(1), (2).

Doctrine et autres documents cités

Anderson, Glenn R. *Expert Evidence*, 3rd ed., Markham (Ont.), LexisNexis, 2014.
Béchard, Donald, avec la collaboration de Jessica Béchard. *L'expert*, Cowansville (Qc), Yvon Blais, 2011.
Canadian Encyclopedic Digest, Ontario 4th ed., vol. 24, Toronto, Carswell, 2014 (loose-leaf updated 2014, release 6).
Chamberland, Luc. *Le nouveau Code de procédure civile commenté*, Cowansville (Qc), Yvon Blais, 2014.
Corpus Juris Secundum, vol. 32, Eagan (Minn.), Thomson West, 2008.
Cross and Tapper on Evidence, 12th ed. by Colin Tapper, Oxford, Oxford University Press, 2010.
Freckelton, Ian, and Hugh Selby. *Expert Evidence : Law, Practice, Procedure and Advocacy*, 5th ed., Pyrmont (N.S.W.), Lawbook Co., 2013.
Halsbury's Laws of Canada : Evidence, 2014 Reissue, contributed by Hamish C. Stewart, Markham (Ont.), LexisNexis, 2014.
Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 4th ed., Markham (Ont.), LexisNexis, 2014.
McWilliams' Canadian Criminal Evidence, 5th ed. by S. Casey Hill, David M. Tanovich and Louis P. Strezos, eds., Toronto, Canada Law Book, 2013 (loose-leaf updated 2014, release 5).
Michell, Paul, and Renu Mandhane. « The Uncertain Duty of the Expert Witness » (2005), 42 *Alta. L. Rev.* 635.
Ontario. *Commission sur les poursuites contre Guy Paul Morin : Rapport* (Rapport Kaufman), Toronto, Ministère du Procureur général, 1998.
Ontario. *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations* (Rapport Osborne), Toronto, Ministère du Procureur général, 2007.

Paciocco, David. "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 *Can. Crim. L.R.* 135.

Paciocco, David M. "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 7th ed. Toronto: Irwin Law, 2015.

Phipson on Evidence, 18th ed. by Hodge M. Malek et al., eds. London: Sweet & Maxwell, 2013.

Royer, Jean-Claude, et Sophie Lavallée. *La preuve civile*, 4e éd. Cowansville, Qué.: Yvon Blais, 2008.

Thayer, James Bradley. *A Preliminary Treatise on Evidence at the Common Law*. Boston: Little, Brown and Co., 1898 (reprinted South Hackensack, N.J.: Rothman Reprints, Inc., 1969).

United Kingdom. *Access to Justice: Final Report* (Woolf Report). London: HMSO, 1996.

APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J. and Oland and Beveridge JJ.A.), 2013 NSCA 66, 330 N.S.R. (2d) 301, 361 D.L.R. (4th) 659, 36 C.P.C. (7th) 22, [2013] N.S.J. No. 259 (QL), 2013 CarswellNS 360 (WL Can.), setting aside in part a decision of Pickup J., 2012 NSSC 210, 317 N.S.R. (2d) 283, 26 C.P.C. (7th) 280, [2012] N.S.J. No. 289 (QL), 2012 CarswellNS 376 (WL Can.). Appeal dismissed.

Alan D'Silva, *James Wilson* and *Aaron Kreaden*, for the appellants.

Jon Laxer and *Brian F. P. Murphy*, for the respondents.

Michael H. Morris, for the intervener the Attorney General of Canada.

Matthew Gourlay, for the intervener the Criminal Lawyers' Association (Ontario).

Ontario. *Rapport de la Commission d'enquête sur la médecine légale pédiatrique en Ontario* (Rapport Goudge), Toronto, Ministère du Procureur général, 2008.

Paciocco, David. « Taking a "Goudge" out of Bluster and Blarney : an "Evidence-Based Approach" to Expert Testimony » (2009), 13 *Rev. can. D.P.* 135.

Paciocco, David M. « Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen's L.J.* 565.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 7th ed., Toronto, Irwin Law, 2015.

Phipson on Evidence, 18th ed. by Hodge M. Malek et al., eds., London, Sweet & Maxwell, 2013.

Royaume-Uni. *Access to Justice : Final Report* (Woolf Report), London, HMSO, 1996.

Royer, Jean-Claude, et Sophie Lavallée. *La preuve civile*, 4e éd., Cowansville (Qc), Yvon Blais, 2008.

Thayer, James Bradley. *A Preliminary Treatise on Evidence at the Common Law*, Boston, Little, Brown and Co., 1898 (reprinted South Hackensack (N.J.), Rothman Reprints, Inc., 1969).

POURVOI contre un arrêt de la Cour d'appel de la Nouvelle-Écosse (le juge en chef MacDonald et les juges Oland et Beveridge), 2013 NSCA 66, 330 N.S.R. (2d) 301, 361 D.L.R. (4th) 659, 36 C.P.C. (7th) 22, [2013] N.S.J. No. 259 (QL), 2013 CarswellNS 360 (WL Can.), qui a infirmé en partie une décision du juge Pickup, 2012 NSSC 210, 317 N.S.R. (2d) 283, 26 C.P.C. (7th) 280, [2012] N.S.J. No. 289 (QL), 2012 CarswellNS 376 (WL Can.). Pourvoi rejeté.

Alan D'Silva, *James Wilson* et *Aaron Kreaden*, pour les appelants.

Jon Laxer et *Brian F. P. Murphy*, pour les intimées.

Michael H. Morris, pour l'intervenant le procureur général du Canada.

Matthew Gourlay, pour l'intervenante Criminal Lawyers' Association (Ontario).

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction and Issues

[1] Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. The question on this appeal is whether one of these basic standards for admissibility should relate to the proposed expert's independence and impartiality. In my view, it should.

[2] Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

[3] Applying these principles, I agree with the conclusion reached by the majority of the Nova Scotia Court of Appeal and would therefore dismiss this appeal with costs.

II. Overview of the Facts and Judicial History

A. *Facts and Proceedings*

[4] The appeal arises out of a professional negligence action by the respondents (who I will call the shareholders) against the appellants, the former auditors of their company (I will refer to them as the auditors). The shareholders started the action after they had retained a different accounting firm, the

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction et questions en litige

[1] Le témoignage d'expert peut constituer la pièce maîtresse dans la recherche de la vérité tout comme il peut présenter des dangers particuliers. Pour se prémunir contre ces dangers, la Cour depuis une vingtaine d'années resserre graduellement les règles d'admissibilité et renforce le rôle de gardien du juge de première instance. Ainsi, l'admission du témoignage d'expert est subordonnée au respect de certaines normes fondamentales. La question à trancher dans le cadre du présent pourvoi est de savoir si l'indépendance et l'impartialité de l'expert que l'on se propose de citer comme témoin devraient compter au nombre de ces normes fondamentales d'admissibilité. À mon avis elles devraient l'être.

[2] Le témoin expert a l'obligation particulière d'apporter au tribunal une aide juste, objective et impartiale. La personne que l'on se propose de citer à ce titre, mais qui ne peut ou ne veut se conformer à cette obligation, n'a pas la qualification pour témoigner à titre d'expert et ne devrait pas y être autorisée. Des réserves moins fondamentales quant à l'indépendance et à l'impartialité de l'expert devraient jouer dans l'analyse globale des coûts et des bénéfices de l'admission du témoignage.

[3] Appliquant ces principes, je partage la conclusion à laquelle sont parvenus les juges majoritaires de la Cour d'appel de la Nouvelle-Écosse et suis d'avis de rejeter le présent pourvoi avec dépens.

II. Rappel des faits et historique judiciaire

A. *Les faits et la procédure*

[4] Le présent pourvoi découle d'une action pour négligence professionnelle intentée par les intimées (ci-après « les actionnaires ») contre les appelants, les anciens vérificateurs de leur compagnie (ci-après « les vérificateurs »). Les actionnaires ont intenté cette poursuite après avoir engagé un autre cabinet

Kentville office of Grant Thornton LLP, to perform various accounting tasks and which in their view revealed problems with the auditors' previous work. The central allegation in the action is that the auditors' failure to apply generally accepted auditing and accounting standards while carrying out their functions caused financial loss to the shareholders. The main question in the action boils down to whether the auditors were negligent in the performance of their professional duties.

[5] The auditors brought a motion for summary judgment in August of 2010, seeking to have the shareholders' action dismissed. In response, the shareholders retained Susan MacMillan, a forensic accounting partner at the Halifax office of Grant Thornton, to review all the relevant materials, including the documents filed in the action, and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out Ms. MacMillan's affidavit on the grounds that she was not an impartial expert witness. They argued that the action comes down to a battle of opinion between two accounting firms — the auditors' and the expert witness's. Ms. MacMillan's firm could be exposed to liability if its approach was not accepted by the court and, as a partner, Ms. MacMillan could be personally liable. Her potential liability if her opinion were not accepted gives her a personal financial interest in the outcome of the litigations and this, in the auditors' submission, ought to disqualify her from testifying.

[6] The proceedings since have been neither summary nor resulted in a judgment. Instead, the litigation has been focused on the expert evidence issue; the summary judgment application has not yet been heard on its merits.

comptable, Grant Thornton srl, de Kentville, pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les actionnaires reprochent essentiellement aux vérificateurs de ne pas avoir appliqué les normes de vérification et comptables généralement reconnues et de leur avoir ainsi causé une perte. La principale question dans le cadre de l'action est de savoir si les vérificateurs ont fait preuve de négligence dans l'exercice de leurs fonctions.

[5] En août 2010, les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. En réponse, les actionnaires ont fait appel à M^me^ Susan MacMillan, une associée en juricomptabilité du cabinet Grant Thornton de Halifax, pour qu'elle examine tous les documents pertinents, notamment ceux déposés dans le cadre de l'action, et rédige un rapport de ses constatations. Son affidavit expose ces dernières, notamment que les vérificateurs, selon elle, ne se sont pas acquittés de leurs obligations professionnelles envers les actionnaires. Les vérificateurs ont présenté une requête en radiation de l'affidavit de M^me^ MacMillan au motif qu'elle n'était pas un témoin expert impartial. Ils ont fait valoir que l'action se résumait à une bataille d'opinions entre deux cabinets comptables, en l'occurrence celui des vérificateurs et celui du témoin expert. Le cabinet de M^me^ MacMillan pourrait être tenu responsable si sa démarche n'était pas acceptée par le tribunal et, en tant qu'associée, M^me^ MacMillan pourrait être tenue personnellement responsable. Sa responsabilité potentielle — si son opinion n'était pas acceptée — se traduit par un intérêt financier personnel dans le règlement du litige; or, de l'avis des vérificateurs, cela devrait suffire à la rendre inhabile à témoigner.

[6] Depuis, l'instance a été tout sauf sommaire et ne s'est toujours pas soldée par un jugement. Le litige a plutôt porté sur la question du témoignage de l'expert; la requête en jugement sommaire n'a pas encore été entendue sur le fond.

B. *Judgments Below*

(1) Nova Scotia Supreme Court: 2012 NSSC 210, 317 N.S.R. (2d) 283 (Pickup J.)

[7] Pickup J. essentially agreed with the auditors and struck out the MacMillan affidavit in its entirety: para. 106. He found that, in order to be admissible, an expert's evidence "must be, and be seen to be, independent and impartial": para. 99. Applying that test, he concluded that this was one of those "clearest of cases where the reliability of the expert . . . does not meet the threshold requirements for admissibility": para. 101.

(2) Nova Scotia Court of Appeal: 2013 NSCA 66, 330 N.S.R. (2d) 301 (Beveridge J.A., Oland J.A. Concurring; MacDonald C.J.N.S. Dissenting)

[8] The majority of the Court of Appeal concluded that the motions judge erred in excluding Ms. MacMillan's affidavit. Beveridge J.A. wrote that while the court has discretion to exclude expert evidence due to actual bias or partiality, the test adopted by the motions judge — that an expert "must be, and be seen to be, independent and impartial" — was wrong in law. He ought not to have ruled her evidence inadmissible and struck out her affidavit.

[9] MacDonald C.J.N.S., dissenting, would have upheld the motions judge's decision because he had properly articulated and applied the relevant legal principles.

III. Analysis

A. *Overview*

[10] In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met,

B. *Les juridictions inférieures*

(1) Cour suprême de la Nouvelle-Écosse : 2012 NSSC 210, 317 N.S.R. (2d) 283 (le juge Pickup)

[7] Le juge Pickup s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié intégralement l'affidavit de M^me^ MacMillan (par. 106). Il était d'avis que, pour être admissible, le témoignage de l'expert [TRADUCTION] « doit être indépendant et impartial et être perçu comme tel » (par. 99) et, partant, a conclu qu'il s'agissait de l'un des « cas les plus évidents où la fiabilité de l'expert [. . .] ne satisfait pas aux critères d'admissibilité » (par. 101).

(2) Cour d'appel de la Nouvelle-Écosse : 2013 NSCA 66, 330 N.S.R. (2d) 301 (le juge Beveridge, avec l'appui de la juge Oland; le juge en chef MacDonald est dissident)

[8] Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit de M^me^ MacMillan. Le juge Beveridge a écrit que, si le tribunal peut, en vertu de son pouvoir discrétionnaire, écarter le témoignage de l'expert pour cause de partialité réelle, le critère retenu par le juge des requêtes, en l'occurrence que l'expert « doit être indépendant et impartial et être perçu comme tel », était mal fondé en droit. Il n'aurait pas dû déclarer inadmissible le témoignage de M^me^ MacMillan ni radier son affidavit.

[9] Le juge en chef MacDonald, dissident, était d'avis de confirmer la décision du juge des requêtes, parce que ce dernier avait selon lui exposé et appliqué correctement les principes juridiques pertinents.

III. Analyse

A. *Aperçu*

[10] Selon moi, l'expert a l'obligation envers le tribunal de donner un témoignage d'opinion qui soit juste, objectif et impartial. Il doit être conscient de cette obligation et pouvoir et vouloir s'en acquitter. S'il ne satisfait pas à ce critère, son témoignage ne devrait pas être admis. Or, dès lors qu'il y est satisfait,

however, concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence. This common law approach is, of course, subject to statutory and related provisions which may establish different rules of admissibility.

B. *Expert Witness Independence and Impartiality*

[11] There have been long-standing concerns about whether expert witnesses hired by the parties are impartial in the sense that they are expressing their own unbiased professional opinion and whether they are independent in the sense that their opinion is the product of their own, independent conclusions based on their own knowledge and judgment: see, e.g., G. R. Anderson, *Expert Evidence* (3rd ed. 2014), at p. 509; S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 783. As Sir George Jessel, M.R., put it in the 1870s, "[u]ndoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them": *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358, at p. 374.

[12] Recent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice": para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid.*, at para. 106; see the Right

les réserves quant à l'indépendance ou à l'impartialité du témoin expert devraient être examinées dans l'évaluation globale des coûts et des bénéfices de l'admission du témoignage. Cette démarche issue de la common law cède le pas bien sûr aux dispositions législatives et connexes établissant dans certains cas des règles d'admissibilité différentes.

B. *Impartialité et indépendance du témoin expert*

[11] Les préoccupations quant à savoir si les témoins experts retenus par les parties sont impartiaux — c'est-à-dire s'ils expriment leur opinion professionnelle sans parti pris — et indépendants — c'est-à-dire si leur opinion est le fruit des conclusions auxquelles ils sont parvenus de façon indépendante en se fondant sur leurs propres connaissances et jugement — ne datent pas d'hier (voir, p. ex., G. R. Anderson, *Expert Evidence* (3e éd. 2014), p. 509; S. N. Lederman, A. W. Bryant et M. K. Fuerst, *The Law of Evidence in Canada* (4e éd. 2014), p. 783). Comme le soulignait Sir George Jessel, maître des rôles, dans les années 1870, [TRADUCTION] « [i]l existe indubitablement une tendance naturelle à faire quelque chose d'utile pour celui qui nous emploie et nous rémunère bien. C'est tout à fait naturel et si infaillible que nous voyons constamment des personnes qui se considèrent, non pas comme des témoins, mais comme les mandataires rémunérés de la personne qui les emploie » (*Lord Abinger c. Ashton* (1873), L.R. 17 Eq. 358, p. 374).

[12] L'expérience récente n'a fait qu'aviver ces préoccupations; nous savons que trop bien que le manque d'indépendance et d'impartialité d'un expert peut donner lieu à de très graves erreurs judiciaires (*R. c. D.D.*, 2000 CSC 43, [2000] 2 R.C.S. 275, par. 52). Comme l'a souligné le juge Beveridge dans la présente affaire, la *Commission sur les poursuites contre Guy Paul Morin : Rapport* (1998), rédigé par l'honorable Fred Kaufman, et le *Rapport de la Commission d'enquête sur la médecine légale pédiatrique en Ontario* (2008), de l'honorable Stephen T. Goudge, donnent deux exemples concrets de cas où [TRADUCTION] « [l]'opinion apparemment solide et impartiale, mais erronée, d'un scientifique expert a joué un rôle de premier plan dans des erreurs judiciaires » (par. 105). D'autres rapports mettent en évidence la nécessité cruciale que l'expert

Honourable Lord Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).

[13] To decide how our law of evidence should best respond to these concerns, we must confront several questions: Should concerns about potentially biased expert opinion go to admissibility or only to weight?; If to admissibility, should these concerns be addressed by a threshold requirement for admissibility, by a judicial discretion to exclude, or both?; At what point do these concerns justify exclusion of the evidence?; And finally, how is our response to these concerns integrated into the existing legal framework governing the admissibility of expert opinion evidence? To answer these questions, we must first consider the existing legal framework governing admissibility, identify the duties that an expert witness has to the court and then turn to how those duties are best reflected in that legal framework.

C. *The Legal Framework*

(1) The Exclusionary Rule for Opinion Evidence

[14] To the modern general rule that all relevant evidence is admissible there are many qualifications. One of them relates to opinion evidence, which is the subject of a complicated exclusionary rule. Witnesses are to testify as to the facts which they perceived, not as to the inferences — that is, the opinions — that they drew from them. As one great evidence scholar put it long ago, it is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness": J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprinted 1969), at p. 524; see also C. Tapper, *Cross and Tapper on Evidence* (12th ed. 2010), at p. 530. While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are not helpful to the trier of fact and might even be misleading: see, e.g., *Graat v. The Queen*, [1982] 2

soit impartial et indépendant dans les procès civils (*ibid.*, par. 106; voir le très honorable lord Woolf, *Access to Justice : Final Report* (1996); l'honorable Coulter A. Osborne, *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations* (2007)).

[13] Pour déterminer la meilleure solution en droit de la preuve à ces préoccupations, il nous faut nous poser plusieurs questions. Est-ce que les réserves au sujet du parti pris possible d'un expert jouent au regard de l'admissibilité de son témoignage ou seulement de la valeur probante de ce dernier? Dans le premier cas, devrait-on y répondre par un critère d'admissibilité, par un pouvoir discrétionnaire permettant d'écarter la preuve ou les deux? Quand justifient-elles que soit exclu un témoignage? Enfin, comment la solution s'inscrit-elle dans le cadre juridique actuel régissant l'admissibilité des témoignages d'experts? Pour répondre à ces questions, nous devons d'abord nous pencher sur ce cadre juridique, circonscrire les obligations du témoin envers le tribunal, puis voir comment ces dernières s'intègrent le mieux dans le cadre juridique.

C. *Le cadre juridique*

(1) La règle d'exclusion des témoignages d'opinion

[14] La règle générale moderne selon laquelle toute preuve pertinente est admissible est assortie de nombreuses exceptions. L'une d'elles a trait au témoignage d'opinion, lequel fait l'objet d'une règle d'exclusion complexe. La déposition des témoins doit relater les faits qu'ils ont perçus, et non présenter les inférences, ou opinions, qu'ils en tirent. Comme l'a dit il y a longtemps un éminent spécialiste de la preuve, [TRADUCTION] « c'est au jury de se faire une opinion et de tirer des inférences et des conclusions, pas au témoin » (J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; réimprimé 1969), p. 524; voir également C. Tapper, *Cross and Tapper on Evidence* (12e éd. 2010), p. 530). Même si plusieurs raisons ont été avancées pour expliquer cette règle d'exclusion, la plus convaincante est probablement celle selon laquelle ces inférences toutes faites ne sont

S.C.R. 819, at p. 836; *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-137 "General rule against opinion evidence".

[15] Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. As Prof. Tapper put it, "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them": p. 530; see also *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 42.

(2) The Current Legal Framework for Expert Opinion Evidence

[16] Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

[17] We can take as the starting point for these developments the Court's decision in *R. v. Mohan*, [1994] 2 S.C.R. 9. That case described the potential dangers of expert evidence and established a four-part threshold test for admissibility. The dangers are well known. One is that the trier of fact will inappropriately defer to the expert's opinion rather

pas utiles au juge des faits et peuvent même l'induire en erreur (voir, p. ex., *Graat c. La Reine*, [1982] 2 R.C.S. 819, p. 836; *Halsbury's Laws of Canada : Evidence* (2014 réédition), par. HEV-137 « General rule against opinion evidence »).

[15] Cependant, ce ne sont pas tous les témoignages d'opinion qui sont exclus. L'exception qui nous intéresse plus particulièrement dans le présent pourvoi est celle qui s'applique au témoignage d'opinion d'un expert sur des questions qui exigent des connaissances spécialisées. Pour reprendre les propos du professeur Tapper, [TRADUCTION] « le droit reconnaît que, dans la mesure où les questions exigent des connaissances ou des compétences particulières, les juges et les jurés ne sont pas forcément en mesure de tirer une véritable conclusion d'après les faits relatés par les témoins. Le témoin est par conséquent admis à faire part de son opinion sur ces questions, pourvu qu'il soit un expert en la matière » (p. 530; voir également *R. c. Abbey*, [1982] 2 R.C.S. 24, p. 42).

(2) Le cadre juridique actuel régissant le témoignage d'opinion d'un expert

[16] Depuis au moins le milieu des années 1990, la Cour a répondu à nombre de préoccupations concernant l'incidence d'une preuve d'expert d'une valeur douteuse sur le déroulement de l'instance. La jurisprudence a clarifié et resserré les critères d'admissibilité, établi de nouvelles exigences de fiabilité, notamment en ce qui concerne la preuve issue de sciences nouvelles, et renforcé l'important rôle de « gardien » du juge qui consiste à écarter d'emblée les témoignages dont la valeur ne justifie pas la confusion, la lenteur et les frais que leur admission risque de causer.

[17] Nous pouvons prendre comme point de départ de cette nouvelle tendance la décision de la Cour dans l'affaire *R. c. Mohan*, [1994] 2 R.C.S. 9. Cet arrêt a mis en lumière les dangers du témoignage d'expert et établi un critère à quatre volets pour en évaluer l'admissibilité. Ces dangers sont bien connus. Il y a notamment le risque que le juge des faits

than carefully evaluate it. As Sopinka J. observed in *Mohan*:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. [p. 21]

(See also *D.D.*, at para. 53; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at paras. 25-26; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 46.)

[18] The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 90, leave to appeal refused, [2010] 2 S.C.R. v. The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J.-L.J.*, at para. 56. The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D.D.*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (*D.D.*, at para. 55); the risk of admitting "junk science" (*J.-L.J.*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 76.

[19] To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility

s'en remette inconsidérément à l'opinion de l'expert au lieu de l'évaluer avec circonspection. Comme le souligne le juge Sopinka dans l'arrêt *Mohan* :

> La preuve d'expert risque d'être utilisée à mauvais escient et de fausser le processus de recherche des faits. Exprimée en des termes scientifiques que le jury ne comprend pas bien et présentée par un témoin aux qualifications impressionnantes, cette preuve est susceptible d'être considérée par le jury comme étant pratiquement infaillible et comme ayant plus de poids qu'elle ne le mérite. [p. 21]

(Voir également *D.D.*, par. 53; *R. c. J.-L.J.*, 2000 CSC 51, [2000] 2 R.C.S. 600, par. 25-26; *R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272, par. 46.)

[18] Il s'agit de préserver le procès devant juge et jury, et non pas d'y substituer le procès instruit par des experts. Il y a un risque que le jury [TRADUCTION] « soit incapable de faire un examen critique et efficace de la preuve » (*R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, par. 90, autorisation d'appel refusée, [2010] 2 R.C.S. v). Le juge des faits doit faire appel à son « jugement éclairé » plutôt que simplement trancher la question sur le fondement d'un « acte de confiance » à l'égard de l'opinion de l'expert (*J.-L.J.*, par. 56). Le danger de « s'en remettre à l'opinion de l'expert » est également exacerbé par le fait que la preuve d'expert est imperméable au contre-interrogatoire efficace par des avocats qui ne sont pas des experts dans ce domaine (*D.D.*, par. 54). La jurisprudence aborde un certain nombre d'autres problèmes connexes : le préjudice qui pourrait éventuellement découler d'une opinion d'expert fondée sur des informations qui ne sont pas attestées sous serment et qui ne peuvent pas faire l'objet d'un contre-interrogatoire (*D.D.*, par. 55); le danger d'admettre en preuve de la « science de pacotille » (*J.-L.J.*, par. 25); le risque qu'un « concours d'experts » ne distraie le juge des faits au lieu de l'aider (*Mohan*, p. 24). Un autre danger bien connu associé à l'admission de la preuve d'expert est le fait qu'elle peut exiger un délai et des frais démesurés (*Mohan*, p. 21; *D.D.*, par. 56; *Masterpiece Inc. c. Alavida Lifestyles Inc.*, 2011 CSC 27, [2011] 2 R.C.S. 387, par. 76).

[19] Pour parer à ces dangers, la Cour dans l'arrêt *Mohan* a établi une structure de base à deux volets

of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect — a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J.-L.J.*, at para. 28.

[20] *Mohan* and the jurisprudence since, however, have not explicitly addressed how this "cost-benefit" component fits into the overall analysis. The reasons in *Mohan* engaged in a cost-benefit analysis with respect to particular elements of the four threshold requirements, but they also noted that the cost-benefit analysis could be an aspect of exercising the overall discretion to exclude evidence whose probative value does not justify its admission in light of its potentially prejudicial effects: p. 21. The jurisprudence since *Mohan* has also focused on particular aspects of expert opinion evidence, but again without always being explicit about where additional concerns fit into the analysis. The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role.

[21] So, for example, the necessity threshold criterion was emphasized in cases such as *D.D.* The majority underlined that the necessity requirement exists "to ensure that the dangers associated with expert evidence are not lightly tolerated" and that "[m]ere relevance or 'helpfulness' is not enough": para. 46. Other cases have addressed the reliability of the science underlying an opinion and indeed technical evidence in general: *J.-L.J.*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239. The question remains, however, as to where the cost-benefit analysis

définissant les règles d'admissibilité du témoignage d'opinion d'un expert. En premier lieu, celui qui cherche à faire admettre une preuve d'opinion émanant d'un expert doit démontrer qu'elle satisfait à quatre critères : (1) la pertinence; (2) la nécessité d'aider le juge des faits; (3) l'absence de toute règle d'exclusion; (4) la qualification suffisante de l'expert (*Mohan*, p. 20-25; voir également *Sekhon*, par. 43). L'arrêt *Mohan* insiste par ailleurs sur le rôle important du juge du procès pour déterminer si une preuve d'expert par ailleurs admissible devrait être exclue parce que sa valeur probante est surpassée par son effet préjudiciable — un pouvoir discrétionnaire résiduel permettant d'exclure une preuve à l'issue d'une analyse coût-bénéfices (p. 21). Il s'agit du second volet de la structure, mis en évidence par la jurisprudence ultérieure (Lederman, Bryant et Fuerst, p. 789-790; *J.-L.J.*, par. 28).

[20] L'arrêt *Mohan* et la jurisprudence ultérieure ne précisent toutefois pas comment cette analyse « du coût et des bénéfices » s'inscrit dans l'analyse globale. La Cour dans cet arrêt procède à l'analyse coût-bénéfices relativement à certains des quatre critères, mais elle fait aussi observer qu'une telle analyse peut relever de l'exercice d'un pouvoir discrétionnaire général qui permet d'exclure une preuve dont la valeur probante ne justifie pas son admission, compte tenu de ses effets potentiellement préjudiciables (p. 21). Depuis l'arrêt *Mohan*, la jurisprudence s'est également intéressée à des aspects particuliers du témoignage d'opinion d'un expert, mais souvent sans expliciter la place qu'occupent ces autres préoccupations dans l'analyse. Cependant, la jurisprudence, dans son ensemble, tend indubitablement à resserrer les critères d'admissibilité et à renforcer le rôle de gardien du juge.

[21] Par exemple, le critère de nécessité a été mis en évidence dans des décisions telles que *D.D.* La majorité y souligne que l'exigence de nécessité « vise à ce que les dangers liés à la preuve d'expert ne soient pas traités à la légère », ajoutant que « [l]a simple pertinence ou "utilité" ne suffit pas » (par. 46). D'autres décisions ont abordé la fiabilité des principes scientifiques à la base d'une opinion et, en fait, des éléments de preuve techniques en général (*J.-L.J.*; *R. c. Trochym*, 2007 CSC 6, [2007] 1 R.C.S. 239). Toutefois, on ne sait toujours pas où exactement,

and concerns such as those about reliability fit into the overall analysis.

[22] *Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.

[23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.

[24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

dans l'analyse globale, s'inscrivent l'analyse coût-bénéfices et les préoccupations comme celles relatives à la fiabilité.

[22] L'arrêt *Abbey* (ONCA) a apporté des précisions utiles en scindant la démarche en deux temps. Je suis d'avis de l'adopter, à peu de choses près.

[23] Dans un premier temps, celui qui veut présenter le témoignage doit démontrer qu'il satisfait aux critères d'admissibilité, soit les quatre critères énoncés dans l'arrêt *Mohan*, à savoir la pertinence, la nécessité, l'absence de toute règle d'exclusion et la qualification suffisante de l'expert. De plus, dans le cas d'une opinion fondée sur une science nouvelle ou contestée ou sur une science utilisée à des fins nouvelles, la fiabilité des principes scientifiques étayant la preuve doit être démontrée (*J.-L.J.*, par. 33, 35-36 et 47; *Trochym*, par. 27; Lederman, Bryant et Fuerst, p. 788-789 et 800-801). Le critère de la pertinence, à ce stade, s'entend de la pertinence logique (*Abbey* (ONCA), par. 82; *J.-L.J.*, par. 47). Tout témoignage qui ne satisfait pas à ces critères devrait être exclu. Il est à noter qu'à mon avis, la nécessité demeure un critère (*D.D.*, par. 57; voir D. M. Paciocco et L. Stuesser, *The Law of Evidence* (7e éd. 2015), p. 209-210; *R. c. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, par. 13; *R. c. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, par. 72).

[24] Dans un deuxième temps, le juge-gardien exerce son pouvoir discrétionnaire en soupesant les risques et les bénéfices éventuels que présente l'admission du témoignage, afin de décider si les premiers sont justifiés par les seconds. Cet exercice nécessaire de pondération a été décrit de plusieurs façons. Dans l'arrêt *Mohan*, le juge Sopinka parle du « facteur fiabilité-effet » (p. 21), tandis que, dans l'arrêt *J.-L.J.*, le juge Binnie renvoie à « la pertinence, la fiabilité et la nécessité par rapport au délai, au préjudice, à la confusion qui peuvent résulter » (par. 47). Le juge Doherty résume bien la question dans l'arrêt *Abbey*, lorsqu'il explique que [TRADUCTION] « le juge du procès doit décider si le témoignage d'expert qui satisfait aux conditions préalables à l'admissibilité est assez avantageux pour le procès pour justifier son admission malgré le préjudice potentiel, pour le procès, qui peut découler de son admission » (par. 76).

[25] With this delineation of the analytical framework, we can turn to the nature of an expert's duty to the court and where it fits into that framework.

D. *The Expert's Duty to the Court or Tribunal*

[26] There is little controversy about the broad outlines of the expert witness's duty to the court. As Anderson writes, "[t]he duty to provide independent assistance to the Court by way of objective unbiased opinion has been stated many times by common law courts around the world": p. 227. I would add that a similar duty exists in the civil law of Quebec: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at para. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), c. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, art. 22 (not yet in force); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), at pp. 14 and 121.

[27] One influential statement of the elements of this duty are found in the English case *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.). Following an 87-day trial, Cresswell J. believed that a misunderstanding of the duties and responsibilities of expert witnesses contributed to the length of the trial. He listed in *obiter dictum* duties and responsibilities of experts, the first two of which have particularly influenced the development of Canadian law:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation . . . .

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise . . . . An expert witness in the High Court should

[25] Le cadre analytique ainsi délimité, penchons-nous sur la nature de l'obligation de l'expert envers le tribunal et voyons comment elle s'inscrit dans ce cadre.

D. *L'obligation de l'expert envers le tribunal*

[26] Les grandes lignes de l'obligation du témoin expert envers le tribunal sont peu contestées. Comme Anderson l'écrit : [TRADUCTION] « L'obligation de fournir une aide indépendante au tribunal sous la forme d'avis objectif et exempt de parti pris a été énoncée à de nombreuses reprises par les tribunaux de common law un peu partout dans le monde » (p. 227). J'ajouterais qu'une obligation semblable existe en droit civil québécois (J.-C. Royer et S. Lavallée, *La preuve civile* (4e éd. 2008), par. 468; D. Béchard, avec la collaboration de J. Béchard, *L'expert* (2011), c. 9; *Loi instituant le nouveau Code de procédure civile*, L.Q. 2014, c. 1, art. 22 (non en vigueur); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), p. 14 et 121).

[27] On trouve dans l'arrêt anglais *National Justice Compania Naviera S.A. c. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.), un énoncé des éléments de cette obligation qui fait autorité. Au terme d'un procès de 87 jours, le juge Cresswell a conclu qu'une méconnaissance des obligations et responsabilités des témoins experts avait contribué à prolonger le procès. Il a dressé, dans une remarque incidente, une liste des obligations et responsabilités des experts, dont les deux premiers points ont particulièrement influencé l'évolution du droit canadien :

[TRADUCTION]

1. Le témoignage de l'expert présenté à la Cour devrait être le produit indépendant de l'expert n'ayant subi quant à la forme ou au fond aucune influence dictée par les exigences du litige et être perçu comme tel . . .

2. Le rôle du témoin expert consiste à fournir une aide indépendante au tribunal sous la forme d'avis objectif et exempt de parti pris sur des questions relevant de son champ d'expertise [. . .] La personne qui témoigne

never assume the role of an advocate. [Emphasis added; citation omitted; p. 81.]

(These duties were endorsed on appeal: [1995] 1 Lloyd's Rep. 455 (C.A.), at p. 496.)

[28] Many provinces and territories have provided explicit guidance related to the duty of expert witnesses. In Nova Scotia, for example, the *Civil Procedure Rules* require that an expert's report be signed by the expert who must make (among others) the following representations to the court: that the expert is providing an objective opinion for the assistance of the court; that the expert is prepared to apply independent judgment when assisting the court; and that the report includes everything the expert regards as relevant to the expressed opinion and draws attention to anything that could reasonably lead to a different conclusion (r. 55.04(1)(a), (b) and (c)). While these requirements do not affect the rules of evidence by which expert opinion is determined to be admissible or inadmissible, they provide a convenient summary of a fairly broadly shared sense of the duties of an expert witness to the court.

[29] There are similar descriptions of the expert's duty in the civil procedure rules in other Canadian jurisdictions: Anderson, at p. 227; *The Queen's Bench Rules* (Saskatchewan), r. 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 11-2(1); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 4.1.01(1); *Rules of Court*, Y.O.I.C. 2009/65, r. 34(23); *An Act to establish the new Code of Civil Procedure*, art. 22. Moreover, the rules in Saskatchewan, British Columbia, Ontario, Nova Scotia, Prince Edward Island, Quebec and the Federal Courts require experts to certify that they are aware of and will comply with their duty to the court: Anderson, at p. 228; Saskatchewan *Queen's Bench Rules*, r. 5-37(3); British Columbia *Supreme Court Civil Rules*, r. 11-2(2); Ontario *Rules of Civil Procedure*, r. 53.03(2.1); Nova Scotia *Civil Procedure Rules*, r. 55.04(1)(a); Prince Edward Island *Rules of Civil Procedure*, r. 53.03(3)(g); *An Act to establish the new Code of*

comme expert devant la Haute Cour ne doit jamais s'arroger le rôle de défenseur. [Je souligne; référence omise; p. 81.]

(La Cour d'appel a confirmé ces obligations ([1995] 1 Lloyd's Rep. 455 (C.A.), p. 496).)

[28] Plusieurs provinces et territoires ont des directives expresses en ce qui concerne l'obligation du témoin expert. En Nouvelle-Écosse, par exemple, les *Règles de procédure civile* prévoient que le rapport d'expert, signé par ce dernier, déclare notamment qu'il fournit une opinion objective pour prêter assistance à la cour; qu'il est disposé à se former un jugement indépendant dans l'assistance qu'il prête à la cour; que son rapport comprend tout ce qu'il considère comme pertinent par rapport à l'opinion exprimée et attire l'attention sur tout ce qui pourrait mener raisonnablement à une conclusion différente (al. 55.04(1)a), b) et c)). Même si ces exigences n'ont aucune incidence sur les règles de preuve sur l'admissibilité d'une opinion d'expert, elles résument bien la conception assez largement partagée de l'obligation d'un témoin expert envers le tribunal.

[29] L'obligation de l'expert est définie de façon similaire dans les règles de procédure civile d'autres provinces et territoires du Canada (Anderson, p. 227; *Règles de la Cour du Banc de la Reine* de la Saskatchewan, règle 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, par. 11-2(1); *Règles de procédure civile*, R.R.O. 1990, Règl. 194, par. 4.1.01(1); *Règles de procédure*, Y.D. 2009/65, par. 34(23); *Loi instituant le nouveau Code de procédure civile*, art. 22). De plus, les règles de la Saskatchewan, de la Colombie-Britannique, de l'Ontario, de la Nouvelle-Écosse, de l'Île-du-Prince-Édouard, du Québec et des Cours fédérales en la matière exigent que les experts certifient qu'ils sont informés de leur obligation envers le tribunal et s'en acquitteront (Anderson, p. 228; *Règles de la Cour du Banc de la Reine* de la Saskatchewan, par. 5-37(3); *Supreme Court Civil Rules* de la Colombie-Britannique, par. 11-2(2); *Règles de procédure civile* de l'Ontario,

Civil Procedure, art. 235 (not yet in force); *Federal Courts Rules*, SOR/98-106, r. 52.2(1)(*c*).

[30] The formulation in the Ontario *Rules of Civil Procedure* is perhaps the most succinct and complete statement of the expert's duty to the court: to provide opinion evidence that is fair, objective and non-partisan (r. 4.1.01(1)(a)). The *Rules* are also explicit that this duty to the court prevails over any obligation owed by the expert to a party: r. 4.1.01(2). Likewise, the newly adopted *Act to establish the new Code of Civil Procedure* of Quebec explicitly provides, as a guiding principle, that the expert's duty to the court overrides the parties' interests, and that the expert must fulfill his or her primary duty to the court "objectively, impartially and thoroughly": art. 22; Chamberland, at pp. 14 and 121.

[31] Many of the relevant rules of court simply reflect the duty that an expert witness owes to the court at common law: Anderson, at p. 227. In my opinion, this is true of the Nova Scotia rules that apply in this case. Of course, it is always open to each jurisdiction to impose different rules of admissibility, but in the absence of a clear indication to that effect, the common law rules apply in common law cases. I note that in Nova Scotia, the *Civil Procedure Rules* explicitly provide that they do not change the rules of evidence by which the admissibility of expert opinion evidence is determined: r. 55.01(2).

[32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's

par. 53.03(2.1); *Règles de procédure civile* de la Nouvelle-Écosse, al. 55.04(1)a); *Rules of Civil Procedure* de l'Île-du-Prince-Édouard, al. 53.03(3)(g); *Loi instituant le nouveau Code de procédure civile*, art. 235 (non en vigueur); *Règles des Cours fédérales*, DORS/98-106, al. 52.2(1)*c*)).

[30] Les *Règles de procédure civile* de l'Ontario énoncent sans doute le plus succinctement et complètement l'obligation de l'expert envers le tribunal, en l'occurrence celle de rendre un témoignage d'opinion qui soit équitable, objectif et impartial (al. 4.1.01(1)a)). Les *Règles* prévoient également expressément que cette obligation l'emporte sur toute obligation de l'expert envers la partie qui l'a engagé (par. 4.1.01(2)). De même, la *Loi instituant le nouveau Code de procédure civile* du Québec prévoit expressément, parmi ses principes directeurs, que la mission première de l'expert envers le tribunal prime les intérêts des parties et qu'il doit l'accomplir « avec objectivité, impartialité et rigueur » (art. 22; Chamberland, p. 14 et 121).

[31] Bon nombre de règles de procédure ne font que reprendre l'obligation à laquelle le témoin expert est tenu envers le tribunal en common law (Anderson, p. 227). À mon avis, c'est le cas des *Règles* de la Nouvelle-Écosse en la matière. Bien sûr, il est loisible à chaque province ou territoire d'établir des règles d'admissibilité différentes, mais à défaut d'indication claire en ce sens, ce sont les règles de la common law qui s'appliquent dans les affaires de common law. Je souligne qu'en Nouvelle-Écosse, les *Règles de procédure civile* disposent expressément qu'elles n'ont aucune incidence sur les règles de preuve servant à déterminer si l'opinion d'expert est admissible (par. 55.01(2)).

[32] Trois concepts apparentés sont à la base des diverses définitions de l'obligation de l'expert, à savoir l'impartialité, l'indépendance et l'absence de parti pris. L'opinion de l'expert doit être impartiale, en ce sens qu'elle découle d'un examen objectif des questions à trancher. Elle doit être indépendante, c'est-à-dire qu'elle doit être le fruit du jugement indépendant de l'expert, non influencée par la partie pour qui il témoigne ou l'issue du litige. Elle doit être exempte de parti pris, en ce sens qu'elle ne doit pas

position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

favoriser injustement la position d'une partie au détriment de celle de l'autre. Le critère décisif est que l'opinion de l'expert ne changerait pas, peu importe la partie qui aurait retenu ses services (P. Michell et R. Mandhane, « The Uncertain Duty of the Expert Witness » (2005), 42 *Alta. L. Rev*. 635, p. 638-639). Ces concepts, il va sans dire, doivent être appliqués aux réalités du débat contradictoire. Les experts sont généralement engagés, mandatés et payés par l'un des adversaires. Ces faits, à eux seuls, ne compromettent pas l'indépendance, l'impartialité ni l'absence de parti pris de l'expert.

E. *The Expert's Duties and Admissibility*

E. *Les obligations de l'expert et l'admissibilité de son témoignage*

[33] As we have seen, there is a broad consensus about the nature of an expert's duty to the court. There is no such consensus, however, about how that duty relates to the admissibility of an expert's evidence. There are two main questions: Should the elements of this duty go to admissibility of the evidence rather than simply to its weight?; And, if so, is there a threshold admissibility requirement in relation to independence and impartiality?

[33] Comme nous l'avons vu, il existe un large consensus quant à la nature de l'obligation de l'expert envers le tribunal. Il n'en va toutefois pas de même du rapport entre cette obligation et l'admissibilité du témoignage de l'expert. Deux questions importantes se posent : les éléments de l'obligation de l'expert jouent-ils au regard de l'admissibilité du témoignage plutôt que simplement de la valeur probante de celui-ci et, dans l'affirmative, l'indépendance et l'impartialité constituent-elles un critère d'admissibilité?

[34] In this section, I will explain my view that the answer to both questions is yes: a proposed expert's independence and impartiality go to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

[34] Dans la présente section, j'explique pourquoi je réponds par l'affirmative à ces deux questions : l'indépendance et l'impartialité de l'expert proposé jouent au regard de l'admissibilité de son témoignage plutôt que simplement de la valeur probante de celui-ci, et l'obligation de l'expert constitue un critère d'admissibilité. Une fois qu'il est satisfait à ce critère, toute réserve qui demeure quant à savoir si l'expert s'est conformé à son obligation devrait être examinée dans le cadre de l'analyse coût-bénéfices qu'effectue le juge dans l'exercice de son rôle de gardien.

(1) Admissibility or Only Weight?

(1) Admissibilité ou valeur probante?

(a) *The Canadian Law*

a) *Le droit canadien*

[35] The weight of authority strongly supports the conclusion that at a certain point, expert evidence should be ruled inadmissible due to the expert's lack of impartiality and/or independence.

[35] La jurisprudence dominante appuie solidement la conclusion qu'il convient, à un certain point, de juger inadmissible le témoignage de l'expert qui fait preuve d'un manque d'indépendance ou d'impartialité.

[36] Our Court has confirmed this position in a recent decision that was not available to the courts below:

> It is well established that an expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker (J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at No. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), chap. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, s. 22 (not yet in force)). However, these factors generally have an impact on the probative value of the expert's opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily "disqualify" the expert (L. Ducharme and C.-M. Panaccio, *L'administration de la preuve* (4th ed. 2010), at Nos. 590-91 and 605). For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case (D. M. Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565, at pp. 598-99).
>
> (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 106)

[37] I will refer to a number of other cases that support this view. I do so by way of illustration and without commenting on the outcome of particular cases. An expert's interest in the litigation or relationship to the parties has led to exclusion in a number of cases: see, e.g., *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Gen. Div.) (proposed expert was the defendant's lawyer in related matters and had investigated from the outset of his retainer the matter of a potential negligence claim against the plaintiff); *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187 (S.C.J.) (expert was the party's lawyer in related U.S. proceedings); *R. v. Docherty*, 2010 ONSC 3628 (expert was the defence counsel's father); *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394 (expert was also a party to the litigation); *Handley v. Punnett*,

[36] La Cour vient de confirmer cette position dans un arrêt dont ne disposaient pas les juridictions inférieures :

> Il est acquis que l'expert doit fournir une opinion indépendante, impartiale et objective, en vue d'aider le décideur (J.-C. Royer et S. Lavallée, *La preuve civile* (4e éd. 2008), nº 468; D. Béchard, avec la collaboration de J. Béchard, *L'expert* (2011), chap. 9; *Loi instituant le nouveau Code de procédure civile*, L.Q. 2014, c. 1, art. 22 (non encore en vigueur)). Par contre, ces facteurs influencent généralement la valeur probante de l'opinion de l'expert et ne sont pas toujours des obstacles incontournables à l'admissibilité de son témoignage. Ils ne rendent pas non plus le témoin expert nécessairement « inhabile » (L. Ducharme et C.-M. Panaccio, *L'administration de la preuve* (4e éd. 2010), nos 590-591 et 605). Pour qu'un témoignage d'expert soit inadmissible, il faut plus qu'une simple apparence de partialité. La question n'est pas de savoir si une personne raisonnable considérerait que l'expert n'est pas indépendant. Il faut plutôt déterminer si le manque d'indépendance de l'expert le rend de fait incapable de fournir une opinion impartiale dans les circonstances propres à l'instance (D. M. Paciocco, « Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen's L.J.* 565, p. 598-599).
>
> (*Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3, par. 106)

[37] Je renvoie à plusieurs autres affaires pour étayer mon opinion. Je procède ainsi pour illustrer mon propos, sans émettre d'avis sur l'issue des affaires en question. Dans certaines, l'intérêt de l'expert dans le procès ou ses liens avec l'une des parties ont mené à l'exclusion (voir, p. ex., *Fellowes, McNeil c. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Div. gén.) (l'expert proposé était l'avocat de la défenderesse dans une affaire connexe et, dès le début de son mandat, il avait monté un dossier en vue d'une poursuite pour négligence contre la demanderesse); *Royal Trust Corp. of Canada c. Fisherman* (2000), 49 O.R. (3d) 187 (C.S.J.) (l'expert était l'avocat d'une des parties dans une instance connexe introduite aux États-Unis); *R. c. Docherty*, 2010 ONSC 3628 (l'expert était le père de l'avocat de la défense); *Ocean c. Economical Mutual Insurance Co.*, 2010 NSSC

2003 BCSC 294 (expert was also a party to the litigation); *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (QL) (S.C.J.) (expert was effectively a "co-venturer" in the case due in part to the fact that 40 percent of his remuneration was contingent upon success at trial: para. 7); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (expert's retainer agreement was inappropriate); *Hutchingame v. Johnstone*, 2006 BCSC 271 (expert stood to incur liability depending on the result of the trial). In other cases, the expert's stance or behaviour as an advocate has justified exclusion: see, e.g., *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19.

[38] Many other cases have accepted, in principle, that lack of independence or impartiality can lead to exclusion, but have ruled that the expert evidence did not warrant rejection on the particular facts: see, e.g., *United City Properties Ltd. v. Tong*, 2010 BCSC 111; *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594 (S.C.J.). This was the position of the Court of Appeal in this case: para. 109; see also para. 121.

[39] Some Canadian courts, however, have treated these matters as going exclusively to weight rather than to admissibility. The most often cited cases for this proposition are probably *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115, and *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77. *Klassen* holds as admissible any expert evidence meeting the criteria from *Mohan*, with bias only becoming a factor as to the weight to be given to the evidence: see also *R. v. Violette*, 2008 BCSC 920. Similarly, the court in *Gallant* determined that a challenge to expert evidence that is based on the expert having a connection to a party or an issue in the case

315, 293 N.S.R. (2d) 394 (l'expert était également partie au litige); *Handley c. Punnett*, 2003 BCSC 294 (l'expert était également partie au litige); *Bank of Montreal c. Citak*, [2001] O.J. No. 1096 (QL) (C.S.J.) (l'expert était effectivement « coentrepreneur » dans cette affaire, notamment en raison du fait que 40 p. 100 de sa rémunération dépendait de l'issue favorable du procès (par. 7)); *Dean Construction Co. c. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (les termes du mandat de l'expert étaient discutables); *Hutchingame c. Johnstone*, 2006 BCSC 271 (la responsabilité de l'expert risquait d'être engagée, selon l'issue du procès)). Dans d'autres affaires, l'attitude ou le comportement de l'expert, qui s'était fait le défenseur d'une partie, a justifié l'exclusion (voir, p. ex., *Alfano c. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. c. Bank of Nova Scotia*, 2003 BCSC 617; *Gould c. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19).

[38] Dans un grand nombre d'autres affaires, les tribunaux, tout en acceptant en principe qu'un manque d'indépendance ou d'impartialité pouvait mener à l'exclusion du témoignage de l'expert, ont néanmoins estimé qu'il n'y avait pas lieu d'écarter ce témoignage eu égard aux faits particuliers de l'espèce (voir, p. ex., *United City Properties Ltd. c. Tong*, 2010 BCSC 111; *R. c. INCO Ltd.* (2006), 80 O.R. (3d) 594 (C.S.J.)). C'est le point de vue qu'a adopté la Cour d'appel dans le cas qui nous occupe (par. 109; voir également par. 121).

[39] Toutefois, certains tribunaux canadiens étaient d'avis que ces questions jouaient exclusivement au regard de la valeur de la preuve, et non au regard de son admissibilité. Les décisions les plus souvent citées à cet égard sont sans doute *R. c. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115, et *Gallant c. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77. Dans la première, le tribunal a déclaré admissible tout témoignage d'expert qui satisfaisait aux critères énoncés dans l'arrêt *Mohan* et précisé que le parti pris n'entrait en jeu que lorsqu'il s'agissait de déterminer la valeur probante du témoignage de l'expert (voir également

or a possible predetermined position on the case cannot take place at the admissibility stage: para. 89.

[40] I conclude that the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight but also on the admissibility of the evidence. I note that while the shareholders submit that issues regarding expert independence should go only to weight, they rely on cases such as *INCO* that specifically accept that a finding of lack of independence or impartiality can lead to inadmissibility in certain circumstances: R.F., at paras. 52-53.

(b) *Other Jurisdictions*

[41] Outside Canada, the concerns related to independence and impartiality have been addressed in a number of ways. Some are similar to the approach in Canadian law.

[42] For example, summarizing the applicable principles in British law, Nelson J. in *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367 (Q.B.), underlined that when an expert has an interest or connection with the litigation or a party thereto, exclusion will be warranted if it is determined that the expert is unwilling or unable to carry out his or her primary duty to the court: see also H. M. Malek et al., eds., *Phipson on Evidence* (18th ed. 2013), at pp. 1158-59. The mere fact of an interest or connection will not disqualify, but it nonetheless may do so in light of the nature and extent of the interest or connection in particular circumstances. As Lord Phillips of Worth Matravers, M.R., put it in a leading case, "[i]t is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence": *R. (Factortame Ltd.) v. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003]

R. c. Violette, 2008 BCSC 920). De même, dans la deuxième, la cour a statué que la contestation du témoignage de l'expert fondée sur l'existence d'un rapport entre ce dernier et l'une des parties ou une question en litige ou sur une préconception de sa part ne pouvait être formulée à l'étape de l'admissibilité (par. 89).

[40] Je conclus que selon la conception prédominante en common law canadienne, l'indépendance et l'impartialité ont une incidence non seulement sur la valeur de la preuve, mais aussi sur son admissibilité. Je signale que, même s'ils soutiennent que les questions concernant l'indépendance de l'expert ne devraient jouer qu'au regard de la valeur probante, les actionnaires invoquent des affaires comme *INCO*, dans laquelle le tribunal reconnaît expressément qu'une conclusion quant au manque d'indépendance ou d'impartialité peut entraîner l'inadmissibilité dans certaines circonstances (m.i., par. 52-53).

b) *Ailleurs dans le monde*

[41] À l'extérieur du Canada, les questions d'indépendance et d'impartialité ont été abordées de diverses façons, dont certaines s'apparentent à la démarche canadienne.

[42] Par exemple, résumant les principes applicables en droit britannique, le juge Nelson, dans l'arrêt *Armchair Passenger Transport Ltd. c. Helical Bar Plc*, [2003] EWHC 367 (Q.B.), a souligné que lorsque l'expert a un intérêt dans un litige ou un rapport avec celui-ci ou avec une partie, l'exclusion est justifiée s'il est établi que l'expert ne peut ou ne veut pas s'acquitter de sa principale obligation envers la cour (voir également H. M. Malek et autres, dir., *Phipson on Evidence* (18e éd. 2013), p. 1158-1159). Le simple fait d'avoir un intérêt ou un rapport ne rend pas quelqu'un inhabile à témoigner, sauf dans certaines circonstances, selon la nature et l'importance de l'intérêt ou du rapport. Comme lord Phillips de Worth Matravers, maître des rôles, l'explique dans un arrêt de principe : [TRADUCTION] « Il est toujours souhaitable qu'un expert n'ait aucun intérêt réel ou apparent dans l'issue d'un procès dans lequel il témoigne, mais une telle neutralité n'est pas automatiquement essentielle à l'admissibilité de son témoignage »

Q.B. 381, at para. 70; see also *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Comm.); *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Ch. D.); *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067 (Ch. D.), at paras. 312-17.

[43] In Australia, the expert's objectivity and impartiality will generally go to weight, not to admissibility: I. Freckelton and H. Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (5th ed. 2013), at p. 35. As the Court of Appeal of the State of Victoria put it: ". . . to the extent that it is desirable that expert witnesses should be under a duty to assist the Court, that has not been held and should not be held as disqualifying, in itself, an 'interested' witness from being competent to give expert evidence" (*FGT Custodians Pty. Ltd. v. Fagenblat*, [2003] VSCA 33, at para. 26 (AustLII); see also Freckelton and Selby, at pp. 186-88; *Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

[44] In the United States, at the federal level, the independence of the expert is a consideration that goes to the weight of the evidence, and a party may testify as an expert in his own case: *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993), at p. 1019; *Tagatz v. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014), at p. 1321. This also seems to be a fair characterization of the situation in the states (*Corpus Juris Secundum*, vol. 32 (2008), at p. 325: "The bias or interest of the witness does not affect his or her qualification, but only the weight to be given the testimony.").

(c) *Conclusion*

[45] Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to

(*R. (Factortame Ltd.) c. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381, par. 70; voir également *Gallaher International Ltd. c. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Comm.); *Meat Corp. of Namibia Ltd. c. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Ch. D.); *Matchbet Ltd. c. Openbet Retail Ltd.*, [2013] EWHC 3067 (Ch. D.), par. 312-317).

[43] En Australie, l'objectivité et l'impartialité de l'expert jouent généralement au regard de la valeur de la preuve, et non de son admissibilité (I. Freckelton et H. Selby, *Expert Evidence : Law, Practice, Procedure and Advocacy* (5e éd. 2013), p. 35). Pour reprendre les propos de la Cour d'appel de l'État de Victoria : [TRADUCTION] « . . . dans la mesure où il est souhaitable que les témoins experts aient l'obligation d'aider le tribunal, on ne devrait pas juger inhabile à témoigner un expert du seul fait qu'il est "intéressé" » (*FGT Custodians Pty. Ltd. c. Fagenblat*, [2003] VSCA 33, par. 26 (AustLII); voir également Freckelton et Selby, p. 186-188; *Collins Thomson c. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. c. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. c. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

[44] Aux États-Unis, au niveau fédéral, l'indépendance de l'expert joue au regard de la valeur de la preuve, et une partie peut témoigner à son propre procès à titre d'expert (*Rodriguez c. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993), p. 1019; *Tagatz c. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. c. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014), p. 1321). Il semble que la situation soit à peu près la même à l'échelle des États (*Corpus Juris Secundum*, vol. 32 (2008), p. 325 : [TRADUCTION] « Le parti pris ou l'intérêt du témoin n'influe pas sur son habilité à témoigner, mais seulement sur la valeur probante de son témoignage. »).

c) *Conclusion*

[45] Conformément à ce qui me semble le courant prédominant dans la jurisprudence canadienne, je suis d'avis que le manque d'indépendance et d'impartialité d'un expert joue au regard tant de l'admissibilité de son témoignage que de la valeur du

the evidence if admitted. That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed up the Canadian approach well in *J.-L.J.*: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility" (para. 28).

(2) The Appropriate Threshold

[46] I have already described the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan. As I see it, the appropriate threshold for admissibility flows from this duty. I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that "the common law has come to accept . . . that expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded": "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 *Can. Crim. L.R.* 135, at p. 152 (footnote omitted). The expert witnesses must, therefore, be aware of this primary duty to the court and able and willing to carry it out.

[47] Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. As Prof. Paciocco aptly observed, "if inquiries about bias or partiality become routine during *Mohan voir dires*, trial testimony will become nothing more than an inefficient reprise of the admissibility hearing": "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565 ("Jukebox"), at p. 597. While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my

témoignage, s'il est admis. Cette façon de voir semble s'accorder davantage avec l'économie générale de notre droit en ce qui concerne les témoignages d'experts et l'importance que notre jurisprudence accorde au rôle de gardien exercé par les juges de première instance. Le juge Binnie cerne bien l'optique canadienne dans l'arrêt *J.-L.J.* : « La question de l'admissibilité d'une preuve d'expert devrait être examinée minutieusement au moment où elle est soulevée, et cette preuve ne devrait pas être admise trop facilement pour le motif que toutes ses faiblesses peuvent en fin de compte avoir une incidence sur son poids plutôt que sur son admissibilité » (par. 28).

(2) Teneur du critère

[46] J'ai déjà exposé l'obligation du témoin expert envers le tribunal : il doit être juste, objectif et impartial. Selon moi, le critère d'admissibilité découle de cette obligation. Je suis d'accord avec le professeur Paciocco (maintenant juge de la Cour de justice de l'Ontario), selon qui [TRADUCTION] « la common law en est venue à concevoir [. . .] que les témoins experts ont l'obligation d'aider le tribunal, qui l'emporte sur celle qu'ils doivent à la partie qui les cite. Le témoin qui ne peut ou ne veut s'acquitter de cette obligation n'est pas habile à exercer son rôle d'expert et devrait être exclu » (« Taking a "Goudge" out of Bluster and Blarney : an "Evidence-Based Approach" to Expert Testimony » (2009), 13 *Rev. can. D.P.* 135, p. 152 (note de bas de page omise)). Par conséquent, les témoins experts doivent être conscients de leur obligation principale envers le tribunal et pouvoir et vouloir s'en acquitter.

[47] L'idée, en imposant ce critère supplémentaire, n'est pas de prolonger ni de complexifier les procès et il ne devrait pas en résulter un tel effet. Comme le souligne le professeur Paciocco, à raison : [TRADUCTION] « . . . si les débats sur la partialité deviennent chose courante pendant un voir-dire de type *Mohan*, le témoignage qui sera donné au procès ne sera plus qu'une répétition inefficace de l'audience sur l'admissibilité » (« Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen's L.J.* 565 (« Jukebox »), p. 597). Sans aller jusqu'à affirmer qu'il faut présumer l'indépendance

view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.

[48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

[49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise,

et l'impartialité de l'expert si elles ne sont pas contestées, je pense qu'en l'absence d'une telle contestation, il est généralement satisfait au critère dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte.

[48] Une fois que l'expert a produit cette attestation ou a déposé sous serment en ce sens, il incombe à la partie qui s'oppose à l'admission du témoignage de démontrer un motif réaliste de le juger inadmissible au motif que l'expert ne peut ou ne veut s'acquitter de son obligation. Si elle réussit, la charge de démontrer, selon la prépondérance des probabilités, qu'il a été satisfait à ce critère d'admissibilité incombe toujours à la partie qui entend présenter le témoignage. Si elle n'y parvient pas, le témoignage, ou les parties de celui-ci qui sont viciées par un manque d'indépendance ou d'impartialité, devrait être exclu. Cette démarche est conforme à la règle générale du cadre établi dans l'arrêt *Mohan*, et généralement en droit de la preuve, selon laquelle il revient à la partie qui produit la preuve d'en établir l'admissibilité.

[49] Ce critère n'est pas particulièrement exigeant, et il sera probablement très rare que le témoignage de l'expert proposé soit jugé inadmissible au motif qu'il ne satisfait pas au critère. Le juge de première instance doit déterminer, compte tenu tant de la situation particulière de l'expert que de la teneur du témoignage proposé, si l'expert peut ou veut s'acquitter de sa principale obligation envers le tribunal. Par exemple, c'est la nature et le degré de l'intérêt ou des rapports qu'a l'expert avec l'instance ou une partie qui importent, et non leur simple existence : un intérêt ou un rapport quelconque ne rend pas d'emblée la preuve de l'expert proposé inadmissible. Dans la plupart des cas, l'existence d'une simple relation d'emploi entre l'expert et la partie qui le cite n'emporte pas l'inadmissibilité de la preuve. En revanche, un intérêt financier direct dans l'issue du litige suscite des préoccupations. Il en va ainsi des liens familiaux étroits avec une partie et des situations où l'expert proposé s'expose à une responsabilité professionnelle si le tribunal ne retient pas son opinion. De même, l'expert qui, dans sa déposition ou d'une autre manière, se fait le défenseur d'une partie ne peut ou ne veut manifestement pas s'acquitter de

assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[50] As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

[51] Having established the analytical framework, described the expert's duty and determined that compliance with this duty goes to admissibility and not simply to weight, I turn now to where this duty fits into the analytical framework for admission of expert opinion evidence.

F. *Situating the Analysis in the Mohan Framework*

(1) The Threshold Inquiry

[52] Courts have addressed independence and impartiality at various points of the admissibility test. Almost every branch of the *Mohan* framework has been adapted to incorporate bias concerns one

sa principale obligation envers le tribunal. Je tiens à souligner que la décision d'exclure le témoignage à la première étape de l'analyse pour non-conformité aux critères d'admissibilité ne devrait être prise que dans les cas manifestes où l'expert proposé ne peut ou ne veut fournir une preuve juste, objective et impartiale. Dans les autres cas, le témoignage ne devrait pas être exclu d'office, et son admissibilité sera déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission.

[50] Comme nous l'avons vu en examinant la jurisprudence anglaise, la décision de permettre ou non à un expert de témoigner malgré son intérêt dans un litige ou son rapport avec celui-ci dépend de leur importance et des faits. La notion d'apparence de parti pris n'est pas pertinente lorsqu'il s'agit de déterminer si le témoin expert pourra ou voudra s'acquitter de sa principale obligation envers le tribunal. Lorsque l'on se penche sur l'intérêt d'un expert ou sur ses rapports avec une partie, il ne s'agit pas de se demander si un observateur raisonnable penserait que l'expert est indépendant ou non; il s'agit plutôt de déterminer si la relation de l'expert avec une partie ou son intérêt fait en sorte qu'il ne peut ou ne veut s'acquitter de sa principale obligation envers le tribunal, en l'occurrence apporter au tribunal une aide juste, objective et impartiale.

[51] Nous avons posé le cadre analytique, défini l'obligation de l'expert et établi que le respect de cette dernière joue au regard de l'admissibilité, et non simplement de la valeur probante. Voyons ensuite où cette obligation s'inscrit dans le cadre analytique régissant l'admissibilité du témoignage d'opinion d'un expert.

F. *L'analyse au sein du cadre établi par l'arrêt Mohan*

(1) L'analyse fondée sur les critères d'admissibilité

[52] Les tribunaux ont abordé la question de l'indépendance et de l'impartialité à divers stades de l'examen des critères d'admissibilité. Presque tous les volets du cadre établi par l'arrêt *Mohan* ont servi

way or another: the proper qualifications component (see, e.g., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166; *R. v. Demetrius*, 2009 CanLII 22797 (Ont. S.C.J.)); the necessity component (see, e.g., *Docherty*; *Alfano*); and during the discretionary cost-benefit analysis (see, e.g., *United City Properties*; *Abbey* (ONCA)). On other occasions, courts have found it to be a stand-alone requirement: see, e.g., *Docherty*; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (Ont. S.C.J.); *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284. Some clarification of this point will therefore be useful.

[53] In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework: S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at 12:30.20.50; see also *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, at para. 21; Lederman, Bryant and Fuerst, at pp. 826-27; *Halsbury's Laws of Canada: Evidence*, at para. HEV-152 "Partiality"; *The Canadian Encyclopedic Digest* (Ont. 4th ed. (loose-leaf)), vol. 24, Title 62 — Evidence, at §469. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts: Hill, Tanovich and Strezos, at 12:30.20.50; Paciocco, "Jukebox", at p. 595.

(2) The Gatekeeping Exclusionary Discretion

[54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge

à l'examen des préoccupations relatives au parti pris : la qualification requise (voir, p. ex., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. c. Kasamekas*, 2010 ONSC 166; *R. c. Demetrius*, 2009 CanLII 22797 (C.S.J. Ont.)); la nécessité (voir, p. ex., *Docherty*; *Alfano*); et l'analyse coût-bénéfices, qui appelle l'exercice d'un pouvoir discrétionnaire (voir, p. ex., *United City Properties*; *Abbey* (ONCA)). À d'autres occasions, les tribunaux en ont fait un critère distinct (voir, p. ex., *Docherty*; *International Hi-Tech Industries Inc. c. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership c. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (C.S.J. Ont.); *Prairie Well Servicing Ltd. c. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284). Des précisions s'imposent donc.

[53] À mon avis, c'est sous le volet « qualification suffisante de l'expert » du cadre établi par l'arrêt *Mohan* qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter (S. C. Hill, D. M. Tanovich et L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5e éd. (feuilles mobiles)), 12:30.20.50; voir également *Deemar c. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, par. 21; Lederman, Bryant et Fuerst, p. 826-827; *Halsbury's Laws of Canada : Evidence*, par. HEV-152 « Partiality »; *The Canadian Encyclopedic Digest* (Ont. 4e éd. (feuilles mobiles)), vol. 24, titre 62 — Evidence, §469). Le témoin expert proposé qui ne peut ou ne veut s'acquitter de cette obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. En abordant cette préoccupation sous le volet de la « qualification suffisante de l'expert », les tribunaux pourront s'attacher à évaluer les risques importants que présentent les experts qui ont un parti pris (Hill, Tanovich et Strezos, 12:30.20.50; Paciocco, « Jukebox », p. 595).

(2) Le pouvoir discrétionnaire du juge en tant que « gardien »

[54] La constatation que le témoignage de l'expert satisfait aux critères ne met pas fin à l'analyse. Conformément au cadre établi dans la foulée de l'arrêt *Mohan* dont nous avons discuté précédemment,

must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

G. *Expert Evidence and Summary Judgment*

[55] I must say a brief word about the procedural context in which this case originates — a summary judgment motion. (I note that these comments relate to the summary judgment regime under the Nova Scotia rules and that different considerations may arise under different rules.) It is common ground that the court hearing the motion can consider only admissible evidence. However, under the Nova Scotia jurisprudence, which is not questioned on this appeal, it is not the role of a judge hearing a summary judgment motion in Nova Scotia to weigh the evidence, draw reasonable inferences from evidence or settle matters of credibility: *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348, at paras. 42-44, 87 and 98; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385, at paras. 6 and 12. Taking these two principles together, the result in my view is this. A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but should generally not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves assigning weight — or at least potential weight — to the evidence.

le juge doit encore tenir compte des réserves émises quant à l'indépendance et à l'impartialité de l'expert lorsqu'il évalue la preuve à l'étape où il exerce son rôle de gardien. Il peut être utile de concevoir la pertinence, la nécessité, la fiabilité et l'absence de parti pris comme autant d'éléments d'un examen en deux temps, qui entrent en ligne de compte à la première étape, celle qui sert à déterminer s'il est satisfait aux critères d'admissibilité, et jouent également un rôle à la deuxième, dans la pondération des considérations concurrentes globales relatives à l'admissibilité. Au bout du compte, le juge doit être convaincu que les risques liés au témoignage de l'expert ne l'emportent pas sur l'utilité possible de celui-ci.

G. *Témoignage d'expert et jugement sommaire*

[55] Je me dois de glisser quelques mots sur le contexte procédural dans lequel s'inscrit le présent pourvoi, en l'occurrence celui d'une requête en jugement sommaire. (Mes commentaires concernent le régime des jugements sommaires établi par les règles de la Nouvelle-Écosse. Je reconnais que d'autres considérations sont susceptibles de jouer dans un autre régime.) Il est bien reconnu que le tribunal saisi de la requête ne peut examiner que la preuve admissible. Cependant, suivant la jurisprudence néo-écossaise, qui n'est pas remise en question dans le présent pourvoi, il n'appartient pas au juge saisi d'une requête en jugement sommaire, en Nouvelle-Écosse, de soupeser la preuve, de tirer des inférences raisonnables de celle-ci ou de trancher des questions de crédibilité (*Coady c. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348, par. 42-44, 87 et 98; *Fougere c. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385, par. 6 et 12). Si l'on considère ces deux principes ensemble, le résultat est à mon avis le suivant. Le juge saisi d'une requête en jugement sommaire en vertu des règles de procédure de la Nouvelle-Écosse doit être convaincu que le témoignage de l'expert proposé satisfait aux critères d'admissibilité à la première étape de l'analyse; en règle générale, il doit toutefois se garder de passer à la seconde étape, celle de l'analyse coût-bénéfices. Cette analyse, sauf dans les cas d'inadmissibilité les plus manifestes, appelle inévitablement l'attribution d'une valeur — ou, à tout le moins, d'une valeur possible — à la preuve.

H. *Application*

[56] I turn to the application of these principles to the facts of the case. In my respectful view, the record amply sustains the result reached by the majority of the Court of Appeal that Ms. MacMillan's evidence was admissible on the summary judgment application. Of course, the framework which I have set out in these reasons was not available to either the motions judge or to the Court of Appeal.

[57] There was no finding by the motions judge that Ms. MacMillan was in fact biased or not impartial or that she was acting as an advocate for the shareholders: C.A. reasons, at para. 122. On the contrary, she specifically recognized that she was aware of the standards and requirements that experts be independent. She was aware of the precise guidelines in the accounting industry concerning accountants acting as expert witnesses. She testified that she owed an ultimate duty to the court in testifying as an expert witness: A.R., vol. III, at pp. 75-76; C.A. reasons, at para. 134. To the extent that the motions judge was concerned about the "appearance" of impartiality, this factor plays no part in the test for admissibility, as I have explained earlier.

[58] The auditors' claim that Ms. MacMillan lacks objectivity rests on two main points which I will address in turn.

[59] First, the auditors say that the earlier work done for the shareholders by the Kentville office of Grant Thornton "served as a catalyst and foundation for the claim of negligence" against the auditors and that this "precluded [Grant Thornton] from acting as 'independent' experts in this case": A.F., at paras. 17 and 19. Ms. MacMillan, the auditors submit, was in an "irreconcilable conflict of interest, in that she would inevitably have to opine on, and choose between, the actions taken and standard of care exercised by her own partners at Grant Thornton" and those of the auditors: A.F., at para. 21. This first submission, however, must be rejected.

H. *Application*

[56] J'aborde maintenant l'application de ces principes aux faits de l'espèce. À mon humble avis, le dossier appuie largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage de M^me^ MacMillan était admissible pour l'instruction de la requête en jugement sommaire. Bien sûr, ni le juge des requêtes ni la Cour d'appel ne disposaient du cadre que j'établis dans les présents motifs.

[57] Le juge des requêtes n'a pas conclu que M^me^ MacMillan avait un parti pris, qu'elle n'était pas impartiale ou qu'elle se faisait le défenseur des actionnaires (motifs de la C.A., par. 122). Au contraire, M^me^ MacMillan a reconnu expressément connaître les normes et exigences voulant que l'expert soit indépendant. Elle était également au fait des directives précises dans le milieu de la comptabilité applicables aux comptables cités comme témoins experts. Elle était consciente à titre de témoin expert de sa principale obligation envers le tribunal (d.a., vol. III, p. 75-76; motifs de la C.A., par. 134). Même si, selon le juge des requêtes, il faut une « apparence » d'impartialité, ce facteur ne constitue pas un critère d'admissibilité, comme je l'explique précédemment.

[58] La prétention des vérificateurs selon laquelle M^me^ MacMillan manquerait d'objectivité repose sur deux principaux points que j'aborde successivement.

[59] D'abord, les vérificateurs soutiennent que le travail fait antérieurement à l'intention des actionnaires par le bureau de Grant Thornton à Kentville [TRADUCTION] « a servi de catalyseur et de fondement à l'action pour négligence » intentée contre les vérificateurs et que cela « empêche [Grant Thornton] d'agir comme expert "indépendant" en l'espèce » (m.a., par. 17 et 19). Selon les vérificateurs, M^me^ MacMillan se trouvait dans « une situation de conflit d'intérêts irréductible qui la forçait inévitablement à commenter et approuver les mesures prises et la norme de diligence observée soit par ses propres partenaires chez Grant Thornton » soit par les vérificateurs (m.a., par. 21). Ce premier argument doit cependant être rejeté.

[60] The fact that one professional firm discovers what it thinks is or may be professional negligence does not, on its own, disqualify it from offering that opinion as an expert witness. Provided that the initial work is done independently and impartially and the person put forward as an expert understands and is able to comply with the duty to provide fair, objective and non-partisan assistance to the court, the expert meets the threshold qualification in that regard. There is no suggestion here that Grant Thornton was hired to take a position dictated to it by the shareholders or that there was anything more than a speculative possibility of Grant Thornton incurring liability to them if the firm's opinion was not ultimately accepted by the court. There was no finding that Ms. MacMillan was, in fact, biased or not impartial, or that she was acting as an advocate for the shareholders. The auditors' submission that she somehow "admitted" on her cross-examination that she was in an "irreconcilable conflict" is not borne out by a fair reading of her evidence in context: A.R., vol. III, at pp. 139-45. On the contrary, her evidence was clear that she understood her role as an expert and her duty to the court: *ibid.*, at pp. 75-76.

[61] The auditors' second main point was that Ms. MacMillan was not independent because she had "incorporated" some of the work done by the Kentville office of her firm. This contention is also ill founded. To begin, I do not accept that an expert lacks the threshold qualification in relation to the duty to give fair, objective and non-partisan evidence simply because the expert relies on the work of other professionals in reaching his or her own opinion. Moreover, as Beveridge J.A. concluded, what was "incorporated" was essentially an exercise in arithmetic that had nothing to do with any accounting opinion expressed by the Kentville office: C.A. reasons, at paras. 146-49.

[62] There was no basis disclosed in this record to find that Ms. MacMillan's evidence should be

[60] Le cabinet professionnel qui découvre ce qu'il estime être une négligence professionnelle ou ce qui pourrait l'être n'est pas d'emblée interdit de donner son opinion en tant que témoin expert. Dès lors que le travail initial est fait de façon indépendante et impartiale et que l'expert proposé comprend son obligation d'apporter au tribunal une aide juste, objective et impartiale et qu'il peut s'acquitter de cette obligation, il est satisfait au critère relatif à la qualification sur ce plan. Or, rien ne permet de penser ici que le cabinet Grant Thornton a été engagé pour exprimer un point de vue dicté par les actionnaires, ni qu'il y ait eu plus qu'une hypothétique possibilité que le cabinet soit tenu responsable envers ces derniers si, en fin de compte, le tribunal n'avait pas retenu son opinion. Le juge n'a pas conclu que M[me] MacMillan avait un parti pris, qu'elle a manqué d'impartialité ou qu'elle s'était faite le défenseur des actionnaires. De plus, l'argument des vérificateurs selon lequel M[me] MacMillan a en quelque sorte « admis » en contre-interrogatoire se trouver dans une situation de « conflit d'intérêts irréductible » n'est pas corroboré par une interprétation raisonnable de son témoignage dans son contexte (d.a., vol. III, p. 139-145). Au contraire, il ressort clairement de son témoignage qu'elle comprenait son rôle d'expert et son obligation envers le tribunal (*ibid.*, p. 75-76).

[61] Deuxièmement, M[me] MacMillan ne serait pas indépendante, puisqu'elle avait « incorporé » une partie du travail fait par son cabinet au bureau de Kentville. Cette prétention est également non fondée. D'abord, je n'accepte pas qu'un expert ne satisfasse pas au critère de la qualification suffisante, dans la mesure où il est question de son obligation de rendre un témoignage juste, objectif et impartial, simplement parce qu'il se fonde sur le travail d'autres professionnels pour se faire une opinion. De plus, comme le juge Beveridge l'a conclu, ce qui a été « incorporé » consistait essentiellement en un exercice arithmétique qui n'avait rien à voir avec quelque opinion comptable qu'aurait exprimée le bureau de Kentville (motifs de la C.A., par. 146-149).

[62] Le présent dossier ne révèle aucun élément qui permette de conclure que le témoignage de

excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. I agree with the majority of the Court of Appeal who concluded that the motions judge committed a palpable and overriding error in determining that Ms. MacMillan was in a conflict of interest that prevented her from giving impartial and objective evidence: paras. 136-50.

IV. Disposition

[63] I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Stikeman Elliott, Toronto.

Solicitors for the respondents: Lenczner Slaght Royce Smith Griffin, Toronto; Groupe Murphy Group, Moncton.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Henein Hutchison, Toronto.

M^me^ MacMillan devrait être exclu parce que celle-ci ne pouvait ou ne voulait rendre devant le tribunal un témoignage juste, objectif et impartial. Je conviens avec la majorité de la Cour d'appel que le juge des requêtes a commis une erreur manifeste et dominante en estimant que M^me^ MacMillan était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial (par. 136-150).

IV. Dispositif

[63] Je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelants : Stikeman Elliott, Toronto.

Procureurs des intimées : Lenczner Slaght Royce Smith Griffin, Toronto; Groupe Murphy Group, Moncton.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Henein Hutchison, Toronto.

testimony in four U.S. cases – *Federal Trade Commission v. Fleetcor Technologies, Inc., Civil Action No. 1:19-cv-5727-AT*, in the United States District Court for the Northern District of Georgia, Atlanta Division, of New Jersey; *The Ruth V. Bennett Revocable Trust by its Sole Trustee, Jonathan D. Bennett and on Behalf of all Others Similarly Situated Persons and Parties v. Millennium Health Care Centers II, LLC, d/b/a Care One at Cresskill, and d/b/a Care One at Valley, et al.,* Civil Action No. CAM-L-2505-17, in the Superior Court of New Jersey Law Division – Civil Park of Camden County; and *People of the State of California, acting by and through Santa Clara Counsel James R. Williams* v. *Intuit Inc., and DOES 1-50, Inclusive* in the Superior Court of California, County of Santa Clara, No. 19CV354178.

2. Methodology

8. In order to prepare this report, I examined information about Cineplex Inc.'s ("Cineplex") pricing strategies and in particular focused on their decision to separately present information about their online booking fee from their advertised ticket prices. Based on my review of Cineplex's website and its mobile application ("app") and on information from published studies in the academic literature, I drew conclusions about the likely impact of how Cineplex presents price information. More specifically, I drew conclusions regarding how this presentation affects consumers' perceptions of how expensive a ticket purchased from Cineplex online would be, and on their decisions of whether to purchase a ticket from Cineplex using the website or app, rather than defer the purchase or pursue other entertainment options.

9. I was asked to answer the following questions:

   (1) How does the manner of presenting pricing information by merchants impact consumers? In particular, how does "drip pricing" (or similar pricing practices) affect consumers in terms of (1) their

2017 ONCA 640
Ontario Court of Appeal

R. v. Abbey

2017 CarswellOnt 12134, 2017 ONCA 640, [2017] O.J. No. 4083, 140
O.R. (3d) 40, 140 W.C.B. (2d) 601, 350 C.C.C. (3d) 102, 39 C.R. (7th) 303

Her Majesty the Queen (Respondent) and Warren Nigel Abbey (Appellant)

Doherty, John Laskin, L.B. Roberts JJ.A.

Heard: February 15, 2017
Judgment: August 4, 2017
Docket: CA C57750

Counsel: David E. Harris, Ravin Pillay, for Appellant
Alexander Alvaro, for Respondent

Comment

The recent judgment of the Ontario Court of Appeal in *R. v. Abbey* vacates the conviction of a man who has now been tried twice for the same murder. In the first trial, the accused was acquitted; the Court of Appeal ordered a new trial because the trial judge had erred in excluding expert evidence from an expert on street gangs about the meaning of a teardrop tattoo. In the second trial, not surprisingly, the expert was permitted to testify, and the accused was convicted. Now, the Court of Appeal has set aside that conviction on the basis that the expert testimony should not have been admitted. The apparent inconsistency in the Court of Appeal judgments is explained by a body of fresh evidence brought forward on the appeal from conviction. This evidence demonstrated that there were serious weaknesses and misrepresentations in the expert's evidence. A new trial has been ordered, so this does not appear to be the end of the story on the Abbey case.

Among the lessons that can be drawn from what has happened so far is one about the role of the Crown as a minister of justice. As Laskin J.A. suggested at para. 141, it would have been unfair for the Crown to prevent the defence from bringing fresh evidence of the weaknesses of the expert's evidence when the Crown itself revealed those weaknesses in an unrelated trial. The entire episode involving the use and ultimate discrediting of this expert's testimony is indeed a stark reminder of the balance of advantage in criminal trials. It is disturbing to think that the Crown can rely on unreliable evidence from an expert to convict a person of first degree murder, only to turn around and discredit that same expert witness when it worked to its advantage in another trial, then to turn around again and try to uphold the murder conviction. The Court of Appeal has signaled its disapproval of such tactics.

Lisa Dufraimont

Osgoode Hall Law School, York University

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.5(1), (2), (3), (4), (5), (6), (7), (8) or (9) or 486.6(1) or (2) of the Criminal Code shall continue. These sections of the Criminal Code provide:

These sections of the Criminal Code provide:

lists the number of gang members who had a teardrop tattoo. Indeed, the texts of the six studies contain only a few references to tattoos and no reference at all to teardrop tattoos.

91 Nonetheless, Totten testified at the *Gager voir dire* that all six studies asked questions about tattoos. But the studies say otherwise. Here is what each study says about tattoos and questions on tattoos:

- The YSB May 1999 Youth Survey does not list what questions were asked of the participants and contains no discussion of tattoos;

- Appendices A and B of the Guys, Gangs and Girlfriends Abuse study list the questions asked of each participant. The questionnaire is detailed: 40 initial screening questions followed by in depth interview questions. Yet the questionnaire does not include a single question about tattoos. And the study itself, including the various charts, does not discuss or refer to tattoos. The absence of questions about tattoos and references to them in the study is hardly surprising. The purpose of the study was to explore how male youth made sense of their abusive behaviour towards their girlfriends;

- In Understanding Serious Youth Violence, question 6 of the interview questions asks: "Do you have any tattoos? Can you show me? What does/do the tattoo(s) mean to you?" Question 7 asks: "How do you communicate with gang members ... Probe for ... tattoo." The report has a section on case studies and several of the subjects discuss their tattoos. But the report contains no discussion of teardrop tattoos;

- Appendix A in When Children Kill lists the questions asked of the 19 participants. None of the questions asks about tattoos. The book itself does contain a few references to tattoos but none to teardrop tattoos;

- Appendix A in the Youth Literacy and Violence Prevention Research report lists the questions to be asked to the participants and the list does include questions on tattoos. Question 18 asks: "Can you tell me how gang members communicate with each other in your gang? With rival gang members? With other people? Probe for details around ... tattoos." Question 19 asks: "Do you have any tattoos? Can you show them to me?" Question 20 asks: "What does the tattoo mean to you (probe for each tattoo)?" But again the report contains no discussion of teardrop tattoos; and

- The Gays in the Gang study does not list the questions asked to the participants. In the body of the study Totten says questions about tattooing were included in the study, and indeed the study does discuss the tattoos of a few of the participants. But once again the study has no discussion of teardrop tattoos.

92 In summary, in two of the six studies questions about tattoos were listed; in two they were not; and two were silent about the questions asked. And no study contained any discussion of or reference to teardrop tattoos, or a list of how many participants had them. Totten said it was not unusual that his studies failed to include questions on tattoos. But again his evidence cannot be verified by a review of the studies.

93 In his 2009 judgment in *Abbey #1*, at para. 119, Doherty J.A. suggested that in assessing the reliability of an expert's opinion that relies on data collected through various means such as interviews - as Totten's opinion does - one important question to ask is whether the data are accurately recorded, stored and available. In *Gager* the Crown asked Totten essentially this very question.

94 The Crown asked Totten for a breakdown of the number of tattoos, including teardrop tattoos, in each study, for a list of the 71 male gang members who had a teardrop tattoo and for the raw data supporting her request. Totten said he did not have the data with him. However, Totten told the Crown he had "masses of data" at home, and had collected and maintained his data on teardrop tattoos. He testified: "I can give you the numbers with teardrops, with the teardrop tattoo out of those six studies". He promised to get the data and bring them to court.

95 Surprisingly, after the luncheon recess, Totten did an about-face. He told the Crown and the trial judge he had no data on teardrop tattoos as he had destroyed all of his data in accordance with the guidelines of the "tri-council ethics committee". Totten said that under these guidelines he was bound to keep his raw data for 10 years, and then destroy them. Totten was not asked and did not say when he destroyed his data, and he did not produce a copy of the committee's guidelines.

across a wide array of different laboratory and theoretical studies addressing contexts far removed from the matter at hand."

Is that correct?

DR. AMIR: Yes.

MR. RUSSELL: And at paragraph 71, you state:

"...the very literature Dr. Morwitz cites can be used to draw exactly the opposite hypothesis."

Is that correct?

DR. AMIR: Yes.

MR. RUSSELL: And you say: "Dr. Morwitz's reviewing the effects of partition pricing reveals mixed predictions about the overall impact." Is that correct?

DR. AMIR: Yes.

MR. RUSSELL: Then you say:

"...Dr. Morwitz's own work reviewing the effects of partitioned pricing yields mixed predictions about their overall impact."

Is that correct?

DR. AMIR: Yes.

MR. RUSSELL: And then:

"Other studies cited by Dr. Morwitz

smaller steps, perhaps.

So there was no empirical evidence relied upon by Dr. Morwitz with respect to her opinion on Cineplex's website.

DR. AMIR: Yes, and that's why I stated that her conclusions are, at best, hypotheses.

MR. RUSSELL: So Dr. Amir, has consumer behaviour evolved with respect to online purchasing?

DR. AMIR: Yes, I said.

MR. RUSSELL: Has it evolved even in recent years?

DR. AMIR: It has.

MR. RUSSELL: In your view, is scrolling an impediment to consumers?

DR. AMIR: No. Consumers scroll -- we have to think about this not just websites through a computer, we have to think about other devices that are growing quite fast, like Smartphones, where you have to scroll in order to do anything.

MR. RUSSELL: Sir, do you understand what researcher bias is?

DR. AMIR: Yes.

MR. RUSSELL: Could you explain it to the Tribunal, please?

DR. AMIR: Researcher bias happens when the

in ways that would be totally foreign to online purchasers in, say, 2004. Some of the studies Dr. Morwitz cites even predate the world-wide web.[79]

76. As Dr. Morwitz has found in her own academic research, marketing strategies and incentives for drip pricing or partitioned pricing vary based on industry context and norms that consumers are accustomed to.[80] Consider the study cited by Dr. Morwitz on drip pricing and partitioned pricing in hotel and resort fees.[81] Dr. Morwitz ignores all the many ways in which the hotel industry and the movie theater industry are different, and how those differences might result in different incentives for marketing. As I described previously, deceptive and hidden fees can have negative impact on firms' long-run profitability.[82] This is particularly true when repeat customers are a significant portion of a firm's customers, as is the case for movie theaters constantly attracting local consumers to see the latest movies. In contrast, resort hotels are marketing towards infrequent hotel resort consumers, making drip pricing more attractive in that context. Dr. Morwitz does not analyze how such fundamental differences across industries impact her hypotheses, let alone her findings and conclusions. As such, they are misleading when applied to Cineplex.

77. Finally, some of the studies Dr. Morwitz cites, such as those on change blindness, or those involving risk and uncertainty, are entirely removed from the matter at hand. For instance, many of the studies on change blindness do not deal with consumer purchasing or choice behavior at all, but rather study entirely unrelated concepts such as the attention paid to visual objects when presented with moving distractions in the real world. Dr. Morwitz does not credibly tie such studies to the Cineplex consumer decision-making process.

78. Dr. Morwitz could have empirically tested her hypotheses with data from actual Cineplex consumers. She does not. Dr. Morwitz could also have tested the question of whether Cineplex's presentation of pricing information "lowers consumers' perceptions of the total ticket costs" and whether consumers were ultimately "influenc[ed] [in] their choice to purchase tickets from Cineplex

[79] The world-wide web was invented in 1989 and multiple of Dr. Morwitz's cited studies predate this benchmark. "The Birth of the Web." *CERN*. <https://home.cern/science/computing/birth-web> (accessed Jan. 11, 2024); Morwitz Report Appendix D.
[80] *See* Greenleaf, Eric A., et al. "The Price Does Not Include Additional Taxes, Fees, and Surcharges: A Review of Research on Partitioned Pricing." *Journal of Consumer Psychology* 26.1 (2016): 105-124 at 119 ("Relative preferences for [partitioned pricing] versus [all-inclusive pricing] may also be affected by whether a change departs from existing practices that consumers are accustomed to. For example, surcharges are more prevalent in online purchases and catalogs (e.g., shipping and handling) and services (tips, buyer's premium), but are less prevalent in bricks and mortar settings.").
[81] Sullivan, Mary W. "Economic Analysis of Hotel Resort Fees." *Bureau of Economics, Federal Trade Commission, Economic Issues* (2017); Morwitz Report ¶¶ 68, 72.
[82] *See supra* ¶ 24.

PUBLIC

A. Mr. Eckert Fails to Adapt His Analysis To the Cineplex Consumer Flow and Fails to Consider Numerous Factors that Influence the Consumer Experience.

84. At multiple points in his report, Mr. Eckert provides reference to different website analytics, such as statistics on desktop and mobile screen resolutions and page fold,[92] and studies on user attention and the page fold.[93] However, Mr. Eckert fails to apply his descriptions of such analytics to actual Cineplex consumers.

85. As one example of this deficiency, Mr. Eckert asserts in his report that 69.33 percent of all users on the web use a "maximum screen resolution with a fixed height of up to 1,080 pixels or smaller[.]"[94] Citing the fact that the Online Booking Fee appears on the ticketing page 1,330 pixels below the top of the browser,[95] he concludes that the Online Booking Fee line item "would only be visible to the user if they chose to ignore the timer and floating call to action button and scroll down to the very bottom of the page."[96] Mr. Eckert preaches the use of analytics, but then uses none, as no claim made in these assertions is supported with data or empirical analysis. Moreover, Mr. Eckert fails a basic premise of demonstrating that his figures describe the appropriate consumer universe of Cineplex customers.

86. Mr. Eckert's approach does not consider the actual website using experience of Cineplex consumers, instead he merely cites general statistics about web users, regardless of whether they are actual Cineplex consumers or whether those same Cineplex consumers could or could not view the Online Booking Fee line item above the page fold. Mr. Eckert's approach also ignores several relevant considerations of consumers and their customized browsing experience, such as the zoom level, the font size, and browser and device selection. All of these directly impact the amount of text visible while browsing and thus impact whether the Online Booking Fee is visible above or below the fold. Moreover, these factors impact whether consumers are in the habit of scrolling down every page (such as in the case of high zoom levels, enlarged fonts, or tablet devices). Aggregate statistics on default screen resolution are thus not descriptive of the experience of actual Cineplex consumers. Mr. Eckert's conclusions based on such statistics are therefore unsupported and misleading.

87. Overall, Mr. Eckert's analyses are not validated, tested, or applied to actual Cineplex consumers. Further, Mr. Eckert offers several conclusions that are not supported by any analysis or supporting

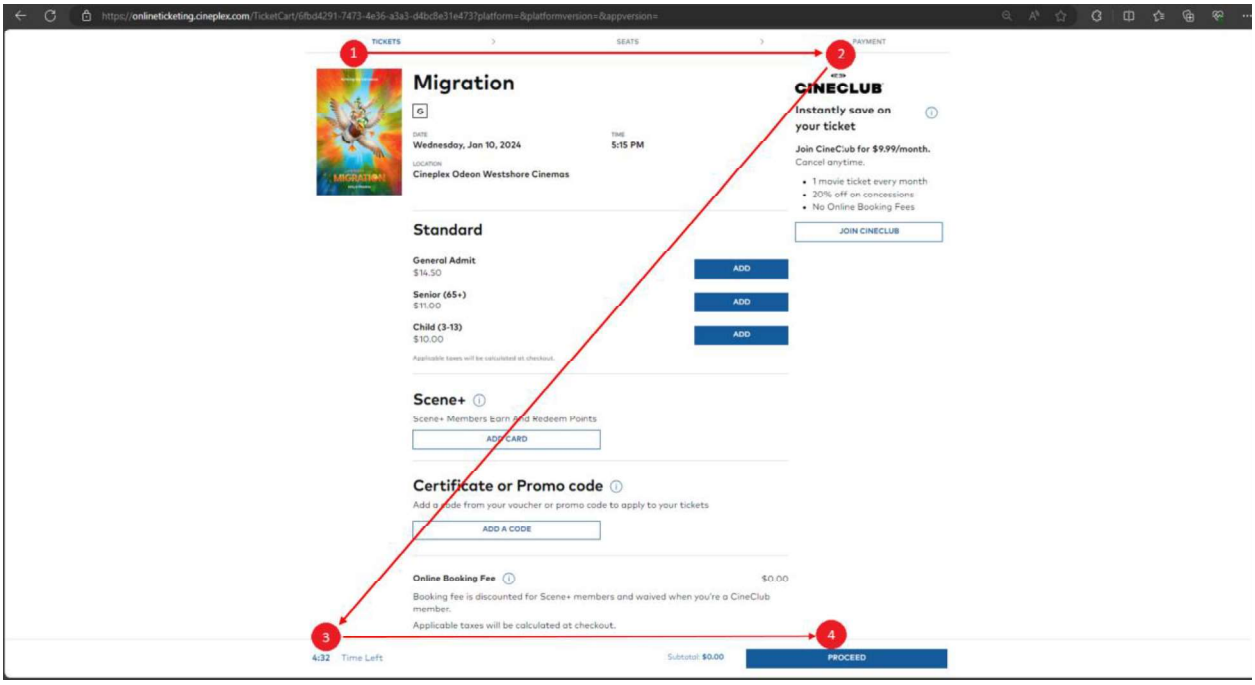
[92] Eckert Report ¶¶ 42-46.
[93] *Id.* ¶¶ 30-31, 47.
[94] *Id.* ¶ 42.
[95] *Id.* Figure 3.
[96] *Id.* ¶ 44.

metrics. For instance, Mr. Eckert claims that the layout of the Cineplex ticketing page is in a "Z Pattern" which discourages consumers from scrolling down the page.[97] While this is an interesting empirical hypothesis, Mr. Eckert does not test it at all, let alone test it on Cineplex consumers. His conclusion that consumers using the Cineplex Website were discouraged from scrolling downwards remains entirely hypothetical and thus misleading.

B. Mr. Eckert's Own Analysis of the Cineplex Ticketing Page Shows that Consumer Attention Would Be Guided Towards Indications of the Online Booking Fee.

88. Mr. Eckert presents information design about configuration patterns for web pages and opines that the Cineplex ticketing page follows a "Z Pattern" in which consumers' attention generally follows a Z shape starting in the top left of the display.[98] *See* **Figure 12**: *Mr. Eckert's Z Pattern Framework for the Cineplex Ticketing Page* for a replication of Mr. Eckert's Figure 1.

Figure 12: Mr. Eckert's Z Pattern Framework for the Cineplex Ticketing Page[99]



89. As is clear from **Figure 12**, Mr. Eckert's "Z-Pattern" actually supports the conclusion that consumers' attention is guided to the Online Booking Fee, as both the second and third element of the Z-Pattern are centered around items discussing the Online Booking Fee. I also note that, even if

[97] *Id.* ¶¶ 34, 37.
[98] *Id.* ¶¶ 33-35.
[99] "Tickets." *Cineplex*. <https://onlineticketing.cineplex.com/TicketCart/6fbd4291-7473-4e36-a3a3-d4bc8e31e473?platform=&platformversion=&appversion=> (accessed Jan. 3, 2024); Eckert Report Figure 1.

paragraph. I do discuss moderators as I continue this discussion.

MR. RUSSELL: We are going to go through that. But on this report, that's a conclusion that you draw from that report. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: Is it not true there were mixed results in your study?

DR. MORWITZ: Yeah. So the magnitude of the effect depends on whether the surcharge is a dollar -- presented as a dollar or as a percent. The impact on purchase intentions depends on the consumer's attitude towards the product.

MR. RUSSELL: Right. And you didn't point out those mixed results in your report yourself, did you?

(Short pause / Courte pause)

DR. MORWITZ: No, not here.

MR. RUSSELL: In paragraph 65, if I could ask you to turn to paragraph 65. You're referring to the Abraham and Hamilton study. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: That's the study that you rely upon in giving your opinion. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And you say:

PUBLIC

71. Moreover, the very literature Dr. Morwitz cites can be used to draw exactly the opposite hypotheses. For example, the academic literature on time pressure points to a potential decrease in purchase likelihood under time pressure conditions,[70] and Dr. Morwitz's own work reviewing the effects of partitioned prices yields mixed predictions about their overall impact.[71] Other studies cited by Dr. Morwitz also state that partitioned prices have ambiguous impacts on consumers. For instance, one study that presented a meta-analysis of the partitioned price literature concluded that "[e]vidence of the impact of partitioned pricing is contradictory[,]" and that it might have "divergent effects" on consumers.[72] Further, that same study found that including the total price—just like the Cineplex Consumer Flow does—lowered the impact of partitioned pricing.[73] I additionally note, contrary to these studies of partitioned prices, the Cineplex Consumer Flow includes both a partitioned price and a non-partitioned, all-inclusive price to its consumers.

72. A critical flaw in Dr. Morwitz's analysis is the lack of any direct empirical support for her conclusions. The Morwitz Report attempts to make up for the lack of any direct empirical support by borrowing from other published studies. There are numerous reasons to predict that these studies would not apply universally, let alone to the matter at hand. For one, Dr. Morwitz has not discussed or tested the external validity of her cited studies, where external validity refers to whether the results from a given research study can be applied to a given situation or population other than that originally studied. The external validity of a study is crucial in evaluating the applicability of those results to real world contexts. Dr. Morwitz has not analyzed the similarities between her studies' conditions and the purchasing of Cineplex movie tickets to determine whether it is appropriate to apply conclusions from those studies to Cineplex.

73. There are common-sense reasons to expect that many of her cited papers either do not apply or would not generalize to the matter at hand. Her discussion of behavioral economic concepts such as framing effects, reference points, loss aversion, the endowment effect, status quo bias, and anchoring

[70] Dhar, Ravi and Stephen M. Nowlis. "The Effect of Time Pressure on Consumer Choice Deferral." *Journal of Consumer Research* 25.4 (1999): 369-384.
[71] *See* Greenleaf, Eric A., et al. "The Price Does Not Include Additional Taxes, Fees, and Surcharges: A Review of Research on Partitioned Pricing." *Journal of Consumer Psychology* 26.1 (2016): 105-124 at 111 ("The impact of [partitioned pricing] depends on several moderators. Two key moderators are the surcharge magnitude and ease of processing."), 112 ("Characteristics of consumers can also moderate the impact of [partitioned pricing]. … participants with moderately favorable attitudes towards brands process surcharges more accurately than those with relatively low, or high, brand attitudes. More general consumer characteristics such as need for cognition and regulatory focus also moderate reactions to [partitioned pricing.]").
[72] Abraham, Ajay T. and Rebecca W. Hamilton. "When Does Partitioned Pricing Lead to More Favorable Consumer Preferences?: Meta-Analytic Evidence." *Journal of Marketing Research* 55.5 (2018): 686-703 at 686.
[73] *Id*.

DR. MORWITZ: Yes. If you look at Appendix C --

MR. RUSSELL: It's in the appendix?

DR. MORWITZ: Appendix C discusses some of the moderators.

MR. RUSSELL: I'm actually -- now you're going to the appendix with the various academic references. Correct? That's where you are, in Appendix D?

DR. MORWITZ: Yes.

MR. RUSSELL: I'm asking in the body of your report, in your opinion that you're providing to this Tribunal, did you ever say there were mixed results?

DR. MORWITZ: In the body, no. I summarized the results on average, the preponderance of evidence in the results, and then I went into the details in the appendix.

MR. RUSSELL: So you understand the word "objectivity" when you're providing something to a Tribunal or a Court. Correct? You went over your Affidavit with Mr. Hood?

DR. MORWITZ: Yes.

MR. RUSSELL: As counsel, even though I'm an advocate, I have to show a level of objectivity. If there was cases against me, cases for me, I point them out and I distinguish the ones that don't help me. But to be

out where you told this Tribunal in your first report that there were mixed results. As I read your report, you gave a very definitive opinion.

DR. MORWITZ: I mean, in this whole section I discuss some of these studies have moderators which shows that the effects vary across different conditions. So I'm discussing that. You asked whether I comment, and I do comment on each article.

MR. RUSSELL: I'm talking about pointing out mixed results to the opinion you gave earlier, but we'll come to the moderating effects. I have gone through many of these articles. I going to spend a little bit of time going through them with you today, and we're going to talk about the moderating effects and how they might apply to the opinion you're giving about Cineplex's website. Because that's what's important.

It's not that you list a number of articles for this Tribunal. You're here to give an opinion. Any lawyer could provide a list of academic studies, but you were here to provide an expert opinion. That's what my friend Mr. Hood is qualifying you to do. And you do give an opinion. But when you give the opinion on the impact of partition pricing, you don't say mixed results. That's clear.

When you give your opinion, you don't say there are mixed results, do you? Your opinion is in the body of

your report, not in your bibliography?

DR. MORWITZ: I don't use the words "mixed results", no.

MR. RUSSELL: Thank you. Now, just to be clear, and we can go to what you were asked to do, and I don't want to be unfair to you. You were asked to look at Cineplex pricing; correct?

DR. MORWITZ: Correct.

MR. RUSSELL: You weren't asked to give an opinion on whether or not it breached the drip pricing provision under the *Canadian Competition Act*, were you?

DR. MORWITZ: No.

MR. RUSSELL: And you never gave an opinion on that, did you?

DR. MORWITZ: No.

MR. RUSSELL: Whenever you were -- Mr. Hood was examining you, he referred to my opening and you made the point that there's a temporal component to the definition in the academic literature. Correct?

DR. MORWITZ: In the academic literature, yes.

MR. RUSSELL: Yes. And currently the FTC is considering a rule. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: It hasn't finalized it yet, has it?

DR. MORWITZ: No. As I said before, I discuss some moderators in the appendix but --

MR. RUSSELL: My point is you didn't put it into the body when you're discussing the very point about partition pricing. You give a very firm conclusion. You didn't alert this Tribunal to the fact that a study that you refer to 20 years later was showing positive and negative effects and that moderators were important to consider. You didn't tell the Tribunal that when you were referring to your conclusion, did you?

DR. MORWITZ: No.

MR. RUSSELL: Now, I'm going to ask you about the same document -- just one second. I'll get the page reference I need to go to here for the Registrar. Page 105. This is the appendix to the articles that you refer to in your opinion. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And I'd like you to look at item number 20, which is on page 106.

That's the study by Dr. Hussain and Dr. Morgan. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: For the life of me -- and I've done this many times -- I can't find where you refer to the study at all in the body of your report.

conclusion. You don't go on to say there were mixed results, do you?

DR. MORWITZ: No, I don't.

MR. RUSSELL: Page 8 of that report. It might not be the same page.

--- Pause

MR. RUSSELL: Under the heading "Conclusion" if you could just scroll down, Madam Registrar. Just under "Conclusion".

Do you see that, Dr. Morwitz?

DR. MORWITZ: The paragraph "Conclusion"?

MR. RUSSELL: Yes.

DR. MORWITZ: Yes.

MR. RUSSELL: Very first sentence says:

> "While sellers often shroud their shipping charges in online auctions, our findings suggest that the profitability of this strategy depends on the size of the charge." (as read)

That's what it says; correct?

DR. MORWITZ: That's what it says.

MR. RUSSELL: Did you ever tell this Tribunal in the body of your report that the size of the charge was material to the issue that you were opining on?

DR. MORWITZ: I hadn't read this paper when -- I wasn't aware of this paper.

MR. RUSSELL: So the answer is no, you didn't tell the Tribunal that.

DR. MORWITZ: No.

MR. RUSSELL: So when you said you did a careful review of the literature, you hadn't read this paper.

DR. MORWITZ: No.

MR. RUSSELL: So in your examination in-chief this morning, Mr. Hood took you to the paragraph of your report at the beginning and your qualifications -- let me just get you there.

P-A-11.

And if I could ask you to turn to paragraph 7. And this is the paragraph that talks about, first of all, publications, and then you go on to say in the second sentence at the bottom there, "I provided expert testimony in four U.S. cases", and then you list them; correct?

DR. MORWITZ: That's correct.

MR. RUSSELL: And what you said this morning is in describing three of them, as I understood it, *Fleetcor* was about price representations?

DR. MORWITZ: Yes.

MR. RUSSELL: *Bennett* was about nursing home

website was to determine whether I believe that these representations map onto partition pricing, drip pricing, and price obfuscation. Given that, the impact on price perceptions and consumer behaviour are drawn from the academic literature of those topics.

MR. RUSSELL: Are you familiar with the phrase "researcher's subjectivity"?

DR. MORWITZ: Yes.

MR. RUSSELL: What is that? Explain it for the Tribunal.

DR. MORWITZ: So a researcher may have some degrees of freedom in how they set up an experiment, or do something, or do some analysis, and that could possibly, in some cases, lead to a certain result that the researcher would like to see.

MR. RUSSELL: So let me see just -- let me put it to you. So I was a researcher, a medical researcher, before I went to law school, in cystic fibrosis. One of the things I had to watch out for, I was looking for a certain outcome in the experiments I did, and I had to be careful about researcher subjectivity, because I might be looking for what I want to find. Is that not what one of the meanings of that means?

DR. MORWITZ: Yes.

MR. RUSSELL: I might see what I want to find.

DR. MORWITZ: Yes.

MR. RUSSELL: And your conclusions at paragraph 3 are essentially threefold. If I could ask you to turn to paragraph 3.

No, it's 14. I'm sorry; 14. I apologize. This is the Summary of Conclusions.

Oh, sorry. I thought we were still on it.

THE REGISTRAR: Is that good?

MR. RUSSELL: Yeah.

And that's paragraph 14 again?

So just to summarize essentially three conclusions, you tell me if I'm wrong, you conclude that Cineplex uses partition pricing; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: You conclude that Cineplex uses drip pricing; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And you conclude that on Cineplex's ticket page, the OBF is a shrouded attribute; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: Those are the three conclusions.

DR. MORWITZ: Those are the three conclusions under 14, yes.

MR. RUSSELL: And those conclusions are based

and (v) stakes of the experiment.[27] They conclude that "great caution is required when attempting to generalize lab results out of sample: both to other populations and to other situations."[28] To the contrary, Dr. Morwitz is not cautious in her blind application of the academic literature, most of which includes laboratory experiments, to the specific context of consumers facing the Cineplex Consumer Flow.

19. Dr. Morwitz could have easily undertaken an empirical investigation designed to properly evaluate the hypothesis of whether the Online Booking Fee was misleading to Cineplex consumers. One way to empirically investigate this question would have been to run a consumer survey, in which a large enough sample of Website or Mobile App Canadian Cineplex consumers were recruited to purchase tickets via engaging with the Cineplex Consumer Flow. After that engagement, members of the survey sample could be asked a set of questions about whether they discerned the Online Booking Fee or whether they were surprised about the application of the Online Booking Fee. Finally, a statistical analysis could have been performed on those survey responses to empirically quantify the hypothesis that the Online Booking Fee was misleading. Dr. Morwitz did none of these steps.[29]

20. Dr. Morwitz does make one empirical investigation into actual Cineplex consumers by evaluating a Reddit internet forum thread in which several users complain about the Online Booking Fee.[30] As I discuss further below, these complaints are about the existence and size of the Online Booking Fee, *not* that the Online Booking Fee is deceptive. Moreover, the discussion of the Online Booking Fee on a widely used internet forum such as Reddit might indicate that information about the Online Booking Fee was widely spread and available to consumers.

IV. DR. MORWITZ OFFERS A SINGLE VIEWPOINT THAT IS LIKELY BIASED.

21. In both the Morwitz Report and the Morwitz Reply Report, Dr. Morwitz's claim that Cineplex used partitioned and drip pricing exclusively relies on her own personal experience browsing the Cineplex Website and interacting with the Cineplex Consumer Flow. By relying exclusively on her own personal interaction with the Website, Dr. Morwitz's approach is biased due to factors including her

---

[27] *Id.*
[28] *Id.*
[29] I note that this is one of many possible empirical analyses that could have been undertaken in analyzing whether the Online Booking Fee is misleading to consumers. Some other possible analyses include an analysis of complaints (as I reported in the Amir Report) or a difference-in-difference regression analysis that analyzed consumer demand and willingness-to-pay before and after the introduction of the Online Booking Fee.
[30] Morwitz Reply Report n. 7.

own personal role as an advocate for tightened drip pricing regulations, knowledge of the hypotheses under study, and several others.

22. Dr. Morwitz claims that her sample of one review of the webpage does not reflect "something idiosyncratic to [her] own method of searching."[31] This is incorrect and is *exactly* why empirical analysis is needed. Dr. Morwitz ignores that there are many possible external variables that might have impacted her review, even without her knowing, on that particular day. Those external factors include her personal approach to scrolling on websites, her personal norms and expectations around website design, general mood and environment, and other biases. These factors could affect her consumer experience above and beyond the idiosyncratic factor of screen settings such as zoom, which Dr. Morwitz herself acknowledges can matter.[32]

23. One crucial bias that Dr. Morwitz ignores is her role as advocate for stronger laws and rules against drip pricing. As she herself describes, she was an active participant in a White House National Economic Council panel whose intentional design was to "discuss the economic case in support of the [Biden] Administration's efforts to crack down on junk fees."[33] Among those proposals, the FTC has begun a process to introduce a rule that appears similar to the one at issue in this Matter that "would give the FTC additional information and enforcement tools to take action and seek penalties against companies adopting unfair and deceptive junk fees."[34] According to the FTC, it proposed addressing the practices of "misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the total cost of any good or service for sale" and "misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the existence of any fees, interest, charges, or other costs that are not reasonably avoidable for any good or service," among other practices.[35] Despite Dr. Morwitz highlighting her

---

[31] *Id.* ¶ 35.
[32] *Id.* ¶ 35.
[33] "Readout of White House Panel on the Economic Case for the President's Initiative on Junk Fees." *Whitehouse.gov* (Mar. 21, 2023). <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/21/readout-of-white-house-panel-on-the-economic-case-for-the-presidents-initiative-on-junk-fees> (accessed Jan. 31, 2024).
[34] "The President's Initiative on Junk Fees and Related Pricing Practices." *Whitehouse.gov* (Oct. 26, 2022). <https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices> (accessed Jan. 31, 2024).
[35] Federal Trade Commission, 16 CFR Part 464, Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011, 87.215 Fed. Reg. 67413-24 (Nov. 8, 2022) at 67416.

active role as a contributor to policies regulating hidden fees, she does not consider that such a role could very well lead to biases (even if unconsciously) in her evaluation of the Cineplex Website.[36]

24. Another crucial bias that Dr. Morwitz ignores is that of a researcher participating in her own research. It is well understood that researchers should collect data that is uncontaminated by participant knowledge of the research hypotheses, as doing otherwise could lead to subjects behaving differently than they would have had they not known about the study's goals.[37] Such reasoning is why it is common for researchers to employ methods such as "double blinding" to account for potential biases, in which participants are unaware of the hypotheses to be tested and of the treatment and control conditions.[38] In relying solely on the single data point of her own experience, Dr. Morwitz's approach violates this fundamental principle of sound research design.

V. DR. MORWITZ AND MR. ECKERT AGREE WITH SEVERAL OF MY CONCLUSIONS.

25. Throughout the Morwitz and Eckert Reply Reports, both Dr. Morwitz and Mr. Eckert agree with several of the conclusions I presented in the Amir Report. I briefly list and discuss these in this section.

26. For one, Dr. Morwitz acknowledges that the academic literature she cites in general, and on partitioned pricing specifically, yields ambiguous and disparate effects depending on setting and specific pricing designs.[39] Further, she acknowledges that those studies refer to contexts different than the online movie purchasing experience.[40]

27. Dr. Morwitz again cites several academic studies that report ambiguous effects of drip pricing and partitioned pricing, alongside influences that moderate the impact of those practices on consumer

---

[36] Indeed, nowhere in the Morwitz Report or the Morwitz Reply Report does Dr. Morwitz attempt to assist or attempt to assist the reader in showing how, from a scientific perspective, the presentation of the ticket price and the Online Booking Fee relate to the FTC's proposed rule. *See id.*
[37] Giannelli, Paul C., et al. "Reference Guide on Forensic Identification Expertise." *Reference Manual on Scientific Evidence, 3rd ed.* Washington, DC: The National Academies Press (2011): 55-128 at 68, quoting Redmayne, Mike. *Expert Evidence and Criminal Justice*. Oxford University Press (2001) ("To the extent that we are aware of our vulnerability to bias, we may be able to control it. In fact, a feature of good scientific practice is the institution of processes—such as blind testing, the use of precise measurements, standardized procedures, statistical analysis—that control for bias.").
[38] Dr. Shari Diamond defines double-blind research to be "research in which the respondent and the interviewer are not given information that will alert them to the anticipated or preferred pattern of response." Diamond, Shari Seidman. "Reference Guide on Survey Research." *Reference Manual on Scientific Evidence, 3rd ed.* Washington, DC: The National Academies Press (2011): 359-424 at 419.
[39] Morwitz Reply Report ¶¶ 47, 49-50.
[40] *Id.* ¶ 53.

Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And then you say, "Based on my review of Cineplex's website"; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: So that's the study, along with the academic research. The two things that you're telling this Tribunal you did is I studied this website and I looked at the academic research and I provided an opinion.

DR. MORWITZ: Yes. And the app.

MR. RUSSELL: And the app. Sorry. I didn't mean to exclude that.

And you've said already you didn't do any experiments, you didn't do any surveys.

DR. MORWITZ: No.

MR. RUSSELL: Were you asked to do any?

DR. MORWITZ: No.

MR. RUSSELL: Could you have done an experiment or a study?

DR. MORWITZ: There, yes.

MR. RUSSELL: You could have; correct? You could have designed a study, an empirical study, of Cineplex's website and user experience, could you not?

DR. MORWITZ: One could.

MR. RUSSELL: You're one of the experts. You

could do it. That's all I'm asking.

DR. MORWITZ: Yes.

MR. RUSSELL: But you weren't asked to do it.

DR. MORWITZ: No.

MR. RUSSELL: So it would be equivalent to an economist appearing before this Tribunal to give views on academic literature without doing any econometric studies; correct?

DR. MORWITZ: Could you repeat that, please?

MR. RUSSELL: It would be equivalent -- we have economists testify in this Tribunal quite regularly. It would be equivalent for them to come and give an opinion to this Tribunal based on academic literature without doing any econometric studies, no surveys, no econometrics, no regression analysis. They would be coming and simply giving their opinion based on academic literature; correct?

DR. MORWITZ: That sounds similar, yes.

MR. RUSSELL: Now, when you examined the website -- and the fact that you're charged with giving an objective opinion to this Tribunal, I mean, you're the witness for the Tribunal, not for an advocate. The same as Dr. Amir is not my expert. He is the Tribunal's expert. I put him forward. You understand that's the role; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: So you understood that you should

PUBLIC

VII. RESPONSE TO THE MORWITZ REPORT

57. In the Morwitz Report, Dr. Vicki Morwitz presents her opinions to the following questions:

- "How does the manner of presenting pricing information by merchants impact consumers? In particular, how does "drip pricing" (or similar pricing practices) affect consumers in terms of 1) their perception of the price to be paid for a given product, and 2) their behaviour?"[50]
- "What impacts could Cineplex's representations with respect to the sale of movie tickets on its Website and in the App be expected to have on consumers': a) perception on the price to be paid for motive tickets; and b) behaviour, including purchasing decisions?"[51]

58. Dr. Morwitz opines that Cineplex "uses partitioned and drip pricing when it charges customers an additional online booking fee" and that the Online Booking Fee is a "shrouded attribute," which she contends is when "firms make it difficult to find or process, or obfuscate product-related information from its customers."[52] Dr. Morwitz additionally opines that the Online Booking Fee "likely lowered consumers' perceptions of the total cost of purchasing tickets from Cineplex[.]"[53]

59. In support of these conclusions, Dr. Morwitz references and summarizes literatures on behavioral economics, behavioral pricing, and information processing (including information salience, change blindness, and time pressure, among other things).[54] She opines that the findings from her selected studies show that Cineplex's presentation of the Online Booking Fee is misleading in that it would have caused consumers to underestimate the price they actually paid for movie tickets.[55]

60. However, Dr. Morwitz's analysis of consumer behavior in general, and drip pricing, shrouded attributes, and partitioned pricing specifically are misapplied to Cineplex and its Consumer Flow. Among other flaws, Dr. Morwitz ignores the simple fact that Cineplex's presentation of pricing is *not* drip pricing as is defined within the academic literature (including Dr. Morwitz's own definition as used in her policy work),[56] as both the base ticket price and the Online Booking Fee are presented simultaneously to consumers. Critically, while much of Dr. Morwitz's report consists of summarizing insights from behavioral economics literatures that are far removed from the context of

[50] Morwitz Report Appendix B.
[51] *Id.*
[52] *Id.* ¶ 14.
[53] *Id.* ¶ 15.
[54] *Id.* Section 4.1.
[55] *Id.*
[56] Morwitz, Vicki G. "Vicki Morowitz Remarks for the White House Convening on the Economic Case for Junk Fee Policies." *Whitehouse.gov* (Mar. 21, 2023). <https://www.whitehouse.gov/wp-content/uploads/2023/03/Vicki-Morwitz-remarks.pdf> (accessed Jan. 11, 2024).

the matter at hand and how they *might* apply to the Cineplex Website and Mobile App, she fails to conduct or report any empirical analysis to support or validate those hypotheses.

A. Dr. Morwitz Fails to Show that the Cineplex Consumer Flow Involves Drip Pricing, Obscured Pricing, or Shrouded Attributes.

61. Throughout her report, Dr. Morwitz presents a summary of several strands of literature in behavioral economics, including discussing multiple articles and studies relating to the effects of drip pricing and obscured pricing on consumer behavior.[57] She also discusses the concept of shrouded attributes.[58] While I take no issue with her survey of that literature, I note that Dr. Morwitz is incorrect that any of that literature's notions of drip pricing, obscured pricing, or shrouded attributes applies to the matter at hand. As I discussed above,[59] the base ticket price and Online Booking Fee are presented to consumers *simultaneously* in the Cineplex Consumer Flow. This simple fact renders all of Dr. Morwitz's discussion of these topics irrelevant.

62. To the contrary, Dr. Morwitz states:

> Cineplex's pricing practice on the Tickets page of its website and app are examples of partitioned pricing and drip pricing as the terms are understood in the academic literature. … It is a form of drip pricing because the amount to be charged for the online booking fee is not presented when the ticket price is first presented, but is only revealed after consumers select a type of ticket. The online booking fee meets the definition of a shrouded attribute because information about it is not made salient on the Cineplex website or in the app.[60]

63. Dr. Morwitz does not support or elaborate upon these assertions, and she does not point to any literature or data analysis that might justify this conclusion.[61] Dr. Morwitz has not performed any analysis showing the definitions of drip pricing or shrouded attributes in her cited academic literature (rather than her own interpretation) and comparing these to the Cineplex Consumer Flow.[62]

---

[57] Morwitz Report Section 4.1.2.
[58] *Id.* ¶ 67.
[59] *See supra* Section VI.A.
[60] Morwitz Report ¶ 146.
[61] In fact, Dr. Morwitz includes no citations whatsoever throughout her entire analysis section on the "[i]mpact of Cineplex's representations." *See* Morwitz Report Section 4.2.2.
[62] In fact, Dr. Morwitz only cites one study related to "shrouded attributes," and this study deals solely with a theoretical model in which a shrouded attribute is one defined as "a product attribute that is hidden by a firm, even though the attribute could be nearly costlessly revealed." Gabaix, Xavier and David Laibson. "Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets." *The Quarterly Journal of Economics* 121.2 (2006): 505-540 at 512. As I discussed in Section VI.A, the Online Booking Fee is not hidden or omitted by Cineplex; it is in fact published on the ticketing page.

MR. RUSSELL: Sir, in your witness statement, you refer to countdown timers. Correct?

MR. McGRATH: That's correct.

MR. RUSSELL: Do you understand the Commissioner has raised issues with respect to the timers?

MR. McGRATH: I do understand that, yes.

MR. RUSSELL: What is the purpose of the countdown timer from Cineplex's perspective?

MR. McGRATH: So there's a number of different countdown timers to refer to here. There's -- you know, the fact that you start with a countdown timer on the first page. There's actually countdown timers on every page through the process. The countdown timer is reset every time you move from one page to the next, and in fact, you would have -- so we start at five minutes.

If you were to take the total amount of time that's available on the countdown timers, it actually adds up to 30 minutes of total timers that are available, and the average transaction from our analytics is only three minutes. So when people -- it varies whether you're on a website or on the app, so it's somewhere between two and four depending on the device you're using. But let's say on average it's three minutes. So we actually provide a total of 30 minutes of time that's available in those various timers, but it's only three minutes that's the

MR. RUSSELL: Sir, in your witness statement, you refer to countdown timers. Correct?

MR. McGRATH: That's correct.

MR. RUSSELL: Do you understand the Commissioner has raised issues with respect to the timers?

MR. McGRATH: I do understand that, yes.

MR. RUSSELL: What is the purpose of the countdown timer from Cineplex's perspective?

MR. McGRATH: So there's a number of different countdown timers to refer to here. There's -- you know, the fact that you start with a countdown timer on the first page. There's actually countdown timers on every page through the process. The countdown timer is reset every time you move from one page to the next, and in fact, you would have -- so we start at five minutes.

If you were to take the total amount of time that's available on the countdown timers, it actually adds up to 30 minutes of total timers that are available, and the average transaction from our analytics is only three minutes. So when people -- it varies whether you're on a website or on the app, so it's somewhere between two and four depending on the device you're using. But let's say on average it's three minutes. So we actually provide a total of 30 minutes of time that's available in those various timers, but it's only three minutes that's the

correct?

MR. McGRATH: At that ticket price, yes.

MR. RUSSELL: And are they attainable at that price at that theatre?

MR. McGRATH: Yes, they are.

MR. RUSSELL: And sir, upon the selection of at least one ticket, is an online price then shown?

MR. McGRATH: Yes. As soon as you select a ticket, then instantaneously, we update the total price that's right beside the "Proceed" button. And then what we also do at the same time is we immediately show the online booking fee in a separate category as well, just above that.

MR. RUSSELL: So to deal with the temporal component here, as you click or after you click the ticket selection, does the price show up?

MR. McGRATH: Immediately upon clicking. It's exactly the same time. As soon as you make a selection, the total is updated with the price that includes the ticket price plus the online booking fee, and the online booking fee line is immediately populated as well.

MR. RUSSELL: So you said exactly at the time you push at least one ticket, the price is immediately shown, and I'm using your words, at the same time.

MR. McGRATH: That's correct.

platform and instead purchasing the ticket at the theatre. Even if the consumer does click on the "ⓘ" button, at this point, the text does not explicitly say that this fee will be added to all orders once tickets are selected.

4.2.1.3.3 Top of the Tickets page with tickets selected

131. In this next section, I scroll back to the top of the screen on both devices. To learn the total price for the purchase, consumers need to select how many tickets of each type they want to purchase. I next added two general admit tickets (listed as being priced at $14.00 each) and two child tickets (listed as being priced at $11.00 each) as shown in Figures 18 (for the website) and 19 (for the app) below.

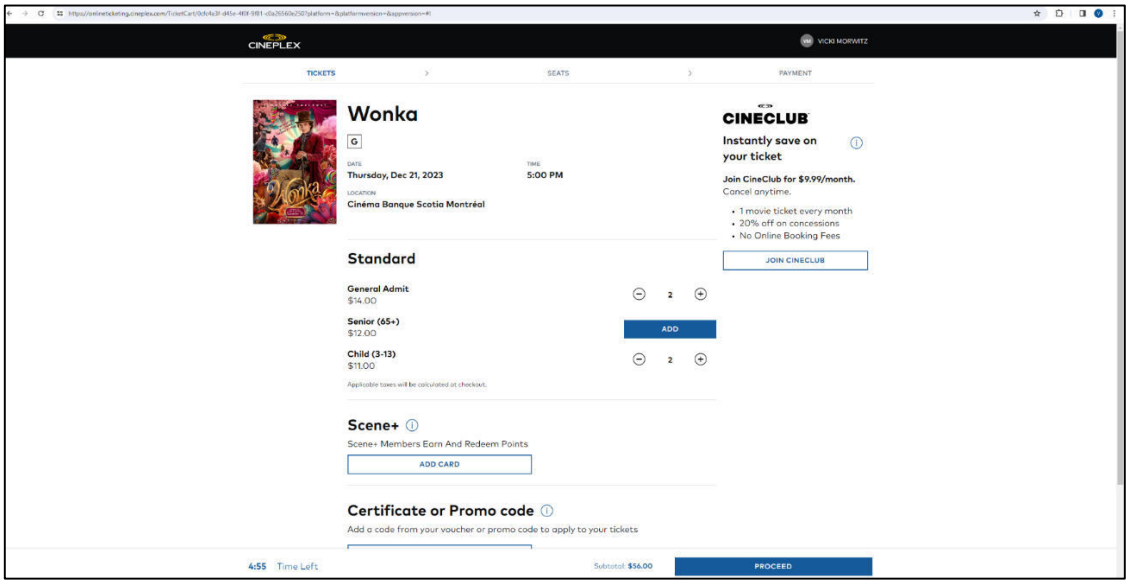


Figure 17 – Website – tickets page, with tickets selected

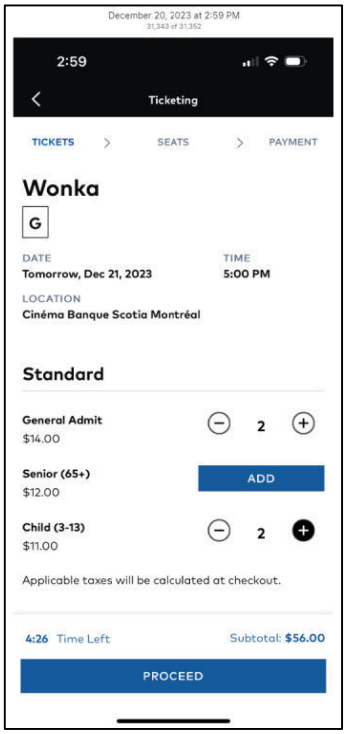


Figure 18 – App – tickets page, with tickets selected

132. At the bottom of both screens in Figures 18 (for the website) and 19 (for the app) above, in the floating ribbon, in small print in a different color font (blue) from the advertised ticket prices, is a subtotal of $56.00. A consumer would have to use a calculator or do mental math to figure out that this subtotal of $56.00 is greater than the listed price for 2 general admit and 2 child tickets, which would be $50.00 (($14.00 x 2) + ($11.00 x 2)). This subtotal is 12 percent higher than the sum of the listed ticket prices for the selected tickets ($56.00 - $50.00/$50.00) yet at this stage, no information is offered for why this sub-total is higher.

133. Since consumers have no reason to expect the total to be greater than the sum of the tickets, they may not pay much attention to this subtotal and because of change blindness, and because all but one digit of total prices excluding and including the additional online booking fees are the same, they might not notice that this displayed subtotal is more than the total of the selected tickets. The floating ribbon at bottom of the screen contains a

prominent blue PROCEED button which consumers can click on to proceed to the next stage of the purchase process.

134. This means consumers can easily move on without realizing that online booking fees were added, without viewing information about online booking fees, shown lower on the page, and without realizing that the subtotal is greater than the sum of the listed prices for their tickets. The presence of the countdown clock would likely increase the chances that consumers would move on to the next page since they did not have much time left to complete their transaction.

4.2.1.3.4 Bottom of the Tickets page with tickets selected

135. In this next section, I scroll to the bottom of the Tickets page to analyze the information consumers are presented with after they have selected tickets, seen only should they choose to scroll to the bottom of the page before clicking on the PROCEED button in the floating ribbon. These screen captures are shown below in Figures 20 (for the website) and 21 (for the app). For consumers who do scroll down, they would next see the same Scene+ and Certificate or Promo code sections described above, with no changes to what I described in paragraphs 122 and 123 above.

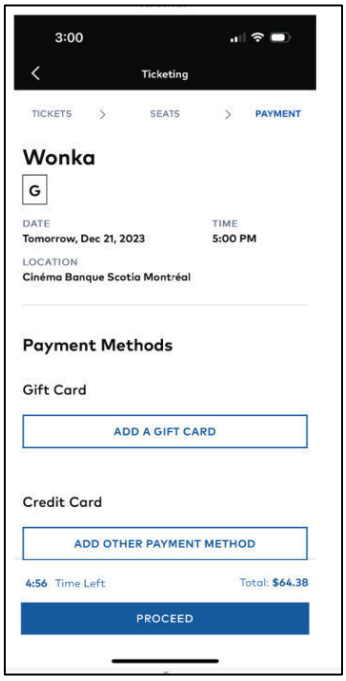


Figure 33 – App – Payment Options page

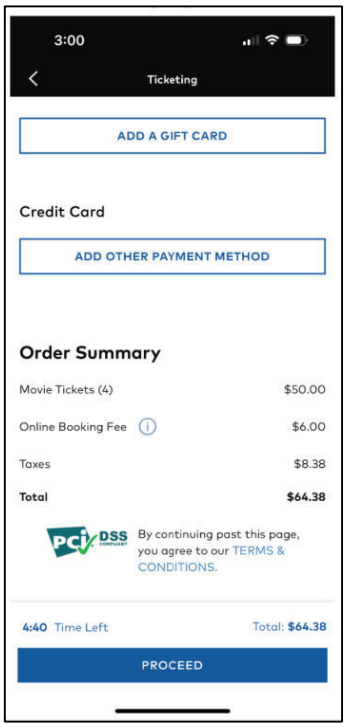


Figure 34 – App – Payment Options page, after scrolling

141. As can be seen in Figures 32 and 33 for the website and Figure 35 for the app, this page breaks down the total price of $64.38 into the price for four

tickets ($50.00), the total for the online booking fee ($6.00), and taxes ($8.38). I also note that for consumers viewing this on the app, they can only see this breakdown if they scroll to the bottom of the Payment Options page, otherwise they only see the total price as shown in Figure 34. Although this breakdown is provided (including the online booking fee and tax), this happens at a later stage in the purchase process and past research has shown that when fees are dripped, consumers are unlikely to restart their search or make another choice, even when shown a total that is more expensive than first expected. Also because of the presence of the countdown clock and the associated sense of time pressure, and because of change blindness, consumers might not even notice that the total price is higher than initially advertised or expected. If a consumer did carefully examine this page, they would notice that the reason why the price increased from $56.00 to $64.38 on the Seat Selection page, is because taxes were added to the total at that stage.

142. The order summary does not provide information about the per ticket amount of the online booking fee or how many tickets were charged an online booking fee. While consumers could obtain that information if they clicked on the "ⓘ" button next to the online booking fee label, for all the reasons stated above related to this button on prior pages, they may not.

143. Below, Figure 36 shows a screen capture of what is shown when a consumer clicks on the "ⓘ" button next to the online booking fee label on the website, and Figure 37 shows what happens when the same is done on the app.

prices listed, because additional online booking fees would later be added to these prices.

118. One difference between the website Tickets page and the app Tickets page is that on the website in the upper right corner of this screen is information about CineClub. Consumers are informed that for a $9.99 monthly charge they receive one ticket every month, a 20 percent discount on concessions, and that there are no online booking fees. This disclosure does not provide consumers with full information about online booking fees, as it does not explain what they are, nor does it explain what they cost, nor when they are charged. Also, consumers may ignore this section of the web page if they are not interested in joining the CineClub.

119. On my view of the website before scrolling to the bottom part of the page (as shown in Figure 8), but not on the app, I also see a section with the header “Scene+” and the upper portion of a section with the header “Certificate or Promo code.” Since I can only see those two sections and the section below that after scrolling on the app, I discuss these two sections in the “Bottom of the Tickets page first view” section of this report.

120. On the bottom of this first screen in both versions of the Tickets page is a ‘floating ribbon.’ On the left side of the floating ribbon is a countdown clock informing consumers how much time they have left to make their purchase decision (Note that several times during my search the countdown clock reached zero and I had to restart my search. For that reason, the times shown as remaining on the countdown clocks in the screen captures below are not always in decreasing order.). To the right of the countdown clock is a “Subtotal,” which is set to $0.00 before any tickets are added. To the right of that on the website, and below that on the app, is a PROCEED button in a blue box which consumers can click on to proceed to the next stage of the purchase process after they have selected at least one ticket to purchase. Regardless of how far down the page I scroll, the floating ribbon always remains anchored at the bottom of my screen.

stage, since no tickets were selected, the box states that “0 Tickets x $1.50 = $0.00”. The current total for the online booking fee of $0.00 is in bold font.

126. Since consumers are not required to click on this button, and since doing so involves another step of the purchase process, in my opinion this makes the online booking fee a shrouded attribute.

127. I then closed that box and returned to the screen shown in Figures 10 (for the website) and 11 (for the app) above this one, which consumers would see at the bottom of the Tickets page.

128. To the right of the “Online Booking Fee” header is a price of “$0.00” which suggests that for this current offering there is no online booking fee. Below the header is a statement that “Booking fee is discounted for Scene+ members and waived when you’re a CineClub member.” No mention is made on this page (unless the consumer clicks on the “ⓘ” button next to the header for this section) about the amount of the online booking fee nor the amount of the discount on that fee for Scene+ members. Below that, in the same section is the statement “Applicable taxes will be calculated at checkout.”

129. Regardless of whether the consumer scrolls to the bottom of the webpage, the floating ribbon with the timer, a subtotal set at this point to $0.00, and a blue PROCEED button consumers can click on to proceed to the next step of the purchase process once they have selected a ticket remains at the bottom of the screen.

130. Nowhere on this screen (unless the consumer clicks on the “ⓘ” next to the “Online Booking Fee” header) is there any indication that an online booking fee will be added to the orders of all customers who do not belong to the CineClub, nor is any information provided about what will be the amount of the online booking fee. In addition, no information is provided to inform consumers that the online booking fee can be avoided by leaving the online

platform and instead purchasing the ticket at the theatre. Even if the consumer does click on the "ⓘ" button, at this point, the text does not explicitly say that this fee will be added to all orders once tickets are selected.

4.2.1.3.3 Top of the Tickets page with tickets selected

131. In this next section, I scroll back to the top of the screen on both devices. To learn the total price for the purchase, consumers need to select how many tickets of each type they want to purchase. I next added two general admit tickets (listed as being priced at $14.00 each) and two child tickets (listed as being priced at $11.00 each) as shown in Figures 18 (for the website) and 19 (for the app) below.

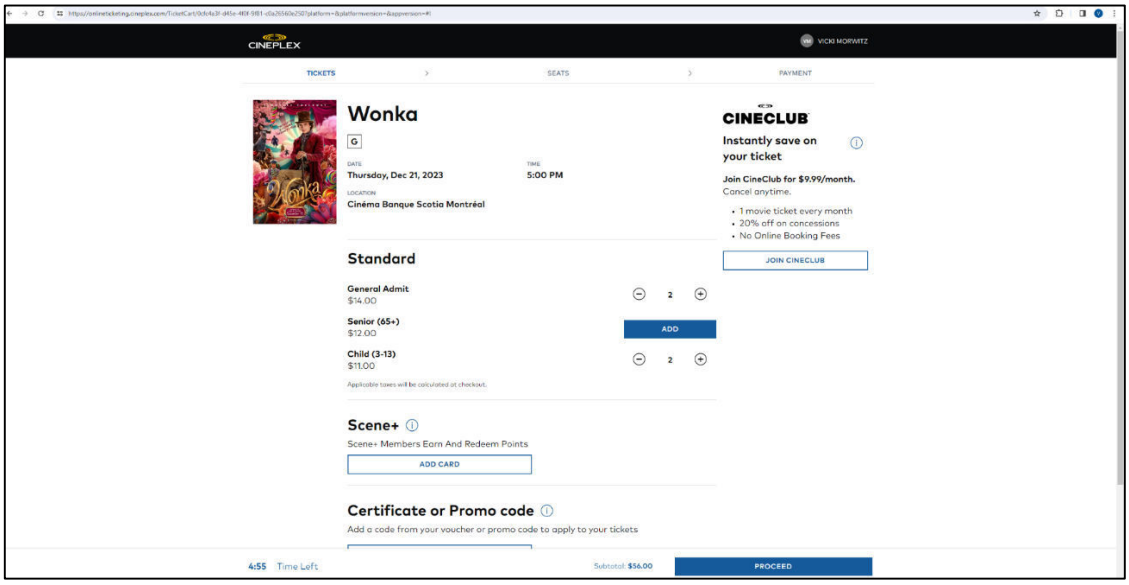


Figure 17 – Website – tickets page, with tickets selected

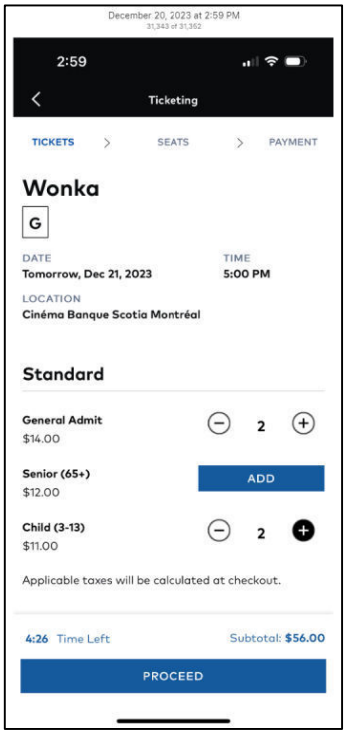


Figure 18 – App – tickets page, with tickets selected

132. At the bottom of both screens in Figures 18 (for the website) and 19 (for the app) above, in the floating ribbon, in small print in a different color font (blue) from the advertised ticket prices, is a subtotal of $56.00. A consumer would have to use a calculator or do mental math to figure out that this subtotal of $56.00 is greater than the listed price for 2 general admit and 2 child tickets, which would be $50.00 (($14.00 x 2) + ($11.00 x 2)). This subtotal is 12 percent higher than the sum of the listed ticket prices for the selected tickets ($56.00 - $50.00/$50.00) yet at this stage, no information is offered for why this sub-total is higher.

133. Since consumers have no reason to expect the total to be greater than the sum of the tickets, they may not pay much attention to this subtotal and because of change blindness, and because all but one digit of total prices excluding and including the additional online booking fees are the same, they might not notice that this displayed subtotal is more than the total of the selected tickets. The floating ribbon at bottom of the screen contains a

prominent blue PROCEED button which consumers can click on to proceed to the next stage of the purchase process.

134. This means consumers can easily move on without realizing that online booking fees were added, without viewing information about online booking fees, shown lower on the page, and without realizing that the subtotal is greater than the sum of the listed prices for their tickets. The presence of the countdown clock would likely increase the chances that consumers would move on to the next page since they did not have much time left to complete their transaction.

4.2.1.3.4 Bottom of the Tickets page with tickets selected

135. In this next section, I scroll to the bottom of the Tickets page to analyze the information consumers are presented with after they have selected tickets, seen only should they choose to scroll to the bottom of the page before clicking on the PROCEED button in the floating ribbon. These screen captures are shown below in Figures 20 (for the website) and 21 (for the app). For consumers who do scroll down, they would next see the same Scene+ and Certificate or Promo code sections described above, with no changes to what I described in paragraphs 122 and 123 above.

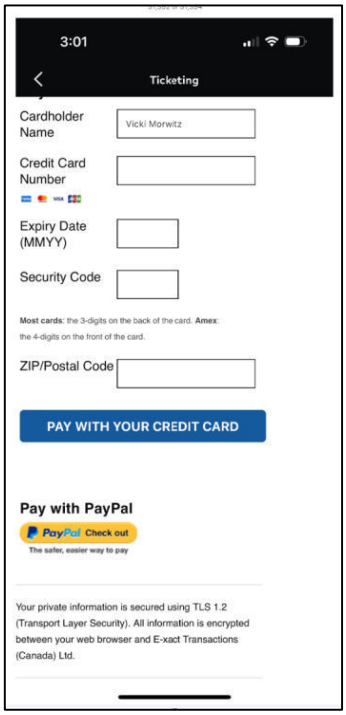


Figure 40 – App – Payment page, after scrolling

4.2.2 Impact of Cineplex's representations with respect to the sale of tickets

145. In my opinion, Cineplex's representations of ticket prices including its decision to separate the online booking fee from those ticket prices lowers consumers' perceptions of the total ticket costs, ultimately influencing their choice to purchase tickets from Cineplex online over alternative options.

146. Cineplex's pricing practice on the Tickets page of its website and app are examples of partitioned pricing and drip pricing as the terms are understood in the academic literature. It is a form of partitioned pricing because the online booking fee is presented separately from the advertised price of the ticket. It is a form of drip pricing because the amount to be charged for the online booking fee is not presented when the ticket price is first presented, but is only revealed after consumers select a type of ticket. The online booking fee meets the definition of a shrouded attribute because

simultaneously up front, and in the same stage (even on the same page where prices are first displayed). The Cineplex Consumer Flow therefore falls outside the generally accepted academic literature's definition of drip pricing, including, most notably, Dr. Morwitz's own definition of drip pricing.

B. Dr. Morwitz Fails to Empirically Test or Otherwise Support Her Various Theoretical Hypotheses.

67. Throughout her report, Dr. Morwitz discusses economic literature and theories that constitute hypotheses about how the world *might* work, yet she fails to provide any empirical support or otherwise validate the applicability of these hypotheses to the Cineplex Consumer Flow. Instead, Dr. Morwitz simply applies the conclusions from her cited studies to this Matter without analyzing whether it is appropriate to apply such conclusions and without performing her own analysis of Cineplex consumers specifically.

68. As an example of this approach, Dr. Morwitz states:

> In my opinion, Cineplex's representations of ticket prices including its decision to separate the online booking fee from those ticket prices lowers consumers' perceptions of the total ticket costs, ultimately influencing their choice to purchase tickets from Cineplex online over alternative options.[68]

69. Similarly, she opines:

> In addition, my opinion is that Cineplex's pricing representations, combined with vague representations about the online booking fee and the presence of countdown clocks, leads consumers to underestimate the total cost of purchasing tickets. Consumers tend to focus primarily on the initially advertised price, neglecting additional fees or the disclosure of total online booking fees and the order's subtotal. This phenomenon is further exacerbated by the time pressure associated with countdown clocks, which enhances anchoring and primacy effects.[69]

70. These statements are not supported by any empirical analysis of Cineplex pricing or consumer behavior. Simply put, these assertions have not been tested. Instead, Dr. Morwitz merely assumes that she can apply to the Cineplex Consumer Flow findings made across a wide array of different laboratory and theoretical studies addressing contexts far removed from the matter at hand.

[68] Morwitz Report ¶ 145.
[69] *Id.* ¶ 149.

PUBLIC

71. Moreover, the very literature Dr. Morwitz cites can be used to draw exactly the opposite hypotheses. For example, the academic literature on time pressure points to a potential decrease in purchase likelihood under time pressure conditions,[70] and Dr. Morwitz's own work reviewing the effects of partitioned prices yields mixed predictions about their overall impact.[71] Other studies cited by Dr. Morwitz also state that partitioned prices have ambiguous impacts on consumers. For instance, one study that presented a meta-analysis of the partitioned price literature concluded that "[e]vidence of the impact of partitioned pricing is contradictory[,]" and that it might have "divergent effects" on consumers.[72] Further, that same study found that including the total price—just like the Cineplex Consumer Flow does—lowered the impact of partitioned pricing.[73] I additionally note, contrary to these studies of partitioned prices, the Cineplex Consumer Flow includes both a partitioned price and a non-partitioned, all-inclusive price to its consumers.

72. A critical flaw in Dr. Morwitz's analysis is the lack of any direct empirical support for her conclusions. The Morwitz Report attempts to make up for the lack of any direct empirical support by borrowing from other published studies. There are numerous reasons to predict that these studies would not apply universally, let alone to the matter at hand. For one, Dr. Morwitz has not discussed or tested the external validity of her cited studies, where external validity refers to whether the results from a given research study can be applied to a given situation or population other than that originally studied. The external validity of a study is crucial in evaluating the applicability of those results to real world contexts. Dr. Morwitz has not analyzed the similarities between her studies' conditions and the purchasing of Cineplex movie tickets to determine whether it is appropriate to apply conclusions from those studies to Cineplex.

73. There are common-sense reasons to expect that many of her cited papers either do not apply or would not generalize to the matter at hand. Her discussion of behavioral economic concepts such as framing effects, reference points, loss aversion, the endowment effect, status quo bias, and anchoring

[70] Dhar, Ravi and Stephen M. Nowlis. "The Effect of Time Pressure on Consumer Choice Deferral." *Journal of Consumer Research* 25.4 (1999): 369-384.
[71] *See* Greenleaf, Eric A., et al. "The Price Does Not Include Additional Taxes, Fees, and Surcharges: A Review of Research on Partitioned Pricing." *Journal of Consumer Psychology* 26.1 (2016): 105-124 at 111 ("The impact of [partitioned pricing] depends on several moderators. Two key moderators are the surcharge magnitude and ease of processing."), 112 ("Characteristics of consumers can also moderate the impact of [partitioned pricing]. … participants with moderately favorable attitudes towards brands process surcharges more accurately than those with relatively low, or high, brand attitudes. More general consumer characteristics such as need for cognition and regulatory focus also moderate reactions to [partitioned pricing.]").
[72] Abraham, Ajay T. and Rebecca W. Hamilton. "When Does Partitioned Pricing Lead to More Favorable Consumer Preferences?: Meta-Analytic Evidence." *Journal of Marketing Research* 55.5 (2018): 686-703 at 686.
[73] *Id*.

deals with pricing situations that generally bear little to no resemblance to Cineplex's Consumer Flow. Of her cited research, only one study is related to online ticket purchasing behavior and found that consumers respond to observing the full purchase price, inclusive of fees, for online sports and concert ticket purchasing if it is presented at the same time as the initial ticket selection. [74] As I described above, this is exactly what Cineplex does in its Consumer Flow. None of Dr Morwitz's cited research is related to movie ticket purchasing. It is well understood that ignoring the appropriate consumer universe is considered a fatal flaw. As noted by Shari Seidman in her treatise Reference Guide on Survey Research, "[a] survey that provides information about a wholly irrelevant population is itself irrelevant."[75]

74. Moreover, most of the work Dr. Morwitz cites dates from years or decades ago,[76] from a time before current norms and consumer expectations around online purchasing flows and pricing structures were formed. Norms and consumer experience shape consumer expectations and change over time and determine what information and purchase flows consumers expect. Indeed, Dr. Morwitz herself has acknowledged this change in norms, stating that "it can be argued that for most online shopping, as well as many important purchases such as cellular phone services, cable television, and travel, [partitioned pricing] is now the norm[.]"[77] These changing norms likely explain why Cineplex consumers do not seem to have issues with the structure of the Cineplex Consumer Flow and Online Booking Fee as evidenced by the lack of complaints.[78]

75. Specifically, many of the studies Dr. Morwitz cites were published more than a decade ago and are unlikely to reflect current consumer norms and expectations for, or behavior in, online purchases. For instance, current consumers are well versed in online purchasing, app navigation, and scrolling

[74] Blake, Tom, et al. "Price Salience and Product Choice." *Marketing Science* 40.4 (2021): 619-636. As I described above, this is exactly what Cineplex does in its Consumer Flow.
[75] Diamond, Shari Seidman. "Reference Guide on Survey Research." *Reference Manual on Scientific Evidence, 3rd ed*. Washington, DC: The National Academies Press (2011): 359-424 at 377. Dr. Diamond also states that: "The definition of the relevant population is crucial because there may be systematic differences in the responses of members of the population and nonmembers."; and "If the relevant subset cannot be identified, however, an overbroad sampling frame will reduce the value of the survey." *Id.* at 377, 379.
[76] *See, e.g.*, Morwitz Report n. 2, 4, 6, 12, 13, 17, 19, 21, 23, 27, 35, 46, 47, 49, 61, 62, 64 (referencing studies or books from 1990 or before).
[77] Greenleaf, Eric A., et al. "The Price Does Not Include Additional Taxes, Fees, and Surcharges: A Review of Research on Partitioned Pricing." *Journal of Consumer Psychology* 26.1 (2016): 105-124 at 107.
[78] *See supra* Section V.C.

PUBLIC

in ways that would be totally foreign to online purchasers in, say, 2004. Some of the studies Dr. Morwitz cites even predate the world-wide web.[79]

76. As Dr. Morwitz has found in her own academic research, marketing strategies and incentives for drip pricing or partitioned pricing vary based on industry context and norms that consumers are accustomed to.[80] Consider the study cited by Dr. Morwitz on drip pricing and partitioned pricing in hotel and resort fees.[81] Dr. Morwitz ignores all the many ways in which the hotel industry and the movie theater industry are different, and how those differences might result in different incentives for marketing. As I described previously, deceptive and hidden fees can have negative impact on firms' long-run profitability.[82] This is particularly true when repeat customers are a significant portion of a firm's customers, as is the case for movie theaters constantly attracting local consumers to see the latest movies. In contrast, resort hotels are marketing towards infrequent hotel resort consumers, making drip pricing more attractive in that context. Dr. Morwitz does not analyze how such fundamental differences across industries impact her hypotheses, let alone her findings and conclusions. As such, they are misleading when applied to Cineplex.

77. Finally, some of the studies Dr. Morwitz cites, such as those on change blindness, or those involving risk and uncertainty, are entirely removed from the matter at hand. For instance, many of the studies on change blindness do not deal with consumer purchasing or choice behavior at all, but rather study entirely unrelated concepts such as the attention paid to visual objects when presented with moving distractions in the real world. Dr. Morwitz does not credibly tie such studies to the Cineplex consumer decision-making process.

78. Dr. Morwitz could have empirically tested her hypotheses with data from actual Cineplex consumers. She does not. Dr. Morwitz could also have tested the question of whether Cineplex's presentation of pricing information "lowers consumers' perceptions of the total ticket costs" and whether consumers were ultimately "influenc[ed] [in] their choice to purchase tickets from Cineplex

[79] The world-wide web was invented in 1989 and multiple of Dr. Morwitz's cited studies predate this benchmark. "The Birth of the Web." *CERN*. <https://home.cern/science/computing/birth-web> (accessed Jan. 11, 2024); Morwitz Report Appendix D.
[80] *See* Greenleaf, Eric A., et al. "The Price Does Not Include Additional Taxes, Fees, and Surcharges: A Review of Research on Partitioned Pricing." *Journal of Consumer Psychology* 26.1 (2016): 105-124 at 119 ("Relative preferences for [partitioned pricing] versus [all-inclusive pricing] may also be affected by whether a change departs from existing practices that consumers are accustomed to. For example, surcharges are more prevalent in online purchases and catalogs (e.g., shipping and handling) and services (tips, buyer's premium), but are less prevalent in bricks and mortar settings.").
[81] Sullivan, Mary W. "Economic Analysis of Hotel Resort Fees." *Bureau of Economics, Federal Trade Commission, Economic Issues* (2017); Morwitz Report ¶¶ 68, 72.
[82] *See supra* ¶ 24.

PUBLIC

online over alternative options."[83] Again, she does not. Likewise, Dr. Morwitz could have tested or somehow supported the hypothesis that "Cineplex's pricing representations, combined with vague representations about the online booking fee and the presence of countdown clocks, leads consumers to underestimate the total cost of purchasing tickets."[84] She does not. Dr. Morwitz's analysis is not helpful in determining the effect of Cineplex's pricing or countdown clock presentation because it is purely suppositive and theoretical.

79. In contrast, I found that, empirically, consumers behaved in a fashion consistent with information-gathering and that they were unimpacted by the Online Booking Fee. As I described above in Section VI.B over 88 percent of Cineplex Website visitors use the Cineplex Website as an information-gathering tool at no cost, where these consumers do not ever see the price or Online Booking Fee charged by Cineplex. My opinion that the Online Booking fee provides value to consumers is supported by both broadly applicable economic tenets as well as an empirical analysis of seat reservation behavior. Similarly, I found that, empirically, there were no complaints produced by the Commissioner regarding the Online Booking Fee prior to the Application in this Matter, which supports the conclusion that consumers did not view the Online Booking Fee as deceptive or misleading. As noted before, there are seven complaints produced by the Commissioner in this Matter, all dated after the issuance of the Notice of Application, representing 0.0000072 percent of visits to the Cineplex Consumer Flow.

80. Finally, I note that Dr. Morwitz ignores the importance and value of non-price information to consumers. Throughout her report, Dr. Morwitz highlights, almost exclusively, information on prices and fees, and indeed seems to believe that the sole goal of consumers visiting Cineplex's Website or Mobile App is their "initial intent to purchase tickets."[85] This is a false premise, as there are numerous reasons why consumers would visit Cineplex's Website, the most important being: seeing what movies are currently showing, at what theaters they are showing, available viewing experiences, and seat availability, in addition to the desire to actively purchase a ticket with a guaranteed seat reservation attached to it.

[83] Morwitz Report ¶ 145.
[84] *Id.* ¶ 149.
[85] *Id.* ¶ 150.

and (v) stakes of the experiment.[27] They conclude that "great caution is required when attempting to generalize lab results out of sample: both to other populations and to other situations."[28] To the contrary, Dr. Morwitz is not cautious in her blind application of the academic literature, most of which includes laboratory experiments, to the specific context of consumers facing the Cineplex Consumer Flow.

19. Dr. Morwitz could have easily undertaken an empirical investigation designed to properly evaluate the hypothesis of whether the Online Booking Fee was misleading to Cineplex consumers. One way to empirically investigate this question would have been to run a consumer survey, in which a large enough sample of Website or Mobile App Canadian Cineplex consumers were recruited to purchase tickets via engaging with the Cineplex Consumer Flow. After that engagement, members of the survey sample could be asked a set of questions about whether they discerned the Online Booking Fee or whether they were surprised about the application of the Online Booking Fee. Finally, a statistical analysis could have been performed on those survey responses to empirically quantify the hypothesis that the Online Booking Fee was misleading. Dr. Morwitz did none of these steps.[29]

20. Dr. Morwitz does make one empirical investigation into actual Cineplex consumers by evaluating a Reddit internet forum thread in which several users complain about the Online Booking Fee.[30] As I discuss further below, these complaints are about the existence and size of the Online Booking Fee, *not* that the Online Booking Fee is deceptive. Moreover, the discussion of the Online Booking Fee on a widely used internet forum such as Reddit might indicate that information about the Online Booking Fee was widely spread and available to consumers.

IV. DR. MORWITZ OFFERS A SINGLE VIEWPOINT THAT IS LIKELY BIASED.

21. In both the Morwitz Report and the Morwitz Reply Report, Dr. Morwitz's claim that Cineplex used partitioned and drip pricing exclusively relies on her own personal experience browsing the Cineplex Website and interacting with the Cineplex Consumer Flow. By relying exclusively on her own personal interaction with the Website, Dr. Morwitz's approach is biased due to factors including her

---

[27] *Id.*
[28] *Id.*
[29] I note that this is one of many possible empirical analyses that could have been undertaken in analyzing whether the Online Booking Fee is misleading to consumers. Some other possible analyses include an analysis of complaints (as I reported in the Amir Report) or a difference-in-difference regression analysis that analyzed consumer demand and willingness-to-pay before and after the introduction of the Online Booking Fee.
[30] Morwitz Reply Report n. 7.

own personal role as an advocate for tightened drip pricing regulations, knowledge of the hypotheses under study, and several others.

22. Dr. Morwitz claims that her sample of one review of the webpage does not reflect "something idiosyncratic to [her] own method of searching."[31] This is incorrect and is *exactly* why empirical analysis is needed. Dr. Morwitz ignores that there are many possible external variables that might have impacted her review, even without her knowing, on that particular day. Those external factors include her personal approach to scrolling on websites, her personal norms and expectations around website design, general mood and environment, and other biases. These factors could affect her consumer experience above and beyond the idiosyncratic factor of screen settings such as zoom, which Dr. Morwitz herself acknowledges can matter.[32]

23. One crucial bias that Dr. Morwitz ignores is her role as advocate for stronger laws and rules against drip pricing. As she herself describes, she was an active participant in a White House National Economic Council panel whose intentional design was to "discuss the economic case in support of the [Biden] Administration's efforts to crack down on junk fees."[33] Among those proposals, the FTC has begun a process to introduce a rule that appears similar to the one at issue in this Matter that "would give the FTC additional information and enforcement tools to take action and seek penalties against companies adopting unfair and deceptive junk fees."[34] According to the FTC, it proposed addressing the practices of "misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the total cost of any good or service for sale" and "misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the existence of any fees, interest, charges, or other costs that are not reasonably avoidable for any good or service," among other practices.[35] Despite Dr. Morwitz highlighting her

---

[31] *Id.* ¶ 35.
[32] *Id.* ¶ 35.
[33] "Readout of White House Panel on the Economic Case for the President's Initiative on Junk Fees." *Whitehouse.gov* (Mar. 21, 2023). <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/21/readout-of-white-house-panel-on-the-economic-case-for-the-presidents-initiative-on-junk-fees> (accessed Jan. 31, 2024).
[34] "The President's Initiative on Junk Fees and Related Pricing Practices." *Whitehouse.gov* (Oct. 26, 2022). <https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices> (accessed Jan. 31, 2024).
[35] Federal Trade Commission, 16 CFR Part 464, Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011, 87.215 Fed. Reg. 67413-24 (Nov. 8, 2022) at 67416.

looked at whether people scroll below floating controls, and they do.

MR. HOOD: You don't mention any of this in your report, do you?

DR. AMIR: No, because my assignment here was to respond to the two expert reports that were provided. To do that, I describe just the whole process so I have a backdrop from which to draw on of what the consumer purchase funnel looks like, and then I move to two particular points with data that we talked about, one is the reservations and the second one is the complaints, and then I moved to respond directly to all the claims made by Dr. Morwitz and Mr. Eckert.

MR. HOOD: You understand Mr. Eckert describes the concept of a false floor. Correct?

DR. AMIR: Mr. Eckert describes the pattern Z which was found by the research, by the way, not by designers, that followed eye-tracking of how people read the stage. And actually, I agree with Mr. Eckert, the Z is important and I show why it is important for the page.

MR. HOOD: The Z is a completely separate issue that Mr. Eckert testifies. Mr. Eckert also testifies to the concept of false floors. Correct?

DR. AMIR: I mean Mr. Eckert calls it a false floor. I call it a floating control, which is what

Bureau; (iii) the Cineplex Consumer Flow clearly shows the Online Booking Fee and allows consumers to self-sort between differently priced ticketing options, enhancing welfare; and (iv) Dr. Morwitz and Mr. Eckert's conclusions are not empirically tested or validated, rendering them unreliable and without a scientific basis.

III. DR. MORWITZ STILL HAS NOT EMPIRICALLY TESTED OR VALIDATED HER HYPOTHESES.

6. Dr. Morwitz still has not empirically tested or validated her various hypotheses. As a result, they remain entirely hypothetical conjectures. Instead of scientifically validating her hypotheses in the Morwitz Reply Report, Dr. Morwitz instead again summarizes various hypotheses from the academic literature and purports to apply those hypotheses to her personal anecdote of browsing the Cineplex Website.

7. As a threshold matter, it is simply unscientific for Dr. Morwitz to claim that "it was unnecessary to empirically test my hypotheses."[3] Without empirical testing, hypotheses remain just that – hypotheticals. For centuries, the foundation of the scientific method has been to generate hypotheses and empirically test those hypotheses.[4] Dr. Morwitz's contention that her hypotheses can be applied, *regardless of the empirical facts*, is simply unscientific.

8. Dr. Morwitz's approach in this Matter stands in contrast to her academic research. For instance, in her published research on partitioned pricing, Dr. Morwitz and coauthors explicitly follow this scientific approach by first "develop[ing] hypotheses of how consumers react to partitioned prices" and next "test[ing] these hypotheses in two experiments."[5] Similarly, in research on drip pricing, Dr. Morwitz and her coauthors present no less than six separate studies to "test … [their] predictions."[6] Dr. Morwitz's failure to follow this approach in evaluating the Cineplex Consumer Flow leaves her simply with a set of hypotheses, as opposed to scientific conclusions.

9. Dr. Morwitz simply asserts that Cineplex practices drip pricing because her personal browsing of the Cineplex Website revealed that result to her.[7] But, as I detailed in the Amir Report, the presentation of the Online Booking Fee is not consistent, from a scientific perspective, with drip pricing,[8] as

---

[3] Morwitz Reply Report Section VI.
[4] "1.3 The Economists' Tool Kit." *Principles of Economics*. University of Minnesota (2016).
[5] Morwitz, Vicki G., Eric A. Greenleaf, and Eric. J. Johnson. "Divide and Prosper: Consumers' Reactions to Partitioned Prices." *Journal of Marketing Research* 25.4 (1998): 453-463 at 454.
[6] Santana, Shelle, Steven K. Dallas, and Vicki G. Morwitz. "Consumer Reactions to Drip Pricing." *Marketing Science* 39.1 (2020): 188-210.
[7] Morwitz Reply Report ¶ 33.
[8] Amir Report ¶ 60.

defined in subsection 74.01(1.1) of the Competition Act,[9] the proposed FTC rule,[10] or her own definition of that practice, as both the ticket price and the Online Booking Fee are presented simultaneously to consumers. Dr. Morwitz ignores relevant information, including that the ticket price inclusive of the Online Booking Fee is displayed instantly on the bottom floating display when consumers add tickets to their cart, regardless of screen resolution. When consumers click the "Proceed" button, the all-inclusive price is visible next to it, unless the consumer has not added tickets, in which case she cannot proceed to the next page.

10. Both Dr. Morwitz and Mr. Eckert ignore a fundamental feature of the online purchasing process. The CTA "Proceed" button will not permit the consumer to enter into the online purchasing process until at least one ticket type is selected on the ticketing page. This is important because it forces the consumer to see the total online price (excluding taxes) before the consumer can proceed to the next steps in the Consumer Flow. As I noted in my report, the total online price (excluding taxes) is displayed prominently immediately beside the "Proceed" button. This is key to understanding the Consumer Flow because much of the analysis of both Dr. Morwitz and Mr. Eckert focuses on placement of information on the ticketing page, yet they fail to note this important feature. Further, they fail to provide any empirical evidence, or even any literature review, that examines consumer behavior with respect to this lockout feature.

11. Dr. Morwitz's personal anecdote about browsing the website remains just that, an anecdote. She admits she did no data analysis.[11] Simply "observ[ing] the practice"[12] is not sufficient for scientific findings. In statistical parlance, she has an N of 1 and an undefined standard deviation.[13] One cannot test empirical hypotheses with such a sample.[14]

12. Instead of performing an empirical analysis, Dr. Morowitz just reasserts her hypotheses presented in the Morwitz Report. For instance, she claims with no citations or support that information about the

---

[9] *Competition Act*, R.S.C. 1985, c. C-34, s 74.01(1.1). Indeed, nowhere in the Morwitz Report or the Morwitz Reply Report does Dr. Morwitz assist or attempt to assist the reader in showing how, from a scientific perspective, the presentation of the ticket price and the Online Booking Fee relate to the language of subsection 74.01(1.1) of the Competition Act.

[10] Federal Trade Commission, 16 CFR Part 464, Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011, 87.215 Fed. Reg. 67413-24 (Nov. 8, 2022) at 67416. *See also infra* ¶ 23.

[11] Morwitz Reply Report ¶ 31.

[12] *Id.* ¶ 31.

[13] "Standard Deviation." *National Library of Medicine*. <https://www.nlm.nih.gov/oet/ed/stats/02-900.html> (accessed Jan. 31, 2024).

[14] A commonly used "rule-of-thumb" in statistical testing is a sample size of at least "25 or 30" for a sufficiently large sample. *See, e.g.*, Hogg, Robert V., Elliot A. Tanis, and Dale L. Zimmerman. *Probability and Statistical Inference, 9th ed.* Upper Saddle River, New Jersey: Pearson (2015) at 202.

Online Booking Fee is not presented clearly because the dollar amount of the Online Booking Fee only shows once tickets are added to the consumer's cart and because some consumers may have to scroll to view the Online Booking Fee line item.[15] She does not test, however, whether consumers were actually misled or confused by the structure of the Website, or whether consumers had to scroll or not.

13. Further, her unsupported assertions ignore that the total amount of the Online Booking Fee depends on the number of tickets added, and, as such, the price and amount of the Online Booking Fee shows immediately after it can be calculated, which is when consumers have added the desired number of tickets into their cart.[16] As I discussed in my opening report, this is an efficient and streamlined design.[17] Moreover, ticket pricing information is never presented on a page that does not inform consumers that the Online Booking Fee exists and will be applied to qualifying transactions. Dr. Morwitz also ignores that the Online Booking Fee is incorporated into the subtotal, giving the consumer an accurate, all-inclusive price on which to base her decision, regardless of scrolling behavior.

14. Similarly, Dr. Morwitz's unsupported assertion that the CineClub advertisement and Scene+ information on the Website ticketing page is not "enough to inform consumers regarding the presence and amount of the online booking fee"[18] is a testable hypothesis. Dr. Morwitz's personal opinion and "disagree[ment]"[19] on this matter is insufficient to determine whether, empirically, consumers were misled about the Online Booking Fee despite these visual cues.

15. Other instances of simply asserting conclusions without empirical investigation abound. For instance, Dr. Morwitz claims that the Online Booking Fee represents "price obfuscation" or a "shrouded attribute" "that makes it more difficult for consumers to notice or understand" relevant information,[20] without analyzing or quantifying whether actual consumers faced additional difficulties in noticing or understanding relevant information due to the Online Booking Fee.

16. Another example is Dr. Morwitz's claims regarding the timer displayed in the Cineplex Consumer Flow, which she claims creates a time pressure that "serve[d] to enhance the effects of partitioned

---

[15] Morwitz Reply Report ¶¶ 7-12.
[16] I also note that Dr. Morwitz incorrectly states incorrectly that I referenced Figure 4 of my opening report as the point when the dollar amount of the Online Booking Fee first appears. In fact, I referenced Figure 5 as that point. Morwitz Reply Report ¶¶ 7-8; Amir Report ¶ 31.
[17] Amir Report Section V.C.
[18] Morwitz Reply Report ¶ 13.
[19] *Id.* ¶ 13.
[20] *Id.* ¶ 34.

and drip pricing[.]"[21] Dr. Morwitz's claim that the Cineplex Consumer Flow resulted in consumers facing time pressure is simply irrelevant for the question at hand of whether the Online Booking Fee is drip pricing or not. Moreover, this is yet another instance where Dr. Morwitz attempts to draw hypotheses from distant academic literature without providing any empirical support. As I noted in my report, research on time limits in other domains may lead to conflicting predictions.[22] The impact of the presented timer on consumer behavior during the Cineplex Consumer Flow is an empirical question. Dr. Morwitz did not study, quantify, or analyze how any consumers responded to the timer.

17. In her claims regarding time pressure, Dr. Morwitz also failed to incorporate the fact that there are actually multiple timers that appear during the Cineplex Consumer Flow (as I noted in my report).[23] For instance, there is a five-minute timer that appears when a consumer arrives at the ticketing page. While on the ticketing page, that timer can be reset for what appears to be indefinitely. Further, a new five-minute timer appears after the consumer has selected one or more tickets and elected to "Proceed" to the seat selection page. Dr. Morwitz does not analyze the impact of the existence of these multiple timers, or the fact that each individual timer can be reset, on her conclusions.[24]

18. What Dr. Morwitz ignores in her application of the academic literature to the context of Cineplex's Online Booking Fee is particularly troubling because a large number of the studies she cites are based on laboratory observation, not the outside world.[25] As Drs. Steven Levitt and John List have explained, "human behavior may be sensitive to a variety of factors that systematically vary between the lab and the outside world."[26] As they explain, behavior in the lab is based not just on monetary factors, but at least five additional factors: (i) moral and ethical considerations; (ii) scrutiny of one's actions by others; (iii) context in which the decision is made; (iv) self-selection of decision-makers;

---

[21] *Id.* ¶¶ 102, 136, 149; *see also id.* ¶ 47.
[22] Amir Report ¶ 71.
[23] *Id.* ¶ 19.
[24] In her description of her engagement with the Cineplex Consumer Flow, Dr. Morwitz appears to have chosen not to reset the timer (ignoring the pop-up request), instead allowing the timer to expire, forcing her to restart her search. Morwitz Report ¶ 120 ("[S]everal times during my search the countdown clock reached zero and I had to restart my search.").
[25] *See, e.g.*, Dhar, Ravi, and Stephen M. Nowlis. "The Effect of Time Pressure on Consumer Choice Deferral." *Journal of Consumer Research* 25.4 (1999): 369-384; Xia, Lan, and Kent B. Monroe. "Price Partitioning on the Internet." *Journal of Interactive Marketing* 18.4 (2004): 63-73; Morwitz, Vicki G., Eric A. Greenleaf, and Eric. J. Johnson. "Divide and Prosper: Consumers' Reactions to Partitioned Prices." *Journal of Marketing Research* 25.4 (1998): 453-463; Payne, John W., James R. Bettman, and Eric J. Johnson. "Adaptive Strategy Selection in Decision Making." *Journal of Experimental Psychology: Learning, Memory, and Cognition* 14.3 (1988): 534-552; Rasch, Alexander, Miriam Thöne, and Tobias Wenzel. "Drip Pricing and its Regulation: Experimental Evidence." *Journal of Economic Behavior & Organization* 176 (2020): 353-370; Santana, Shelle, Steven K. Dallas, and Vicki G. Morwitz. "Consumer Reactions to Drip Pricing." *Marketing Science* 39.1 (2020): 188-210.
[26] Levitt, Steven D. and John A. List. "What Do Laboratory Experiments Measuring Social Preferences Reveal About the Real World?" *Journal of Economic Perspectives* 21.2 (2007): 153-174 at 154.

and (v) stakes of the experiment.[27] They conclude that "great caution is required when attempting to generalize lab results out of sample: both to other populations and to other situations."[28] To the contrary, Dr. Morwitz is not cautious in her blind application of the academic literature, most of which includes laboratory experiments, to the specific context of consumers facing the Cineplex Consumer Flow.

19. Dr. Morwitz could have easily undertaken an empirical investigation designed to properly evaluate the hypothesis of whether the Online Booking Fee was misleading to Cineplex consumers. One way to empirically investigate this question would have been to run a consumer survey, in which a large enough sample of Website or Mobile App Canadian Cineplex consumers were recruited to purchase tickets via engaging with the Cineplex Consumer Flow. After that engagement, members of the survey sample could be asked a set of questions about whether they discerned the Online Booking Fee or whether they were surprised about the application of the Online Booking Fee. Finally, a statistical analysis could have been performed on those survey responses to empirically quantify the hypothesis that the Online Booking Fee was misleading. Dr. Morwitz did none of these steps.[29]

20. Dr. Morwitz does make one empirical investigation into actual Cineplex consumers by evaluating a Reddit internet forum thread in which several users complain about the Online Booking Fee.[30] As I discuss further below, these complaints are about the existence and size of the Online Booking Fee, *not* that the Online Booking Fee is deceptive. Moreover, the discussion of the Online Booking Fee on a widely used internet forum such as Reddit might indicate that information about the Online Booking Fee was widely spread and available to consumers.

IV. DR. MORWITZ OFFERS A SINGLE VIEWPOINT THAT IS LIKELY BIASED.

21. In both the Morwitz Report and the Morwitz Reply Report, Dr. Morwitz's claim that Cineplex used partitioned and drip pricing exclusively relies on her own personal experience browsing the Cineplex Website and interacting with the Cineplex Consumer Flow. By relying exclusively on her own personal interaction with the Website, Dr. Morwitz's approach is biased due to factors including her

---

[27] *Id.*
[28] *Id.*
[29] I note that this is one of many possible empirical analyses that could have been undertaken in analyzing whether the Online Booking Fee is misleading to consumers. Some other possible analyses include an analysis of complaints (as I reported in the Amir Report) or a difference-in-difference regression analysis that analyzed consumer demand and willingness-to-pay before and after the introduction of the Online Booking Fee.
[30] Morwitz Reply Report n. 7.

own personal role as an advocate for tightened drip pricing regulations, knowledge of the hypotheses under study, and several others.

22. Dr. Morwitz claims that her sample of one review of the webpage does not reflect "something idiosyncratic to [her] own method of searching."[31] This is incorrect and is *exactly* why empirical analysis is needed. Dr. Morwitz ignores that there are many possible external variables that might have impacted her review, even without her knowing, on that particular day. Those external factors include her personal approach to scrolling on websites, her personal norms and expectations around website design, general mood and environment, and other biases. These factors could affect her consumer experience above and beyond the idiosyncratic factor of screen settings such as zoom, which Dr. Morwitz herself acknowledges can matter.[32]

23. One crucial bias that Dr. Morwitz ignores is her role as advocate for stronger laws and rules against drip pricing. As she herself describes, she was an active participant in a White House National Economic Council panel whose intentional design was to "discuss the economic case in support of the [Biden] Administration's efforts to crack down on junk fees."[33] Among those proposals, the FTC has begun a process to introduce a rule that appears similar to the one at issue in this Matter that "would give the FTC additional information and enforcement tools to take action and seek penalties against companies adopting unfair and deceptive junk fees."[34] According to the FTC, it proposed addressing the practices of "misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the total cost of any good or service for sale" and "misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the existence of any fees, interest, charges, or other costs that are not reasonably avoidable for any good or service," among other practices.[35] Despite Dr. Morwitz highlighting her

---

[31] *Id.* ¶ 35.
[32] *Id.* ¶ 35.
[33] "Readout of White House Panel on the Economic Case for the President's Initiative on Junk Fees." *Whitehouse.gov* (Mar. 21, 2023). <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/21/readout-of-white-house-panel-on-the-economic-case-for-the-presidents-initiative-on-junk-fees> (accessed Jan. 31, 2024).
[34] "The President's Initiative on Junk Fees and Related Pricing Practices." *Whitehouse.gov* (Oct. 26, 2022). <https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices> (accessed Jan. 31, 2024).
[35] Federal Trade Commission, 16 CFR Part 464, Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011, 87.215 Fed. Reg. 67413-24 (Nov. 8, 2022) at 67416.

active role as a contributor to policies regulating hidden fees, she does not consider that such a role could very well lead to biases (even if unconsciously) in her evaluation of the Cineplex Website.[36]

24. Another crucial bias that Dr. Morwitz ignores is that of a researcher participating in her own research. It is well understood that researchers should collect data that is uncontaminated by participant knowledge of the research hypotheses, as doing otherwise could lead to subjects behaving differently than they would have had they not known about the study's goals.[37] Such reasoning is why it is common for researchers to employ methods such as "double blinding" to account for potential biases, in which participants are unaware of the hypotheses to be tested and of the treatment and control conditions.[38] In relying solely on the single data point of her own experience, Dr. Morwitz's approach violates this fundamental principle of sound research design.

V. DR. MORWITZ AND MR. ECKERT AGREE WITH SEVERAL OF MY CONCLUSIONS.

25. Throughout the Morwitz and Eckert Reply Reports, both Dr. Morwitz and Mr. Eckert agree with several of the conclusions I presented in the Amir Report. I briefly list and discuss these in this section.

26. For one, Dr. Morwitz acknowledges that the academic literature she cites in general, and on partitioned pricing specifically, yields ambiguous and disparate effects depending on setting and specific pricing designs.[39] Further, she acknowledges that those studies refer to contexts different than the online movie purchasing experience.[40]

27. Dr. Morwitz again cites several academic studies that report ambiguous effects of drip pricing and partitioned pricing, alongside influences that moderate the impact of those practices on consumer

---

[36] Indeed, nowhere in the Morwitz Report or the Morwitz Reply Report does Dr. Morwitz attempt to assist or attempt to assist the reader in showing how, from a scientific perspective, the presentation of the ticket price and the Online Booking Fee relate to the FTC's proposed rule. *See id.*
[37] Giannelli, Paul C., et al. "Reference Guide on Forensic Identification Expertise." *Reference Manual on Scientific Evidence, 3rd ed.* Washington, DC: The National Academies Press (2011): 55-128 at 68, quoting Redmayne, Mike. *Expert Evidence and Criminal Justice*. Oxford University Press (2001) ("To the extent that we are aware of our vulnerability to bias, we may be able to control it. In fact, a feature of good scientific practice is the institution of processes—such as blind testing, the use of precise measurements, standardized procedures, statistical analysis—that control for bias.").
[38] Dr. Shari Diamond defines double-blind research to be "research in which the respondent and the interviewer are not given information that will alert them to the anticipated or preferred pattern of response." Diamond, Shari Seidman. "Reference Guide on Survey Research." *Reference Manual on Scientific Evidence, 3rd ed.* Washington, DC: The National Academies Press (2011): 359-424 at 419.
[39] Morwitz Reply Report ¶¶ 47, 49-50.
[40] *Id.* ¶ 53.

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

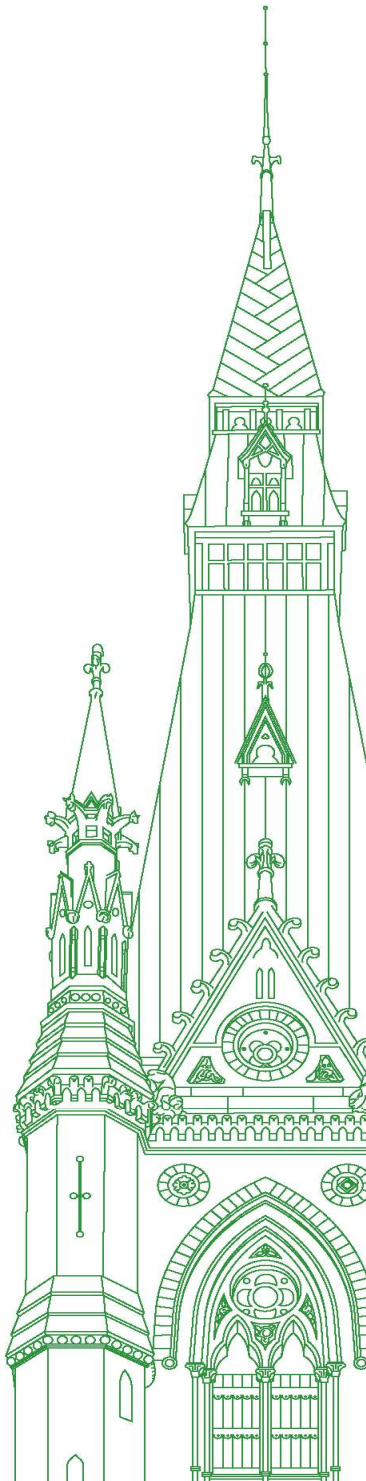
44th PARLIAMENT, 1st SESSION

Standing Committee on Finance

EVIDENCE

NUMBER 050

Tuesday, May 24, 2022



Chair: Mr. Peter Fonseca

The Chair: That concludes our first round of questions.

We're moving to our second round, members and witnesses, commencing with the Conservatives. We have MP Chambers for five minutes.

Go ahead, please.

Mr. Adam Chambers (Simcoe North, CPC): Thank you very much, Mr. Chair. It's nice to see everyone here. Thank you for taking time this week to be with us with excellent presentations.

I'd like to swing back to the chamber, if I may, for most of my time, Mr. Chair.

Mr. Agnew, you talked about two issues. I'd like to focus on both, but first let's talk about the Competition Act changes.

Are there challenges in principle with these changes or is it mostly around process and interpretation and having some ability to have feedback on some of this legislation before it becomes law?

Mr. Mark Agnew: Absolutely it is the latter. We don't have any challenge with discussing how to modernize the penalties, because admittedly they are quite small today. We don't have a problem with talking about abuse of dominance, because we want to make sure there is something in there that balances the needs of both businesses and consumers.

Unfortunately, what we saw in the budget document, which was going to be something that was a bit more narrow in scope, has ended up being quite a broad piece now in Bill C-19. Having a more robust consideration of those and a more structured process as part of the phase two the government has committed to doing already I think would be the way to go about having that conversation.

Mr. Adam Chambers: From your perspective, is there a pressing need that this has to become law by the end of this session—by June? Is it possible that we could perhaps consult on some of these changes over the summer, not at this committee but with respective stakeholders within industry, and then perhaps put a refined version of these in the budget bill in the fall?

Mr. Mark Agnew: That's correct. There is no need to press through with changes before the end of the spring sitting of Parliament.

As I alluded to in my opening comments, there has been a tendency by some to link the Competition Act changes to what can address the current inflationary environment. Certainly our views is that these changes, if they're enacted in June, are not going to move the dial on inflation. We need to make sure that we get it right as opposed to getting it done quickly.

Mr. Adam Chambers: Thank you.

We heard last week a stakeholder mention a question around constitutionality of at least one of the sections. Is that a view that you've looked at as the chamber, or have you sought external opinions that give you the same kind of concern?

Mr. Mark Agnew: Yes. We sought out the views of our members, and we have heard from some of them the concern about the scope of the penalty size and what that means from a constitutional perspective. Thankfully, despite all my sins, I'm not a lawyer—I didn't have to go to law school—but this is the sort of thing where we do need to have a fairly rigorous discussion about it. Again, some members have raised that constitutional concern with us.

Mr. Adam Chambers: Thank you.

I'll turn now to the recreation tax, or the boat tax, as we've talked about many times here at this committee. You mentioned the U.S. having gone down this road and reconsidering it.

What's the experience that we should be drawing on here in Canada?

Mr. Mark Agnew: I'm not familiar with all the ins and outs of the U.S. experience, but there are a couple of things to consider. One is the impact on manufacturing jobs, because this is a very real business cost that is imposed upon companies. Certainly in the current, again, inflationary environment and recovery from the pandemic, companies have an even thinner margin and less manoeuvre room to go with.

Then, of course, another thing is that if other jurisdictions aren't doing this, people are going to be looking for circumvention measures. Are those jobs just going to go away and move elsewhere? The people who are intended to be taxed are going to move the economic activity, and we will have nothing to show for it here on the domestic end.

Mr. Adam Chambers: Would it surprise you to learn that the government did not complete an economic impact assessment prior to the introduction of the tax? They have been talking about it for at least a couple of years, but we haven't seen any economic analysis.

Mr. Mark Agnew: I haven't seen any economic analysis.

Again, this goes back in some ways to the point about competition, and I think some of the other remarks that witnesses made today. There's a need to make sure we're doing this right and that, as people like to say, it's evidence-based policy-making. What is the evidence base around it, and what are going to be the real-world impacts if we go ahead with it?

● (1230)

Mr. Adam Chambers: I have one final question.

If you had any advice to the committee over the next couple of weeks, are there amendments that you could perhaps provide in writing to the Competition Act changes, if we're unsuccessful in having it separated out from the bill? That would be helpful.

Mr. Mark Agnew: Absolutely.

If the chair could just indulge us, the fact that we haven't been able to come forward with amendments from the discussions that we've had with our members thus far, I think underscores just how complex this really is.

To go back to the honourable member's opening question to me, we're not actually seeking to have the entirety of the Competition Act provisions removed from the BIA. We've really tried to give it some diligent thought to say what the real problems are that need to be consulted on more. Hence, that's why I've come to the committee today seeking for those three specific provision to be removed.

EVIDENCE

OTTAWA, Wednesday, June 8, 2022

The Standing Senate Committee on National Finance met with videoconference this day at 12:01 p.m. [ET] to study the subject matter of all of Bill C-19, An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures.

Senator Percy Mockler (*Chair*) in the chair.

[*English*]

The Chair: Honourable senators, before we begin, I would like to remind senators and witnesses to please keep their microphones muted at all times unless recognized by name by the chair.

[*Translation*]

Honourable senators, witnesses, should any technical challenges arise, particularly in relation to interpretation, please advise the chair or the clerk and we will try to resolve them. If you experience other technical challenges, please contact the ISD Service Desk with the technical assistance number provided.

[*English*]

The use of online platforms does not guarantee speech privacy or that eavesdropping won't be conducted. As such, while conducting committee meetings, all participants should be aware of such limitations and restrict the possible disclosure of sensitive, private and privileged Senate information. Participants should know to do so in a private area and to be mindful of their surroundings.

We will now begin with the official portion of our meeting. I wish to welcome all of the senators and the viewers across Canada who are watching us on sencanada.ca.

My name is Percy Mockler, senator from New Brunswick and Chair of the Standing Senate Committee on National Finance. Now, I would like to introduce the members of the National Finance Committee who are participating in this meeting: Senator Boehm, Senator Dagenais, Senator Duncan, Senator Forest, Senator Galvez, Senator Gerba, Senator Gignac, Senator Loffreda, Senator Marshall, Senator Moncion, Senator Pate and Senator Richards.

Today, we will continue our study on the subject matter of Bill C-19, An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures, which was referred to this committee on May 4, 2022, by the Senate of Canada.

TÉMOIGNAGES

OTTAWA, le mercredi 8 juin 2022

Le Comité sénatorial permanent des finances nationales se réunit aujourd'hui, à 12 h 1 (HE), avec vidéoconférence, pour étudier la teneur complète du projet de loi C-19, Loi portant exécution de certaines dispositions du budget déposé au Parlement le 7 avril 2022 et mettant en œuvre d'autres mesures.

Le sénateur Percy Mockler (*président*) occupe le fauteuil.

[*Traduction*]

Le président : Honorables sénateurs, avant de commencer, j'aimerais rappeler aux sénateurs et aux témoins que vous êtes priés de mettre votre micro en sourdine en tout temps, à moins que le président ne vous donne la parole.

[*Français*]

Honorables sénateurs et sénatrices, mesdames et messieurs les témoins, si vous éprouvez des difficultés techniques, notamment en matière d'interprétation, veuillez le signaler au président ou à la greffière et nous nous efforcerons de résoudre le problème. Si vous éprouvez d'autres difficultés techniques, veuillez contacter le Centre de services de la DSI en utilisant le numéro d'assistance technique qui vous a été fourni.

[*Traduction*]

L'utilisation de plateformes en ligne ne garantit pas la confidentialité des discours ou l'absence d'écoute. Ainsi, lors de la conduite des réunions de comités, tous les participants doivent être conscients de ces limitations et limiter la divulgation éventuelle d'informations sensibles, privées et privilégiées du Sénat. Les participants doivent savoir qu'ils doivent participer dans une zone privée et être attentifs à leur environnement.

Nous allons maintenant amorcer la portion officielle de notre réunion. Bienvenue à tous les sénateurs et sénatrices et aussi à tous les Canadiens qui nous regardent sur sencanada.ca.

Je m'appelle Percy Mockler; je suis sénateur du Nouveau-Brunswick, et président du Comité sénatorial permanent des finances nationales. J'aimerais maintenant vous présenter les membres du Comité des finances nationales qui participent à la réunion : le sénateur Boehm, le sénateur Dagenais, la sénatrice Duncan, le sénateur Forest, la sénatrice Galvez, la sénatrice Gerba, le sénateur Gignac, le sénateur Loffreda, la sénatrice Marshall, la sénatrice Moncion, la sénatrice Pate et le sénateur Richards.

Aujourd'hui, nous continuons notre étude sur la teneur complète du projet de loi C-19, Loi portant exécution de certaines dispositions du budget déposé au Parlement le 7 avril 2022 et mettant en œuvre d'autres mesures, qui a été renvoyé à notre comité par le Sénat du Canada le 4 mai 2022.

At a time when the government is trying to attract investment and rebuild our economy, a tax that guts homegrown manufacturing and retail businesses makes no sense. Instead of supporting our industry as a vital part of Canada's recovery, this tax is picking winners and losers in outdoor recreation.

The luxury tax also has the potential to damage Canada's trade relations. Concerns have been raised by the boating industry in the United States that this tax directly attacks our Canada-U.S.-Mexico Agreement. Similarly, our trading partnership in the U.K. and the European Union could be hurt by what many may see as an indirect tariff on boats.

In conclusion, I want to draw attention to the latest report released by the Parliamentary Budget Officer stating that there will be a $2.9 billion loss in sales from boats, aircraft and cars. However, $2.1 billion, which is 75% of the loss, is expected to come from boats. This is a complete assault on the boating industry.

I saw that yesterday there was an amendment passed removing the September 1, 2022, implementation date for the aerospace industry. That's wonderful news. However, if 75% of the loss is expected from the boating industry, it would be only logical to have a similar amendment for boats to save jobs and not decimate the industry in Canada.

Thank you, Mr. Chair.

The Chair: Thank you, Madam.

Now I will recognize Mr. Mark Agnew, Canadian Chamber of Commerce, to be followed by Ms. Rahmati and Mr. Barnable. The floor is yours, Mr. Agnew.

Mark Agnew, Senior Vice-President, Canadian Chamber of Commerce: Chair and honourable members, it is a pleasure to be here today to discuss Bill C-19. I will focus my remarks on both the competition policy aspects of the legislation as well as the luxury goods tax. I will start with competition policy.

Given the evolving nature of the economy, our competition policies need to keep pace. However, getting it right is critical. This means robust consultations with stakeholders, including not

propriétés de loisir, de nombreuses familles choisissent d'acheter un bateau comme chalet.

À un moment où les gouvernements tentent d'attirer les investissements et de reconstruire notre économie, cela n'a aucun sens d'imposer une taxe qui coupe les vivres des entreprises de fabrication et de ventes au détail locales. Au lieu de soutenir notre industrie, pourtant essentielle à la relance du Canada, cette taxe va déterminer qui seront les gagnants et les perdants dans le secteur des loisirs de plein air.

Cette taxe de luxe risque également d'affaiblir les relations commerciales du Canada. L'industrie américaine de la navigation de plaisance a soulevé des préoccupations quant au fait que cette taxe attaque directement l'Accord Canada—États-Unis—Mexique. Dans le même ordre d'idées, notre partenariat commercial avec le Royaume-Uni et l'Union européenne pourrait être miné par ce que beaucoup considèrent comme un tarif douanier indirect sur les bateaux.

Pour conclure, j'aimerais attirer votre attention sur le dernier rapport publié par le directeur parlementaire du budget selon lequel il pourrait y avoir des pertes de 2,9 milliards de dollars en ventes pour les bateaux, les aéronefs et les voitures. De plus, 2,1 milliards de dollars, c'est-à-dire 75 % de cette perte, seraient attribuables aux bateaux. Il s'agit absolument d'une attaque dirigée contre l'industrie nautique.

J'ai vu, hier, qu'un amendement avait été adopté pour retirer la date de mise en œuvre du 1er septembre 2022 pour l'industrie aérospatiale. C'est une excellente nouvelle, mais si on s'attend à ce que 75 % des pertes soient attribuables à l'industrie nautique, il ne serait que logique d'adopter un amendement similaire pour les bateaux afin de sauver les emplois et d'éviter de dévaster l'industrie canadienne.

Merci, monsieur le président.

Le président : Merci, madame.

Je donne maintenant la parole à M. Mark Agnew, de la Chambre de commerce du Canada, puis ce sera à Mme Rahmati et à M. Barnable. Vous avez la parole, monsieur Agnew.

Mark Agnew, premier vice-président, Chambre de commerce du Canada : Monsieur le président, honorables sénateurs et sénatrices, c'est un plaisir d'être ici aujourd'hui pour discuter du projet de loi C-19. Je vais surtout axer mes commentaires sur les dispositions de la loi qui traitent de la politique en matière de concurrence et de la taxe sur les produits de luxe. Je vais commencer par la politique en matière de concurrence.

Compte tenu de la nature changeante de l'économie, nos politiques en matière de concurrence doivent suivre le rythme, mais il est tout de même essentiel de bien faire les choses. Cela

only the business community but also representatives from the legal community, civil society and consumers, among others.

The chamber is particularly concerned with three elements and hopes that these will not be part of an omnibus bill but, rather, be part of the fuller review of the Competition Act that has been promised by Innovation, Science and Economic Development Canada, or ISED, for later this year.

First is the abuse of dominance provisions and the codifying of a number of definitions. An overly broad approach to defining what anti-competitive behaviour is particularly problematic because every act of competition may — at least in the eyes of a competitor — "impede" their progress or expansion. Indeed, an act seen to outdo a competitor is at the very heart of healthy and necessary competition in the economy. Clarity is also needed in areas like privacy given we have a separate privacy regulator at the federal level in this country. While some have argued that these proposals could codify existing practice, we should not be haphazard given that legislation cannot be changed on a whim.

Second is the changes to penalties. The proposed changes to administrative monetary penalties represent a significant overcorrection in our view. Such significant penalties of up to 3% of global revenues are problematic when the provisions are being expanded and companies are left without the benefit of jurisprudence to fall back on to understand their implications. The penalties additionally scope-in company activities that are not linked to violations that could potentially be occurring here in Canada.

Third are the no-poach provisions in the legislation. As others have pointed out in separate forums, this poses challenges in the franchise context, where companies have provisions written into contracts, often as a means to ensure that their investments in employee training are not being undermined. There are also interactions with provincial labour laws and how that would interact is not clear at the moment.

I don't have specific amendments to offer the committee today due to the time that we as a business organization need to consult our members that sit across different sectors.

veut dire de mener des consultations robustes avec les intervenants, y compris le milieu des affaires, mais aussi d'autres représentants du milieu juridique, de la société civile et des groupes de consommateurs, entre autres.

Il y a trois éléments en particulier qui préoccupent la Chambre, et nous espérons que ces éléments seront retirés du projet de loi omnibus, afin qu'ils soient placés sous l'égide de l'examen complet de la Loi sur la concurrence qu'Innovation, Sciences et Développement économique Canada — ou ISDE — a promis d'entreprendre plus tard cette année.

Le premier élément concerne les dispositions relatives à l'abus de position dominante et la codification d'un certain nombre de définitions. L'adoption d'une définition trop large de ce qui est anticoncurrentiel pose surtout particulièrement problème, puisque tout acte de concurrence peut — du moins, du point de vue d'un concurrent — « entraver » sa progression ou son expansion. En effet, une action visant à surpasser un concurrent est au cœur même de la concurrence saine et nécessaire. La clarté des définitions est aussi nécessaire dans des domaines comme la protection des renseignements personnels, puisque nous avons un organisme de réglementation fédéral distinct en matière de protection de la vie privée au Canada. Même si certains ont fait valoir que ces propositions pourraient codifier la pratique existante, nous ne devrions pas modifier à l'aveuglette le cadre législatif, étant donné qu'une loi ne peut être modifiée sur un coup de tête plus tard.

Le deuxième élément concerne les modifications apportées aux sanctions. Les modifications proposées aux sanctions administratives pécuniaires représentent une correction excessive, de notre point de vue. Des sanctions aussi lourdes, pouvant aller jusqu'à 3 % des revenus mondiaux, posent un problème lorsque les dispositions sont élargies et que les entreprises ne bénéficient plus de la jurisprudence existante pour les interpréter. Les sanctions s'appliquent en outre à des activités organisationnelles internes qui ne sont pas liées à des violations qui pourraient être commises au Canada.

Le troisième élément concerne les dispositions relatives aux accords de non-débauchage dans le projet de loi. D'autres ont souligné, dans des tribunes distinctes, que cela pose problème dans le contexte des franchises, où les contrats des entreprises comportent souvent les dispositions pour garantir que les investissements dans la formation de leurs employés ne sont pas minés. Il faut aussi tenir compte des interactions avec les lois du travail provincial, et nous ne voyons pas clairement, actuellement, comment tout cela va interagir.

Je n'ai pas de modifications précises à présenter au comité aujourd'hui, puisque nous, en tant qu'organisation commerciale, devons toujours prendre le temps de consulter nos membres appartenant aux différents secteurs.

Despite the assertions made by some that we should make the changes now and figure it out later through administrative guidance or reopening it in the phase two review, I'm not sure this is the right approach that we should take. Ultimately, we don't know what will happen with the review given that it hasn't yet begun. While there may be a tendency to view the Competition Act changes in the context of the current inflationary environment, the current drivers of inflation in the economy would not be addressed by what's included in the Budget Implementation Act.

I want to briefly shift now to the proposed luxury goods tax. Members will be aware from other witnesses that have spoken today about what the luxury goods tax means for the Canadian economy. The industry, especially the aerospace industry, is still in recovery mode from the pandemic. Many concerns that we've heard from our members echo what Mr. Mueller has said about the concerns that he's also heard from his members in the aerospace industry.

There are a number of specific amendments that we'd like to see if the legislation is advanced, including exemptions for exports and liabilities when it comes to usage by the buyer after the sale has occurred.

Again, as other witnesses have also pointed out, it's useful to know what the impact of such a tax has been in other jurisdictions and how, in particular, the United States experience can be something that we learn lessons from here in Canada.

Thank you for the opportunity to make these comments. I look forward to the questions from senators later.

Stuart Barnable, Director of Operations, Canada's Building Trades Unions: Thank you to the members of the committee for the invitation to appear today.

I'm joined by my colleague Rita, our government relations specialist. CBT represents 14 international construction unions with a combined membership of over 3 million unionized workers across North America of which 600,000 are in Canada. The men and women of the building trades are employed anywhere from small developments to billion-dollar construction projects through to the operation, renovation, maintenance and the repurposing of plants, factories and facilities. This construction and maintenance sector annually represents approximately 6% of Canada's GDP.

Today we're here to talk about how Bill C-19 impacts the building trades. This bill includes some important wins for workers, including something we have long advocated for, a

Même si certains affirment que nous devrions apporter ces modifications maintenant et régler les problèmes plus tard au moyen de directives administratives ou en rouvrant la loi lors de la deuxième phase de l'examen, je ne suis pas convaincu qu'il s'agit de la bonne façon de procéder. Au bout du compte, nous ne savons pas ce qui ressortira de cet examen, puisqu'il n'a pas encore commencé. Même si on peut avoir tendance à voir ces modifications de la Loi sur la concurrence dans le contexte de l'environnement inflationniste actuel, ce qu'on propose ici dans la Loi d'exécution du budget ne permettra pas de compenser les pressions inflationnistes actuelles dans l'économie.

Je vais maintenant aborder brièvement le sujet de la taxe proposée sur les produits de luxe. Compte tenu des témoignages précédents aujourd'hui, vous saurez quelles répercussions cette taxe sur les produits de luxe aura sur l'économie canadienne. L'industrie, en particulier l'industrie aérospatiale, tente toujours de se remettre de la pandémie. Nos membres partagent un grand nombre des préoccupations que M. Mueller a soulevées en parlant des préoccupations des membres de l'industrie aérospatiale.

Il y a un certain nombre de modifications précises que nous aimerions voir apporter au projet de loi, s'il doit aller de l'avant, notamment des exemptions pour les exportations et le traitement des dettes en ce qui concerne l'utilisation par l'acheteur après une vente.

Encore une fois, comme l'ont souligné les autres témoins, il est utile de comprendre les effets qu'une telle taxe a eus dans les autres pays. En particulier, nous devrions tirer des leçons ici au Canada de l'expérience des États-Unis.

Je vous remercie de m'avoir permis de présenter cet exposé. Je serai heureux de répondre aux questions des sénateurs et des sénatrices, plus tard.

Stuart Barnable, directeur des opérations, Syndicats des métiers de la construction du Canada : Je remercie les membres du comité de l'invitation à témoigner aujourd'hui.

Je suis accompagné de ma collègue, Mme Rahmati, qui est notre spécialiste en relations gouvernementales. Les Syndicats des métiers de la construction du Canada représentent 14 syndicats internationaux de la construction, qui regroupent plus de 3 millions de travailleurs syndiqués en Amérique du Nord, dont 600 000 au Canada. Les hommes et les femmes des métiers de la construction sont employés dans tout type de projets, des petits aménagements aux projets de construction de plusieurs milliards de dollars, que ce soit pour l'exploitation, la rénovation, l'entretien ou la réfection des usines et des installations. Le secteur de la construction et de l'entretien représente environ 6 % du PIB annuel du Canada.

Nous sommes ici aujourd'hui pour parler des conséquences du projet de loi C-19 sur les métiers de la construction. Ce projet de loi comprend d'importantes victoires pour les travailleurs, entre

Mr. Mueller: As senators well know, businesses thrive on consistency and predictability. We're encouraged by the amendment but not satisfied. We will need to have some pretty frank consultations, and we will have to see further amendments in order to mitigate the serious negative impacts of the tax.

There is still some uncertainty there. As I said before, we're seeing companies lose some sales because of it. I am looking forward to the discussions with the government on that to mitigate the seriously negative impacts of the bill as it is currently drafted.

Senator Loffreda: My question is for the Canadian Chamber of Commerce. We talked substantially about the luxury tax. Given the fact that you are here, I'm interested in knowing your perspective on other matters with the budget bill.

Are your members satisfied with the other elements in the budget bill, for example, the changes being proposed in Bill C-19 to the Competition Act? I am thinking, for instance, of the wage fixing and the no-poach agreements in Division 15 of Part 5 of the bill. Is this something the chamber has called for?

To what extent have your members been consulted for the budget bill? We discussed consultation with respect to the luxury tax in detail, but are there any other elements being disputed in the budget bill?

I know the government is making efforts to improve links to the business community which, according to many, was much needed. Do you see improvements? Are we getting there?

Mr. Agnew: Thank you, senator, for the question. The direct answer would be that no, we're not happy with certain changes that are in the budget with relation to the Competition Act. The three that we have concerns about are the changes to the abuse of dominance provisions, the penalties and the no-poach provisions.

Similar to some of the conversations earlier today about luxury goods, we were not consulted on those specific changes in the budget. We saw the budget document in April that alluded to the fact that these changes would be coming, but we saw the legislation at the same time everyone else did. These are complex legal matters and that is why we urged that these three measures be taken out for further consultation and be put into what the government has already committed to doing with a broader review of the Competition Act.

M. Mueller : Comme les sénateurs le savent bien, les entreprises prospèrent grâce à la constance et à la prévisibilité. Nous sommes encouragés par l'amendement, mais nous ne sommes pas satisfaits. Nous devrons mener des consultations assez franches, et voir d'autres amendements pour atténuer les graves répercussions négatives de la taxe.

Il subsiste une certaine incertitude. Comme je l'ai dit auparavant, nous voyons des entreprises perdre des ventes à cause de cette taxe. J'attends avec impatience les discussions avec le gouvernement à ce sujet afin d'atténuer les répercussions négatives graves du projet de loi tel qu'il est actuellement rédigé.

Le sénateur Loffreda : Ma question s'adresse à la Chambre de commerce du Canada. Nous avons beaucoup parlé de la taxe sur certains biens de luxe. Étant donné que vous êtes ici, j'aimerais connaître votre point de vue sur d'autres questions relatives au projet de loi d'exécution du budget.

Vos membres sont-ils satisfaits des autres éléments du projet de loi d'exécution du budget, par exemple, les changements proposés dans le projet de loi C-19 à la Loi sur la concurrence? Je pense par exemple à la fixation des salaires et aux accords de non-débauchage à la section 15 de la partie 5 du projet de loi. Est-ce quelque chose que la Chambre a demandé?

Dans quelle mesure vos membres ont-ils été consultés concernant le projet de loi d'exécution du budget? Nous avons discuté en détail de consultation concernant la taxe sur certains biens de luxe, mais y a-t-il d'autres éléments qui sont contestés dans le projet de loi d'exécution du budget?

Je sais que le gouvernement s'efforce d'améliorer les liens avec le milieu des affaires, ce qui, d'après de nombreuses personnes, était fort nécessaire. Voyez-vous des améliorations? Sommes-nous sur la bonne voie?

M. Agnew : Merci, monsieur le sénateur, de poser la question. La réponse directe serait que non, nous ne sommes pas heureux de certains changements dans le budget concernant la Loi sur la concurrence. Les trois qui nous préoccupent sont les changements des dispositions sur l'abus de position dominante, les sanctions et le non-débauchage.

Tout comme certaines des conversations qui ont eu lieu plus tôt aujourd'hui au sujet des biens de luxe, nous n'avons pas été consultés sur ces changements particuliers dans le budget. Nous avons vu en avril le document budgétaire qui faisait allusion au fait que ces changements allaient arriver, mais nous avons vu la loi en même temps que tout le monde. Il s'agit de questions juridiques complexes, et c'est pourquoi nous avons insisté pour que ces trois mesures soient retirées afin que l'on mène une consultation plus approfondie et intégrée dans ce que le

is an outcome.

MR. RUSSELL: In the writing yourself that you do, do you not state that firms do this to increase revenue? Is that not a conclusion you've drawn in the articles that you've written?

DR. MORWITZ: I believe that I have said that, yes.

MR. RUSSELL: And is there anywhere in your report where you would ever even consider that there might be other objectives from the way in which Cineplex represents its pricing?

DR. MORWITZ: My report doesn't at all go into the objectives of Cineplex.

MR. RUSSELL: No. But you say that the type of pricing that you say is used here achieves this result. This is the objective in the general sense that it increases revenue. First of all, you're very firm on your view that partition pricing increases demand; correct?

DR. MORWITZ: I -- the academic literature shows that as an outcome.

MR. RUSSELL: So I'm going to ask you about what your view is because it's you who's opining to this Tribunal.

Does partition pricing always increase demand and revenue for the seller?

DR. MORWITZ: In many cases it does.

MR. RUSSELL: I said very clearly -- we can quarrel about my words, and I'll go over them again. Does it always, underscore, lead to increased demand and increased revenue?

DR. MORWITZ: No, not always.

MR. RUSSELL: Not always. Did you point that out in your report?

DR. MORWITZ: I pointed out that the effects can vary.

MR. RUSSELL: We'll come to that. Can you tell me where you found that? Can you tell me where you said that?

DR. MORWITZ: Where I said that? I believe in my reply report, if you give me one minute, please.

MR. RUSSELL: I'm not talking about your reply report for the moment. I'm talking about your main report.

DR. MORWITZ: Oh, okay.

MR. RUSSEL: That's what we're on.

DR. MORWITZ: I'm not certain.

MR. RUSSELL: Did you put it in your main report at all?

DR. MORWITZ: I'm not certain.

MR. RUSSELL: I'll let you take a moment.

--- Pause

DR. MORWITZ: Yes. If you look at Appendix C --

MR. RUSSELL: It's in the appendix?

DR. MORWITZ: Appendix C discusses some of the moderators.

MR. RUSSELL: I'm actually -- now you're going to the appendix with the various academic references. Correct? That's where you are, in Appendix D?

DR. MORWITZ: Yes.

MR. RUSSELL: I'm asking in the body of your report, in your opinion that you're providing to this Tribunal, did you ever say there were mixed results?

DR. MORWITZ: In the body, no. I summarized the results on average, the preponderance of evidence in the results, and then I went into the details in the appendix.

MR. RUSSELL: So you understand the word "objectivity" when you're providing something to a Tribunal or a Court. Correct? You went over your Affidavit with Mr. Hood?

DR. MORWITZ: Yes.

MR. RUSSELL: As counsel, even though I'm an advocate, I have to show a level of objectivity. If there was cases against me, cases for me, I point them out and I distinguish the ones that don't help me. But to be

objective to the Court, to the Tribunal, they expect me to be objective in my presentation. You understand that concept? But you didn't say ever to this Tribunal in your main report, until it was raised by Dr. Amir, that there were mixed results. Correct?

DR. MORWITZ: There are moderating factors and I discuss those details in an appendix.

MR. RUSSELL: So the Appendix D, let's be clear for the record, is a list of articles or studies. There's no commentary or opinion from you in that specifically, is there?

DR. MORWITZ: There is commentary. There is some commentary.

MR. RUSSELL: Could you point it out to us, please?

DR. MORWITZ: Well, for example --

MR. RUSSELL: Could you just -- we have to get it on the record. What page are you on?

DR. MORWITZ: Page 101, paragraph 154.

MR. RUSSELL: Just one moment. Mmhmm?

DR. MORWITZ: The last sentence is commentary, is my commentary on that research. Paragraph 153, the last sentence --

MR. RUSSELL: Just a moment until they just --

MR. HOOD: Wait until it's up on the screen.

DR. MORWITZ: Oh, I'm sorry.

THE REGISTRAR: I'm sorry, I don't even know what we're putting up.

MR. RUSSELL: We're at page 101, paragraph 154 in the appendix, which is entitled Further research on partition pricing.

THE REGISTRAR: It's up.

MR. RUSSELL: One fifty-four (154) is the article that you refer to below in footnote 69, the effect of salience on mental accounting?

DR. MORWITZ: Yes.

MR. RUSSELL: So you're referring to that. Can you show us where you showed mixed results in that paragraph, read the words to us, please?

DR. MORWITZ: Oh, your question was whether I provide commentary. I was pointing to where I provide commentary.

MR. RUSSELL: My question is where you point out mixed results. I was very clear in my question. Mixed results --

DR. MORWITZ: Okay. That was a --

MR. RUSSELL: -- whether -- let me finish. Mixed results on whether partition pricing increases demand and revenue, and you said there was some. You said there are moderating factors. I asked you specifically, point

out where you told this Tribunal in your first report that there were mixed results. As I read your report, you gave a very definitive opinion.

DR. MORWITZ: I mean, in this whole section I discuss some of these studies have moderators which shows that the effects vary across different conditions. So I'm discussing that. You asked whether I comment, and I do comment on each article.

MR. RUSSELL: I'm talking about pointing out mixed results to the opinion you gave earlier, but we'll come to the moderating effects. I have gone through many of these articles. I going to spend a little bit of time going through them with you today, and we're going to talk about the moderating effects and how they might apply to the opinion you're giving about Cineplex's website. Because that's what's important.

It's not that you list a number of articles for this Tribunal. You're here to give an opinion. Any lawyer could provide a list of academic studies, but you were here to provide an expert opinion. That's what my friend Mr. Hood is qualifying you to do. And you do give an opinion. But when you give the opinion on the impact of partition pricing, you don't say mixed results. That's clear.

When you give your opinion, you don't say there are mixed results, do you? Your opinion is in the body of

your report, not in your bibliography?

DR. MORWITZ: I don't use the words "mixed results", no.

MR. RUSSELL: Thank you. Now, just to be clear, and we can go to what you were asked to do, and I don't want to be unfair to you. You were asked to look at Cineplex pricing; correct?

DR. MORWITZ: Correct.

MR. RUSSELL: You weren't asked to give an opinion on whether or not it breached the drip pricing provision under the *Canadian Competition Act*, were you?

DR. MORWITZ: No.

MR. RUSSELL: And you never gave an opinion on that, did you?

DR. MORWITZ: No.

MR. RUSSELL: Whenever you were -- Mr. Hood was examining you, he referred to my opening and you made the point that there's a temporal component to the definition in the academic literature. Correct?

DR. MORWITZ: In the academic literature, yes.

MR. RUSSELL: Yes. And currently the FTC is considering a rule. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: It hasn't finalized it yet, has it?

some of it got moved to an appendix. But they are -- as we've discussed earlier, I talk about some of the moderators that some of those studies show, for example, the one you just mentioned about firm reputation.

MR. RUSSELL: Again, my question was, did you put that in the body of your report to discuss that it may be -- the moderating effects means moderating the opinion that you gave. Did you point those out to the Tribunal in your opinion, or did you leave them to an appendix? And we've gone through it and those appendix just describe studies.

Did you say to this Tribunal in the body of your report, when you consider price perceptions, you have to give some thought to these -- and you should have listed them, in my view -- moderating effects? Did you do that? Is it in your report?

DR. MORWITZ: I did not do that.

MR. RUSSELL: In paragraph 59 of your -- of the same report, and that is at page --

THE REGISTRAR: Thirty (30).

MR. RUSSELL: Thirty (30). Thank you.

And this refers to Morwitz, Greenleaf, and Johnson, which you footnote at the bottom, that's what I've been referring to as the Divide and Prosper study. Is that correct?

DR. MORWITZ: Yes.

MR. RUSSELL: It's fair enough to call it that? I don't want to -- it's been cited by you and it's been cited by others, that it's often referred to as Divide and Prosper, because as you point out here, you were the first to examine it. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: So it's within the vernacular of some of your colleagues out there to talk about your study as Divide and Prosper; right?

DR. MORWITZ: I guess.

MR. RUSSELL: Okay. Well, we'll go through that as well.

And you said here:

> "We found through two experiments, that when a price is partitioned, it lowers consumers' average perceptions of the total price of the product and increases their demand."

Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: You didn't put any caveats on it. You didn't put any thought to any moderators on that at all. That's what you said here?

DR. MORWITZ: And that's what I say in this

paragraph. I do discuss moderators as I continue this discussion.

MR. RUSSELL: We are going to go through that. But on this report, that's a conclusion that you draw from that report. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: Is it not true there were mixed results in your study?

DR. MORWITZ: Yeah. So the magnitude of the effect depends on whether the surcharge is a dollar -- presented as a dollar or as a percent. The impact on purchase intentions depends on the consumer's attitude towards the product.

MR. RUSSELL: Right. And you didn't point out those mixed results in your report yourself, did you?

(Short pause / Courte pause)

DR. MORWITZ: No, not here.

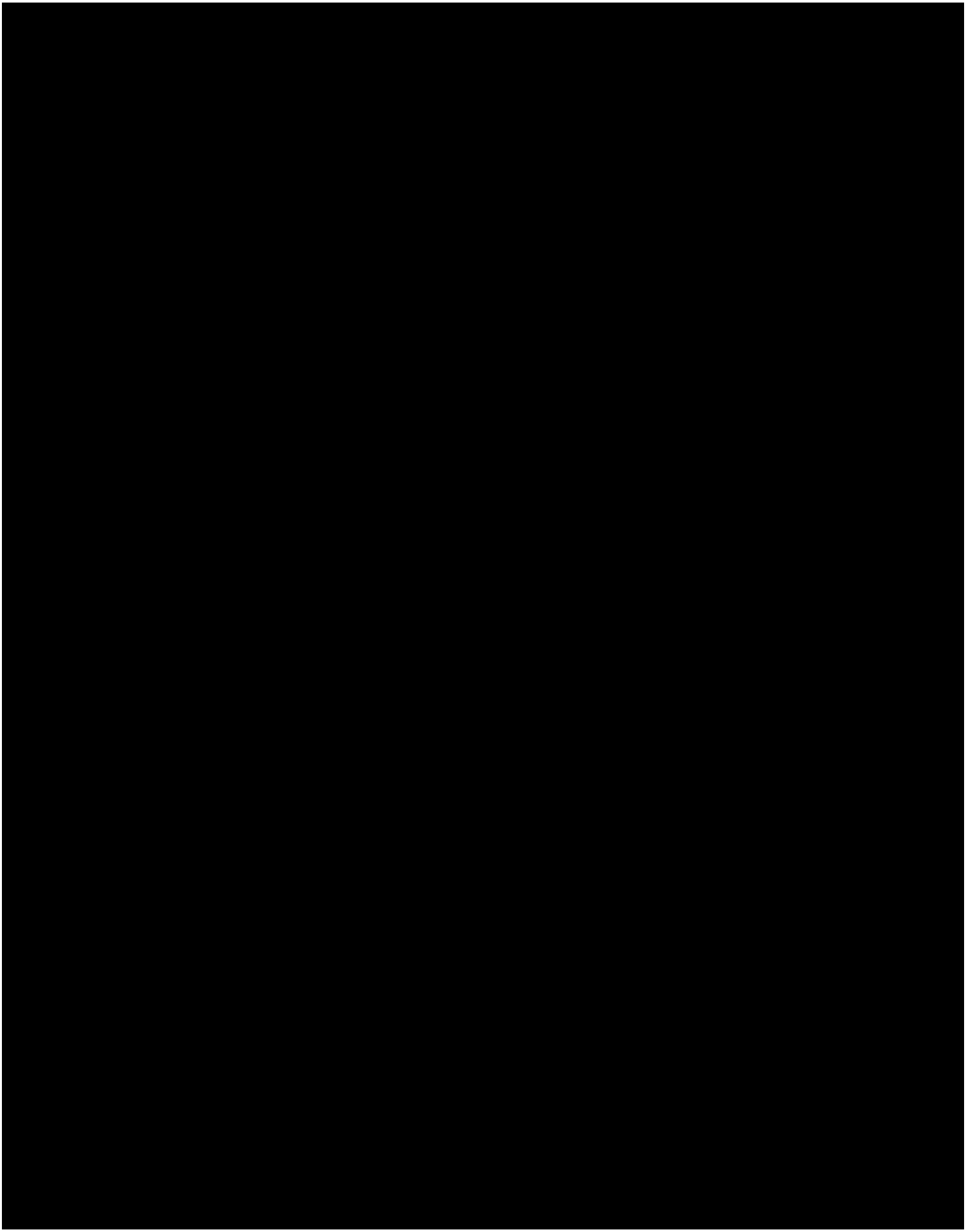
MR. RUSSELL: In paragraph 65, if I could ask you to turn to paragraph 65. You're referring to the Abraham and Hamilton study. Correct?

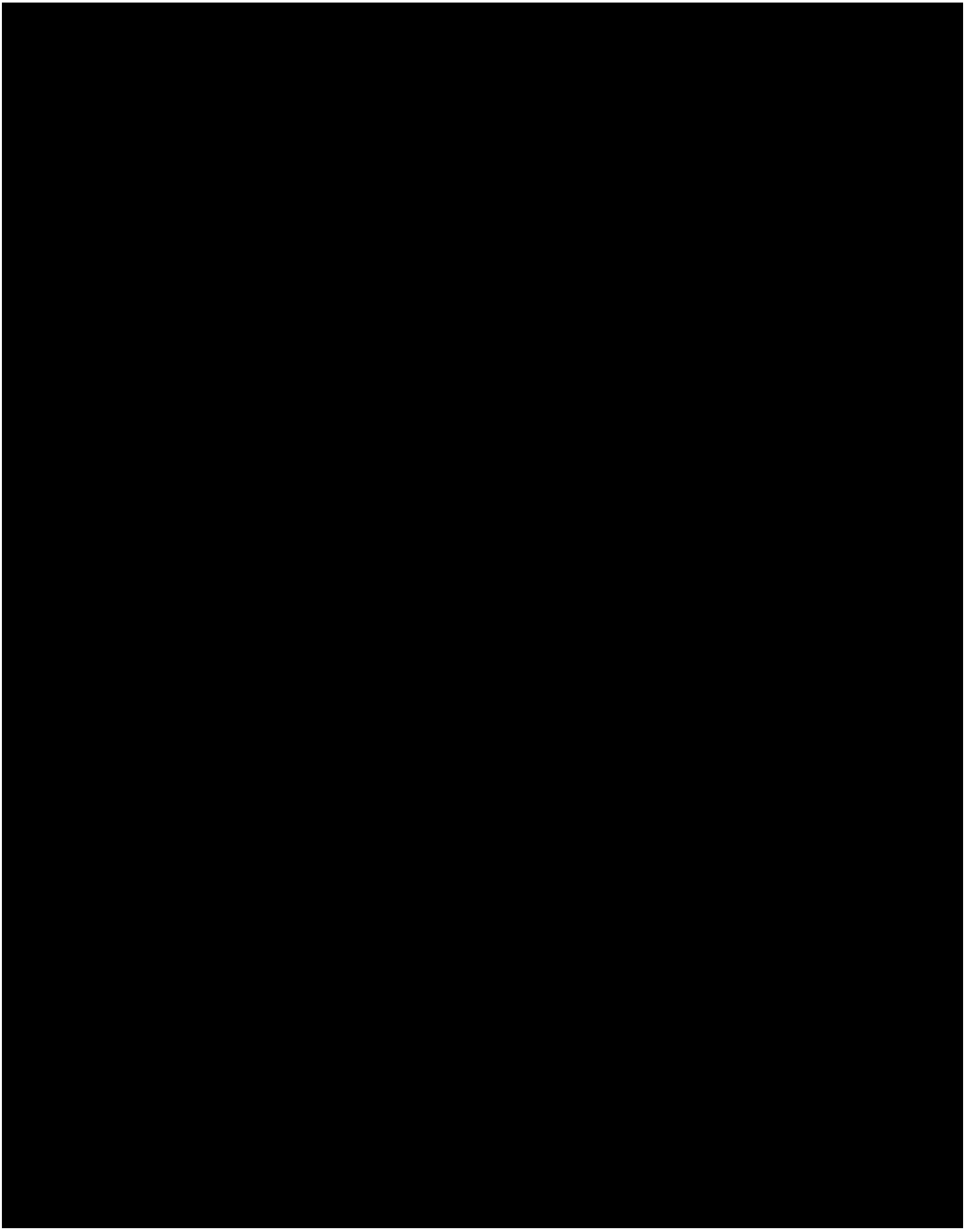
DR. MORWITZ: Yes.

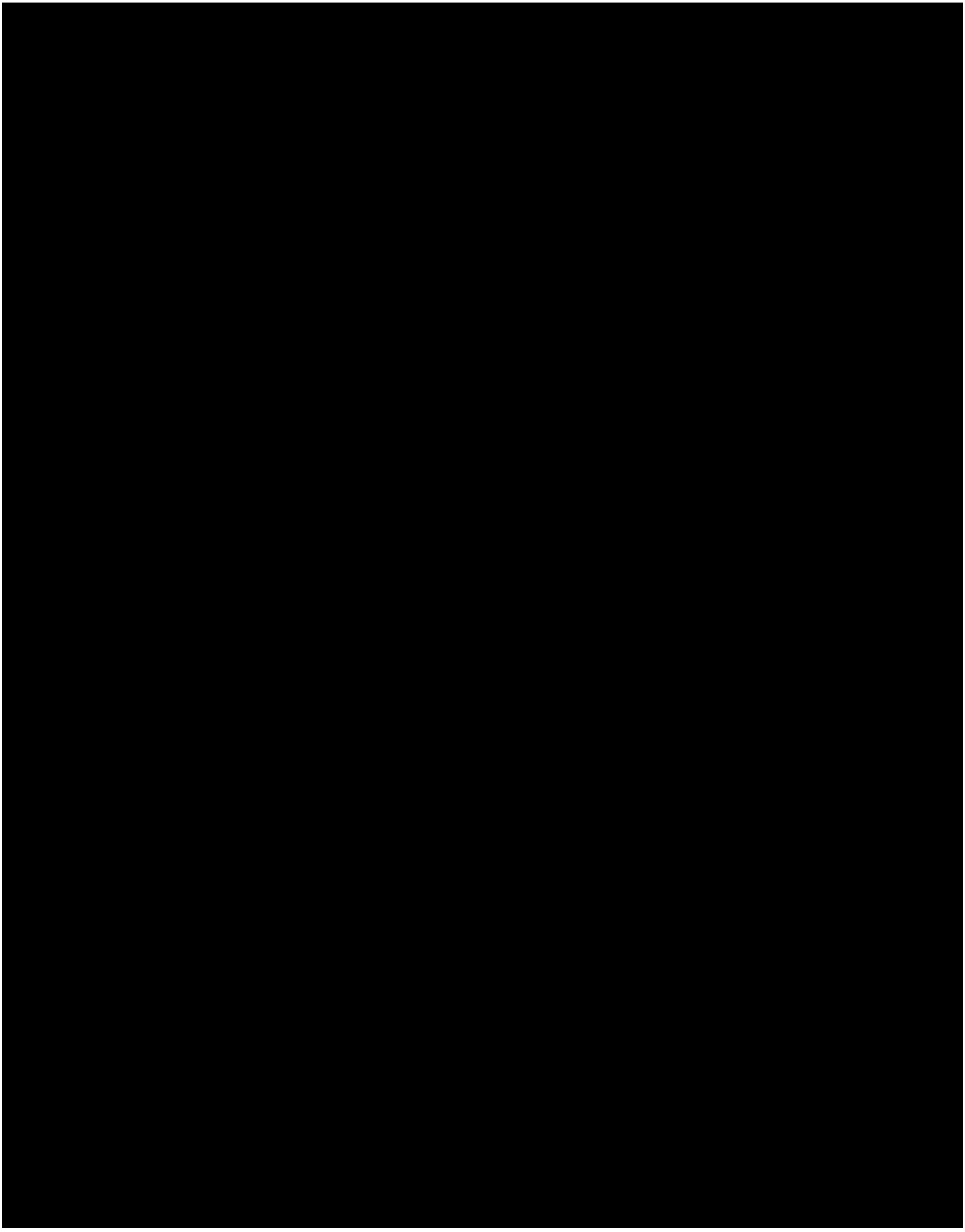
MR. RUSSELL: That's the study that you rely upon in giving your opinion. Correct?

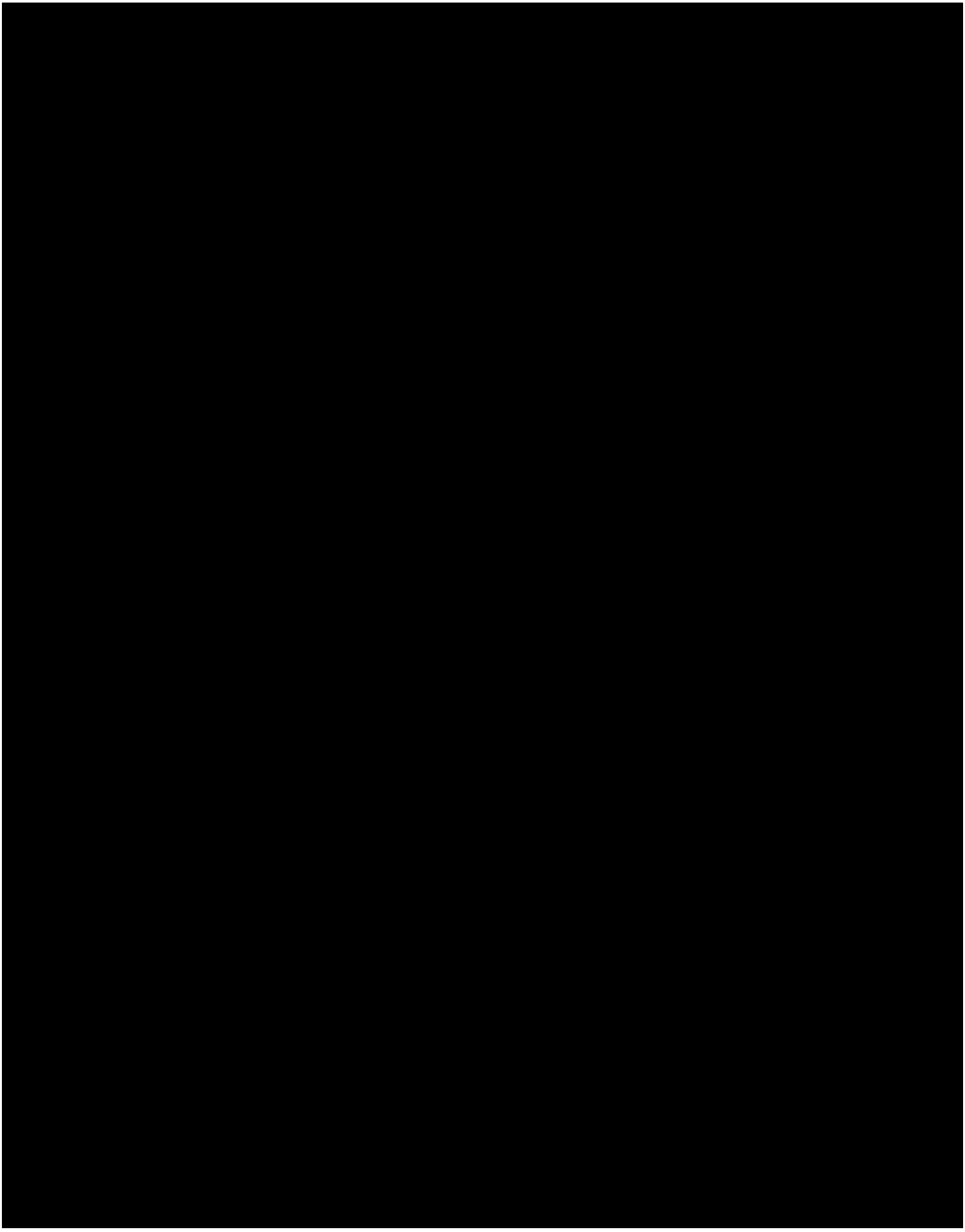
DR. MORWITZ: Yes.

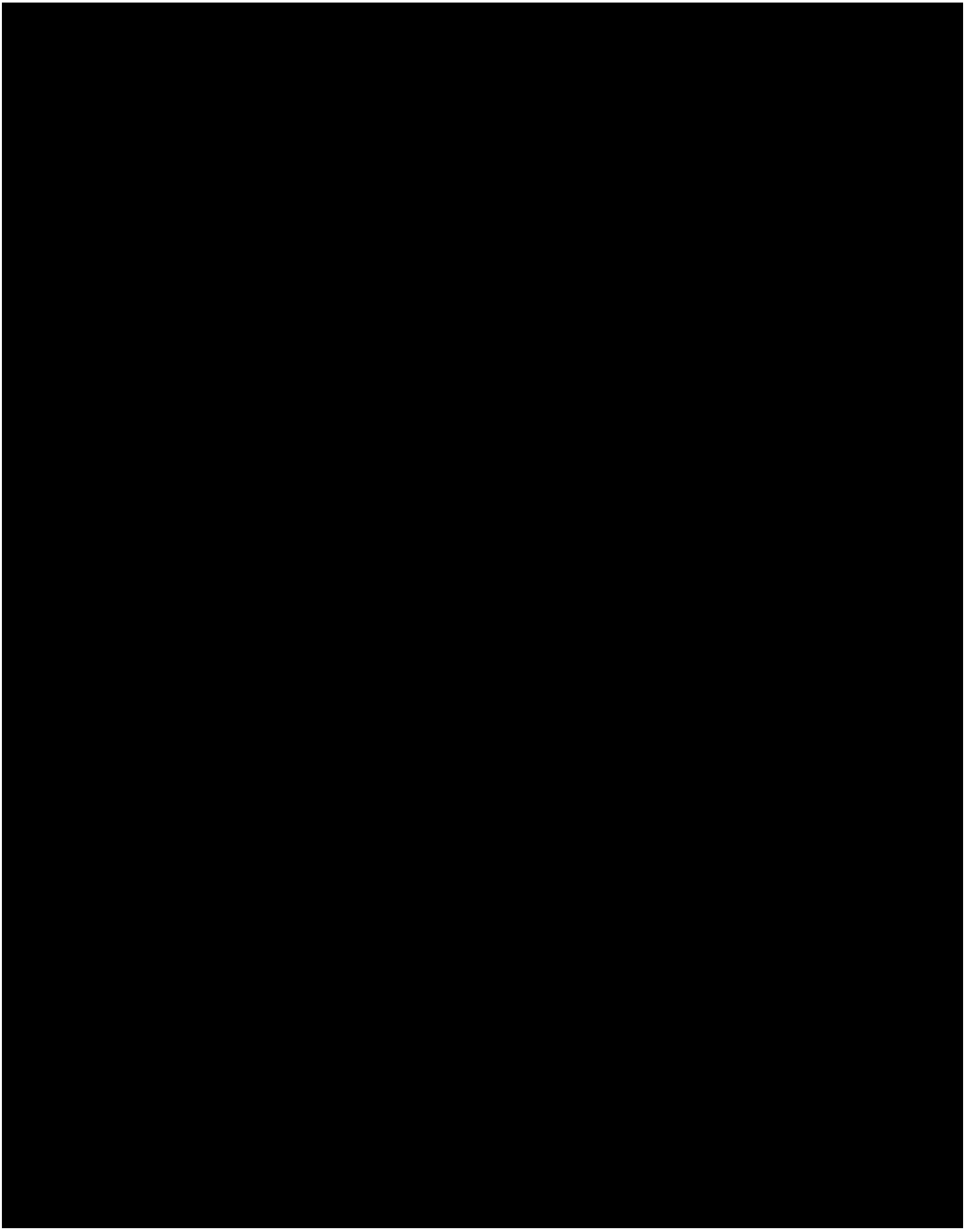
MR. RUSSELL: And you say:

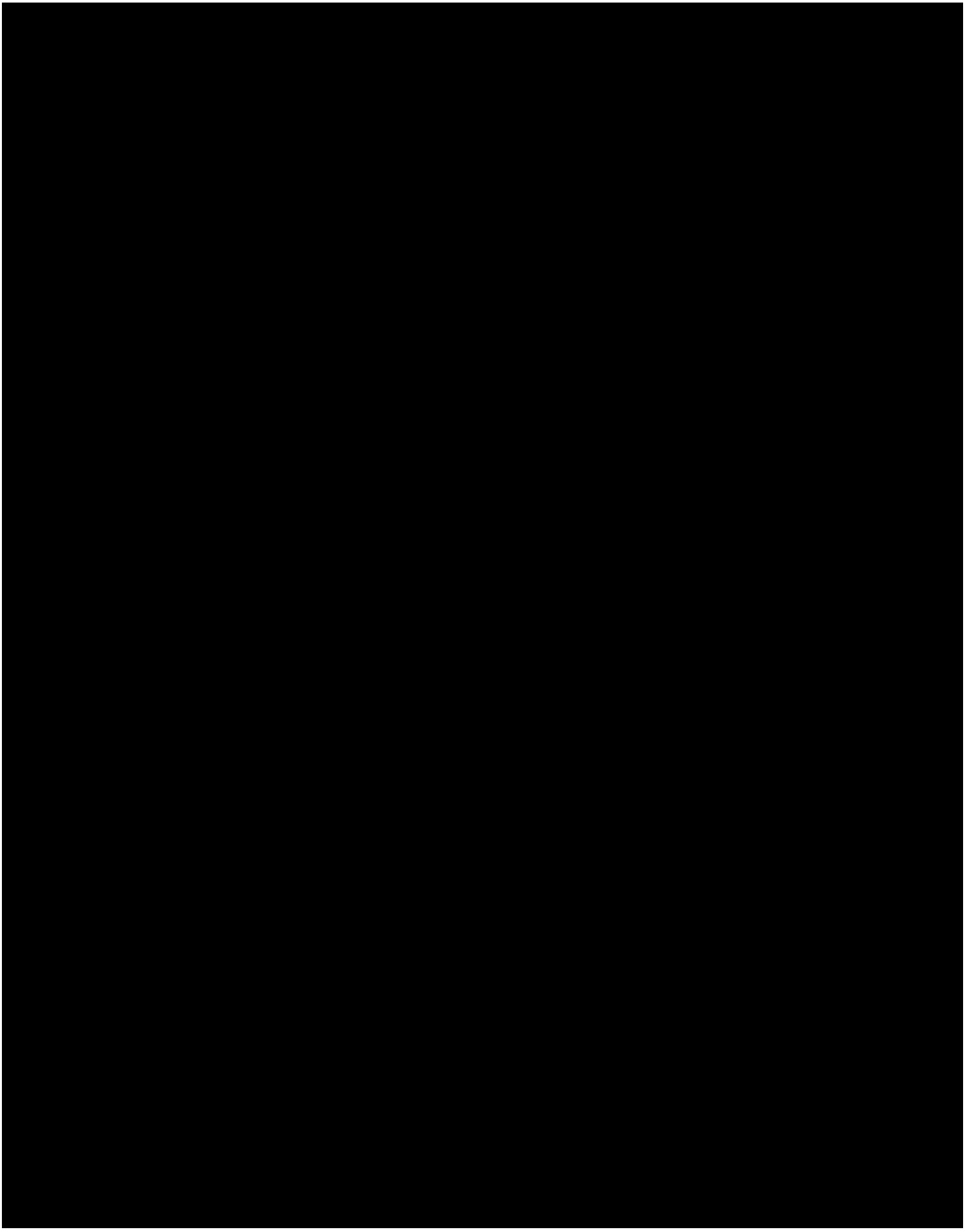


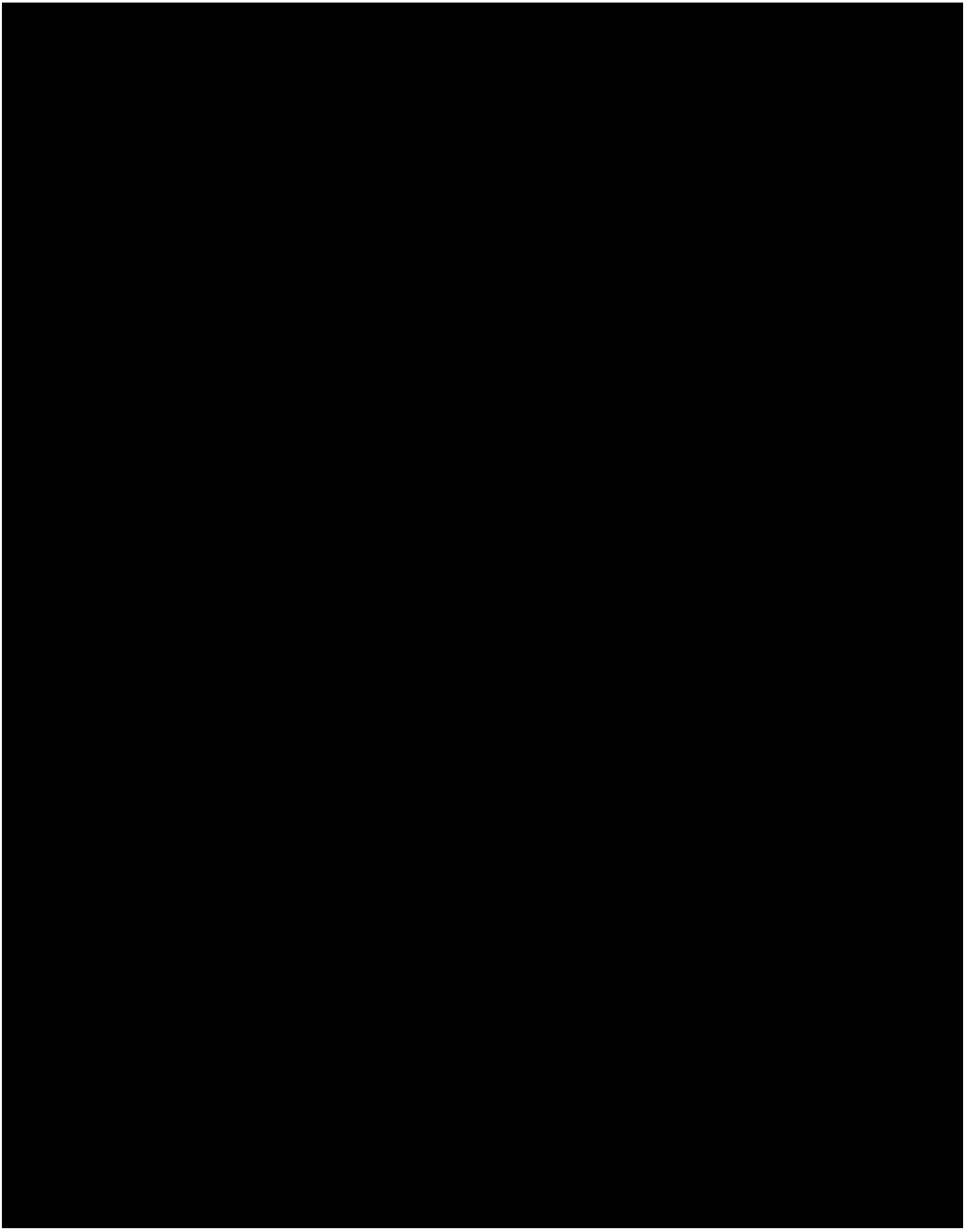


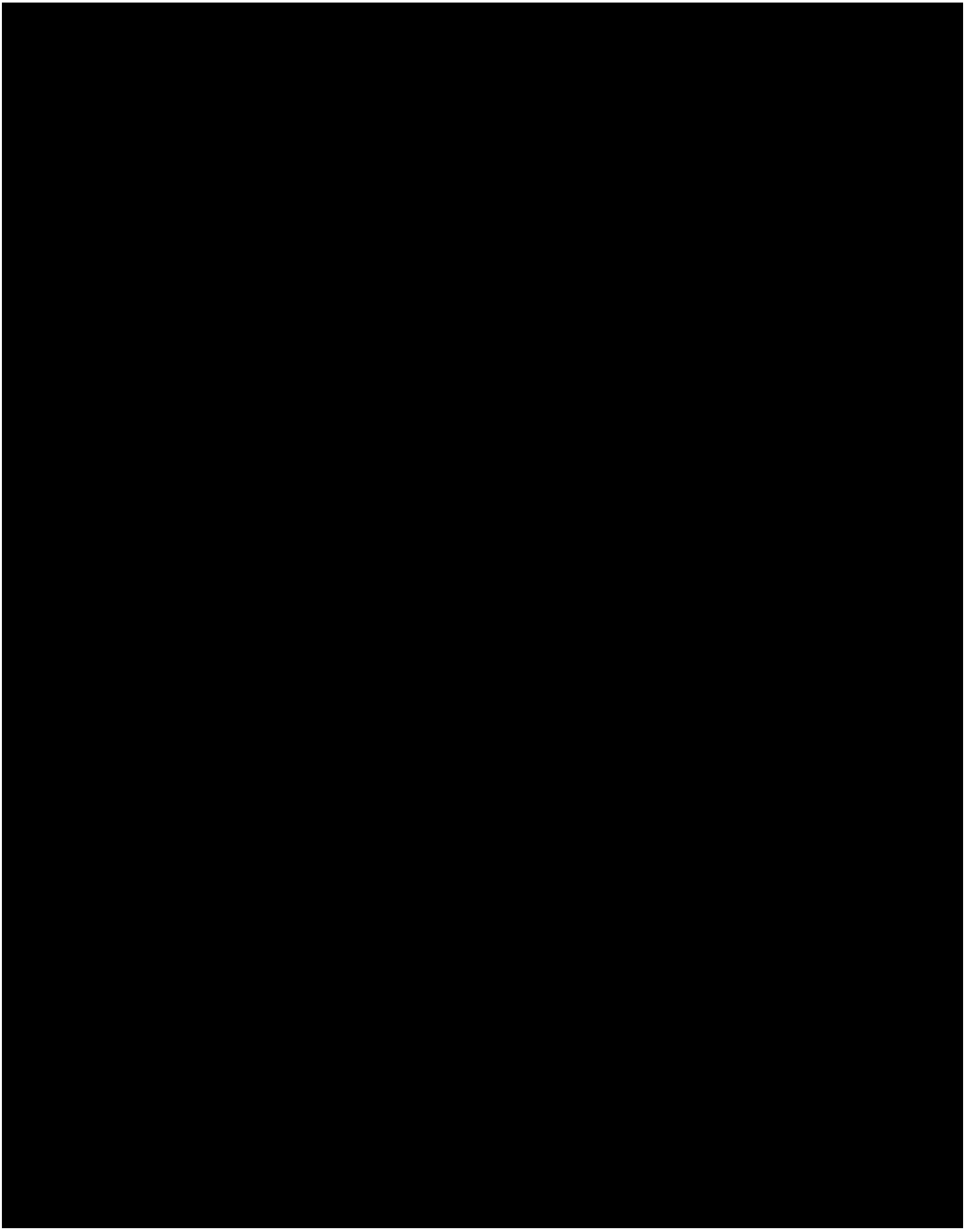


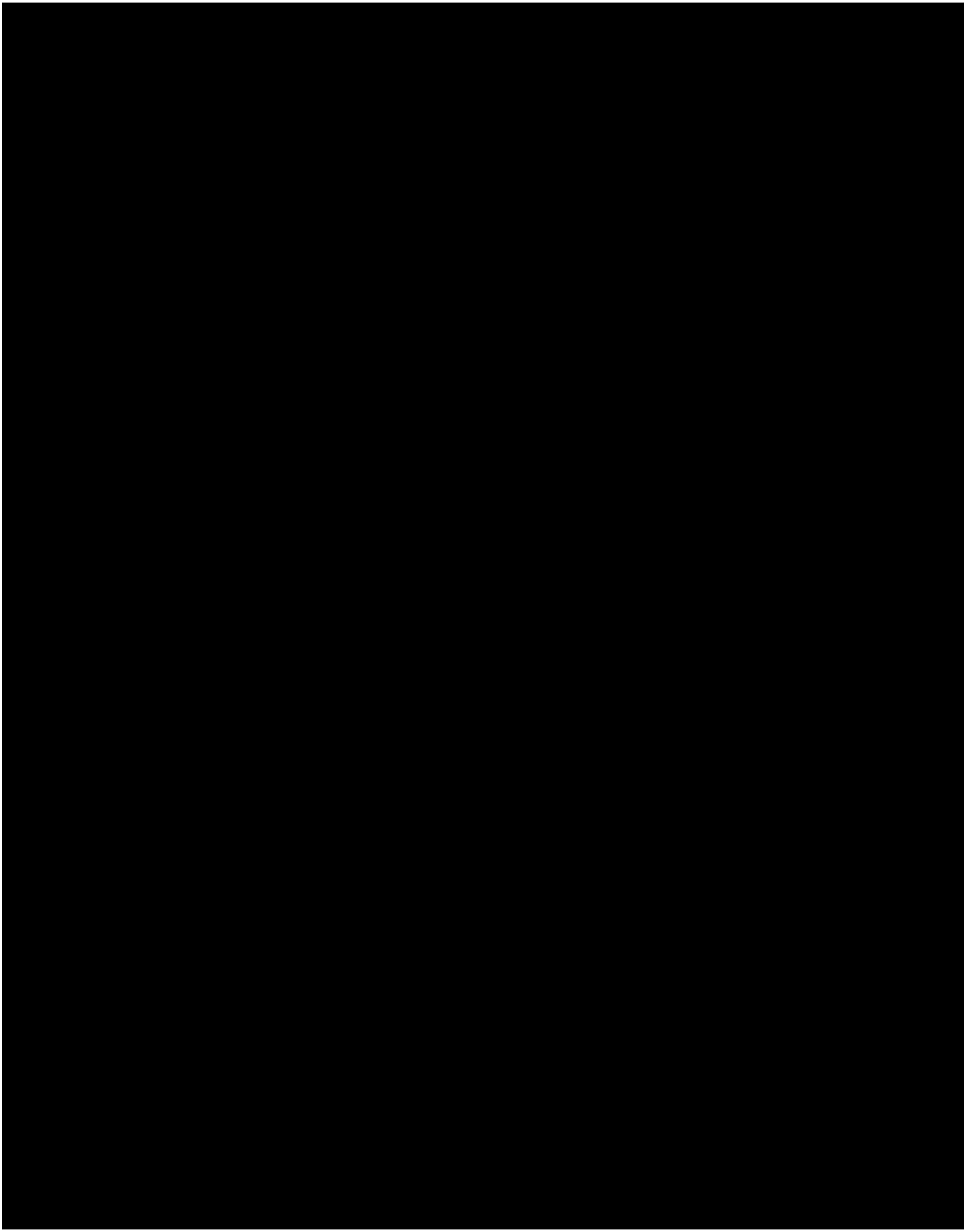


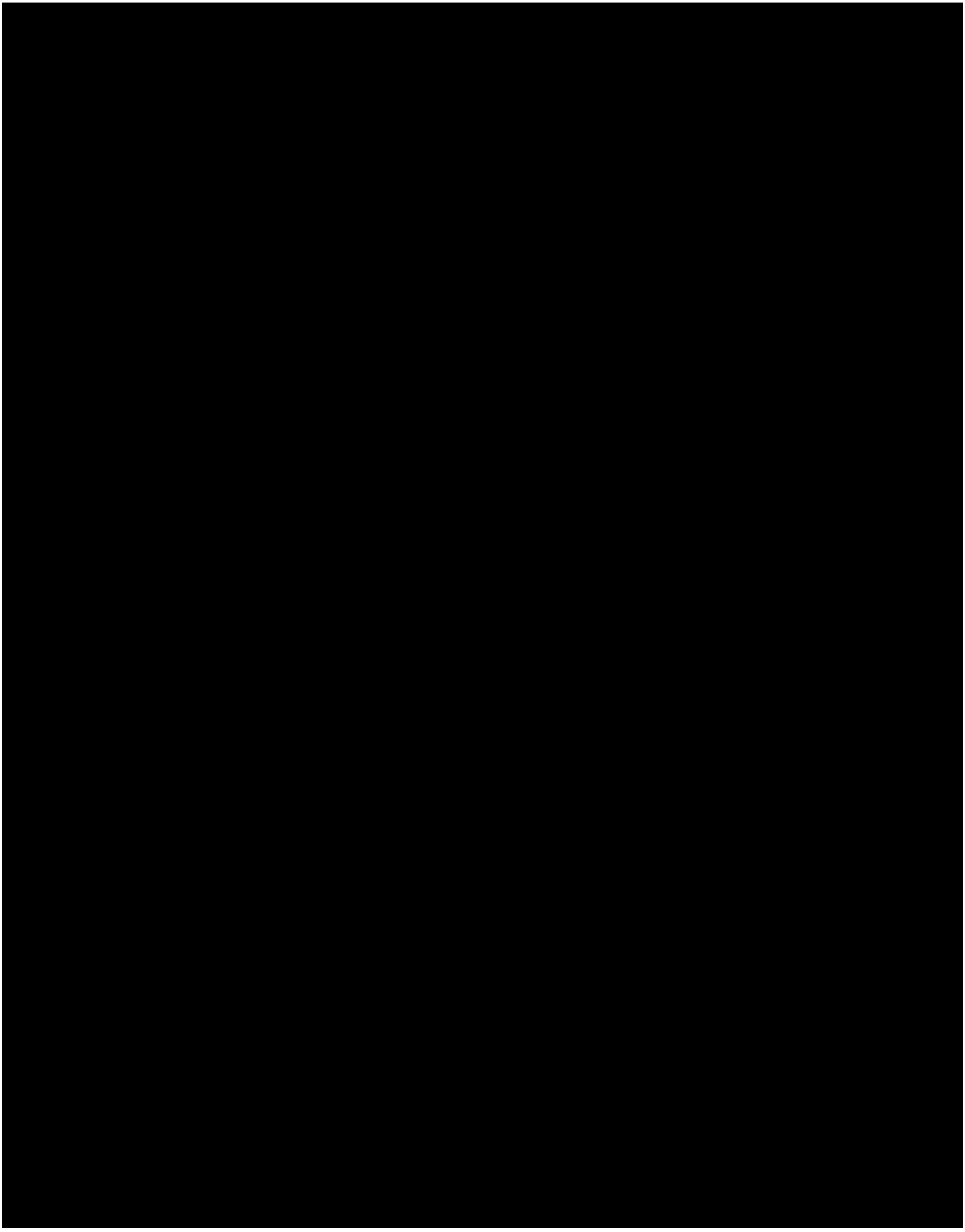


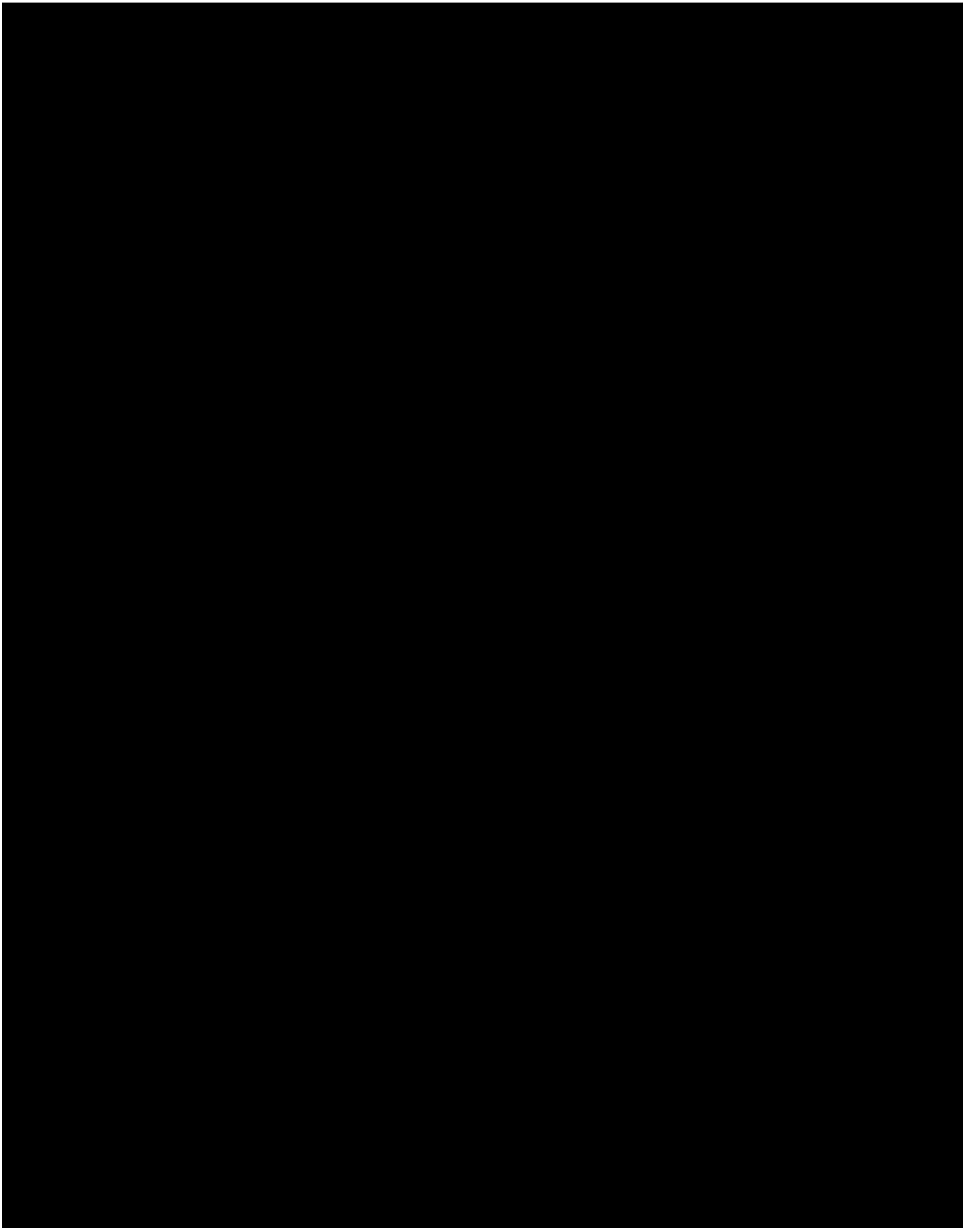


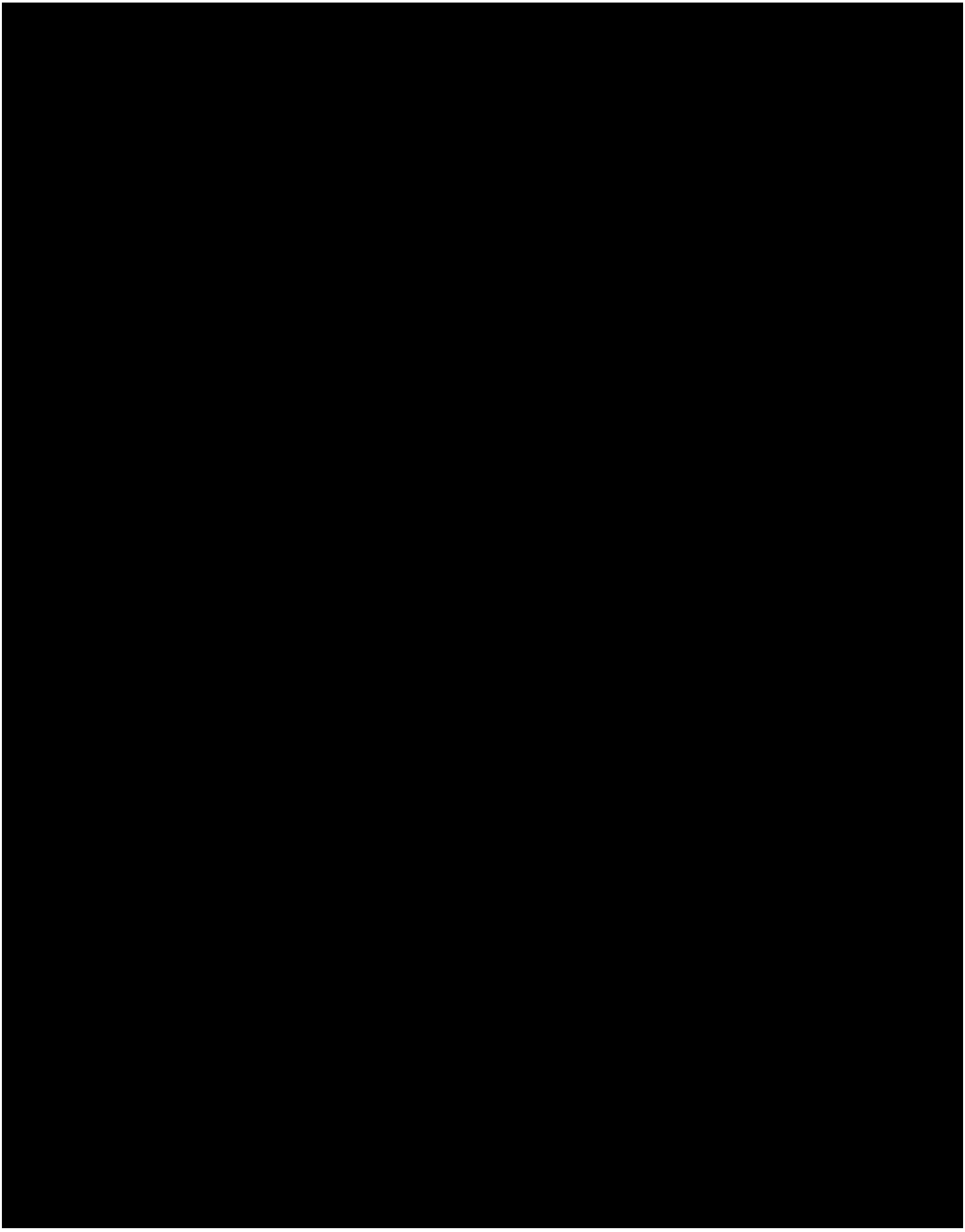


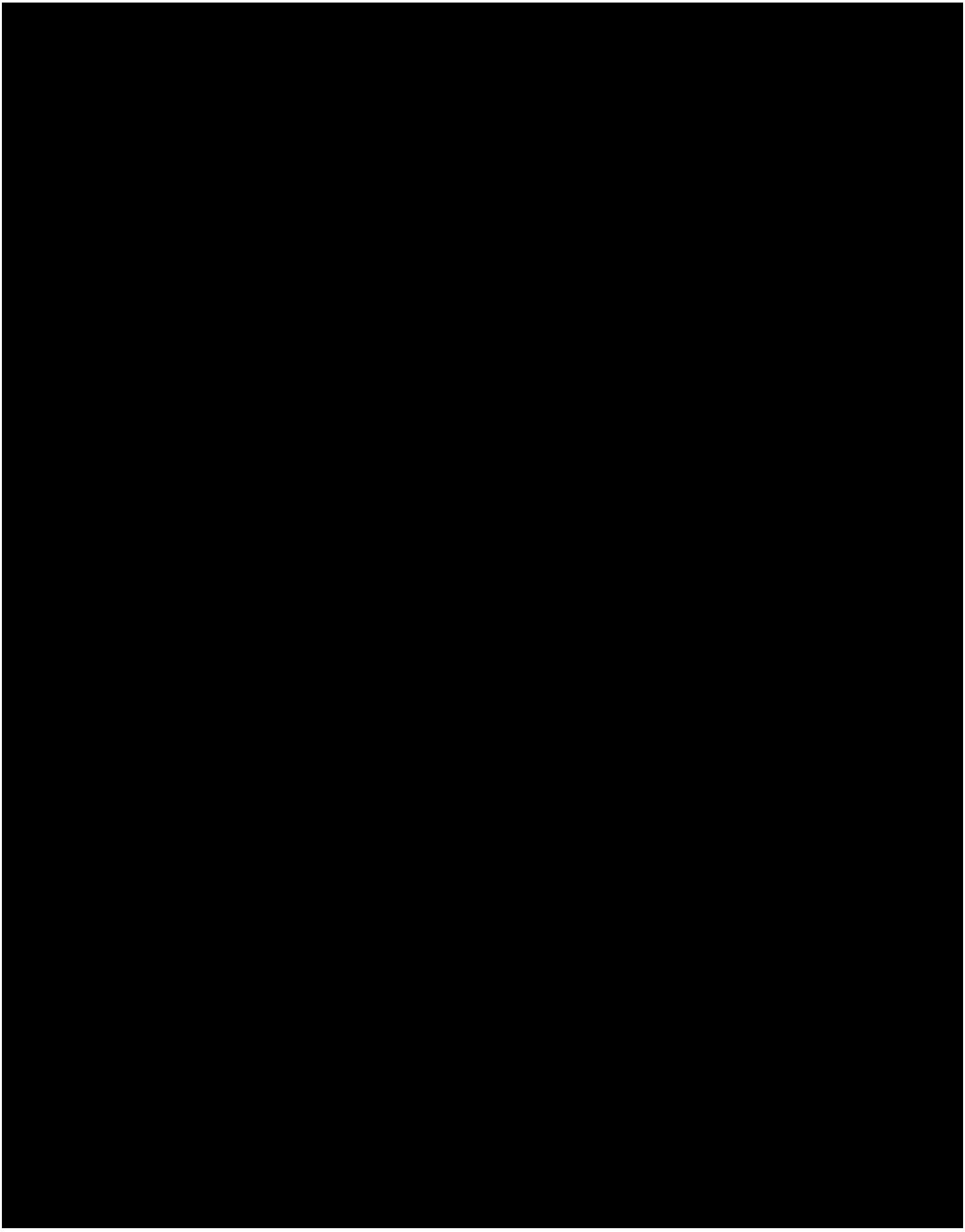


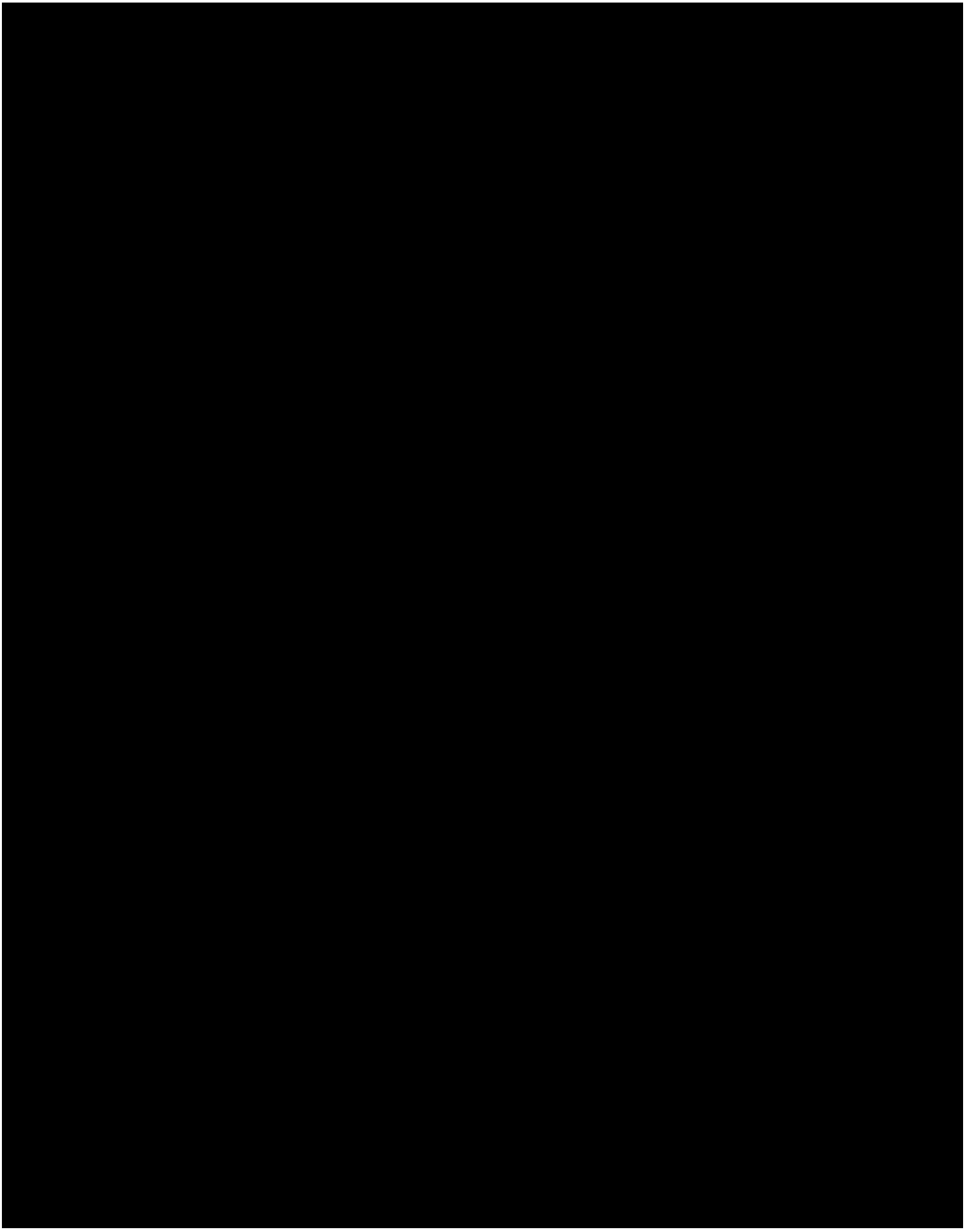


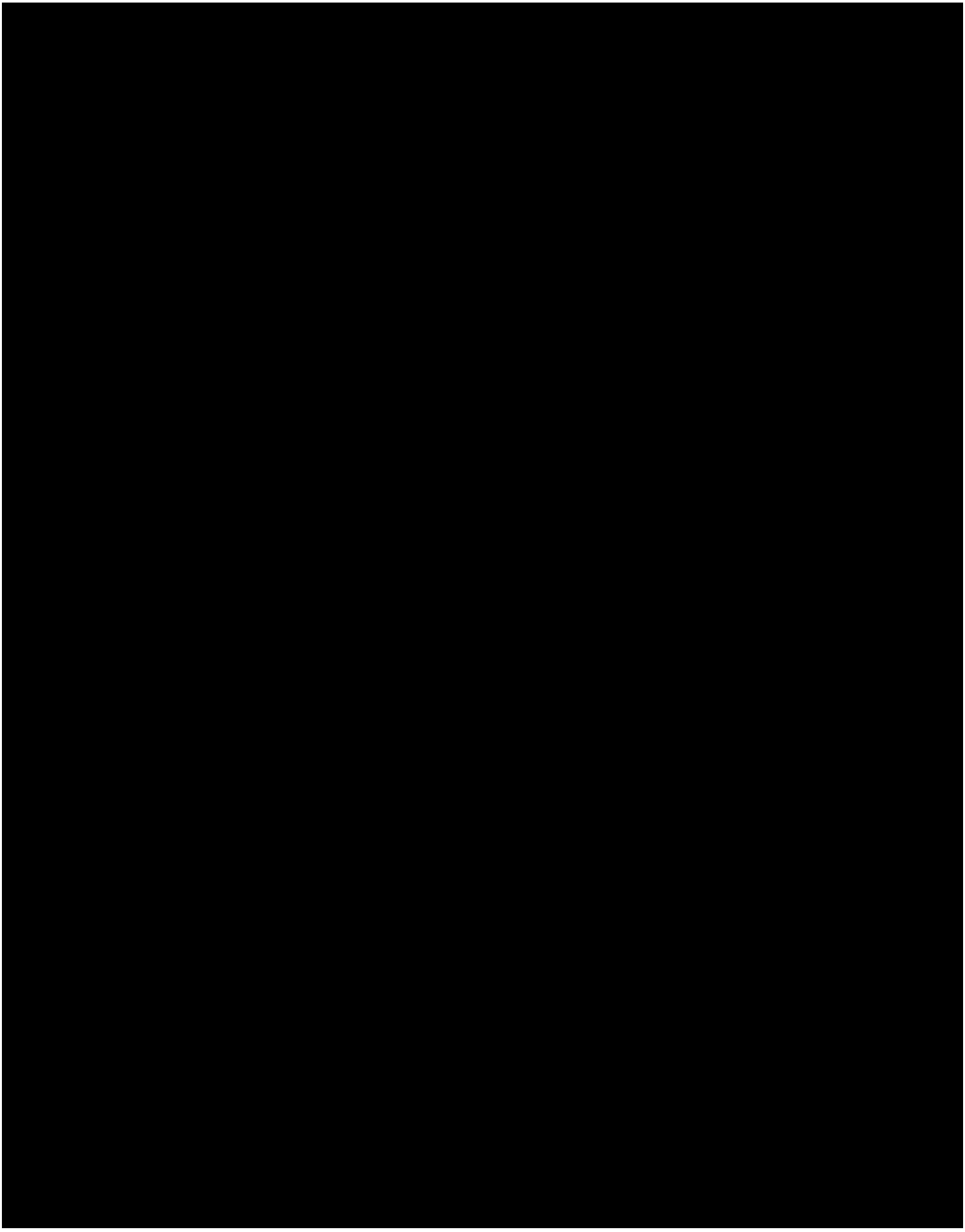


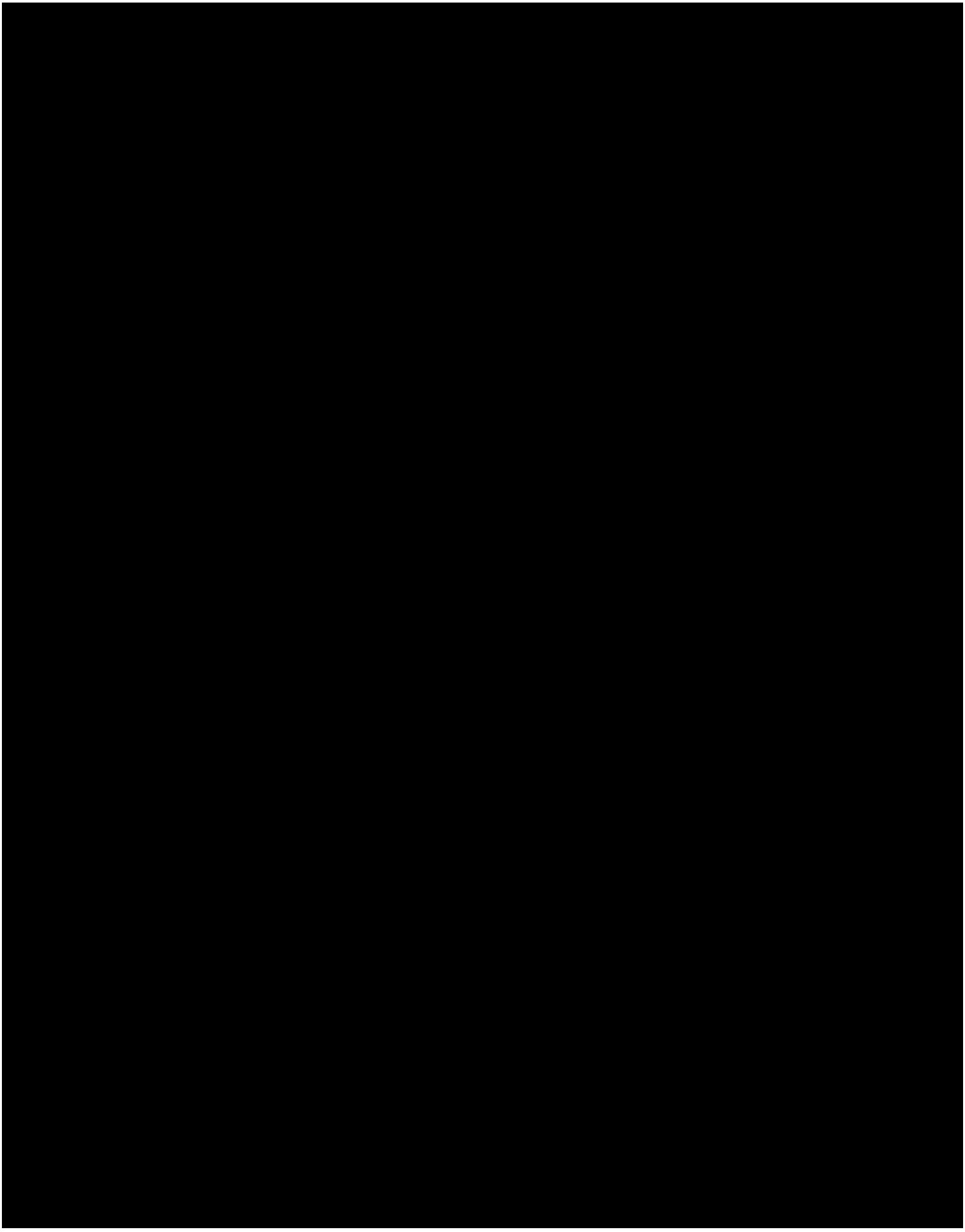


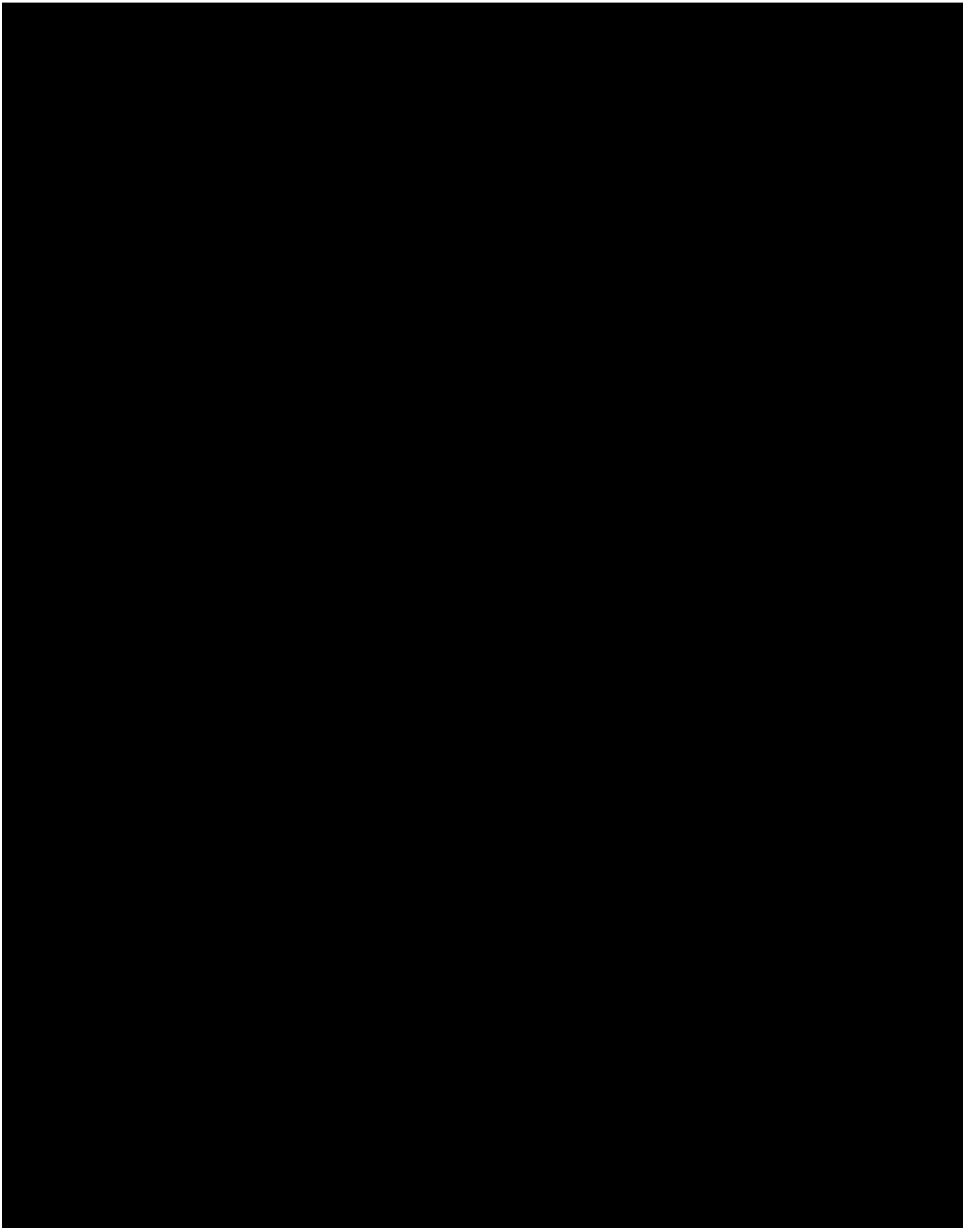


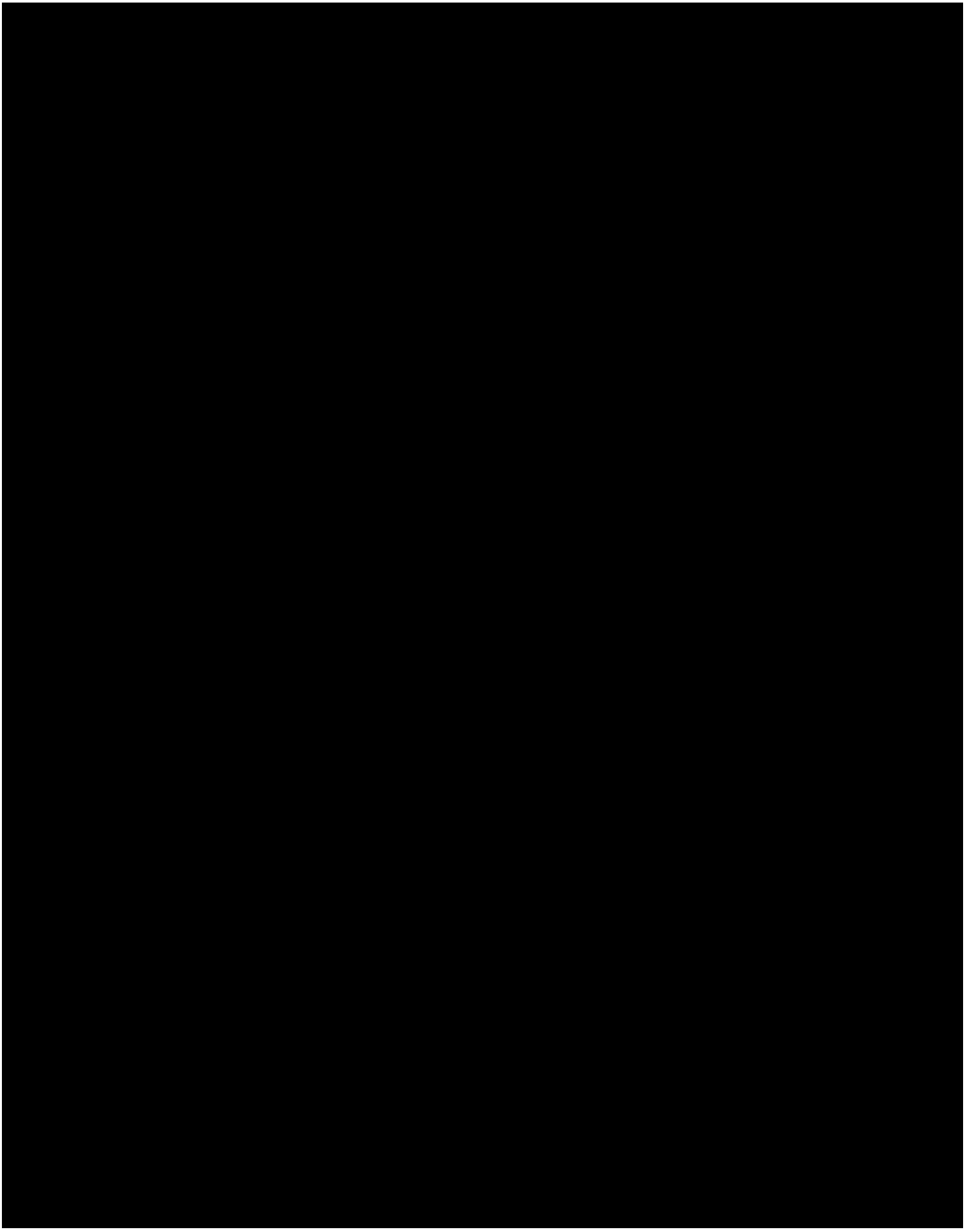












paragraph. I do discuss moderators as I continue this discussion.

MR. RUSSELL: We are going to go through that. But on this report, that's a conclusion that you draw from that report. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: Is it not true there were mixed results in your study?

DR. MORWITZ: Yeah. So the magnitude of the effect depends on whether the surcharge is a dollar -- presented as a dollar or as a percent. The impact on purchase intentions depends on the consumer's attitude towards the product.

MR. RUSSELL: Right. And you didn't point out those mixed results in your report yourself, did you?

(Short pause / Courte pause)

DR. MORWITZ: No, not here.

MR. RUSSELL: In paragraph 65, if I could ask you to turn to paragraph 65. You're referring to the Abraham and Hamilton study. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: That's the study that you rely upon in giving your opinion. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And you say:

"The results of their meta-analysis suggested that, on average, the use of partitioned pricing leads to a 9% increase in preference of the use over all-inclusive pricing."

Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And that 9 percent was statistically relevant from your perspective when you reviewed their study?

DR. MORWITZ: I believe it was what we call marginally significant result. I'd have to go back to the paper and look.

MR. RUSSELL: Moderately significant.

MR. JUSTICE LITTLE: I think she said marginally.

DR. MORWITZ: Marginally.

MR. RUSSELL: Marginally, sorry. Okay.

Did you say that in your report, "marginally significant"?

DR. MORWITZ: No, it says the size of the effect.

MR. RUSSELL: Now, Dr. Morwitz, I'd like to put a copy of that article to you, please. Fifty-one (51).

THE REGISTRAR: Is it a record or Agreed?

place.

MR. RUSSELL: So Dr. Morwitz, this is one of the articles that you referred to in your report?

DR. MORWITZ: Yes.

MR. RUSSELL: If I could ask you to turn to page 699.

Page numbering's different. This one doesn't have paragraph numbers.

I'm sorry. Give me one second here.

MR. JUSTICE LITTLE: Just for the record, this is the Abraham and Hamilton article.

DR. MORWITZ: Yes.

MR. RUSSELL: There should be a heading "General Discussion", but for some reason it's not on the page that's showing up here. It's under the heading "General Discussion".

Sixteen fourteen (1614)?

THE REGISTRAR: It's on screen.

MR. RUSSELL: There we go. Okay. You've got it.

Do you see that, Dr. Morwitz?

DR. MORWITZ: Yes.

MR. RUSSELL: Under the heading "General Discussion", it says:

"The first study to examine partition

pricing showed a positive effect on consumers' responses to offers when the price was divided into components, encouraging managers to 'divide and prosper' [in quotes]." (as read)

And that's in reference to your paper; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And then, of course, it goes on to say Morwitz et al. 1998. It's the same paper that we've been talking about; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: It says:

"However, subsequent works have found both positive and negative effects of partition pricing and, at the time of our analysis, a nearly equal number of positive and negative effects had been documented." (as read)

That's what it says; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And so at the time of this publication -- this publication is years later than yours -- I'm just trying to find the date -- 2018. Correct? Do you want to look at that.

DR. MORWITZ: I trust you, yeah.

MR. RUSSELL: It's the front of the article, it shows the publication in the Journal of Marketing Research.

DR. MORWITZ: Yes, I can see the year in my --

MR. RUSSELL: Pardon?

DR. MORWITZ: I can see the year in my statement.

MR. RUSSELL: So this is 20 years later, referring to your study, and then saying, "found both positive and negative effects". Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: Did you point that out to the Tribunal in the body of your report? I know you cited the article. But did you put that in the body of your report, that there were positive and negative effects?

DR. MORWITZ: No.

MR. RUSSELL: And then at the very bottom of that paragraph in terms of, again, referencing your paper, it says:

> "Before they can 'divide and prosper' however, managers need to conduct a carefully analysis of the situation." (As read)

Right?

DR. MORWITZ: Yes, it says that.

DR. MORWITZ: I trust you, yeah.

MR. RUSSELL: It's the front of the article, it shows the publication in the Journal of Marketing Research.

DR. MORWITZ: Yes, I can see the year in my --

MR. RUSSELL: Pardon?

DR. MORWITZ: I can see the year in my statement.

MR. RUSSELL: So this is 20 years later, referring to your study, and then saying, "found both positive and negative effects". Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: Did you point that out to the Tribunal in the body of your report? I know you cited the article. But did you put that in the body of your report, that there were positive and negative effects?

DR. MORWITZ: No.

MR. RUSSELL: And then at the very bottom of that paragraph in terms of, again, referencing your paper, it says:

> "Before they can 'divide and prosper' however, managers need to conduct a carefully analysis of the situation." (As read)

Right?

DR. MORWITZ: Yes, it says that.

MR. RUSSELL: That's what it says. Just before that it talks about a range of conditions for consumers are likely to respond more favourably to partition pricing, yet several moderators were significant suggesting managers, and the moderators that we're talking about here are the same moderating effects that we were referring to earlier. Correct?

DR. MORWITZ: These are some of the moderating effects.

MR. RUSSELL: Yet several moderators were significant. Suggesting that managers and researchers can influence the effect of partition pricing on consumers. Right? That's what it says?

DR. MORWITZ: Yes.

MR. RUSSELL: So those moderating effects, this article that you refer to in your paper, say it's important to understand the moderating effects. Correct?

DR. MORWITZ: It says that, yes.

MR. RUSSELL: In fact, it coins the phrase before you can divide and prosper, you better know about those; right? That's what it's saying?

DR. MORWITZ: Yes.

MR. RUSSELL: So if the managers that are going to think about this need to know about it, doesn't this Tribunal need to know about it?

DR. MORWITZ: So the price representations are not only partition pricing, they're also drip and price obfuscation, and the articles that are reviewed here look only at partition pricing where the surcharges are fully salient. It doesn't investigate what happens when the surcharges are dripped or made not salient in some other way.

MR. RUSSELL: So the caveat you're giving me is, oh, this isn't about drip pricing, this is about partition pricing. Is that correct?

DR. MORWITZ: Yeah, it's an important part of the field of partition pricing. We were very careful in our initial study to put the surcharge right next to the base price, in the same size font, to see what are the effects when everything is fully revealed. And so that's a characteristic of this literature.

MR. RUSSELL: I'm going to ask you to return to paragraph 59 of your report, which is P-A-11. Paragraph 59, you see that?

THE REGISTRAR: Oh, 59? Sorry. I heard 49.

MR. RUSSELL: Sorry.

And I just put this to you, I read it to you a few minutes ago. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: This says again -- let's look at

it carefully, referring to your own paper:

"We found through two experiments that when a price is partitioned..."

This is talking about partitioned pricing here, is it not?

DR. MORWITZ: Yes.

MR. RUSEELL: "...it lowers consumers' average perceptions of the total price of the product and increases their demand."

And so, when I just put to you a moment ago this is about partition pricing your answer was, oh, but it's not about drip pricing. But my question was about partition pricing because I had referred you to your own article and your own research -- and this wasn't about drip pricing either. It was about partition pricing, "Divide and Prosper", was it not?

DR. MORWITZ: Yes.

MR. RUSSELL: And it's very clear that in the paper I just put to you when you refer to "Divide and Prosper", which is an experiment on partitioned pricing that they came out and said both negative and positive effects. You didn't say anything about that after paragraph 59, did you? You didn't add it into paragraph 59 and cite the paper that's in your study to say there are mixed results?

DR. MORWITZ: No. As I said before, I discuss some moderators in the appendix but --

MR. RUSSELL: My point is you didn't put it into the body when you're discussing the very point about partition pricing. You give a very firm conclusion. You didn't alert this Tribunal to the fact that a study that you refer to 20 years later was showing positive and negative effects and that moderators were important to consider. You didn't tell the Tribunal that when you were referring to your conclusion, did you?

DR. MORWITZ: No.

MR. RUSSELL: Now, I'm going to ask you about the same document -- just one second. I'll get the page reference I need to go to here for the Registrar. Page 105. This is the appendix to the articles that you refer to in your opinion. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And I'd like you to look at item number 20, which is on page 106.

That's the study by Dr. Hussain and Dr. Morgan. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: For the life of me -- and I've done this many times -- I can't find where you refer to the study at all in the body of your report.

Shrouded Attributes and Information Suppression: Evidence from the Field*

Jennifer Brown
Northwestern University

Tanjim Hossain
University of Toronto

John Morgan
University of California, Berkeley

Abstract

We use field and natural experiments in online auctions to study the revenue effect of varying the level and disclosure of shipping charges. Our main findings are: (1) disclosure affects revenues—for low shipping charges, a seller is better off disclosing; and (2) increasing shipping charges boosts revenues when these charges are hidden. These results are not explained by changes in the number of bidders.

*We thank Alvin Ho, John Li, and Jason Snyder for their excellent research assistance, Edward Tsai and Rupert Gatti for their help in conducting the experiments in Taiwan and Ireland, respectively, and Sean Tyan for kindly sharing his dataset with us. We also thank Eric Anderson, Rachel Croson, Stefano DellaVigna, Botond Koszegi, Ulrike Malmendier, Chun-Hui Miao, two editors of this journal, as well as seminar participants at a number of institutions. The second author gratefully acknowledges the financial support of Hong Kong Research Grants Council and Center for Economic Development, HKUST. The third author gratefully acknowledges the financial support of the National Science Foundation. Please direct all correspondence to Tanjim Hossain at tanjim.hossain@utoronto.ca.

1 Introduction

Online stores often reveal shipping charges only after a consumer fills her "shopping cart." Television offers for items "not sold in stores" disclose shipping and handling in small print with speedy voice-overs. Airlines increasingly use hidden fuel surcharges. Hidden mandatory telephone and energy fees in hotels have triggered class-action lawsuits.[1] Are these practices profitable? Firms will enjoy higher revenues if consumers naïvely underestimate "shrouded" charges. However, if hidden fees make consumers suspicious, demand may fall. If consumers fully anticipate the charges, shrouding will have no effect.

We conduct field experiments using leading online auction platforms in Taiwan and Ireland to compare revenues for identical items while varying both the amount and the disclosure level of the shipping charge. We also compare revenues before and after a change on eBay's US site that allowed users to display shipping charges in their search results. Our main findings are: (1) shrouding affects revenues—for low shipping charges, a seller is better off disclosing; and (2) increasing shipping charges boosts revenues when shipping charges are shrouded. Changes in the number of bidders do not appear to drive these revenue differences.

Theoretical predictions on the profitability of shrouded pricing frequently depend on the rationality level of consumers. The literature makes a distinction between shrouded charges that are unavoidable (surcharges) and avoidable (add-ons). Shrouding a surcharge is not optimal when all consumers are fully rational and disclosure is costless (Milgrom, 1981; Jovanovic, 1982). However, shrouding may be optimal with boundedly rational consumers (Spiegler, 2006). Add-ons may be shrouded in equilibrium when consumers are myopic (Gabaix and Laibson, 2006; Miao, 2006), lack self-control (DellaVigna and Malmendier, 2004), or vary in their tastes for the add-on and advertising add-on prices is expensive (Ellison, 2005). Moreover, there is no incentive for firms to educate consumers about competitors' shrouded add-ons (Gabaix and Laibson). Empirical literature on price shrouding mostly suggests that shrouding raises profitability. Ellison and Ellison (2009) find that shrouding add-ons is a profitable strategy for online firms selling computer memory chips. Chetty *et al.* (2009) find that consumer demand falls when retailers post tax-inclusive prices (i.e. disclose a surcharge) for personal care products using a field experiment. They offer similar results for tax disclosure in alcohol prices using historical data. Ellison (2006) surveys various approaches to modeling bounded rationality and their implications for firm pricing. DellaVigna (2009) provides an overview of bounded rationality models using field data.

Theory suggests that firms can exploit price partitioning (separating price into compo-

[1] Woodyard, C., "Hotels face lawsuits on surcharges for phones, energy," USA TODAY, September 26, 2004.

nents) to affect consumer choice (Kahneman and Tversky, 1984; Thaler, 1985). Hossain and Morgan (2006) find evidence of this in field experiments on eBay's US auction site. They find that, when shipping is shrouded, raising the shipping charge increases both revenues and the number of bidders attracted to an auction. In contrast, mixed results have been obtained in laboratory experiments (Morwitz *et al.*, 1998; Bertini and Wathieu, 2008). Smith and Brynjolfsson (2001) find that online book retailers do not benefit from price partitioning. Our paper complements these earlier work by studying the interaction between price partitioning and disclosure using both field and natural experiments.

2 Field Experiments

We conducted field experiments, selling 10 different types of iPods, to study the revenue effect of changing the amount and shrouding level of shipping charges. The auction title and item description specified the capacity, model, and color of each iPod. The item description clearly stated the shipping charge and method. We disclosed the shipping charge in the title of the listing for half of the auctions and shrouded (omitted) it from the title for the other half.

We used two different auction sites for these experiments, selling 36 items on Yahoo Taiwan in 2006 and 40 items on eBay Ireland in 2008. Our seller identity on each site had a reasonable reputation rating. The choice of auction sites and products allows us to easily vary shipping and shrouding while selling identical items. IPod markets on these sites are thick, and exhibit considerable variation in shipping charges. Neither site automatically reveals shipping in search listings, an essential feature for examining shrouding.[2] This allowed us to control the disclosure level of shipping charges without drawing attention to ourselves.

Taiwan

We sold new 512 MB and 1GB silver iPod Shuffles as well as 1GB and 2GB Nanos in both white and black—a total of six different iPod models. Our treatments were:

	Opening Price of TWD 750		Opening Price of TWD 600
	Low Shipping TWD 30	High Shipping TWD 180	High Shipping TWD 180
Disclosed	DL	DH	DR
Shrouded	SL	SH	SR

[2]In contrast, eBay US automatically discloses shipping.

where "TWD" denotes New Taiwan Dollars. At the time of our experiments, the exchange rate was TWD 33 to USD 1 or EUR 0.83. Prior to the start of the experiments, we collected field data and observed shipping charges ranging from TWD 50-250 with a median shipping charge of TWD 100. Thus, our low shipping charge is a "bargain" in this market while our high shipping charge is at the 99th percentile of the market. We auctioned all six iPod models under each treatment. Treatments DL, DH, and DR were conducted from March 13 to March 20, 2006 while treatments SL, SH, and SR were conducted from March 20 to March 27, 2006. While the auctions are separated by a week, Apple made no changes to the suggested retail price over this period, nor were there any price trends in online auctions for iPods worldwide (Glover and Raviv, 2007). All auctions closed successfully. Figures 1 and 2 present screenshots (and accompanying English translations) for auctions where the shipping charge is disclosed and shrouded, respectively.

To examine the effect of shrouding, we compare treatments Dx to Sx. Comparing treatments xL to xH reveals the effect of raising the shipping charge while holding the opening price fixed. In comparing treatments xL to xH, there is a potential confound—the reserve price (minimum payment) of the auction also increases. This is unlikely to matter since the minimum payment is considerably below the retail price, and not likely to be binding.[3] Nevertheless, the xR treatments ("R" is a mnemonic for reserve) disentangle shipping charges and reserve price. To study the effects of raising the shipping charge while holding the reserve constant, we compare treatments xL to xR. Comparing treatments xR to xH identifies the effect of raising the opening price with a fixed shipping charge.

Ireland

We sold new 1GB second generation of iPod Shuffles in four different colors: blue, green, pink and silver. Since changing the reserve price had no effect in the Taiwan experiments, we simplified the design, omitting the xR treatments. Our treatments were:

	Opening Price of EUR 0.01	
	Low Shipping EUR 11	High Shipping EUR 14
Disclosed	DL	DH
Shrouded	SL	SH

At the time of our experiments, the exchange rate was EUR 0.77 to USD 1. We conducted 8 auctions per week, with two items in each treatment cell. In a given week, items of the same color differed only by shipping charge. The disclosure treatment for a color alternated each

[3] The cheapest iPod we sold, the 512 MB Shuffle, had a retail price of TWD 2500.

week. We ran the experiments over the five week period from October 13, 2008 to November 18, 2008, and all auctions closed successfully. Prior to the start of the experiments, we collected field data and chose shipping charges coinciding with the 25th and 75th percentile of the market. Figures 3 and 4 present screenshots for auctions where the shipping charge is disclosed and shrouded, respectively.

Results

Table 1 summarizes the results by country for each treatment, while Table 2 presents formal statistical tests. By pooling the data from both countries, we can take advantage of a larger data set to estimate more precise effects. Three tests are reported, a standard t-test, a Wilcoxon signed-rank test, and a Fisher-Pitman exact permutation test. As the table shows, the statistical significance is similar across tests. Table 2 also presents permutation based confidence intervals.[4]

The effects of shrouding on revenues may be seen by comparing by comparing each item under treatment Dx with its pair under treatment Sx.[5] Notice that, under low shipping, revenues declined with shrouding. Statistical tests indicate that this revenue difference is significant at the 5% level. Under high shipping, the effect is ambiguous—disclosure increased revenues in Taiwan but reduced them in Ireland. Formal statistical tests do not indicate a significant difference in revenues—confidence bounds suggest revenue differences between shrouded and disclosed treatments under *high shipping* do not exceed EUR 2.95.

Disclosing a low shipping charge might raise revenues by attracting more bidders, yet there is little evidence of this. Disclosure increased the number of bidders in Taiwan but reduced them in Ireland. Statistical tests suggest that revenue differences cannot be attributed to changes in the number of bidders. Similarly, disclosure has no significant effect on the number of bidders under high shipping.

How do shipping charges affect revenues under the different shrouding treatments? This may be seen by comparing each item under treatment xL with its pair under treatment xH. When shipping charges are disclosed, the revenue effect is ambiguous—more expensive shipping raises revenues increase in Taiwan but lowers them in Ireland. Once again, formal statistical tests fail to reject the hypothesis of no treatment effect—confidence bounds indicate the effect is somewhere below EUR 2.16. In contrast, raising the shipping charge significantly increases revenues when shrouded—the winning bidder pays, on average, 5% more in Taiwan and 7% more in Ireland under high shipping. As Table 2 shows, this revenue difference is significant at about the 1% level.

[4]Permutation based confidence intervals are only valid under the null hypothesis of exchangeability. Thus, we construct these only for treatment pairs where we cannot reject the null.

[5]When multiple identical items were sold under the same treatment, we used mean revenue as the unit of observation leading to 10 obsrvations for 10 different types of ipods.

Shipping charges have only modest effects on the number of bidders attracted to each auction. In Taiwan, higher shipping charges attract slightly fewer bidders. In Ireland, they attract slightly more. Statistical tests are consistent with this observation–we cannot reject the null hypothesis of no treatment effect at conventional levels either under disclosure or shrouding.

Holding opening price fixed, raising the shipping charge increases the reserve level of the auction. Comparing treatments xH to xR isolates a pure reserve effect. Regardless of disclosure, there is no statistical difference between these treatments. In contrast, comparing treatments xL to xR isolates a pure shipping effect. Here we find that raising the shipping charge increases revenues, but the effect is more pronounced when shipping costs are shrouded.[6] This revenue difference is significant at the 10% level under disclosure and the 5% level under shrouding. To summarize, changes in the reserve level do not appear to drive auction revenues.

Discussion

The main findings that emerge from the field experiments are: (1) shrouding a low shipping charge is a money-losing strategy; (2) raising shipping charges increases revenue, particularly when shrouded; and (3) these revenue differences cannot be attributed to changes in the number of bidders. We sketch a model that can explain these findings. Suppose that the number of bidders is fixed. Some bidders are *attentive*—they are fully aware of the shipping charge. Others are *naïve*—they are unaware of the exact shipping charge, but believe it to be extremely low.[7] Finally, *suspicious* bidders are also unaware of the exact shipping charge, but assume that it will be high.[8]

With disclosure, a fraction of the naïve and suspicious bidders become aware of the exact shipping charge and change their bids. Suspicious bidders raise their bids since the actual shipping charge is lower than their expectations, while naïve bidders lower their bids since the shipping charge is unexpectedly high. When the shipping charge is low, the net effect of disclosure is to increase seller revenues since the gains from suspicious bidders outweigh the losses from naïve bidders. The reverse is true when the shipping charge is high. Thus, there is a shipping charge threshold below which disclosure is optimal and above which sellers prefer to shroud.

Increasing the shipping charge causes attentive bidders to reduce their bids on a one-for-one basis. Bids of naïve and suspicious bidders, who are unaware of the exact shipping

[6] The revenue difference between treatments SL and SR is consistent with the findings of Hossain and Morgan (2006), who also found that revenues increased with higher shipping charges, holding the reserve fixed. Unlike their findings, we do not see a treatment difference in the number of bidders.

[7] Such behavior might arise if consumers anchor on the base price (Kahneman and Tversky, 1979).

[8] We are grateful to an anonymous referee for suggesting a model along these lines.

charge, do not respond to this change. The net effect is to improve seller revenues. When the shipping charge is shrouded, this improvement is larger than when the shipping charge is disclosed since a smaller fraction of bidders adjust their bids.

3 Natural Experiment

On October 28, 2004, eBay US announced a change in their search format—prospective bidders would now have the option of seeing the shipping charge for each auction on the results page. Prior to this, users had to read the body of each auction listing to learn the shipping charge. EBay also increased the visibility of shipping charges by displaying them on the bid confirmation screen. This action shifted the default from shrouding to disclosure of shipping charges.

We obtained a dataset used in Tyan (2005) consisting of successful auctions for gold and silver coins conducted on eBay's US site from September to December 2004. In this dataset, we classify the shipping charges for each auction as either "shrouded" or "disclosed." Shipping charges are shrouded when they are not included in the title or search results and disclosed when they are included. Shrouded auctions are those ending prior to October 27, 2004, while disclosed auctions are those beginning after November 10, 2004.[9] Auctions between these dates are omitted. Table 3 summarizes the revenue (including shipping), opening price, shipping charge, and number of unique bidders for the shrouded and disclosed auctions of gold and silver coins. Interestingly, average revenues are higher when the shipping charge is disclosed than when it is shrouded. The increase, however, cannot be attributed to differences in the number of bidders—shrouded auctions attract about the same number of bidders as do disclosed auctions.

We study changes in shrouding and shipping charges using the following regression:

$$\begin{aligned} revenue &= \beta_0 + \beta_1 shipping + \beta_2 opening + \beta_3 disclosed \\ &\quad + \beta_4 disclosed \times shipping + \beta_5 disclosed \times opening + \gamma X + \varepsilon \end{aligned} \tag{1}$$

where X is a matrix of control variables. For the field experiments, we include product fixed effects. For silver coins, we use a dummy for whether then coin was graded. For gold coins, we use dummies for each grade interacted with dummies for the grading organization. We also control for whether the coin was listed as a "proof" or "brilliant uncirculated." Controls for photographs, acceptance of Paypal or credit cards, and the decile of the sellers' feedback rating are used for all coin auctions. To account for heteroskedasticity, we use

[9] Results are robust to variations in these cutoff dates.

robust estimation. Table 4 presents the results of this analysis.

If shrouding matters, then we should reject the hypothesis that the coefficients associated with disclosure are all equal to zero ($\beta_3 = \beta_4 = \beta_5 = 0$). Table 4 reports that this is the case in all instances.

What happens when a seller increases the shipping charge but leaves the reserve level unchanged? If all bidders were attentive, this would have no effect on revenues (under shrouding $\beta_1 = \beta_2$; under disclosure $\beta_1+\beta_4 = \beta_2+\beta_5$). When shipping charges are shrouded, we reject this hypothesis—a one dollar increase in shipping with an equal reduction in the opening price raises revenue. When shipping charges are disclosed, we can reject the null hypothesis for silver coins, but not for other items. In all cases, increasing shipping by a dollar while holding the reserve level constant has a smaller revenue effect when the shipping charge is disclosed than when it is shrouded.

An average seller benefited from the increased disclosure of shipping charges due to eBay's format change. Formally, we reject the hypothesis that an average seller earned the same revenue under shrouding and disclosure ($\beta_3 + \beta_4\times$ average opening price $+ \beta_5\times$ average shipping charge $= 0$; $F_{(1,261)} = 4.48$ for gold coins and $F_{(1,499)} = 50.58$ for silver coins).

Are differences in the number of bidders driving the revenue effects? To examine this, we change the dependent variable in equation (1) to the number of unique bidders. Table 5 presents the results of this analysis. We only observe a shrouding effect on the number of bidders for silver coins. For all other data, we cannot reject the hypothesis that the disclosure coefficients are all equal to zero ($\beta_3 = \beta_4 = \beta_5 = 0$). Moreover, in every instance, shipping charge coefficients are statistically indistinguishable from zero. There is little evidence that changes in the number of bidders are responsible for the observed revenue differences. Instead, revenue differences are likely a result of differences in the bids being placed.

Discussion

The regression results complement those of the field experiment: (1) shrouding affects revenues; (2) raising the shipping charge increases revenues, and the effect is stronger under shrouding; and (3) these differences are not attributable to changes in the number of bidders. The finding that disclosure on eBay increased average seller revenues, however, presents a puzzle. If disclosure were profitable, then why didn't more sellers disclose their shipping charges in the title of their listing?

Prior to the institutional change on eBay, an individual seller would not benefit by switching from shrouding to disclosing a high shipping charge. Revenues would fall if more naïve bidders than suspicious ones became aware of the shipping charge, since newly-aware naïves would then lower their bids. In contrast, disclosure is profitable for sellers offering low shipping charges. A market-wide change is likely to have different effects on awareness. In

particular, suppose that suspicious bidders are more technologically sophisticated than naïve bidders and hence more likely to adjust their user preferences to make shipping visible following the changes to eBay's site. Now, if a seller discloses a high shipping charge, newly-aware suspicious bidders will raise their bids (so long as the charge is below their expectations), and revenues will increase. Similarly, sellers offering a low shipping charge will also benefit from disclosure. As a result, overall seller revenues can increase with such a change even when disclosure was previously unprofitable (for high shipping charge sellers).

4 Conclusion

While sellers often shroud their shipping charges in online auctions, our findings suggest that the profitability of this strategy depends on the size of the charge. In field experiments, we find that shrouding a low shipping charge actually reduces seller revenues, while shrouding a high shipping charge does not improve revenues relative to disclosure. Using field data from eBay, we find that an institutional change toward transparency may raise revenues for the average seller. Shrouding and partitioned pricing are complements—a seller can increase revenues by raising its shipping charge when shrouded, but not under disclosure. These revenue effects are not attributable to changes in the number of bidders. Perhaps most surprising is the large revenue effect of raising shipping charges under shrouding. Indeed, for all products, the estimated effect of raising the shipping charge (β_1 in Table 1) is statistically indistinguishable from 1 at the 5% level.[10] That is, at the current level of shipping fees, a dollar marginal increase in shipping fees passes directly through to seller revenues.

[10] For gold coins, the coefficient is more than one. Formally, we can reject the null hypothesis that $\beta_1 = 1$ at the 7% level.

References

[1] Bertini, M., and L. Wathieu (2008): "Attention Arousal Through Price Partitioning," *Marketing Science*, 27, 236-246.

[2] Chetty, R., A. Loony, and K. Kroft (2009): "Salience and Taxation: Theory and Evidence," *American Economic Review*, 99, 1145-1177.

[3] DellaVigna, S. and U. Malmendier (2004): "Contract Design and Self-Control: Theory and Evidence," *Quarterly Journal of Economics*, 119, 353-402.

[4] DellaVigna, S. (2009): "Psychology and Economics: Evidence from the Field," *Journal of Economic Literature*, 47, 315-372.

[5] Ellison, G. (2005): "A Model of Add-on Pricing," *Quarterly Journal of Economics*, 120, 585-637.

[6] Ellison, G. (2006): "Bounded Rationality in Industrial Organization," R. Blundell, W. Newey, and T. Persson (eds.), *Advances in Economics and Econometrics: Theory and Applications, Ninth World Congress*, Cambridge University Press: Cambridge.

[7] Ellison, G., and S. Ellison (2009): "Search, Obfuscation, and Price Elasticities on the Internet," *Econometrica*, 77, 427-452.

[8] Gabaix, X., and D. Laibson (2006): "Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets," *Quarterly Journal of Economics*, 121, 505-540.

[9] Glover, B. and Y. Raviv (2007): "Revenue Non-equivalence Between Auctions with Soft and Hard Closing Mechanism: New Evidence from *Yahoo!*," Working Paper, University of Pennsylvania.

[10] Hossain, T., and J. Morgan (2006): "...Plus Shipping and Handling: Revenue (Non)Equivalence in Field Experiments on eBay," *Advances in Economic Analysis and Policy*, 6:2, Article 3.

[11] Jovanovic, B. (1982): "Truthful Disclosure of Information," *Bell Journal of Economics*, 13, 36-44.

[12] Kahneman, D. and A. Tversky (1979): "Prospect Theory: An Analysis of Decision Under Risk," *Econometrica,* 47, 263-291.

[13] Kahneman, D., and A. Tversky (1984): "Choices, Values, and Frames," *American Psychologist*, 39, 341-350.

[14] Miao, C.-H. (2006): "Consumer Myopia, Standardization and Aftermarket Monopolization," Working Paper, University of South Carolina.

[15] Milgrom, P. (1981): "Good News and Bad News: Representation Theorems and Applications," *Bell Journal of Economics*, 12, 380-391.

[16] Morwitz, V., E. Greenleaf, and E. Johnson (1998): "Divide and Prosper: Consumers' Reaction to Partitioned Prices," *Journal of Marketing Research*, 35, 453-463.

[17] Smith, M. and E. Brynjolfsson (2001): "Consumer Decision-making at an Internet Shopbot: Brand Still Matters," *Journal of Industrial Economics*, 49, 541-558.

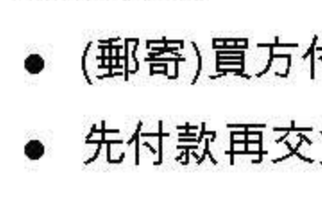
[18] Spiegler, R. (2006): "Competition Over Agents with Boundedly Rational Expectations," *Theoretical Economics*, 1, 207-231.

[19] Tyan, S. (2005): "The Effect of Shipping Costs on Bidder Entry and Seller Revenues in eBay Auctions," Senior Thesis, Department of Economics, Stanford University.

[20] Thaler, R. (1985): "Mental Accounting and Consumer Choice," *Marketing Science*, 4, 199-214.

Figure 1: Screenshot for Disclosed Auction in Taiwan

YAHOO! 奇摩 拍賣



全新未拆封IPOD NANO 2G(白色)!!! 運費台幣30元!!!

賣方資料

賣方(評價)： terp898 (27)

正面評價百分比：93.55 %

付款方式

- 接受銀行或郵局轉帳

交貨方式

- (郵寄)買方付運費
- 先付款再交貨

商品新舊

- 全新

賣方的所有拍賣商品 (0)

賣方「關於我」 / 評價與意見

拍賣問與答 (0)

拍賣檔案

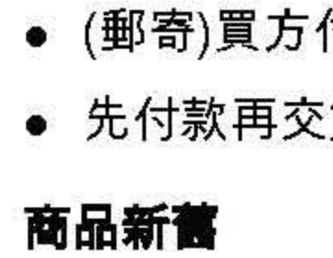
目前出價：	5,400 元
得標者：	cheery080808 (2)
商品數量：	1
出價次數：	38 (出價紀錄)
起標價格：	750 元
出價增額：	100 元
所在地區：	台北市
開始時間：	2006-03-13 18:51
結束時間：	2006-03-20 18:51
拍賣編號：	e12331412

容量 2GB

這是一部全新未拆封的IPOD NANO 2G(白色). 除郵寄外, 賣方不接受其他的運送方式. 運費為台幣30元, 運費不可議價. 買家請在拍賣完成10天內付款. 賣方只接受銀行轉帳現金. 您的 iPod 包含 90 天的電話技術支援和一年的有限保固。

Figure 2: Screenshot for Shrouded Auction in Taiwan

YAHOO! 奇摩 拍賣



全新未拆封IPOD NANO 2G(白色)!!!

賣方資料

賣方(評價)： terp898 (27)

正面評價百分比：93.55 %

付款方式

- 接受銀行或郵局轉帳

交貨方式

- (郵寄)買方付運費
- 先付款再交貨

商品新舊

- 全新

賣方的所有拍賣商品 (0)

賣方「關於我」 / 評價與意見

拍賣問與答 (2)

拍賣檔案

目前出價：	**5,200 元**
剩餘時間：	**已經結束**(倒數計時器)
得標者：	c711123.tw (57)
商品數量：	1
出價次數：	33 (出價紀錄)
起標價格：	750 元
出價增額：	100 元
所在地區：	台北市
開始時間：	2006-03-20 21:22
結束時間：	2006-03-27 21:22
拍賣編號：	d18146669

容量 2GB

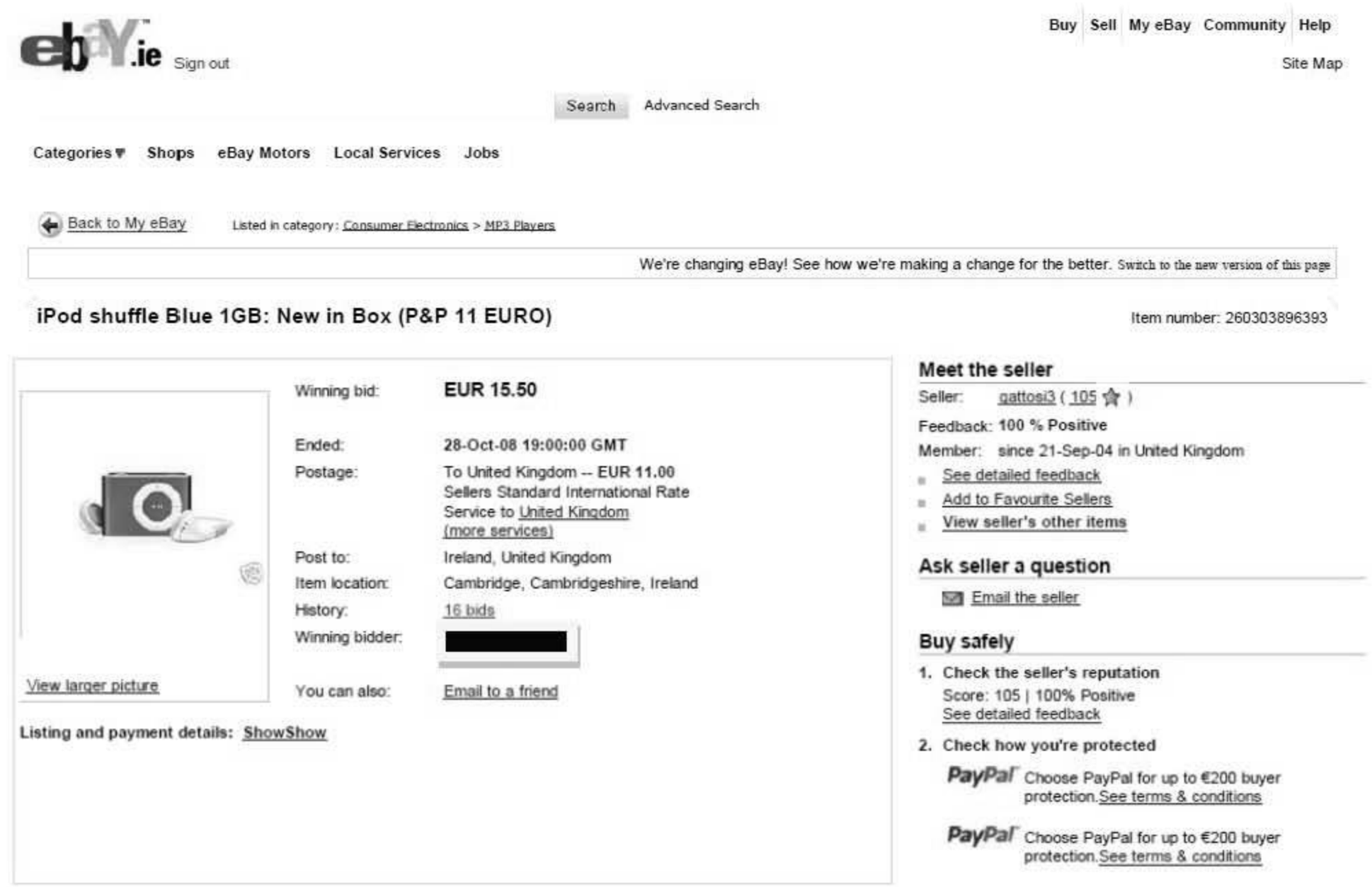
這是一部全新未拆封的IPOD NANO 2G(白色). 除郵寄外, 賣方不接受其他的運送方式. 運費為台幣30元, 運費不可議價. 買家請在拍賣完成10天內付款. 賣方只接受銀行轉帳現金. 您的 iPod 包含 90 天的電話技術支援和一年的有限保固。

Translation of the Item Description in the Taiwan Auctions

Title (Disclosed Treatment):
Brand new IPOD SHUFFLE 1G!!! Shipping Fee TWD30 <TWD 180>!!!
Title (Shrouded Treatment):
Brand new IPOD SHUFFLE 1G!!!

Item Description:
This is a brand new IPOD SHUFFLE 1G. The seller delivers only via standard postage service. The shipping cost is TWD30 <TWD 180> and is not negotiable. The buyer needs to make the payment within 10 days of completion of the auction. The seller only accepts payment by bank transfer. Your ipod comes with 90 days of telephone technical support and 1 year of warranty.

Figure 3: Screenshot from Disclosed eBay Ireland Auction



Description

Seller assumes all responsibility for listing this item.

Item Specifics - MP3 & Digital Media Players

Storage Capacity:	1 GB	Display Capability:	--
Memory Type:	--	Compatible Memory:	--
Brand:	Apple iPod	PC Interface:	--
Model:	iPod Shuffle	Condition:	New
Additional Features:	--		

This is an auction for one NEW Blue iPod shuffle (1GB) in a SEALED-BOX.

Inside the box, you'll find: one blue iPod shuffle with 1GB of internal memory, one set of white headphones, one USB docking station for charging the unit and transferring songs via iTunes. The iPod and dock are both PC and Mac-compatible. Apple's QuickStart guide is also included.

With this iPod shuffle you can:
-Store up to 240 songs
-Enjoy up to 12 hours of skip-free playback
-Also store data on the USB flash drive
-Charge the iPod via included USB docking station
-Play, pause, click forward, move back, and adjust the volume with an easy-to-use circular control pad
-Attach the iPod on your shirt, belt, pocket, or pack using the built-in clip

Shuffle the songs! Or play them straight through!

P&P charge for the iPod is EUR 11.00.

We ship only within Ireland and the United Kingdom. The P&P charge is non-negotiable and we do not combine shipping if you purchase multiple goods.
Payments must be sent within 10 days of the end of the auction.
Happy Bidding!

Figure 4: Screenshot from Shrouded eBay Ireland Auction

This is an auction for one NEW Pink iPod shuffle (1GB) in a SEALED-BOX.

Inside the box, you'll find: one pink iPod shuffle with 1GB of internal memory, one set of white headphones, one USB docking station for charging the unit and transferring songs via iTunes. The iPod and dock are both PC and Mac-compatible. Apple's QuickStart guide is also included.

With this iPod shuffle you can:
-Store up to 240 songs
-Enjoy up to 12 hours of skip-free playback
-Also store data on the USB flash drive
-Charge the iPod via included USB docking station
-Play, pause, click forward, move back, and adjust the volume with an easy-to-use circular control pad
-Attach the iPod on your shirt, belt, pocket, or pack using the built-in clip

Shuffle the songs! Or play them straight through!

P&P charge for this item is EUR 11.00.

PLEASE NOTE: We ship only within Ireland and the United Kingdom.
The P&P charge is non-negotiable and we do not combine shipping if you purchase multiple goods.
Payments must be sent within 10 days of the end of the auction.
Happy Bidding!

Table 1. Summary Statistics for Yahoo and eBay Field Experiments

		Opening Price of TWD 750 or EUR 0.01					Opening Price of TWD 600		
		Low Shipping TWD 30 or EUR 11			High Shipping TWD 180 or EUR 14			High Shipping TWD 180	
		mean	*st.dev*		*mean*	*st.dev*		*mean*	*st.dev*
Taiwan	revenue	92.92	28.76	revenue	96.92	30.91	revenue	95.31	30.03
	# of bidders	11.17	2.32	# of bidders	10.17	3.76	# of bidders	10.5	3.7
	# of observations	6		# of observations	6		# of observations	6	
Disclosed									
Ireland	revenue	37.52	5.63	revenue	36.93	5.65	revenue	-	-
	# of bidders	5.8	1.3	# of bidders	7.0	1.9	# of bidders	-	-
	# of observations	10		# of observations	10		# of observations	-	
Taiwan	revenue	88.89	29.31	revenue	93.26	28.87	revenue	94.27	30.53
	# of bidders	11.33	5.6	# of bidders	10.5	5.2	# of bidders	12.7	4.1
	# of observations	6		# of observations	6		# of observations	6	
Shrouded									
Ireland	revenue	36.36	4.85	revenue	38.94	3.15	revenue	-	-
	# of bidders	6.7	2.26	# of bidders	6.9	1.6	# of bidders	-	-
	# of observations	10		# of observations	10		# of observations	-	

Note: Revenue is denoted in Euros. In March 2006, 1 TWD = 0.024 EUR. Shipping charges are "shrouded" when they are not included in the title or search results. Shipping charges are "disclosed" when they appear in the title and search results.

Table 2. Summary of Pair-wise Tests of Revenue and Number of Bidders for Yahoo and eBay Field Experiments

	# of pair of obs.	Mean Differences (e.g. DL-SL)	t-Test	Wilcoxon Signed-Rank Test	Fisher-Pitman Permutation Test	Monte-Carlo Permutation-based 90% Confidence Intervals
Revenue			t-stat	z-stat	*p-value*	
DL vs SL	10	2.763	2.578 **	1.736 *	0.047	-
DH vs SH	10	1.422	0.807	0.410	0.445	(-2.95, 2.95)
DL vs. DH	16	-1.126	0.853	0.724	0.409	(-2.16, 2.16)
SL vs SH	16	-3.254	3.043 ***	2.617 ***	0.011	-
DH vs DR	6	-1.605	0.793	0.420	0.500	(-3.09, 3.09)
SH vs SR	6	1.008	0.488	0.216	0.750	(-3.25, 3.25)
DL vs DR	6	-2.389	2.200 *	1.782 *	0.094	-
SL vs SR	6	-5.376	4.997 ***	2.201 **	0.031	-
# of Bidders						
DL vs SL	10	-0.533	0.291	0.204	0.805	(-2.93, 2.93)
DH vs SH	10	-0.271	0.148	0.307	0.906	(-2.18, 2.18)
DL vs. DH	16	-0.375	0.535	0.863	0.666	(-1.13, 1.13)
SL vs SH	16	0.188	0.174	0.339	0.921	(-1.69, 1.69)
DH vs DR	6	0.333	1.000	1.000	0.625	(-0.66, 0.66)
SH vs SR	6	2.167	2.484 **	1.897 **	0.094	-
DL vs DR	6	0.667	0.445	0.315	0.750	(-2.33, 2.33)
SL vs SR	6	-1.333	0.623	0.954	0.656	(-3.33, 3.33)

Note: *, ** and *** represent statistical significance at the 10, 5 and 1 percent levels, respectively. "D" indicates disclosure, "S" indicates shrouded, "L" indicates low shipping fees and "H" indicates high shipping fees. "R" indicates Taiwan auctions with a high shipping fee and low opening price, designed to have a reserve equal to the reserve in treatment "L". Revenue is denoted in Euros. In March 2006, 1 TWD = 0.024 EUR. Permutation-based confidence intervals were constructed only when we failed to reject the null hypothesis of equality (200,000 replications).

Table 3: Summary Statistics for Gold and Silver Coin Auctions

	Gold Coins			Silver Coins		
		mean	*st.dev*		*mean*	*st.dev*
Disclosed	revenue	67.45	22.00	revenue	45.72	4.19
	opening price	12.17	21.81	opening price	24.10	16.16
	shipping charge	4.55	1.37	shipping charge	5.08	1.27
	# of bidders	6.15	2.48	# of bidders	4.53	2.92
	# of observations	162		# of observations	306	
		mean	*st.dev*		*mean*	*st.dev*
Shrouded	revenue	62.12	16.92	revenue	42.49	4.18
	opening price	9.04	17.02	opening price	18.98	15.98
	shipping charge	4.81	1.90	shipping charge	4.95	1.48
	# of bidders	6.34	2.44	# of bidders	4.37	2.70
	# of observations	124		# of observations	212	

Note: Shipping charges are "shrouded" when they are not included in the title or search results. Shipping charges are "disclosed" when they appear in the title and search results. Data from silver and gold coin auctions was provided by Tyan (2005). For the coin data, shrouded auctions are those ending prior to October 27, 2004, while disclosed auctions are those beginning after November 10, 2004. Auctions between these dates are omitted.

Table 4: Regressions of Total Auction Revenue for Ipod and Coin Auctions

Dependent variable: Revenue (i.e. final price + shipping charge)

		iPods *(EUR)*	Gold Coins *(USD)*	Silver Coins *(USD)*
Coefficient Estimates				
β_1 Shipping Charge		1.130 ***	2.031 ***	0.888 ***
		(0.320)	(0.569)	(0.178)
β_2 Opening Price		-0.101	0.013	0.079 ***
		(0.378)	(0.046)	(0.015)
β_3 Disclosed		6.991	4.053	4.261 ***
		(8.634)	(4.941)	(1.392)
β_4 Disclosed x Shipping Charge		-0.470 **	-0.359	-0.290
		(0.266)	(1.218)	(0.253)
β_5 Disclosed x Opening Price		-0.140	0.048	-0.013
		(0.446)	(0.075)	(0.021)
F-tests				
$\beta_3 = \beta_4 = \beta_5 = 0$		4.17 ***	2.1 *	18.47 ***
	d.f.	(3,61)	(3,261)	(3,499)
$\beta_1 = \beta_2$		4.48 **	11.95 ***	20.45 ***
	d.f.	(1,61)	(1,261)	(1,499)
$\beta_1 + \beta_4 = \beta_2 + \beta_5$		2.20	2.15	8.45 ***
	d.f.	(1,61)	(1,261)	(1,499)
# of observations		76	286	518

Note: *, ** and *** represent statistical significance at the 10, 5 and 1 percent levels, respectively. The values in parentheses are robust standard errors. For experimental data, "Disclosed"=1 when the shipping charge was listed in the item title. For field data, "Disclosed"=1 when the auction occurred after November 10, 2004. IPod regressions includes item-specific fixed effects. Coin regressions included controls for condition, grade, seller reputation and other auction characteristics.

Table 5: Regressions of Total Number of Bidders for iPod and Coin Auctions

Dependent variable: Number of Bidders

		iPods	Gold Coins	Silver Coins
Coefficient Estimates				
β_1 Shipping Charge		0.244	0.124	-0.089
		(0.394)	(0.078)	(0.089)
β_2 Opening Price		-0.228	-0.077 ***	-0.132 ***
		(0.350)	(0.005)	(0.007)
β_3 Disclosed				0.969
				(0.756)
β_4 Disclosed x Shipping Charge				0.066
				(0.132)
β_5 Disclosed x Opening Price				-0.019 **
				(0.010)
F-tests				
$\beta_3 = \beta_4 = \beta_5 = 0$		0.51	0.44	12.2 ***
	d.f.	(3,61)	(3,261)	(3,499)
$\beta_1 = \beta_2$		0.44	6.44	0.23
	d.f.	(1,61)	(1,264)	(1,499)
$\beta_1 + \beta_4 = \beta_2 + \beta_5$				1.83
	d.f.			(1,499)
# of observations		76	286	518

Note: *, ** and *** represent statistical significance at the 10, 5 and 1 percent levels, respectively. The values in parentheses are robust standard errors. For experimental data, "Disclosed"=1 when the shipping charge was listed in the item title. For field data, "Disclosed"=1 when the auction occurred after November 10, 2004. IPod regressions includes item-specific fixed effects. Coin regressions included controls for condition, grade, seller reputation and other auction characteristics.

conclusion. You don't go on to say there were mixed results, do you?

DR. MORWITZ: No, I don't.

MR. RUSSELL: Page 8 of that report. It might not be the same page.

--- Pause

MR. RUSSELL: Under the heading "Conclusion" if you could just scroll down, Madam Registrar. Just under "Conclusion".

Do you see that, Dr. Morwitz?

DR. MORWITZ: The paragraph "Conclusion"?

MR. RUSSELL: Yes.

DR. MORWITZ: Yes.

MR. RUSSELL: Very first sentence says:

> "While sellers often shroud their shipping charges in online auctions, our findings suggest that the profitability of this strategy depends on the size of the charge." (as read)

That's what it says; correct?

DR. MORWITZ: That's what it says.

MR. RUSSELL: Did you ever tell this Tribunal in the body of your report that the size of the charge was material to the issue that you were opining on?

DR. MORWITZ: I hadn't read this paper when -- I wasn't aware of this paper.

MR. RUSSELL: So the answer is no, you didn't tell the Tribunal that.

DR. MORWITZ: No.

MR. RUSSELL: So when you said you did a careful review of the literature, you hadn't read this paper.

DR. MORWITZ: No.

MR. RUSSELL: So in your examination in-chief this morning, Mr. Hood took you to the paragraph of your report at the beginning and your qualifications -- let me just get you there.

P-A-11.

And if I could ask you to turn to paragraph 7. And this is the paragraph that talks about, first of all, publications, and then you go on to say in the second sentence at the bottom there, "I provided expert testimony in four U.S. cases", and then you list them; correct?

DR. MORWITZ: That's correct.

MR. RUSSELL: And what you said this morning is in describing three of them, as I understood it, *Fleetcor* was about price representations?

DR. MORWITZ: Yes.

MR. RUSSELL: *Bennett* was about nursing home

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

consumer processes the price much more carefully.

MR. RUSSELL: My point simply is this, that the reputation of the firm would be something that would have to be considered before you could say, "This is the conclusion on this issue"; correct? There are other studies that say that.

DR. MORWITZ: Yes, and I do mention that. I can't remember if it's my reply report or my main --

MR. RUSSELL: We're going to go through whether you mentioned it or not in the main body of your report. I'm going to be spending some time on that when I go through it.

But let me ask you one other moderating effect. One of the other moderating effects that I've seen in these studies is the size of the added fee; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: So a very small fee may have a different effect than a larger fee. So for example, if your shipping cost was, you know, 80 percent of what the product is, that might have a different effect than if the shopping cost was a dollar and your product was $100; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: So that balance between the price of the product and the actual fee in question is important.

DR. MORWITZ: Those things can affect the magnitude of the effect, yes.

MR. RUSSELL: And the opinion that you give on any given situation. You should consider those moderating effects, Dr. Morwitz, right? That's what you're saying.

But I'm trying to get the fact that you have to give consideration to those moderating effects that show up in the academic literature; correct?

DR. MORWITZ: So my opinion is that the situation most closely matches the academic studies, not just in partition pricing but also in drip pricing, that more closely match the current situation.

MR. RUSSELL: Let me ask my question again. Do the moderating effects -- I just mentioned two of them. We're going to have a few more to look at. Are the moderating effects not something you should consider when you're giving an opinion on consumer perception of what you say is drip pricing or partition pricing? Is it not something that you as a senior academic in this field should have to consider?

DR. MORWITZ: I mean, it depends what I was asked to consider. If I was asked to consider how large is this effect, the moderators would be very important. If I'm asked to talk about the direction of the effect, I can go more with the predominance of evidence and the closest

matches in the literature.

MR. RUSSELL: So are you saying that you weren't asked by the Commissioner to provide any view on any of these moderating effects. Is that correct? Is that what your answer is right now?

DR. MORWITZ: No, my answer was I wasn't asked to comment on how big or small the effect would be depending on these sort of moderating factors.

MR. RUSSELL: Are you saying you didn't give a definitive opinion in your report to this Tribunal?

DR. MORWITZ: No.

MR. RUSSELL: You gave a definitive opinion, did you not?

DR. MORWITZ: I did.

MR. RUSSELL: And the moderating effects were considered or not considered by you in giving that opinion?

DR. MORWITZ: I know the moderating effects. I mean, I discuss the literature --

MR. RUSSELL: That's not my question. Did you consider them?

DR. MORWITZ: Yes.

MR. RUSSELL: Okay. And where did you set them out in this report?

DR. MORWITZ: So I review some of the literature on partition pricing. It's a big literature, so

some of it got moved to an appendix. But they are -- as we've discussed earlier, I talk about some of the moderators that some of those studies show, for example, the one you just mentioned about firm reputation.

MR. RUSSELL: Again, my question was, did you put that in the body of your report to discuss that it may be -- the moderating effects means moderating the opinion that you gave. Did you point those out to the Tribunal in your opinion, or did you leave them to an appendix? And we've gone through it and those appendix just describe studies.

Did you say to this Tribunal in the body of your report, when you consider price perceptions, you have to give some thought to these -- and you should have listed them, in my view -- moderating effects? Did you do that? Is it in your report?

DR. MORWITZ: I did not do that.

MR. RUSSELL: In paragraph 59 of your -- of the same report, and that is at page --

THE REGISTRAR: Thirty (30).

MR. RUSSELL: Thirty (30). Thank you.

And this refers to Morwitz, Greenleaf, and Johnson, which you footnote at the bottom, that's what I've been referring to as the Divide and Prosper study. Is that correct?

could do it. That's all I'm asking.

DR. MORWITZ: Yes.

MR. RUSSELL: But you weren't asked to do it.

DR. MORWITZ: No.

MR. RUSSELL: So it would be equivalent to an economist appearing before this Tribunal to give views on academic literature without doing any econometric studies; correct?

DR. MORWITZ: Could you repeat that, please?

MR. RUSSELL: It would be equivalent -- we have economists testify in this Tribunal quite regularly. It would be equivalent for them to come and give an opinion to this Tribunal based on academic literature without doing any econometric studies, no surveys, no econometrics, no regression analysis. They would be coming and simply giving their opinion based on academic literature; correct?

DR. MORWITZ: That sounds similar, yes.

MR. RUSSELL: Now, when you examined the website -- and the fact that you're charged with giving an objective opinion to this Tribunal, I mean, you're the witness for the Tribunal, not for an advocate. The same as Dr. Amir is not my expert. He is the Tribunal's expert. I put him forward. You understand that's the role; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: So you understood that you should

be examining the website fully and carefully.

DR. MORWITZ: Yes.

MR. RUSSELL: And anything that might impact the user experience should be noted by you; correct? If we're being careful, thorough and objective, you're going to note anything that could affect the consumer experience on this web page.

DR. MORWITZ: I focused on the price representations, so that's where I focused my attention, and I tried my best to be thorough.

MR. RUSSELL: But you're not suggesting you didn't give an opinion on consumer -- likely consumer behaviour, likely -- within the role that you say within marketing, that you're studying consumer behaviour, you gave an opinion on what you expect consumer behaviour to be based on this website, based on your academic research; correct?

DR. MORWITZ: Yes. I reviewed the website and the app to see whether they meet the definitions of some of these pricing concepts and then I summarized what we know about the impact of those pricing concepts.

MR. RUSSELL: So let me ask my question again. You reviewed it fully; correct?

DR. MORWITZ: I tried my best, but with a focus on the pricing aspects. I didn't, for example, go through

Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And then you say, "Based on my review of Cineplex's website"; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: So that's the study, along with the academic research. The two things that you're telling this Tribunal you did is I studied this website and I looked at the academic research and I provided an opinion.

DR. MORWITZ: Yes. And the app.

MR. RUSSELL: And the app. Sorry. I didn't mean to exclude that.

And you've said already you didn't do any experiments, you didn't do any surveys.

DR. MORWITZ: No.

MR. RUSSELL: Were you asked to do any?

DR. MORWITZ: No.

MR. RUSSELL: Could you have done an experiment or a study?

DR. MORWITZ: There, yes.

MR. RUSSELL: You could have; correct? You could have designed a study, an empirical study, of Cineplex's website and user experience, could you not?

DR. MORWITZ: One could.

MR. RUSSELL: You're one of the experts. You

could do it. That's all I'm asking.

DR. MORWITZ: Yes.

MR. RUSSELL: But you weren't asked to do it.

DR. MORWITZ: No.

MR. RUSSELL: So it would be equivalent to an economist appearing before this Tribunal to give views on academic literature without doing any econometric studies; correct?

DR. MORWITZ: Could you repeat that, please?

MR. RUSSELL: It would be equivalent -- we have economists testify in this Tribunal quite regularly. It would be equivalent for them to come and give an opinion to this Tribunal based on academic literature without doing any econometric studies, no surveys, no econometrics, no regression analysis. They would be coming and simply giving their opinion based on academic literature; correct?

DR. MORWITZ: That sounds similar, yes.

MR. RUSSELL: Now, when you examined the website -- and the fact that you're charged with giving an objective opinion to this Tribunal, I mean, you're the witness for the Tribunal, not for an advocate. The same as Dr. Amir is not my expert. He is the Tribunal's expert. I put him forward. You understand that's the role; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: So you understood that you should

literature. Correct?

DR. MORWITZ: I want to be clear. That's not the only paper on the topic from which I drew conclusions. That happened to be the first paper that was done on the topic.

MR. RUSSELL: I actually said from the academic literature. I didn't take it down to one, I was just using one as an example. There are others. In fact, I'm going to take you to them. There's other online studies that we're going to look at today that, although you refer to them in your paper, in the appendix, they weren't raised in the body of your opinion. I'm going to be going through that with you.

And there were certain things that had to be done because they were online as opposed to paper. Simple things, for research. It's no surprise that they would to do that, right, that they would have to control for the fact that they're online?

DR. MORWITZ: I'm not sure what you mean by control for online. Yeah, we do online studies, we do paper studies. They're different.

MR. RUSSELL: The simple point is this. If I'm a person that did everything I showed you, you could not say from a behavioural psychology standpoint, which you're saying, that Rob Russell -- there was a shrouded attribute

want to promote their business online?

DR. MORWITZ: You didn't -- I didn't know who "they" was in your question.

MR. RUSSELL: I'm talking about Walmart for the moment.

DR. MORWITZ: Okay.

MR. RUSSELL: They're going to want to promote their online opportunity, if you will, for consumers as well as you could go to their stores; correct?

DR. MORWITZ: Yes. We call that multi-channel, yes.

MR. RUSSELL: And -- multi-channels. And Cineplex is multi-channel; right?

DR. MORWITZ: Yes.

MR. RUSSELL: So you can go to the bricks and mortar theatre, buy the ticket, there's no OBF, or you go into the online purchase process and you pay the OBF. That part of the facts is quite straightforward without analyzing the factors for a moment, correct, that alternative is available?

DR. MORWITZ: Yes.

MR. RUSSELL: And you're not, in your opinion, saying they can't have different prices at the store or online. That's not part of your opinion; correct?

DR. MORWITZ: No.

MR. RUSSELL: Did you ever note in your report that Cineplex was multi-channel?

DR. MORWITZ: I did not use the term "multi-channel". I do talk about prices in the theatre versus prices online.

MR. RUSSELL: Did you look to any studies where multi-channel was studied with respect to partition pricing or drip pricing?

DR. MORWITZ: Please give me a minute.

The Blakenthallay-by-playingen haul study. Those tickets could be bought by stub had you been. They could be bought through another provider, in some cases from the theatre directly.

MR. RUSSELL: But not Stub Hub. Stub Hub is online only; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And just to point out why that's important, Stub Hub is not going to have a web page that shows alternative pricing. That's bricks and mortar; correct?

DR. MORWITZ: Correct.

--- Pause

DR. MORWITZ: Okay. I don't see one that directly examines that, no.

MR. RUSSELL: Thank you.

MR. RUSSELL: And then, as soon as you click, okay -- I'm just not arguing about the fact you have to click for the moment. Beside the "Proceed" button -- you heard the testimony yesterday of Dr. Eckert -- Mr. Eckert, I should say?

DR. MORWITZ: Yes.

MR. RUSSELL: He says that "Proceed" button is a call to action in his view and his Zed pattern said they're going to pay attention to the price beside that "Proceed" button. That was his evidence, was it not?

DR. MORWITZ: I don't recall him saying you'll pay attention to the price.

MR. RUSSELL: Okay. So now the next thing we have is we know that the online booking fee, as soon as you click the button, is broken out down below. So there's all this below the fold thing that we're talking about. Leaving that aside, on this web page, if you were in an experiment and you gave that web page to your grad students instead of your piece of paper, they would be able to scroll down and see the OBF; correct?

We're not talking about what they would be inclined to for the moment. They're able to do it.

DR. MORWITZ: Yes.

MR. RUSSELL: You don't deny that, that they can scroll down and see that.

details of the rules they're proposing.

MR. RUSSELL: So the definition that you cite here, and you say the FTC defines pricing as a pricing technique in which firms advertise only part of a product's price up front; right?

DR. MORWITZ: Yes.

MR. RUSSELL: Do you understand "up front" to mean the beginning of the process?

DR. MORWITZ: Yes.

MR. RUSSELL: The beginning of the purchase process.

DR. MORWITZ: Yes.

MR. RUSSELL: And then it goes on to say:

"...and reveal other charges later as the shoppers go through the buying process."

So the temporal component that you use in the definition is up front with dripping in of a charge in the process; right? That's the words that are used.

DR. MORWITZ: Correct.

MR. RUSSELL: Those are all my questions. Thank you.

MR. JUSTICE LITTLE: Mr. Hood?

MR. HOOD: Could I have a 10-minute break?

MR. JUSTICE LITTLE: Sure.

THE REGISTRAR: The clock is good now. We

whether the consumer would be incented or prevented in some way in terms of the design from doing what they otherwise would know how to do, which is to scroll. Right?

DR. MORWITZ: I'm not saying they don't scroll. I'm saying that because they need to scroll, the information is seen later.

MR. RUSSELL: And you're also not saying if they do scroll, all of the information we're talking about is on that ticket page, right? It's in the four corners of the web page. It's just dependent on scrolling; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: Now, returning to paragraph 8 again of your report, you say -- I'll give you a moment to catch up. You've got it in front of you again?

DR. MORWITZ: I do.

MR. RUSSELL: It's just, you:

> "...drew conclusions how this presentation affects consumers' perceptions of how expensive a ticket purchased from Cineplex online would be..."

This is in your conclusions. That's what you say you're drawing for this Tribunal, that sentence?

DR. MORWITZ: Yes.

MR. RUSSELL: That's it. You said in your

summary what your conclusion is, that it's about how expensive a ticket purchased from Cineplex online would be, and you're dealing with the perceptions of that. Correct?

DR. MORWITZ: Correct.

MR. RUSSELL: So it's how expensive it would be; right?

DR. MORWITZ: Correct.

MR. RUSSELL: You're not giving an opinion on anything else?

DR. MORWITZ: Well, I'm giving an opinion about price perceptions and purchase behaviour.

MR. RUSSELL: Right, okay. And when you say "how this presentation affects", you're talking about the features on the ticket page, I take it?

DR. MORWITZ: The ticket page and beyond, yes.

MR. RUSSELL: So let's talk about what the presentation means in this sentence. So the ticket page is part of the presentation that you're examining. What else?

DR. MORWITZ: And the pages that follow.

MR. RUSSELL: The pages that follow. So the seating page. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And can you tell me -- I can go to it, if you want, but when you're on the seating page, does that all-in price that's beside the "Proceed" button

persist on that page as well?

DR. MORWITZ: Yes, if memory serves correctly, the tax is added at that stage.

MR. RUSSELL: Do you want me to look --

DR. MORWITZ: I mean, I can look in here.

MR. RUSSELL: Take a look.

DR. MORWITZ: Yes.

MR. RUSSELL: Sorry?

DR. MORWITZ: Yes.

MR. RUSSELL: Sorry. Yes, what? Sorry.

DR. MORWITZ: The price, as I said, now also including tax is shown.

MR. RUSSELL: Right. So more information about pricing is persistent along the bottom of the screen; correct?

DR. MORWITZ: Persistent, revised, and present.

MR. RUSSELL: What other pages did you include in your -- in your word, presentation?

DR. MORWITZ: So the payment options page and the payments page.

MR. RUSSELL: Let's just do one at a time. So the payment option page, that's also the page where there's a breakout for the consumer as well; correct? So it shows both the all-in price, but it shows a breakout of the OBF and taxes on that page. Correct?

DR. MORWITZ: Those things can affect the magnitude of the effect, yes.

MR. RUSSELL: And the opinion that you give on any given situation. You should consider those moderating effects, Dr. Morwitz, right? That's what you're saying.

But I'm trying to get the fact that you have to give consideration to those moderating effects that show up in the academic literature; correct?

DR. MORWITZ: So my opinion is that the situation most closely matches the academic studies, not just in partition pricing but also in drip pricing, that more closely match the current situation.

MR. RUSSELL: Let me ask my question again. Do the moderating effects -- I just mentioned two of them. We're going to have a few more to look at. Are the moderating effects not something you should consider when you're giving an opinion on consumer perception of what you say is drip pricing or partition pricing? Is it not something that you as a senior academic in this field should have to consider?

DR. MORWITZ: I mean, it depends what I was asked to consider. If I was asked to consider how large is this effect, the moderators would be very important. If I'm asked to talk about the direction of the effect, I can go more with the predominance of evidence and the closest

matches in the literature.

MR. RUSSELL: So are you saying that you weren't asked by the Commissioner to provide any view on any of these moderating effects. Is that correct? Is that what your answer is right now?

DR. MORWITZ: No, my answer was I wasn't asked to comment on how big or small the effect would be depending on these sort of moderating factors.

MR. RUSSELL: Are you saying you didn't give a definitive opinion in your report to this Tribunal?

DR. MORWITZ: No.

MR. RUSSELL: You gave a definitive opinion, did you not?

DR. MORWITZ: I did.

MR. RUSSELL: And the moderating effects were considered or not considered by you in giving that opinion?

DR. MORWITZ: I know the moderating effects. I mean, I discuss the literature --

MR. RUSSELL: That's not my question. Did you consider them?

DR. MORWITZ: Yes.

MR. RUSSELL: Okay. And where did you set them out in this report?

DR. MORWITZ: So I review some of the literature on partition pricing. It's a big literature, so

DR. MORWITZ: Yes. If you look at Appendix C --

MR. RUSSELL: It's in the appendix?

DR. MORWITZ: Appendix C discusses some of the moderators.

MR. RUSSELL: I'm actually -- now you're going to the appendix with the various academic references. Correct? That's where you are, in Appendix D?

DR. MORWITZ: Yes.

MR. RUSSELL: I'm asking in the body of your report, in your opinion that you're providing to this Tribunal, did you ever say there were mixed results?

DR. MORWITZ: In the body, no. I summarized the results on average, the preponderance of evidence in the results, and then I went into the details in the appendix.

MR. RUSSELL: So you understand the word "objectivity" when you're providing something to a Tribunal or a Court. Correct? You went over your Affidavit with Mr. Hood?

DR. MORWITZ: Yes.

MR. RUSSELL: As counsel, even though I'm an advocate, I have to show a level of objectivity. If there was cases against me, cases for me, I point them out and I distinguish the ones that don't help me. But to be

DR. MORWITZ: I wouldn't say no trouble.

MR. RUSSELL: I wouldn't say no trouble --

DR. MORWITZ: We all have trouble.

MR. RUSSELL: All right. Obviously, I had some trouble, didn't I? So I get it.

But the point is, you don't have any trouble scrolling, I take it?

DR. MORWITZ: Generally, no. Sometimes the mouse sticks.

MR. RUSSELL: But, you see, I mean, just -- I just want to make sure that we're clear because this has been a big part of this case. This is a mouse. It's not unusual to have a scroll button on it, is it?

DR. MORWITZ: No.

MR. RUSSELL: And it's not unusual if I -- my phone happens to be hooked up because it's running the internet for that screen, but I could easily on a smartphone, people scroll. It's part of how you work a smartphone, isn't it? You scroll?

DR. MORWITZ: Yes.

MR. RUSSELL: So you wouldn't say the average consumer using that technology wouldn't know how to scroll?

DR. MORWITZ: No, I would not say that.

MR. RUSSELL: So you wouldn't say the scrolling itself is a factor in your opinion; what you're saying is

whether the consumer would be incented or prevented in some way in terms of the design from doing what they otherwise would know how to do, which is to scroll. Right?

DR. MORWITZ: I'm not saying they don't scroll. I'm saying that because they need to scroll, the information is seen later.

MR. RUSSELL: And you're also not saying if they do scroll, all of the information we're talking about is on that ticket page, right? It's in the four corners of the web page. It's just dependent on scrolling; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: Now, returning to paragraph 8 again of your report, you say -- I'll give you a moment to catch up. You've got it in front of you again?

DR. MORWITZ: I do.

MR. RUSSELL: It's just, you:

> "...drew conclusions how this presentation affects consumers' perceptions of how expensive a ticket purchased from Cineplex online would be..."

This is in your conclusions. That's what you say you're drawing for this Tribunal, that sentence?

DR. MORWITZ: Yes.

MR. RUSSELL: That's it. You said in your

DR. MORWITZ: No.

MR. RUSSELL: You refer to what you expect it might be in your remarks to the White House. Correct? You suggest in there this is what the definition from the FTC may be. Do you want to take a moment to look at that?

DR. MORWITZ: Yes, please.

MR. RUSSELL: Okay. Let's do that. This is the one that we only could identify --

THE REGISTRAR: It was 863? It's P-A-13. I'll put it up.

MR. HOOD: Sorry, that's an exhibit; right?

THE REGISTRAR: It has been promoted to an exhibit, yes. The remarks. Is that correct?

MR. RUSSELL: Yes, that's the one.

THE REGISTRAR: It's on the screen.

MR. RUSSELL: And if you could just go to the bottom of the first page for Dr. Morwitz?

Right at that last paragraph, you can see there, Dr. Morwitz, you refer to the FTC definition. If you can read it for the Tribunal, please?

DR. MORWITZ: Yes.

> "The FTC defines drip pricing as a pricing technique in which firms advertise only part of a product's price up front and reveal other charges

later as shoppers go through the buying..."

I can't see the rest.

MR. RUSSELL: So upfront and later is your reference to temporal component; right? There's a timing or temporal component to the -- although I'm not going to give you a hard time about the fact it hasn't been finalized as a definition. But what you expect to be the FTC definition which they put out in papers -- we're going to be coming to that as well -- has a temporal component?

DR. MORWITZ: Yes.

MR. RUSSELL: So the academic literature you rely on definitionally has a temporal component. Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And the FTC proposed rule has a temporal component to it. Correct?

DR. MORWITZ: I haven't seen the details of the proposed rule.

MR. RUSSELL: The one you refer to in your remarks to the White House, the definition does, does it not? The one you just read to us?

DR. MORWITZ: The definition, yes.

MR. RUSSELL: Yes, that's all I'm saying, the definition. Have you examined the drip pricing provision under our legislation here in Canada?

DR. MORWITZ: I read it. I don't recall the details.

MR. RUSSELL: So you didn't consider that to be important in terms of your opinion?

DR. MORWITZ: It wasn't part of what I was asked to do.

MR. RUSSELL: Okay. Thank you.

Now, this goes again to -- you're a researcher and you're -- I'm not trying to suggest in anything I'm saying this morning, you're not a respected researcher. I make that clear; that's not what I'm saying at all. I have read a lot of your works at this point. And I can tell you this, just as an aside, I did not like a fee that I got in a hotel I stayed in after I fully paid in advance, I can tell you that. And I didn't like the resort fee down in Miami when I was down on business after I paid it fully. I get your point.

It's not that it's not an important issue for consumers. I'm not approaching at that at all today, just so we know that. It's not respect for the work you've done that's at issue here, it's the precision of your opinion, not only in terms of the way it's presented, but its relevance to our drip pricing provision here in Canada. That's the focus.

Now, on that point, in this case, it's very

question, please?

MR. RUSSELL: I'll take you to your reply report, which is P-A-12.

THE REGISTRAR: What paragraph or page?

MR. RUSSELL: It would be paragraph 14.

THE REGISTRAR: It's on screen.

MR. RUSSELL: Do you see that in your reply report?

DR. MORWITZ: I do.

MR. RUSSELL: The way it starts off is you observe the fact that Dr. Amir did an analysis of the number of complaints. It's not saying that he has challenged you on that. He did his own analysis and made a comment on that; correct?

DR. MORWITZ: Correct.

MR. RUSSELL: And you decided to take it on as an issue despite the fact you just said a few minutes ago that you weren't asked to do it.

DR. MORWITZ: Yes, I did.

MR. RUSSELL: We're almost done. Give me one second.

Exhibit P-A-13.

THE REGISTRAR: It's on screen.

MR. RUSSELL: Dr. Morwitz, Mr. Hood put this to you this morning. This is a copy of your written remarks

to the White House convening on the economic case for junk fee policies?

DR. MORWITZ: Yes.

MR. RUSSELL: And you say you were asked to speak to that conference, were you?

DR. MORWITZ: Yes.

MR. RUSSELL: Did you consider that to be an honour?

DR. MORWITZ: Yes.

MR. RUSSELL: And in terms of your appearing, you draw in, as you point out, the years of work that you've done in the area. Is that correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And if we look at your remarks here, the very second sentence, you say, "This is personally a very exciting time for me."

"Very exciting".

DR. MORWITZ: Yes.

MR. RUSSELL: Why?

DR. MORWITZ: It was exciting to me that academic research, some of it I did, some that others have done on this topic, was being viewed as a helpful input for making decisions about policy.

MR. RUSSELL: And the policy that you were supporting here is that there would be -- there would be

laws or regulations to restrict or outlaw junk fees and other aspects of drip pricing, in your view.

DR. MORWITZ: My understanding is a number of the different branches of the U.S. government are considering regulation related to this topic, so I think it's come up in the FTC and the CFPB and HUD, so a number of different agencies were in the audience, people working for the agencies. It wasn't one regulation. I think there was a series of regulations that were being considered.

MR. RUSSELL: In the second paragraph, you say:

> "I am thrilled that my research is now shedding light on a topic of much interest to consumers, legislators, regulators and well-intentioned organizations here at home." (as read)

Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: You don't need to apologize for it, but you're very enthusiastic about this opportunity to speak to these issues. That's clearly so based on your own words; correct?

DR. MORWITZ: Yes, I mean, it's rare that behavioural science is brought into these discussions and arguments. It's often just the economists, so I -- you

know, I was personally thrilled, but I was also thrilled for my field that our scholarship, what is being -- is being viewed to be helpful.

MR. RUSSELL: And then you say:

"Let me start with partition pricing. My co-authors and I coined the phrase." (as read)

Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: And you said that in your report to this Tribunal as well, you coined the phrase; right?

DR. MORWITZ: Yes.

MR. RUSSELL: So you consider yourself at the forefront of this issue.

DR. MORWITZ: I do.

MR. RUSSELL: And the policies that you would support would be, in your view, protective to consumers; correct?

DR. MORWITZ: Protective to consumers and to honest businesses.

MR. RUSSELL: And to honest businesses. Okay.

So you want laws to prevent it, in simple terms, in some of these aspects you're talking about. I don't think you need to apologize for the fact you're an advocate here in terms of trying to support the

government's initiative towards those sorts of laws; correct?

DR. MORWITZ: I don't consider myself to be an advocate. I believe that the scholarship, the findings from the scholarship, help to shed light on when certain kinds of pricing strategies are harmful to consumers and to businesses and, therefore, when regulation would be helpful.

MR. RUSSELL: So you didn't believe you're an advocate then. You believe you gave a balanced and objective view of the evidence?

DR. MORWITZ: I do.

MR. RUSSELL: And you say in the fourth full paragraph which starts "In general" -- make sure I'm in the right place.

Scroll down a bit more. Right there.

> "In general, what research has shown is that when firms separate mandatory charges versus assessing one all-inclusive price, consumers tend to underestimate the total price they'll have to pay." (as read)

That's what you say; correct?

DR. MORWITZ: Yes.

MR. RUSSELL: Very similar in what you said in

your report to this Tribunal.

DR. MORWITZ: Yes.

MR. RUSSELL: And then you say, the next full paragraph down:

> "What academic research on partition pricing makes clear is that consumers make better decisions when firms are using all-inclusive pricing." (as read)

Correct?

DR. MORWITZ: Yes.

MR. RUSSELL: We did before the lunch hour review some articles where there are mixed results, though; correct.

DR. MORWITZ: Yes.

MR. RUSSELL: So this wasn't -- you didn't point that out in these submissions either, did you?

DR. MORWITZ: No, I didn't.

MR. RUSSELL: I actually don't believe you need to apologize for not doing that when you're trying to take a position in any sort of task force. That's not what I'm putting to you. I just want to make it clear what's going on here.

DR. MORWITZ: I'm not trying to take a position. I'm trying to summarize a wide body of

either, did you?

DR. MORWITZ: No. The paragraph that you mentioned earlier I said in general, I summarized -- again, it's a big -- multiple big bodies of literature, so I summarized the general aggregate findings that reflect what we tend to see in the market.

MR. RUSSELL: But there's nothing like there's another body of research that says the opposite or other very senior people involved in the issues like yourself have got different results. You didn't say anything like that at the White House either, did you?

DR. MORWITZ: I didn't, no.

MR. RUSSELL: The definition that you have, if we can go to the front page again, it's the paragraph that starts, "A related pricing strategy is drip pricing" right there at the bottom.

There we go.

Do you see that paragraph?

DR. MORWITZ: Yes.

MR. RUSSELL: I take it because, as you said, it's very exciting and it's important to you that you're staying aware of what the FTC proposed policy will be and rule may be?

DR. MORWITZ: No. I mean, I try to keep up. I have not -- I don't know all the details of what all the