Competition Tribunal Tribunal de la concurrence

PUBLIC VERSION

Reference: *Canada (Commissioner of Competition) v Cineplex Inc*, 2024 Comp Trib 5
File No.: CT-2023-003
Registry Document No.: 84

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)

Dates of hearing: February 14-16, 20-21 and 28-29, 2024
Before: Mr Justice Andrew D. Little (Chairperson)
Date of Reasons for Order and Order: September 23, 2024

REASONS FOR ORDER AND ORDER

Table of Contents

I. The Parties 4

II. The Application 4

III. The Evidence 5

A. The Witnesses 5

B. Assessment of Fact Witnesses 7

C. Assessment of Video Evidence 8

D. The Expert Witnesses 9

(1) Legal Test for Admissibility 9

(2) The Commissioner's Experts 11

(3) Cineplex's Expert 26

IV. Factual Findings 31

A. Tickets and Seat Selection 31

B. Cineplex Connect Account, Scene+ and CineClub 32

C. The Online Booking Fee 32

D. Movie Ticket Sales 34

E. Relevant Contents of cineplex.com and the App 34

F. Scrolling, and Information Above and Below the Fold 41

G. The Countdown Timer on the Floating Ribbon 42

H. Conversion Pages 43

I. What Website Users See 44

J. Website Statistics 47

K. Other Aspects of Mr McGrath's Evidence Related to the Website and the App 47

L. The Start of the "Purchase Process" on the Website and the App 49

V. Relevant *Competition Act* Provisions 52

A. Provisions Related to Reviewable Conduct 52

B. Objectives of the *Competition Act* and the Deceptive Marketing Provisions in section 74.01 52

C. The Burden of Proof and the Nature of Reviewable Conduct in Part VII.1 of the *Competition Act* 57

VI. The Representations 58

A. Representations on the Cineplex Website and the App 58

B. Literal Meaning and General Impression of the Representations 58

(1) Applicable Legal Tests 59

(2) Application of the Legal Tests 70

VII. Did Cineplex Engage in Reviewable Conduct? 76
A. Issues for Decision under section 74.01 76
B. The Parties' General Positions concerning subsection 74.01(1.1) 77
C. The Proper Interpretation of subsection 74.01(1.1) 80
(1) Legal Principles 80
(2) Interpretation of subsection 74.01(1.1), including Text, Context and Purpose 82
(3) All-inclusive Pricing 84
D. Does subsection 74.01(1.1) Apply to the Present Case? 84
(1) The Making of a "representation of a price …" 85
(2) "… that is not attainable due to a fixed obligatory charges or fees …" 85
(3) The Representations of Movie Tickets Prices are "not attainable" due to the Online Booking Fee 93
(4) "… unless …" 94
(5) Conclusion on the Application of subsection 74.01(1.1) 94
E. Were the Representations on the Tickets Page "false or misleading" under paragraph 74.01(1)(*a*)? 94
(1) Is subsection 74.01(1.1) a "Complete Code"? 94
(2) Were the Representations "false or misleading"? 97
F. Were the Representations False or Misleading "in a material respect" under paragraph 74.01(1)(*a*)? 103
G. Conclusion 104
VIII. Remedy 104
A. The Parties' Positions 104
B. Determination on Remedies 108
(1) An Order under paragraph 74.1(1)(*a*)? 108
(2) Provisions Affecting an Order under paragraphs 74.1(1)(*b*), (*c*) and (*d*) 108
(3) An Order under paragraph 74.1(1)(*d*)? 110
(4) Should the Tribunal Order an AMP? 115
(5) Subsection 74.1(4) and Overall Proportionality of the Tribunal's Order 119
IX. Conclusion 120

[1] This proceeding concerns the deceptive marketing provisions of the *Competition Act*, RSC, 1985, c C-34. The central question posed by the Commissioner of Competition's application is whether Cineplex Inc makes price representations to the public that are false or misleading in a material respect.

[2] For the reasons that follow, the Commissioner's application succeeds.

I. THE PARTIES

[3] The Commissioner is responsible for the administration and enforcement of the *Competition Act*.

[4] The parties agreed that Cineplex is a "top-tier Canadian brand that operates in the film entertainment and content, amusement and leisure, and media sectors" and that it is "Canada's largest and most innovative film exhibitor". As of December 31, 2023, Cineplex owned, leased or had a joint venture in 1,631 screens in 158 theatres from coast to coast.

[5] Cineplex's website is located at cineplex.com. It displays information about Cineplex's film entertainment offerings. Cineplex also has a mobile application – the App – that displays similar information. Consumers may purchase movie tickets online via the website (whether on a computer or a mobile phone, at cineplex.com) and on the App (on mobile phones), or in-person at Cineplex theatres (at a box office, a concession or a kiosk).

II. THE APPLICATION

[6] The Commissioner filed an application dated May 17, 2023. The Commissioner alleged that Cineplex engages in reviewable conduct under section 74.01 of the *Competition Act* by making representations to the public that are false or misleading in a material respect. According to the Commissioner, Cineplex promotes movie tickets to the public on its website and on its App at prices that are not attainable, because consumers purchasing such movie tickets online must also pay a fixed obligatory fee – the Online Booking Fee – in addition to the price represented for the ticket. The Commissioner relied on both the longstanding deceptive marketing provision in the *Competition Act* on false or misleading representations to the public in paragraph 74.01(1)(*a*) and the recently enacted provision on so-called "drip" pricing in subsection 74.01(1.1).

[7] Cineplex filed a Response dated June 30, 2023. The Response pleaded that the Commissioner's application resulted from a mischaracterization of the website and App purchase process, and a misapprehension and misapplication of the law. Briefly stated, Cineplex's position was that the ticket prices as they first appear on the website and the App are attainable because the consumer may purchase the movie tickets at these prices in-person at the theatre. The Online Booking Fee is only applicable if the consumer purchases the movie tickets online (that is, on the website or the App). If purchased online, Cineplex argued that information about the Online Booking Fee is readily shown on the Tickets Page of the website or the App, as the Online Booking Fee is automatically included in the subtotal price displayed on a "floating" ribbon on the screen. As a result of this "instantaneous" display after a consumer selects one or more tickets, Cineplex's position was that the Online Booking Fee cannot be said to be "hidden" from the customer. The added fee, Cineplex pleaded, allows the consumer to benefit from selecting and reserving the seat(s) of their choice at the time of the online purchase. In addition, certain categories of membership consumers are either not subject to the Online Booking Fee or subject to a lesser fee.

[8] The Commissioner's Reply dated July 14, 2023, alleged that contrary to Cineplex's assertions, the Online Booking Fee is fixed and obligatory for consumers who purchase their movie tickets online. The Commissioner denied the relevance of Cineplex's disclosures on the website and App related to the Online Booking Fee *after* the impugned representations are made. The Commissioner pleaded that Cineplex's representations remain false or misleading in any event.

III. THE EVIDENCE

A. The Witnesses

[9] Before the hearing, and consistent with the *Competition Tribunal Rules*, the parties served and filed witness statements for their proposed fact witnesses, and affidavits with attached reports for proposed expert witnesses under a Scheduling Order dated August 31, 2023. At the hearing, the witnesses adopted their respective documents as their evidence.

[10] At the hearing, the Commissioner called six witnesses.

[11] Mr Adam Zimmerman is a senior competition law officer who conducts investigations at the Competition Bureau. He provided evidence relating to Cineplex's website and App, including

nine video recordings of Mr Zimmerman moving through the website or the App and photographs from several Cineplex locations in Ottawa (ON) and Gatineau (QC).

[12] Three other officers working at the Competition Bureau provided witness statements attaching photographs from Cineplex locations in Vancouver (BC), Toronto (ON) and Montreal (QC), which were admitted into evidence on consent and without their attendance at the hearing for cross-examination.

[13] The other two witnesses for the Commissioner were proposed as expert witnesses. Mr Jay Eckert and Dr Vicki Morwitz each filed affidavits attaching expert reports and reply reports that responded to Cineplex's proposed expert.

[14] The Commissioner also filed read-in evidence from the examination for discovery of Cineplex's representative, including documents. The Commissioner's read-in evidence was updated to include additional related discovery evidence identified by Cineplex after reviewing the Commissioner's read-ins.

[15] Cineplex called two witnesses. The first was Mr Daniel McGrath, who serves as Chief Operating Officer of Cineplex. The second witness was Dr On Amir, who filed an affidavit attaching an initial expert report in response to Mr Eckert's and Dr Morwitz's initial reports. By Order dated February 9, 2024, the Tribunal granted Cineplex leave to file an "Addendum" to Dr Amir's report, which was in substance a sur-reply expert report.

[16] Mr Zimmerman and Mr McGrath filed affidavits supporting the Commissioner's and Cineplex's respective claims of confidentiality over certain documents and information. These affidavits were accepted into evidence and neither one was the subject of cross-examination.

[17] Near the end of the fact portion of the hearing, the parties advised that they were continuing to work towards an agreed statement of facts. They subsequently filed an Agreed Statement of Facts dated February 23, 2024.

B. Assessment of Fact Witnesses

[18] Mr Zimmerman provided careful and objective evidence in his written statement dated January 8, 2024, in the videos attached to his statement and during his oral testimony. He was straightforward and responsive to questions and provided credible and reliable evidence to the Tribunal.

[19] Mr McGrath provided a witness statement dated January 12, 2024 and testified at the hearing. Mr McGrath's witness statement advised that he had personal knowledge of the matters set out in it, and that in preparing it, he had relied on information from Cineplex's business records and a number of other Cineplex employees. All of this information was "typical of and consistent with the type of information [he] would use on a routine regular basis to make decisions in the normal course of [his] duties". His statement also acknowledged that Mr McGrath oversaw the conceptualization, decision making and implementation processes for the Online Booking Fee at issue in this proceeding.

[20] Mr McGrath was appropriately diligent in many of his responses at the hearing, often checking his written statement before answering questions. He also acknowledged that his witness statement did not disclose certain facts about the preparation of his video evidence, including that he had not prepared the video himself. However, there were also several occasions in cross-examination when Mr McGrath was reluctant to acknowledge certain things or did not respond to the question posed. He instead made an argument or a counterpoint back to counsel. In one instance, counsel asked a question several times before getting a direct and responsive answer. Cross-examination also revealed that some pertinent facts were left out of his witness statement – for example, that some statements relating to the online environment were equally applicable at the theatre. In addition, some aspects of Mr McGrath's witness statement amounted to a statement of Cineplex's corporate position in this proceeding.

[21] Having read Mr McGrath's witness statement closely and considered his testimony, I find that I must approach his evidence with some caution and care.

C. Assessment of Video Evidence

[22] Mr Zimmerman's witness statement, which he adopted as his evidence at the hearing, attached (among other things) nine videos, which depicted his movement on a mobile phone and on a computer through cineplex.com and the App. The voiceover in the videos describes the settings used and the steps Mr Zimmerman took through both the website and the App. In some videos he did not scroll to the bottom of webpages, whereas in other videos he did scroll down, which showed the contrast in what a user would see in each circumstance. I find the videos attached to Mr Zimmerman's witness statement to be helpful and accurate in depicting what a user would see in the circumstances of each video.

[23] Mr McGrath's witness statement attached a video. He provided the voiceover during the video. The images in the video exhibit became an issue at the hearing, because they did not reflect what a consumer would see during a visit to the Cineplex website or while using the App. The video was also not prepared by Mr McGrath but by others including members of the Cineplex legal team. The video began as an apparent "live" visit to the website and through its webpages, but stopped to introduce static screenshots of the user's screen into the video. The screenshots were also zoomed out to show more of the webpages than what had previously been depicted. After the inserted screenshots returned to the "live" depiction of the website, the video's view of the webpage was zoomed out to 50% compared with the previous "live" depiction so that more of a webpage appeared on the video – in one instance the video introduced screenshots and immediately after returned to depict the "live" website, without advising the viewer of the change. Without the changed zoom, the website user would have had to scroll down to see some of the information on a webpage. These changes were not identified by Mr McGrath in his voiceover during the video or in Mr McGath's witness statement, but were identified in the reply expert report of Mr Eckert delivered before the hearing. Some evidence about those changes emerged during Mr McGrath's evidence in chief, and more was revealed during cross-examination.

[24] Cross-examination also revealed that Mr McGrath's video did not depict what a mobile phone user would see either on the mobile version of cineplex.com or when using the App, yet a majority (approximately 75%) of movie tickets purchased online are sold on mobile phones, using the Cineplex mobile website or the App. Cineplex sought to address this omission by introducing

evidence about the App, including the process of ticket purchasing on it, during Mr McGrath's re-examination (through highly directed or leading questions). That evidence was recorded on counsel's phone and became Exhibit P-R-0042.

[25] I am mindful that in some respects, the contents and order of the webpages on cineplex.com or on the App are things I can and did observe for myself during the hearing. That said, the objectivity of the overall presentation of the website experience in Mr McGrath's video exhibit contrasted markedly with the video exhibits attached to Mr Zimmerman's witness statement.

[26] In this light, I find that the video attached as Exhibit "A" to Mr McGrath's witness statement is not reliable evidence and, in particular, it is not reliable evidence of a consumer's experience of visiting the Cineplex website.

[27] For its part, Exhibit P-R-0042, the recording of the App made during Mr McGrath's re-examination at the hearing, warrants diminished weight as it contains Cineplex's counsel's narrative and emphasis of what was depicted.

D. The Expert Witnesses

(1) Legal Test for Admissibility

[28] Expert opinion evidence may be admitted under a two-stage test: *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 SCR 182, at paras 19, 23-24; *R v Mohan*, [1994] 2 SCR 9, at p. 20 and following; *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18 ("*P&H*"), at paras 113-115; *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 ("*VAA*"), at paras 105-106.

[29] The first stage is the threshold stage for admissibility. The party proposing the expert evidence must establish, on a balance of probabilities, that it satisfies four requirements: (i) logical relevance, (ii) necessity in assisting the trier of fact, (iii) the absence of an exclusionary rule, and (iv) a properly qualified expert. If the expert's opinion is based on novel or contested science or science used for a novel purpose, there is a fifth requirement: the reliability of the underlying science for that purpose must be established.

[30] At the first stage, the issue is logical relevance: *White Burgess*, at para 23; *R v Bingley*, 2017 SCC 12, [2017] 1 SCR 170, at para 15; *R v Abbey*, 2009 ONCA 624, 97 OR (3d) 330, at para 82. The threshold is the same for any evidence at a hearing and is low: *R v J-LJ*, 2000 SCC 51, [2000] 2 SCR 600, at para 47.

[31] In considering necessity as a threshold requirement, expert evidence must provide information that is considered "outside the experience and knowledge" of the Tribunal: *White Burgess*, at para 23; *Mohan*, at p. 23; *P&H*, at para 114; *VAA*, at para 108. While mere helpfulness is insufficient, necessity is not to be judged too strictly: *Mohan*, at p. 23; *P&H*, at para 114.

[32] The second stage for admissibility is a gatekeeping stage. It involves a discretionary weighing of the benefits, or probative value, of admitting evidence that meets the preconditions to admissibility, against the potential risks or "costs" of its admission, including considerations such as consumption of time, prejudice and the risk of causing confusion. This assessment is done on a case-by-case basis. If the costs outweigh the benefits, the proposed evidence may be inadmissible even if it meets the four requirements.

[33] At this second stage, evidence may not be legally relevant if it is not sufficiently probative to warrant its admission into evidence or if the evidence is irrelevant as a matter of law: *Mohan*, at p. 21; *Abbey*, at paras 82-85; *R v Sekhon*, 2014 SCC 15, [2014] 1 SCR 272, at para 49.

[34] The Tribunal must also ensure that expert evidence does not usurp its role as fact-finder or distort the fact-finding process: *Mohan*, at pp. 21, 24-25; *P&H*, at para 115; *VAA*, at para 109.

[35] In *Commissioner of Competition v Sears Canada Inc*, 2005 Comp Trib 2, the Tribunal admitted expert evidence from a marketing professor on marketing and consumer behaviour as it related to pricing and other stimuli: see paras 80, 139. Justice Dawson used the evidence in a variety of ways, including on a *Canadian Charter of Rights and Freedoms* challenge, the characteristics of the product at issue in that case (tires), market definition, the time reference period, and aspects of whether the respondent had established that the price representations were not false or misleading in a material respect under the then subsection 74.01(5): see paras 341-342, 347, 361-362, 366-367.

(2) The Commissioner's Experts

[36] Cineplex challenged the admissibility of the evidence provided by the Commissioner's experts. Cineplex's position was that Mr Eckert's evidence was neither relevant nor necessary. According to Cineplex, Dr Morwitz did not provide independent and objective evidence to the Tribunal and therefore should not be qualified to give opinion evidence to the Tribunal as an expert.

(i) Mr Eckert

[37] The Commissioner proposed to qualify Mr Eckert as an expert in website design and development, with core areas of expertise including website strategy development, user experience design, conversion rate optimization and user interface design (user experience and user interface) for software on computerized devices, including websites and mobile applications.

[38] Mr Eckert's report described user interface design principles and their application to Cineplex's website and App. His reply report responded to Dr Amir's report, including Dr Amir's critique that Mr Eckert did not use analytical information from Cineplex or account for users' zoom levels.

[39] Mr Eckert is the founder and creative director at Parachute Design Group Inc. He leads website design projects from conception to final deployment and provides ongoing analysis of website performance and conversion rate optimization to offer continued modifications and adaptations of websites to improve user experience and overall performance. His core areas of expertise include user experience design – the method of determining which information the web user will see and when they will see certain specific information in their journey throughout a website to optimize conversions (i.e., to increase the percentage of users who perform a desired action on a website – such as, in the present case, to turn mere "visitors" into movie ticket purchasers). His expertise also includes user interface design, which (as concerns this proceeding) is the process that designers use to build interfaces for websites and mobile applications – that is, what the users see and interact with.

[40] Cineplex did not challenge Mr Eckert's professional qualifications, proposed areas of expertise or the specific scope of his testimony or his written reports. Rather, Cineplex submitted

that Mr Eckert's evidence was not relevant or necessary to the Tribunal's determinations under subsection 74.01(1.1) and that his opinion related only to web design rather than the elements of drip pricing in that subsection.

[41] The Commissioner submitted that Mr Eckert's evidence easily satisfied the four requirements in *Mohan* for admissibility, and that the benefits of admitting his evidence outweigh any costs (citing *VAA*, at paras 105-106).

[42] The Commissioner argued that Mr Eckert's evidence was relevant to the issues before the Tribunal, including (i) whether the disclosure of the existence and the amount of the Online Booking Fee is made in a place on the Tickets Page where consumers are likely to see it or become aware of it; (ii) user interface design concepts such as "call to action" prompt buttons and "false floors" (that is, an apparent end of the webpage, creating an illusion of completeness); (iii) whether consumers are likely to scroll down on the Tickets Page; and (iv) whether the website could have been designed in a manner that did not result in drip pricing.

[43] With respect to necessity, the Commissioner submitted that Mr Eckert had unique and specialized knowledge necessary to assist the Tribunal on matters outside its ordinary experience and knowledge. The Commissioner argued that his evidence was reasonably necessary to assist the Tribunal in understanding that, even though there are a large number of different sized screens that consumers use, the disclosure and the existence and amount of the Online Booking Fee is not visible for the majority of computer screens and is not visible without scrolling on any mobile phones.

[44] Lastly, the Commissioner submitted that Mr Eckert was properly qualitied to testify in the proposed areas of expertise. The Commissioner contended that website design and development includes the use of analytics to understand consumer behaviours, technologies and expectations when using websites and mobile applications. Further, he has an in-depth understanding of how web users in Canada consume content on a webpage or a mobile application, which is a fundamental principle of user experience design. His experience extends to issues involving standard screen dimensions and what information will typically not be readily visible on-screen whether on the website or the App, unless one scrolls down.

[45] I agree with the Commissioner that Mr Eckert's evidence is admissible expert evidence. Applying the threshold test for admissibility, Mr Eckert's evidence is relevant and necessary and he is properly qualified to provide the Tribunal with opinion evidence. His evidence as a whole is relevant to the issues identified by the Commissioner and, more broadly, to the general impression which the Tribunal is required to take into account under section 74.01: see subsection 74.03(5). The contents of Mr Eckert's evidence fall outside the Tribunal's ordinary experience and knowledge. Neither party raised any applicable exclusionary rule. Mr Eckert's expertise is well established through his background, training and his industry experience spanning more than twenty years as a founder and leader of his business. The areas of expertise for opinion evidence as proposed by the Commissioner at the hearing are supported by his professional expertise and reflected the contents of his reports and oral testimony. In the words of *Mohan,* he has acquired special or peculiar knowledge through years of experience concerning the matters on which he provided evidence: *Mohan,* at p. 25. While neither party's submissions referred to any costs of his testimony for the second stage of the assessment, I find that the benefits of admitting his evidence outweigh any costs.

[46] Mr Eckert testified in a straightforward and helpful manner. His testimony was responsive to questions, careful and candid. He made appropriate admissions about his opinions during cross-examination. His written reports were well-presented. He did not shade his evidence to favour either party. I have no concerns about his integrity or ability to perform his professional duty to the Tribunal.

[47] For these reasons, I conclude that Mr Eckert's expert opinion evidence is admissible and that he was a credible witness. As will be seen, I also accept the evidence in his reports and oral testimony.

(ii) Dr Morwitz

[48] The Commissioner proposed to qualify Dr Morwitz as an expert in marketing, consumer psychology and behavioural economics, with a specialized knowledge in consumer behavioural aspects of pricing, including drip and partitioned pricing. The Commissioner argued that Dr Morwitz is the leading expert in her field, whose early work put her at the forefront of a branch of behavioural economics that deals with pricing.

[49] Dr Morwitz's initial report focused on two 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 (i) their perception of the price to be paid for a given product, and (ii) their behaviour?

- 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': (i) perception of the price to be paid for movie tickets, and (ii) behavior, including purchase decisions?

[50] Dr Morwitz's report described concepts such as drip pricing, partitioned pricing and shrouded attributes in the academic literature, and provided Dr Morwitz's observations and conclusions about the likely impact of how Cineplex presents price information.

[51] Dr Morwitz's reply report responded to Dr Amir's report, including to Dr Amir's conclusions that (i) firms will not use drip pricing when they aim to build a positive reputation, (ii) consumer complaints are relevant considerations, and (iii) the Cineplex website and App provide clear information and an itemization of the Online Booking Fee.

[52] Dr Morwitz is the Bruce Greenwald Professor of Business and Professor of Marketing at Columbia Business School at Columbia University. Before July 2019 she was the Harvey Golub Professor of Business Leadership and Professor of Marketing at the Stern School of Business, New York University. She holds a bachelor of science degree in computer science and applied mathematics from Rutgers University, and an MSc in operations research from Polytechnic University (now the Tandon School of Engineering at New York University). She also holds an MA in statistics and a PhD in marketing from the Wharton School at the University of Pennsylvania. She has numerous publications in scholarly journals, has served as editor or on the editorial boards of peer review journals including the *Journal of Consumer Research*, and has received numerous awards and distinctions including being named a Fellow of the Society for Consumer Psychology. She has taught courses at the Stern School to undergraduate, MBA, executive MBA, and doctoral students in marketing management, marketing research, and judgment and decision making. At Columbia University since 2019, she has taught Behavioral

Economics and Decision Making to MBA and executive MBA students and a course on Mastering Customer Insights to executives. As is apparent, Dr Morwitz has impressive academic credentials in the subject matter for which she was proposed to provide opinion evidence. She has acquired special or peculiar knowledge through study and experience that enable her to provide opinions to this Tribunal: *Mohan,* at p. 25.

[53] Cineplex submitted that Dr Morwtiz's evidence did not meet the legal requirements for admissibility, because:

(a) it was not relevant, specifically to the Tribunal's determination of the issues under subsection 74.01(1.1);

(b) it was not necessary, again specifically to the Tribunal's determination of the issues under subsection 74.01(1.1);

(c) it did not meet the threshold test for admissibility in *White Burgess* because it was not impartial or objective and was biased; and

(d) it was not reliable.

[54] Each of these arguments will be assessed in turn.

(a) <u>Relevance and Necessity</u>

[55] The arguments on the issues of relevance and necessity were related, so it is convenient to deal with them together. Cineplex argued that Dr Morwitz's evidence was irrelevant because the questions she was asked to answer do not help to determine any of the elements under subsection 74.01(1.1), including "attainability" and whether the Online Booking Fee is "fixed or obligatory". Cineplex's position was that these are questions of fact that opinion evidence does not assist the Tribunal to determine. With respect to necessity, Cineplex submitted that the Tribunal could come to a satisfactory conclusion without the assistance of opinion evidence. Particularly given the specialized nature of the Tribunal, an opinion about whether certain prices are appropriately displayed on the Cineplex website is not necessary to enable the Tribunal to make findings of fact. In this respect, Cineplex referred to *Mohan,* at pp. 23-24.

[56] The Commissioner submitted that Dr Morwitz's evidence was relevant to the behaviour of consumers and necessary as it is outside the Tribunal's scope of knowledge of consumer behaviour. According to the Commissioner, "[b]ecause consumers do not act to maximize their utility as traditional economics would predict, the Tribunal requires assistance in understanding how consumers actually act and why". The Commissioner submitted that Dr Morwitz could provide expertise to assist the Tribunal understand drip pricing and how it impacts consumer behaviour, and evidence to assist the Tribunal concerning how behavioural biases affect consumers' switching behaviour, how website design impacts consumers' purchasing decisions, whether online pricing representations are misleading (due to, for example, a shrouded attribute), and materiality.

[57] I agree substantially with the Commissioner. Dr Morwitz's evidence meets the required logical relevance for admissibility under the *Mohan* criteria. It is relevant to whether Cineplex's price representations are false or misleading under paragraph 74.01(1)(*a*). Dr Morwitz's evidence meets the necessity criterion for the reasons indicated by the Commissioner and generally assists the Tribunal to appreciate why consumers may not behave as traditional economics would predict. It is appropriate to have an evidentiary basis in this area.

(b) Impartiality, Objectivity and Alleged Bias

[58] Cineplex's main position about the admissibility of Dr Morwitz's evidence concerned impartiality, objectivity and alleged bias. The impartiality, objectivity and alleged bias issues are best addressed under one heading, before turning to Cineplex's position on the reliability of her evidence. Cineplex did not argue that Dr Morwitz lacked independence and there is nothing in the evidence to suggest that Dr Morwitz's reports (or the testimony at the hearing) contained opinions that were not her own.

[59] Cineplex's arguments on impartiality and objectivity were, in summary, that Dr Morwitz's evidence was not admissible because it did not provide a balanced or objective review of the literature she relied on and of Cineplex's website design.

[60] Cineplex argued that the purpose of opinion evidence was to assist the court to make an impartial and objective decision. Referring to the description of impartiality in judicial decision

making in *R v S (RD)*, [1997] 3 SCR 484, at paras 104-105, Cineplex maintained that expert opinion evidence must meet that same standard of impartiality or objectivity in order to assist the Tribunal. Counsel acknowledged that this proposition has not been the subject of commentary in the decided case law.

[61] Cineplex argued as follows in its written submissions:

> 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.

[62] To support its position, Cineplex identified the following in Dr Morwitz's evidence:

(a) There were mixed results in her own research and mixed results in the academic literature that she said she relied upon.

(b) There were exceptions, or "moderators" (such as the size of the surcharge), noted in the research studies and academic literature that Dr Morwitz stated she relied upon, but she did not bring those exceptions or moderators to the attention of the Tribunal.

(c) She did not acknowledge the existence of "researcher bias" because the opinions were based on her own subjective review of the website and the App.

(d) She did not note that her opinion evidence did not rely upon any scientific information, empirical data or any scientific review of the website or the App or that she could have undertaken such an empirical or scientific review. She also did not note in her expert opinion that a study of Cineplex's website and Cineplex's consumers would need to be undertaken in order to test the opinion evidence she provided and that without such testing,

her opinion was no more than one hypothesis regarding the opinions she provided in her report.

[63] Cineplex also identified a list of facts or points in the evidence that were not mentioned in Dr Morwitz's evidence, which Cineplex connected to opinions she "purported" to provide on consumer behaviour on the Cineplex website. One such omission was that the "call to action" prompt button had a feature that Cineplex dubbed a "lockout feature", which prevented consumers from advancing into the online purchase process until they had made a ticket selection.

[64] According to Cineplex, all of these alleged failures related to the academic literature and the website design tainted the objectivity and impartiality of Dr Morwitz's evidence, rendering it inadmissible.

[65] The Commissioner's responses were:

(a) No one reading Dr Morwitz's reports could come to the conclusion that additional details were needed to explain her opinion.

(b) Dr Morwitz's report provided a comprehensive review of the literature. She also referred to academic papers with "mixed results" and described her findings with appropriate language that conditioned the certainty of her opinion (such as "on average" and "overall").

(c) Dr Morwitz did not fail to refer to a recent academic study (a meta-analysis) that discussed moderators that showed different results. She cited it in her first report. In addition, it did not in any way invalidate her previous work or literature review. Moreover, some of the moderators could actually strengthen her opinion when applied to the present case.

(d) Cineplex's criticism that Dr Morwitz's report did not include the findings of all studies ever done, or some studies with results that differed with her conclusion, does not logically imply that her overall opinion is biased.

(e) The Tribunal should look at Dr Morwitz's instructions, that is, the questions she was asked to answer. Dr Morwitz was asked to provide her expert opinion in response to two questions – a general one related to consumer behaviour in association with pricing representations,

and a specific one related to the application of the knowledge of behavioural economics to the pricing representations made by Cineplex on its website and App. The Commissioner argued that Cineplex's critiques were based on a faulty premise because Dr Morwitz was not asked to quantify how many consumers were actually misled or what their actual price perceptions were.

(f) The Commissioner noted that some of the criticisms of Dr Morwitz's evidence, if accurate, applied equally to Dr Amir's evidence (such as the one concerning "researcher bias", as each provided an opinion based on their own review of the Cineplex website; and neither mentioned the so-called "lockout feature" on the Tickets Page).

[66] Cineplex also contended that Dr Morwitz's evidence was "biased", owing to the failings in literature and evidence reviews (set out above) and because she had assumed the role of an advocate, consistent with her advocacy for laws and rules for drip pricing. Cineplex noted that in *White Burgess,* the Supreme Court stated that expert opinion "must be unbiased in the sense that it does not unfairly favour one party's position over another": *White Burgess,* at para 32.

[67] During the hearing, including in its opening statement, Cineplex also took the position that Dr Morwitz was an advocate because she had, on invitation from the US National Economic Council, attended a gathering of experts at the White House on "junk fees" and spoke on a panel. Counsel referred to her statement (Exhibit PA-0019) in which she said, "I'm very excited to be here" and, on the panel, addressed partitioned pricing and drip pricing. Despite its prominence in opening and during cross-examination of Dr Morwitz, this position appeared principally through footnotes in Cineplex's closing submissions. Cineplex did rely on Dr Amir's sur-reply report, which argues that one "crucial bias" ignored by Dr Morwitz was "her role as an advocate for stronger laws and rules against drip pricing". After describing his understanding of Dr Morwitz's participation on the panel and some statements made by the US Federal Trade Commission, Dr Amir advised that Dr Morwitz did not consider that her role as a contributor to policies regulating hidden fees "could very well lead to biases (even if unconsciously) in her evaluation of the Cineplex Website".

[68] The Commissioner's position on alleged bias is captured above in relation to the review of the academic literature. The Commissioner also submitted that in this proceeding, the first

contested case on drip pricing in Canada, the Commissioner sought out the foremost expert on the subject and Cineplex was attempting to turn her expertise around and into an argument about bias. The Commissioner referred to (i) the Tribunal's decision in *VAA*, which admitted expert evidence despite the expert's close business relationship with one of the parties: *VAA*, at paras 104, 126; and (ii) Justice Perell's analysis admitting expert evidence in *Wise v Abbott Laboratories, Limited*, 2016 ONSC 7275, at paras 37-83.

[69] I conclude that Dr Morwitz's evidence is admissible.

[70] The Supreme Court addressed the issue of inadmissibility of an expert opinion based on impartiality, lack of objectivity and bias in *White Burgess.* Justice Cromwell, speaking for the Court, addressed the expert's duty to the court at paragraph 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 position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: [citation excluded]. 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.

[71] At paragraph 46 of *White Burgess,* the Court endorsed the statement that "expert witnesses have a duty to assist the court that overrides their obligation to the party calling them" and confirmed that the expert witnesses must be "aware of this primary duty to the court and able and willing to carry it out". Justice Cromwell discussed the onus on the parties with respect to this threshold requirement and stated at paragraph 49:

> <u>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</u>. 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. […] an expert who, in his or her proposed evidence or otherwise, 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.
>
> [Emphasis added]

See also *dTechs EPM Ltd v British Columbia Hydro and Power Authority*, 2023 FCA 115, at para 49.

[72] The process contemplated by the Supreme Court in *White Burgess* is as follows. An expert's attestation or testimony recognizing and accepting the duty to the Tribunal will generally be sufficient to establish that the threshold test has been met. The burden is then on the litigant 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 or unwilling to comply with his or her duty. If the opponent meets this burden of showing such a realistic concern, then the litigant proffering the witness must demonstrate that the expert is impartial, independent and unbiased. If that is not done, the expert's evidence, or those parts of it that are tainted by a lack of independence or by impartiality, should be excluded. See *White Burgess,* at paras 46-49; *Wise v Abbott Laboratories,* at para 61.

[73] This is not one of the rare cases in which an expert's evidence is inadmissible as alleged by Cineplex. Cineplex has not raised realistic concerns about Dr Morwitz's ability or willingness to perform her duties to the Tribunal.

[74] With respect to the legal test, the Tribunal must apply the standard in the appellate cases that are binding on it, which is that the expert's opinion must be "impartial in the sense that it reflects an objective assessment of the questions at hand". I do not accept Cineplex's position that an expert witness must be as impartial as a judicial decision maker in order to assist the Tribunal.

Cineplex did not refer to any decided cases that applied any different, or higher, standard for impartiality. It did not cite any court decision or academic treatise to support its argument in principle or that criticized the statements made in *White Burgess* as inadequate.

[75] Dr Morwitz signed an acknowledgement that she would comply with the Tribunal's code of conduct for expert witnesses and expressly acknowledged that an expert has a duty to assist the Tribunal impartially on matters relevant to her expertise, that this duty overrides any duty to a party to the proceeding including the party retaining the expert, that the expert is to be independent and objective, and that an expert is not an advocate for a party. The form of this acknowledgement followed the Tribunal's Notice on *Acknowledgement of Expert Witnesses* (December 2010).

[76] Dr Morwitz understood and performed her obligation to the Tribunal. As she testified at the hearing, "… I understand my duty to provide impartial assistance to the Tribunal on the matters that are relevant to this case". She did not display, either in her reports or during her oral testimony, an unwillingness or inability to perform her duty to the Tribunal to be impartial and objective.

[77] Dr Morwitz's evidence was her own professional objective assessment of the questions posed to her and the issues she discussed that are relevant to this proceeding. In addition, her opinions were the product of her independent judgment. I am not at all persuaded that they were influenced by her retainer by the Commissioner or by the outcome of this litigation.

[78] Cineplex's critiques of Dr Morwitz's evidence were topics that were available to be raised in cross-examination. However, those points are pertinent, at most, to the weight of her opinions. They fall well short of concerns that warrant a conclusion of inadmissibility based on a lack of independence or impartiality.

[79] With respect to alleged bias, I have reviewed the authorities cited and the evidence, listened to and observed Dr Morwitz's testimony and that of Dr Amir, and considered the relevant paragraphs of Dr Amir's sur-reply report. I find no merit in Cineplex's position on inadmissibility based on alleged bias. Dr Morwitz's views in this proceeding did not unfairly favour one party's position over another. Her evidence meets the requirements described by Justice Cromwell in *White Burgess*.

[80] I do not accept Cineplex's argument, and Dr Amir's comments that seem to support it, that Dr Morwitz's "advocacy" for stronger laws on drip pricing or partitioned pricing implies that she unfairly favours one party's position over another, or that her opinion would change in this proceeding depending on which party hired her. To the contrary, I am confident that Dr Morwitz's opinions in relation to the matters on which she testified would be unaltered by which side requested her views.

[81] In reaching these conclusions, I find specifically that Dr Morwitz's participation on a panel at the White House – its existence, her reaction to it (including being "thrilled" that the scholarship in her field was viewed as helpful), and the evidence about what she said – do not give rise to a bias in her reports or testimony in this matter. She provided opinions that complied with her obligations to the Tribunal and that were well within the boundaries of what is realistically expected in adversarial litigation: see *White Burgess,* at para 32; compare *Wise v Abbott Laboratories,* at paras 51, 81-82.

[82] I will add the following observations. In my view, Cineplex's position on bias arising from Dr Morwitz's visit to the White House – at its highest – does not properly distinguish the appropriate provision and defence of genuinely-held professional views by an expert witness, on one hand, from inadmissible "purchased advocacy" (a phrase used by Justice Perell in *Wise v Abbott Laboratories,* at paragraph 81) such as a "hired gun" witness, on the other hand. Genuine experts provide opinions on matters on which they have developed specialized knowledge or expertise, through years of study and experience. Their role in a courtroom is precisely to provide those opinions. Their views are of special assistance because they fall outside of the experience of the court or the Tribunal. Their evidence supports the broader objective of truth-seeking, so the decision maker can better appreciate the evidence and resolve the dispute between the litigating parties. The test in *White Burgess* recognizes that an expert will be compensated for their work. The test excludes the "expert" who does not provide a genuine, independent, impartial and unbiased opinion about the matter, while recognizing the realities of adversarial litigation. *White Burgess* instructs that only in clear and rare cases will a proposed expert's opinion be inadmissible. The legal test weeds out the kind of purchased advocacy that is not permitted. In that context, it is natural and entirely expected that people with sufficient expertise to be qualified to provide opinion evidence will have genuine and well-considered views on matters of policy related to their fields.

Those views may be helpful to legislators and policy- and rule-makers, particularly if the person with expertise is expressly asked to provide those views. Doing so is not irrelevant to the admissibility of a proposed expert's opinion, but is equally not determinative of bias. In the present case, Dr Morwitz's statement at the White House and her testimony about her visit do not support a finding of an impermissible bias in her opinion evidence in this proceeding.

(c) Allegations Related to Reliability

[83] Cineplex submitted that the reliability of proposed expert evidence concerns both the relevance of the evidence as well as being an exclusionary rule (at the third stage of the threshold test for admissibility). Cineplex's written submissions referred to *White Burgess,* at paragraph 121, to contend (rather summarily) that Dr Morwitz's evidence was novel scientific evidence and was not supported by a statistical review or scientific study; instead, it was the subjective conclusions of Dr Morwitz. In oral argument, Cineplex acknowledged that behavioural economics principles were not novel, but contended that the ideas on what partitioned pricing means and the results of testing on consumer behaviour were novel in that the outcome is not consistent. Cineplex relied on the cross-examination of Dr Morwitz and on Dr Amir's report, which argued that "the very literature Dr Morwitz cites can be used to draw exactly the opposite conclusion", including her own research (which Dr Amir stated yielded mixed predictions about overall impact) and that a meta-analysis concluded that the impact of partitioned prices is contradictory and may have divergent effects on consumers.

[84] I agree that the reliability of opinion evidence is a component of admissibility (as with all evidence): see *R v Trochym,* 2007 SCC 6, [2007] 1 SCR 239, at para 27, cited in *White Burgess,* at paras 21, 23. I also agree that in the case of an opinion based on novel or contested science or science used for a novel purpose, the proponent of expert evidence must establish the reliability of the underlying science (in addition to the four *Mohan* criteria): *White Burgess,* at paras 16, 23; *R v J-LJ,* at paras 33, 35-36, 47.

[85] I cannot conclude that Dr Morwitz's evidence is based on such novel or contested science that it cannot be admissible owing to a lack of reliability.

[86] In her oral testimony, Dr Morwitz acknowledged that the academic literature shows mixed results as to whether partitioned pricing increases demand and revenue. Dr Morwitz's report referred to a 2018 meta-analysis article (i.e., a study of studies), relied on by Cineplex in cross-examination, and the paper's conclusion of the positive effect of partitioned pricing on consumer preference and that the results of their meta-analysis suggested that, on average, the use of partitioned pricing leads to a 9% increase in consumer preference over the use of all-inclusive pricing: at para 65. Dr Morwitz advised in cross-examination that this was a marginally significant result. Her report stated that 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.

[87] There were some aspects of the testing outcomes in the academic literature that Dr Morwitz did not mention expressly in her report. She acknowledged during cross-examination that she did not advise in the body of her report that certain moderators would impact consumers' pricing perceptions and did not say expressly that there were mixed results in some studies relating to the effects of moderators. She also acknowledged that the academic literature included both positive and negative effects of partitioned pricing on consumer perceptions.

[88] I pause to note that the meta-analysis article used in cross-examination considered when, according to the academic literature, partitioned pricing with certain combinations of moderators may lead to "favorable consumer preferences" (or as characterized in Dr Morwitz's report, an "inclination toward the target product") – in other words, advantageous outcomes for firms selling goods to the public.

[89] Dr Morwitz advised in re-examination that for partitioned pricing, the academic literature shows by and large (i) decreased price perceptions (the price appears cheaper than all-inclusive pricing) which was not included in the meta-analysis paper; and (ii) an increase in demand. In addition, she advised that certain moderators made the effects bigger while others made the effects smaller or go in the opposite direction. She considered them in providing her opinion to the Tribunal.

[90] Finally, Dr Morwitz testified that the meta-analysis article examined what she calls "transparent partitioned pricing". It did not look at drip pricing or at price obfuscation, or either of

them in combination with partitioned pricing. The article examined how consumers react when all information is put before and made salient to them.

[91] From a review of her reports and entire testimony, Dr Morwitz showed in a balanced way that there are nuances in the literature. While the issues raised in cross-examination and in Dr Amir's report were appropriately raised, I am not persuaded that they render Dr Morwitz's report and testimony unreliable or so novel as to be inadmissible. Nor do these issues show that Dr Morwitz is not objective or impartial, or that her testimony was biased.

[92] The legal requirements to exclude Dr Morwitz's evidence as set out in *White Burgess* are not met.

(d) Dr Morwitz's Testimony

[93] Dr Morwitz's testimony provided candid responses to questions. She conceded appropriate points in both her reply report and cross-examination. She was careful, pausing to think before answering or checking her report. Overall, Dr Morwitz was a very good and credible witness.

(3) Cineplex's Expert

[94] Cineplex tendered Dr Amir's affidavits and attached a responding report and a sur-reply report. Dr Amir testified at the hearing.

[95] At the hearing, Cineplex proposed that Dr Amir be qualified to provide opinion evidence about marketing, consumer behaviour and psychology, business analytics and market research and surveys. At the hearing, after cross-examining him on several topics, the Commissioner confirmed that he had no issues with these proposed qualifications.

[96] Dr Amir is the Wolfe Family Presidential Endowed Chair in Life Sciences, Innovation, and Entrepreneurship, and Professor of Marketing at the Rady School of Management at the University of California, San Diego. He holds a bachelor of science in computer science from Israeli Open University, Tel Aviv, and a PhD in Management Science and Marketing from the Massachusetts Institute of Technology. He has taught Marketing Management, Pricing, Consumer Behavior, Business Analytics, Marketing Strategy, Market Research, Applied Market Research, Lab to

Market, and Data Driven Decision Making at the MBA and Executive levels, and specific programs for major corporations (both nationally and internationally). He has also taught MBA Marketing Management courses at Northwestern University's Kellogg School of Management, Yale School of Management, Recanati School of Business of Tel Aviv University, IDC Herzliya, and Cheung Kong Graduate School of Business in Shanghai, China. He is the Chief Behavioural Science Officer at Fiverr Inc and serves on the advisory board of several companies. Dr Amir has published articles in marketing, management, and psychology journals and designed and conducted consumer surveys for his academic research and consulting work.

(a) The Commissioner's Objection to Dr Amir's Proposed Area of Expertise Related to "User Design" Best Practices

[97] The Commissioner's position was that paragraphs 26 to 32 of Dr Amir's report were not admissible. The Commissioner submitted that they contained opinion evidence that Dr Amir was not qualified to give related to "user design" best practices. The Commissioner noted that in those paragraphs, the supporting citations were from 1980 and from a marketing textbook that did not discuss user design principles. According to the Commissioner, Dr Amir's knowledge of online consumer behaviour along with unspecified publications related to interface and consumer psychology was not sufficient to provide him with "special or peculiar knowledge through study or experience" in respect of the principles of user design.

[98] During oral argument at the end of the hearing, Cineplex took the position that it proposed to qualify Dr Amir in the areas of user design interface and website design interface as a rebuttal witness to Mr Eckert.

[99] Dr Amir characterized his areas of expertise as including "consumer behaviour, website design interface, and online purchase decision making" in both his affidavit and in his first report dated January 12, 2024. At paragraph 10 of the report, he summarized his conclusions as follows:

> Principles of marketing dictate that firms are incentivized to design transparent and user-friendly online interfaces to enhance the consumer experience and gain consumer loyalty. My review of the Cineplex Website

> and Mobile Appl found that Cineplex's ticket buying experience was clear and streamlined, reflecting these user design best practices.

[100] Elsewhere in that same report, Dr Amir discussed the design of Cineplex's online ticket sales process, including passing comments on the role of user interface design and the incentives for online sellers to provide a "purchasing flow that is streamlined and intuitive while providing consumers with all the relevant information they need to make informed purchase decisions": at paragraph 23. He stated that Cineplex's website design, the consumer flow and the presentation of the Online Booking Fee were consistent with "marketing and user design best practices as well as industry standards and norms" and that the Online Booking Fee was "presented in a transparent manner that is consistent with user design best practices": at paragraph 65. He also stated that "the initial ticketing page design makes it clear that the Online Booking Fee is not a mandatory or fixed charge".

[101] Dr Amir provided his response to Mr Eckert's reports in Part VIII of his initial report and in his sur-reply report. The latter report reaffirms Dr Amir's view that the Cineplex ticket buying experience reflects user design best practices.

[102] Dr Amir confirmed in cross-examination that he had no degree, diploma or accreditation in graphic design and had not taught courses or consulted for companies in website design or user interface design. At the time of the hearing, he had not published papers on website design, best practices for website design or user interface, nor had he published papers on the impact of drip pricing. His publications and research on marketing, consumer behaviour and consumer psychology inform website designs, designers, and user interface. He testified that businesses use his knowledge, expertise and advice to design their websites and interfaces because of his expertise on how consumers behave online and how consumers respond to different information presented to them online.

[103] Dr Amir agreed during re-examination that the comments in his report about Dr Eckert's report were related to "consumer behaviour with design" and that he advises industry on consumer behaviour related to design.

[104] At the hearing, Cineplex did not expressly propose to qualify Dr Amir as an expert in website design, user interface design, or in the best practices related to either one. It only did so

expressly during oral argument at the end of the hearing. However, Dr Amir stated that he had expertise in website design interface in his initial report and the Commissioner cross-examined on that potential area of expertise during the hearing. Despite the omission from the proposed areas of expertise at the hearing, I find that the Commissioner had sufficient substantive notice, as did the Tribunal, that Dr Amir's proposed evidence would include opinions on website design interface or user interface design. This finding does not condone counsel's failure to mention it when proposing Dr Amir's areas of expertise at the hearing.

[105] In Dr Amir's report, the heading for paragraphs 26 to 32 is "The Cineplex User Experience Reflects User Design Best Practices". In those paragraphs, he explained his view that Cineplex's website's "consumer flow" (as described earlier in his report) was well-engineered and exhibits user design best practices, as well as transparent and intuitive user experiences. He outlined five stages of consumer decision making process and how the consumer flow on cineplex.com is an example of an interface that follows these stages. After a discussion of the steps on the website, with particular reference to the Tickets Page, Dr Amir concluded that the structure and design of the website and the App fit the five steps of the consumer decision process. He found that the presentation of prices was logical, intuitive and consistent with prevailing marketing and online norms.

[106] I conclude that paragraphs 26 to 32 of Dr Amir's report are admissible opinion evidence as they mostly concern the application of marketing principles to the Cineplex website, something within his expertise. However, where Dr Amir's reports provided opinions and comments on website design, website design interface or user design interface issues, and specifically on whether the Cineplex website or App reflects best practices in those areas, he went beyond the scope of his core expertise (at least as was demonstrated in this proceeding). Despite the sworn statements about expertise in "website design interface" in his affidavit and in paragraph 6 of his initial report, Dr Amir has much less expertise and experience, when compared with Mr Eckert, to assist the Tribunal in these areas. In these areas, Mr Eckert's evidence must be preferred.

(b) Dr Amir's Testimony

[107] Dr Amir testified in a clear and direct manner. He made a number of appropriate concessions during cross-examination. For instance, he acknowledged during cross-examination that he had not reviewed all of the Commissioner's proposed evidence and the transcripts of Cineplex's discovery before he delivered his reports (they were not provided to him). He also acknowledged that some of his figures that he alleged depicted the Cineplex website did not accurately show what a user would experience (e.g., he had to scroll or to zoom out to capture what was actually depicted). His description of the consumer flow did not mention that Cineplex requires a consumer to first create an account with Cineplex and then log in before pricing information is displayed.

[108] I find Dr Amir's reports and testimony to be less objective and less helpful than the reports and testimony of Dr Morwitz and Mr Eckert. Recognizing that Dr Amir was retained to respond to the Commissioner's expert witnesses, his two reports contain material contents that were, in both substance and tone, more argument than objective expert opinion.

[109] Accordingly, I give diminished weight to Dr Amir's evidence overall, and particularly as it concerns his response to Mr Eckert's evidence in Part V.B. at paragraphs 26-32, and Part VIII of Dr Amir's initial report and in his sur-reply report.

[110] I note finally that there was an internal inconsistency in Dr Amir's reports that raises concerns about objectivity. While he was sharply critical of Dr Morwitz for providing an opinion based on her own personal review of Cineplex's website and for failing to conduct empirical studies of how consumers interacted with the website, Dr Amir's own reports provided opinions about the website and App based on his own interactions with the website and without an empirical study of his own. Dr Amir did not recognize this point in either of his reports. He only acknowledged it during direct examination at the hearing (that his own review of the website was subjective like Dr Morwitz's and involved "researcher bias"). The submission that Dr Amir's opinion was rebuttal evidence does not answer this internal inconsistency in his evidence, nor does the "caveat" Dr Amir offered during his testimony that he used "two empirical facts" in his report. Indeed, Cineplex acknowledged during oral argument that if Dr Morwitz's evidence were excluded

for providing conclusions based on personal reviews and failing to conduct empirical studies, so too must Dr Amir's. While neither expert's evidence is inadmissible for this reason, these circumstances further adversely affect the objectivity of Dr Amir's evidence.

IV. FACTUAL FINDINGS

[111] The Tribunal makes the following findings of fact, having considered all the admissible, reliable evidence presented at the hearing.

[112] Cineplex operates its website and App, which members of the general public may visit for information about, among other things, movies playing at Cineplex theatres across Canada and to purchase movie tickets. Users do not initially need to log in or enter a password to get access to the website or the App.

A. Tickets and Seat Selection

[113] Consumers are able to purchase tickets to movies showing at Cineplex theatres online, via the website and on the App. Consumers may also purchase their movie tickets in-person at Cineplex's theatres (at a box office, concession or kiosk).

[114] A seat selection must be made when making either an online purchase or an at-theatre purchase of movie tickets. In other words, the booking of a ticket goes hand in hand with the attribution of a seat; if all seats are booked, no ticket can be sold. Historically, whether ticket holders had purchased their tickets in-person at the theatre or online (meaning, regardless of the medium of purchase), they would simply walk-in the theatre and sit wherever a seat was available. This practice changed with the COVID-19 pandemic. Cineplex began offering "advance" seat selection in all of its theatres to help ensure social distancing during the pandemic, commencing in or around June 2020. Cineplex did not charge consumers to reserve seats from June 2020 until mid-June 2022.

[115] Consumers' ability to purchase movie tickets as close to, or as far in advance of, a movie's showtime is the same, whether the purchase is made in-person at the theatre or online using the website or the App.

B. Cineplex Connect Account, Scene+ and CineClub

[116] To purchase a movie ticket on Cineplex's website or App, a consumer must have a Cineplex Connect Account, created by the user with Cineplex by providing their name, email address and phone number.

[117] Before the website or the App displays any ticket prices (i.e., any pricing information) for movies, the user must log into their Cineplex Connect Account and enter an authentication code that is either texted to their mobile phone or shared by automated voice message on their phone. Ticket prices are then displayed on the Tickets Page on both the website and the App.

[118] Cineplex is a partner in Scene+, Canada's largest entertainment and lifestyle loyalty program. There is no monetary fee to join. Scene+ members earn points through purchases at various retailers or by using associated credit cards. Members earn points on a variety of movie, entertainment, refreshment and other purchases at Cineplex theatres across Canada. Points can be redeemed for products, including tickets for Cineplex movie theatres.

[119] Cineplex also offers a movie subscription program called CineClub. Launched in the third quarter of 2021, CineClub provides benefits to its members such as one free movie ticket every month, discounts on purchases at concessions and no payment of the Online Booking Fee when a ticket is purchased online on the website or the App. CineClub members currently pay a monthly fee of $9.99 plus applicable taxes or an annual fee of $119.88 plus applicable taxes. A consumer must be a Scene+ member to join CineClub.

C. The Online Booking Fee

[120] In February 2022, Cineplex was looking at ways to drive – i.e., increase – its revenue and margin. One option was to implement a service fee for online ticket purchases. The ensuing assessment of different revenue sources led to the implementation of the Online Booking Fee in June 2022.

[121] An internal Cineplex slide deck dated February 1, 2022, entitled "Admission Pricing Initiatives", contained information gathered by way of "peer review" from Cineplex's competitors about service fees on a per-ticket basis. This slide deck confirms that by that time, Cineplex was

considering implementing a service fee of $1.50 per ticket, with a discount for loyalty consumers (Scene+ members) and waivers for CineClub subscribers. The slide deck set out net revenue projections for a service fee in two scenarios, one for Digital Channels and a second for All Channels. A separate slide provided an All Programs Comparison with net revenue projections for both digital and all channels.

[122] The same slide deck advised that through research with Scene+ members, Cineplex had assessed the "switching" impact of $1-$2 adjustments in base pricing in three scenarios. Given the challenge of assessing whether members would be willing to pay more, the research was framed as a potential discount [redacted]. [redacted] In each of the three scenarios, [redacted].

[123] Cineplex introduced the Online Booking Fee effective June 15, 2022. The Online Booking Fee is $1.50 per ticket. It is discounted for Scene+ members (who pay $1.00) and it is waived for CineClub members (who pay a monthly or annual fee to join). The quantum of these Online Booking Fees has not changed since June 2022.

[124] In other words, every consumer who is not a CineClub member must pay an Online Booking Fee per ticket if they wish to purchase tickets online, whether on the website or the App.

[125] Within a single online transaction, the Online Booking Fee is capped to a maximum of four tickets. Data shows that a very substantial majority of online ticket purchases ([redacted]%) are for four tickets or fewer, and so are subject to Online Booking Fees.

[126] A key distinction among the various purchasing options is that the Online Booking Fee does not apply to movie tickets purchased in-person at Cineplex's theatres (at a box office, a concession or a kiosk).

[127] The implementation of the Online Booking Fee had the practical effect of raising prices for movie tickets purchased online – that is, the amount paid by consumers who have to pay it. Cineplex recognized that it was a price increase at the time it was implemented. Mr McGrath testified on behalf of Cineplex at discovery (read into the record at the hearing) that he hoped the fee would go "under the radar" with the news media when it was introduced, but it did not. He had to answer questions from a board member about it, including its impact on Scene+ members. Mr McGrath testified that Cineplex did not put out a press release about the Online Booking Fee: "[w]e, generally, wouldn't put out a press release when we are increasing the price of movie tickets or concessions. That's not standard practice for us."

[128] In dollars, in 2022 – the year it was introduced – the Online Booking Fee generated $11,678,336, and a total of $27.3 million in 2023 (approximately $5.2 million during the first quarter, $7 million during the second quarter, $9.9 million during the third quarter, and $5.2 million during the fourth quarter).

D. Movie Ticket Sales

[129] In 2022, close to half (48%) of all movie tickets were purchased in-person at theatres. The rest were purchased online.

[130] Approximately three-quarters of Cineplex's online ticket sales occur through mobile devices (through the website or the App), while the remainder are purchased on a computer. Put another way, 75% of online ticket purchases are done using mobile phones and 25% of online ticket purchases occur on a computer. Of the 75%, half are mobile website purchases and half use the App. Accordingly, about 37.5% of purchasers visit the Tickets Page on the App.

[131] CineClub members represent a very small minority of online ticket purchases and of overall ticket purchases (approximately [redacted]% as of June 2022).

E. Relevant Contents of cineplex.com and the App

[132] The following description of a user's navigation through the website and the App is based on the reliable evidence before the Tribunal, with particular reference to the exhibits attached to Mr Zimmerman's witness statement. The findings below concern the structure and design of

Cineplex's website and App, recognizing that there may be other ways to navigate to particular webpages on each.

[133] On arrival on the cineplex.com homepage or upon launching the App, the user is presented with information about movie titles. The user may then navigate through webpages that provide information about the films currently being shown and upcoming, theatre locations, different types of film-watching experiences (e.g., premium seating or different sizes of screens), the date and time that a film will be shown, and more – all before reaching the Tickets Page. The Tickets Page is where ticket prices are displayed. As previously stated, only after a user has logged into their Cineplex Connect Account can the user see ticket prices.

[134] After selecting the category and number of tickets on the Tickets Page, a "floating" ribbon appears at the bottom of the page displaying certain information. Akin to the concepts of a "false floor" or a "floating floor", the floating ribbon creates the illusion that the webpage is complete. The ribbon remains visible to the users at the bottom of the webpage, regardless of scrolling up or down on the page. Users who click on the PROCEED button in the floating ribbon on the Tickets Page proceed to the Seat Selection Page. After selecting their seat(s), users who click on the PROCEED button in the floating ribbon on the Seat Selection Page proceed to the Payment Options Page. Those who click on the PROCEED button in the floating ribbon on the Payment Options Page move to the Payment Page.

[135] There are a number of important features of the process leading to the Tickets Page and ultimately to a ticket purchase by a consumer, which may be likened to a funnel (or as Dr Amir described it, a "consumer purchase funnel").

[136] Cineplex's ticket prices are not uniform across all theatres and films. The user's choices of film, type of experience, theatre location, date and time affect the ticket prices displayed on the Tickets Page.

[137] En route to the Tickets Page, and after a movie is selected, the user may advance by clicking "Get Tickets" (in a rectangular blue box) on the website (whether on a mobile phone or computer) or by clicking dates and showtimes under the heading "Buy Tickets" on the App. Both display (automatically) the Cineplex theatre closest to the user where the movie is playing. The user has

options to select the date and time of the showing. There is also an opportunity to preview seats, which takes the user to a different webpage where seats for the movie, both already booked and still available, are displayed. On that webpage, users may click “Get Tickets” from that location, which takes the user to the Tickets Page. A user does not have to log into their Cineplex Connect Account to preview seats on a seat map.

[138] As noted, ticket prices are displayed on the Tickets Page. In order to see ticket prices, a user must first log into their Cineplex Connect Account. To log in, the user enters their email address and password. Cineplex then texts or shares by automated voice message a six-digit code to the user’s phone, which the user must then enter for authentication. The website and the App recognize if a user is a Scene+ member (if the user has provided that information) and whether a user is a CineClub member. In other words, a user must log into their Cineplex Connect Account before the website or App displays prices.

[139] The Tickets Page, on the website and on the App, is the first webpage where Cineplex advertises movie ticket prices. When users reach the Tickets Page, they have an opportunity to click to select the category and number of tickets they wish to add to their online shopping cart. When they do so, the display on the Tickets Page changes to provide additional information that reflects the ticket selection(s). However, no new webpage is opened; all changes are updated automatically and instantaneously on same webpage. The following description of the Tickets Page is therefore divided into two sections.

[140] Tickets Page (A) – What a user sees when no ticket is yet selected: When a logged-in user arrives on the Tickets Page, the webpage displays information about the film, location, date and time of the showings as selected by the user. The heading across the top of the webpage on both the website and the App says Tickets > Seats > Payment.

[141] The Tickets Page displays distinct prices for three categories of consumers: General Admission, Seniors and Children. Beside each option, to the right, it reads ADD in a rectangular blue box. One may click that box to add a desired ticket.

[142] Below the prices, users are advised that applicable taxes will be added at checkout.

[143] On the Tickets Page of its website (in the top right if viewed on a computer, and in the middle of the page if viewed on a mobile phone), Cineplex advertises the benefits of joining CineClub, including the waiving of any Online Booking Fee. The advertisement states "Instantly save on your ticket" and, below, in the third bullet point: "No Online Booking Fees". The advertisement does not disclose the amount of that fee (i.e., the savings for joining CineClub). There is a white space outlined in blue to click to JOIN CINECLUB.

[144] This CineClub advertisement does not appear on the App. Thus, about 37.5% of movie ticket purchasers – those who navigate the Tickets Page on the App – do not see the CineClub advertisement and therefore do not see the reference to "No Online Booking Fees".

[145] Across what appears to be the bottom of the Tickets Page, there is the floating ribbon (as described above) that did not appear on the previous webpages, which displays additional information. On the left of the floating ribbon is a timer that descends starting at 5 minutes and reads "Time Left". On the right side of the floating ribbon is displayed "Subtotal: CA$0.00" (because no ticket has yet been added to the online shopping cart), and the button PROCEED, again in a rectangular blue box.

[146] A user may or may not scroll down on the Tickets Page. As mentioned earlier, scrolling down does not affect the floating ribbon; it remains visible at all times at the bottom of the user's window.

[147] Also on the same Tickets Page are other kinds of information. There is an opportunity to enter a user's Scene+ identification and/or a "Certificate or Promo code", each by clicking to do so and entering the required information. And at the bottom of the Tickets Page is information about the Online Booking Fee. There is a blue encircled "i" that may be clicked, which links to additional information about the fee in a pop-up window, further detailed below. On that webpage, one can read: "Booking fee is discounted for Scene+ members and waived when you're a CineClub member. Applicable taxes will be calculated at checkout". At this stage of the process, the amount of the Online Booking Fee is not displayed; the subtotal still reads "CA$0.00" because no ticket has yet been selected.

[148] Clicking the blue "i" button opens a pop-up window. Under the heading "**Online Booking Fee**" is "**$1.50 per movie ticket** – Non-Refundable", and indicates that the "Online booking fee is capped at a maximum of 4 tickets per transaction." It states "0 Movie Tickets x $1.50 = **$0.00**". (Bolding is in original.)

[149] This information about the Online Booking Fee on the Tickets Page at this stage is, according to Mr Eckert's evidence, "below the fold": in other words, it means that for a majority of users, one must scroll down to see it. I will return to this point shortly.

[150] Tickets Page (B) – What a user sees once a ticket is selected: If a user selects a ticket, some information displayed on the Tickets Page and the floating ribbon updates. When clicked once, the blue ADD space to the right of a category of ticket disappears and the number "1" appears, between the symbols "+" or " – " which are inside circles. A user can change the number of tickets by clicking "+" or "–" (plus or minus) to add or subtract tickets of any of the three categories. The webpage then displays the number of tickets chosen. The process is substantially the same on the mobile website and the App.

[151] When a user adds one or more tickets to her online shopping cart, the number to the right of the word "Subtotal" on the floating ribbon changes from "CA$0.00" to display an amount equal to the sum of the price of the ticket(s) plus any applicable Online Booking Fee for the ticket(s). For example, if a user clicked to select one General Admission ticket at a price of CA$15.25, the subtotal on the floating ribbon will read "CA$16.75", or "CA$16.25" for a Scene+ member who has advised the website or App of this status, or "CA$15.25" if the website or App recognizes the user as a CineClub member.

[152] After one or more tickets are selected, the information on the floating ribbon does not change to provide an explanation for how the subtotal is determined. In other words, the floating ribbon does not advise the user that the subtotal reflects the aggregate of the price of tickets and the applicable Online Booking Fees. The user must therefore notice by herself that the subtotal is not the product of the number of tickets multiplied by the applicable ticket price or prices, by doing the mental math to work that out. A user must add up the ticket prices and deduct that sum from the stated subtotal to determine the amount of the Online Booking Fee(s) that were added. The

floating ribbon does not break out the aggregate cost of the tickets and the aggregate cost of the Online Booking Fees.

[153] At this stage, if one scrolls down, near the bottom of the Tickets Page on the website and on the App, the information displayed to the right of the words Online Booking Fee has changed from "CA$0.00" to reflect the sum of any applicable fee. For one ticket, the Online Booking Fee display reads "CA$1.50", unless the user is a Scene+ member ("CA$1.00") or CineClub member ("CA$0.00"). For a user who is not a Scene+ or CineClub member and who purchases four tickets or more, the Online Booking Fee will show "CA$6.00".

[154] Clicking the blue "i" button again opens a pop-up window on top of the Tickets Page. Under the heading "**Online Booking Fee**" is "**$1.50 per movie ticket** – Non-Refundable", and indicates that the "Online booking fee is capped at a maximum of 4 tickets per transaction." This pop-up window now states the number of movie tickets and the total Online Booking Fee, for example "4 Movie Tickets x $1.50 = **$6.00**". (Bolding is in original.)

[155] To see the aggregate amount of the Online Booking Fees on this webpage without doing the mental math, described above, a user must scroll down, or scroll down and click "i" for additional information.

[156] A user cannot proceed with an online movie ticket purchase without first clicking the ADD button to select at least one movie ticket on the Tickets Page. If a consumer clicks the PROCEED button without clicking the ADD button to select a movie ticket, a warning pop-up appears, and the consumer may not proceed with the transaction until a movie ticket is selected. Cineplex characterized this feature as a "lockout" that prevents a user from going forward on the website or App to the next step of seat selection until at least one ticket is selected.

[157] However, once tickets are selected, a user is <u>not</u> required to scroll to the bottom of the Tickets Page (where the information about the Online Booking Fee is located) before being able to advance by clicking the PROCEED button.

[158] Mr McGrath testified that Cineplex very specifically designed the Tickets Page to have the total online price (that is, the subtotal – i.e., the aggregate price of the tickets plus any applicable

Online Booking Fees, but excluding applicable taxes) right beside the PROCEED button, to ensure consumers see the online price before proceeding to the next page.

[159] Seat Selection Page: Moving on to the next step, the user is prompted to select seat(s) for the movie at the theatre chosen. On arrival at the seat selection page, the information on the floating ribbon changes from the Tickets Page. It now shows a "Total" cost, which is an aggregate amount representing the sum of the price of all tickets, plus the sum of any applicable Online Booking Fees, plus applicable taxes. After selecting seats, the user then clicks the PROCEED button to arrive at the Payment Options Page.

[160] Payment Options Page: The Payment Options Page is where the user selects the method of payment. The total on the floating ribbon is still the tickets price plus any applicable Online Booking Fees plus applicable taxes. The user makes the payment type selection and then clicks the PROCEED button to arrive at the Payment Page (discussed below).

[161] The Payment Options Page on the website (again, whether on a computer or a mobile phone) and the App displays an Order Summary, which shows the number of movie tickets selected and their aggregate cost, the Online Booking Fees and their aggregate cost, applicable taxes in aggregate, and a total. A blue "i" button is available beside Online Booking Fee to click for information (doing so yields the same information as on Tickets Page (B) discussed above (at paragraph 154)). Importantly, the Order Summary is only visible on the website or the App if a user scrolls down to see it.

[162] Below the Order Summary, it says: "By continuing past this page, you agree to our TERMS & CONDITIONS."

[163] The floating ribbon remains at the bottom of the Payment Options Page on both the website and the App, with the countdown timer ("Time Left") on the left side and, on the right side, the total price and the clickable blue box to proceed with the purchase.

[164] A user can click the PROCEED button and move to the next page without scrolling down to see either the Order Summary or the statement about the TERMS & CONDITIONS.

[165] **Payment Page:** Once a user lands on the Payment Page on a computer, the floating ribbon displays a countdown timer, restarted at 15:00 ("Time Left"). The webpage shows the selected movie, the date and time and location selected, and enables the user to "Review Your Order," above the total cost of the order. It provides spaces to input credit card or other payment information, and once a user has scrolled down on the webpage, there is a blue rectangular box to click to proceed with the purchase. On the mobile phone website and on the App, the information on the Payment Page is essentially the same, although there is no floating ribbon with a countdown timer.

F. Scrolling, and Information Above and Below the Fold

[166] There are webpages on the website and the App where a user may scroll, or needs to scroll, to advance forward. A user's desired movie may not immediately appear on the screen and the user may have to search for it by scrolling down the webpage. Or the user may be interested in seeing some movie but has not yet selected which one, and browses the website or App to find one of interest. Another example is on the App, where, after selecting a movie, a user arrives at a webpage with the "Buy Tickets" heading and selects a day to see the movie. The user must then scroll down to click a show time on that date at the location chosen, which advances the user to the Tickets Page.

[167] Mr McGrath and Dr Amir confirmed that on the Tickets Page, after adding a ticket to the online shopping cart, a mobile website or App user does not have to scroll to the bottom of the Tickets Page before being able to advance by clicking PROCEED.

[168] Mr McGrath confirmed that a floating ribbon on the App means a user can click the PROCEED button without ever scrolling to the bottom of the webpage.

[169] Dr Amir confirmed that on all mobile phones, a user can go through the online purchase process without ever seeing the information that is disclosed below the fold with respect to the Online Booking Fee.

[170] Dr Amir also testified that websites used to be designed to require consumers to scroll to the bottom before clicking a button to advance to the next page, but people did not find the button at their convenience. Dr Amir suggested that it was more convenient for people to have the button

allowing to proceed available at any point, as it currently appears on the floating ribbon. In other words, the current design (which does not require a consumer to scroll down and therefore see all pricing information prior to proceeding with the purchase) is a deliberate design choice that Cineplex preferred. Cineplex could elect to require consumers to scroll down to the bottom of the page to click the PROCEED button if it wanted to.

[171] As detailed below, Mr Eckert provided significant context and understanding for this and other evidence, and I accept Mr Eckert's evidence.

[172] Mr Eckert's report explained that, akin to the display of newspapers on a newsstand, the concept of a "fold" on a webpage also applies to digital marketing and website design. Because webpages 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 down to view the rest of the page content. Everything after that scroll point is considered below the fold.

[173] The fold is important because scrolling is an extra action that users must take to access content. Regardless of what screen size or type of device is used, online marketing best practices suggest that "anything of primary importance is placed in that first viewable area of the web page before the user has to scroll down to reveal more information". Mr Eckert referred to research, based on quantitative evidence by the Nielsen Norman Group, finding a dramatic drop-off in user attention at the position of the page fold – the information immediately above the fold was viewed 102% more than the information immediate below it.

[174] Mr Eckert's report advised that when users fail to see information of value, they stop scrolling. In addition, users scroll when there is a reason to do so.

G. The Countdown Timer on the Floating Ribbon

[175] There is a countdown timer on the left side of the floating ribbon, starting at the Tickets Page. The timer resets when a user moves to the next webpage, but users are not advised that it will do so.

[176] Mr McGrath testified that there were "backend" reasons for the countdown timer related to "resource management" – effectively, to ensure that abandoned or otherwise incomplete

transactions do not clog up the communications between the website and the ticketing system (which includes individual theatres). He testified that a timer is part of the underlying architecture of the Vista software Cineplex purchased to drive its online ticketing engine and that the countdown timer has been part of the purchase flow long before the introduction of the Online Booking Fee. In other words, according to Mr McGrath, the countdown timer is independent from the implementation of the Online Booking Fee and is geared towards a different purpose.

[177] However, tickets do not come out of inventory (that is, they do not become unavailable) until the user clicks the PROCEED button after selecting at least one ticket and moves to the Seat Selection Page.

H. Conversion Pages

[178] Mr Eckert described two principles of webpage design configuration, known as the F pattern and the Z pattern. The Z pattern is used for conversion pages that serve the single purpose of converting users into consumers, such as the Tickets Page on the website and the App.

[179] As Mr Eckert's report advised, conversion pages "are designed to quickly move the user from initial page load to making a selection and advancing to the next step the website owner wants them to take in the sales funnel." On a conversion page, the "call to action" prompt button is placed at the end of the Z (i.e., the bottom right corner), as the Cineplex website has done by placing the PROCEED button on the floating ribbon in that position.

[180] Mr Eckert agreed in cross-examination that if the issue were whether Cineplex adequately showed the total price clearly to the consumer, it did a good job. He also agreed that if a user scrolled down, the user would see the Online Booking Fee broken out from the price of tickets in the subtotal on the floating ribbon.

[181] However, Mr Eckert's report also advised as follows with respect to obscuring content:

> 36. Conversion pages are usually the most important pages in a website and are carefully designed to optimize conversions, whether the goal is to increase leads, or drive sales through the website. Understanding the user's screen dimensions in these scenarios is paramount to the overall success of

> the web page design to place the call to action in the optimal position on the user's screen above the page fold.
>
> 37. To ensure the user sees the primary call to action above the fold, Cineplex.com uses a floating ribbon along the bottom edge of the browser to ensure the timer and primary call to action are always in view. This approach introduces two notable issues that impact the user's experience by obscuring other content on the web page related to understanding the additional fees associated with purchasing tickets online, referred to as the Online Booking Fee. The first is the creation of a false floor. The second is discouraging the user from scrolling down the page by implementing a timer and floating call to action button above the fold.
>
> [Emphasis added.]

[182] Mr Eckert described the "false floor" user experience issue as occurring when the design of a webpage above the fold creates the "illusion of completeness", which can interfere with scrolling. When the primary "call to action" prompt button is also included above the fold, it encourages users to convert (that is, to proceed with the transaction) without scrolling down the webpage any further. With the addition of a countdown timer, a placement of a "call to action" prompt button (here, the PROCEED button on the Tickets Page of the website and the App) above the page fold "discourages scrolling as users can select their tickets and convert without having to scroll down".

[183] Mr Eckert testified at the hearing that the false floor encourages the user to proceed without scrolling because there is no need to scroll further. According to him, the consumer has all the information needed to proceed forward, presented above the fold.

[184] I accept Mr Eckert' evidence on conversion pages as just outlined.

I. What Website Users See

[185] Mr Eckert's report also discussed standard screen dimensions and resolutions, based on industry-wide accepted screen resolution metrics. The underlying source was public data from a source that provides real-time screen resolution metrics based on over 5 billion webpage views per month across more than 1.5 million websites. He noted at the hearing that the source monitors over

5 billion clicks (visits to webpages) per month and that there was no reason to suspect that Cineplex's patrons were any different from other people. His firm uses these global statistics when they do not have analytics from a client's website, a practice that is paramount throughout the professional web design industry and published on agency websites and professional grade website testing platforms.

[186] Mr Eckert advised that based on statistics from November 2023, website designers will note that 69.33% of all users of the Internet use a maximum screen resolution with a fixed height of up to 1,080 pixels or smaller, while 2.97% of web users have a maximum resolution of 1,440 pixels or smaller (with the remaining 28.13% undetermined). On cineplex.com, the placement of the Online Booking Fee on the Tickets Page is well beyond what common web browsers can display above the page fold, positioned 1,330 pixels below the top of the browser.

[187] In addition, based on the same common screen resolution data from November 2023, Mr Eckert demonstrated that over 69% of viewers using computers would not readily see the Online Booking Fee information located below the fold near the bottom of the Tickets Page on cineplex.com. For users using the mobile version of the website and the App, the Online Booking Fee is also beyond the maximum viewable area of contemporary mobile phones, without scrolling down. Mr Eckert showed that over 63% of mobile viewers would not see the Online Booking Fee information located below the fold near the bottom of the Tickets Page on the App without scrolling down. One of Dr Amir's screen captures of the App showed that what he saw on the Tickets Page was consistent with Mr Eckert's evidence.

[188] Mr Eckert referred to two studies by the Nielsen Normal Group (which he characterized as "world-renowned user experience researchers" at the hearing), in 2010 and 2018, on how web users consume webpage content and how often users scroll down to view beyond the initially displayed webpage. These studies showed that users spent more than half of their time viewing content located above the fold. Both showed a sharp decrease in attention below the fold.

[189] Mr Eckert concluded at paragraph 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.
>
> [Emphasis added.]

[190] I accept Mr Eckert's evidence.

[191] Dr Amir's reports did not address the concept of a false floor. At the hearing, however, he testified that the industry refers to a "floating floor" (rather than a false floor) and that it helps users see a "call to action" prompt button. He advised that people scroll because they want to find information that is relevant. While he referred orally to his studies with companies showing that a floating floor does not inhibit consumers from scrolling (instead it helps people see the "call to action" prompt button), Dr Amir did not elaborate on his study and did not do a study of the Cineplex website or App himself. Dr Amir criticized Mr Eckert's reports for failing to measure empirically whether his views accurately reflected consumer behaviour and argued in his initial report that Mr Eckert's conclusion that consumers using the Cineplex website were discouraged from scrolling downwards remained "entirely hypothetical and thus misleading". His sur-reply report argued that Mr Eckert's report was unsupported by an empirical study on whether Cineplex consumers scrolled or not. However, Dr Amir did not provide a reasoned basis to disagree with Mr Eckert's opinion on website design and, unlike Mr Eckert, did not refer to any external evidence to support his position. Mr Eckert's evidence was neither hypothetical nor misleading.

[192] Dr Amir did not comment on Mr Eckert's use of the external studies on screen dimensions and resolutions, or what a user would see, apart from his view that Mr Eckert failed to apply his descriptions to actual Cineplex consumers and failed to describe their experiences.

[193] Cineplex's evidence at discovery (read into the record at the hearing) was that it does not track users' scrolling on its webpages or App. Cineplex did not adduce analytics or other evidence about actual consumer use patterns on its website and specifically, adduced no evidence on information consumption above and below the fold or on scrolling behaviour on the Tickets Page. Nor did Cineplex provide evidence about its website design or expected user experience and

behaviour from anyone directly involved in the design and strategy of cineplex.com or the Tickets Page.

J. Website Statistics

[194] Cineplex has some data about visits and visitors to its website on computers and mobile phones. Cineplex does not track similar traffic on the App.

[195] According to the data collected, in the last six months of 2022, users visited the Cineplex website approximately 97 million times. There are no data available for the number of actual or unique visitors to the website. Of the website traffic (visits, not visitors), approximately 11.8% reached a user's online shopping cart on the Tickets Page. Of those, approximately 42% (or about 5% of initial visits) completed an online purchase of tickets. The remaining 58% left without purchasing a ticket.

[196] Cineplex's website data for the calendar year 2022 ("Ticketing Funnel by Page Views") shows the ticketing process by page views and by consumer group. For that period, overall, approximately 52% of consumers who reached the Tickets Page selected a quantity of tickets (which went into their online shopping cart), approximately 28% of consumers reached seats section, approximately 14% viewed the payment options and 6.5% reached the order stage. The numbers are also broken down by consumer groups (showing the numbers and proportion of CineClub members, Scene+ members and regular consumers reaching each stage of ticketing). From the Tickets Page on the website, Cineplex data for the calendar year 2022 about both the App and the mobile website (entitled "Ticketing Funnel Comparison – Fallout") also shows a marked drop-off of visitors as they progress through them.

[197] According to Cineplex data, from start to finish, it takes consumers an average of three minutes and one second to complete a transaction on its website and two minutes and 34 seconds to complete the transaction on the App.

K. Other Aspects of Mr McGrath's Evidence Related to the Website and the App

[198] Mr McGrath acknowledged that there were other ways to design certain webpages and that additional information could have been included on certain pages. For example, Cineplex could

display the all-inclusive price (although Mr McGrath believed it would be misleading) or it could add a blue link next to the preview seats option where the in-theatre ticket prices could be displayed.

[199] Mr McGrath testified that in his view, it would be misleading to consumers to provide an all-inclusive price (that is, the "base price" of the ticket plus the Online Booking Fee) on the Tickets Page, because in his view, consumers pay for two separate products when they pay the theatre ticket price and the Online Booking Fee.

[200] Mr McGrath testified that there are "two separate products being purchased in the online booking system": (i) the ticket for the showing, and (ii) the guaranteed advance seat selection for that showing. He noted that these products have separate value and a separate price. He explained that purchasers obtain the certainty of seat selection of their choice and a guaranteed seat from the online purchase, booked from wherever a user may be at a given moment (rather than having to go to the theatre to proceed with the purchase of tickets and to book their seat). Purchasers get a digital copy of the ticket, which can be shared with others attending the movie. Dr Amir provided his opinion that advance seat selection has value to consumers in the "certainty of knowing you have a seat and picking good seats"**.**

[201] However, as was made clear at the hearing, purchasers cannot buy a ticket to a movie without a seat selection, either online or in-person at the theatre. This circumstance was an apparent departure from paragraph 60 of Mr McGrath's witness statement, which advised that

> … 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.
>
> [Emphasis added.]

[202] While the underlined words leave the impression that at-theatre ticket purchases are different from online purchases, that is not the case. Mr McGrath confirmed in cross-examination that one can also purchase advance tickets at the theatre, hours or days in advance of a showing and immediately select and reserve a preferred seat. Buying tickets at a theatre in advance causes a seat to be held for the consumer and that seat is no longer available for those purchasing tickets

either in-person at the theatre or online. Whether one purchases tickets online or at the theatre, Cineplex relies on the same seat reservation system (Vista software). In both cases, if the consumer who purchases tickets in advance does not come to the show, the seat remains empty. To the extent there is a material difference between the purchase methods, it is that the user who proceeded online paid the associated Online Booking Fee, whereas the consumer who bought the tickets at the theatre did not.

[203] While Cineplex's internal booking system may treat a movie ticket and the corresponding seat selection as distinct, in all practical terms, the movie ticket and the seat to watch that movie are obviously bound up together. Whether one purchases tickets online or in-person at the theatre, one cannot attend a Cineplex movie without a seat in the theatre and one cannot acquire a seat without purchasing a movie ticket. Cineplex does not offer two separate products to consumers that can be separately purchased or used.

L. The Start of the "Purchase Process" on the Website and the App

[204] The parties spent considerable time at the hearing drawing out evidence related to where the "purchase process" begins on cineplex.com and on the App. The Commissioner's eventual position during argument at the end of the hearing was that the purchase process begins on the homepage. Cineplex's position, supported by Mr McGrath's statement and testimony, was that the purchase process begins on the Tickets Page, at the moment when a consumer selects a product (that is, a movie ticket) by clicking the ADD button. (See Tickets Page (B) above.)

[205] I have not been persuaded that much (if anything) turns on the issue of where the purchase process begins on the website or the App in this case. There is no requirement for or reference to being in a "purchase process" in the language of either paragraph 74.01(1)(*a*) or subsection 74.01(1.1) of the *Competition Act*. Cineplex advised during its oral submissions that the issue was not relevant to subsection 74.01(1.1) and does not fit within the statute. There was also reference to discussions about the purchase process arising in relation to possible rules proposed by the US Federal Trade Commission.

[206] Nonetheless, I will make the following factual findings and observations in the event that the start of the purchase process is meaningful to the outcome of this case.

[207] Viewing the evidence as a whole, I find no persuasive basis to conclude that the purchasing process "begins" on any particular webpage, or anywhere specific on the App, other than perhaps the homepage. The website and the App as a whole serve as a funnel designed to convert visitors into ticket purchasers. The entire process of clicking through the website or App is designed to encourage users to select a show (i.e., a film to watch at a location, date and time) and then buy a ticket to see that show.

[208] To identify where the purchase process begins, there was considerable focus on the contents of and user actions on the Tickets Page. Yet much of the website and the App as a whole, starting with the homepage, contains some information relevant to the purchase of movie tickets. There is no express statement asking the user to enter the purchase process, or advising the user that they are doing so. In my view, there are at least four different stages at which one could argue the purchase process begins.

[209] Before reaching the Tickets Page, a log in process is required through which the user must self-identify and input an authentication code. At least one webpage before the Tickets Page has express content that suggests a user's intention to buy tickets, as the user must click a button that reads "Get Tickets" on the website (or the heading "Buy Tickets" on the App) to advance to the next page. On the App, the heading "Buy Tickets" appears before a user selects a date, time and location to see their chosen movie. One must click on that button to get to the Tickets Page. The display of "Get Tickets" / "Buy Tickets" and then clicking to move past these webpages on the website or the App could be indications that a user has entered the purchase process.

[210] The Tickets Page itself has the heading Tickets > Seats > Payment and it displays prices and the ability to click to add one or more tickets to the user's online shopping cart. The mere display of this information could serve as an indication that a user has entered the purchase process (before clicking to add a ticket).

[211] On the Tickets Page, the user may click on the ADD button to add one or more tickets to the online shopping cart, which could be an indication that a user has entered the purchase process. A subtotal of ticket prices plus the associated Online Booking Fee is then displayed. However, no tickets are actually taken from inventory at this point.

[212] Clicking forward to the Seat Selection Page could be an indication that a user has entered the purchase process. Tickets are taken from inventory and held temporarily for the user at this point, but a large number of users drop off (i.e., abandon the purchase process and leave the website) at the point of seat selection. Because no ticket may be purchased without making a specific seat selection – which the user has not yet done on arrival at this webpage – the tickets are then released back in the inventory if the user drops off.

[213] If the user elects to continue forward, the user then moves to the Payment Options Page, and then the Purchase Page, if a purchase is completed.

[214] On this evidence, I see no persuasive basis on which to identify a specific webpage or moment when the purchase process begins on the website or the App, other than perhaps the homepage where the user is presumed to land first.

[215] The data evidence supports Cineplex's observation that a substantial majority of website user visits do not reach the Tickets Page. Cineplex argued that this evidence should lead to a finding that the webpages before the Tickets Page were for consumers to gather information, before commencing the ticket purchase process by clicking the ADD button on the Tickets Page. However, it is also true that the drop-off of users continues on each page after the Tickets Page. Only a very small percentage of those who make it to the Tickets Page eventually buy tickets on the website. The evidence shows no clear delineation before and after the moment a user clicks the ADD button on the Tickets Page.

[216] I accept that the Tickets Page has been designed as a "conversion" page, which encourages the user to click the PROCEED button to advance. But that design does not imply that the user is necessarily converted to a purchaser, or that the purchase process necessarily begins with the click of the ADD button, owing to the contents of the webpages before the Tickets Page, the contents of the Tickets Page (A) and the website user data.

[217] Considering all of the above factors together, it would be artificial to conclude that the webpages before the Tickets Page are for information purposes only and that the purchase process only begins at the Tickets Page upon clicking the ADD button.

V. RELEVANT *COMPETITION ACT* PROVISIONS

A. Provisions Related to Reviewable Conduct

[218] Section 74.01, specifically through paragraph 74.01(1)(*a*) and subsection 74.01(1.1), defines certain conduct related to representations to the public that constitutes reviewable conduct under section 74.1.

[219] Subsection 74.03(4) provides that "for greater certainty", in proceedings under section 74.01, it is not necessary to establish that any person was deceived or misled.

[220] Subsection 74.03(5) provides that in proceedings under section 74.01, the "general impression conveyed by a representation as well as its literal meaning" shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.

[221] Cineplex did not argue that it exercised due diligence under subsection 74.1(3).

B. Objectives of the *Competition Act* and the Deceptive Marketing Provisions in section 74.01

[222] This proceeding raises the overall objectives of the *Competition Act* and of the deceptive marketing provisions in Part VII.1, and specifically subsections 74.01(1) and (1.1).

[223] In their submissions, the parties referred to the overall objectives of the *Competition Act* and the purposes of subsections 74.01(1) and (1.1). The Commissioner's written submissions implied that the objective of subsection 74.01(1.1) is "consumer protection", which the Commissioner refined during oral submissions to better reflect what he alleged to be the objectives of the provisions.

[224] Like its predecessor the *Combines Investigation Act*, the *Competition Act* is intended to promote vigorous and fair competition in Canada and to discourage certain forms of commercial behaviour that are viewed as detrimental to Canada and the Canadian economy: see *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641, at p. 676; *R v Wholesale Travel Group Inc,* [1991] 3 SCR 154, at pp. 190, 198, 199 (*per* Chief Justice Lamer)

and pp. 256-257 (*per* Justice Iacobucci); *Alex Couture Inc v Canada (Attorney General)* (1991), 38 CPR (3d) 293 (Qué CA), at pp. 320, 321*b*, 324c-*d*.

[225] Section 1.1 of the *Competition Act* sets out the objectives of the statute:

Purpose and Interpretation	Objet et définitions
Purpose	Objet
Purpose of Act	**Objet**
1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.	**1.1** La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[226] In prior cases, appellate courts and this Tribunal have commented on these stated objectives and how they related to specific provisions in the statute: see, e.g., *R v Stucky,* 2009 ONCA 151, at paras 39-40; *Canada (Commissioner of Competition) v Superior Propane Inc,* 2001 FCA 104, [2001] 3 FC 185, at paras 85-93. There have also been other implicit goals identified in the case law: see *Shah v LG Chem Ltd,* 2018 ONCA 819, at paras 36-38 and the cases cited there.

[227] The Federal Court of Appeal has stated that the objective of the deceptive marketing provisions in section 74.01 is to "incite firms to compete based on lower prices and higher quality", in order to achieve the objective in section 1.1 of providing consumers with competitive prices and product choices: *Canada (Commissioner of Competition) v Premier Career Management Group*

Corp, 2009 FCA 295, [2010] 4 FCR 413 ("*Premier Career Management Group FCA*"), at para 61. Discussing both the overall goals of the statute and the purposes of the deceptive marketing provisions, Justice Sexton stated:

> [61] […] Importantly, the deceptive marketing provisions—unlike many other provisions of the Act—do not list actual harm to competition as an element of the offence. Since harm to competition is not listed as an element of the offence in this case, but it is a truism that the Act always seeks to prevent harm to competition, it is presumed that whenever the elements of paragraph 74.01(1)(a) are made out, there is *per se* harm to competition.
>
> [62] When a firm is permitted to make misleading representations to the public, putative consumers may be more likely to choose the inferior products of that firm over the superior products of an honest firm. When consumer information is distorted in this manner, firms are encouraged to be deceitful about their goods or services, rather than to produce or provide higher quality goods or services, at a lower price. Therefore, as the appellant contends, when a firm feeds misinformation to potential consumers, the proper functioning of the market is necessarily harmed, and the Act is rightly engaged, given its stated goals.
>
> [63] As the appellant submits, the proper focus of analysis in deceptive marketing cases is the consumer. While the respondents correctly state that the Act is not a consumer protection statute, they are wrong to suggest that this interpretation of the deceptive marketing provisions is tantamount to interpreting the Act as a consumer protection statute. On the contrary, as the foregoing analysis indicates, a focus on the consumer is not indicative of the objective of the scheme, but is a consideration antecedent to the ultimate objective: maintaining the proper functioning of the market in order to preserve product choice and quality.

[228] Similar statements are found in the Tribunal's decision (*Commissioner of Competition v Premier Career Management Group et al*, 2008 Comp Trib 18 ("*Premier Career Management Group CT"*), at para 187) and in a publication quoted by Justice Simpson in that case: Department of Consumer and Corporate Affairs Stage 1, Competition Policy, Background Paper of April 1976, at p. 38. In *Commissioner of Competition v Gestion Lebski inc*, 2006 Comp Trib 32, Justice Blanchard found that the purpose of the deceptive marketing provisions was "to ensure the quality and accuracy of commercial information and to prevent deceptive marketing practices": at para

264. He also accepted that consumer protection was an underlying objective of paragraph 74.01(1)(*b*): at para 97.

[229] In *Commissioner of Competition v Imperial Brush Co Ltd And Kel Kem Ltd (cob as Imperial Manufacturing Group)*, 2008 Comp Trib 02, the Tribunal (*per* Justice Phelan) commented as follows in a proceeding under paragraph 74.01(1)(*b*):

> [76] […] the general underlying rationale of paragraph 74.01(1)(*b*) is the decrease of deceptive advertising. The word "deceptive" in this case, however, does not refer to "false" advertising, but to unsubstantiated, unsupported or speculative representations about the performance, efficacy or length of life of the product. The objective is to prevent certain unsubstantiated representations. The deception being addressed is that these representations are grounded in some objective testing. A representation that a product will perform in a specific way is designed to convince the purchaser that there is some objective basis upon which the purchaser can rely.
>
> [77] Also, the provision sets out a substantiation requirement, the proof of which lies on the seller. The paragraph thus seeks to redress the imbalance of knowledge between the consumer and the seller. It protects the consumer by ensuring that she can rely on statements regarding the performance, efficacy or length of life of a product since those statements are to be based on proper and adequate tests.
>
> […]
>
> [79] The improvement of consumer information benefits, in turn, consumers, firms selling competing products, and the proper functioning of the market. The Royal Commission on Prices Spreads noted that measures for consumer protection also benefit sellers.
>
> [80] On the basis of the evidence before the Tribunal, I therefore conclude that the objective of paragraph 74.01(1)(*b*) is the protection of consumers, competitors and the proper functioning of the market from the harm caused by unsubstantiated representations about the performance, efficacy or length of life of a product.
>
> [Emphasis added.]

See also paragraph 74.

[230] In *Sears*, the Tribunal (*per* Justice Dawson) made the following comments about the purposes of the ordinary price provision in subsection 74.01(3):

> [82] […] The Act seeks to encourage and maintain competition and the objective of the impugned legislation is to do this by improving the quality and accuracy of marketplace information and by discouraging deceptive marketing practices.
>
> […]
>
> [97] In *Irwin Toy,* … Chief Justice Dickson found that there could be no doubt that a ban on advertising directed to children was rationally connected to the objective of protecting children from advertising because the "governmental measure aims precisely at the problem identified". I am similarly satisfied on the basis of common sense and logic that the impugned legislation, by sanctioning OSP representations that are materially misleading, aims directly at the objectives of the impugned legislation. Put another way, sanctioning materially false or misleading OSP representations promotes the protection of consumers from deceptive OSP representations, protects businesses from their anti-competitive effects, and protects competition from their anti-competitive effects and inefficiencies.
>
> [Emphasis added.]

[231] Prior to the enactment of the deceptive marketing provisions in 1999, a consultative panel provided a report to the Commissioner that referred to harm to the "competitive process, including consumers, competitors and others": E. Ratushny, Q.C., Chair, "Report of the Consultative Panel on Amendments to the *Competition Act*" dated March 6, 1996, p. 18.

[232] Consistent with these decisions, the Federal Court has observed that the protection of consumers is one of the "underlying purposes" of the *Competition Act*: *Lin v Airbnb, Inc,* 2019 FC 1563, at para 57 (appeal dismissed following settlement: 2022 FCA 2).

[233] In sum, the *Competition Act* is not a consumer protection statute. Instead, the statute has broader economic objectives, as are expressly stated in section 1.1. The focus of the deceptive

marketing provisions of the *Competition Act* is the consumer. Those provisions are designed to support the statutory objective of providing consumers with competitive prices and product choices. The provisions have several specific aims that focus on the informational integrity of markets. The aims are: to enhance and protect the proper functioning of markets, so markets are not distorted by misinformation; to protect consumers from purchasing goods or services based on inaccurate information; to encourage competition on the merits by incenting firms to provide accurate and truthful information to the public, particularly as to the price of goods and services, for the benefit of both consumers and honest competitors; and to support the production and supply of higher quality goods and services at lower prices.

C. The Burden of Proof and the Nature of Reviewable Conduct in Part VII.1 of the *Competition Act*

[234] The standard of proof in this proceeding is the civil standard of proof on a balance of probabilities: *Gestion Lebski inc,* at paras 53, 152, 191; *Tervita Corp v Canada (Commissioner of Competition),* 2015 SCC 3, [2015] 1 SCR 161, at para 66; *Toronto Real Estate Board v Canada (Commissioner of Competition),* 2017 FCA 236, [2018] 3 FCR 563, at paras 48, 87; *FH v McDougall,* 2008 SCC 53, [2008] 3 SCR 41, at paras 45-46, 49.

[235] Some of the parties' submissions referred to the reviewable conduct in section 74.01 as an "offence" or "reviewable offence". The word "offence" has been used in some contexts: see *Premier Career Management Group FCA,* at para 61. Historically, like today, there has been an offence in the *Competition Act* relating to the knowing or reckless making of a representation to the public that is false or misleading in a material respect: see section 52.

[236] However, section 74.01, through section 74.1, does not create an "offence" in the sense of the criminal law provisions in Part VI (including section 52) or the offences in section 66 of the *Competition Act*. The Tribunal concluded in *Gestion Lebski inc* that proceedings under paragraphs 74.01(1)(*a*) and (*b*) are not criminal proceedings, that the sanctions provided for in subsection 74.1(1) are not true penal consequences, and that a person against whom the Commissioner initiates a proceeding under paragraphs 74.01(1)(*a*) and (*b*) is not a person "charged with an offence" within the meaning of section 11 of the *Charter*: *Gestion Lebski inc,* at paras 43-70. The Tribunal acknowledged that reviewable conduct has some conceptual similarity to strict liability

offences (e.g., that neither one required proof of a mental element), but confirmed that the standard of proof for reviewable conduct matters is on a balance of probabilities, not proof beyond a reasonable doubt as in criminal proceedings: *Gestion Lebski inc*, at para 53.

[237] In my respectful view, it is preferable to refer to the reviewable practices in section 74.01 as civil provisions (*Premier Career Management Group FCA*, at paras 27, 39; *Gestion Lebski inc*, at paras 50-55, 152, 264) and to leave the term "offences" to refer to the criminal law provisions of the *Competition Act* that prohibit conduct and involve penal consequences.

VI. THE REPRESENTATIONS

A. Representations on the Cineplex Website and the App

[238] The Commissioner alleged that Cineplex makes representations about the price of movie tickets on its website that are false or misleading in a material respect under paragraph 74.01(1)(*a*). The Commissioner claimed that Cineplex's ticket price representations are not attainable due to fixed obligatory charges or fees under subsection 74.01(1.1).

[239] The price representations relate to the price for individual tickets for movies (General Admission, Seniors or Children) displayed on the Tickets Page of the website and the App, before a consumer clicks the ADD button to select one or more tickets to a movie (i.e., at the stage of Tickets Page (A) described above). The Commissioner maintained that these unattainable price representations continue to be displayed on the Tickets Page even after the ADD button is clicked and the Online Booking Fee is added to the cost for consumers (i.e., at the stage of Tickets Page (B), described above).

[240] The Tribunal finds that these displays on Cineplex's website constitute a "representation" to the public under paragraph 74.01(1)(*a*) and a "representation of a price" under subsection 74.01(1.1).

B. Literal Meaning and General Impression of the Representations

[241] Subsection 74.03(5) requires the Tribunal, in proceedings under section 74.01, to take into account both the literal meaning and the general impression conveyed by a representation.

(1) Applicable Legal Tests

(a) Literal Meaning

[242] The literal meaning of a representation is conceptually uncontroversial: it is what it says on its face, interpreted in its ordinary sense: *Richard v Time Inc*, 2012 SCC 8, [2012] 1 SCR 265, at para 47; *Sears*, at paras 327, 330-331.

(b) General Impression – Parties' Positions on the Appropriate Legal Test

[243] The parties disagreed about the legal test to be applied to determine the general impression conveyed by the impugned representations. The Commissioner advocated for the "credulous and inexperienced consumer" based on *Richard,* while Cineplex supported the "average consumer" as the appropriate perspective from which to determine general impression.

[244] The Commissioner submitted that the Tribunal should consider the general impression conveyed by the representation to the "credulous and inexperienced consumer" as adopted in *Richard*: at paras 63-78; *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2013 ONSC 5315 ("*Chatr 2013"*), at paras 123-132; *Bell Canada v Cogeco Cable Canada*, 2016 ONSC 6044, at paras 25-26.

[245] In oral submissions, the Commissioner noted that the attributes of the consumer looking at the advertisement are a fundamental issue in any misrepresentation case. The Commissioner submitted that prior to *Richard,* the test for general impression was the "average consumer", who has an average level of intelligence, scepticism and curiosity. The Commissioner contended that on the basis of *Richard,* one can no longer consider the average consumer who is prudent and well-informed, but instead must consider a consumer who is a step below – a consumer who is credulous and inexperienced in detecting misrepresentations.

[246] The Commissioner observed that in *Chatr 2013,* the Ontario Superior Court applied a "credulous and technically inexperienced" consumer standard. The Commissioner argued that the standard was correct but that the Ontario court erred by interpreting "inexperienced" as meaning inexperienced with the product or with technology in that case, as opposed to being inexperienced

in detecting falsehoods and subtleties in consumer commercial representations (citing *Richard*, at para 71). The Commissioner also noted that the Federal Court referred to the *Chatr 2013* standard in *Canada (Commissioner of Competition) v Canada Tax Reviews Inc*, 2021 FC 921, at paras 82-85; and *Energizer Brands, LLC v Gillette Company*, 2023 FC 804, at para 178.

[247] For its part, Cineplex relied on the "average consumer" (citing the Tribunal's decision in *Premier Career Management Group CT*, at para 208; Anita Banicevic, "Assessing General Impression under the *Competition Act*: The Credulous Man Who Was Never There", 29 *Canadian Competition Law Rev* 57 (2016)). Citing several cases, Cineplex argued that 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. The average consumer varies depending on the audience to which the advertisement is directed.

[248] For the reasons that follow, I agree in part with each of the parties on the legal standard. I also conclude that both parties are correct that the attributes of the intended audience can be important and should be considered in each case.

[249] As I will explain, the appropriate perspective for assessing the general impression of a representation under section 74.01 is that of the ordinary citizen. In most cases, the ordinary citizen will be the ordinary consumer to whom the representation is made, directed or targeted. Applying the analytical approach contemplated by *Richard*, the ordinary citizen or consumer standard is more consistent with the statutory objectives in the *Competition Act*, section 1.1, and with the purposes of the deceptive marketing provisions. This standard is able to respond to the specific circumstances of each case through the attributes of the ordinary consumer to whom the representation is made, directed or targeted, as the decided case law determining liability under sections 74.01 and 52 of the *Competition Act* shows.

(i) General Impression – Cases before *Richard*

[250] Prior to *Richard*, the Federal Court of Appeal held that, when construing representations to the public, the proper perspective under paragraph 74.01(1)(*a*) of the *Competition Act* was that of the "ordinary citizen", possessing ordinary reason and intelligence and common sense: *PCMG*

FCA, at para 72, quoting *R v Kenitex Canada Ltd et al* (1980), 51 CPR (2d) 103 (Ont Co Ct), at p. 107 (appeal by individual accused allowed (1981), 34 OR (2d) 665 (CA))**.**

[251] The Tribunal had previously applied the same standard: *Sears*, at paras 325-327; *Gestion Lebski inc*, at paras 153, 191. In both cases, the Tribunal quoted the full passage from *Kenitex*, as follows:

> The ordinary citizen is, by definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal. In the last analysis, therefore, it is for the trier of fact to determine what impression any such representation would create, not by applying his own reason, intelligence and common sense, but rather by defining the impression that that fictional ordinary citizen would gain from hearing or reading the representation.

(ii) General Impression – Cases after *Richard*

[252] Since *Richard*, the Federal Court of Appeal has not determined whether the "credulous and inexperienced" consumer standard in *Richard* should be applied under section 74.01. The Court of Appeal for Ontario left the question open in *Rebuck v Ford Motor Company*, 2023 ONCA 121, at para 26 (leave to appeal denied, SCC Court File 40698, November 2, 2023).

[253] Courts at first instance have taken into account the attributes of the intended audience in their analyses. None of those decisions binds the Tribunal, but they are persuasive authority.

[254] In *Chatr 2013*, the Ontario court noted that the difference between the purposes of the Quebec's *Consumer Protection Act* (the "CPA") and the purposes of the *Competition Act* was a relevant consideration in determining the proper consumer perspective to be applied to the representations in that case: *Chatr 2013*, at paras 126-127. Justice Morrocco adapted the perspective of the credulous and inexperienced consumer in *Richard* to the consumers to whom the representations were directed, concluding that the proper consumer perspective was that of a "credulous and technically inexperienced consumer of wireless services": *Chatr 2013*, at paras 128-132. I observe in passing that the court in *Kenitex* described the ordinary citizen as "lacking any relevant expertise".

[255] The Commissioner referred to *Bell Canada v Cogeco Cable Canada,* in which Justice Matheson issued an interlocutory injunction restraining the defendant from making representations. At the first stage of the injunction test, she found a serious issue to be tried concerning a representation on the defendant's homepage that it provided the "best Internet service in your neighbourhood", based in part on the general impression conveyed to the ordinary citizen or average consumer: see paras 24-25. Justice Matheson adopted the consumer perspective of the "credulous and technologically inexperienced consumer of Internet services": *Bell Canada v Cogeco Cable Canada,* at para 25 (citing *Chatr 2013,* at paras 128-132).

[256] In *Canada Tax Reviews,* Chief Justice Crampton assumed, for the purposes of that decision, that this standard applied: at para 83.

[257] In *Energizer,* Justice Fuhrer found that the determination of the general impression of an advertisement included consideration of the nature of the particular portion of the public to whom it is directed. She added that the general impression is to be assessed from the perspective of a consumer to whom the representation is targeted, which was a "credulous and technically inexperienced consumer of batteries in the sense that their lack of experience relates to the technical information in the comparative performance claims": *Energizer,* at paras 176, 178. Put another way, Justice Fuhrer found that the relevant perspective for general impression is the "ordinary, hurried customer "who take[s] no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement" and not the perspective of a careful and diligent consumer": *Energizer,* at para 180, quoting *Richard,* at paras 66-67. She also noted the connection to the test for trademark confusion: at para 183.

[258] The appropriate audience perspective has been the subject of academic commentary both before and after *Richard*: see Banicevic, at pp. 58, 61-68; Adam Newman, "Richard v Time: The Return of the Credulous Man?", 26 *Canadian Competition Law Rev* 275 (2013), at pp. 278-280; George N. Addy, "Deceptive Marketing Practices", in R.S. Khemani and W.T. Stansbury, eds., *Canadian Competition Law and Policy at the Centenary,* (Halifax: Institute for Research on Public Policy, 1991), at pp. 391-392; M.E. Rice and M.D. Rice, "Section 52(1)(a) of the *Competition Act*: Who is the Average Person?", 15 *Can Bus Law Rev* 97 (1989); Vaughan Black, "A Brief Word about Advertising", 20 *Ottawa Law Rev* 509, at pp. 528-534.

[259] Given the parties' competing positions and the state of the case law, I turn to the Supreme Court's analysis in *Richard* and first principles.

(iii) The Supreme Court's Decision in *Richard v Time Inc*

[260] The Supreme Court's decision in *Richard* did not overrule or refer to the "ordinary citizen" standard in *Premier Career Management Group FCA* or *Kenitex,* nor did it comment directly on the proper consumer perspective under section 74.01 (or section 52) of the *Competition Act*. However, the Court did provide guidance on how to identify the appropriate approach to general impression.

[261] In *Richard,* the Supreme Court interpreted a provision of Quebec's CPA relating to the prohibited practice of making a false or misleading representation to a consumer by any means whatsoever. Section 218 of the Quebec CPA set out the approach to determine whether a representation was a prohibited practice. Its wording was "based to a large extent on" subsection 52(4) of the *Combines Investigation Act* (now subsection 52(4) of the *Competition Act)*: *Richard,* at para 45.

[262] In the Quebec CPA, like the other statutes, both the literal meaning and the general impression must be taken into account: *Richard,* at paras 44-45; see *Competition Act,* subsections 52(4) and 74.03(5), as originally enacted by 23-24 Eliz II, c. 76, s. 18 (1976); 46-47-48 Eliz II, c. 2, subss. 12(2) and 22 (1999). The Supreme Court's analysis recognized the interconnections between the general impression test in the statutes and the case law under the *Combines Investigation Act* and the Quebec CPA: see *Richard,* at paras 44-45, 69.The Court also noted the connection between the proper approach for general impression and the test used to determine confusion under the *Trademarks Act* to determine whether a trademark causes confusion: *Richard,* at para 57.

[263] The Supreme Court in *Richard* noted that in recent decisions, Quebec courts had used the expression "average consumer" to describe the relevant consumer perspective under the Quebec CPA. The Court described that consumer as "the product of a legal fiction personified by an imaginary consumer to whom a level of sophistication that reflects the purpose of the C.P.A. is attributed": at para 62.

[264] Importantly, the Court stated that the "crux of the issue [was] whether the level of sophistication of the average consumer conceptualized by the Court of Appeal is consistent with the objectives of the C.P.A.": *Richard,* at para 62.

[265] After setting out the parties' positions, the Court observed that the Quebec CPA is one of a number of statutes enacted for the protection of consumers and that courts applying the statutes have often used the "average consumers test": at para 65. The Court referred to the "ordinary hurried consumer" test in the *Trademarks Act*: at para 66. At paragraph 68, the Court stated:

> Obviously, the adjectives used to describe the average consumer may vary from one statute to another. Such variations reflect the diversity of economic realities to which different statutes apply and of their objectives. The most important thing is not the adjectives used, but the level of sophistication expected of the consumer.

[266] The Court concluded:

> [71] Thus, in Quebec consumer law, the expression "average consumer" does not refer to a reasonably prudent and diligent person, let alone a well-informed person. To meet the objectives of the C.P.A., the courts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations.
>
> [72] The words "credulous and inexperienced" therefore describe the average consumer for the purposes of the C.P.A. This description of the average consumer is consistent with the legislature's intention to protect vulnerable persons from the dangers of certain advertising techniques. The word "credulous" reflects the fact that the average consumer is prepared to trust merchants on the basis of the general impression conveyed to him or her by their advertisements. However, it does not suggest that the average consumer is incapable of understanding the literal meaning of the words used in an advertisement if the general layout of the advertisement does not render those words unintelligible.

[267] The Supreme Court in *Richard* was clear that the objectives of different statutes may vary, and that adjectives to describe the characteristics of the "average consumer" also may vary from one statute to another to meet the objectives of each statute. In the paragraphs quoted above, the Court was also clear to restrict its analysis to the objectives of the Quebec CPA. In disagreeing

with the standard for the consumer's perspective used by the Quebec Court of Appeal, the Supreme Court established a legal standard to reflect and implement the legislature's intentions in the Quebec CPA: see paras 73, 78.

(iv) The Proper Test for General Impression under section 74.01 and subsection 74.03(5) of the *Competition Act*

[268] In this case, consistent with the directions in *Richard*, the proper consumer perspective in the general impression test for section 74.01 and subsection 73.03(5) should reflect the overall objectives of the *Competition Act*, the purposes of the deceptive marketing provisions, the breadth of section 74.01, and the diversity of circumstances in which representations to the public may arise under section 74.01.

[269] The analysis starts with the objectives of the *Competition Act* and the deceptive marketing provisions, particularly subsection 74.01(1). As discussed above, section 1.1 of the *Competition Act* provides that the purpose of the *Competition Act* is to maintain and encourage competition in Canada in order to achieve four objectives, one of which is to "provide consumers with competitive prices and product choices". The purposes of the deceptive marketing provisions have already been articulated. The focus is on the consumer and the provisions are concerned with the proper functioning of markets, without distortion from false or misleading representations, for the benefit of consumers and honest competitors and to incite firms to compete on the basis of price and quality.

[270] The reviewable conduct in subsection 74.01(1) concerns a range of commercial representations. The chapeau language of the provision captures representations 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". In paragraph 74.01(1)(*a*), the reviewable conduct is the making of a materially false or misleading representation "to the public".

[271] Retailers and other vendors make representations to the public about their goods and services in many different media, including television, as pop-ups during the streaming of live events, on websites and mobile applications, in social media, on billboards and bus shelters, orally on radio or online or in person, and of course in print advertisements. Representations come in all

shapes and sizes. They may include words, images, sounds, or a mix. Words may be capable of more than a single meaning (of which one may be accurate and another not). The words may also be literally true but the accompanying images convey a misleading impression.

[272] A representation may be made to the public at large, or be directed at a specific segment of the public. For example, a representation may be made to highly sophisticated consumers (members of the public) who are well informed about the subject matter of the representations and not easily deceived or misled. Another representation could be made to a group of vulnerable and easily misled individuals. In addition, the nature and attributes of the product may be important: for example, some goods and services may have unfamiliar technical qualities, be expensive, or be only purchased infrequently by consumers, further refining the characteristics of the targeted public members.

[273] In this context, section 74.01, including the general impression test, must be able to respond to the broad diversity of price and other representations made to the public – or some subset of the public, as in *Premier Career Management Group FCA* – according to the nature of the representation, the context in which it was made, and the characteristics of the members of the public to whom the representations may be made, targeted or directed, with a view to protecting and enhancing such undistorted markets and honest competition.

[274] Courts' and the Tribunal's analyses of general impression show that the characteristics of the audience are not immutable or pre-defined in the case law. In some cases, it has not been necessary to expressly consider the characteristics of the audience: see, e.g., *Commissioner of Competition v PVI International Inc,* 2002 Comp Trib 24; *Commissioner of Competition v Yellow Page Marketing,* 2012 ONSC 927, in which the representations were sent to thousands of businesses, individuals and organizations across Canada. In other cases, the nature of the representation and the specific characteristics of the audience have been expressly considered in the assessment of the general impression of the representation, and more generally in whether the representation was false or misleading in a material respect. See *Chatr 2013,* at paras 123-132; *Maritime Travel Inc v Go Travel Direct Inc.,* 2008 NSSC 163, at paras 42-44, 68, 86 ("*Maritime Travel Inc NSSC*") (aff'd 2009 NSCA 42, at paras 25, 127, 130, 132); *Purolator Courier Ltd v United Parcel Service Canada Ltd,* 1995 CanLII 7313 (Ont Ct (GD)), at paras 40, 55, 58; *Premier*

Career Management Group CT, at paras 211-212 (aff'd *Premier Career Management Group FCA*, paras 18-19, 72, 74-78); *Sears*, at paras 203-202, 213-217, 341.

[275] Some examples in the case law will help to illustrate. The Supreme Court of Nova Scotia considered the characteristics of the intended audience for advertisements about travel packages in *Maritime Travel Inc NSSC*. To determine the general impression of one advertisement, Justice Hood considered the sophistication of the intended audience and the care that the reader would use to read the advertisement, as well as the medium used and disclaimers in the advertisement: at paras 42-44. Justice Hood found that a person contemplating spending $700 to $1,000 per person for four people to go on a southern vacation would be a "literate person of average intelligence": at para 43. The court held that the person would read the advertisement carefully before committing to spend the required money and would realize the significance of the words "up to", as those words were commonly found in advertisements. Because the impugned representations were made in a newspaper advertisement, the court concluded that the consumer would have "ample opportunity to consider it and its wording with care". In the same decision, Justice Hood considered the same intended audience for other advertisements for vacation packages: at paras 68, 86. The Nova Scotia Court of Appeal approved of Justice Hood's consideration of the intended consumer audiences for the advertisements: *Go Travel Direct.Com Inc v Maritime Travel Inc*, 2009 NSCA 42, at paras 25, 127, 130, 132.

[276] In *Premier Career Management Group CT*, the Tribunal considered the average prospective client of the company, who was likely to have some post-secondary education, some work experience and access to the funds necessary to pay PCMG's fees. They "were not normally gullible" but were "likely to accept what was reasonably implied without critical analysis because, to varying degrees, they were needy": at paras 211-212. The quoted excerpts appear in the Federal Court of Appeal's description of the Tribunal's decision on whether the representations were false or misleading: *Premier Career Management Group FCA*, at paras 18-19. The appeal court concluded that the Tribunal constructed the representations correctly, although it is clear that Justice Sexton applied the "ordinary" citizen, person or consumer standard in his analysis of the arguments on appeal: at paras 72, 74-75. The appeal court considered the "typical client" of the respondents in its analysis that rejected arguments that the Tribunal erred in determining whether the representations were false or misleading in a material respect: at paras 76-77, 79.

[277] Similarly, in *Sears*, the Tribunal considered the time consumers spent searching for tires, and consumers' limited ability to evaluate the intrinsic qualities of tires as it related to materiality under subsections 74.01(3) and 74.01(5): *Sears*, at paras 203-202, 213-217, 341. See also *Purolator Courier Ltd v United Parcel Service Canada Ltd*, at paras 40 (low frequency consumers were particularly susceptible to the message in the advertisements), 55 (the degree of sophistication that the public to whom the advertisement is directed exhibits), 58 (consumers were not totally naïve; they were business individuals).

[278] Against all of this background, I conclude that that the Tribunal should not adopt the "credulous and inexperienced" consumer in *Richard* as the legal standard for the general impression test under section 74.01 and subsection 74.03(5) of the *Competition Act*. Instead, as *Richard* contemplates, the legal standard should be appropriate for the objectives of the *Competition Act* and the purposes of the deceptive marketing provisions in it. The legal perspective for the general impression test should remain that of the ordinary consumer of the product or service, which may be refined according to the nature of the representation at issue, the characteristics of the members of the public to whom the representation was made, directed or targeted, the nature of the product or service involved, and the particular circumstances of the case.

(c) Methodology and Evidence for General Impression

[279] In *Richard*, the Supreme Court found that under the Quebec CPA, when dealing with a written advertisement, a court must make an objective determination of the general impression conveyed by the entire advertisement (rather than portions of it). A court should not make a minute dissection of the text, but instead read it over entirely once to determine the general impression conveyed: *Richard*, at para 56. Similarly, as the Court noted, the test to be applied for confusion under the *Trademarks Act* is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees a name (allegedly potentially confusing with the trademark) at a time when he or she has no more than an imperfect recollection of the trademark in question, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks: *Richard*, at para 57, citing *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, [2006] 1 SCR 824, at para 20; *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, [2011] 2 SCR 387, at para 41.

[280] The question of general impression under the *Competition Act*, including the characteristics of the audience, is a matter for the Tribunal to determine: *Sears*, at paras 327-332; *PVI International Inc*, at paras 11-12, 15, 25, 46, 50-51; *Gestion Lebski inc*, at paras 167, 216, 247, 249-50. This approach has been adopted by the Supreme Court and the appeal and trial-level courts of provinces: *Richard*, at paras 84-87; *Rebuck*, at paras 21-22, 26; *Maritime Travel Inc NSCA*, at paras 15-26; *Bell Mobility Inc v Telus Communications Company*, 2006 BCCA 578, at paras 20, 28; *Energizer*, at paras 184, 203, 215; *Yellow Page Marketing*, at paras 36-37 (aff'd 2013 ONCA 71); *Drynan v Bausch Health Companies Inc*, 2021 ONSC 7423, at paras 98-104 [objective determination under the Ontario CPA]. This approach is consistent with older appellate decisions concerning prosecutions under the former *Combines Investigation Act* relating to false or misleading representations, which also undertook their own assessments of the impugned representations to the public: see *Regina v RM Lowe Real Estate Ltd and Pastoria Holdings Ltd*, 1978 CanLII 2500, 40 CCC (2d) 529 (Ont CA), at p. 531; *The Queen v Viceroy Construction Co Ltd*, 1975 CanLII 606, 11 OR (2d) 485 (CA). Both *Combines Investigation Act* cases cited by the Supreme Court in *Richard* also did so: *R v Imperial Tobacco Products Ltd*, [1971] 5 WWR 409 (Alta SC, AD), at paras 16, 51-54, 56; *R v Colgate-Palmolive Ltd*, 1969 CanLII 1005 (ON SC), [1970] 1 CCC 100, at p. 103.

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

[282] I also note that neither party in this case pointed to a decision in which a court or this Tribunal required survey or other empirical data to determine general impression under subsections 74.01(1) and 74.03(5) of the *Competition Act*. Indeed, neither party adduced evidence by way of surveys, or analytics from the website or the App, to show the general impression of actual Cineplex consumers.

[283] I return now to the representations in the present case.

(2) Application of the Legal Tests

(a) Literal Meaning

[284] The literal meaning of the price representations, on both the Tickets Page of the website and the App, is that tickets for a selected movie at a selected time, date and theatre location can be purchased at the per-ticket prices for General Admission, Seniors and Children as displayed on the Tickets Page. On its face, the Tickets Page does not distinguish between at-theatre and online ticket prices and does not state expressly either that the prices are "at-theatre" prices or "online" prices. The Tickets Page does not otherwise draw the consumer's attention to the fact that prices may vary depending on the medium used for the purchase.

(b) General Impression

[285] The general impression test considers the representations on the Tickets Page from the perspective of the ordinary consumer – the ordinary moviegoer navigating the website or the App. Those representations are the price per movie ticket for General Admission, Seniors or Children. The quantum of each one does not include the Online Booking Fee.

[286] Overall, based on the evidence, I conclude that the general impression of the ordinary citizen moviegoer navigating Tickets Page (A) is that they can purchase tickets on the website and the App for the stated prices on that page. Put another way, the ordinary citizen would form the impression that Cineplex is offering movie tickets for online purchase, both on the website and on the App, at the per-ticket prices represented on the Tickets Page beside each of General Admission, Seniors and Children. The general impression of an ordinary consumer would be that the stated ticket prices are the whole or entire price charged by Cineplex (subject to applicable taxes). The general impression conveyed to the ordinary consumer is consistent with the literal meaning of the displayed prices.

[287] In support of this conclusion, I will address a number of issues raised by the parties with respect to general impression, and make additional findings on them.

[288] First, the Commissioner submitted that Cineplex's price representations convey the general impression that a ticket is available for purchase at a price lower than what Cineplex actually charges – that is, that the price shown on the Tickets Page for the tickets the consumer selects is the price that they will in fact pay. The Commissioner also argued that consumers on the website or App are credulous and:

> ready to believe the initial price representations they can see on the screen and … have no reason to be curious about what is below the false floor, and the consumer is inexperienced at detecting the falsehoods or subtleties found in commercial representations. [Consumers are] not going to meticulously pay attention to the subtotal to see if it is consistent with the ticket prices, and it means they're not going to scroll, because Cineplex gives them no reason to scroll.

[289] These submissions contain a mix of submissions on several issues, including the attributes of a member of the targeted audience.

[290] I have already disagreed with the Commissioner's position on the legal starting point for general impression, which he argued should consider the general impression conveyed by the representation to the "credulous and inexperienced consumer". The Commissioner did not point to any evidence that an ordinary consumer on the Cineplex website has any unusual characteristics related to credulity or readiness to believe on-screen representations, and I find none.

[291] Second, Cineplex did not make extensive submissions directed at the characteristics of the audience for general impression purposes. It did not suggest that the consumers using the Cineplex website or App had any special characteristics, higher sophistication or vulnerabilities, or that the price representations targeted any particular group or subset of the Canadian population that might affect the perspective the Tribunal should consider in assessing the price representations. It did suggest that everyone knows how to and does scroll on websites and mobile applications, including the App.

[292] Third, neither party attempted to distinguish the audience viewing the representations on a computer from those seeing the representations on the mobile website or the App on their mobile phones. While different movies may attract audiences with different demographic characteristics, the allegations and evidence in this proceeding were premised on the overall class of price

representations on the Tickets Page rather than on individual representations concerning ticket prices for specific shows at identified locations.

[293] Fourth, the following circumstances of the making of the price representations are relevant for general impression purposes:

(a) Cineplex's movie ticket price representations were made on its website, which is an interactive medium somewhat different from a static print advertising or a mailing. Cineplex has control over its website and each of its webpages, including the information presented, the order in which it is presented, the flow as the user moves through it, the design of each page, and what is presented above and below the fold.

(b) As a commercial website, cineplex.com is designed as a "funnel" with the objectives that include assisting users to identify a movie of interest and then converting them into consumers by purchasing one or more tickets. The website was designed to facilitate a user's easy and speedy movement through it and to encourage the user's conversion into a ticketholder.

(c) The presence of a countdown timer on the floating ribbon, starting on the Tickets Page, suggests some degree of urgency or the necessity to proceed swiftly with the transaction to the ordinary consumer.

(d) A user who purchases tickets on the website spends about three minutes in total on the site.

(e) In contrast to *Maritime Travel Inc NSSC*, the amount of money involved is relatively small: under $20 per ticket, even including the Online Booking Fee. The maximum aggregate amount of Online Booking Fees per transaction is $6, i.e., $1.50 for the first four tickets.

[294] These circumstances would not cause the ordinary consumer to scrutinize carefully or pay any heightened attention to the represented ticket prices or any other information displayed on the Tickets Page. In particular, the ordinary consumer would not pause to carefully consider or analyze the price representations and the other information on Tickets Page (A). In addition, the ordinary consumer would not pause on Tickets Page (B) to do the mental math upon seeing the subtotal on the floating ribbon to ensure the accuracy of the total amount before clicking the PROCEED button

to move to the Seat Selection Page. (I note that at discovery and at the hearing, even Mr McGrath could not readily do the mental math upon being spontaneously asked to calculate the subtotal (including the Online Booking Fee) of the amount that a consumer buying a certain number of tickets of different age categories would be paying.)

[295] Fifth, for general impression purposes, what does the ordinary consumer see on the Tickets Page?

[296] The Commissioner's position was that the information to be used to determine the average consumer's general impression is the information seen on the consumer's screen on the Tickets Page at stage (A) – that is, the information located above the fold. The Commissioner referred to *Bell Canada v Cogeco Cable Canada*, in which Justice Matheson stated:

> [26] In the Internet context, there is an issue regarding what constitutes looking at the advertisement as a whole. That question need not be finally resolved now. However, for the purpose of this motion, I do not accept Cogeco's submission that I should proceed on the basis that the entirety of what a consumer can scroll down to or link to should be considered. The Cogeco homepage consists of five pages of text, graphics and hyperlinks and two pages of terms and conditions in the seemingly inevitable fine print. Cogeco asks me to proceed on the basis that the consumer would or should view all of this material. As I indicated at the hearing, I have some difficulty with that proposition. This sort of Internet homepage is not comparable to an ad published within a single page of a print newspaper or magazine: e.g., *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265.
>
> [27] It is at least arguable that, for the purposes of s. 52, the court should consider what the consumer would see on a single screen, including the labels on the hyperlinks on that screen. I recognize that the amount of content presented on the screen could depend to some extent on the size of the screen on the device chosen by the consumer. Even taking that into account, much of what Cogeco seeks to rely upon would not appear on that first screen.

[297] Cineplex made little argument about general impression (apart from the legal standard) but did take the broader position that the entire Tickets Page should be considered (both above and below the fold). After all, it argued, "everyone scrolls" on computers and mobile phones. Cineplex

also focused on the information on Tickets Page (B), that is, after the consumer has selected one or more tickets. Cineplex referred to *Bell Mobility Inc v Telus Communications Company*, in which the British Columbia Court of Appeal stated that the general impression "is determined by the average consumer's perception of the information contained within the four corners of the impugned advertisements": *Bell Mobility Inc v Telus Communications Company*, at para 20. See also *Maritime Travel Inc NSSC*, at paras 39 (#3), 42-46. To Cineplex, the four corners of the advertisement in this case included the entire Tickets Page, including the contents after scrolling down to the bottom.

[298] I accept the Commissioner's position on this issue. The general impression of the ordinary consumer should be determined by using the information located above the fold – what is visible to most consumers on arrival at the Tickets Page, before selecting a ticket. First, Mr Eckert's evidence demonstrated, with recent, reliable and publically-available global webpage viewing statistics in support, that a solid majority (about two-thirds) of website and App users would see what is on their screens – the information that appears above the fold – when landing on the Tickets Page where they are presented with ticket pricing information for the first time. Second, I accept Mr Eckert's evidence that consumers scroll down on a webpage or on the App if given a reason to do so. To the ordinary consumer, there is no obvious reason to do so on Cineplex's Tickets Page. Third, I find on the evidence that Cineplex's website was designed to dissuade (and, on a balance of probabilities, likely had the effect of dissuading) the ordinary consumer from scrolling down. Instead, the website enables and encourages the ordinary consumer to click the PROCEED button on the floating ribbon and to continue with the purchase of movie tickets without scrolling down – therefore, without seeing the information about the Online Booking Fee located below the fold once tickets are selected on the Tickets Page.

[299] In sum, for the purposes of the general impression of the ordinary consumer, the information within the "four corners" of the advertisement is what the ordinary citizen sees on the Tickets Page, above the fold and without scrolling.

[300] Sixth, what would the price representations on the Tickets Page convey to the ordinary consumer about online versus at-theatre ticket prices?

[301] Cineplex submitted that the price displayed on Tickets Page (A) was "price advertising", that is, a representation of the ticket price for the specific theatre selected if purchased in-person, on site. According to Cineplex, at this stage on the Tickets Page, the displayed prices are the "at-theatre" prices if the website user were to purchase tickets at the theatre box office, a concession or a kiosk. To Cineplex, the consumer has two options at this point – a "fundamental choice": the consumer can go in person to the theatre and pay the at-theatre prices for the selected movie tickets (i.e., the amount displayed on the webpage), or the consumer can click the ADD button and go ahead with an online purchase. After a consumer clicks the ADD button to select one or more tickets, Cineplex submitted that the consumer has entered the online purchasing process and the "advertised" price becomes a "base price" on Tickets Page (B) – which will be subject to the applicable Online Booking Fee. At that point, the Tickets Page immediately displays the all-inclusive aggregate price of the ticket or tickets as the subtotal on the floating ribbon, beside the PROCEED button.

[302] I do not agree with Cineplex's position that the prices displayed on Tickets Page (A) are a representation of the at-theatre price only. I find that an ordinary citizen would view the ticket prices displayed on the Tickets Page on the Cineplex website and the App to be the price of a ticket for the show playing at the selected theatre at the selected time, without any qualifier about where the ticket is purchased. The consumer must already be logged in, and has already clicked either "Get Tickets" on the website or "Buy Tickets" on the App. The headline on the Tickets Page and the ADD button make it clear that tickets are available in those two online channels. The prices on the Tickets Page would convey to the ordinary consumer that movie tickets are available at that price in those channels, that is, where the consumer sees the representations. As witnesses confirmed, there is no indication on the Tickets Page that the displayed pricing is only the "at-theatre" price. Looking at the Tickets Page objectively and neutrally, the natural impression conveyed is that movie tickets are available for purchase at the represented prices on the website or the App where the consumer sees them.

[303] Put another way, Cineplex argued that the price representations on its Tickets Page concern tickets for the show if purchased at the selected theatre. To an ordinary consumer, the price representations on the Tickets Page is more likely to concern the price for tickets for the show to see it at the selected theatre – not the price if the consumer decides to buy their tickets in-person

at that theatre. As Cineplex has already told the consumer that she can buy tickets on the website or the App where the prices are being represented and where the consumer sees those prices, the general impression is that tickets can be purchased in those online channels for the prices displayed on the Tickets Page.

[304] Seventh, what is the effect of the advertisement for CineClub in the top right corner on Tickets Page (A) of the website (which, as previously indicated, does not show on the App)? Based on the evidence of the F and Z patterns of website viewing (discussed above in section H), agreed to by both Mr Eckert and Dr Amir, an ordinary citizen would likely notice the advertisement. From it, some consumers could pause long enough to notice the third bullet point referring to an Online Booking Fee. However, the ordinary consumer would see no information about the quantum of the Online Booking Fee or how it affects movie ticket prices for the vast majority of moviegoers (as according to Cineplex website data, only a small number of visitors who reach the Tickets Page are CineClub members). The advertisement provides only a small morsel of information about the Online Booking Fee.

[305] Having made detailed factual findings and findings related to general impression, I turn to the issues for decision under section 74.01.

VII. DID CINEPLEX ENGAGE IN REVIEWABLE CONDUCT?

A. Issues for Decision under section 74.01

[306] Cineplex does not contest that the representations on its website and the App were made for the purpose of promoting its business interests (as contemplated by the chapeau language of subsection 74.01(1)), and that the representations on its website were made "to the public" for the purposes of paragraph 74.01(1)(*a*). Cineplex also does not take the position that the Online Booking Fee represented "only an amount imposed by or under an Act of Parliament or the legislature of a province" under subsection 74.01(1.1).

[307] The parties disagreed about whether Cineplex made a representation that was "false or misleading in a material respect". Most of their submissions focused on the proper interpretation and application of subsection 74.01(1.1).

[308] To determine whether Cineplex engaged in reviewable conduct, the Tribunal must resolve the following issues:

- Does subsection 74.01(1.1) apply to the present case?
- Were the representations on the Tickets Page "false or misleading" under paragraph 74.01(1)(*a*), without applying subsection 74.01(1.1)?
- Were the representations false or misleading "in a material respect"?

B. The Parties' General Positions concerning subsection 74.01(1.1)

[309] Paragraph 74.01(1)(*a*) and subsection 74.01(1.1) provide as follows:

Deceptive Marketing Practices	Pratiques commerciales trompeuses
Reviewable Matters	Comportement susceptible d'examen
Misrepresentations to public	**Indications trompeuses**
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	**74.01 (1)** Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :
(a) makes a representation to the public that is false or misleading in a material respect;	**a)** ou bien des indications fausses ou trompeuses sur un point important;
[…]	[…]
Drip pricing	Indication de prix partiel
(1.1) For greater certainty, the making of a representation of a	**(1.1)** Il est entendu que l'indication d'un prix qui n'est

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.	pas atteignable en raison de frais obligatoires fixes qui s'y ajoutent constitue une indication fausse ou trompeuse, sauf si les frais obligatoires ne représentent que le montant imposé sous le régime d'une loi fédérale ou provinciale.

[310] The parties were in general agreement that subsection 74.01(1.1) concerns "drip" pricing, described at a high level as a retailer advertising a product or a service at a stated price, but then adding one or more additional amounts to that price so the consumer actually has to pay more than the originally advertised amount to purchase the product or service. Beside subsection 74.01(1.1), the phrases "Drip pricing" and "*Indication de prix partiel"* appear as marginal notes, but are for convenience of reference only and form no part of the enactment: *Interpretation Act*, RSC, 1985, c I-21, section 14.

[311] The parties otherwise disagreed on the overall effect of subsection 74.01(1.1) as it relates to paragraph 74.01(1)(*a*), the meaning of individual words and phrases in it and its application to the facts in this proceeding. Both parties took the position that the provision was clear and unambiguous – yet they disagreed on its meaning.

[312] The Commissioner's general position on subsection 74.01(1.1) was that Cineplex's price representations on the Tickets Page are not attainable due to a fixed obligatory charge or fee, namely the Online Booking Fee. The Commissioner submitted that the *Competition Act* deems Cineplex's conduct to be false or misleading pursuant to subsection 74.01(1.1). The Commissioner contended that the price represented on the Tickets Page is not "attainable" due to the Online Booking Fee, which is a fixed obligatory charge or fee as contemplated by that provision. Cineplex maintained that the prices it represented on the Tickets Page are attainable and that the Online Booking Fee is neither a "fixed" nor an "obligatory" charge or fee under subsection 74.01(1.1). The Commissioner and Cineplex also made legal submissions about the proper interpretation of subsection 74.01(1.1).

[313] According to the Commissioner, on the evidence, the price representations made on the website and the App are not attainable because if consumers purchase tickets online, they must pay an Online Booking Fee to complete the transaction unless they have subscribed to a Cineplex membership.

[314] Cineplex's general position on subsection 74.01(1.1) was that the Commissioner's position was based on a mischaracterization of the website and App purchase process and a misapprehension and misapplication of the law. Cineplex characterized subsection 74.01(1.1) as a "complete code" to describe drip pricing.

[315] On the evidence, Cineplex maintained that the prices displayed on its website and App were attainable, not "fixed", and not "obligatory". Consumers can purchase tickets either in-person (at the theatre) or online (using the website or the App.) The Online Booking Fee does not apply to movie tickets purchased in-person at Cineplex's theatres (at the box office, a concession or a kiosk). What Cineplex characterized as the "base price" displayed on the Tickets Page of the website and the App is therefore attainable.

[316] Overall, Cineplex submitted that there is no price advertised by Cineplex that is not attainable. The base prices are attainable at the theatre chosen by the consumer, as displayed on the Tickets Page. The Online Booking Fee is therefore not obligatory because consumers can avoid paying it by purchasing tickets in-person at the theatre.

[317] Cineplex argued that its ticket prices are not fixed. 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 (e.g., IMAX, VIP, 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 online purchase.

[318] Cineplex also stated that the elements of subsection 74.01(1.1) including "attainability" and whether the fee in question is "fixed" and "obligatory" are questions of pure fact for which opinion evidence, particularly the opinion evidence of Dr Morwitz and Mr Eckert, do not assist the Tribunal. All of the issues raised by Dr Morwitz and Mr Eckert were argued to be outside of

the issues and facts necessary for a determination of whether the prices shown on the website or the App are attainable and whether they are fixed or obligatory.

[319] By contrast, the Commissioner argued at the hearing that Mr Eckert and Dr Morwitz's evidence was relevant and necessary for subsection 74.01(1.1), for all the reasons in his written argument.

C. The Proper Interpretation of subsection 74.01(1.1)

[320] Parliament enacted subsection 74.01(1.1) in 2022 by the *Budget Implementation Act, 2022*, S.C. 2022, c. 10, s. 258. There are no decided cases that apply subsection 74.01(1.1), so its interpretation and application are a matter of first impression for the Tribunal.

(1) Legal Principles

[321] The Tribunal interprets a statutory provision by applying the modern principle of statutory interpretation. The words in the provision must be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and the object of the legislation, and the intention of Parliament: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, at paras 117-118, citing *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, at para 21 and *Bell ExpressVu Limited Partnership v Rex*, [2002] 2 SCR 559, 2002 SCC 42, at para 26; *Pioneer Corp v Godfrey*, [2019] 3 SCR 295, 2019 SCC 42, at para 42; *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2022 FCA 25, at para 49.

[322] The interpretation process generally involves an analysis of the text of the provision in the context of the statutory scheme and the purpose(s) of the statute. Parliament's intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: *Vavilov*, at para 118. Although the relative effect of ordinary meaning, context and purpose in the interpretation of a statute may vary from one case to another, one must seek, "in all cases", to read the provisions of a piece of legislation "as a harmonious whole": *Canada (Attorney General) v National Police Federation*, 2023 FCA 75, at para 47, citing *Canada Trustco Mortgage Co v Canada*, [2005] 2 SCR 601, 2005 SCC 54, at para 10.

[323] In *Canada Trustco*, the Supreme Court held that if the words of a provision are precise and unequivocal, their ordinary meaning plays a dominant role in the interpretive process. If the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. However, in all cases, the Court must seek to read the provisions of the legislation as a harmonious whole: *Canada Trustco,* at para 10; *9354-9186 Québec inc v Callidus Capital Corp*, [2020] 1 SCR 521, 2020 SCC 10, at para 60.

[324] The English and French versions of subsection 74.01(1.1) are equally authoritative. As a matter of statutory interpretation, the two versions must be read together and one must search for their shared meaning. If there is discord or the two versions seem irreconcilable, there are rules to resolve the situation. See *Canadian Charter of Rights and Freedoms*, subsection 18(1); *Canada (Attorney General) v Redman*, 2020 FCA 209, at para 22; *R v Daoust*, 2004 SCC 6, [2004] 1 SCR 217, at paras 26-27; *Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 10, at para 182.

[325] Section 12 of the *Interpretation Act* provides:

Enactments Remedial	Solution de droit
Enactments deemed remedial	**Principe et interprétation**
12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	**12** Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

[326] Parliamentary debates may inform the interpretation process, but with certain caveats including that such extrinsic evidence is not more important than the legislative text: see, e.g., *R v Khill*, 2021 SCC 37, at para 111; *MediaQMI inc v Kamel*, [2021] 1 SCR 899, 2021 SCC 23, at paras 37-38. In the present case, the excerpts from Hansard filed by the parties are inconclusive on the meaning of the words and phrases in subsection 74.01(1.1). While they refer to "drip" pricing generally, there is little to assist the Tribunal to interpret the provision.

[327] I am aware that the Commissioner entered into a number of consent agreements related to "drip" pricing that were registered with the Tribunal under section 105 of the *Competition Act*. However, neither party referred to them and neither argued that they were relevant to the interpretation of subsection 74.01(1.1).

(2) Interpretation of subsection 74.01(1.1), including Text, Context and Purpose

[328] Subsection 74.01(1.1) appears in the deceptive marketing provisions of the *Competition Act*, immediately after subsection 74.01(1).

[329] The parties disagreed on the characterization of subsection 74.01(1.1) – whether it is a "deeming" provision (according to the Commissioner), or a limiting provision or a "complete code" of what constitutes drip pricing (according to Cineplex). It might also be seen as a direction from Parliament that a specified inference be made if certain factual preconditions are met (an inference that may be mandatory and to which subsection 74.01(5) on its face does not apply).

[330] It is not necessary to select one of these labels or characterizations. It is enough to analyze the text of subsection 74.01(1.1), in context and in light of the purposes of the provisions and the statute and to ensure that it is interpreted in concert with other provisions and the scheme of the legislation.

[331] Subsection 74.01(1.1) does not create a separate reviewable practice for the purposes of section 74.1. The text of subsection 74.01(1.1), when read with its neighbour subsection 74.01(1), refers to two elements in paragraph 74.01(1)(*a*): the making of a representation, and the requirement that the representation be false or misleading. Subsection 74.01(1.1) contemplates that if certain factual conditions are met, the making of a representation of a price "constitutes" a false or misleading representation, unless other conditions apply.

[332] More precisely, subsection 74.01(1.1) identifies one species of representation to the public (a "representation of a price") and directs that if the conditions are met (the price is "not attainable due to fixed obligatory charges") then an element of the reviewable conduct in paragraph (1)(*a*) is met: the representation is false or misleading. It may be noted here that in proceedings under section 74.01, it is not necessary to establish that any person was deceived or misled: see *Competition Act*, paragraph 74.03(4)(*a*).

[333] Subsection 74.01(1.1) advances the objectives of the *Competition Act* and of the deceptive marketing provisions in two ways. First, it describes the price representations that Parliament has determined are false or misleading. Doing so expressly provides guidance about non-permissible conduct to retailers and other persons making commercial representations to the public to sell their products and services. It also seeks to engender trust by consumers in the price representations they see, through clarity and transparency. Second, subsection 74.01(1.1) provides a specific means to support the achievement of the statutory goals: it simplifies the Tribunal's assessment by removing any need to analyze and determine separately whether a price representation that meets the stated conditions is false or misleading under paragraph 74.01(1)(*a*). It also confirms that the conduct, if it meets the other elements of paragraph 74.01(1)(*a*), will constitute reviewable conduct.

[334] The English and French versions of subsection 74.01(1.1) have a shared and common meaning. The language in each version parallels the other in content, apart from the phrase "*qui s'y ajoutent*" in French. Comparing the language in the provision ("… a representation of a price that is not attainable due to fixed obligatory fees or charges constitutes…" and "… *l'indication d'un prix qui n'est pas atteignable en raison de frais obligatoires fixes qui s'y ajoutent constitue* …"), the phrase "*qui s'y ajoutent*" in the French version suggests that the fixed obligatory charges are added to the represented price. In my view, that is implicit in the English version: if a price representation is not "attainable" due to fixed obligatory charges or fees, those charges or fees must inherently be added in some way to a represented price.

[335] The parties' submissions sought to define the words "attainable", "fixed" and "obligatory" in subsection 74.01(1.1), and then applied those proposed definitions to the evidence to support their respective positions. Given the scope of paragraph 74.01(1)(*a*) and subsection 74.01(1.1) and the broad and diverse range of commercial representations to which they may apply, I do not believe the Tribunal should attempt to define these terms in the abstract or for all possible purposes. Instead, the sections that follow will explain the conclusions I have reached on the evidence in this case, and why I agree or disagree with the parties' respective positions.

(3) All-inclusive Pricing

[336] Before turning to the application of subsection 74.01(1.1), I pause to address an issue raised by both parties: whether subsection 74.01(1.1) contemplates all-inclusive pricing.

[337] The Commissioner took the position that an initially-presented price has to include any fixed obligatory charge or fee. The components of the all-inclusive price can be set out separately later in the purchase process, but the price presented initially must be the all-inclusive price. (The Commissioner clarified that he did not take the position that every price displayed online has to be all-inclusive pricing with respect to that channel. Cineplex could advertise dual pricing, so long as it is clear about it.) For its part, Cineplex submitted that subsection 74.01(1.1) requires the total all-inclusive price absent applicable taxes be disclosed and be attainable. Cineplex argued that its display on the floating ribbon on Tickets Page (B) constituted disclosure of the total cost of the tickets selected by the consumer (including any applicable Online Booking Fee).

[338] All-inclusive pricing provisions are found in some provincial legislation: see Quebec CPA, section 224(c); *Ticket Sales Act, 2017*, SO 2017, c 33, Sched 3, section 6; see also Kenneth Jull and Nicole Spadotto, "Digital Advertising and Purchasing: Fun or a New Type of Deception?" (2020), 33 *Canadian Competition Law Rev* 1, at p. 9. The wording of subsection 74.01(1.1) does not mirror these provincial provisions; for example, the Quebec provision states: "… the price advertised must include the total amount the consumer must pay for the goods or services". Such express wording does not appear in the *Competition Act*.

[339] It is not necessary in this case to determine whether or not a form of "all-inclusive" price representation is an implicit requirement of a proper interpretation of subsection 74.01(1.1). I leave that question, and what constitutes an "all-inclusive" price representation, for a future case.

D. Does subsection 74.01(1.1) Apply to the Present Case?

[340] For the reasons below, I conclude that the represented ticket prices are not attainable due to the Online Booking Fee, which is a fixed obligatory charge or fee that is added to the represented ticket prices.

(1) The Making of a "representation of a price …"

[341] The impugned representations, including their literal meaning and the general impression they convey, have been identified and described above.

[342] There is no dispute that Cineplex makes representations of the prices of its movie tickets on the Tickets Page of its website and App. The display of prices on the Tickets Page is a "representation of a price" under subsection 74.01(1.1), and specifically, the display is of the prices of movie tickets for General Admission, Seniors and Children.

(2) "… that is not attainable due to a fixed obligatory charges or fees …"

[343] I agree with Cineplex that for subsection 74.01(1.1) to apply, the representation of a price must not be not attainable "due to" fixed obligatory charges or fees. The key questions are whether the Online Booking Fee is a "fixed" and "obligatory" charge or fee.

(a) <u>The Online Booking Fee is a "fixed" Charge or Fee</u>

[344] The Commissioner contended that the Online Booking Fee is "fixed" for the purposes of subsection 74.01(1.1).

[345] According to the Commissioner, to decide whether a charge or fee is fixed under subsection 74.01(1.1), the question is: did the advertiser determine the amount before making the price representation? If yes, the charge or fee is fixed. Conversely, when the existence and amount of the charge or fee is unknown to the advertiser before making the price representation (such as when the charge varies depending on the method and location of delivery of a product), then the charge or fee is not fixed.

[346] In this case, the Commissioner's position was that Cineplex set the Online Booking Fee in 2022 for regular consumers at $1.50 and for Scene+ members at $1.00. These amounts have never varied since their implementation in June 2022. Cineplex knows the amount of the fee to be applied to a particular transaction well before a consumer first sees the price representations on the website or the App. A consumer must log in before seeing movie ticket prices. This information enables Cineplex to determine the amount of the Online Booking Fee, if any. It is therefore fixed.

[347] Cineplex's position was that the Online Booking Fee is not fixed. Cineplex made legal submissions on the meaning of "fixed", essentially as "not variable". According to Cineplex, the requirement that the charge or fee be "fixed" clearly distinguishes amounts caught by the provision from charges or fees that are variable and dependent on choices by the consumer. Cineplex maintained that the Online Booking Fee is variable based on the type of consumer involved (Regular, Scene+ or CineClub), how many tickets the consumers chooses, whether a promotional code or voucher applies, and because there is a cap on the overall aggregate Online Booking Fees at four tickets.

[348] For the following reasons, I find on the evidence that the Online Booking Fee is a "fixed" charge or fee. I believe it is unnecessary and unwise to attempt to define the word "fixed" in subsection 74.01(1.1) for all purposes, i.e., anticipating every possible kind of charge or fee that may be levied by a person making a representation of a price.

[349] First, on the evidence, Cineplex set the amount of the Online Booking Fee at $1.50 before its introduction in June 2022. The quantum of $1.50 has not been altered since June 2022. The vast majority of online ticket purchasers pay the full regular $1.50 Online Booking Fee. The amount of the fee for Scene+ and CineClub member was also set before June 2022 and has not varied since then. Internally, Cineplex made revenue projections based on those amounts and the projected number of moviegoers in each category. The Online Booking Fee was established and its quantum set by Cineplex for consumers in those three categories before it made any representations of a ticket price on its website and App.

[350] Second, the Online Booking Fee is fixed when Cineplex makes representations about the price of tickets on its Tickets Page, when the consumer sees those representations and when the consumer may begin to act upon them by clicking the ADD button. Consumers who reach the Tickets Page must already have logged into their Cineplex Connect Account. They cannot see pricing without doing so. By logging in, Cineplex is able to categorize the consumer as a regular consumer, a Scene+ member or a CineClub member. It therefore determines the quantum of the Online Booking Fee that applies to that consumer. (If the consumer has not entered their Scene+ or CineClub information into their Cineplex Connect Account, the website or App assumes the full $1.50 per ticket applies.) On arrival at Tickets Page (A), the Online Booking Fee is therefore

fixed not only for each type of consumer (Regular, Scene+ and CineClub) but for the particular consumer. The website or the App knows the type into which the consumer falls and is immediately able to add the Online Booking Fee to the price of the ticket(s) selected when the consumer clicks the ADD button.

[351] Third, the Commissioner placed some importance on the fact that the pre-determined $1.50 Online Booking Fee is the regular amount, which in Cineplex's own advertising is discounted for Scene+ members (to $1.00) and is waived for CineClub members.

[352] I adopt a narrower view: the fact that some consumers pay a different, pre-determined and set amount of the Online Booking Fee does not alter the fact that the fee is "fixed" for each consumer and for each category of consumer created by Cineplex. Whether a fee may be characterized as discounted or waived, Scene+ members simply pay a different fixed amount than those who are not Scene+ members, and there is no charge or fee for CineClub members. This conclusion is consistent with the Commissioner's position that Cineplex's website and App cannot avoid the application of subsection 74.01(1.1) simply because they have created different categories of consumers for whom the fee is discounted or waived.

[353] I will now address Cineplex's submissions. Cineplex relied on Dr Amir's testimony that the Online Booking Fee is not fixed because its "amount can vary". Dr Amir also offered the view that the Online Booking Fee was not fixed because it varies depending on the number of tickets a consumer purchases per transaction. Mr McGrath testified to the same effect, which reflected Cineplex's corporate position. I do not accept those positions. Dr Amir acknowledged that he was not asked to provide an opinion on the interpretation of subsection 74.01(1.1) or of any word in it, which is outside his purview as an expert. In any event, the fact that the aggregate total of Online Booking Fees "varies" with the number of tickets purchased does not affect the applicable per-ticket fixed charge or fee that is added by Cineplex to the represented price for each ticket. The cap on the aggregate Online Booking Fees at four tickets does not affect whether the fees are "fixed" as explained above – which cap, in any event, only benefits a very small percentage of online ticket purchase transactions.

[354] Cineplex's legal submission was that "fixed" charges or fees in subsection 74.01(1.1) are, by definition, charges or fees that are not "variable". Cineplex maintained that 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, [and] variable commission rates".

[355] However, Cineplex's legal argument sought to define "fixed" by what it is not – "not variable". Parliament did not use the phrase "not variable" in subsection 74.01(1.1). Cineplex adduced no edifying evidence as to Parliament's intent in using the word "fixed" in subsection 74.01(1.1). The excerpts from Hansard filed by the parties shed no light on this issue. Neither the evidence nor legal argument have shown that charges or fees that are "not variable" are always "fixed", or that "fixed" charges and fees are always "not variable". I decline to decide or comment on whether fees such as shipping charges are by definition not "fixed", as Cineplex's position suggested, as it is not an issue in the present case.

[356] Cineplex also submitted that its fees were not fixed because they are dependent on choices made by a consumer. That proposition, without more, is too broad and amorphous to be accepted when considering the legal meaning of a "fixed" charge or fee in this statutory provision.

[357] Lastly, Cineplex's position on the allegedly "variable" Online Booking Fee undermines, rather than advances, Parliament's purposes in enacting subsection 74.01(1.1) as part of the deceptive marketing provisions in the *Competition Act* generally and in subsection 74.01 specifically. Nothing in the wording of subsection 74.01(1.1) or the evidence suggests that one may avoid the application of the provision merely by creating two or more levels of fixed charges or fees and charging them to different categories of consumers. Nor is there any language or evidence to suggest that Parliament intended that subsection 74.01(1.1) not apply merely because a consumer purchases more than one item and must therefore pay two or more charges or fees. To accept Cineplex's position would imply that a retailer could easily avoid the application of the provision simply by setting one fixed obligatory charge or fee paid by some consumers and another fixed obligatory charge or fee paid by some other consumers. As the *Competition Act* is deemed to be remedial, it is hard to see how this interpretation of the provision would be consistent with the purposes of the *Competition Act* generally, or the deceptive marketing provisions in particular. See *Interpretation Act*, section 12; *Canada (Director of Investigation and Research) v Air Canada*, [1994] 1 FC 154 (CA), at pp. 186-187; *Rakuten Kobo Inc v Canada (Commissioner of*

Competition), 2018 FC 64, [2018] 4 FCR 111, at paras 102-104; *Bédard v Canada (Attorney General)*, 2007 FC 516, at para 39; *Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, at paras 118-123; *Commissioner of Competition v Direct Energy Marketing Limited*, 2015 Comp Trib 2, at paras 39-40.

[358] I therefore find that the Online Booking Fee is a "fixed" charge or fee for the purposes of subsection 74.01(1.1).

(b) <u>The Online Booking Fee is an "obligatory" Charge or Fee</u>

[359] The Commissioner's position was that the Online Booking Fee is obligatory because it must be paid by those consumers to whom it applies (regular consumers and Scene+ members). It is not optional. Payment of the fee is obligatory for all consumers to whom it applies who want to complete the purchase of movie tickets on the website or the App. A consumer can never purchase a movie ticket online without paying the Online Booking Fee unless they are a CineClub member, in which case it is waived. To complete a ticket purchase online, the consumer must therefore pay the applicable fee.

[360] The Commissioner confirmed in oral argument that according to him, the relevant question on "obligatory" under subsection 74.01(1.1) is: for whatever channel the consumer happens to be purchasing the product in, is the Online Booking Fee obligatory for the consumer to purchase in that specific channel? Simply put, once the consumer starts the purchase process, a charge or fee is mandatory if it must be paid to complete the purchase process in that channel.

[361] Cineplex's position was that the Online Booking Fee is not obligatory for the purchase of tickets at Cineplex theatres. It is "completely avoidable" by purchasing a movie ticket in-person at the theatre. Cineplex submitted that at any time, a consumer can decide to leave the website or App – therefore avoiding to pay the Online Booking Fee – and complete the transaction in-person at the theatre. To Cineplex, the existence of that alternative ends – or should end – the inquiry and analysis.

[362] Cineplex sought to distinguish its position from situations in which no "bricks & mortar" location is available to purchase the desired product, and from instances when fees are added "at

the counter" after a consumer concludes a reservation online or on arrival at a location (such as a "resort" fee).

[363] Cineplex made submissions on the broader theme of consumer choice and whether the displayed ticket prices were attainable, backed by passages in Mr McGrath's witness statement. Mr McGrath stated that on the Tickets Page, a consumer 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". This "base price" is the ticket price before the consumer makes any selection of tickets (i.e., it is the price displayed on Tickets Page (A)). According to Mr McGrath's witness statement, 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". (He noted that the base price can be obtained online by CineClub members.)

[364] According to Cineplex, the choice it offers to consumers is consistent with the objective in section 1.1 of the *Competition Act* to "provide consumers with competitive prices and product choices". Cineplex's position was that subsection 74.01(1.1) uses both the words "attainable" and "obligatory", which underscores the requirement that an alternative is not available to the consumer.

[365] I conclude on the evidence that the Online Booking Fee on Cineplex's website and App is an "obligatory" charge or fee under subsection 74.01(1.1).

[366] To start, as a matter of fact, payment of the Online Booking Fee is required for all consumers who complete the purchase of movie tickets on the website or the App, unless they are CineClub members. Mr McGrath and Dr Amir both testified that every consumer who is not a CineClub member must pay the Online Booking Fee if they wish to purchase tickets online. (This was the question that Mr McGrath was asked several times in cross-examination before answering directly – see paragraph 20, above.) There is no evidence that since its implementation on June 15, 2022, any consumer has purchased a ticket on the website or the App without paying the Online Booking Fee, other than CineClub members. For context, I note that online sales represent just over half of the tickets sold by Cineplex. It may also be recalled that the Online Booking Fee

generated the considerable amounts of $11,678,336 in 2022 and $27.3 million in 2023 for Cineplex.

[367] I am not persuaded that the Online Booking Fee is not obligatory simply because a consumer may abandon their online tickets purchase and attend the theatre to purchase a ticket, therefore avoiding it. I agree with the Commissioner's position that the question is whether the charge or fee is obligatory for consumers who want to complete a purchase of a movie ticket on the website or the App. The answer is: yes, it is obligatory.

[368] The display of prices on the Tickets Page would lead an ordinary consumer to believe that the prices they are seeing on the website or the App are the online ticket prices to be paid. As previously mentioned, the website and the App do not display ticket prices as "in-theatre" prices and do not advise consumers on the Tickets Page that the represented ticket prices (that is, without the Online Booking Fee) are only available if they abandon the online purchase process and proceed with the purchase in-person at the theatre.

[369] Cineplex's position is not supported by the contents of the Tickets Page evidence. The consumer may be aware that tickets can be purchased at the theatre; the relevant question, however, is whether the consumer is aware that she has a choice to buy online and pay the additional fee, or buy at the theatre without paying it. The latter question properly reflects the objectives of the statute and the purposes of the deceptive marketing provisions. The Tickets Page does not make that choice clear.

[370] While Cineplex and Mr McGrath's witness statement characterized the tickets prices as a "base price" that can be obtained at the theatre, Tickets Page (A) does not advise a consumer that the displayed prices are the "at-theatre" prices, or are "base prices" to which an additional fee will be added for online purchases. Nor does that webpage advise that there is a difference between the at-theatre price and the online price. Cineplex does not advise consumers that to purchase tickets online, an Online Booking Fee may apply, or – after the consumer has already logged into their Cineplex Connect Account – that an Online Booking Fee will apply to that particular consumer if she purchases tickets online.

[371] The subtotal on the floating ribbon does not inform the consumer about the option of purchasing tickets at the theatre without paying the Online Booking Fee or, as explained elsewhere in these reasons, inform the consumer about that fee given the required mental math. Although Mr McGrath and Dr Amir testified in cross-examination that there is no evidence that consumers became aware of the Online Booking Fee and then decided to abandon their online ticket purchase to buy tickets at the theatre instead, there are numerous reasons why a consumer might end their use of the website or the App without completing the purchase of a movie ticket, as many consumers do. Cineplex did not adduce any evidence to show that consumers were actually aware of the relevant choice.

[372] It is fair to say that online ticket purchasing promotes consumer choice by enabling them to purchase tickets in advance of a show without attending at a theatre location. The evidence confirmed that consumers can purchase movie tickets on the website and the App days or longer in advance of the show time. Mr McGrath testified that Cineplex believes consumers find value in being able to purchase movie tickets in advance, an intuitively attractive proposition that was also supported by Dr Amir.

[373] However and importantly, Cineplex's position on the "important choice" gains little traction under subsection 74.01(1.1) due to the absence of a properly informed consumer – someone who is made aware of the choice being offered, including the real cost of both options. The absence of materially relevant information on the Tickets Page, as just discussed, undermines Cineplex's submission.

[374] Lastly, and returning to the obligatory nature of the fee, the Online Booking Fee has an aggregate maximum per transaction (based on four tickets). However, only a very small number of tickets purchased online exceed this cap limit. The fact that the Online Booking Fee has a maximum quantum for regular consumers and Scene+ members does not affect whether it is obligatory.

[375] Accordingly, I conclude that the Online Booking Fee is "obligatory" under subsection 74.01(1.1).

(3) The Representations of Movie Tickets Prices are "not attainable" due to the Online Booking Fee

[376] The Commissioner submitted that Cineplex's price representations were not attainable due to the Online Booking Fee. Specifically, the prices represented on Tickets Page (A) of the website and the App were not attainable for purchases on the website and the App due to the Online Booking Fee.

[377] Cineplex disagreed, arguing that the price of a ticket, including a ticket purchased in advance with a seat selection, is always attainable by attending the selected theatre to purchase it. On this view, the base price displayed on the Tickets Page of the website and on the App is therefore attainable. Cineplex noted that nearly half of all movie tickets are purchased at theatres at the base ticket price. Similarly and as noted above, Cineplex submitted that there is no price advertised by Cineplex that is unattainable: the prices are attainable either at the theatre chosen by the consumer as displayed on the Tickets Page, or online at the total price shown on the floating ribbon (the subtotal), which includes any Online Booking Fee if the consumer chooses to purchase a ticket online.

[378] Cineplex relied on Mr Zimmerman's evidence in cross-examination. He admitted that the prices displayed on the Tickets Page are attainable if purchased at the theatre and that the prices are also attainable online if the consumer is a CineClub member. Mr McGrath and Dr Amir noted that consumers who use certain promotional coupons are also not charged the Online Booking Fee.

[379] I agree with the Commissioner. When considering whether Cineplex's representations of a price are "not attainable due to" the Online Booking Fee under subsection 74.01(1.1), the analysis focuses on the impugned price representations, the channel in which the representations are made and where consumers see them, and whether consumers pay a fixed obligatory charge or fee to complete a purchase in that same channel.

[380] Cineplex makes the impugned price representations about the price of tickets on the website and in the App. Whether viewed from the perspective of the ordinary consumer, or through the eyes of the Tribunal with the benefit of the very detailed review of the Tickets Page during the hearing, the displayed prices on the website and the App are represented to be the prices consumers

must pay to purchase a ticket in those same channels in which the price representation is made, is seen and may be acted upon. The website and App do not state otherwise, expressly or impliedly; they give no indication that the displayed prices do not apply in the very medium in which the representations are made and in which consumers see them and can purchase tickets. Equally, neither the literal meaning nor the general impression conveyed by the price representations suggest that the displayed price is only an at-theatre price.

[381] Accordingly, the fact that the represented prices of movie tickets on the website or the App is attainable if a consumer buys them in-person at the theatre is not relevant to the determination of whether or not they are "attainable" under subsection 74.01(1.1) in another channel where a price representation is made and tickets may be purchased.

(4) "… unless …"

[382] There is no debate that the Online Booking Fee does not represent an amount imposed by or under an Act of Parliament or a provincial legislature.

(5) Conclusion on the Application of subsection 74.01(1.1)

[383] Accordingly, applying subsection 74.01(1.1), Cineplex's representations of ticket prices on its website and App constitute false or misleading representations.

E. Were the Representations on the Tickets Page "false or misleading" under paragraph 74.01(1)(*a*)?

[384] In the event that Cineplex's representations of tickets prices do not constitute false or misleading representations as a result of subsection 74.01(1.1), the question is whether they are false or misleading under paragraph 74.01(1)(*a*).

(1) Is subsection 74.01(1.1) a "Complete Code"?

[385] Cineplex submitted that subsection 74.01(1.1) constitutes a "complete code". It pointed to the phrase "[f]or greater certainty" and contended that the provision is exhaustive of what constitutes "drip" pricing under the *Competition Act*. On this view, the Tribunal cannot in law

determine whether Cineplex's alleged "drip" price representations are false or misleading under paragraph 74.01(1)(*a*) alone, without subsection 74.01(1.1).

[386] Cineplex characterized the Commissioner's position under paragraph 74.01(1)(*a*) as his "residual" position that drip pricing is materially misleading when the consumer is not aware of the amount of the Online Booking Fee. According to Cineplex, subsection 74.01(1.1) leaves no room for the residual argument of the Commissioner because the words "[f]or greater certainty" make it clear that drip pricing as set out in subsection 74.01(1.1) is "definitional and complete". On this approach, it is straightforward and clear that drip pricing only applies when the total price (excluding applicable taxes) is not attainable and *only then* is it misleading under section 74.01. If this were not the case, the phrase "[f]or greater certainty" would be unnecessary. Cineplex submitted that 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. According to Cineplex, the residual argument of the Commissioner is contrary to subsection 74.01(1.1) itself and contrary to the clear objectives of Parliament.

[387] In response, the Commissioner argued that subsection 74.01(1.1) is not a complete code, as it only relates to one element of the reviewable conduct in paragraph 74.01(1)(*a*) – whether the representation is false or misleading. It is not a standalone provision that defines reviewable conduct. According to the Commissioner, subsection 74.01(1.1) neither expands nor limits the scope of the application of paragraph 74.01(1)(*a*) but simply clarifies that certain types of price representations are deemed to be false or misleading. The purpose of subsection 74.01(1.1) is to facilitate proof of one of the elements of paragraph 74.01(1)(*a*). The Commissioner argued that to prevent the Tribunal from assessing whether the price representations are false or misleading independently from subsection 74.01(1.1) would lead to an absurd result contrary to statutory interpretation principles: a company could make "wildly misleading price representations as long as it does not meet the requirement of [subsection 74.01(1.1)] – for example, adding an extra variable charge disclosed in miniscule font or requiring the consumer to click on an obscured link".

[388] I am unable to conclude that subsection 74.01(1.1) is a complete code or that it precludes a separate analysis under paragraph 74.01(1)(*a*). First, subsection 74.01(1.1) does not define reviewable conduct separately from paragraph 74.01(1)(*a*). The Commissioner could not simply

prove the requirements of subsection 74.01(1.1) and seek a remedy. Rather, Parliament has determined that certain kinds of price representations are false or misleading. The other elements of reviewable conduct under paragraph 74.01(1)(*a*) must still be shown to prove that a respondent has engaged in reviewable conduct.

[389] Second, the language of the provisions does not support a legal rule that precludes any inquiry under paragraph 74.01(1)(*a*) in every case that the evidence satisfies subsection 74.01(1.1). The representations captured by the two provisions are not coextensive: paragraph 74.01(1)(*a*) is not limited to price representations, whereas subsection 74.01(1.1) expressly refers to a representation as to price. In addition, there is no reason why Parliament cannot define more than one way that a representation is false or misleading for the purposes of reviewable conduct. A representation could be false or misleading by meeting the requirements of subsection 74.01(1.1) and also false or misleading for another reason under paragraph 74.01(1)(*a*).

[390] Although Cineplex's argument is essentially that subsection 74.01(1.1) has "occupied the field" to describe all circumstances in which a price representation is false or misleading and constitutes "drip" pricing, it is not clear what "field" has been occupied. Parliament may have described one species of false or misleading representation in enacting subsection 74.01(1.1), or it may have identified one species of drip or partitioned pricing (i.e., where the price is made up of more than one element) that will support a finding of reviewable conduct.

[391] Third, the mere enactment of subsection 74.01(1.1) does not mean that the false or misleading conduct it is meant to catch was not already caught by paragraph 74.01(1)(*a*). That is, enacting subsection 74.01(1.1) does not imply that Parliament changed the law in 2022. Subsection 45(2) of the *Interpretation Act* provides:

Amendment does not imply change in law	**Absence de présomption de droit nouveau**
45 (2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom	**45 (2)** La modification d'un texte ne constitue pas ni n'implique une déclaration portant que les règles de droit du texte étaient différentes de celles de sa version modifiée ou que le Parlement, ou toute

the enactment was enacted to have been different from the law as it is under the enactment as amended.	autre autorité qui l'a édicté, les considérait comme telles.

[392] In addition, subsection 45(3) provides that a repeal or amendment does not declare the previous state of the law:

Repeal does not declare previous law	**Absence de présomption de droit nouveau**
45 (3) The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.	**45 (3)** La modification d'un texte ne constitue pas ni n'implique une déclaration portant que les règles de droit du texte étaient différentes de celles de sa version modifiée ou que le Parlement, ou toute autre autorité qui l'a édicté, les considérait comme telles.

See *Premier Career Management Group FCA,* at para 57.

[393] For these reasons, the Tribunal is not precluded from considering paragraph 74.01(1)(*a*).

(2) Were the Representations "false or misleading"?

[394] As the focus of both parties' evidence and legal argument was on subsection 74.01(1.1), they gave significantly less attention to whether the price representations were false or misleading under paragraph 74.01(1)(*a*).

[395] The Commissioner's position was that the website and App were designed in such a way that disclosure of the existence and amount of the Online Booking Fee is hidden from view, "below the fold" and off-screen for the vast majority of consumers. According to the Commissioner, consumers will not see the information about the Online Booking Fee disclosed below the fold for all phone users, and for most consumers purchasing tickets through their computer. The Commissioner maintained that the design of the website incorporates a "call to action" prompt button whose effect is to attract the focus of the consumer to proceed to the next step of the

purchase process without further exploring the rest of the webpage. According to the Commissioner, Cineplex presents the Online Booking Fee in a manner that is somewhat shielded, which in turn increases the likelihood that consumers will purchase a ticket online and lowers their perception of the ultimate cost of the ticket purchased online. The Commissioner noted that nothing about the Online Booking Fee is disclosed until after a consumer acts on the price representations made by Cineplex. The Commissioner relied on Dr Morwitz's evidence, in particular her opinions about "shrouded attributes" and partitioned or drip pricing.

[396] Owing to its various positions already described, Cineplex made few submissions that went solely to whether its price representations were false or misleading under paragraph 74.01(1)(*a*). Cineplex emphasized that its pricing was not misleading because the total all-inclusive price payable for tickets is shown on the floating ribbon beside the word "Subtotal" at the bottom of the screen on Tickets Page (B) as soon as a consumer clicks the ADD button to add a ticket. Cineplex also argued that the existence and quantum of the Online Booking Fee is disclosed throughout the purchasing process through the CineClub advertisement on the Tickets Page, the information at the bottom of Tickets Pages (A) and (B), and the availability of additional information by clicking on the blue encircled "i" button.

[397] I conclude that the price representations are false or misleading under paragraph 74.01(1)(*a*). The displayed ticket prices are not accurate because "more" must be paid up to four tickets per transaction on the website or App. In addition, as is explained immediately below, the consumer is deceived or led astray by the contradictory and incomplete information on the Tickets Page after clicking the ADD button to add one or more tickets.

[398] As previously indicated on several occasions, the Tickets Page displays ticket prices without concurrent display of an additional fee to make a purchase on the website or the App. Because the existence and quantum of that additional component of the price is not displayed to the consumer on Tickets Page (A), the individual may complete the purchase of tickets without ever realizing that they must pay – or have paid – an additional fee for the tickets. After adding a ticket and seeing Tickets Page (B), the displayed ticket price per ticket does not change, but the subtotal on the floating ribbon shows the aggregate sum of the displayed price of the selected tickets plus any applicable Online Booking Fee. The ordinary consumer (who does not pause to

do the mental math, as already discussed) is misled as there is no indication that the subtotal is anything other than the sum of the displayed price of the selected tickets – yet the subtotal is in fact a higher amount. Even a consumer who successfully does the mental math and notices a discrepancy immediately sees and feels the deception of the displayed ticket price.

[399] The existence and quantum of the Online Booking Fee is obfuscated by placing some information about it at the bottom of the Tickets Page, but without any indication in the viewable area of the page that the information is available by scrolling down. Consumers will not scroll unless they need to do so, are told they must do so, or at minimum something suggests that they should do so to get more information. The Tickets Page does none of these: consumers can click PROCEED to the next page without scrolling down (and in practical terms are encouraged to do exactly that), they are not prevented from advancing to the next page without scrolling to the bottom (although they could be), and they are not given any indication that more information on the price is available by choosing to scroll down (again, some indication could be provided).

[400] Before the consumer clicks to add a ticket to the online shopping cart, the quantum of the Online Booking Fee is not displayed above the fold. To find out the quantum, one must scroll to the bottom of the page and click on the blue encircled "i", which opens a pop-up window with information and the quantum. After the consumer clicks to add a ticket to the online shopping cart (resulting in the appearance of Tickets Page (B)), the existence and quantum of the fee component of the price is obfuscated. At this point the aggregate Online Booking Fees is embedded within the dollar amount of the subtotal shown on the floating ribbon, but the consumer is not informed about the fee and the floating ribbon does not break down the amount displayed or explain how the subtotal is calculated.

[401] On the next page where the consumer may proceed with seat selection, the subtotal on the floating ribbon changes to show a total cost, which is an aggregate amount representing the sum of the price of all tickets, plus the sum of any applicable Online Booking Fee, now also including applicable taxes. While this change shows the total amount the consumer will ultimately have to pay, it does nothing to advise the consumer about the existence or quantum of any Online Booking Fee that may be included.

[402] Advancing to the Payment Options Page on the website or on the App, the consumer can locate an Order Summary, which shows the number of movie tickets purchased and their aggregate cost, the Online Booking Fee and its aggregate cost, applicable taxes in aggregate, and a total amount. However, that Order Summary is not visible above the fold on the website or on the App, and a consumer must scroll down to see it. Again, there is no requirement or need for a consumer to scroll prior to completing the purchase.

[403] Thus, as Mr McGrath and Dr Amir acknowledged, a consumer can get through the process without becoming aware that any Online Booking Fee is payable. Indeed, a consumer may complete a purchase of tickets without realizing that they ultimately paid more than the originally represented ticket price, plus applicable taxes.

[404] I note that this overall analysis concerns the making of representations about ticket prices. It is not founded on the non-disclosure of the Online Booking Fee but on two related instances of inaccurate and misleading information displayed on the Tickets Page. The initial display of ticket prices is inaccurate or deceptive on its face. The Tickets Page remains misleading even after the subtotal is displayed on the floating ribbon because the subtotal appears inaccurate when viewed with the per-ticket displayed prices, without additional information about the quantum per ticket of the Online Booking Fee. The inaccuracy of the represented ticket prices on Tickets Page (A) and the deceptive and unexplained gap between the sum of the represented per-ticket prices and the represented subtotal on Tickets Page (B) are both related to Cineplex's omission of information about the Online Booking Fee on the Tickets Page (both above the fold and at all).

[405] As such, the present case is easily distinguished on its facts from cases that rely solely on non-disclosure of a defect and do not involve clear representations to the public: see, e.g., *Arora v Whirlpool Canada LP*, 2013 ONCA 657, at paras 50-51; *Palmer v Teva Canada Ltd*, 2022 ONSC 4690, at para 253 (aff'd *Palmer v Teva Canada Limited*, 2024 ONCA 220, at paras 94-96); *Rebuck*, at para 45; *Hoy v Expedia Group Inc*, 2022 ONSC 6650, at para 117; *Gaudette c Whirlpool Canada*, 2020 QCCS 1423, at para 61. The present case is closer to *Vallance v DHL Express (Canada), Ltd*, 2024 BCSC 140, at paras 55-56, 58-61, but stronger on its facts than *Vallance*. It is not necessary to consider the circumstances in which a partial statement of facts or similar omission can, on its own, constitute a representation under paragraph 74.01(1)(*a*).

[406] Beyond this analysis of the factual evidence, Dr Morwitz's expert opinion provides support for the finding of representations that are false or misleading under paragraph 74.01(1)(*a*). She testified that the Online Booking Fee is a "shrouded attribute" according to the academic literature. It is a fee separated from the price of the ticket and presented sequentially (i.e., the ticket price is presented first, and the fee is added later). She identified the shrouding or obfuscation of the fee owing to the number of steps that a consumer has to take to find or learn information about the per-ticket Online Booking Fee. She referred to: (i) the need to click on the ADD button for fee information to be displayed, (ii) the absence of any reference to a fee next to the displayed ticket price, (iii) the placement of Online Booking Fee information at the bottom of the Tickets Page (below the fold) and that consumers have to scroll down to find it, (iv) having to do mental math about the subtotal to otherwise become aware of the fee, (v) the font used to display it, (vi) the need to click the blue encircled "i" to get information about the added fee, and (vii) the use of the countdown clock to create a sense of urgency.

[407] Dr Morwitz described the effect on consumers of separating different elements of the overall price to be paid. In particular, her opinion was that the way in which the ticket prices and the Online Booking Fee are presented on the website and the App lowers consumers' perceptions of the total price of the tickets and affects their buying behaviour by leading them to underestimate the total price of purchasing the tickets.

[408] Dr Morwitz provided a summary of the academic literature and provided her own analysis of the situation on the Cineplex website and App. As discussed when analyzing Cineplex's objections to the admissibility of her evidence, I find that her opinions on these issues were not materially altered or compromised at the hearing. I also recognize that Dr Morwitz did not conduct a study to determine whether actual consumers were misled by the Cineplex website or App, or whether the partitioned pricing in fact led to altered perceptions of the ticket price or changed buying behaviour. As the Commissioner noted, she was not asked to do so (nor was the Commissioner required to demonstrate so under the *Competition Act*).

[409] Cineplex relied on Dr Amir's evidence that virtually no consumer was misled by the Online Booking Fee. I agree that evidence of this nature, if properly supported, could be relevant to the

Tribunal's assessment, acknowledging again that the Commissioner is not required to adduce evidence to show that anyone was actually deceived: see paragraph 74.03(4)(*a*).

[410] In his report, Dr Amir testified that there were 97 million consumer visits to the Cineplex website in 2022. By contrast, only seven complaints were submitted to the Competition Bureau, all of which were after the Commissioner filed the Notice of Application in this matter, about a year after the Online Booking Fee was introduced. This represented 0.0000072 percent of visits to the "Cineplex Consumer Flow" (as Dr Amir described it). This suggested to Dr Amir that, "from a scientific perspective, virtually all consumers of the Cineplex Website did not find the Online Booking Fee misleading". Dr Amir did not find this surprising, given his analysis 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".

[411] At the hearing, Dr Amir testified that it was his "scientific conclusion" that virtually all consumers of the Cineplex website did not find the Online Booking Fee misleading.

[412] I do not accept this position. It is neither scientific nor reliable. Cross-examination demonstrated that the numerator used by Dr Amir (i.e., the number of complaints to the Competition Bureau) was inaccurate and unreliable as a measure of actual persons who were deceived or misled. In addition, the denominator used by Dr Amir was significantly overstated. Cross-examination revealed that the premise (97 million visits to the website) did not reflect actual visitors. The number of website visitors is necessarily some unknown lower number, which Dr Amir agreed was significantly less than 97 million. In addition, the time period for the number of visits used by Dr Amir was calendar 2022, but the Online Booking Fee was not implemented until June 15, 2022, meaning that the number of "visits" is overstated by using the first 5.5 months in the calendar year.

[413] Further, it is apparent that to obtain a reasonable understanding of consumers who were or were not misled by Cineplex's display of pricing information, one would have to consider only those who were exposed to the ticket prices on the Tickets Page. A user cannot see pricing information without logging in, and, as Dr Amir recognized in his report, about 85.7 million of the "visits" did not reach the Tickets Page. Only 11.8% got to the Tickets Page, and an even smaller number got past the Tickets Page to the next page.

[414] Lastly, Dr Amir's analysis considered visits to the Tickets Page through the website but did not consider visits through the App, although about 37.5% of purchasers visit the Tickets Page on the App.

[415] I give no weight to Dr Amir's analysis on website visits and consumer complaints, including the inference drawn from it that virtually no one was misled. That the conclusion is consistent with other aspects of Dr Amir's report is of no consequence given the limited extent of his expertise to testify about website user design and best practices.

[416] The factual evidence before the Tribunal leads to the conclusion that the ticket price representations on the Cineplex website and the App were false or misleading. That conclusion is also supplemented and supported by the expert opinion from Dr Morwitz.

[417] The Commissioner has established the "false or misleading" element under paragraph 74.01(1)(*a*).

F. Were the Representations False or Misleading "in a material respect" under paragraph 74.01(1)(*a*)?

[418] A representation is material under paragraph 74.01(1)(*a*) if it is "so pertinent, germane or essential that it could affect the decision to purchase": *Apotex Inc v Hoffman La-Roche Ltd* (2000), 195 DLR (4th) 244 (Ont CA), 2000 CanLII 16984, at para 16. See also *Premier Career Management Group FCA*, at paras 20 (quoting *Apotex*), 65, 80; *Sears*, at paras 333-336 (a "material influence on the mind of a consumer"); *Gestion Lebski inc*, at paras 154, 163, 288; *Yellow Page Marketing*, at para 34.

[419] The representations at issue in this case were material. They related to the price of movie tickets. While I do not agree with the Commissioner that the Tribunal should adopt a presumption that price representations are material because they always affect the decision to purchase, it will very often be the case – as it is here. The representations constituted a material influence on the mind of consumers and their decision to purchase movie tickets. The Online Booking Fee constitutes a significant proportion of displayed ticket prices. Cineplex's own consumer research in the months before it adopted the Online Booking Fee assessed the "switching" impact of $1-$2 adjustments in base ticket pricing, and showed that $1-2 was material to consumers (in that it was

enough to influence consumer behaviour). Cineplex set the Online Booking Fee at $1.50. Cineplex was also aware on implementation that the fee was, in reality, a price increase. Further, Dr Morwitz's evidence indicated that partitioning the price likely increased the prospect that consumers would purchase tickets online (and pay the Online Booking Fee). For the reasons already discussed, the display of the subtotal on the floating ribbon (which incorporates any applicable Online Booking Fee) does not rescue the situation.

G. Conclusion

[420] The Commissioner has established that the ticket price representations on Cineplex's website and App constitute reviewable conduct under paragraph 74.01(1)(*a*) of the *Competition Act*.

VIII. REMEDY

A. The Parties' Positions

[421] The Commissioner requested that the Tribunal order behavioural and monetary remedies, including a Canada-wide prohibition order, and either an order for restitution or a "significant" administrative monetary penalty – an AMP.

[422] The Commissioner submitted that Cineplex had collected approximately $40 million from its deceptive conduct. According to the Commissioner in his opening submissions at the hearing, the quantum of the AMP should be "at least" $40 million. His written argument in closing argued that the AMP should be "the amount Cineplex has gained from engaging in the misleading conduct". The Commissioner observed that an AMP of $40 million is "not even close" to the maximum AMP that the Tribunal may order under paragraph 74.1(1)(*c*) of the *Competition Act*.

[423] With respect to an AMP, the Commissioner referred to the following aggravating and mitigating factors under subsection 74.1(5):

(a) The misrepresentations were frequent and extensive: they have occurred since June 15, 2022, and have affected consumers purchasing millions of tickets across Canada;

(b) The misrepresentations were material and affected consumers' purchasing behaviour, which increased the likelihood that a consumer would purchase tickets;

(c) Cineplex received significant revenue, approximately $39 million, from charging Online Booking Fees as of December 31, 2023;

(d) Cineplex is Canada's largest film exhibitor and as of December 31, 2023, owned, leased or had a joint venture in 1,631 screens in 158 theatres;

(e) In 2023, Cineplex's revenue was approximately $1.4 billion dollars. Since the pandemic, Cineplex has returned to profitability for the last two years;

(f) Cineplex is unlikely to change its conduct voluntarily: it could have ceased its conduct long before the Commissioner filed the application to this Tribunal. Cineplex commenced its conduct the same month as subsection 74.01(1.1) was enacted; and

(g) Cineplex has not relied on the existence of an effective corporate compliance program as a mitigating factor, nor did it seek an advisory opinion from the Competition Bureau related to its conduct or otherwise adduce evidence of any legal advice it received that its conduct complied with the *Competition Act*.

[424] The Commissioner also argued that the Tribunal may order Cineplex to give people their money back under paragraph 74.1(1)(*d*) and that there were compelling reasons to order "restitution instead of an AMP" in this case. The Commissioner submitted:

(a) The amount of the Online Booking Fees charged to consumers is not in dispute;

(b) The amount of the money paid by consumers is directly linked to the reviewable conduct;

(c) Cineplex accounts for the revenues from Online Booking Fees separately from other streams of revenue in its annual and quarterly reports, such that the total amount to be paid to consumers is ascertainable;

(d) The affected consumers can be identified, as every consumer who purchased tickets online first had to create a Cineplex Connect Account, which included at a minimum providing

Cineplex with an email address and a phone number. As Mr Zimmerman's evidence showed, one must log into that account before one can see prices or purchase tickets on the website or the App;

(e) Cineplex tracks each consumer's purchase history since before the Online Booking Fee was implemented so that the consumers can be identified and such fees can be refunded; and

(f) Cineplex admitted on discovery that restitution is technically possible.

[425] During his submissions, the Commissioner noted that before Cineplex displays ticket prices to the consumer, the consumer must have logged into their Cineplex Connect Account and selected a movie, location, time, and experience type. Cineplex knows that the consumer, if not a CineClub member, will have to pay at least one Online Booking Fee to complete the purchase. However, Cineplex fails to tell this to the consumer and instead waits for the consumer to act on the price representations before adding the Online Booking Fee to the cost of the ticket purchase.

[426] While Cineplex denied wrongdoing under the *Competition Act*, it submitted in the alternative that the Tribunal should not impose an AMP as this is the first case heard by the Tribunal involving subsection 74.01(1.1), the first interpretation of that provision and a novel case. Cineplex's brief written submissions on remedy argued that the Commissioner's approach to the provision was "beyond the clear or obvious interpretation of the provision and beyond any guidance the Commissioner provided to the business community". Cineplex did not link its submissions to the evidence of Competition Bureau presentations on drip pricing (or to past consent agreements registered with the Tribunal). However, if the Tribunal were inclined to award an AMP, Cineplex contended that the amount should be no more than $500,000 as ordered in *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2014 ONSC 1146 ("*Chatr 2014*"), at para 77.

[427] With respect to aggravating and mitigating factors for an AMP, Cineplex submitted as follows:

(a) Cineplex has not been found to have engaged in any unlawful conduct under the *Competition Act* (which I take to refer to the absence of any previous reviewable conduct under the *Competition Act*);

(b) The evidence is uncontroverted that Cineplex's intention was to provide a choice to consumers which is welfare enhancing (relying in part on Dr Amir's evidence that consumers are able to select the experience they wish at different prices, or else decide whether they want to pay more to get the value of pre-booking);

(c) The consumers who purchase online obtained value for their purchases, including the value of the advance seat selection;

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

(e) The evidence is uncontroverted that Cineplex believed that its webpage was fully compliant with the *Competition Act* and that it provided consumers with all relevant information, including locking consumers out from the online purchase process until they had selected tickets and seen the total price to be paid, including any Online Booking Fee (subject to applicable taxes).

[428] Cineplex submitted that a restitution order would not be appropriate in this case, because consumers received the advantages that the Online Booking Fee provided, meaning a movie ticket with an online seat selection. According to Cineplex, "[t]his is not a junk fee where no value was received for the fee in question".

[429] Cineplex referred to subsection 74.1(4), which provides that the terms of an order made against a person under paragraphs 74.1(1)(*b*), (*c*) or (*d*) – which include orders for a monetary penalty and restitution – "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".

B. Determination on Remedies

(1) An Order under paragraph 74.1(1)(*a*)?

[430] I agree with the Commissioner that the Tribunal should make an order under paragraph 74.1(1)(*a*) requiring Cineplex not to engage in the reviewable conduct or substantially similar reviewable conduct. The Commissioner did not provide proposed language for this part of the Tribunal's order. It will be drafted in accordance with paragraph 74.1(1)(*a*) and provide Cineplex with sufficient notice having regard to the potential implications for its future conduct: see section 66**.**

[431] As contemplated by subsection 74.1(2), this part of the Tribunal's order shall apply for a period of ten (10) years. Cineplex did not argue otherwise.

(2) Provisions Affecting an Order under paragraphs 74.1(1)(*b*), (*c*) and (*d*)

[432] Section 74.1 includes guidance about the purpose of an order under paragraphs 74.1(1)(*b*), (*c*) and (*d*) and imposes certain limitations.

[433] Subsection 74.1(4) provides that 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 Part VII.1 of the *Competition Act*. The same subsection expressly proscribes that a remedy be imposed with a view to punishment of the respondent.

[434] The remedies that may be imposed by the Tribunal are also limited in quantum by subparagraph 74.1(1)(*c*)(ii) and the language in paragraph 74.1(1)(*d*). For an order that is not a "subsequent order" (as is the case here; there is no prior order) the maximum AMP payable by a corporation is the greater of $10 million, and three times the value of the "benefit derived from the deceptive conduct" if that amount can be reasonably determined: clause 74.1(1)(*c*)(ii)(B). The amount to be distributed under paragraph 74.1(1)(*d*) shall not exceed the total of the "amounts paid to the [respondent] person for the products" in respect of which the conduct was engaged in. It may be observed that in both cases, the quantum is related to the financial amount obtained by the respondent through the reviewable conduct.

[435] There are three additional comments at the outset. First, the *Competition Act* contains indications that the remedies under paragraphs 74.1(1)(*b*), (*c*) and (*d*) can and should work together – they must achieve a common purpose under subsection 74.1(4), and one factor to take into account in determining the amount of an AMP under paragraph 74.1(1)(*c*) is any decision in relation to an application for an order under paragraph 74.1(1)(*d*): see paragraph 74.1(5)(*j*).

[436] Second, both paragraphs 74.1(1)(*c*) and (*d*) contemplate that the Tribunal has discretion in how to fashion its order. A respondent may be ordered to pay an AMP under paragraph (*c*) "in any manner that the court specifies", subject to the quantum limitations. Paragraph (*d*) contemplates an order to pay an amount to be distributed "in any manner that the court considers appropriate".

[437] Third, to promote conduct in conformity with the *Competition Act* as subsection 74.1(4) contemplates, the Tribunal may in appropriate circumstances make an order under paragraphs 74.1(1)(*c*) and/or (*d*) with a view to ensuring that a respondent does not profit or otherwise reap a financial gain from its false or misleading conduct.

[438] I will elaborate on this third point. The purposes of Part VII.1 have been described above. The focus is on the consumer and on the accuracy of representations to the public to preserve the informational integrity of markets and to avoid the *per se* harm to competition that follows from false or misleading information: *Premier Career Management Group FCA*, at para 61. In my view, a Tribunal order should seek to align the future incentives of a respondent with attaining the objectives of the deceptive marketing provisions and to support compliance with the *Competition Act*. In many cases, that will imply an AMP or restitution order (or a combination of both) that gives precedence to the amount obtained by the respondent through the reviewable conduct as a means to carry out the requirements of subsection 74.1(4), short of punishing the respondent. In other words, in those cases, the respondent should not keep any of the financial gains it made by its false or misleading representations.

[439] The Tribunal's assessment of remedial options for reviewable conduct under Part VII.1 should also consider whether the possible financial consequences of a Tribunal order would operate as a form of licence fee (e.g., where the financial gains outweigh the possible negative consequences of the reviewable conduct). A remedy for proven reviewable conduct under Part VII.1 should not be a cost of doing business. That would undermine, rather than advance, the

objectives of the deceptive marketing provisions and would not promote conformity with the statute.

(3) An Order under paragraph 74.1(1)(*d*)?

[440] The Commissioner submitted in oral argument that an order for "restitution" is available in the *Competition Act* as a remedy to encourage compliance with the *Competition Act*. I agree that a remedy under paragraph 74.01(1)(*d*) can do so.

[441] Paragraph 74.1(1)(*d*) provides that the Tribunal may order a respondent:

Determination of reviewable conduct and judicial order	**Décision et ordonnance**
74.1 (1) […]	**74.1 (1)** […]
(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate.	**d)** s'agissant du comportement visé à l'alinéa 74.01(1)a), de payer aux personnes auxquelles les produits visés par le comportement ont été vendus — sauf les grossistes, détaillants ou autres distributeurs, dans la mesure où ils ont revendu ou distribué les produits — une somme — ne pouvant excéder la somme totale payée au contrevenant pour ces produits — devant être répartie entre elles de la manière qu'il estime indiquée.

[442] The Commissioner's proposed remedy under paragraph 74.1(1)(*d*) sought "restitution" based on the gain made by Cineplex while engaging in the reviewable conduct. Both parties also referred to the use of the word "restitution" in the *Competition Act*.

[443] Paragraph 74.1(1)(*d*) refers to payment of an "amount" to be distributed among the persons to whom the products were sold. That paragraph does not characterize the "amount" or its function, nor does it use the term "restitution". However, as Cineplex noted during oral argument, paragraph

74.1(5)(*k*) and subsection 74.1(7) refer to "restitution" ("*restitution*"), a "refund" ("*remboursement*") and "other compensation" ("*de toute autre forme de dédommagement*") as orders under paragraph 74.1(1)(*d*). These are some of the options evidently open to the Tribunal.

[444] The amount to be paid under paragraph 74.1(1)(*d*) shall not exceed "the total of the amounts paid to the person for the products in respect of which the conduct was engaged in". The aggregate amount paid by moviegoers to Cineplex for Online Booking Fees was $11,678,336 in 2022 and $27.3 million in 2023, for a total of $38.978 million from its implementation in June 2022 until December 31, 2023. The maximum amount that could be ordered under paragraph 74.1(1)(*d*) – on the evidence and arguments made in this case – is therefore $38.978 million.

[445] I agree with the Commissioner that the present case has attributes that could support an order that Cineplex pay an amount to be distributed amongst those who paid the Online Booking Fee – a refund to consumers. For example, as the Commissioner observed, the aggregate amount of the Online Booking Fees charged to consumers is not in dispute and is easily distinguished from amounts paid by consumers that are referable solely to the movie tickets. The money paid by consumers for the Online Booking Fee is directly linked to the reviewable conduct. The affected consumers can also be identified, as every consumer who purchased tickets online first had to create a Cineplex Connect Account. As Mr Zimmerman's evidence showed, one must log into that account before one can see prices or buy tickets on the website or the App. Cineplex also confirmed in answers to undertakings, which were read into the record at the hearing, that it has an online purchase history for consumers dating back to June 15, 2022, including the number of tickets purchased, the date of purchase and whether the person was a Scene+ or CineClub member at the time. Cineplex could generate information to determine who paid any Online Booking Fee since June 2022 and the total amount of such fees charged to each consumer. It would need some time to do so.

[446] I am not persuaded by Cineplex's submission that an order under paragraph 74.1(1)(*d*) is inappropriate on the basis that consumers got "the value that they were told they were getting", which was the benefit of the advanced seat selection. Mr McGrath and Dr Amir opined that consumers received value when they paid the Online Booking Fees because they purchased movie tickets and a reserved seat in advance, without having to travel to the theatre. In my view, this

position merits little weight. If Cineplex's argument seeks to prevent an order entirely under paragraph 74.1(1)(*d*), I am unable accept it. Receipt of some "value" does not excuse reviewable conduct. Nor should it preclude any possibility of such a remedy in a case in which the consumer actually receives the product or service but paid more than the represented price. Accepting such an argument would also appear to preclude a refund or similar remedy when a displayed price is unattainable due to only a small fixed obligatory charge or fee. Alternatively, if Cineplex's argument seeks not to prevent an order under paragraph 74.1(1)(*d*) but instead to mitigate the quantum payable, it cannot succeed in this case because Cineplex did not attempt to quantify its impact on the quantum to be ordered, either in the evidence or in argument. Cineplex also did not point to any legal or principled basis to consider its argument in the context of a material representation to the public that was false or misleading.

[447] I pause to recognize that paragraph 74.1(1)(*d*) will often be read to enable an order determined by the aggregate amount paid for a single product purchased by many consumers. It is also true that the reasons in this case have raised doubt as to whether the movie ticket and the online seat selection were, in fact, separable into two different products, as Cineplex and Dr Amir contended. However, paragraph 74.1(1)(*d*) comfortably captures the present factual circumstances. The provision refers to "the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold". Cineplex's representations about Online Booking Fees enabled it to generate additional revenue through the sale of movie tickets online and the fee obviously refers to the online booking of movie tickets. The amounts generated by the Online Booking Fee (distinct from the price of the related movie tickets) have been readily determined in an aggregate quantum that is not contested. (Neither party contended that the products "in respect of which" the conduct was engaged in included the actual movie tickets so that the maximum "amount" under paragraph 74.1(1)(*d*) should include the aggregate paid for the tickets.)

[448] In light of these factors, a refund to consumers could be an appropriate and significant part of an overall order in this proceeding, to promote conduct by Cineplex that is in conformity with the purposes of the deceptive marketing provisions of the *Competition Act*. The aggregate amount to be refunded for conduct up to December 31, 2023, would be $38.978 million and Cineplex could be ordered to pay that sum under paragraph 74.1(1)(*d*).

[449] However, I have concluded that it is not appropriate to make an order under paragraph 74.1(1)(*d*) in this case. There are a number of interconnected factors that lead to this conclusion, in part owing to the practical implementation of such an order.

[450] In my view, an order under paragraph 74.1(1)(*d*) should presumptively be in the form of money returned into the hands of the affected consumers by way of refund. The question is then how the funds could be distributed to affected consumers. While the aggregate "amount" of a possible full refund was not disputed in this case, there has been no proposal or evidence on how to distribute individual refunds to consumers. We do not know precisely how many consumers are affected, but there are at least tens of thousands. Some may have paid a single Online Booking Fee and be entitled to a refund of just $1.50, while others may be regular moviegoers or consumers who paid for others' tickets (and Online Booking Fees), who would presumably be entitled to a larger refund. We have no concrete sense of the true scale of the refund process.

[451] The parties did not address the cost of distributing refunds to consumers. There would be costs incurred by Cineplex itself in providing data related to affected consumers. Then there is the cost of an administrator to distribute the funds to affected consumers. The Commissioner did not offer an administration protocol or any evidence on how it might work. The cost of administering the distribution to tens of thousands of consumers could well be very significant.

[452] Thus there is the prospect of a very large number of small refunds, and high administration costs in distributing them to consumers.

[453] The parties' submissions did not address the many practical issues mentioned in subsection 74.1(8) related to the implementation of an order under paragraph 74.1(1)(*d*). It appears that the Tribunal has the ability to order another hearing and to make one or more additional orders, consistent with subsection 74.1(8) and the power to require payment and distribution of an amount "in any manner that the [Tribunal] considers appropriate" under paragraph 74.1(1)(*d*). See comparably: *Commissioner of Competition v The Toronto Real Estate Board,* 2016 Comp Trib 7, at paras 769-781, 786, and the resulting order made soon after (2016 Comp Trib 8). In this case, it is clear that the Tribunal would require additional evidence and submissions on how to implement an order under paragraph 74.1(1)(*d*) and would have to convoke at least one more hearing (and

perhaps several) on the logistics of a refund order. That will take up more of the parties' and the Tribunal's resources, and interfere with the finality of the Tribunal process.

[454] Similarly, if the Commissioner sought an order requiring Cineplex itself to make the refunds to its consumers, the evidence is still not sufficient. Assuming such an order could be made to authorize a refund (and not a credit to consumers) by a respondent itself – something not addressed by either party – there is insufficient evidence about whether it would in fact work, in practical terms, back to June 2022. For example, what would have to be done to provide a refund to credit cards or debit cards (some of which may have expired)? What role would the court or an administrator play in ensuring the refunds are actually paid and received?

[455] There are also concerns about whether all consumers will take up their (small) refunds. The parties would have to consider the scenario in which some of the $38.978 million is not distributed (refunded) to consumers who paid Online Booking Fees within a reasonable period of time. In class proceedings, there are statutory provisions and case law for guidance on *cy-près* issues: see, e.g., *Sun-Rype Products Ltd v Archer Daniels Midland Company,* 2013 SCC 58, [2013] 3 SCR 545, at paras 25-26; *Breckon v Cermaq Canada Ltd*, 2024 FC 225, at paras 49-54; *Sorenson v easyhome Ltd*, 2013 ONSC 4017, at paras 23-28; *Class Proceedings Act*, 1992, SO 1992, c 6, sections 24 and 27.2.

[456] There are a couple of other points relating to remedial fairness that affect the decision to make an order under paragraph 74.1(1)(*d*). One is that Cineplex continued to make the representations and to collect Online Booking Fees after December 31, 2023, up to the time of the hearing. There was no suggestion at the hearing that it had stopped or would stop doing so after the hearing. The evidence justifies an inference that these amounts will have been significant in quantum, but I am loathe to estimate them with sufficient precision to make an order under paragraph 74.1(1)(*d*). Similarly, since August 2022, Cineplex has allowed consumers to redeem their Scene+ points towards the payment of Online Booking Fees. While those consumers were affected by the reviewable conduct, the Commissioner did not argue that the *Competition Act* gives the Tribunal jurisdiction to reverse those redemptions. In both circumstances, an order under paragraph 74.1(1)(*d*) that refunds some consumers but not all affected consumers, for conduct that is presumably continuing, suggests unfairness to more recent consumers and Scene+ members. (I

recognize that it is not inconceivable that these issues could also be addressed by some future order or other means.)

[457] In all the circumstances, I will not make an order under paragraph 74.1(1)(*d*) in this case.

(4) Should the Tribunal Order an AMP?

[458] I turn to a possible order for an AMP. Paragraph 74.01(1)(*c*) provides that the Tribunal may order a corporation that engages in reviewable conduct to pay an AMP "in any manner that the [Tribunal] specifies", in an amount not exceeding the greater of (A) $10 million (and $15 million for each subsequent order) and (B) three times the value of the benefit derived from the deceptive conduct. If the latter amount cannot be reasonably determined, the amount in (B) is 3% of the corporation's worldwide gross revenues. Prior to the recent amendments in 2022, the maximum AMP for a corporation was set at $10 million (and $15 million for each subsequent order), before part (B) was added: see S.C. 2022, c. 10, s. 260; S.C. 2009, c. 2, subs. 424(2).

[459] The maximum AMP in this case is the greater of $10 million and three times the benefit derived from the reviewable conduct (three times $38.978 million or approximately $116.9 million). The possible range for an AMP is therefore $0 to $116.9 million.

[460] As noted, the purpose of an AMP is to promote conduct by the respondent that is in conformity with the deceptive marketing provisions: subsection 74.1(4). Subsection 74.1(5) sets out aggravating and mitigating factors, evidence of which shall be taken into account. As mentioned, one of the factors is any decision in relation to an application for an order under paragraph 74.1(1)(*d*).

[461] There is some guidance from prior cases in applying the factors listed by Parliament to reach an appropriate quantum. Where there is guidance, the decisions suggest that the circumstances should be analyzed to determine whether a factor is aggravating, mitigating or neutral. None of the prior decisions considered the current monetary range of AMPs enacted in 2022, and several were decided before the amendments to the *Competition Act* in 2009 that raised the maximum AMP from $100,000 to $10 million: S.C. 2009, c. 2, subs. 424(2). None of the decisions involved making or analyzing a possible concurrent order under paragraph 74.1(1)(*d*). See *Chatr 2014*, at paras 54-77; *Yellow Page Marketing*, at paras 57-69; *Commissioner of*

Competition v Premier Career Management Group Corp and Minto Roy, 2010 Comp Trib 17; *Commissioner of Competition v Sears Canada Inc,* 2005 Comp Trib 13; *PVI International Inc*, at paras 65-66; *Gestion Lebski inc,* at paras 310-313, 318-319.

[462] In the present case, the following are important aggravating factors:

(a) The reviewable conduct occurred on the Cineplex's website and App and affected consumers across Canada and in all of Cineplex's theatres. As of December 31, 2023, Cineplex owned, leased or had a joint venture in 1,631 screens in 158 theatres.

(b) The reviewable conduct occurred every day starting in mid-June 2022 and continued up to the commencement of the hearing.

(c) The reviewable conduct affected tens of thousands of consumers.

[463] The representations at issue were material to consumers. As an element of the reviewable conduct, this factor is related to the amounts paid as Online Booking Fees. There is no specific evidence that the representations were material to consumers' purchase of movie tickets (distinct from materiality to the Online Booking Fee).

[464] There is no evidence before the Tribunal that the affected consumers had characteristics that made them vulnerable or that they were specifically exploited by the reviewable conduct. No party sought to distinguish amongst the categories of consumers represented by General Admission, Seniors and Children.

[465] Cineplex is a large business enterprise. It is Canada's largest film exhibitor. The Agreed Statement of Facts advised that in 2022, Cineplex had revenues of approximately $1.269 billion and in 2023, revenues of approximately $1.389 billion. Cineplex did not make submissions or refer to specific evidence on its financial position or ability to pay (despite some evidence in the record in Cineplex's Management's Discussion and Analysis for 2022 and 2023, the latter dated February 7, 2024).

[466] The gross revenue from sales affected by the reviewable conduct is $38.978 million up to December 31, 2023. This is very significant revenue. Absent other concerns, this amount could

have been the subject of an order under paragraph 74.1(1)(*d*). The Commissioner offered no specific evidence of additional revenue from Online Booking Fees after December 31, 2023, up to the end of the hearing or the anticipated fees generated after the hearing.

[467] The Commissioner did not adduce evidence of adverse effects or a substantial lessening of competition in any specific competition market (recognizing that there is *per se* harm to competition from reviewable conduct under paragraph 74.01(1)(*a*): *Premier Career Management Group FCA*, at para 61).

[468] Cineplex submitted that it offered the online booking of seats to provide a choice to consumers, which was said to be welfare enhancing. Cineplex also argued that consumers obtained value for their purchases, including the option of choosing their preferred seats among those available at the time of purchase, in advance of their showings.

[469] I consider these points to favour Cineplex, but only mildly. Its position must be tempered by the fact that Cineplex began to offer the online seat bookings in 2020, well before it decided in 2022 to impose the Online Booking Fee. In addition, Cineplex implemented the Online Booking Fee after engaging in a process designed to find alternatives to drive revenue and margin. The Online Booking Fee effectively increased ticket prices, as Cineplex was aware at the time in June 2022. I am not persuaded that Cineplex's submissions on these issues should be given much weight, particularly because of the nature of the representations and that it implemented the Online Booking Fee well after advance seat selection was available online in order to raise revenues, and in a manner that obscured their existence and quantum.

[470] For similar reasons, Cineplex's subjective belief on its compliance with the *Competition Act* and the absence of complaints to alert Cineplex have little weight. The responsibility to comply with the *Competition Act* was on Cineplex. With respect to complaints, Cineplex did not change its conduct after the Commissioner commenced this proceeding, so it is doubtful that it would have done anything different in response to complaints.

[471] The Commissioner did not suggest that Cineplex has any history of non-compliance with the *Competition Act*, which is an attenuating factor.

[472] Relatedly, while Cineplex continued its representations (i.e., did not self-correct) in the face of the Commissioner's application, there is no evidence that leads me to believe Cineplex will not self-correct by appropriately modifying its website and App after it learns that the Tribunal has found that it has engaged in reviewable conduct.

[473] As analyzed above, the Tribunal will not make an order under paragraph 74.1(1)(*d*), owing mainly to practical concerns about the implementation of such an order. The Tribunal's decision not to do so, and why, is relevant as a factor related to the amount of an AMP under paragraph 74.1(5)(*j*). In assessing an AMP, I have accounted for the facts and arguments already analyzed under paragraph 74.1(1)(*d*). In this case, these considerations complement and support an AMP in the amount of the Online Booking Fees collected by Cineplex.

[474] The Ontario Superior Court in *Chatr 2014* held that the amount of an AMP to be paid by a respondent must be considered through a lens of proportionality: *Chatr 2014,* at paras 12-16. Justice Morrocco stated:

> [15] Proportionality also requires keeping in mind the counterbalancing effects of the respondents' reviewable conduct, such as loss of reputation. Genuine companies like the respondents are loathe to see their reputations damaged and it can be assumed they will take steps to prevent this from happening again in the future. In this way, the counterbalancing effects of reviewable conduct will generally have a conformist effect and thus will reduce the amount of the monetary penalty.
>
> [16] In applying the principle of proportionality the court also has to keep in mind that there is no notion of general deterrence in subsection 74.1(4).

[475] I accept that Cineplex's reputation will be negatively affected by the outcome of this proceeding and the orders that will be made.

[476] The most influential factors related to an AMP are: the quantum Cineplex collected from its reviewable conduct (which could have been the subject of a concurrent order under paragraph 74.1(1)(*d*) but is not in this case, for reasons already discussed); the geographic scope, frequency, extent and duration of the reviewable conduct (including the absence of self-correction after this proceeding started) all of which are aggravating factors; and the relative size of Cineplex's

business. I recognize that there is some conceptual overlap within these items (such as the geographic scope of the conduct and the size of Cineplex's business).

[477] Finally, I return to the Commissioner's submissions. In final argument, he submitted that the Tribunal should impose an AMP in the amount Cineplex has gained from engaging in the misleading conduct. As a matter of fairness to Cineplex during the Tribunal process, I will not impose an AMP in this case that exceeds the proven financial gains it collected through the Online Booking Fee from June 2022 to December 31, 2023.

[478] Considering the parties' submissions, the purpose of an order and limitations on it under subsection 74.1(4), the factors under subsection 74.1(5), and the range of minimum and maximum monetary penalty that may be ordered, I conclude that the Tribunal should impose an AMP in the amount of $38.978 million under paragraph 74.1(1)(*c*).

(5) Subsection 74.1(4) and Overall Proportionality of the Tribunal's Order

[479] In my view, the Tribunal's overall order is proportional and respects Parliament's directions in subsection 74.1(4). In my view, its terms are proportional to the nature of Cineplex's reviewable conduct (including its severity, frequency, duration, materiality, and geographic scope), the number and proportion of Cineplex consumers affected, the quantum of Online Booking Fees collected, and Cineplex's financial position. In addition:

(a) This is not a case in which the conduct was designed deliberately to deceive members of the public, nor were the representations directed at a vulnerable segment of the public.

(b) Cineplex will suffer harm to its reputation and, as in *Chatr 2014*, will likely take steps to end the reviewable conduct.

(c) No evidence suggested that Cineplex has any history of non-compliance with the *Competition Act*.

(d) While the reviewable conduct had been occurring for more than 19 months at the time of the hearing, Cineplex requested a prompt hearing on the merits of the Commissioner's application, which occurred.

[480] The order also accounts for the fact that this is the first Tribunal case that has interpreted and applied subsection 74.01(1.1), which was recently added to the *Competition Act* adjacent to the long-standing provision concerning false or misleading representations to the public in paragraph 74.01(1)(*a*).

IX. CONCLUSION

[481] The Commissioner's application will be allowed and remedies granted in accordance with the conclusions immediately above.

[482] The Commissioner requested a costs award. The Tribunal has described the legal principles applicable to costs in recent cases: see *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 02, at para 723; *P&H*, at paras 768-776.

[483] The parties agreed that the successful party should be awarded $77,000 in respect of legal fees, plus HST. They each filed written submissions on the issues that remained in dispute, which concerned disbursements for experts and other items. Most of those submissions concerned the reasonableness of Cineplex's claims for expert fees and disbursements, if Cineplex were to prevail on the merits.

[484] The Commissioner has succeeded. He shall have his legal costs in the amount agreed by the parties. He filed a Bill of Costs in the amount of $178,961.16. He submitted that an order of $160,000 (inclusive of tax) was a fair quantum for disbursements. Applying the principles in the case law, I agree.

[485] As I did on the last day of the hearing, I would like to recognize and thank both parties' lawyers, paralegals and other staff for their dedicated work both inside and outside the hearing room.

[486] I also commend Mr Hood and Mr Russell as senior counsel for ensuring that Ms Cybulsky and Mr Abadi had meaningful time on their feet during the hearing. Such "ice time" is essential to the development of litigation counsel early in their careers and is something that the Tribunal will encourage and expect during future proceedings.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[487] The application is allowed.

[488] For a period of ten (10) years, Cineplex:

(a) shall not make representations to the public on its website or App concerning Online Booking Fees that are false or misleading in a material respect, and

(b) shall not engage in substantially similar conduct that constitutes reviewable conduct under paragraph 74.01(1)(*a*) (including subsection 74.01(1.1)).

[489] Cineplex shall pay an administrative monetary penalty under paragraph 74.1(1)(*c*) of the *Competition Act* in the amount of $38,978,000, within 30 days of this Order.

[490] Cineplex shall pay costs to the Commissioner in the amounts of:

(a) $77,000 plus HST, in respect of legal fees, and

(b) $160,000 (inclusive of tax) in respect of disbursements.

DATED at Ottawa, this 23rd day of September, 2024.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

Jonathan Hood
Irene Cybulsky

For the respondent:

Cineplex Inc.

Robert S. Russell
Martin Abadi
Raymond Ashurov
Josh Abaki
Erin Penney (paralegal)