

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT

No.: 500-06-001291-240

SÉBASTIEN PONTON

Applicant

v.

CINEPLEX INC.

-and-

CINEPLEX ENTERTAINMENT LIMITED
PARTNERSHIP

Defendants

**APPLICATION BY DEFENDANTS CINEPLEX INC. AND CINEPLEX
ENTERTAINMENT LIMITED PARTNERSHIP FOR LEAVE TO ADDUCE
RELEVANT EVIDENCE
(Art. 574 al 3 C.C.P.)**

TO THE HONORABLE DOMINIQUE POULIN S.C.J., DEFENDANTS CINEPLEX INC.
AND CINEPLEX ENTERTAINMENT LIMITED PARTNERSHIP RESPECTFULLY
SUBMIT AS FOLLOWS:

I. INTRODUCTION

1. On January 19, 2024, the Applicant filed his *Application for Authorization to Institute a Class Action and Appoint Applicant as Class Representative* and instituted the present class action (the “**Application for authorization**”). He seeks to obtain a remedy for people who purchased a movie ticket from the Defendants **Cineplex Inc. and Cineplex Entertainment Limited Partnership** (collectively, “**Cineplex**”);
2. The Applicant alleges that Cineplex makes representations to Quebec consumers that are misleading or deceptive about the price that consumers will have to pay to purchase a movie ticket because of an alleged “mandatory additional” online booking fee;
3. Through the Application for authorization, Applicant Sébastien Ponton seeks authorization to bring a class action on behalf of the following class:

All persons who, in the province of Quebec, paid an Online Booking Fee when purchasing a Movie Ticket through www.cineplex.com or Cineplex Mobile from the date on which Cineplex began charging Online Booking Fees in Quebec until the date that this action is certified as a class proceeding.

4. The Defendants hereby request leave to adduce relevant evidence in order to rectify, clarify, or rebut these allegations, which are incomplete, erroneous or misleading in many respects and to assist the court in adequately evaluating the legal syllogism advanced by the Application for authorization and its chances of success pursuant to s. 575(2) CCP (the “**Application**”);

II. THE EVIDENCE THE RESPONDENTS SEEK TO ADDUCE

5. Through the present Application, Cineplex requests leave to adduce relevant evidence in:
 - (a) To clarify that the online booking fee provides the customer with distinct additional benefits, including advance seat selection;
 - (b) To clarify that there is no single price for a movie ticket whether purchased in person or online;
 - (c) To clarify that the online booking fee is variable based on a number of factors and that it may vary or not be charged depending on whether a consumer participates in certain loyalty or membership programs and also for certain promotional coupons;
 - (d) To clarify that instantaneously, upon selecting the tickets that the consumer wishes to buy online, the online booking fee is separately displayed and the price of the ticket, including the online booking fee (if the online booking fee applies), is displayed immediately;
 - (e) To present complete versions of the screenshots included in Exhibits P-4, P-5, P-6, P-7 and P-8;
 - (f) To provide the Court with relevant proceedings filed before the Competition Tribunal, which will be useful for the Court to determine the scope of the authorization, in light of the debate already held before the Competition Tribunal.
6. The above-mentioned evidence will be adduced by way of an Affidavit of Mr. Daniel Francis McGrath, communicated in support of the present Application as Exhibit R-1, which refers to the documentary evidence identified as Exhibits R-2 to R-4;
7. This evidence is necessary, useful, reasonable and proportional to the study of the criteria for authorization, and to demonstrate that several facts alleged in the

Application for authorization are erroneous, misleading and do not appear to justify the conclusions sought;

8. The present Application is well-founded in fact and in law;

III. CONCLUSION

9. The evidence Cineplex seeks leave to adduce will assist the Court in determining whether the authorization criteria of article 575 CCP are met and, in particular, whether Applicant have shown an arguable case (para. 575 (2) CCP);
10. If granted, the evidence will indeed assist the Court in understanding the vital elements of the Application for authorization and in determining whether the facts alleged appear to justify the conclusions sought;
11. For these reasons, Cineplex seeks leave from this Honourable Court to adduce the above-mentioned affidavit and attached documents as relevant evidence.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

- A. **GRANT** the present *Application by Defendants Cineplex Inc. and Cineplex Entertainment Limited Partnership for Leave to Adduce Relevant Evidence*;
12. **ALLOW** Defendants Cineplex Inc. and Cineplex Entertainment Limited Partnership to file the Affidavit of Mr. Daniel Francis McGrath, filed as Exhibit R-1, which refers to the documentary evidence identified as Exhibits R-2 to R-4;
- B. **THE WHOLE** without legal costs, save in case of contestation.

Montréal, September 16, 2024



Borden Ladner Gervais LLP

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CANADA
PROVINCE OF QUÉBEC
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SÉBASTIEN PONTON

Applicant

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CINEPLEX INC.

-and-

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PARTNERSHIP

Defendants

AFFIDAVIT OF DANIEL FRANCIS MCGRATH

I, the undersigned, Daniel Francis McGrath, carrying on my profession at Cineplex Inc. and Cineplex Entertainment Limited Partnership ("**Cineplex**") having its head office at 1303 Yonge Street, Toronto, Ontario, Canada M4T 2Y9, solemnly declare:

I. INTRODUCTION

1. I am the Chief Operating Officer at Cineplex, Defendant in the present case.
2. I have reviewed the Applicant's *Application for Authorization to Institute a Class Action and Appoint Applicant as Class Representative* (the "**Application for authorization**").
3. I have personal knowledge of the facts set forth herein and/or I have conducted internal inquiries with Cineplex to determine the information set forth in this Affidavit.

II. OVERVIEW OF CINEPLEX

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

5. Cineplex sells movie tickets through various forums, including through its website at Cineplex.com (the “**Website**”), through its mobile application, the Cineplex Mobile App (the “**App**”), and in person at Cineplex’s theatres.
6. Cineplex offers its guests the opportunity to join CineClub, a paid movie subscription program, which provides members with benefits accessible across Cineplex’s businesses nationwide including Cineplex theatres.
7. Cineplex is also a joint owner of the Scene+ loyalty program, which allows customers to earn and redeem points for entertainment, movies, travel, shopping and dining. The Scene+ program is free for members to join.
8. Cineplex Inc. is a publicly traded company that is not directly involved in the operations of Cineplex, including of its Website and App.

III. FACTORS INVOLVED IN TICKET PRICING

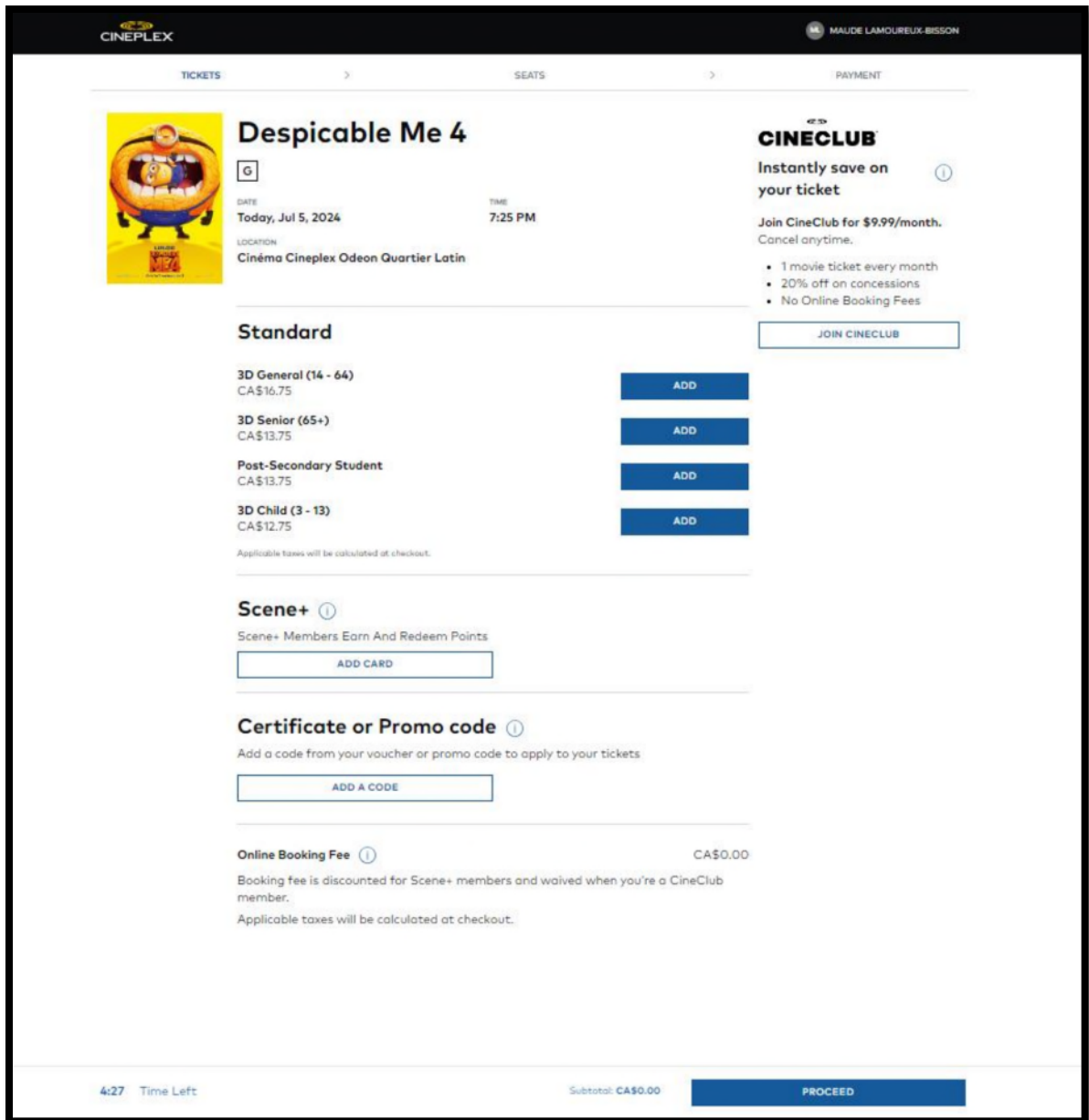
9. Customers can purchase movie tickets either in person (at the theatre) or online (using the Website or the App).
10. Due to the many viewing options available at Cineplex’s theatres, there is no single price for a movie ticket whether purchased in person or online. Ticket prices are differentiated in a number of ways. The Website and the App are both interactive based on the customer’s choices.
11. Prices differ by theatre location -and within each location- and vary according to the age of the moviegoer, the theatre experience (IMAX, VIP, 4DX, ScreenX, UltraAVX, D-BOX, Clubhouse), the day of the week, movie release date and whether the moviegoer is a member of Scene+ or of the CineClub.
12. Prices also vary based on whether the customer wants to purchase the ticket at the theatre or online with an advance seat reservation.
13. If the customer decides to purchase online and selects a ticket category, then the online booking price (which includes the online booking fee, when applicable) is instantaneously and contemporaneously shown on the very first page of the Website or App.
14. The customer can then move forward through the advance seat selection to the completion of the purchase on the pages that follow.
15. There is no secondary payment (other than taxes) subsequently introduced on the pages that follow the very first page of the Website or App.

IV. ADVANCE TICKET PURCHASES AND ONLINE BOOKING FEE

16. Customers can purchase advance tickets, which come with a guaranteed seat, in more than one way. Customers can purchase an advance ticket by attending in person at the theatre, or via the Website or the App ("**Advance e-Ticket**").
17. On June 15, 2022, Cineplex introduced the online booking fee for certain Advance e-Tickets purchased in the online booking system.
18. The introduction of the online booking fee did not impact the pricing of tickets that could be purchased at the theater.
19. The online booking fee is variable based on a number of factors such as whether the customer is a CineClub or Scene+ member, promotional coupons and the number of tickets purchased. CineClub members are not charged the online booking fee and Scene+ members who are not CineClub members are charged an online booking fee of \$1.00 per ticket (up to a maximum of four tickets or \$4.00). Further, the online booking fee is not charged for certain promotional coupons.

V. PURCHASING PROCESS

20. Consumers wishing to view movie availability and pricing using the Website begin by either selecting a theatre or a movie from the navigation bar. Once they select their preferred theatre location, the movie they want to see, their preferred theatre experience, and their preferred showtime, consumers are asked to sign into their Cineplex account.
21. Immediately after signing in, the first page that the consumer sees is the "Tickets" page, which lists the types of tickets available for purchase and their corresponding prices when purchased at the theatre for the applicable date and theatre experience.
22. Consumers who want to purchase tickets at the theatre and simply visit the Website to determine the availability of a movie, can determine the price and availability at the theatre of their choice immediately and then exit the Website.
23. No price for online purchases is shown before the consumer makes the selection of the type of ticket they want to purchase. Prior to ticket selection, the subtotal for an online purchase at the bottom of the page is \$0.00, as indicated in the "Tickets" page screenshot:



24. Below is what customers will see when they click on the Online Booking Fee icon:

✕

Online Booking Fee

\$1.50 per movie ticket
Non-Refundable

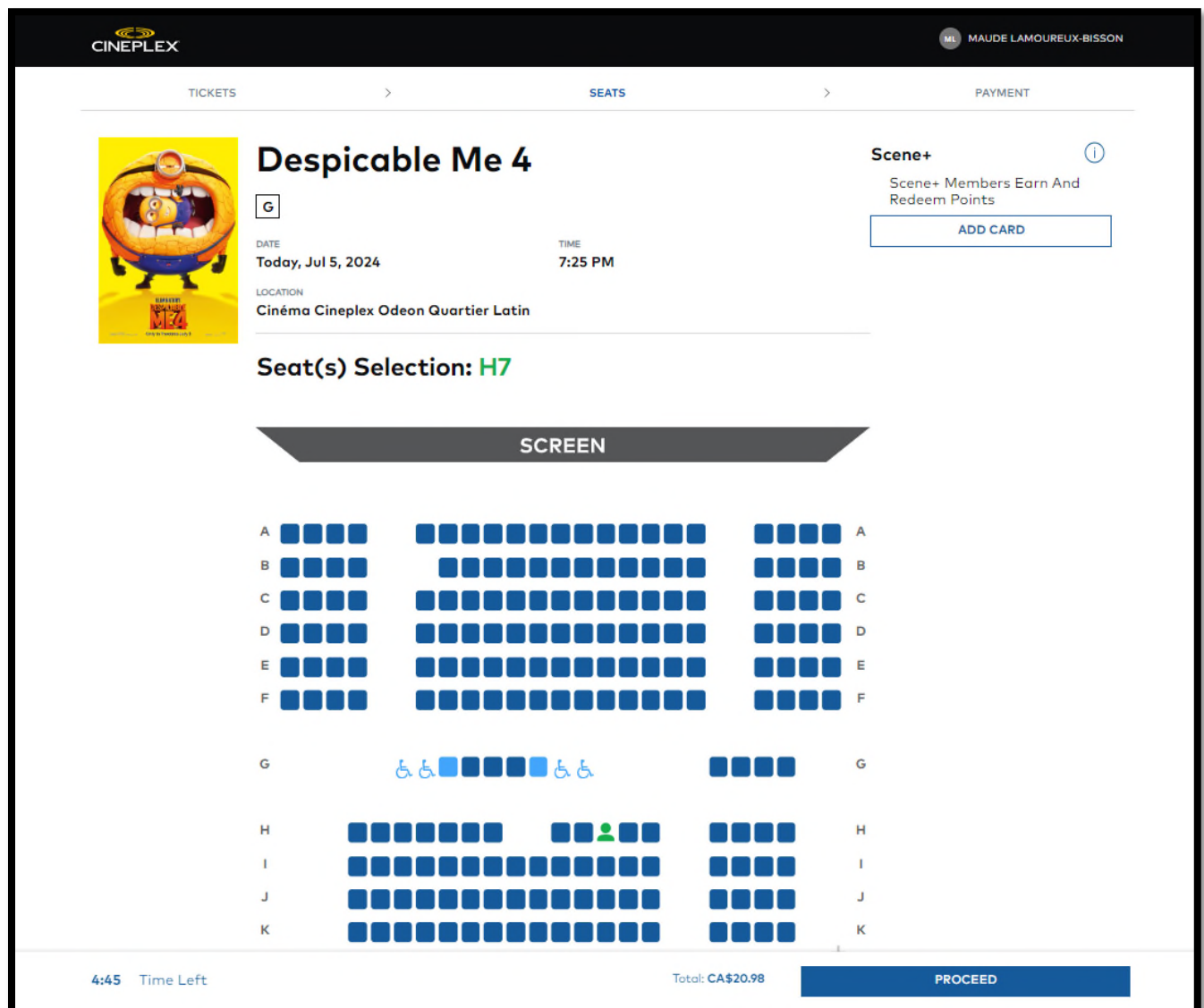
Online booking fee is capped at a maximum of 4 tickets per transaction.

0 Movie Tickets x \$1.50 = **\$0.00**

25. Instantaneously, upon selecting the tickets that the consumer wishes to buy online, the online booking fee is separately displayed and the price of the ticket, including the online booking fee (if the online booking fee applies), is displayed immediately to the left of the "Proceed" button, or "call-to-action" button, as indicated in the "Tickets" page (after selection) screenshot:

The screenshot shows the Cineplex website interface for purchasing tickets to 'Despicable Me 4'. The page is titled 'TICKETS' and includes navigation links for 'SEATS' and 'PAYMENT'. The movie details section shows the title 'Despicable Me 4', a rating of 'G', the date 'Today, Jul 5, 2024', the time '7:25 PM', and the location 'Cinéma Cineplex Odeon Quartier Latin'. The 'Standard' ticket section lists three options: '3D General (14 - 64)' for CA\$16.75, '3D Senior (65+)' for CA\$13.75, and 'Post-Secondary Student' for CA\$13.75. The 'Scene+' section includes a link to 'ADD CARD' and a note that 'Scene+ Members Earn And Redeem Points'. The 'Certificate or Promo code' section includes a link to 'ADD A CODE'. The 'Online Booking Fee' section shows a fee of CA\$1.50, with a note that it is discounted for Scene+ members and waived for CineClub members. The subtotal is CA\$18.25, and the Online Booking Fee is CA\$1.50. A 'PROCEED' button is located at the bottom right of the page.

26. A consumer cannot proceed with the online purchase process until the consumer selects a ticket on the "Tickets" page and also clicks "Proceed". If a consumer clicks the "Proceed" button on the "Tickets" page without first selection at least one ticket, and error message is displayed requiring the selection of a ticket.
27. By clicking on the "Proceed" button, the consumer then enters the online purchasing process and is taken to the "Seats" page screenshot, where they are able to make seat selection and reservation in advance, and with the added convenience of doing this online. A total price is shown at the bottom of the page, which includes the online booking fee (if applicable) and tax.



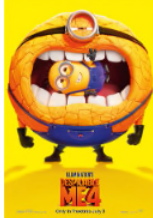
28. Once the consumer has made a seat selection, the consumer is taken to the "Payments" page, where the consumer is provided with an "Order Summary" that provides a breakdown of the purchase price. Consumers can then select their

payment method and proceed to enter their payment information, as appears from the “Payment” page screenshot:

The screenshot shows the 'Payment' page for a movie ticket purchase on the Cineplex website. The page is titled 'Despicable Me 4' and shows the movie poster, rating 'G', date 'Today, Jul 5, 2024', time '7:25 PM', and location 'Cinéma Cineplex Odeon Quartier Latin'. The user is logged in as 'MAUDE LAMOUREUX-BISSON'. The 'Payment Methods' section includes options for 'Gift Card' and 'Credit Card'. The 'Order Summary' table shows the total cost of CA\$20.98. A 5-minute countdown timer is visible at the bottom left, and a 'PROCEED' button is at the bottom right.

CINEPLEX ML MAUDE LAMOUREUX-BISSON

TICKETS > SEATS > **PAYMENT**

 **Despicable Me 4** G

DATE: Today, Jul 5, 2024 TIME: 7:25 PM

LOCATION: Cinéma Cineplex Odeon Quartier Latin

Scene+ 1
Scene+ Members Earn And Redeem Points
[ADD CARD](#)

Payment Methods

Gift Card
[ADD A GIFT CARD](#)

Credit Card
[ADD OTHER PAYMENT METHOD](#)

Order Summary

Movie Tickets (1)	CA\$16.75
Online Booking Fee i	CA\$1.50
Taxes	CA\$2.73
Total	CA\$20.98

 By continuing past this page, you agree to our [TERMS & CONDITIONS](#).

4:52 Time Left Total: CA\$20.98 [PROCEED](#)

29. The 5-minute countdown, which resets each time the consumer changes page - and therefore progresses through the payment process - serves to guarantee the consumer that his or her seat will be reserved long enough to complete the transaction.
30. The process for purchasing tickets on the App is similar to the purchasing process on the Website described above. The only difference is that after App users select their preferred movie and showtime, they are taken to the Tickets page without signing in (where they are already signed into their account). The remainder of the purchasing process is the same as on the Website.

VI. PROCEEDINGS BEFORE THE COMPETITION TRIBUNAL

31. A Notice of Application of the Commissioner of Competition was filed against Cineplex on May 18, 2023, in connection with Cineplex' s online booking fee, for an order pursuant to section 74.1 of the *Competition Act*, R.S.C 1985, c. C-34, as amended, as appears from the Notice of Application attached herewith as **Exhibit R-2**.
32. Cineplex opposed to this Notice of Application, as appears from its response dated June 30, 2013, attached herewith as **Exhibit R-3**.
33. The Commissioner of Competition filed a reply on July 14, 2023, as appears from the reply, attached herewith as **Exhibit R-4**.
34. A hearing of six (6) days was held in February 2024 before the Competition Tribunal on the merits of the Commissioner of Competition's Notice of Application before the Honourable Andrew D. Little, Chair of the Competition Tribunal, who reserved his judgment.
35. All the facts herein are true and correct.

AND I HAVE SIGNED in Toronto, ON, on September 16, 2024:

Daniel Francis McGrath

Daniel Francis McGrath

Declared under oath remotely before me by technological means
in Montréal, QC, on September 16, 2024

Nathalie Angers



Nathalie Angers
Commissioner for Oaths for Québec
And for outside of Quebec # 137 908

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

Date: May 18, 2023
CT- 2023-003

Annie Ruhlmann for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

1

CT-2023-**THE COMPETITION TRIBUNAL**

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

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

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

CINEPLEX INC.

Respondent

NOTICE OF APPLICATION

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

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

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

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

APPLICATION

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

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. OVERVIEW

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

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

I. THE PARTIES

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

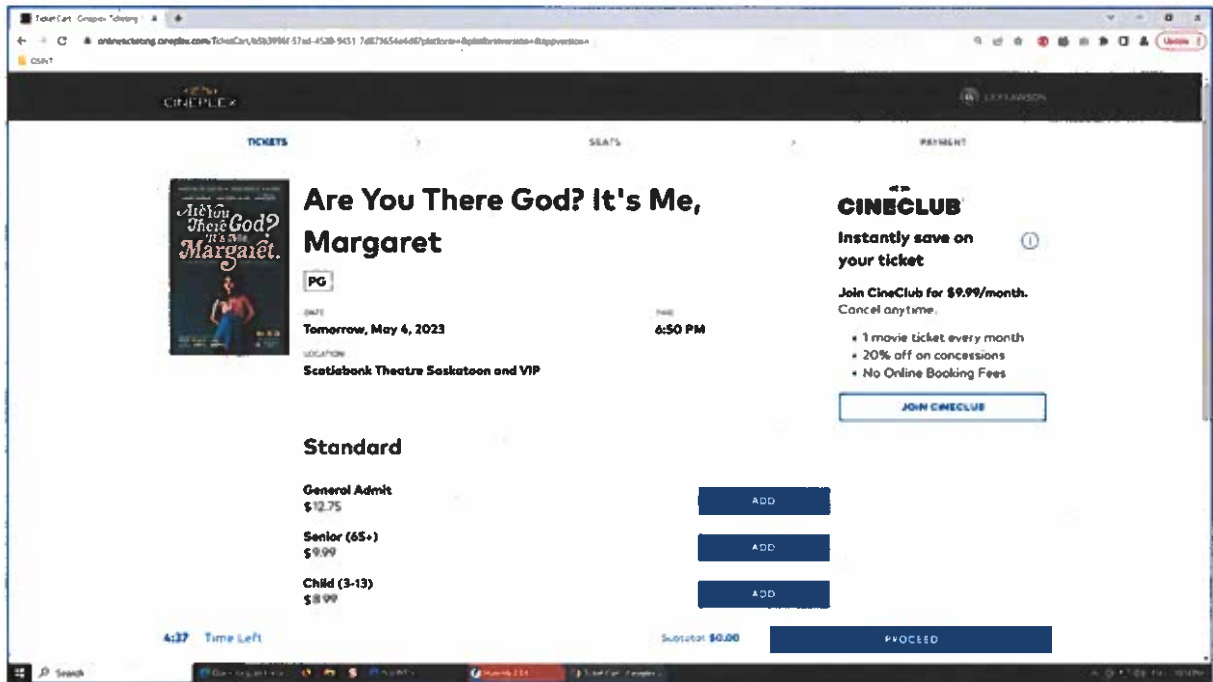
II. CINEPLEX'S DECEPTIVE MARKETING PRACTICES

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

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

The Unattainable Price Representations

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



The fixed obligatory fees

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

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

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

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

The Unattainable Price Representations are false or misleading to consumers

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

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

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

The Unattainable Price Representations are material to consumers

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

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

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

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

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

The image shows two screenshots of the Cineplex website's ticket selection interface. The top screenshot displays the movie 'Shazam! Fury of the Gods' with a PG rating, scheduled for today at 6:55 PM at the Scotiabank Theatre Vancouver. It lists three ticket options: General Admit (\$14.50), Senior (65+) (\$10.50), and Child (3-13) (\$9.50). A 'CINECLUB' promotion offers a \$9.99/month membership with benefits like 1 movie ticket every month and 20% off on concessions. The bottom screenshot shows the 'Standard' ticket selection screen with the same three ticket options and 'ADD' buttons. Below the ticket options, there are sections for 'Scene+' (Members Earn And Redeem Points), 'Certificate or Promo code', and 'Online Booking Fee' (\$0.00). The bottom screenshot also shows a 'PROCEED' button and a 'Time Left' timer.

Shazam! Fury of the Gods

PG

DATE: Today, Apr 5, 2023

TIME: 6:55 PM

LOCATION: Scotiabank Theatre Vancouver

Standard

General Admit \$14.50

Senior (65+) \$10.50

Child (3-13) \$9.50

Applicable taxes will be calculated at checkout

CINECLUB

Instantly save on your ticket

Join CineClub for \$9.99/month. Cancel anytime.

- 1 movie ticket every month
- 20% off on concessions
- No Online Booking Fees

JOIN CINECLUB

ADD

ADD

ADD

3:45 Time Left

Subtotal: \$0.00

PROCEED

Scene+

Scene+ Members Earn And Redeem Points

ADD CARD

Certificate or Promo code

Add a code from your voucher or promo code to apply to your tickets

ADD A CODE

Online Booking Fee

Booking fee is discounted for Scene+ members and waived when you're a CineClub member.

Applicable taxes will be calculated at checkout.

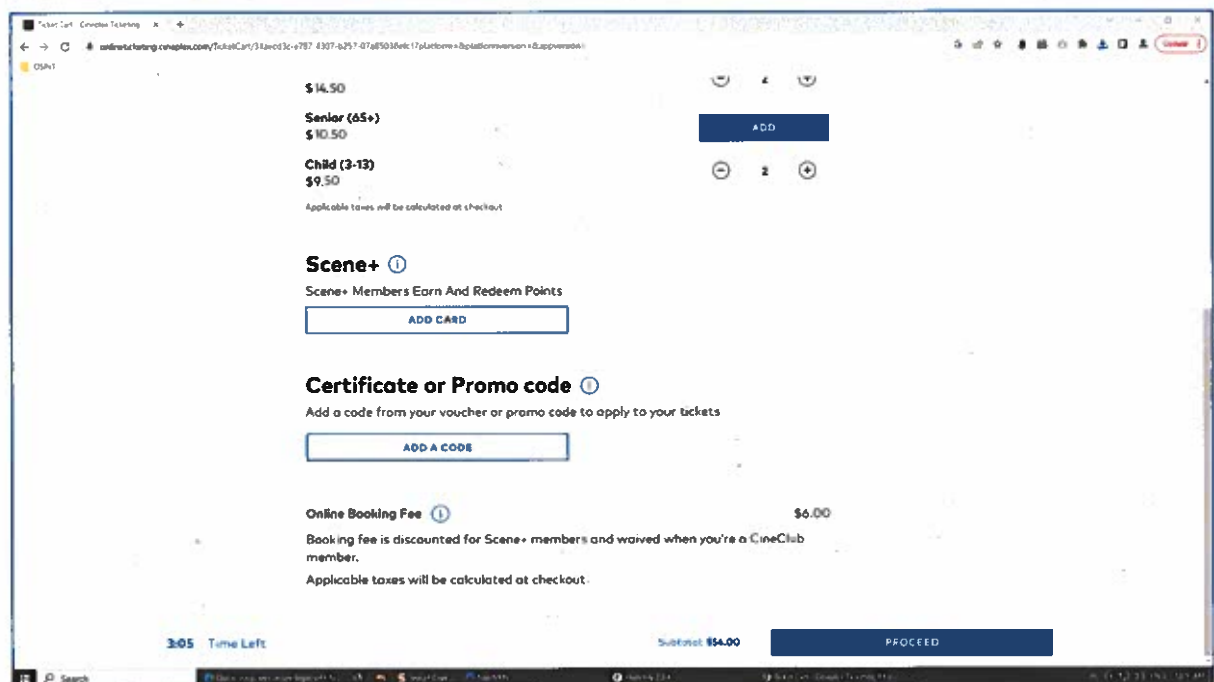
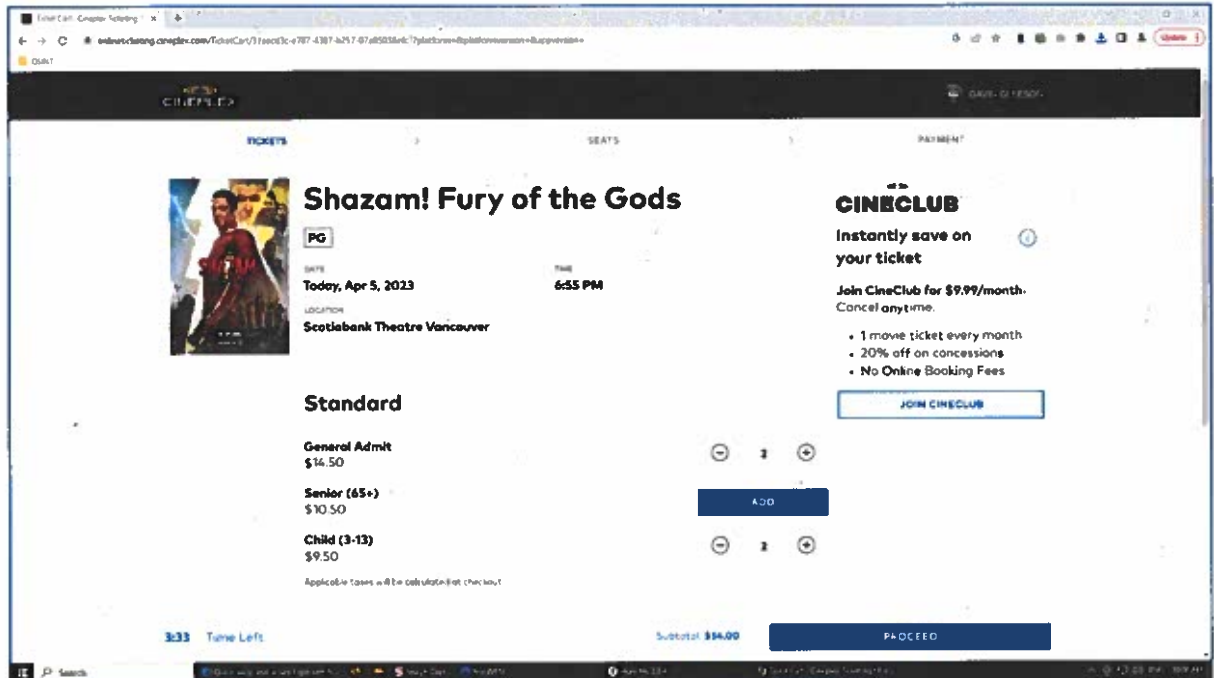
3:09 Time Left

Subtotal: \$0.00

PROCEED

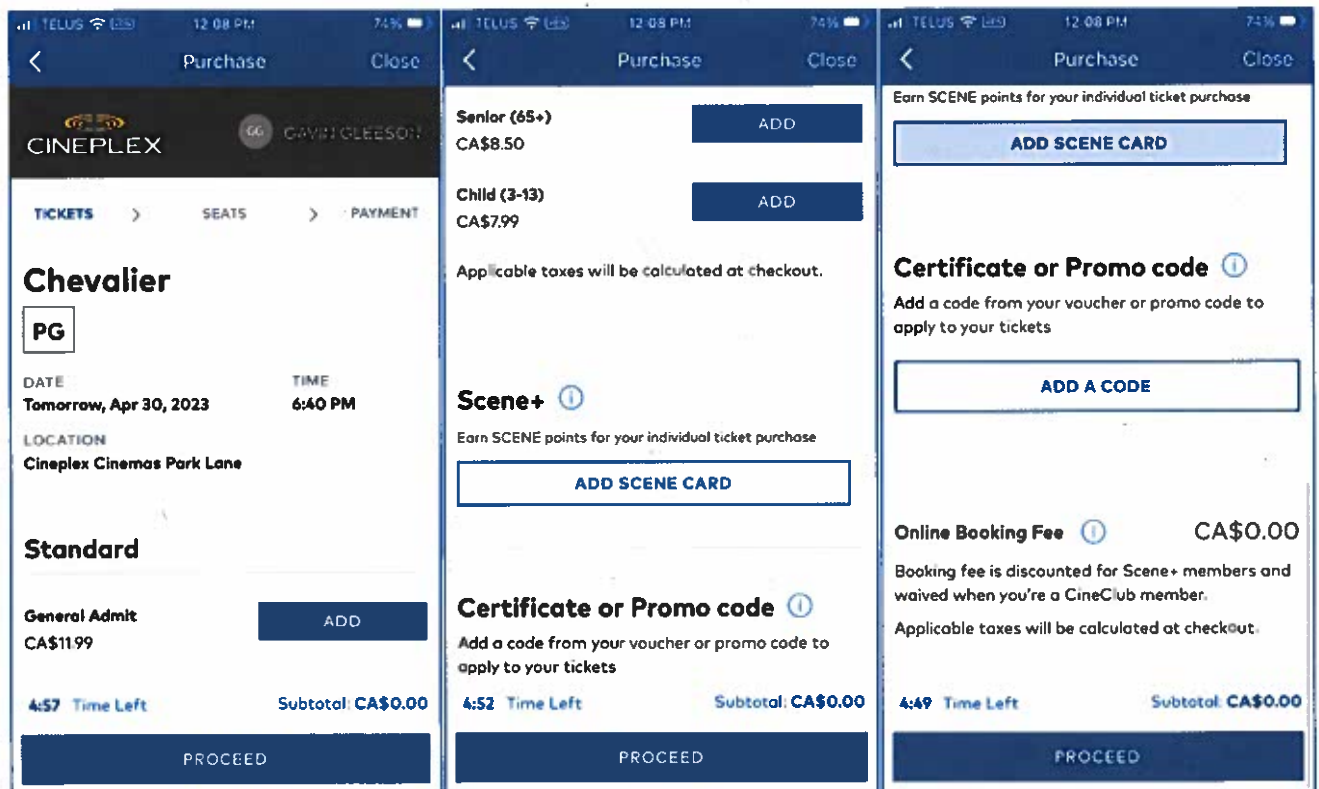
30. The following images reveals the full cost of the Movie Tickets after Cineplex has added the fixed obligatory Online Booking Fee to the

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

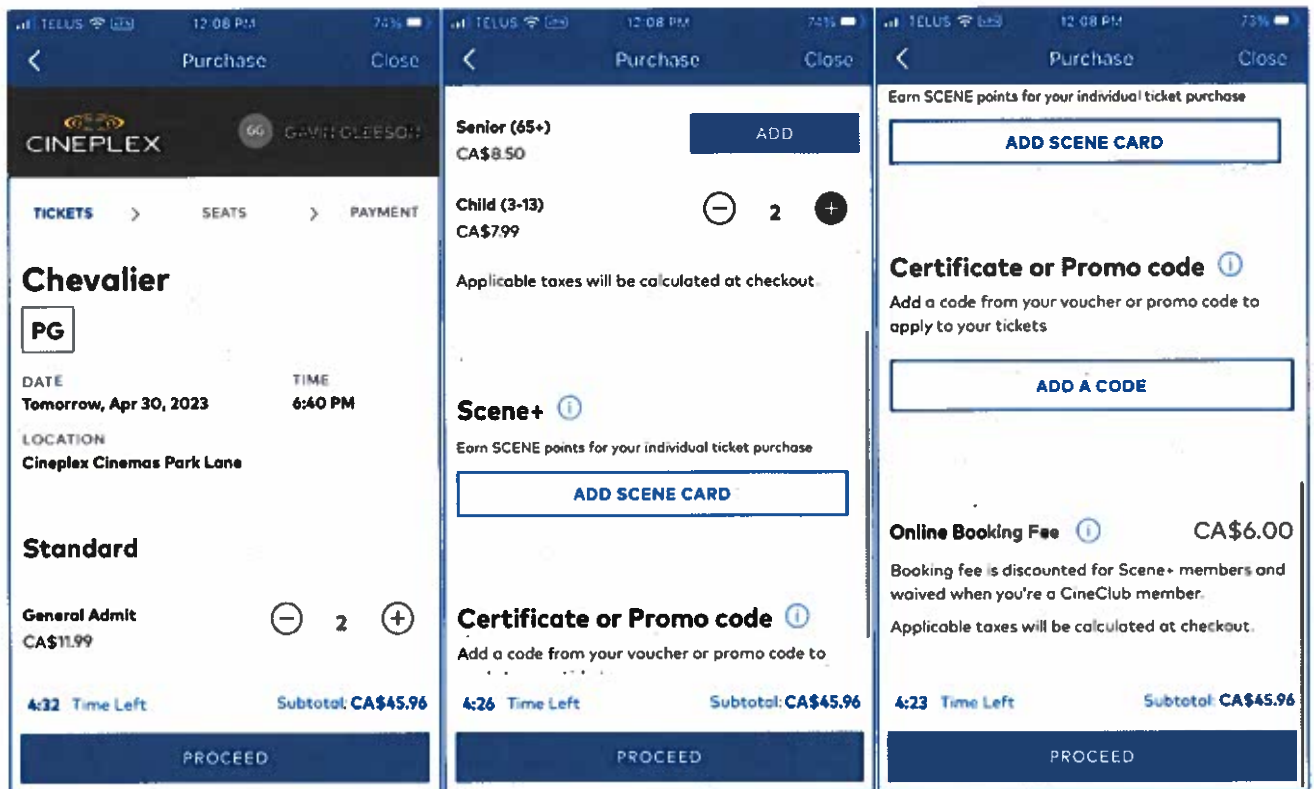


App Example 2 – April 30, 2023, *Chevalier*

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



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



IV. AGGRAVATING FACTORS

33. The deceptive conduct described herein is aggravated by the factors referred to in subsection 74.1(5) of the Act, including (but not limited to) the following:
- a. Cineplex is the largest and only national movie exhibitor carrying on business in Canada and the Unattainable Price Representations have been made and continue to be made across Canada;
 - b. Cineplex engages in the conduct at issue on a daily basis, and has continued to engage in it for over eleven months as of the time of filing this Application;

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

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

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

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

V. RELIEF SOUGHT

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

VI. PROCEDURAL MATTERS

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

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

**Boswell,
Matthew**

Digitally signed by Boswell,
Matthew
Date: 2023.05.17 17:05:55
-04'00'

Matthew Boswell
Commissioner of Competition

**I hereby certify this to be a true copy of the
original document /**

**Je certifie par la présente que ceci est une copie
conforme au document original**

Dated this / Fait ce May 18, 2023

Ruhlmann, Annie

Digitally signed by Ruhlmann, Annie
DN: cn=CA, o=CC, ou=ATSSC-EDDATA, c=ca, email=Annie.Ruhlmann@cc.gc.ca
Reason: I have reviewed this document
Location: Gatineau
Date: 2023.05.18 10:31:47.04:00
Rand PDF Editor Version: 11.2.3

**For Registrar, Competition Tribunal /
Pour Registraire, Tribunal de la concurrence**

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

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AND TO : The Registrar
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 584

CT-2023-003

THE COMPETITION TRIBUNAL

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

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

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

—and—

CINEPLEX INC.

Respondent

RESPONSE

1. The Respondent, Cineplex Inc. (“Cineplex”), submits this Response to the Notice of Application of the Commissioner of Competition (the “**Commissioner**”), filed on May 18, 2023 (the “**Application**”) for an order pursuant to section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “*Act*”). Cineplex opposes the Commissioner’s Application and for reasons set out below, the Application should be dismissed in its entirety.

I. OVERVIEW

2. The Application brought by the Commissioner alleges (an allegation that Cineplex denies) that Cineplex has engaged in, and continues to engage in, reviewable conduct contrary to paragraph 74.01(1)(a) and subsection 74.01(1.1) of the *Act*. Specifically, the Application focuses on purchases that are made on Cineplex.com (the “**Website**”) and the Cineplex Mobile App (the “**App**”) and the application of a contingent and contemporaneous on-line booking fee (“**the on-line booking fee**”).
3. Cineplex pleads that this is a straightforward matter for resolution. The facts and the law are uncomplicated. Cineplex’s position is simple and well-founded in law and fact, as particularized in this pleading. The Commissioner’s assertion that Cineplex engages in drip pricing by promoting its movie tickets to the public on its Website and App, at prices that are obligatory and unattainable, is based on a mischaracterization of the Web Site and App purchase process, and a misapprehension and misapplication of the law. This assertion also contradicts the Competition Bureau’s own published definition of drip pricing.
4. The ticket prices on the Website and App are clearly *attainable* by the customer. All information is clearly shown on the very first page of the Website and App when a customer first sees prices, including ticket prices and movie availability.
5. Notably, ticket prices are differentiated in a number of ways, including the age of the moviegoer, the theatre experience, the day of the week, the theatre location, and other factors further particularized in this pleading. Customers can purchase tickets in person (at the theatre) or online (through the Website and the App). There are many options that impact the overall cost of attending the theatre to see a movie. This requires an ‘interactive’ approach to the selections by the customer. This “interactive necessity” is approached by Cineplex in a direct and transparent manner where the customer knows the overall cost of purchasing a movie ticket instantaneously on the very first page where pricing is disclosed. There are no hidden fees or

fees that are added in the process from the very first moment the customer clicks on the box indicating the show and type of ticket that the customer wishes to purchase.

6. If the customer decides to purchase on-line, the on-line booking price (including the on-line booking fee) is shown on the *very first page* of the Website and App *and throughout* the purchasing process. The customer can then move forward through the advance seat selection to the completion of the purchase on the pages that follow.
7. Importantly, regardless of the purchase method, the prices are all *attainable* and the on-line booking fee is clearly not obligatory for the purchase of a ticket to see a movie.
8. There is no secondary payment (other than taxes) subsequently introduced on the pages that follow the very first page of the Website or App (or at all). The customer is repeatedly made aware of the on-line booking fee (where such on-line booking fee applies) and of the on-line booking fee's simultaneous integration into the full price of the offering as the customer navigates through the purchasing process on both the Website and the App.
9. Further, there is no basis for the Commissioner's claim that Cineplex made price representations that are false or misleading in a material respect contrary to section 74.01(1)(a). In, *inter alia*, paragraphs 20 to 26 of the Application (which are denied), the Application inaccurately describes the Website and App ticket purchase flow and misrepresents and omits crucial aspects of the purchasing process in an attempt to establish a violation of section 74.01(a). A review of the purchasing flow and process on both the Website and App discloses that the process is transparent, efficient, and user-friendly.
10. The customer can attain the offering as initially presented. The prominence, proximity, and presentation of disclosures in relation of the on-line booking fee further dispel any allegation of deceptive marketing practices as asserted in the Application (and denied by Cineplex) or at all.

11. The Commissioner's claims against Cineplex are without merit and this Application should accordingly be dismissed in its entirety with costs payable to Cineplex.

II. ADMISSIONS AND DENIALS

12. Except as expressly admitted below, Cineplex denies each and every allegation in the Application. Cineplex denies any wrongdoing at all. Cineplex further denies that the Commissioner is entitled to the relief sought in the Application - or to any relief at all - and puts the Commissioner to the strictest proof thereof.

III. MATERIAL FACTS

Background

13. Cineplex is a film and entertainment company with head offices at 1303 Yonge Street in Toronto, Ontario, Canada.
14. Cineplex offers CineClub membership, which provides members with benefits accessible across Cineplex's businesses nationwide including Cineplex's theatres. Cineplex also offers membership in the Scene+ loyalty program, which allows customers to earn and redeem points for entertainment, movies, travel, shopping, and dining.

Variability of Ticket Pricing: The Importance of Choices

15. Customers can purchase tickets either in person (at the theatre) or online (using the Website or the App.)
16. Importantly, there is no single price for a movie ticket, whether purchased in person or online. There is multiple variability: Prices vary according to the age of the moviegoer, the theatre experience (IMAX, VIP, 4DX, ScreenX, UltraAVX, D-BOX, Clubhouse or regular), the day

of the week, the theatre location, whether the moviegoer is a member of either CineClub or the Scene+ loyalty program, and whether the customer wants to purchase a ticket at the theatre or proceed with an advance ticket purchase and advanced seat reservation through an on-line purchase.

17. This price differentiation and variability accordingly requires an interactive approach (“**Interactive Necessity**”) to the Website and the App to allow for various possible customer selections. There is nothing unusual about this Interactive Necessity. There are many examples where pricing depends on customer choices.
18. Drip pricing is a form of deceptive marketing where the customer is drawn into the purchase process without full disclosure of overall pricing or cost. Cineplex has absolutely ensured that the pricing is transparent and instantaneous. Immediately upon the customer making some initial choices, the customer is presented with the overall cost before the customer proceeds with the purchase process. There is no drip pricing in the Cineplex purchase process.
19. The Website and App have two primary functions:
 - a. **Choices:** They provide the customer with information regarding movies playing at theatres, the locations, times, and prices for which tickets can be purchased at theatres or through the on-line purchase process. At all times, the customer receives a clear indication of the choices with respect to the purchase of tickets. The attainable price for purchase at the theatre or purchase on-line is always prominently shown to the customer based on the customer’s choice of purchase.
 - b. **Process:** They provide the customer with the convenience of an instant on-line purchase process as well as the benefit of instant advance ticket purchase and advance seat reservation if the customer chooses to purchase on-line.

Advance Ticket Purchases and Seat Selection

20. Customers can purchase advance tickets, which come with a guaranteed seat, in more than one way. Customers can purchase an advance ticket by attending in person at the theatre or through the added convenience of instantaneous access to the advance electronic ticket online, via the Website or the App (“**Advance e-Ticket**”).
21. By purchasing Advance e-Tickets, customers can instantly derive the additional benefit, convenience, cost savings, and service of a guaranteed seat of choice and avoid a sold-out showing. An Advance e-Ticket can also be instantly gifted or forwarded without having to incur the cost of physically attending at the theatre and can also be used to ensure instant seat selection for groups that wish to sit together.
22. In essence, there are two separate services or products being purchased in the on-line booking system: the ticket for the show and the advance seat reservation for that show. Locking in the experience that the customer wants, including preferred seating, is an important value-add that the online booking system provides. This has been shown to be particularly important, for example, at the time of launch of new movies for film buffs. The online booking system accordingly helps ensure that customers experience no lineups at the theatre, or disappointment that the film, time, and seat of their choice is not available, because it can be locked in instantaneously through the on-line booking system.

Variability of Online Booking Fee: The Importance of Choices

23. On June 15, 2022, Cineplex introduced an on-line booking fee for certain Advance e-Ticket purchases as part of expanded services and benefits offered to customers. This did not impact the pricing of tickets that could be purchased at the theatre (including regular advance tickets purchased at the theatre.)
24. The on-line booking fee was implemented to provide for the expansion and improvement of Cineplex’s digital infrastructure and offerings to provide customers with more options

(including instant advance and reserved seating options online by way of the Advance e-Tickets) quicker service, and more secure transactions.

25. The on-line booking fee is not an obligatory fee. It only applies to certain types of online ticket purchases and never applies to purchases at the theatre.

26. Further to the benefits of Advance e-Tickets, as particularized at paragraphs 20-22, above, the on-line booking fee provides the customer with distinct additional benefits, including the benefits of advance choice of seat reservation. Customers can accordingly assure themselves that they will be able to see the movie they have selected at the time they have chosen, that they can obtain their preferred seating, and ensure that their group is seated together, all at their fingertips, within a few instantaneous clicks and without the inconvenience of physically going to the theatre to purchase a ticket in advance or wait in line. Cineplex pleads that these benefits provide an additional service or product within the meaning of Section 2 of the *Act*.

27. It is important to note that the on-line booking fee is contingent: it either does not apply at all or is lower for some on-line purchasers. Only certain tickets purchased on the Website or the App - and only under certain prominently presented scenarios - can incur a fee of \$1.50 up to a maximum of four tickets per transaction (i.e. capped at \$6 for those tickets to which the \$1.50 on-line booking fee applies). Customers who purchase their tickets in a theatre, at ticketing kiosks, box-office or concession are not charged the on-line booking fee. Further, customers using a promotional coupon for a free admission, such as a "buy one – get one free" offer, are not charged the online booking fee. In addition, CineClub members are also not charged the online booking fee, and the fee is reduced to \$1.00 for Scene+ members. Again, this Interactive Necessity is dealt with in a full, transparent and instantaneous basis at the very moment the customer initiates an online purchase.

Cineplex's Website

28. Customers wishing to view movie availability and pricing using the Website begin by either selecting a theatre or a movie from the navigation bar. Once they select their preferred theatre location, the movie they want to see, their preferred theatre experience, and their preferred showtime, customers are asked to sign into their Cineplex account.
29. Immediately after signing in, the first page the customer sees is the “**Tickets**” page, which lists the types of tickets available for purchase and their corresponding price for purchase at the theatre. Customers who want to purchase tickets at the theatre and simply visit the website to determine the availability of a movie, can determine the price and availability at the theatre of their choice immediately and then exit the Website.
30. Those customers who wish to purchase tickets through the advance on-line ticket purchase process begin by selecting tickets based on the age bracket of the moviegoer. The total price including the on-line booking fee is *immediately shown* on the “Tickets” page (i.e. at the first page the customer sees when inquiring about ticket availability and pricing.), as particularized in Figures 1(a) and 1(b) (full page showing before and after selection of ticket), below.

TICKETS

SEATS

PAYMENT



Guardians of the Galaxy Vol. 3

PG

DATE
Thursday, Jul 6, 2023

TIME
2:55 PM

LOCATION
Scotiabank Theatre Toronto

Standard

General Admit
\$13.50

Senior (65+)
\$9.50

Child (3-13)
\$8.50

Applicable taxes will be calculated at checkout.

ADD

ADD

ADD

Scene+ ①

Scene+ Members Earn And Redeem Points

ADD CARD

Certificate or Promo code ①

Add a code from your voucher or promo code to apply to your tickets

ADD A CODE

CINECLUB

Instantly save on your ticket ①

Join CineClub for \$9.99/month. Cancel anytime.

- 1 movie ticket every month
- 20% off on concessions
- No Online Booking Fees

JOIN CINECLUB

Online Booking Fee ①

Booking fee is discounted for Scene+ members and waived when you're a CineClub member.

Applicable taxes will be calculated at checkout.

\$0.00

4:50 Time Left

Subtotal: \$0.00

PROCEED

Figure 1 (a): "Tickets" page before a ticket is selected by the customer.

TICKETS SEATS PAYMENT

Guardians of the Galaxy Vol. 3

PG

DATE: Thursday, Jul 6, 2023 TIME: 2:55 PM

LOCATION: Scotiabank Theatre Toronto

Standard

General Admit \$13.50

Senior (65+) \$9.50

Child (3-13) \$8.50

Applicable taxes will be calculated at checkout.

Scene+ Scene+ Members Earn And Redeem Points

Certificate or Promo code Add a code from your voucher or promo code to apply to your tickets

Online Booking Fee \$1.50

Booking fee is discounted for Scene+ members and waived when you're a CineClub member.

Applicable taxes will be calculated at checkout.

4:46 Time Left Subtotal: \$15.00 PROCEED

CINECLUB Instantly save on your ticket

Join CineClub for \$9.99/month. Cancel anytime.

- 1 movie ticket every month
- 20% off on concessions
- No Online Booking Fees

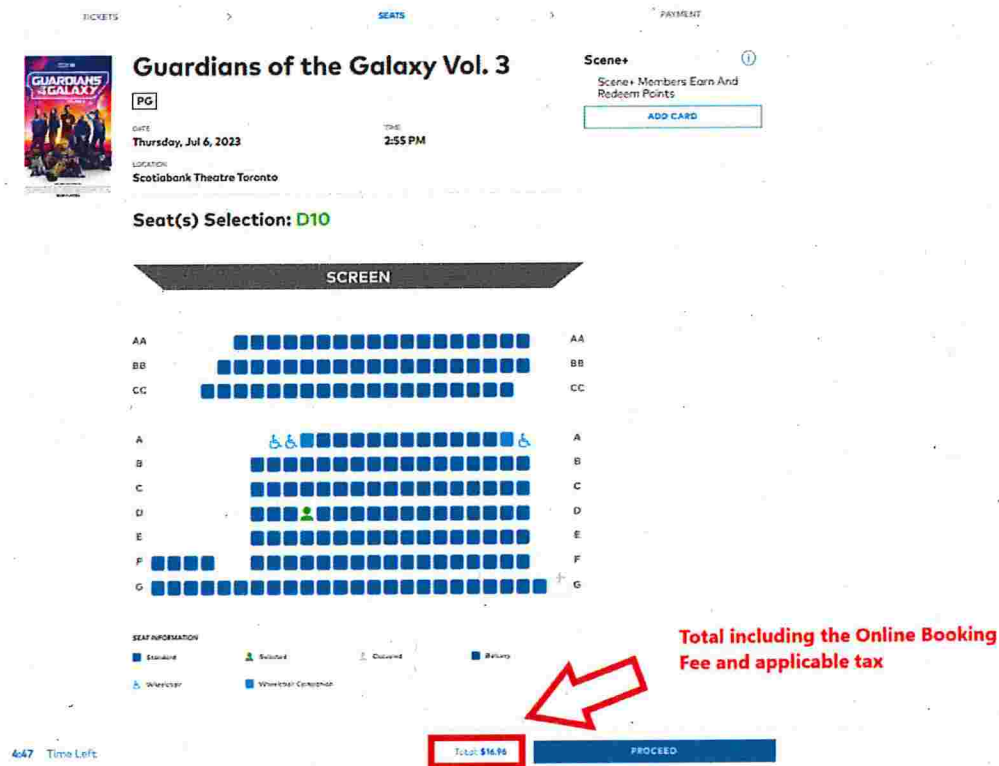
JOIN CINECLUB

Figure 1 (b): "Tickets" page after a ticket is selected by the customer.

31. No price for online purchases is shown before the customer makes the selection of the type of ticket they want to purchase. Prior to ticket selection, the subtotal at the bottom of the page is \$0.00, as particularized at Figure 1(a), above. Immediately upon selection of the number and type of ticket, the subtotal reflects the total cost (other than taxes) that will be charged in the on-line purchase process, as particularized in Figure 1(b), above.
32. Further, the customer is clearly made aware of the on-line booking fee *before* the customer first selects to purchase the ticket and is able to make an informed choice before proceeding with the advanced on-line purchase. The customer can either choose to purchase a ticket at the theatre at the price shown in the ticket category section or proceed with an advance on-line purchase with the advantage and service of an advance seat reservation at the price shown

immediately before the button to 'PROCEED' with the advance on-line purchase. There is no subsequent or secondary add-on to pricing except for taxes.

33. The customer may then proceed through the on-line purchase to the 2nd page which is the "Seats" page, where the customer is able to make a seat reservation in advance with the added convenience of doing this online. A total price is shown at the bottom of the page, which includes the on-line booking fee (if applicable) and tax, as particularized in Figure 2, below:



[Figure 2]

34. Once the customer has made a seat selection, the customer is taken to the "Payment" page, where the Customer is provided with an "Order Summary" that provides a clear breakdown of the purchase price. Customers can then select their payment method and proceed to enter their payment information.

35. Throughout the course of the transaction, the total cost including the on-line booking fee is prominently shown on every page. The customer has the opportunity to review the purchase price at four separate, consecutive stages.

Cineplex's Mobile App

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

37. The design of both Website and App prioritizes the user experience. The layout is designed for transparency and user-friendliness, providing clear and consistent pricing information for the offering from the initial page throughout the purchase flow. As further particularized in diagrams herein, on both the Website and App, on the same page or screen at the first point of contact, there is: (a) a specific representation as to the specific price for the specific movie selected, (b) explicit disclosures of the existence and quantum of the on-line booking fee, and (c) disclosure of the circumstances in which the on-line booking fee will be charged. Single disclosures of similar kind, allowing the customer to discern and appreciate the online booking fee (and where or whether applicable), are made in the following two pages or screens and a comprehensive disclosure is made at the "Payment" page. At every instance, the online booking fee is apparent on the face of the pages.

IV. THE GROUNDS ON WHICH THE APPLICATION IS OPPOSED

a) Cineplex is not in breach of section 74.01(1.1) of the Act

38. Subsection 74.01(1.1) states:

For greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the

obligatory charges or fees represent only an amount imposed by or under an Act of Parliament or the legislature of a province. [emphasis added]

39. Contrary to the Commissioner's allegations in paragraphs 3, 13, and elsewhere in the Application (allegations which are denied), Cineplex does not make unattainable price representations on either its Website or App. The Commissioner's position is based on a mischaracterization of the purchase process on both the Website and the App and a misapplication of the law.

40. All pricing displayed on the Website and App *is attainable*. Specifically, the price representations made on the Website and App are attainable as the on-line booking fee for advanced purchase and advance seat reservation is *not obligatory* (nor is it fixed.) As indicated in paragraph 27 of this Response, CineClub members can purchase tickets without incurring the on-line booking fee, and customers using a promotional coupon will also not be charged the on-line booking fee. Scene+ members also receive a discount on the online booking fee. Further and importantly, all customers can purchase tickets without incurring the on-line booking fee at any Cineplex box office counter or kiosk. Accordingly, despite the Commissioner's claims in the Application, the first price that customers see on the "Tickets" page is attainable and does not, in any way, meet the criteria of subsection 74.01(1.1) of the *Act*.

41. In any case, the price representations on the "Tickets" page do not contravene the Competition Bureau's own definition of drip pricing. The Competition Bureau defines drip pricing as the practice of offering attractive headline prices and then adding additional mandatory fees *later*

in the transaction [emphasis added].¹ There are absolutely no fees added after the customer makes a ticket selection, other than taxes.

42. At paragraph 14 of the Application, the Commissioner incorrectly claims that “after customers select the number of tickets they want, they are invited to proceed with the purchase. A non-refundable fixed on-line booking fee of \$1.50 is subsequently added to the purchase.” In fact, the on-line booking fee is *not fixed* and is added to the purchase *at the same time* as the customer first selects the tickets on both the Website and the App. The customer is aware of the price that the customer is paying for the ticket as soon as the ticket is selected. The subtotal on the very first page discloses the overall cost before the customer proceeds into the on-line purchase process and is prominently displayed throughout the remainder of the purchasing process. The only other charges that are subsequently added to the price are taxes. Attainment of the expected initial offer, as presented, is at all times possible. There is no secondary charge (other than taxes).
43. Cineplex pleads, and the fact is, that the customer is presented with the online booking fee before any selection is made at all (in both the Website and the App) again when the selection is made, and throughout the purchase process and until payment is completed on the “Payments” page (on both Website and App.)
44. Cineplex pleads that that the repeated disclosure (throughout the purchasing process) of the online booking fee as part of the full price for the offering does not and cannot meet the relevant

¹ Competition Bureau Canada, “Deceptive Marketing Practices Digest – Volume 5,” March 4, 2020; see also Competition Bureau, *Examining the Canadian Competition Act in the Digital Era*, February 8, 2022, available online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-advice/interventions-competition-bureau/examining-canadian-competition-act-digital-era#sec06> where the Bureau described drip pricing as the practice of “**presenting a customer with a price, while concealing mandatory fees until later in the purchasing process**”.

definition of - or test for - drip pricing, and this is accordingly fatal to the Commissioner's allegations in the circumstances.

b) Cineplex did not breach subsection 74.01(1)(a) of the Act

45. Contrary to the allegations made in paragraphs 20 to 26 of the Application (which are denied), Cineplex's price representations on its Website and App are not false or misleading in a material (or in any) respect. The purchasing process is transparent and uncomplicated throughout.

46. Section 74.01(1) of the *Act* states:

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

47. With specific reference to the allegations at paragraph 20, and as made elsewhere, in the Application (which allegations are denied), wherein the Commissioner claims that the design of the Cineplex purchase process is such that customers may not become aware of the on-line booking fee, Cineplex pleads that the purchase process was designed to ensure that transactions remain at all times transparent, expedient, and efficient, including specifically in respect of the on-line booking fee. A review of the purchase process on both the Website and the App indicates that this process is consistent with these goals.

48. The Commissioner's allegations at paragraph 21 and elsewhere in the Application (allegations which are denied), that a customer may not scroll to the bottom of the page, are unfounded in both fact and law. First, reference to the on-line booking fee is found both at the top of the page and bottom of the page *before* the customer makes any selection on the Ticket page, as well as in a pop-up window. Secondly, the information presented on the "Tickets" page is concise and

requires minimal scrolling. Thirdly, it is a matter of law that information within the four corners of an advertisement or any other promotional material is considered to be complete and adequate disclosure. This is not a situation where there is any attempt to hide any information from the customer by using small type or hiding the information so it is unlikely a customer will make a choice before becoming aware of the information. The reference to the on-line booking fee is present *before* any selection is made by the customer in the on-line booking process and is immediately shown as part of the on-line price. It is not added at a later stage or hidden in any way. It is a proposition of ordinary common sense that for customers using e-commerce, scrolling while shopping is a natural and expected part of the purchasing process. Even for customers who are credulous and inexperienced, scrolling down the page before proceeding to the next step in the purchase process would be common and habitual.

49. Contrary to the Commissioner's allegations at paragraph 22 of the Application (allegations which are denied), both the Website and App use *the same font* for pricing throughout the "Tickets" page and the subtotal is prominently displayed.
50. With specific reference to paragraph 24 of the Application (which is denied), the Commissioner incorrectly asserts that the on-line booking fee is not separately shown to customers before they pay for the purchase. The fee is displayed in at least two separate places on the very first page, the "Ticket page". The on-line booking fee is also included in the price as the customer proceeds through the purchase process and the entire purchase is shown in an "Order Summary" on the "Payment" Page immediately before customers are asked to pay for the purchase.
51. With specific reference to paragraph 25 of the Application (which is denied), the Commissioner incorrectly asserts that the use of "urgency cues" increases the pressure on customers to complete the transaction as quickly as possible. What the Application conveniently fails to mention, is that the countdown timer is set at 5 minutes beginning on the "Tickets" stage of the process, that it re-sets, and that there is no limit as to the amount of resets

available to a customer. Further, from start to finish, it takes customers an average of 3 minutes and four seconds to complete a transaction on the Website and 2 minutes and 44 seconds to complete the transaction on the App. Customers therefore have more than ample time to complete their purchases, even assuming that the countdown timer did not reset.

c) Administrative Monetary Penalty is Inappropriate

52. Further to the foregoing, Cineplex did not engage in reviewable conduct under the *Act*. However, if the Tribunal determines that Cineplex contravened the *Act* (which is not admitted but herein expressly denied), the Commissioner would not be entitled to an administrative penalty as requested under section 1(d) of the Application.

53. Cineplex denies each and every one of the alleged aggravating factors outlined by the Commissioner in paragraph 33 of the Application. Specifically, Cineplex notes the following:

- i. The price representations are not false or misleading in a material (or in any) respect. The nominal nature of the fee would not influence the average customer's decision to purchase tickets online.
- ii. If the price representations are found to be misleading, which is not admitted and expressly denied herein, self-correction will fully remedy the conduct. Cineplex only introduced the fee in June 2022, less than one year from the date of the Application and self-correction would be sufficient in the circumstances.

54. In light of the foregoing, an administrative penalty is not warranted in this case.

d) No Basis for Reimbursement

55. As described above, Cineplex did not contravene the *Act*. However, if the Tribunal determines that Cineplex contravened the *Act* (which is not admitted but herein expressly denied), the Commissioner's request that former and current customers should be reimbursed as outlined

in paragraph 1(e) of the Application is inappropriate and should be denied. Specifically, customers received the product that they willingly chose to purchase at prices that Cineplex fully disclosed to them prior to the purchase. Customers received a benefit and suffered no loss or detriment from the transaction. As such, no reimbursement should be made for events that customers have already enjoyed.

V. PROCEDURAL MATTERS/ORDER REQUESTED

56. Cineplex agrees with the Commissioner's proposal that the proceedings be conducted in English.
57. Cineplex requests that this matter be heard in person in the City of Toronto.
58. Cineplex requests that the Application be dismissed, with costs.

DATED at Toronto, this 30th day of June 2023.



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CT-2023-003

THE COMPETITION TRIBUNAL

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

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

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

CINEPLEX INC.

Respondent

REPLY OF THE COMMISSIONER OF COMPETITION

I. OVERVIEW

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

II. CINEPLEX INVENTS A DRIP PRICING TEST

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

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

III. CINEPLEX MISCHARACTERISES THE CONSUMER PURCHASE FLOW

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

Step 1 – selecting a theatre;

Step 2 – selecting the movie they want to see;

Step 3 – selecting their preferred theatre experience;

Step 4 – selecting the date and preferred showtime;

Step 5 – signing in to their Cineplex account;

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

Step 7 – selecting their seats; and

Step 8 – finally paying for the Movie Tickets.

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

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

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

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

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

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

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

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

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

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

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

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

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



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

B) The Online Booking Fee is Fixed

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

C) The Online Booking Fee is Obligatory

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

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

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

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

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

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

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

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

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

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

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SUPERIOR COURT
(Class Actions)

DISTRICT OF MONTRÉAL
No.: 500-06-001291-240

SÉBASTIEN PONTON

Applicant

v.

CINEPLEX INC.

-and-

**CINEPLEX ENTERTAINMENT LIMITED
PARTNERSHIP**

Defendants

**APPLICATION BY DEFENDANTS CINEPLEX INC.
AND CINEPLEX ENTERTAINMENT LIMITED
PARTNERSHIP FOR LEAVE TO ADDUCE
RELEVANT EVIDENCE
(Art. 574 al 3 C.C.P.)**

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