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# Hold My Popcorn: Canadian Competition Tribunal Decides First Case Under *Competition Act's* Amended Misleading Representations Provisions

Authors: [Anita Banicevic](#), [Charles Tingley](#) and [Umang Khandelwal](#)

Canada's Competition Tribunal (Tribunal) recently released its [reasons](#) in the first contested case to apply the amended misleading representations provisions of the *Competition Act* (Act). The Tribunal's decision assessed online representations by Cineplex Inc. about the price of its movie tickets, which the Commissioner of Competition (Commissioner) alleged to be false or misleading. The Tribunal ruled in favour of the Commissioner, finding that by adding a mandatory online booking fee that was not clearly and separately disclosed during the purchasing process, Cineplex contravened both the general misleading representations provisions and the recently enacted "drip pricing" provisions. The Tribunal has ordered Cineplex to, among other things, pay an administrative monetary penalty (AMP) of C\$38.9 million, the highest AMP ordered to date under the Act. Cineplex has [publicly stated](#) that it will appeal the Tribunal's decision.

Many of the Tribunal's findings turn on Cineplex's approach to its online price representations and, as a result, are fact-specific. However, as discussed in more detail below, certain aspects of the Tribunal's decision may have broader [implications](#) for businesses advertising in Canada, particularly in respect of how the Tribunal is likely to assess the general impression conveyed by online representations and determine appropriate remedies where deceptive conduct has been found to have occurred.

## Background: Recent Amendments and the Commissioner's Case

The general civil misleading representations provisions found in paragraph 74.01(1)(a) of the Act sanction the promotion of a product, service or business interest through representations to the public that are false or misleading in any "material" respect.

In June 2022, a new provision (subsection 74.01(1.1)) was introduced, at the Competition Bureau's (Bureau's) recommendation, to explicitly deem drip pricing to be false and misleading. Drip pricing refers to the practice of "dripping" additional charges or fees during the purchasing process that make the initially advertised price unattainable. Specifically, the drip pricing provision provides that 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 are imposed by a federal or provincial law (such as a sales tax).

The June 2022 amendments also increased the maximum AMP available under the civil misleading advertising provisions (previously capped at C\$10 million for an initial order and C\$15 million for each subsequent violation) to the greater of C\$10 million and three times the value of the benefit derived from the conduct (or, if that benefit cannot reasonably be determined, then 3% of the respondent's annual worldwide gross revenues).

In May 2023, the Commissioner filed an [application](#) against Cineplex, Canada's largest cinema chain, alleging that the manner in which Cineplex adds an online booking fee to the price of its movie tickets purchased online contravenes both the general misleading representations provisions and the specific drip pricing provision. In particular, the Commissioner alleged that the initial pricing representations that were made on Cineplex's website and app were false or misleading because they are not ultimately attainable (due to the application of the online booking fee) and the subsequent disclosure of the online booking fee at the bottom of the page was "inadequate to cure the deception to the consumer." Moreover, the Commissioner alleged that Cineplex's purchase flow was designed in such a manner that consumers may never become aware of the online booking fee given that the disclosure was provided only at the bottom of the page (located in an area "below the fold" that most consumers could not see without choosing to scroll down). Further, the Commissioner and his experts took issue with the fact that Cineplex's purchase page used a "floating ribbon" showing the subtotal price

for movie tickets that included (but did not break out) the additional \$1.50 online booking fee. This floating ribbon also included a call-to-action button that invited consumers to “proceed” without scrolling down further. According to the Commissioner and his experts, this ribbon created a “false floor,” giving the impression that the consumer had reached the bottom of the page and, as a result, discouraged further scrolling.

Since 2020, the Bureau has reported that false and misleading advertising is the leading category of business conduct for which it receives complaints. Interestingly, while the Bureau reportedly receives thousands of complaints every year under the misleading representations provisions, it did not receive any complaints regarding Cineplex’s pricing representations prior to filing its application with the Tribunal. This suggests that the Bureau initiated enforcement of its own accord and serves as an important reminder that the Bureau may itself be looking for cases that match its enforcement priorities.

## Unpacking the Tribunal’s Decision

In reaching its decision that Cineplex’s online ticket prices were misleading, the Tribunal assessed (i) the general impression created by the Cineplex price representations; and (ii) whether the general impression was false or misleading in a material respect (having regard to both the general misleading representations provisions and the specific drip pricing provision).

### Assessing General Impression

Under the misleading representations provisions of the Act, the Tribunal is required to consider both the literal meaning and the “general impression” of an impugned representation. The assessment of the general impression can be important because it defines the scope of the representation that is to be evaluated for whether it is false or misleading in a material respect. The general impression takes into account considerations such as font size and accompanying imagery, and is therefore often different from the literal meaning. In this case, the Tribunal’s assessment of the general impression touched on two key aspects: (i) the perspective from which to assess the representation, and (ii) the scope of the online content to be considered in the Tribunal’s assessment.

#### *Perspective from which to assess the representations*

When considering the perspective from which to approach a representation, the Tribunal held that the general impression of a representation should be assessed from the perspective of the “ordinary consumer of the product or service.” In so doing, the Tribunal rejected the Bureau’s argument that the impression should be assessed from the perspective of a “credulous and inexperienced” consumer, a standard adopted by the Supreme Court of Canada in *Richard v Time*, a case decided under Québec’s *Consumer Protection Act*. Here, the Tribunal reviewed the existing jurisprudence under the Act as well as purpose of the Act itself, distinguishing its underlying purpose from that of provincial consumer protection statutes.<sup>1</sup> In this regard, the Tribunal stated that the deceptive marketing 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.”

Where a given representation is aimed at the general public (rather than a prospective consumer of a particular product), the general impression as assessed from the perspective of a “credulous” or “ordinary” consumer may not be significantly different. However, where the consumer of a particular product is well-informed or educated, then this difference in perspective may affect the message that is conveyed or understood by such consumers (e.g., because the relevant consumers can be expected to have a more informed impression). The Tribunal further held that the general impression 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.” For example, in this case, the Tribunal noted that its assessment of the ordinary consumer’s perspective was influenced by factors such as the presence of a countdown timer on Cineplex’s site that created a sense of urgency, the fact that typical users spent about three minutes in total on the Cineplex site, and the relatively small amounts of money involved in each purchase. Given that the attributes of the audience and the representations are important in assessing the general impression, these same considerations will be important for advertisers to bear in mind when assessing their own compliance.

#### *Scope of the online content to be considered*

Particularly for online disclosures, determining what parts of a website encompass the relevant representation has been the subject of debate in existing jurisprudence and can be critical to the assessment whether a given representation is false or misleading. In determining what portion of Cineplex's website could be considered for the purpose of assessing the general impression of Cineplex's pricing representations, the Tribunal accepted the Commissioner's position that, in this case, only information "above the fold" (i.e., visible without scrolling down the page) was relevant. On this point, Cineplex had argued that the entirety of the webpage (including the disclosure at the bottom of the page) should be taken into account. The Tribunal's determination on this point was central to the outcome in this case, since the Tribunal acknowledged that the fee was disclosed to a consumer who viewed the entire page.

While focusing on content above the fold may appear to be quite limiting for online representations, this finding is likely specific to the facts in this case. Here, the Tribunal determined that not only was the consumer not required to scroll down to the bottom of the Cineplex website (where information about the online booking fee was located) but also, as noted above, Cineplex's website was designed to dissuade consumers from scrolling to the bottom. That said, the Tribunal accepted the Commissioner's expert's evidence that "consumers scroll down on a webpage or on the App if given a reason to do so." This acknowledgment should provide some comfort that not all online representations will necessarily be similarly limited to what is initially visible above the fold, particularly if consumers are given a reason to scroll down or review other content. Having taken the perspective of the ordinary consumer and the relevant content into account, the Tribunal held that the general impression of Cineplex's representations was that the pricing that first appeared online when the consumer was purchasing tickets (i.e., without the online booking fee) was the applicable price for which tickets could be purchased online.

### **Assessing Whether Representations Are False or Misleading**

The Tribunal found that Cineplex's price representations were false or misleading in a material respect when assessed under the general misleading representations provisions as well as the new drip pricing provisions of the Act.

In assessing Cineplex's price representations under the broader paragraph 74.01(1)(a), the Tribunal held that the initially displayed ticket prices were not accurate and 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." The Tribunal specifically noted that (i) Cineplex's failure to break out the online booking fee concurrently with the initial display of ticket prices was central to its finding; and (ii) providing a subtotal that included, but did not identify, the online booking fee was insufficient to override the general impression that online movie tickets were available at initially displayed prices. The Tribunal did not specifically address whether the "alternative approaches" that the Commissioner's expert had proposed in his reply report (which broke out the online fee in a pop-up) would have been considered compliant. The Tribunal also determined that Cineplex's ticket price representations met the "materiality" requirement given that Cineplex itself had conducted studies that determined a C\$1 to C\$2 increase in price was enough to influence a consumer's behaviour.

Turning to the new drip pricing provisions, the Tribunal determined that Cineplex's price representations also met the requirements of subsection 74.01(1.1) and, as a result, were deemed to be false or misleading. More specifically, the Tribunal held that the online booking fee qualified as a fixed and obligatory fee since it was mandatory for a specific subset of consumers (regardless of the fact that not all consumers were required to pay the fee). In reaching this conclusion, the Tribunal dismissed Cineplex's argument that the initial price advertised was, in fact, attainable if the movie tickets were purchased in person. The Tribunal noted that consumers would expect that the prices initially advertised by Cineplex on its website were attainable if they purchased from the website. The Tribunal also noted that the Cineplex website did not disclose that the online booking fee would not be charged if the tickets were purchased in person.

### **Applying the New Remedy Provisions**

Where a finding of deceptive conduct has been made, the Tribunal retains discretion as to the form of remedy and can choose to impose a prohibition order (prohibiting such conduct going forward), an AMP and/or some form of restitution to those affected by the deceptive conduct. In this case, the Commissioner sought the imposition of "a financial penalty of C\$40 million either as an AMP, restitution or a combination of both," with C\$40 million representing roughly the amount of the revenue (approximately C\$39 million) Cineplex earned from the online booking fee between June 2022 and December 31, 2023.

Although the Tribunal considered whether to order restitution by way of refunds to affected consumers, it ultimately concluded that administrative limitations made this remedy impractical (pointing out that the parties' submissions had not addressed the "many practical issues" involved and there was "no proposal or evidence on how to distribute individual refunds to consumers"). In particular, the Tribunal noted that there was a "prospect of a very large number of small refunds, and high administration costs in distributing them to consumers." Had restitution been ordered, such refunds could have affected the availability or amount of any damages awarded as part of any follow-on consumer class actions that have become more common in advertising cases in Canada.

Having decided to order an AMP, under the amended provisions, the Tribunal has the discretion to order penalties of up to three times the "benefit" of the conduct at issue. Here, the Tribunal determined that the entirety of the revenues earned from the online booking fee represented the value of the "benefit" from the conduct, and that the maximum monetary penalty was therefore C\$116.9 million (i.e., three times the benefit derived from the conduct). That said, there appears to have been little discussion of the precise nature of the benefit to Cineplex of not clearly disclosing the online booking fee to all consumers. Arguably, the Tribunal's approach presumes that all consumers who paid the online booking fee would have chosen not to make an online ticket purchase had the fee been properly disclosed. The Tribunal went on to say that as a "matter of fairness," it would not order a penalty in excess of the benefit derived (the total revenues from the booking fee to the end of 2023). It remains unclear, however, what the Tribunal would have ordered if the Commissioner had requested a higher AMP and the extent to which the Tribunal's considerations of fairness were motivated by the fact that this is the first litigated case that has interpreted and applied the new drip pricing provisions and/or increased penalty provisions.

As the AMPs that may be ordered become more significant, the availability of defences such as the due diligence defence (which was not raised by Cineplex) may become more important. Under the due diligence defence, an AMP is not available if it can be established that the person exercised due diligence to prevent the conduct from occurring. It can also be expected that as the magnitude of AMPs ordered increases (particularly when other remedies are also ordered), questions may be raised as to when the amount ordered approaches punishment rather than solely encouraging compliance.

Finally, the Tribunal also exercised its discretion to impose a 10-year prohibition order that prohibits Cineplex from engaging in the contravening conduct or similar conduct. Prohibition orders have not been imposed in every case and carry significant consequences if breached.

### **Implications for Advertisers**

While it remains to be seen whether the Tribunal's decision will be impacted by Cineplex's appeal, in the interim, businesses advertising in Canada would be well advised to:

- **Expect continued active enforcement regarding drip pricing.** The Competition Bureau's [Annual Plan for 2024-2025](#) confirms that the Bureau intends to continue to "crack down" on drip pricing, and representatives of the Bureau have publicly stated that it is pursuing multiple drip pricing cases. Given a similar focus in the United States on "[junk fees](#)," with cases pending against StubHub, among others, this continued focus is not surprising.
- **Carefully evaluate online purchasing flow for disclosure of mandatory fees.** The Tribunal's decision is a reminder to properly itemize and disclose any mandatory fees clearly and conspicuously to consumers. While the Tribunal did not go as far as to find that the Act requires "all-in pricing" in order to remain compliant, businesses should bear in mind the Bureau's position that later (non-concurrent) disclosure will not necessarily cure an initial pricing representation that is considered deceptive.
- **Consider representations in the form and format viewed by consumers.** While many of the Tribunal's findings are unique to the facts in this case, advertisers should nonetheless review their website design to ensure that consumers are encouraged or required to review any information that is relevant to their understanding. Furthermore, consideration should be given to the use and potential impact of "countdown timers" and other "urgency cues."
- **Compliance programs are important.** Having a robust and effective compliance program in the advertising area could assist in spotting potential issues, and present the availability of a due diligence defence, which may take on particular importance in light of the significant AMPs and reputational risks associated with a contravention.

- **Private rights of action are coming.** While enforcement of the civil misleading representations currently remains exclusively with the Bureau, companies should also be reminded that, as of June 2025, a private right of action (with leave of the Tribunal) will become available. In the interim, several class actions (relying on alleged breaches of the Act's criminal misleading advertising provisions) have been initiated on the basis of allegations of drip pricing in a variety of industries, including against Canada Post, online florist Bloomex, travel site Omio, as well as Cineplex.

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## About Davies

Davies has extensive experience advising clients concerning the application of the misleading representations provisions of the *Competition Act* and responding to related complaints and inquiries. We have represented clients in reaching resolutions with the Competition Bureau as well as contested proceedings and private class actions in this area.

<sup>1</sup>Both Cineplex and the Tribunal cited a paper authored by Anita Banicevic on the perspective to be used for assessing general impression. See Anita Banicevic, "Assessing General Impression under the Competition Act: The Credulous Man Who Was Never There," 29 Canadian Competition Law Rev 57 (2016).

Key Contacts: [Anita Banicevic](#), [John Bodrug](#) and [Charles Tingley](#)

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