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## Competition Bureau Tests Canada's New Drip Pricing Law

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Canada's Commissioner of Competition filed an [application](#) under the deceptive marketing provisions of the *Competition Act* (Act) on May 18, 2023, alleging that Cineplex Inc. is making false or misleading representations to the public on its website and mobile app about the prices of its movie tickets. The Commissioner is seeking an order from the Competition Tribunal (Tribunal) to, among other things, prohibit the price representations, require Cineplex to pay restitution to affected consumers (up to the total amount paid for the products in question) and impose an administrative monetary penalty (AMP) on Cineplex in an amount to be determined by the Tribunal. Under the recently amended civil misleading representations provisions, the Tribunal may impose AMPs up 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).

### The Bureau's Case

The Competition Bureau's lawsuit focuses on what the Bureau alleges to be a fixed mandatory "online booking fee" that is added to the initial price of movie tickets during the purchasing process on Cineplex's website and mobile app. The Bureau alleges that the manner in which Cineplex adds the online booking fee to the price of its movie tickets is contrary to the Act's civil misleading representations provisions, which were amended in June 2022 to deem to be misleading any "representation of a price that is unattainable due to fixed obligatory charges or fees [...] unless the obligatory charges or fees represent only an amount imposed by or under an Act of Parliament or the legislature of a province."

The Bureau describes in its application the sequence of prompts on Cineplex's website or app that it alleges breach the Act's drip pricing provisions. First, consumers launch Cineplex's website or app and select the movie they wish to see and the relevant date, time, theatre location, video format or other specialty options for the movie. Second, consumers must log into their Cineplex account to be taken to the tickets page where they are first presented with Cineplex's ticket prices for their selection. Third, after selecting the number of movie tickets they would like, consumers are invited to proceed with their purchase, and a non-refundable fixed online booking fee is then added to the cost of the purchase.

The Bureau alleges that the above-noted sequence is sufficient to establish a prohibited price representation under the Act's new drip pricing provisions, and also that Cineplex's online purchasing process in fact misleads consumers as to the actual price of its movie tickets:

- **Placement of fee disclosure on web pages.** The Bureau says Cineplex prominently displays prices for movies tickets near the top of the web page, whereas consumers need to scroll down to the bottom of the web page to find reference to the online booking fee.
- **Use of floating ribbons.** The Bureau alleges that the use of a floating ribbon that remains visible onscreen at all times and prompts a consumer to "proceed" negates the need to scroll down the page to where the online booking fee would become apparent. The Bureau also notes that the floating ribbon contains a "subtotal" (and, later in the process, a "total") amount in smaller print that incorporates the online booking fee but does not identify it or break it out, requiring mental arithmetic for a consumer to detect that a fee has been added to the regular movie ticket price.
- **Other urgency cues.** The Bureau also says that a countdown timer displays on screen at every stage of the purchasing process, which acts as an urgency cue to complete the process as quickly as possible and may inhibit consumers from becoming aware of the

additional cost displayed in the subtotal or total fields or from scrolling to the bottom of the page where the online booking fee is displayed.

Note that, as described above, the Bureau's application does not allege that the online booking fee is completely hidden from consumers. Indeed, the amount of the online booking fee appears to be available to consumers if they click on a link beside the fee when it first appears onscreen. Rather, the gist of the Bureau's application is that the fee is not sufficiently or clearly disclosed to consumers in the purchasing process. In addition, the Bureau acknowledges that the online booking fee may be reduced or waived depending on whether a consumer is a member in certain Cineplex loyalty programs.

### Cineplex's Initial Response

Cineplex has yet to file a formal pleading in response to the Commissioner's application, which was filed on May 18, 2023; however, on that same day, Cineplex issued a [press release](#) saying that it "will seek an early determination [of the application] and expect[s] this suit to be dismissed quickly as it has no merit." In its press release, Cineplex also stated that its online booking fee is "entirely optional and provides the convenience of advance seat selection" and that "Cineplex's guests can buy their tickets at their local theatre without paying this modest fee."

### Key Takeaways

1. **Drip pricing or "junk fees" will continue to attract vigorous enforcement action in Canada.** The Bureau's application sends an unambiguous message that it will be monitoring how companies apply additional (non-governmental) fees in the purchasing process. This proceeding is consistent with the Bureau's prior enforcement action alleging drip pricing in the rental car and sporting and entertainment ticket industries, which led to a number of consent agreements between 2016 and 2020. It is also consistent with calls by elected officials here and in the United States to clamp down on so-called junk fees, which have attracted additional political attention in the current inflationary environment. The 2023 federal Budget briefly mentions that the government is working to reduce "junk fees" for Canadians and notes that the types of fees that could be targeted include "higher telecom roaming charges, event and concert fees, excessive baggage fees, and unjustified shipping and freight fees."
2. **The Bureau is embracing new powers granted by Parliament to enforce the *Competition Act*, including increased civil penalties.** The enforcement action against Cineplex also demonstrates the Bureau's efforts to use the Act's new drip pricing provisions, which came into force less than 12 months ago, in June 2022. Another recent amendment to the Act – namely, increased maximum civil penalties for deceptive marketing conduct – may also feature in this matter. As noted above, the Bureau may now seek AMPs up to three times the benefit derived from the impugned conduct or, if the benefit cannot be reasonably determined, then 3% of a respondent's annual worldwide gross revenues. In its notice of application, the Bureau prominently asserts that Cineplex earned C\$17 million from its online booking fee in the nine months ending March 31, 2023, citing Cineplex's quarterly and annual reports.
3. **Businesses should examine how their online representations are displayed to consumers in different formats and on different devices.** The Bureau's application is a reminder that adequate disclosure in digital marketing may depend on the particular features and limitations of specific online communication channels. The Bureau's allegations indicate that various contextual factors that may be present in a digital environment, such as scrolling, floating ribbons, font size and "urgency cues," may influence a consumer's behaviour and, consequently, the general impression conveyed to that consumer. The application provides a window into the Bureau's enforcement thinking with respect to online marketing and particularly the sales flow once a customer is interacting with a website or app to select and purchase products.
4. **If litigated, this case could result in useful judicial interpretation of the Act's new drip pricing provisions.** The Bureau has not published guidance on how it will enforce the Act's new drip pricing provisions since they were enacted in June 2022. Although the new provisions deem "the representation of a price that is unattainable due to fixed obligatory charges or fees" to be misleading, it is not clear what combinations of price representations and fee disclosures fall within or outside this provision and in particular what, if any, scope remains for separately disclosing prices and mandatory fixed (non-government) fees.

Given that Cineplex's online booking fee is, in fact, disclosed to consumers (with additional details available a click away) and shows up in the total charge, this matter may provide guidance on when additional disclosure (in a disclaimer or click-through) may be sufficient to resist a drip pricing allegation, or else to mount a "due diligence defence" to argue against the imposition of AMPs. In addition, Cineplex's press release foreshadows a potential legal argument over whether a fixed fee is considered to be "obligatory" when it can be avoided by some other means of purchasing the product or service. There may also be questions about whether the fee in question is "fixed" because, according to the Bureau's application, Cineplex's online booking fee may vary or be waived depending on whether a consumer participates in certain loyalty or membership programs.

*Davies has extensive experience in defending advertising cases and negotiating settlements involving the misleading representations provisions of the Competition Act. For details about our experience in this area, please contact one of the members of our team.*

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