DECEPTIVE MARKETING LAW AFTER CINEPLEX

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In Canada (Commissioner of Competition) v Cineplex, the Competition Tribunal considered two major deceptive marketing law issues: the legal standard when applying the general impression test, and how section 74.01(1.1) (the drip pricing provision) is interpreted and applied. The decision provided guidance to these issues but left many more questions unanswered. We surveyed questions related to (1) the method of constructing the ordinary citizen legal standard adopted by the Tribunal, (2) the specific principles used in interpreting and applying section 74.01 and its relationship to other provisions in the Competition Act, and (3) the likelihood of restitution orders as remedies in future cases. Guided by the Tribunal's reasons in Cineplex, the purposes of competition law, the underlying behavioural economic principles of deceptive marketing law, and approaches to similar issues in foreign jurisdictions, we offer potential directions for the law in answering certain questions we have identified.

Dans l'affaire Canada (Commissaire de la concurrence) c Cineplex, le Tribunal de la concurrence s'est penché sur deux questions majeures en droit des pratiques commerciales trompeuses : les normes juridiques appropriées dans l'application du critère de l'impression générale et l'interprétation ainsi que l'application du paragraphe 74.01(1.1) de la Loi sur la concurrence (la disposition concernant l'indication de prix dits « partiels »). La décision a permis de clarifier certains aspects de ces questions, tout en laissant de nombreuses autres interrogations en suspens. Les auteurs ont recensé plusieurs questions en lien avec (1) la méthode retenue par le Tribunal pour établir la norme juridique du citoyen ordinaire, (2) les principes spécifiques utilisés pour interpréter et appliquer l'article 74.01 et sa relation avec d'autres dispositions de la Loi sur la concurrence, et (3) la probabilité d'accorder des ordonnances de restitution à titre réparatoire dans de futures affaires. À la lumière des motifs du Tribunal dans l'affaire Cineplex, des objectifs de la Loi sur la concurrence, des principes de l'économie comportementale qui sous-tendent le droit des pratiques commerciales trompeuses et des approches adoptées pour des questions similaires dans des ressorts à l'étranger, les auteurs proposent des pistes qui permettraient au droit de répondre à certaines questions soulevées.

Part I. Introduction

In the recent decision of *Canada (Commissioner of Competition) v Cineplex Inc*,[1] the Competition Tribunal (the "Tribunal") had the opportunity to address two key issues in deceptive marketing law. First, whether the consumer perspective standard employed in consumer protection law to determine if a representation is false or misleading also applies in competition cases. Second, *Cineplex* was the first case interpreting the new "drip pricing" provision under section 74.01(1.1) of the *Competition Act*.[2] Thus, it is an important decision that will guide future deceptive marketing cases in Canada. Although the case tackled each of these matters directly, there remain several lingering questions on deceptive marketing law following the *Cineplex* decision. This paper identifies these questions and, where possible, offers paths that future cases could take in developing the law further.

Part II provides a general background of relevant deceptive marketing law and economic principles. Section II-A outlines the purposes of deceptive marketing regulation in the competition context, contrasting it with provincial consumer protection legislation. Section II-B surveys the development of the consumer perspective up to the *Cineplex* decision and judicial debate about whether to adopt the standard used in consumer protection legislation as set out in *Richard v Time Inc*.[3] Sections II-C through E focuses on drip pricing, providing an overview of the economic and legal definitions. Section II-F concludes by summarizing the *Cineplex* decision and its conclusions on the appropriate consumer perspective, and the interpretation of the drip pricing provision.

Part III then outlines the lingering questions. The succeeding parts each address a category of questions. Part IV addresses questions on the consumer perspective: first, the appropriate perspective for representations made to the public at large; and second, whether the test operates by adjusting a common baseline, or defining the consumer purely based on each case's facts. For both questions, we look to Australia and New Zealand for guidance.

Part V addresses statutory interpretation issues. First, the remaining questions on how the drip pricing provision is interpreted and applied. We look to the Tribunal's reasons in *Cineplex* and the objectives of competition law for guidance. With respect to the new language in the Act regarding "fixed obligatory charges or fees", we argue that (1) the term "fixed" refers to a seller's ability to set and pre-determine a surcharge's amount and structure; (2)

the term "obligatory" also can include considerations of search and switching costs; and (3) the consumer perspective could be considered throughout the entire analysis under the provision. Second this Part addresses how the new drip pricing provision affects the closely related "sale above advertised price" provision. We argue that the two can coexist, targeting somewhat different conduct despite being somewhat redundant: they can be used as alternatives to pursuing a claim for drip pricing with slightly different standards under each. Third, whether *Cineplex* can be used to inform proceedings under the criminal track for deceptive marketing and civil recovery under the criminal provision.

Part VI addresses the final issue of remedies. We argue that the case implies that "restitution" orders[4] are unlikely to be successful in deceptive marketing generally. In Part VII, we conclude that there are many issues that still remain after *Cineplex*, although the case has brought some clarity to the law. Further legal developments should be guided by the purposes of competition law and the underlying economic harms of drip pricing and deceptive marketing.

Part II. Background

A. Purposes of Deceptive Marketing in Competition Law and Consumer Protection

Deceptive marketing is addressed both by provincial consumer protection statutes and the federal *Competition Act*. For example, Ontario's *Consumer Protection Act*[5] uses similar language to the *Competition Act* concerning deceptive representations. The Ontario *Consumer Protection Act* classifies the making of a "false, misleading or deceptive representation" as an unfair practice,[6] while the *Competition Act* prohibits making a representation that is "false or misleading in a material respect."[7] Both statutes capture false or misleading representations made to consumers. Despite this, they do not serve the same underlying purpose. This section compares the purposes of deceptive marketing in the consumer protection and competition law contexts. It illustrates the different harms to which these similar measures are targeted.

Provincial consumer protection legislation is aimed at the consumer. In the context of deceptive advertisements, consumer protection law aims to shift the relationship between consumers and suppliers. It acknowledges the imbalance of power between merchants and consumers and aims to correct it.[8] In the context of deceptive advertising, consumer protection achieves this by shifting the merchant relationship from *caveat emptor*

to *caveat venditor* – let the seller beware.[9] This policy and legislative shift provides a framework for trade practices that better protect vulnerable consumers.[10] The scope of consumer protection legislation is thus captured by its name – protection for the consumer. The regulation of business practices is focused on the extent to which those practices could harm the consumer.

The *Competition Act* is aimed at maintaining competition in the market. The Act's purpose statement references consumers only through the goal of "provid[ing] consumers with competitive prices and product choices" among other purposes focused on businesses, the Canadian economy, and Canadian and world markets.[11] Even its reference to consumers is not consumer *protection*, but rather in providing consumers with direct benefits of competition in better prices and selection. Consumers are a consideration under the *Competition Act*, but the *Competition Act* is not directly aimed at consumer welfare like provincial consumer protection legislation. Instead, it aims to enhance consumer welfare indirectly, through laws that protect and promote competitive markets.

Deceptive marketing case law acknowledges this. Early cases present the *Competition Act*'s objective in targeting deceptive marketing as a form of market regulation.[12] In considering the ordinary price representation provision under section 74.01(3) (a specific type of deceptive marketing regarding promotional versus regular prices), the Tribunal identified three purposes in *Canada (Commissioner of Competition) v Sears Canada Inc* ("*Sears*")[13] These included protecting consumers, but also "protect[ing] businesses from the anti-competitive effects of deceptive ordinary selling price representations" and "protect[ing] competition from the anti-competitive effects and inefficiencies that result from deceptive ordinary price representations".[14] While consumers are considered, so are the anti-competitive effects on businesses and the market.[15] Thus, while consumer protection is part of deceptive marketing in competition law, it is not the only part. The purposes identified in *Sears* look to the market as a whole.

While provincial consumer protection legislation and the *Competition Act* overlap in their regulation of deceptive marketing, each regime has a different purpose. Consumer protection legislation centres on the consumer. The *Competition Act*'s aim is broader. As the Federal Court of Appeal held in *Canada (Commissioner of Competition) v Premier Career Management Group Corp*,[16] "a focus on the consumer is not indicative of the objective of the scheme, but is a consideration antecedent to the ultimate objective: maintaining the proper functioning of the market in order to preserve product choice and quality."[17] Deceptive marketing distorts markets by

encouraging firms to be deceitful, rather than to produce quality products.[18] Accurate information is a precondition of workable competition.[19] Where false information is fed to consumers, competition is necessarily harmed.[20] It is this market distortion, not consumer protection *per se*, that the *Competition Act* is concerned with. In protecting against market distortion, the *Competition Act* indirectly protects consumers.

Based on these differences, the Tribunal confirmed in *Cineplex* that the *Competition Act* is "not a consumer protection statute".[21] It identified three objectives for the deceptive marketing provisions:

1) to enhance and protect the proper functioning of markets, so markets are not distorted by misinformation; to protect consumers from purchasing goods or services based on inaccurate information;

2) to encourage competition on the merits by incenting firms to provide accurate and truthful information to the public, particularly as to the price of goods and services, for the benefit of both consumers and honest competitors; and

3) to support the production and supply of higher quality goods and services at lower prices.[22]

The Tribunal reaffirmed a broader ambit than consumer protection. These purposes prioritize competition, market function, and the quality of goods. This focus on market distortion and market functionality suggests that the harms targeted by the deceptive marketing provisions are economic in nature. While the consumer is affected, the harms targeted affect the market as a whole.

B. False and Misleading Advertising

Reviewable false and misleading advertising is governed primarily by section 74.01(1)(a) of the *Competition Act*.[23] Reviewable conduct is defined as the making of representations to the public that are false or misleading in a material respect.[24] This is a three-step test: there must be representations, which are false and misleading, and are so in a material respect. The existence of a representation is a factual determination without a set definition in the jurisprudence.[25] Materiality is defined as whether the consumer would likely be influenced by the false or misleading representation.[26] These elements were not a significant issue in *Cineplex*.

The element that has received the most judicial attention in deceptive marketing practice case law is how to assess whether a representation is

false or misleading. This was a major issue in *Cineplex* and the jurisprudence preceding it. The *Competition Act* provides some guidance. Section 74.03(5) prescribes that the "general impression" and the "literal meaning" of the representation must be considered.[27] The literal meaning is self-explanatory[28] – it is the general impression that has captivated courts and the Tribunal. While determining whether the general impression is false or misleading is a highly factual matter,[29] determining the general impression requires a legal assessment to identify the appropriate consumer perspective. This section surveys the development of the consumer perspective in the jurisprudence until the decision in *Cineplex*.

1. The Time Before Time

Assessing the general impression requires defining the consumer from whose perspective the advertisement is viewed. Historically, Canadian deceptive marketing law used the "ordinary citizen" as its consumer perspective.[30] This test originated in criminal deceptive marketing cases.[31] Its canonical expression is found in *R v Kenitex*:[32]

> [B]y definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal.[33]

The *Kenitex* formulation was adopted by the Tribunal for section 74.01(1) in *Sears*[34] and affirmed in *Commissioner of Competition v Gestion Lebski Inc*.[35] Neither provides a deep analysis of the consumer perspective.

Over time, the standard adapted to consider the audience to which the representation was directed, becoming the "average consumer."[36] Courts looked to characteristics of the intended audience, such as "relevant demographics of the intended audience, relative intelligence levels and the level of care that the intended audience would apply in purchasing the product."[37] In short, courts and the Tribunal were required to determine the general impression through the eyes of its intended audience.[38] This test was adopted by several courts and included in the Competition Bureau's ("Bureau") enforcement guidelines on the application of the *Competition Act* to internet representations.[39] These guidelines instructed businesses reviewing their advertisements for compliance to "adopt the perspective of the average consumer."[40]

A salient example is *Maritime Travel Inc v Go Travel Direct.Com Inc.*[41] This case considered alleged deceptive marketing on the part of Go Travel

Direct.Com's advertisement comparing the price of a trip from its service and Maritime Travel's. Justice Hood surveyed the applicable law, finding that the relevant perspective was that of an average person seeing the advertisement in its intended form.[42] The context of the intended audience was a crucial factor. He analyzed various cases on this point, discussing the relative sophistication of consumers in different markets.[43]

Justice Hood found the consumer in *Maritime Travel* to be a "literate person of average intelligence."[44] This consumer would be contemplating spending between $700 and $1,000.00 per person on a trip. Such a person would "read the ad carefully" and "would have ample opportunity to consider it and its wording with care."[45] This formulation of the test is highly contextual, unlike the general standard set out in *Kenitex* and adopted in *Sears*. The release of *Time* altered the paradigm by introducing a less contextual standard.

2. Richard v Time: Enter the Credulous and Inexperienced Consumer

Time's application to the *Competition Act* has been unclear. *Time* was decided under provincial consumer protection laws, whose objectives differ to the *Competition Act*.[46] *Time* held that, when deciding the general impression for consumer protection, the consumer was to be described as "credulous and inexperienced."[47] While courts have applied *Time* in the competition law context, they have been reluctant to adopt its standard, which prescribes a less sophisticated consumer.[48]

In *Time*, Mr. Richard was mailed a letter implying that he won a contest from Time Magazine. In fact, the mailer was only an entry into a sweepstakes. Mr. Richard brought an action for misleading advertising under Québec's *Consumer Protection Act*.[49] Relevant to our analysis is the Supreme Court's determination of the relevant consumer perspective in deciding whether an advertisement constitutes a false or misleading representation. To determine the standard, the Court stressed that the "average consumer does not exist, but is the product of a legal fiction, personified by an imaginary consumer to whom a level of sophistication that reflects the purpose of the [Québec *Consumer Protection Act*] is attributed."[50] To Court had to determine what level of sophistication of the fictional consumer from whose perspective an impugned advertisement would be analyzed so as to best realize the purposes of the Québec *Consumer Protection Act*.[51]

Given the relevant statute's goal of protecting consumers, the Court endorsed lower court decisions characterizing the consumer as "not very

sophisticated."[52] The Court defined the standard with a consumer that is "credulous" and "inexperienced."[53] This consumer is neither reasonably prudent nor well-informed.[54] The perspective was grounded in the consumer protection purpose of the Québec *Consumer Protection Act*.[55] The Court found that "[t]o meet the objectives of the [Québec *Consumer Protection Act*], the courts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations."[56] This is a low standard, as opposed to one requiring reasonableness or due care by the consumer.

3. Post-Time Confusion

As the objectives of the *Competition Act*'s deceptive marketing provisions are broader than those in the consumer protection regime, it is not immediately obvious that *Time*'s standard would apply to competition cases. Nevertheless, the standard saw some adoption in this context, most notably in *Canada (Commissioner of Competition) v Chatr Wireless Inc*.[57]

Chatr considered representations from Chatr Wireless that, among other things, it provided "fewer dropped calls than new wireless carriers."[58] In determining the appropriate consumer perspective, the Ontario Superior Court of Justice looked to *Time*. However, the Court noted the different purposes of the two acts and the role of competition law as market regulation. This difference in purpose was held as relevant to determining the perspective.[59]

Unlike in the *Time* decision, where the representations were made to the public at large, the representations here were aimed at consumers wanting unlimited texting and wireless services, a specific market segment.[60] While the Court accepted that these consumers were credulous, they could not be said to be inexperienced with wireless talk and text services by virtue of their being in that specific market segment.[61] Thus, the Court did not conclude that the consumer was generally inexperienced. In this case, the standard was modified; the consumer was held to be inexperienced with the "technical information contained in the advertisements,"[62] such as the claim that Chatr would drop fewer calls because of its cell site density. The *Chatr* standard was adopted in various future cases, mostly in the telecommunications context.[63]

Ten years later, the Ontario Court of Appeal had the opportunity to consider the standard in *Rebuck v Ford Motor Company*.[64] Unfortunately, while the Court addressed the difference in purpose between Ontario's *Consumer*

Protection Act and the *Competition Act*, it ultimately declined to determine the appropriate consumer perspective.[65]

In the cases surveyed above where the *Time* standard was used, it was modified based on the circumstances of that case. In *Chatr*, the Court explicitly considered the consumer to whom the advertisement was targeted, in line with the "ordinary citizen" standard. By the time *Cineplex* was heard, there was no definitive answer in the case law, though there appeared to be a move towards the *Time* standard. The Tribunal in *Cineplex* was thus poised to determine whether *Time*'s standard would stick.

C. Parliament Introduces the Drip Pricing Provision

In 2022, Parliament introduced section 74.01(1.1), the "Drip Pricing" provision. Section 74.01(1.1) creates a specific sub-category of false and misleading representations aimed at price representations that have been partitioned. The provision captures any price representation that is "not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation".[66] However, obligatory charges or fees imposed by or under an Act of Parliament or the legislature of a province are excluded.[67] This provision provides that conduct that meets these terms is false or misleading in all circumstances, eschewing the need for the normal analysis.

The provision is not well-defined in the Act—there is minimal guidance on what types of price representations are covered by the provision. To understand the prohibition, it is important to consider drip pricing in the economic sense and the legal sense. The next two sections define each of these conceptions of drip pricing.

D. The Economist's Conception of Drip Pricing

This section provides an overview of drip pricing as understood in the behavioural economics and consumer psychology literature. Drip pricing has been widely researched over the years. The potential negative effects of drip pricing identified or confirmed by these studies caused competition and consumer protection authorities to take action to regulate price representations, in some cases leading to amended or new legislation.[68] It is important to understand (1) the types of pricing practices that make up drip pricing, (2) the impact of drip pricing on consumer decisions, and (3) the broader effects of drip pricing on markets.

1. Pricing Practices that Constitute Drip Pricing

The basic concept of drip pricing is a strategy where the seller initially presents the price of one part of the product ("base price"), then presents the price of other components ("surcharge") later in the purchasing process.[69] Drip pricing is very closely related to price partitioning. Price partitioning generally includes the practice of dividing up the presentation of the base price and surcharge.[70] The difference between drip pricing and price partitioning is timing. In drip pricing, the surcharge is presented after the base price. In price partitioning, both can be presented at the same time. The surcharge can be mandatory or optional.[71] Because drip pricing is an incident of price partitioning, the effects of price partitioning often can be seen in drip pricing.[72]

Drip pricing and price partitioning become more complex when sellers add a qualitative dimension to price representations. Sellers can control how and when to present the elements of the price in marketing, including by emphasizing the base price. Sellers may notify consumers that additional surcharges will be levied later in the process. However, this notice may emphasize the base price, making that messaging more prominent than information about surcharges.

2. Effects on Consumer Decisions

Consumer decision-making processes can differ when presented with drip-pricing and when presented with all-inclusive pricing. Drip pricing may cause consumers to underestimate the total price of the product,[73] largely due to the way price information is presented to them. Underestimation can lead to errors in purchasing decisions (e.g., purchasing too much of a product or purchasing the more expensive option because of a perceived lower price).[74]

One explanation for this effect is the anchoring and adjustment theory, initially proposed by Tversky and Kahneman. This theory posits that people estimate values by starting with an initial value or starting point (anchor) and then adjusting that value (adjustment) to arrive at a final estimate.[75] However, biases often influence the way the initial value is adjusted, resulting in an insufficient adjustment.[76] In the drip pricing context, the consumer starts with the lower represented base price of the product (anchoring), and then may inadequately account for the surcharges that are introduced at later stages of the purchasing process (adjustment).[77] The adjustment is inadequate because consumers give more attention to the information presented first (i.e., the lower base price) and less attention to the information

presented later (i.e., the surcharge), thereby underestimating the impact of the surcharge on the total price.[78]

Another explanation for consumer errors in purchasing decisions that is commonly discussed in the literature is related to the fact that drip pricing increases consumers' search costs, which can skew their perception of prices and price comparisons. Drip pricing makes the adjustment stage of price estimation more difficult because price comparisons across different products are more complex when the price is divided up and presented differently.[79] The increased difficulty increases search costs – time and psychological costs associated with piecing together the different price components throughout the purchasing process.[80] When the costs of fully and accurately estimating a product's price are high, consumers tend to use lower-effort processing strategies.[81] Consumers may believe that there is minimal benefit in considering alternatives if they assume that the amount of the surcharge across product options is similar to that of the option with the lowest base price.[82] When consumers expect higher costs of leaving the transaction to evaluate alternatives after surcharges are revealed, they may perceive the purchase that they have already started to be the optimal option.[83] Consumers might even justify their decisions to avoid the psychological cost of admitting that a bad purchase was made.[84]

Contextual and psychological factors that influence the way consumers process price representations can further affect consumer decisions. One consideration is consumer experience. Huck and Wallace proposed that with experience over time, consumers may become annoyed by drip pricing and shift the demand for the products of one firm to another.[85] This could disincentivize drip pricing. However, that would require consumers to have sufficient market power. More research is needed to explore the effect of drip pricing on consumer experience.[86]

A second consideration is consumer perceptions of fairness, which may impact purchasing decisions. Banerjee et al suggest that consumers with low expectations of drip pricing, but who encounter an unpleasant surprise of drip pricing, perceive the transaction to be less fair and would less likely make the purchase.[87] Conversely, consumers with high expectations of drip pricing and encounter drip pricing will perceive the transaction to be more fair and would more likely make the purchase.[88] Moriuchi and Murdy, Chu et al, and Totzek and Jergensen suggest that timing of the surcharge's disclosure will influence the consumer's perception of whether the surcharge was fair.[89] This may incentivize firms to provide added transparency when

prices are dripped.[90] However, consumer expectations are likely to vary from industry to industry.[91]

A third consideration is how the price information is presented. Kim demonstrates that the way that prices are visually represented and partitioned affects how well consumers can recall and process on the price information in that representation.[92] Morwitz, Greenleaf and Johnson also demonstrated that consumers are more likely to use mental shortcuts (i.e., heuristics) to calculate the total price when the surcharge was presented as a percentage rather than a dollar amount.[93] Using mental short cuts leads to incorrect calculation of the total price, which in turn leads to suboptimal decision-making.[94]

In sum, the literature in economics and consumer psychology has provided evidence of drip pricing affecting consumer decisions by influencing the way consumers take in and process pricing information. When this influence is common across consumers, drip pricing can affect the way markets behave.

3. Impact on Markets

Drip pricing can have an impact on the broader markets by distorting competition. If markets were operating with perfect competition, sellers would not be able to increase profits through the use of drip pricing.[95] However, some studies have demonstrated that sellers do profit from drip pricing and price partitioning, evincing a distortion of perfect competition.[96] This is largely because drip pricing and price partitioning can change demand by influencing consumer decisions.[97]

The studies have demonstrated different reasons for the shift in demand. Morwitz, Greenleaf and Johnson found that the anchoring and adjustment effect increases demand for sellers who use drip pricing.[98] Huck and Wallace, and Ellison and Ellison explain that higher search costs caused by drip pricing, as explained above, cause the distortion in demand.[99] Rasch, Thöne and Wenzel's results demonstrate that drip pricing can lead to lower levels of competition within a market.[100] They find that even if consumers are fully informed of the prevalence of drip pricing, the level of competition is insufficient to drive prices down to the level where all-inclusive pricing is used.[101] They find that the higher search costs imposed onto consumers by drip pricing lead consumers to make decisions based on initial base price representations, rather than the total pricing. The overall result is that consumers are worse off and that sellers can increase their profits. Furthermore, Ellison and Ellison explain that sellers compete for consumers' attention

before introducing the surcharges to consumers.[102] They theorize that while base prices are advertised at near cost to the seller, profits are ultimately earned through the surcharge.[103]

4. Conclusion

The behavioural economics and consumer psychology literature has identified a number of potential issues with drip pricing. Although more research is needed on the specific nature of the relationship between the context in which drip pricing arises and consumer decisions, there has been enough evidence for competition and consumer protection authorities to be concerned about the effects of drip pricing. However, the legal conception of the types of representations that should be addressed through regulation is not as developed as the economic conception. The next section discusses how the law on drip pricing has developed and evolved in Canada.

E. Legal Conception of Drip Pricing

The development of drip pricing regulation has seen a few major shifts over its history in Canada. This section will survey the development of regulating drip pricing and identify the types of price representations that have historically been considered drip pricing by Canada's Bureau. This section will also assess the usefulness of past enforcement activities in informing the new drip pricing provisions. The characteristics of what constitutes drip pricing under the *Competition Act* were and remain uncertain, even after the Act's amendment to add the provision specifically targeting drip pricing.

1. Pre-Drip Pricing Provision

Prior to the enactment of the drip pricing provision, there was generally little legal guidance as to what constituted drip pricing despite the Bureau's recognition of drip pricing as a form of deceptive marketing as early as 2015.[104] Enforcement actions were taken under the false and misleading advertising provision (section 74.01(1)) and the sale above advertised price provision (section 74.05(1)). Most enforcement actions against drip pricing were concluded through consent agreements with businesses including car rental companies, ticket agents, and telecommunications.[105] Although the term "drip pricing" was not used in any of these consent agreements, the Bureau has stated that they are / has used them as examples of drip pricing.[106] The Bureau's conception of drip pricing is useful in assessing what the legal conception of drip pricing entails. The facts of these consent agreement cases have common features that indicate that the Bureau's conception of

drip pricing is broader than the economist's conception (outlined above) and includes both drip pricing and price partitioning.

First, in all the consent agreement cases, the Bureau argued that there were price representations that were "not in fact attainable" because the sellers required consumers to pay "additional Non-Optional Fees."[107] The focus of the analysis was attainability: whether the price adduced from the general impression was the actual price being paid.[108] The focus on attainability pushed the scope of the Bureau's conception of drip pricing beyond the basic economic conception, which focuses on the absence of disclosing surcharges with the initial representation of the base price. The attainability of an initial price representation can be impeded by inadequate disclosure of surcharges – not just nondisclosure – with the initial price representation.

Second, only in *The Commissioner of Competition v Stubhub Inc, Stubhub Canada Ltd*[109] and *The Commissioner of Competition v Ticketmaster LLC, TNOW Entertainment Group, Inc, and Ticketmaster Canada LP*[110] were the non-optional fees not presented with the initial price representation, and in the later stages of the transaction.[111] This suggests that the Bureau's conception of drip pricing also incorporates incidents of price partitioning.

Third, how the additional non-optional fees were presented to the consumers – in addition to when they were presented – was a factor in determining whether the prices were properly represented. In *The Commissioner of Competition v Hertz Canada Limited and Dollar Thrifty Automotive Group Canada Inc*,[112] *The Commissioner of Competition v Enterprise Rent-A-Car Canada Company*,[113] and *The Commissioner of Competition v Discount Car & Truck Rentals Ltd*,[114] the wording used to describe the fees, how they were used, and where they were placed created the general impression that they were taxes or fees required by governments and authorized agencies.[115] In *The Commissioner of Competition v Comwave Networks Inc*,[116] the non-optional fees were disclaimed in the fine print of the price representations. In *Commissioner of Competition v Aviscar Inc and Budgetcar Inc/Budgetauto*,[117] the words used to describe the non-optional fees, where the words were placed, and how they were combined with actual taxes created a general impression that consumers would be getting a discount when they were not.[118] This indicates that qualitative factors in the actual price advertisement are relevant.

Notwithstanding the consent agreement cases, the Bureau's definition of drip pricing seemed to have changed in its formulation over the years. In 2015, the Bureau referred in its *Deceptive Marketing Digest* to drip pricing as

"advertisers offer[ing] an attractive price for a good or service, but consumers who respond to the representation discover that unexpected additional costs are added to the prominently advertised price."[119] In the 2020 update of the Bureau's *Deceptive Marketing Digest*, drip pricing was referred to as "the practice of offering attractive headline prices and then adding additional mandatory fees later in the transaction."[120] The "unexpected" aspect of the additional fees was dropped, broadening the definition.

2. Drip Pricing Provisions

In 2022, the *Competition Act* was amended to include a drip pricing provision.[121] The Bureau had requested for the inclusion of the provision to make enforcement easier – having the *Competition Act* recognize drip pricing as deceptive would eliminate the need for the Bureau to prove why drip pricing is deceptive.[122] The general impression test is to be applied to drip pricing since the general impression test applies to all of section 74.01. However, while the provision governs what constitutes the legal conception of drip pricing, the provision does not provide clear guidance on the types of price representations considered drip pricing. In its commentary about the amendments, the Bureau noted that the provision at minimum cements the practice of drip pricing as a form of false and misleading advertising, although the provision does not explicitly make reference to drip pricing.[123]

The consent agreement cases discussed in section II-E(1) of this paper, above are of limited use in interpreting the provision. If the application of the new drip pricing provision is intended to remain consistent with prior enforcement activities, then the consent agreement cases demonstrate that the provision addresses both drip pricing in the economic sense and some instances of price partitioning (those with inadequate disclosure of surcharges), as both could be captured by the provision's language. However, although the provision uses similar language related to attainability contained in consent agreements, the consent agreements do not provide a clear definition of attainability. The provision also uses the new term "fixed obligatory" fees, which is a shift from the "non-optional" fee language used in consent agreements. It is uncertain if these terms are equivalent.

About one year after the new provisions came into effect, the Bureau brought a drip pricing case against Cineplex before the Tribunal.[124] The decision interpreted the drip pricing provision and brought some additional guidance to the scope of the new provision. The Tribunal also took the opportunity to revisit the formulation of the general impression test and

how the test is to apply. The next section provides a summary of the decision and its main legal outcomes.

F. Summary of *Canada (Commissioner of Competition) v Cineplex Inc*

The previous sections outlined two issues in deceptive marketing law that needed clarification: first, the legal standard for the consumer perspective in the general impression test; and second, the interpretation of the scope of section 74.01(1.1). These two issues were argued before the Tribunal in *Cineplex*. This section summarizes the *Cineplex* decision on these issues.

1. Background and Facts

Cineplex charged an online booking fee. The fee was $1.50 per ticket, capped at four tickets. The fee was not uniform. Members of the Scene+ loyalty program paid $1.00 per ticket, capped at four tickets.[125] Members of the CineClub loyalty program had no fee.[126] The design of Cineplex's webpage and app did not readily make the booking fee apparent when consumers were at the stage of selecting their tickets.

After selecting the number of tickets, a "floating ribbon" appeared at the bottom of the webpage. The ribbon contained a "PROCEED" button and a subtotal which included both the ticket price and the booking fee. Although information about the booking fee was available to the consumer on the webpage, it was not visually apparent,[127] and consumers needed to scroll down to the bottom of the page to find the breakdown of the subtotal containing the booking fee. This was the case throughout the booking process.[128]

2. The Consumer Perspective: Welcoming Back the Ordinary Citizen

The Tribunal declined to use the *Time* standard to assess the general impression and reintroduced the ordinary citizen standard, describing it as "appropriate for the objectives of the *Competition Act* and the purposes of the deceptive marketing provisions".[129] The standard was constructed "with a view to protecting and enhancing undistorted markets and honest competition."[130] The *Competition Act*'s market-protection objectives were front and centre in the decision.

In looking to the objectives, the reasons note that section 74.01(1) concerns a wide variety of representations which may be directed at the public at large or specific market segments.[131] Therefore, the standard requires sufficient flexibility to capture multiple types of representations, price or

non-price, made either to the public at large or to certain classes of consumers.[132] Thus, the consumer in each case will have their own characteristics, which are not and cannot be pre-defined by legal rules.[133]

To determine the consumer perspective, the Tribunal or Court must look at the "ordinary consumer of the product or service,"[134] who is usually the consumer "to whom the representation is made, directed or targeted."[135] The definition of this consumer was further refined by a list of contextual factors:

1) the nature of the representation at issue,

2) the characteristics of the members of the public to whom the representation was made, directed or targeted,

3) the nature of the product or service involved, and

4) the particular circumstances of the case.[136]

The *Cineplex* construction of the ordinary citizen standard is contextual, unlike *Time*'s blanket standard. In this way it is more reminiscent of the later "average citizen" standard than the formulation of the ordinary citizen in *Kenitex* and *Sears*. Under *Cineplex*, the ordinary citizen is determined in the context of the impugned representations. The public at large will have different needs than a specific subset of consumers. This standard is responsive to all markets, types of representations, and classes of consumers.

3. Application of the Literal Meaning and General Impression

The Tribunal found that the price representations were representations of the ultimate price the consumer would pay, not specifically an "at-theatre" price. The literal meaning was that the represented price was a final price.[137] The general impression was viewed from the perspective of an "ordinary citizen moviegoer" using the site or app.[138] Ironically, the contents of this perspective was not hotly contested.[139] The bulk of the analysis considered the fourth factor, the circumstances of the making of the price representations. The most salient circumstance was the design of the website itself. Specifically, it was designed to facilitate easy movement through the purchase process and "encourage the user's conversion into a ticketholder."[140] This was found not to cause the consumer to carefully scrutinize the page.[141]

The Tribunal's decision on general impression was primarily based on this website design. Consumers were not expected to scroll below the floating ribbon as there was no reason to do so.[142] The design of the page

dissuaded the ordinary consumer from scrolling down, thus hiding the booking fee.[143] Since the website hid information, the general impression was that the represented price was the final price, not an at-theatre price.

This discussion touches, albeit obliquely, on the ways drip pricing capitalizes on consumer psychology. For example, the Tribunal referred to the countdown timer and the "funnel" design of the site, both of which pressure consumers to make a snap decision.[144] The new consumer perspective accurately reflects the goals of the *Competition Act* and is generally successful in clarifying the law. A focus on the circumstances of the case, rather than a pre-existing standard, allows the analysis to be tailored to the market in need of protection. The standard is not perfect, however, and we address some unresolved issues and lingering questions in the final section.

4. Interpretation of the Elements under Section 74.01(1.1)

The Tribunal found that the elements of section 74.01(1.1) were met. The requirements can be outlined as the following:

1) There was a making of a "representation of a price."

2) The price is "not attainable due to" a charge or fee that was "fixed" and "obligatory."

3) Amounts imposed by or under an Act of Parliament or a provincial legislature are exempt.

The first requirement was easily decided. The literal meaning and general impression of the representations demonstrated that they were the display of movie ticket prices.[145] The third requirement was not an issue as the exemption did not apply to Cineplex's booking fees.[146]

The second element required more analysis. It was further broken down into three requirements:

1) The represented price was not "attainable" due to fees or charges.

2) The fees or charges were

   a) "Fixed" and

   b) "Obligatory".

No authoritative or persuasive guidance on section 74.01(1.1)'s interpretation existed. The Hansard is sparse[147] and there had been no case law. The

Tribunal found it unnecessary to define "attainable," "fixed," and "obligatory" in the abstract or for all possible purposes.[148] Instead, a fact-based, contextual approach was taken. All three components were found to have been met.

"Fixed"

The Tribunal rejected the Commissioner's proposed definition of "fixed" to mean that the advertiser determined the fee's amount before making the representation. However, the Tribunal accepted the Commissioner's evidence to find that the fee was fixed:

1) The $1.50 was set before the booking fee's introduction, and Cineplex had deliberated the precise level to set the booking fee.

2) By the time that the consumer selects tickets on the Tickets Page, the booking fee is already predetermined.

3) The fact that consumers with different memberships pay a different, predetermined fee does not change the fact that the fee is fixed for each consumer.

The Tribunal then rejected Cineplex's proposed definition of "fixed" to mean "not variable."[149] The Tribunal also rejected that Cineplex's evidence on whether the booking fee was fixed.

1) The cap on the booking fee at four tickets has no effect on the per-ticket fixed fee. This cap also does not affect enough consumers to matter.[150]

2) The fee's dependency on customer decisions alone is insufficient to render the fees as not fixed. Such a proposition would be too "broad and amorphous."[151]

Furthermore, the Tribunal ruled out the possibility of creating two or more levels of fixed charges or fees and charging different categories of customers in itself is sufficient to avoid the application of section 74.01(1.1).[152] The fact that Cineplex charged "pre-determined" and "set amount[s]" to different consumers did not alter the fact that the fee is "fixed."[153]

"Obligatory"

In determining whether a fee or charge was obligatory, a consideration is whether the consumer had a choice to pay the fee or charge. The consumer is required to have been aware that they have the choice.[154]

The Tribunal concluded that the booking fee was obligatory. Firstly, the fee applied to all consumers. Secondly, consumers did not have the choice not to pay. The consumers were not properly informed of the choices, thus, the choice to purchase the tickets in-theatres was meaningless.[155] The ticket prices were not advertised as "in-theatre" prices and "online" prices. And the display would lead an ordinary consumer to believe that the online prices are the only prices to be paid.

"Not Attainable Due to Charges or Fees"

The Tribunal delineated three factors to determine whether a represented price is attainable:

1) The impugned price representation,

2) The channel in which the representations were made and where consumers saw them, and

3) Whether consumers pay a fixed obligatory charge or fee to complete the purchase in that same channel.[156]

Applying these factors, the Tribunal found that the represented ticket prices were not attainable due to the booking fees. The impugned price representation was the ticket prices on the Tickets Page. The ticket prices were represented as the prices that consumers must pay if purchasing through the website, which is the channel in which the price representations were made, seen and acted upon. Neither the literal meaning nor the general impression suggested that the ticket prices only applied to in-theatre purchases.

Part III. Lingering Questions after *Cineplex*

Cineplex makes strong strides in clarifying the law on deceptive marketing. It will be a key decision not just in future drip pricing cases, but other deceptive marketing cases brought under section 74.01(1)(a). However, there are several issues left in the law post-*Cineplex*.

The first set of issues concern the consumer perspective. First, it is not clear from *Cineplex* what the consumer perspective would be when a

representation is made to the public at large. We consider whether this standard would resemble *Time* and look to Australian and New Zealand jurisprudence for potential construction. Second, the method of applying the consumer perspective is ambiguous. There could be either a common baseline perspective that is further refined based on the facts, or there could be constructed bottom-up from the facts directly. We examine the benefits and drawbacks of each.

Second are statutory interpretation issues on defining and applying the elements of reviewable conduct section 74.01(1.1). First, *Cineplex* provides an example of how the factual matrix is used to support the finding of a charge that is "fixed." However, the Tribunal does not explicitly outline any principles of what "fixed" means in the context of section 74.01(1.1). We consider the reasons given in the decision and the objectives of competition law to argue that "fixed" refers to pre-determination or the ability to set the fee or charge. Second, it is uncertain whether or how search and switching costs might play a role in determining whether a charge was "obligatory." We consider the heavy burden that considering search and switching costs might have on sellers. Third, the Tribunal did not explain the extent to which the consumer perspective is considered when analyzing the "fixed," "obligatory," and "not attainable" requirements under section 74.01(1.1). The Tribunal had considered consumer perspective under "obligatory" and "not attainable" but not under "fixed." We argue that the consumer perspective can be considered in all three requirements. Following this are two statutory interpretation issues. We address the degree to which the drip pricing provision and the sale above advertised price provision are duplicative, arguing that there is room for both in the *Competition Act*. Next, we argue that the *Cineplex* standard for consumer perspective and drip pricing should inform cases under the criminal deceptive marketing provision.

Finally, we briefly address the Tribunal's decision not to issue a restitution order. We argue that the decision suggests that restitution will be seldom used in the drip pricing context. However, the fine issued should be sufficient to meet the aims of competition remedies.

Part IV. Constructing the Ordinary Citizen

For all of *Cineplex*'s guidance on the ordinary citizen, there are two remaining questions on how to construct the ordinary citizen. First, where a representation is made to the public at large, what are the characteristics of the ordinary citizen? Are they meaningfully different to the credulous and inexperienced consumer in *Time*? Second, the methodology laid out by the

Tribunal is somewhat unclear. It can be interpreted as requiring a common baseline ordinary citizen who is then deviated from, or a fully contextual analysis. This section examines each in turn.

A. The Ordinary Citizen and the Public At Large

The public at large is the broadest possible cross-section of society. The reasons in *Cineplex* do not explain as to what this cross-section looks like. It cannot be assumed that the "ordinary moviegoer" is the same as the public at large.[157] Thus, *Cineplex* does not address the question and so the characteristics of the public at large to determine consumer perspective are unclear.

One possible solution would be adopting the credulous and inexperienced consumer standard from *Time*. On its face, this is a reasonable choice. *Time* concerned a representation to the public at large. Further, its standard incorporates the wide range of knowledge and reasoning abilities present in such a cross-section.[158] Where representations are made to everyone, then credulous and inexperienced people are part of the target audience. If there is any place for the credulous and inexperienced consumer, it would be here.

Adopting this standard raises issues with the objectives of the *Competition Act* and its deceptive marketing provisions. The *Time* standard was based on the goals of consumer protection legislation, which as discussed above are different from competition concerns.[159] Competition law's aim in regulating deceptive marketing is primarily to protect the proper functioning of *markets*, not protect *consumers*. So long as businesses are providing accurate information to consumers, workable competition and effective markets are protected.[160] This is why the Tribunal chose not to adopt *Time*'s standard. Thus, the standard does not need to capture the credulous and inexperienced consumer.

Australia and New Zealand offer one way of constructing the ordinary citizen when the public at large is the target audience. Both use a variation of the ordinary citizen approach to consumer perspective. In Australia, the standard is the "reasonable consumer".[161] The New Zealand Court of Appeal refers to it as the "typical consumer."[162] The two are substantially similar.

In *Australian Competition and Consumer Commission v Jetstar Airways Pty Limited*,[163] the Federal Court of Australia discussed the range of persons likely to read an advertisement made to the "world at large."[164] *Jetstar* internet advertisements for airline services, which the Australian Competition and Consumer Commission alleged were not attainable, similar to the *Cineplex* decision.[165] The Court described this range of persons as including:

> […] the shrewd and the ingenuous, the educated and the uneducated, the experienced and inexperienced in commercial transactions; it will include the astute, the informed, those who are sceptical and read the small print, those who are intelligent and those who are well informed, and it will also cover many who do not possess those characteristics and those who are less informed and those with average intelligence.[166]

Despite this wide range of persons, the court is not to consider everyone included in that range. It must exclude certain extreme outliers, the "extremely stupid, the unusually gullible and those whose reactions are extreme or fanciful."[167] Thus, the consumers considered are the "'ordinary' or 'reasonable' members of that class."[168] The question then becomes "whether a not insignificant number of persons within that class are likely to have already been led into error by the impugned conduct or likely to be led into error in the future by such conduct."[169] The resultant class of consumers is "all the consumers in the class targeted except the outliers."[170]

This does not mean that the consumer is well-informed or has a robust reasoning capacity. The consumer "[…] of somewhat less than average intelligence and background knowledge."[171] Indeed, the Federal Court of Australia cautions that it is not entitled to assume that the consumer "will be able to supply for himself or herself omitted facts or to resolve ambiguities."[172] This is then between "average" as understood by the New Zealand Court of Appeal and the standard in *Time*. It includes people with below and above average intelligence and information, but not those whose perspective is "extreme." This approach can capture the mental shortcuts and behaviour that consumer psychology is concerned with.[173]

When considering the public at large, this approach slots neatly into *Cineplex*'s reasons for rejecting *Time*. It provides explicit guidance on whom to exclude when determining consumer perspective for competition law. The outliers identified in these cases exist in Canada and are analogous to the credulous and inexperienced consumers protected in *Time*.[174] Further, the ordinary citizen standard in *Kenitex*, and reintroduced in *Cineplex* suggested a more prudent consumer. Adopting the outliers exclusion would tailor the standard to fit the market-regulation objectives of the *Competition Act*, avoiding turning it into a consumer protection statute.

An "ordinary" person is not likely to have an extreme reaction or to be unusually gullible. Competition law does not need to bend over backwards to protect outliers, as that is not its purpose. In cases of general advertising, the Tribunal should adopt a definition of the ordinary citizen in the context of the public at large like that used in Australian and New Zealand case

law. The law should recognize the existence of outliers and exclude them from the consumer standard. Doing so ensures a focus on the accuracy of information, reasonably understandable to the ordinary person, and not on protecting those who do not represent the general population.

B. Is There a Common Baseline for the Ordinary Citizen?

The process of constructing the ordinary citizen on a set of facts can be interpreted in two ways. One starts from a common baseline and then uses contextual factors to deviate from the baseline and construct the ordinary citizen within the targeted group. The other is purely contextual, where the ordinary citizen is a cross-section of the public constructed entirely from the evidentiary record without reference to any baseline.

The Tribunal refers to the standard in *Kenitex*, which held that "[t]he ordinary citizen is, by definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal."[175] However, this is only referred to when describing the history of general impression law rather than when the standard is actually laid out. The Tribunal does use the phrase "the legal perspective… should remain that of the ordinary consumer of the product or service."[176] This does suggest the adoption of a previous standard. However, *what* previous standard this refers to is not clear in the reasons. Whether this is the general ordinary citizen standard in *Kenitex* or the average person in cases like *Maritime Travel* is not explicit.

When considering whether the ordinary moviegoer is particularly credulous or inexperienced, the Tribunal remarked that "The Commissioner did not point to any evidence that an ordinary consumer on the Cineplex website has any unusual characteristics related to credulity or readiness to believe on-screen representations, and I find none."[177] This statement can be interpreted under either construction of the standard. Either the Commissioner was required to show why the Tribunal should deviate from a set standard, or that the Commissioner failed to establish, based purely on the facts, that the ordinary moviegoer was particularly credulous and inexperienced.

There are two potential pathways the law could take. The first is the highly contextual approach implicit in *Cineplex*, where each case is considered in its own context without reference to a baseline ordinary citizen. In this path, different contexts would be bespoke bubbles. They would interact with each other only by analogy to each other, with similar standards likely used for

cases in the same industry, akin to the post-*Chatr* cases. There is nothing inherently wrong with this standard. The Tribunal provided guidance on how to identify the characteristics of the intended audience, and similar standards have been employed in the section 52 context. How this would play out and whether these constructions adequately meet the needs of competition law is a matter for future case law. Where everything is based on individual facts, conclusions cannot be drawn *a priori*.

With a heavily contextual analysis there are a few risks. First, Canadian competition case law tends to develop at a snail's pace, with cases few and far between. Further common law elaboration is likely to take years, leaving the contours of the standard and its application to different markets unknown.[178] Second, if the ordinary citizen is unmoored from a general standard then it may be difficult for courts and the Tribunal to fashion a robust and consistent analysis of the ordinary citizen. *Time* and *Kenitex* each provide a sense of what kind of person the ordinary citizen is meant to be. Without this, decision-makers will need to exercise more discretion and elaborate on the factors laid out in *Cineplex* which could lead to inconsistent decision-making.

An alternative proposal would be to incorporate the general standard in Australian and New Zealand case law, discussed in the previous section, as the baseline. One would start with the largest cross-section of consumers and adjust using characteristics of the targeted consumers. This framework can generally be transferred to the Canadian context without difficulty. Like the *Cineplex* standard, the Australian and New Zealand framework considers the target class of consumers. The same contextual elements are present, though implied in that context. In defining the target class, the factors in *Cineplex* can help to contour that set of consumers.

What would a consumer perspective that takes cues from Australia and New Zealand's jurisprudence look like? It would first define the class of consumers are the targets of the advertisement, minus any outliers. Then, the characteristics of that class would be defined by considering the *Cineplex* factors. This would in turn modify the general standard of persons with "less than average intelligence and background knowledge" to best fit the circumstances.

Chatr is a good example of this kind of reasoning. It began with a baseline of the credulous and inexperienced consumer. Given that the consumers in that case were necessarily experienced with unlimited wireless services, Justice Marrocco then adjusted the perspective accordingly, finding that

the consumers were only "technologically inexperienced."[179] In *Chatr*, the baseline was deviated from to fit the context of that particular case. The Australian and New Zealand definition and its exclusion of outliers provides clear instruction on how to conceptualize a given class of consumers. It is entirely in line with the standard provided in *Cineplex* and the objectives of the *Competition Act*.

One note of caution for using these cases is that the ultimate question to be answered in Australian and New Zealand law is whether "a not insignificant number of persons within that class are likely to have already been led into error by the impugned conduct or likely to be led into error in the future by such conduct."[180] This does differ from the Canadian context, where materiality is determined by whether the "ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered."[181] While a notable difference, this does not affect the determination of consumer perspective. Rather, this difference goes to the materiality of the misrepresentation, and so it should not be an impediment to adopting the useful suggestions from the Australian and New Zealand cases.[182]

Regardless of which methodology is adopted, a more contextual analysis may make compliance with the deceptive marketing regime more difficult. The advantage of a fixed standard like *Time* is that in all cases, firms can more readily predict its applicability. Where the standard is contextual, it may not always be easy to predict the characteristics of the consumer. This could lead to diverging interpretations about what constitutes deceptive marketing and thus more uncertainty. We take no position on which of the methodologies we outline would be more effective. That is a matter for future case law to determine. With this section, we mean to offer two constructions of the standard and clarify ways the jurisprudence may develop.

Part V. Statutory Interpretation Issues

A. Interpretation and Application of Section 74.01(1.1)

Although the Tribunal provided some guidance on the definition of section 74.01(1.1), much uncertainty remains. First, the definitions of the three requirements of section 74.01(1.1) are not well-developed. Second, the Tribunal's characterization and application of those requirements overlap, and the distinction between the requirements is hard to identify.

1. What factors should be considered in determining whether the fees were "fixed"?

The Tribunal's fact-based analysis provides minimal guidance on how the "fixed" requirement will be satisfied in future cases. The "fixed" requirement should refer to a seller's ability to set, i.e., pre-determine, the fee's amount and structure. This interpretation is supported by the Tribunal's reasons.

First, although the Tribunal did not adopt the Commissioner's proposed definition of "fixed", the Tribunal's reasons for finding that the booking fee was "fixed" seem to align very closely with the Commissioner's proposed definition. The Tribunal focused on Cineplex's ability to set and pre-determine the amount and structure of the fee as an indicator of whether the fee is "fixed." Although different types of consumers were charged different booking fees, the amounts of the fees were already set by the time the consumer began the purchasing process.[183] Therefore, the ability to pre-determine fees' amount and structure appears to be an important consideration.

Second, the Tribunal rejected Cineplex's proposed definition that "fixed" means "not variable."[184] The Tribunal concluded that Cineplex's proposed definition was contrary to Parliament's intent and the purposes of section 74.01(1.1). It is uncertain whether a fee's variability can at all be relevant to determining whether the fee is "fixed."

Third, the Tribunal did not seem to foreclose the possibility that a fee's dependency on consumer choices could be a relevant consideration.[185] The Tribunal only stated that "without more," the dependency itself is "too broad and amorphous."[186] There was no explicit rejection that dependency could not be relevant at all. However, this begs the question of what "more" is needed for the dependency to render a charge or fee as not fixed.

Interpreting "fixed" to mean "set" or "pre-determined" also accords with the function and purposes of section 74.01(1.1) and the *Competition Act* more broadly. Although the deceptive marketing provisions have a large consumer protection aspect, their ultimate objective is protecting competition and undistorted markets. In the context of section 74.01(1.1), competition is protected by preventing sellers from misrepresenting price information within the market. The provision should only apply when sellers have control over pricing and are not bound or obligated to price a product a certain way. If this was not required, enforcement against the sellers would be ineffective in protecting competition – they are not the source of the problem. Essentially, the "fixed" requires some level of fault on the sellers for causing the distortion in pricing information.

There is also a fine line between market players behaving anti-competitively and market conditions not facilitating competition. The former is dealt with by competition enforcement measures under the *Competition Act*, and the latter should be dealt with by economic policy. Sellers being unable to "fix" the surcharge is different from sellers merely passing costs onto consumers. When sellers pass costs onto consumers, they still have control over how the fees are set. One extreme example of a fee that is not "fixed" is the charge for paying with a debit card. The usage charge is obligatory because it must be paid. It makes the initial price unattainable because it is added to the total amount that the consumer pays for the product. However, the seller does not pre-determine this charge. The bank sets when and how much to charge.

2. Do perceived switching costs factor into assessing whether there is optionality and choice when determining the "obligatory" requirement?

The Tribunal also did not set out specific principles in deciding whether a charge or fee is "obligatory." The Tribunal's analysis appears to focus on choice and optionality. First, the consumer must pay a fee in the transaction's purchase channel. Second, the consumer needs to be "aware" of alternative channels that do not charge the fee.[187] However, if the availability of choice and optionality is the focus of "obligatory," awareness might not always suffice.

The Tribunal did not consider how perceived search and switching costs might impact the analysis. Whether an alternative without the booking fee existed was assessed from the ordinary consumer's perspective. However, if an ordinary consumer perceived high switching costs, the consumer might not have perceived a plausible alternative to exist, even if the consumer was aware of *an* alternative.[188] The key would be *when* the consumer was made aware of the alternative. If the consumer was made aware that there were alternative channels that did not require the fee to be paid at the start of the transaction, the charge would essentially be the price for the added convenience of making the transaction through the specific channel. If the consumer was instead made aware of alternatives that did not require the charge late into the transaction, the charge might be considered obligatory because of the perceived search and switching costs associated with leaving the transaction and looking into the alternative.

If search and switching costs are to be included in the analysis, it would mean that the seller might be responsible for minimizing such costs arising from partitioning prices. When such an obligation might arise will depend

on the facts. It will be an onerous one for sellers because the of general uncertain nature of behavioural economics and consumer psychology evidence. It will be difficult to know exactly when search and switching costs created by a specific pricing practice will be high enough to deprive an ordinary consumer of a choice. Imposing such an onerous obligation can only be justified once the Commissioner has provided evidence that demonstrates the high switching costs for the particular price representations being challenged. Given the uncertain nature of behavioural economic and consumer psychology evidence, the Commissioner will likely have a very high evidentiary burden to set out that the specific price representations being challenged will impose high search and switching costs on the ordinary consumer.[189]

3. To what extent is consumer perspective relevant to the analysis for each requirement of section 74.01(1.1)?

The Tribunal referred to the ordinary citizen and the general impression when establishing that the "obligatory" and "not attainable" requirements had been met.[190] The Tribunal focused on whether the general impression conveyed by the price representation suggested that the booking fee was mandatory for the channel. However, the Tribunal referred to "the eyes of the Tribunal with the benefit of the very detailed review" of the channel as a way of coming to establish that the price representations were "not attainable."[191] The Tribunal also did not refer to the ordinary citizen or the general impression when discussing whether the booking fee was "fixed."

The consumer perspective could be considered under every requirement for section 74.01(1.1). Under the "fixed" requirement, a fee or charge's dependency on a consumer's choices might be relevant.[192] When consumer choice is considered, the consumer's perspective might be relevant. The consumer perspective must be considered for the "not attainable" requirement because this requirement is what links the entire analysis of the provision to the initial price representation. Although the Tribunal's reasons contained both the general impression and the perspective "through the eyes of the Tribunal,"[193] it should be clarified here that the general impression should hold more weight than the Tribunal's perspective. A parallel can be drawn here with the final step of the analysis under section 74.01(1)(a), whether the general impression is false and misleading. Similarly, the "not attainable" step is satisfied by establishing that the price representation, adduced by the general impression, cannot be attained.

4. Further Considerations for Developing the Jurisprudence around Section 74.01(1.1)

Given the general lack of authoritative guidance on the interpretation of section 74.01(1.1), the provision's interpretation will need to evolve, based on the facts presented in the cases that arise. However, two broad considerations should also guide the interpretation of section 74.01(1.1).

First, the structure of section 74.01(1.1) is important.[194] The grammatical structure of the provisions should be properly considered, and then inferences can be drawn from the structure. At the core of section 74.01(1.1) are price representations that "[are] not attainable due to… charges or fees." Section 74.01(1.1) captures representations that features "fixed" and "obligatory" charges. Consistent with modern rules of statutory interpretation, these terms should be given a large and liberal interpretation.[195] However, these terms should not be interpreted so broadly that section 74.01(1.1) requires all-inclusive pricing. As the Tribunal in *Cineplex* established, this is not what the provision requires.[196]

Second, the different requirements under section 74.01(1.1) should be able to come together coherently to generally describe the types of pricing representation that are captured by the provision. The Tribunal decision did not outline a clear idea of the types of price representation that section 74.01(1.1) is intended to capture. With Cineplex's price representations being captured under section 74.01(1.1), there is still continuity in the type of price representations subject to deceptive marketing enforcement. Cineplex's booking fee is consistent with the types of representations found to be deceptive in the consent agreement cases. Section 74.01(1.1) then captures at least two types of price representations:

1) A non-optional surcharge is presented after the base price is initially presented. This is the basic economic conception of drip pricing. Examples include *StubHub*, *Ticketmaster*, and *Jetstar*.

2) A non-optional surcharge is presented with the base price, but the surcharge is not presented in clear manner. This is price partitioning with an added layer of marketing representations. Examples include *Avis & Budget*, *Hertz & Dollar Thrifty*, and *Enterprise*.

B. The New Drip Pricing Regime and Section 74.05(1): Sale above advertised price

The drip pricing provisions should not be considered in isolation from other relevant provisions; related provisions in a statute inform the interpretation of each other.[197] As discussed, the *Competition Act* has another provision that has been used to target drip pricing: the sale above advertised price provision under section 74.05(1). In a class certification case under section 74.05, the Federal Court noted that the alleged conduct had been described as drip pricing by the Bureau.[198] This long-standing provision's continued availability alongside section 74.01(1.1) presents some interesting questions of application and interpretation.

Section 74.05(1) clearly covers conduct beyond drip pricing. It requires only that a product be sold at a higher price than advertised.[199] If an advertisement stated that a product was $30, but at point of purchase the seller priced it at $40 without any extra fees, then that conduct would not be covered by the drip pricing provision, but it is a sale above advertised price. Section 74.05(1) would also cover negligence, refusal to honour the advertised price, the seller arguing that a "mistake" was made without evidence, or intentionally false price representations. A prior criminal provision covering the same conduct has been used to convict sellers where shelf and checkout prices did not match newspaper advertisements.[200] These are sales above advertised prices, but not necessarily drip pricing. There is a broad scope for this provision outside drip pricing.

The two can still overlap. A sale above advertised price can include the imposition of hidden fees and in the Bureau's eyes at least *has* been sufficient to cover drip pricing.[201] There are two possibilities for interpreting the overlap. First, that section 74.01(1.1)'s purpose is to contain the practice of drip pricing within itself, to the exclusion of section 74.05(1). This would reduce the scope of section 74.05(1). The alternative is accepting the overlap, with both provisions able to cover drip pricing, just in different ways.

The first interpretation is what Ruth Sullivan describes as a paramountcy argument, arguing that the two provisions conflict when applied to a drip pricing case and that section 74.01(1.1) ought to prevail.[202] It is attractive due to the specificity of the statement "for greater clarity" and the title of section 74.01(1.1) as "drip pricing", both implying that the provision intended to entirely capture drip pricing. However, this leads to the

undesirable conclusion that Parliament intended to restrict the operation of section 74.05(1) without directly amending it.

The second option is more likely to succeed. Ruth Sullivan has stated that "[s]o long as overlapping provisions *can* apply, it is presumed that they are meant to apply."[203] This is a well-accepted presumption in the case law.[204] Courts are not fond of displacing this presumption. As the Supreme Court stated in *Thibodeau v Air Canada*,[205] "[o]verlap, on its own, does not constitute conflict in this context, so that even where the ambit of two provisions overlaps, there is a presumption that they both are meant to apply, provided that they can do so without producing absurd results."[206] For there to be conflict, the provisions must be "so inconsistent with … or repugnant" to each other that they are "incapable of standing together."[207] That is not the case with sections 74.01(1.1) and 74.05(1). The two operate in different circumstances, and even in the drip pricing context they operate with different tests and requirements. Both can act as for liability for the same (or at least substantially similar) conduct, in a drip pricing case.

Extrinsic evidence supports allowing overlap. The Bureau's recommendations to Parliament characterize a potential drip pricing provision as a clarificatory tool. The Bureau noted that while section 74.01 was successfully used to fight drip pricing, the *Competition* Act failing to recognize it as harmful led to "significant resources" being needed to prove that it was deceptive.[208] This is also evident in Senate Hansard. The Honourable Lucie Moncion described one of the purposes of the amendments as to "clarify that posting of partial prices is false or misleading representation."[209] While Hansard is not dispositive, it is an important interpretive tool.[210]

The plain text of section 74.01(1.1) supports overlap.[211] The legislation begins with "for greater clarity", indicating that it has the clarificatory role advocated by the Bureau. This is also true from its function, which states that if a practice is drip pricing, it is necessarily false and misleading. The text and context do not suggest that section 74.05(1)'s role in regulating drip pricing was meant to be abrogated from. Given the requirement of large and liberal interpretation, absent clear textual direction the scope of each provision should not be reduced.

The two provisions are likely to operate in a state of overlap in drip pricing cases.[212] They are complimentary streams of liability; the Commissioner or private parties may argue both or either provision. Outside of drip pricing cases, there is a broad scope of activity that section 74.05(1) regulates. Section 74.01(1.1) does not require a reading down of section 74.05(1).

C. *Cineplex*'s Applicability to Criminal Deceptive Marketing Cases

As *Cineplex* was a civil case decided under section 74.01 before the Tribunal, rather than a superior court, and it is not binding in the criminal deceptive marketing context. Thus, the ordinary citizen standard may develop differently in criminal cases under section 52, or private recovery cases based on underlying criminal action.[213] This could lead to different standards between the civil and criminal provisions. There are compelling reasons to adopt the ordinary citizen standard in the section 52 context. First, the ordinary citizen standard originated in the section 52 jurisprudence.[214] Second, when the two provisions are compared, the only difference between them is that section 52 requires *mens rea*, while section 74.01(1) does not.

The only difference between the two provisions is that the criminal provision includes the language "knowingly or recklessly."[215] The same *conduct* (i.e., the *actus reus*) is targeted by each provision – what makes one criminal is *intent*. There is no principled reason to differentiate the consumer perspective from which to view the underlying conduct based on the type of proceeding. The same applies to the drip pricing provisions, which are identical in both contexts.[216] Section 52 has been used to inform civil deceptive marketing cases. In *Sears*, the Tribunal used the criminal provision to inform interpretation of the then-new civil provisions.[217] Given the similarities between the two provisions, this relationship should work in reverse.

A consistent interpretation will allow the two types of cases to inform each other, contributing to the development of the case law. This is especially important for section 36(1) recovery actions. While these actions are based on underlying criminal conduct, they are civil provisions at heart. Applying the ordinary citizen standard in the section 52 context will bring the two types of civil action to a consistent conceptual ground. Given recent amendments now allowing for private actions to the Tribunal under section 74.01(1),[218] a consistent interpretation of deceptive marketing conduct would streamline legal argument by applying the same standard to similar civil actions.

The next part will briefly discuss the Tribunal's decision on the appropriate remedy in *Cineplex*. We recognize that the topic of remedies is broad, and an entire article can be written on the Tribunal's decision in *Cineplex* on this topic. However, the decision to choose an administrative monetary penalty over a restitution order is worth highlighting.

Part VI. Administrative Monetary Penalties and Restitution Orders

The Tribunal ultimately ordered that Cineplex refrain from making false representations about the Booking Fee, refrain from substantially similar conduct, and pay an administrative monetary penalty of $38,978,000.[219] In coming to this conclusion, the Tribunal found that a restitution order under section 74.1(1)(d) was inappropriate.[220] The lack of a restitution order in this case suggests that they are unlikely to be used in future similar large-scale cases with a low per-consumer refund. The Tribunal's analysis for whether restitution was appropriate surveyed the following factors:

1) How distinguishable and certain the amount of booking fees paid was, compared to other payments.[221]

2) The practicalities of distributing the refunded money.[222]

3) Evidence that such an order would work.[223]

4) The impact on Tribunal resources.[224]

5) Whether consumers would take up the refunds, given the low amount of value per-consumer.[225]

6) Fairness considerations:[226]

    a) That Cineplex continued to make the representations.

    b) Uncertainty of the Tribunal's jurisdiction to reverse Scene+ points redemptions used to pay the online booking fee.[227]

The Tribunal also rejected Cineplex's suggestion that consumers received the "value that they were told they were getting", that is, "advanced seat selection."[228] This was given little weight. The Tribunal held that receipt of some value "does not excuse reviewable conduct."[229]

The Tribunal had substantial information about who paid what amount of booking fees and when. Although this information was not perfect,[230] it was still possible to calculate a per-customer refund of the booking fee given that purchases were tied to account information. The issue was primarily one of distribution – how to get thousands of small refunds out to those affected.[231] In future cases of large-scale drip pricing, information may be much worse, making it even more unlikely that restitution would be ordered in such cases.

The size of the refund also militates against the use of restitution. In *Cineplex*'s case, the amount would be $1.50 or $1.00 per ticket, a small amount in isolation. The Tribunal stated in a side note that "[t]here are also concerns about whether all consumers will take up their (small) refunds."[232] Just because an amount is material for finding reviewable conduct under section 74.01(1)(a) does not mean that it is material enough for a consumer to actively take up their refund. The mental shortcuts that a consumers use when prices are dripped do not necessarily mirror onto the case of taking up a refund of a few dollars. It takes less effort to accept a dripped price then to take time out of one's life to claim that small refund. For similar cases, then, restitution is even less likely to be appropriate or effective.

A lack of restitution orders does not mean that remedies will be ineffective. The administrative monetary penalty ordered in *Cineplex* was historically high and equivalent to the amount Cineplex earned from the Booking Fee.[233] In terms of sending a deterring signal to the market and Cineplex, this amount should be impactful.

Part VII. Conclusion

Cineplex is an important step forward in deceptive marketing law. It will guide future cases both in and out of the drip pricing context. However, no one case is a complete answer to all issues and all situations. We have identified some questions that remain after *Cineplex* and provided potential directions the law could take and considerations for future development in this area. Regardless of whether these proposals are adopted, the Tribunal and the courts should pay close attention to the purposes of the *Competition Act* and to the underlying economic harms of drip pricing and deceptive marketing generally when deciding future cases.

ENDNOTES

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** JD, MA Philosophy (Queen's University). The authors are grateful to Professor Cherie Metcalf, William (Bill) Wu, Irma Shaboian, Brendan Monahan, Jeffrey Ma, and Will Das Neves for comments and discussions on earlier drafts of this paper. The authors are likewise grateful to the editors of the Canadian Competition Law Review for their comments. Any remaining errors are the authors' own.

1 2024 Comp Trib 5 [*Cineplex*].

2 *Competition Act*, RSC 1985, c C-34.

3 2012 SCC 8 [*Time*].

4 An order under s 74.1(1)(d) of the *Competition Act*, *supra* note 2. Although this provision does not use the word "restitution", it was argued as restitution in *Cineplex* and the term was used in the Tribunal's judgment (see *Cineplex*, *supra* note 1 at paras 442–43).

5 *Consumer Protection Act*, *2002*, SO 2002, c 30, Schedule A.

6 *Ibid*, s 14(1) ("[i]t is an unfair practice for a person to make a false, misleading or deceptive representation"). See also *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 5(1) "[a] supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction); *Consumer Protection Act*, CQLR, c P-40.1, s 219 ("[n]o merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer").

7 *Competition Act*, *supra* note 2, s 74.01(1)(a).

8 *Prebushewski v Dodge City Auto (1984) Ltd*, 2005 SCC 28 at para 33; *Bernstein v Peoples Trust Company*, 2019 ONSC 2867 at para 136 [*Bernstein*].

9 *Time*, *supra* note 3 at para 43, citing *Regina v Colgate-Palmolive Ltd*, 1969 CanLII 1005 at 102 (ONSC).

10 *Bernstein*, *supra* note 8 at paras 135–36.

11 *Competition Act*, *supra* note 2, s 1.1.

12 See Anita Banicevic, "Assessing General Impression under the Competition Act: The Credulous Man Who Never Was There" (2016) 29:2 Can Competition L Rev 54 at 64; see also *R v Stucky*, 2009 ONCA 151 at paras 38–48 [*Stucky*] (particularly noting at para 39 that the primary objective of the act is to "protect Canadian businesses").

13 2005 Comp Trib 2 [*Sears*].

14 *Ibid* at para 93.

15 See *Cineplex*, *supra* note 1 at para 227; *Canada (Commissioner of Competition) v Premier Career Management Group Corp*, 2009 FCA 295 at paras 61–63 [*Premier*].

16 *Premier*, *supra* note 15.

17 *Ibid* at para 63.

18 *Ibid* at para 62.

19 John S Tyhurst, *Canadian Competition Law and Policy* (Toronto: Irwin Law, 2021) at 496, citing Frederic M Scherer, *Industrial Market Structure and Economic Performance* (Boston: Houghton Mifflin, 1980) at 42 ("[t]he

prescriptions for workable competition from economists include that there be no "unfair, exclusionary, predatory or coercive tactics," and that sales promotion be informative, or not misleading").

[20] Tyhurst, *supra* note 19 at 497; *Premier*, *supra* note 15 at para 62; see also Glenn Ellison & Sara Fisher Ellison, "Search and Obfuscation in a Technologically Changing Retail Environment: Some Thoughts on Implications and Policy" (2018) 18 Innovation Pol'y & Econ 1; Alexander Rasch, Miriam Thöne & Tobias Wenzel "Drip pricing and its regulation: Experimental evidence" (2020) 176 J of Econ Behaviour & Organization 353; Florian Baumann & Alexander Rasch, "Exposing false advertising" (2020) 53:3 Can J Econ 1211.

[21] *Cineplex*, *supra* note 1 at para 233. But see *Lin v Airbnb, Inc*, 2019 FC 1563 at para 57 [*Lin*], where Gascon J held that deceptive marketing is closely related to consumer protection and that the *Competition Act* has been recognized as consumer protection legislation. See also *Finkel v Coast Capital Savings Credit Union*, 2017 BCCA 361 at para 61. The *Competition Act* can play a consumer protection role, but its purposes are broader as recognized in *Cineplex*.

[22] *Cineplex*, *supra* note 1 at para 233.

[23] Misleading advertising as a criminal offence is handled by s 52 of the *Competition Act*, *supra* note 2. This includes a drip pricing provision under s 52(1.3).

[24] *Competition Act*, *supra* note 2, s 74.01(1)(a).

[25] In *Sears*, *supra* note 13 at paras 321–23, the representations were defined by reference to a statutory provision limiting the kind of representations that could be considered. In *Cineplex*, *supra* note 1 at paras 238–40, the Tribunal defined the representations after a lengthy discussion of the facts.

[26] *Sears*, *supra* note 13 at para 333, citing *R v Kenitex Canada Ltd et al* (1980), 51 CPR (2d) 103, [1980] OJ No 2758 (Ont Co Ct) [*Kenitex*]. See also *Sears*, at paras 334–36.

[27] *Competition Act*, *supra* note 2, s 74.03(5) ("[i]n proceedings under sections 74.01 and 74.02, the *general impression conveyed by a representation as well as its literal meaning shall be taken into account* in determining whether or not the person who made the representation engaged in the reviewable conduct" [emphasis added]).

[28] The literal meaning is "what it says on its face, interpreted in its ordinary sense" (see *Cineplex*, *supra* note 1 at para 242, citing *Time*, *supra* note 3 at para 47; see also *Sears*, *supra* note 13 at paras 327, 330–31).

[29] Once the literal meaning and general impression are determined, the tribunal or court then asks whether either or both are false or misleading. Extrinsic evidence can be used, but this evidence cannot modify the general impression already determined (see *Bell Mobility Inc v Telus Communications Co*, 2006 BCCA 578 at para 18 [*Bell Mobility*]; *Maritime Travel Inc v Go Travel Direct.Com Inc*, 2008 NSSC 163 at para 17 [*Maritime Travel*], aff'd 2009 NSCA 42 at para 5 [*Maritime Travel Appeal*]). This is a heavily fact-based inquiry without a specific legal test (see e.g., *Cineplex*, *supra* note 1 at paras 394–417; *Sears*, *supra* note 13 at paras 333–44).

[30] There was a brief period where the "credulous man" test was considered. However, a bill that would have codified this test never received royal assent (see Adam Newman, "Richard v Time: The Return of the Credulous Man" (2013) 26:2 Can Competition L Rev 275 at 278–80). For the purposes of this discussion, that test is irrelevant.
[31] See generally Newman, *supra* note 30 at 280.
[32] *Kenitex*, *supra* note 26.
[33] *Ibid* at 107.
[34] *Sears*, *supra* note 13 at para 326.
[35] *Commissioner of Competition v Gestion Lebski Inc*, 2006 Comp Trib 32 at para 155.
[36] Banicevic, *supra* note 12 at 61.
[37] *Ibid.*
[38] *Ibid* at 63.
[39] Competition Bureau, "Application of the Competition Act to Representations on the Internet" (16 October 2009) at 4, online (pdf): <publications.gc.ca/site/archivee-archived.html?url=https://publications.gc.ca/collections/collection_2010/ic/Iu54-1-2009-eng.pdf> [Competition Bureau, *Internet Representations*]; Banicevic, *supra* note 12 at 61–63. For a case applying this perspective, see e.g., *Maritime Travel Appeal*, *supra* note 29.
[40] *Internet Representations*, *supra* note 39 at 4.
[41] *Maritime Travel*, *supra* note 29.
[42] *Ibid* at para 17, citing *Bell Mobility*, *supra* note 29 at paras 16–19.
[43] *Maritime Travel*, *supra* note 29 at paras 18–23.
[44] *Ibid* at para 43.
[45] *Ibid.*
[46] See Banicevic, *supra* note 12 at 64–65.
[47] *Time*, *supra* note 3 at para 72.
[48] See e.g., Banicevic, *supra* note 12 at 64–65, 68–69; *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2013 ONSC 5315 at paras 123–31 [*Chatr*] (modifying *Time*'s standard to fit the circumstances). See also Newman, *supra* note 30.
[49] *Supra* note 6.
[50] *Time*, *supra* note 3 at para 62.
[51] *Ibid* at 61–62.
[52] *Ibid* at paras 65–72.
[53] *Ibid* at para 69.
[54] *Ibid* at para 71.
[55] *Ibid* at para 50.
[56] *Ibid.*
[57] *Chatr*, *supra* note 48.
[58] *Ibid* at para 6.
[59] *Ibid* at para 127.
[60] *Ibid* at para 129.
[61] *Chatr*, *supra* note 48 at para 131.

[62] *Ibid*.
[63] *Bell Canada v Cogeco Cable Canada GP Inc*, 2016 ONSC 6044; *Telus Communications v Shaw Communications Inc*, 2020 BCSC 1354; see also *Canada (Commissioner of Competition) v Canada Tax Reviews Inc*, 2021 FC 921 (where the Federal Court, in a motion to set aside and vary, assumed the application of the *Chatr* test only for that proceeding).
[64] 2023 ONCA 121.
[65] *Ibid* at para 26 (it should be noted that this case was based on s 52(1), a criminal provision, under which an action for recovery under s 36(1) was brought).
[66] *Competition Act*, *supra* note 2, s 74.01(1.1). Note that the wording is slightly different to the initial enactment in *Budget Implementation Act*, *2022*, *No 1*, SC 2022, c 10, s 259. This difference is immaterial.
[67] *Ibid*.
[68] See Innovation, Science and Economic Development Canada, "The Future of Competition Policy in Canada" (2022) at 47–48, online: <ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada>. See also Federal Trade Commission, "*Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011*" (2022), online: <federalregister.gov/documents/2022/11/08/2022-24326/unfair-or-deceptive-fees-trade-regulation-rule-commission-matter-no-r207011>; *Digital Markets, Competition and Consumers Act 2024* (UK), ss 230(2)(b)–(c), (g), (4).
[69] Somak Banerjee et al, "The impact of consumer expectations and familiarity on deceptive pricing in advertising: a view from drip pricing practice" (2024) 43:2 Intl J of Advertising 254 at 256–57; Peter O'Loughlin, "Cognitive Foreclosure" (2022) 38:4 Ga St U L Rev 1097 at 1154; Tom Blake et al, "Price Salience and Product Choice" (2021) 40:4 Marketing Science 619 at 619; Rasch, Thöne & Wenzel, *supra* note 20 at 353–54; Shelle Santana, Steven K Dallas & Vicki G Morwitz, "Consumer Reactions to Drip Pricing" (2020) 38:1 Marketing Science 188 at 188; Kenneth Jull & Nicole Spadotto, "Digital Advertising and Purchasing: Fun or a New Type of Deception?" (2020) 33:1 Can Competition L Rev 1 at 3; Eric A Greenleaf et al, "The price does not include additional taxes, fees, and surcharges: A review of research on partitioned pricing" (2016) 26:1 J of Consumer Psychology 105 at 107; Stefan Huck & Brian Wallace, *The Impact of Price frames on Consumer Decision Making* (London, UK: Office of Fair Trading, 2010) at 6; Gorkan Ahmetoglu, Adrian Furnham & Patrick Fagan, "Pricing practices: A critical review of their effects on consumer perceptions and behaviour" (2014) 21 J of Retailing and Consumer Services 696 at 697.
[70] O'Loughlin, *supra* note 69 at 1154; Jull & Spadotto, *supra* note 69 at 14; Greenleaf et al, *supra* note 69 at 106; Vicki G Morwitz, Eric A Greenleaf & Eric J Johnson, "Consumer's Reactions to Partitioned Prices" (1998) 35:4 J of Marketing Research 453 at 453.
[71] See Banerjee et al, *supra* note 69 at 256–57.
[72] See Dirk Totzek & Gabriel Jurgensen, "Many a little makes a mickle: Why do consumers negatively react to sequential price disclosure?" (2020) 38:1 Psychology

& Marketing 113 at 114; Santana, Dallas & Morwitz, *supra* note 69 at 189; Huck & Wallace, *supra* note 69 at 22–23.

[73] See Santana, Dallas & Morwitz, *supra* note 69; Greenleaf et al, *supra* note 69; Huck & Wallace, *supra* note 69; Hyeong Min Kim, "The effect of salience on mental accounting: how integration versus segregation of payment influences purchase decisions" (2006) 19:4 J Behavioural Decision Making 289; Morwitz, Greenleaf & Johnson, *supra* note 70. See also Amos Tversky & Daniel Kahneman, "Judgment Under Uncertainty: Heuristics and Biases" (1974) 185 Science 1124.

[74] See Santana, Dallas & Morwitz, *supra* note 69 at 207; Huck & Wallace, *supra* note 69 at 59.

[75] Tversky & Kahneman, *supra* note 73 at 1128.

[76] *Ibid* at 1128–30.

[77] Santana, Dallas & Morwitz, *supra* note 69 at 207; Morwitz, Greenleaf & Johnson, *supra* note 70; Tversky & Kahneman, *supra* note 73. See also Jull & Spadotto, *supra* note 69.

[78] Greenleaf et al, *supra* note 69 at 116; Morwitz, Greenleaf & Johnson, *supra* note 70; Tversky & Kahneman, *supra* note 73.

[79] Blake et al, *supra* note 69; Greenleaf et al, *supra* note 69 at 116; Morwitz, Greenleaf & Johnson, *supra* note 70.

[80] Santana, Dallas & Morwitz, *supra* note 69; Nicholas G Rupp, "Drip Pricing and Costly Search: Evidence from the Airline Industry" (15 December 2023) online (SSRN): <ssrn.com/abstract=4666048>; Huck & Wallace, *supra* note 69. See also Morwitz, Greenleaf & Johnson, *supra* note 70; Ellison & Ellison, *supra* note 20.

[81] Greenleaf et al, *supra* note 69; Morwitz, Greenleaf & Johnson, *supra* note 70.

[82] Santana, Dallas & Morwitz, *supra* note 69.

[83] *Ibid*. See also Prabhanjan Didwania, "Drop By Drop: Understanding the Role of Anchor and Surcharges in Drip Pricing" (2022) online: <ssrn.com/abstract=4138758>.

[84] Santana, Dallas & Morwitz, *supra* note 69 at 203; Jull & Spadotto, *supra* note 69 at 24.

[85] Huck & Wallace, *supra* note 69 at 93.

[86] See Greenleaf et al, *supra* note 69 at 120; Huck & Wallace, *supra* note 69 at 93.

[87] Banerjee et al, *supra* note 69.

[88] *Ibid*.

[89] Emi Moriuchi & Samantha Murdy, "Consumer Reactions to Drip Pricing: The Moderating Effect of Price Fairness in the Sharing Economy Accommodation" (2024) 0:0 Cornell Hospitality Q 1 at 8–10; Wujin Chu et al, "Fairness perception of ancillary fees: Industry differences and communication strategies" (2020) 55 J Retailing & Consumer Services 102092; Totzek & Jurgensen, *supra* note 72 at 124–25.

[90] Chu et al, *supra* note 89, s 7.3 (The study's managerial implications suggest that with increased perception of fairness, and thereby better associations with a firm's brand, that comes with added transparency, there are incentives for firms to be more transparent when prices are dripped).

[91] *Ibid*.

[92] Kim, *supra* note 73 at 387.
[93] Morwitz, Greenleaf & Johnson, *supra* note 70 at 458–60.
[94] *Ibid*.
[95] Ellison & Ellison, *supra* note 20 at 7–8.
[96] *Ibid* at 8; Rasch, Thöne & Wenzel, *supra* note 20; Morwitz, Greenleaf & Johnson, *supra* note 70 at 462.
[97] Rasch, Thöne & Wenzel, *supra* note 20; Morwitz, Greenleaf & Johnson, *supra* note 70 at 462; Huck & Wallace, *supra* note 69 at 56, 62–63.
[98] Morwtiz, Greenleaf & Johnson, *supra* note 69.
[99] Huck & Wallace, *supra* note 69 at 56, 62–63; Ellison & Ellison, *supra* note 20 at 11–15.
[100] Rasch, Thöne & Wenzel, *supra* note 20.
[101] *Ibid* at 368.
[102] Ellison & Ellison, *supra* note 20 at 8, 10, 12–15; Glenn Ellison, "A Model of Add-On Pricing" (2005) 120:2 QJ Econs 585.
[103] *Ibid* at 6–12.
[104] See *Aviscar Inc et al* (11 March 2015), CT-2015-001, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463135/index.do>; Competition Bureau, "The Deceptive Marketing Practices Digest, vol 1" (2010) at 4, online (pdf): <competition-bureau.canada.ca/sites/default/files/attachments/2022/cb-digest-deceptive-marketing-e.pdf> [Competition Bureau, *Deceptive Marketing Digest Volume 1*]. Note that these documents are not legally binding.
[105] *Commissioner of Competition v Aviscar Inc and Budgetcar Inc/Budgetauto Inc* (6 February 2016), CT-2015-001, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462953/index.do> [*Avis & Budget*]; *The Commissioner of Competition v Comwave Networks Inc* (13 September 2016), CT-2016-014, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462928/index.do> [*Comwave*]; *The Commissioner of Competition v Hertz Canada Limited and Dollar Thrifty Automotive Group Canada Inc* (24 April 2017), CT-2017-009, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462884/index.do> [*Hertz & Dollar Thrifty*]; *The Commissioner of Competition v Ticketmaster LLC, TNOW Entertainment Group, Inc, and Ticketmaster Canada LP* (27 June 2019), CT-2018-005, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/465258/index.do> [*Ticketmaster*]; *The Commissioner of Competition v Enterprise Rent-A-Car Canada Company* (22 February 2018), CT-2018-006, online: <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462781/index.do> [*Enterprise*]; *The Commissioner of Competition v Discount Car & Truck Rentals Ltd* (11 October 2018), CT-2018-012, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/465282/index.do> [*Discount Rentals*]; *The Commissioner of Competition v Stubhub Inc, Stubhub Canada Ltd* (13 February 2020), CT-2020-002, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/466483/index.do> [*Stubhub*].
[106] See Competition Bureau, "The Deceptive Marketing Practices Digest, vol 5" (2020), online (pdf): <competition-bureau.canada.ca/deceptive-marketing-practices-digest-volume-5> [Competition Bureau, *Deceptive*

Marketing Digest Volume 5]; Competition Bureau, "The Deceptive Marketing Practices Digest, vol 6" (2023), online (pdf): <competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/deceptive-marketing-practices-digest-volume-6#sec02>; see also *Lin*, *supra* note 21 at para 37 ("[…] "sale above advertised price" now contained at section 74.05 of the Competition Act. This reviewable conduct is sometimes referred to by the Competition Bureau as fragmented pricing or drip pricing").

[107] See *Avis & Budget*, *supra* note 105 at 2; *Comwave*, *supra* note 105 at 2; *Hertz & Dollar Thrifty*, *supra* note 105 at 2; *Ticketmaster*, *supra* note 105 at 2; *Stubhub*, *supra* note 105 at 1.

[108] See David Ada Friedman, "Regulating Drip Pricing" (2020) 31 Stan L & Pol'y Rev 51 at 88–91.

[109] *Supra* note 105.

[110] *Supra* note 105.

[111] *Ibid* at 2 ("consumers were required to pay additional Non-Optional Fees that were added later in the purchasing process"); *StubHub*, *supra* note 105 at 2 ("the initial price shown on the Event Page does not include the Non-Optional Fees added on the Check-Out Page").

[112] *Supra* note 105.

[113] *Supra* note 105.

[114] *Supra* note 105.

[115] *Hertz & Dollar Thrifty*, *supra* note 105 at 2 ("created the general impression that they were taxes, surcharges and/or fees that governments and authorized agencies required rental car companies to collect from consumers"); *Enterprise*, *supra* note 105 at 2 ("the Respondent's wording and placement of such disclosures did not create a general impression that they were taxes, surcharges and/or fees that governments and authorized agencies required rental car companies to collect from consumers"); *Discount Rentals*, *supra* note 105 at 2 ("created the general impression that they were taxes, surcharges and/or fees that governments and authorized agencies required rental companies to collect from consumers").

[116] *Supra* note 105.

[117] *Supra* note 105.

[118] *Avis & Budget*, *supra* note 105 at 2.

[119] Competition Bureau, *Deceptive Marketing Digest Volume 1*, *supra* note 104 at 4.

[120] Competition Bureau, *Deceptive Marketing Digest Volume 5*, *supra* note 106.

[121] *Competition Act*, *supra* note 2, s 74.01(1.1).

[122] Competition Bureau, "Examining the Canadian Competition Act in the Digital Era" (8 February 2022), s 6.1, online: <competition-bureau.canada.ca/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era#sec06_1>.

[123] See Competition Bureau, "The Future of Competition Policy in Canada" (15 March 2023), s 4.8, online: <competition-bureau.canada.ca/en/how-we-foster-competition/

promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada#sec-4-8>.

[124] *Commissioner of Competition v Cineplex Inc* (18 May 2018), CT-2023-003, online: Competition Tribunal <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521195/index.do>.

[125] *Cineplex*, *supra* note 1 at para 123.

[126] *Ibid*.

[127] On the top right, an advertisement for joining CineClub contained a small encircled "i" that, when clicked, presented information about the booking fees (*Cineplex*, *supra* note 1 at paras 147–48).

[128] *Cineplex*, *supra* note 1 at para 152.

[129] *Ibid* at para 278.

[130] *Ibid* at para 273.

[131] *Ibid* at paras 271–72.

[132] *Ibid* at para 273.

[133] *Ibid* at para 274.

[134] *Ibid* at para 278.

[135] *Ibid* at para 249.

[136] *Ibid* at para 278.

[137] The literal meaning was dealt with quickly. The Tickets Page did not distinguish between at-theatre and online prices, nor did it state expressly that there were different prices, nor did it draw consumers' attention to the fact that prices could vary (*Cineplex*, *supra* note 1 at para 284).

[138] *Cineplex*, *supra* note 1 at para 286.

[139] See the discussion in *Cineplex*, *supra* note 1 at paras 290–291 (the Commissioner having no submissions as to the characteristics of the consumer once the *Time* standard was rejected; Cineplex's only submission being that "everyone knows how to and does scroll on websites and mobile application").

[140] *Cineplex*, *supra* note 1 at para 293.

[141] *Ibid* at para 294.

[142] *Ibid* at para 298.

[143] *Ibid*.

[144] *Ibid* at para 293. These are some of the effects of drip pricing identified by Jull and Spadotto in their review of economic literature on drip pricing (see Jull & Spadotto, *supra* note 69 at 22–26).

[145] *Ibid* at para 342.

[146] *Ibid* at para 382.

[147] Drip pricing has few mentions in parliamentary debates, mostly without substantive discussion. In the House of Commons, drip pricing was only given a cursory mention as something addressed in the amendments to the *Competition Act* (see "Bill C-19, An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures", 2nd reading, *House of Commons Debates*, 44-1, No 65 (5 May 2022) at 1235 (Francesco Sorbara). There is also one mention in the Senate, where the drip pricing provision is described as a clarificatory provision. "Bill C-19, An Act to implement certain provisions of the

budget tabled in Parliament on April 7, 2022 and other measures", 3rd reading, *Senate Debates*, 44-1, No 58 (22 June 2022) at 1520 (Hon Lucie Moncion) [*Bill C-19 Senate Debates*].

[148] *Cineplex*, *supra* note 1 at para 335.

[149] *Ibid* at para 355.

[150] *Ibid* at para 353.

[151] *Ibid* at para 356.

[152] *Ibid* at para 357.

[153] *Ibid* at para 352.

[154] *Ibid* at para 373.

[155] *Ibid*.

[156] *Ibid* at para 379.

[157] Several facts suggest that these two are different groups. For example, the representations were made on the Cineplex website to people specifically looking to purchase movie tickets, many of whom had an account. This is different to a billboard advertisement, or a mailer like in *Time*, especially if the ordinary moviegoer was a member of Scene+ or CineClub.

[158] "[T]he expression "average consumer" does not refer to a reasonably prudent and diligent person, let alone a wellinformed person. […] [C]ourts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations" (*Time*, *supra* note 3 at para 71).

[159] *Time*, *supra* note 3 at paras 33, 44, 50–51.

[160] Tyhurst, *supra* note 19 at 496–97; see also *Premier*, *supra* note 15 at 62.

[161] *Australian Competition and Consumer Commission v Jetstar Airways Pty Limited*, [2015] FCA 1263 [*Jetstar*]; *Google Inc v Australian Competition and Consumer Commission*, [2013] HCA 1 [*Google*].

[162] *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd*, [2014] NZCA 418 [*Godfrey Hirst*] at para 26 ("'Average' is not a good choice of word because of the potential for confusion with its mathematical meaning, which would take as the standard the consumer falling in the middle of the class").

[163] *Jetstar*, *supra* note 161.

[164] *Ibid* at para 26.

[165] *Ibid* at paras 156–60.

[166] *Ibid* at para 26.

[167] *Ibid* at para 29. Similar outliers language is used in New Zealand (see *Godfrey Hirst*, *supra* note 162 at para 47; see also *Commerce Commission v Viagogo AG*, [2024] NZHC 713 at paras 59–60).

[168] *Jetstar, supra* note 161 at para 29, citing *Google*, *supra* note 161 at para 7. See also *Jetstar* at para 167, citing *Godfrey Hirst*, *supra* note 162 at para 143.

[169] *Jetstar, supra* note 161 at para 167.

[170] *Godfrey Hirst*, *supra* note 162 at para 48.

[171] *Jetstar*, *supra* note 161 at para 26.

[172] *Ibid*.

[173] See generally Tversky & Kahneman, *supra* note 73; Morwitz, Greenleaf & Johnson, *supra* note 70; Greenleaf et al, *supra* note 69.
[174] *Time*, *supra* note 3 at paras 71–72.
[175] *Cineplex*, *supra* note 1 at para 251, citing *Sears*, *supra* note 13 at paras 325–27 and *Kenitex*, *supra* note 26 at 107.
[176] *Cineplex*, *supra* note 1 at para 278.
[177] *Ibid* at para 290.
[178] This may not hold true for the future for two reasons. Firstly, if section 52 cases and private recovery under section 36(1) use the same standard, there would be a larger body of case law to develop the test. Secondly, the introduction of a private access regime for deceptive marketing cases (see *Fall Economic Statement Implementation Act*, SC 2024, c 15, s 254(1), (6) [*Fall Economic Statement Implementation Act*]) may lead to a further influx of cases.
[179] *Chatr*, *supra* note 48 at paras 130–31.
[180] *Jetstar*, *supra* note 161 at para 26.
[181] *Sears*, *supra* note 13 at para 333, citing *Kenitex*, *supra* note 26.
[182] It should be noted that in New Zealand, the consumer is expected to exercise a reasonable degree of care when viewing an advertisement. The standard must be "reasonable having regard to all the circumstances including the characteristics of the target group of consumers. By "characteristics" we refer to the consumers' level of knowledge, acumen, ability and the like" (*Godfrey Hirst*, *supra* note 162 at para 51, cited with approval in *Tasman Insulation New Zealand Ltd v Knauf Insulation Ltd*, [2015] NZCA 602 [*Tasman*]). Depending on the circumstances, a consumer may be expected to make further inquiries to rectify any "misunderstanding about the nature or characteristics of a product" (*Tasman* at para 257). While no such positive obligation exists in Canadian law, similar considerations exist. The consumer's ability to make such inquiries has been considered in Canadian deceptive marketing law (See e.g., *Sears*, *supra* note 12 at paras 213–18). Thus, while notable, this difference should not militate against adopting the New Zealand model.
[183] *Cineplex*, *supra* note 1 at paras 350–52. This seems to suggest that pure price discrimination is insufficient to escape the application of section 74.01(1.1).
[184] *Ibid* at para 355.
[185] *Ibid* at para 356.
[186] *Ibid*.
[187] *Ibid* at paras 368–69.
[188] See e.g., Santana, Dallas & Morwitz, *supra* note 69; Huck & Wallace, *supra* note 69.
[189] See *Cineplex*, *supra* note 1 (discussing Dr. On Amir's expert report at 36–37). Dr. Amir's evidence report made a similar argument for requiring the Commissioner to bring stronger evidence tying the applicability of certain behavioural economics and consumer psychology principles to the specific facts in *Cineplex*.
[190] *Cineplex*, *supra* note 1 at paras 368, 380.
[191] *Ibid* at para 380.

[192] *Ibid* at para 356.
[193] *Ibid* at para 380.
[194] Starting with the structure of the provision is starting with the plain and literal meaning of the provision (Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 130 [Sullivan, *Statutory Interpretation*]).
[195] *Interpretation Act*, RSC 1985, c I-2, s 12 ("[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects"); *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at paras 23–24 [*CISSS*]; *Piekut v Canada (National Revenue)*, 2025 SCC 13 at para 46 [*Piekut*]; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 25; *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 at para 22 (SCC). The effect of this legislation and the interpretive rules that arise from it is to "[abolish] the distinction between strict and liberal construction" (Ruth Sullivan, *Construction of Statutes*, 7th ed, (Toronto: LexisNexis Canada Inc, 2022), s 15.02 [Sullivan, *Construction of Statutes*]). See also Sullivan, *Construction of Statutes*, s 9.04.
[196] *Cineplex*, *supra* note 1 at para 355.
[197] See generally Sullivan, *Statutory Interpretation*, *supra* note 194 at 173–79; Sullivan, *Construction of Statutes*, *supra* note 195, s 13.02(4). See also *CISSS*, *supra* note 195 at para 24; *Piekut*, *supra* note 194 at paras 42–45.
[198] *Lin*, *supra* note 21 at para 37.
[199] *Competition Act*, *supra* note 2, s 74.05(1); Tyhurst, *supra* note 19 at 511.
[200] Tyhurst, *supra* note 19 at 512, citing *R v Steinberg's Ltd*, [1977] Carswell Ont 1213, 17 OR (2d) 559.
[201] Tyhurst, *supra* note 19 at 511; Competition Bureau, *Deceptive Marketing Digest Volume 1*, *supra* note 104 at 4; *Lin, supra* note 21 at para 37.
[202] For a full description of this kind of argumentation, see Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82:1 Can Bar Rev 51 at 73–75.
[203] Sullivan, *Construction of Statutes*, *supra* note 195 at 325–27.
[204] See e.g., *Thibodeau v Air Canada*, 2014 SCC 67 at para 92 [*Thibodeau*]; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at paras 37, 41.
[205] *Thibodeau, supra* note 204 at para 186.
[206] *Ibid* at para 92.
[207] *Ibid* at para 94, citing *Daniels v White*, 1968 CanLII 67 (SCC).
[208] Competition Bureau, *Examining the Competition*, *supra* note 121, s 6.1.
[209] *Bill C-19 Senate Debates*, *supra* note 147 at 1520.
[210] *Reference re Securities Act*, 2011 SCC 66 at para 64; *Rizzo*, *supra* note 195 at para 35, citing *R v Morgentaler*, [1993] 3 SCR 463 at 484, 1993 CanLII 74 (SCC).
[211] The text must take primacy. See *CISSS*, *supra* note 195 at para 24. See also Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59:4 Alta L Rev 919 at 927, 930–31.
[212] Drip pricing is also enumerated under the electronic marketing provisions in s

74.011, specifically s 74.011(3.1). This is further evidence that Parliament intended drip pricing to be applicable in multiple contexts.
[213] As permitted by *Competition Act*, *supra* note 2, s 36.
[214] See Banicevic, *supra* note 12; *Kenitex*, *supra* note 26.
[215] *Competition Act*, *supra* note 2, s 52(1).
[216] *Ibid*, ss 52(1.3), 74.01(1.1).
[217] *Sears*, *supra* note 13 at paras 93, 333–37 (finding the purposes of the criminal and civil provisions identical; using the criminal provisions to inform the consumer perspective in the civil context).
[218] The *Fall Economic Statement Implementation Act*, *supra* note 178 amended the private access provision of the *Competition Act, supra* note 2 (s 103.1) to allow for private parties to bring actions for deceptive marketing, including drip pricing. Section 254(1) amends the leave provision to state that "[a]ny person may apply to the Tribunal for leave to make an application under section 74.1[…]". Section 254(6) prescribes the standard, requiring that such an action be "in the public interest". Note that this is different to the test historically applied in private actions for other anti-competitive conduct (see *JAMP Pharma Corporation v Janssen Inc*, 2024 Comp Trib 8 at paras 12, 34–40; *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 28 at paras 42, 54). It remains to be seen how permissive this test will be and thus whether private actions at the Tribunal will be a significant force. Also note that these amendments come into force on June 20, 2025 (see *Fall Economic Statement Implementation Act*, *supra* note 178, s 272).
[219] *Cineplex*, *supra* note 1 at paras 488–89.
[220] *Ibid* at paras 440–57.
[221] *Ibid* at para 445.
[222] *Ibid* at paras 450–51.
[223] *Ibid* at para 545.
[224] *Ibid* at para 453.
[225] *Ibid* at para 455.
[226] *Ibid* at para 456.
[227] *Cineplex*, *supra* note 1 at para 456 ("[i]n both circumstances, an order under paragraph 74.1(1)(d) that refunds some consumers but not all affected consumers, for conduct that is presumably continuing, suggests unfairness to more recent consumers and Scene+ members").
[228] *Ibid* at para 446.
[229] *Ibid.*
[230] *Ibid* at paras 445, 447.
[231] *Ibid* at paras 450–55.
[232] *Ibid* at para 455 [emphasis added].
[233] *Ibid* at paras 477–78; Competition Bureau Canada, "Competition Bureau wins deceptive marketing case against Cineplex" (23 September 2024), online (news release): <canada.ca/en/competition-bureau/news/2024/09/competition-bureau-wins-deceptive-marketing-case-against-cineplex.html>.