**1. Tribunal Comments from the Cineplex Decision**

Paragraph 446 of the Cineplex decision rejects the defense’s “customers got value” argument and notes that Cineplex presented no quantification of how much the fee actually mattered. Because Cineplex offered neither evidence nor argument on any offsetting consumer benefit, the Tribunal gave its argument “little weight.”

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

That, I think, can be interpreted as an invitation to determine the but-for world quantitatively.

Below, I try to develop a basic framework and a toy model to show how one might argue to reduce the quantum payable. Such an argument would be made “in the alternative.” It should also be noted that depending on the but-for world chosen by the Tribunal and the elasticity of demand, it’s also possible that the quantum would **increase** from the total revenue collected from the dripped fee (this is because Cineplex made sales it would not have made but for the conduct).

**2. Basic framework**

Let

* advertised ticket price (the “base” price)
* online booking fee (e.g., $1.50, or $1.00 for Scene+; 0 for CineClub). For this outline, we assume the fee is blanket $1.50 for all customers.
* full price actually paid online
* quantity of tickets demanded when consumers perceive the price
* price elasticity of demand

Assume a linear demand curve

**3. Three plausible but-for scenarios**

| **Scenario** | **What changes?** | **Price consumers face** | **Quantity** | **Online revenue** |
| --- | --- | --- | --- | --- |
| **Status quo** |  | but consumers anchor on the lower . |  | ​ |
| **A. All-in Pricing** | Fee rolled into headline price | (no anchoring gap) |  | ​ |
| **B. Fee removed; base price unchanged** | Online price truly equals advertised price |  |  | ​ |
| **C. Fee scrapped; Cineplex raises to maximize revenue** | Price set to an optimal |  |  |  |

**3.1 Closed-form expressions**

* **Volume effect in scenario A**
* **Revenue gain from drip pricing relative to A**
* **Revenue gain relative to B (simple refund case)**
* **Revenue gain relative to C (honest profit-maximizer)**

FOC:

Gain from drip pricing over Scenario C is

**4. What elasticity matters?**

* At status-quo price , the elasticity is
* Drip pricing will always be a superior strategy for Cineplex to Scenario A. That is, the quantum in Scenario A will always be positive. However, once consumers become elastic enough, though, the quantum in Scenario A will actually be greater than the quantum in Scenario B. This is because Cineplex makes many more sales due to the conduct.
* Scenario C will always result in a reduction of the quantum relative to Scenario B.
  + This is because Scenario C is a superset of Scenario B. Further:
    - If consumers are very inelastic, Cineplex can raise price and not lose much volume. Drip pricing actually is suboptimal and the benefit Cineplex derived from the conduct actually be $0
    - If consumers are very elastic, then cineplex can slash prices significantly and sell many more tickets and increase revenue. Again, drip pricing is suboptimal and the benefit from the conduct to Cineplex would be $0.
    - Anything in-between suggests dripping is the optimal strategy for Cineplex, but the benefit derived relative to Cineplex picking the optimal solution is less the quantum in Scenario B
    - If elasticity is unit elastic, the gain from drip pricing would max out and reach the AMP in Scenario B

**5. Empirical work required**

1. **Estimate ε, A, and B**
   * Use ticket-level data?
2. **Assume anchoring behaviour?**
3. **Quantify consumer harm**
   * Overcharge per ticket in Scenario B is exactly
   * In Scenario A or C, harm requires calculating revenues in but-for worlds
   1. **Illustration**

Suppose

* A price of $14 implies . Normally we would observe this
* This implies M
* (example inelastic demand)[[1]](#footnote-1)

Then

**Scenario A:**

Volume falls by

Incremental revenue increase from conduct relative to Scenario A is:

This is an over $8M decrease from the quantum calculated by the Tribunal.

**Scenario B:**

We sell the same quantity since that is what the consumer anchored on. And so .

Incremental revenue increase from conduct relative to Scenario B is:

This is, of course, exactly as the Tribunal calculated.

**Scenario C:**

We choose a new price that maximizes revenue:

Incremental revenue increase from the conduct relative to Scenario C:

This is over $10M less than the AMP ordered by the Tribunal.

**7. How this helps the Tribunal**

* **Restitution (s. 74.1(1)(d)). Or calculating harm related to the conduct**
  + Scenario A allows Cineplex to include the fee to its price in the but-for world. This has the potential to increase or decrease the AMP depending on the observed elasticity
  + Because the Tribunal opted for an AMP equal to the online-booking-fee revenue rather than restitution, Scenario B now represents the actual penalty baseline, not the refund upper bound
  + Scenario C allows Cineplex to price optimally in the world without the conduct. By construction, if this were the but-for world accepted by the Tribunal, the AMP ordered could be AT MOST the baseline amount in Scenario B
* **Administrative monetary penalty (s. 74.1(1)(c))**
  + AMP can target the unlawful gain () × 3 so all scenarios are within the power of the Tribunal to order

**8. What is the correct but-for world?**

* If the but-for world is Cineplex NOT raising prices, then the Tribunal made the correct call. If the but-for world is Cineplex raising prices to increase revenues, then the correct quantum to be ordered will depend on the price sensitivity of consumers. Few points on this:
  + It should be noted that Cineplex HAS NOT reduced prices, they are just now revealing the fee
    - Though this might be because the decision is under appeal
  + It’s not obvious to me what the correct but-for world is, perhaps a matter for qualitative evidence?
    - In other words, the “but-for” world would depend on what the Tribunal thinks is likely to happen
* Some helpful jurisprudence on correct but-for world
  + Tervita CT: The Tribunal's entire analysis of the "but-for" world involved determining what the Vendors of Babkirk would likely have done with the Babkirk facility if CCS had not acquired it (e.g., operate it themselves, sell to another party like SES)
  + Tervita SCC: Granted this is a different part of the act, but the Supreme Court explicitly endorsed the "but-for" test as the appropriate analytical framework under section 92 of the Competition Act. The exercise "involves comparing the state of competition if the merger proceeds with the state of competition that is likely to prevail ‘but for’ the merger" (para 50-51). The ultimate question is whether the merged entity is "likely to be able to exercise materially greater market power than in the absence of the merger" (para 54).
    - Note that Tervita SCC also agrees with the ability of the Tribunal to look at likely future actions:
      * [57] Tervita seeks clarity as to the appropriate legal test under the “prevention” branch. In Tervita’s view, the “Tribunal erred in its application of the legal test for a substantial prevention of competition” (A.F., at para. 59). Tervita argues that “the Act requires that the Tribunal focus its analysis on the merger under review” (ibid.). Tervita acknowledges that s. 92 does involve a forward-looking approach, but submits that what should be projected into the future is the merging parties as they are, with their assets, plans and businesses at the time of the merger. Tervita argues that the Act does not permit the Tribunal to speculate, as it says it did in this case, and that its “fundamental error” is that it focused “not on the merger between Tervita and [the Vendors], but rather on how competition might have developed looking years into the future” (A.F., at para. 71).
      * [58] My understanding of Tervita’s argument is that the wording of s. 92 essentially limits the inquiry to whether the Babkirk site was a viable competitive entrant into the secure landfill market at the time it was acquired by Tervita. That is, in order to establish that the merger is likely to substantially prevent competition, a party to the merger must be a potential competitor based on the assets, plans and businesses of the party at the time of the merger
      * [59] For the reasons that follow, I am unable to agree with Tervita
  + Canada Pipe, in an abuse case, the FCA employed a “but for” test to conduct the inquiry. The Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is “substantial”

**9. Conclusion**

Depending on what the appropriate but-for world is, the AMP ordered may be greater than, less than, or equal to the current methodology of the Tribunal. It seems to me, however, that a correct calculation of an AMP requires at least 1) establishing the correct but-for world in a drip pricing case, and 2) determining the price sensitivity of consumers.

1. I think previous research suggests demand of movie tickets is elastic. We ignore this for the purpose of our example. See <https://www.sciencedirect.com/science/article/abs/pii/S0167718714000174>. [↑](#footnote-ref-1)