The contract may remain in force despite misrepresentations or latent defects because the consumer has obligations too

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The duty to inform is one of the main obligations sellers owe to their purchasers. This applies in the context of civil law, business law or consumer law. The duty to inform is based on the good faith obligation owed by any party to a co-contracting party. Case law often mentions it. Two recent decisions of the Court of Quebec provide good examples of it.

In the first case[1], judge J. Sébastien Vaillancourt ordered a motor vehicles merchant to reimburse to his customer part of the purchase price of a vehicle on the ground that the merchant's representative, at the time of the sale, had failed to inform the customer of the scope of damages suffered by the vehicle in two accidents which occurred prior to its purchase.

Yet, the merchant's representative had informed the consumer that the vehicle had been involved in an accident and that the cost of repairs had been high. However, judge Vaillancourt held that the reassuring statements of the merchant, to the effect that [TRANSLATION] "*the high cost of the repairs was only due to the high cost of replacement parts*", had played a large role in convincing the customer to purchase the vehicle. However, it appeared later than the vehicle had suffered structural damage, which led to the conclusion that the high cost of the damages was not due to the price of parts, but rather to the extent of the damages.

The judge concluded that the customer's consent had been vitiated and that he would not have purchased the vehicle had he known the extent of the damages and been falsely told that their cost was due to the cost of the parts. He relied on section 228 of the *Consumer Protection Act* (*CPA*), which prohibits a merchant from failing to mention an important fact in any representation made to a consumer[2].

When a merchant engages in such a prohibited practice, it is presumed that had the consumer been aware of such practice, he would not have entered into the contract or would not have paid such high a price[3]. In the case under review, the consumer was seeking cancellation of the contract. Cancelling a contract requires that the parties be restored in the same position as before the contract was entered into. This involves returning the vehicle to the merchant and the reimbursement of the purchase price to the consumer, which is referred to as restoration.

Even if the customer had been misled, judge Vaillancourt refused to cancel the contract. He noted

that the customer had travelled in excess of 30,000 kilometres with the vehicle without experiencing any mechanical problem and that he was acknowledging that the vehicle was functioning properly. A consumer cannot request the cancellation of something he used without a problem. Furthermore, an essential condition was lacking: the consumer was not offering to return the vehicle but was continuing to use it. Restoration was therefore impossible.

The consumer was maintaining that the value of the use he had made of the vehicle could be deducted from the reimbursed amount. Out of fairness for the merchant, the Court dismissed this argument and refused to apply a deduction equal to the value of the use of the vehicle. He wrote the following: [TRANSLATION] "*the evidence is unclear as to the depreciation caused by the use of the vehicle and this would render arbitrary the determination of such value by the Court, thus possibly causing an injustice to the defendant if restoration was to be ordered*". (Emphasis added)

However, judge Vaillancourt concluded that the customer was nevertheless entitled to a reduction of the sale price. He refused to follow the opinion of an expert witness who had established at 25% the depreciation caused to the vehicle by the accidents. He rather considered that if the scope of the damages had been disclosed at the time of purchase, the price would have been reduced by 20%. Accordingly, judge Vaillancourt ordered the merchant to pay to the customer consumer an amount equal to 20% of the purchase price of the vehicle, plus the amount of the taxes.

This decision well illustrates the importance of the duty of merchants to inform, but also highlights the fact that consumers have their own obligations too. The logic of the judge follows an established case law trend and brings to mind two decisions of the Court of Appeal issued a few days apart in 1995[4]. In these cases, the Court of Appeal had affirmed the decisions in the first instance in which the cancellation of sale contracts had been denied due to the fact that the consumers had continued to use the vehicles. These two decisions of the Court of Appeal are frequently referred to in matters where consumers seek the nullity of sales contracts of vehicles due to latent defects. The use of the sold property by a consumer while he has pending proceedings against the merchant is a very relevant element respecting the validity of his claim. A consumer who seeks the nullity of a contract has the obligation to cease using the property sold and offer it in deposit, as tender. Continuous use of the property sold may result in the consumer losing his right of action or severely hindering same.

In another recent decision[5], judge Christian Brunelle of the Court of Québec also refused to cancel the sale of a motor vehicle. In this matter, even if the customer had been informed of the fact that the vehicle he had purchased had been damaged during a snow removal operation, he had not been informed that the vehicle had been involved in two accidents and had been damaged.

A fact is worthy of note: even if he had purchased the vehicle from a merchant, the customer consumer did know the former owner since it was the former owner who had told him that he was changing vehicles. Therefore, the consumer had had ample opportunity to inquire with the former owner as to the characteristics of the vehicle. In defence, the merchant was maintaining that it was a courtesy sale for which he was not responsible. Judge Brunelle refused to treat the matter as a courtesy sale. In fact, the merchant had not had the consumer fill the form prescribed under section 71 of the *Regulation Respecting the Application of the Consumer Protection Act*[6]. The *CPA* thus applied to the contract entered into between the customer and the merchant. *Dura lex sed lex* (the law is hard, but nonetheless the law). We note that the consumer's proceedings could have been avoided by the merchant, by establishing better practices.

On the merits, judge Brunelle first noted that the merchant had not failed his duty to inform. For such a failure to occur, the merchant would have had to know that the vehicle had been involved in accidents. No evidence demonstrated such knowledge. To conclude that the merchant fails to reveal an important fact, one must prove that he was aware of it. Such was not the case.

Nevertheless, it is on the basis of the presence of a latent defect that the merchant was held liable.

The simple fact that the vehicle was involved in two accidents represented, in the opinion of the judge, a deterioration within the meaning of article 1729 of the *Civil Code of Québec* (CCQ)[7], which allowed for presuming the presence of a defect[8] :

[TRANSLATION]

[55] In the opinion of the Court, the used car which had been involved in accidents, then repaired – even according to good practices – exhibits a certain "deterioration", which is very real, at the time of the sale as compared to a car which is identical or of the same kind.

This "*deterioration*" referred to at section 1729 CCQ may be represented by a repair on the vehicle, which depreciates the property. Such repair, unknown by the consumer, is tantamount to a latent defect, in respect of which the consumer may pursue his remedies.

Here again, the customer consumer was seeking the cancellation of the purchase contract entered into with the merchant. As judge Vaillancourt did, judge Brunelle refused to cancel the contract and rather ordered that the purchase price be reduced. He first considered that the customer had been informed of the fact that the vehicle had been damaged during a snow removal operation. He was also of the view that despite all the information he had received from the merchant at the time of the sale, the customer had only very summarily inspected the vehicle prior to purchasing it. Judge Brunelle wrote: [TRANSLATION] "*which resulted in him failing to notice apparent defects because of his lack of diligence and vigilance*"

By this decision, judge Brunelle confirmed that the *CPA* does not dispense consumers from reasonably inspect property before purchasing it from a merchant. In judge Brunelle's view, the "*ordinary examination*" imposed on consumers under section 53 CPA[9] must comply with a certain threshold of [TRANSLATION] "*diligence and vigilance*". It is to be noted that even if the *CPA* imposes very strict duties on merchants, consumers have duties too when purchasing goods.

Lastly, as in the previous case, judge Brunelle noted that the customer consumer had benefited from the vehicle, having used it on a daily basis until the day of the hearing, having even travelled 26,000 kilometers without any mechanical problem whatsoever. One must understand that in such a case, the damages granted to the consumer were rather limited.

The duty to inform is at the heart of the consumer-merchant relationship and a cornerstone of consumer law. The *CPA* imposes many duties to inform on merchants and provide remedies that are varied and adapted to circumstances when the merchant fails to comply with the provisions of the law.

However, the consumer must be in a position allowing him to pursue the remedies provided under the law. The *CPA* was not passed to allow consumers to claim compensation on the basis of trivialities[10].

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1. *Gauthier* c. *2818876 Canada inc.*, 2017 QCCQ 11087 (C.Q., Civil Division).
2. Section 228 *CPA*: ***"228.****No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer*."
3. Section 253 *CPA*.
4. *Beauchamp* c. *Relais Toyota*, [1995] R.J.Q. 741 (C.A.); *Nichols* c. *Toyota Drummondville (1982) inc.*, [1995] R.J.Q. 746 (C.A.).
5. *Bilodeau* c. *Mercedes Benz de Québec (Chatel Automobiles ltée)*, 2017 QCCQ 9663 (C.Q., Civil Division).
6. "***71.*** *A sales contract for a used automobile or for a used motorcycle is exempt from the application of sections 37, 38, 53, 54 and 155 to 165 of the Act where:*
    1. *the used automobile or the used motorcycle was given in exchange to the merchant by a consumer at the time of purchase of an automobile or a motorcycle;*
    2. *the used automobile or the used motorcycle is sold to a consumer designated by the person who gave it in*

exchange; and

3. *the maximum sale price of the used automobile or of the used motorcycle corresponds to the credit granted for the exchange to the consumer by the merchant. The exemption referred to in the first paragraph applies only to a contract containing written attestation, by the consumer who has given the used automobile or the usedmotorcycle in exchange to the effect that the vehicle has been sold to the consumer designated by him."* (Emphasis added)

7. Article 1729 *CCQ*: « ***1729.****In a sale by a professional seller, a defect is presumed to have existed at the time of the sale if the property malfunctions or deteriorates prematurely in comparison with identical property or property of the same type; such a presumption is rebutted if the defect is due to improper use of the property by the buyer.* (Emphasis added)
8. In *CNH Industrial Canada Ltd*. c. *Promutuel Verchères, société mutuelle d'assurances générales*, 2017 QCCA 154, par. 28 (C.A.), Mr. Justice Pelletier writes : [TRANSLATION] "*In my opinion, the application of the rule under this section triggers not two but three presumptions in favour of the purchaser, that of the existence of a defect, that such defect was existing prior to the sale and, lastly that of the existence of a causal link between the defect and the deterioration or malfunctioning."*
9. Section 53 *CPA*: "***53.*** *A consumer who has entered into a contract with a merchant is entitled to exercise directly against the merchant or the manufacturer a recourse based on a latent defect in the goods forming the object of the contract, unless the consumer could have discovered the defect by an ordinary examination."*
10. *Crédit Ford du Canada ltée* c. *Gatien*, [1981] C.A. 638, 644 (C.A.). For recent cases, see : *Caisse populaire Desjardins du Portage* c. *Létourneau*, 2013 QCCQ 4395, par. 24 (C.S.); *Caisse populaire du Cœur des Vallées*, c. *Robitaille*, 2017 QCCQ 3834, pars. 58 & 76 (C.Q.). Also see: *Courval (Syndic de)*, J.E. 89-1256 (C.A.).