

Federal Court



Cour fédérale

**Date: 20230523**

**Docket: T-1242-21**

**Citation: 2023 FC 712**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, May 23, 2023**

**PRESENT: Associate Justice Benoit M. Duchesne**

**BETWEEN:**

**André RODRIGUE**

**Plaintiff**

**and**

**HIS MAJESTY THE KING**

**Defendant**

**JUDGMENT**

[1] The plaintiff is claiming damages in the amount of \$42,094.11 to reimburse him for the amounts he paid to purchase and repair a vehicle purchased from the Canadian Armed Forces (Forces) on January 20, 2020, through a virtual auction administered by GCSurplus.

[2] The plaintiff argued that the vehicle he purchased from the defendant was affected by significant hidden defects known to the defendant and not disclosed at the time of sale, thus

rendering the purchased vehicle unfit for its intended use. He argued that he either would not have purchased the vehicle or would not have paid such a high price if he had known of the defects at the time of the sale.

[3] He is also claiming damages in the amount of \$5,000.00 for negligence and inconvenience. Finally, he is demanding that GCSurplus take back the vehicle to dispose of it via its regular method.

[4] I find that the vehicle in question in this case was not affected by hidden defects at the time of its sale on January 20, 2020, and that, even if it was, the plaintiff had purchased the vehicle without a warranty of quality as provided for and agreed to in his contract of sale with the defendant, with the effect that he cannot now blame the defendant because the vehicle's quality was not what he believed it to be at the time of the purchase sale. I also find that the plaintiff was unable to demonstrate that the defendant was negligent.

[5] The action is therefore dismissed.

#### **I. The context of the GCSurplus auction**

[6] GCSurplus is an agency of Public Services and Procurement Canada (PSPC) whose mission is to enable Canadian government organizations to put surplus or confiscated property up for sale. GCSurplus is not the owner of the property it offers for sale. The sale of surplus or confiscated goods is carried out by virtual auction through the GCSurplus website.

[7] GCSurplus sells hundreds of surplus or confiscated vehicles each year through its website and virtual auction. Vehicles offered for sale are physically located in different locations across Canada. Potential buyers of these vehicles may visit one of the GCSurplus sales centres in each province to inspect the vehicle of interest to them before making an offer to purchase and, if they offer to purchase and are the buyers selected by GCSurplus following the auction, they must pay for and take possession of the purchased vehicle located there. Buyers can also purchase and request delivery of the goods they have purchased, if need be.

[8] A client department that chooses to sell a vehicle through GCSurplus completes a declaration of surplus and a Report of Surplus, which provides information about the vehicle declared surplus, such as the model and year of production of the vehicle, the VIN (Vehicle Identification Number), rust spots, the general visible condition of the vehicle, what is known of what is broken or not working in the vehicle, and any other information relevant to the sale. The Report of Surplus is the official internal declaration of the vehicle as a “surplus” vehicle and is authorized for divestiture. Photos of the property may be attached to the Report of Surplus to properly describe the vehicle in question and its components and to demonstrate their visual condition at that point in time.

[9] The Report of Surplus and photos of the vehicle to be sold are forwarded to GCSurplus so that the vehicle can be added to the list of goods for sale on the GCSurplus website.

[10] The relevant information contained in the Report of Surplus as well as the photos of the vehicle are collected by and for GCSurplus and are displayed on and discoverable in the

“Details” tab displayed by GCSurplus for each vehicle offered for sale on its website. GCSurplus relies on the department’s statements as recorded in the Report of Surplus to supplement the relevant marketing information.

[11] GCSurplus does not carry out any thorough inspection of vehicles offered for sale on its website. Only a visual inspection is undertaken to describe the vehicle on its sales page on its website because GCSurplus employees have no particular expertise in the field of mechanics and are not accredited vehicle inspectors.

[12] Any potential purchaser of a vehicle offered for sale by virtual auction through the GCSurplus website must register and open an online account with GCSurplus. Indeed, it is impossible for someone to bid in the auction through the GCSurplus website without registering and opening an account beforehand.

[13] A user who registers with GCSurplus must necessarily accept the “General Terms and Conditions A” visible and legible at the time of registration; otherwise, he or she cannot use the website as a user/buyer, or to bid on goods offered for sale. Only registered buyers who have accepted General Terms and Conditions A can make bids or offers to purchase, or buy goods offered for sale by GCSurplus. Once accepted by a registered user, General Terms and Conditions A then constitute the contract that binds the parties in relation to the sale of the goods through the GCSurplus virtual auction.

[14] It is admitted by the plaintiff that he registered with GCSurplus and that he accepted General Terms and Conditions A as contractual clauses applicable to his use of the GCSurplus site as well as to his bids, offers to purchase, and purchase contracts through GCSurplus.

[15] General Terms and Conditions A include clauses that provide for and bind the parties. Among other things, these contain disclaimers and limits of liability, notices that all goods sold are sold on an “as-is/where-is” basis, and that it is the buyer’s responsibility to inspect the goods before submitting an offer to purchase. In addition, General Terms and Conditions A explicitly provide that the law applicable to the sale of property by GCSurplus shall be governed by the laws and regulations in force in the Province of Ontario unless otherwise specified by the parties.

[16] Users who wish to make an offer to purchase a vehicle offered for sale through the GCSurplus site can go to the location of the vehicle to make an inspection before submitting an offer to purchase through auction. Indeed, as put in evidence at trial, many buyers come to the GCSurplus sales centre in Montréal, Quebec, with their mechanic to do a pre-bid visual inspection of a vehicle without, however, doing a road test. While caution suggests that an inspection of a good offered for sale by auction would be wise, users are not required to inspect a good before submitting an offer to purchase. General Terms and Conditions A also provide that a registered user acknowledges that he or she has been provided with full opportunity to inspect any goods he or she purchases by auction and that he or she is fully satisfied with their condition when he or she bids on the good put up for sale.

[17] The sale process subsequently operates like any other auction, subject to the provisions relevant to the process and sale contained in General Terms and Conditions A: the potential buyer submits a bid and offer to purchase a specific property, the offer to purchase is evaluated and accepted (or refused, as the case may be), and an invoice is issued. The successful buyer pays for his or her purchase, takes his or her receipt, and takes possession of the property in accordance with the conditions provided for in General Terms and Conditions A, namely, “as-is/where-is”, and without conventional (i.e. contractual) or legal warranty.

## **II. The vehicle and its resale**

[18] In the fall of 2009, the Forces acquired a blue Dodge Sprinter manufactured in September 2009 for use by the Forces’ locksmith at the military base in Valcartier, Quebec (the Sprinter).

[19] The overwhelming evidence shows that the Sprinter was closely monitored and that the vast majority of the problems or anomalies that affected it were detected and corrected during its use by the Forces. For example, between 2011 and 2018, the vehicle was subject to annual inspections and complete mechanical examinations.

[20] The Sprinter was used continuously by the Forces from February 2010 to June 2019, with relatively little monthly mileage. It appears that the Sprinter’s engine stopped starting around June 2019 and that the decision was then taken by the base fleet manager to sell the Sprinter.

[21] Once the resale was approved by higher command at the military base in Valcartier, the Forces prepared a document entitled [TRANSLATION] “Full Service Remarketing Control Sheet”

(the Control Sheet). The Control Sheet includes information on the vehicle such as make, model, year and odometer reading, among other things. The inspection carried out to complete the Control Sheet is a visual inspection and not a mechanical inspection. The information on the Control Sheet provides a summary of the condition of the vehicle. The information reflects what is apparent during the visual inspection and what is apparent in light of the last annual inspection report.

[22] The Control Sheet states that at the time of its resale the Sprinter's odometer indicated 33,364 km of travel; that the Sprinter was not considered roadworthy, had an engine that did not start and was otherwise in poor condition; that the vehicle was rusted; and that the paint was in poor condition. The precise condition of the engine is not described, but the fact that the engine was not working and had to be repaired before it could run is an obvious conclusion based on the facts disclosed in relation to its condition.

[23] The Sprinter was eventually included in the list of vehicles located at the GCSurplus sales centre in Montréal and offered for resale through the GCSurplus website.

[24] The information sheet for the Sprinter published on the GCSurplus website contains detailed vehicle information as follows:

[TRANSLATION]

Item: Dodge Sprinter Van, 2009

Minimum bid: 3000.00

Closing date: 08-January-2020 @ 11 p.m. (time) 20 EDT (Eastern Daylight time)

Specifications Year: 2009

Make: Dodge

Model: Sprinter Van

Version: 2500 144-in. WB

Body style: CARGO VAN

Engine type: 2.7L L5 DOHC 20V TURBO DIESEL

Transmission: 5-speed automatic transmission

Drive

line: Rear-wheel

Brake type: Disc brakes

VIN/Serial

number: WD0BE7AC195420191

Odometer: 33364 KM

Anti-Theft Locks: Power locks

Anti-theft

Braking and traction: Anti-lock Brakes (ABS)

Electric emergency brake assist

Traction control system

Electrical stability control

Safety: Air bag (driver's side)

Passenger air bag

Remote controls

and

release: Keyless system

Wheels: Steel wheels

Tires: Conventional spare tire



Windows: Power windows

Wipers: Intermittent Wiper

Climate control: Air conditioning

Interior Features:

Tachometer

Tilt steering column

Telescopic steering wheel

Entertainment: AM/FM radio

CD player

Exterior features: Mud flaps

Observations: The engine turns over but does not start.

This vehicle will need to be towed from its current location.

The interior of the vehicle is dirty.

The left front tire is flat.

The malfunction indicator light is on.

There are dents, scratches and rust on the vehicle.

This vehicle is used, has not undergone mechanical inspection and may require unknown repairs.

Inspection is recommended before submitting a bid.

Additional comment(s):

Registration

1. This vehicle is used, has not undergone mechanical inspection and

may require unknown repairs.

2. This vehicle was owned by National Defence (DND). It has never registered with the province. No registration will be supplied with the vehicle.

3. This vehicle will have to undergo a mechanical inspection by a firm recognized by the SAAQ before being registered.

Inspection and pick-up

1. Property inspection is on Thursday afternoon from 1:00 p.m. to 3:30 p.m.

only.

2. Pick-up is by appointment only. Pick-up times are

Monday to Friday, from 8:00 a.m. to 12:00 p.m. and 1:00pm to 3:30 p.m.

3. Any pick-up by a carrier or third party requires a completed bill of lading and an Authority to Release signed and sent to GCSurplus prior to shipment by the carrier or third party.

4. To schedule an appointment and for shipping inquiries please contact GCSurplus at: 514-283-5511 or by email to [TPSGC.gcsurplusquebec-gcsurplusquebec.PWGSC@tpsgc-pwgsc.gc.ca](mailto:TPSGC.gcsurplusquebec-gcsurplusquebec.PWGSC@tpsgc-pwgsc.gc.ca).

5. Please provide the necessary vehicle and labour for pick-up.

[25] The resale sheet on the GCSurplus website also includes the following text under the “Sales Clause” tab:

This sale is subject to all of the clauses outlined in the GCSurplus General terms and conditions A, unless General terms and conditions B are cited.

The Purchaser must also pay particular attention to the following clauses.

**Clause No. Description:**

832.1 All sales are final. No purchased Goods may be returned and no requests for reimbursement in whole or in part will be accepted.

[26] The resale sheet on the GCSurplus website includes 61 colour photos of the Sprinter taken by GCSurplus staff before resale.

[27] The photos show a blue Dodge Sprinter with a puncture and flat front left tire, with rust on the outer panels. The underside of the vehicle is also photographed, as are the wheels, the engine, and the engine information as written on the Sprinter. The interior of the Sprinter is photographed and shows a dirty and dusty cabin. The odometer and dashboard showing an illuminated engine light were also photographed and included among the photos available to potential buyers before making a purchase offer.

**III. The purchase**

[28] The plaintiff, a Quebec resident, was a regular user of GCSurplus in 2019–2020. He had accepted GCSurplus General Terms And Conditions A at the time of opening his account with the effect that General Terms And Conditions A constitute the contract between him and the defendant for his offers to purchase and purchase transactions through the GCSurplus website.

He admitted that he purchased other GCSurplus goods from time to time, including another vehicle to replace the one at issue. He is not a mechanic and has no special skills in vehicle repair.

[29] The plaintiff read the Sprinter information sheet as it appeared on the GCSurplus website before drawing up and submitting an offer to purchase. Although he could have made a visual inspection of the Sprinter at the Montréal resale centre with his mechanic before making his bid at the auction, the plaintiff chose not to do an inspection. He had seen the photos of the Sprinter and felt that the photos and the detailed sheet that appeared on the GCSurplus website provided him with sufficient information about the vehicle and its condition so that an in-person visual inspection was not necessary.

[30] The plaintiff knew that the detailed information on the vehicle stated that the vehicle was used, had not undergone a mechanical inspection and could require unknown repairs, and that the engine was turning over but not starting. By relying on his own knowledge, independent presumptions, and judgment, the plaintiff reasoned that there could be a multitude of reasons why the engine light was on in the Sprinter's dashboard and that he did not expect a diesel engine of the type used in the Sprinter would need to be changed after traveling 33,364 km.

[31] Without any submissions from the defendants other than what was included in the detailed sheet on the GCSurplus website, the plaintiff formed the opinion that the Sprinter was a good bargain given its minimum bid of \$3,000 and what he believed would be a much higher payable price for a Sprinter with a comparable odometer manufactured in 2009. According to the

plaintiff at trial, [TRANSLATION] “I thought I was buying an almost new vehicle, because the engine was diesel and there was so little mileage.”

[32] The plaintiff assumed that the vehicle would still be in good condition, mechanically and otherwise, subject to what had been disclosed by the defendant, and a good purchase as the vehicle was a former Forces vehicle. He relied on his assessment of the credibility of GCSurplus and the Forces to conclude that the vehicle was a better deal than the information disclosed on the GCSurplus website might suggest. In addition, he believed that the vehicle should be good given that his neighbour owned a Sprinter that seemed to be working well.

[33] The plaintiff purchased the Sprinter at the auction for \$9,299.00 on January 8, 2020. On January 13, 2020, he took possession of the Sprinter at the GCSurplus sales centre in Montréal, where at the same time he signed a document entitled “Authority to Release” As provided for in paragraph 3(7)(e) of the General Terms and Conditions A. The Authority to Release includes the following entry in the “Description” box:

2009 Dodge Sprinter Van

Registration

1. This vehicle is sold used, without any mechanical inspection, and may require unknown repairs.
2. This was a Department of National Defence (DND) vehicle. It has never been registered provincially. There is no registration for this vehicle.
3. This vehicle must be inspected by a SAAQ recognized firm prior to being registered.

[34] The description of the vehicle and the full content of the detailed information consulted by the plaintiff before making his offer to purchase and his purchase of the Sprinter are reiterated in the Authority to Release in their entirety, but in English.

[35] The plaintiff had the Sprinter towed to his mechanic some time after the date of the Authority to Release.

#### IV. **Repairs**

[36] The plaintiff had repairs done on the Sprinter according to the recommendations of his mechanic, which he thought were reasonable. Between January 28, 2020 and October 22, 2022, the plaintiff undertook the following actions, among others:

- a) request for a complete analysis of the starting system of the vehicle,
- b) request for a mechanical inspection carried out in accordance with the SAAQ's standards;
- c) changed the rack and pinion;
- d) changed front brake discs and rear brake pads.
- e) changed the intake manifold gasket;
- f) changed the timing chain;
- g) repaired the turbo;
- h) changed the starter;
- i) changed the lift pump;
- j) changed the engine;
- k) changed the brake sensor;
- l) changed the front blower;
- m) changed the rear suspension bar and suspension bushings;
- n) changed the EGR cooler;
- o) changed the o-ring and o-ring seal; and
- p) changed the radio.

[37] The total expenses the plaintiff incurred to repair the Sprinter and keep it running exceed \$44,094.14. The money spent on changing the engine was \$6,700.00 for the engine itself, and some \$6,626.50 was spent on labour and parts directly related to changing the engine.

[38] The plaintiff deducted \$626.59 in Sprinter maintenance costs from his claim during cross-examination at trial. His claim for repair costs was then \$42,094.11.

## V. Analysis

[39] The main issue in this case is whether the Sprinter was affected by one or more hidden defects at the time of its sale in January 2020, which correspond to the plaintiff's repairs. If hidden defects are established, the issue is then to determine the appropriate remedy.

[40] Finally, I must determine whether the defendant was negligent in his conduct and his disclosure of facts to the plaintiff up to the time of the sale.

[41] The first step is to determine the law applicable to the issues in question given the parties' arguments at trial.

### I. The law applicable on the merits in relation to hidden defects

[42] The parties argued that Quebec law on hidden defects provided for in articles 1726 et seq. of the *Civil Code of Québec* (the CCQ) should apply to the dispute.

[43] The General Terms And Conditions A binding on the parties provide in their subsection 5(12) as follows:

#### 5. General Terms and Conditions of Agreement

##### 12. Application of Law

This sale is governed by and is to be construed in accordance with the laws and regulations of the province of Ontario (Canada) or as may be otherwise specified by the parties.

[44] The parties' evidence is that neither party addressed the question of the law applicable to the substance of the sale transaction at the time of the sale or at the time of the offer to purchase in January 2020. The parties acted in accordance with the contents of General Terms and Conditions A from the registration of the plaintiff with GCSurplus until the issuance of the declaration. The issue of the law applicable on the merits only arose at the time of the defendant's defence, when the defendant argued that Quebec law applied on the merits in relation to the Sprinter's legal guarantee of quality.

[45] Having no other evidence that the law applicable to the sale at the time of sale was "otherwise specified by the parties", the parties should be held to the contract they entered into as explicitly provided for in their contract and Ontario sales law should be applied unless there is a reason to apply another substantive law. The parties agreed on the law applicable to the sale when the plaintiff registered with GCSurplus, and the parties confirmed their agreement regarding the law applicable to the sale when ownership of the Sprinter was transferred by the "Authority to Release" already provided for in General Terms and Conditions A.

[46] The plaintiff is representing himself and argued that Quebec law applies on the merits without proposing jurisprudential or other support for his argument.

[47] The defendant argued that article 3117 CCQ applies to exclude the application of Ontario law despite what is stipulated in General Terms And Conditions A, and makes the CCQ applicable. Article 3117 of the CCQ states:

**3117.** The choice by the parties of the law applicable to a      **3117.** Le choix par les parties de la loi applicable au



consumer contract cannot result in depriving the consumer of the protection afforded to him by the mandatory rules of the law of the State where he has his residence if the conclusion of the contract was preceded, in that State, by a specific offer or by advertising and the consumer took in that State all the steps necessary on his part for the conclusion of the contract, or if the order from the consumer was received in that State.

The same rule also applies where the consumer was induced by the other contracting party to travel to a foreign State for the purpose of concluding the contract.

In the absence of a designation by the parties, the law of the place where the consumer has his residence is, in the same circumstances, applicable to the consumer contract.

contrat de consommation ne peut avoir pour résultat de priver le consommateur de la protection que lui assurent les dispositions impératives de la loi de l'État où il a sa résidence si la conclusion du contrat a été précédée, dans ce lieu, d'une offre spéciale ou d'une publicité et que les actes nécessaires à sa conclusion y ont été accomplis par le consommateur, ou encore, si la commande de ce dernier y a été reçue.

Il en est de même lorsque le consommateur a été incité par son cocontractant à se rendre dans un État étranger afin d'y conclure le contrat.

En l'absence de désignation par les parties, la loi de la résidence du consommateur est, dans les mêmes circonstances, applicable au contrat de consommation.

[48] Article 3117 of the CCQ does not exist in a legislative silo. Article 3111 of the CCQ sets out the general principle from which article 3117 of the CCQ derogates in the particular cases where it applies. Article 3111 of the CCQ provides:

**3111.** A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or whose designation may

**3111.** L'acte juridique, qu'il présente ou non un élément d'extranéité, est régi par la loi désignée expressément dans l'acte ou dont la désignation

be inferred with certainty from the terms of the act.	résulte d'une façon certaine des dispositions de cet acte.
Where a juridical act contains no foreign element, it remains nevertheless subject to the mandatory provisions of the law of the State which would apply in the absence of a designation.	Néanmoins, s'il ne présente aucun élément d'extranéité, il demeure soumis aux dispositions impératives de la loi de l'État qui s'appliquerait en l'absence de désignation.
The law may be expressly designated as applicable to the whole or to only part of a juridical act.	On peut désigner expressément la loi applicable à la totalité ou à une partie seulement d'un acte juridique.

[49] Applying article 3111 of the CCQ alone would lead to the conclusion that Ontario law, being the law expressly designated in the General Terms And Conditions A, the legal act binding the parties, as being applicable to the sale made with GCSurplus, would be the law applicable to the substance of this dispute regarding the sale and quality guarantee of the Sprinter.

[50] The wording of article 3117 CCQ provides for its conditions of application. First, the contract between the parties and in dispute must be a “consumer contract”. The expression “consumer contract” in article 3117 of the CCQ is defined by article 1384 of the CCQ, which reads as follows:

<b>1384.</b> A consumer contract is a contract whose field of application is delimited by legislation respecting consumer protection whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic purposes, property or services from the other party,	<b>1384.</b> Le contrat de consommation est le contrat dont le champ d'application est délimité par les lois relatives à la protection du consommateur, par lequel l'une des parties, étant une personne physique, le consommateur, acquiert, loue, emprunte ou se procure de toute autre manière, à des fins
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<p>who offers such property or services as part of an enterprise which he carries on.</p>	<p>personnelles, familiales ou domestiques, des biens ou des services auprès de l'autre partie, laquelle offre de tels biens ou services dans le cadre d'une entreprise qu'elle exploite.</p>
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[51] The Quebec Court of Appeal defined the scope and effect of articles 1384 and 3117 of the CCQ in *eBay Canada Ltd. c Mofo Moko*, 2013 QCCA 1912 (CanLII). It specified that a consumer contract within the meaning of articles 1384 and 3117 of the CCQ is determined by the identification of the parties to the contract, i.e. by the presence of a consumer and a merchant. Whether there is a “consumer” within the meaning of these articles is determined on the basis of the definition of “consumer” contained in the *Consumer Protection Act*, RSQ, c P-40.1. The *Consumer Protection Act* defines a consumer as a natural person, except a merchant who obtains goods or services for the purposes of his or her business.

[52] There is no evidence to suggest that the plaintiff is a merchant who purchased the Sprinter for the purposes of his business. The plaintiff is therefore a “consumer” within the meaning of article 3117 of the CCQ.

[53] I assume here that the defendant is a “merchant” within the meaning of the *Consumer Protection Act* or within the meaning of section 1384 of the CCQ for the purposes of analyzing the issues only and without deciding whether the defendant is a merchant within the meaning of the CCQ in its auction through the GCSurplus website in general. By doing so, we can focus on meeting the criteria for the application of article 3117 of the CCQ to find out whether the protections in the *Civil Code of Québec* in respect of a membership contract apply because of the

events that occurred rather than because of the parties' status as a consumer or merchant (*EBay Canada Ltd. c Mofo Moko*, 2013 QCCA 1912 (CanLII) at paragraph 45). Having determined that the plaintiff is a consumer, all that remains to be determined is whether the conditions of application of article 3117 CCQ apply to preclude the application of Ontario law. The conditions for the application of article 3117 of the CCQ are that:

- a) the conclusion of the contract was preceded, in that State, by a specific offer or by advertising and the consumer took in that State all the steps necessary on his [or her] part for the conclusion of the contract, or if the order from the consumer was received in that State;
- b) the consumer was induced by the other contracting party to travel to a foreign State for the purpose of concluding the contract; or,
- c) [i]n the absence of a designation by the parties, the law of the place where the consumer has his [or her] residence is, in the same circumstances, applicable to the consumer contract.

[54] The evidence shows that conditions b) and c) described above do not apply; the plaintiff was not encouraged to go to a State other than Quebec to conclude his purchase contract, and the contract between the parties designates a law applicable to the substance of the contractual relationship between the parties in relation to the sale.

[55] There is no evidence to suggest that the purchase contract between the parties was preceded by a special offer or advertising in Quebec. The Sprinter was included in the list of goods for sale on the GCSurplus website, but being displayed on a website without more, without any particular solicitation of the consumer by a specific advertisement, is not sufficient to constitute a special offer or an advertisement to satisfy the first part of the condition of application provided for in the first paragraph of article 3117 of the CCQ (GOLDSTEIN, Gérald,

*Commentaires sur le Code civil du Québec*, Commentary on article 3117 of the CCQ, *La Référence*, Yvon Blais, at para 3117 565). Simply displaying the description of a property for sale on a website without more does not constitute a special offer or an advertisement within the meaning of article 3117 of the CCQ.

[56] Given that the condition of application provided for in the first paragraph of section 3117 of the CCQ is conjunctive, failure to satisfy its first component, which requires proof of an advertisement or a special offer in Quebec, renders moot the issue of whether the second part of the condition of application, that relating to the place where the acts necessary to conclude a contract of membership are carried out, has been satisfied.

[57] It must therefore be concluded that article 3117 of the CCQ does not apply in the circumstances, that article 3111 of the CCQ applies, and that Ontario law applies to the substance of the dispute concerning the sale as provided for in General Terms and Conditions A.

[58] In the event that I am wrong in my analysis and that Quebec law applies more generally in relation to the sale of the Sprinter and the warranty as to its quality, the plaintiff's action should be dismissed anyway because he did not give notice of the alleged defects to the defendant within the time limits provided for in article 1739 of the CCQ, and proceeded to repair the property without allowing the seller the opportunity to determine whether it was one or more defects covered by the warranty against hidden defects provided for in the *Civil Code of Québec* (*Waters c Passmore*, 2019 QCCS 3805 (CanLII) at paras 142–148, and the jurisprudence cited

therein). Here, the plaintiff's failure to give notice of the defect as required by the Code is fatal to the latent defect action.

## II- Ontario law on hidden defects

[59] Despite the fact that the Court provided the parties with an opportunity to make submissions on the content of Ontario law with respect to hidden defects, neither party made any submissions other than to state that Ontario law would, in their view, be similar to Quebec law. The parties declined the opportunity to submit post-trial written submissions on the issue. That being the case, the Court takes judicial notice of Ontario law with respect to hidden defects in property sold by auction.

[60] The law of sale in Ontario is governed by the *Sale of Goods Act*, RSO 1990, c S.1, (SGA) and common law to the extent that it applies despite the relevant legislation.

[61] Section 15 of the SGA sets out the law applicable to warranties as to the quality of property sold:

### **Implied conditions as to quality or fitness**

**15** Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to

### **Conditions implicites quant à l'usage**

**15** Sous réserve des lois pertinentes, il n'existe pas de garantie ou de condition implicite relative à la qualité des objets fournis en vertu d'un contrat de vente ni à leur adaptation à un usage particulier, sauf dans les cas suivants :

the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.

3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

1. Il y a une condition implicite que les objets sont raisonnablement adaptés à l'usage particulier que l'acheteur fait connaître expressément ou implicitement au vendeur, en montrant qu'il s'en remet à la compétence ou au jugement de celui-ci, lorsque les objets correspondent à la description de ceux que le vendeur fournit dans le cours de son commerce, qu'il en soit ou non le fabricant. Il n'y a pas de condition implicite relative à l'adaptation à un usage particulier d'un article déterminé sous son brevet ou sous une autre appellation commerciale.

2. Il y a une condition implicite que les objets achetés sur description sont de qualité marchande si le vendeur fait le commerce d'objets de cette description (qu'il en soit ou non le fabricant). Si l'acheteur a examiné les objets, il n'y a pas de condition implicite relative aux vices que l'examen aurait dû révéler.

3. Une garantie ou condition implicite relative à la qualité des objets ou à leur adaptation à un usage particulier peut être incorporée au contrat par renvoi aux usages du commerce.

4. Une garantie ou condition expresse n'invalide une garantie ou une condition

découlant implicitement de la présente loi que si elles sont incompatibles.

[62] Section 53 of the SGA provides that the parties may, by express agreement, derogate from the warranties set out in section 15 of the SGA and exclude them completely (*J B Printing Ltd. v 829085 Ontario Ltd.*, 2003 CanLII 19834 (ON SC) at paragraphs 34 and 35; *Tobey v Loranger*, 2020 ONSC 4669 (CanLII) at paragraphs 28 to 30):



**Exclusion of implied laws and conditions**

**53** Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

**Exclusion de conditions légales**

**53** Les droits, les obligations ou la responsabilité que la loi attache à un contrat de vente peuvent être écartés ou modifiés par convention expresse, par l'usage entre les parties ou par les usages du commerce, si ceux-ci sont de nature à obliger les deux parties au contrat.

[63] General Terms And Conditions A, in paragraph 4(1)(b), expressly provides that no warranty is offered or granted in respect of goods purchased through GCSurplus, stipulating as follows:

**DISCLAIMER,  
WARRANTY AND  
INSPECTION****1. General****a. Item Descriptions**

The description of the Goods is based on the best information available to GCSurplus/PWGSC;

**b. Goods sold "as-is/where-is"**

All Goods are sold on an "as-is/where-is" basis. Canada /PWGSC/ GCSurplus makes no warranty, expressed or implied, legal, contractual or verbal, as to the quantity, kind, character,

**AVIS DE NON-  
RESPONSABILITÉ,  
GARANTIE ET  
INSPECTION****1. Générale****a. Description des Biens**

La description des biens se fonde sur les meilleurs renseignements dont disposent GCSurplus et TPSGC;

**b. Tous les biens sont  
vendus selon le principe «  
sur place et tel quel »**

Tous les biens sont vendus selon la formule « sur place et tel quel ». Le gouvernement du Canada, TPSGC et GCSurplus ne formulent aucune garantie,

quality, weight, size, condition or fitness for any use or purpose with respect to the Goods listed on GCSurplus. Goods are purchased at the Purchaser's own risk and peril;

Any mention of a sale item's condition in the sales listing represents the best assessment of the sales representative at the time of listing and is offered for guidance only and is not an enforceable condition of sale.

### **c. Minimum Bids**

For greater certainty, the Purchaser acknowledges that the minimum bid established by GCSurplus/PWGSC for the Goods, if any, shall not be interpreted as an estimation of the value of the Goods nor as a warranty or a representation that the value of the Goods is equal or greater than that amount;

### **d. Appraisals**

GCSurplus may seek independent appraisals to assist in establishing fair minimum bids. These appraisals, although made by professionals, are retained by GCSurplus and may not reflect the actual value of the Good or Goods. Interested Users should seek their own independent appraisals.

### **e. Inspection of Goods**

Inspection prior to submitting an offer is the responsibility of

explicite ou implicite, légale, contractuelle ou verbale, quant à la quantité, à la nature, au caractère, à la qualité, au poids, à la taille ou à la description d'une part quelconque du matériel, ou quant à un état convenant à une fin quelconque par rapport aux biens mis en vente sur GCSurplus. Les biens sont vendus aux propres risques et périls de l'acheteur;

Toute mention de l'état de l'article à vendre représente la meilleure évaluation du représentant au moment de la mise en vente, elle est offerte à titre indicatif seulement, et ne constitue pas une condition de vente exécutoire;

### **c. Soumission d'offres de prix minimal**

Il est entendu que l'acheteur reconnaît que l'offre de prix minimal fixé par CGSurplus ou TPSGC sur les biens, s'il y a lieu, ne peut être interprétée comme une estimation de la valeur des biens ni une garantie ni une représentation que la valeur des biens est égale ou supérieure à ce montant;

### **d. Évaluations**

GCSurplus peut demander des évaluations d'un expert indépendant pour l'aider à établir des soumissions d'offre de prix minimal

the User and may be arranged by appointment only during regular office hours with the custodian of the Goods at the location(s) indicated on the sale listing;

**f. Offers to Purchase**

1. When making an Offer to Purchase, the User acknowledges that they have been provided with full opportunity to inspect the Goods and is fully satisfied with respect to the condition of the Goods.

équitable. Ces évaluations, même si elles sont faites par des professionnels, sont retenues par GCSurplus et peuvent ne pas refléter la valeur réelle du bien ou des biens. Les utilisateurs intéressés doivent trouver leur propre expert indépendant pour une évaluation;

**e. Inspection des biens**

Il incombe à l'utilisateur d'inspecter les biens avant de présenter une offre, et il peut prendre rendez-vous à cette fin pendant les heures normales de bureau, seulement avec le gardien des biens aux lieux indiqués sur la liste des biens mis en vente;

**f. Offres d'achat**

Lorsqu'il présente une offre d'achat, l'utilisateur reconnaît qu'il a bénéficié de toute la liberté d'examiner les biens et qu'il est parfaitement satisfait de leur état.

[64] This stipulation constitutes a derogation by express agreement provided for in section 53 of the SGA and applies so as to exclude any warranty against hidden defects on which the plaintiff relies. Since there is no warranty against hidden defects applicable in this case, the plaintiff's claim for hidden defects must be rejected since he purchased a vehicle as it was and where it was, without any warranty as to the quality of the vehicle or its components, and at his own risk.

### III. The absence of hidden defects

[65] If I am wrong with respect to the lack of warranty against hidden defects applicable to the proceeding, I would dismiss the claim on the basis that the alleged defects that affected the engine and the other components of the Sprinter at the time of sale were apparent defects, not hidden, that the other alleged defects were not hidden defects, and that a prudent and diligent buyer would not have acted as the plaintiff did.

[66] The common law distinguishes between a hidden defect and a patent defect by stating that a patent defect is a defect that a purchaser could discover if he or she inspects the property in question with ordinary care. A hidden defect is a defect that a purchaser who inspects property with ordinary care would not likely discover. Whether the defect is patent or hidden is a matter of degree. A defect that is patent is a defect that is visible or that arises from something that is visible or that is discoverable by exercising due diligence and asking appropriate questions in relation to the property in question (*Tony's Broadloom & Floor covering Ltd. v. NCM Canada Inc.* 1995 CanLII 7153 (ON SC), affirmed, [1996] O.J. No. 4372, 31 O.R. (3d) 481, 1996 CanLII 680 (C.A.O.)).

[67] The defendant was clear in his description of the Sprinter on his website: the engine was turning over but not starting, the engine light was on, it did not undergo a mechanical inspection and the entire vehicle might need unknown repairs. Although the severity of the problems affecting the Sprinter's engine was not disclosed because it was not known to the defendant, the plaintiff independently relied on his own assumptions to minimize the seriousness of the

apparent or potential problems affecting the Sprinter in order to convince himself of a reality that did not exist.

[68] It was wrong to believe that the Sprinter was [TRANSLATION] “almost new” because the engine was diesel and the odometer showed a relatively modest mileage. Neither the type of engine nor the low mileage could conceal that the engine would not start, that the malfunction indicator light was on, and that the problems affecting the engine could be major to the point where the entire engine needed to be replaced. The fact that the plaintiff’s neighbour owned a Sprinter that appeared to the plaintiff to be functioning well should not suggest that any other Sprinter put up for sale for the minimum price of \$3,000 would be equivalent in terms of mechanical or other integrity, or performance.

[69] The specific problems with the engine were unknown to the defendant. The disclosure that the vehicle and necessarily the engine might need unknown repairs was a clear and undeniable indication that something more serious could affect the Sprinter’s engine as well as these other components. What was unknown to both the plaintiff and the defendant was the extent of the repairs required to put the engine into working order. Underestimating the potential repair costs required to start the engine is not a hidden defect. The extent of the repairs to be made to correct a defect that is patent because of its disclosure does not change the nature of the patent defect to a hidden defect. The defects affecting the engine were therefore patent at the time of the sale.

[70] The balance of the repairs carried out and claimed by the plaintiff are repairs which had the objective of improving the vehicle compared to the used old vehicle he purchased. The plaintiff did not ask any questions about the condition of these components of the Sprinter before submitting his offer to purchase despite the defendant having stated in the information sheet that the vehicle might need unknown repairs and had not undergone a mechanical inspection. The defects were therefore patent to the extent that they constitute defects. The plaintiff nonetheless relied on the recommendations of his mechanic to perform repairs for which no probative evidence was provided to demonstrate that they were, in fact, required, or that there was a defect in terms of quality or premature wear compared to similar components.

[71] The defendant is not responsible for the costs the plaintiff incurred to improve the various components of the Sprinter after its purchase, particularly when the purchase was “as-is/where-is” at the buyer’s risk.

[72] As the hidden defects have not been established, I do not have to address the question of the appropriate remedy.

#### **IV. Negligence**

[73] The plaintiff argued that the defendant was negligent in his transmission of relevant information to the Sprinter. The plaintiff did not insist on this aspect of his claim at trial other than to say that the defendant should have disclosed in his online information sheet that the Sprinter engine had to be completely replaced.

[74] As mentioned above, the defendant did not know that the Sprinter's engine had to be replaced when it was put up for sale or at the time of sale. The defendant cannot be considered to have been negligent for failing to disclose under the common law criteria, or to have committed an extra-contractual fault within the meaning of article 1457 of the CCQ when he did not have knowledge of the information that should have been disclosed, according to the plaintiff's allegations. It is not a breach of the duty of care or a fault within the meaning of article 1457 of the CCQ not to disclose what we do not know. In fact, subsection 4(9) of the General Terms And Conditions A explicitly states that neither the goods sold on the GCSurplus website nor the information contained therein are warranted, and that purchasers are strongly advised to independently verify goods and the information pertaining to them before submitting an offer for a sale transaction. The plaintiff did not verify the information as he should have.

[75] I find that the plaintiff has not established knowledge of the alleged defect by the defendant and has not established an essential element of his claim for negligence. The plaintiff's claim for negligence is therefore dismissed.

**V. Conclusion**

[76] The plaintiff's claims must be dismissed for the above reasons.

**THIS COURT ORDERS as follows:**

1. . The plaintiff's action is dismissed.
2. . The parties are invited to attempt to negotiate an agreement on the costs of the proceeding. If the parties have not settled the costs of the proceeding before June 9, 2023, they may make written submissions on costs not exceeding more than 3 pages each, not including appendices and case law. The plaintiff's written submissions must be served and filed in the Registry with proof of service by June 14, 2023, and the defendant's written submissions must be served and filed in the Registry with proof of service by June 30, 2023.

“Benoit M. Duchesne”  
Associate Judge

Certified true translation  
Janna Balkwill



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1242-21

**STYLE OF CAUSE:** ANDRÉ RODRIGUE v HIS MAJESTY THE KING

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** MARCH 7, 2023

**JUDGMENT AND REASONS:** BENOIT DUCHESNE AJ

**DATED:** MAY 23, 2023

**APPEARANCES:**

André Rodrigue

PLAINTIFF  
SELF-REPRESENTED

Mathieu Laliberté

FOR THE DEFENDANT

**SOLICITORS OF RECORD:**

Mathieu Laliberté  
Attorney General of Canada  
Ottawa, Ontario

FOR THE DEFENDANT