

CANADA / JUDGMENT

Oznaga v. Société d'exploitation des loteries

[1981] 2 SCR 113

COURT

Supreme Court of Canada

DECIDED

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Collection

Supreme Court Judgments

Date

1981-10-20

Report

[1981] 2 SCR 113

Judges

Dickson, Robert George Brian; Estey, Willard Zebedee; McIntyre, William Rogers; Chouinard, Julien; Lamer, Antonio

On appeal from

Quebec

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SUPREME COURT OF CANADA

Oznaga v. Société d'exploitation des loteries, [1981] 2 S.C.R. 113

Date: 1981-10-20

Ion Oznaga Appellant; and

La Société d'exploitation des loteries et courses du Québec Respondent.

1981: February 12; 1981: October 20.

Present: Dickson, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Interpretation — Allegation that Loto-Perfecta (6/36) drawing not in accordance with Regulation — Action to recover — Claim to be made in 30 days unless written notice received earlier — Notice of claim given over 15 months after drawing — Motion to dismiss — Notice not a prior and essential condition for right of action to exist — Deadlines do not begin to run until creditor is aware of the existence of facts giving rise to his right — Civil Code, art. 2232 — Code of Civil Procedure, arts. 2, 166 — Regulation respecting the 6/36 otherwise called Loto-Perfecta, (1975) 107 Quebec Official Gazette, 4501, (No. 30, 13/8/1975), ss. 27, 28, 29, 35.

Appellant held a ticket in the drawing of the Loto-Perfecta (6/36) on September 24, 1976: he alleged that the winning numbers were not determined in accordance with the 6/36 Regulation. He maintained that the selection of the numbers of the tumbler did not occur simultaneously with the running of the race. He argued that in such a case the determination of the numbers should be solely by means of operation of the tumbler, and that accordingly he held one of the winning tickets.

Appellant sent notice of his claim on January 25, 1978 and brought his action to recover on September 6, 1978. The Société d'exploitation des loteries moved to dismiss his action on the basis of s. 35 of the Regulation, which released the Société of any obligation upon the expiry of 30 days following the date of the draw, unless it had received a written notice of the claim prior to expiry of this deadline. The Superior Court ruled in favour of the Société and the Court of Appeal upheld this judgment.

Held: The appeal should be allowed and the motion to dismiss dismissed except as to conclusion 3(a).

The notice provided for by s. 35 of the Regulation is not a prior and essential condition for existence of the right of action. The latter exists as of right for 30 days, and notice within the 30 days is only a means of preserving the right of action beyond that period.

By its decision in *City of Montreal v. Vaillancourt* the Court wished to extend to time limits other than true prescriptions certain provisions of art. 2232 of the Civil Code, namely the suspension of prescription based on the de facto impossibility of taking action. This concept should not be unduly extended, but lack of awareness of the facts which are the basis of the right, when such lack of awareness results from the debtor's fault, is de facto impossibility of acting as provided for in art. 2232, and the starting point for computing deadlines will be suspended until the creditor is aware of the existence of his right-provided he acted with the care of a reasonable man.

In the case at bar the allegations of appellant, contained in his statement of claim and reply—which, entered in the record within the correct time, had the same effect as an amended statement of claim—attribute to the government corporation manoeuvres which resulted in concealing from him the existence of the facts on which he claims his right was based, until January 6, 1978. The thirty-day deadline must therefore be computed from that date. These allegations, taken as proven for the purposes of this appeal, suffice to protect Oznaga's action for the time being from a motion to dismiss based on s. 35. The trial judge will decide as to the merits of his claims and will determine when Oznaga in fact learned of the "manoeuvre", if any, and whether he then acted within the required time limits.

City of Montreal v. Vaillancourt, [1977] 2 S.C.R. 849, followed; *Rabinovitch v. Chechik*, [1929] S.C.R. 400, affirming (1928), 45 K.B. 129; *Marquette Marketing Corporation Limited v. Continental Insurance Company et al.*, [1977] C.A. 533; *National Bank of Canada v. Soucisse et al.*, decision rendered on September 28, 1981, referred to.

APPEAL from a decision of the Court of Appeal for Quebec, affirming a judgment of the Superior Court[1], allowing a motion to dismiss and dismissing the action brought by appellant. Appeal allowed and motion to dismiss dismissed except as to conclusion 3(a).

Ion Oznaga, for himself.

Louis-Paul Cullen, for the respondent. English version of the judgment of the Court delivered by

LAMER J.—This appeal is from a decision of the Court of Appeal for Quebec, which upheld the decision of a judge of the Superior Court[2], allowing a motion to dismiss and dismissing the action brought by appellant against the Société d'exploitation des loteries et courses du Québec.

It should immediately be noted that, for the purposes of this appeal, the facts as alleged in the pleadings of Mr. Oznaga at the trial level must be taken as proven.

Appellant held a ticket in the drawing of the Loto-Perfecta, otherwise known as "6/36", on September 24, 1976.

This drawing was held by respondent, a government corporation, under the authority of and in accordance with a Regulation enacted by Order in Council, A.C. 3064-75, July 23, 1975: Regulation respecting the 6/36 otherwise called Loto-Perfecta, (1975) 107 Québec Official Gazette, 4501, (No. 30, 13/8/1975).

In view of the grounds upon which the motion to dismiss made by the Société against the appellant's action is predicated, there is no need here to undertake an exhaustive description of the operation of the 6/36, nor to refer to all the allegations of fact contained in the pleadings; it will suffice to say that the Regulation respecting the 6/36 provided that winners would be determined by the interaction of three independent operations, as one might assume, for the purpose of guaranteeing an honest drawing and above all making such honesty apparent to the public.

The player selects numbers when he buys a ticket. These numbers will make him a winner if, in certain circumstances and under certain conditions, they correspond to the numbers produced jointly by the operation of a tumbler and a horse race. The Regulation provides for the operation of this part of the drawing as follows: 27. Method of draw: The Corporation shall determine winning numbers by means of a tumbler and a horse race, in the following manner:

- (a) the tumbler, which permits to mix 36 identical balls numbered from 1 to 36 inclusive and which comprises 10 slots identified from "A" to "J" inclusive, is powered and operates until each of the 10 slots contains one of the 36 balls of the tumbler;
 - (b) a horse race, subject to special rules and to the racing rules in force in Québec, shall be held simultaneously in order to select 7 slots from among the 10 slots of the tumbler.
28. Determination of winning numbers: Subject to the provisions of sections 29 and 30, the numbers contained in the 7 slots selected by means of the race shall become the winning numbers for the corresponding draw in the following manner: the numbers contained in the slots whose letters are identical to the letters of the first 6 horses to arrive at the finish line shall be the winning numbers, and the number contained in the slot whose letter is identical to the letter of the seventh horse to arrive at the finish line shall be the winning number called "complementary".
29. Cancellation of event: Where the race cannot be held on the date fixed for the draw, or is cancelled because less than 7 horses finished the race, or is cancelled for any reason whatsoever and cannot be resumed within the prescribed time, the draw shall be performed solely by means of the tumbler by retaining the numbers contained in the slots bearing letters A, B, C, D, E and F for the determination of the winning numbers, and the number contained in slot "G" for the determination of the "complementary" winning number.

[Emphasis added.]

Mr. Oznaga alleged that the selection of the numbers by the tumbler never at any time occurred, the evening of September 24, 1976 included, simultaneously with the running of the race. He stated that, like all the others, the race of September 24, 1976 was run at 7:15 p.m., while the televised drawing of the operation of the tumbler took place at 10 p.m., that is, nearly three hours later. It is important to know that the government corporation was not accidentally in breach of its Regulation, since it took the trouble to conceal what it was doing with a show when the drawing was taking place. These drawings were held on Fridays at 10 p.m. and were televised as part of a program known as "La Corne d'Abondance" [the horn of plenty]. Oznaga's pleadings further alleged that the statements made by those presenting the program were such that they were clearly intended to give the impression to viewers, including respondent's co-contractors (holders of tickets), that this was a "live" broadcast from the tumbler operation, and more importantly, that it was also a live broadcast from the running of a race at the "Blue Bonnets" race track in Montreal.

It is conceivable, although not in any way expressly argued by the Corporation, that the manoeuvre was limited to giving the impression that the televised program was live whereas it was entirely filmed at 7:15 p.m. and the operation of the tumbler in fact took place during the race three hours earlier, and that in this way the requirement that the two operations be simultaneous was in fact complied with: this we do not know, and only the evidence at a trial would decide the point.

At the stage of a motion to dismiss, the Court must limit itself to what was alleged by Oznaga, namely that the operation of the tumbler was broadcasted live at 10 p.m., and that the impression was given that a race was being broadcast live at the same time when it in fact had occurred and been filmed at 7:15 p.m.

Oznaga argued that as a consequence the operation of the tumbler was in no way concurrent with the running of the race, and that therefore the determination of the winners should be solely by means of the operation of the tumbler, as provided by the Regulation.

Finally, Mr. Oznaga alleged that he held one of the winning tickets.

The motion to dismiss his action was based on s. 35 of the Regulation:

35. Time allowed for claim: The Corporation shall be released from any liability and obligation with respect to all 6/36 operations in connection with a draw upon the expiry of 30 days following the date of the draw, unless it has received a or several written notices of claim prior to the expiry of the said period. It was argued that Mr. Oznaga brought his action two years after the race of September 4, 1976, that is on September 6, 1978, and that he did not take care to preserve his rights of action by sending a notice within 30 days after the race, the notice which he sent being in fact dated January 25, 1978.

The Superior Court judge and the judges of the Court of Appeal ruled in favour of the Corporation.

With respect, I feel that in the case at bar they erred by causing the thirty-day period to run from the date of the race, and that they ought to have computed the time from the date on which Oznaga alleged he had acquired knowledge of the facts which, in his opinion, entitled him to claim his prize.

Respondent pleaded in the trial court that the action should be dismissed because plaintiff had neither alleged nor proven that a notice was sent within 30 days.

In allowing the motion, the Superior Court judge said the following [at p. 187]:

[TRANSLATION] Plaintiff-respondent did not allege that he complied with this requirement, and it was not until January 25, 1978 that he sent defendant-applicant a notice requiring it to pay him the amount of the prize claimed.

And the Court of Appeal ruled:

[TRANSLATION] WHEREAS appellant admitted at the hearing that he did not give respondent notice within thirty days of the drawing of September 24, 1976, and the only written notice alleged by appellant was that of January 25, 1978;

WHEREAS the absence of the notice required by the Regulation justified the trial judge in allowing the motion to dismiss, and dismissing the action, without it being necessary to decide whether the loss of a chance of winning, complained of by plaintiff-appellant in paragraph 11(c) of his statement of claim, entitles him to claim the first prize of \$425,162.20.

It is worth noting that the notice provided for in s. 35 of the Regulation is not, as might be the case with the notice required in other statutes, a prior and essential condition for existence of the right of action. The latter exists as of right for 30 days, and notice within the 30 days is only a means of preserving the right of action beyond that period. Thus, where a clause of this kind is concerned, plaintiff, whose action alleges facts as a result of which the action falls after the expiry of 30 days following the holding of the race, must allege facts which, assuming that they are proven, establish that the notice was sent within 30 days after the race, or which support a conclusion that this deadline was suspended and the notice sent within 30 days of the time from which the period in fact legally began to run. Additionally, the absence of an allegation, or the allegation of facts which place plaintiff beyond the deadline, is sufficient to non-suit the action.

It is thus clear that if the thirty-day period in the case at bar should begin to run from the date of the race, the lower courts were correct in holding that, on the basis of Oznaga's allegations, his action was inadmissible, and in dismissing it. However, as I am of the view, for the reasons I shall indicate below, that the deadlines should be calculated otherwise, mention should be made here of other allegations in the pleadings which are relevant to my way of calculating these deadlines.

In paragraph 15 of his statement of claim Mr. Oznaga alleged:

[TRANSLATION] 15. Defendant refused or neglected to pay plaintiff his prize, that is, the sum of \$425,162.20, although duly requested to do so, and in particular defendant was requested to pay this amount to plaintiff by plaintiff himself, on January 25, 1978, and defendant is hereby called upon to produce at any hearing concerning this matter the original of such request made by plaintiff, failing which secondary evidence of the afore-said will be introduced.

That letter of January 25 (in fact dated January 19), which was filed as an exhibit and which must be taken into consideration (see *Rabinovitch v. Chechik*[3], at p. 407, affirming on this point the decision of the Court of Appeal for Quebec[4]; see also *Marquette Marketing Corporation Limited v. Continental Insurance Company et al.*[5], states inter alia that plaintiff was misled for a long time by the Corporation and its employees. The following is an extract from the letter sent to the Corporation by Mr. Oznaga:

[TRANSLATION] The program "La Corne d'Abondance" was brought to you by the Société d'exploitation des loteries et courses au Québec, the host Raymond Lemay says every Friday evening at 10:15 p.m. (Produced by Pierre Laberge, a production of Télé-Metropol Montréal, President: Roland Giguère).

Each week, over a million people taking part in the Loto-Perfecta who watched your program have been misled and deceived, because they had the impression that the horse race took place simultaneously with the operation of the tumbler, especially after listening to the following statements by your host Raymond Lemay at 10:15 p.m.:

1. We bring you the 6/36 race, directly from Blue Bonnets! The race ordinarily occurs at 7:15 p.m., that is before the regular program, which begins at 7:30-but the participants were made to believe that the race began at 10:15 p.m.
2. The race is now over! For a long time I too thought this was true! ... because he gave the impression that the race was run simultaneously with the operation of the tumbler which was set in motion in the Télé-Me-tropol studio.
3. We are awaiting the official result from the judges! Unbelievable! Why?—in order to deceive once again the million participants watching your program?
4. Here is the official result from Blue Bonnets! The official result has arrived quickly (it is in fact already on a piece of paper in front of the host) ... and ticket holders are happy.
5. We have eliminated the eighth, ninth and tenth horses at the finish line! What speed—it's amazing!
6. We will now proceed with the Mini-Loto drawing.

It is in paragraph 2 that Mr. Oznaga alleged that he was not aware of the manoeuvre until a long time after the race.

Having moved by motion to dismiss on October 20, 1978, the Corporation nonetheless on November 8, 1978 filed a defence, which repeated its arguments for dismissal based on s. 35 of the Regulation, and a reply was filed by Mr. Oznaga on November 17. It is in this reply that he indicated the exact time at which he became aware of the facts on which his right of action was based.

He alleged, in paragraph 25(e) to (h):

[TRANSLATION] (e) The manoeuvres undertaken by defendant or with its knowledge are such that, without them, the other contracting party would not have entered into the contract, and this will all be established at the hearing in accordance with the Civil Code.

Indeed, the near-perfect camouflage of defendant's manoeuvres with the modern techniques of television and the tacit and discreet assistance of its employees and representatives succeeded in hiding the truth for over two years and in misleading millions of people; the unlawful and improper manoeuvres of defendant were contrary to the principles of law set forth in the Civil Code, in the Lotteries Act and in its own Regulation;

- (f) It was not until January 6, 1978 that defendant began making the first drawing by means of the tumbler only, before invited witnesses, thus dispensing with the horse race as a means of selecting and determining winning numbers, and plaintiff thus had clear confirmation

that defendant had taken all these measures so that in future it would be released (in any case until the end of 1977) from any liability or obligation to the contract-ing participants. It thus hoped to be in a position to rely in the future, but in any case for earlier drawings, on the celebrated section 35 of its Regulation, which provides for a thirty-day deadline in making any claim after each drawing;

- (g) Until the end of 1977, for all contracting partici-pants, all the 6/36 operations concerning a drawing (section 35 of the Regulation) were those undertaken by defendant in connection with the program "La Corne d'Abondance" presented by the Corporation, and with the specific statements made by hosts: "Direct from Blue Bonnets", "Our studio auditors".

It was not until the drawing of January 6, 1978 that defendant began to assume its responsibilities and carry out its obligations regarding all the operations of the 6/36 connected with a drawing (section 35) and

- (h) Plaintiff realized that defendant had decided to comply after January 6, 1978 with the provisions of its Regulation, and plaintiff accordingly immediately sent his notice, specifically on January 19, 1978, which was received by defendant on January 25, 1978, within the thirty-day deadline for making a claim, taking into account the fact that the provisions of this Regulation had also been complied with by defendant since January 6, 1978.

Defendant was accordingly notified within the thirty-day period for making a claim, after it began to comply with the provisions of its own Regulation, to "pay every prize for a winning coupon which would have been excluded in computing prizes, for any reason whatso-ever" (section 33), as the reserve fund established by the Corporation was sufficient and enabled it at the same time to comply with its responsibilities and obligations.

[Emphasis added.]

In this reply, Mr. Oznaga alleged that he was not aware of the swindle (or at least that his suspicions in this regard were not confirmed) until January 6, 1978; he contended that if the thirty-day deadline should not begin to run until that date, his notice of January 25 was within the thirty-day deadline required by s. 35. It should be noted that these allegations were entered in the record on November 17, 1978, and so well before the decision on the motion to dismiss, which is dated January 8, 1979; this Court must therefore consider whether it should take them into account in deciding this appeal, and treat as proven the statements of fact made throughout the pleadings, including Oznaga's reply, and not merely those contained in his statement of claim.

In my opinion the answer should be in the affirmative,

Article 166 of the Code of Civil Procedure, which must be read, interpreted and applied in light of art. 2 of the Code of Civil Procedure, states that:

166. When it is possible to remedy the ground upon which the exception is based, the plaintiff may ask that he be granted a delay to do so and that judgment be rendered upon the exception only upon the expiry of such delay.

If the ground remains, the suit is dismissed; if it has been remedied, the exception is maintained for costs only.

Mr. Oznaga could have used this article as a basis for asking the Court for a delay in which to file an amended statement of claim, in which he could have completed his allegations and thus attempted to rectify his statement of claim by adding the facts which he actually alleged in his reply. This is what he would have had to do, if he had not been given the opportunity of proceeding by way of a reply when the Corporation filed a defence repeating its grounds for dismissal. Oznaga's reply, entered in the record within the correct time, had the same effect as an amended statement of claim. Thus, to the extent that these allegations contained in the reply were able to "remedy the ground upon which the exception is based", Oznaga will, depending on the outcome, be required to pay only the costs of the exception in the Superior Court.

It now remains to determine whether these facts alleged by him had the effect of suspending the running of the s. 35 deadline, and if so, whether the notice which he sent on January 25, 1978 was sent within the required time.

Since the decision of this Court in *City of Montreal v. Vaillancourt*[6], the question of whether the thirty-day notice specified by s. 35 is a notice prerequisite to the right of action or a short prescription has ceased to be of importance in relation to its calculation, including the determination of its starting point.

That case involved a claim by a widow against the City for the death of her husband as the result of a fall on the sidewalk. According to art. 1088 of the City's Charter, the plaintiff had to give notice of the accident within 15 days, otherwise she would lose her right of action. Article 1088 modifies the stringency of the Charter in cases of act of God or other similar situations, but these provisions of the article are irrelevant as they were not taken into account by the Court in computing the time limit. As plaintiff's notice was not received until the seventeenth day after the accident, the city's defence to her action was, by a motion to dismiss, on the ground that the requirements of art. 1088 had not been observed. In addition, amongst other arguments which are of no relevance here, plaintiff had argued in her action that (at pp. 855-56):

... it was only approximately ten (10) days following the accident that the actual cause of the death of the late Arthur Thomas Lovett was made known to the Plaintiff, it being theretofore reported in the Police report and the said Arthur Thomas Lovett was believed to have died from a heart condition and Plaintiff was only able to communicate with legal counsel at the earliest, on the afternoon of February 8th 1973;

In short, Donalda Vaillancourt was saying that, in computing the fifteen-day time limit, its starting point should be placed at around February 5, and thus that the letter was received by the city within the legal time limit. De Grandpré J., speaking for this Court, said the following (at p. 856):

There is no doubt that the legislator imposed a very heavy burden on claimants in cases covered by art. 1088 of the Charter. This burden is in derogation of the general law in matters of delictual liability, and as such must be interpreted so as not to make the exercise of the right aleatory.

He went on to say (at pp. 856-57):

... In the case at bar, since the facts came to the claimant's attention some ten days after the accident (this is indicated in her declaration which must, for the time being, be taken as true), she was obviously not relieved of the obligation created by art. 1088 of the Charter. On the other hand, if this obligation has as its starting point not the date of discovery but the date of the accident, we arrive at the situation where the time limit for acting granted to the claimant becomes so short as to be practically a denial of the right of action. This would be an extravagant conclusion which I could not agree with.

I do not see why in matters of prescription the law would recognize the existence of cases which suspend its running while in matters of notice, this would not be true. Even if the notice of accident is not a proceeding, it is impossible for me to consider it more strictly than the prescription. In my opinion it follows that since the period did not start to run until February 5, receipt of the letter by the City on the twelfth satisfied the requirements of art. 1088 of the Charter.

[Emphasis added.]

In my opinion, by its decision in the aforementioned case, the Court wished to extend to time limits other than true prescriptions certain provisions of art. 2232 of the Civil Code, namely the suspension of prescription based on the de facto impossibility of taking action. This also corresponds with Dean Jean Carbonnier's comments on judicial attitudes in an article contained in the *Revue Trimestrielle de Droit Civil*, (1952) vol. 50, at p. 171, "Notes sur la prescription extinctive" [comments on extinctive prescription] (at pp. 178-79):

[TRANSLATION] These attempts to provide a theoretical framework should however not blind us to the empiricism prevailing in the courts, which has led many contemporary writers to adopt an attitude of total scepticism (Tissier, Prescription, Nos. 36 et seq.; Hugueney, note S. 1924.1.193; Battifol, note S. 1929.1.225; Voirin, note D. 1934.2.33; Rodière, note S. 1951.2.45). The requirement of a predetermined deadline may be a convenient means of not having to apply an extended period of time, by suspension or interruption, which would leave unprotected for too long certain classes of defendant that merit protection: a child threatened with disowning, a purchase of real property in an action to rescind for lesion (Comp. Req., May 3, 1927, D. hebdomadaire, 1927.302; Civ., July 16, 1941, D.C. 1942.69, note by Mr. Rouast), and so on. This impression is confirmed by the fact that, after laying down the rule that a predetermined deadline is inconsistent with any

extension, the courts have nonetheless reserved, as a kind of safety valve—at least in some cases, though not all (see as to this, for the action in disavowal, Req., November 25, 1946, D. 1948.321; Paris, November 19, 1948, S. 1949.2.34)—the right of having recourse to the maxim *Contra non valentem agere ...*, which is not [sic] legally indefensible (surely Act of God is an exception to all rules and authorizes the suspension of even procedural deadlines—see the rule stated by the Conseil d'État, April 6, 1949, Gaz. Pal., 1949.1.284.)), but which once again clearly demonstrates the irresistible force which, in this whole area of extinctive prescription, has caused the courts to retain a measure of judicial authority just where the deadlines would appear to be most strict.

The intention of this Court that, if not all causes of prescription, then at least the absolute impossibility of acting provided for in art. 2232 of the Civil Code, should apply to deadlines other than simple prescription, emerges from its statements and the positions taken by it in other areas in which it has sought to interpret the law in an equitable way (see, *inter alia*, *National Bank of Canada v. Soucisse et al.*, a decision rendered on September 28, 1981). While sharing this approach, I am nonetheless of the opinion that care must be taken not to relax the computing of deadlines, substantive as well as procedural, to the point that they become almost inoperative, for such clauses serve the ends of justice as they are designed to provide special protection for certain rights which under certain conditions the legislator wishes to give priority, be that to the detriment of the rights of others, by providing them protection from litigants who act belatedly (see, *inter alia*, in this regard, the observations of Prof. John W. Durnford, "Some Aspects of the Suspension and of the Starting Point of Prescription", (1963) *Thémis* 245).

Accordingly, the concept of it being "absolutely impossible ... in fact to act", provided for in art. 2232 of the Civil Code, should not be unduly extended as a basis for a suspension of deadlines.

I am therefore of the view that in general it is rightly so that legal scholars refuse to regard the creditor's lack of awareness of the legal facts which are the basis of his right as constituting an absolute *de facto* impossibility of acting (see Pierre Martineau, *La prescription*, P.U.M., 1977, at pp. 353 et seq.). Be that so, there however appears to be as much agreement, and I concur, in recognizing that lack of awareness of the legal facts giving rise to a right, when such lack of awareness results from the debtor's fault, is *de facto* impossibility of acting as provided for in art. 2232, and that the starting point for computing deadlines will be suspended until the creditor is aware of the existence of his right — provided, it should be added, that he acted with the care of a reasonable man.

Although the observations made by this Court in *City of Montreal v. Vaillancourt* do not expressly make this point regarding the causes of such lack of awareness, they must nevertheless be read in conjunction with the fact that, in that case, Donalda Vaillancourt was misled by the police report written by city employees themselves: in my opinion, de Grandpré J. seems to say this by implication when he reproduces in his opinion the paragraph of plaintiffs declaration in which it is mentioned. In the case at bar Mr. Oznaga's allegations, taken as proven for the purposes of this appeal, attribute to the government corporation manoeuvres which resulted in concealing from him the existence of the facts on which he claims his right was based, until January 6, 1978. The thirty-day deadline must therefore be computed from that date. At this stage of the judicial

proceedings, therefore, these allegations suffice to protect Oznaga's action for the time being from a motion to dismiss based on s. 35. The trial judge will decide as to the merits of his claims and will determine when Oznaga in fact learned of the "manoeuvre", if any, and whether he then acted within the required time limits.

In its submission to this Court, respondent raised other grounds for dismissal which were not dealt with by the Court of Appeal and the Superior Court, in view of their findings on s. 35 of the Regulation. These grounds are described in general in paragraph 7 of the motion to dismiss:

[TRANSLATION] The action of respondent [Oznaga] has no basis in law, even assuming that the facts alleged therein are true.

The conclusions sought by Mr. Oznaga are as follows (I have numbered them so they may be more easily identified):

[TRANSLATION]

1. ORDER defendant to pay plaintiff the sum of FOUR HUNDRED AND TWENTY-FIVE THOUSAND, ONE HUNDRED AND SIXTY-TWO DOLLARS AND TWENTY CENTS (\$425,162.20), being the amount of the first prize in the said 6/36 drawing (Loto-Perfecta) of September 24, 1976 (No. 26), the whole in accordance with the contractual obligations assumed by defendant to plaintiff, which have not been respected by defendant;
 2. DECLARE null and void the numbers determined as winning numbers by defendant by means of a horse race held at 7:15 p.m. on the same day as the activating and operation of the tumbler, because that race was not held simultaneously and is therefore illegal, improper and void, to the extent that it was used or tended to be used in establishing the winners of the said drawing, as such race was not held simultaneously with the drawing by the tumbler, as required by section 27 of defendant's Regulation, and must therefore be disregarded in determining the said winning numbers or combinations;
 3. DECLARE that, for the reasons given in the statement of claim, the determination of the winning numbers of the drawing in question should be arrived at solely by means of the tumbler, on account of the failure by defendant, and its employees and representatives, to comply with an essential requirement, that is, the failure not to hold the horse race simultaneously with the said drawing of the tumbler; and
- 3.(a) accordingly declare that if the horse race had been held simultaneously at 10 p.m. on September 24, 1976, that is, simultaneously with the tumbler, the first six (6) horses at the finish line would have corresponded to the numbers indicated by plaintiff in his combination of six (6) numbers determined by the tumbler as winning numbers, namely: two (2), three (3), thirteen (13), twenty-six (26), thirty-four (34) and thirty-five (35);

4. DECLARE that the result of this drawing should have been established and determined exclusively in the manner set forth in the Regulation, that is, by the said tumbler, and therefore, in this case, find plaintiff to be the holder of six of the said numbers selected by the tumbler, and the sole and first person to claim the first prize, the sole winner of the said first prize, and that he is thus entitled to the amount of that prize, namely, to the sum of \$425,162.20;
5. RESERVE to plaintiff any other conclusions that may be useful or necessary in the circumstances, the whole with interest and costs.

[Emphasis added.]

If Mr. Oznaga succeeds in proving the existence of the substantive conditions making s. 29 of the Regulation applicable, only the evidence can show the position in which the six (6) numbers of his ticket were in the pockets of the tumbler, and whether, depending on their position, these entitle him to a prize, including, as he alleged, the first prize. Respondent says that, to succeed, Oznaga's claim would have to overcome insurmountable evidentiary difficulties. Be that as it may, "exceptions to dismiss" cannot be grounded on the weighing of evidentiary burdens. On the other hand, respondent's submission on conclusion 3(a) is correct: there is no basis in the allegations of Mr. Oznaga on which the Court could legally conclude as he suggests.

I would therefore allow this appeal, set aside the decision of the Court of Appeal and the judgment of the Superior Court, allow the motion to dismiss as to conclusion 3(a) only, and dismiss it with respect to the other conclusions, but order appellant to pay the costs of the exception in the Superior Court; the costs in the Court of Appeal and in this Court should be in the cause.

Appeal allowed, motion to dismiss dismissed except as to conclusion 3(a).

Solicitors for the respondent: Ogilvy, Montgomerie, Renault, Clarke, Kirkpatrick, Hannon & Howard, Montreal.

[1] [1979] C.S. 186.

[2] [1979] C.S. 186.

[3] [1929] S.C.R. 400.

[4] (1928), 45 K.B. 129.

[5] [1977] C.A. 533.

[6] [1977] 2 S.C.R. 849.

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