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*Nov. 13
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Jan. 22

ISRAEL GHIMPELMAN AND STUART IDELSON (*Defendants*) ..... APPELLANTS;

AND

DAME TAUBE BERCOVICI, BARUCH HALPERN AND ISRAEL HALPERN (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Companies—Officers—Appointed by directors—Term of office not specified—Same directors re-elected—Failure to appoint new officers due to deadlock among directors—Claim of holding over—Quo warranto against president and secretary—No longer choice of majority—Mandataries—Termination of mandate on election of new board—The Quebec Companies Act, R.S.Q. 1941, c. 276, ss. 82, 86—Civil Code, arts. 1701, 1711—Code of Civil Procedure, art. 987.

The issued shares of a company, incorporated under the *Quebec Companies Act*, were held by two groups, one of which was headed by the defendant G, and the other by H, one of the plaintiffs. Each group was represented on the board of directors by three directors. In 1952, the board appointed G and I to the offices of president and secretary, respectively, without specifying their terms of office. In 1953 the same directors were re-elected, but, by reason of a deadlock, failed to appoint new officers, whereupon G and I claimed that so long as no new officers were appointed, they continued to hold their offices by virtue of the doctrine of "holding over". The plaintiffs

*PRESENT: Kerwin C.J. and Taschereau, Rand, Fauteux and Abbott JJ.

successfully petitioned the Superior Court for a writ of *quo warranto* on the ground that G and I were illegally occupying and exercising their offices. This judgment was affirmed by the Court of Appeal.

Held (Rand J. dissenting): The appeal should be dismissed; G and I had ceased to be the choice of the majority of the directors and *quo warranto* was the appropriate procedure to remove them from their offices.

Per Kerwin C.J. and Taschereau and Fauteux JJ.: By virtue of the *Quebec Companies Act,* the directors, in the absence of other provisions in the letters patent or by-laws, are elected for a year, and, once elected, they become immediately and exclusively vested with the duty and right to elect among themselves a president. The period for which such an officer is thus elected cannot extend beyond the expiration of the maximum lawful term of the directors, for then the right to elect new officers will become vested in the directors freshly elected or re-elected. Thus the tenure of the office of president will expire contemporaneously with that of the directors, at which time it may be extended or renewed, if this be the manifest will of the new board of directors. In the present case, not only was the will of the majority not indicated either expressly or tacitly, but the deadlock left no possible doubt that G and I had ceased to be the choice of the majority.

The "holding over" doctrine had no application and, in any event, would appear to be inconsistent with the spirit of the Act, particularly as it would sanction the perpetuation in office of officers who had failed to obtain the confidence of the majority. Furthermore, a lawful title to the offices could not be derived from the provisions of the Act contemplating the necessity of such offices being held continuously by someone, nor could the Courts, on the basis of practical consideration, sanction the assertion of an unfounded legal position.

Per Abbott J.: The board of directors and the officers of a company incorporated under the *Quebec Companies Act* are respectively the agents or mandataries of the company, and as such their mandate expires when a new board of directors is elected. But it is not accurate to say that the officers are substituted mandataries within the meaning of art. 1711 of the *Civil Code*. Where newly-elected directors fail to meet immediately and appoint new officers, there is no doubt, in most cases, of the implied authority from the new board to the existing officers, to continue to act as such, pending the first meeting of the directors. When, however, as in the present case, the directors did meet, and by reason of a deadlock failed to appoint officers, it became obvious that the previous incumbents no longer possessed the confidence of the newly-elected board. In that case, equal shareholding does not justify one group taking advantage of the *status quo* in order to maintain its representatives in office indefinitely

Per Rand J., *dissenting*: The statute implies a continuity in the offices of president, vice-president and secretary, subject only to a change of personnel elected or appointed to succeed existing incumbents. The practical necessities of maintaining the activities of the company require that continuity, and from the beginning of limited liability companies in analogy to public and semi-public offices that principle has been recognized. The holding over rule is contemplated

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by the companies legislation in its latest form, is based on the convenience of business and is supported also by the formal structure of the company, of which the board and the offices are part.

Assuming that the offices of president and secretary are held at the will of the directors, they obviously require a continuance in office of an incumbent until his incumbency is terminated by action of the board. There was no such action here. The statute does not require an annual election of officers; their tenure is a question of fact arising from their appointment, which being impliedly from time to time, requires simply that a continuing presidency be provided. Furthermore the president and secretary are independent and direct officers of the company and cannot be taken to be substitutes of the board.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), affirming a judgment maintaining a petition for a writ of *quo warranto* against two officers of a company. Appeal dismissed.

P. F. Vineberg, for the defendants, appellants.

A. J. Campbell, Q.C., for the plaintiffs, respondents.

The judgment of Kerwin C.J. and Taschereau and Fauteux JJ. was delivered by

FAUTEUX J.:—This is an appeal, by leave, from a unanimous decision of the Court of Queen's Bench for the Province of Quebec (1) affirming a judgment of the Superior Court declaring that the appellants, Ghimpelman and Idelson, illegally occupy and exercise the offices of president and secretary respectively of Rockhill Apartments Limited and dispossessing them of the same.

The dispute bears on the tenure of such offices and there is no controversy as to the facts which may be outlined as follows:

Rockhill Apartments Limited is a company incorporated in 1949 by letters patent issued under the *Quebec Companies Act,* R.S.Q. 1941, c. 276. The assets of the corporation consist mostly in an apartment house situated in Montreal and its shares are held equally by two groups, *i.e.,* the Ghimpelman and Halpern families, which are related and here respectively represented by appellants and respondents.

Up to July 1949, the board managing the affairs of the company was composed of five directors, then increased to six, of whom four constituted a quorum. There is no

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casting vote in the event of a tie, a contingency which materialized when the six directors, elected at the annual general meeting held on June 23, 1953, then and at a subsequent meeting called and held for that purpose on the 30th of the same month, divided equally on any attempt aiming at the appointment of the president and secretary of the company. These attempts were exclusively those of the Halpern group; the Ghimpelman faction, which up to that year had held these offices, persistently refused to put any motion in this respect, on the then alleged ground that it would meet with a similar fate, a fact which would have supplied further evidence that they no longer were the choice of the majority. Since that time and because of a strict adherence to this division, the deadlock resulting therefrom has been perpetuated.

It is common ground that, under the provisions governing this company, (i) "the election of directors shall take place yearly, and all the directors then in office shall retire, but, if otherwise qualified, they shall be eligible for re-election": s. 86 (1); and (ii) "the directors shall elect among themselves a president and if they see fit a chairman of meetings and one or more vice-presidents of the company, and may also appoint all other officers thereof": s. 86 (4).

The provisions of s. 86 (1) were complied with, but those of s. 86 (4) were not and, as intimated at the hearing, by counsel for all parties, they will not be if the legal position asserted by the appellants receives the sanction of the Court.

I do not find it necessary to deal with the jural nature of the function of directors nor of their relationship with the corporation, its shareholders or officers, for the question here arising is not related to directors but is whether the appellants, in view of all the circumstances of this case and under the law applicable thereto, are entitled to retain their respective offices, as they claim.

With respect to the office of president. In providing that, in the absence of other provisions in such behalf in the letters patent or by-laws,—which is the case here—the directors are elected for a year and must elect among themselves a president, the Quebec Legislature made clear

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that once the directors are elected, at the annual general meeting of the shareholders, they become immediately and exclusively vested with the duty and right to elect among themselves the president. And it is also manifest that the maximum period of time for which the president is thus elected cannot extend beyond the expiration of the maximum lawful term of the directors, for then the right to elect the president will become vested in the directors freshly elected or re-elected by the shareholders then qualified to do so. Evidently the law does not contemplate that the former and the latter group of directors be, at any one time, both in office and possessed with a duty and right of a nature designed for one group. The circumstance that all the former directors are re-elected is foreign to and cannot affect the interpretation of these sections which must operate whether such circumstance is or is not present. There cannot be two interpretations. Thus the maximum term of the tenure of the office of president expires contemporaneously with that of the directors, at which time it may be extended or renewed, if this be the manifested will of the majority of the directors freshly elected or re-elected. In the present instance this will of the majority was neither expressly nor tacitly indicated; on the contrary the cleavage appearing immediately after the election of the directors and persisting ever since leaves no possible doubt that Ghimpelman has ceased to be the choice of the majority.

The "holding-over" doctrine, allowing the continuance in possession of an office and of the exercise of its functions after the end of its lawful term, was invoked. To the extent that this doctrine has a recognition under the law it is dealt with exhaustively in s. 82 reading:

> If, at any time, an election of directors is not made or does not take effect at the proper time, the company shall not be held to be thereby dissolved, but such election may take place at any subsequent general meeting of the company called for that purpose, and the retiring directors shall continue in office until their successors are elected.

The circumstance conditioning the operation of the section, *i.e.*, the failure to hold the election of directors at the proper time, is not present here; and furthermore the office covered by the provision is that of director and not that

of president. The letters patent or by-laws of the company make no reference to the doctrine. Finally it would appear to be highly inconsistent with the spirit of the Act and particularly with the paramount majority rule principle attending the appointment of persons entrusted, in any capacity, with the management of the affairs of a company and attending also such management, to sanction the perpetuation in office of officers who have failed to obtain the confidence of the majority.

With respect to the office of the secretary. Ever since the existence of this company, the secretary was elected each year. The terms of the resolution adopted for that purpose always indicated that such officer was elected "for the ensuing year", except for the election held in 1952, when these words do not appear. Whether or not this was the result of an oversight, counsel for the parties could not say. But the failure to mention a term is not indicative of an intention to depart from the practice invariably followed, in previous years, of electing the secretary for the ensuing year only. Indeed it is clear—and significant—from the minutes of the meeting of June 30, 1953 that the attitude of the Ghimpelman group to the election of a secretary was identical to that they had taken to the election of the president. This and what was said at the hearing before us evidences that Idelson, as secretary, like Ghimpelman, as president, was not the choice of the majority.

There remain to be considered two points advanced in support of appellants' position. Their removal from office, it is said, would be inconsistent with these provisions of the Act, which, for the proper operation of the business of the company, contemplate the necessity of such offices being held continuously by someone. In this argument, I find no assistance; for from such necessity a lawful title to these offices, which is here lacking, cannot be derived. The other point is that the relief sought for and obtained by respondents will not solve the deadlock and the situation resulting therefrom. This remains to be seen; and in any event the function of the Court is not to suggest or to bring solutions in like matters but to determine the con-

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troversy raised by the pleadings. It cannot, on the basis of practical considerations, sanction the assertion of an unfounded legal position.

It may finally be noted that no precedent in point has been quoted in the matter and that there are no provisions, either in the *Quebec Companies Act* or in the *Winding up Act*, R.S.Q. 1941, c. 278, dealing with a like situation. This, however, does not imply the absence of any useful remedy.

I would dismiss the appeal with costs.

RAND J. (*dissenting*):—This is a proceeding by way of *quo warranto* to the appellants who claim to be the president and secretary respectively of Rockhill Apartments Limited, a company incorporated under the *Quebec Companies Act*, R.S.Q. 1941, c. 276.

The facts giving rise to the controversy are these. The shares are held equally by two groups represented by the appellants and the respondents. In 1952 the board of directors, being all such six persons, elected Ghimpelman president and Idelson secretary without reference to duration. On June 23, 1953 the annual meeting was held at which all six were re-elected. Later on the same day the board met, a motion to place the affairs of the company under two managers was defeated, and the meeting ended. At a further meeting on June 30 a motion to elect the respondent Baruch Halpern president was on an equal division defeated. No election was proposed for any other office. The meeting apparently adjourned to July 15, but nothing further is shown to have taken place and on October 7, 1953 the action was instituted.

On May 31, 1954 the Superior Court held that the term of office of the president and the secretary elected in 1952 had expired on June 30, 1953, and that both offices thereupon became vacant. On appeal the judgment was affirmed (1).

It does not appear what, if any, are the duties and authority of the president in respect of the management of the affairs of the company or what powers, if any, Ghimpelman and Idelson were in fact exercising. No suggestion is made of a likely change of attitude on the part

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of any member of either group, and the protagonists of the two groups, president Ghimpelman and vice-president Baruch Halpern receive the same remuneration; nor was any made of any unauthorized acts on the part of either officer. The application of art. 987 of the *Code of Civil Procedure* to a private corporation was not challenged; nor was it disputed that the discretion attaching to the issue of a prerogative writ extends to such a case. There is no claim by any respondent to either office nor is the company itself complaining. The judgment seems to assume that in the state in which the company finds itself its interests and those of the shareholders will best be served by the declaration that it is also destitute of officers.

That in such circumstances of frustration the Courts are powerless to afford a remedy is not put forward nor could it be sustained. In view of the substance of the dispute a question might have been raised on the appropriateness of the remedy sought in view of its futility, but it was not, and the issue is that of the technical title to the offices regardless of all other considerations.

The Companies Act has followed the practice of legislation in the United States in creating the office of president; in England it seems scarcely to be known. This is pointed out in Mitchell, Canadian Commercial Corporations, at p. 1114. By s. 86, subs. (4) of the Act, the directors

> shall elect from among themselves a president and, if they see fit, a chairman of meetings and one or more vice-presidents of the company, and may also appoint all other officers thereof.

Prior to 1925 this was in the words of one of the earliest enactments providing joint stock companies with general clauses, c. 31 (Can.), 1860, "The directors shall from *time to time* elect", etc. When the phrase "from time to time" was dropped in the revision of 1925 it was omitted also from s. 164, subs. (3) dealing with by-laws. These omissions were obviously intended as mere improvements in text and the present language is to be construed in the same sense as before.

The offices of president, vice-president and secretary are offices of the company recognized and required by the statute. That they are contemplated to be filled continuously is evidenced by the following considerations: that by

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s. 49 which provides that every shareholder is entitled to a certificate under the common seal of the company and by a by-law which requires the president to sign all certificates, an act which he may be called upon to do at any time; by s. 68 providing for the entry in the register of transfers to be made by the secretary, transfers that are not valid except as between the parties until that entry is made; that transmissions effected by law will call for similar action by both officers; that the books of the company by s. 101 are in the custody and under the control of the secretary; that s. 94 requires that at least 10 days' notice of meetings shall be given by registered letter to each shareholder, to be done primarily by the secretary, a duty placed upon him specifically by s. 96 in the case of the requisitioning of a meeting; by s. 97, that in the absence of a chairman of meetings—and there was none here—the president presides *de jure;* that a register of mortgages is required by s. 102 and this, together with the other books mentioned in s. 101, are, by s. 103, required to be kept open during the reasonable business hours of every day except Sundays and holidays; by s. 105 declaring that "every company which neglects to keep such book or books as aforesaid" shall be liable to a penalty; that s. 107 provides for an inspection of the affairs of the company by the Provincial Secretary and at that time it is the duty of "all officers and agents of the company to produce" all books and documents called for; that s. 120 provides a general penalty against any officer of a company who commits any act contrary to the provisions of Part I of the Act "or fails or neglects to comply with such provisions".

Here is the implication of a continuity in incumbency subject only to a change of personnel elected or appointed to succeed existing incumbents. The practical necessities of maintaining the activities of the company require that continuity and from the beginning of limited liability companies in analogy to public and semi-public offices that principle has been recognized.

Legislation in Canada dealing with such companies found its origin in England and the United States. The earliest mode was by way of incorporation by special Act. Then in 1844 in England, the *Companies Clauses Act* was

passed which provided general clauses for every corporation thereafter so incorporated. A similar enactment in the province of Canada in 1860 has already been mentioned. The enactment in England of the *Companies Act* of 1862 followed. Since then our legislation, including that of Quebec, has kept the same general pattern. We are, therefore, dealing with corporate conceptions as they are embodied in modern legislation, and no special principle or feature of the civil law is involved.

It is of some interest that the original enactment of the *Railway Act,* 14-15 Victoria (Can.), c. 51, s. 16(6), provided that:

> The Directors shall, at their first or at some other meeting, after the day appointed for the annual general meeting, elect one of their number to be the President of the Company, who shall always, when present, be the Chairman of and preside at all meetings of the Directors, and shall hold his office until he shall cease to be a Director, or until another President shall be elected in his stead; and they may in like manner elect a Vice-President, who shall act as Chairman in the absence of the President.

This appears in almost identical language in R.S.Q. 1941, c. 291, s. 21(3). A review of a number of statutes passed between 1850 and 1860 discloses similar provisions though not containing the whole of the specific reference to the presidency: for example, 13-14 Victoria, c. 28, providing for the incorporation of companies for manufacturing, mining, mechanical or chemical purposes, by s. 7 enacted that each company should have a chairman or president to be elected by the trustees (which the directors were there called) from among themselves and also such subordinate officers as the company by its by-laws might require; the same appears in c. 65, s. 18, of the Consolidated Statutes (1859) dealing with companies for supplying gas and water to municipalities; c. 67 of the same consolidation, respecting electric telegraph companies, by s. 7 provided a more general clause authorizing the company to appoint such directors, officers and agents "and make such prudential rules, regulations and by-laws" as might be necessary to the transaction of its business; and s. 25 of c. 68 respecting companies engaged in the transmission of timber down rivers:

> The directors may elect one of their number to be the president and may nominate and appoint such officers and servants as they may deem necessary . . . .

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The language of c. 31 (Can.), 1860, has already been mentioned. These provisions show obviously that although dealing with the same matter they were drafted independently and without precise consistency of form, though of substance, with one another, but that of the *Railway Act*, preserved to this day, evidences beyond any doubt the convenience and practicability of the rule of continuity.

Similar provisions in identical language with that with which we are concerned, except in the first two the added phrase "from time to time", are contained in the company legislation of the Dominion and at least two of the Provinces: R.S.C. 1952, c. 53, s. 90(*d*); R.S.O. 1950, c. 59, s. 89(*c*); R.S.N.B. 1952, c. 33, s. 93(*d*).

The embarrassment of the company in the absence of a president is indicated here by the fact that in a deadlock it could be of the utmost importance that the company be represented by counsel at such a meeting as that held on June 30; but it does not seem that an engagement of counsel could have been made except by the president *de jure*: *Standard Trust Company v. South Shore Railway Company* (1).

In the American work of Thompson on Corporations, 3rd ed. 1927, vol. 2, p. 463, para. 1059, the holding over by a duly elected officer is dealt with and the authorities there cited make it clear that when the appointment of an officer is not expressly limited to a date or period of time or event, and even where the time is in general terms, the tenure of an incumbent continues until his successor is appointed. As representative instances of this the following cases are cited: *McCall v. Byram Manufacturing Company* (2), holding that the secretary of a company continues in office until his successor is appointed when the appointment is "for the year ensuing, commencing on the first instant", in which it is said, on the authority of *Foot v. Prowse* (3):

> Now it is settled, even with respect to officers who are required by law to be elected annually, that they may hold over after the year until others are chosen and sworn.

The Congregational Society of Bethany v. Sperry (4), where the language of the previous decision is approved and

(1) (1903), 5 Que. P.R. 257.
(2) (1827), 6 Conn. 427.
(3) (1725), 1 Stra. 625, 93 E.R. 741, affirmed *sub. nom. Prowse v. Foot* (1725), 2 Bro. Parl. Cas. 167, 1 E.R. 950.
(4) (1834), 10 Conn. 200 at 206.

declared to be equally applicable to society officers; *Sparks et al. v. Farmers' Bank* (1), an action against a surety for a cashier, an office to which election was to be made annually at the meeting of the general board of directors in the month of January in each year, the appointee to qualify by furnishing a bond, holding that, assuming it to be an "annual" office, its tenure did not *ipso facto* expire at the end of the year or at the annual meeting of the board or even upon an election, but only by election plus qualification, and at p. 296 stating the principle to be

> . . . that if the term of an officer, civil or corporate, created by statute or charter, is not limited to expire at a fixed time, or upon a specified event, but there is simply a direction for the annual election of the officer, his original term continues, though after the year, until a successor is duly elected and qualified.

The same and many other authorities are cited in support of the same rule in the article on Corporations in 14*a* Corpus Juris at pp. 72-73.

These decisions indicate the background and origin of the rule which so far from being nullified is seen to be contemplated by the legislation in its latest form. Based upon the convenience of business, the rule is supported also by the formal structure of the company. The managing agency of a corporation, the board of directors, a body subject to such control by the shareholders as the law of the company prescribes, and the offices, apart from the incumbents of either, are part of that structure; and being such the enactments presuppose them at all times, except in unavoidable contingencies, to be occupied.

In the Court of Queen's Bench (2), Hyde J. seems to take the view that the office of president is held at the will of the directors. Assuming that to be the case, it obviously requires a continuance in office of an incumbent until his incumbency is terminated by action of the board. Nothing of that sort took place here; no board action has affected the last legal appointment to the presidency and the incumbent has not suffered any disqualification. McDougall J. does not come to a definite conclusion on the date when the tenure ceased; it was either upon the election of the new board on June 23, 1953 or at least on June 30 when the meeting of the board proved abortive. That it did not take place on the election of the new board follows from

(1) (1869), 3 Del. Ch. 274.

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the fact that the president presides *de jure* over the annual meeting. How far, then, does the office continue beyond that? What is there in the statute that necessarily fixes any point of time before the election of a new president or remove the existing incumbent? I see nothing. Section 86, subs. (4) does not require an annual election of officers; the word "directors" does not describe each newly elected personnel of the board; the express reference in subs. (1) to the annual election of directors excludes that expression from subs. (4). This is implied also in the language of the latter to "all other officers"; their tenure admittedly is a question of fact arising from the circumstances of their appointment. The appointment, impliedly from time to time, of a president requires simply that a continuing presidency be provided; it bears no implication of an annual election.

McDougall J. refers to art. 1711 of the *Civil Code* which deals with a substitute of a mandatary. I am quite unable to see how the president can be taken to be a substitute of the board. When appointed pursuant to the statute, he becomes an independent and direct officer of the company. The board is not answerable for his actions nor does he execute the mandate of the board: he carries out such authority and duty as are his by virtue of the statute, the by-laws and the executive action of the company, acting by the board: he is in office as much by the statute as the board itself.

What is said of the president applies *a fortiori* to the secretary: it would be with astonishment that dominion companies should learn that their secretary, appointed for an indefinite tenure, ceases to hold his office upon every periodic election of a board of directors.

I would, therefore, allow the appeal, set aside the judgments and dismiss the action with costs throughout.

ABBOTT J.:—I am in substantial agreement with the reasons of McDougall and Hyde JJ. in the Court of Queen's Bench (1) and there is little that I can usefully add to them.

I share the view which they have expressed that the board of directors and the officers of a company incorporated under the *Quebec Companies Act,* are respectively

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the agents or mandataries of the company . As such they are subject to the provisions of the Title "Of Mandate" in the *Civil Code,* except in so far as these are rendered inapplicable by any general or special law relating to corporations as such: see Mignault, "Droit Civil Canadien", vol. 2 at p. 348. In my opinion, however, it is not accurate to say that persons elected or appointed as officers of such a company, are substituted mandataries within the meaning of art. 1711 of the *Civil Code.* Such officers are, of course, the agents or mandataries of the company, but under the terms of the governing statute, the directors, and the directors alone, are empowered to appoint them. The directors themselves are also agents or mandataries of the company, but in their case the statute prescribes that (except to fill a vacancy for an unexpired term) they shall be named by the shareholders. In the present case, however, this distinction as to the method of election or appointment would appear to have no practical significance.

Where newly-elected directors of a limited liability stock company fail to meet immediately and appoint new officers, there is no doubt, in most cases, implied authority from the new board of directors to the existing officers, to continue to act as such, pending the first meeting of directors. When, however, as in the present case, the directors did meet, and by reason of a deadlock failed to appoint officers, it became obvious that the previous incumbents no longer possessed the confidence of the newly-elected board.

Equal shareholding in a limited liability company invites difficulty, of course, under certain circumstances. It does not, however, justify one group taking advantage of the *status quo* in order to maintain its representatives in office indefinitely.

The appeal should be dismissed with costs.

Appeal dismissed with costs, RAND J. *dissenting.*

Solicitors for the defendants, appellants: Phillips, Bloomfield, Vineberg & Goodman, Montreal.

Solicitors for the plaintiffs, respondents: Brais, Campbell, Mercier & Leduc, Montreal.