DATE: 20040304
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COURT OF APPEAL FOR ONTARIO

LASKIN, CRONK and ARMSTRONG JJ.A.

B E T W E E N :	)	
	)	
COUNCIL OF THE WASAUKSING FIRST NATION a.k.a. COUNCIL OF OJIBWAYS OF PARRY ISLAND BAND, and JOHN BEAUCAGE and TERRY PEGAHMAGABOW, on their own behalf and on behalf of the registered members of the WASAUKSING FIRST NATION a.k.a. OJIBWAYS OF PARRY ISLAND BAND	)	Yehuda Levinson, Eugene Meehan and David Stone, for the applicants (appellants)
Applicants (Appellants)	)	
	)	
- and -	)	
	)	
WASAUSINK LANDS INC., JOYCE TABOBONDUNG, WILFRED KING, DORA TABOBONDUNG, LESLIE TABOBONDUNG, and FLORENCE TABOBONDUNG	)	Charles Campbell and Renée Lang, for the respondents (respondents)
Respondents (Respondents)	)	
	)	Heard: April 2 and 3, 2003

On appeal from the judgment of Regional Senior Justice Robert A. Blair of the Superior Court of Justice dated January 18, 2002.

BY THE COURT:

I. OVERVIEW

[1] Wasauksing First Nation (the "WFN") is a native community on an island in Lake Huron. Back in the 1960s, to gain revenues for its members, the WFN decided to lease part of its land as cottage lots. Because the *Indian Act*, R.S.C. 1985, c. I-5 prohibits Indian Bands from alienating land (except to the Crown), in 1971 the respondent, Wasausink Lands Inc. ("WLI") was incorporated to lease the lots, and collect and manage the rents.

[2] Between 1971 and 1994 the chief and band council of the WFN controlled WLI. In 1994 and 1995 the chief and council at the time – now individual respondents – reorganized WLI, formally separating its governance from that of the WFN. The individual respondents remain the directors of WLI. Since 1997, however, the WFN has elected a new chief and band council – the appellants – who object to the respondents' management of WLI.

[3] At its core, this litigation is about who controls WLI. The appellants contend that the members of the WFN are members of WLI and that the chief and council of the WFN are the rightful directors of WLI. They rely on the practice that existed between 1971 and 1994. The respondents, on the other hand, contend that control of WLI, its members and directors, must be determined by the corporation's letters patent and by-laws, and by the provisions of the *Corporations Act*, R.S.O. 1990, c. 38 (the Act).

[4] The appellants sought relief from the requirements of the Act and put forward a number of arguments in support of that relief. After a long trial, Blair R.S.J., in lengthy and thorough reasons, dismissed their application. The appellants now appeal to this court on three grounds:

> (i) the trial judge erred in failing to give effect to their claim by rectifying the corporate registers of WLI under s. 309(1) of the Act;
>
> (ii) in the alternative, this court should impose in their favour a constructive trust on the current directors and officers of WLI; and
>
> (iii) in the further alternative, the trial judge erred in failing to grant them a constitutional exemption from the requirements of the Act by recognizing an aboriginal right under s. 35(1) of the *Constitution Act*, *1982*.

II. FACTS

[5] The facts in this case were exhaustively reviewed in the reasons for judgment of the trial judge, reported at [2002] O.J. No. 164. It is therefore unnecessary to engage in a further detailed review of the evidence. For the purpose of these reasons, it will suffice to provide a general outline of the facts in order to put our analysis and conclusions in context. What follows, therefore, is a summary of the facts based upon the review of the trial judge.

[6] The WFN peoples were originally Ojibways. Approximately 400 members of the WFN live on a reserve located on Parry Island in Georgian Bay adjacent to the Town of Parry Sound. An additional 600 or so members of the WFN live off the reserve.

[7] Sometime in the 1950s, the WFN conceived the idea of renting some of their reserve lands on Parry Island for cottage lots as a means of generating income for the various needs of the reserve. However, the *Indian Act, supra,* prevented the transfer of an interest in real property by aboriginals, except to the Crown.

[8] In order to comply with the *Indian Act*, 244 lots to be rented for cottage use were surrendered to the Crown in the early 1960s. The federal crown agreed to hold the rents received in trust for the benefit of the WFN. However, it was not long before the band council of the WFN began to look for ways to exercise more control over this enterprise and, in particular, the funds derived from it. As a result of discussions with representatives of Indian and Northern Affairs Canada (INAC), the federal government agreed to the incorporation of a company which would enter into a head lease with the Crown for the 244 cottage lots. WLI entered into the head lease and then sublet the lots to the cottagers.

[9] The letters patent of WLI provide that the corporation is "to foster and advance the interests of the Ojibways of Parry Island Band (now the Wasauksing First Nation)" and "to do all things as are incidental or conducive to the obtainment of those objects".

[10] WLI was established in 1971 as the economic development agency of the WFN. In addition to managing the cottage lots and collecting the rents, it operated or managed various other properties, businesses and projects.

[11] The original applicants for incorporation of WLI were Flora Tabobondung (then the chief of the WFN), Hubert Tabobondung, Matilda Tabobondung, Leslie E. Tabobondung and Ernest Partridge (the Original Incorporators). All of these persons, except for Leslie Tabobondung, were members of the WFN band council at the time of WLI's incorporation. Leslie Tabobondung became a member of the band council in 1972. The Original Incorporators were also the first directors of WLI.

[12] Until the 1990s, WLI appeared to operate as an integral part of the activities of the band council. The trial judge summarized the situation as follows:

> It is clear on the evidence that in practical terms, between 1971 and Fall 1993, the Chief and Council in office from time to time acted as *de facto* directors of WLI and were accepted as such by the members of the [WFN] and by the Federal Government and all concerned parties dealing with WLI. I find that this was so. However, there is no evidence of any meetings of WLI members having ever been held to elect these persons as directors. It seemed to follow from their election as Chief and Council that they were expected to fill the role.

Band council general meetings were usually followed by WLI meetings. Both meetings were open to all members of the WFN.

[13] In February 1993, Joyce Tabobondung was elected chief of a new WFN band council. The new chief and her council reviewed the affairs of the WFN and WLI and concluded that there were serious financial and organizational issues that needed to be addressed. The WFN was indebted to the bank in the amount of $630,000. WLI's overdraft at the bank was $70,000. The new band council concluded that the affairs of WLI needed to be separated from the affairs of the WFN. In order to proceed with a new organization plan, they retained the services of three consultants: one to review the financial affairs; one to review the cottage leasing operation; and one to review the organizational structure of the WFN and WLI.

[14] The review by the financial consultant revealed that the funding, provided by the federal government through INAC, was insufficient to cover the expenses of the WFN. For several years, WLI had been making payments to the WFN to cover the shortfall.

[15] In 1994 and 1995, the new band council, under Joyce Tabobondung, initiated the reorganization of WLI as a separate entity from the WFN (the 1994 Reorganization). This involved the admission of some new members of the corporation and changes to the board of directors of WLI, all of which is detailed in the reasons for judgment of the trial judge.

[16] The new band council and WLI negotiated an operating agreement, which was intended to provide a protocol to govern the relationship between the two organizations. The agreement was signed in the spring of 1995. The operating agreement was described by the trial judge as follows:

> The provisions for the management of WLI are central to the *raison d'être* behind the Operating Agreement. The Agreement recognized that the WLI directors were responsible for the day-to-day operations of the corporation and that they were to develop and carry out various development and business plans in that regard. However, to ensure that the general direction of WLI's activities was consistent with the policies of the [WFN] as they were established from time to time, the WLI directors were restricted in various ways in what they could do without WFN approval. In particular, the Operating Agreement stipulated that WLI:

- would only accept as members of the corporation individuals who had been approved by the [WFN] from a short list proposed by WLI;

- would limit the compensation payable to directors;

- would obtain the [WFN's] prior written approval,

  - of the auditor of WLI

  - of any proposed by-law or application for supplementary letters patent of WLI

  - for spending more than 50% of WLI's annual operating revenues on operating expenses in any one year, or more than 25% of annual operating revenues on capital investments in any one financial year, or to incur cumulative debt in excess of 75% of annual operating revenues in any financial year; and finally,

- was not to proceed with any activities unless they had been outlined in a business plan approved by the [WFN].

The Operating Agreement also required WLI to forward financial statements, provide a review of operations, and submit business plans and an outline of requirements to the [WFN]. Any individual authorized by WFN was to be entitled to access to the books and records of WLI on 48 hours written notice. In addition, under Article 3 WLI was to pay certain sums to WFN, including 25% of its net annual income.

[17] The reorganization of WLI and the execution of the operating agreement unfortunately did not result in an improvement in the financial affairs of the WFN. During the tenure of Joyce Tabobondung and her council, the financial situation continued to deteriorate. As a result, INAC appointed a third party manager to manage and administer the funds provided by the federal government to the WFN.

[18] Not long after the appointment of the third party manager, a crisis developed over the provision of schooling for the children of the WFN. In August 1996, the parents of school-aged children were informed by the Parry Sound Board of Education that their children could not attend the local schools in September due to a failure of the band council to pay the required tuition fees.

[19] The upshot of this crisis and other contentious issues that arose at the time was that Joyce Tabobondung and her fellow councillors were defeated in an election held in February 1997. John Beaucage replaced Joyce Tabobondung as the chief.

[20] Although the third party manager eventually paid the outstanding tuition fees, the education crisis placed John Beaucage and his new council in a series of confrontations with the members and directors of WLI led by Joyce Tabobondung.

[21] When Mr. Beaucage and his councillors were elected, they began to attempt to roll back many of the changes brought about as a result of the organization of WLI under the Joyce Tabobondung council. Mr. Beaucage and his new council refused to communicate with WLI directors in regard to WLI business plans. As well, they repudiated the operating agreement and declined to proceed with the implementation of other arrangements and agreements that had been made between the Joyce Tabobondung council and WLI before the election of February 1997.

[22] At the centre of the dispute between John Beaucage and his followers and Joyce Tabobondung and her followers is the issue of whether or not all members of the WFN are members of WLI. Beaucage and his fellow councillors asserted that all members of the WFN are indeed members of WLI.

[23] Finally, in December 1997, the band council, John Beaucage and others began this litigation against WLI, Joyce Tabobondung and others. In their application, the appellants sought a range of remedies. As relevant to this appeal, they sought a declaration that all members of the WFN are members of WLI, a declaration that the duly elected chief and council of the WFN are the directors of WLI, and an order rectifying the company's registers of members and of directors as necessary. The trial judge declined to grant this declaratory relief and dismissed the appellants' rectification claim.

[24] The appellants also sought an order declaring that the WFN's custom and practice of the band council governing and managing its affairs on behalf of its members is constitutionally exempt from the application of the Act. The trial judge declined to grant this relief.

[25] In addition, the appellants sought an order declaring that the operating agreement of September 12, 1995 is invalid or, alternatively, unenforceable against the WFN. In that connection, during the proceedings before the trial judge, the respondents initially supported the operating agreement as a valid and legally-binding document. However, at the conclusion of the trial, they elected to accept the appellants' repudiation of the operating agreement. Consequently, the trial judge had no alternative but to declare that the operating agreement had been terminated and that it is no longer of any force and effect.

[26] The trial judge refused to grant any of the other relief sought by the appellants.

III. ANALYSIS

(1) Rectification Claim

[27] The appellants argue that from the time of WLI's incorporation in 1971, the WFN community understood that all members of the WFN were to be members of WLI and that the persons elected from time to time as the WFN's chief and as councillors of the WFN band council were to be the directors of WLI (collectively, the WFN Understanding).

[28] The appellants also maintain, as detailed in their factum filed on this appeal, that WLI was created "to ensure that the entire [WFN] community could control its assets and resources for the benefit of the community". They submit that the formal constating records of WLI mistakenly fail to give effect to this fundamental objective and to the underlying "open, inclusive, representative and consensus-based" decision-making customs, practices and traditions of the WFN. Thus, the appellants contend, WLI's corporate records fail to give effect to the "very reason why the corporation was set up".

[29] The appellants submit that this deficiency constitutes a substantive error in the corporate records of WLI that is susceptible to rectification under s. 309(1) of the Act. In that regard, they maintain that s. 309(1) should receive a broad and liberal construction to give effect to the customs, practices and traditions of the WFN, a unique aboriginal and cultural community.

[30] Sections 309(1), (2) and (5) of the Act provide:

> s. 309(1) If the name of a person is, without sufficient cause, entered in or omitted from the minutes of proceedings mentioned in section 299 or from the documents or registers mentioned in sections 41 and 300, or if default is made or unnecessary delay takes place in entering therein the fact of any person having ceased to be a shareholder or member of the corporation, the person or shareholder or member aggrieved, or any shareholder or member of the corporation, or the corporation itself, may apply to the court for an order that the minutes, documents or registers be rectified, and the court may dismiss such application or make an order for the rectification of the minutes, documents or registers, and may direct the corporation to compensate the party aggrieved for any damage the party has sustained.
>
> (2) The court may, in any proceeding under this section, decide any question relating to the entitlement of a person who is a party to such proceeding to have the person's name

> entered in or omitted from such minutes, documents or registers, whether such question arises between two or more shareholders or members or alleged shareholders or members, or between any shareholder or member or alleged shareholder or member and the corporation.
>
> ….
>
> (5) This section does not deprive any court of any jurisdiction it otherwise has.

[31] The trial judge concluded that the members of WLI are the Original Incorporators of WLI, as modified during the 1994 Reorganization and thereafter, and that the current directors of WLI are the respondents Dora, Leslie and Florence Tabobondung rather than the current elected chief and members of the WFN band council. He also made the following key findings of fact:

> (i) WLI was not incorporated with the intention that all members of the WFN would be members of the corporation, nor with the intention that the WFN itself would be a member of WLI;
>
> (ii) WLI was established as a limited, rather than as a universal, membership corporation; and
>
> (iii) the original directors of WLI were still in place when the 1994 Reorganization of WLI was undertaken. In addition, the 1994 Reorganization was itself properly carried out and was initiated by a validly elected chief and band council of the WFN.

[32] The trial judge rejected the appellants' claim for rectification on two grounds. First, he held that the requisite factual underpinning for the rectification claim had not been established at trial. Second, he held that the rectification remedy under s. 309(1) of the Act does not extend to the type of relief sought by the appellants concerning WLI.

[33] We conclude that the trial judge was correct to hold that the rectification remedy under s. 309(1) is not available to the appellants in the circumstances of this case. We reach this conclusion for the reasons that follow.

(i) Factual Underpinning for the Rectification Claim

[34] In considering the trial judge's findings regarding the factual underpinning for the appellants' rectification claim, it is useful to consider the provisions of WLI's constating records first.

(a) Constating Records of WLI – Membership

[35] It is common ground that WLI's letters patent and by-laws do not support the alleged WFN Understanding, either with respect to membership in WLI or concerning the composition of its board of directors. The appellants seek rectification of WLI's corporate records for that reason.

[36] The letters patent of WLI provide that a charter is issued to the Original Incorporators of WLI "constituting them and any others who become members of the Corporation hereby created a corporation without share capital under the name of [WLI]" for specific objects.

[37] This language in the letters patent is significant. By stipulating that persons other than the Original Incorporators can "become" members of WLI, the letters patent provide for a limited membership of five persons in WLI – the Original Incorporators – subject to expansion of the membership over time. During the 1994 Reorganization of WLI, certain of the Original Incorporators ceased to be members of WLI and new members were added in their stead. The membership of WLI was not then expanded, however, as it might have been, to include all members of the WFN. Indeed, the letters patent of WLI have never expressly provided for universal membership in WLI. To the contrary, as the trial judge held, the language used in the letters patent suggests that there was no intention at the time of WLI's creation that it be established as a universal membership corporation.

[38] The appellants argue that universal membership applies to WLI because members of the WFN community were treated and admitted as members of WLI by successive band councils of the WFN. They emphasize that universal membership is a foundational concept within the WFN community, requiring that WFN community assets be managed and controlled in an "open, inclusive, representative and consensus-based manner". Sections 124(1) and (2) of the Act, however, provide that the admission of a person or an unincorporated association as a member of a not-for-profit corporation must be effected by resolution of the board of directors of the corporation unless the letters patent, supplementary letters patent or by-laws of the corporation provide for the admission of members by virtue of their office. WLI's letters patent do not invoke this exception by providing for the admission of members to WLI by virtue of their offices in the WFN. In addition, there is no suggestion that any resolutions of WLI's board of directors were passed prior to the 1994 Reorganization of WLI to alter or add to WLI's membership.

[39] Moreover, no amendment of WLI's letters patent has ever been sought or obtained to amend the membership of WLI for the purpose of giving effect to the WFN Understanding regarding membership in WLI.

[40] Prior to the 1994 Reorganization, no formal by-laws were passed by the directors of WLI. An unsigned by-law, which the trial judge accepted was at one time appended to WLI's letters patent in its formal minute books, provided that membership in WLI "shall consist of the [Original Incorporators] and such other persons as are admitted as members by the board of directors". The trial judge held that this draft by-law "was probably never enacted and in force". Nonetheless, its provisions regarding membership are instructive. Like the letters patent, it contemplated a limited membership in WLI that might be expanded prospectively by WLI's board of directors. As the trial judge remarked, this draft by-law "is at least some indication of the incorporators' intentions at the time".

[41] A general by-law regulating the affairs of the corporation was approved on September 10, 1994 as part of the 1994 Reorganization of WLI ("By-law No. 1"). By-law No. 1 also provides for limited, rather than universal, membership in WLI, subject to prospective enlargement of the membership by WLI's board of directors. Accordingly, the only by-law of WLI that appears to have been formally enacted and that addresses membership in WLI, is inconsistent with the universal membership concept advanced by the appellants.

[42] Thus, none of WLI's constating records provide for universal membership in WLI in accordance with the WFN Understanding. Consequently, WLI's other corporate records, including its register of members, make no provision for the membership in WLI of all members of the WFN.

(b) Constating Records of WLI – Board of Directors

[43] Similarly, WLI's letters patent make no provision for persons becoming directors of WLI by virtue of their offices or positions with the WFN, as is permissible under s. 127 of the Act, and no amendment to the letters patent was ever sought or obtained in that regard. The letters patent provide that the Original Incorporators are the first directors of WLI, that they are to hold office for two years, and that the election of directors is to take place every two years.

[44] WLI's By-law No. 1 regularized the procedures for the election of directors. It provides that the members of WLI, by resolution passed by at least two-thirds of the votes cast at a general meeting of members, may remove any director before the expiration of his term of office and, by a majority of the votes cast at that meeting, may elect any person in his stead for the remainder of his term.

[45] Section 287(2) of the Act requires the election of directors of a corporation on a yearly basis unless the by-laws of the corporation otherwise provide. Section 287(1) provides that directors are to be elected by the shareholders or members of the

corporation in general meeting. Prior to the 1994 Reorganization, no formal general meetings of the original members of WLI were held for the election of directors.

[46] Section 284(1) of the Act provides that the persons named as first directors in the instrument creating a corporation are the directors of the corporation until replaced. Section 287(4) of the Act states that if an election of directors is not held at the time required by the Act, the directors continue in office until their successors are elected. The effect of these provisions, in the absence of an election of directors at a properly constituted meeting of the members of WLI, was to continue the original directors of WLI – the Original Incorporators – as the directors of WLI.

(c) WFN Understanding

[47] Nonetheless, the appellants claimed at trial and submit before us that the WFN Understanding has governed the composition of the membership and of the board of directors of WLI from 1971 to date. The basis of this claim was succinctly described by the trial judge:

> How, then, do the Applicants say "others" – i.e. <u>all</u> members of the First Nation, including newborns – have "become" members? Essentially, they say this is so because everyone *believed* themselves to be members, and were treated as such. More elegantly, perhaps, they submit:
>
> a) that from 1971 until at least 1993, the community members of the [WFN] understood and believed that they were all members (or "shareholders") of WLI, and that they were treated as such by the acting WLI directors who were the successively elected Chiefs and Band Council members of the [WFN];
>
> b) that the members of the [WFN] elected their Chiefs and Band Council members from time to time, and that those elections were considered to be elections for the board of directors of WLI as well, because the same individuals performed both functions; and,
>
> c) that successive Chiefs and Band Councillors acted at all times as the *de facto* directors of WLI, and were accepted by the members of the [WFN] as such [emphasis in original].

[48] The core issue at trial regarding the appellants' contention that all members of the WFN were intended, and understood to be, members of WLI, concerned the meaning of the term "member of WLI". In respect of those who felt that "membership" in the WFN was co-extensive with membership in WLI, the trial judge was required to determine whether "membership" meant membership as that term is used under the Act, that is, in the context of the regulation of corporations, or whether "membership" meant something else. The trial judge framed this central question in this way:

> Did they mean "member" in the corporate-law sense, as contemplated by the Letters Patent and governing legislation? Or did they mean "member" in a more general way, i.e., as reflective of a sense of belonging and of recognition that the proceeds from the leased lots were for the benefit of the [WFN] and were to be used in [its] best interests?

[49] The trial judge held that "the latter meaning…more closely reflects the views held by members of the [WFN]". He elaborated:

> I am not able to find a factual basis for concluding that all members of WFN are – or were intended at the time of incorporation to be – the corporate "members" of WLI. Nor am I able to conclude that the reorganization of WLI from a *de facto* situation where the members of Chief and Council as elected from time to time acted as the directors of WLI during their term [of] office, to a board of directors properly elected by the members of the Corporation in accordance with the provisions of the Letters Patent, the new By-law, and the governing corporate law legislation, was improperly carried out.

[50] The trial judge accepted that at least some members of the WFN "understood and believed that they and all members of the [WFN] were members of WLI and that the community members were treated as such by successive Band Councils". However, after a detailed review of the evidence regarding the beliefs and perceptions of WFN members concerning membership in WLI, the trial judge made the following critical findings:

> After reviewing all of the evidence, including the foregoing excerpts and documentation, I am prepared to accept that there was a widespread feeling amongst members of the [WFN] that they were a part of WLI – or, perhaps more accurately, that *it* was a part of them as the [WFN] – and that this sense of belonging was perceived in some loose sense as "membership". However, I am not prepared to find that there

> was a general understanding or belief amongst all, or even a majority of the members of the [WFN], that all members of the [WFN] were "members" of WLI – in corporate law terms – simply by virtue of the fact that they were members of the [WFN]. Some members of the [WFN] may have had that understanding and belief. Others, however, did not. Most, I conclude, simply believed that the members of the [WFN] were "members" of WLI in the sense that WLI *belonged* to the members of the [WFN] and was obligated to act, and to use its resources, for the general benefit of the Wasauksing community [emphasis in original].

[51] In connection with the composition of WLI's board of directors, as we have said, the trial judge accepted that although no formal election of directors was carried out by the members of WLI prior to 1994, as a practical matter, the persons elected from time to time as the chief and the councillors of the band council of the WFN served as the *de facto* directors of WLI between December 1971 and the Fall of 1993. Thereafter, the 1994 Reorganization was undertaken by the elected chief and band council of the WFN. The trial judge's assessment of the significance of these facts was expressed in the following terms:

> [T]he original directors of the Corporation were technically still in place at the time Chief Joyce Tabobondung and her Council initiated the reorganization – in their capacity as *de facto* directors – in 1994.
>
> The fact that it was the *de facto* board of directors of WLI who initiated the reorganization is a significant consideration. Even if it could be argued that the foregoing…could be overcome by the long-standing practice of the [WFN] to accept newly elected Chiefs and Council members as the acting directors of WLI, the reality is that it was just such a board of directors who instituted the change.
>
> …
>
> It is not as if the original members and directors of WLI rose suddenly like a phoenix from the ashes to wrest control of WLI from the Chief and Council. The reorganization was initiated by a validly elected Chief and Council, who were acting at the same time – as the Applicants submit they should have been – as the *de facto* board of directors, in order

> to regularize a long-standing hiatus in the proper corporate administration and structuring of WLI [emphasis in original].

[52] In our view, the trial judge's factual findings concerning the membership and the directors of WLI pose an insurmountable barrier to the appellants' rectification claim under s. 309(1) of the Act.

[53] An appellate court will not interfere with a trial judge's findings of fact absent a palpable and overriding error in the trial judge's appreciation of the evidence: see *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (C.A.); *Robert McAlpine Ltd. v. Byrne Glass Enterprises Ltd.* (2001), 141 O.A.C. 167 (C.A.); and *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

[54] The appellants do not challenge the trial judge's factual findings concerning the intentions of the parties who incorporated WLI. Nor do they directly attack his conclusions regarding the composition of WLI's membership or of its board of directors. Rather, in effect, they submit that the trial judge misapprehended the evidence concerning the WFN Understanding and erred by applying "black letter" corporate law principles to his consideration of the issues concerning the membership and the directors of WLI. We would not give effect to these submissions.

[55] Various members of the WFN testified at trial concerning their beliefs and perceptions regarding membership in WLI. These witnesses included several former chiefs and members of the band council of WFN, some of the Original Incorporators, and various WFN members who previously worked with or for WLI. The testimony of these witnesses, as a whole, indicates that from and after the incorporation of WLI in 1971 members of the WFN held no uniform or consistent belief or understanding regarding the corporate structure of WLI and the basis for entitlement to membership in WLI.

[56] For example, the trial testimony of some WFN members suggested that membership in WLI arose as a matter of birthright, that is, members of the WFN automatically became members of WLI because they were "born into it". Other members of the WFN testified that they believed that every person who was registered on the WFN band membership list was automatically considered to be a member of WLI. Many members of the WFN testified that all WFN members had an "interest" in WLI, or in the lands controlled by WLI, because they had given up part of their land or because WLI was created for their benefit. In that context, some of the Original Incorporators of WLI testified that they did not believe that members of the WFN were members of WLI but, rather, that they had an interest in the lands managed by WLI.

[57] This evidence indicates that the level of understanding by members of the WFN concerning the corporate framework of WLI and the concept of legal membership in the corporation was uneven. Moreover, the testimony at trial concerning the beliefs and

perceptions of members of the WFN regarding membership in WLI was inconsistent. In many instances, it was also conflicting and unclear.

[58] Thus, it was open to the trial judge on the record before him to find, as he effectively did, that there was no "general understanding or belief amongst all, or even a majority of the members of the [WFN] that all members of the [WFN] were "members" of WLI – in corporate law terms – simply by virtue of the fact that they were members of the [WFN]".

[59] We note in this regard that the appellants themselves state in their factum filed on this appeal that prior to the 1994 Reorganization of WLI, "most" members of the WFN regarded themselves as members of WLI and considered the councillors on the WFN's band council to be the directors of WLI. This statement is inconsistent with the universal membership concept for WLI that is otherwise urged by the appellants.

[60] Other evidence at trial also supports the trial judge's finding regarding the membership of WLI. In particular, this finding is supported by the evidence concerning the way in which decisions were made regarding the affairs of WLI and the reasons for the original membership structure of WLI.

[61] The historical approach to decision-making concerning WLI is especially telling in this connection.

[62] As we have previously indicated, meetings of WLI were usually held after WFN band council meetings and were generally open to all members of the WFN. The trial judge found as a fact that although members of the WFN attended and participated in WLI meetings, they did not vote on issues relating to the affairs of WLI or on any resolutions concerning WLI.

[63] The appellants do not dispute this finding. However, they assert that it is of no moment because, in accordance with the customs, practices and traditions of the WFN, members of the WFN only vote on issues when no consensus can otherwise be reached. They also argue that WFN members did not vote on matters concerning WLI because the meetings in question were meetings of WLI's directors, rather than of its members. We would not give effect to these submissions.

[64] While we accept that the traditional decision-making process of the WFN is characterized by the search for consensus rather than by formal vote-taking, we agree with the trial judge that the fact that WFN members did not vote on matters concerning WLI is significant. The trial judge found as a fact that meetings of the members of WLI were held from at least the time of the 1994 Reorganization. Members of the WFN did not vote, or seek to vote, at those meetings concerning the affairs of WLI. By now seeking to rectify the corporate records of WLI to confer membership status *under the Act* on all members of the WFN, thereby obtaining the legal right to vote on the affairs of

WLI, the appellants essentially seek the right to a form of participation in the decision-making of WLI that they have not exercised to date.

[65] In rejecting the alleged WFN Understanding, the trial judge also had regard to the original membership structure of WLI.

[66] The trial judge noted that the structure of WLI at the time of its incorporation, which contemplated only five original members and directors, was designed to ensure that WLI obtained and maintained status as a non-taxable, not-for-profit corporation under the Act. He correctly observed that not-for-profit corporations are restricted at law in the payments and distributions that they may make to their members. The trial judge stated:

> Universal…membership in WLI might well jeopardize the use of the corporation's resources for purposes benefiting [WFN] members, through programs such as loans to individual [WFN] members and the land share distributions which have occurred. In short, there were very cogent reasons for WLI having been incorporated with only a few members to operate it and carry out its objects to advance the overall interests of the [WFN], as opposed to having been incorporated with a universal membership.

[67] Although the appellants dispute this finding, there was evidence before the trial judge to support his conclusion that the original limited membership structure of WLI was deliberate, not accidental, and driven, at least in part, by tax exemption considerations. Those factors negate the assertion of a common understanding by the members of the WFN that they were all members of WLI.

[68] In the end, the trial judge correctly observed that: "An individual does not become a member or shareholder of a corporation through belief or understanding, no matter how genuinely that belief and understanding may be held." The correctness of that proposition is not contested by the appellants.

[69] Accordingly, there was evidence adduced at trial upon which a trier of fact, acting judicially, could conclude that membership in the WFN is not synonymous with membership in WLI. In addition, in our view, the evidence established that there was no legal basis upon which to conclude that the persons who served as the WFN's elected chief and members of band council also automatically enjoyed status as directors of WLI.

[70] The factual foundation for the appellants' claim for rectification of WLI's corporate records is predicated on acceptance of the alleged WFN Understanding. The burden of establishing the WFN Understanding at trial rested on the appellants. We do not agree with the appellants' contention that the trial judge misapprehended the evidence

concerning the WFN Understanding. Rather, as he was entitled to do on the record before him, he simply concluded that the appellants had not discharged their evidential burden to establish the existence of the WFN Understanding and, hence, the factual underpinning for their rectification claim.

[71] We also do not accept the appellants' submission that the trial judge erred by applying "black letter" corporate law principles to his assessment of the issues concerning the membership and the board of directors of WLI. The Act is an enactment of general application. Section 88 of the *Indian Act, supra*, provides:

> Subject to the terms of any treaty and any other Act of Parliament, *all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act* or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act [emphasis added].

[72] By its stipulation that provincial laws of general application "are applicable to and in respect of Indians in the province", s. 88 of the *Indian Act* renders the Act applicable to the issues of the composition of the membership and of the board of directors of WLI. Accordingly, unless membership in and the governance of WLI are constitutionally exempt from the application of the Act – an argument that we address later in these reasons – the trial judge did not err in applying the provisions of the Act to his analysis of these issues.

[73] The trial judge's finding that the appellants had failed to establish the factual underpinning for their rectification claim is itself dispositive of this claim. It is therefore technically unnecessary to address the conclusions of the trial judge concerning the scope of the rectification remedy under s. 309(1) of the Act. However, as considerable time was spent on this issue by the parties in their oral and written submissions to this court, we will comment on it briefly.

(ii) Rectification Under Section 309(1) of the Act

[74] Sections 309(1), (2) and (5) of the Act, in combination, afford discretion to a court to rectify specific corporate records, to award compensation to an aggrieved party for damages occasioned by a proven corporate records deficiency, and to determine the entitlement of any person who is a party to a rectification application to have their name entered in or omitted from the corporate records in question. In this case, the appellants seek rectification of the registers of members and of directors of WLI for the purpose of recognizing and giving effect to the WFN Understanding.

[75] Section 309(1) does not expressly delineate the scope of the rectification remedy established thereunder; nor does it set out the circumstances under which the remedy may be granted. Moreover, there is no developed jurisprudence concerning the rectification remedy under s. 309(1) of the Act. What, then, is the scope of the remedy contemplated by s. 309(1) and what pre-conditions, if any, must be satisfied in order to obtain the remedy?

[76] In *Snell's Equity*, 30th ed. (London: Sweet & Maxwell Ltd., 2000) at 693, J. McGhee describes the equitable remedy of rectification in these terms:

> If by mistake a written instrument does not accord with the true agreement between the parties, equity has power to reform, or rectify, that instrument so as to make it accord with the true agreement. What is rectified is not a mistake in the transaction itself, but a mistake in the way in which that transaction has been expressed in writing. Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of the contract [footnotes omitted].

See also J.E. Martin, *Modern Equity*, 16th ed. (London: Sweet & Maxwell Ltd., 2001) at 866-67.

[77] The pre-conditions to the granting of rectification were considered by the English Court of Appeal in *Joscelyne v. Nissen*, [1970] 2 Q.B. 86 at 98. The court held in that case that an applicant seeking rectification of a written agreement must demonstrate, on "convincing proof", that the parties had a common intention, antecedent to the formal document in question and evidenced by some outward expression of accord, that continued unchanged until the time that the formal document was executed by the parties and that the formal document mistakenly did not conform to the prior common intention. In *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 22 O.R. (2d) 291 (H.C.J.), aff'd (1980), 26 O.R. (2d) 746 (C.A.), leave to appeal to S.C.C. refused 1 S.C.R. xi and *John Austin & Sons Ltd. v. Smith* (1982), 35 O.R. (2d) 272 (C.A.), this court accepted the *Joscelyne* formulation as a correct statement of the modern rule concerning the pre-conditions to rectification. See also *Dynamex Canada Inc. v. Miller* (1998), 161 Nfld. & P.E.I.R. 97 (Nfld. C.A.) and *Public Service Alliance of Canada v. NAV Canada* (2002), 59 O.R. (3d) 284 at paras. 44-45 (C.A.).

[78] Recently, in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, the Supreme Court of Canada considered the equitable remedy of rectification. Unlike this case, the central issue in *Sylvan Lake* concerned the conditions precedent to rectification in cases of alleged unilateral, rather than mutual, mistake.

Nonetheless, the following observations at para. 31 by Binnie J., writing for the majority of the Supreme Court, are instructive:

> Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent…The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other.

[79] Later in his reasons, in considering the standard of proof applicable in rectification cases, Binnie J. stated at paras. 41-42:

> The modern approach, I think, is captured by the expression "convincing proof", i.e., proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil "more probable than not" standard.

[80] It is also important to emphasize that rectification is available only in cases of genuine mistake. It does not apply in instances of ambiguity or mistaken assumption. McGhee in *Snell's Equity, supra*, makes this point at 696:

> Further, *what is relevant is "the intention of the parties at the time when the deed was executed, and not what would have been their intent if, when they executed it, the result of what they did had been present to their minds." There can thus be no rectification if the omission of a term was deliberate, even if this was due to an erroneous belief that the term was unnecessary* or that it was sufficiently dealt with in the antecedent oral agreement, or that the term was illegal, or a breach of covenant, and similarly if the instrument intentionally contains a provision which in fact means something different from what the parties thought it meant. *Rectification ensures that the instrument contains the provisions which the parties actually intended it to contain, and not those which it would have contained had they been better informed* [footnotes omitted and emphasis added].

See also S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book Inc., 1999) at 239-40.

[81] As relevant to the appellants' rectification claim, the following principles concerning equitable rectification emerge from the foregoing authorities. Rectification is available in the exercise of the court's discretion. Such discretion is not to be exercised lightly but, rather, only where it is demonstrated that, by mistake, a written document or instrument does not accord with or accurately reflect the agreement or arrangements intended by the parties. Rectification is not used to vary the intentions of the parties, or to speculate on the substance of those intentions; rather, it is designed to correct a mistake in carrying out the settled intentions of the parties as established by the evidence. As well, and importantly, rectification is not available to correct erroneous assumptions or beliefs as to what was intended; the remedy seeks to effect the actual intentions of the parties which, by mistake, were not accurately recorded. Finally, a heavy burden rests on the party seeking rectification to establish on convincing proof: (i) the existence and nature of a common intention by the parties prior to the making of the document or instrument alleged to be deficient; (ii) that this common intention remained unchanged at the date that the document or instrument was made; and (iii) that the challenged document or instrument, by mistake, does not conform to the parties' prior common intention.

[82] In this case, the trial judge denied the appellants' rectification claim in the exercise of his discretion under s. 309(1) of the Act. The jurisdiction of an appellate court to review the exercise of judicial discretion is strictly constrained. We are not in a position to interfere with the trial judge's decision to deny rectification unless it is clearly demonstrated that he wrongfully exercised his discretion by giving no weight, or insufficient weight, to relevant considerations: see *Reza v. Canada*, [1994] 2 S.C.R. 394 at 404-05: *Friends of Oldman River Society of Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76-77; and *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at 588. We conclude that this exacting standard of review is not met in this case, for four reasons.

[83] First, all of the necessary pre-conditions to the granting of rectification are not satisfied here.

[84] The appellants were obliged to demonstrate on convincing evidence that there was a common intention among the members of the WFN community that the membership and governance of WLI be structured and maintained in accordance with the alleged WFN Understanding. This required proof of a common intention that WLI be structured and operated as a universal membership corporation, that is, that all members of the WFN would also be members of WLI.

[85] The defining moment in the search for a common intention is the time antecedent to when the challenged document or instrument, in respect of which rectification is sought, was made. Here, the relevant time is prior to the incorporation of WLI in 1971. The trial judge held that the evidence of what happened at the time of the incorporation of WLI, and of what the WFN was then told and understood, was neither extensive nor

clear. He also rejected the appellants' claim that the WFN Understanding existed after the creation of WLI. Accordingly, a critical pre-condition to the granting of rectification – proof of an existing common intention among the members of the WFN concerning the membership and governance of WLI – has not been satisfied on convincing evidence.

[86] Second, we agree with the trial judge's conclusion that no error exists in the corporate records of WLI that requires rectification. The trial judge found as a fact that WLI was created as a limited membership corporation. Since there was no convincing demonstration at trial of a common intention that universal membership apply to WLI, there is no "mistake" in the corporate records of WLI to be rectified.

[87] Third, we do not agree that the trial judge interpreted s. 309(1) of the Act too narrowly, or that he misconstrued the purpose of the rectification remedy established under that provision.

[88] The trial judge stated in connection with the nature and scope of the rectification remedy under s. 309(1):

> In my opinion, s. 309 is designed to permit the *rectification* of clerical errors or mistakes in completing corporate records and registers. Its purpose is not to permit the *restructuring or reorganization* by judicial fiat of a corporation's shareholding structure or membership, or the crafting of new by-laws for the corporation, which is in effect what the [appellants] seek in these proceedings. "Rectification", according to *The Shorter Oxford English Dictionary*, means "the correction of error; a setting straight or right". Section 309 is a rectification provision, not a restructuring or reorganization provision [emphasis in original].

[89] The change to WLI's membership register sought by the appellants would fundamentally alter the composition of the membership of WLI notwithstanding that the requested change has not been authorized in accordance with the provisions of the Act that regulate the membership of not-for-profit corporations. In addition, the changes sought by the appellants to WLI's registers of members and directors, in combination, would effectively re-write the provisions of By-law No. 1 and effect a significant realignment of the structure of WLI and a re-distribution of control over it.

[90] We agree with the trial judge that the rectification remedy under s. 309(1) is not designed to facilitate such far-reaching corporate changes. Rather, its purpose is to permit the correction of unintended or inadvertent clerical errors or mistakes in the completion of corporate records and registers. It is not intended as a tool to resolve complex corporate disputes by facilitating, through the exercise of judicial discretion, fundamental changes that intrude on established internal corporate affairs. It is also not

intended as a device to secure an exemption from substantive requirements of the Act concerning the regulation of a corporation's structure or affairs.

[91] Finally, we do not accept the appellants' argument that an expansive interpretation of s. 309(1) of the Act is required in this case because its invocation is sought in an aboriginal context.

[92] The appellants rely on *R. v. Nowegijick*, [1983] 1 S.C.R. 29, a case which concerned the issue of whether income earned by a registered Indian living on a reserve was exempt from taxation under the *Income Tax Act*, 1970-71-72 (Can.), c. 63 by virtue of s. 87 of the *Indian Act*, R.S.C. 1970, c. I-6. In considering this issue, the Supreme Court of Canada stated at 36:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. *It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians*…In *Jones v. Meehan*, 175 U.S. 1 (1899), it was held that *Indian treaties "must…be construed*, not according to the technical meaning of [their] words…but *in the sense in which they would naturally be understood by the Indians* [emphasis added].

As appears from this passage, the principle of statutory construction referenced by the Supreme Court applies to "treaties and statutes relating to Indians". See also, in the tax exemption rights context, *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at paras. 13-15 and, in the context of band taxation tribunal by-laws, *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at 67.

[93] None of the *Nowegijick, Mitchell* or *Matsqui Indian Band* cases suggests that this interpretive principle applies to the construction of statutory provisions of general application, like s. 309(1) of the Act.

[94] As well, we do not understand the interpretive principle formulated in *Nowegijick* to mandate the expansive interpretation of laws of general application where such a reading is not otherwise warranted. Were it otherwise, as the trial judge observed, laws of general application concerning corporations could be interpreted so as to create one form of statutory regime for aboriginals and another form of statutory regime, concerned with the same subject matter, for non-aboriginals. *Nowegijick, Mitchell* and *Matsqui Indian Band* do not dictate or support such an outcome. To the contrary, as observed by the Supreme Court in *Nowegijick* at p. 36: "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens."

[95] The appellants also argue that an expansive interpretation of a statutory provision is warranted in the aboriginal context if it is demonstrated that an established aboriginal practice conflicts with the applicable statutory provision. Support for this proposition may be found in *Re Adoption of Katie E7-1807* (1961), 32 D.L.R. (2d) 686 (N.W.T.C.) and *Casimel v. Insurance Corp. of British Columbia* (1993), 82 B.C.L.R. (2d) 387 (B.C.C.A.). See also, in the context of membership in an unincorporated association, *Lakeside Colony & Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165.

[96] This argument rests on proof of an established aboriginal practice or custom that is at odds with the requirements of the enactment in question. It is unsustainable on the facts here.

[97] The trial judge held, in connection with the appellants' argument that the WFN's custom and practice of governing and managing its affairs through band council is constitutionally exempt from the application of the Act, that there is no established aboriginal practice to operate or manage a corporation. We discuss the appellants' constitutional exemption argument later in these reasons. For the purpose of the interpretation of s. 309(1) of the Act, however, we agree with the respondents' submission that the alleged WFN Understanding, even if it had been established at trial, does not itself constitute an aboriginal practice or custom merely because the community at issue is aboriginal. Stated somewhat differently, aboriginal peoples engage in many activities, and may hold many beliefs, that do not attract the status of aboriginal practices and customs.

[98] We also agree with the trial judge's conclusion that the *Re Adoption of Katie E7-1807* and *Casimel* decisions do not assist the appellants. In those cases, unlike the case at bar, the asserted aboriginal practice or custom was established to the satisfaction of the court and the relevant provincial legislation was interpreted and applied in light of the proven aboriginal practice or custom. In this case, the asserted practice or custom, which involves the membership and governance of a not-for-profit corporation, was not established at trial. There is no suggestion that the WFN community had a settled practice or custom concerning the corporate records of WLI, or regarding the application of the Act to WLI.

[99] For all of these reasons, we conclude that the trial judge did not err in rejecting the appellants' claim for rectification under s. 309(1) of the Act.

(2) Trust Claim

[100] As an alternative to the relief sought under s. 309(1) of the Act, the appellants submit that this court should impose a constructive trust on the directors and officers of WLI. In oral argument they framed their trust submission in one of two ways: either that WLI, its officers and directors, hold legal title to the corporation for the benefit of the

WFN and its members, or that the directors and officers of WLI must vote at meetings of the corporation as directed by the band council. In advancing this submission the appellants rely on the four conditions for imposing a constructive trust set out by the Supreme Court of Canada in *Soulos v. Korkontzilas,* [1997] 2 S.C.R. 217.

[101] The appellants did not ask for a declaration of a constructive trust at trial. They sought this relief for the first time on appeal. On that ground alone we decline to give effect to their submission.

[102] The ordinary rule is that a party cannot raise a new issue on appeal. An appellate court may depart from this ordinary rule and entertain a new issue where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so.

[103] The appellants do not meet these requirements for departing from the court's ordinary practice. *Soulos* was decided in 1997. Thus, its four conditions for imposing a constructive trust were known more than three years before this trial began. These four conditions are as follows:

> (i) the defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (ii) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (iii) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personally or related to the need to ensure that others like the defendant remain faithful to their duties; and
>
> (iv) there must be no factors which would render imposition of a constructive trust unjust in all circumstances of the case.

[104] Because the question of a constructive trust was not raised at trial, neither side led evidence on these conditions, and the trial judge made no findings on them. We do not have a proper record to make findings on these conditions. Moreover, doing so would be unfair to the respondents. For example, the second condition requires the court to consider whether the respondents were guilty of wrongdoing. A party facing an allegation of wrongdoing ought to be given an opportunity to lead evidence to meet the

allegation. The respondents were denied this opportunity. The third and fourth conditions require the court to engage in a broad inquiry into the justness of a constructive trust. In this case, that inquiry would have to be conducted in the absence of a proper evidentiary basis to make such a determination.

[105] For these reasons, we are not persuaded that it is in the interests of justice to entertain the constructive trust argument on its merits. We therefore decline to give effect to this submission.

(3) Constitutional Exemption Claim

[106] Finally, the appellants sought a constitutional exemption from the requirements of the Act. The WFN asked the court to recognize that WFN members have an aboriginal right under s. 35(1) of the *Constitution Act* to control and manage the assets of the community in a way that respects their traditional practices and customs. That traditional practice or custom, according to the appellants, is marked by "open, inclusive, representative and consensus-based decision-making". To give effect to this traditional practice or custom, the WFN wanted this court to ignore the corporate structure and organization of WLI, and instead permit the band council to manage the corporation. We found no merit in this submission and did not call on the respondents to answer it.

[107] The trial judge correctly applied the framework set out by the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, *R. v. Van der Peet*, [1996] 2 S.C.R. 507 and *Mitchell v. Canada (Minister of National Revenue)*, [2001] 1 S.C.R. 911 for establishing an aboriginal right protected by s. 35(1). As well, he accurately characterized (at para. 285 of his reasons) the right the appellants asserted.

[108] As the trial judge pointed out, in *Van der Peet* Lamer C.J.C. emphasized at para. 46 that "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right". Yet on the record before him, the trial judge found that the appellants did not meet this requirement. In his words, they "have failed to establish an evidentiary foundation sufficient to form the basis for a finding that the traditional pre-European contact practices and the aboriginal right they seek to establish existed and continued to exist". The trial judge's finding is entitled to deference on appeal. We are not persuaded that it was tainted by any palpable and overriding error. On that ground alone the constitutional exemption claim must fail.

[109] Moreover, we also agree with the trial judge's conclusion that even if the appellants had established the aboriginal right they assert, the Act does not infringe that right. The appellants could have structured WLI in a way that gave effect to the open, inclusive and consensus-based decision-making they espouse. But they did not do so. Now they seek to invoke a constitutional exemption to circumvent the corporate structure

they established in 1971 and modified in 1994. This they cannot do. For these reasons we do not give effect to their request for a constitutional exemption.

IV. CONCLUSION

[110] We agree with the trial judge that the appellants are not entitled to relief under s. 309(1) of the Act or to a constitutional exemption from the requirements of the Act. We decline to deal with the appellants' trust claim. This argument was not raised at trial and we do not have either a proper evidentiary record or findings of fact to consider it on appeal. The appeal is therefore dismissed. The respondents are entitled to their costs of the appeal on a partial indemnity basis, which we fix in the amount of $35,000 inclusive of disbursements and Goods and Services Tax.

RELEASED:

"MAR –4 2004" "John Laskin J.A."

"JL" "Eleanore A. Cronk J.A."

"Robert P. Armstrong J.A."