Ontario

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The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

File No. CA 008-10

H. Dianne Sutter)
Deputy Mining and Lands Commissioner)

Friday, the 9th day
of December, 2011.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister of Natural Resources under subsection 28(15) of the **Conservation Authorities Act** against the refusal to grant permission for development within a Regulated Area of the Etobicoke Creek watershed and for the recognition of the recent placement of 10,360 cubic metres of fill at the property municipally known as 7080 Dixie Road, City of Mississauga, Province of Ontario;

AND IN THE MATTER OF

Ontario Regulation 166/06.

B E T W E E N:

ONTARIO KHALSA DARBAR INC.
Appellant

- and -

TORONTO AND REGION CONSERVATION AUTHORITY
Respondent

O R D E R

MOTION FOR DISMISSAL
BASED ON LACK OF JURISDICTION

WHEREAS THIS APPEAL to the Minister of Natural Resources was received by this tribunal on the 4th day of November, 2010, having been assigned to the Mining and Lands Commissioner ("the tribunal") by virtue of Ontario Regulation 759/90;

AND WHEREAS this tribunal issued an Order To File documentation on the 5th day of November, 2010;

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AND WHEREAS Mr. Jonathan Wigley, counsel for the respondent, requested a Motion For Dismissal Based On Lack Of Jurisdiction on the 1st day of June, 2011;

AND WHEREAS counsel for the respondent and the appellant respectively, exchanged their materials and filed copies with the tribunal of all documentation to be relied upon in the hearing of the Motion on the 20th day of June, 2011 (respondent) and the 15th day of July, 2011 (appellant), respectively;

AND WHEREAS this Motion was heard in the courtroom of this tribunal on the 26th day of July, 2011;

1. **IT IS ORDERED** that this Motion be and is hereby dismissed.

2. **IT IS FURTHER ORDERED** that no costs shall be payable by either party to this Motion.

3. **IT IS FURTHER DIRECTED** that the parties advise the tribunal through its Registrar, of dates for the hearing of the merits of this appeal, by no later than 30 days from the date of this Order on the Motion.

DATED this 9th day of December, 2011.

Original signed by H.D. Sutter

H. Dianne Sutter
DEPUTY MINING AND LANDS COMMISSIONER

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MOTION FOR DISMISSAL
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REASONS

Appearances:

Mr. John L. O'Kane: on behalf of the appellant
Mr. Jonathan H. Wigley: on behalf of the respondent

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Introduction

The motion was submitted by the Toronto and Region Conservation Authority, the respondent in an appeal to the Minister of Natural Resources by Ontario Khalsa Darbar Inc. pursuant to subsection 28(15) of the **Conservation Authorities Act**

The Toronto and Region Conservation Authority (hereinafter TRCA) is seeking an order to dismiss the appeal as being a request for permission "after the fact". In the alternative, the TRCA is seeking an order of

> "summary dismissal of this appeal on the basis that the evidence filed to date by the applicant demonstrates a negative effect on the control of flooding and a clear loss of 10,360 cubic metres of flood storage capacity of the Etobicoke Creek" (Ex. 2a)

The TRCA, being the appellant in this case, has submitted that:

1. The **Conservation Authorities Act** does not permit applications to be made for permission after the fact. Permission must be sought before any development occurs.
2. The Mining and Lands Commissioner, on appeal, does not have the authority to grant permission "after the fact".

The Ontario Khalsa Darbar Inc. (hereinafter Khalsa) is a corporation owning lands in the City of Mississauga within the jurisdiction of the TRCA. The property includes play areas and soccer fields within the regulated floodplain of the Etobicoke Creek watershed, an area regulated by Ontario Regulation 166/06. As a result, any development, which by definition includes filling, requires the permission of the TRCA prior to any action being taken.

In October of 2009, Khalsa added approximately 10,360 cubic metres of fill to the play areas and soccer fields, covering an area of 1214 square metres. This was done without any knowledge or permission of the TRCA. A charge was laid by the TRCA and the Khalsa pled guilty to said charge in the Ontario Superior Court of Justice. No sentence has been imposed by the Court to date, ostensibly awaiting the outcome of the appeal by Khalsa to the Mining and Lands Commissioner (MLC) of their follow up application to the TRCA to maintain the fill in its current placement. The TRCA had accepted this application for maintaining the fill or for 'after the fact' approval and apparently dealt with it in the exact manner used for any application for development. The TRCA staff did not recommend the application and this recommendation was accepted by the TRCA's hearing body, the Executive Committee. Correspondence was provided to the appellant/applicant on four different occasions outlining the process of receipt, review, recommendation and the right of appeal to both the TRCA hearing body and then on to the Mining and Lands Commissioner. That is what Khalsa has done under MLC File CA008-10.

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The motion of the TRCA to dismiss this appeal was received by the Mining and Lands Commissioner on June 20, 2011 and the Hearing into this matter was held on Tuesday, July 26th, 2011, in the Courtroom of the Mining and Lands Commissioner, 700 Bay Street, 24th Floor, Toronto, Ontario.

Clarification of Issues

At the commencement of the Motion hearing, Mr. Wigley indicated that he had framed the motion on two bases, the first being that there is no jurisdiction under the **Act** to grant 'after the fact' permission by the Mining and Lands Commissioner.

The second deals with the matter of the negative effect on the control of flooding that the Khalsa application clearly establishes. It is this base or issue on which Mr. Wigley was requesting a full dismissal of the application since it was so clearly within the floodplain of the Etobicoke Creek. Since this request was made, the appellant has filed further affidavits with the Commissioner which argue that because of past actions required and approved by the TRCA, there actually is a storage capacity increase which the appellant can use to off set the effect on the control of flooding within the area which is the subject of the appeal before the Commissioner.

Because of these submissions, Mr. Wigley has concluded that a "substantive argument" has been put forth which needs to be dealt with through a full hearing process, if one is to be held and therefore, he will not address this issue at this hearing but deal solely with the question of "*whether or not the Mining and Lands Commissioner has the jurisdiction to deal with an appeal after the fact*". (Transcript – p. 7 and 8)

ISSUE

Does the **Conservation Authorities Act** clearly indicate that 'after the fact' applications are not allowed?

SUBMISSIONS

Summary of Facts Not in Dispute

1. The fill placed by Khalsa definitely was not permitted;
2. The fill was placed within the floodplain area of the Etobicoke Creek;
3. A Charge requesting removal of the fill was made by the TRCA;
4. The appellant has pled guilty in Court to this charge;
5. No decision regarding sentencing has been made to date;
6. The fill has not been removed to date;
7. The appellant's filed an application basically to allow the continuance of the fill that had been placed in the valley of the Etobicoke Creek;
8. The TRCA staff did not recommend the application for approval to the Executive Committee - the hearing body;
9. The TRCA Executive Committee accepted staff's recommendation;

10. An appeal was submitted to the Minister of Natural Resources and referred to the Mining and Lands Commissioner;
11. The Mining and Lands Commissioner issued an order to file documents preparatory to a Hearing on November 5, 2010.

Submission by the TRCA - Mr. J. Wigley

There is no question that the Khalsa required the permission of the TRCA to place fill in the floodplain. This permission was not sought. Mr. Wigley submitted that because of past occurrences between the two parties, "*it was clear that the Khalsa Darbar is well aware of the regulation*". (Transcript - page 9)

The main point of Mr. Wigley's submission was the question of whether the **Conservation Authorities Act** allows an applicant to seek permission after the fact, being after development has taken place.

Clause 28(1)(c) provides conservation authorities with the right and responsibility to make regulations :

> "*prohibiting, regulating or requiring permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development*".

Mr. Wigley examined the **Act** and Regulation 166/06 with regard to the examples of what he termed "prospective" permission being required, meaning in the future, as opposed to retroactive or 'after the fact' permission.

- Permission is required under clause 28(1) 9 (c);
- The language used in the definition of 'development' tends to be prospective; (Subsection 28 (25))
- Subsection 28 (15) Appeal- states:
  "A person who has been refused permission or who objects to conditions imposed on a permission"; This is the process followed by the applicant in appealing the authority decision to the Mining and Lands Commissioner who may "*(a) refuse permission; or (b) grant the permission, with or without conditions*:"
- The Commissioner may make a decision regarding the appeal and impose conditions, but cannot order the fill to be removed, as only the courts can do that as is outlined in Section 16.
- Subsection 28(16) is the section of the **Act** that deals with the consequences of an act for which permission had not been secured. It states that anyone contravening "*a regulation made under subsection (1) or the terms and conditions of a permission of an authority in a regulation made under clause (1) (b) or (c) is guilty of an offence…*". If in these situations, there is a court conviction, a fine or even imprisonment may be imposed indicating that there are consequences to after the fact actions;

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- Section 3 of *Regulation 166/06* indicates that the authority "*may grant permission for development in or on*" regulated areas.
- Section 4 of the Regulation deals with the need for "*a signed application for permission to undertake development*", undertake being the operative word;
- Section 4.2. Requires a statement about the "the proposed use of the buildings and structures following completion of the development" and Section 4.3. requires "the start and completion dates of the development".
- Section 4.4 through 6 require information about elevations, drainage and type of fill proposed to be placed or dumped; This information would allow the authority to assess the application (proposal) before any activity took place.
- Section 8 allows the authority to cancel permission "*if it is of the opinion that the conditions of the permission have not been met*"; Obviously a permission had to have been in place before a cancellation could occur.

In Mr. Wigley's view, all these points refer to the future. Permission is required "*to do something, not forgiveness for having done something*". (Transcript - p. 12-13) On this basis, "*Development cannot precede permission*" (Transcript – p. 17)

Mr. Wigley referenced *Hanna v. Conservation Halton* – MLC File CA 005-09, unreported, a decision made on October 15, 2009. In this case, the applicant's attempted to submit an application to the authority seeking approval of their actions after the fact. The Authority refused to accept the application and therefore no decision was made by the authority which could be appealed to the Mining and Lands Commissioner. However, the applicants appealed to the Commissioner on the basis of a lawyer's letter indicating that the application was returned and would not be dealt with by the authority. Conservation Halton brought a motion arguing that the tribunal did not have jurisdiction to hear an appeal since there was no decision upon which an appeal could be made. The tribunal accepted this motion.

Mr. Wigley submitted that, in fairness, the TRCA had accepted the Khalsa 'after the fact' application which the TRCA staff had processed in the usual manner. However, his argument is that this fact makes no difference since the Commissioner has no jurisdiction under the **Act** to hear an after the fact appeal and the appeal should, therefore, be dismissed.

Submission by the Ontario Khalsa Darbar Inc. – Mr. John O'Kane

The Ontario Khalsa Darbar Inc. appealed the refusal of the TRCA to grant permission to maintain the placement of fill on their lands on the basis that they were told that they could appeal. Mr. O'Kane submitted four documents which indicated that there was a process for submitting an application and this avenue of appeal was available to them in the event the TRCA denied their application.

1. Violation Notice dated October 16, 2009 - Khalsa was to remove the fill and restore the area to the satisfaction of the TRCA. The letter, signed by Paul Nowak, Enforcement Officer for the TRCA, included the notice of violation

(dated October 21, 2009) and also included a permit application package and a comment that a submission of a proposal to maintain the fill as placed would not "*necessarily result in the issuance of a permit or approval by this office*". (Ex.3c – tab 2 and 3)

2. Khalsa submitted an application for development to the TRCA on January 14, 2010, indicating that the work had been completed. The application form outlines the Permit Review Procedures including the right of appeal of the Hearing Board's decision to the Minister of Natural Resources. (Ex. 3c – tab 4) The application was accepted and the required fee paid.

3. By letter, dated April 27, 2010 and signed by Jason Wagler, Planner 1 for the TRCA, Khalsa received acknowledgment of the application and was advised that the submission of the application did not resolve the matter before the courts regarding the illegal placement of fill. It was noted that "*As such, this permit application can only deal with whether the TRCA will issue a permit to allow for the existing fill to remain in-situ*". (Ex. 3c – tab 5)

   The staff report indicated that Khalsa's supporting evidence fell short of the test regarding the control of flooding, as there was a significant loss of floodplain storage capacity because of the illegal fill. The staff did not support the permit application and declared that approval would not be recommended to the TRCA's Hearing Board.

   The letter continued by indicating that Khalsa could appeal the staff decision to the Hearing Board, which they did. They also were told that an appeal of the TRCA's Hearing Board could be submitted to the Ontario Mining and Lands Commissioner.

4. By letter, dated September 27, 2010 and signed by Brian Denny, Chief Administrative Officer for the TRCA, Khalsa was notified of the Hearing Board's refusal of their application. The final paragraph of the letter again outlined the applicants right of appeal to the Minister of Natural Resources and then, of course, on to the Mining and Lands Commissioner.

Mr. O'Kane's submission states that "one of the pivotal issues on this motion relates to fundament fairness to a litigant and a public agency misleading litigants about their legal rights". (Transcript - p. 22-23) He does not accept the TRCA's present submission that since the application was 'after the fact', that there is no jurisdiction for the TRCA to entertain the application and by extension, no jurisdiction for the tribunal as well. The application was accepted. There was a report to the Hearing Board. There was a hearing before that board at which time the application was refused. There exists correspondence from the TRCA on four occasions where the process of appeal was referenced. If there was no jurisdiction, why did this process occur?

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Mr. O'Kane acknowledges that Conservation Halton dealt with a similar matter in a different way. They refused to accept the application. The TRCA accepted the Khalsa application. It was processed as other applications have been processed. Mr. O'Kane went on to state:

> "*Once the TRCA renders a decision to deny permission, there's a statutory right of appeal to the MLC, because its not the substance, in my submission, of their decision that creates the jurisdiction. It's the fact that they made a jurisdiction denying permission that triggers the MLC's jurisdiction.*" (Transcript - p. 25)

In addition, there is nothing in Subsection 28(15) that restricts the Minister's or the MLC's authority or jurisdiction with regard to granting or refusing permission of an appeal. In Mr. O'Kane's view, Mr. Wigley is asking the tribunal to now and in the future deal only with refusal decisions that are made regarding applications 'before the fact'. In effect, he is asking the tribunal to interpret Section 28 "*by reading in words that the legislature never put there*". (Transcript – p. 26) Mr. O'Kane reiterated that "*nowhere has the legislature specifically precluded after the fact applications*". (Transcript – p. 26) It speaks to where "*the Conservation Authority has denied permission on an application*". (Transcript - p 28) If the Authority had refused to accept the application, then, Mr. O'Kane submits, the remedy for Khalsa would be to seek an opinion from the Courts. There would be no appeal to the Mining and Lands Commissioner.

Mr. O'Kane referenced two Ontario Court of Appeal decisions, where a particular registrar of Motor Vehicles had refused to accept an application. A judicial review followed and in both cases, the appeal court said that the applications should have been accepted and if denied, an appeal to the appropriate tribunal could have taken place. (Reference : *Hassan v. Registrar*, MVDA (2001) CanLII 24153 (ON CA) and *Amerato v. Registrar*, MVDA (2005) CanLII 31577 (ON CA))

Mr. O'Kane summarized his position at this point in the following way:

> "*On the facts of this case, not only do we have a decision of TRCA, which in my submission, provides MLC with jurisdiction under Section 28 (15), because it's a denial of permission. That's all Section 28 (15) requires for this tribunal to have jurisdiction.*" (Transcript – p. 42)

However, in June of 2011, the TRCA submitted the Notice of Motion regarding the question of jurisdiction of the Mining and Lands Commissioner to hear the Khalsa appeal. Mr. Wigley did indicate that he had been having a discussion with Khalsa's former lawyer, but Mr. O'Kane had not heard about the potential of the motion until it was submitted. In any event, Mr. O'Kane submitted that at no time was the Khalsa told that the TRCA was of the opinion that Khalsa had no right to submit an appeal since it was an 'after the fact' application until then.

Mr. O'Kane's submitted that the TRCA's recent actions raises the question of "*a fundamental fairness consideration*". He maintains that the tribunal's "*jurisprudence already contains examples of what Mr. Wigley submits cannot be done jurisdictionally, and that is, consider after the fact permit applications*". (Transcript - p. 43) The example used was *Hope v.*

Rideau Valley Conservation Authority (2006). The MLC's jurisdiction was not an issue in that substantive appeal.

In *McConkey v. Otonabee Region Conservation Authority*, (1993), Mr. O'Kane submitted that the basis of that hearing by Commissioner Kamerman was to determine the jurisdiction of the tribunal "*to hear an appeal and make a decision in respect of land upon which a court of competent jurisdiction had already made an order affecting such land*". (Transcript-p.46) No matter how the details differ, Mr. O'Kane submits that, as in the Khalsa case, the Otonabee Region Authority attempted to get rid of the McConkey appeal. However, the Commissioner dismissed the motion.

Mr. O'Kane cited a large section of Commissioner Kamerman's words regarding 'after the fact' applications, which he concluded was highly relevant to the Khalsa situation.

> *The question of whether circumstances exist which would render the Commissioner without jurisdiction to hear an appeal under subsection 28(5) of the Act rest with the courts, with the exception of determining if the requirements of subsections (3) and (4) have been met, thus giving rise to a valid appeal. Needless to say, an order under subsection 28(1) of the Judicial Review Procedure Act, R.S.O. 1990, c. J. 1. would be equally determinative.*
>
> *This tribunal finds that the determination of the appeal of the 91-009 Application is within its jurisdiction, being an application for the legal placement of fill. The order of the court is for the removal of fill which has been illegally placed both on the 91-009 Application land and other land for which there is no application or permission. Therefore, an order of this tribunal, if permission were to be granted on appeal, would not be contrary to the order of the court in so far as the lands which are properly within the 91-009 Application are involved. The effect of the order of the court on other lands is not a factor which need be considered.*
>
> *In considering the issue raised in this motion, the tribunal wishes to make clear that the possibility of refusing to consider any appeal where fill has been placed without a permit is very compelling as a means of expressing a strong deterrent to prospective applicants. In this case, this is particularly so because the placing of fill was so flagrantly in disregard of the Act, as evidenced by two Notices of Violation and two Informations pursuant to section 24 of the Provincial Offences Act issued prior to the making of the application. However, such a deterrent is available only where the legislature states in clear terms that such power exists."*(Transcript – pages 48-50)

Mr. O'Kane indicated that the above was relevant both because of the decision itself, but also because of the comments made by the tribunal about how compelling it would be to grant the motion in order to express a strong deterrent to future applicants, especially those that flagrantly disregard the need to secure a permit. The tribunal in the *Hanna* appeal expressed similar sentiments. However, up until this time, the Ontario Legislature has not taken any steps to clarify the issue within the **Act**.

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In conclusion, Mr. O'Kane submitted that the cases discussed are not necessarily binding on the Tribunal, but they should be considered persuasive and would assist in "*developing a coherent body of jurisprudence*" for the Mining and Lands Commissioner. (Transcript - p. 50)

Mr. Wigley framed his reply on the basis that Mr. O'Kane basically had admitted that the TRCA was right in their view that 'after the fact' applications were not valid and the TRCA should not have accepted the application, nor taken an application fee, nor processed the application. In effect, Mr. O'Kane was admitting that the **Act** does not allow for permission 'after the fact'. Mr. Wigley implied that the evidence in Mr. Harban Singh's report shows that, if Khalsa had been told that there was no jurisdiction to accept or process the application, then they would not have spent funds on reports and would have accepted the TRCA's decision.

Mr. Wigley suggested that the TRCA had been fair and responsible by allowing the application to be reviewed and heard. However, because they did this, that does not '*clothe anybody with jurisdiction. It doesn't create the jurisdiction in the Mining and Lands Commissioner.*' (Transcript - p.55) If the **Act** is properly interpreted, 'after the fact' permission is not permitted and it is clear that the Khalsa Dabar appeal is due to a refusal to permit an 'after the fact' action.

FINDINGS

The tribunal has found much that is compelling in the evidence provided by both Khalsa Darbar and by the Toronto and Region Conservation Authority. There appears to be some agreement on 'what should have happened' in order for the Motion before the tribunal to succeed. However, 'what did happen' must be considered and is relevant in this particular case.

The tribunal actually agrees that the interpretation of the **Act** provided by Mr. Wigley is in fact, what might be the case. But the tribunal also agrees with the statement made by Commissioner Kamerman in 1993 in her decision in the *McConkey* appeal:

> *"However, such a deterrent is available only where the legislature states in clear terms that such power exists"*

ISSUE: Does the **Conservation Authorities Act** clearly indicate that 'after the fact' applications are not allowed?

The simple answer to this issue is no, it does not. However, the time for a debate about this issue and a possible resolution is for another time and place. The tribunal can only reflect on what the **Act** actually says. Although not in a position to interpret the words and thoughts behind the legislation, the tribunal does have some opinions about the problem confronting the TRCA and other conservation authorities regarding the issue of the validity of 'after the fact' applications.

The tribunal acknowledges the very strong implied directions in the **Act** that requires permission before any actual activity or action occurs**.** The tribunal agrees with Mr. Wigley's argument insofar as the **Act** implies permission 'before the fact', as Deputy Commissioner Orr also did in *Hanna v. Conservation Halton,* However, the tribunal also finds

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there is no clarity with regard to the possibility of an 'after the fact' applications not being permissible. In this regard, this tribunal acknowledges and accepts the position taken by Commissioner Kamerman in 1993 in the *McConkey v. Otonabee Region Conservation Authority* that the legislation has not clearly stated that an 'after the fact' application for permission is not allowed. The amendments to the **Act** since that decision was issued have not altered this situation. Mr. Wigley clearly demonstrated that point.

The Ontario Legislature, in enacting the **Conservation Authorities Act,** did not include any wording denying an applicant the right to seek an 'after the fact' permission. It most definitely takes a proactive stance in the **Act**, but it does not speak to the issue of 'after the fact' applications. The tribunal must ask the question, 'are there any circumstances where an 'after the fact' permission must be sought and possibly approved? What would those circumstances be? Is this a question that the drafters of the **Act** may have grappled with? We do not know. The tribunal does know that the MLC has heard substantive appeals dealing with the issue where the applicant had either gone beyond the permission granted, such as the *Hope v. Rideau Valley Conservation Authority* and had sought an "after the fact' approval or the applicant had completely carried out the work without permission, as in the case of the Khalsa Dabar. The tribunal has no knowledge that 'after the fact' applications are not (often) dealt with throughout the province by various conservation authorities. Conservation Halton appears to have adopted a policy that prevents accepting such applications, whereas others such as the Rideau Valley CA did accept the *Hope* appeal. In the same vein, the TRCA accepted the Khalsa application.

We do know that the Ontario Legislature has enacted legislation dealing with natural justice and fairness in appeals. The **Statutory Powers Procedures Act** sets a sort of 'minimum standard' for administrative tribunals where the tribunal is required by or under such **Act** to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision. Procedural fairness is a hallmark of administrative law.

The Mining and Lands Commissioner is subject to these guidelines. Conservation Authorities also develop their policies and procedures with a view to acting in a fair manner with the public and Mr. Wigley acknowledged that is why the Khalsa appeal was processed.

Despite, the agreement that the **Act** does strongly imply that permission is to be given before any activity occurs, the tribunal must conclude that the **Conservation Authorities Act** does not speak to 'after the fact' permission and does not state that such applications are not permitted. A clear interpretation within the **Act** is required in order for the tribunal to find that such circumstances would exist which could deny an applicant the right of a hearing on the issues, if such an application had been accepted, processed and a fee paid.

FINDINGS AND CONCLUSIONS

The question regarding jurisdiction, has become a dichotomy for the tribunal, as it has for the TRCA. The issue has been divided into two parts. The TRCA followed the process of the **Act** by providing a copy of the application to the Khalsa, accepting the application and the appropriate fee, preparing a report for presentation to the Hearing Body and holding a hearing before the Hearing Body (Executive) at which time, the application was refused. All this was done with follow up written letters indicating that Khalsa had the right to appeal to the Mining

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and Lands Commissioner. All was done in the right order and according to Mr. Wigley, in the spirit of fairness.

The other side of the dichotomy arrives when the TRCA submitted a Notice of Motion to the MLC on the basis that the MLC has no jurisdiction to hear this appeal since, in their submission, 'after the fact' applications are not permissible under the **Act**. The tribunal has heard much about 'after the fact' applications, but considers that this change of direction, as outlined at this hearing, can also be considered an 'after the fact' action.

If this direction now is to be considered appropriate by the TRCA, the tribunal must question why the TRCA went through a process allowing the Khalsa to apply and have their application processed in the correct manner and accepted the appropriate fee. The tribunal does not view this about-face as being done in the spirit of fairness. If the Authority plans on following this procedure in the future, then some sort of policy direction needs to be developed so that applicants are aware of the intent of the TRCA. In this case, the Khalsa did not know that this was the TRCA's view when they began the process.

It is unfortunate that this has happened with an applicant who apparently has flagrantly ignored what they knew to be the correct process. The issue of flooding both above and below this site is one of great importance to the TRCA and due to the new submissions made by the Khalsa engineering consultant, deserves a full hearing. To find in favour of an applicant who has ignored the **Act** is difficult for this tribunal. However, the tribunal has a responsibility to be fair and must find that the TRCA's motion is not fair and does not provide the applicant with any semblance of 'natural justice'.

Based on the decision regarding the **Act** itself, it is obvious that the tribunal is of the opinion that the MLC has the jurisdiction to hear this appeal that was processed by the TRCA in the manner dictated by the **Act**.

The tribunal accepts the respondent's (Khalsa) view that subsection 28(15) says it all. Despite the tribunal's acceptance of Mr. Wigley's interpretation, the opinion must be based on the words that actually exist in the **Act** as opposed to an interpretation. In reference to Deputy Commissioner Orr's summation in *Hanna v. Conservation Halton* where it is stated that:

> *"Nor does the Act provide a means to apply for approval of permission after something has been built" (transcript - p.6)*

the tribunal accepts this interpretation as to what might be in the **Act**, but must also accept that there are no words that say that such an action is prohibited. There may be cases which arise where an exception should be allowed and is necessary for the good of the community, which, if not allowed, could cause another problem for conservation authorities. The tribunal sees this issue as one that needs a thorough debate and hopefully, a solution that is beneficial to both the conservation authorities and the public.

The tribunal finds that there is no clear statement that would preclude the MLC from having jurisdiction in this matter of an 'after the fact' application and appeal.

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The tribunal further finds that the Notice of Motion regarding the Khalsa Darbar appeal is, in effect, an ‘after the fact’ appeal to correct a situation that is of their own making. If the application had not been ‘encouraged’, nor processed by the TRCA, the question would have been a different one and would have probably been before the Courts.

As a result, this Motion will be dismissed.

No costs will be awarded to either party.