



Office of the
Conflict of Interest and
Ethics Commissioner

Commissariat aux
conflits d'intérêts et
à l'éthique

Smolik Report

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Mario Dion

Conflict of Interest and
Ethics Commissioner

Smolik Report

made under the *CONFLICT OF INTEREST ACT*

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PREFACE

This report is submitted pursuant to the *Conflict of Interest Act* (Act) S.C. 2006, c. 9, s. 2.

The Conflict of Interest and Ethics Commissioner may conduct an examination under the Act at the request of a member of the Senate or House of Commons or, as is the case with this examination, on his own initiative.

When an examination is conducted on the Commissioner's own initiative, unless the examination is discontinued, the Commissioner is required to provide a report to the Prime Minister setting out the relevant facts of the case as well as the Commissioner's analysis and conclusions in relation to the examination. At the same time that the report is provided to the Prime Minister, a copy of the report is also provided to the public office holder or former public office holder who is the subject of the report and the report is made available to the public.

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EXECUTIVE SUMMARY

This report presents the findings of my examination under the *Conflict of Interest Act* (Act) of the conduct of Mr. Jim Smolik, a former Assistant Chief Commissioner and Acting Chief Commissioner of the Canadian Grain Commission (Commission). I sought to determine whether Mr. Smolik contravened his post-employment obligations under the Act when he engaged in several interactions with the Commission on behalf of his new employer, Cargill Limited (Cargill).

Mr. Smolik left the Commission in November 2016 and joined Cargill as Head of Corporate Affairs Canada. During this time, Cargill was facing potentially significant fines under Ontario's *Environmental Protection Act* for dust emissions at its Sarnia, Ontario, terminal, and urgently needed a favourable decision from the Commission to apply white mineral oil to grain at that terminal.

The examination focused on section 33 and subsection 35(2) of the Act.

Section 33 prohibits former public office holders from acting in such a manner as to take improper advantage of their previous office. This rule applies for an indefinite period.

The evidence showed that Mr. Smolik, within a few weeks after leaving public office, engaged in a series of actions aimed at helping Cargill resolve the dust emission issue at its Sarnia terminal. He exploited his previously established Commission relationships by obtaining internal Commission notes concerning grain dust suppression which he shared with his employer. He also used social interactions with Commission staff to facilitate official interactions between himself or Cargill and the Commission. In addition, Mr. Smolik exploited the knowledge and expertise he had acquired as Assistant Chief Commissioner and Acting Chief Commissioner in advising Cargill colleagues on how to navigate Commission processes in order to obtain a timely and favourable decision in relation to its Sarnia terminal issues.

In my view, Mr. Smolik exploited the relationships he had established and the knowledge and expertise he had gained as Assistant Chief Commissioner and Acting Chief Commissioner of the Commission. In so doing, Mr. Smolik acted in a manner that clearly took improper advantage of his previous positions at the Commission. I therefore found that he contravened section 33 of the Act.

Subsection 35(2) prohibits former reporting public office holders from making representations for or on behalf of any other person or entity to any department, organization, board, commissioner or tribunal with which they had direct and significant official dealings during their last year in public office. For Mr. Smolik, this rule applied for a cooling-off period of one year following his last day in office. The term representation in subsection 35(2) includes communications made with a view to influencing official decisions, opinions or actions.

As Assistant Chief Commissioner and Acting Chief Commissioner of the Commission, there is no doubt that Mr. Smolik had direct and significant official dealings with the Commission during his last year in public office, from November 2015 to November 2016.

Furthermore, the evidence showed that Cargill's July 2017 application, submitted by Mr. Smolik, was a communication made by him to the Commission with a view to influencing a decision or action on the part of the commissioners, namely the granting of an order to exempt Cargill from the prohibition against the use of white mineral oil at its Sarnia terminal.

I therefore found that Mr. Smolik contravened subsection 35(2) of the Act.

CONCERNS AND PROCESS

[1] On June 21, 2017, the Office of the Conflict of Interest and Ethics Commissioner (Office) received information from a member of the public in relation to the post-employment activities of Mr. Jim Smolik, a former Assistant Chief Commissioner and Acting Chief Commissioner of the Canadian Grain Commission (Commission). According to the information provided, shortly after Mr. Smolik left the Commission in November 2016, he allegedly engaged in several official interactions with Commission staff on behalf of his new employer, Cargill Limited. The complainant asked the Office to examine whether Mr. Smolik contravened any of his post-employment obligations under the *Conflict of Interest Act* (Act).

[2] After a review of the information, Ms. Mary Dawson, former Conflict of Interest and Ethics Commissioner, determined that she had reason to believe that Mr. Smolik may have contravened his post-employment obligations under the Act.

[3] On September 15, 2017, Ms. Dawson wrote to Mr. Smolik advising him that she was commencing an examination on her own initiative under subsection 45(1) of the Act to determine whether he had contravened section 33 and subsection 35(2) of the Act.

[4] Section 33 of the Act prohibits a former public office holder from acting in such a manner as to take improper advantage of his or her previous public office.

[5] Subsection 35(2) of the Act prohibits a former reporting public office holder from making representations, whether for remuneration or not, for or on behalf of any other person or entity to any department, organization, board, commission or tribunal with which he or she had direct and significant official dealings during the period of one year immediately before his or her last day in office.

[6] On November 7, 2017, Mr. Smolik replied to Ms. Dawson's letter dated September 15, 2017, providing the Office with a detailed response setting out factual information, along with supporting documents and a memorandum of law from his counsel.

[7] On January 9, 2018, I began my mandate as Conflict of Interest and Ethics Commissioner. After considering the information relating to this matter, I determined that the examination should proceed and the Office notified Mr. Smolik of my decision on January 16, 2018.

[8] I conducted a first interview with Mr. Smolik on March 15, 2018. I received additional information from Mr. Smolik on June 15, 2018, and on August 15, 2018. I also sought documentary evidence from two additional witnesses.

[9] On December 4, 2018, I conducted a second interview with Mr. Smolik. He was given an opportunity to review the transcripts of his interviews and other relevant documents.

[10] On February 25, 2019, Mr. Smolik's counsel made further written submissions.

[11] In keeping with the practice of the Office, Mr. Smolik was also given an opportunity to comment on a draft of the factual portions of this report (Concerns and Process, Findings of Fact and Mr. Smolik's Position) before it was finalized.

[12] On May 22, 2019, the Office received Mr. Smolik's counsel's comments on the draft of the factual portions of the report, and additional written submissions.

FINDINGS OF FACT

Mandate of the Canadian Grain Commission

[13] The Canadian Grain Commission (Commission) is a federal government agency. According to its website, the mandate of the Commission, which is set out in the *Canada Grain Act*, is to work in the interest of grain producers. It regulates grain handling in Canada and certifies the quality, safety and quantity of export shipments of Canadian grain. The *Canada Grain Act* requires the Commission to undertake, sponsor and promote research in relation to grains and grain products.

[14] The Commission reports to Parliament through the Minister of Agriculture and Agri-Food Canada. The Commission is headed by three commissioners appointed by the Governor in Council. The commissioners are reporting public office holders subject to the *Conflict of Interest Act* (Act).

[15] The *Canada Grain Act* sets out the various powers exercised by the commissioners. The commissioners set the organization's direction, establish policy, and administer and enforce the *Canada Grain Act*. The Chief Commissioner is the Chief Executive Officer of the Commission and, subject to the Commission's by-laws, has supervision over and direction of the work and staff of the Commission. The Assistant Chief Commissioner may exercise all the powers and perform all the functions of the Chief Commissioner in the event of the absence or incapacity of the Chief Commissioner or if the office of the Chief Commissioner is vacant. The Chief Operating Officer is responsible for the overall management and co-ordination of the operations of the various divisions of the Commission.

Mr. Smolik's appointment as Assistant Chief Commissioner

[16] Mr. Smolik was appointed as Assistant Chief Commissioner of the Commission on November 19, 2007, for a three-year renewable term. Mr. Smolik's term was renewed on two occasions, namely in November 2010 and 2013. On January 21, 2016, prior to the end of his third term, Mr. Smolik assumed the responsibilities of Acting Chief Commissioner until his departure from public office on November 24, 2016.

[17] Mr. Smolik testified that, as Assistant Chief Commissioner and Acting Chief Commissioner, part of his role was to communicate to the grain industry the work and activities of the Commission, such as the various consultation processes relating to licensing producer railway car loading facilities, agents or feed mills. Mr. Smolik also testified that, as a Commissioner, he participated in the making of decisions and the signing of orders relating to the licensing of grain dealers and grain elevator operators, including orders pursuant to section 117 of the *Canada Grain Act*, which exempts particular grain elevators or grain handling operations from certain requirements of the *Canada Grain Act*.

Mr. Smolik's communications with the Office concerning his post-employment obligations

[18] In October 2016, while still Acting Chief Commissioner at the Commission, Mr. Smolik contacted the Office to obtain post-employment advice concerning a potential employment opportunity with Cargill Limited (Cargill).

[19] According to its website, Cargill is the Canadian subsidiary of Cargill Inc., and is one of Canada's largest merchandisers and processors. Its interests include the processing of beef, poultry, malt, and oilseed, as well as the manufacturing of livestock feed. It is also involved in crop input product retailing, grain handling, milling, salt distribution and merchandizing.

[20] In mid-October 2016, Mr. Smolik informed the Office that he may have an opportunity to join Cargill. He confirmed that he did not have direct and significant official dealings with Cargill during his last year of employment at the Commission, which would have otherwise prohibited him from accepting the opportunity under subsection 35(1) of the Act. Mr. Smolik explained that while only about 35% of Cargill operations dealt with grain, it was his understanding that Cargill would require him to be mostly involved on the beef side of their business.

[21] The Office informed Mr. Smolik that based on the information provided, accepting an offer from Cargill would not be prohibited under the post-employment rules of the Act.

[22] In an email dated October 21, 2016, the Office reminded Mr. Smolik of his post-employment obligation under subsection 35(2) of the Act, which prohibited him from making representations on behalf of Cargill to any department, organization, board, commission or tribunal with which he had direct and significant official dealings during his last year in office, in particular, the Commission. Mr. Smolik was also informed that sections 33 and 34 of the Act apply indefinitely and prohibit him from acting in such a manner as to take advantage of his previous office or to switch sides. Mr. Smolik was also advised that, should he provide advice to any future employer or client, he would need to be particularly mindful not to use information that was obtained in his capacity as a public office holder and that is not available to the public.

[23] In a November 2, 2016 email, Mr. Smolik formally notified the Office of the firm offer of employment from Cargill and confirmed that he understood his post-employment obligations.

[24] Mr. Smolik joined Cargill on November 28, 2016, as Head of Corporate Affairs Canada.

[25] On December 8, 2016, the former Conflict of Interest and Ethics Commissioner wrote to Mr. Smolik as a former reporting public office holder to remind him of all of his post-employment obligations under the Act, including those set out in sections 33 and 35.

The matter of applying white mineral oil to grain as a means of dust suppression

Background

[26] According to the Government of Canada, grain dust, which is present in grain handling facilities such as grain elevators across Canada, is considered an airborne hazardous substance due to the adverse health effects associated with exposure via inhalation over time. According to Mr. Smolik, grain dust can also spur pollution complaints from residents who live near grain terminals.

[27] On August 13, 2015, Cargill was charged by the Government of Ontario when its grain terminal in Sarnia, Ontario, released a contaminant (dust) into the natural environment. Cargill was also charged with failing to report the incident to the appropriate authorities contrary to the *Environmental Protection Act* of Ontario. According to Cargill's written submission, potential fines imposed by the Government of Ontario in relation to the charges could be substantial.

[28] White mineral oil has been used for some time in the United States as a means of dust suppression at grain terminals. In Canada, however, its application to grain had not yet been permitted by the Commission.

Mr. Smolik's understanding of the Commission's position on the application of white mineral oil to grain as a means of dust suppression

[29] In his written submission of November 7, 2017, Mr. Smolik wrote that while he was a Commissioner, the Commission's position relating to the application of mineral oil to grain as a means of dust suppression was to not pursue it as an option. In his first interview, Mr. Smolik testified that the matter was not raised with the commissioners, nor did he participate in any discussion on the subject.

[30] According to Mr. Smolik, the issue of dust suppression at grain terminals was an operational matter that fell within the responsibility of the Commission's Chief Operating Officer and directors, who form the Executive Management Committee (EMC), along with the Chief Grain Inspector.

[31] In his written submission, Mr. Smolik wrote that over the years the EMC had discussed the issue of dust suppression with the Commission's American counterpart and that no actions were taken by the EMC. Mr. Smolik also wrote that shortly before he left the Commission, the latter undertook a fact-finding trip to the Pacific Northwest region in the United States to gain an understanding of how grain companies were handling dust emissions at terminals.

[32] Mr. Smolik wrote that, as the trip was under the purview of the EMC, he was not involved nor was he included in any internal meetings relating to dust control.

[33] Mr. Smolik also indicated in his written submission that the EMC had made the decision to conduct a scientific evaluation of the application of white mineral oil to grain as a means of dust suppression in early 2017, only after he had left the Commission.

[34] During his first interview and in his written submission, Mr. Smolik stated that, during his term as a Commissioner, he had not been made aware that several different grain companies, including Cargill, had requested that the Commission change its position on the application of white mineral oil to grain as a means of dust suppression.

[35] In its written submission to the Office, the Commission wrote that an evaluation of the application of white mineral oil to grain as a means of dust suppression was commenced in response to the industry's request for the Commission's position on the matter, and had begun prior to Mr. Smolik's departure from the Commission. The evaluation was to include a review of Canadian and American legislation, as well as a scientific evaluation to determine whether the application of white mineral oil would cause changes to the grain.

[36] According to notes provided by Cargill, Mr. Smolik, as Acting Chief Commissioner, participated in an August 18, 2016 conference call with another grain company to discuss the application of white mineral oil to grain as a means of dust suppression. Mr. Smolik was joined on that call by another Commissioner, the Commission's Chief Grain Inspector and the Commission's Local Operations Supervisor of the Western Region.

[37] During his second interview, Mr. Smolik testified that, while he recalled the conference call, in his view, it was to gather information and no decision on the application of white mineral oil to grain as a means of dust suppression could be made at that time. Mr. Smolik also testified that he had received the August 18, 2016 notes from another Commissioner—after the latter had left public office—along with other notes from two other meetings between the Commission and grain companies. Mr. Smolik testified that he shared these notes with Cargill's Senior Lawyer shortly after he began working at Cargill.

Mr. Smolik's involvement in the dust suppression issue while at Cargill

[38] On November 8, 2016, shortly before Mr. Smolik joined Cargill, the company received a summons to appear before the Ontario Court of Justice to respond to the charges relating to the Sarnia terminal's dust issue.

[39] Mr. Smolik testified during his first interview that although he joined Cargill as Head of Corporate Affairs Canada in late November 2016, he was not made aware of the Sarnia terminal's dust issue until February 23, 2017, when Cargill's Senior Lawyer shared a February 2, 2017 email exchange between Cargill's Senior Lawyer and the Commission's Chief Grain Inspector.

[40] Mr. Smolik testified that it was from this email that he first learned that Cargill was looking to apply white mineral oil to grain as a means of dust suppression at its Canadian terminals. In his written submission, Mr. Smolik wrote that it was also from this email that he first learned that the Commission had assigned a lead on the dust suppression issue: the Local Operations Supervisor of the Western Region.

[41] Following Mr. Smolik's first interview, the Office requested from the Commission and Cargill all relevant documents and communications relating to this examination. Many of the documents received from Cargill were either authored by Mr. Smolik or addressed to him directly, yet Mr. Smolik had not provided many of these documents to the Office in spite of the very general nature of the request. When asked why those documents had not been disclosed, Mr. Smolik testified that a change in the software program at Cargill had caused other employees to lose information and emails; however, he was not sure if he had lost any, and stated that he had submitted what he had found.

[42] While Mr. Smolik first testified that he only learned of the Sarnia terminal's dust issue on February 23, 2017, the documentary evidence produced by Cargill showed that Mr. Smolik became involved in the matter as early as mid-December 2016, after receiving an email from a Cargill staff member who reported directly to him.

[43] In an email dated December 14, 2016, the staff member asked Mr. Smolik, in respect of the Sarnia terminal's dust issue, whether there had been any discussions at the Commission about taking measures to reduce dust emissions by applying mineral oil to the grain considering the prohibition to do so in the *Canada Grain Act*.

[44] Mr. Smolik replied later that day that he knew that a group from the Commission had visited grain terminals in the Pacific Northwest to discuss what was being done in terms of the application of mineral oil to grain as a means of dust suppression. He wrote that he knew the issue for the Commission was twofold: first, whether any oil or water additives would impact the end-use quality or functionality of the grain and, second, whether anything put on the grain could change its official weight.

[45] During his second interview, Mr. Smolik admitted that he knew what the issues were by having worked at the Commission. Mr. Smolik also recalled that prior to January 2017, he discussed the dust issues that Cargill was facing with the former Commissioner of the Commission who, at that time, had given him notes of his discussions with grain companies.

Mr. Smolik's communications with Cargill's Senior Lawyer in relation to the dust suppression issue

[46] The documentary evidence submitted by Cargill showed that Mr. Smolik continued to be involved in the Sarnia terminal's dust issue in January 2017 by providing advice to Cargill's Senior Lawyer on how to go about raising the matter with the Commission.

[47] In an email dated January 9, 2017, Mr. Smolik informed Cargill's Senior Lawyer to contact the Commission's Chief Grain Inspector, noting that he was "in a bit of a tough spot" to do so himself from his work computer as he and Cargill had agreed to a six-month ban on anything relating to the Commission. Mr. Smolik wrote that he had met socially with the Chief Grain Inspector earlier that week and had informed him that he may expect an email from Cargill's Senior Lawyer to discuss the Sarnia terminal's dust issue. Mr. Smolik suggested that Cargill's Senior Lawyer communicate with the Chief Grain Inspector quickly as the latter had resigned and would be leaving the Commission in February 2017.

[48] In the same email, Mr. Smolik also mentioned that the Chief Grain Inspector would likely include the Commission's Local Operations Supervisor of the Western Region in the discussion as this individual was the lead on the dust issue when Mr. Smolik was at the Commission.

[49] During his second interview, Mr. Smolik stated that he knew who the Commission's lead on the dust issue was as early as January 9, 2017, and certainly not as late as February 23, 2017, as he had originally testified.

[50] The documentary evidence showed that Cargill's Senior Lawyer, following Mr. Smolik's advice, contacted the Commission's Chief Grain Inspector from January 12, 2016, until late February 2017, concerning the Sarnia terminal's dust issue and the application of mineral oil to grain. The correspondence also showed that, according to the Commission, the Canada Food Inspection Agency (CFIA) played a role relating to the application of mineral oil to grain. On February 23, 2017, Cargill's Senior Lawyer forwarded these email discussions to Mr. Smolik, who doubted the necessity to involve the CFIA.

Mr. Smolik's communications with the Commission

[51] On March 1, 2017, Mr. Smolik telephoned the Commission's lead on the dust issue to discuss the current steps being undertaken by the Commission to evaluate the application of mineral oil to grain as a means of dust suppression. Mr. Smolik testified that he had decided on his own to contact this individual. On the same day, Mr. Smolik emailed Cargill's Senior Lawyer in respect of his discussion with the Commission's lead and wrote that hopefully it wouldn't be too long before the Commission had the results of their evaluation on the application of mineral oil to grain.

[52] In early April 2017, during an Ontario Agri Business Association meeting, Commission officials informed grain companies that the Commission was on target to complete its evaluation of the application of white mineral oil to grain as a means of dust suppression. This information was shared with Mr. Smolik on April 6, 2017.

[53] On May 16, 2017, Mr. Smolik sent an email to the Director of Industry Services at the Commission and wrote that it had been nice to see him socially. Mr. Smolik asked for an update and a timeline on a decision relating to the application of mineral oil to grain. He wrote that Cargill was facing severe penalties due to dust emissions, and the company's mitigation measures were limited by what was permitted under the *Canada Grain Act*. Mr. Smolik also asked whether the Commission would grant an industry-wide exemption should the organization be permitted to apply mineral oil to grain or if individual requests for exemptions would be required. The Director of Industry Services replied that the matter was still being evaluated.

[54] Mr. Smolik testified that he knew to reach out to the Director of Industry Services as the latter would be more in the know concerning the results of the evaluation of the application of mineral oil to grain as a means of dust suppression at the Commission. Mr. Smolik also testified that he reached out to the Director of Industry Services because the resolution of the matter was becoming time sensitive for

Cargill, as applying mineral oil to grain would require the purchasing and installation of specialized equipment before the fall harvest.

[55] On May 21, 2017, Mr. Smolik forwarded the Commission's Director of Industry Services' response to Cargill's Senior Lawyer and indicated that he "will continue to push a little harder now on in. [The Director of Industry Services] doesn't like to take a position, but I plan on forcing him to do something soon." The Senior Lawyer responded that considering the charges faced by Cargill, he hoped the Commission could soon be persuaded.

[56] During a June 1, 2017 Western Grain Elevator Association meeting which Mr. Smolik attended, he asked a Commission representative, who was also in attendance, for an update regarding the Commission's decision on the application of white mineral oil to grain as a means of dust suppression. The Commission's representative informed participants that more testing was required.

[57] In a June 21, 2017 email, Cargill's Senior Lawyer wrote to Mr. Smolik and other staff that Mr. Smolik had been following up with the Commission on its decision regarding the application of mineral oil to grain, and according to him, the Commission had stalled on rendering a decision. The Senior Lawyer wrote that, as a result of the delay, Mr. Smolik suggested that Cargill "push" the issue forward by making a formal application to the Commission to request an exemption under the *Canada Grain Act* to permit the application of white mineral oil to grain at the Sarnia terminal. The Senior Lawyer wrote that he believed this was a good idea.

[58] During his first interview, Mr. Smolik testified that he was not aware of how Cargill came to know that it could request an exemption to apply white mineral oil to grain, but that under the *Canada Grain Act*, exemptions can be requested. During his second interview, Mr. Smolik testified that he couldn't recall if it was "simply" him who suggested the application, but that in any event, requesting an exemption is common knowledge in the grain industry. Mr. Smolik acknowledged that, while he was at the Commission, no grain terminal had requested an exemption under the *Canada Grain Act* for the application of mineral oil to grain.

[59] On June 22, 2017, Cargill's Senior Lawyer sent Cargill employees, including Mr. Smolik, a draft application addressed to the Commission's Chief Grain Inspector for an exemption under section 117 of the *Canada Grain Act*. The Senior Lawyer requested comments on the content and included questions relating to whom the application should be addressed, who should sign the application on Cargill's behalf, and the type of information that should be included.

[60] During his first interview, Mr. Smolik testified that he had not drafted the letter, but had simply signed it on behalf of Cargill. However, documentary evidence showed that Mr. Smolik had an active role in the drafting of the application.

[61] In an email dated June 23, 2017, Mr. Smolik responded to various questions addressed to him in relation to the application. Mr. Smolik wrote that the letter should be addressed to the Chief Commissioner of the Commission with a copy sent to the Chief Grain Inspector as it was the Chief

Commissioner who had the authority to sign off on the order. Mr. Smolik also made comments as to the way commissioners would be viewing the information contained in the submission and identified which information would play into their decision. He also commented on the fact that he was not aware of any precedent. Cargill's Senior Lawyer asked who should sign the letter. A Cargill senior official wrote that Mr. Smolik should sign the letter as he had the closest relationship with the Commission. Mr. Smolik replied that he was fine to sign the letter if it was the correct protocol.

[62] On July 20, 2017, a letter addressed to the Commission's Chief Commissioner, with the subject line "RE: Application for Exemption – Section 117 of *Canada Grain Act*," was submitted by Mr. Smolik as an application for approval to permit the application of white mineral oil to grain as a means of dust suppression at the Sarnia terminal. In the letter, Mr. Smolik asked the Chief Commissioner to contact him directly for any additional information regarding the application. The request was accompanied by regulatory documentation on the application of white mineral oil to grain as a means of dust suppression in the United States.

[63] On the same day, Mr. Smolik sent an email to his former Executive Assistant at the Commission. Mr. Smolik told her that he had a letter to deliver to the Chief Commissioner and provided the name of the person who would hand-deliver it; he also asked her to meet that person on the ground floor of the building. In an email, Mr. Smolik's former Executive Assistant confirmed receipt of the letter and assured its delivery to the Chief Commissioner.

[64] Mr. Smolik testified that the purpose of the letter was to document Cargill's request so that it could be introduced as evidence that Cargill was doing its due diligence to mitigate the dust emissions issue in its proceeding before the Ontario Court of Justice.

The Commission's concerns in relation to Mr. Smolik's July 20, 2017 application to the Commission

[65] In an August 10, 2017 email, Cargill's President informed Mr. Smolik that the Commission's Chief Commissioner had raised concerns relating to a potential conflict of interest in respect of his July 20, 2017 application, and that consequently, she would be addressing her response directly to the President.

[66] Mr. Smolik replied to Cargill's President that he had not been imposed any post-employment restrictions by the Office, except on active files that he may have dealt with while employed at the Commission. He wrote that prior to working at Cargill, he spoke with members of Cargill's Human Resources and that he voluntarily agreed that he would not contact the Commission for six months, which, according to Mr. Smolik, he had complied with. He also wrote that Cargill had been fined for dust emissions, a matter that was currently before the courts, and stated that Cargill's Senior Lawyer had required evidence demonstrating that Cargill was restricted by law by a federal government agency to suppress dust.

[67] In an August 11, 2017, email to Mr. Smolik and other Cargill staff, Cargill's President forwarded the Chief Commissioner's letter in response to Cargill's July 20, 2017 application for exemption. In the letter, the Commission's Chief Commissioner wrote that prior to making any definitive decisions on the application of mineral oil to grain as a dust suppressant, the Commission needed to complete its evaluation.

[68] In the same August 11, 2017 email, Cargill's President also informed staff of a telephone discussion he had with the Chief Commissioner, who advised him that any decision on the application of mineral oil to grain was contingent on the CFIA's approval.

[69] In follow-up emails, Cargill staff questioned the validity of the Commission's Chief Commissioner's assertion that the hold-up on the approval for the application of mineral oil to grain was in fact due to the CFIA as the grain in question would not be produced for human consumption, and that the issue appeared to be of a political nature rather than a regulatory one.

[70] In response to the concerns raised, Mr. Smolik replied to Cargill's President that the Commission was protecting itself given that the Chief Grain Inspector and the Director of Industry Services had knowledge of the matter having visited grain terminals in the Pacific Northwest. Mr. Smolik wrote that the Chief Grain Inspector would have done something but was now retired and that the Director of Industry Services would not make a decision. Mr. Smolik stated that he would look through his contacts to find someone at the CFIA.

[71] Between August 20 and August 23, 2017, Mr. Smolik emailed the CFIA to request a ruling on the application of mineral oil to grain at the Sarnia terminal. Mr. Smolik was informed by the CFIA that exported grain feed so labelled fell outside of the CFIA's scope.

[72] On November 20, 2017, Cargill received the Commission's approval for the application of white mineral oil to grain at its Sarnia terminal.

MR. SMOLIK'S POSITION

[73] Mr. Smolik's position is that he did not contravene section 33 and subsection 35(2) of the *Conflict of Interest Act* (Act). In support of Mr. Smolik's position, his counsel provided submissions addressing each of the alleged contraventions.

[74] In relation to section 33, counsel's position is that for there to be a contravention, there must be evidence that Mr. Smolik improperly took advantage of his previous public office. If there is no advantage available from a previous office, then section 33 cannot be contravened.

[75] Counsel's position is that the evidence does not demonstrate that any improper advantage was taken.

[76] Counsel submits that Mr. Smolik could only be disadvantaged by his previous position of public office given that he was the appointee of a defeated government, and that even prior to 2015, there had been long-standing tension between some of the employees of the Commission and the appointed commissioners.

[77] Counsel also submits that Mr. Smolik never misused confidential information he obtained while in public office. In support of this position, counsel's view of Mr. Smolik's evidence was that he provided Cargill with his assumptions about how the Commission would view the issue of applying mineral oil to grain, which were based on public information as well as general knowledge about agricultural policy issues accumulated over a long career in the industry. According to counsel, the evidence showed that Mr. Smolik never shared classified Commission information with Cargill and while the oiling of grain as a dust suppressant was a well-known policy issue, even while Mr. Smolik held public office at the Commission, there was no policy "file" on the issue.

[78] With respect to Mr. Smolik's knowledge of Commission operations and personnel as well as his recommendations to Cargill in that regard, counsel submits that the recommendations were not based on special knowledge as anyone with access to the internet or a telephone could have drawn the same conclusions. Information regarding the roles of Commission employees are available on the Commission's website, employee business cards, and on the Government Electronic Directory Services website. Since the Commission serves the public, the responsibilities of Commission staff are matters of public interest.

[79] With respect to Mr. Smolik's social interactions with Commission staff, counsel submits that the evidence showed that Mr. Smolik had worked at the Commission for many years and that his former colleagues are his friends and community with whom he discusses personal matters and shares interests. Counsel submitted that Mr. Smolik had not leveraged, and would not leverage, these relationships to further any professional interest.

[80] In relation to subsection 35(2) of the Act, counsel's position is that while Mr. Smolik did have communications with the Commission and did sign an application for an exemption order, none of these communications amounted to making a representation.

[81] According to counsel's submission, the individual's intention is relevant to whether a former reporting public office holder is making representations and requires an attempt to influence. While Mr. Smolik had written that he will "push" the issue and force Commission staff to make a decision on permitting the application of mineral oil as a dust suppressant, his statement must be read with an understanding of Mr. Smolik's personality, his frustration, and his lack of influence or authority to force the Commission to make decisions.

[82] Counsel's position is that Mr. Smolik's efforts to obtain information from Commission staff of the Commission did not amount to making representations because he merely inquired about the status of the dust suppression file. The Commission's evaluation of the application of mineral oil to grain was a matter involving a scientific analysis which could not be influenced in the same way as someone trying to influence public policy, legislation or the awarding of a contract. Counsel's position is that since scientific analysis cannot be influenced in the way that a policy decision may be, any communications regarding laboratory tests and other analyses cannot be the subject of representations.

[83] With respect to the July 20, 2017 application that Mr. Smolik signed and submitted, counsel submits that Mr. Smolik's letter was a bare application that contained no representations. The goal was to put on the record the application for approval but not to make any representations in support of it, which therefore cannot constitute the making of representations.

[84] Finally, with respect to any factual discrepancy that may have occurred between Mr. Smolik's November 7, 2017 letter to the Office and other evidence, counsel submits that these were errors of memory that were inadvertent and made in good faith.

ANALYSIS AND CONCLUSIONS

Analysis

[85] I must determine whether Mr. Smolik, a former Assistant Chief Commissioner and Acting Chief Commissioner of the Canadian Grain Commission (Commission), contravened his post-employment obligations, namely section 33 and subsection 35(2) of the *Conflict of Interest Act* (Act), in relation to post-employment activities he carried out on behalf of his employer, Cargill Limited (Cargill).

Section 33

[86] Section 33 of the Act prohibits former public office holders from acting in such a manner as to take improper advantage of their previous public office. The prohibition applies for an indefinite period after leaving public office and reads as follows:

33. No former public office holder shall act in such a manner as to take improper advantage of his or her previous public office.

[87] The general prohibition set out in section 33 of the Act is very broad in scope. It stands in contrast to some of the other post-employment provisions that deal with specific activities, such as the prohibitions on switching sides and on contracting.

[88] Whether a former public office holder has acted in such a manner as to take improper advantage of his or her previous public office is a question of fact and depends on the circumstances of each case.

[89] In conducting my examination, I found Mr. Smolik's version of events to be inconsistent with the information contained in the documentation submitted by both Cargill and the Commission. In fact, many of the relevant documents which were either authored by Mr. Smolik or addressed to him directly showed a level of involvement in the Sarnia terminal's dust issue that was far greater than Mr. Smolik had initially led me to believe. I also found Mr. Smolik to be less than forthcoming with his answers to questions relating to these documents during his second interview, including why he had not produced the documents himself.

[90] The documentary evidence shows that the Commission's evaluation of the application of mineral oil to grain as a means of dust suppression commenced prior to Mr. Smolik's departure from the Commission and was in response to a broader industry request for the Commission's position on the issue.

[91] It is also clear from the evidence submitted by Cargill that during the times relevant to this examination, Cargill was facing important fines for dust emissions at its Sarnia terminal and urgently

needed a decision from the Commission to be able to reduce dust emissions through the application of mineral oil to grain at their terminal elevators.

[92] The evidence shows that Mr. Smolik, within a few weeks of leaving public office, engaged in a series of actions on behalf of Cargill, aimed at assisting Cargill in resolving the dust emissions issue at its Sarnia terminal. Cargill often consulted Mr. Smolik for guidance and assistance in addressing this issue with the Commission. In my view, Mr. Smolik was more than willing to assist his employer in any manner despite the post-employment advice he had received from this Office and the “six-month ban on anything relating to the Commission” that he and Cargill had agreed upon.

[93] The evidence also shows that Cargill relied on Mr. Smolik’s insight, guidance and assistance as a former Commissioner of the Commission, to navigate through Commission processes to obtain a timely and favourable result in respect of its dust issue.

[94] In my view, Mr. Smolik took improper advantage of the relationships he had established while at the Commission as well as the knowledge and expertise he had acquired while in public office.

[95] Mr. Smolik exploited the relationships he had previously established with Commission staff and the level of authority he once had while in public office when he:

- obtained, following his departure from public office, official Commission meeting notes from a former Commissioner of the Commission concerning the application of mineral oil to grain as a means of dust suppression, and shared these internal Commission notes with Cargill;
- used, on several occasions, social interactions with Commission staff members to facilitate official interactions between himself or Cargill and the Commission to resolve Cargill’s Sarnia terminal’s dust issue.

[96] Mr. Smolik also exploited his level of knowledge and expertise gained as a former Commissioner of the Commission when he:

- advised Cargill to seek an individual exemption order, a process with which he was very familiar as a former Commissioner, knowing that the scientific evaluation would not be resolved because he knew the inner workings of the Commission and in particular the mindsets of certain Commission staff who were tasked with addressing the dust emissions issue;
- advised Cargill on how to tailor the application for the exemption order including the type of information he knew the commissioners would consider to be useful in deciding whether to grant an exemption.

[97] In my view, Mr. Smolik could not have provided such advice if not for his experience as a former Commissioner. Mr. Smolik also exploited his previous public office to facilitate his and Cargill’s access to Commission staff and to shepherd Cargill on a very specific course of action which ultimately resulted in the issuance of the exemption order. I find that in so doing, Mr. Smolik acted in a manner that clearly took improper advantage of his previous position of public office.

Conclusion

[98] For the reasons set out above, I have determined that Mr. Smolik contravened section 33 of the Act.

Subsection 35(2)

[99] Subsection 35(2) of the Act prohibits former reporting public office holders from making representations for or on behalf of another person or entity to entities with which they had direct and significant official dealings during their last year in public office. The prohibition applies during a post-employment cooling-off period, which in the case of Mr. Smolik was of one year: November 2016 to November 2017.

[100] Subsections 35(2) and 36(1) of the Act read as follows:

35. (2) No former reporting public office holder shall make representations whether for remuneration or not, for or on behalf of any other person or entity to any department, organization, board, commission or tribunal with which he or she had direct and significant official dealings during the period of one year immediately before his or her last day in office.

[...]

36. (1) With respect to all former reporting public office holders except former ministers of the Crown and former ministers of state, the prohibitions set out in subsections 35(1) and (2) apply for the period of one year following the former reporting public office holder's last day in office.

[101] As a former Commissioner of the Commission, there is no doubt that Mr. Smolik had direct and significant official dealings with the Commission during his last year in public office. The evidence also shows that upon leaving his position of public office to join Cargill, Mr. Smolik was given specific advice by the Office to not make representations to the Commission during his one-year cooling-off period.

[102] What remains to be determined is whether Mr. Smolik made representations to the Commission when he, on behalf of Cargill, engaged in various direct communications with the Commission in relation to the status of the scientific evaluation the Commission was conducting and when he submitted an application addressed to the Chief Commissioner of the Commission requesting an exemption under section 117 of the *Canada Grain Act* to apply white mineral oil to grain as a means of dust suppression at Cargill's Sarnia terminal.

[103] In *The Sullivan Report*, my predecessor, Ms. Mary Dawson, interpreted "representations" in subsection 35(2) of the Act as including communications made with a view to influencing official decisions, opinions or actions.

[104] Mr. Smolik's counsel submitted that no representations were made by Mr. Smolik to the Commission.

[105] With respect to Mr. Smolik's communications with the Commission in relation to the scientific evaluation the Commission was conducting, the evidence shows that his efforts were aimed at gathering information to determine the status of an evaluation that could affect the industry at large. I therefore find that these communications were not made with a view to influencing official decisions, opinions or actions of the Commission.

[106] With respect to the application dated July 20, 2017, counsel submitted that it was a bare application devoid of reasons, arguments, a rationale, or any content capable of influencing a decision. According to counsel, the purpose of the application was to document Cargill's due diligence in mitigating the dust issue at its Sarnia terminal for the Ontario Court of Justice proceedings relating to the fines imposed by the Government of Ontario. Therefore, there was no intention on the part of Mr. Smolik or Cargill to support the July 20, 2017 application to the Commission with representations.

[107] I cannot accept this position as it is plain and obvious that the July 20, 2017 application submitted by Mr. Smolik was a communication made by him to the Commission with a view to influencing a decision or action on the part of the commissioners, namely the granting of an order by the commissioners pursuant to section 117 of the *Canada Grain Act*. Furthermore, Cargill's continued efforts to seek the Commission's eventual granting of such an order in November 2017 shows that Cargill's intention was not simply to document Cargill's due diligence.

[108] I find that Mr. Smolik's July 20, 2017 application requesting an exemption pursuant to section 117 of the *Canada Grain Act* was a representation made during his cooling-off period, on behalf of Cargill to the Commission, an entity with which Mr. Smolik had had direct and significant official dealings during his last year in public office.

Conclusion

[109] For the reasons set out above, I have determined that Mr. Smolik contravened subsection 35(2) of the Act.



Mario Dion
Conflict of Interest and Ethics Commissioner
May 30, 2019

SCHEDULE: LIST OF WITNESSES

The names of all witnesses are listed below according to the organizations to which they belonged at the time of the events that are the subject of this examination.

Information and Documents Requested

Canadian Grain Commission

- Ms. Patti Miller, Chief Commissioner
- Mr. Brian Brown, Chief Audit Executive

Cargill Limited

- Mr. Jeff Vassart, President
- Mr. Cameron Funk, Senior Lawyer