FONDATION SIERRA CLUB CANADA FOUNDATION

Office of the Conflict of Interest and Ethics Commissioner
ATTN: Mary Dawson, Commissioner
Parliament of Canada
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June 18, 2014

RE: Request for examinations and rulings under *Conflict of Interest Act* with regard to Ted Menzies' work with Crop Life Canada

Dear Commissioner Dawson:

Sierra Club Canada Foundation requests that you undertake an examination, and issue a public ruling, under the *Conflict of Interest Act* with regard to the legal requirements and prohibitions that apply to the work former federal Cabinet minister Ted Menzies has been doing as the President and CEO of Croplife Canada since January 1, 2014, specifically with regard to any way Croplife Canada is engaging with the federal government or with any provincial, territorial or municipal government institutions with which he had direct and significant official dealings during his last year as a Cabinet minister, or that deal with matters about which he would have confidential information he obtained while he was a Cabinet minister that is not available to the public.

A. Mr. Menzies' Cabinet and post-Cabinet activities and related facts

Mr. Menzies was a federal Cabinet minister from February 7, 2006 on, most recently:

- From January 4, 2011 to July 14, 2013: Minister of State (Finance), and;
- From October 10, 2007 to January 3, 2011: Parliamentary Secretary to the Minister of Finance.

In addition to holding these positions and attending secret Cabinet meetings where confidential information that is not available to the public is shared on a wide variety of issues and topics, Mr. Menzies was also a member of various Cabinet committees and through their meetings and documents likely also received other confidential information, including:

- May 18, 2011 to July 14, 2013: Member of Economic Prosperity Committee;
- September 13, 2012 to July 14, 2013: Vice-Chair of Priorities and Planning Sub-Committee on Government Administration
- May 18, 2011 to July 14, 2013: Alternate Member of Treasury Board (and also Vice-Chair of Treasury Board - Strategic and Operating Review Sub-Committee from May 18, 2011 to September 12, 2013, and Member from January 4, 2011 to May 17, 2011).

Croplife Canada has been registered to lobby the federal government from March 28, 1996 through to the present. According to the federal Lobbyists Registry, Croplife Canada was registered to lobby Finance Canada through the entire time period that Mr. Menzies was Parliamentary Secretary and Minister of State (Finance), and has continued to be registered to lobby Finance Canada since Mr. Menzies became President of Croplife Canada.

It is a violation of the *Lobbying Act* to state in a registration that you are lobbying a government department if you are not, in fact, communicating with regard to decisions of officials and/or public office holders in the department. As a result, Croplife Canada must either have been lobbying someone at Finance Canada during the time that Mr. Menzies' was Parliamentary Secretary and Minister of State (Finance) or their registration violates the *Lobbying Act*.

Croplife Canada has been and continues to be registered to lobby several other federal government departments, and also had direct communications with many department officials and politicians and other public office holders while Mr. Menzies was a member of Cabinet, and continues to have these communications since he became President of Croplife Canada.

It is important to note that not all communications are disclosed in the Registry – only oral, pre-arranged communications initiated by the lobbyist are required to be disclosed. As a result, it is possible that Croplife Canada communicated directly with Mr. Menzies while he was in Cabinet.

Finally, the following subject matters have remained the same in all of Croplife Canada's registrations in the Registry since June 11, 2010 (in other words, covering the last three years that Mr. Menzies was a member of Cabinet):

- Discussion with Pest Management Regulatory Agency (PMRA) as to the possibility of an Empty Pesticide Container Program as a condition of pesticide registration;
- Forward policy and implementation. We are seeking policies and programs that are supportive of plant science technologies;
- Own Use Import Program: with regards to health and safety, product access for Canadian growers and address economic outcome;
- Plant Biotechnology Policy - policy to be put in place for plant made industrial products, application of confined commercial environmental release policy to

plant made industrial products - implementation of increased flexibility in confined field trials for plant biotech products -expanded market access for genetically modified crops;

- Protection of Proprietary Interests in Pesticides Data (PPIP) Policy - Discussion of policy components. Regulatory directive DIR 2007-03
- Fee for service by Pest Management Regulatory Agency (PMRA) - changes to User Fee Regulations under Pest Control Products Act (PCPA);
- Pest Control Products Act and Regulations relating to user import.

B. Legal issues concerning Mr. Menzies' activities

Mr. Menzies is covered by the provisions of the *Conflict of Interest Act* (the "*Act*") in his role as a former member of Cabinet/public office holder.

1. Issues in Mr. Menzies' role as a former member of Cabinet/public office holder

(a) Giving advice using confidential information he learned in office

Subsection 34(2) of the *Act* prohibits former public office holders from *ever* giving "advice to his or her client, business associate or employer using information that was obtained in his or her capacity as a public office holder and is not available to the public."

Despite being Ethics Commissioner since July 2007, you have failed to issue a guideline or interpretation bulletin defining exactly what this key rule means.

Sierra Club Canada Foundation's opinion, based on standard statutory interpretation rules, is that all a former public office holder has to do to violate this subsection is use confidential information as the basis for giving advice – they do not have to share the confidential information with anyone, they just have to use it as a basis for the advice they give.

For effective enforcement, your assumption must be that the former public office holder is using the confidential information they learned while in office, as they cannot un-learn what they learned. If you do not make this assumption, you are setting up a scheme whereby it could never be proven that the office holder used the information, given that what is happening in someone's mind is essentially unknowable.

This assumption is the basis of all effective enforcement of conflict of interest and ethics rules – no one can know what is going on in someone's mind when they make a decision or give advice to others, and so people must be prohibited in every case from participating in discussions and decisions when they have a private interest, and must be prohibited from giving advice to others when they know inside information that could give others there an advantage. Their claim that they didn't think about their private interest when making a decision, or didn't use what they know when giving advice, can never be believed because it can never be proven either way, and so to

protect the public interest they must be prohibited from participating in the decision-making process, and from being in a position to give the advice.

This means a former public office holder must be prohibited from being an advisor to any client, business associate or employer that has an interest in federal government operations and/or decisions, including decisions made jointly with provincial, territorial or municipal governments or with other entities.

While the prohibition in subsection 34(2) of the *Act* on giving advice using confidential information has no time limit, Sierra Club Canada Foundation's position is that former public office holders should be allowed to be an advisor on federal or other government matters after the Cabinet ministers, ministerial staff, and government officials whom the former public office holder knows and interacted with while in office have left their offices.

The real danger that subsection 34(2) is aimed at preventing is the sharing of secret, inside information that will give someone or some entity an advantage over others in influencing the government and winning the decision they want. After all the key top decision-makers and other key top officials (who deal with the most confidential information) whom the former public office holder knows have left office, this danger is reduced significantly.

However, if the decision-making process on an issue drags on for several years, the prohibition on being an advisor on that issue should continue whenever the Ethics Commissioner determines that there is key confidential information that could still be shared by the former public office holder.

Based on the above, Sierra Club Canada Foundation's opinion is that there is enough evidence for you to form a reasonable belief that Mr. Menzies is not complying with subsection 34(2) when he is working for Croplife Canada given that:

- Mr. Menzies left Cabinet only 11 months ago;
- many of the federal Cabinet ministers are the same people as when he was in office, and presumably also many of the Cabinet staff and senior government officials are the same people;
- Croplife Canada is registered to lobby the federal government, and is lobbying on the same issues that it lobbied on while Mr. Menzies was a Cabinet minister as those issues are still being reviewed by the government and the Cabinet, and;
- therefore Croplife Canada still has ongoing interests in federal government decisions and Mr. Menzies very likely knows confidential information that affects those interests, interests that Croplife Canada lobbied Mr. Menzies' department (and possibly his office) about through his last year in office.

In other words, Sierra Club Canada Foundation's opinion is that in Mr. Menzies' interactions with Croplife Canada he cannot avoid using confidential information that he learned while in office, information that has very significant value to any stakeholder given that the Cabinet and the government and the decision-making

processes on the issue are essentially the same as when Mr. Menzies was a public office holder.

(b) Acting for an entity involved in a negotiation with the federal government
Subsection 34(1) of the *Act* prohibits former public office holders from ever acting for any person or entity "in connection with any specific proceeding, transaction, negotiation or case to which the Crown is a party and with respect to which the former public office holder had acted for, or provided advice to, the Crown."

As a member of Cabinet who was involved in several farm organizations before he entered federal politics, including the Canadian Agri-Food Trade Alliance, Grain Growers of Canada and Western Canadian Wheat Growers Association, and who owned a farm up to 2003, the year before he entered federal politics, it is very likely that Mr. Menzies provided advice of some sort to the federal government concerning agricultural issues

Croplife Canada has been lobbying the federal government on exactly the same issues through Mr. Menzies' last three years as a member of Cabinet.

Based on the above, Sierra Club Canada Foundation's opinion is that there is enough evidence for you to form a reasonable belief that Mr. Menzies is not complying with subsection 34(1) given that he is now working with Croplife Canada "in connection with" a "specific proceeding" or "negotiation" (the review process of the Protection of Proprietary Interests in Pesticides Data (PPIP) Policy - Discussion of policy components. Regulatory directive DIR 2007-03, among other regulations) in which the federal government is involved very directly and Mr. Menzies' former Cabinet colleagues have final approval decision-making power.

(c) Taking improper advantage of his previous public office
Subsection 33 of the *Act* prohibits former public office holders from ever acting in any way that takes "improper advantage of his or her previous public office."

If you determine that Mr. Menzies has violated either of the other provisions in the *Act* cited in the sections above, by definition Mr. Menzies will have acted improperly in a way that takes advantage of his former public office, and therefore you must also rule that he has violated subsection 33.

C. Your weak enforcement record, especially re: former public office holders
In your December 2013 Information Notice about Post-Employment Obligations of public office holders, you state the following:

"The post-employment section of the Act relies mainly on the voluntary compliance of former public office holders. The Commissioner can, however, conduct an

examination into any alleged breach; the findings of her examinations are made public."

I cite this statement in part to point out that it says you can conduct an examination "into any alleged breach" and commits you to issuing a public ruling in every case. However, I mainly cite it because it reveals your very weak enforcement attitude and approach.

There is no good reason for the post-employment requirements to rely on "voluntary compliance". You hold an administrative tribunal position, and under well-established administrative law principles you have clear authority to require federal government institutions to inform you about the departure of office holders, and to require former office holders to provide you with detailed information about their activities, and to conduct regular, random, unannounced audits to enforce any section of the *Act*.

Your powers as an administrative tribunal and enforcement agency are underlined by the main purposes of the *Act* as set out in section 3, namely to "minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise" (subsection 3(b)) and to "provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this *Act* has occurred" (subsection 3(c)).

Effective enforcement and the avoidance of conflicts of interest and resolution of conflicts in the public interest must always override the other purposes of the *Act* of encouraging experienced and competent persons to seek public office (subsection 3(d)), and facilitating exchanges between the private and public sectors (subsection 3(e)). The private and public sectors can always have exchanges through open, meaningful consultation processes that are not limited in any way by the provisions in the *Act*, and avoiding taking part in discussions and decisions in which they have a private interest is a very simple way for any experienced person to hold a public office while upholding the purpose and complying with the measures in the *Act*.

As the Supreme Court of Canada stated in 1996 in its leading case ruling on government ethics standards, *R. v Hinchey*, "given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe" (para. 18), and "The magnitude and importance of government business requires not only the complete integrity of government employees and officers conducting government business but also that this integrity and trustworthiness be readily apparent to society as a whole" (para. 94).

In Sierra Club Canada Foundation's opinion, your continued failure to require disclosure by federal government departments of the departure of public office holders, and disclosure of detailed information by former public office holders about their activities, and to conduct regular, random, unannounced audits and inspections, is a negligent abdication of your clear legal duties and mandate.

Your negligence in this area of enforcement is matched in other areas, as you have let dozens of off the hook for very questionable actions, and made more than 80 secret rulings. Most recently you refused to investigate the actions of staff of the Prime Minister's Office in paying off Senator Mike Duffy even though you are clearly legally empowered to undertake the investigation right now, in yet another decision that covers up for former Chief of Staff to the Prime Minister Nigel Wright.

We can only hope that you will, finally, take some effective enforcement actions to ensure former public office holders are complying with the legal requirements of the *Conflict of Interest Act* (and hopefully also to ensure all public office holders covered by the *Act* are complying with all measures in it).

Please take one step, finally, to exercise some effective enforcement by initiating an examination of Mr. Menzies' activities now. You have been in office for seven years and you have a long-confirmed reputation as a lapdog – if you fail to initiate this examination you will only provide further evidence that there is, in fact, almost no enforcement of the *Act*.

Please contact Sierra Club Canada Foundation at the address above if you need any more information to initiate the examination. We hopefully look forward to seeing your ruling very soon.

Sincerely,

John Bennett, National Program Director
Sierra Club Canada Foundation
On behalf of the Board of Directors of Sierra Club Canada Foundation