

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c.P.8, as amended by the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c.28 (the "PBA");

AND IN THE MATTER OF a Notice of Intended Decision of the Superintendent dated March 7, 2013, to Make Orders under sections 77.3(1)(a) and (b) and 87 of the *PBA* relating to the Navistar Canada Inc. Non-Contributory Retirement Plan, Registration Number 0351684;

AND IN THE MATTER OF a Hearing in accordance with subsection 89(8) of the Act.

BETWEEN:

NAVISTAR CANADA INC.

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

**SUBMISSIONS OF THE
SUPERINTENDENT OF FINANCIAL SERVICES
ON THE JURISDICTIONAL MOTION
(Motion returnable October 10, 2013)**

September 27, 2013

**MINISTRY OF THE ATTORNEY GENERAL
FOR THE PROVINCE OF ONTARIO**
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I. INTRODUCTION

1. The Superintendent of Financial Services (the "Superintendent") files these submissions in respect of the jurisdictional motion brought by Navistar Canada Inc. (the "Applicant") and in response to the Submissions of Navistar Canada Inc. Jurisdictional Motion (the "Applicant's Submissions").

2. The Applicant objects to the jurisdiction of the Superintendent and the Tribunal to rule on the issue of the applicability of the 0.9 banked pensionable service credit under section 7.03(b)(iii) (the "Credit Service Issue") of the Navistar Canada Inc. Non-Contributory Retirement Plan, Registration Number 0351684 (the "Plan"). In the Applicant's Submissions, the Applicant argues that

a. The Superintendent had no jurisdiction to include a proposed order in the Notice of Intended Decision (the "NOID") respecting the Credited Service Issue. The Applicant focusses on the timing of the decision rather than its substance and states that the decision "was, at best, premature" because it was made prior to the filing of a wind up report by the Applicant; and

b. Alternatively, if the Tribunal finds that the Superintendent does have jurisdiction, the Applicant relies on certain alleged statements made by the former Deputy Superintendent, Pensions during the course of certain without prejudice discussions to support the argument that

there was a breach of procedural fairness relating to the Credited Service Issue. The Applicant argues that this breach, in turn, deprived the Superintendent of his jurisdiction to deal with the issue.

3. The Superintendent disagrees with the position of the Applicant and submits that the Superintendent and the Tribunal have jurisdiction to deal with the Credited Service Issue. As stated in the NOID, that authority stems from section 87 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA") which permits the Superintendent to "require an administrator or any other person to take or to refrain from taking any action in respect of a pension plan or pension fund" where the Superintendent "is of the opinion on reasonable and probable grounds" that the pension plan is not being administered in accordance with its terms.

4. In this case, the Superintendent determined that the Applicant's interpretation and administration of the credited service provisions of the Plan was not consistent with the terms of the Plan and included a proposed order in the NOID relating to the issue. In so doing, the Superintendent did what he has done in numerous cases in the past and this issue, one of Plan interpretation and enforcement, is the same type of issue which routinely comes before the Tribunal.¹

¹¹ See, for example, *National Steel Car v. Superintendent of Financial Services*, Decision Number P0271-2006-1; *York University v. Superintendent of Financial Services*, Decision Number P0334-2008-1; *Colpitts v. Superintendent of Financial Services*, Decision Number P0507-2012-1.

5. Further, there is no merit to the suggestion that the Superintendent's inclusion of the Credited Service Issue was premature or that his jurisdiction to deal with the issue does not arise until after the wind up report is filed. There is no express or implied limitation in the *PBA* on the combining of the section 87 relief in the same NOID which orders the wind up of the Plan. Indeed, doing so makes practical sense.

6. In respect of the allegation that a breach of procedural fairness deprived the Superintendent of jurisdiction, the Superintendent objects to the admissibility of the evidence of the without prejudice discussions because those discussions are inadmissible by virtue of settlement privilege and are ultimately irrelevant to the determination of the jurisdictional issue.

7. Alternatively, if the Tribunal determines that these discussions are admissible, it is clear that they do not give rise to any breach of procedural fairness as the Applicant alleges. Indeed, the evidence will show that the Applicant was provided notice of the Superintendent's intention to include the Credited Service Issue in the NOID and provided an opportunity to provide its position on that issue which the Applicant exercised.

II. FACTS

8. For the purposes of the jurisdiction motion and subject to the clarifications below, the Superintendent generally agrees with the facts set out in paragraphs 5 to 10 of the Applicant's Submissions.

9. In respect of paragraph 7, production at the Chatham facility actually ceased on June 30, 2009 although notification that the closure would be permanent was provided to the Canadian Auto Workers and its Locals 35 and 127 (the "CAW") on July 28, 2011.²

10. In respect of paragraph 8, the Credited Service Issue, as defined for the purposes of this hearing, is not limited to members on lay off and extends to members on sick leave.³

11. In respect of paragraph 9, the submissions provided to the Superintendent specifically addressed the Credited Service Issue. Prior to the commencement of the without prejudice discussions, the Applicant addressed the Credited Service Issue in two separate sets of submissions dated March 23, 2012 and April 20, 2012.⁴

² Agreed Statement of Facts ("ASF"), paragraphs 9 and 11.

³ Pre-Hearing Conference Memorandum (Pre-Hearing Conference held on June 20, 2013), paragraph 7(b).

⁴ ASF, paragraph 14; Letter dated March 23, 2012 from Bruce Dobie to Dave Gordon, page 5, Agreed Book of Documents ("ABD"), Tab 5; Letter dated April 20, 2012 from Bruce Dobie to Dave Gordon, page 3, ABD, Tab 7.

12. In respect of paragraph 10, the meetings held with the Deputy Superintendent, Pensions and his staff were held specifically at the request of the parties. In correspondence dated June 21, 2013, both the Applicant and the CAW requested that the meetings be held "on a without prejudice basis" to, in the words of the Applicant, permit "a more fulsome discussion" and, in the words of the CAW, "to attempt to resolve the outstanding matters."⁵

13. The Superintendent objects to the facts set out in paragraphs 11 to 16 of the Applicant's Submissions because those facts relate to without prejudice discussions and are privileged. The facts are also irrelevant. Alternatively, if the Tribunal determines that the evidence (*viva voce* evidence and documents) relating to the facts set out in these paragraphs is admissible then the Superintendent does not agree that the facts as set out by the Applicant are accurate. The Superintendent submits that the evidence will disclose that there was no breach of procedural fairness in terms of how the Credited Service Issue was dealt with. Specifically, the Superintendent provided notice of his intention to deal with the Credited Service Issue in the NOID and the Applicant had ample opportunity to make submissions on the issue an opportunity the Applicant exercised.

⁵ Letter dated June 21, 2012 from Bruce Dobie to Dave Gordon, ABD, Tab 8; Letter dated June 21, 2012 from Ken Lewenza to Dave Gordon, ABD, Tab 9.

III. ISSUES

14. The parties agreed that the following issue needs to be determined in this motion:

Does the Superintendent have the jurisdiction to rule on the applicability of the 0.9 banked pensionable service credit under section 7.03(b)(ii) of the Plan?⁶

The Superintendent submits that both the Tribunal and the Superintendent have the jurisdiction to rule on the Credited Service Issue. This jurisdiction stems from section 87 of the *PBA* and there is no express or implied limitation against including intended relief under section 87 with an intended order dealing with wind up issues. Further, assuming that the Tribunal rules that the evidence relating to the Applicant's allegations of a breach of procedural fairness is admissible, the Superintendent submits that that evidence will disclose that no breach of procedural fairness has occurred and that there is no basis to support the Applicant's contention that the Superintendent lost jurisdiction as a result of the alleged breaches.

⁶ Pre-Hearing Conference Memorandum (Pre-Hearing Conference held on June 20, 2013), paragraph 7(a).

IV. ARGUMENT

Jurisdiction of the Superintendent

15. The Applicant argues that the Superintendent and the Tribunal do not have jurisdiction to rule on Credited Service Issues at this time because there has been no determination made regarding the wind up. The Applicant argues that this jurisdiction is not engaged until the wind up has been ordered and a wind up report is prepared for the Superintendent's approval under sections 70(4), (5) and 77.4(1) of the PBA.

16. While the Applicant may have described the usual mechanics surrounding the ordering of a wind up and the preparation and approval of a wind up report, those mechanics do not define the scope of the Superintendent's jurisdiction under the *PBA*. Specifically, as stated in the NOID, the Superintendent has jurisdiction under section 87 to rule on the Credited Service Issue. Section 87 states:

Order by Superintendent

87. (1) The Superintendent, in the circumstances mentioned in subsection (2) and subject to section 89 (hearing and appeal), by a written order **may require an administrator or any other person to take or to refrain from taking any action in respect of a pension plan or a pension fund.**

Condition precedent to order

(2) The Superintendent may make an order under this section if the **Superintendent is of the opinion, upon reasonable and probable grounds,**

(a) that the pension plan or pension fund is not being administered in accordance with this Act, the regulations or the pension plan;

(b) that the pension plan does not comply with this Act and the regulations; or

(c) that the administrator of the pension plan, the employer or the other person is contravening a requirement of this Act or the regulations.

Time

(3) In an order under this section, the Superintendent may specify the time or times when or the period or periods of time within which the person to whom the order is directed must comply with the order.

Reasons for order

(4) An order under this section is not effective unless the reasons for the order are set out in the order (emphasis added).

17. Section 87 allows the Superintendent to issue an order requiring any person to “take or to refrain from taking any action” where “the Superintendent is of the opinion, upon reasonable and probable grounds that the pension plan ... is not being administered in accordance with ... the pension plan.” In this case, Navistar has been clear that its long standing practice is that members are only entitled to the 0.9 years of credited service under section 7.03(b)(ii) if and when they return to work after lay off or sick leave.⁷ Also, Navistar has been clear as to its intention to continue to apply its practice in the context of calculating wind up entitlements in the wind up report. The Superintendent is of the opinion that this practice is inconsistent with the terms of the Plan. Accordingly, the threshold for issuing an order under section 87(2)(a) (that the Plan is not being administered in accordance with its terms) has been met.

⁷ Letter dated March 23, 2012 from Bruce Dobie to Dave Gordon, page 5, ABD, Tab 5; Letter dated April 20, 2012 from Bruce Dobie to Dave Gordon, page 3, ABD, Tab 7.

18. Further, section 19(3) of the *PBA* requires that a pension plan be administered in accordance with the filed documents including the pension plan text (except where the plan text does not comply with the *PBA*). Consequently, a failure to administer a pension plan in accordance with the pension plan text constitutes a contravention of the *PBA*. Therefore, a failure to administer a pension plan in accordance with the terms of the pension plan text (as is alleged in this case) also gives rise to grounds to issue an order under section 87(2)(c). On this basis, the Superintendent clearly has jurisdiction to address the Credited Service Issue under section 87 of the *PBA*.

19. Further, there is no express or implied limitation in the *PBA* against combining an intended order under section 87 with an intended wind up order.

20. In this case, it makes practical sense to deal with the Credited Service Issue at this stage. The Applicant has conceded that a wind up is necessary. Its objection is limited to the scope of that wind up and whether or not it covers members who were terminated between June 30, 2009 to July 28, 2011.⁸ Consequently, a wind up report will have to be prepared either way and the Credited Service Issue will have to be resolved in order to finalize it. It cannot be avoided. This fact distinguishes this case from the more general situation covered by the FSCO Policy W100-102 where it is not clear if a wind up report will be required until a wind up has been ordered or declared.

⁸ Pre-Hearing Conference Memorandum (Pre-Hearing Conference held on June 20, 2013), paragraph 7(c).

21. Indeed, the issues, as framed in the NOID, encompass all issues arising out of the closure of the Applicant's Chatham facility. The resolution of the Credited Service Issue will affect benefit entitlements as reflected in the partial wind up report and, therefore, the resolution of the Credited Service Issue (as with all issues dealt with in the NOID) will be necessary to draft the wind up report.

22. The consequence of the Applicant's position, if it is accepted, would be that the current hearing would be limited to the remaining issues. Whatever the Tribunal's decision on those issues, the next step would be for Navistar to draft the wind up report which would, no doubt, be prepared on the basis of Navistar's view of the Credited Service Issue. This would trigger another NOID and another hearing before the Tribunal to determine the Credited Service Issue. If the Superintendent's position on the Credited Service Issue prevailed, the wind up report would have to be significantly revised. It is difficult to see how such a process affords any greater level of fairness to Navistar. It does, on the other hand, make the resolution of the issues more complicated, costly and will delay the ultimate determination and payment of wind up entitlements to the members to their detriment.

23. Finally, it is important to note a fundamental inconsistency in the Applicants' position. The NOID also identified relief in respect of the payment of certain special early retirement under section 1.03 of the Plan. Like the Credited Service Issue, this relief relates to benefits which would be payable on wind up

and otherwise. As a result, all of the Applicant's arguments respecting prematurity could also have been raised in respect of the special early retirement benefit issues but those issues have been identified for resolution in this hearing⁹ and the Applicant has raised no jurisdictional objection in respect of those issues. The Applicant has offered no explanation in respect of this inconsistency in its position.

Jurisdiction of the Tribunal

24. The Applicant's arguments are largely focussed on the assertion that the Superintendent did not have the jurisdiction to "decide" the Credited Service Issue in the NOID. The Applicant has not clearly articulated the extent to which its objection also applies to the jurisdiction of the Tribunal. Indeed, the mere fact that an issue does not appear in a NOID does not foreclose the possibility of the Tribunal deciding, nonetheless, to hear the issue.¹⁰ Certainly it is not clear how or why the alleged breaches of procedural fairness by the Superintendent, if they occurred (which the Superintendent denies), would operate to limit the jurisdiction of the Tribunal.

25. What is clear is that the jurisdiction of the Tribunal is defined by section 89(9) of the *PBA* which states:

(9) At or after the hearing, the Tribunal by order may direct the Superintendent to make or refrain from making the intended

⁹ Pre-Hearing Conference Memorandum (Pre-Hearing Conference held on June 20, 2013), paragraph 7(d) and (e).

¹⁰ *Imperial Oil Limited v. Superintendent of Financial Services*, Decision Number P0346-2009-2; *CBS Canada Co. v. Superintendent of Financial Services*, Decision Number P0164-2001-1.

decision indicated in the notice and to take such action as the Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

Accordingly, the Tribunal's powers are not limited to directing the Superintendent to carry out or refrain from carrying out the intended decision but extend to directing the Superintendent "to take such action as the Tribunal considers the Superintendent ought to take in accordance with" the *PBA*. Accordingly, the Tribunal's jurisdiction goes at least as far as the Superintendent's jurisdiction as is outlined above and encompasses the authority to consider and decide the Credited Service Issue.

Statements Made During the Without Prejudice Meetings are not Admissible

26. The Applicant attempts to rely on alleged statements concerning the jurisdiction of the Superintendent which the Applicant alleges the former Deputy Superintendent, Pensions made during the course of without prejudice meetings convened in response to the parties' request dated June 21, 2012. The Superintendent submits that any communications made during the course of these meetings (including the alleged statements relating to jurisdiction) are not admissible because such statements are covered by settlement privilege and they are irrelevant to the determination of the jurisdiction of the Superintendent and Tribunal. The Superintendent, therefore, objects to the introduction of the anticipated *viva voce* evidence to be called by the Applicant in addition to the documents at tabs 10 to 24 of the Agreed Book of Documents.

Settlement Privilege

27. In its recent decision in *Sable Offshore Energy Inc. v. Ameron International Corp.*,¹¹ the Supreme Court of Canada affirmed the importance of settlement privilege. Its importance arises out of the fact that the promotion of voluntary settlement is crucial to the efficient functioning of the justice system. According to the Supreme Court of Canada, settlement privilege promotes settlement because it “wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.”¹²

28. Settlement privilege is a class. Consequently, there is a presumption of inadmissibility unless the party seeking to rely on the without prejudice statement can establish that a competing public interest favouring disclosure outweighs the substantial public interest in promoting settlement.¹³

29. Countervailing interests justifying disclosure have been found to include misrepresentation, fraud or undue influence and the prevention of overcompensation.¹⁴ None of these exceptions apply in this case.

30. The Applicant argues that settlement privilege does not attach to the alleged comments by the Deputy Superintendent, Pensions because those

¹¹ [2013] S.C.J. No. 37.

¹² *Ibid*, paragraphs 1 and 2.

¹³ *Ibid*, paragraphs 12 and 19.

¹⁴ *Ibid*, paragraph 19.

comments are in respect of the adjudication of matters before the Deputy Superintendent, Pensions and because the alleged comments gave rise to a breach of procedural fairness.

31. This argument should be rejected for several reasons. First, there is simply no evidence that the without prejudice meetings were adjudicative in nature. Indeed, the characterization of the nature of the meetings as being “on a without prejudice basis” by the parties is completely contrary to that characterization. Second, as set out more fully below, the *PBA* does not require nor even provide for any sort of formal hearing or adjudicative process before the Superintendent. Indeed the process culminates in a mere proposed or intended decision which does not have force until affirmed by the Tribunal after a full opportunity for a *de novo* hearing. Third, consistent with the Superintendent’s general practice and procedural fairness requirements,¹⁵ the parties’ formal positions were provided by way of written submissions on all issues (including the Credited Service Issue) which submissions formed the basis of the intended decision set out in the NOID. Accordingly, the discussions before the Superintendent are properly characterized as being outside of any adjudicative function but fall within the veil of confidentiality which applies to settlement discussions.

¹⁵ *Consumers Packaging Inc. v. Superintendent of Financial Services*, FST Decision No. P0162-2001-2 at page 15; *Edmonton Police Assn v. Edmonton*, 2007 ABCA 184 at paragraphs 6 and 13 to 16; Sara Blake, *Administrative Law in Canada*, 5th ed.(Toronto: LexisNexis Canada Inc. 2011) at 12.

32. The Applicant's position, if accepted by the Tribunal, gives rise to larger policy and systemic concerns. It would effectively preclude any possibility of any settlement discussions occurring with the involvement of the Superintendent or his staff. If discussions which are held expressly on a without prejudice basis are not shielded from future litigation it is hard to see why any party would be prepared to enter into settlement discussions for fear that they may be labelled "adjudicative". The important public policy in fostering settlements would suffer as a result. Indeed, even the prospect of informal but candid discussions at the Superintendent stage (which should be fostered by the regulatory structure which places the formal hearing process at the Tribunal stage) will be significantly curtailed. Such a result would be damaging to the regulatory process because such discussions are often a fruitful way of resolving complex regulatory issues and disputes.

The Alleged Statements are Not Relevant

33. It is trite to state that the jurisdiction of the Superintendent is determined by the applicable statutory provisions of the *PBA*.¹⁶ The Deputy Superintendent cannot limit that jurisdiction through his comments or statements any more than he can expand his jurisdiction by merely saying so.

34. This assertion takes on even more force when one recalls that it is the Tribunal which is tasked, in this motion, with determining the scope of the

¹⁶ *Dunsmuir v. New Brunswick* [2008] SCJ No.9 at paragraph 29; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities)* [2006] SCJ No. 4 at paragraph 35.

Superintendent's jurisdiction and, indeed, its own jurisdiction. Under section 89(9), the Tribunal has the power to direct the Superintendent in respect of the intended decision and can direct the Superintendent to take appropriate action in accordance with the *PBA*. In this sense, the Tribunal's function is supervisory.¹⁷ Alleged comments of the Deputy Superintendent made during the course of informal without prejudice discussions cannot bind the Tribunal operating in this capacity. The Tribunal's decision concerning the scope of the Superintendent's and the Tribunal's jurisdiction is to be determined on the basis of the applicable statutory provisions and not on the basis of the Deputy Superintendent's informal comments. As a result, any alleged comments about jurisdiction are irrelevant. Therefore, those comments are irrelevant.

There is No Breach of Procedural Fairness

35. Alternatively, if the Tribunal determines that the evidence concerning the contents of the without prejudice discussions is admissible the Superintendent submits that the evidence does not disclose a breach of procedural fairness.

36. It is anticipated that the evidence will disclose that, at most, that the Deputy Superintendent, Pensions expressed concerns about dealing with the Credited Service Issue in a NOID prior to the filing of a wind up report. However, notice of the Superintendent's intention to deal with the issue in the NOID was provided and the Applicant was afforded full opportunity to make submissions on the issue which opportunity the Applicant exercised. There is no reasonable

¹⁷ *Baxter v. National Steel Car* [2004] O.J. No. 4909 at page 9, paragraph 25.

basis on the record for the Applicant to draw the conclusion that the Superintendent did not intend to deal with the Credited Service Issue in the NOID and no basis for the Applicant to "not put in its case" on the Credited Service Issue.

37. Further, the claim of breach of procedural fairness needs to be assessed in the context of the nature of the process before the Superintendent. The Applicant erroneously refers to this process as encompassing a "decision" or "adjudication" by the Superintendent. In reality, the process before the Superintendent only results in an intended or proposed decision which is not binding on any party until an opportunity for a full hearing *de novo* before the Tribunal is provided.¹⁸ At the Tribunal hearing, a party has the full right to lead any admissible evidence and advance any relevant legal arguments to support its position. Accordingly, even if the Applicant can establish that it did not "put in its case" before the Superintendent because of the Deputy Superintendent's alleged comments (which the Superintendent denies) the Applicant retains the full right to do so in front of the Tribunal during the course of this hearing and no unfairness results.

¹⁸ *Consumers Packaging Inc. v. Superintendent of Financial Services*, FST Decision No. P0162-2001-2 at page 14.

V. REMEDY REQUESTED

38. For the reasons set out above, the Superintendent requests that the motion be dismissed and that the Tribunal confirm that it has the jurisdiction to deal with the Credited Service Issue in this hearing

Dated at Toronto, Ontario, this 27th day of September, 2013.



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Services