

FINANCIAL SERVICES TRIBUNAL

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

AND IN THE MATTER OF a Notice of Intended Decision of the Superintendent of Financial Services 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.

**SUBMISSIONS OF THE APPELLANT, NAVISTAR CANADA INC.
ON JURISDICTION**

PART I – OVERVIEW

1. On this preliminary motion Navistar seeks a declaration that the Acting Deputy Superintendent exceeded his jurisdiction on an application for partial plan wind up. Specifically, the Acting Deputy Superintendent found that former employees of Navistar were entitled to bank credited service for the period between the expiry of the collective agreement between Navistar and the employees’ union and the effective date of partial wind up of the pension plan. This decision was, at best, premature under the regulatory regime established by the Pension Benefits Act as it was made before Navistar prepared and submitted its partial plan wind up report. The Acting Deputy Superintendent had no express or implied statutory jurisdiction to make the decision at the stage when he made it. The Acting Deputy Superintendent also erroneously awarded credited service to former employees who had terminated employment before the expiry of the collective agreement. The Acting Deputy Superintendent had no jurisdiction to do so. The

declaration sought by Navistar should be granted and the decision in respect of credited service should be set aside.

2. Even if the Acting Deputy Superintendent did have jurisdiction to make a decision on credited service when he made it, which Navistar denies, such a decision constitutes a breach of procedural fairness in the circumstances of this case. The Deputy Superintendent (who preceded the Acting Deputy Superintendent in hearing the matter) advised the parties that he did not intend to make an order on the matter of credited service, as it would be more properly dealt with in the wind up report. By so advising the parties, the Deputy Superintendent lost any jurisdiction he had to rule on credited service in his decision. As a result of the Deputy Superintendent's assurances that the credited service issue would not be decided, Navistar did not make full submissions on its case on the credited service issue. In deciding the issue of credited service without hearing Navistar's case, the Acting Deputy Superintendent deprived Navistar of its right to be heard. This was a fundamental breach of procedural fairness.

3. Navistar expects that one or both of the respondents will argue that evidence on what the Deputy Superintendent said to the parties about his ability to decide the credited service issue is inadmissible because those statements were made in the context of settlement discussions and, as such, are covered by settlement privilege. The Deputy Superintendent's statements regarding his jurisdiction to decide the credited service issue are not covered by settlement privilege and, even if they are, they are necessary for the proper disposition of this proceeding and privilege should consequently be waived.

PART II – FACTS

4. Navistar’s submissions are limited to only those facts that are relevant to the issues of jurisdiction, procedural fairness and settlement privilege raised by this motion and addressed in the above overview. Those facts are set out below.

The Plan

5. Navistar Canada Inc. (“Navistar”) sponsors the Navistar Canada Inc. Non-Contributory Retirement Plan (the “Plan”). The Plan is a defined benefit pension plan.

Agreed Statement of Facts – Jurisdiction Motion, para. 3

6. Article 7 of the Plan is entitled “Credited Service”, and sets out certain terms and conditions on the applicability of credited service during times of employee layoff.

Non-contributory Retirement Plan Agreement, Agreed Book of Documents – Jurisdiction Motion, Tab 1, p. 38

7. Active employees of Navistar who were members of the Canadian Auto Workers union Locals 35 and 127 (“CAW”) were laid off between June 30, 2009 and July 28, 2011, at which point operations at Navistar’s Chatham facility closed permanently.

Agreed Statement of Facts – Jurisdiction Motion, paras. 2, 11

The Deputy Superintendent and credited service

8. One of the outstanding issues between the parties during closure negotiations was whether or not bank credited service applied during the time of layoff prior to closure.

Letter from of Navistar to FSCO dated March 23, 2012, Agreed Book of Documents – Jurisdiction Motion, Tab 5, p. 5

Letter from CAW-Canada to FSCO dated April 5, 2012, Agreed Book of Documents – Jurisdiction Motion, Tab 6, p. 5

9. Commencing in 2012, Navistar and the CAW submitted a number of letters to the Deputy Superintendent of Financial Services (the “Deputy Superintendent”) regarding a potential partial wind-up of the Plan.

Agreed Statement of Facts – Jurisdiction Motion, para. 14

10. Navistar and the CAW met with the Deputy Superintendent on July 16, 2012 (the “July Meeting”), September 7, 2012 (the “September Meeting”) and February 19, 2013 (the “February Meeting”).

Agreed Statement of Facts – Jurisdiction Motion, para. 15

11. At the July Meeting, the Deputy Superintendent said he was “stumped” on the issue of credited service.

FSCO Meeting notes of Catherine Day, Agreed Book of Documents – Jurisdiction Motion, Tab 12, p. 8

Meeting notes of Henry Van Vroenhoven dated July 16, 2012, Agreed Book of Documents – Jurisdiction Motion, Tab 11, p. 8

12. At the September Meeting, the Deputy Superintendent said that credited service was a matter of “plan interpretation” and that “we will need a partial wind up report to deal with this issue.”

Summary of meeting held on September 7, 2012, Agreed Book of Documents – Jurisdiction Motion, Tab 16, p. 2

Meeting notes of Henry Van Vroenhoven dated September 7, 2012, Agreed Book of Documents – Jurisdiction Motion, Tab 19, pp. 6, 8

Meeting notes of Bob Chernecki dated September 7, 2012, Agreed Book of Documents – Jurisdiction Motion, Tab 18, p. 9

FSCO Meeting notes of Catherine Day for September 7, 2012, Agreed Book of Documents – Jurisdiction Motion, Tab 12, p. 14

13. At the February Meeting, the Deputy Superintendent asked for the “unequivocal positions” of the parties. The Deputy Superintendent’s meeting notes for the February Meeting include a note stating “roll all into one NOID → 4 issues”.

Meeting notes of the Deputy Superintendent dated February 19, 2013, Agreed Book of Documents – Jurisdiction Motion, Tab 20, p. 3

14. In response to the Deputy Superintendent’s request for Navistar’s unequivocal position, Navistar outlined its positions on what it considered to be the live issues before the Deputy Superintendent and reiterated its submissions on credited service, namely, that the Deputy Superintendent did not have jurisdiction over the issue.

Navistar letter to FSCO dated February 28, 2013, Agreed Book of Documents – Jurisdiction Motion, Tab 23, p. 2

15. Henry Van Vroenhoven, who was Labour Relations Manager until November 1, 2011 and the Manager, Human Resources-Employee Relations of Navistar thereafter, was present at all meetings referred to above. Mr. Van Vroenhoven recalls the Deputy Superintendent indicating that he did not intend to rule on the issue of credited service for lack of jurisdiction. Mr. Van Vroenhoven consequently believed that the issue of credited service would not be dealt with in the Notice of Intended Decision.

Witness Statement of Henry Van Vroenhoven dated July 26, 2013, Brief of Witness Statements – Jurisdiction Motion, Tab 2, paras. 18-19

16. Barry Morris, who was the Director, Labour Relations of Navistar at all material times, was present at all meetings referred to above. Mr. Morris’ understanding was that the Deputy Superintendent did not believe he could include a ruling on credited service in the Notice of

Intended Decision. Mr. Morris consequently believed that the issue of credited service would not be dealt with in the Notice of Intended Decision.

Witness Statement of Barry Morris dated July 26, 2013, Brief of Witness Statements – Jurisdiction Motion, Tab 1, paras. 15-16

17. On March 6, 2013, the Deputy Superintendent retired.

Witness Statement of K. David Gordon, Brief of Witness Statements – Jurisdiction Motion, Tab 3, para. 1

18. On March 7, 2013, the Acting Deputy Superintendent issued a Notice of Intended Decision (“NOID”) regarding the partial wind up of the Plan which included a full ruling on the merits and applicability of the credited service provisions of the Plan to all former employees, including those former employees who had terminated employment before the expiry of the collective agreement.

Notice of Intended Decision, Agreed Book of Documents – Jurisdiction Motion, Tab 25, paras. 43-48

PART III – LAW & ARGUMENT

19. This motion raises three issues: the Acting Deputy Superintendent’s jurisdiction to rule on credited service in the NOID, whether the Deputy Superintendent lost any jurisdiction he may have had to rule on credited service by advising Navistar that he would not do so, and whether the statements of the Deputy Superintendent regarding credited service are covered by settlement privilege and inadmissible.

20. For the reasons below, Navistar submits that the deputy Superintendent did not have jurisdiction to rule on credited service; even if he did have such jurisdiction, he lost it when he advised that he would not make such a ruling; and his statements to that effect are admissible.

Issue 1: No jurisdiction re: credited service on application for partial plan wind up

Jurisdiction on an application for partial wind up

21. On an application for partial windup under section 77.3 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the “PBA”), the Superintendent, or his or her delegate, by order may require the partial wind up of a pension plan. The scope of the Superintendent’s authority under section 77.3 is to determine whether circumstances exist to order a partial wind up and, if they do, to determine the effective date of the partial wind up.

PBA ss. 70, 77.3, 77.4, Schedule B

Jurisdiction on an application to approve a partial plan wind up report

22. Once a NOID is issued regarding a partial plan windup and, if appropriate, determining the effective date of the wind up, then the pension plan administrator is required to prepare a partial plan wind up report in accordance with the requirements of the PBA, regulations under the PBA and FSCO policy guidelines.

PBA ss. 70, 77.3, 77.4, Schedule B

FSCO Policy W100-102, Schedule C, p. 3

23. The Superintendent will then review the partial plan wind up report to ensure it complies with the requirements of the PBA, regulations made under the PBA and FSCO policy guidelines. At that stage—and not before—the Superintendent is specifically empowered to refuse to approve a wind up report that, in the view of the Superintendent, does not meet the requirements of the PBA and regulations made under the PBA, or that does not protect the interests of the members, former members, retired members and other persons entitled to benefits under the pension plan.

PBA s. 70(5), Schedule B

FSCO Policy W100-102, p. 3, Schedule C

Acting Deputy Superintendent exceeded his express statutory jurisdiction

24. Section 77.3 of the PBA does not expressly confer authority upon the Superintendent to deal with the issue of credited service in the context of a partial plan wind up, and certainly not before a partial plan wind up report has been submitted. While the Superintendent has jurisdiction to consider whether the interests of Plan members are sufficiently protected by a partial plan wind up report, the Superintendent cannot do so before such a report is issued. The Acting Deputy Superintendent did not have jurisdiction to deal with credited service on an application for partial windup under section 77.3 of the PBA. The credited service decision was made before any partial plan wind up report had been submitted and was, at best, premature.

PBA ss. 70(5), 77.3, 77.4, Schedule B

Acting Deputy Superintendent had no implied statutory jurisdiction

25. A statutory body may enjoy implied statutory powers that are not expressly conferred upon it. However, this will only be the case where those implied statutory powers are required as a matter of practical necessity for the tribunal to accomplish its statutory purpose.

Ontario v. 974649 Ontario Inc. (2001), 206 D.L.R. (4th) 444, 47 C.R. (5th) 316, [2001] 3 S.C.R. 575 (S.C.C.) at paras. 70-71, Book of Authorities of Navistar Canada Inc. (“Authorities”), Tab 1, referring to *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 (S.C.C.), Authorities, Tab 2

26. The Acting Deputy Superintendent was not required, as a matter of practical necessity, to deal with credited service in order to grant or refuse an order for the partial wind up of the Plan, which was the Acting Deputy Superintendent’s statutory purpose in the circumstances of an application for partial wind up under section 77.3 of the PBA. As a result, the Acting Deputy

Superintendent had no implied statutory authority to make an order in respect of credited service in an application for partial wind up of the Plan.

Acting Deputy Superintendent had no jurisdiction on credited service

27. The Acting Deputy Superintendent made the decision on credited service in the absence of any express or implied statutory authority to do so and, consequently, did so without jurisdiction.

28. Navistar should therefore be granted a declaration that the Acting Deputy Superintendent did not have jurisdiction to decide, as he did, that former employees of Navistar were entitled to bank credited service for the period between the expiry of the collective agreement between Navistar and the employees' union and the effective date of partial wind up of the pension plan. Navistar should also be granted a declaration that the Acting Deputy Superintendent did not have jurisdiction to decide, as he did, that former employees who had terminated employment before the expiry of the collective agreement should be awarded credited service.

Issue 2: Jurisdiction lost through breach of procedural fairness

29. Administrative bodies are under a legal duty to afford interested persons a fair opportunity to participate in the decision-making process before any action is taken that is detrimental to their interests.

Nicholson v. Haldimand-Norfolk (Regional Municipality)
Commissioners of Police, [1979] 1 S.C.R. 311, Authorities, Tab 3

30. At common law, administrative bodies are bound by the "the duty of fairness". "The right to be heard" has traditionally been identified as a key element of the duty to be fair.

Donald J.M. Brown. John M. Evans, *Judicial Review of Administrative Action in Canada* (Looseleaf), DJMB Publishing Inc.: Toronto, 1998 at 7:1610, Authorities, Tab 4

31. A decision of a preliminary nature will not in general trigger the duty to act fairly unless in circumstances where any prejudice could be suffered by a party. The importance of the decision to the parties affected by it is to be weighed in determining the content of the duty of fairness. The more impactful the decision to those affected, the more stringent the procedural protections required.

Vatanabadi v. Canada (Minister of Employment & Immigration)
1993, 19 Imm. L.R. (2d) 157, [1993] 2 F.C. 492 at para. 19,
Authorities, Tab 5

Baker v. Canada (Minister of Citizenship and Immigration) (1999),
174 D.L.R. (4th) 193 (SCC) at para. 25, Authorities, Tab 6

32. Administrative decisions on the issue of employee benefits give rise to greater procedural protections.

Edmonton Police Association v. Edmonton (City), 2007 ABCA 184
at para 8, Authorities, Tab 7

33. A decision-maker will generally lose its jurisdiction if, in taking an action or making a decision, it breaches the rules of procedural fairness. The right to be heard requires a decision-maker to give “a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial in their views”.

Kane v. University of British Columbia (1980), 18 B.C.L.R. 124,
[1980] 1 S.C.R. 1105 at para. 32, Authorities, Tab 8, quoting *Bd. of
Education v. Rice*, [1911] A.C. 179 at 182 (H.L.), Authorities, Tab 9

34. The Deputy Superintendent advised Navistar that he would not be making a decision on credited service and, in doing so, lost any jurisdiction in respect of the issue of credited service. The Acting Deputy Superintendent’s decision on credited service had a material impact on Navistar. The issue of credited service involves an alleged employee benefit and must warrant a greater duty of procedural fairness. As a result of the Deputy Superintendent’s assurances that the

credited service issue would not be decided, Navistar did not put in its case on the credited service issue. In deciding the issue of credited service without hearing Navistar's case, the Acting Deputy Superintendent deprived Navistar of its right to be heard. This was a fundamental breach of procedural fairness.

Summary of meeting held on September 7, 2012, Agreed Book of Documents – Jurisdiction Motion, Tab 16, p. 2

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Edmonton Police Association v. Edmonton (City), 2007 ABCA 184 at para 8, Authorities, Tab 7

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Issue 3: Waiver of privilege and confidentiality

35. The Deputy Superintendent indicated that he did not intend to rule on the issue of credited service. This was a statement in respect of the scope of the issues properly before him. Statements by an adjudicator in respect of the scope of the issues properly before that adjudicator are, on their face, not privileged, because they are in respect of the adjudication of the matters before the adjudicator.

36. Even if the adjudicator's statements and notes related to those statements were made in the context of a settlement discussion to which settlement privilege might attach, any privilege is not absolute. It is subject to exceptions. One of these exceptions is where documents covered by settlement privilege are necessary for the proper disposition of a proceeding.

Ontario (Ministry of Correctional Services) v. McKinnon (2010), 190 A.C.W.S. (3d) 1194, [2010] O.J. No. 3001 (S.C.J. (Div. Ct.)) at para. 4, Authorities, Tab 10, following *Inter-Leasing Inc. v. Ontario (Minister of Finance)*, [2009] O.J. No. 4714 (Ont. Div. Ct.) at para. 11, Authorities, Tab 11

37. A party seeking to introduce in evidence material subject to settlement privilege must show that the communication is relevant and the disclosure is necessary, either to show the agreement of the parties or to address a compelling or overriding interest of justice.

Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada, [2005] B.C.J. No. 5 (B.C. C.A.) at para. 20, Authorities, Tab 12

38. Privilege can be waived expressly or by implication. Waiver may occur when fairness requires it.

Ross River Dena Council v. Canada (Attorney General of Canada), [2009] 2 C.N.L.R. 334, 67 C.P.C. (6th) (Y.T.C.A.) at paras. 51-52, Authorities, Tab 13

39. Documents must be released if they pertain to issues that are at the heart of the litigation, and if the possibility of harm arising from the release appear to be absent. The communication at issue does not have to be the “only way” to establish particular facts.

Ontario (Ministry of Correctional Services) v. McKinnon (2010), 190 A.C.W.S. (3d) 1194, [2010] O.J. No. 3001 (S.C.J. (Div. Ct.)) at para. 5, Authorities, Tab 10, following *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, [2005] B.C.J. No. 5 (B.C. C.A.), Authorities, Tab 12

40. Procedural fairness, and more specifically the right to be heard, is a compelling or overriding interest of justice. Allowing settlement privilege to frustrate Navistar’s attempt to lead evidence that it was denied procedural fairness and the right to be heard would be unfair. This issue is at the heart of this motion and no harm would result from the waiver of privilege. Fairness requires that privilege be waived.

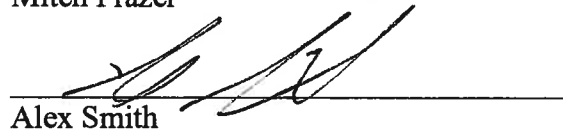
ORDER REQUESTED

41. Navistar seeks a declaration that the Acting Deputy Superintendent lacked jurisdiction to rule on the issue of credited service under the Plan and striking the credited service ruling from the NOID. In the alternative, if the Acting Deputy Superintendent is found to have had jurisdiction to rule on the issue of credited service, Navistar seeks an order that by ruling on the issue in the NOID, the Acting Deputy Superintendent breached the principles of procedural fairness, and as such the ruling should be struck from the NOID and the parties should be permitted to make submissions and lead evidence on the matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Mitch Frazer



Alex Smith

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Navistar Canada Inc.