Financial Services Tribunal

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Tribunal des services financiers

5160, rue Yonge
Boîte 85
Toronto ON M2N 6L9

Ontario

Fax/Télécopieur

Date: **November 4, 2013**

To/A:
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Unifor Legal Department

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From/De:
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MESSAGE: Re: P0521-2013
Navistar Canada Inc. Non-Contributory Retirement Plan, Reg. No. 0351684

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November 4, 2013

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Mr. Lewis Gottheil
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Toronto ON M2H 3H9 **By Fax (416) 495-3786 and Regular Mail**

Dear Counsel:

Re: FST File # P0521-2013
Navistar Canada Inc. Non-Contributory Retirement Plan, Reg. No. 0351684

Enclosed is a copy of the Reasons for Decision from the motion hearing in the above matter, heard on October 10, 2013.

Yours truly,

Vincent Laurella
Assistant Registrar

FINANCIAL SERVICES TRIBUNAL

Citation: Navistar Canada Inc. v. Ontario (Superintendent Financial Services), 2013 ONFST 13
Decision No. P0521-2013-1
Date: 2013/11/04

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

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 *Pension Benefits Act*, R.S.O. 1990, c. P.8.

B E T W E E N:

NAVISTAR CANADA INC.

APPLICANT

and

SUPERINTENDENT OF FINANCIAL SERVICES

RESPONDENT

and

UNIFOR (formerly CAW-CANADA) AND ITS LOCALS 127 AND 35

ADDED PARTY

BEFORE:

Florence A. Holden
Vice-Chair of the Tribunal and Chair of the Panel

Jeffrey Richardson
Member of the Tribunal and Member of the Panel

Jennifer Brown
Member of the Tribunal and Member of the Panel

APPEARANCES:

For the Applicant – Mitch Frazer and Alex Smith, Torys LLP
For the Superintendent of Financial Services – Mark Bailey
For the Added Party – Lewis Gottheil, Unifor

DATE HEARD:
October 10, 2013

REASONS FOR DECISION

I. INTRODUCTION

[1] This matter comes to us as a Request for Hearing filed by the Applicant, Navistar Canada Inc. ("Navistar") with respect to a Notice of Intended Decision by the Acting Deputy Superintendent, Pensions of the Financial Services Commission of Ontario dated March 7, 2013 (the "Notice"), to make certain orders in respect of the Navistar Canada Inc. Non-Contributory Retirement Plan (the "Plan"). The Notice would require Navistar to partially wind up the Plan effective July 28, 2011, and to include certain Plan members in the partial windup who ceased to be employed at Navistar's assembly plant in Chatham, Ontario after June 30, 2009, and to also include those Plan members who retired or voluntarily severed their employment with Navistar between June 30, 2009 and July 28, 2011. The Notice further required the partial Plan windup report to include the value of certain benefits under the Plan. These substantive issues will be heard and considered at a full hearing before this panel of the Financial Services Tribunal (the "Tribunal") to be held on agreed dates in December, 2013.

In advance of that hearing, the Applicant raised issues of jurisdiction that form the basis for this preliminary motion. At the pre-hearing conference of June 20, 2013, the Tribunal added the CAW-Canada and its Locals 127 and 35 as a full party and ordered that the jurisdictional issue be dealt with separately in advance of the full hearing, before a full panel. The Chair of the panel agreed to expedite its decision on the jurisdictional issue. The Tribunal rendered a brief verbal decision on the motion on October 10, 2013 with written reasons to follow.

II. ISSUES

[2] At a pre-hearing conference on June 20, 2013, the parties agreed to frame the jurisdictional issue as follows: Do the Superintendent and the Tribunal have the jurisdiction to rule on the applicability of the 0.9 years bank pensionable service credit under section 7.03(b)(iii) of the Plan (to Plan members affected by the partial wind up)?

[3] For the purpose of this motion references to the Superintendent include his delegates the Deputy Superintendent, Pensions and the Acting Deputy Superintendent, Pensions. As well, references to the 0.9 years bank pensionable service credit under section 7.03(b)(iii) of the Plan shall be referred to as "bank credited service".

[4] In its written submissions to the Tribunal, the Applicant amended the jurisdictional issue to delete any reference to the Tribunal's jurisdiction. It sought a declaration that the Acting Deputy Superintendent, Pensions acting for the Superintendent of Financial Services of Ontario ("Superintendent") lacked the jurisdiction to rule on the issue of bank credited service prior to the filing of the related partial Plan windup report by the Applicant. The Applicant further submitted that, even if the Superintendent had the jurisdiction to decide the bank credited service issue, the Superintendent lost such jurisdiction as a result of certain alleged statements made by the former Deputy Superintendent, Pensions during all-party without prejudice discussions, on the basis that his statements constituted a breach of procedural fairness. The Applicant sought a ruling from the Tribunal that evidence be admitted with respect to those without prejudice discussions as being necessary to decide the jurisdictional issue. Further the Applicant submitted in closing that under the PBA, the court not the Tribunal, claimed jurisdiction over windups initiated under section 77.3 of the PBA. The Tribunal notes that the Applicant had previously conceded the Tribunal's jurisdiction over its application for a hearing before the Tribunal and the issues raised therein under the Notice.

[5] Both the Superintendent and Unifor objected to the admissibility of evidence of the without prejudice discussions by virtue of settlement privilege. Further the Superintendent suggested that if evidence of such discussions were held admissible, it did not support a finding of breach of procedural fairness and further that those discussions are ultimately irrelevant to the issue of jurisdiction. Both the Superintendent and Unifor support the jurisdiction of the Superintendent and Tribunal with respect to the bank credited service issue.

III. DECISION

[6] Having considered the submissions of all parties and evidence before us, we dismiss Navistar's application to seek a declaration that the Acting Deputy Superintendent, Pensions lacked jurisdiction to rule on the issue of bank credit service under the Plan and to strike that ruling from the Notice. We find the Superintendent did have jurisdiction to deal with the bank credited service issue and further that such jurisdiction was not lost due to any breach of procedural fairness. In the course of the hearing, the Tribunal also found that the all-party without prejudice discussions constituted settlement discussions, and for reasons outlined below were subject to settlement privilege. The Applicant did not present us with a case to breach such settlement privilege and admit meeting notes, witness statements or hear direct testimony with respect to those settlement discussions. Lastly we confirm that the Tribunal also has jurisdiction to address the bank credited service issue at the full hearing.

IV. THE FACTS

[7] On agreement of the parties and as stipulated by the parties during the hearing, the Tribunal found the following facts relevant to this motion:

a. Navistar Canada Inc. ("Navistar") owned and operated an assembly plant located at 508 Richmond Street in Chatham, Ontario, Canada (the "Plant").

b. Some employees of Navistar who worked at the Plant were members of the Canadian Auto Workers union (the "CAW") Locals 35 and 127. The CAW subsequent to the commencement of its application for and grant of full Party status on June 20, 2013, merged with the Communications, Energy and Paperworkers Union of Canada and is now known as Unifor.

c. Navistar sponsors the Navistar Canada Inc. Non-Contributory Retirement Plan (the "Plan"), a defined benefit plan covering former employees at the Plant who are represented by the CAW, as well as CAW-represented employees employed at Navistar's Burlington, Ontario facility. The Plan is registered with the Financial Services Commission of Ontario ("FSCO"). The registration number of the Plan is 0351684. The Plan was incorporated by reference into the collective agreements.

d. The number of members of the Plan as at year end declined during the period 2008 to 2011.

e. Navistar and the CAW were parties to two separate collective agreements. The CAW and its Local 127 and Navistar were parties to a collective agreement governing hourly production workers and related skilled trades; and the CAW and its Local 35 and Navistar were parties to a collective agreement governing office and clerical workers (together, the "Collective Agreements"). The Collective Agreements expired on or about June 30, 2009 (the "Expiry Date").

f. On April 2, 2009, Navistar sent a Notice to the CAW to commence bargaining for new collective agreements. Formal negotiations between Navistar and the CAW began on May 4, 2009.

g. On June 13, 2009, the Ministry of Labour issued a 'no board' report.

h. On or about June 29, 2009, Navistar advised the CAW that Navistar did not intend to reconfigure or resume production at the Plant until new collective agreements were reached.

i. Negotiation sessions between Navistar and the CAW continued beyond the Expiry Date on November 18, 2009, December 9, 2009, February 16, 2010, August 19, 2010, September 29, 2010, January 20, 2011, March 8, 2011, May 5, 2011, and May 19, 2011. In addition, there were a significant number of phone calls and e-mails between the parties which supplemented negotiations.

j. On April 2, 2009, the Plant Manager posted a notice of indefinite layoff to all members of Local 127 and Local 35 commencing on the expiration of the Collective Agreements on June 30, 2009. No agreement was reached for new collective agreements and on June 29, 2009 all remaining Local 127 and Local 35 members at the Plant were placed on indefinite layoff. On June 28, 2011, Navistar notified the CAW that the Plant would be closed permanently (the "Closure Date").

k. Navistar and the CAW continued closure negotiations. Commencing in 2012, Navistar and the CAW each submitted a number of letters to the Deputy Superintendent of Financial Services (the "Superintendent") regarding outstanding issues related to potential partial windups of the Plan. One of these issues involved the issue of bank credited service under section 7.03(b)(iii) of the Plan and the proper administration of the Plan in the context of a windup and more generally. The Tribunal finds it unnecessary for the purpose of the application of this jurisdictional issue to make a finding on the interpretation and proper administration of section 7.03(b)(iii) at this time, as the issue will be fully addressed at the December hearing. However, we do find that the Superintendent acting through his delegates the Deputy Superintendent, Pensions and Acting Deputy Superintendent, Pensions received conflicting interpretations from Navistar and the then CAW as to the administration of that section. These conflicting interpretations were laid out in a series of letters prior to the commencement of the without prejudice discussions and reiterated after those discussions. Navistar addressed the bank credited service issue in its letters dated March 23, 2012 and April 20, 2012.

l. Meetings between the parties and the Superintendent occurred on July 16, 2012, September 7, 2012 and February 19, 2013. We find these meetings were held at the joint request of Navistar and the then CAW as evidenced in a letter from each party dated June 21, 2012. Navistar's letter says in part:

> "...there is an interest on the part of both parties to meet together with your office on a without prejudice basis to have a more fulsome discussion of these items. The parties have agreed to write to FSCO separately and request such a discussion with your office. From a Company perspective, we would also appreciate the opportunity to clarify our positions to you and answer any questions that you or your office may have."

The CAW letter stated:

> "Following a number of discussions between the CAW Canada and the corporation I advise that there is an interest on the part of both parties to meet together with your office on a without prejudice basis to attempt to bring this file to a resolution. The parties have agreed to write the Financial Services Commission of Ontario separately and to request such a discussion with your office."

The Applicant ultimately conceded at the hearing that these were settlement discussions. The Superintendent and Unifor took the position that these without prejudice discussions were settlement discussions. We find that these discussions were settlement discussions and consequently that it would be reasonable for the parties to assume that they were held with the express intent that discussions would not be disclosed if settlement failed.

m. We find that the windup issues in dispute were not settled during the settlement discussions as evidenced by subsequent correspondence from the parties.

n. At the invitation of the Superintendent at the last joint meeting of February 19, 2013, both the Applicant and the CAW sent letters to FSCO that among the other outstanding windup issues, addressed the bank credited service issue. On February 28, 2013, Navistar begins its correspondence by saying: "You have asked us for our unequivocal positions on the four issues discussed at our meeting on Tuesday, February 19, 2013. The issues are ...(iv) the 0.9 'bank' service issue. Please find our positions on these issues outlined in brief below." The letter goes on to say in paragraph (iv) that: "Our view is that (FSCO) does not have jurisdiction on this issue. Assuming that it is determined that FSCO does have jurisdiction over this issue, our position is as follows...."

We find that this is the first instance in evidence submitted to us in which the Applicant took the position in its correspondence that FSCO lacked jurisdiction over the bank credited service issue and gave no reason at the time for its position.

o. In its response of March 4, 2013, the CAW confirmed its earlier submissions, and also "the agreement of the parties that ***your office may consider and determine at the same time all of the issues enumerated in the correspondence from counsel for the company dated February (2)8, 2013"*** (emphasis ours). Based on our interpretation of this correspondence and that of Navistar sent on February 28, 2013, we find that as of February 19, 2013, FSCO asked for and received further final submissions from the parties on all of the outstanding issues including the bank credited service issue. It seems reasonable for us to conclude that FSCO had not, as of the February 19, 2013 date, come to a final resolution of its position on bank credited service but intended to deal with all of the outstanding windup issues. Our finding was not disputed by any of the parties. It is equally reasonable and consistent in our view that a request for "unequivocal" submissions from FSCO as noted in Navistar's letter to FSCO of February 28, 2013 was a signal that the Superintendent intended to deal with all of the outstanding issues in the Notice including the bank credited service issue.

p. On March 7, 2013, the Acting Deputy Superintendent, Pensions through delegated authority from the Superintendent issued a Notice that, in part, proposed that Navistar include the bank pensionable credited service in determining the pension benefit or commuted value of the pension benefit of affected members under the partial windup who were on layoff or Company approved sick leave at the effective date of the windup if they met eligibility requirements, whether or not the member returned to work. Based on Navistar's submissions to it, the Superintendent had concluded that section 7.03(b)(iii) of the Plan was not being administered in accordance with the Plan provisions. Navistar had indicated that under its administrative practice, Plan members were required to physically return to active service to obtain the bank service credit. Although other reasons were or could be alleged, the Superintendent concluded that,

> "The interpretation proposed by Navistar is inconsistent with the plain wording of section 7.03(b)(iii) of the Plan. There are no words in the section that limit its scope or application to only those who return to work. The provision does not state or indicate that one of the eligibility requirements for a member to qualify for the additional accrual of credit service is that the member must return to work or that if the member does not, he or she forfeits it."

While the Tribunal is not at this time required to make a finding as to the correctness of the Superintendent's interpretation of the Plan, we do find that the Superintendent had sufficient evidence before him to conclude that under section 87 of the PBA, there were reasonable and probable grounds, that the Plan was not being administered in accordance with its terms. In fact Navistar provided those grounds to the Superintendent in its description of administrative practice and its intention to continue to apply that practice in preparing the windup report.

V. ANALYSIS

[8] The first question is: Did the Superintendent or his or her delegate have jurisdiction to issue the Notice and include the bank credited service issue? We will deal with the Tribunal's jurisdiction separately.

[9] The Notice in respect of the bank credited service issue was issued under section 87 of the PBA.

[10] We believe it would be helpful to first set out the relevant sections of the PBA under consideration.

[11] Section 77.3(1) states in part:

> "**Order by Superintendent for partial wind up**
> 77.3 (1) The Superintendent by order may require the partial windup of a pension plan,
>
> (a) if a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;
>
> (b) if all or a significant portion of the business carried on by the employer at a specific location is discontinued;..."

[12] Section 87 currently 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.

(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 the 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.

(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.

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

[13] Section 89(2) of the PBA states:

"**Notice of intention re various orders**
89. (2) If the Superintendent intends to make or refuse to make any of the following orders, the Superintendent shall serve notice of the intended decision, together with written reasons for it, on the administrator of the pension plan and on any other person to whom the intended order is to be directed:
...4. An order under section 87 (administration of a pension plan)."

[14] Subsections 89(6) through (9) state:

"**Notice requiring hearing**
(6) A notice under subsection (1), (2), (3), (3.01), (3.1), (4) or (5) shall state that the person on whom the notice is served is entitled to a hearing by the Tribunal if the person delivers to the Tribunal, within thirty days after service of the notice under that subsection, notice in writing requiring a hearing, and the person may so require such a hearing.

Powers of Superintendent
(7) Where the person on whom the notice is served does not require a hearing in accordance with subsection (6), the Superintendent may make the intended decision indicated in the notice.

> **Hearing**
> (8) Where the person requires a hearing by the Tribunal in accordance with subsection (6), the Tribunal shall appoint a time for and hold the hearing.
>
> **Powers of Tribunal**
> (9) At or after the hearing, the Tribunal by order may direct the Superintendent to make or refrain from making the intended decision indicated in the notice and to take such action as the Tribunal considers the Superintendent ought to take in accordance with the Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent."

[15] The PBA sets out a straightforward process: notice of an intended decision by the Superintendent with a right to a hearing before the Tribunal. If no hearing is elected the Superintendent may make the intended decision in the notice. If a hearing is elected, then the Tribunal may affirm or substitute its opinion for the Superintendent after the hearing. This practice appears to us to be generally understood by participants in the pension regulatory scheme. In fact the Applicant followed this process in order to appear before the Tribunal.

[16] The Applicant submits that the Notice was at best, premature under the regulatory regime established by the PBA as it was made before Navistar prepared and submitted its windup report. It contends that the Superintendent had no express or implied statutory jurisdiction to make the decision at the stage when he made it. The Applicant suggested that once an application for partial plan windup is initiated under section 77.3 of the PBA, the Superintendent's jurisdiction is limited to decisions on the windup date and the windup group. Navistar suggests that "Credited service is not a matter related to the windup date or the wind up group." The Applicant argues such an order under section 87 of the PBA in respect of credited service could only be made after a windup report was filed.

[17] If one accepted the Applicant's argument, which we do not, the Superintendent as pension regulator would be unable to issue any compliance orders under the PBA once a windup process was initiated under s. 77.3, whether initiated by a plan sponsor or administrator or the Superintendent, even if faced with evidence of non-compliance with the plan terms and/or the PBA. Not surprisingly the Applicant could not direct us to any law on point or public purpose. To bind the Superintendent's hands in this way would be an unreasonable interpretation of the PBA and the Superintendent's necessarily broad regulatory powers. The Superintendent is regularly called on to deal with compliance issues involving plan interpretation whether or not they also involve a plan windup.

[18] As a practical matter, the Superintendent must consider the manner of determining windup benefits which are in part based on credited service and the determination of the affected class of members. In this case, the fact of partial windup is not in dispute. In order to finalize the windup report the credited service and class membership issues will have to be determined. The Superintendent is entitled to require that the Plan is properly administered and need not wait for the windup report to be filed to address these issues. To suggest that the process be further delayed, resulting in a second Notice and hearing, at additional cost and expense, and further

delay to plan members of the determination of their windup benefits is unacceptable to us. It is difficult to see how the Applicant's approach provides greater procedural fairness to anyone.

[19] We were also directed by the Applicant to FSCO Policy W100-102. We do not find the policy helpful. That policy simply outlines certain filing requirements and procedure to be followed on windup. It is certainly not determinative of a jurisdictional issue or law.

[20] We find that the exercise of section 87 powers is not circumscribed either explicitly or implicitly under the PBA by section 77.3 of the PBA. Section 87 powers are expressly conferred by statute and can be interpreted on its ordinary and plain meaning, to mean that the Superintendent has discretionary power to act on reasonable and probable grounds. It is not an implied power. There is no limitation under the PBA that would prevent an intended order under section 87 from being combined with an order under section 77.3, nor was the Applicant able to direct us to any case law or practice that supported his view.

[21] Section 87 does not require the Superintendent to demonstrate correctness in his interpretation of the Plan's administration before issuing a Notice. The Applicant has the right to apply for a hearing before the Tribunal in respect of the Notice and did so.

[22] Counsel for the Applicant suggests that the Ontario Legislature could not have meant for the powers under section 77.3 and section 87 to co-exist. We disagree. If his argument were to hold, the Superintendent would have to knowingly permit a potential or continuing breach of the plan terms or PBA once a windup is declared. This cannot be what the Legislature intended. Section 77.3 cannot displace section 87 in this manner. In this instance, the use of both powers is a sensible regulatory approach. The Applicant's argument serves no legal or public policy purpose in our view and would result in unnecessary delay and cost and potential injury to plan members.

[23] Further, on the facts of this case, the application of section 7.03(b)(iii) of the Plan appears to go beyond windup benefits to basic plan administration. The failure to administer an Ontario-registered pension plan and related fund in accordance with the PBA also constitutes a contravention of section 19(3) of the PBA and also gives rise to a section 87 order irrespective of windup. The Applicant made no submissions on this point.

[24] Having found on the facts above that the Superintendent had reasonable and probable grounds to suspect that the Plan was not being administered with its terms, the Superintendent and his delegates are therefore entitled to exercise his jurisdiction under section 87 of the PBA. Consequently we find that the Superintendent, acting through his delegate, had a clear and express power and jurisdiction to issue a Notice under section 87 of the PBA and to rule on the applicability of the 0.9 years bank pensionable service credit under section 7.03(b)(iii) of the Plan to Plan members.

[25] Having found such jurisdiction by the Superintendent existed, we were asked to consider whether that jurisdiction was lost as a result of alleged statements made during without prejudice discussions held between the parties on each of July 16, 2012, September 7, 2012 and February 19, 2013 which support an alleged breach of fairness. We have already found on the evidence

and admissions before us that those meetings were settlement discussions and further meet the three conditions deemed to be present for privilege to apply[1], namely that:

a. A litigious dispute must be in existence or within contemplation between Navistar and the then CAW on behalf of the Plan members;

b. The communication was made with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed as evidenced by the "without prejudice" letters of June 21, 2012; and

c. The purpose of the communication must be to attempt to effect a settlement or in the words of the CAW "to bring the file to a resolution" as evidenced by those same letters and conceded by the parties.

At the hearing we declined to waive the settlement privilege attached to those settlement discussions. Our reasons follow.

[26] Essentially the Applicant advised that because of certain alleged statements made by the Deputy Superintendent, Pensions during the settlement discussions, it understood that a decision on the bank credited service issue would be deferred. Consequently Navistar argued that there was a breach of procedural fairness, more specifically a restriction on the right to be heard, resulting from the subsequent issuance of the Notice, which should support a loss of jurisdiction. In determining this loss of jurisdiction, counsel argued that the settlement privilege should be waived and vive voce and documentary evidence of the settlement discussions be admitted.

[27] We will deal first with the privilege issue. Both the Superintendent and Unifor objected to the admissibility of evidence regarding settlement discussion. The Applicant variously submitted that the statements were not privileged or if they were should be excepted from privilege on the basis that it was necessary to establish a breach of procedural fairness and "no harm would result from the waiver of privilege. Fairness requires that privilege be waived."

[28] We find it useful to echo the Supreme Court of Canada's comments on settlement privilege in the recent case of *Sable Offshore Energy Inc. v. Ameron International Corp.* ('Sable case')[2] where Abella J. stated:

> "The purpose of settlement privilege is to promote settlement. The privilege 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."

And Abella J states further that:

> "The settlement privilege created by the 'without prejudice', rule was based on the understanding that parties will be more likely to settle if they have confidence

[1] *Inter-leasing Inc. v. Ontario (Minister of Finance)*, (2009) C.J. No. 4714, at para 10.
[2] *Sable Offshore Energy Inc. v. Ameron International Corp.* (2013) S.C.J. No. 37, para.2.

> from the outset that their negotiations will not be disclosed...What matters is the intent of the parties to settle the action. Any negotiations undertaken with this purpose are inadmissible."[3]

[29] The Applicant, who admitted through legal counsel that the discussions were settlement discussions, tried to then characterize part of those alleged discussions as having an adjudicative flavour to which privilege could not attach. No case law on point was cited. To characterize settlement discussions as being simultaneously adjudicative in nature suspends belief. We ask: How could any parties possibly have confidence in a settlement discussion in which, at any given time, an individual statement may have to subsequently be disclosed and be the subject of further dispute as to its characterization and possible litigation? The Applicant's argument if taken literally would lift the cloak of privilege in any dispute of privilege. It goes against the very purpose of settlement privilege. We accept the Superintendent's contention that it would be hard to see why any party would be willing to enter into settlement discussions for fear that they may be labelled adjudicative. It would damage the current regulatory process which relies on such candid discussions to facilitate the resolution of disputes. The important public policy in fostering settlements would suffer.

[30] This is not a case where the regulator made an adjudicative decision on this issue during the settlement discussions and then there was a breach of that decision; it was clear that a final decision was not made by the Deputy Superintendent, Pensions during or at the end of the settlement discussions. Having found that the discussions were settlement discussions we find privilege attached.

[31] The parties did not agree to the waiver of privilege. To come within the exceptions to the privilege, the Applicant must show that on balance "a competing public interest outweighs the public interest in encouraging settlement."[4] Countervailing interests have included allegations of misrepresentation, fraud or undue influence, or prevention of overcompensation of a plaintiff,[5] or disclosure necessary to meet a defense of laches, lack of notice or the passage of a limitation, or where the parties have made an agreement respecting evidence in the litigation.[6] None of these exceptions were pleaded or evidence adduced on these bases.

[32] The Applicant relied on the case of *Inter-leasing Inc. v. Ontario (Minister of Finance)*[7], to establish the proposition that in this case, waiver was necessary and the settlement discussion evidence necessary to address an overriding interest of justice, namely one of procedural fairness. While the concept of fairness extends to administrative decisions which affect the rights, privileges or interests of an individual (which may include the Applicant), the Applicant did not provide a clear case of how this principle should apply to the exercise of the Superintendent's powers under section 87 of the PBA.

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[3] *Sable*, op. cited, para. 13-14.
[4] *Dos Santos Estate. v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, at para. 20.
[5] *Sable*, par. 19 citing *Unsilver plc. v. Proctor & Gamble Co.*, (2001) 1 All E.R. 783 (C.A.), and *Dos Santos*.
[6] *Inter-leasing Inc.*, op. cited, para 11.
[7] *Inter-leasing Inc. v. Ontario (Minister of Finance)*, (2010) 1 C.T.C. 177, para. 11

[33] Counsel for Navistar also referred to the *Nicholson v. Haldimand-Norfolk (Regional Municipality Commissioners of Police)*[8] as its authority for the concept of natural justice. In that case, it quotes an earlier decision of *Selvarajan v. Race Relations Board* (FN13):

> "... the investigating body is under a duty to act fairly, but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it."

We agree that the principle of procedural fairness under common law applies to an administrative body.

[34] We would however include the subsequent comments in the *Selvarajan* decision to which the Applicant did not refer, namely:

> "The investigating body is, however the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report."[9]

[35] The PBA has left to the Superintendent the right to determine its own procedure, subject to an automatic right to request a hearing before the Tribunal. As in the Baker[10] case cited by the Applicant, the duty of fairness should be reviewed in all of the circumstances of the specific context of each case. In our view, the right of procedural fairness in the context of this case is essentially the right of Navistar to have its views heard and considered by the decision-maker. A full hearing by the Superintendent prior to the issuance of a Notice under the PBA is not necessary, nor required or contemplated by the PBA or FSCO Act. Meaningful participation by the parties appears to have already taken place notwithstanding a lack of agreement. The Applicant is fully aware of its own position and generally that of Unifor on the bank credited service issue. It has had numerous opportunities to state its position and provide evidence to the Superintendent in his regulatory capacity. Navistar agrees that a final determination by the Superintendent was not made at the last settlement meeting. It understood that the issue was open. Navistar was invited to, and did make further submissions on the bank credited service issue before and after the settlement meetings and prior to the issuance of the Notice. It reiterated its position on the bank credited service issue in its Request for Hearing by the Tribunal.

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[8] *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, (1979) 1. S.C.R. 311 at para. 26.
[9] *Nicholson*, op cited, at para 26.
[10] *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (SCC), at para 21.

[36] Any breach of procedural fairness has its remedy in a procedural solution and should not affect the rights of third parties.[11] We note that the parties are not agreed on the facts of what was said by the Deputy Superintendent, Pensions in settlement discussions or what reasonable expectations may have existed on the part of all the parties at the conclusion of the settlement discussions. Whatever expectations Navistar may have had about the possible delay in the Superintendent's position on February 19, 2013, it maintained a procedural remedy to appeal the Superintendent's Notice to this Tribunal and in fact has exercised that right. Such expectation for delay in a decision, if it existed, should not eliminate the substantive rights of third parties, namely Unifor and the Plan members to have the issue decided on the merits along with the other windup issues at a full hearing before the Tribunal.

On appeal, the Notice has no force. It must be affirmed, rejected or amended by the Tribunal under section 89(9) of the PBA.[12] The outstanding windup issues as framed in the Notice encompass the windup issues arising from the closure of the Plant. The resolution of these issues will affect the benefits entitlements reflected in the partial windup report and are necessary before the report is drafted and filed.

[37] In the *Nicholson* case cited by the Applicant as support for its proposition for the right of a full hearing before the Superintendent, the livelihood of a terminated police officer was at stake. The officer had been denied the right to any hearing. In this case, both plan sponsor (Navistar) and Plan member rights are at stake. A right to a full hearing on the issue before the Tribunal exists, as does the right of the parties to settle the issue at any time. It is difficult to discern what damage Navistar would incur as a result of the need to raise its arguments at a full hearing before the Tribunal in advance of preparation of the windup report. No evidence of damage was put forward. The loss alleged by the Applicant to a full hearing before the Superintendent was never a right that it had. Its rights to procedural fairness in our view were fully protected.

[38] In our view, evidence as to the content of comments made by the Deputy Superintendent, Pensions in settlement discussions does not appear to be relevant to the determination of the procedural fairness issue for the reasons noted above. Whatever comments were made, they should not restrict his successor's (the Acting Deputy Superintendent, Pensions) or the Superintendent's ability to exercise his jurisdiction under section 87 of the PBA in the Notice provided the test of 'reasonable and probable grounds' under section 87 are met. Those grounds were met. We agree with the Superintendent's submission that the Deputy Superintendent, Pensions cannot limit that jurisdiction through his comments or statements any more than he can expand his jurisdiction by merely saying so. Section 87 clearly gave the Superintendent the jurisdiction to issue a Notice under section 87 of the PBA.

[39] For all of these reasons, we find no loss of any procedural fairness on the facts of the case before us and no loss of jurisdiction by the Superintendent or his delegates to issue the Notice and include the bank credited service issue.

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[11] See *Consumers Packaging Inc. v. Superintendent of Financial Services*, FST Decision No. P0162-2001-2, at page 13.
[12] *Consumers*, op cited, at page 14.

[40] Lastly then we come to the issue of the Tribunal's jurisdiction. The Applicant did not address at all in its written submissions and only in a cursory fashion when asked by the Chair to do so, the ability of the Tribunal to deal with the bank credited service issue. We are not sure frankly how the Applicant's alleged breaches of procedural fairness would operate to limit our jurisdiction given the authority granted to us under section 89(9) of the PBA.

[41] 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 bank credited service issue.

[42] We find that the Tribunal has jurisdiction as it comes directly to us from the Superintendent's Notice and is not less than the Superintendent's authority in this regard. We wholly reject the Applicant's contention for the reasons given above that invoking section 77.3 of the PBA eliminates any role of the Tribunal on appeal of a decision or Notice issued by the Superintendent. It is without merit. Section 20 of the FSCO Act states:

> **"Exclusive Jurisdiction:**
> 20. The Tribunal has exclusive jurisdiction to:
>
> (a) exercise the powers conferred on it under this Act and every other Act that confers powers on or assigns duties to it; and
> (b) determine all questions of fact or law that arise in any proceeding before it under any act mentioned in clause (a)."

As the bank credited service issue is legitimately before the Tribunal under the Notice we have full jurisdiction to decide the issue.

[43] Even if the Superintendent had not dealt with the bank credited service in the Notice, we are of the view, that the jurisdiction conferred on us by section 89(9) of the PBA when read together with section 20 of the FSCO Act is sufficiently broad to permit us to determine the outstanding partial windup issues before us, including the bank credited service issue if in the course of the hearing before us evidence of that issue is brought before us. The Tribunal regularly deals with section 87 matters. We note the comments in *CBS Canada* case, which states:

> "When an issue is raised before the Tribunal without the benefit of any findings on the underlying facts, if they are disputed, or without any considered opinion of the Superintendent, the Tribunal would be entitled, under subsection 89(9), to refer the matter back to the Superintendent to make the appropriate findings and take a position on the issue. However, we think that the referral approach is in the discretion of the Tribunal and that subsection 89(9) also permits the Tribunal to address such an issue as one of first

impression. If any fact finding is required, the Tribunal is not without its own processes for engaging in that exercise."[13]

[44] We find therefore that given that the bank credited service issue is squarely before us, we have jurisdiction under subsection 89(9) to address the issue at the December hearing.

VI. ORDER

[45] For the reasons outlined above, the Application is dismissed in its entirety. The Notice stands as issued and all issues therein will be addressed at the December 2013 hearing before the Tribunal. Evidence submitted as to the content of the settlement discussions will be struck from the record as settlement privilege applies.

Dated at Toronto, this 4th day of November, 2013.

Florence A. Holden

Jeffrey Richardson

Jennifer Brown

[13] *CBS Canada Co. v. Superintendent of Financial Services*, FST Decision Number P0164-2001-1 at page 19.

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[13] *CBS Canada Co. v. Superintendent of Financial Services*, FST Decision Number P0164-2001-1 at page 19.