FST File No. P0521-2012

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 WITH RESPECT TO JURISDICTION

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PART I – INTRODUCTION

1. The CAW-Canada and its Local 127 were parties to a collective agreement with the applicant, Navistar Canada Inc. (hereinafter "Navistar" or "the applicant"), which expired on or about June 30, 2009. This agreement covered a bargaining unit of hourly production workers employed at the applicant's heavy truck manufacturing and assembly plant in Chatham, Ontario.

2. Concurrently, the CAW-Canada and its Local 35 were parties to a collective agreement with the applicant, Navistar, which also expired on or about June 30, 2009. This agreement covered a bargaining unit of salaried, office and clerical workers employed in the same workplace.

3. These agreements were the last of a series of contracts going back decades. In the course of this collective bargaining relationship, the parties negotiated a defined benefit pension plan registered as Plan No. 0351684 and known as the Navistar Canada Inc. Non-Contributory Retirement Income Plan ("the Plan").

4. On July 28, 2011, Navistar publicly announced its decision to permanently close its heavy truck manufacturing and assembly facility in Chatham, Ontario.

5. After July 28, 2011, there were negotiations undertaken by the CAW-Canada and its Locals 127 and 35 with the applicant, concerning a closure agreement which would settle all of the outstanding employment related issues (including retirement income issues) that arose out of or were relevant to the closure of the facility, and the final termination of the employment relationship previously enjoyed by members of the union.

6. A key issue between the parties involved the administration of the aforesaid pension plan and the terms upon which it would be wound-up in part.

7. The parties were unable to resolve their differences relating to the contents of a closure agreement, and more specifically, the parties remained at odds with respect to the proper interpretation and administration of the pension plan vis-à-vis the members of the union affected by the events leading to the closure of the facility.

PART II – THE PLAN

8. Article 19 – Benefit Plans of the last (expired) collective agreement between the applicant and the CAW-Canada and its Local 127 provided as follows:

> "Simultaneously with the execution of this agreement, the company and the union have agreed upon additional supplemental agreements and exhibits which are made parts of this agreement as described below:
>
> (i) Health Security Program Agreement – Exhibit "A"
>
> (ii) Canadian Legal Services Plan Agreement – Exhibit "B"
>
> (iii) Supplemental U.I.C. Benefit Plan – Exhibit "C"
>
> (iv) Non-Contributory Retirement Plan – Exhibit "D"
>
> (v) Retirement Savings Plan for Represented Employees of International Truck and Engine Corporation Canada – (Exhibit "A")".
>
> No matter respect respecting the above exhibits shall be subject to the grievance procedure established in this agreement.

> In the event of any conflict between the provisions of this agreement and the provisions of the exhibit referred to in section 19.01(a), the provisions of the exhibit shall prevail[1].

9. Article 1.02 of the last (expired) collective agreement between the applicant and the CAW-Canada and its Local 35 with respect to office and clerical employees provided as follows:

> "The parties to the agreement have provided for a pension plan (Appendix "E"); Retirement Savings Plan for represented employees of International Truck and Engine Corporation Canada (Exhibit "A"); a Health Security Program (Appendix "F"); Supplemental Unemployment Benefit Plan (Appendix "E"); and Legal Services Plan (Appendix "H") by Supplemental Agreement signed by the parties simultaneously with the execution of the agreement, which Supplemental Agreements are attached hereto and made parts of this Agreement as if set out in full herein, subject to all provisions of this Agreement.[2]

10. The Non-Contributory Retirement Plan referred in Article 19, and the pension plan referred to in Article 1.02 is the same document. It is found at Tab 1 of the Agreed Book of Documents.

11. Article 7.03(b)(iii) of the Plan provides as follows:

> "7.03 Credited Service from January 1, 1969.
>
> Service from January 1, 1969 shall be credited as follows:
>
> (b) For the purpose of computing Credited Service:
>
> (iii) An Employee of the Company on and after January 1, 1969 who is absent from work due to layoff or Company-approved sick leave and who accrues in any calendar year

[1] Collective agreement between the applicant and CAW-Canada and its Local 127, Agreed Book of Documents, Tab 2, pages 60-61

[2] Collective Agreement between the applicant and the CAW-Canada and its Local 35, Agreed Book of Documents, Tab 3, page 4

> commencing after 1971 less than 1615 compensated hours, shall receive credit of 40 hours for each complete calendar week of such absence during such year due to layoff or Company-approved sick leave provided that the Employee shall have received pay during that year for at least 170 hours, and provided further that if such layoff or sick leave continues after that year the Employee shall be credited with 40 hours for each complete calendar week of absence after that year, not to exceed 1530 hours of credit for all such absence related to receipt of such pay from the Company in the first year. An Employee who returns to work on or after July 1, 1980 and receives pay for a period of less than 170 hours and who thereafter returns to such layoff or sick leave, shall not be disqualified, solely because of the receipt of such pay, from receiving credit for which he would otherwise be eligible hereunder. For the purposes of this subsection only, an Employee who is laid off subsequent to July 1, 1980 and whose first day of absence due to such layoff is the first regularly scheduled work day in the January next following his last day worked shall be deemed to have been laid off on December 31 of the year in which he last worked. Notwithstanding the above, in no event shall there be any duplication of Credited Service by reason of this subsection (iii)."

PART III – CORRESPONDENCE TO FSCO

12. On March 9, 2012, CAW-Canada wrote the Deputy Superintendent of FSCO and set out the union's view of the proper application of certain provisions of the *Pensions Benefits Act* ("PBA") to the plan, and the proper administration of the plan in the context of the discontinuance of the Navistar heavy truck manufacturing and assembly facility[3].

13. The union made clear that "disagreements" had developed between it and the company not only about the terms by which the plan should be partially wound up, but also about the proper administration of the plan more generally.

[3] Correspondence, March 9, 2012, Agreed Book of Documents, Tab 4

14. The union submission stated in part

> "We feel it would be helpful to set out our view of the application of certain provisions of the PBA in the context of the NCRP at Chatham. We believe this is necessary because of disagreements we were having with the company on questions over: (1) the period of time the partial windup should cover and, therefore, who should be included in the partial windup (or, conversely, who, if anyone, should be excluded from the partial windup?) and (2) the criteria to be applied, and the benefits provided, when determining benefit eligibility under the plan, **and** under section 74 of the PBA…

15. One of the important observations made by the union included the following submission about the operation of Article 7.03:

> Our rationale is as follows:…members do not terminate their membership in the NCRP as a result of layoff. In fact, under Article 7.03(b)(iii) of the NCRP, members laid off after having worked at least 170 hours in 2009 (the majority of Chatham members laid off in 2009) are entitled to an additional accrual of .9 of a year of credited service in the NCRP while on layoff. For members laid off in June 2009, this takes their credited service accrual in the NCRP through May 2010."

16. The union submission also contained other significant points which, however, are not material to this preliminary issue.

17. On March 13, 2012, the applicant delivered to FSCO a reply to the union's submissions. The reply was detailed and attempted to deal with all the issues raised by the union including, significantly, the matter of crediting "bank" service.

18. In taking the opportunity to address the proper interpretation and application of Article 7.03, the applicant made clear its assessment of what it deemed to be the parties' past practice (and, by implication), the applicant set out its intention regarding the future administration of Article 7.03(b)(iii). In this context, with

respect to the meaning and administration of Article 7.03(b)(iii), the applicant stated as follows:

> "It is been the long standing company practice that employees are only entitled to receive the 0.9 "bank" of credited service upon their physical return to work. Where an employee broke his/her service for any reason, prior to returning to active service, the "bank" service was removed from his/her credited pension service history and their final credited service was calculated as such. The CAW is now asking you to ignore the historical practice regarding qualifications for, and forfeiture of, the 0.9 "bank" of credited service while on layoff. Moreover, the company has made agreements with the CAW, since the expiry of the collective agreement, where pension credited service accrued up to and including June 30, 2009, and "bank" service is not applicable[4]".

19. The dialogue continued. On April 5, 2012, the union responded in writing to the applicant's reply by forwarding a five page set of representations to FSCO. Again, all key issues were examined, including the contentious matter of the proper administration of Article 7.03(b)(iii). With respect to the latter issue, the union stated:

> "The language in the pension plan with respect to the accrual of credited service while on layoff is clear. Article 7.03(b)(iii) of the plan reads as follows:
>
> > For the purposes of computing credited service: (iii) an employee of the company on or after January 1, 1969, who is absent from work due to layoff or company-approved sick leave and who accrues in any calendar year commencing after 1971 less than 1,615 compensated hours, shall receive credit of 40 hours for each calendar week of such absence during such year due to layoff or company-approved sick leave provided that the employee shall have received during that year for at least 170 hours, and provided further that if such layoff or sick leave continues after that year, the employee shall be credited with 40 hours for each such complete calendar week of absence after that year, not to exceed 1,530

[4] Correspondence of the applicant, March 13, 2012, Agreed Book of Documents, Tab 5, page 5

hours of credit for all such absence related to receipt of such pay from the company in the first year."

It is our submission that the plan language is clear:

Under the terms of the plan, employees laid off, whether in 2008 or 2009, whether or not they return to work, but provided they had received pay for at least 170 hours in their year of layoff (2008 or 2009), are entitled to received credited service during their period of layoff until a total of 1,530 hours of additional credit is granted for the period of layoff. There is no requirement in the plan language that members return to work to get the credit. In the absence of any ambiguity in language, past practice is not the determinative factor.[5]"

20. On April 20, 2012, the applicant exercised its opportunity to rebut the union's submission of April 5, 2012. Again, the company included in its rebuttal an argument with respect to the crediting of "bank" service. The company stated:

"The company disagrees with the union on the application of "bank" service. The company submits that long standing past practices are very instructive on matters such as these. Further, these practices were not performed in isolation as evidenced by the many agreements the company has made with the union since the expiry of the collective agreement. In every instance, pension credited services accrued up to and including June 30, 2009 and "bank" service is not applicable. The "bank" service has only ever been available to employees who return to work for the company. To now claim that these past practices do not apply and that a new practice is justified runs contrary to well established norms. The company submits that this is unjustifiable and entirely unsupportable[6]."

21. By the middle of June, 2012, none of the issues separating the applicant and the union in relation to the interpretation and administration of the pension plan and

[5] Correspondence to FSCO, April 5, 2012, Agreed Book of Documents, Tab 6, page 5

[6] Correspondence to FSCO, April 20, 2012, Agreed Book of Documents, Tab 7, page 3 - **(The union vigorously disputes the assertions made by the company in its correspondence that there has been a long standing past practice of denying "bank" service to laid off workers who did not return physically to the workplace. Further, the union also disputes the assertion that it has made agreements with the company since the expiry of the collective agreement on June 30, 2009, which are relevant to the interpretation and application of Article 7.03(b)(iii). However, these differences are to be debated and resolved at a hearing on the merits of this issue, and not in the course of the hearing of this preliminary issue of jurisdiction).**

its proper windup in part had been bridged. Both sides, however, expressed a desire to meet on a **without prejudice** basis to try and find a resolution to some or all of their differences.

22. Contemporaneously, on June 21, 2012, both sides communicated in writing with Mr. Gordon, Deputy Superintendent, Pensions, and formally invited FSCO to convene a **without prejudice** discussion to advance a solution to the disputes dividing the parties.

23. The union put it this way:

> "Although the parties remain apart with respect to the outstanding items set out in our March 9th and April 5th submissions to FSCO, there has been dialogue as to whether or not the Corporation was interested in a tripartite discussion in an attempt to resolve the outstanding matters. 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[7].

24. The applicant's message dated June 21, 2012 stated:

> "Although the parties remain apart with respect to the outstanding items set out in our March 23, 2012 and April 20, 2012 submissions to FSCO, 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.[8]"

[7] Correspondence to FSCO, June 21, 2012, Agreed Book of Documents, Tab 9
[8] Correspondence to FSCO, June 21, 2012, Agreed Book of Documents, Tab 8

25. Three without prejudice meetings occurred at the offices of FSCO. There was no settlement of the issues in dispute. At the end of the meetings, the parties were invited by FSCO to make a final, "unequivocal" submission to FSCO on **all outstanding issues**[9].

26. The invitation to address all of the issues in dispute between the parties was premised on FSCO's desire to start a formal process, and ultimately, if necessary, put all matters in dispute before the Financial Services Tribunal.

27. The applicant took full advantage of the Deputy Superintendent's invitation and filed a final argument on the record. The applicant's correspondence with respect to the matter of "bank" service stated:

> "Our view is that the Financial Services Commission of Ontario (FSCO) does not have jurisdiction over this issue. Assuming that it is determined that FSCO does have jurisdiction over this issue, our position is as follows.
>
> It has been the long standing company practice that employees are only entitled to receive the 0.9 "bank" accredited service upon their physical return to work. Where an employee broke his/her service for any reason, prior to returning back to active service, the "bank" service was removed from his/her credited pension service history and their final credited service was calculated as such. Moreover, the company has made agreements with the Canadian Autoworkers Union (the CAW) since the expiry of the collective agreement where pension credited services accrued up to and including June 30, 2009 and "bank" service is not applicable…".[10]

28. The union replied on March 4, 2013 by correspondence and made the following representations:

[9] Correspondence of the applicant to FSCO, February 28, 2013, Agreed Book of Documents, Tab 25, page 1
[10] Correspondence to FSCO, March 4, 2013, Agreed Boo of Documents, Tab 24

> "As you are aware, the union contests the position of the company. However, instead of repeating the various submissions the union has over the past few months, we ask you to accept on the record and refer to our submissions dated August 21, 2012 (with related case law and documents) as well as our earlier letters of March 8, 2012 and April 5, 2012. These submissions explain the rationale of the union's position. We also confirm 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 8, 2013[11]."

29. Clearly then, the applicant appreciated and understood that among the various matters the Superintendent of FSCO had to determine, two issues had been framed: the Superintendent's jurisdiction to make a ruling with respect to the interpretation and administration of Article 7.03(b)(iii), and the merits of the respective positions of the parties with respect to the proper interpretation and administration of Article 7.03(b)(iii) not only in the context of a plan windup, but more generally, in terms of determining the proper entitlements of plan members who had either been laid off or taken a company approved sick leave absence.

30. Manifestly, the applicant grasped and exercised its last opportunity to address this issue in its correspondence of February 28, 2013.

31. There was no denial of fairness to any party before the Superintendent issued his determinations. The applicant's opportunity to state its case with respect to Article 7.03(b)(iii) was not compromised in the least.

PART IV – NOTICE OF INTENDED DECISION

[11] Correspondence to FSCO, February 28, 2013, Agreed Book of Documents, Tab 23

32. The Acting Deputy Superintendent, Pensions, (FSCO) issued a Notice of Intended decision on March 7, 2013[12].

33. The Deputy Superintendent, in the NOID ruled, in part:

> "I also intend to order, **under section 87 of the PBA**, that:…
>
> (e) Navistar review the pension benefits or commuted value of the pension benefits of members who terminated employment prior to June 30, 2009, and, for each member of the plan who met all the eligibility requirements in section 7.03(b)(iii) of the plan, re-calculate the members' pension benefit and commuted value of the pension benefit to include the additional accrual of credited service for the period of layoff or sick leave provided for in section 7.03(b)(iii) of the plan, whether or not the member returned to work".

34. The Deputy Superintendent's rationale for this aspect of the NOID is set out in paragraphs 43-47 of the NOID which state:

> "43. Section 7.03(b)(iii) of the Plan states that members laid off or on Company-approved sick leave having worked at least 170 hours in their year of layoff are entitled to an additional accrual of credited service for the period of layoff or sick leave, if they meet the other eligibility requirements in s. 7.03(b)iii). Specifically, the relevant part of s. 7.03(b)(iii) of the Plan provides as follows:
>
> 7.03 Credited Service from January 1, 1996.
>
> 35. "7.03 <u>Credited Service from January 1, 1969.</u>
>
> Service from January 1, 1969 shall be credited as follows:
>
> (b) For the purpose of computing Credited Service:
>
> (iii) An Employee of the Company on and after January 1, 1969 who is absent from work due to layoff or Company-approved sick leave and who accrues in any calendar year

[12] NOID, FSCO, Agreed Book of Documents, Tab 25

commencing after 1971 less than 1615 compensated hours, shall receive credit of 40 hours for each complete calendar week of such absence during such year due to layoff or Company-approved sick leave provided that the Employee shall have received pay during that year for at least 170 hours, and provided further that if such layoff or sick leave continues after that year the Employee shall be credited with 40 hours for each complete calendar week of absence after that year, not to exceed 1530 hours of credit for all such absence related to receipt of such pay from the Company in the first year.

44. Navistar takes the position that employees who qualify are only entitled to receive the additional accrual of credited service for the period of layoff "upon their physical return to work". Navistar submits that this has been the longstanding Company practice.

45. The interpretation proposed by Navistar is inconsistent with the plain wording of s. 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 credited service is that the member must return to work or that if the member does not, he or she forfeits it.

46. Navistar is asking the Superintendent to permit Navistar to administer the Plan and the wind up of the Plan contrary to the terms of the Plan. The Superintendent does not have authority to do so, unless s. 7.03(b)(iii) of the Plan is contrary to the *PBA.* Section 7.03(b)(iii) is not contrary to the *PBA*, therefore, eligible members of the Plan, whether or not they return to work, are entitled to receive the additional accrual of credited service in accordance with s.7.03(b)(iii)

47. Section 87 of the *PBA* authorizes the Superintendent by order to require that an administrator “take or refrain from taking any action in respect of a pension plan or a pension fund” if the Superintendent is of the opinion, upon reasonable and probable grounds, that the pension plan is not being administered in accordance with the *PBA*, regulations under the *PBA* or the pension plan.”

PART V - NOTICE OF APPEAL

36. Appendix “A” to the request for hearing (Form 1) submitted by the applicant asserts four distinct reasons why the applicant disagrees with the Superintendent’s Notice of Intended Decision.

37. One of the reasons asserted by the applicant declares as follows:

> “The Superintendent did not have jurisdiction to deal with credited service.
>
> - In an application for a partial plan windup, the scope of the Superintendent’s jurisdiction is limited to matters dealing with the partial windup of the plan, namely, the windup date and the windup group.
> - The plan provides for employees who return to work, after a period of layoff or sick leave, to receive from the company credited service for the period of their absence.
> - Credited service is not a matter related to the windup date or the windup group.
> - The Superintendent did not have jurisdiction over credited service because it is outside of the scope of a partial plan windup.
> - The Superintendent advised, during the process before him, that he did believe he had jurisdiction to deal with this matter. The company was entitled to rely on his statement and should not be faced with a finding on credited service in the Notice of Intended Decision by the Superintendent[13].”

PART VI – STATEMENT OF ISSUE

38. The pre-hearing Memorandum dated June 27, 2013 enunciates the preliminary jurisdictional issue as follows:

[13] Applicant’s Form 1 – Request of Hearing, Agreed Book of Documents, Tab 26

"Does the Superintendent and the Tribunal have the jurisdiction to rule on the applicability of the 0.9 "bank" pensionable service credit under section 7.03(b)(iii) of the plan?"

PART VII – SUBMISSIONS OF THE UNION

A. Jurisdiction of the Superintendent or his/her delegate, the Deputy Superintendent

39. The authority of the Superintendent of FSCO to insure that pension plans, like the plan herein, are administered according to their terms and the *PBA* is broad and wide ranging. This is necessarily so because the Superintendent (or his/her delegate), by virtue of the *Financial Services Commission of Ontario Act, 1997*, is charged with administering and enforcing, among other statutes, the *Pension Benefits Act*, and the *Financial Services Commission of Ontario Act, 1997*. The Superintendent is also mandated to supervise generally all regulated sectors spelled out by the statute.

40. More specifically, Section 87 of the *PBA* provides that the Superintendent may make an order requiring a plan administrator (like the applicant) to take any action in respect of the pension plan if the Superintendent is of the opinion, upon reasonable and probable grounds, that the pension plan or pension fund in question is not being administered in accordance with the *PBA*, the Regulations, or the pension plan itself.

41. The union submits that the correspondence of the parties referred to above, viewed objectively, does provide the Superintendent with reasonable and probable grounds to come to an opinion that the applicant's plan was and is not

being administered according to its terms, in relation to the failure to provide certain credited service enhancements according to Article 7.03(b)(iii).

42. Section 87 of the *PBA* does not require the Superintendent to demonstrate to any third party that he/she is correct in his/her determination before the Superintendent issues a notice of intent to make a decision. And while the union agrees that in the exercise of his/her decision making power under Section 87, the Superintendent should adhere to principles of fairness, Section 87 does not require the Superintendent to conduct a hearing, or adhere to all principles of natural justice before issuing a notice of an intended decision.

43. The correspondence of the applicant and union filed up to June 21, 2012, and after February 19, 2013, provided the Superintendent with the reasonable and probable grounds contemplated by section 87 of the *PBA* to form the opinion that Article 7.03(b)(iii) has not been administered according to its terms, and moreover, was not going to be administered according to its terms going forward.

44. In this respect, the company had conceded in its correspondence to the Superintendent that it had not granted laid off plan members or plan members on sick leave who terminated their employment and retired before July 28, 2011 with 0.9 credited service units if they had not physically returned to work after their layoff or sick leave.

45. The Superintendent considered the applicants' concession, and examined the plain and simple words of Article 7.03(b)(iii). He found:

> "Navistar is asking the Superintendent to permit Navistar to administer the plan and the wind-up of the plan contrary to the terms of the plan. The Superintendent does not have authority to do so, unless Section 7.03(b)(iii) of the plan is contrary to the *PBA*. Section 7.03(b)(iii) is not contrary to the *PBA,* therefore eligible members of the plan, whether or not they return to work, are entitled to receive the additional accrual of credited service in accordance with Section 7.03(b)(iii)."

46. The applicant has exercised its right to challenge the Superintendent's opinion supporting his notice of intended decision. However, it is not correct to say that the Superintendent had no sufficient grounds upon which to issue his notice.

47. Given the submission above, it follows that the union says that this Honourable Tribunal has the jurisdiction to direct the Superintendent to make or refrain from making the intended decision which is indicated in his notice and to take such action as the Tribunal considers the Superintendent ought to take in accordance with the *Act* and the Regulations.

48. For such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

49. The Superintendent's jurisdiction to make the direction under review with respect to Article 7.03(b)(iii) is established whether or not the applicant's plan is about to be partially wound-up, is subject to a partial wind-up order issued under the PBA, has already been subject to a partial wind-up report, or is functioning in the absence of any shadow of a partial wind-up process.

50. In all of the circumstances referred to above, the Superintendent has the mandate to ensure that a plan member's credited service is properly calculated according to plan terms.

51. Accordingly, for example, even in the context of a partial plan wind-up, before or after the partial plan wind-up report has been issued and submitted to the FSCO, if the Superintendent has learned that one or more plan members in the past have been subject to an improper calculation of their credited service, and that such a practice is on-going, the Superintendent has the mandate to step in, again, if he or she has reasonable and probable grounds to believe that the calculation of a plan member's credited service is being done contrary to the terms of the plan.

52. In this case, there is nothing premature about the Superintendent's notice of intended decision. The Superintendent had learned of the company's conduct vis á vis workers who had retired from lay-off and/or sick leave, prior to and after June 30, 2009, up to July 28, 2011. This information is current and should be acted upon.

53. The fact that the information about the company's practice regarding the administration of Article 7.03(b)(iii) was produced in the course submissions about the pending partial wind-up of the plan is immaterial to the Superintendent's overriding jurisdiction to ensure that the plan is administered according to its terms. The Superintendent need not wait until a wind-up report is issued with respect to this plan, before he is entitled to ensure that the plan is administered properly.

Admissibility of Evidence Regarding Settlement Meetings and Submissions

54. The applicant asks the Tribunal to admit into evidence and consider statements allegedly made by the Deputy Superintendent during one or more of the settlement meetings held at the offices of FSCO. The union vigorously objects to the admission and consideration of any such statements.

55. The union says that any such statements made by the Deputy Superintendent, or any of the parties in the course of these meetings are inadmissible because they are subject to a "settlement privilege".

56. The Ontario Superior Court of Justice has confirmed that communications, whether oral or written, made in furtherance of the settlement of a litigious dispute are subject to privilege.[14]

57. Three conditions must be present for settlement privilege to apply:

1. A litigious dispute must be in existence or within contemplation;
2. The communication must be made with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed;
3. The purpose of the communication must be to attempt to effect a settlement.[15]

58. It is accurate to say that as of June 21, 2012, a litigious dispute pertaining to the administration and partial wind-up of the plan was, objectively speaking, within the contemplation of both the applicant and the union.

[14] *Inter-Leasing Inc. v. Ontario (Minister of Finance),*[2009] O.J. No. 4714 at para. 10, see Applicant's Book of Authorities at Tab 11
[15] *Inter-Leasing Inc. v. Ontario (Minister of Finance)* (Supra) para. 10

59. It is also accurate to say that the communications of all parties, including the Deputy Superintendent and officials of FSCO, in the course of the meetings held at the offices of FSCO were made with the express intent that they would not be disclosed in the legal proceeding in the event that negotiations failed.

60. Further, it is accurate and appropriate to say that all of the communications made by the parties, including the observations and remarks of the Deputy Superintendent and officials of FSCO, were made in furtherance of a bona-fide attempt to facilitate a resolution between the parties.

61. Therefore, it is submitted that the onus rests on the shoulders of the applicant to demonstrate why a breach of this general and important class of evidentiary privilege is warranted.[16]

62. There may be exceptions to this class of settlement privilege established by law. Exceptions to the privilege have arisen where there has been fraud, where disclosure is necessary to meet a defense of laches, lack of notice, or the passage of a limitation, or where parties have made an agreement respecting evidence in the litigation. [17]

63. None of these exceptions have been pleaded here, nor is the applicant in a position to prove any such exception applies. The impugned statements of the Deputy Superintendent should not be admitted.

If the Impugned Statements are admitted, how should they be considered?

[16] *Inter-Leasing Inc. v. Ontario (Minister of Finance)* (Supra) para. 11
[17] *Inter-Leasing Inc. v. Ontario (Minister of Finance)* (Supra) para. 11

64. The applicant pleads that the Superintendent advised in the course of the settlement discussions that he "believed" he did not have jurisdiction to deal with the "bank" credit service, or that he was "stumped" on the issue, or that the issue of credited service was a "matter of plan interpretation".

65. All of these comments if issued in the course of a settlement meeting would not compromise the right of the applicant to a fair process. All can be seen to be part of the "give and take" of settlement discussions, particularly in light of the Deputy Superintendent's plain observation at the beginning of the meetings that he had made no decisions about any of the issues covered in the submissions of the parties.

66. The only statement made by the Deputy Superintendent that could have influenced the course of the overall proceedings was his observation on September 7, 2012 to the affect that: "we will need a partial wind-up report to deal with this issue….. I cannot deal with this issue until the partial wind-up report is filed".[18]

67. At the outset, the union observes that it disagreed then with the Deputy Superintendent's assessment of the timing of his authority to decide the issue of the "bank" credited service. Nevertheless, the Deputy Superintendent's statements on September 7, 2012 must not be viewed in isolation, or taken out of context. The settlement discussions did not end on September 7, 2012. They continued on February 19, 2013.

[18] Summary of meeting held on September 7, 2012, FSCO, Agreed Book of Documents, Tab 16, page 2

68. Any potential misunderstanding or unfairness to the applicant was alleviated and remedied on February 19, 2013. On that day, officials of FSCO conducted a "pre-meeting" with each side before the joint meeting itself convened in the offices of FSCO.

69. While evidently, representatives of the union were not in attendance at the "pre-meeting" held between officials of FSCO and the applicant, the notes taken by a FSCO representative appear to underline that the Deputy Superintendent had changed course, likely with the view that his new approach would be more efficient and timely.

70. A representative from FSCO advised the applicant, in the course of the "pre-meeting" that in light of the parties failure to advance the issues, FSCO would solicit "one last final submission-unequivocal position of the company in regards to the issues and from CAW".[19]

71. The Deputy Superintendent made clear FSCO's intention to "roll all info into one NOID-four issues".[20]

72. When the joint meeting convened, the Deputy Superintendent briefly reviewed the four remaining issues, and how these issues shaped up for either side.

73. The Deputy Superintendent then observed that it would be a step forward if the parties could aggregate the four issues together, and allow the FST to deal with the matter as a whole.

[19] Notes of FSCO, February 19, 2013, meeting Agreed Book of Documents, Tab 20
[20] Notes of FSCO, February 19, 2013, meeting Agreed Book of Documents, Tab 20 (Supra)

74. The parties took a break.

75. Upon resumption of the meeting, the Deputy Superintendent took the floor again briefly. He observed that there appeared to be no solution, and that all the issues were open. He stated that the formal process should begin. He asked the parties to put into writing their comprehensive final submissions on **all** the issues so that **all** the issues could be put before the Tribunal. The Deputy Superintendent listed the four key issues: (a) the wind-up date; (b) the scope of coverage of plan members in the wind-up report; (c) the application of the consent benefit – Article 1.03; (d) the 0.9 credited service matter. Mr. Gordon asked the parties to confirm that there were no other issues. The parties did so.

76. The Deputy Superintendent advised that FSCO would issue a decision on or before March 6, 2013, as he was retiring on that day.

77. There was no objection raised by either side to the process outlined by the Deputy Superintendent. Indeed, Navistar agreed to the way forward.

78. And indeed, Navistar filed a letter/submission enunciating its position with respect to all the issues.

79. Accordingly, in so far as any observation made by the Superintendent on September 7, 2012, may have suggested that the issue of the 0.9 bank credited service was going to be deferred, that suggestion was superseded by a clear consensus achieved by all the parties with respect to the way forward after February 19, 2013.

80. That consensus of the parties negates and cures any concern about the fairness of the proceeding undertaken prior to the issuance of the Superintendent's notice of intended decision.

PART VII – ORDER REQUESTED

81. In all the circumstances, the union respectfully submits that this Honorable Tribunal should answer the preliminary issue as follows: The Superintendent and Tribunal have the jurisdiction to rule on the applicability of the 0.9 banked pensionable service credit under Section 7.03(b)(iii) of the plan.

ALL OF WHICH IS RESPSECTFULLY SUBMITTED.

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