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Ontario

June 5, 2013

HAND DELIVERED

Financial Services Tribunal
5160 Yonge Street, 14th Floor
Toronto, Ontario
M2N 6L9

Attention: Rhonda Booth
Registrar

Dear Ms. Booth:

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

Enclosed please find 4 copies of the Pre-Hearing Conference Brief of the Superintendent of Financial Services with respect to the above-noted matter.

Yours truly,

A handwritten signature in black ink, appearing to read 'Mark Bailey', written over a horizontal line.

Mark Bailey
Legal Counsel

MB/pz

Encl.

cc: Mitch Frazer, Torys LLP – by email and courier
Lewis Gottheil, CAW Canada – by email and courier

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.

-and-

Applicant

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

**PRE-HEARING CONFERENCE BRIEF OF THE
SUPERINTENDENT OF FINANCIAL SERVICES
(Pre-Hearing Conference June 20, 2013)**

**MINISTRY OF THE ATTORNEY GENERAL
FOR THE PROVINCE OF ONTARIO**

Financial Services Commission of Ontario
Legal Services Branch
5160 Yonge Street, 17th Floor
Toronto, Ontario M2N 6L9

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I. INTRODUCTION

1. The Superintendent of Financial Services (the "Superintendent") files this Pre-Hearing Conference Brief in response to the Notice of Pre-Hearing Conference dated April 15, 2013 and in response to the Pre-Hearing Conference Brief dated May 10, 2013 and filed by Navistar Canada Inc. (the "Applicant") (the "Applicant's Brief").

2. The Request for Hearing filed by the Applicant relates to the Superintendent's Notice of Intended Decision (the "NOID") dated March 7, 2013 (attached at Tab F to the Applicant's Brief) 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 (the "Plan").

3. The proposed orders set out in the NOID relate to the partial wind up of the Plan as a result of the cessation of operations and closure of the Applicant's facility in Chatham Ontario and the interpretation of section 7.03(b)(ii) of the Plan text. Specifically, the NOID contains the following proposed orders:

- a. An order, under sections 77.3(1)(a) and (b) of the *PBA*, that the Plan be wound up in part effective July 28, 2011 and that the partial wind up include Plan members who ceased to be employed at the Chatham facility after June 30, 2009, including those who retired or voluntarily

severed their employment with the Applicant between June 30, 2009 and July 28, 2011;

- b. Orders, under sections 40(2) and 74(7) of the *PBA* that the Applicant review the pension benefits or commuted value of the pension benefits of all members, including members who terminated employment prior to June 30, 2009 and members included in the partial wind up, to ensure the payment of the special early retirement benefit in section 1.03 of the Plan for each member of the Plan who met all the eligibility requirements (or who could grow into those eligibility requirements pursuant to sections 74(1.3) and (7) of the *PBA*) for entitlement to receive the benefit except the consent of the Applicant;

- c. Orders that the Applicant, for the purpose of determining the pension benefit or the commuted value of the pension benefit of all members as reflected in the partial wind up report and otherwise, including members who terminated employment prior to June 30, 2009 and members included in the partial wind up, include the additional accrual of credited service for any period of layoff or sick leave provided for in section 7.03(b)(iii) of the Plan, if the member met all the eligibility requirements in section 7.03(b)(iii) of the Plan, whether or not the member returned to work.

II. BACKGROUND

4. For the purposes of the pre-hearing conference, the Superintendent relies on the facts set out in the NOID and does not admit the facts set out in the Applicant's Brief.

III. PRELIMINARY MATTERS

5. **Jurisdiction:** The Superintendent submits that the Financial Services Tribunal (the "Tribunal") has jurisdiction to conduct this hearing.

6. The Applicant takes the position that the Superintendent's proposed order on the credited service issue (paragraph 3(c) above) is beyond the jurisdiction of the Superintendent (and presumably the Tribunal) which jurisdiction, in the context of "an application for partial plan wind up", the Applicant asserts is "limited to matters dealing with the partial wind up of the plan, namely, the wind up date and the wind up group." The Applicant alleges that the former Deputy Superintendent made statements during discussions with the parties that indicated his view that he did not have jurisdiction to deal with the credited service issue. The Applicant states that it is entitled to rely on this statement and should not now be faced with a potential order on this issue.

7. The Superintendent disagrees with the position of the Applicant as to the jurisdiction of the Superintendent and the Tribunal to deal with the credited service issue. The Superintendent makes the following preliminary submissions and reserves the right to make further submissions if it is necessary to have this issue adjudicated.

8. There is no substantive nor procedural rule or requirement which would limit the Superintendent's capacity to include a proposed order regarding the credited service issue in the NOID. There is no merit to the Applicant's assertion that there is some sort of formal "application for partial wind up" which operates to limit the scope of Superintendent's jurisdiction. Indeed, the issues, as framed by the parties at the Superintendent level, encompass all issues arising out of the closure of the Applicant's closure of the Chatham facility. The resolution of the credited service issue will affect benefit entitlements as reflected in the partial wind up report and, therefore, the credited service issue does arise out of the partial wind up. The *PBA* does not contemplate a formal wind up application which is required to be dealt with separate and apart from other relevant issues.

9. It makes procedural sense, is fair and adjudicatively efficient to deal with the credited service issue in this hearing. Clearly, the Superintendent and Tribunal have the jurisdiction to interpret and enforce the terms of the Plan under section 87 of the *PBA*. The Applicant does not appear to contend otherwise. Its objection appears to be limited to the fact that this issue is combined in the same NOID as the issues relating to the scope of the partial wind up. The

consequence of the Applicant's position, if it was accepted, would simply be that the credited service issue would be dealt with in a separate NOID. This is a distinction of mere form not substance and would simply make the ultimate resolution of all matters arising out of the Chatham closure more complicated, costly and lengthy.

10. The Applicant attempts to rely on alleged statements concerning the jurisdiction of the Superintendent which the Applicant alleges the former Deputy Superintendent made during the course of meetings with the parties. In respect of these statements, the Superintendent submits as follows:

- a. The Superintendent denies that the former Deputy Superintendent made such statements;
- b. The discussion during which the statements are alleged to have been made were, on the request of the parties (the Applicant and CAW-Canada and its Locals 127 and 35 (the "CAW")), conducted on a without prejudice basis in order to assist the parties to arrive at a consensual resolution to the outstanding issues. Accordingly, any evidence as to alleged statements made during those discussions (including the alleged statements made by the former Deputy Superintendent) is not admissible. On this basis, the Superintendent intends to object to the introduction of any such evidence during the course of this proceeding;

- c. Even if such statements were made, which the Superintendent denies, and the evidence necessary to prove them is admissible, which is not the case, informal comments by the Deputy Superintendent as to his view of his jurisdiction are wholly irrelevant to legal determinations which the Tribunal may be required to make as to its jurisdiction to deal with the credited service issue. In other words, the Tribunal will have to determine its jurisdiction on the basis of the *PBA* and relevant case law. The alleged comments of the former Deputy Superintendent are not germane to this analysis;
 - d. Even if the former Deputy Superintendent did make the alleged statements (which, again, the Superintendent denies), there is no unfairness to the Applicant because the Applicant was provided with extensive opportunities to make submissions on this issue at the Superintendent stage of which the Applicant took advantage. As a result, the inclusion of the credited service issue in the NOID ought not to have been a surprise to the Applicant and is consistent with the efficient resolution of the outstanding matters.
11. The Superintendent suggests that a preliminary motion be scheduled to deal with the jurisdictional issue raised by the Applicant. Timelines for the exchange of motion materials prior to the preliminary motion should be established.

12. The Superintendent proposes that the following issue be determined in the jurisdictional motion:

Does the Tribunal, in the circumstances of this case, have the jurisdiction to determine whether a member is required to physically return to work from lay off or sick leave in order to be entitled to the credited service enhancements set out in section 7.03(b)(iii) of the Plan text?

13. **Party Status:** The Superintendent notes that the CAW has filed an Application for Party Status. The Superintendent consents to the granting of full party status to the CAW.

14. **Notice:** The Superintendent submits that notice should be provided to all members, former members and retirees under the Plan who were affected by the wind up proposed in the NOID and/or who would be affected by the credited service issue (i.e.: who met the eligibility requirements in section 7.03(b)(iii) of the Plan). Notice can be waived if the CAW can confirm that it represents all such persons. If not, notice should be by mail to the last known address as well as newspaper advertisement in a local newspaper. The Superintendent is prepared to prepare the first draft of the notice.

15. **Disclosure:** Pursuant to Rule 27 of the Tribunal's Rules of Practice and Procedure, the parties should agree upon a plan for disclosure of all documents and information upon which they intend to rely at the hearing.

IV. MATTERS IN ISSUE

16. The Superintendent proposes that the issues be framed as follows:

a) Should members who retired or severed their employment during the period June 30, 2009 to July 28, 2011 be included in the partial wind up group?

b) Are members who terminated prior to July 28, 2011 and met all the eligibility requirements for entitlement to the special early retirement benefit in section 1.03 of the Plan text (the "SER Benefit"), other than the consent of the Applicant, entitled to the SER Benefit pursuant to sections 40(2) and 74(7) of the *PBA*?

c) Assuming that that the Tribunal determines that it has jurisdiction to deal with the credited service issue, is a member required to physically return to work from lay off or sick leave in order to be entitled to the credited service enhancements set out in section 7.03(b)(ii) of the Plan text?

- d) Given the answers to issues (a) to (c), what remedy, if any, should be granted by the Tribunal?

V. HEARING PROCEDURES

A. Order of Proceeding

17. The Superintendent submits that the order of proceeding in respect of evidence and submissions be as follows:

- (a) The Applicant;
- (b) CAW;
- (c) The Superintendent; and
- (d) The Applicant (in reply).

B. Agreed Statement of Facts ("ASF") and Agreed Book of Documents ("ABD")

18. The Superintendent suggests that an ASF be prepared and filed. In addition, the Superintendent suggests that an ABD also be prepared. A timetable should be established for the first draft by the Applicant, comments from the other parties and the final filing with the Tribunal.

C. Witnesses

19. At present and depending upon the extent to which the relevant facts and documents can agreed upon, the Superintendent does not anticipate calling any

witnesses. A timetable should be established for the exchange of witness statements.

D. Length of Hearing

20. At present, the Superintendent anticipates that the hearing can be completed in three days.

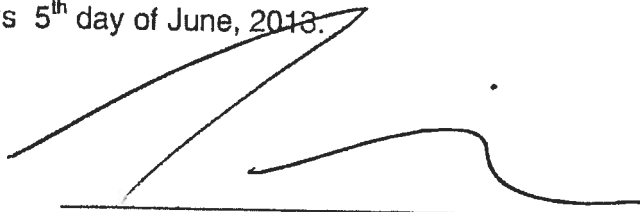
E. Written Submissions

21. Written submissions should be filed by the parties. A timetable should be established for the deadlines applicable to the filing of the written submissions.

VI. SETTLEMENT CONFERENCE

22. The Superintendent is willing to participate in a settlement conference to attempt to settle any or all of the issues in dispute.

Dated at Toronto, Ontario, this 5th day of June, 2018.



Mark Bailey
Counsel for the Superintendent of Financial
Services