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Toronto, Ontario M2H 3H9

UNIFOR
theUnion | lesyndicat

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Secrétaire-trésorier national

May 22, 2014

Peter Gallus, Director/Registrar
Ontario Labour Relations Board
505 University Avenue, 2nd Floor
Toronto, Ontario M5G 2P1

HAND DELIVERED

Dear Sir:

Re: Unifor and its Locals 127 and 35 as successors to CAW-Canada and its Locals 127 and 35 (applicant) and Navistar Canada Inc. (respondent); Unfair Labour Practice Application

I act as counsel for the above captioned applicant. Please find enclosed one signed original copy and one copy of the application of Unifor and its Locals 127 and 35.

As indicated in the Certificate of Delivery, a copy of this application has been delivered to the respondent employer by courier and facsimile transmission.

Thank you for your attention to this letter. Please do not hesitate to contact our office if we can be of further assistance.

Yours truly,

Lewis Gottheil

LEWIS GOTTHEIL
Counsel, Unifor

LG/ww/cope343

cc. K. Lewenza, B. Chernecki, J. Mitchell, J. Wareham, R. Reaume, C. Wiebenga, J. Lucier, S. Galea, Henry Vanroenhoven, Navistar Canada Inc., 5500 N. Service Rd., Burlington, ON L7L 6W6 (by fax @ 905-332-2975 and Overnight Courier)

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Form A-33

LABOUR RELATIONS ACT, 1995

APPLICATION UNDER SECTION 96 OF THE ACT
(UNFAIR LABOUR PRACTICE)

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

Between:

UNIFOR AND ITS LOCALS 127 AND 35

Applicant,

- and -

NAVISTAR CANADA INC.

Responding Party.

The applicant states that the responding party has violated section(s) 17 of the *Labour Relations Act, 1995*. (You must claim that some section OTHER THAN SECTION 96 has been violated.)

The applicant requests the following:

See Schedule "B" attached

(Describe **in detail** what you wish the Board to order as a result of this application.)

The applicant states:

1. (a) Name, address, telephone number, facsimile number and e-mail address of the applicant:

Unifor	**Unifor Local 127**	**Unifor Local 35**
205 Placer Court	**280 Merritt Avenue**	**P.O. Box 1139**
Toronto, ON M2H 3H9	**Chatham, ON N7M 3G1**	**Chatham, ON N7M 5L8**
Phone: 416-495-3750	**Phone: 519-354-3450**	**Phone:**
Fax: 416-495-3786	**Fax: 519-354-7460**	**Fax: 519.380.9170**

(b) Name, address, telephone number, facsimile number and e-mail address of a contact person for the applicant:

Unifor Legal Department
205 Placer Court
Toronto, ON M2H 3H9

Attention: L. N. Gottheil
Phone: 416-495-3750
Fax: 416-495-3786
Email: lewis.gottheil@unifor.org

(c) E-mail address of representative and assistant (if any):

□ **Counsel: lewis.gottheil@unifor.org Assistant: wendy.white@unifor.org**

□ Paralegal: Assistant:

□ **other:** **Assistant:**

(d) Name, address, telephone number, facsimile number and e-mail address of the responding party:

Navistar Canada Inc.
5500 N. Service Road
Burlington, ON L7L 6W6

Attention: Henry Vanvroenhoven
Phone: 905-332-2968
Fax: 905-332-2975
Email: henry.vanvroenhoven@navistar.com

2. (a) Name, address, telephone number, facsimile number and e-mail address of any other person, trade union, employer or employers' organization who may be affected by the application:

(b) The person, trade union, employer or employers' organization named in paragraph 2(a) is affected by the application for the following reason(s):

[Before you file your application with the Board, you must deliver to the responding party and to the person(s) named in paragraph 2(a): a copy of your application, a blank response form, and a Notice to Responding Party and/or Affected Party of Application under Section 96 of the Act (Form C-12) with the names of the parties and the date inserted. You must also complete the attached Certificate of Delivery.]

3. In support of its request, the applicant relies on the following material facts:

See Schedule "A" attached

(Include **all** of the material facts on which you rely including the circumstances, what happened, where and when it happened, and the names of any persons said to have acted improperly. Please note that you will not be allowed to present evidence or make any representations about any material fact that was not set out in the application and filed promptly in the way required by the Board's Rules of Procedure, except with the permission of the Board.)

4. Other relevant statements: **N/A**

DATED **May 21, 2014**.

Lewis Gottlieb

Signature for the Applicant
Counsel for the Applicant

Form A-33

CERTIFICATE OF DELIVERY

1. I certify that the following documents were delivered to [**X**] the responding party, and [ ] any affected party named in paragraph 2 of the application:

   - Application under Section 96 of the Act;
   - a blank copy of a Response to Application under Section 96 of the Act (Form A-34); and
   - Notice to Responding Party and/or Affected Party of Application under Section 96 of the Act (Form C-12) **with the names of the parties and the date inserted.**

Henry Van Vroenhoven **Manager, Human Resources** **Navistar Canada Inc.**	**Fax: 905-332-2975**
Name of Organization and name and title of person to whom documents were delivered	Address or facsimile number to whom documents were delivered
Henry Van Vroenhoven **Manager, Human Resources** **Navistar Canada Inc.**	**5500 N. Service Rd.,** **Burlington, ON** **L7L 6W6**
Name of Organization and name and title of person to whom documents were delivered	Address or facsimile number to whom documents were delivered

[Complete either section 2 or section 3 or section 4 below.]

2. These documents were delivered by [x] facsimile transmission or [ ] hand delivery on

   May 21, 2014 (Date) at _____ a.m./p.m.

3. These documents were sent by [ ] regular mail on _____ (Date) at

   _____ a.m./p.m.

4. These documents were given to Priority Courier (Name of Courier) on May 21, 2014 (Date)

   and I was advised that they would be delivered not later than May 22, 2014 (Date)

   at 5:00 p.m.

Form A-33

NAME: Wendy White

TITLE: Support Staff

SIGNATURE: _____

IMPORTANT NOTES

YOU MUST FILE WITH THE BOARD ONE SIGNED ORIGINAL AND ONE COPY OF THIS APPLICATION AND ANY MATERIALS THAT ACCOMPANY IT.

THE BOARD'S RULES OF PROCEDURE DESCRIBE HOW AN APPLICATION MUST BE FILED, WHAT INFORMATION MUST BE PROVIDED, AND THE TIME LIMITS THAT APPLY. AN APPLICATION MAY NOT BE PROCESSED BY THE BOARD IF IT DOES NOT COMPLY WITH THE BOARD'S RULES OF PROCEDURE.

YOU CAN OBTAIN A COPY OF THE RULES FROM THE BOARD'S OFFICES AT 505 UNIVERSITY AVE., 2ND FLOOR, TORONTO, ONTARIO, M5G 2P1 (TEL. (416) 326-7500) OR FROM THE BOARD'S WEBSITE AT www.olrb.gov.on.ca.

BOARD HEARINGS ARE OPEN TO THE PUBLIC UNLESS THE PANEL DECIDES THAT MATTERS INVOLVING PUBLIC SECURITY MAY BE DISCLOSED OR IF IT BELIEVES THAT DISCLOSURE OF FINANCIAL OR PERSONAL MATTERS WOULD BE DAMAGING TO ANY OF THE PARTIES. HEARINGS ARE NOT RECORDED AND NO TRANSCRIPTS ARE PRODUCED.

THE BOARD ISSUES WRITTEN DECISIONS, WHICH MAY INCLUDE THE NAME AND PERSONAL INFORMATION ABOUT PERSONS APPEARING BEFORE IT. DECISIONS ARE AVAILABLE TO THE PUBLIC FROM A VARIETY OF SOURCES INCLUDING THE ONTARIO WORKPLACE TRIBUNALS LIBRARY, AND OVER THE INTERNET AT WWW.CANLII.ORG, A FREE LEGAL INFORMATION DATA BASE. SOME SUMMARIES AND DECISIONS MAY BE FOUND ON THE BOARD'S WEBSITE UNDER *HIGHLIGHTS* AND RECENT DECISIONS OF INTEREST AT WWW.OLRB.GOV.ON.CA.

IN ACCORDANCE WITH THE *ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT, 2005,* THE BOARD MAKES EVERY EFFORT TO ENSURE THAT ITS SERVICES ARE PROVIDED IN A MANNER THAT RESPECTS THE DIGNITY AND INDEPENDENCE OF PERSONS WITH DISABILITIES. PLEASE TELL THE BOARD IF YOU REQUIRE ANY ACCOMMODATION TO MEET YOUR INDIVIDUAL NEEDS.

Schedule A

Introduction

1. The applicants, Unifor and its Locals 127 and 35 are the trade union successors to CAW-Canada and its Locals 127 and 35, respectively. In this pleading they are jointly referred to as "the applicant" or "the union".

2. The respondent employer Navistar Canada Inc. (hereinafter "the respondent" or "Navistar" or "the company") was formerly known as International Truck and Engine Corporation of Canada. The respondent is incorporated under the laws of Ontario.

3. The respondent's head office is located in Burlington, Ontario.

4. For many decades, up until June 30, 2009, the respondent manufactured and assembled Long Distance Class 8 heavy tractor trucks with optional sleeper cabs, at its facility in Chatham, Ontario.

5. The respondent is a wholly owned subsidiary of Navistar International Corporation, a multi-national corporation with headquarters in Warrenville, Illinois, USA.

6. The heavy truck models manufactured by the respondent in the months leading up to June 30, 2009 included the International Truck brand of Prostar and Lonestar long distance tractors.

7. The applicant and the respondent were parties to a collective bargaining relationship going back several decades.

8. The terms and conditions of hourly unionized production workers employed at the respondent's Chatham facility were defined and governed by successive collective bargaining agreements, made by the CAW-Canada and its Local 127 and the respondent, the last of which was in effect between January 31, 2007 and June 30, 2009.

9. The terms and conditions of employment of unionized office and clerical, salaried workers were defined and governed by successive collective bargaining agreements binding the respondent and the CAW-Canada Local 35, the last of which was in effect also between January 31, 2007 and June 30, 2009.

Layoffs of Hourly Production Employees

10. On or about November 2, 2008, there were approximately 1,132 unionized hourly production employees of the respondent at its Chatham facility represented by the CAW-Canada and its Local 127. Of this total, approximately 1,015 were actively employed, and approximately 79 were on layoff from active employment with a right of recall. Approximately 38 employees were absent from work on an approved personal or medical leave of absence.

11. On November 5, 2008, 470 unionized hourly production employees were provided a notice of layoff, due to a shortage of work, for the purpose of section 58 of Part XV of the *Employment Standards Act, 2000*, effective February 1, 2009.

12. On January 5, 2009, 170 unionized hourly production employees were provided a notice of layoff, due to a shortage of work, for the purpose of Section 58 of Part XV of the *Employment Standards Act, 2000*, effective March 1, 2009.

13. On April 2, 2009, all remaining active unionized hourly production employees represented by the CAW-Canada and its Local 127 were provided a notice of layoff, due to a shortage of work, for the purpose of Section 58 of Part XV of the *Employment Standards Act, 2000* effective June 30, 2009. After June 30, 2009, these employees were on layoff with a right of recall to active employment.

Layoffs in the CAW-Canada Local 35 Bargaining Unit

14. On or about November 4, 2008, there were approximately 101 employees within the bargaining unit defined by the office collective agreement.

15. On November 5, 2008, 29 active employees covered by the office collective agreement were given a notice of layoff, due to a shortage of work, for the purpose of Section 58 of Part XV of the *Employment Standards Act, 2000*, effective February 1, 2009.

16. On January 5, 2009, a further 29 employees covered by the office collective agreement were given a notice of layoff, due to a shortage of work, for the purpose of Section 58 of Part XV of the *Employment Standards Act, 2000*, effective March 1, 2009.

17. On April 2, 2009, all remaining active employees in the office bargaining unit were given a notice of layoff, due to a shortage of work, for the purpose of Section 58 of Part XV of the *Employment Standards Act, 2000* effective June 20, 2009.

18. As of June 30, 2009, all remaining active employees in the office bargaining unit commenced a layoff with a right of recall to employment.

Collective Bargaining

19. Before the expiry of the production and office collective agreements, the CAW-Canada and Locals 127 and 35 attempted to bargain with the respondent for a renewal of the production and office collective agreements. These negotiations did not produce a settlement.

20. By operation of the *Labour Relations Act, 1995* s.o. 1995 c. 1, Schedule A as amended, and by the terms of the production and office collective agreements, the CAW-Canada and its Locals 127 and 35, and the respondent, entered into a legal strike/lockout position effective 12:01 am June 30, 2009, at which time both collective agreements ceased to operate.

21. However, neither the respondent, nor the CAW-Canada and its Locals 127 and 35, or any employee of the respondent represented by the CAW-Canada and its

Locals 127 and 35 commenced or engaged in a lockout or strike, respectively, on or after June 30, 2009.

22. On or about July 28, 2011 Navistar International Corporation, on behalf of the respondent, delivered a letter to the CAW-Canada announcing the decision taken by the parent corporation on behalf of the respondent to permanently close the respondent's Chatham facility "as part of Navistar's North American manufacturing restructuring initiative".

23. On or about August 2, 2011, the respondent sent a letter to each unionized employee represented by the CAW-Canada and its Locals 127 and 35 advising them that the respondent had notified the union about the respondent's intent to close the Chatham production facility as part of the company's efforts to restructure its North American operations. The respondent advised that its decision to close was driven by "the unparalleled economic industry and operational conditions that have rendered the Chatham plant uncompetitive".

24. No collective agreement was in effect when the applicant union, and the affected employees received notice of closure of the Chatham facility from their employer, the respondent.

25. Following the announcement of the permanent closure of the Chatham facility, representatives of the applicant and the respondent met to bargain the terms of the closure agreement.

26. Face to face meetings occurred on or about August 19-24, 2011; September 23-25, 2011; October 17, 2011 and December 20, 2011, in Windsor, Ontario.

27. The discussions between the parties centered on the following issues which are normally germane to the conclusion of a closure agreement:

Continuation of bargaining rights
Recall rights
Employee records
Termination and severance pay entitlements
Transition payments

Defined benefit pension plan wind-up
Post-employment health care benefits
Health security coverages
Treatment of employees in receipt of WSIB benefits
Employee Assistance plan funding
Worker Adjustment Centre funding
Settlement of outstanding grievances
Disposition of sub fund monies
Post-closure dispute resolution procedure
Final release and agreement

28. By December 20, 2011, most of the items noted-above had been resolved by way of a tentative agreement with respect to that particular issue.

29. The items covered by a tentative agreement, as of December 20, 2011, included:

Continuation of bargaining rights
Recall rights
Employee records
Post-employment health care benefits
Treatment of employees in receipt of WSIB benefits
Certain conditions pertaining to the Health Security Agreement
Employee Assistance Plan
Worker Adjustment Centre funding
Grievances
Supplemental Unemployment Benefits Fund
Post-closure dispute resolution procedure
Final release and agreement

30. The remaining items in dispute concerned two fundamental issues, namely, (1) workers entitlement to severance pay, or related compensation (2) the terms and conditions under which the defined benefit non-contributory retirement pension plan would be wound-up.

Pension Plan Issues

31. The necessity of a partial plan wind-up as of the end of July, 2011, pertaining to the unionized employees defined benefit pension plan sponsored by the respondent was understood by both sides.

32. However, the respondent's position regarding the wind-up of the pension plan included the following disputed conditions:

(a) Only plan members who remained as "on-roll employees" as of July 31, 2011, and who had not broken service with the respondent, would be eligible for wind-up benefits.

(b) The accumulation of credited service for laid off employees would cease, in all circumstances, as of December 31, 2009, even though Article 1.03 of the unionized employees Navistar Pension Plan allowed for a 0.9 unit of supplementary credited service to be accumulated for workers who ceased active employment in 2009, thus permitting an accumulation of credited service for a large majority of plan members well beyond December 31, 2009.

(c) Only "on-roll employees" who met the eligibility criteria as stated in Exhibit "C" to the unionized employees Navistar Pension Plan would be provided special early retirement benefits under Article 1.03 of the Pension Plan. The respondent did not acknowledge that it had provided "deemed consent" for access to special early retirement under the provisions of Article 1.03 of the Pension Plan.

(d) Workers who had received severance pay from the respondent were not entitled to participate in the wind up of the plan and receive special early retirement benefits under Article 1.03.

33. The applicant contested each of the positions taken by the respondent with respect to the wind up of the defined benefit pension plan. The applicant argued that each of the company's positions violated the minimum standards guarantees offered by the *Pension Benefits Act* (*PBA*) or failed to respect the basic terms of the Plan. The dispute was not resolved at the bargaining table. The Financial Services Commission of Ontario (FSCO) is the governmental regulator of registered pension plans in Ontario. Submissions in writing were delivered by the

applicant and respondent to FSCO. The Deputy Superintendent (Pensions) of FSCO issued a notice of intended decision with respect to the disputed conditions of the pension plan wind up. The notice of intended decision largely adopted the submissions made by the applicant.

34. The respondent appealed the notice of intended decision issued by the Deputy Superintendent to the Financial Services Tribunal ("FST").

35. A hearing of the respondent's appeal was fixed for December 9, 2013.

Severance Pay

36. While the parties have a difference regarding the matter of transition pay for those employees not entitled to severance pay, the key remaining difference between the parties and the principal difference between the parties regarding severance pay concerns not so much the amount of severance pay to be paid by the respondent but rather **which** employees represented by the applicant are entitled to severance pay.

37. It was understood by both sides that employees with less than five years service were not entitled to statutory severance pay.

38. Initially the respondent paid severance pay to individual employees, with more than five years of service, who requested such pay, and were prepared to sign, on their own account, individually, a release and a renunciation of recall rights.

39. The respondent made such payments notwithstanding the absence of a closure agreement.

40. The respondent obliged each individual worker who sought, on their own accord, severance pay monies to sign an individual "contract" of release of liability pertaining to severance pay, notwithstanding the absence of the union's consent to such a procedure.

41. By December 2012, the respondent ceased its practice of paying severance pay to individual workers requesting same.

42. A list of workers who received severance pay and were obliged by the respondent to individually sign waivers is attached.

43. The company insisted that all employees immediately eligible for retirement were/are not entitled to severance pay. The respondent categorized any employee eligible to take regular early reduced retirement, as being "immediately eligible to retire", and thus the respondent insisted that such workers were dis-entitled to statutory severance pay.

44. The respondent also took the position that any "on-roll employee" who was immediately eligible for a special early retirement, or who could "grow into" a special early retirement benefit was dis-entitled to severance pay.

45. While the union recognized that any employee who as of July 28, 2011 was eligible to take normal retirement at age 65, or a disability pension or was immediately eligible to retire **and** immediately eligible as of July 28, 2011 to commence receiving an unreduced retirement benefit would not be entitled to severance pay, the union insisted that all other workers with in excess of five years' service as of July 28, 2011 were or would be entitled to severance pay.

46. The applicant's view was and remains that many of the severed employees of the respondent whom the respondent seeks to deny severance pay are entitled to such pay. Two significant categories of such employees entitled to severance pay include:

    1. Those workers who "grow into" an actuarially unreduced pension **after** their termination of employment has occurred;

    2. Notwithstanding paragraph 1 above, all workers who retire short of 60 years of age or 30 years of service or a combined 85 points of age and service and accordingly suffer an actuarial reduction with respect to their pension benefits.

47. The dispute between the parties with respect to **entitlement** to statutory severance pay centered upon the meaning, interpretation, and application of paragraph 9(3) of Ontario Regulation 288/01.

48. Paragraph 9(3) of Ontario Regulation 288/01 exempts certain workers from entitlement to severance pay. Specifically, it states:

> "The following employees are prescribed for the purposes of sub-section 64(3) of the *Act* as employees who are not entitled to severance pay under section 64 of the *Act*: an employee who, on having his or her employment severed, retires and receives an actuarially unreduced pension benefit that reflects any service credits which the employee, had the employment not been severed, would have been expected to have earned in the normal course of events for purposes of the pension plan.

49. Talks pertaining to the resolution of the severance pay and pension wind-up issues reached an impasse and broke down by the end of December, 2011.

Class Action Re: Severance Pay

50. On March 27, 2012, the CAW-Canada Local 127 production unit chairperson Cathy Baker, and the CAW-Canada Local 35 office and clerical unit vice chairperson Joe Lucier stepped forward as proposed class action plaintiffs and served and filed a statement of claim which named the respondent as a defendant. The claim sought a remedy on their own behalf, and on behalf of similar situated unionized employees of the respondent.

51. The class action proposed to obtain a number of remedies, including the following orders:

> "A declaration that the defendant (respondent) had breached its contracts of employment **or the terms of its employment relationship** with the plaintiffs and each member of the class
>
> An order that the defendant (respondent) pay the plaintiffs and all class members compensation in lieu of notice, including payment for all outstanding wages, vacation pay, overtime, premiums, benefits and **severance pay** in amounts to be determined by the court

> A declaration that the defendant had breached the terms of its employment relationship with the plaintiffs and each member of the class.... By failing to comply with its contractual or legal obligations towards these unionized employees, **by failing to adhere to statutory requirements**, and by retaining for itself amounts in respect of wages and or compensation owing to the plaintiffs and members of the class".

52. One of the principal allegations contained in the statement of claim was the proposition that the respondent had failed to pay members of CAW-Canada Locals 127 and 35 the statutory severance pay due to them as a result of their termination of employment and the closure of the Chatham facility.

53. The respondent moved to have the proposed class action dismissed on the grounds of the Superior Court Justice lacked the jurisdiction to entertain the claim. The respondent argued that the statement of claim raised issues that were covered by the parties' obligation to bargain with each other in good faith.

54. The respondent further submitted, in its motion material and before the Court, that if the plaintiffs were concerned about the conduct of the respondent in relation to entitlements following the closure of the Chatham facility, a complaint to the Ontario Labour Relations Board was necessary.

55. On May 9, 2013, the motions judge, Justice Gates dismissed the proposed class action and struck down the statement of claim issued by Ms. Baker and Mr. Lucier.

56. The motions judge summarized the arguments of the respondent before the court in part as follows:

> "In response, Navistar brings this motion pursuant to rules 21.01 and 25 of the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194 to strike out the amended statement of claim and to dismiss the plaintiffs claim to being entitled to bring the proposed class proceeding. It says that this court has no jurisdiction to hear this matter.
>
> Navistar submits that at all times the plaintiffs and all the members of the proposed class were represented by the CAW as their exclusive bargaining agent such that exclusive jurisdiction rests with the Ontario

> Labour Relations Board ("OLRB") pursuant to the *Ontario Labour Relations Act*, s.o. 1995 c.1, Schedule "A" ("*LRA*")...
>
> Navistar's position, simply put, is that the labour relations scheme embodied in the LRA displaces the common law of individual employment contracts and that, therefore, the only proper form to deal with these issues is the OLRB and not the courts.

57. The respondent also pleaded that because the statutory scheme of exclusive representation still governed, in the absence of a decertification of the union or the union's voluntary abandonment of bargaining rights, the dispute identified by the union could only be heard by the Ontario Labour Board.

58. Navistar said that while an employee could resort to the minimum standards of the *ESA, 2000* this did not give an employee the right to deal with the employer directly and that the CAW-Canada had to bargain a closure agreement in order to obtain the various entitlements provided by law. Navistar took this position notwithstanding the fact that it had dealt with many employees individually by negotiating the signature of a signed release in return for statutory severance pay.

59. The union appealed the decision of Justice Gates to the Ontario Court of Appeal.

60. The appeal was heard on February 7, 2014. The plaintiffs appeal was dismissed by the Court of Appeal. The Court of Appeal issued a brief endorsement which stated:

> [1] "We are in substantial agreement with the reasons of the motion judge.
>
> [2] We called on the respondent on only one issue – the claim as it relates to benefits under the *Employment Standards Act ("ESA")*
>
> [3] With respect to the *ESA*-related claim, we read that claim as advanced on the same basis as the other claims, that is, that on the expiry of the collective agreement, individual contracts of employment sprang up between the workers and their employer. In our view, that claim is no more tenable on the facts as pleaded or as a matter of law that are the other claims advanced, e.g. the reasonable notice claim.

> [4] The motion judge was not asked to determine what, if any, entitlement the plaintiffs had under the *ESA*. No one suggests that the motion judge made any such determination.
>
> [5] The appeal is dismissed."

Other Meetings and Discussions Between the Parties

61. Following the dismissal of the proposed civil class action, but before the Court of Appeal hearing, on June 17, 2013, Robert Chernecki (retired) Assistant to the President wrote to Barry Morris, Director of Labour Relations for Navistar International.

62. Mr. Chernecki, on behalf of the Union, delivered a comprehensive set of proposals for a closure agreement. The proposals included a resolution of several issues the parties had resolved on a tentative basis. The two key issues in dispute remained pension benefit entitlements on plan wind-up, and severance pay.

63. The respondent rejected the offer and made no counter proposal.

64. Subsequently the applicant took steps to request and arrange a meeting with representatives of the respondent to discuss in person a comprehensive resolution to all closure issues.

65. Such a meeting occurred on August 13, 2013 in Detroit, Michigan. Troy Clarke President, Navistar International, and Barry Morris, a Senior Human Resources Director, attended the meeting for the respondent. Ken Lewenza, President of the CAW-Canada and Lewis Gottheil, Counsel attended for the applicant.

66. The union provided the company with another comprehensive offer, off the record, to resolve all closure issues.

67. The senior company officials in attendance advised that they would consider the offer and reply in due course.

68. On September 26, 2013, Mr. Clarke and Mr. Lewenza spoke for about five minutes by telephone. There was sufficient time for the respondent to advise the applicant that the respondent rejected the union's offer of settlement.

69. On October 17, 2013, the union communicated with Mr. Morris in writing and provided an "on the record" complete offer for settlement.

70. The union's offer for settlement was straight forward. The union proposed that the matter of bargaining rights, employee records, treatment of WSIB employees, grievances and a post closure dispute procedure be resolved as they had been tentatively agreed to by the parties as of December, 2011.

71. That left only two key issues for resolution: pension wind-up entitlements, and severance pay/transition pay entitlements. With respect to the matter of pension wind-up entitlements, the union's submission proposed the following settlement term:

> "The company shall administer the partial wind-up of the Navistar Canada Inc. Retirement Plan and all other related matters according to the PBA, supporting regulations, and decisions of the FST and/or courts".

72. With respect to severance pay and transition payments, the union submitted the following terms:

> **"Severance pay: the company accepts the last proposal of the union or accepts the following terms: any dispute with respect to entitlement to severance pay as per *ESA* for any or all on-roll employees is sent to grievance arbitration to a mutual agreed arbitrator who has all the powers and authority of a Section 48 arbitrator under the OLRA and law, including the authority to make a full remedy if warranted (no claim will be made for any employee who has received *ESA* severance pay) (in default of mutual agreement on appointment MOL).**
>
> On-roll employees: includes all employees on the respective production and clerical unit seniority list as of June 30, 2009, including all laid off employees, employees on company approved leave of absence, employees on disability and WSIB. This definition applies to all references to on-roll employees in this agreement.

> Transition payments all on-roll employees as of June 30, 2009 who were not entitled to severance pay will be entitled to a one time transition payment of "30 or more years – $35,000; 20 but less than 30 years - $20,000; 10 but less than 20 years – $17,500; less than 10 years – $3,000".

73. On or about November 8, 2013, Barry Morris telephoned Ken Lewenza to advise that the union would receive a written response shortly with respect to the proposal put forward on October 17, 2013. Mr. Morris advised that the response would be to the effect that the union's offer was "too rich" and the company would rely on their "past positions".

74. On November 13, 2013, a written reply from the respondent to the union was received. It stated as follows:

> "Thank you for your letter and proposal dated October 17, 2013. I apologize for the delay in my response as the letter was addressed to the former Navistar headquarters and accordingly spent some time getting to me. The company has given careful consideration to your proposal for a settlement of all outstanding issues related to the closure of the Chatham Assembly Plant and, unfortunately, find that this does not represent a basis for final agreement. Both parties have clearly defined our respective positions and at this point, we feel that the appropriate course is to pursue the process we are currently in with the Financial Services Tribunal".

75. On November 25, 2013, the union replied in writing to the respondent. The applicant union observed, in part, as follows:

> "On October 17, 2013, the union sent you, by email and letter, a comprehensive offer. The offer is and remains straight forward. It calls for the resolution of some secondary issues on the basis of previous tentative agreements.
>
> The two major cost items remain pensions and severance pay. With respect to pensions, the union's offer is simple and cannot be any more plain. The company will do whatever the minimum standards of the PBA call for in the plan wind-up. There can be no bargaining over that point.
>
> With respect to severance pay, the union's offer is that the company should pay severance pay according to the minimum entitlements in the

Employment Standards Act, 2000. Again, there can be no bargaining over that point. **In light of any disagreements over WHO is entitled to severance pay, the union says an arbitrator should decide that issue. Again, there is no real bargaining that can occur with respect to this request: the company has to honour the *ESA 2000*, the union asks for no more on that point.**

The only issue that goes beyond the legal minimum is the issue of transition payments to workers not entitled to severance pay. This is a cost item. The company has a duty to bargain with the union. The company itself has repeated this principle many times – it must bargain in good faith with the union after the closure announcement of July 28, 2011. However, since at least August 2013 the company has not engaged in bargaining. Your letter of November 13, 2013 is a non-starter; it does not define the company's position. The company says that the process before the FST should play out presumably before the company will bargain. But the parties cannot delay bargaining in that fashion. What is the company's position for settlement? What will constitute grounds for a deal? The process for the FST will not advance a settlement discussion because that process will define minimum entitlements. What is the company's position for settlement today? Please advise in detail with a supporting explanation".

76. The respondent replied in writing to the union applicant on November 27, 2013. In that correspondence the respondent stated:

"We acknowledge receipt of your letter dated November 25, 2013. We agree with you that the pension issue remains a major cost item and we too share your disappointment with the lack of progress to date.

Given the fact that pensions would be an important item in any overall settlement proposal, given the fact that we are less than two weeks away from the commencement of a four day Tribunal hearing regarding the parties rights and obligations with respect to the various pension issues, we feel that it would be the most prudent use of everyone's time to focus their efforts on that proceeding, in order to ensure that the Financial Service Tribunal thoroughly briefed on the outstanding pension matters and is able to make a fully informed decision. We are more than happy to resume our negotiations after the conclusion of the hearing, and we suggest we touch base at that time to discuss next".

77. On December 5, 2013, the parties were advised that the FST hearings scheduled for December 9, 11, 12, and 16, 2013 were cancelled due to a lack of quorum among members of the FST.

78. On December 13, 2013, the applicant wrote to the respondent and said as follows:

> "We acknowledge receipt of your correspondence dated November 27, 2013.
>
> We again disagree with the contents. We cannot defer discussions in the manner you suggest. Our union and Navistar need to act to bargain a resolution to our issues **now**, something that can and must be done now, assuming as we must that Navistar agrees to abide by any FST ruling with respect to the FST file which was to be heard commencing on December 9, 2013. Indeed, the cancellation of the hearing by the Registrar's office demonstrates clearly why a deferral of bargaining cannot and must not await a ruling of the FST. In any event, it is clear that the FST will simply direct what constitutes minimum standards entitlements in the pension sphere.
>
> Navistar has to bargain with the union with respect to severance pay issues now given the union's recent offer on this subject. Indeed the company cannot plead elsewhere that severance pay is only an issue for negotiations, and then instead of negotiating ask for an order of the FST denying severance pay entitlement as the company did in its brief of submissions to the FST. That kind of positioning is arbitrary and inconsistent.
>
> Accordingly, we return to the key issues between us which in our view can be simply stated – we can put them in the form of a question.
>
> **(1) Will Navistar agree to put the issue of any disputed entitlement of any employee on the seniority list as of June 2009 to minimum standards *ESA* severance pay to an independent arbitrator for resolution?**
>
> The union has proposed a transition payment for all employees found not to be entitled to severance pay under the *ESA* rules. If that sum of money is not acceptable,
>
> **(2) What sum of money is acceptable?**

Your substantive answers to these questions are imperative in our view to permit the parties to complete our efforts in bargaining.

We look forward to these answers within the briefest of delays".

79. On December 23, 2013, Navistar replied:

"Navistar acknowledges receipt of your letter dated December 13, 2013.

Navistar disagrees with many of the assumptions and conclusions made in the letter.

Further to Navistar's letter to Ken Lewenza dated November 27, 2013 we agree that the pension issues remain a major cost item and we too share your disappointment with the lack of progress to date. Given the fact that the Financial Services Tribunal hearing regarding the parties rights and obligations with respect to the various pension issues has been adjourned, Navistar would be happy to resume our negotiations on a "without prejudice" basis subject to Unifor submitting a reasonable "without prejudice" settlement proposal for our review in preparation for such negotiations".

80. On February 17, 2014, shortly after the dismissal of the proposed class action to recover, among other matters, severance pay compensation, the applicant wrote the respondent the following correspondence:

"We acknowledge receipt of your letter dated November 27, 2013. As you will recall just days after November 27, 2013 the FST cancelled the hearings in the pension appeal initiated by the Company.

Last week (February 7, 2014) the Court of Appeal turned down the appeal of the dismissal of the proposed class action lawsuit brought by Cathy Baker and Joe Lucier.

However, the Court of Appeal was careful to say the dismissal had nothing to do with a worker's entitlement to severance pay.

The Company has consistently submitted that the ability to bargain in good faith applies to the issues arising out of the closure.

That duty cannot be suspended or put off. Nor can the union wait several months until the FST issues a ruling (with the possibility Navistar may appeal an adverse FST ruling) before meaningful negotiations are

undertaken. This is especially true when the union's offer to settle the pension issue is simple: each side will respect the outcome of the legal proceedings as that outcome simply defines minimum standards in the pension context. The other significant cost item for the Company is severance pay. **Again, here the Union's position is simple – any dispute regarding *ESA* severance pay entitlement is sent to arbitration**. Finally, the amount of transition pay to be awarded anyone not entitled to severance pay (potentially a very small group) is negotiable. Accordingly, we are putting our position expressed in the attached October 17, 2013 letter (and reaffirmed since) back on the table.

Navistar has an obligation to respond with a substantive response. The duty to bargain in good faith calls for nothing less.

We look forward to Navistar's response"

81. The respondent replied with the following message:

"We acknowledge receipt of your letter dated February 17, 2014. Further to our letter to Lewis Gottheil dated December 23, 2013 (a copy is attached for your reference), we are happy to resume our negotiations on a "without prejudice" basis.

We recognize that the Financial Services Tribunal hearing regarding the pension matters has been rescheduled for early April 2014. As such, we suggest that it would be most efficient if we could arrange a face-to-face meeting in March 2013, subject to everyone's schedules.

Please advise as to your availability in March 2014, and if you have a preference as to meeting location, attending parties, etc".

82. The applicant, in turn responded:

"Unifor and its affected Local Unions as previously noted seek to meet with the Company. However, the identity of the attending parties, the scope of the meeting, and indeed the meeting location depends on the Company's response to two simple points:

a) Will the company present a proposal for settlement at the meeting in response to the Union's last proposal and if so would the Company do so in advance of the meeting to allow the Union to save time in its analysis of same; and

b) The Union says the negotiations must be on the record, save for

the following point. We recognize that the issues of pension benefit entitlement and windup are the subject of litigation before the FST. As such, we recognize that any discussion of such pension issues cannot be relied upon or repeated by either side in connection with the FST proceedings. Everything else is on the record.

Please provide us with your response to these points and we can move forward".

83. The respondent stated, in a letter dated March 17, 2014:

"We acknowledge receipt of your letter dated March 11, 2014 and we join you in wanting to move forward with a face-to-face meeting.

Further to your correspondence, we will prepare a response to the Union's last proposal, and will endeavor to provide it to the Union in advance of our meeting. We agree with having these negotiations on the record.

Could you please advise as to your availability and preferences as to meeting location, identity of the parties attending and the scope of the meeting".

84. On March 24, 2014 the company tabled a comprehensive offer for settlement. The company's position regarding severance pay failed to address the key issue dividing the parties; the issue which presented the principle obstacle to settlement.

85. The company's position regarding severance pay was that it would simply "meet legislative requirements subject to final pension eligibility determination."

86. The company failed to advise how it proposed to bridge the gap between the parties' respective positions as to WHO was entitled to the legislative requirements. This was a subject the applicant had repeatedly raised and identified – nevertheless the respondent avoided it again.

87. The company's position with respect to the pension plan windup stated that the issues ought to be left in the hands of the FST and any related appeal.

88. On March 31, 2014 the union advised the respondent as follows:

> "Thank you for your letter of March 26, 2014. I have been instructed to send along this reply. The union seeks to meet with the company at the earliest available opportunity. It appears that the best way forward is to take an hour or so at the end of one of the days of hearings that are already set in front of the FST.
>
> We can ask FSCO to provide us a room in which to meet. There are many such meetings rooms on the floor of the building where the hearing will take place.
>
> We suggest we met Friday, April 11th when the first day ends.
>
> We look forward to the company's response".

89. On April 7, 2014 the Company responded:

> "I acknowledge receipt of your letter dated March 31, 2014 via email regarding a meeting to discuss the issues related to the above matter. We share your desire to meet at the earliest possible time to attempt to bring the issues that separate us to resolution. You have suggested a meeting following the first day of the Tribunal hearing. I suggest we take the opportunity to use that time to identify a suitable date for both teams to meet that will give us ample time to fully explore potential solutions to the issues. In earlier correspondence, the Union suggested a Saturday meeting in Windsor. The Company is in agreement with that plan on a date that is mutually acceptable.
>
> If you would like to discuss prior to April 11th, please feel free to call me at your convenience at my office – (331) 332-3570 or on my cell phone (630) 605-2032. I look forward to hearing from you".

90. On April 8, 2014 the union advised the company that it was looking forward to a meeting at the end of the first day of the FST hearings.

91. After the first day of hearing before the FST was completed, the parties did indeed have an opportunity to meet.

92. Mr. Morris, Mr. Soccio, counsel to the respondent as well as Henry VanRoenhoven, the respondent's Human Resources Manager participated in the meeting for the respondent.

93. Bob Chernecki, retired Assistant to the President, Jim Mitchell, National Representative, Jeff Wareham, National Representative, Cathy Wiebenga, Local 127 Unit Chair and Joe Lucier, Local 35 Unit Chair, as well as Douglas Wright attended the meeting.

94. Counsel for the applicant kicked off the meeting by stating words to the effect of:

> "We have been corresponding back and forth about a meeting. But before we fix a date for a meeting we have a question we need to ask.
>
> The company and union have a difference over WHO is entitled to severance pay. Will you agree to send that issue of who is entitled to severance pay under the *ESA* to arbitration"?

95. Mr. Morris for the respondent immediately and plainly said NO the company will not agree to send the issue of entitlement to arbitration.

96. The meeting then broke up.

Submissions

97. There are and have been two outstanding and significant costs issues which have divided the parties in the course of bargaining with respect to a closure agreement (a) pension entitlements upon plan windup (b) severance and related compensation. Both issues are fundamentally governed by minimum standards legislation. Employers and collective bargaining agents cannot "contract out" out of minimum standard guarantees.

98. The parties' differences with respect to the application of the minimum standards expressed in the *PBA* were put before and resolved by FSCO. FSCO found (subject to review upon appeal) that the positions expressed by the union reflected and were consistent with the minimum standards set out in the statute and the terms of the Pension Plan.

99. The parties' differences regarding WHO is entitled to statutory severance pay have sunk the prospects for collective bargaining and the conclusion of a final closure deal.

100. The union initially brought an action in Court to recover severance pay and related compensation after an impasse was reached at the end of 2011.

101. The union submitted in the course of that action, that among other matters, the Court could and should take jurisdiction over a claim for statutory severance pay. The respondent argued no such claim could be entertained in Court.

102. The Court of Appeal found that the claim, as expressed was grounded upon an individual employment relationship which could not be sustained. No decision was made regarding the matter of substantive entitlement to statutory severance pay.

103. The impasse over WHO is entitled to severance pay remains.

104. The union has repeatedly offered an appropriate way out of the impasse. The way out is provided by arbitration, so that every employee who is entitled to the statutory guarantees may have his/her rights determined and vindicated according to law.

105. The applicant submits that the company's refusal to agree to send the matter of entitlement to *ESA* statutory severance pay to arbitration has reinforced the impasse which precluded a resolution to these talks. The question as to WHO is entitled to severance pay under the *ESA* cannot be compromised by the union because access to statutory severance pay reflects access to a minimum standard of employment. The guarantees expressed in the *ESA 2000* are viewed commonly as quasi constitutional in nature. The determination of WHO is entitled to statutory severance pay, in these circumstances, absent an agreement of the parties must be resolved by an independent third party.

106. The respondent opposed the determination of severance pay entitlements by the Superior Court of Justice.

107. The union supported an attempt by local union representatives to have the matter of entitlement to severance pay determined by an independent adjudicator (the Superior Court of Justice) under the terms of the *ESA 2000*.

108. Once the litigation was over and after the applicant produced a clear comprehensive offer for settlement, and made repeated requests for a substantive response from the respondent, the respondent's response has been to block the resolution of the last substantive outstanding issue.

109. The employer ought not to be able to take the matter of statutory rights under the *ESA* to impasse because to do so, in this context, would render such statutory rights subject to the parties' balance of bargaining power rather than the rule of law.

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Schedule "B"

1. The applicant seeks a declaration that the respondent's conduct as specified herein constitutes a violation of Section 17 of the *OLRA*.

2. The applicant seeks an order of the OLRB directing the respondent to cease and desist its violation of the *OLRA, 1995*.

3. The applicant seeks a direction of the OLRB that the matter of entitlement to severance pay under the *ESA 2000* be referred to a neutral arbitrator clothed with all of the powers granted by Section 48 of the *OLRA, 1995* to determine which employees of the respondent as of June 29, 2009 are entitled to severance pay under the *ESA 2000*.

4. Should the parties be unable to select an arbitrator within seven days of the decision of the OLRB to direct arbitration, then the Minister of Labour of Ontario or the OLRB shall be empowered to appoint such an arbitrator.

NAVISTAR
IRREVOCABLE RECALL RIGHTS ELECTION

NAME	DATE
Blackwell, Sherry	January 3, 2012
Currie, Stephen	February 20, 2012
Moon, Pam	March 7, 2012
Fraser, Esther	March 27, 2012
McLean, Valerie	March 29, 2012
Rushlow, Denise	April 24, 2012
Merritt, Evan	May 7, 2012
Pisonneault, Larry	May 8, 2012
Ritches, Christopher	May 9, 2012
Robbins, Sue	May 15, 2012
Ardis, Tracy	May 16, 2012
Hall, Brian	May 28, 2012
Valade, Timothy	May 28, 2012
Baxter, Beverly	May 31, 2012
Cowan, Cory	June 5, 2012
Brooks, William	June 5, 2012
Earle, (McPhail), Melanie	June 12, 2012
Jackson, Mark	June 19, 2012
Iwanchun, Steve	June 22, 2012
Beaurone, Johanne	June 25, 2012
Hoste, Patrick	June 27, 2012
Eagleson, Allan	June 28, 2012
Violot, Jeff	June 29, 2012
Burke, Anita	June 29, 2012
Vandermolen, Andrew	June 29, 2012
Henry, Charles E.	July 3, 2012
Iliffe, Peggy	July 3, 2012
Crew, Greg	July 3, 2012
Polano, Frank	July 6, 2012
Collins, Ryan	July 6, 2012
Clements, Louis	July 8, 2012
Vandenham, Dawn	July 9, 2012
Alexander, Gilbert	July 10, 2012
Fletcher, Jim	July 10, 2012
VanMensel, Frank	July 11, 2012
Green, Carl	July 12, 2012
Rottier, Katherine	July 12, 2012
Dejaegher, Chris	July 12, 2012
Day, John	July 13, 2012
Cazabon, David	July 13, 2012
Leggroulx, Phillip	July 13, 2012
Debusschere, Ron	July 20, 2012
Skrzypa, Brian	July 22, 2012
Roberts, Gary	July 27, 2012
Drew, Tom	July 27, 2012
Drew, Tom	July 27, 2012
Bedell, Mary Ann	July 30, 2012
Dhamiait, Ranjit	July 30, 2012
Dhamiait, Ranjit	July 30, 2012
Gustin, Steve	August 2, 2012

NAVISTAR
IRREVOCABLE RECALL RIGHTS ELECTION

Robinson, Dennis	August 8, 2012
Baylis, Ken	August 16, 2012
Mahu, Lorraine	August 16, 2012
Cooper, Owen	August 17, 2012
Peats, Eva	August 23, 2012
Decan, Daniel E.	August 30, 2012
Glassford, James P.	September 9, 2012
Lane, James D.	September 12, 2012
Poissnat, Tammy	September 17, 2012
Petrusenko, Oleg	September 17, 2012
LeClerc, Debra	September 17, 2012
Emery, Mark	September 19, 2012
McDonald, Kelvin	September 20, 2012
Dreveny, Daniel J.	September 24, 2012
Galbraith, Kevin	September 26, 2012
Jamrozinski, Chris	September 30, 2012
Robertson, Kevin	October 2, 2012
Jackson, Darlene	October 4, 2012
Gaetz, Tracy	October 5, 2012
Martin, Donna Jean	October 9, 2012
Lanove, Marcel	October 9, 2012
Rumble, Terry L.	October 10, 2012
Bourgeois, Penny	October 15, 2012
Hopkins, Bonnie Jean	October 15, 2012
White, David	October 16, 2012
Gagner, Dwayne	October 16, 2012
Griffin, Richard Anthony	October 26, 2012
Haskell, Lindaq	October 31, 2012
Fysh, Wendy	November 1, 2012
Stewart, Rhona	November 1, 2012
Homewood, Richard	November 1, 2012
Lauzon, Kim	November 4, 2012
Moir, Paul	November 5, 2012
Heuston, Suzanne	November 6, 2012
Burniston, Shawn	November 8, 2012
Nanthis, Mary Theresa	November 20, 2012
LaPainth, Karen	December 6, 2012
Ormond, Daphne	December 7, 2012
Ngo, Te Van	December 10, 2012
Day, Wayne	December 13, 2012
Courture, Verna Marie	December 17, 2012
Cox, Michael	January 22, 2013
Cruse, John	February 12, 2013
Raspburg, Jason Anthony	March 18, 2013
Haruath, Allen Dale	April 16, 2013
Mason, Dan	June 12, 2013
Siddall, Cathy	June 12, 2013
Carrothers, Thomas	June 24, 2013
Kur....George	March 19, 2012 ??
McKrever, Sean	May 15, 2012

Somers, Ed