Court of Appeal File No. M45335
Divisional Court File No. 364/14

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

NAVISTAR CANADA INC.

Appellant (Moving Party)

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent (Responding Party)

- and -

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

Added Party

FACTUM OF THE MOVING PARTY NAVISTAR CANADA INC.

(Motion for leave to appeal)

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PART I – THE PROPOSED APPEAL

The moving party and the order below

1. Navistar Canada Inc. ("Navistar") seeks leave to appeal from the order of the Divisional Court of Ontario (the "Divisional Court") dismissing Navistar's appeal from the Decision with Reasons of the Financial Services Tribunal (the "FST") requiring Navistar to:

   (a) include hundreds of members of the Navistar Canada Inc. Non-Contributory Retirement Plan in the partial windup of that Plan, even though those members were no longer Navistar employees on the effective date of the windup, and

   (b) re-calculate the pensions or commuted value of the pensions for all members of the Plan since its inception more than half a century ago.

Overview

2. Navistar Canada Inc. manufactured trucks at a plant in Chatham, Ontario (the "Plant"). Navistar's truck manufacturing business at Chatham was cyclical, with rounds of significant layoffs and callbacks being a regular feature. The workforce at the plant fluctuated from over 2,000 employees to as few as a few hundred over the years.

3. Starting with the global recession in 2008, Navistar, like others in the highly competitive truck manufacturing industry, faced severe challenges. Capital spending by customers plummeted and orders dropped. The survival of its manufacturing operations at Chatham was threatened. In 2009, as the company faced the expiration of its collective agreements with the Canadian Auto Workers' Locals 35 and 127 ("CAW") (now Unifor), it realized it had to change its operations to be more flexible, make more varieties of trucks at the Chatham location and

service a regional customer base to cut the huge transportation costs of shipping trucks across the continent. It needed to reorganize its business.

4. Navistar knew it could not reorganize its business without the union's consent to new terms in its upcoming collective agreements. No agreement was reached prior to the expiration of the existing agreements on June 30, 2009, but both sides resolved to continue negotiations while the Plant was idled. Negotiations continued for two years, during which time hundreds of employees retired or severed employment. By July 2011, it was clear no agreement to reorganize would be reached and negotiations ended. The Board of Directors of Navistar (the "Board") decided to close the Chatham plant on July 28, 2011, triggering a partial windup of the Navistar Canada Inc. Non-Contributory Retirement Plan (the "Plan") under the *Pension Benefits Act* (the "*PBA*").

5. Section 77.3(1) of the *PBA* sets out the different circumstances in which the Superintendent of Financial Services (the "Superintendent") can order a partial windup. The issue in this case is the proper interpretation and application of that section. Subsection (a) deals with windups arising from a reorganization. The Deputy Superintendent of Financial Services (the "Deputy") erroneously relied on this subsection in ordering the partial windup and determining the scope of the windup group, and the FST and the Divisional Court upheld that decision. Navistar tried in good faith to reach a deal with the union that would allow for reorganization, but that effort failed. While Navistar sought to reorganize to deal with economic challenges of the recession, Navistar was unable to effect any reorganization without new collective agreements, which the union rejected.

6. In the absence of new collective agreements, Navistar closed the plant. Section 77.3(1)(b) covers the events in this case. That section provides for a partial windup when a company closes down a facility at a particular location, in this case the Plant. Under a windup pursuant to s. 77.3(1)(b), the former employees who are entitled to participate in the partial windup are those who were still "on roll" on the date the Chatham plant closed on July 28, 2011. Nonetheless, the Divisional Court upheld the FST's decision that all former employees who ceased employment before and during the period of time when Navistar sought to negotiate with the union to permit it to reorganize are to be included in the partial windup group. In doing so, the Divisional Court, like the FST before it, conflated ss. 77.3(1)(a) and (b). As a result of this misinterpretation of the statutory scheme for partial windups, the Divisional Court held that not only the 558 employees who remained on roll with rights of recall were properly in the windup group, but also all of the hundreds of employees who had left Navistar's employment since February 1, 2009.

7. The leading authority on reorganizations triggering windups is the decision of then Chair of the Pension Commission of Ontario, Eileen Gillese, which held that a windup based on reorganization must relate to a reorganization that was undertaken and the terminations have to be the direct result of a reorganization that has been implemented. As Chair Gillese said, "being *related* to a reorganization is not the same thing as resulting from a reorganization" (emphasis added).

8. In the present case, no reorganization was undertaken; instead, there was a closure. The FST acted outside of its jurisdiction and contrary to sections 74(7) and 77.3(1) of the *PBA* by including hundreds of employees in the windup group beyond those whose employment was

terminated as a result of the s. 77.3(1)(b) event, via the closure at the Chatham location on July 28, 2011, the date of the windup. The Divisional Court erred in upholding that decision.

9. The FST also erred by ordering Navistar to re-calculate the pensions or commuted value of the pensions for all members of the Plan since its inception to include 0.9 years of credited service for all previous periods of layoffs even though pre-windup issues were not before the Superintendent, and even though Navistar had already compensated many of those members pursuant to past practice. The Divisional Court failed to address this aspect of Navistar's appeal in its reasons for decision.

10. Before granting leave, this Court must be satisfied that the proposed appeal presents an arguable question of law, or mixed law and fact, requiring consideration of matters such as the interpretation of legislation. The proposed appeal raises important issues of interpretation of the windup sections of the *PBA*, including the determination of who is eligible to be included in a windup group and the proper interpretation of the windup provisions. The Divisional Court decision errs in law and has significant implications for the practice in this area. Though partial windups have been eliminated by legislative amendment, the same principles apply to full plan windups.

11. This case meets the test for granting leave to appeal, and leave should be granted.

PART II - FACTS

The parties and the Plan

12. ***Navistar.*** The moving party, Navistar, was a manufacturer of commercial vehicles, including heavy trucks. Navistar operated in Chatham, Ontario for more than a century and

owned and operated a heavy truck assembly plant located at 508 Richmond Street in Chatham for more than 60 years (the "Plant").

13. ***The union.*** Navistar was party to collective agreements at the Plant with the CAW. Unifor is the successor to the CAW and was an added party in the appeal before the Divisional Court.

14. ***The Superintendent.*** Upon the closure of the Plant in 2011, both the CAW and Navistar jointly requested that the Superintendent, the respondent in the proposed this appeal, approve a partial windup of the Plan.

15. The Deputy Superintendent of Financial Services (the "Deputy Superintendent") conducted consultations with Navistar and the CAW. The Acting Deputy Superintendent then issued the Notice of Intended Decision ("NOID") in respect of the partial windup.

16. ***The Plan.*** Navistar sponsors the Plan, which is a defined benefit pension plan covering former employees at the Plant who are represented by Unifor. The Plan is registered with the Financial Services Commission of Ontario ("FSCO"). The registration number is 0351684. Navistar is the plan sponsor and administrator.

Background to the appeal

Vehicle production at the Plant

17. Navistar was a major employer in Chatham for many decades. At the hearing before the FST, Navistar led uncontested evidence that there had been a history of fluctuations in the size of the active workforce at the Plant, which rose and fell significantly many times. A significant

change in the size of the workforce occurred once again as a result of a significant decline in orders in late 2008.[1]

18. In the wake of the most severe economic crisis in North America since the Great Depression, and partially as a result of that crisis, Navistar experienced a decrease in Class 8 truck orders in late 2008. At the hearing, the FST accepted Navistar's uncontradicted evidence that its truck production in North America and elsewhere was severely impacted by the general worldwide economic downturn in 2007-2008. In accepting the testimony of Navistar's witness on this issue, Mr. Morris, the FST found that:

> The truck industry in particular was hit by a combination of factors including the credit crisis, fluctuating exchange rates, higher fuel prices, high production costs, and changing freight delivery patterns, which ultimately resulted in fewer truck orders. He testified that as a long haul truck facility in Chatham, fewer orders meant fewer jobs.[2]

19. Production rates at the Plant declined sharply from 115 units in October 2008 to just 35 units in February 2009, with significant resulting layoffs. From February1, 2009 until June 30, 2009, Navistar laid off the following number of employees: 499 effective February 1, 2009, 185 effective March 1, 2009, and 522 effective June 30, 2009, being all remaining Plan members.[3]

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[1] *Transcript of the examination-in-chief of Barry Morris, Friday April 11, 2014* ("*Morris Transcript*"), pp. 104-105, Motion Record of Navistar Canada Inc. ("MR"), Tab 7, pp. 91-92

[2] *Navistar Canada Inc. v. Ontario (Superintendent Financial Services*, 2014 ONFST 8, (the "*Tribunal Decision*") at para. 15(j), MR, Tab 4, pp. 38-39

[3] *Tribunal Decision* at para. 15(u), MR, Tab 4, p. 42; *Navistar Canada Inc. v. Superintendent of Financial Services*, 2015 ONSC 2797 (the "*Divisional Court Decision*"), para. 8, MR, Tab 5, p. 70

20. The FST heard uncontested evidence that other manufacturers and competitors in the region faced similar challenges. Many relocated or ceased operations entirely.[4]

21. Thirty-six Navistar employees chose to retire between November 2008 and the commencement of negotiations for new collective agreements between Navistar and the CAW in May 2009.[5]

Navistar develops a reorganization plan and bargains for a new agreement

22. In response to this crisis in demand for its products and other changes in the market for commercial vehicles, Navistar determined that operations at the Plant would need to be reorganized. In order to proceed with a reorganization, Navistar needed to conclude new collective agreements with the union that would permit the reorganization it required. As a result, in or about the spring of 2008, Navistar was developing a reorganization strategy.[6]

23. The existing collective agreements were set to expire June 30, 2009. The FST heard uncontested evidence that Navistar, aware that a previous expiration of a collective agreement resulted in violent job action by some workers, determined that if no new collective agreements were reached by June 30, 2009, then the Plant would be idled as the parties continued to bargain for new collective agreements. Consistent with this decision, on April 2, 2009, Navistar posted a notice of indefinite layoff to all remaining members of the CAW employed at the Plant,

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[4] *Morris Transcript*, pp. 82, 177-179, MR, Tabs 8 and 9, pp. 93-97

[5] *Transcript of the cross-examination of Henry VanVroenhoven, Monday April 14, 2014 ("VanVroenhoven Transcript")*, p. 383, MR, Tab 10, p. 98

[6] *Divisional Court Decision*, para. 6, MR, Tab 5, p. 70

commencing on June 30, 2009. June 30 was the date later chosen by the Acting Deputy Superintendent as the start date for inclusion of terminated employees in the windup group.[7]

24. The parties commenced formal negotiations for new collective agreements on May 4, 2009. It was the intent of both parties to obtain collective agreements. The parties were not able to reach an agreement by June 30, 2009 and the Plant was idled.[8]

25. Before the Plant was idled, 36 eligible CAW members opted to retire. A further 61 eligible CAW members opted to retire, effective July 1, 2009 at the expiration of the collective agreement. However, the majority of members remained active, hopeful that collective agreements would be negotiated. Both Navistar and the CAW shared this goal.[9]

26. After the Plant was idled, Navistar continued to bargain in good faith for collective agreements that could accommodate Navistar's planned reorganization at the Plant. In a pleading filed by the CAW before the Labour Board more than a year after the Plant was idled the CAW acknowledged that Navistar was "engaged in 'hard bargaining' as opposed to 'bad faith bargaining'". The FST held that Navistar's bargaining mandate remained unchanged from 2009 through 2011.[10]

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[7] *Divisional Court Decision*, para. 5, MR, Tab 5, p. 70; *Morris Transcript*, pp. 188, 217, MR, Tab 11, pp. 99-100

[8] *Tribunal Decision* at paras. 15(y), 15(ff), MR, Tab 4, pp. 42-43

[9] *Tribunal Decision* at para. 15(hh), MR, Tab 4, p. 43

[10] *Tribunal Decision* at para. 15(w), MR, Tab 4, p. 42; *Response of the Union to Ontario Labour Relations Board*, at para. 31, MR, Tab 17, p. 116

The Plant remains equipped and operable after it is idled

27. Following the expiration of the collective agreements on June 30, 2009, the Plant was idled and Plant equipment remained in place at the Plant. The uncontradicted evidence of Navistar was that while idled, the Plant was maintained in a "state of readiness". In its Labour Board pleading the CAW acknowledged that the Plant had been idled. The uncontradicted evidence showed that the union regulators inspected the state of the Plant. FSCO accepted that the Plant was in a state of "temporary shutdown in June 2009". Consistent with Navistar's good-faith bargaining position, the equipment inside the Plant was kept in a state that would allow production to restart with two to three months of retraining and retooling.[11]

Navistar and the union fail to reach new collective agreements

28. The FST found, correctly, that Navistar's bargaining mandate remained the same through 2009-2011. Navistar persisted in its efforts to reach new collective agreements with the union after the Plant was idled and until the decision was made to close the Plant. Negotiation sessions took place on November 18, 2009, December 9, 2009, February 16, 2010, August 19, 2010, September 29, 2010, January 20, 2011, March 8, 2011, May 5, 2011 and May 19, 2011. In addition to the numerous meetings, there were many phone calls and e-mails between the parties, which supplemented negotiations. During these negotiating sessions Navistar presented proposals which, if accepted, would have (i) soon put a portion of the laid off CAW members back to work and (ii) allowed Navistar to retain the Plant as an operational facility with the

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[11] *Response of the Union to Ontario Labour Relations Board* at para. 31, MR, Tab 17, p. 116; *VanVroenhoven Transcript,* p. 320, MR, Tab 12, p. 101; *Letter from Navistar to Cathy Wiebenga and Sonny Galea dated June 29, 2009,* MR, Tab 18, pp. 119-20; *Morris Transcript*, p. 93, MR, Tab 13, p. 102; Transcript of the Opening Statement of FSCO, p. 43, MR, Tab 16, p. 105

potential to grow its active workforce, as it had on many occasions in the past if market conditions so allowed.[12]

The Plant is closed

29. Navistar informed the CAW that Navistar intended to permanently close the Plant on July 28, 2011 (the "Plant Closure"). The Superintendent correctly found that July 28, 2011 was the effective date for the partial windup. The FST and Divisional Court both upheld that finding.[13]

30. Between the idling of the Plant on June 30, 2009 and the Plant Closure, 43 employees voluntarily accepted severance packages. These employees had the opportunity to consult with the CAW or obtain independent legal advice prior to making their decision.[14]

31. Most employees who accepted severance packages signed waivers releasing Navistar of any further claims. Some voluntarily chose to withdraw their pension entitlements under the Plan and transfer them to another retirement arrangement.[15]

32. Employees who chose to retire, as opposed to end their employment, received all rights and benefits available to them under the collective agreements, despite their expiration.

33. The Divisional Court correctly held that at the date of the Plant Closure there were approximately 522 active members in the Plan. Navistar expected that the Plan would be

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[12] *Tribunal Decision* at paras. 15(w), 15(pp), MR, Tab 4, pp. 42, 45; *Morris Transcript*, pp. 188, 217, MR, Tab 11, pp. 99-100

[13] *Tribunal Decision* at para.11, MR, Tab 4, p. 37; *Divisional Court Decision*, para. 11, MR, Tab 5, p. 71

[14] *Tribunal Decision* at para. 15(nn), MR, Tab 4, p. 44

[15] *Severance Agreements*, MR, Tab 19, pp. 121-184

partially wound up and would cover these employees who were still "on roll" on July 28, 2011, but not those employees who had left Navistar's employment prior to that date.[16]

34. Navistar faced similar challenges from the economic crisis in respect of its plant in Springfield, Ohio. In Springfield, Navistar Inc. (the parent corporation of Navistar Canada Inc.) and the union came to an agreement and, as a result, the Springfield plant was reorganized. The uncontradicted evidence of Navistar was that employment at the Springfield plant had since increased by hundreds of employees. This had been the plan and the hope of Navistar in respect of the Chatham Plant had a reorganization been agreed to by the union.[17]

The Notice of Intended Decision

35. Following consultations amongst the Deputy Superintendent, Navistar and the union, on March 7, 2013, the Acting Deputy Superintendent issued a NOID regarding the partial windup of the Plan pursuant to sections 77.3(1)(a) and (b) and 87 of the *PBA*. In the NOID, the Acting Deputy Superintendent incorrectly held that:

(a) the partial windup group included Plan members who ceased to be employed by Navistar after it idled the Plant on June 30, 2009; and

(b) all employees (including all current, former and retired employees) of Navistar who met eligibility requirements were entitled to credited service under section 7.03(b)(iii) of the Plan.[18]

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[16] *Tribunal Decision* at para. 15(jj), MR, Tab 4, pp. 43-44; *Divisional Court Decision*, para. 11, MR, Tab 5, p. 71

[17] *Morris Transcript*, MR, p. 135, Tab 14, p. 103

[18] *Notice of Intended Decision*, paras. (a)-(e), 18, 42, 46, MR, Tab 6, pp. 81-21, 84, 88, 89

The FST Decision

36. On April 3, 2013, Navistar requested a hearing before the FST with respect to the NOID. Prior to the hearing, on October 10, 2013, Navistar brought a jurisdictional motion, which the FST dismissed. The FST's dismissal of Navistar's motion is not at issue in this appeal.[19]

37. The hearing on the remaining issues proceeded before the FST on April 11, 14 and 15, 2014. The FST heard from two witnesses who testified on behalf of Navistar: Barry Morris, Director, Labour Relations for Navistar's parent company, Navistar, Inc., and Henry VanVroenhoven, Manager, Human Resources-Employee Relations at Navistar. Neither the respondent nor the added party union called any witnesses.

38. The FST released the FST Decision on July 11, 2014.

The state of the Plant while idled

39. Despite Navistar's uncontradicted evidence at the hearing that the Plant was in a "state of readiness" while idled, in the FST Decision the FST found, contrary to the evidence, that Navistar "stripped the plant of its assembly operations" once the collective agreements expired and the Plant was idled.[20]

40. The evidence of Mr. Morris was that a re-start of the Plant would have taken two to three months to re-train employees for different product lines. Mr. Morris gave evidence that, with the approach of idling, the initial parts of the operations of the line would be "strip[ped] out" of any further product and that, with idling, the assembly line would be cleared of all product. This was

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[19] *Navistar Canada Inc. v. Ontario (Superintendent Financial Services)*, 2013 ONFST 8, para. 4, MR, Tab 3, p. 19

[20] *VanVroenhoven Transcript*, p. 320, MR, Tab 12, p. 101; *Tribunal Decision* at para. 15(ll), MR, Tab 4, p. 44

a normal part of idling the Plant. The evidence of Mr. VanVroenhoven was that the Plant was in "a state of readiness" while idled.[21]

41. In the FST Decision the FST misstated Mr. Morris's evidence on this issue, finding:

> At the expiry of the collective agreements, while the parties continued to have discussions around a closure agreement, Navistar stripped the Plant of its assembly operations.[22]

Mr. VanVroenhoven's uncontradicted evidence was that the Plant was in a "state of readiness" while idled.[23]

The interpretation of s. 77.3(1) and the scope of the windup group

42. In the FST Decision, the FST correctly found that July 28, 2011 was the effective date of the windup of the Plan. Notwithstanding this finding, the FST went on to find, wrongly, that the windup group included all former employees of Navistar who ended employment or retired within the more than two years prior to the effective date of the windup. The FST made this ruling notwithstanding Navistar's evidence that:

(a) former employees who voluntarily entered into agreements severing their employment with Navistar before July 28, 2011 received consideration for doing so, including both severance payments and their benefits due under the expired collective agreements;

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[21] *Morris Transcript*, pp. 93, 206, MR, Tabs 13 and 15, pp. 102, 104; *VanVroenhoven Transcript*, p. 320, MR, Tab 12, p. 101

[22] *Tribunal Decision* at para. 15(ll), MR, Tab 4, p. 44

[23] *VanVroenhoven Transcript*, p. 320, MR, Tab 12, p. 101; *Tribunal Decision* at para. 15(ll), MR, Tab 4, p. 44

(b) those employees had no reasonable expectation of being included in the windup group;

(c) the CAW condoned these agreements; and

(d) many of these employees also signed waivers releasing Navistar of any claims.[24]

43. The FST also made its ruling on the scope of the windup group notwithstanding Navistar's evidence that former employees who retired before the effective date of the windup were, by the effective date, no longer active members of the Plan, but instead were retired members in receipt of pension benefits from the Plan.[25]

44. The FST used February 1, 2009 as the effective start date for inclusion of former employees in the windup group on the grounds that, "Navistar had clearly articulated a restructuring strategy and was implementing it by February 1, 2009." This finding again disregards the distinction between a restructuring and the closure of a facility.[26]

45. The FST held that the scope of the windup group could be determined with reference to both the "reorganization" and "plant closure" subsections of s. 77.3(1) of the *PBA*. Notwithstanding its finding that Navistar's bargaining mandate remained the same through 2009-2011, the FST ruled that the windup group must extend to not only all employees "on roll" as at July 28, 2011, but also to all employees who terminated or retired and were no longer "on roll"

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[24] *Severance agreements*, MR, Tab 19, pp. 121-184; *Post-July 1, 2009 Retirement Agreements*, MR, Tab 20, pp. 185-230

[25] *Post-July 1, 2009 Retirement Agreements,* MR, Tab 20, pp. 185-230

[26] *Tribunal Decision* at para. 15(w), MR, Tab 4, p. 42

from February 1, 2009. This ruling added even more former employees into the windup group than the decision of the Acting Deputy Superintendent.[27]

46. The FST held that members who terminated or retired between February 1, 2009 and July 28, 2011—as well as all employees who were "on roll" at the date of Plant Closure—who met the following criteria were entitled to a special early retirement benefit pursuant to ss. 40(2) and 74(7) of the *PBA*:

(a) their combination of age plus years of continuous employment or membership in the Plan equaled 55 years or more on the date of Plant Closure; and

(b) they met all the eligibility requirements for entitlement to the special early retirement benefit in section 1.03 of the Plan, other than the consent of Navistar.[28]

Credited Service

47. The FST also awarded credited service, pursuant to section 7.03(b)(iii) of the Plan, not only to former employees who were in the windup group, but also to former employees who terminated employment prior to June 30, 2009. As a result, the FST Decision dictates how credited service accumulated since the creation of the Plan in 1954—that is, for the 57 years prior to the effective date of the windup of the Plan—should be recalculated. The FST's decision to award credited service to former employees who terminated employment prior to the windup period ("Pre-Windup Credited Service") was not an issue raised in the process before the Deputy Superintendent and was beyond the scope of both the NOID and the hearing before the FST.

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[27] *Tribunal Decision* at paras. 10, 15(w), MR, Tab 4, pp. 37, 42

[28] *Tribunal Decision* at paras. 12, 13, MR, Tab 4, p. 37

The Divisional Court Decision

48. Navistar appealed the FST's decision to the Divisional Court and the appeal was heard on April 9, 2015. In its decision released July 3, 2015, the Divisional Court substantially upheld the FST's decision.

The standard of review

49. The Divisional Court correctly found that on questions of fact the standard is reasonableness and noted that when a Tribunal misapprehends crucial evidence, the misapprehension may render the decision unreasonable.[29]

50. The Divisional Court reviewed the applicable case law on the standard of review, relying in particular on this Court's decision in *Hydro One Inc. v. Ontario (Financial Services Commission)*, 2010 ONCA 6 (CanLII). At paragraph 36, of that decision, this Court held that the standard of review on pure questions of statutory interpretation involving the *PBA* is one of correctness. The Divisional Court noted that in *Hydro One*, this Court relied upon the decision of the Supreme Court of Canada in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54 (CanLII), where it was determined that the FST is not entitled to deference on a pure question of statutory interpretation of the PBA (*Monsanto*, at para. 16).[30]

51. Notwithstanding the binding authority of this Court and the Supreme Court of Canada from *Hydro One* and *Monsanto*, the Divisional Court concluded that interpretation of the windup-triggering subsections of s. 77.3(1) is not a question of statutory interpretation that must

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[29] *Divisional Court Decision*, para. 25, MR, Tab 5, p. 73

[30] *Divisional Court Decision*, para. 21, MR, Tab 5, p. 73

be reviewed upon a standard of correctness. The Divisional Court instead held that the "determination that a reorganization has or has not taken place cannot be made without a review of the facts required to conclude its existence." The Divisional Court relied on the FST having found that a reorganization had taken place even though there was no evidence that any reorganization had been or could have been implemented without the union's agreement. Thus the Divisional Court erred in deferring to the FST's finding about who should be included in the windup group based on a reorganization that never occurred. The Divisional Court erred in applying the reasonableness standard.[31]

The interpretation of s. 77.3(1) and the scope of the windup group

52. Notwithstanding its correct review of the applicable case law, the Divisional Court rejected Navistar's submission that, as a matter of statutory interpretation and indeed as a matter of logic, a windup under s. 77.3(1) of the PBA could not be ordered as a result of both a reorganization pursuant to subsection (a) and a discontinuance due to closure pursuant to subsection (b). The Divisional Court erroneously stated that Navistar made this argument in its factum but abandoned it in its appeal when, in fact, this argument was central to Navistar's submissions before the Divisional Court.[32]

Credited service

53. The Divisional Court upheld the FST's award of credited service to former employees who (i) were in the windup group, and (ii) were not in the windup group, and who terminated

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[31] *Divisional Court Decision*, paras. 22, 23, MR, Tab 5, p. 73

[32] *Divisional Court Decision*, para. 32, MR, Tab 5, pp. 74-75

employment prior to June 30, 2009. The Divisional Court failed to address this aspect of Navistar's appeal in its reasons for decision, though the Court did address Navistar's arguments in respect of Navistar's jurisdiction motion before the FST (which is not in issue on this appeal).[33]

PART III – THE PROPOSED QUESTIONS

54. If leave to appeal is granted, Navistar proposes that this Court should answer the following questions:

(a) Did the Divisional Court make an error of law in upholding the FST's order that the partial windup could be made pursuant to both the discontinuance and closure provisions of s. 77.3(1), with the result that the windup group includes all Plan members who ceased to be employed from February 1, 2009 until immediately prior to Plant Closure?

(b) Did the Divisional Court make an error of law in upholding as reasonable the FST's order that Navistar re-calculate the pensions or commuted value of the pensions for all members of the Plan since its inception more than half a century ago?

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[33] *Divisional Court Decision*, paras. 43-48, MR, Tab 5, pp. 78-79

PART IV – ISSUES AND ARGUMENT

55. The sole issue is whether the Court should grant leave to appeal. Navistar submits that leave should be granted. This case fully meets the two settled criteria, arguable legal issue and public importance.[34]

56. The proposed appeal is of significant public importance in Ontario. The Tribunal's decision cannot be allowed to stand because it is commercially unreasonable. The Tribunal's erroneous application of s. 77.3(1)(a) when no reorganization actually took place chills the legitimate, permissible, and routine corporate conduct that is contingency planning for undesirable but possible outcomes. The Tribunal's decision deters prudent planning for any contingency because, under the regime established by the Tribunal's decision in this case, those plans will trigger s. 77.3(1)(a) and the company will be locked in to the windup consequences of what was intended to be a possible (and hopefully avoidable) course of action.

Standard of review

57. Errors of fact are assessed on a standard of reasonableness. When an administrative tribunal misapprehends crucial evidence, the misapprehension constitutes a palpable and overriding error and renders the tribunal decision unreasonable.[35]

58. In concluding that this standard had not been met with respect to the FST's finding that Navistar had reorganized, the Divisional Court erred in law.

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[34] *Re Sault Dock Co. Ltd. and City of Sault Ste. Marie*, [1973] 2 O.R. 479 at 481 (C.A.), Book of Authorities of the Moving Party Navistar Canada Inc. ("BOA"), Tab 1

[35] *Ontario (Disability Support Program) v. Crane* (2006), 83 O.R. (3d) 321, 278 D.L.R. (4th) 374 (Ont. C.A.) at paras. 33-36, BOA, Tab 2; *Her Majesty the Queen v. W.B. and S.*, 2011 ONSC 288 (Div. Ct.) at para. 25, BOA, Tab 3

59. The Supreme Court of Canada has held that the standard of review of FST decisions involving a pure question of law related to the interpretation of a section that has no specialized technical meaning is correctness. The Court concluded that "there is little to indicate that the legislature intended to create a body with particular expertise over the statutory interpretation of the Act."[36]

60. In failing to apply *Monsanto* and, instead, concluding that the applicable standard of review on the FST's interpretation of subsections 77.3(1)(a) and (b) was reasonableness, the Divisional Court erred in law. The FST erred in applying s. 77.3(1)(a) when there was no basis on which to find that a reorganization had occurred. The Divisional Court also erred in law by upholding as reasonable the FST's order that Navistar re-calculate the pensions or commuted value of the pensions for all members of the Plan since its inception more than half a century ago.

Arguable legal issue

61. The Divisional Court erred in deciding to dismiss the appeal. At a minimum, its conclusions raise legal issues which are deserving of argument in and decision by this Court.

The Divisional Court's interpretation of s. 77.3(1) is an error of law

62. In reviewing the FST's decision in this case, the Divisional Court was required by the *Monsanto* decision to review the FST's finding on a pure question of law related to the interpretation of a section that has no specialized technical meaning. The Divisional Court was required to conduct this review according to the standard of correctness. The pure question of

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[36] *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* 2004 SCC 54 at paras. 8, 12, 16, BOA, Tab 4

law in this case is the scope of the windup group under alternative subsections of s. 77.3(1) of the *PBA*. Section 77.3(1) of the *PBA* has no specialized technical meaning. The Divisional Court should have shown—and this Court should show—no deference to the FST's interpretation of this statutory provision.[37]

The statutory basis for ordering partial windup

63. The Divisional Court correctly held that in the circumstances of this case the FST derives jurisdiction to order a partial windup from subsection 77.3(1)(b) of the *PBA*. This subsection provides that:

> The Superintendent by order may require the partial wind up of a pension plan, [...] if all or a significant portion of the business carried on by the employer at a specific location is discontinued.

All of the business carried on by Navistar at the Plant was discontinued when Navistar decided to close the Plant. This established the FST's jurisdiction, which was upheld by the Divisional Court, to order a partial windup under subsection 77.3(1)(b).[38]

64. Section 77.3(1)(b) of the *PBA* clearly provides a statutory basis for the FST to order a partial windup in respect of those employees whose active employment was terminated as a result of the Plant Closure. The FST therefore had jurisdiction under s. 77.3(1)(b) to include those employees whose active employment was terminated as a result of the Plant Closure in the windup group. The evidence before the FST supported this finding. The FST accepted the

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[37] *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* 2004 SCC 54 at paras. 8, 12, 16, BOA, Tab 4; *Hydro One Inc. v. Ontario (Superintendent of Financial Services)* (2008), 67 C.C.P.B. 86, [2008] O.J. No. 1436 (Div. Ct.) at paras. 25-28, BOA, Tab 5

[38] *Divisional Court Decision*, para. 32, MR, Tab 5, pp. 74-75

undisputed evidence of Navistar that Navistar was attempting to reorganize its operations at the Plant until shortly before Plant Closure, and that Navistar required the agreement of the union to do so. As the example of the Springfield plant shows, reorganization would have allowed for the possibility of future growth, while Plant Closure did not.[39]

65. Section 77.3(1)(b) does not provide a statutory basis for the FST to order a partial windup in respect of those employees whose active employment was terminated for reasons other than the Plant Closure. The FST therefore did not have jurisdiction under s. 77.3(1)(b) to include those employees whose active employment was not terminated as a result of the Plant Closure in the windup group. The FST implicitly acknowledged this in the Windup Decision when it held that the partial windup was also triggered under subsection 77.3(1)(a) of the *PBA*. This subsection provides that a partial windup may be ordered:

> if a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer

66. Subsection 77.3(1)(a) provides jurisdiction to order a partial windup where a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer; or the reorganization of the business of the employer. In this case, the FST asserted jurisdiction under s. 77.3(1)(a) on the basis of reorganization.

67. Navistar took action that put it squarely and specifically under s. 77.3(1)(b), namely, it discontinued business at the specific location of Chatham. Reorganization does not apply to

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[39] *Morris Transcript*, p. 135, MR, Tab 14, p. 103

confer s. 77.3(1)(a) jurisdiction because while Navistar attempted to put itself in a position to reorganize its business by negotiating new collective agreements with the union, Navistar was unable to reorganize its business. In the face of its inability to reorganize its business because it could not conclude new collective agreements with the union, Navistar instead abandoned its efforts at reorganization and closed the Plant (i.e., discontinued at a specific location). The Plant Closure triggered the FST's jurisdiction under subsection 77.3(1)(b). It did not trigger jurisdiction under subsection 77.3(1)(a).

68. In *London Life,* the FST held that having found a reorganization under s. 69(1)(d) (the predecessor to s. 77.3(1)(a)), it was not necessary to address closures under s. 69(1)(e). The basis for ordering a partial windup was found under only one subsection of s.69(1).[40]

69. The FST erred in its interpretation of the statutory scheme established by s. 77.3(1) by holding that the partial windup "exists under both subsections 77.3(1)(a) and (b) of the Act". On the basis of this incorrect statutory interpretation, the FST ordered, "The Plan members included in the windup group shall include all employees 'on roll' as at July 28, 2011 and those employees who terminated or retired from February 1, 2009 through and including July 28, 2011." The Divisional Court upheld the FST's decision on this point on the basis of the same incorrect statutory interpretation, holding that:

> In the end, the failure to renew the collective agreements may have ultimately brought on the Plant closure; however, the evidence is

[40] *London Life Insurance Co. v. Ontario (Superintendent of Financial Services),* 2001 ONFST 6, 26 C.C.P.B. 249 at paras. 19-21, BOA, Tab 6

> clear that Navistar had implemented a reorganization well before the Plant was closed.[41]

70. The FST's and the Divisional Court's conflation of "reorganization" and "discontinuance at a specific location" reflects an error of statutory interpretation in the reading of s. 77.3(1) of the *PBA*. There was no reorganization within the meaning of s. 77.3(1)(a) of the *PBA*. Instead, there was a discontinuance of Navistar's Chatham business on July 28, 2011 at the Plant within the meaning of s. 77.3(1)(b) of the *PBA*.

71. A reorganization of operations at the Plant and the closure of the Plant are mutually exclusive. If operations are reorganized, the reorganization will not involve the closure of the Plant. If the Plant is closed, there are no operations to reorganize. As a matter of logic and of statutory interpretation, reorganization and closure cannot both be used to define the scope of the windup group. The decision of the Divisional Court does not address this logical flaw in the FST's decision. Rather, the Divisional Court's decision adopts the FST's flawed reasoning. Like the FST, the Divisional Court conflated these two mutually exclusive scenarios for the purposes of determining—and radically expanding without any statutory basis for doing so—the windup group.[42]

72. While in some circumstances a reorganization may involve a plant closure or plant closures, in this case, there was no reorganization. Instead, there was a failed attempt to reorganize operations at the Plant and a subsequent plant closure. The leading authority on reorganizations triggering windups is the decision of then Chair of the Pension Commission of Ontario, Eileen Gillese, which held that a windup based on reorganization must relate to a

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[41] *Divisional Court Decision*, para. 35, MR, Tab 5, p. 75; *Tribunal Decision* at para. 10, MR, Tab 4, p. 37

[42] *Divisional Court Decision*, paras. 35-36, MR, Tab 5, pp. 75-76

reorganization that was undertaken and the terminations have to be the direct result of a reorganization that has been implemented. As Chair Gillese said, "being *related* to a reorganization is not the same thing as resulting from a reorganization" (emphasis added). In the present case, no reorganization was undertaken; instead, there was a closure. Closure and reorganization are mutually exclusive.[43]

Unjust enrichment at Navistar's expense

73. In addition, former employees who voluntarily entered into agreements severing their employment with Navistar before Plant Closure on July 28, 2011 received consideration for doing so, such as severance payments, benefits due under the expired collective agreements and enhanced pension benefits. It cannot be the case that former employees are entitled to multiple benefits intended to compensate them for the same loss of employment, such as severance (which is to compensate for loss of employment) and enhanced pension benefits (which are to compensate for loss of employment in the event of a plan windup). Nevertheless, the FST and the Divisional Court did precisely that by allowing former employees both to:

(a) retain the consideration they bargained for and received from Navistar, and

(b) receive the benefits of being included in the windup group.

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[43] *Re: Stelco Inc. Retirement Plan for Salaried Employees* (1993) PCO Bulletin/Vol 4/Issue 1, p. 40; aff'd [1994] O.J. No. 1202, 115 D.L.R. (4th) 437 (Div. Ct.), further aff'd 126 D.L.R. (4th) 767 (C.A.), BOA, Tabs 7-8; *Re: Imperial Oil Ltd. Retirement Plan (1988)* (1996) PCO Bulletin/Vol. 6/Issue 4, p. 90; aff'd [1997] O.J. No. 1961 (Div Ct.), BOA, Tabs 9-10; *Re: McDonnell Douglas Ltd. Salaried Plan Ltd.*, May 19, 1999, FSCO Bulletin/ Vol. 8/Issue 2,; aff'd (2000), 23 C.C.P.B. 145, BOA, Tab 11

74. Allowing this part of the Divisional Court's decision to stand would result in an unjust enrichment at the expense of Navistar.[44]

75. In any event, former employees who retired before the effective date of the windup were, by the effective date, no longer active members of the Plan, but instead were retired members in receipt of pension benefits from the Plan.[45]

76. Neither the severed nor the retired former active employees who were no longer "on roll" when the Plant closed should have been included in the partial windup group. The Divisional Court's holding on the scope of the windup group—which is properly governed by subsection 77.3(1)(b), and not by subsections 77.3(1)(a) and 77.3(1)(b)—is incorrect and should be reversed by this Court.

The Divisional Court failed to address Pre-Windup Credited service

77. The Divisional Court did not disturb the FST's unreasonable award of Pre-Windup Credited Service. By not reversing this portion of the FST's award and not addressing this aspect of Navistar's appeal in its reasons for decision, the Divisional Court erred in law.

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[44] *CAW v. Kitchener Frame Ltd.*, 2010 ONSC 3890 (Div. Ct.), BOA, Tab 12

[45] *CBS Canada Co. v. Ontario (Superintendent of Financial Services)*, 2003 ONFST 10, BOA, Tab 13

PART V – ORDER REQUESTED

78. Navistar requests an order granting it leave to appeal from the order of the Divisional Court dated July 3, 2015.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

for Sheila Block

for Mitch Frazer

for Alex Smith

Lawyers for the moving party Navistar Canada Inc.

SCHEDULE A

1. *Re Sault Dock Co. Ltd. and City of Sault Ste. Marie*, [1973] O.R. 479 (C.A.), at p. 481

2. *Ontario (Disability Support Program) v. Crane* (2006), 83 O.R. (3d) 321, 278 D.L.R. (4th) 374 (Ont. C.A.) at paras. 33-36

3. *Her Majesty the Queen v. W.B. and S.*, 2011 ONSC 288 (Div. Ct.) at para. 25

4. *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* 2004 SCC 54 at paras. 8, 12, 16

5. *Hydro One Inc. v. Ontario (Superintendent of Financial Services)* (2008), 67 C.C.P.B. 86, [2008] O.J. No. 1436 (Div. Ct.) at paras. 25-28

6. *London Life Insurance Co. v. Ontario (Superintendent of Financial Services),* 2001 ONFST 6, 26 C.C.P.B. 249 at paras. 19-21

7. *Re: Stelco Inc. Retirement Plan for Salaried Employees* (1993) PCO Bulletin/Vol 4/Issue 1, p. 40

8. *Re: Stelco Inc. Retirement Plan for Salaried Employees* [1994] O.J. No. 1202, 115 D.L.R. (4th) 437 (Div. Ct.), aff'd 126 D.L.R. (4th) 767 (C.A.)

9. *Re: Imperial Oil Ltd. Retirement Plan (1988)* (1996) PCO Bulletin/Vol. 6/Issue 4, p. 90

10. *Imperial Oil Limited v. Ontario (Superintendent of Financial Services)* [1997] O.J. No. 1961 (Div. Ct.)

11. *Re: McDonnell Douglas Ltd. Salaried Plan Ltd.*, May 19, 1999, FSCO Bulletin/ Vol. 8/Issue 2,; aff'd (2000), 23 C.C.P.B. 145

12. *CAW v. Kitchener Frame Ltd.*, 2010 ONSC 3890 (Div. Ct.)

13. *CBS Canada Co. v. Ontario (Superintendent of Financial Services)*, 2003 ONFST 10

SCHEDULE B

Pension Benefits Act

R.S.O. 1990, CHAPTER P.8

Grow-in benefits for members

Activating events

74. (1) This section applies if a person ceases to be a member of a pension plan on the effective date of one of the following activating events:

1. The wind up of a pension plan, if the effective date of the wind up is on or after April 1, 1987.
2. The employer's termination of the member's employment, if the effective date of the termination is on or after July 1, 2012. However, this paragraph does not apply if the termination occurs in any of the circumstances described in subsection (1.1).
3. The occurrence of such other events as may be prescribed in such circumstances as may be specified by regulation. 2010, c. 9, s. 56 (1); 2011, c. 9, Sched. 35, s. 6.

Same, termination of employment

(1.1) Termination of employment is not an activating event if the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer or if the termination occurs in such other circumstances as may be prescribed. 2010, c. 9, s. 56 (1).

Exceptions, election by certain pension plans

(1.2) This section does not apply with respect to a jointly sponsored pension plan or a multi-employer pension plan while an election made under section 74.1 for the plan and its members is in effect. 2010, c. 9, s. 56 (1).

Benefit

(1.3) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least 55 on the effective date of the activating event has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date. 2010, c. 9, s. 56 (1).

Part year

(2) In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership on the effective date of the activating event. R.S.O. 1990, c. P.8, s. 74 (2); 2010, c. 9, s. 56 (2).

Member for 10 years

(3) Bridging benefits offered under the pension plan to which a member would be entitled if the activating event had not occurred and if his or her membership were continued shall be included in calculating the pension benefit under subsection (1.3) of a person who has at least 10 years of continuous employment with the employer or has been a member of the pension plan for at least 10 years. 2010, c. 9, s. 56 (3).

Prorated bridging benefit

(4) For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the activating event had not occurred. R.S.O. 1990, c. P.8, s. 74 (4); 2010, c. 9, s. 56 (4).

Notice of termination of employment

(5) Membership in a pension plan that is wound up includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*. R.S.O. 1990, c. P.8, s. 74 (5); 2004, c. 31, Sched. 31, s. 3; 2010, c. 9, s. 56 (5).

Application of subs. (5)

(6) Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment. R.S.O. 1990, c. P.8, s. 74 (6).

Consent of employer

(7) For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent. R.S.O. 1990, c. P.8, s. 74 (7).

Consent of administrator, jointly sponsored pension plans

(7.1) For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent. 2005, c. 31, Sched. 18, s. 9.

Use in calculating pension benefit

(8) A benefit described in clause (1.3) (a), (b) or (c) for which a member has met all eligibility requirements under this section shall be included in calculating the member's pension benefit or the commuted value of the pension benefit. 2010, c. 9, s. 56 (6).

(9) REPEALED: 2010, c. 9, s. 56 (7).

. . .

Order by Superintendent for partial wind up

77.3 (1) The Superintendent by order may require the partial wind up of a pension plan,

(a) if a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;

(b) if all or a significant portion of the business carried on by the employer at a specific location is discontinued;

(c) if part of the employer's business or part of the assets of the business are sold, assigned or otherwise disposed of and the person or entity who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person or entity;

(d) if the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in part;

(e) if any of the circumstances described in clauses 69 (1) (a), (b), (c) or (h) exists; or

(f) if any other prescribed event or prescribed circumstance occurs. 2010, c. 9, s. 61.

Date

(2) The order must specify the effective date of the partial wind up. 2010, c. 9, s. 61.

Notice of the order

(3) The administrator of the pension plan shall give notice of the order to the persons and entities listed in clauses 68 (2) (b) to (e) and shall include in the notice such information about the partial wind up as the order may specify. 2010, c. 9, s. 61.

Duty to file notice

(4) The administrator shall file with the Superintendent a copy of the notice given under subsection (3). 2010, c. 9, s. 61.

. . .

Order by Superintendent

87. (1) The Superintendent, in the circumstances mentioned in subsection (2) and subject to section 89 (hearing and appeal), by a written order may require an administrator or any other

person to take or to refrain from taking any action in respect of a pension plan or a pension fund. R.S.O. 1990, c. P.8, s. 87 (1).

Condition precedent to order

(2) The Superintendent may make an order under this section if the Superintendent is of the opinion, upon reasonable and probable grounds,

(a) that the pension plan or pension fund is not being administered in accordance with this Act, the regulations or the pension plan;

(b) that the pension plan does not comply with this Act and the regulations; or

(c) that the administrator of the pension plan, the employer or the other person is contravening a requirement of this Act or the regulations. R.S.O. 1990, c. P.8, s. 87 (2).

Time

(3) In an order under this section, the Superintendent may specify the time or times when or the period or periods of time within which the person to whom the order is directed must comply with the order. R.S.O. 1990, c. P.8, s. 87 (3).

Reasons for order

(4) An order under this section is not effective unless the reasons for the order are set out in the order. R.S.O. 1990, c. P.8, s. 87 (4).

NAVISTAR CANADA INC. Appellant	v.	SUPERINTENDENT OF FINANCIAL SERVICES Respondent	v.	UNIFOR (formerly CAW-CANADA) et al. Added Party

Court of Appeal File No. M45335
Divisional Court File No. 364/14

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

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