TABLE OF CONTENTS

PART I - OVERVIEW

1. The Appellant, Navistar Canada Inc. ("Navistar) is appealing from two decisions of the Financial Services Tribunal ("the Tribunal"): the Jurisdiction Decision dated November 4, 2013 and the Partial Windup Decision dated July 11, 2014. It is the position of the Added Party, Unifor (formerly CAW-Canada) and its Locals 127 and 35 ("the Union"), that the appeal should be dismissed.

2. This factum focuses on the appeal of the Partial Windup Decision. The Union adopts the Superintendent's submissions with respect to the Jurisdiction Decision as well as the standard of review that applies to both decisions.

3. This appeal arises out of an extended reorganization that culminated in the closure of Navistar's production facilities in Chatham, Ontario. These events resulted in the loss of employment for over a thousand employees, many of whom were older and had significant amounts of service with Navistar and its pension plan, the Navistar Canada Inc. Non-Contributory Retirement Plan ("the Plan"). In the Partial Windup Decision, the Tribunal ordered a partial windup of the Plan and determined that all who lost their jobs as a result of the reorganization or closure were entitled to partial windup benefits under the *Pension Benefits Act* ("PBA"). It also determined Plan member eligibility for Special Early Retirement ("SER") benefits and credited service enhancements.

4. There is nothing about the Partial Windup Decision that warrants this Court's intervention. The Partial Windup Decision is justified, transparent and rational. The Tribunal thoroughly considered the evidence and arguments of the parties. Its factual findings flow logically from the evidence, and with one singular and unwarranted exception, are not challenged by Navistar. While the Partial Windup Decision is only required to be reasonable,

the Tribunal correctly identified the applicable legal principles and applied them to the facts in a manner that was grounded in precedent, policy, and logic.

5. Navistar devotes a significant portion of its factum to an alleged "palpable and overriding" factual error that is neither an error nor relevant to the issues before this Court. It seeks to delineate the partial windup group using an invented, self-serving and incorrect definition of the term "reorganization". It claims to be a victim of "unjust enrichment" when in fact it is Navistar who is seeking to deprive Plan members of their minimum statutory entitlements after having been enriched by their years of service. It seeks to limit entitlement to the SER benefit on the basis of a document that is not part of the Plan and which in any event supports entitlement to the benefit. Where Navistar cites authorities in its factum, it does so baldly, often without explaining how the case in question supports, or even relates to, the argument being made. In contrast to the Tribunal's determinations, Navistar's arguments find no support in the PBA, its underlying policies, or the jurisprudence.

PART II - THE FACTS

6. With the singular and unwarranted exception of the finding in paragraph 15(ll) of the Partial Windup Decision (addressed in the argument below), Navistar does not challenge any of the Tribunal's factual findings on the "palpable and overriding" standard that it concedes is applicable. Thus, there is no basis for this Court to review, let alone interfere with, any of the Tribunal's findings of fact. Navistar's account of "the Facts" should be rejected to the extent that it differs from the factual findings of the Tribunal.

7. The Union relies on the Tribunal's factual findings in their entirety and offers the account below on a summary basis only.

A. The Parties

8. Navistar is the Canadian subsidiary of Navistar, Inc. a corporation that manufactures and distributes trucks in North America and elsewhere. Navistar Canada Inc. owned and operated a heavy truck assembly plant in Chatham, Ontario (the "Plant") as well as a facility in Burlington in which no assembly was performed.

Navistar Canada Inc. v. Superintendent of Financial Services and Unifor 2014 ONFST 8 (CanLII) ("Partial Windup Decision"), Union's Compendium ("UC"), Tab 1, pp. 5-6, ¶15(a), (b), (i), (j)

9. Most employees of Navistar were members of the Union. Navistar and the Union were parties to two separate collective agreements: one for hourly production workers and related skilled trades and the other covered office and clerical workers (together, the "Collective Agreements"). The collective agreements expired on June 30, 2009.

Partial Windup Decision, UC, Tab 1, pp. 5-6, ¶15(d), (f)

10. Navistar is the sponsor of the Plan, which is a non-contributory defined benefit plan covering Unionized employees. The Plan was incorporated into the Collective Agreements.

Partial Windup Decision, UC, Tab 1, p. 6, ¶15(e), (g)

Non-Contributory Retirement Plan Agreement ("the Plan"), UC, Tab 2, pp. 37-121

B. Navistar Develops a Reorganization Strategy by May 2008

11. By the spring of 2008, Navistar was developing a reorganization strategy for the Plant. This was due in part to the worldwide economic downturn that particularly affected the truck industry, as well as a desire on Navistar's part to relocate production to Mexico that was independent of the reduction in demand.

Partial Windup Decision, UC, Tab 1, pp. 6, 7, 10, ¶15(j), (m)ii, (u)

12. The reorganization strategy involved turning the Plant into a much smaller regional facility, with a reduced workforce (about 100 employees from what was then 1,100) and diminished production (sleeper cabs, which then constituted about 75% of the Plant's output, would be transferred to Navistar Inc.'s non-unionized facility in Mexico). Permanent closure of the Plant was contemplated as part of the reorganization strategy in the event that such dramatic reductions in the scope and scale of production could not be achieved.

Partial Windup Decision, UC, Tab 1, p. 7, ¶15(m)

13. By October 15, 2008, the Union had heard rumours of Plant closure, which were confirmed on November 4, 2008, when Navistar formally notified the Union that Plant closure was under consideration.

Partial Windup Decision, UC, Tab 1, pp. 8-9, ¶15(o),(p)

C. Navistar Implements its Reorganization Strategy Effective February 1, 2009

14. On November 5, 2008, Navistar gave notice of changes to its production schedule and of up to 500 layoffs. These changes began to take effect on February 1, 2009, when the line rate was reduced from 115 units per day to 35 units per day (the minimum permitted under the Collective Agreements) and 470 Plan members were laid off. Thus, as the Tribunal found, "[i]t is clear to us on the full evidence before us, that Navistar had clearly articulated a restructuring strategy and was implementing it by February 1, 2009."

Partial Windup Decision, UC, Tab 1, pp. 9-10, ¶15(p)(t)(u)(w)

15. A further 185 Plan members were laid off effective March 1, 2009 (pursuant to notices that had been issued in January 2009).

Partial Windup Decision, UC, Tab 1, p. 9, ¶15(s)

16. As noted, the collective agreements were set to expire on June 30, 2009. Collective bargaining for renewal agreements commenced in the early spring of 2009.

Partial Windup Decision, UC, Tab 1, p. 10, ¶15(v), (y)

17. From the outset of bargaining, Navistar made it clear to the Union that a "monumentally different, radically different and smaller structure…was needed to keep a presence in Chatham". Navistar's bargaining mandate, which remained unchanged over the course of negotiations, required dramatic changes to the scale and scope of production, including the elimination production of sleeper cabs and other core functions, reduced minimum production requirements (from 35 to 10-12), increased management rights to assign and contract out work, and the elimination of certain benefits. Navistar made it clear that the Plant could continue "only on the basis proposed," and that the only alternative was to close the Plant. At the same time, Navistar was aware that the proposed reorganization would not be ratified by the Union's membership.

Partial Windup Decision, UC, Tab 1, pp. 10, 11, ¶15(v), (w), (aa), (bb)

18. On April 2, 2009, Navistar provided the Union with formal notice to bargain, as well as notice of indefinite layoff to all Plan members effective June 30, 2009.

Partial Windup Decision, UC, Tab 1, pp. 10-11, ¶15(y), (z)

19. On June 29, 2009, the day before the collective agreements were to expire, Navistar advised the Union that it did not intend to resume production at the Plant until new collective agreements were concluded. It placed all remaining 522 Plan members on indefinite layoff as per the notices issued in April. Navistar took these measures in furtherance of its reorganization strategy, not to avoid "violent job action", as Navistar asserts in paragraph 23 of its factum. The Tribunal found no evidence of a strike or a threatened strike as of the expiry date, let alone a "violent" one.

Partial Windup Decision , UC, Tab 1, p. 11, ¶15(z), (ee), (ff)

Transcript of Examination of Barry, April 11, 2014 ("Morris Transcript"), UC, Tab 3, pp. 122-123 and Tab 4, pp. 124-126

20. Negotiations continued beyond the expiry date on various dates in 2010 and 2011 but did not result in a collective agreement.

Partial Windup Decision, UC, Tab 1, p. 13, ¶(pp) and (rr)

21. Navistar notified the CAW that the Plant would be closed permanently effective July 28, 2011. At this time, there were approximately 558 employees left "on roll" with recall rights. All of them were terminated.

Partial Windup Decision, UC, Tab 1, p. 13, ¶15(tt)

22. The closure of the Plant had always been contemplated as the final stage of the reorganization in the (likely) event that Navistar did not negotiate "monumental" reductions to the scope and scale of production at the Plant. As the Tribunal found, "the closure was simply the final step in the reorganization, the timing of which was controlled by [Navistar]."

Partial Windup Decision, UC, Tab 1, p. 20, ¶35

23. In paragraphs 22 and 27 of its factum, Navistar implies that it would have required a new collective agreement with the Union in order for the reorganization to start. In fact, the reorganization was well underway as of February 1, 2009, and continuing through to July 28, 2011. The parties' failure to conclude a collective agreement meant that the reorganization ended up taking the form of Plant closure rather than continuing to operate at radically diminished capacity. It certainly did not mean that the reorganization had never commenced.

D. Employees Terminated Employment as a Result of the Reorganization

24. Some employees who were laid off prior to the closure date terminated their employment, through severance or retirement, rather than remaining "on roll." These employees faced the

reality that, "the restructured Plant, if it continued under the new terms proposed by Navistar, would employ approximately 100 employees." Thus, it would have been evident to them that, "even if a new agreement were to have been ratified after the Expiry Date, based on seniority rights the vast majority of Plant employees (and Plan members) had no reasonable prospect of recall at June 28, 2009 and that was true for most of them by February 1, 2009."

Partial Windup Decision, UC, Tab 1, p. 12, ¶15(kk)

25. Navistar baldly asserts in paragraph 26 of its factum that "the majority of members remained active, hopeful that collective agreements would be negotiated." To the contrary, the Tribunal's findings support the conclusion that the vast majority of Navistar's workforce (i.e. all but 100) would have had no reason to be hopeful for their future at the Plant. In this vein, the assertion made in paragraph 29 of Navistar's factum, namely that its bargaining proposals would have "allowed Navistar to retain the Plant as an operational facility with the potential to grow its active workforce," was specifically rejected by the Tribunal, which found no evidence that future growth "was a credible or likely possibility." Navistar's contention, in paragraph 35, that it hoped to grow the Plant on the model of the Navistar facility in Springfield, Illinois, is equally unsubstantiated. The Tribunal found rather that Navistar's reorganization strategy involved transferring the Plant's capacity to Springfield (as well as Mexico).

Partial Windup Decision, UC, Tab 1, pp. 8-9, 10, 11, 12-13, ¶15(o), (x), (aa), (kk), (oo)

26. In paragraphs 21 and 32-34 of its factum, Navistar makes a number of inaccurate and unsubstantiated claims about employees who severed or retired during the reorganization period. In particular, contrary to what Navistar alleges in paragraph 21, those who retired between November 2008 and May 2009 did not "cho[o]se" to do so because of "the economic

conditions," but rather in response to the reorganization which came with the likelihood, if not the certainty, of impending job loss.

27. Further, contrary to what Navistar may be implying in paragraph 32, the Union did not play a role in negotiating the severance packages accepted by some Plan members. To the contrary, the Tribunal found that the Union "played no role in drafting the election, did not consent to or sign it in any capacity and in our view is not bound by it."

Partial Windup Decision, UC, Tab 1, p. 26, ¶55

28. In paragraph 31 of its factum, Navistar claims to have "expected that the Plan would be 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." In fact, Navistar had always contemplated (and feared) that it would be liable for partial windup benefits to all Plan members terminated as a result of the reorganization. As early as 2008, Navistar was warned by its Plan administrator that "if the terminations are spaced over a number of different periods, so that on their own they do not individually represent a large percentage of the membership, they could be aggregated if they relate to the same event to determine if a partial wind-up has occurred." Thus, while Navistar may have hoped to avoid its obligations to those terminated before July 28, 2011, it had no reasonable expectation that this would be the result.

Partial Windup Decision , UC, Tab 1, p. 8, ¶15(n)

E. The Partial Windup Decision

29. On March 7, 2013, the Superintendent issued a Notice of Intended Decision, which Navistar unsuccessfully challenged before the Tribunal. The Tribunal rejected Navistar's jurisdictional challenges in its Jurisdiction Decision, and made determinations on the merits as described below.

30. The Tribunal carried out its analysis with regard to the remedial character of the PBA and the partial windup provisions in particular. It noted that the employees whose inclusion in the partial windup group was in dispute were "precisely the type of employee the Act is intended to protect," in that they were not only affected by a plant closure, but many of them were older employees with appreciable amounts of service in the Plan.

Partial Windup Decision, UC, Tab 1, p. 17, ¶21

Firestone Canada, [1990] O.J. No. 2316 ¶16-17, Union's Book of Authorities ("UBA"), Tab 1

Monsanto Canada Inc., 2004 SCC 54 ¶38, Appellant's Book of Authorities ("ABA"), Tab 3

GenCorp Canada Inc. (1998), 158 D.L.R. (4th) 497 ¶16, UBA, Tab 2

Hydro One Inc. v. Ontario, [2008] O.J. No. 1436 (Div. Ct) ¶43, ABA, Tab 4

The Statutory Trigger for a Partial Windup and Basis for Inclusion in the Partial Windup Group

31. The Tribunal first considered whether the partial windup had to be ordered under s. 77.03(1)(b) alone, as urged by Navistar, or under s. 77.03(1)(b) in conjunction with s. 77.03(1)(a), which was the position of the Superintendent and the Union.

32. Section 77.03(1)(b) authorizes a partial windup order "if all or a significant portion of the business carried on by the employer at a specific location is discontinued." The parties agreed that the Plant closure on July 28, 2011 triggered a partial windup under s. 77.03(1)(b). Section 77.03(1)(a) is triggered "if a significant number of members of the pension plan cease to be employed by the employer as a result of… the reorganization of the business of the employer." The Union and the Superintendent took the position that a "reorganization" of Navistar's business had both preceded and culminated in the closure of the Plant.

Pension Benefits Act, R.S.O. 1990 C. P.8 ("PBA"), ss. 77.03(1)(a) and 77.03(1)(b)

Partial Windup Decision UC, Tab 1, p. 15 ¶17-18

33. The Tribunal held that s. 77.3(1)(a) could apply in conjunction with s. 77.03(1)(b). It found nothing in the PBA or the jurisprudence that prohibits the application of more than one provision of subsection of 77.03(1) to the same set of facts, and noted to the contrary that there was precedent for doing so.

Partial Windup Decision, UC, Tab 1, pp. 17, 18 ¶22, 27

McDonnell Douglas, May 19, 1999, FSCO Bulletin/Vol. 8/Issue 2 at p. 12, aff'd (2000), 23 C.C.P.B. 145, ABA, Tab 10

34. The Tribunal determined that s. 77.03(1)(a) applied to the circumstances before it. It used the definition of "reorganization" as the term is used in that subsection of the PBA, quoting the applicable authorities for the proposition that the term "is wider than that where the word is used in statutes dealing with formal corporate reorganizations," and "connotes among other things, a group of intended events occurring as a result of some form of deliberate guidance." To establish a "reorganization", it need only be shown "that the guiding mind had, at the beginning, at least a rough sense of what the organization would look like at the end of the process, of the approximate duration of the process, and of the route that would be followed to get to the end."

Partial Windup Decision, UC, Tab 1, pp. 18-19, ¶28-30

Marino v. Ontario (2007), 67 C.C.P.B. 51 ¶26, 29, 31, aff'd (2008) 67 C.C.P.B. 86 (Ont. Div. Ct), UC, Tab 3

Stelco Inc. (1993) PCO Bulletin/Vol 4/Issue 1, p. 40 at p. 44, aff'd [1994] O.J. No. 1202 (Div. Ct.) ¶2-3, affirmed 1995 CanLII 8918 (ON CA), ABA, Tabs 6-7

Imperial Oil (1996), PCO Bulletin/Vol 6/Issue 4/ p. 90 at p. 94, aff'd [1997] O.J. No. 1961 (Gen. Div.), ABA, Tabs 8-9

35. The Tribunal found that what had transpired between February 1, 2009 (when the downsizing began to take effect) and July 28, 2011 (when the Plant closed) constituted a "reorganization" within the meaning of s. 77.03(1)(a):

> We find that Navistar planned and executed a reorganization strategy that could only result in a monumentally different, radically different and smaller structure in Chatham (in their words), reducing from approximately 1,100 to 100 employees. As noted in the facts above, it never deviated from its strategy in any meaningful fashion and it was well aware that the CAW would not agree to the strategy. It was not a reorganization that could take place in a day. It was also not a reorganization or closure that was the result solely of CAW's refusal to agree to Navistar's new terms, as Navistar repeatedly tried to allege. It is the fact of the reorganization via the actions of Navistar that are of legal significance. We find that the result of its actions, namely the planned layoffs, closure of the Plant and resulting terminations of employment and indeed a partial Plan windup, were foreseeable by Navistar and formed part of its planning.
>
> Partial Windup Decision, UC, Tab 1, pp. 19-20, ¶32

36. The Tribunal also found that the terminations occurring over the reorganization period, in addition to being "significant" in number, were "the 'result' of that reorganization, not merely related to it." It considered the matter from the perspective of the employees, who "would certainly have been able to anticipate likely job loss and possible plant closure as a result of the reorganization."

Partial Windup Decision, UC, Tab 1, pp. 12, 20, 21, ¶15(kk), 33-4, 36, 38

37. The Tribunal rejected Navistar's argument that terminations that were "voluntary" should be excluded from the partial windup group, noting that "[t]he Act does not distinguish between involuntary and voluntary terminations although the Legislature could certainly have done so." Moreover, this interpretation would defeat the PBA's purposes, as this would allow an employer to "circumvent its partial windup obligations simply by staggering its layoffs and announcing closure late in the downsizing process."

Partial Windup Decision, UC, Tab 1, pp. 21, 23, ¶39, 40(a), 40(e)

38. The Tribunal rejected Navistar's argument that terminations for reasons allegedly unrelated to the facts giving rise to the partial windup should be excluded from the partial windup group. It referred to prior decisions that noted the impracticality and futility of looking into the minutiae of multiple terminations to ensure that the driving force for each one was the

reorganization. The Tribunal quoted *Marshall Steel* for the proposition that, "if the termination of employment occurred during the partial wind-up period, it is deemed to be as a result of the events giving rise to the partial wind-up."[1]

Partial Windup Decision, UC, Tab 1, pp. 21-22, 23, ¶39, 40(b), 40(f)

Imperial Oil, supra at p. 95

Marshall Steel Limited, Decision No. PO150-2001 at p. 6, UBA, Tab 4

39. Thus, the Tribunal determined that the partial windup group under s. 77.03(1)(a) included employees who terminated from February 1, 2009 to July 28, 2011.

Partial Windup Decision, UC, Tab 1, p. 23 ¶41

40. The Tribunal also rejected Navistar's narrow approach to delineating the partial windup group under s. 77.03(1)(b). Navistar argued that employees who ceased employment prior to the Plant closure were excluded from the partial windup group, because their terminations preceded the event that triggered the application of s. 77.03(1)(b). The Tribunal found no basis for this approach in the language of s. 77.03(1)(b), which is triggered by a business discontinuance in and of itself and does not even refer to terminations, let alone require that terminations result from the business discontinuance. Moreover, even if is necessary for an employee to be terminated as a result of a business discontinuance in order to be included in a partial windup group under s. 77.03(1)(b), this would not preclude a finding that terminations prior to or after the effective date of the discontinuance are related to and the result of that discontinuance, especially when the PBA's remedial purpose is considered.

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[1] That said, the Tribunal went further than it had to and found statistical evidence of a "nexus" between the reorganization and the terminations that took place within the reorganization period, in that the rate of laid off employees who had severed their employment from February 1, 2009 until the Closure Date was much higher than the percentage of employees on layoff in the past who would terminate voluntarily and give up recall rights. (Partial Windup Decision, UC, Tab 1, pp. 21 and 23, ¶40 and 40(f)).

Partial Windup Decision UC, Tab 1, pp. 17-18, ¶23-25

41. The Tribunal also rejected Navistar's argument that Plan members who received severance payments under the *Employment Standards Act, 2000* ("ESA") should be excluded from the partial windup group. It cited authorities for the proposition that severance payments under the ESA cannot be offset against partial windup entitlements under the PBA, as these are two different types of benefits designed to compensate for two distinct types of losses. Thus, eligible employees may be entitled to both. Moreover, it determined that "as a matter of policy, the law should not provide an economic incentive to dismiss pensionable employees rather than other employees." In any event, even if there is an argument to be made as to the reduction of severance benefits, it would have to be made in a different forum, as the Tribunal lacked jurisdiction to determine severance amounts under the ESA.

Employment Standards Act, 2000, S.O. 2000 C. 41 ("ESA"), ss. 63-64

Partial Windup Decision, UC, Tab 1, pp. 23-25 ¶41-49

Imperial Oil, supra at p. 96

Atlantic Oil Workers Union (2006), 273 D.L.R. (4th) 86 ¶80, UBA, Tab 5

Marino, supra ¶77

IBM Canada Limited v. Waterman 2013 SCC No. 70 ¶4, UBA, Tab 6

42. The Tribunal rejected Navistar's related argument that Plan members who signed a "release" in Navistar's favour should be excluded from the partial windup group. It found that the document in question released Navistar only from claims related to recall and unjust termination, not from claims under the PBA. The Tribunal also held that even if the release had purported to address the employee's right to be included in a partial windup, it would be unenforceable on the basis that parties cannot contract out of a minimum statutory standard.

Partial Windup Decision, ¶51-55

Provost v. Superintendent of Financial Services, May 31, 2012, FST Decision No. P0480-2011-1 at p. 6, UBA, Tab 7

SER Benefits

43. The Tribunal considered Navistar's argument that Plan members who terminated service prior to the Plant closure were not entitled to have SER benefits included in the calculation of their pension benefits or the commuted value thereof. SER benefits are provided under s. 1.03 of the Plan, which states:

> Any employee who has attained age 55, but not age 65, and has completed 10 or more years of Credited Service, may be retired at the option of the Company, or under mutually satisfactory conditions, and shall upon proper application be entitled to a pension, provided, however, than an Employee discharged for cause shall not be eligible for a pension under this section.

Partial Windup Decision, UC, Tab 1, pp. 29-30, ¶70, 73

Plan, UC, Tab 2, p. 40

44. The Tribunal determined that the SER benefit provided under s. 1.03 was an "ancillary benefit" within the meaning of s. 40(1) of the PBA, because it falls into the category of "early retirement options and benefits in excess of those provided by section 41 (early retirement option)." As such, under s. 40(2) of the PBA, the SER Benefit must be included in the calculation of the member's pension benefit or the commuted value thereof if the member has met all the eligibility requirements under the pension plan necessary to exercise the right to receive the ancillary benefit. Further, under s.74(1.3) of the PBA, Plan members whose combination of age plus years of service at the date of the partial windup equals at least 55 have the right to "grow into" SER benefits in accordance with the terms of the Plan.

Partial Windup Decision, UC, Tab 1, pp. 31, 32, ¶76, 78

PBA, ss. 40(1), 40(2), 41, 74(1.3)

BICC Cables Canada Inc., (2000), 26 C.C.P.B. 179 (Div. Ct) ¶17-20, ABA, Tab 14

45. The issue before the Tribunal concerned the applicability of the "deemed consent" provisions of the PBA in ss. 40(3) and 74(7). These deem the employer to have provided consent where "the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit." The Tribunal considered the purpose of the deemed consent provisions, which is to ensure that all benefits provided by a pension plan are determinable.

Partial Windup Decision, UC, Tab 1, pp. 30, 31-32, 33-34, ¶71, 76, 85, 88

PBA, ss. 40(3) and 74(7)

46. The Tribunal determined that the SER is a "consent benefit" within the meaning of ss. 40(3) and 74(7) because s. 1.03 states that the benefit would be provided "at the option of the Company or under mutually satisfactory conditions." It noted that "identical language to this was held to constitute a consent benefit in the Pension Commission's decision in *Caterpillar.*" Thus, the Tribunal deemed Navistar to have consented to provide the SER for otherwise eligible employees, both for the purposes of calculating the value of pension benefits under s. 40(2), and for the grow-in entitlement in s. 74.

Partial Windup Decision ¶74

Caterpillar of Canada Ltd., May 16, 1996, XDEC-33 (PCO), at p. 7, UBA, Tab 8

47. Navistar argued that Exhibit "C" to the Plan should be read together with s. 1.03 to deny the SER Benefit to all terminations prior to July 28, 2011. It relied specifically on paragraph C of Exhibit "C", which it interpreted as restricting the SER entitlement to those "laid off as the direct result of a plant closing." The Tribunal rejected this argument, concluding that Exhibit "C" was not part of the Plan, but rather a "simple guide to the application of s. 1.03 of the Plan," with no legal effect. It reached this conclusion on the basis of the following considerations:

a. Exhibit "C" itself opens with a paragraph stating that the standards in question "will be used by the company as a guide in the application of [s. 1.03]."

b. In the *Caterpillar* decision, the Pension Commission of Ontario reached the same conclusion with respect to an identically-worded document.

c. There was no evidence before the Tribunal that the Union had agreed to the application of Exhibit "C" in the event of a closure or layoff.

d. There was evidence before the Tribunal that the parties did not consider Exhibit 'C' to be part of the Plan.

Partial Windup Decision, UC, Tab 1, pp. 32-33, 34 ¶80-84, 87

Plan, UC, Tab 2, p. 40

Exhibit "C" to the Plan, UC, Tab 2, pp. 104-106

Caterpillar, supra at pp. 7-8

48. The Tribunal also noted that paragraph B of Exhibit "C", which Navistar had failed to recognize, would have permitted "consideration" for employees "whose layoff appears to be permanent and appears to have no further opportunity for employment with the Company."

Partial Windup Decision, UC, Tab 1, pp. 34-35, ¶86, 89

Exhibit "C" to the Plan, UC, Tab 2, p. 105

49. The Tribunal also rejected Navistar's argument that the deemed consent provision in s. 74(7) could only apply to Plan members terminated as a result of the partial windup. Navistar based this argument on its submission already considered and rejected by the Tribunal. The Tribunal reiterated that "the windup group must extend to members who terminated employment

or retired from February 1, 2009 to and including July 28, 2011 for reasons that relate to the reorganization or closure, that on the facts of this case put them squarely in the windup group."

Partial Windup Decision, UC, Tab 1, pp. 34-35, ¶88-90

Credited Service Under s. 7.03(b)(iii) of the Plan

50. The Tribunal determined that Plan members were not required to physically return to work from layoff in order to be entitled to the credited service enhancements set out in s. 7.03(b)(iii) of the Plan. There is no appeal from this determination.

Partial Windup Decision, UC, Tab 1, pp. ¶57-69

PART III -ISSUES AND THE LAW

51. The Union adopts the submissions of the Superintendent that the standard of review that applies to the appeal of the Partial Windup Decision is reasonableness. Moreover, as Navistar concedes, an error of fact must be "palpable and overriding" to warrant a factual review.

52. The Union submits that the Partial Windup Decision is reasonable, to say the least. It is justified, transparent and rational. The Tribunal thoroughly considered the evidence and arguments of the parties. Its factual findings flow logically from the evidence, and with a singular and unwarranted exception, are not challenged by Navistar. The Tribunal accurately identified the applicable legal principles and applied them to the facts in a manner that was grounded in precedent, policy, and logic. Thus, while the Decision is only required to be reasonable, it is in fact correct.

53. As detailed below, none of Navistar's arguments provide any basis for overturning the Tribunal's Decisions. In particular:

a. The Tribunal's alleged "palpable and overriding" factual error bears no relevance to the issues, and in any event was not an error;

b. The Tribunal did not err in delineating the scope of the partial windup group; and

c. The Tribunal did not err in determining entitlement to SER benefits.

A. No "Palpable and Overriding" Factual Error

54. Navistar claims that it made a "palpable and overriding" error in finding that the Plant, once idled on June 30, 2009, "was not in a state of readiness." Navistar specifically takes issue with the Tribunal's finding that "Navistar stripped the plant of its assembly operations" and that "a re-start of the Plant would have taken considerable expense and 3-6 months or more to re-tool and retrain employees for different product lines." Navistar claims that no evidence other than the "misstated" evidence of Mr. Morris was relied on by the Tribunal to support its findings, and that it was on this basis that the Tribunal rejected Mr. VanVroenhoven's "uncontradicted" evidence that the Plant was in a "state of readiness" while idled. This argument is flawed in three respects.

Navistar Factum ¶28, 43-47, 57-62, 76, 78

Partial Windup Decision, UC, Tab 1, p. 12, ¶15(ll)

55. First, and fundamentally, the Tribunal's finding as to the Plant's state of readiness from 2009-2011 has no bearing on any of the issues before the Tribunal or this Court. Navistar baldly asserts that this finding "informed" the Tribunal's determination with respect to the scope of the partial windup group without explaining the basis for the link it is drawing. There is no link. The Plant's state of readiness simply did not factor into the Tribunal's determinations respecting the scope of the partial windup group. The Tribunal would have defined the partial windup group in precisely the same way even if it had found that the Plant was in such an immediate state of

readiness that it could have resumed operations on a moment's notice. Navistar's claim is a red herring, intended to distract from the actual issues at play.

Navistar Factum ¶76

56. Second, Navistar has misstated the Tribunal's actual finding. The Tribunal did not find that the Plant "was not in a state of readiness"; it found that it was "not in a state of readiness so as to immediately resume production." Thus, the Tribunal did not "reject" Mr. VanVroenhoven's evidence on this point (although it did find his testimony "evasive" and "unpersuasive" in other respects). Mr. VanVroenhoven had testified only that the Plant was in a "state of readiness." He did so to draw a distinction between an idled plant and a closed one. He did not testify that the Plant was in a state of readiness so as to immediately resume production, or even offer his views as to how long it would take for the Plant to resume production.

Partial Windup Decision, UC, Tab 1, p. 12, 13-14, ¶15(ll), (xx), (yy)

Transcript of the examination of Henry VanVroenhoven, April 14, 2014 ("VanVroenhoven Transcript"), UC, Tab 5, pp. 127-130

57. Third, the Tribunal did not "misstate" the evidence of Mr. Morris. He testified that Navistar had in fact emptied the assembly line by the end of June 23, 2009, having "stripped out the initial parts of assembly operations" the week prior. He also testified that if the Plant were to be reopened, the manner of producing trucks would be fundamentally changed, so that there would have to be investment, retooling, as well as 2-3 months of retraining. While Mr. Morris did not explicitly state that it would have taken 3-6 months for the Plant to re-open, it was hardly a "palpable and overriding error" for the Tribunal to have found that it would have taken at least that long for the parties to have reached a collective agreement, for the necessary investments to have been secured, for the Plant to have been retooled, for employees to have been recalled, and for 2-3 months of retraining to have taken place.

Morris Transcript, UC, Tab 3, pp. 122-123 and Tab 6, pp. 131-134

E-mail dated June 12, 2009, UC, Tab 7, p. 135

58. Navistar also argues, in paragraph 76 of its factum, that the Tribunal's finding as to the readiness of the Plant through 2009-2011 is inconsistent with its finding that Navistar continued to bargain in good faith over this period. In fact, the Tribunal did not find that Navistar bargained in good faith, but rather held that it lacked jurisdiction to make findings on this matter. In any event, there would be no inconsistency between a finding that Navistar bargained in good faith and the Tribunal's finding that Navistar had a clear bottom-line objective to which it held fast, namely radically diminished scope and scale of production or closure of the Plant.

Partial Windup Decision, UC, Tab 1, pp. 4-5, 10, 11, ¶9, 15(w), (aa)

B. No Error In Determining Scope of Partial Windup Group

No Error in Determining that s. 77.03(1)(a) Applies

59. Navistar takes the position that the Tribunal erred in applying s. 77.3(1)(a) to the facts of this case because "Navistar did not reorganize its business." Rather, in the face of Navistar's failure to conclude collective agreements with the Union, what occurred, according to Navistar, was not "reorganization" but rather "a failed attempt to reorganize."

Navistar factum ¶69, 75

60. Navistar's argument is nothing but misguided and distorted play on words. It is self-defining "reorganization" to refer only to a particular phase of its reorganization strategy, which would have seen the Plant continue to operate under such "monumentally" and "radically" different conditions that fundamentally different collective agreements would have been needed. It was only this phase of Navistar's reorganization strategy that Navistar "failed" to achieve;

Navistar had already implemented other significant elements of its reorganization strategy within the limits of the existing collective agreements and after the expiry of those agreements. Moreover, the breakdown of collective bargaining and closure of the Plant did not represent a "failure" of Navistar's reorganization strategy, but the final phase of it: Navistar had always contemplated closing the Plant as the final stage of its reorganization in the (likely) event that it could not bargain for all of the monumental and radical changes that it desired.

61. Navistar's definition of "reorganization" is also at odds with the definition applied by the Tribunal, which has been affirmed by this Court. Again, as the Tribunal identified, a "reorganization" under s. 77.03(1)(a) connotes "a group of intended events occurring as a result of some form of deliberate guidance." Navistar does not cite any authorities to support the narrow definition of "reorganization" that it is employing. The Tribunal did not err by applying the definition of "reorganization" that has been developed in the jurisprudence and which accords with the remedial purposes of the PBA, rather than Navistar's invented, narrow and self-serving one.

Partial Windup Decision, UC, Tab 1, pp. 18-19, ¶28-30

Marino, supra ¶26, 29, 31

Stelco Inc., supra at p. 44

Imperial Oil, supra at p. 94

62. Applying the appropriate definition of "reorganization" to the circumstances before it, the Tribunal determined that Navistar began to develop a reorganization strategy in the spring of 2008, that this reorganization was being implemented by February 1, 2009, that Navistar continued to reorganize over the period of collective bargaining, and that when Navistar failed to bargain the desired changes, it closed the Plant - a move that had always been contemplated as a

possible and likely final stage of its reorganization strategy. Navistar does not challenge any of the factual findings that actually informed these determinations.

> Partial Windup Decision, UC, Tab 1, pp. 19-20, ¶32

63. Thus, there is no basis for this Court to interfere with the Tribunal's determination that a "reorganization" within the meaning of s. 77.03(1)(a) occurred from Feb. 1, 2009-July 28, 2011.

No Error in Ordering Partial Windup Under Two Subsections of s. 77.3(1)

64. In paragraphs 69-74 of its factum, Navistar argues that the Tribunal erred in its interpretation of the statutory scheme established by s. 77.3(1) by holding that the partial windup exists under both subsections 77.03(1)(a) and (b) of the PBA. These subsections provide,

> 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; …
>
> *PBA*, ss. 77.03(1)(a) and (b)

65. Navistar claims that a reorganization under s. 77.03(1)(a) and a closure under s. 77.03(1)(b) are mutually exclusive, in that "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, reorganization and closure cannot both be used to define the scope of the windup group."

66. In fact, Navistar's reasoning defies logic. While the closure of a plant may preclude future reorganization, the converse does not hold: a closure may be preceded by, or be the culmination of, a "reorganization" within the meaning of s. 77.3(1)(a). As Navistar itself

acknowledges in paragraph 75 of its factum, "a reorganization may involve a plant closure or plant closures."

67. Navistar's "logic" only makes sense on its invented and self-serving misuse of the term "reorganization." Again, Navistar employs the term to refer specifically to one particular phase of its reorganization strategy, i.e. continued operation at monumentally diminished capacity, which by definition could not have taken place at the same time as the closure of the Plant. However, on the basis of what "reorganization" actually means under s. 77.03(1)(a), a "reorganization" can precede and/or culminate in a plant closure, which is what in fact occurred.

68. The proposition being urged upon this Court by Navistar, namely that a determination under s. 77.03(1)(b) precludes the application of s. 77.03(1)(a), is incorrect as a matter of statutory interpretation. As the Tribunal held, that is nothing in the PBA that prevents the application of more than one subclause of s 77.03(1) to the same set of facts, and indeed, there is precedent for doing this.

McDonnell Douglas, supra at p. 12

69. Moreover, Navistar's proposed interpretation of s. 77.03(1) would defeat the remedial purposes of the PBA as a whole and the partial windup scheme in particular. If Navistar is right, an employer could play the provisions of s. 77.03(1) off one another, using s. 77.03(1)(b) to avoid its obligations under s. 77.03(1)(a). Specifically, an employer could follow a reorganization with a strategically-timed closure, thereby triggering the application of s. 77.03(1)(b) and thereby, according to Navistar, relieve itself of its obligations under s. 77.03(1)(a). This is precisely what Navistar is attempting in this case. Far from showing "special solicitude" to employees affected by a discontinuance or reorganization, this

interpretation of s. 77.03(1) would deprive these employees of the very protections that the partial windup provisions exist to provide.

Firestone Canada Inc., supra ¶16-17

70. The cases relied on by Navistar do not support the proposition that jurisdiction to order a partial windup must be found under only one subsection of s. 77.3(1). In *London Life,* the Tribunal found it "unnecessary" – not impermissible – to order the partial windup under both the reorganization and business discontinuance provisions. In that case, nothing turned on the provision under which the partial windup was ordered: the scope of the partial windup group would have been the same either way. By contrast, in this case, the scope of the partial windup group is said (by Navistar) to depend entirely on whether the partial windup was triggered by the reorganization or the closure.[2] Hence, given the way the issues have been framed by Navistar in this case, it would not have been prudent for the Superintendent or the Tribunal to order the partial windup under the closure provision alone. It was appropriate for the Tribunal to resolve the dispute with respect to s. 77.03(1)(a) in order to confirm the scope partial windup group.

London Life Insurance Co. (2001), 26 C.C.P.B. 249 ¶19-21, ABA, Tab 5

71. In paragraph 75 of its factum, Navistar cites a number of decisions in apparent support for the proposition that "closure and reorganization are mutually exclusive". Those cases do not even address that proposition, let alone support it.

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[2] The Union does not agree with Navistar's framing of the issues, but rather takes the position that the Tribunal could have delineated the partial windup group in precisely the same way under s. 77.03(1)(b) (see ¶72 below).

Scope of Windup Group Under s. 77.03(1)(b)

72. Contrary to what Navistar argues in paragraph 67 of its factum, the Tribunal could have defined the scope of the partial windup group as it did on the basis of s. 77.03(1)(b) alone. As the Tribunal determined, there was nothing in the PBA that would preclude a determination that terminations of employment prior to or after the effective date of the discontinuance are related to and the result of that discontinuance. Reading such a restriction into the PBA, as Navistar suggests should be done, would defeat its remedial purposes. Thus, even if the Tribunal was required to make its decision under s. 77.03(1)(b) alone (which it was not), it could have, and in that scenario should have, determined that the terminations that occurred from February 1, 2009-July 28, 2011 were all related to and the result of the Plant closure.

Partial Windup Decision, UC, Tab 1, pp. 17-18, ¶23-25

No "Unjust Enrichment" at Navistar's Expense

73. Contrary to the argument in paragraphs 77 and 80 of Navistar's factum, the Tribunal did not err by including in the partial windup group employees who "voluntarily" entered into severance agreements between June 30, 2009 and July 28, 2011. Navistar's characterization of the severance arrangements as "voluntary" is deliberate, and inappropriate. As the Tribunal determined, "voluntariness" has no significance in the context of a large-scale reorganization in which the vast majority of employees had no realistic prospect of recall.

Partial Windup Decision, UC, Tab 1, pp. 21, 23, ¶39, 40(a), 40(e)

74. Moreover, there is no merit to Navistar's claims of unjust enrichment. "Unjust enrichment" requires three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment. A "juristic reason" refers to a "reason in law or justice for the defendant's retention of the benefit

conferred by the plaintiff." Where the burdens or benefits in question are provided under a statute, the "juristic reason" criterion is readily satisfied. In this case, there is a clear juristic reason for members of the partial windup group to claim and retain the partial windup benefits: the PBA. The PBA provides benefits to those affected by the partial windup of a pension plan and does not contemplate the offsetting of such benefits against any severance pay to which such plan members may be entitled.

Kerr v. Baranow, 2011 SCC 10 ¶36-41

75. Moreover, substituting severance pay for partial windup benefits would defeat the purpose of the partial windup provisions, which is to ensure a fair source of retirement income for workers whose termination of employment has occurred on an unplanned date, at a comparatively later stage in their in their working lives. The purpose of severance payments under the ESA, by contrast, is to compensate employees for their lost investment in the employer's business, as well as for losses going forward as they find new employment. As the Tribunal held, and the jurisprudence provides, these are two different types of benefits designed to insure against two distinct types of losses. Where these losses occur simultaneously or in sequence, employees ought to be able to claim both.

Ontario Nurses' Association v. Mount Sinai Hospital, 2005 CanLII 14437 (ON CA) ¶32, 39

Imperial Oil, supra at p. 96

Atlantic Oil Workers Union, supra ¶80

Marino, supra ¶77.

IBM Canada Limited v. Waterman, supra ¶4

76. Navistar cites *Kitchener Frame* in apparent support for its unjust enrichment argument, but that case is of no assistance to Navistar. In *Kitchener Frame,* an arbitrator held that plan

members were disentitled from severance pay pursuant to an ESA regulation disentitling from severance pay "[a]n employee who, on having his or her employment severed, retires and receives and 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." The arbitrator found that the plan in question provided for an unreduced pension triggered by a plant closure that made up for the loss of future service credits.

Kitchener Frame Ltd., 2010 ONSC 3890 (Div. Ct.) ¶10, 29-30, 52, ABA, Tab 11

ESA Regulation, O.R. 288/01, s. 9(1) ¶3

77. *Kitchener Frame* is distinguishable for at least three reasons. First, the issue in *Kitchener Frame* was entitlement to severance pay under the ESA, which was a matter over which the arbitrator had jurisdiction. In contrast, the issue before the Tribunal was entitlement to partial windup benefits under the PBA, including grow-in benefits under s. 74; the Tribunal rightly determined that it lacked jurisdiction to make determinations with respect to severance benefits.

Partial Windup Decision, UC, Tab 1, p. 25, ¶49

78. Second, the unreduced pension in *Kitchener Frame* was made available by the plan itself immediately upon severance (plant closure). In contrast, the pension benefit at issue in this case is a grow-in benefit triggered by a partial windup under s. 74 of the PBA. By definition, a grow-in benefit cannot qualify for the ESA exemption, because it is not given to an employee "upon having his or her employment severed." Indeed, in *Kitchener Frame,* the company did not even contest the severance entitlement of employees on the basis of any grow-in benefits for which they might have been eligible.

ESA Regulation, O.R. 288/01 s.9(1) ¶ 3

79. Third, the unreduced pension in *Kitchener Frame* had been actuarially demonstrated to provide employees with a benefit equal or greater to what they would have received if the plant had not been closed. In contrast, there was no evidence before the Tribunal or before this Court that would permit a comparison between the value of the SER and the future service credits that would have been earned had the terminations not taken place.

Kitchener Frame, supra ¶28

80. In any event, if there is an argument to be made regarding entitlement to severance benefits, it must be pursued under the administrative and adjudicative scheme established by the ESA (see Parts XX1-XXIII). Navistar should not be able to avoid these processes by disguising an ESA argument as an unjust enrichment claim and pursuing it through this appeal.

81. Finally, contrary to what Navistar argues in paragraph 79 of its factum, the case of *CBS Canada Co.* does not support the proposition that employees who retired before the effective date of the partial windup should be excluded from the partial windup group because they were, by the effective date, no longer members of the Plan. In that case, the Tribunal determined, *inter alia,* that an individual was excluded from the partial windup group not because he was no longer a Plan member by the effective date (he was), but because he gave specific evidence that his decision to retire was unrelated to the partial windup. Far from establishing that plan members who retire before the partial windup date must be excluded from the partial windup group, the Tribunal expressly contemplated the possibility of individuals being included in the partial windup group because they ceased employment "during the period of the event giving rise to the partial wind-up."

CBS Canada Co., 2003 ONFST 10 at pp. 5 and 7, ABA, Tab 12

C. No Error in Determination of Entitlement to SER benefits

82. In paragraphs 81-84 of its factum, Navistar argues that employees whose employment ceased prior to July 29, 2011 are not eligible for SER benefits under the Plan. It relies on paragraph C of Exhibit "C" to the Plan, which contemplates SER benefits for employees laid off at or after the age of 40 as a direct result of a Plant closing. It argues that employees who terminated prior to July 28, 2011 do not meet this "requirement" because they did not terminate as a "direct result" of a Plant closure.

83. Navistar's reliance on Exhibit "C" to the Plan is misplaced. As the Tribunal determined, Exhibit "C" has no legal effect because it is not part of the Plan, but is rather a guide to the application of s. 1.03 of the Plan. The Tribunal reached this conclusion on the basis of the plain language of Exhibit "C", the *Caterpillar* decision, the absence of any evidence that Exhibit "C" was intended to be part of the Plan, and evidence that the parties did not in fact consider Exhibit "C" to be part of the Plan. Navistar does not specifically challenge any of these determinations or the factual findings upon which they were based.

Partial Windup Decision, UC, Tab 1, pp. 32-33, 34 ¶80-84, 87

84. Even assuming that Exhibit "C" could somehow affect rights under the Plan, it does so in a manner that actually supports the SER claims of Plan members who terminated prior to Plant closure. Navistar's argument with respect to Exhibit "C" has misleadingly focused on a single paragraph, paragraph C. However, paragraph B provides that "consideration for special early retirement may also be given to an Employee whose layoff appears to be permanent and who appears to have no further opportunity for employment with the Company." Plan members terminated over the period February 1, 2008 – July 28, 2011 faced no realistic possibility of recall and as such their layoffs "appear[ed] to be permanent." That these employees would have

been eligible for "consideration" under paragraph B confirms the discretionary nature of the SER benefit, and its proper characterization as a "consent benefit" under of ss. 40(3) and 74(7).

Exhibit "C" to the Plan, UC, Tab 2, p. 105

PBA, ss. 40(3) and 74(7)

85. Navistar also argues, in paragraphs 85-86 of its factum, that employees who terminated prior to July 28, 2011 are not eligible for the "deemed consent" provision in s. 74(7) of the PBA, because these employees were not terminated as a result of the partial windup. For reasons set out above, employees terminated from February 1, 2009 – July 28, 2011 were terminated as a result of the reorganization and/or the Plant closure and were properly included in the partial windup group. These employees therefore qualify for deemed consent under s. 74(7). The *BICC Cables* case does not assist Navistar in this regard. To the contrary, *BICC Cables* supports the analysis applied by the Tribunal.

BICC Cables, supra ¶17-20

PART IV - ORDER REQUESTED

86. The Union requests an order dismissing this appeal with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

for L.N. Gottheil

December 22, 2014