

August 11, 2014

**FAX**

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

Lewis Gottheil  
Director, Legal Department  
UNIFOR  
205 Placer Court  
Toronto, Ontario M2H 3H9

Dear Counsel:

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

Enclosed and served upon you pursuant to the Divisional Court *Rules* are the Notice of Appeal and Appellant's Certificate of Navistar Canada Inc.

Yours truly,



for  
Tom Stevenson

TS/kat

Enclosures

cc: Mitch Frazer, Torys LLP  
Alex Smith, Torys LLP

Divisional Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

**B E T W E E N:**

NAVISTAR CANADA INC.

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

- and -

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

Added Party

**NOTICE OF APPEAL**

(Appeal made under the *Pension Benefits Act*, R.S.O. 1990, c. P. 8)

THE APPELLANT, Navistar Canada Inc. (“Navistar”), APPEALS from the two decisions of the Financial Services Tribunal (the “Tribunal”) – the Jurisdiction Decision, released November 4, 2013, and the Windup Decision, released July 11, 2014.

THE APPELLANT ASKS for an order:

- (a) setting aside that part of the Jurisdiction Decision made by the Tribunal without allowing the Appellant to present relevant evidence, namely the order that both the Tribunal and the Acting Deputy Superintendent, Pensions of the Financial Services Commission of Ontario (the “Superintendent”) had the jurisdiction to rule on the applicability of the 0.9 years bank pensionable service credit under

section 7.03(b)(iii) of the Navistar Canada Inc. Non-Contributory Retirement Plan (the “Plan”);

- (b) setting aside that part of the Windup Decision which ordered:
  - (i) the Superintendent to order a partial windup of the Plan on the basis of a windup report to be prepared by Navistar that:
    - (A) includes all Plan members who ceased to be employed between February 1, 2009 up to and including June 28, 2011;
    - (B) credits all such members with up to 0.9 years of credited service under section 7.03(b)(iii) of the Plan regardless of their return to work, such additional credited service not to go beyond the later of the individual’s termination date or effective windup date of July 28, 2011; and
    - (C) provides all eligible Plan members affected by the partial windup whose age and continuous service or plan membership equals 55 years or more with the special early retirement benefit (the “SER Benefit”) as defined in section 1.03; and
  - (ii) Navistar to provide proof to the Superintendent that the pensions or commuted value of the pensions for all members who are not affected by the partial windup and are entitled to 0.9 years of credited service under section 7.03(b)(iii) of the Plan (in effect, all such members of the Plan since the Plan’s inception until February 1, 2009) have been re-calculated to include these benefits, or in the case of deceased members where there is no continuing benefit payable, to the deceased member’s beneficiary; and
- (c) awarding Navistar its costs of the appeal;

or such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE APPEAL are as follows:

- (a) This appeal arises from a Notice of Intended Decision by the Superintendent dated March 7, 2013 to make certain orders in respect of the Plan (the “Notice”). The Notice would require Navistar to partially windup the Plan effective July 28, 2011, and to include certain Plan members in the partial windup who were no longer Navistar employees, having retired or voluntarily severed their employment prior to the effective windup date of July 28, 2011. The Notice further required the partial Plan windup report to include the value of certain benefits under the Plan.
- (b) Navistar required a hearing in front of the Tribunal in respect of the Notice under s. 89(8) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 (the “Act”).
- (c) The Divisional Court has authority under section 91 of the Act which provides that a decision of the Tribunal may be appealed to the Divisional Court.

#### **The Jurisdiction Decision**

- (d) On October 10, 2013 Navistar brought a motion for a declaration that the Superintendent and the Tribunal had lost jurisdiction to rule on the applicability of the 0.9 years bank pensionable service credit under section 7.03(b)(iii) of the Plan (the “0.9 Issue”) and that, contrary to the rules of procedural fairness, the Superintendent had ruled on the 0.9 Issue.
- (e) The Tribunal refused to hear from Navistar’s witnesses in attendance at the hearing on October 10, 2013, and refused to consider other relevant and admissible evidence on the 0.9 Issue, including the issue of whether the Superintendent had violated the rules of procedural fairness in ruling on the 0.9 Issue.
- (f) In the Jurisdiction Decision, the Tribunal erred by ordering that the Superintendent and the Tribunal had the jurisdiction to rule on the 0.9 Issue, and that any such jurisdiction was not lost due to any breach of procedural fairness.

#### **The Windup Decision**

- (g) The hearing on all other issues proceeded before the Tribunal on April 11, 14 and 15 2014.

- (h) Navistar was significantly affected by the worldwide recession in 2007-2008, which had a severe impact on its truck production.
- (i) The collective agreement covering employees at Navistar's assembly plant in Chatham, Ontario (the "Plant") had an expiry date of June 30, 2009. Aware that a previous expiration of a collective agreement resulted in violent job action by some workers, Navistar determined that if no new collective agreement was reached by June 30, 2009, then the Plant would be idled as the parties continued to bargain for a new collective agreement. The Plant was idled on June 30, 2009, but maintained in a condition that would allow it to be re-opened once a collective agreement was reached.
- (j) Bargaining for a new collective agreement continued until the decision was made in July 2011 to cease operations at the Plant. At that point Navistar expected that the Plan would be partially wound up and would cover those employees still "on roll" at that date, but not those employees who had left Navistar's employment prior to July 28, 2011.
- (k) The Superintendent correctly determined that the Plan windup date was July 28, 2011, but erred by ordering that the windup include Plan members who ceased to be employed at the Plant after June 30, 2009, including those who retired or voluntarily severed their employment with Navistar between June 30, 2009 and July 28, 2011.
- (l) The Superintendent also erred by ordering that the windup valuation include enhanced benefits for all Plan members, including additional credited service (the 0.9 Issue). In addition, the Superintendent ordered that all employees included in the partial windup group would receive SER benefits, and extended those benefits to employees who had retired before the expiry of the collective agreement, contrary to sections 74(7) and 77.3(1) of the Act.
- (m) The Tribunal 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, UNIFOR, called any witnesses.

- (n) The Tribunal released the Windup Decision on July 11, 2014.
- (o) In the Windup Decision, the Tribunal accepted the uncontradicted evidence of Mr. Morris that Navistar's truck production in North America and elsewhere was severely impacted by the general worldwide economic downturn in 2007-2008. As a result of the recession, the Tribunal also found that by the spring of 2008 Navistar was developing a "reorganization strategy" for the Plant. The reorganization strategy contemplated truck operations continuing at the Plant and the Tribunal found that the reorganization strategy "remained the bargaining mandate for Navistar through 2009-2011".
- (p) Notwithstanding this finding that Navistar's bargaining mandate remained the same through 2009-2011, and contrary to the uncontradicted evidence of Mr. VanVroenhoven, the Tribunal found that at the expiry of the collective agreements with the union in 2009 "Navistar stripped the Plant of its assembly operations." In making this erroneous finding of fact on the basis of no evidence and contrary to the evidence that was before the Tribunal, the Tribunal made a palpable and overriding error that amounts to an error of law.
- (q) Relying on its erroneous finding that Navistar stripped the Plant in 2009, and notwithstanding its finding that Navistar's bargaining mandate remained the same through 2009-2011, the Tribunal erred by ordering that the windup group shall include not only all employees "on roll" as at July 28, 2011 but also those employees who terminated or retired and were no longer "on roll" from February 1, 2009 through and including July 28, 2011.
- (r) These rulings adding former employees into the windup group increased the number of employees covered by the partial windup ordered by the Tribunal by hundreds of employees, contrary to sections 74(7) and 77.3(1) of the Act.
- (s) The Tribunal 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 under section 7.03(b)(iii) of the Plan for all previous periods of layoffs even though many of those members had already been compensated by Navistar pursuant to past practice.

- (t) The Appellant relies on the Act, specifically sections 74, 77.3, and the Regulations promulgated thereunder.

The Appellant requests that this appeal be heard at Toronto.

August 11, 2014

**Torys LLP**  
79 Wellington St. W., Suite 3000  
Box 270, TD Centre  
Toronto, ON M5K 1N2  
Fax: 416.865.7380

Sheila Block (LSUC#: 14089N)  
Tel: 416.865.7319

Mitch Frazer (LSUC#: 43925I)  
Tel: 416.865.8220

Alex Smith (LSUC #: 57578L)  
Tel: 416.865.8142

Lawyers for Navistar Canada Inc.

TO: Mr. Mark Bailey  
Legal Services Branch  
Financial Services Commission  
5160 Yonge Street, 17th Floor  
Toronto ON M2N 6L9  
Fax (416) 590-7556

AND TO: Mr. Lewis Gottheil  
Director, Legal Department  
UNIFOR  
205 Placer Court  
Toronto ON M2H 3H9  
Fax (416) 495-3786

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

Proceeding commenced at TORONTO

**NOTICE OF APPEAL**

**Torys LLP**  
79 Wellington St. W., Suite 3000  
Box 270, TD Centre  
Toronto, ON M5K 1N2  
Fax: 416.865.7380

Sheila Block (LSUC#: 14089N)  
Tel: 416.865.7319

Mitch Frazer (LSUC#: 43925I)  
Tel: 416.865.8220

Alex Smith (LSUC #: 57578L)  
Tel: 416.865.8142

Lawyers for Navistar Canada Inc.



Divisional Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

**B E T W E E N:**

NAVISTAR CANADA INC.

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

- and -

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

Added Party

**APPELLANT'S CERTIFICATE**

(Appeal made under the *Pension Benefits Act*, R.S.O. 1990, c. P. 8)

The Appellant, Navistar Canada Inc. (“Navistar”), certifies that the following evidence is required for the appeal, in the Navistar's opinion:

1. All of the evidence that was before the Financial Services Tribunal, including transcripts of oral evidence.

August 11, 2014

**Torys LLP**  
79 Wellington St. W., Suite 3000  
Box 270, TD Centre  
Toronto, ON M5K 1N2  
Fax: 416.865.7380

Sheila Block (LSUC#: 14089N)  
Tel: 416.865.7319

Mitch Frazer (LSUC#: 43925I)  
Tel: 416.865.8220

Alex Smith (LSUC #: 57578L)  
Tel: 416.865.8142

Lawyers for Navistar Canada Inc.

TO: Mr. Mark Bailey  
Legal Services Branch  
Financial Services Commission  
5160 Yonge Street, 17th Floor  
Toronto ON M2N 6L9  
Fax (416) 590-7556

AND TO: Mr. Lewis Gottheil  
Director, Legal Department  
UNIFOR  
205 Placer Court  
Toronto ON M2H 3H9  
Fax (416) 495-3786

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

Proceeding commenced at TORONTO

**APPELLANT'S CERTIFICATE**

**Torys LLP**  
79 Wellington St. W., Suite 3000  
Box 270, TD Centre  
Toronto, ON M5K 1N2  
Fax: 416.865.7380

Sheila Block (LSUC#: 14089N)  
Tel: 416.865.7319

Mitch Frazer (LSUC#: 43925I)  
Tel: 416.865.8220

Alex Smith (LSUC #: 57578L)  
Tel: 416.865.8142

Lawyers for Navistar Canada Inc.