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July 17, 2015

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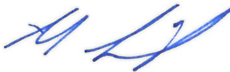
Dear Counsel:

Re: *Navistar Canada Inc. v. Superintendent of Financial Services*
Divisional Court File No. 364/14

Enclosed and served upon you pursuant to the *Rules* is Navistar Canada Inc.'s notice of motion for leave to appeal to the Court of Appeal for Ontario.

Yours truly,



Alex Smith

AS/kt

Enclosure

cc: Mitch Frazer
Sheila Block

19961990

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

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

NAVISTAR CANADA INC.

Appellant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

- and -

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

Added Party

NOTICE OF MOTION FOR LEAVE TO APPEAL

THE MOVING PARTY, Navistar Canada Inc. ("Navistar"), will make a motion to be heard by the Court in writing within 36 days after service of the moving parties' motion record, factum and transcripts, if any, or on the filing of the moving parties' reply factum, if any, whichever is earlier, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

THE MOVING PARTIES propose that the motion be heard in writing.

THE MOTION IS FOR:

1. An order granting leave to appeal to the Court of Appeal for Ontario.
2. Such further and other relief as counsel may request and this Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. The proposed appeal arises from a Notice of Intended Decision by the Superintendent dated March 7, 2013 (the "Notice") to make certain orders in respect of the Navistar Canada Inc. Non-Contributory Retirement Plan (the "Plan"). 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 and required Navistar to 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.

2. Navistar required a hearing in front of the Financial Services Tribunal (the "Tribunal") in respect of the Notice under s. 89(8) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 (the "PBA" or the "Act"), following which the Tribunal issued a decision substantially affirming the Notice, which decision was upheld by the Divisional Court. On this motion, Navistar seeks leave to appeal the decision of the Divisional Court to the Court of Appeal for Ontario.

3. The decision of the Divisional Court presents 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 the decision has significant implications for the practice in this area.

The appeal is prima facie meritorious

4. Navistar Canada Inc. ("Navistar") was a manufacturer of long haul trucks with a plant in Chatham, Ontario. Like others in the highly competitive truck manufacturing industry, Navistar faced severe challenges in the global recession that started in 2008. Capital spending by customers plummeted and orders dropped. The survival of its manufacturing operations at Chatham was threatened.

5. Navistar's truck manufacturing business at Chatham had always been cyclical, with rounds of significant layoffs and recalls of workers being a regular feature. The workforce at the plant at times fluctuated from 2,000 employees to a few hundred over the years.

6. In 2009, as the company faced the expiration of its collective agreement with the then Canadian Auto Workers Union (now Unifor), it realized the severe impact of the worldwide recession required changes to its operations to be more flexible, make more varieties of trucks at the Chatham location and service a regional customer base in order to eliminate the huge transportation and fuel costs of shipping trucks across the continent. It needed to reorganize the way it carried on its business at the Chatham plant (the "Plant").

7. Navistar knew it could not unilaterally reorganize and it needed to agree to new terms pursuant to a new collective agreement. No agreement was reached prior to the expiration on June 30, 2009 of the existing agreement but both sides resolved to continue collective bargaining negotiations after the expiration date.

8. Aware that a previous expiration of a collective agreement had 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 new collective agreement was ratified.

9. Good faith labour bargaining continued for two years. However, by July 2011, it was clear that a new collective agreement that would permit organizational changes could not be obtained and negotiations ended. Unable to reorganize its business to meet the marketplace demands for lower manufacturing costs and more competitively priced products, Navistar decided to close the Plant on July 28, 2011.

10. The Superintendent of Financial Services correctly determined that the Plan windup date was July 28, 2011.

11. At July 28, 2011 there were 558 employees "on roll" at the Plant, that is actively employed, although then currently on layoff because of the drop in orders and, from June 30, 2009, because of the idling of the plant. However, these workers were still employees of Navistar and capable of being recalled back to work at the Plant once a new collective agreement was reached and more employees were needed as orders increased.

12. Between June 30, 2009 and July 28, 2011, the date of the closure, up to 300 employees had voluntarily retired or severed their employment with Navistar and were no longer employees of the company, subject to recall, leaving the 558 "on roll".

13. The PBA creates a statutory partial windup. The legislation defines it as "the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of the pension plan" (s. 77.1(5)). The PBA sets out when the Superintendent can order a partial windup in s. 77.3(1).

14. The issue in this case is the proper interpretation and application of that section. Subsection (a) deals with windups arising from a business reorganization. This section was applied in error. Although reorganization was desired by Navistar, it could not unilaterally impose a reorganization on a unionized plant. It attempted to achieve agreement with union in order to proceed with a reorganized plant but the negotiations needed to achieve that outcome failed.

15. As a result, instead of having a partial windup resulting from a reorganization, the company closed the Plant. Section 77.3(1)(b) specifically covers such an event as occurred 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.

16. Those entitled to participate in the partial windup are the employees who were still "on roll" at the Chatham plant on July 28, 2011, the date of the closure of the Plant and the undisputed established date for the partial windup.

17. As stated by the Supreme Court of Canada in *Monsanto*, the Tribunal has no specific expertise in the interpretation of the Act. The Divisional Court decision wrongly affirmed the Tribunal decision that conflated s. 77.3(1)(a) and (b). 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 that employees who had left Navistar's employment from February 1, 2009 through to the actual windup date of July 28, 2011 were to be added to the windup group.

> *Monsanto v. Superintendent of Financial Services*, [2004] 3 SCR 152, at 161

18. The leading authority on this issue is a decision of then Tribunal Chair, Eileen Gilese, which held that a windup based on reorganization must relate to a reorganization that was actually undertaken. The decision further held that the terminations have to be the direct result of the reorganization that has been implemented. Activity that predates a reorganization does not trigger a windup on this ground. As Chair Gilese said, "being *related* to a reorganization is not the same thing as *resulting* from a reorganization." (emphasis added)

> *Re Imperial Oil Ltd. Retirement Plan* (1988) 1996 PCO Bulletin, Vol. 6, Issue 4, P. 90

19. The Tribunal acted outside of its jurisdiction to include employees beyond the 558 whose employment was terminated as a result of the s. 77.3(1)(b) event, namely the closure of the Chatham plant on July 28, 2011, the date of the windup. The Divisional Court erred in upholding that decision.

20. 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.

21. Contrary to the uncontradicted evidence, 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 it, the Tribunal made a palpable and overriding error that amounts to an error of law. The Divisional Court nonetheless upheld this portion of the Tribunal's decision.

22. 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 more than 50 years

ago to include 0.9 years of credited service under section 7.03(b)(iii) of the Plan for all previous periods of layoffs. In addition, many of those members had already been compensated by Navistar pursuant to past practice. The Divisional Court failed to address this aspect of Navistar's appeal in its reasons for decision.

The points on appeal are of significance to the practice

23. Even though partial windups have been substantially eliminated by legislative amendment, these same principles apply to full windups. The decision departs from the established law in Ontario. Other jurisdictions across the country have similar windup regimes as well and this legally erroneous precedent should be reversed.

24. From a business perspective, this decision penalizes companies trying to rationalize their workforces in order to preserve as many jobs as possible in an economic downturn with the aim of building back the workforce when the recovery comes. In cyclical manufacturing industries, this takes long, arduous negotiations and expensive steps to rationalize the workforce with arrangements like severance packages and early retirement arrangements to make room for recall of younger workers. The evidence in this case showed that both Navistar and the union were engaged in such a process, with the company compensating many employees with severance packages.

25. This decision penalizes a company seeking to use these legitimate avenues to preserve its economic enterprise since it doubly compensates workers who voluntarily severed their employment by requiring the company to include them again in the windup group.

26. In this case, Navistar went to great lengths to attempt to preserve approximately 165 jobs at first instance, with the plan to recall more employees as the business began to improve and recover after the worldwide recession. The evidence in the record showed, at the U.S. parent company's plant in Ohio where similar negotiations with the UAW were, in fact, successful, that hundreds of workers were in fact recalled as the business conditions began to improve as the recession eased. Yet the precedent of this decision would discourage persistent and prolonged negotiations since the company is penalized by having to include hundreds of additional workers in the windup group if the negotiations fail.

Test for leave

27. 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.

28. This case meets that test and has significance for the practice in the area of pensions and labour law.

29. The moving party Navistar relies on the Act, specifically sections 74, 77.1, 77.3, and the Regulations promulgated thereunder.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The hearing record that was before the Divisional Court.
2. Such further and other evidence as counsel may advise and this Court may permit.

July 17, 2015

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NAVISTAR CANADA INC.	- and -	SUPERINTENDENT OF FINANCIAL SERVICES	- and -	UNIFOR (formerly CAW-CANADA) AND ITS LOCALS 127 AND 35
Appellant		Respondent		Added Party

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

COURT OF APPEAL FOR ONTARIO
PROCEEDING COMMENCED AT TORONTO

NOTICE OF MOTION FOR LEAVE TO APPEAL

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