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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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 ADDED PARTY UNIFOR (formerly CAW-CANADA) AND ITS LOCALS 127 AND 35 (Motion for Leave to Appeal)

LAW OFFICE OF LEWIS GOTTHEIL
Barristers and Solicitors
17 Castlewood Road
Toronto ON M5N 2L1

Lewis Gottheil, LSUC #021671L
Tel: 416-484-7223
Cell: 416-230-0793
Email: lewis.gottheil@gmail.com

Counsel for the Added Party, UNIFOR (formerly CAW-CANADA) AND ITS LOCALS 127 AND 35

TO: THIS HONOURABLE COURT

AND TO: TORYs LLP
79 Wellington Street West, 30th Floor
Box 270, TD South Tower
Toronto ON M5K 1N2
Fax: 416-865-7380

Sheila R. Block
Tel: 416-865-7319
Email: sblock@torys.com

Mitch Frazer
Tel: 416-865-8220
Email: mfrazer@torys.com

Alexander Smith
Tel: 416-865-8142
Email: asmith@torys.com

Counsel for the Appellant
Navistar Canada Inc.

AND TO: Legal Services Branch
Financial Services Commission
5160 Yonge Street, 17th Floor
Toronto ON M2N 6L9

Deborah McPhail
Tel: 416-226-7764
Fax: 416-590-7556
Email: deborah.mcphail@fsco.gov.on.ca

Counsel for the Respondent
Superintendent of Financial Services

TABLE OF CONTENTS

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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 ADDED PARTY
UNIFOR (formerly CAW-CANADA) AND ITS LOCALS 127 AND 35
(Motion for Leave to Appeal)

OVERVIEW

1. The Appellant, Navistar Canada Inc. ("Navistar") is seeking leave from the Divisional Court's decision in *Navistar Canada Inc. v. Superintendent of Financial Services,* 2015 ONSC 2797 ("the Decision"). The Respondent, Unifor (formerly CAW-Canada) and its Locals 127 and 35 ("the Union") opposes Navistar's motion.

2. The Decision arises out of an extended reorganization that culminated in the closure of Navistar's truck manufacturing plant 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").

3. In the Decision, the Divisional Court confirmed the determination by the Financial Services Tribunal ("FST") that a partial windup was justified under both s. 77.3(1)(a) (reorganization) and s. 77.3(1)(b) (discontinuance) of the *Pension Benefits Act* ("*PBA*"). It determined that the partial windup group included employees who ceased to be employed between February 1, 2009 (when the reorganization commenced) through to July 28, 2011 (when the Plant closed). It also confirmed that the Superintendent of Financial Services ("the Superintendent") had jurisdiction to rule on the applicability of s. 7.03(b)(iii) of the Plan, which entitled Plan members to credited service enhancements during periods of layoff or disability, regardless of whether they returned to work ("the credited service issue").

4. The Appellant seeks leave to appeal with respect to the following issues: (a) the Divisional Court's interpretation of s. 77.3(1) of the *PBA* and the scope of the partial windup group; and (b) the Divisional Court's alleged failure to address the service credit issue on its merits.

5. The Appellant's request for leave must be denied, for at least three reasons.

6. First, and fundamentally, there is no public interest in hearing this appeal, as all of the legislative provisions at issue on this proposed appeal, i.e. the partial windup provisions under s. 77.3(1) of the *PBA*, have since been repealed. If a plant like Navistar's were to shut down today, the issues raised under the *PBA*, and the proper analysis for resolving those issues, would be entirely different. As well, the service credit "issue" does not engage any general legal principles, but rather involved the application, by the Superintendent, of a particular provision of

the Plan to the evidence before him. As such, there is little, if any, precedential value to this proposed appeal. For this reason alone, the appeal must be dismissed.

7. Second, Navistar is seeking to use this appeal to raise new issues that were not pursued before the Divisional Court, to the prejudice of the Respondents and to the disadvantage of this reviewing Court. Notably, Navistar appears to be seeking leave to appeal the service credit issue on its merits, even though it did not argue this issue before the Divisional Court (Navistar's challenge to the credited service issue was exclusively jurisdictional in nature). Navistar also appears to be attempting to revive arguments with respect to the interpretation of s. 77.3(1) that it did not pursue before the Divisional Court, including the argument that s. 77.3(1)(a) and s. 77.3(1)(b) are mutually exclusive as pure matter of law, and the argument that the scope of the partial windup group will result in an unjust enrichment at Navistar's expense.

8. Third, Navistar fails to raise arguable questions of law or mixed law or fact. All of the issues raised in this proposed appeal were resolved by the Divisional Court and/or the FST on the basis of settled authorities and principles. Navistar has failed to raise any arguable questions relating to these decisions. Instead, Navistar simply recycles the arguments that it made below without addressing the reasoning employed by the Divisional Court and/or the FST.

PART I - FACTS

9. The Union relies on the findings of the Divisional Court and FST and provides the following account of facts that are relevant to the issue raised by the Appellant's leave application.

A. The Parties

10. 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.

Navistar Canada Inc. v. Superintendent of Financial Services, 2015 ONSC 2797 ("Decision") ¶3, Motion Record of Navistar Canada Inc. ("MR"), Tab 5, p. 70

Navistar Canada Inc. v. Superintendent of Financial Services and Unifor, 2014 ONFST 8 ("Partial Windup Decision") ¶15(a), (i), MR , Tab 4, pp. 37-38

11. Most employees of Navistar were members of the Union. Navistar and the Union were parties to two collective agreements: one for hourly production workers and related skilled trades and the other for office and clerical workers. Both collective agreements expired on June 30, 2009.

Decision ¶5, MR, Tab 5, p. 70

12. Navistar was the sponsor of the Plan, which is a non-contributory defined benefit plan covering unionized employees. The Plan was incorporated into the collective agreements.

Decision ¶3, MR, Tab 5, p. 70

Partial Windup Decision ¶15(e) and (g) , MR, Tab 4, p. 38

B. Circumstances Giving Rise to the Decision

13. By the spring of 2008, Navistar was developing a reorganization strategy, the objective of which was to transfer the Chatham Plant's capacity to Springfield, Illinois as well as Mexico. The reorganization involved significantly reducing the number of employees in the Chatham Plant (from approximately 1,100 in November 2008 to 100 by July 2009).

Decision ¶6, MR, Tab 5, p. 70

Partial Windup Decision ¶15(j), (m)(ii) and (u) , MR, Tab 4, p. 38, 39-40, 42

14. In November 2008, Navistar advised the Union that the closure of the Plant was being considered, and that at a minimum there would be significant reductions to changes to the production schedule (from 115 units per day to 35 units per day, being the minimum permitted under the collective agreements).

Decision ¶7, MR, Tab 5, p. 70

15. Navistar proceeded to implement its reorganization plan by laying off 499 employees effective February 1, 2009 and 185 employees effective March 1, 2009.

Decision ¶8, MR, Tab 5, p. 70

16. On April 2, 2009, Navistar provided the Union with formal notice to bargain. 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 of sleeper cab production and other core functions, further reduced minimum production requirements (down to 10-12 units per day), 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 its proposal would not be ratified by the Union's membership.

Decision ¶9, MR, Tab 5, p. 71

Partial Windup Decision ¶15(v), (w), (aa), (bb), MR, Tab 4, pp 42 and 43

17. All remaining Plan members, being an additional 522 employees, were laid off effective June 30, 2009, the date on which the collective agreements expired.

Decision ¶8, MR, Tab 5, p. 70

18. The parties were unable to agree on the terms of new collective agreements and on August 8, 2011, Navistar confirmed its decision to close the Plant effective July 28, 2011.

Decision ¶9, MR, Tab 5, p. 71

C. Notice of Intended Decision by the Superintendent

19. Following the closure of the Plant, both Navistar and Unifor requested that the Superintendent approve a partial windup of the Plan.

Decision ¶10, MR, Tab 5, p. 71

20. On March 7, 2013, the Superintendent issued a Notice of Intended Decision ("NOID"), which included orders under s. 77.3(1)(a) (reorganization) and s. 77.3(1)(b) (discontinuance) that the Plan be partially wound up in part effective July 28, 2011 (the Plant closure date), and that the partial wind up group include Plan members who ceased to be employed after June 30, 2009 (the FST subsequently broadened the scope of the partial windup group to include Plan members who ceased to be employed after February 1, 2009). The NOID also included an intended order for the payment of SER benefits, including on a grow-in basis under s. 74(1.3), as well as an intended order that the Appellant administer the Plan in accordance with its terms by providing credited service under s. 7.03(b)(iii) of the Plan to all eligible members, regardless of whether they returned to work from layoff or disability.

Decision ¶10-11, MR, Tab 5, p. 71

Notice of Intended Decision by the Acting Deputy Superintendent, Pensions of the Financial Services Commission of Ontario, dated March 7, 2013 ("NOID"), MR, Tab 6, pp 81-90

21. Navistar requested a hearing before the FST with respect to the NOID. The FST issued two decisions that were issued on November 4, 2013 ("the Jurisdictional Decision") and July 11, 2014 ("the Partial Windup Decision").

Decision ¶13, MR, Tab 5, p. 71

Partial Windup Decision, Tab 4, pp. 33-68

Navistar Canada Inc. v. Ontario (Superintendent of Financial Services), 2013 ONFST ("Jurisdictional Decision"), MR, Tab 3, pp. 17-32

D. Jurisdictional Decision of the FST

22. The Jurisdictional Decision was the result of a preliminary motion brought by Navistar seeking orders that the Superintendent did not have the jurisdiction to rule on the applicability of the 0.9 years banked pensionable service credit under s. 7.03(b)(iii) of the Plan, or that the Superintendent had lost jurisdiction as a result of certain comments made by the former Deputy Superintendent acting for the Superintendent during the pre□hearing meetings.

Decision ¶14, MR, Tab 5, p. 71

23. The FST held that the Superintendent had jurisdiction to rule on the service credit issue under s. 87 of the *PBA*. It determined that the Superintendent did not lose jurisdiction due to any breach of procedural fairness. The FST declined to admit *viva voce* evidence or receive meeting notes or witness statements concerning the pre□hearing meetings as they constituted settlement discussions and thus were subject to settlement privilege.

Decision ¶15, MR, Tab 5, p. 71

E. Partial Windup Decision of the FST

24. The Partial Windup Decision addressed the substance of the NOID issued by the Superintendent.

Decision ¶16, MR, Tab 5, p. 72

25. The FST confirmed the Superintendent's intended decision that a partial windup was justified under both ss. 77.3(1)(a) (reorganization) and 77.3(1)(b) (discontinuance) of the *PBA*. In this regard, the FST rejected Navistar's argument that ss. 77.3(1)(a) and (b) were mutually exclusive, noting that:

a. There was nothing in the *PBA* or the law that prohibits the Superintendent from applying more than one provision of subsection 77.3(1) of the *PBA* to the particular facts of any case.

b. S. 77.3(1)(b) had been applied in conjunction with subsection s. 77.3(1)(a) in other cases before the Tribunal.[1]

c. The *Imperial Oil* case relied on by Navistar did not support the proposition that it was advancing, and in any event, it was distinguishable (to the extent that *Imperial Oil* applied, it supported the Respondents' position).

Partial Windup Decision ¶22-25, MR, Tab 4, pp. 49-50

26. The FST defined the partial windup group more broadly than the Superintendent, as including those employees who ceased to be employed between February 1, 2009 (when the reorganization commenced) up to and including July 28, 2011 (the Plant closure date).

Decision ¶16, MR, Tab 5, p. 72

27. The FST also confirmed the Superintendent's intended decisions with respect to Special Early Retirement ("SER") benefits, and specifically held that all Plan members whose combination of age plus years of continuous employment or membership in the Plan that equaled 55 years or more on the effective date of the Plan partial windup would be entitled to the SER benefit under the grow-in provisions of the *PBA*.

Decision ¶17, MR, Tab 5, p. 72

28. The FST rejected Navistar's argument that allowing former employees to retain both severance payments under the *Employment Standards Act, 2000* ("*ESA*") as well partial windup benefits (i.e. SER benefits) would result in an unjust enrichment at Navistar's expense. It relied on numerous authorities holding that severance payments cannot be offset against statutory pension enhancements, as these are different types of benefits that compensate for different types

[1] *McDonnell Douglas Canada Ltd. Salaried Plan,* May 19, 1999 XDEC-44 (PCO) ["*McDonnell Douglas*"]

of losses.[2] The FST also held that the case relied on by Navistar, *Kitchener Frame*,[3] did not assist Navistar because it was distinguishable and did not speak to the unjust enrichment argument being made by Navistar.

Partial Windup Decision ¶41-49, MR, Tab 4, pp 55-57

29. Further, the FST confirmed the Superintendent's intended decision with respect to the credited service issue under s. s. 7.03(b)(iii) of the Plan, namely that Plan members who were on layoff or disability and who met the criteria should be granted 0.9 years of banked credited service regardless of whether they had returned to work after their leave. In making this determination, the FST applied established principles of plan interpretation,[4] reasoning as follows:

d. The Plan text was unambiguous in that no requirement to return to work exists. Thus, there was no need to resort to extrinsic evidence.

e. Even if there had been a need to resort to extrinsic evidence, Navistar's evidence of past practice was unpersuasive, and at most suggested that any requirement to return to work was recent and unilateral and thus should be given no weight.

f. Even if Navistar's extrinsic evidence had been compelling, the Superintendent's interpretation should have been preferred on the basis that ambiguity should be resolved as against Navistar as the drafter of the Plan.

---

[2] Such authorities included *Imperial Oil Limited v. Ontario (Superintendent of Pensions)*, (1996) PCO Bulletin Vol. 6/Issue 4, p. 80 (XDEC-34) ["*Imperial Oil*"], aff'd [1997] OJ No. 1961 (Div. Ct.); *Atlantic Oil Workers Union, Local 2 v. Imperial Oil Ltd.*, [2006] NSJ No. 337 (NSCA) ["*Atlantic Oil Workers*"]; *Marino v. Ontario (Superintendent of Financial Services)* (2007) 67 CCPB 51, affirmed (2008) 67 CCPB 86 (Ont. Div. Ct.) ["*Marino*"]; and *IBM Canada Limited v. Waterman*, [2013] SCC No. 70 ["*Waterman*"].

[3] *National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 1451 v. Kitchener Frame Ltd.* (2010), OJ No. 3041 (Div. Ct.) ["*Kitchener Frame*"].

[4] In this regard, the FST relied on *York University Faculty Association v. Superintendent of Financial Services*, 2010 ON FST 11 ["*York University*"]; *Davenport v. Hudson's Bay Company*, 2006 O.J. No. 3623 (Sup. Ct.) ["*Hudson's Bay*"]; McCreight *v. 146919 Canada Ltd.* (1991), 35 CCEL 282 (Ont. Gen. Div.) ["*McCreight*"]; and *BICC Cables Canada Inc. v. Ontario (Superintendent of Financial Services)* (2000), 26 CCPB 179 ["*BICC Cables*"].

g. The result was not absurd and did not amount to a retroactive amendment to the Plan, as Navistar had argued. Recognizing the practical difficulty of determining whether Plan members received the right amount of past service, the parties were permitted to provide the Superintendent with evidence of compliance on the issue.

Partial Windup Decision ¶57-69, MR, Tab 4, pp. 58-61

F. Navistar's Appeal to the Divisional Court

30. Navistar appealed both of the FST's decisions to the Divisional Court under s. 91 of the *PBA*. As recorded in the decision, Navistar pursued only three issues on appeal, which were as follows:

a. Did the Tribunal make a palpable and overriding error of fact when it found that Navistar did not maintain the Plant in a state of readiness once it was idled?

b. Did the Tribunal make an error of law in holding that the Windup Group included all Plan members who ceased to be employed from February 1, 2009 until immediately prior to the Plant closure?

c. In the Jurisdictional Decision, did the Tribunal err by ordering that the Acting Deputy Superintendent had the jurisdiction to rule on the credited service issue without having the issue return to the pre-hearing process?

Decision ¶18-19, MR, Tab 5, p. 72

31. There are three issues apparently raised by Navistar's proposed appeal that were not fully pursued, or in some cases not pursued at all, before the Divisional Court.

32. First, Navistar did not pursue the merits of the credited service issue before the Divisional Court. Navistar's challenge in regard to the credited service issue was exclusively jurisdictional in nature.

Decision ¶18-19, MR, Tab 5, p. 72

Navistar's Divisional Court Factum, Superintendent of Financial Services' Record ("SR"), Tab 2

33. Second, Navistar did not pursue its apparent argument that, as "a pure question of law," a reorganization under s. 77.3(1)(a) and a discontinuance under s. 77.3(1)(b) are mutually exclusive. The Divisional Court expressly found as such, noting that "[i]n its factum, the Appellant challenged the Tribunal's authority to make an order for the partial windup of the Plan under both ss. 77.3(1)(a) (reorganization) and 77.3(1)(b) (discontinuance) of the *PBA*. This ground of appeal was not pursued at the hearing of the appeal."

Decision ¶18-19 and 32, MR, Tab 5, pp. 72 and 75

34. Navistar now takes issue with the Divisional Court's characterization of its position before that court, baldly asserting in paragraph 52 of its factum that "this argument [i.e. the mutual exclusivity argument] was central to Navistar's submissions before the Divisional Court." Navistar provides no support for this assertion, nor could it, since the Divisional Court's account is the correct one. In both its factum before the Divisional Court, as well as on this leave motion, Navistar conceded that "in some circumstances, a reorganization may involve a plant closure or plant closures." This belies Navistar's contention that it pursued the mutual exclusivity argument before the Divisional Court as a "pure question of law." Navistar's actual argument was, and is, that "in the circumstances of this case, closure and reorganization are mutually exclusive" [emphasis added]. As the Divisional Court correctly noted, Navistar's actual argument raised questions of mixed fact and law, namely whether on these facts, a reorganization within the meaning of s. 77.3(1)(a) took place.

Navistar's Divisional Court Factum ¶75, SR, Tab 2, pp. 33-34

Navistar's Leave to Appeal Factum ¶72

35. Third, in its oral argument before the Divisional Court, Navistar did not pursue its "unjust enrichment argument," namely that employees who received severance payments or other benefits were unjustly enriched at Navistar's expense because they also received the benefits of being included in the partial windup group.

Decision ¶18-19, MR, Tab 5, p. 72

G. The Divisional Court's Decision

36. In the Decision, the Divisional Court denied Navistar's appeal from the FST's Jurisdictional Decision and Partial Windup Decision.

37. With respect to the Partial Windup Decision, the Divisional Court determined that the standard of review was reasonableness, since, as noted above, the issues actually pursued by Navistar raised questions of fact or mixed fact and law. The Divisional Court rejected Navistar's argument that the FST's determination that a reorganization had taken place raised a pure question of statutory interpretation reviewable on a correctness standard, noting 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," and also involved "the exercising of discretion to order a partial windup or not." In reaching these conclusions about the appropriate standard of review, the Divisional Court carried out analysis established by the Supreme Court of Canada in *Dunsmuir.*[5] It specifically relied on this Court's holdings in *Hydro One*[6] to the effect that "decisions that include an exercise of discretion to the facts of the case should be reviewed on a standard of reasonableness." It also distinguished this case from *Monsanto*[7] and *Hydro One* on the basis that those cases, unlike this one, raised pure questions of statutory interpretation reviewable on a standard of correctness.

---

[5] *Dunsmuir v. New Brunswick*, 2008 SCC 9 ["*Dunsmuir*"]
[6] *Hydro One Inc. v. Ontario (Financial Services Commission)*, 2010 ONCA 6 ["*Hydro One*"]
[7] *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54 ["*Monsanto*"]

Decision ¶20-26, MR, Tab 5, pp. 72-74

38. The Divisional Court held that the FST's finding that a reorganization had taken place was reasonable, "fall[ing] well within the range of acceptable outcomes." The Divisional Court noted that the FST had relied upon the applicable authorities with respect to the broad meaning of "reorganization",[8] and had determined the existence of a reorganization on the basis of an analysis that was "reasonable and well-supported by the evidence." In this regard, the Divisional Court noted in particular that "the evidence is clear that Navistar had implemented a reorganization well before the Plant was closed."

Decision ¶34-36, MR, Tab 5, pp. 75-76

39. The Divisional Court went on to conclude that the Tribunal's definition of the partial windup group was reasonable, rejecting Navistar's contention that it was inappropriate to include Plan members in the partial windup group who "voluntarily" left their employment after February 1, 2009. In drawing this conclusion, the Divisional Court considered the following factors:

a. s. 77.03(1)(a), which does not distinguish between voluntary and involuntary employment;

b. jurisprudence establishing that if employment ceases during an extended reorganization process, the employment is deemed to cease as part of the reorganization;[9]

---

[8] *Stelco Inc. v. Ontario (Superintendent of Pensions)* (1994), 115 DLR (4th) 437 (Ont. Div. Ct.) ["Stelco"] and *Marino v. Ontario (Superintendent of Financial Services)*, (2007) 67 CCPB 51 ["*Marino*"]

[9] *Imperial Oil, supra*; *Marshall Steel Limited and Associated Companies and the Superintendent of Financial Services of Ontario*, 2002 ON FST 25 ["*Marshall Steel*"])

c. the fact that approximately 500 employees were laid off effective February 1, 2009 in furtherance of a reorganization strategy that had developed by the spring of 2008 and been communicated to the Union in November 2008;

d. the remedial purposes of the *PBA* and the partial windup scheme, which demand "that an employer should not be able to avoid its windup obligations by staggering its layoffs and encouraging members to cease their employment where there is little or no chance of a recall."

Decision ¶38-42, MR, Tab 5, pp. 76-78

40. The Divisional Court also held that Navistar's reliance on *Imperial Oil* was misplaced, as the facts of that case were very different from the present case (to the extent that *Imperial Oil* applied, it supported the Respondents' position).

Decision ¶40, MR, Tab 5, p. 76

41. The Divisional Court also determined that FST's finding that Navistar did not maintain the Plant in a state of readiness once it was idled was reasonable and did not constitute a misapprehension of "crucial" evidence. Navistar does not appear to be seeking leave to appeal this factual determination.

Decision ¶27-31, MR, Tab 5, p. 74

42. With respect to the Jurisdictional Decision, the Divisional Court held that the Tribunal did not err by ordering that the Acting Deputy Superintendent had the jurisdiction to rule on the credited service issue and that the Superintendent had not lost this jurisdiction due to any breach of procedural fairness. Navistar does not seek leave to appeal these determinations.

Decision ¶42-48, MR, Tab 5, pp. 78-79

H. Amendments to the *PBA*

43. On July 1, 2012, amendments to the *PBA* came into effect that eliminated partial windups and that changed the conditions of eligibility for grow-in benefits, such as the SER.

44. In particular, under s. 77.1(2), a pension plan cannot be wound up if the effective date of the partial wind up would fall on or after July 1, 2012. Partial windups are only permissible if the effective date of the partial windup precedes July 1, 2012.

Pension Benefits Act, RSO 1990, c. P.8, ("*PBA*") ss. 77.1(1), 77.1(2)

45. Further, s. 74(1) of the *PBA* now provides that the "activating events" for grow-in benefits include termination of employment (not for cause) if the effective date of the termination is on or after July 1, 2012, as well as a windup. Thus, a pension plan member who is terminated from their employment on or after July 1, 2012 is entitled to grow into SER benefits if he or she otherwise meets the conditions of eligibility under his or her plan and the *PBA*. Entitlement to grow-in benefits no longer depends exclusively on the existence of a windup, as it did at the time of the events giving rise to this litigation.

PBA, s. 74

I. Navistar's Facts

46. Navistar asserts facts that are not supported, and are in some cases contradicted, by the factual findings of the Divisional Court and the FST, even though no findings of fact are actually challenged in this proposed appeal. Navistar's account of the facts must accordingly be rejected to the extent that it differs from the findings on record.

47. Navistar's facts also appear to be addressed to the merits of its proposed appeal and not to the only issue raised by this application for leave, which is whether it is in the public interest for this Court to entertain the proposed appeal. Thus, in addition to being unsubstantiated, Navistar's facts ought to be disregarded as irrelevant.

PART II - ISSUES RAISED BY THE MOVING PARTY

A. Issues

48. The Union agrees that the only issue to be decided on this motion is whether leave to appeal the Divisional Court's decision should be granted.

B. Applicable Legal Principles

(ii) Leave to Appeal Only Where Public Interest Engaged

49. Decisions of the Ontario Divisional Court in its appellate capacity are intended to be final. When it is acting as a second level of appeal, the role of the Ontario Court of Appeal is similar to that of the Supreme Court of Canada: to determine issues of law having public importance, not to correct errors in the courts below.

Sault Dock Co. Ltd. and City of Sault Ste. Marie, 1972 CanLII 572 (ONCA) ["*Sault Dock Co.*"]

Hall, Geoff R., "Applications for Leave to Appeal: the Paramount Importance of Public Importance" (1999), 22 Advocates Quarterly 87 ["Hall Article"] pp. 95-97

50. Thus, leave to appeal from decisions of the Divisional Court should not be granted save in exceptional cases. The appellant must raise an arguable question of law or mixed fact and law that relates to the interpretation of a federal or provincial statute (including its constitutionality), the interpretation of some general principle or rule of law, or the interpretation of a municipal by-law or an agreement where the point in issue is of public importance. In applying these criteria, the focus must be on the impact of the decision on the development of the jurisprudence in Ontario. Neither the merits of the proposed appeal, nor the importance of the appeal to the parties, are of relevance on this kind of motion.

Sault Dock Co., supra

Hall Article, *supra*

(iii) New Issues Should not be Considered in an Appeal

51. As a general rule, appellate courts will not entertain new issues on appeal, as this would "run contrary to the basic purpose of an appeal, which is to correct trial error." There are several rationales for this rule, not the least of which is that it deprives the appellant judges of the benefit of a lower court's determination of the issue. A reviewing court should exercise its discretion to hear new issues on an exceptional basis only, where the following three conditions are all satisfied: (a) there is a sufficient evidentiary record to resolve the issue; (b) the failure to raise the issue at the hearing below was not due to a tactical decision; and (c) the refusal to hear the new issue would not risk a miscarriage of justice.

Kaiman v Graham, 2009 ONCA 77 ¶8
Buik Estate v Canasia Power Corp., 2015 ONCA 352 ¶10
Byrnes v Law Society of Upper Canada, 2015 ONSC 2939 ¶23, 34

C. Application of Legal Principles

(i) No Public Interest to this Appeal

52. There is no public interest to be served in hearing this proposed appeal. The proposed appeal concerns the interpretation of the now-repealed partial windup provisions of the *PBA,* as well as the service credit issue, which involves the interpretation of a specific provision of the Plan (s. 7.03(b)(iii)). An appeal of these issues will not have any significant impact on the development of the jurisprudence in Ontario.

53. As detailed above (see heading 'H' of the Facts section), the legislative provisions at issue in the proposed appeal, i.e. the partial windup provisions under s. 77.3(1) of the *PBA*, have now been repealed, with the result that a "partial windup" no longer exists. In this connection, an employee's entitlement to grow-in benefits under s. 74 of the *PBA* is no longer exclusively contingent on the existence of a windup, but rather turns on whether the employee has been terminated without cause (subject to being otherwise eligible under the plan and the *PBA*).

PBA, ss. 77.1(2), 77.3(1) and 74(1)

54. Thus, if a plant like Navistar's were to shut down today, the issues raised under the *PBA*, and the proper analysis for resolving those issues, would be entirely different. No questions would arise with respect to the statutory basis for declaring a partial windup (discontinuance under s. 77.3(1)(a), reorganization under s. 77.3(1)(b), or both). There would be no question as to whether and when a "reorganization" within the meaning of s. 77.3(1)(a) had occurred, nor would the definition of the partial windup group arise. The activating event for an employee's entitlement to grow-in to SER benefits would be termination without cause, not a partial windup. In short, it is extremely unlikely that the issues raised by this proposed appeal will ever arise again.

55. While acknowledging that partial windups have been eliminated by legislative amendment, Navistar baldly asserts in paragraph 10 of its factum, that "the same principles apply to full plan windups." This is incorrect. The circumstances in which the Superintendent may require a full plan windup are enumerated in s. 69(a) of the *PBA* and do not include a "reorganization" or a "discontinuance." The terms at issue before the Divisional Court do not come into play in a full windup situation.

PBA, s. 69(a)

56. As well, the service credit issue involved the application, by the Superintendent, of a particular provision of the Plan to the circumstances before him. Navistar has not asserted that this determination raises a legal issue of general public importance, and it does not. It is of concern to the parties only.

(ii) Appellant Seeking to Raise New Issues on Appeal

57. Navistar is apparently seeking to raise three issues on appeal that it did not pursue before the Divisional Court: (1) the credited service issue on its merits; (2) the mutual exclusivity

argument as a matter of pure statutory interpretation; and (3) the unjust enrichment argument. It should not be permitted to do so.

58. Were Navistar's leave motion to be granted, the Court would be in a position of having to decide these issues without the benefit of the Divisional Court's determinations. The Respondents, for their part, would be prejudiced by virtue of not having had a full opportunity to respond to these arguments before the Divisional Court. While the Respondents did have the opportunity to respond to Navistar's mutual exclusivity and unjust enrichment arguments in their facta, Navistar's abandonment of these issues before the Divisional Court deprived them of the opportunity to argue these points before the panel. More significantly, the Respondents were deprived of the opportunity to address the merits of the credited service argument both orally and in writing, because Navistar decided against pursuing this argument in its factum.

59. Moreover, and critically, Navistar has not established that this Court's refusal to entertain these issues would risk a miscarriage of justice. There can be no dispute that Navistar is a sophisticated party that is represented by experienced counsel. Its failure to argue these points before the Divisional Court can only be construed as a tactical decision. That Navistar's decision did not result in a victory for Navistar does not create a miscarriage of justice. This Court should not devote precious space on its docket to giving Navistar a further chance to re-litigate its case on a different basis.

(iii) No Arguable Questions Raised

60. Navistar fails to raise arguable questions of law or mixed law or fact. As detailed above (see headings E and G of the Facts section), all of the issues raised in this proposed appeal were resolved by the Divisional Court and/or the FST on the basis of settled authorities and principles. Navistar has failed to raise any arguable questions relating to these decisions. Instead, Navistar

simply recycles the arguments that it made below (frequently relying on factual assertions that are unsupported or contradicted by the unchallenged findings below), without even addressing the reasoning employed by the Divisional Court and/or the FST.

61. In particular, Navistar argues that the Divisional Court erred with respect to the standard of review. However, Navistar does not take issue with the Divisional Court's essential holding that exercises of discretion under the *PBA* involving questions of mixed law and fact are reviewable on a standard of reasonableness. Its argument is that the Divisional Court mischaracterized the issues in this case as involving a "pure question of law," a characterization that cannot be sustained, or even argued, in the face of Navistar's failure to actually argue any pure questions of law (see paragraph 33 above).

62. Navistar raises issues with respect to the interpretation of s. 77.3(1) and the scope of the partial windup group. However, Navistar fails to address the extensive analysis carried out by the Divisional Court and/or the FST on these issues (as set out above, the mutual exclusivity argument and the unjust enrichment argument were addressed only by the FST because Navistar did not pursue these issues before the Divisional Court). Navistar simply reiterates the arguments it made below, relying on the same authorities already found to be unhelpful or distinguishable, without setting out a basis upon which it could be concluded that the Divisional Court and/or FST erred.

63. Navistar argues that the Divisional Court erred by not reversing the credited service aspect of the FST's decision but makes no submissions whatsoever on this point. It thereby fails to raise any arguable questions with respect to the FST's determination of this issue.

64. Thus, the proposed appeal fails to raise arguable questions of law or mixed fact and law, let alone ones of public importance.

PART III - ADDITIONAL ISSUES

65. Unifor does not raise any additional issues on this motion.

PART IV - ORDER REQUESTED

66. The Respondent requests an order dismissing this Application for Leave to Appeal with costs.

All of which is respectfully submitted this 11th day of September, 2015.

C. Wisen

fa

L.N. Gottheil

Counsel for the Added Party
Unifor (formerly CAW-CANADA) and its
Locals 127 and 35

SCHEDULE "A" – AUTHORITIES

Navistar Canada Inc. v. Superintendent of Financial Services, 2015 ONSC 2797

Navistar Canada Inc. v. Superintendent of Financial Services and Unifor, 2014 ONFST 8

Navistar Canada Inc. V. Ontario (Superintendent of Financial Services), 2013 ONFST

Imperial Oil Limited v. Ontario (Superintendent of Pensions), (1996) PCO Bulletin Vol. 6/Issue 4

Atlantic Oil Workers Union, Local 2 v. Imperial Oil Ltd., [2006] NSJ No. 337 (NSCA)

Marino v. Ontario (Superintendent of Financial Services (2007), CCPB 51, affirmed (2008) 67 CCPB 86 (Ont.Div.Ct.)

IBM Canada Limited v. Waterman, [2013] SCC No. 70

National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 145 v. Kitchener Frame Ltd. (2010), OJ No. 3041 (Div.Ct.)

York University Faculty Association v. Superintendent of Financial Services, 2010 ON FST 11

Davenport v. Hudson's Bay Company, 2006 OJ No. 3623 (Sup.Ct.)

McCreight v. 146919 Canada Ltd. (1991), 35 CCEL 282 (Ont.Gen.Div.)

BICC Cables Canada Inc. v. Ontario (Superintendent of Financial Services) (2000), 26 CCPB 179

Dunsmuir v. New Brunswick, 2008 SCC 9

Hydro One Inc. v. Ontario (Financial Services Commission), 2010 ONCA 6

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), 2004 SCC 54

Stelco Inc. v. Ontario (Superintendent of Pensions) (1994), 115 DLR (4th) 437 (Ont.Div.Ct.)

Marshall Steel Limited and Associated Companies and the Superintendent of Financial Services of Ontario, 2002 ON FST 25

Sault Dock Co. Ltd. and City of Sault Ste. Marie, 1972 CanLII 572 (ONCA)

Hall, Geoff R., *Application for Leave to Appeal: the Paramount Importance of Public Importance* (1999), 22 Advocates Quarterly 87

Katman v. Graham, 2009 ONCA 77

Bulk Estate v. Canasia Power Corp., 2015 ONCA 352

Byrnes v. Law Society of Upper Canada, 2015 ONSC 2939

SCHEDULE "B" - STATUTORY PROVISIONS

Pension Benefits Act, RSO 1990, c. P.8

69. (1) The Superintendent by order may require the wind up of a pension plan if,

(a) there is a cessation or suspension of employer contributions to the pension fund;

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.

77.1 (1) A pension plan may be wound up in part if the effective date of the partial wind up precedes the date on which this section comes into force. 2010, c. 9, s. 61.

(2) A pension plan cannot be wound up in part if the effective date of the partial wind up would fall on or after the date on which this section comes into force. 2010, c. 9, s. 61.

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;

NAVISTAR CANADA INC.
Appellant
- and-
UNIFOR (formerly CAW-CANADA) AND ITS LOCALS 127 AND 35
Added Party

- and -

SUPERINTENDENT OF FINANCIAL SERVICES
Respondent

Court File No. M45335

Divisional Court File No. 364/14

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

FACTUM OF THE ADDED PARTY UNIFOR (formerly CAW-CANADA) AND ITS LOCALS 127 AND 35

LAW OFFICE OF LEWIS GOTTHEIL
17 Castlewood Road
Toronto ON M5N 2L1

Lewis Gottheil (021671L)
Tel: 416-484-7223
Cell: 416-230-0793

Solicitors for the Added Party, UNIFOR (formerly CAW-CANADA) AND ITS LOCALS 127 AND 35