



IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990,
c. P.8, as amended (the "*PBA*")

AND IN THE MATTER OF a Notice of Intended Decision of
the Superintendent of Financial Services to Make Orders
under sections 18 and 87 of the *PBA* relating to the CAMI
Automotive Inc. Pension Plan for Salaried Employees,
Registration Number 0947556

TO: **General Motors of Canada Limited**
1908 Colonel Sam Drive
Oshawa ON L1H 8P7

Attention:
Joanne Sweeney Birstonas

Administrator, Plan Sponsor and Employer

NOTICE OF INTENDED DECISION

I INTEND TO MAKE THE FOLLOWING ORDERS:

1. Under section 87 of the *PBA*, ordering the Administrator to administer the indexation provision in the CAMI Automotive Inc. Pension Plan for Salaried Employees, Registration Number 0947556 (the "Plan") so as to apply it to all years of service credited under the defined benefit provision of the Plan regardless of whether or not the member retires from active employment and to administer the Plan without regard to the amendments to the Plan listed in paragraph 3 immediately below;
2. Under section 87 of the *PBA*, ordering the Administrator to recalculate and adjust all pension benefit payments and commuted value payments paid under the Plan, since January 1, 1995, so as to apply the indexation provision to all years of service credited under the defined benefit provision of the Plan regardless of whether or not the former member, retired member or other Plan beneficiary retired from active employment, and that the calculation is done without regard to the amendments to the Plan listed in paragraph 3 immediately below;

3. Under section 18 of the *PBA*, revoking the registration of the parts of the following amendments to the Plan which purport to reduce or eliminate the indexation benefits accrued in respect of service prior to the effective date of each amendment and/or purport to limit indexation benefits to members who retire from active employment : (i) the 2003 Amendment (as defined herein); (ii) the 2006 Amendment (as defined herein); (iii) any amended and restated Plan texts that reflect the 2003 Amendment and/or the 2006 Amendment; and (iv) the 2011 Amendment (as defined herein).

REASONS:

Background

1. The Plan was established by CAMI Automotive Inc. effective January 1, 1988 as a defined contribution plan. CAMI Automotive Inc. (CAMI) was acquired by General Motors of Canada Limited (GMCL) and amalgamated into GMCL effective January 1, 2011. From the establishment of the Plan, the employer (CAMI or GMCL, as applicable) has also been the Plan sponsor and administrator.
2. Effective January 1, 1995, a non-contributory defined benefit (DB) provision was added to the Plan. The DB provision included an indexation benefit. Section 6.4 of the 1995 Plan text provided that:

The annual pension payable in accordance with Section 6.1 or 6.2 to or on account of any Pensioner who retired from active employment with the Company shall be increased each January 1st following the Pensioner's actual retirement date plus one year. The percentage increase in the annual pension payable shall be equal to 90% of the lesser of 8% and the percentage increase in the Consumer Price Index during the 12-month period ending on the immediately preceding September 30th.

3. Section 9.1(b)(i) of the 1995 Plan text provided that a member who terminated employment, other than for reason of retirement or death, after completion of 24 months of continuous service would have a deferred vested pension and that:

The deferred pension shall be determined in accordance with Section 6.1 or 6.2(a) and Sections 6.3 and 6.4, as applicable, but based on the Active Member's or Transferred Member's Best Average Earnings, Best Average YMPE and Credited Service to the date of his termination.

Section 6.4, as described above, was the indexation provision. Section 6.1 (calculation of the normal retirement benefit) and section 6.2 (calculation of the early retirement benefit) both refer to "an Active Member or Transferred Member who retires from employment with the Company". While the 1995 Plan text contains the words "as applicable", it does not indicate that there was any circumstance when the indexation provision would not be applicable to a terminated member. Therefore, the 1995 Plan text contained an indexation formula that applied to all members.

4. The Plan was amended and restated effective January 1, 2001. There was no material change to Section 6.4 or 9.1(b)(i).
5. The Plan was amended in 2003 retroactive to 1995 (Amendment No. 2 to the 2001 Plan restatement) to, in part, delete the phrase "or 6.02(a) and Sections 6.03 and 6.04, as applicable" from Section 9.01(b)(i) (the "2003 Amendment"). The 2003 Amendment was registered by the Superintendent on June 30, 2003.
6. The Plan was amended and restated effective December 12, 2006; the indexing provision in section 6.4 was amended to provide as follows (the "2006 Amendment") (changes are in italics):

The annual pension payable in accordance with Section 6.01 or 6.02 to or on account of any Pensioner who retired *or was deemed to have retired* from active employment with the Company shall be increased each January 1st following the Pensioner's actual retirement date plus one year. The percentage increase in the annual pension payable shall be equal to 90% of the lesser of 8% and the percentage increase in the Consumer Price Index during the 12-month period ending on the immediately preceding September 30th. *For clarity, the provisions of this Section 6.04 shall not apply to the pension payable to a Member under Section 10.01.*

Section 10.01 provided for early retirement on account of disability. The 2006 Amendment was registered by the Superintendent on February 6, 2008.

7. The Plan was amended and restated again effective January 1, 2008 but no change was made to the indexing provision.
8. An amendment effective November 1, 2010 provided enhanced pension benefits for certain members whose employment was terminated as a consequence of the amalgamation of CAMI and GMCL. The enhanced pension benefits include indexation of the pension payable.

9. Effective June 30, 2011, GMCL amended the Plan to freeze all benefits; GMCL amended and restated the Plan effective July 1, 2011 (jointly referred to as the "2011 Amendment"). Active members became members of the General Motors Canadian Retirement Program for Salaried Employees (the "GMCL Plan") on July 1, 2011. The freeze applies to all components of the benefit formula. With respect to indexation, all active employees who were, on June 30, 2011, retirement eligible under the terms of the Plan continue to have the indexation provisions apply to the frozen accrued Plan pension benefits. For all other active employees, no indexation will be provided, even for past service credited under the Plan. The 2011 Amendment was registered by the Superintendent on July 8, 2011.

Indexation as a Pension Benefit

10. GMCL's position, as expressed in correspondence with the Superintendent, is that: (a) from the time that the DB provision was added to the Plan in 1995, the Plan has provided an indexation benefit only to those members who retire from active employment; and (b) the indexation formula under the Plan is an ancillary benefit for purposes of the *PBA* and, therefore, (i) can be eliminated for those who are not yet eligible to retire under the Plan and, therefore, have not yet "met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit" (*PBA*, s.14(1)(c)); and (ii) the gradual and uniform accrual rule in section 14.1(1) of the *PBA* does not apply.
11. An indexation benefit set out in a plan formula is a "pension benefit" under the *PBA*. The term "pension benefit" is defined in section 1 of the *PBA* as follows:

"pension benefit" means the aggregate monthly, annual or other periodic amounts payable to a member or former member during the lifetime of the member or former member, to which the member or former member will become entitled under the pension plan or to which any other person is entitled upon the death of a member or former member.

The indexation formula is part of the Plan benefit formula and the indexation benefit, once determined for a year, becomes part of the periodic amount payable to a member during the lifetime of the member.

12. As an indexation benefit set out in a plan formula is a pension benefit under the *PBA*: (i) a plan may not be amended to reduce the amount or the commuted value of an indexation provision accrued with respect to employment before the effective date of the amendment (*PBA*, s. 14(1)); and (ii) the indexation benefit must accrue in a gradual and uniform manner (*PBA*, s. 14.1(1)).

13. An indexation benefit accrues in a gradual and uniform manner under a plan if it accrues with years of service. If the plan terms provide that an indexation formula vests only when the member retires from active employment, the benefit does not accrue in a gradual and uniform manner as required by section 14.1(1) of the *PBA*.
14. The Superintendent has discretion to register a pension plan and to permit its continued registration "if the Superintendent is of the opinion that registration is justified in the circumstances of the pension plan and its members" (*PBA*, s. 14.1(4)). GMCL's position is that if the Plan indexing benefit is a pension benefit that is inconsistent with the gradual and uniform accrual requirement in section 14.1(1) of the *PBA*, the Superintendent should exercise his discretion under *PBA* s. 14.1(4) on the basis that it is reasonable and fair to do so on the facts of this case for the following reasons:
 - i. The same result could have been achieved through CAMI amending the plan to provide ad hoc pension increases to retirees.
 - ii. If the Superintendent concludes that the Plan indexation benefit is not in accordance with the *PBA*, the Superintendent has only two options – to exercise the s. 14.1(4) discretion or to revoke the registration of the part of the Plan containing the original indexing provision (*PBA*, s. 18). An order under section 87 is not an option in this situation as section 87 does not form part of the comprehensive scheme of the *PBA* to deal with situations where a plan or plan amendment does not comply with the *PBA* or the *PBA* Regulations. The revocation of the registration of the part of the Plan containing the original indexing provision would mean that there was no indexation benefit at all.
 - iii. There was full disclosure to Plan members that the indexation benefit only applied to individuals who retired from active employment.
15. The Superintendent considered whether or not to exercise his discretion in this case, and he is of the opinion that the exercise of discretion is not justified in the circumstances of the Plan and its members for a number of reasons including those set out below.
 - i. The 1995 Plan text provided the indexation benefit to all members (as discussed below). Any amendment to eliminate this benefit with respect to prior years of service is void pursuant to section 14(1) of the *PBA*. In such circumstances, the section 14.1(4) discretion is not operative.
 - ii. The *PBA* does not restrict the Superintendent in the exercise of his powers in the manner suggested by GMCL. The provisions of the *PBA* must be read as a whole and be given a purposive interpretation.

- iii. The communications to members were not sufficiently and consistently clear that the indexation benefit applied only to individuals who retired from active employment.
- iv. The Superintendent is not aware of any particular circumstances of the pension plan and its members that would justify a departure from the application of the gradual and uniform accrual rule.

The 1995 Plan Text and the 2003 Amendment

- 16. The Superintendent is of the opinion that the DB provision of the Plan originally provided the indexation benefit to all members, not just members who retire from active employment because section 9.1 of the 1995 Plan text provided that a member who terminated employment with a vested benefit was entitled to a deferred pension determined in accordance with Section 6.1 (normal retirement benefit) or 6.2(a) (early retirement benefit) and Sections 6.3 (bridge benefit) and 6.4 (indexation benefit), as applicable. As such, there is a specific reference to the indexation benefit in the provision of the 1995 Plan governing the calculation of the deferred pension entitlement. Further, while section 9.1 of the 1995 Plan text contains the words "as applicable", it does not indicate that there is any circumstance when the indexation provision would not be applicable in the calculation of the deferred pension entitlement.
- 17. The indexation provision in section 6.4 itself does refer to "any Pensioner who retired from active employment with the Company" suggesting that indexation may be limited to members who retire from active employment. However, section 6.1 also refers to "an Active Member or Transferred Member who retires from employment with the Company" but section 9.1 makes it clear that section 6.1 also governs the calculation of deferred pensions. Accordingly, it is clear that the scheme of the 1995 Plan text requires the application of certain provisions (including the indexation provision in section 6.4) to deferred pension entitlements even though those provisions may refer to members who retire from active employment.
- 18. Accordingly, the 2003 Amendment is void pursuant to section 14(1)(a) of the *PBA* insofar as it purports to reduce the amount or the commuted value of a pension benefit accrued under a pension plan with respect to employment before the effective date of the amendment. In addition, the 2003 Amendment renders the Plan as amended contrary to section 14.1 of the *PBA*.
- 19. Further, the 2003 Amendment is not valid, in part, under the Plan terms as the Plan's amendment power was not broad enough to permit this amendment. Section 17.1 and 17.2 of the 1995 Plan text and similar provisions in subsequent

plan texts restrict the Company from amending the Plan in any way that is contrary to the terms of applicable legislation and from reducing the amount of benefits to which members and others "are entitled under the Plan up to the date of such amendment".

20. An amendment to a pension plan is not effective until the administrator of the plan files an application for registration of the amendment and the application meets the requirements of section 12 of the *PBA* (*PBA*, s. 13). The application for registration of the 2003 Amendment did not meet the requirements of section 12 of the *PBA* because the Administrator incorrectly certified that the amendment complied with the *PBA* and regulations and did not adequately disclose the nature of the amendment on the registration form. Therefore, the 2003 Amendment is ineffective.
21. To the extent that the 2003 Amendment reduces the benefit formula for the accrual of future benefits, it is an adverse amendment under section 26 of the *PBA* and the notice requirements must be followed. Had the adverse nature of the 2003 Amendment been properly disclosed to the Superintendent, the Superintendent would have been required to require the Administrator to provide a section 26 notice to affected persons and would not have been able to register the 2003 Amendment before 45 days after the date that the Administrator transmitted such notices. No such notice was provided. Therefore, the registration of the 2003 Amendment is not effective.

The 2006 Amendment

22. The Superintendent is of the opinion that the 2006 Amendment, insofar as it incorporates the 2003 Amendment and insofar as it provides that the indexation provision is not applicable to those who retire due to disability does not comply with section 14.1 of the *PBA* or section 14 of the *PBA*. The 2006 Amendment is void pursuant to section 14(1)(a) of the *PBA* insofar as it purports to reduce the amount or the commuted value of a pension benefit accrued under a pension plan with respect to employment before the effective date of the amendment. In addition, the 2006 Amendment renders the Plan as amended contrary to section 14.1 of the *PBA*.
23. The 2006 Amendment is not valid, in part, under the Plan terms as the Plan's amendment power was not broad enough to permit this amendment. Section 17.1 and 17.2 of the 1995 Plan text and similar provisions in subsequent Plan texts restrict the Company from amending the Plan in any way that is contrary to the terms of applicable legislation and from reducing the amount of benefits to which members and others "are entitled under the Plan up to the date of such amendment".

24. An amendment to a pension plan is not effective until the administrator of the plan files an application for registration of the amendment and the application meets the requirements of section 12 of the *PBA* (*PBA*, s. 13). The application for registration of the 2006 Amendment did not meet the requirements of section 12 of the *PBA* because the Administrator incorrectly certified that the amendment complied with the *PBA* and regulations and did not adequately disclose the nature of the amendment on the registration form. Therefore, the 2006 Amendment is ineffective.
25. To the extent that the 2006 Amendment reduces the benefit formula for the accrual of future benefits, it is an adverse amendment under section 26 of the *PBA* and the notice requirements must be followed. Had the adverse nature of the 2006 Amendment been properly disclosed to the Superintendent, the Superintendent would have been required to require the Administrator to provide a section 26 notice to affected persons and would not have been able to register the 2006 Amendment before 45 days after the date that the Administrator transmitted such notices. No such notice was provided. Therefore, the registration of the 2006 Amendment is not effective.

The 2011 Amendment

26. The Superintendent is of the opinion that the 2011 Amendment insofar as it eliminates the indexation benefit with respect to past service is void under section 14(1)(a) of the *PBA*.
27. The 2011 Amendment is not valid, in part, under the Plan terms as the Plan's amendment power was not broad enough to permit this amendment. Section 17.1 and 17.2 of the 1995 Plan text and similar provisions in subsequent Plan texts restrict the Company from amending the Plan in any way that is contrary to the terms of applicable legislation and from reducing the amount of benefits to which members and others "are entitled under the Plan up to the date of such amendment".

Intended Decision

28. Section 18(1)(g) of the *PBA* states that the Superintendent may revoke the registration of a part of an amendment that does not comply with the *PBA* and the regulations. The Plan as amended by the 2003 Amendment, 2006 Amendment and 2011 Amendment does not comply with section 14.1 of the *PBA* and/or section 14 of the *PBA*. Therefore, the Superintendent intends to revoke the registration of the part of each amendment related to the indexation provision.
29. Section 87(2)(a) of the *PBA* states that the Superintendent may by written order require an administrator or any other person to take any action in respect of a

pension plan or pension fund if the Superintendent is of the opinion, upon reasonable and probable grounds, that the pension plan or pension fund is not being administered in accordance with the *PBA*, the regulations or the pension plan. Further, section 19 of the *PBA* requires the administrator to ensure that the pension plan is administered in accordance with the *PBA*, regulations and the plan documents. GMCL has confirmed that the Plan has been administered as if the indexation provision applied only to those who retired from active employment and as if the 2003 Amendment, the 2006 Amendment and the 2011 Amendment were valid amendments with respect to the indexation provision.

30. The Superintendent is of the opinion, upon reasonable and probable grounds and for the reasons stated above, that the Plan is not being administered in accordance with the *PBA* and the Plan terms and intends to order the Administrator to administer the Plan indexation provision in accordance with the gradual and uniform accrual rule in section 14.1 of the *PBA*, and without regard to amendments that are void pursuant to section 14 of the *PBA*, ineffective under section 13 or 26 of the *PBA* and/or invalid under the Plan terms, so as to apply the indexation provision to all years of service credited under the DB provision of the Plan regardless of whether or not the member retires from active employment and to recalculate and adjust all pension benefits payments and commuted value payments paid under the Plan, since January 1, 1995, so as to apply the indexation provision to all years of service credited under the DB provision of the Plan regardless of whether or not the former member, retired member or other Plan beneficiary retired from active employment.
31. Such further and other reasons as may come to my attention.

YOU ARE ENTITLED TO A HEARING by the Financial Services Tribunal (the "Tribunal") pursuant to section 89(6) of the *PBA*. **To request a hearing, you must deliver to the Tribunal a written notice that you require a hearing, within thirty (30) days after this Notice of Intended Decision is served on you.**¹

YOUR WRITTEN NOTICE must be delivered to:

Financial Services Tribunal
5160 Yonge Street
14th Floor
Toronto, Ontario
M2N 6L9

¹ NOTE - Pursuant to section 112 of the *PBA* any Notice, Order or other document is sufficiently given, served or delivered if delivered personally or sent by regular mail and any document sent by regular mail shall be deemed to be given, served or delivered on the fifth day after the date of mailing.

Attention: The Registrar

FOR FURTHER INFORMATION on a Form for the written notice, please see the Tribunal website at www.fstontario.ca or contact the Registrar of the Tribunal by phone at 416- 590-7294, toll free at 1-800-668-0128, ext. 7294, or by fax at 416-226-7750.

IF YOU FAIL TO REQUEST A HEARING WITHIN THIRTY (30) DAYS, I MAY CARRY OUT THE INTENDED DECISION AS DESCRIBED IN THIS NOTICE.

DATED at Toronto, Ontario, this *18th* day of *November*, 2013.

A handwritten signature in black ink, appearing to read "Brian Mills", is written over a horizontal line. The signature is somewhat stylized and scribbled.

Brian Mills
Deputy Superintendent, Pensions