SUPREME COURT OF NOVA SCOTIA
Citation: *Halifax Herald Limited v. Superintendent of Pensions*, 2024 NSSC 39

Date: 20240208
Docket: 523381
Registry: Halifax

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Between:

The Halifax Herald Limited

Appellant

\- and -

Superintendent of Pensions

\- and -

Halifax Typographical Union, Local 30130

\- and -

Nova Scotia Labour Board

Respondents

DECISION ON APPEAL

Judge: The Honourable Justice Scott C. Norton

Heard: January 2 and 3, 2024, in Halifax, Nova Scotia

Decision: February 8, 2024

Counsel: Level Y. Y. Chan and Dante Manna, for the Appellant
Katie Roebothan, for the Superintendent of Pensions
Balraj Dosanjh, for the Halifax Typographical Union, Local 3-130
Edward A. Gores, KC, for the Nova Scotia Labour Board, not participating

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By the Court:

Introduction:

[1] Over the course of 2018 and 2019, the Halifax Herald Ltd. ("The Herald") was required under the provisions of the *Pension Benefits Act*, SNS 2011, c. 41("Act"), and Pension Benefits Regulations made under the Act ("Regulations") in place at that time to make certain payments (totaling $2,656,656.00) into the pension plan it maintained for its employees and retired employees. The Herald was aware that it was required to make these payments in 2018 and 2019 but it did not make these payments. Instead, The Herald preferred to use the money to fund its pivot into digital operations. The Herald was hopeful that pending changes to the Regulations would erase its obligations to make these payments.

[2] Amendments to the Regulations came into force on April 1, 2020 (the "2020 Amendments"). This appeal is about whether the 2020 Amendments justified The Herald's ongoing refusal to make the payments due in 2018 and 2019.

Background:

[3] One of the underlying purposes of the *Pension Benefits Act* and Regulations is to ensure that Defined Benefit ("DB") pension plans are adequately funded to ensure that employees will receive the pension that has been promised to them throughout their years of employment. It does that by requiring pension plan sponsors (like The Herald) to file with the Superintendent of Pensions (the "Superintendent") annual information returns (s.65 of the Regulations) and, at least every three years, valuation reports (s.53 of the Regulations).

[4] With respect to a DB pension plan, the valuation report must include:

(a) a valuation of the pension plan on a *going concern* basis, assessing whether there are sufficient assets to meet the plan's proximate liabilities, estimated on the assumption of a continuing plan; and,

(b) a *solvency* valuation, which assesses whether there are sufficient assets if the plan was to be wound up on the valuation date.

[5] The Act and Regulations contain minimum going concern and solvency funding requirements. Based on the financial health of the plan disclosed in the report, the plan sponsor may be required to make "special payments" into the plan

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to rectify a going concern unfunded liability or a solvency deficiency. Such "special payments" are then set until the next valuation report, at which time the "special payments" may be increased, reduced or even eliminated, all depending on the financial health of the plan based on the new valuation report.

[6] The impugned "special payments" that are the subject of this appeal were in respect of a *solvency* deficiency.

[7] The 2020 Amendments maintained the structure of requiring regular valuation reports to gauge the financial health of the plan and the need for any "special payments". However, the 2020 Amendments introduced a new reduced *solvency* funding requirement for DB pension plans with respect to valuation reports with a valuation date on or after December 31, 2019. Specifically, the 2020 Amendments required DB plans to meet an 85% solvency funding standard ("Post-Reform Solvency Funding Standard") whereas the Regulations that had been in place immediately prior to April 1, 2020, required DB plans to meet a 100% solvency funding standard ("Pre-Reform Solvency Funding Standard"). Following the introduction of the 2020 Amendments, if a DB plan met the 85% solvency funding standard in a valuation report with a valuation date on or after December 31, 2019, that DB plan was no longer required to make "special payments" into the plan (with respect to a solvency deficiency).

[8] The two relevant valuation reports relating to The Herald's DB pension plan ("Plan") in this case are dated 2017 and 2019. A valuation report dated March 31, 2017, was filed with the Superintendent on December 21, 2017 (the "2017 Valuation Report"). A valuation report dated December 31, 2019, was filed with the Superintendent on December 1, 2020 (the "2019 Valuation Report").

[9] There is no dispute that pursuant to the 2017 Valuation Report, The Herald owed "special payments" of $14,723,600.00 to make up for the solvency deficiencies in its pension plan (based on the 100% solvency funding requirement in place at that time). The Herald had elected to extend the amortization period of its solvency deficiency over a period of 15 years, a form of solvency relief that was available under s.107 of the Regulations in force immediately prior to April 1, 2020. In 2018 and 2019, The Herald was responsible to be making monthly "special payments" towards this outstanding special payment amount (in the total amount of $2,656,656.00) but The Herald did not make these payments.

[10] On November 9, 2020, the Superintendent issued a Notice of Proposed Order to The Herald advising that it had failed to submit the required annual information

return ("AIR") since December 31, 2016. The AIR due on June 30, 2018, was not filed despite reminders/delinquent filing reminders sent December 8, 2017; July 18, 2018; October 7, 2019; December 9, 2019; and May 6, 2020. The AIR due June 30, 2019, was not filed despite reminders/delinquent filing reminders sent November 15, 2018; October 7, 2019; December 9, 2019; and May 6, 2020. The AIR due August 31, 2020, was not filed despite reminders/delinquent filing reminders sent December 12, 2019, and May 6, 2020.

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[11] On April 1, 2020, the 2020 Amendments came into force bringing with them a new 85% solvency funding standard that applied to valuation reports with valuation dates on or after December 31, 2019. Based on the calculations in the 2019 Valuation Report, The Herald had met the 85% solvency funding standard so no "special payments" were required moving forward with respect to solvency deficiencies.

[12] The Superintendent of Pensions maintained however, that pursuant to the language in the Regulations, The Herald's obligation to make the "special payments" that were calculated under the 2017 Valuation Report that became due and owing over the course of 2018 and 2019 continued to be owing. The Herald repeatedly refused to make the "special payments" that were due and owing in 2018 and 2019. The Herald took the position that, as The Herald had met the *new* 85% solvency funding standard at the time of the 2017 Valuation Report and thereafter, the 2020 Amendments had relieved The Herald from making the "special payments" that had become due in 2018 and 2019.

[13] The Superintendent issued a Notice of Intended Decision dated January 17, 2022 (the "NOID") finding that the 2020 Amendments (and the 85% solvency funding standard) were not intended to operate retrospectively so as to relieve The Herald from making those "special payments" that became due in 2018 and 2019 under the 100% solvency funding standard.

[14] In the Reasons of the Superintendent for Issuing the Notice of Intended Decision, the Superintendent made the following findings at paras. 36-38:

> [36] In correspondence dated September 13, 2021, the Superintendent requested specimen copies of annual member statements for the past three years so that "we may review the disclosure regarding special payments being made into the Plan." In submissions dated October 12, 2021, legal counsel noted in respect of the statements, "Our client has advised that these have been provided in accordance with the Pension Benefits Regulations". No further comment was made in subsequent submissions.

> [37] Having reviewed annual member statements provided to Plan members in respect of 2018 and 2019, **<u>I find that the disclosure regarding special payments was incorrect and misleading</u>**. Section 74 of the Regulations states:
>
> > **Annual statement to members**
> >
> > 74 (1) An annual statement to members must be provided no later than 6 months after the end of a pension plan's fiscal year.
> >
> > (2) An annual statement to members must contain at least all of the following information for the period covered by the statement, as the information is recorded in the administrator's records for the pension plan:
> >
> > ….
> >
> > t) if special payments are being made to liquidate any going concern unfunded liability or solvency deficiency, a statement to that effect;
>
> [38] The 2018 member statement stated, "In accordance with the Nova Scotia Pension Benefits Act, the employer is making special payments to liquidate the unfunded liability and the solvency deficiency." Similarly, the 2019 member statement stated, "In accordance with the Nova Scotia Pension Benefits Act, the employer is making special payments to liquidate the unfunded liability and the solvency deficiency." **<u>The Employer knew these statements to be false at the times they were made</u>**. At page 12 of the 2019 Valuation Report, the Plan actuary states, "This [the Special Payment Amount] represents payments due to the Plan from January 2018 to December 2019…". In its capacity as Plan administrator, the Employer should have taken care to ensure that an accurate statement in respect of special payments was included in the 2018 and 2019 member statements.
>
> [Emphasis added]

[15] The Herald appealed the NOID to the Labour Board ("Board"). Before the Board, The Herald argued that the 2020 Amendments should operate retrospectively.

[16] The Board rendered a decision dated March 14, 2023 (the "Decision") and determined that the 2020 Amendments were not intended to apply retrospectively so as to relieve The Herald from making those "special payments" that became due over 2018 and 2019. The Board concluded that "special payments in respect of solvency deficiencies that were assessed and payable prior to a valuation report with a valuation date of December 31, 2019 remain due and payable." The Board concluded that the 2020 Amendments did not serve to "expunge" those "special payments" that "were already due and payable."

[17] The Herald appeals to this court pursuant to s.116 of the Act. The Herald says that the Board's interpretation of the statutory requirements contained two principal errors of law:

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(a) First, the Board failed to consider the plain language of s.99(3) of the Regulations, the main operative provision. Its conclusion that the impugned “special payments” continued to be payable was based primarily on s.99(1) alone, despite that s.99(1) applies “except as otherwise provided in this Section”. When all the provisions of the Regulations are interpreted in context and in light of the purpose of the 2020 Amendments, the proper interpretation is that the 2020 Amendments, and s. 99(3) of the Regulations in particular, eliminated The Herald’s liability to make the impugned “special payments”.

(b) Second, the Board based its interpretation on an erroneous determination that the 2020 Amendments were not retrospective. The Board erred by ignoring the plain language of the 2020 Amendments (particularly s. 99(3)) in performing its retrospectivity analysis. Had the Board correctly applied the principles of statutory interpretation and considered the words of the 2020 Amendments in context and harmoniously with the purpose of the 2020 Amendments, it would have concluded that the 2020 Amendments retrospectively relieved The Herald of any continuing liability in respect to the impugned “special payments”. It would have found that the presumption against retrospectivity does not apply, or in any event (even if the presumption does apply) such presumption would have been rebutted.

History of Legislative Changes

[18] The Record of information that was before the Board shows that over the last 10-15 years, market and demographic conditions have presented practical challenges to employers who sponsor DB pension plans. Many of those conditions, such as the 2007-2008 financial crisis and suppression of long-term interest rates, are entirely beyond the control of any employer. The same market factors, as noted above, can also lead to volatility in solvency funding. Unable to control these factors, some sponsors have struggled to meet solvency funding obligations.

[19] The Herald is one such employer. In addition to solvency volatility, The Herald and other traditional media companies have been facing unprecedented circumstances leading to financial hardship, particularly the migration of traditional media advertising revenues to foreign-owned platforms in the digital space.

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[20] The Herald Plan is a hybrid plan with both a frozen DB provision and a Defined Contribution ("DC") provision for current and future accruals. As of August 15, 2017, for Plan members who were employed in The Herald's newsroom bargaining unit (and July 1, 2017 for all others), the Plan members no longer accrued benefits on a DB basis, but began accruing benefits under the Plan on a DC basis (aside from the newsroom members, who were moved into a Union-sponsored pension plan, with a negotiated contribution rate, for future accruals). In other words, there are no new payments being made into the DB Plan due to the arrival of new employees.

[21] Recognizing that many Nova Scotia employers, like The Herald, were struggling to meet their solvency funding obligations, the provincial government made an almost decade-long attempt to provide temporary relief through a number of initiatives, including:

(a) in 2009, Nova Scotia permitted pension plans with solvency deficiencies identified in a valuation report between December 30, 2008 and January 2, 2011 to be funded over 10 years instead of 5 years; and,

(b) in 2013, Nova Scotia permitted pension plans with solvency deficiencies identified in a valuation report dated between January 3, 2011 and January 2, 2014 to fund the deficiency over 15 years instead of 5 years. Later, 15-year amortization was offered for a further three-year period for valuation reports dated between December 30, 2016, and January 2, 2019, but this relief remained temporary.

[22] Even with these temporary relief measures in place and employed to the full extent, there were plans, including The Herald's, that were fully funded as a *going concern* but whose *solvency* "special payments" were not reasonably attainable for the plan sponsors under the then existing regulatory framework. Recognizing the inadequacy of the solvency relief measures employed to date, the province undertook legislative reforms to how pensions were funded ("Funding Reform").

[23] In early 2017, the Province of Nova Scotia began consultations with employers, employees and other interested parties, to help understand the changes necessary to improve the funding framework for DB pension plans.

[24] In September 2017, the province released the discussion paper, *Pension Funding Framework Review* and other issues affecting pension plans, to help gather more feedback. Consultation closed in November 2017.

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[25] *The Pension Funding Framework Review: What We Heard* was then released in April 2018. It provided a summary of feedback collected during the province's consultations. Importantly, the province reported "strong support for solvency funding reform" among pension plan sponsors and trustees.

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[26] During consultation, many employers reported that their pension plans struggled to remain solvent under the previous system. Additionally, employers reported needing greater flexibility in how they implement their plans, and improved stability.

[27] The province sought to gather the public's opinion on various questions pertaining to, in particular, three options for a new DB pension plan framework, including:

1. Maintain Full Solvency Funding: Maintain the current solvency funding standard (fund 100% of solvency liabilities) but introduce measures to help reduce the volatility and variability of funding payments;
2. Eliminate Solvency Funding and Enhance Going Concern Funding: Eliminate the current solvency funding rules, but enhance going concern funding requirements; or
3. Reduce Solvency Funding: Modify the solvency funding standard so that solvency liabilities need only be partially funded, possibly combined with additional measures to help reduce volatility and variability of funding payments (part of Option 1) and/or enhance going concern funding requirements (part of Option 2).

[28] Ultimately, the Funding Reform put into effect is consistent with combining the reduced *solvency* funding aspect of Option 3 with the enhanced *going concern* funding part of Option 2.

[29] Effective April 1, 2020, the Government of Nova Scotia amended the Act and Regulations to put these changes into effect through the 2020 Amendments. The Funding Reform made changes to both going concern funding and solvency funding:

(a) With respect to solvency funding, Nova Scotia extended permanent solvency special payment relief to DB plan sponsors, provided the plan continued to meet a reduced solvency funding standard of 85% ("Post-Reform Solvency Funding Standard") and the sponsor continued to make

the required normal cost contributions. This replaced the prior solvency funding relief regime of extended amortization timelines.

(b) At the same time, the Funding Reform enhanced the prior 100% going concern funding requirement by additionally requiring a DB plan to fund a provision for adverse deviations ("Post-Reform Going Concern Funding"). The Post-Reform Going Concern Funding Standard is a number between 105% and 122% on a going concern basis, calculated based on the target asset allocations in the plan's statement of investment policies and procedures.

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[30] The purpose of Funding Reform was to rebalance the protections afforded to plan members under Regulation funding requirements. While the Post-Reform Solvency Funding Standard and permanent solvency funding relief were aimed to benefit employers, like The Herald, the Post-Reform Going Concern Funding Standard provided additional protection to DB plan members.

[31] This Appeal is focused on the *solvency* funding-related changes (i.e. the 2020 Amendments' implementation of the Post-Reform Solvency Funding Standard) because the impugned "special payments" relate only to solvency funding. Accordingly, the main regulatory provisions engaged in the statutory interpretation are those concerning solvency "special payments".

[32] With respect to the solvency funding-related changes in the Funding Reform, their intent and effect were two-fold. First, to relieve DB plan sponsors in circumstances like The Herald's, i.e. those that were affected by demographic changes of the working population (i.e., increased life expectancy of retired workers, workers entering workforce later and retiring earlier), along with market conditions and low long-term interest rates. Each of these forces were outside the control of employers but had the effect of increasing the burden with respect to solvency funding. Second, to protect the benefits earned by the members of the pension plans.

[33] As stated by the Minister of Finance and Treasury Board during Parliamentary debates of the amendments, some pension plans struggled to remain solvent under the previous system. The government valued the security that workplace DB pension plans provide and for them to continue so that Nova Scotians have peace of mind in their retirement years. Employers told government that they wanted greater flexibility and stability, and employees told them they were most concerned about protection of their benefits. The changes to the Act and Regulations were in response to both (*Hansard*, Record p. 606).

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[34] The following chart displays a comparison of the relevant Regulations before and after 2020 Amendments:

Prior to April 1, 2020	**After April 1, 2020 (amendments underlined)**
Definitions Section 2(1) “special payment” means a payment, or 1 of a series of payments, made to liquidate a going concern unfunded liability or a solvency deficiency in relation to the pension benefits under a pension plan, and determined in accordance with (i) Section 99 or 101, for the minimum amount of payments required in relation to a going concern unfunded liability or a solvency deficiency, (ii) Section 104, for payments made under temporary exceptions to the minimum amount of payments required in relation to a going concern unfunded liability, (iii) Section 105, for payments made under temporary exceptions to the minimum amount of payments required in relation to a solvency deficiency, (iv) Section 107, for payments made under an elected extended amortization period in relation to a solvency deficiency;	**Definitions** Section 2(1) “special payment” means a payment, or 1 of a series of payments, made to liquidate a going concern unfunded liability or solvency deficiency in relation to the pension benefits under a pension plan, and determined in accordance with (i) Section 99 or 101, for the minimum amount of payments required in relation to a going concern unfunded liability or a solvency deficiency, (ii) Section 104, for temporary special payments made under subsection 105(1) or (2) or Section 107, as those provisions read immediately before April 1, 2020;
Determination of solvency deficiency 9 The solvency deficiency, as of a particular valuation date, of a pension	**Determination of solvency deficiency of plan providing defined benefits**

plan that provides defined benefits is determined by the following formula: solvency deficiency = A - B in which A = the sum of the solvency liabilities, the solvency liability adjustment and the previous year credit balance as of the valuation date of the valuation report, B = the sum of the solvency assets and the solvency asset adjustment as of the valuation date of the valuation report.	9(1) The solvency deficiency, as of a particular valuation date, of a pension plan that provides defined benefits, is determined by the following formula: solvency deficiency = A - B in which A = the sum of all of the following: (i) the applicable percentage of the plan's solvency liabilities set out in subsection (2), (ii) the applicable percentage of the plan's solvency liability adjustment set out in subsection (2), (iii) the plan's previous year credit balance as of the valuation date B = the sum of the plan's solvency assets and the solvency asset adjustment as of the valuation date. (2) For the value of "A" in subsection (1), the applicable percentage for subclauses (i) and (ii) is (a) 100%, for a valuation date that is before December 31, 2019; and (b) 85%, for a valuation date that is on or after December 31, 2019.
Minimum amount of special payments	**Special Payments—General**

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	Minimum amount of special payments
99(1) Except as otherwise provided in this Section and in Sections 101, 104, 105 and 107, the special payments required to be made after the first valuation date of a valuation report must not be less than the sum of all of the following amounts, paid in the following manner and within the specified amortization periods:	99(1) Except as otherwise provided in this Section and in Sections 101 and 104, the special payments required to be made after the first valuation date of a valuation report with a valuation date before December 31, 2019, must not be less than the sum of all of the following amounts, paid in the following manner and within the specified amortization periods: […]
(b) for a solvency deficiency, other than a solvency deficiency for a pension plan exempted from special payments under subsection 19(6), the amounts required to liquidate the solvency deficiency, plus interest at the solvency valuation interest rate, to be paid by equal monthly instalments over a period of no longer than 5 years.	(b) for a solvency deficiency, other than a solvency deficiency for a pension plan exempted from special payments under subsection 19(6), the amounts required to liquidate the solvency deficiency, plus interest at the solvency valuation interest rate, to be paid by equal monthly instalments over a period of no longer than 5 years.
(2) The beginning of the amortization period for special payments to liquidate a solvency deficiency or going concern unfunded liability determined for the plan in the report may be deferred to a date that is not later than 12 months after the valuation date.	(2) For a valuation report with a valuation date before December 31, 2019, the beginning of the amortization period for special payments to liquidate a solvency deficiency or going concern unfunded liability determined for the pension plan in the report may be deferred to a date that is not later than 12 months after the valuation date. (3) Subject to Section 96A and except as provided in subsection (4), the special payments required to be

	made after the valuation date of a valuation report with a valuation date on or after December 31, 2019, must be not less than the sum of all of the following amounts, paid in the following manner and within the following amortization periods: […] (d) for the first valuation report filed or submitted with a valuation date on or after December 31, 2019, the special payments required to liquidate any solvency deficiency in the report, together with interest at the solvency valuation interest rate, to be paid by equal monthly instalments over a period of no longer than 5 years beginning on the valuation date of the report; (e) for a valuation report filed subsequent to the first valuation report referred to in clause (d), the special payments required to liquidate any new and existing solvency deficiency in the report, together with interest at the solvency valuation interest rate, to be paid by equal monthly instalments over a period of no longer than 5 years beginning 1 year after the valuation date of the last filed valuation report.
	Special payments—temporary exceptions 104 Special payments made under subsection 105(1) or (2) or Section 107, as those provisions read

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	immediately before April 1, 2020, may continue to be made in accordance with those provisions until the first valuation report is filed with a valuation date on or after December 31, 2019.
Temporary exceptions to minimum special payments—solvency deficiencies arising under former regulations 105 (1) If, on the date these regulations come into force, special payments are being made under clause 6A(3)(a) of the former regulations to liquidate existing or new solvency deficiencies identified in the first valuation report prepared with a valuation date on or after December 30, 2008, and no later than January 2, 2011, the special payments may continue in accordance with that clause instead of as required for payments that are required to liquidate a solvency deficiency under clause 99(1)(b), but the pension plan must otherwise meet the requirements of subsection 32(1) when the plan is amended. (2) If an election to make special payments to liquidate a solvency deficiency over 15 years has been made under Section 7 of the former regulations, (a) the special payments may continue in accordance with subsection 7(4) of the former regulations instead	105 [repealed]

of as required for payments that are required to liquidate a solvency deficiency under clause 99(1)(b), but the pension plan must otherwise meet the requirements of subsection 32(1) when the plan is amended; and (b) the obligation to send progress reports continues in accordance with Section 7 of the former regulations while special payments are being made in accordance with that Section.	
One-time election to extend amortization period 107 (1) Subject to subsection (2), an administrator of a pension plan that provides defined benefits may elect to liquidate the following solvency deficiencies for the defined benefits in the pension plan under this Section instead of making special payments as required under clause 99(1)(b): (a) a new solvency deficiency; and (b) an eligible existing solvency deficiency. (2) An administrator cannot elect to make special payments under this Section unless all of the following conditions are satisfied: (a) all employer contributions and employee contributions due and payable under the pension plan have been made in accordance with Part 3:	107 [repealed]

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Funding of Pension Plans—Payment of Contributions; (aa) a solvency relief report is filed under these regulations that sets out all of the following, in addition to the information required for a valuation report by subsections 53(2), (3) and (4): (i) a statement that the administrator of the pension plan proposes to make an election to extend the amortization period under Section 107, (ii) the special payments that will be required if an election is made to extend the amortization period to liquidate, in accordance with Sections 107 to 116, a new solvency deficiency and any eligible existing solvency deficiency, (iii) the special payments that will be required if an election is not made to extend the amortization period to liquidate, in accordance with Sections 107 to 116, a new solvency deficiency and any eligible existing solvency deficiency; (b) the process for making an election and objecting to an extension of the period for liquidating a solvency deficiency is conducted in accordance with this Section and Sections 108 to 114;	

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(c) the election is successful, in accordance with Section 113. (3) Special payments made to liquidate a solvency deficiency under this Section must not be less than the sum of the following: (a) the amount required to fully liquidate a new solvency deficiency determined as at an eligible valuation date, plus interest at the solvency valuation interest rate, to be paid by equal monthly instalments over a period of no longer than 15 years; (b) the amount required to fully liquidate an eligible existing solvency deficiency that has not been fully liquidated as at an eligible valuation date, plus interest at the solvency valuation interest rate, to be paid by equal monthly instalments over a period of no longer than 15 years. (4) The start of the amortization period for special payments under this Section may be deferred to a date that is no later than 12 months after the eligible valuation date.	

Analysis of 2020 Amendments
Section 9

[35] Based on s.9 of the Regulations in place immediately prior to April 1, 2020, pension plans were required to use a 100% solvency funding standard for the solvency valuation calculations. Therefore, prior to the 2020 Amendments taking effect, a pension plan had to be fully funded or a liability would arise resulting in the pension plan having to make "special payments". As a result of the 2020

Amendments, the minimum standard for solvency funding was lowered to 85% for valuation dates on or after December 31, 2019. Section 9(2)(b) of the Regulations states that the lower 85% solvency funding standard only applies "for a valuation date that is on or after December 31, 2019". Subsection 9(2)(a) explains that the 100% solvency funding standard continues to apply "for a valuation date that is before December 31, 2019". (Emphasis added)

Section 99

[36] Section 99 of the pre-April 2020 Regulations addresses amortization periods permitted for "special payments" owing due to temporary relief provisions extended prior to the 2022 amendments. These temporary relief provisions are found in the pre-2022 amended ss.99(1)(b), 105 and 107.

[37] The 2020 Amendments specifically added the words "with a valuation date before December 31, 2019". After April 1, 2020, and based on s.9(2)(a) of the Regulations, "solvency deficiency", as that term is used in s.99(1)(b), was based on a 100% solvency funding standard "for a valuation date that is before December 31, 2019" (Emphasis added).

[38] Section 99(1)(b) of the Regulations specifically deals with "special payments" required to address solvency deficiencies that were to be paid by equal monthly instalments over a period of no longer than five years. This five-year period pursuant to s.99(1)(b) was the standard period of time over which a solvency deficiency was to be paid unless a party had been granted an exception under the prior temporary solvency relief provisions pursuant to ss.105 or 107 of the Regulations in force immediately prior to April 1, 2020.

[39] As can be seen from the underlined language in the chart above, s.99(3) was also added as a result of the 2020 Amendments. Section 99(3) addresses special payment requirements arising from a valuation report with a valuation date on or after December 31, 2019 (applying the new 85% standard). As of April 1, 2020, subsection 99(3) of the Regulations explains that the "special payments" required to be made after the valuation date of a valuation report with a valuation date on or after December 31, 2019 are to be paid in accordance with one of the subsections included in 99(3). Pursuant to s.9(2)(b) of the Regulations, these "special payments" under s.99(3) are based on valuations applying the new 85% solvency funding standard which applies "for a valuation date that is on or after December 31, 2019".

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[40] Section 99(1) begins with the words "Except as otherwise provided in this Section and in Sections 101 and 104". The words "Except as otherwise provided in this Section" which are found at the beginning of s.99(1) (and were there both before and after the 2020 Amendments) refers to subsection 99(2) (which was also there both before and after the 2020 Amendments) and subsection 99(3). While subsection 99(1)(b) generally requires "special payments" in respect of a solvency deficiency identified in a valuation report with a valuation date prior to December 31, 2019 to be amortized over a period of not more than five years commencing from the valuation date, s.99(2) permits the amortization period to be deferred for up to 12 months. The reference to s.101 deals with jointly sponsored pension plans (not relevant here). The reference to s.104 applies to those plans that elected to amortize solvency deficiencies over 15 years (instead of 5 under s.99(1)(b)) and will be addressed in greater detail below.

Sections 105 and 107

[41] The regulations in force immediately prior to April 1, 2020, also contained temporary solvency relief provisions (which existed at ss.105-115 of the pre-April 1, 2020 regulations). Essentially, these sections permitted a plan to elect to extend the amortization period of a solvency deficiency over 15 years as opposed to making the "special payments" over a five-year period as was required under s.99(1)(b). Sections 105 and 107 of the regulations in force prior to April 1, 2020, are the two most relevant sections for our purposes.

[42] For example, s.105 of the regulations, as they read immediately prior to April 1, 2020, allowed minimum "special payments" to be made in respect of solvency deficiencies that had been determined in accordance with temporary solvency funding relief that had been provided under s.7 of the regulations in effect prior to June 1, 2015 (the "Former Regulations"). The Former Regulations permitted a one-time election to amortize, over a period of up to 15 years, a new solvency funding deficiency and the remainder of any existing solvency funding deficiencies then being amortized over five years. Section 105 permitted plans to continue to make "special payments" as determined under the Former Regulations.

[43] Section 107 of the regulations, as they read immediately prior to April 1, 2020, permitted a one-time election to amortize a new solvency funding deficiency over a period of up to 15 years and the remainder of any existing solvency funding deficiencies would then be amortized over five years.

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[44] As a result of the 2020 Amendments, the temporary solvency relief provisions that had previously been available under ss.105–115 of the regulations in force immediately prior to April 1, 2020, were repealed. Now with the new 85% solvency funding standard taking effect as of April 1, 2020, these earlier solvency relief provisions that had allowed plans to elect to extend the amortization period of a solvency deficiency over 15 years (as opposed to 5) based on the prior 100% solvency funding standard were no longer in effect.

[45] Although these sections (105–115) were repealed, s.104 of the Regulations was expressly brought in with the 2020 Amendments to address those plans, like The Herald, that had elected to extend the amortization period of a solvency deficiency over a period of 15 years under the previous ss.105 or 107. For those plans that had elected arrangements under ss.105 or 107 and were not making their "special payments" over the standard five-year period (as contemplated under the general clause – 99(1)), this new s.104 of the Regulations applied. Section 104 explained that those plans that had elected to extend the amortization period of a solvency deficiency (i.e. lower payments calculated over a longer amortization period) could continue to make the "special payments" that had been calculated on this basis pursuant to s.105 or s.107 (as those sections read before April 1, 2020) until the first valuation report is filed with a valuation date on or after December 31, 2019. It is noteworthy that a specific pension plan may not have to file a valuation report until as late as December 2022, depending on when the last valuation report was filed. Section 104 deals with that circumstance.

Section 2(1) Definition of "Special Payment"

[46] Section 2(1) under the regulations in force immediately prior to April 1, 2020, defined "special payment" as set out in the chart above, and explained that "special payments" would be determined in accordance with other sections in the regulations, such as 99, 105 or 107 (as referenced above).

[47] Based on the changes that came in with the 2020 Amendments, the definition of "special payment" found at s.2(1) of the Regulations was also amended as shown in the chart above. Essentially, the direct references to ss.105 and 107 that had been in the pre-April 2020 definition of "special payment" were removed from the new definition (as these sections had been repealed) and instead the new definition of "special payment" referred to the new s.104.

[48] Section 9 and s.2(1) of the Regulations confirm that special payments" that were required to be made after the first valuation date of a valuation report with a

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valuation date before December 31, 2019 with respect to a solvency deficiency (based on the 100% solvency funding standard), whether amortized over 5 years or 15 years, were required to be paid until a valuation report with a valuation date on or after December 31, 2019.

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[49] Under ss.99(3) and 104 of the Regulations, however, it was open to a plan to recalculate in a valuation report with a valuation date on or after December 31, 2019, to determine what if any liability was due at 85%. Based on this calculation, if the result was that the plan was at least 85% funded on a solvency basis, the obligation to make "special payments" moving forward would cease as of the first valuation report on or after December 31, 2019.

[50] Nothing in the 2020 Regulations (not in ss.99, 104, 2(1), or anywhere else) expressly forgave any "special payments" that were due and payable prior to December 31, 2019, under the 100% solvency funding standard but had not been paid.

[51] One further comment on the legislative scheme. Section 86 of the Regulations was repealed by the 2020 Amendments and replaced in its entirety by the following:

> **Minimum contributions to pension plan**
>
> 86 (1) Except as provided in subsections (3) and (5) and Section 86A, the employer contributions and employee contributions made under a pension plan must not be less than the sum of all of the following:
>
> (a) All employer contributions and employee contributions required to pay the normal cost;
>
> (b) all special payments set out in a previous valuation report that remain to be paid with respect to any going concern unfunded liability;
>
> (c) all special payments set out in a previous valuation report that remain to be paid with respect to any solvency deficiency;
>
> (d) all special payments required to be paid with respect to any going concern unfunded liability that is determined in the most recently filed or submitted valuation report;
>
> (e) all special payments to be paid with respect to any solvency deficiency that is determined in the most recently filed or submitted valuation report;
>
> (f) all payments determined in accordance with Sections 183 to 186 as the payments required to be made to a pension plan on wind-up or partial wind-up of the plan under Sections 99 and 100 of the Act.

[Emphasis added]

It is noteworthy that subsection (c) did not exist prior to the 2020 Amendments.

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Factual Background: The Herald's 2017 and 2019 Valuation Reports

[52] Pursuant to s.53 of the Regulations, The Herald filed the 2017 Valuation Report with the Superintendent on December 1, 2017. The 2017 Valuation Report identified a new solvency deficiency of $7,478,000 (applying the 100% solvency funding standard). The 2017 Valuation Report explained that on a hypothetical wind-up basis, the Plan had a deficit of $14,723.600. "Special payment" amounts were calculated as the sum of payments required in respect of the new solvency funding deficiency in addition to those "special payments" required in respect of a solvency deficiency identified in the previous valuation report that was prepared prior to the 2017 Valuation Report.

[53] Specifically, the 2017 Valuation Report included a schedule at p.15 of the Report that identified the minimum "special payments" required per annum under the application of temporary solvency funding relief pursuant to s.107 of the regulations that were in place in 2017 (prior to the 2020 Amendments taking effect). On p. 14 of the 2017 Valuation Report, the actuary stated:

> Special Payments under Solvency Relief
>
> According to the new temporary solvency funding relief Regulations under the Nova Scotia *Pension Benefits Act*, new solvency deficiencies can be amortized over a 15 year period with member consent. Therefore, if the Plan Sponsor applies the temporary solvency relief provisions, the minimum required special payments are $772,000 for the period of April 1, 2017 to March 31, 2018, and then $1,407,800 per annum for the following 10 years, reducing to $635,800 per annum for the following 5 years. This payment level will be reviewed at the time of the next actuarial valuation, due no later than March 31, 2020.
>
> The following table summarizes the required special payments as at March 31, 2017 if the solvency relief provisions are adopted.

[54] A table at the top of p. 15 of the 2017 Valuation Report indicated that annual "special payments" of $1,407,800.00 were required to be made into the Plan.

[55] Page 15 of the 2017 Valuation Report stated, "Special payments must be paid by equal monthly installments, within 30 days following the end of each month". This is consistent with s.92(7) of the Regulations (prior to and following April 1, 2020) which state:

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> **When and how payment of contributions to be paid**
>
> 92 […]
>
> (7) Except as provided in subsection (6) for an increase in special payments, all special payments must be paid in equal monthly instalments no later than 30 days after the month in relation to which the special payment is payable.

[56] The Herald elected to proceed with solvency relief under s.107 of the regulations (in place immediately prior to April 1, 2020) and a certificate of consent to extend the amortization period of the new solvency deficiency identified in the 2017 Valuation Report from 5 years to 15 years was filed with the Superintendent on March 7, 2018.

[57] As of the 2017 Valuation Report, The Herald had a solvency deficit in the amount of $14,723,600. The Herald had an obligation to make monthly payments (as calculated by the actuary as per the 2017 Valuation Report) towards this $14,723,600 amount over the course of 2018 and 2019. The Herald did not make these payments.

[58] The 2020 Amendments came into effect on April 1, 2020, and at that time the solvency funding standard was reduced to 85% for a valuation report with a valuation date that is on or after December 31, 2019.

[59] The Herald filed the 2019 Valuation Report with the Superintendent of Pensions on December 1, 2020. The 2019 Valuation Report indicated a going concern excess of $1,365,900. The 2019 Valuation Report indicated a solvency excess (applying the 85% solvency funding standards) of $1,924,700 with a transfer ratio of 86.9%. On a hypothetical windup basis, the Plan had a deficit of $13,137,700.

[60] In the 2019 Valuation Report, the actuary explained that as there was no longer a solvency deficiency (applying the new 85% solvency funding standard), the "special payments" owing under the 2017 Valuation Report ceased effective January 1, 2020. The actuary stated on p. 8:

> In accordance with Section 9(2) of the Regulations to the PBA, for valuation dates on or after December 31, 2019, the solvency deficiency is calculated using 85% of the solvency liabilities. As shown above, the solvency excess is $1,924,700 at December 31, 2019, excluding the employer contributions due under the prior funding regime.

As there is no longer a solvency deficiency, the special payments established at the last valuation can cease effective January 1, 2020.

[61] At p. 12 of the 2019 Valuation Report, the actuary stated:

B. Special Payments

Special payments may be required in order to amortize any Plan deficiencies. Effective December 31, 2019, the Nova Scotia Pension Benefits Regulations were amended to adjust the calculation of the going concern excess/unfunded liability to include an explicit provision for adverse deviations and to adjust the calculation of the solvency deficiency to use 85% of solvency liabilities.

The valuation as at December 31, 2019 revealed a going concern excess. In addition, the valuation as at December 31, 2019 revealed no solvency deficiency. Therefore, in accordance with the Nova Scotia Pension Benefits Regulations, no new special payments are required, and previously established special payments can cease effective January 1, 2020.

[62] As to the "special payments" that became due in 2018 and 2019, the actuary stated, on p. 12 of the 2019 Valuation Report:

C. Contributions Due under Prior Funding Regime

<u>There are outstanding employer contributions in the amount of $2,770,537 which were due under the funding regulations in effect prior to April 1, 2020. This represents special payments due to the plan from January 2018 to December 2019 and an amount related to the change in the recommended employer current service contributions following the March 31, 2017 actuarial valuation</u>.

[Emphasis added]

[63] In Section V of the 2019 Valuation Report, on p. 13, in the section entitled "Summary of Conclusions and Recommendations", the actuary further explained:

4. As at the valuation date, special payments are not required under the current funding regime. However, there are contributions due under the prior funding regime of $2,770,500.

[64] From the $2,770,537.00 amount referenced above, an amount of $113,881.00 related to the change in the recommended current service contributions following the 2017 Valuation Report. The Herald confirmed in submissions made to the Superintendent on October 12, 2021, that this amount of $113,881.00 had been paid in full.

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[65] Therefore, over the course of 2018 and 2019, The Herald was responsible to have paid "special payments" in the amount of $2,656,656 (the Special Payment Amount) into the Plan. This Special Payment Amount was never paid into the Plan.

Events Leading up to this Appeal

[66] As noted above, on November 9, 2020, the Superintendent issued a Notice of Proposed Order to The Herald proposing to order that The Herald file three Annual Information Returns ("AIR") for the years ending December 31, 2017, December 31, 2018, and December 31, 2019.

[67] On November 26, 2020, Mr. Ian Scott, Executive Vice President and Chief Operating Officer with The Herald wrote a letter to the Superintendent attaching the three AIRs requested. Mr. Scott explained at para. 2 of that November 26, 2020, letter:

> I draw your attention to page 6 of each AIR where the certification that all contributions to the plan have been at least equal to the those required by the current plan document and the Actuarial Information Summary. These have been crossed out as not all special payments have been made by the plan sponsor.

[68] Mr. Scott continued to explain at para. 5:

> Current rules allow that existing and new pension plans with valuation dates on or after December 31, 2019 are required to fund to 85% of liabilities determined on a solvency basis. No solvency payments are required if a plan's solvency ratio is 85% or higher. As the Halifax Herald plan solvency ratio exceeds 85%, no solvency payments are therefore required.

[69] On May 17, 2021, the Superintendent wrote a letter to Mr. Scott. In this letter, the Superintendent stated that there were outstanding contributions due to the Plan which included an amount of $2,656,656.00 in respect of "special payments" due to the Plan from January 2018 to December 2019 and also, at para. 3 of her letter:

> Your letter of November 26, 2020 implies that you are taking the view that, because of the regulatory changes that came into effect on April 1, 2020, these contributions are no longer required. **This is not the case**. The contributions payable prior to April 1, 2020 regulations must be paid into the plan, regardless of the current funded status of the plan. The regulatory changes effective April 1, 2020 to the formula for calculating the solvency deficiency of a defined benefits pension plan were not made retroactive. They apply only to valuation dates on or after December 31, 2019: see clause 9(2)(b) of the *Regulations*.

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(Emphasis added in original)

[70] In this letter, the Superintendent asked Mr. Scott to confirm whether the outstanding employer contributions had been paid and if they had not, she asked for a proposed timeline setting out when The Herald proposed making the outstanding "special payments" into the Plan.

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[71] Mr. Scott responded with a letter on June 16, 2021, advising that The Herald was working with legal counsel to respond to the Superintendent's May 17, 2021, letter. The Herald provided a substantive response to the Superintendent on the issues on November 8, 2021. In its response, The Herald acknowledged that it had not paid the outstanding Special Payment Amount into the Plan and it put forward its position that this Special Payment Amount was no longer due to be paid into the Plan by virtue of the 2020 Amendments.

[72] The Superintendent issued the NOID on January 22, 2022. The Superintendent found that the 2020 Amendments carried forward the requirement to make and to continue to make "special payments" established by a valuation report with a valuation date before December 31, 2019. The Superintendent concluded that The Herald was required to make the Special Payment Amount that was due in 2018 and 2019 under the 100% solvency funding standard.

[73] The Herald filed an Appeal of the NOID with the Labour Board (the "Board") on or about February 16, 2022. Counsel argued the appeal before the Board on November 17 and 18, 2022. The Board rendered its Decision on March 14, 2022.

[74] The Board concluded that the Special Payment Amount that became due and owing over 2018 and 2019 was required to be paid, consistent with the Superintendent's NOID and the position that had been put forward by the Superintendent before the Board on appeal. Specifically, the Board concluded at para. 111 of its Order:

> This extended analysis of this complex Regulations comes down to this: special payments in respect of solvency deficiencies that were assessed and payable prior to a valuation report with a valuation date of December 31, 2019 remain due and payable. The fact that the liability to make future payments after that date that would otherwise have been payable under the Act and Regulations not been amended does not affect or expunge those that were already due and payable. The Herald is obligated to make the payments in issue. I agree then with the Superintendent's NOID on this point.

[75] In its March 14, 2023, Decision, the Board directed the Superintendent to make the intended decision set out in the NOID.

[76] On April 28, 2023, The Herald filed a Notice of Appeal to this Court, pursuant to s.116 of the Act.

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Issues

[77] As framed by the Appellant's Factum, the issues before the Court are:

1. Did the Board err in its interpretation of s.99(1) of the Regulations by incorrectly determining that s.99(1) maintained the requirement to make "special payments" due but not paid prior to the first valuation report with valuation date on or after December 31, 2019?

    a. Did the Board fail to consider The Herald's submissions on s.99(3)?

    b. Did the Board err in its legislative interpretation of the Regulations, as amended, to maintain both pre- and post-reform funding standards after the terms of s.99(3) had been met?

2. Did the Board err by determining that the provisions of the 2020 Amendments removing the requirement to make "special payments" determined in accordance with the Pre-Reform Solvency Funding Standard were not retrospective to 2018 and 2019?

    a. Did the presumption against retrospectivity apply, and if so, was the presumption rebutted?

    b. Did the Board err in its legislative interpretation of the 2020 Amendments in finding they were not retrospective?

Standard of Review

[78] In *Canada (Attorney General) v. Vavilov*, 2019 SCC 65, at paras. 36-52, the Supreme Court of Canada confirmed that the standard of review for statutory appeals of administrative decisions are the same as judicial appeals. Speaking about statutory appeals, at para. 37, *Vavilov* explicitly held that:

> Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33,

> [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable).

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[79] The parties agree that the standard of correctness applies to issues 1(b) and 2(b). The Herald says that the same standard applies to issues 1(a) and 2(a). The Respondents say that issues 1(a) and 2(a) involve mixed questions of law and fact and therefore should be determined on the standard of palpable and overriding error.

[80] In *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, the Court explained questions of mixed fact and law at para. 35:

> … Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

[81] I will address the standard of review within my analysis of issues 1(a) and 2(a).

The Board Decision

[82] Before analysing the issues on appeal, I will provide an overview of the Board's Decision. Following an introduction (paras. 1 - 4), the Board reviewed the NOID (paras. 5 – 7) and then reviewed the evidence (paras. 8 – 11). Beginning at para. 12, the Board reviewed the legislative context (paras. 12 – 16), reviewed the "Pressure on Pension Plans" (paras. 17 – 21) and then reviewed "The Solvency Funding Deficiencies in the Herald DB Plan" (paras. 22 – 26). Beginning at para. 27, the Board conducted an extensive review of pension reform under the heading "Pension Reform was in the Air" and reviewed key information and documentation leading up to the introduction of the 2020 Amendments in April of 2020. The Board then reviewed the "History of the Herald's Disagreement with the Superintendent (paras. 37 – 46) before setting out the central issue at para. 46:

> The central issue before the Board can be stated simply: did the amended Act and Amended Regulations that came into effect on April 1, 2020 have – or were they intended to have – retrospective effect. If they did, as the Applicant Herald submits, then there is no longer any obligation to make the special payments that had been due and owing before the amendments came into effect. Any liability to make the 2018 and 2019 special payments was erased by the amended Act and Regulations. On the other hand, if, as the Respondents submit, the changes did not have

> retrospective effect, then the obligation to make the special payments of 2018 and 2019 remains and the Herald must pay it.

[83] After setting out the central issue, the Board provided a summary of the oral arguments made by The Herald (paras. 47 – 62), those put forward by the Superintendent (paras. 63 – 74), those put forward by the Union (para. 75), and The Herald's Reply (para. 76). It is against this backdrop and within this context that the Board proceeded to the "Analysis and Decision" section beginning at para. 77 of the Decision.

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Issue (1) The Board Erred in its interpretation of s.99(1) of the Regulations

[84] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, the Supreme Court of Canada adopted as the preferred approach the so-called "modern principles" of statutory interpretation formulated by Elmer Driedger in *The Construction of Statutes*. Iacobucci, J., for the court, wrote at paras. 18-23:

> 18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40a of the [*Employment Standards Act* of Ontario ("ESA")], respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee...." Similarly, s. 40a(1a) begins with the words, "Where...fifty or more employees have their employment terminated by an employer... ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by the employer".
>
> 19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by the employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the ESA termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the ESA.
>
> 20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the

provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *Canada (Procureure générale) c. Hydro-Québec,* (sub nom. *R. v. Hydro-Québec)* [1997] 3 S.C.R. 213 (S.C.C.); *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.); *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550 (S.C.C.); *Friesen v. R.,* [1995] 3 S.C.R. 103 (S.C.C.).

22 I also rely upon s. 10 of the *Interpretation Act,* R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

[Emphasis added]

[85] The Herald argues that the Board erred in its interpretation of s.99(1) of the Regulations by failing to consider the plain language of that section, in the context of the entire Regulations as amended by the 2020 Amendments, and the purpose behind Funding Reform changes to solvency funding. That, in summary, s.99(3) of the Regulations provides, once the first valuation report on or after December 31, 2019 is filed, there is no remaining "special payment" requirement under the Regulations in respect of a solvency deficiency, unless that first valuation report on or after December 31, 2019 (or a subsequent valuation report) discloses a solvency funding deficiency.

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[86] I respectfully disagree. I find that the Board committed no error of law in its interpretation of the Regulations.

[87] The Board, at para. 110 concluded that the impugned “special payment’s” continued to be due and owing after the first valuation report with valuation date on or after December 31, 2019, under s.99(1) of the Regulations:

> …previously incurred solvency deficiency obligations would continue as calculated and payable under the pre-reform Regulations (rather than s.99(1) of the current Regulations) until the delivery of a new actuarial report with a valuation date on or after December 31, 2019. Once that happened the calculation and payment of solvency deficiencies was to be determined pursuant to s.99(1) of the Regulations. What that means then for the Herald is that [the impugned “special payments”] remained due and owing.

[88] At para. 92, the Board stated that the first step is to consider “how a solvency deficiency was determined both before and after April 1, 2020”. The Board at para. 93 reviewed s.9 of the Regulations that existed before the 2020 Amendments came into force. At para. 94, the Board considered s.9 of the Regulations that existed after the 2020 Amendments. Section 9 is the section which addresses the determination of a solvency deficiency. After reviewing these two versions of s.9, the Board commented:

> [96] One notes immediately that there was a significant difference in the way deficiency funding was determined. In the previous version the funding formula contained only one valuation date. Under the amended version the determination of whether there was a solvency deficiency depended on whether the valuation date was before December 31, 2019 (when the percentage was 100%) or after that date (when the percentage was 85%).
>
> [97] The point here is that the decision to differentiate expressly between deficiency funding rates pre- and post-December 31, 2019 does not suggest an intent to extend the 85% figure back before December 31, 2019. It rather suggests an intent to keep that distinction alive, so as to ensure that the changes effective April 1, 2020 did not change any determination of solvency deficiencies that had been made prior to December 31, 2019.

[89] The Board, at this point in its Decision, had determined that the language at s.9 does not reveal an intent that the 85% solvency funding standard was to operate retrospectively “back before December 31, 2019” but on the contrary “It rather suggests an intent to keep that distinction alive, so as to ensure that the changes effective April 1, 2020 did not change any determination of solvency deficiencies that had been made prior to December 31, 2019.”

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[90] The Board then turned to the term “special payment” which is a defined term in s.2(1) of the Regulations:

> “special payment” means a payment, or 1 [*sic*] of a series of payments, made to liquidate a going concern unfunded liability or solvency deficiency in relation to the pension benefits under a pension plan, and determined in accordance with
>
> (i) Section 99 or 101, for the minimum amount of payments required in relation to a going concern unfunded liability or a solvency deficiency,
>
> (ii) Section 104, for temporary special payments made under subsection 105(1) or (2) or Section 107, as those provisions read immediately before April 1, 2020.

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[91] The Board noted at para. 99 of its Decision that the definition of “special payment” refers to s.99, s.101 or s.104. The Board then proceeded to address each of these sections.

[92] The Board first addressed s.99(1) at para. 100 of its Decision. The Board carefully examined the language at s.99(1) and concluded at para. 101 that:

> On the face of it s.99(1) deals with special payments required in respect of valuation reports with valuation dates before December 31, 2019. That at first glance would appear to apply to special payments under the 2017 Ecklar Report…

[93] I agree that s.99(1) applies to “special payments” in respect of valuation reports with valuation dates before December 31, 2019. Section 99(1) carries forward the obligation to make those “special payments” that were due and owing under a valuation report with a valuation date before December 31, 2019 (applying the 100% solvency funding standard).

[94] The Board goes on to state, however, that “there is an express limitation – s.99(1) applies “except as otherwise provided in this section and in sections 101 and 104.”

[95] At para. 102, the Board referred to s.101 of the Regulations and correctly determined that that section does not concern us here “because it deals with jointly sponsored pension plans” and the Herald’s Plan is not such a plan.

[96] The Board then proceeded to s.104 which states:

> 104 Special payments made under subsection 105(1) or (2) or Section 107, as those provisions read immediately before April 1, 2020, ***may continue to be made*** in

> accordance with those provisions ***until*** after the first valuation report is filed with a valuation date on or after December 31, 2019. (Board's emphasis)

[97] The Board correctly noted at para. 104 of its Decision that s.104 "deals with special payments regarding solvency funding that were payable under s.105(1) or (2), or s.107 of the Regulations as they existed before April 1, 2020". The Board reviewed s.105(1) and (2) that had been in force immediately prior to the 2020 Amendments and stated at para. 106, in part:

> …it is clear that s.105(1) contemplates that special payments for solvency deficiencies which had been determined under a previous version of the Regulations could continue to be paid under those past regulatory provisions, rather than as provided for in this iteration of the Regulations. The same can be said for s.105(2). The point is that special payment obligations that had been incurred under a previous version of the Regulations did not cease to be payable. It was just that they could be paid in accordance with the previous rather than the current regulations.
>
> [Emphasis added]

[98] These observations made by the Board correctly conclude that under s.105, "special payment" obligations that had been calculated under a prior version of the regulations, were still required to be paid even after new regulations were introduced. The Board notes that these "special payment" obligations "did not cease to be payable". Pension plans, however, were given the option to continue to make the "special payments" in accordance with the former regulations as opposed to the current ones.

[99] At para. 108, the Board noted that it was s.107 (1) – (4) that "the Herald took advantage of when it elected in March 2018 to extend the amortization period for its payments to fund the solvency deficiency of its plan for 15 years". The Board appropriately directed itself to s.104.

[100] The Board then turned to the language of s.104 and correctly determined it to mean that the obligation to make "special payments" that were due and owing under a prior valuation report were not erased with the introduction of the 2020 Amendments. On the contrary, the language in s.104 contemplates that these "special payments" will continue until the first valuation report is filed with a valuation date on or after December 31, 2019. The Board stated at para. 109:

> [*Returning*] then to s.104 of the Regulations as it now exists we can see that what it contemplates is the continuation of special payments that were being made (or at

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least, that were supposed to have been paid) in respect of a pre-reform solvency deficiency pursuant to subsection 105(1) or (2) or section 107 "as those provisions read immediately before April 1, 2020." Such payments "may continue to be made ... until the first valuation report is filed with a valuation date on or after December 31, 2019." The intent here is similar to that in the pre-reform Regulations (as discussed above at para.[105]). The funding obligation that exists as of the change in the Regulations is not expunged—it is rather allowed to continue under the old regulatory regime for a time until a specified event takes place (which, in this case, was a report with a valuation date on or after December 31, 2019). This conclusion is strengthened by the definition of 'special payment' in the current Regulations since, as already noted, it is a payment "made to liquidate a ... solvency deficiency ... determined in accordance with ... section 104, for temporary special payments made under subsection 105(1) or (2) or section 107, as those provisions read immediately before April 1, 2020."

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[101] The Board explained at para. 110 that pursuant to ss.2(1) and 104 of the Regulations, The Herald was responsible to continue to make those special payments calculated and payable under the regulations in force prior to April 2020 until the first valuation report with a valuation date on or after December 31, 2019:

> In short, the intersection of the definition of 'special payment' in s.2(1) with the wording of s.104 means that previously incurred solvency deficiency obligations would continue as calculated and payable under the pre-reform Regulations (rather than s.99(1) of the current Regulations) until the delivery of a new actuarial report with a valuation date on or after December 31, 2019. Once that happened the calculation and payment of solvency deficiencies was to be determined pursuant to s.99(1) of the Regulations. What that means then for the Herald is that the special payments totalling $2,656,656.00, being special payments that were due and owing prior to the delivery of the 2020 Eckler Report (with its valuation date of December 31, 2019) remained due and owing.

[102] The Board reasoned at para. 111 that the 2020 Amendments did not relieve The Herald from making "special payments" in respect of solvency deficiencies that arose under a valuation report with a valuation date before December 31, 2019, that had become due and payable. The Board correctly concluded at para. 111 that The Herald was obligated to make the s Amount that became due and payable over 2018 and 2019:

> [111] This extended analysis of this complex Regulations comes down to this: special payments in respect of solvency deficiencies that were assessed and payable prior to a valuation report with a valuation date of December 31, 2019 remain due and payable. The fact that the liability to make future payments after that date that would otherwise have been payable had the Act and Regulations not been amended

> does not affect or expunge those that were already due and payable. The Herald is obligated to make the payments in issue. I agree then with the Superintendent's NOID on this point.

[103] I find no error of law in this analysis. Further, although not specifically addressed by the Board, s.86(1)(c) of the Regulations makes it abundantly clear that the legislature intended that the impugned "special payments" of 2018 and 2019 would continue to be due and payable when that section was replaced in its entirety by the 2020 Amendments:

> **Minimum contributions to pension plan**
>
> 86 (1) Except as provided in subsections (3) and (5) and Section 86A, the employer contributions and employee contributions made under a pension plan <u>must not be less than the sum of all of the following</u>:
>
> …
>
> (c) <u>all special payments set out in a previous valuation report that remain to be paid with respect to any solvency deficiency</u>;
>
> [Emphasis added]

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[104] Therefore, regardless of the standard of review that is applied (whether it be correctness or palpable and overriding error), the Board's decision satisfies the standard of review. I will now address to the sub issues raised in The Herald's Factum.

Issue 1(a) Whether the Board failed to consider The Herald's submissions on s.99(3)?

[105] At pp. 30 and 31 of its Factum, The Herald summarizes its interpretation of s.99(3) and argues that s.99(3) relieves the Herald from making the "special payment". Respectfully, such an interpretation is flawed for many reasons, including that it narrowly focuses on the language of s.99(3) and fails to consider the meaning of the other relevant sections such as s.99(1), s.9, s.2(1), s.86(1)(c) and s.104 that, when read together, strongly support an interpretation that the "special payments" that became due and owing under a valuation report with a valuation date <u>before</u> December 31, 2019 are required to be paid. In order to achieve a proper interpretation, s.99(3) must be read in the context of these other relevant provisions.

[106] The Board conducted a complete analysis of the relevant sections of the Regulations. Section 99(3) expressly deals with "special payments" arising under a valuation report with a valuation date on or after December 31, 2019, and not

"special payments" arising under a valuation report with a valuation date before December 31, 2019, such as the 2017 Valuation Report. Therefore, s.99(3) is not directly relevant to the question with which the Board was faced.

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[107] To interpret s.99(3) as though the 85% solvency funding standard applies to erase any "special payments" due and owing under a valuation report with a valuation date prior to December 31, 2019, is directly inconsistent with s.9(2) of the Regulations which clearly states at s.9(2)(b) that the 85% solvency funding standard only applies "for a valuation date that is on or after December 31, 2019". Section 9(2)(a) states that the 100% solvency funding applies "for a valuation date that is before December 31, 2019".

[108] The Herald put forward its interpretation with respect to s.99(3) in its submissions which the Board inferentially did not accept. The Board conducted its own full examination of the relevant sections which lead to a different conclusion. That does not amount to an error of law. Indeed, analyzing s.99(3) in isolation, without consideration of the context of s.99 as a whole as well as the scheme of the Act as a whole, would be contrary to the principles in *Rizzo*. The Board's interpretation of the relevant legislative provisions was, in my view, correct and its failure to expressly discuss The Herald's submissions on s.99(3) did not amount to an error of law.

Issue 1(b) The Board erred in its statutory analysis of the 2020 Amendments in relation to solvency "special payment" obligations

[109] At para. 105 of its Factum, The Herald argues that s.104 of the Regulations is discretionary in that it states that "Special payments made under […] Section 107, […], may continue to be made in accordance with those provisions until the first valuation report is filed with a valuation date on or after December 31, 2019." The Herald argues therefore, that due to this "permissive language", the Board erred in finding that s.104 and s.2(1) obligated The Herald to make the "special payment" Amount.

[110] I find no error of law or principle with the Board's interpretation of s.104. Respectfully, the use of the word "may" in s.104 does not give a pension plan that falls under that section the option of whether to continue to make "special payments" that have already become due and owing. The use of the word "may" simply gives a pension plan the option, once the 2020 Amendments came into force, to continue to make "special payments" based on a solvency deficiency that was amortized over a period of 15 years (pursuant to the former s.107) instead of proceeding under the

Regulations currently in force. The option was between continuing to make "special payments" in accordance with the former s.107 or making "special payments" under s.99(1)(b) in the current Regulations. The use of the word "may" under s.104 does not permit a pension plan to choose whether or not it will make "special payments" that became due and owing under a valuation report with a valuation date before December 31, 2019.

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[111] This interpretation is supported by the express language found in ss.105(1) and 105(2) of the regulations that were in force immediately prior to April 1, 2020. The wording found in these sections provides greater clarification around the legislature's intention of the use of the word "may." For example, s.105(1) found in the regulations immediately prior to April 1, 2020, stated, in part:

> 105 (1) If, on the date these regulations come into force, special payments are being made under clause 6A(3)(a) of the former regulations to liquidate existing or new solvency deficiencies identified in the first valuation report prepared with a valuation date on or after December 30, 2008, and no later than January 2, 2011, the special payments <u>may</u> continue in accordance with that clause instead of as required for payments that are required to liquidate a solvency deficiency under clause 99(1)(b).
>
> [Emphasis added]

[112] Section 105(2) found in the regulations immediately prior to April 1, 2020, stated, in part:

> 105(2) If an election to make special payments to liquidate a solvency deficiency over 15 years has been made under Section 7 of the former regulations,
>
> a) the special payments <u>may</u> continue in accordance with subsection 7(4) of the former regulations instead of as required for payments that are required to liquidate a solvency deficiency under clause 99(1)(b)
>
> [Emphasis added]

[113] Further, the language in s.99(1)(b) also supports this interpretation. Section 99(1)(b) of the Regulations addresses "special payment" obligations with respect to solvency deficiencies arising under valuation reports with a valuation date before December 31, 2019, that are to be paid out over a period of five years.

[114] The language in this section is clear that "special payments" required to be made after the first valuation date of a valuation report with a valuation date before December 31, 2019 (and calculated based on the 100% solvency funding standard by virtue of s.9) are required to be paid. There is no permissive language in s.99(1)(b)

suggesting that a plan may choose whether or not to make these "special payments". It would not make sense for the Regulations to permit those plans that elected to proceed under s.107 (or 105) to choose whether or not to make "special payments" arising under a valuation report with a valuation date prior to December 31, 2019 that became due and payable when plans that are proceeding under s.99(1)(b) do not have that option.

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[115] For all of the reasons set out above, the Board correctly interpreted s.104 in determining that s.104 along with the definition of '"special payment"' in s.2(1) "means that previously incurred solvency deficiency obligations would continue as calculated and payable under the pre-Reform Regulations" (at para. 110 of its Decision).

[116] The Herald argues at para. 107 of its Factum that the Board's second error was "to overlook that s. 104 is also time limited – there can be no special payments under s. 104 once 'the first valuation report is filed with a valuation date on or after December 31, 2019'". The Herald argued that as of December 1, 2020, when The Herald filed its 2019 Valuation Report, s.104 was no longer applicable.

[117] Simply because The Herald filed a valuation report on December 1, 2020, this does not change the fact that all "special payments" that were due and payable under a valuation report with a valuation date prior to December 31, 2019, with respect to a solvency deficiency are still required to be paid.

[118] Once the 2019 Valuation Report was filed by The Herald, this meant that the "special payments" as they had been calculated under s.107 (i.e. amortized over 15 years) could no longer continue to be made in accordance with that section. However, any "special payments" that became due and owing in 2018 and 2019 were still required to be paid. There is no language in the Regulations that relieves The Herald from its obligation to make the "special payments" that became due and owing prior to the first valuation report with a valuation date on or after December 31, 2019. As noted, *supra*, s.86(1)(c) makes this abundantly clear. The Board's interpretation of s.104 was correct.

Issue (2) The Board erred in determining that the presumption against retrospectivity of the amendments to the Regulations applied and was not rebutted

[119] At para. 112 of its Factum, The Herald submits that the Board made three errors of law in its analysis regarding whether the 2020 Amendments were retrospective or not:

(a) By determining that the presumption against retrospectivity applied;

(b) By applying the wrong test to determine whether the presumption was rebutted; and,

(c) By conducting an incomplete statutory interpretation analysis.

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Issue 2(a) Did the presumption against retrospectivity apply, and if so, was the presumption rebutted?

[120] The Board found that the presumption against retrospectivity did apply. Its reasoning is found at paras. 81-86 of the Decision:

> [81] The Herald's argument here is that the changes in the Act and in particular the Regulations 'reached back' to revise the earlier solvency ratio from 100% to 85%. What had been an obligation to fund to a solvency ratio of 100% was now to be read as 85%. An act of default as of March 31, 2020 was converted the next day to an act of compliance. Is that how the changes should be read?
>
> [82] The Herald's submission that it did first runs up against the presumption against retrospectivity. It is a general presumption when interpreting legislative changes that such changes are not intended to have retrospective effect. Legislation that changes the consequences attached to a particular action or event as of a certain date are not presumed to project that change back before the legislation come into effect. A statute that does have retrospective effect would be one that, as explained in Driedger in *Statutes: Retroactive Retrospective Reflections*, cited in *Thibault Estate* at para.9, "attaches new consequences to an event that occurred prior to its enactment." As further elaborated in Sullivan, *The Construction of Statutes* (7th ed),
>
>> "It is presumed that the legislature does not intend legislation to be applied retrospectively, as defined by Driedger, unless the legislation is beneficial or its purpose is to protect the public. At the end of 'Statutes: Retroactive Retrospective Reflections,' Driedger provided the following summary of his understanding of retrospectivity and how it differs from retroactivity:
>>
>> 1) A retroactive statue is one that changes the law as of a time prior to its enactment
>>
>> 2(1) A retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment

2(2) A statue is not retrospective by reason only that it adversely affects an antecedently acquired right.

2(3) A statute is not retrospective unless the description of the prior event is the fact situation that brings about the operation of the statute.

3) The presumption does not apply unless the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty.

4) The presumption does not apply if the new prejudicial consequences are intended as protection for the public rather than as a punishment for a prior event.

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[83] The Herald in its submissions argues that the legislative and regulatory changes "were beneficial and remedial, and not prejudicial to any party:" para.113, Ex. 1; and see *Mathers & Son*, *supra* at paras.9-11; and *Hawker Siddeley*, *supra* at paras.129-30, 134.

[84] The difficulty here is that immediately prior to the coming into effect of the changes, the members of the Plan had a right to a Plan that was funded on the basis of a 100% solvency ratio. They had a right to the benefit of a plan that on insolvency would meet 100%, not 85%, of its liabilities to its members. Thus they had a right to a plan that would be funded as of the assessment date on the basis of

a) 85% as of the assessment date, ***plus***

b) a special payment that was intended to bring that 85% up to 100%.

[85] The fact that the pre-April 2020 Regulations permitted the Special Payment to be amortized over 15 years rather than paid immediately did not detract from that right, given the assumption that the shortfall was bound to be made good. The election filed by the Herald on March 2018 permitted it to meet that obligation over 15 years rather than immediately, but it was a right that it 'purchased' by its commitment to make the required annual payments necessary to satisfy the deficiency over time. Allowing the Herald to avoid the payments that had become due in 2018 and 2019 would mean that the Herald had acquired a valuable benefit for nothing. It also means that the interests of the members of the Plan would be prejudiced. As noted in the 2020 Ecklar report, if the payments are not included the solvency funding of the Plan is at 86.9%; if they are included, it would be at 89.7%. Given their interest in having a pension as fully funded as possible, it is difficult to see the difference as anything other than adverse to the interests of the plan members. It would deny them the benefit of a Plan that had in it (albeit notionally) an additional $1,407,800.00 (the amount of the outstanding special payments then due and owing). The benefit to the Herald is matched by the detriment to the Plan members. Hence it cannot be said that the amendments were not prejudicial. They might, if the Herald's position was correct, benefit it, but any such benefit would be to the prejudice of the plan members.

> [86] I was not persuaded then that I could set aside the presumptions against retrospectivity or the presumption against legislative interference with vested rights to one side. That does not mean that the presumptions—and in particular that against retrospectivity—could not be rebutted. But it does mean that the onus of proving that it did not apply fell on the Herald.

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[121] At para. 118 of its Factum, The Herald argues that the Board erred in its analysis of whether the presumption against retrospectivity should apply because it failed to examine the purpose of the 2020 Amendments and then ascertain whether the legislative changes were beneficial, remedial or prejudicial. The Herald referred to a quote from Ruth Sullivan's text (at para. 114 of its Factum) which states that "it is 'presumed that the legislature does not intend legislation to be applied retrospectively…unless the legislation is beneficial or its purpose is to protect the public.'"

[122] In its Decision, in assessing whether the presumption against retrospectivity applied, the Board referred to this same quote from Ruth Sullivan that is referenced in the previous paragraph. At para. 85 of its Decision, the Board considered the 2020 Amendments and whether they were purely beneficial. The Board determined in this paragraph that the Amendments were not purely beneficial (as a result of prejudice caused to the Plan members) and therefore, the Board was not able to determine that the presumption against retrospectivity did not apply.

[123] The Board did in fact consider the purpose of the Regulations. Before including the specific assessment of prejudice to the Plan members at para. 85 of the Decision, the Board does outline the purpose of the 2020 Amendments earlier in its decision. At para. 32 for example, under the heading "Pension Reform Was In The Air", the Board stated:

> [32] The same department issued a news release on February 26, 2020 – "Province introduces Regulations to Amend Pension Benefits:" [*Ed.2*], Tab 7. Material to the issue before the Board was the following statement:
>
> > "Nova Scotians wants [*sic*] to have peace of mind in their retirement years. That is why government is introducing that regulation was a [*sic*] under the Pension Benefits Act to improve the flexibility and stability of defined-benefits pension plan funding.
> >
> > 'These regulations will help stabilize contribution requirements for employers, while maintaining the security of benefits for plan members under the Pension Benefits Act,' said Finance and Treasury Board Minister Karen Casey.

[124] The Board is referring here to statements made by the Minister of Finance and Treasury Board that speak directly to the purpose of the 2020 Amendments. Also, when reviewing the submissions made by the parties, the Board considered the specific argument made by the Superintendent in response to whether the presumption against retrospectivity applied and summarized the Superintendent's arguments regarding the purpose of the Regulations as follows: (at para. 70 of the Decision)

> …She submitted that a review of the debates in Hansard suggested that in addition to flexibility and stability, the Legislature was also looking to protect members of pension plans. Relieving employers of obligations they had already incurred did not protect members of plans whose solvency ratios had fallen below 100% prior to the reforms.

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[125] Therefore, prior to para. 85, comments made by the Board earlier in its Decision indicate that the Board was aware of the purposes of the 2020 Amendments, to improve flexibility and stability for employers but at the same time, to protect benefits for members. With this awareness, the Board correctly determined at para. 85, based on the facts, that the Amendments were not purely beneficial as they caused prejudice to the Plan members. I conclude that in applying the facts to the legal test, the Board's determination on whether the presumption against retrospectivity applied did not amount to palpable and overriding error.

[126] At para. 120 of its Factum, The Herald argued that the Board erred by focusing "on prejudice to the interests of the pension plan members rather than prejudice to their rights". The Herald argues that "the presumption applies only if there is an effect on rights rather than interests."

[127] Before the Board, both The Herald and Superintendent relied on the following authority that elaborated on the legal principle that the presumption against retrospective application will not apply if the legislation in question is beneficial. The paragraphs in *Contours Ltd. v. L.J. Mathers*, 1993 NSCA 145, that were relied upon by the Superintendent before the Board are as below:

> 29 I agree with the submission of appellants' counsel that when Driedger indicates the presumption against retrospective application does not apply to beneficial statutes that he must have been referring to statutes which only confer a benefit. That appears to be the opinion of Jeffrey G. Macintosh in "The Retrospectivity of the Oppression Remedy" (1987-88) 13 Canadian Business Law Journal 219 where he says at p. 220:

> The oppression provision creates a new duty (or duties) that did not exist before. The legal liability so created operates prejudicially rather than benevolently, and appears to be founded on an event or transaction rather than a status or character.

And further in a footnote to the above statement:

> A statute which confers a benefit rather than a burden is said to operate benevolently. Because of the policy underlying the presumption against retrospectivity, the presumption does not operate in the case of such a statute. See [Driedger]. Although the oppression provision could be said to confer a benefit on the plaintiff, it seems clear that a benevolent statute is one which only confers a benefit.

30 To not apply the presumption to a statute which both confers a benefit to one person and prejudices another person would, in the opinion of Pierre-André Côté, be wrong as indicated in the following passage from "The Interpretation of Legislation in Canada", 2nd ed., p. 136:

> In several cases, retroactivity has been implied by the remedial character of the new statute. But is the fact that a law is more generous or liberal sufficient for it to be considered retroactive? Since all statutes are deemed remedial, such a view could lead to a general rule of retroactivity. That would be killing the patient to cure the illness! Certainly a statute that is remedial for one person may be prejudicial to another.

[Emphasis added]

[128] These paragraphs do not distinguish between rights and interests in assessing any prejudice caused by new legislation (nor do they indicate that the prejudice must be to a right and not an interest). As stated by Sullivan, *Statutory Interpretation* (3rd ed) (Toronto, Irwin Law, 2016), at p. 363: "A right is an interest or expectation that is recognized or protected by law, either by common law or legislation".

[129] If there is a distinction between rights and interests, the impacts of the 2020 Amendments that were assessed as potentially being prejudicial to the Plan members in this case, impacted both their rights and interests. While The Herald argues that members have no right to a particular funding level, Plan members do have a legitimate right to receive a fully funded pension upon retirement and to apply the 2020 Amendments retrospectively prejudices that right. The Board's determination in this regard not only did not amount to palpable and overriding error but rather, it was correct.

[130] At pp. 45 – 47 of its Factum, The Herald suggests that the Board erred by applying the wrong test as to whether the presumption against retrospectivity was

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rebutted. The Herald asserts that the Board did not apply the correct legal test that comes from *R. v. Dineley*, 2012 SCC 58, where the Court stated that even where the presumption against retrospectivity applies, it is rebutted if "it is possible to discern a clear legislative intent that it is to apply retrospectively." (para. 10).

[131] If the question is whether the Board applied the correct legal test, the standard of correctness would apply. If the question is whether the Board properly applied the facts to the legal test, the standard of palpable and overriding error would apply. I find that the Board did not err with respect to the application of the test from *R. v. Dineley* or the manner in which it was applied.

[132] First, in assessing whether the presumption against retrospectivity was rebutted, the Board assessed the "two key considerations" that were put forward in The Herald's brief that was filed with the Board. Specifically, The Herald stated at para. 116 of its submission to the Board that:

> According to Sullivan, there are two key considerations in determining whether the presumption against retrospectivity s rebutted:
>
> (a) How arbitrary or unfair it would be to apply the new legislation to the facts in question; and
>
> (b) The extent to which not applying it would tend to defeat the legislation purpose and in particular whether applying it is necessary or warranted by the goals to be achieved.

[133] The Board assessed both of these key considerations at paras. 88 and 89 of the Decision, applied the relevant facts and the evidence but did not determine that either consideration rebutted the presumption in this case. The Board then stated (at para. 90):

> With these observations in mind the Board turns to the interpretation of the Act and the Regulations and the impact of the amendments that became effective April 1, 2020.

[134] At this point in the Decision, the Board refers to the specific language of the Regulations to determine if there is "a clear legislative intent" that the Regulations were to "apply retrospectively".

[135] The Board then conducted an interpretive analysis of the relevant sections of the Regulations and made findings with respect to the legislature's intent as to how the 2020 Amendments should apply. For example, after reviewing s.9 of the Regulations (pre and post the 2020 Amendments) the Board stated:

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> [96] One notes immediately that there was a significant difference in the way deficiency funding was determined. In the previous version the funding formula contained only one valuation date. Under the amended version the determination of whether there was a solvency deficiency depended on whether the valuation date was before December 31, 2019 (when the percentage was 100%) or after that date (when the percentage was 85%).
>
> [97] The point here is that the decision to differentiate expressly between deficiency funding rates pre- and post-December 31, 2019 does not suggest an intent to extend the 85% figure back before December 31, 2019. It rather suggests an intent to keep that distinction alive, so as to ensure that the changes effective April 1, 2020 did not change any determination of solvency deficiencies that had been made prior to December 31, 2019.
>
> [Emphasis added]

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[136] Respectfully, the Board did precisely what the Supreme Court in *R. v. Dineley* directed. It looked for the intent of the legislature in the language of the Regulations. The Board determined that these provisions do not indicate an intent for the 85% solvency funding standard to operate retrospectively but that the opposite is true.

[137] The Board's conclusion in this regard was strengthened after the Board reviewed ss.2(1), 99(1), 101, 104 (and the former ss.105 and 107) and makes further comments about the legislature's intent:

> [*Returning*] then to s.104 of the Regulations as it now exists we can see that what it contemplates is the continuation of special payments that were being made (or at least, that were supposed to have been paid) in respect of a pre-reform solvency deficiency pursuant to subsection 105(1) or (2) or section 107 "as those provisions read immediately before April 1, 2020." Such payments "may continue to be made ... until the first valuation report is filed with a valuation date on or after December 31, 2019." The intent here is similar to that in the pre-reform Regulations (as discussed above at para.[105]). The funding obligation that exists as of the change in the Regulations is not expunged—it is rather allowed to continue under the old regulatory regime for a time until a specified event takes place (which, in this case, was a report with a valuation date on or after December 31, 2019).
>
> [Emphasis added]

[138] Therefore, the Board, in its Decision, did not ignore the direction from *R. v. Dineley*. The Board did in fact analyse the legislation to discern the intent of the legislature and determined that the intent was not for the Amending Regulations to operate retrospectively so as to relieve The Herald from its obligation to pay the "special payment" Amount.

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[139] I would also note that the Board's Decision leading up to the findings and conclusions mentioned above, referenced the case of *R. v. Dineley* at para. 57. It was after this reference that the Board embarked on its own review of the relevant statutory language in the Regulations and determined that the language did not discern a clear legislative intent for the Regulations to be applied retrospectively so as to relieve The Herald from having to pay the "special payment" Amount. The Board's treatment of the applicable test from *R. v. Dineley* did not constitute an overriding and palpable error and was in fact, correct.

Issue 2(b): Did the Board err in its legislative interpretation of the 2020 Amendments in finding they were not retrospective?

[140] At p. 49 of its Factum, The Herald suggests that the Board's legislative analysis "is problematic for a plethora of reasons." Over the pages of the Factum that follow, The Herald alleges various problems with the Board's interpretation.

[141] First, at p. 49 of its Factum, The Herald appears to be suggesting that in assessing whether the retrospective application of the 2020 Amendments would defeat the legislative purpose (at para. 89 of its Decision), the Board only considered the preamble to the Act and did not consider the purpose of the 2020 Amendments. At para. 89 of its Decision, in assessing whether the retrospective application of the 2020 Amendments would defeat the legislative purpose, the Board did review the preamble to the Act and, in my opinion, correctly noted that applying the legislation retrospectively would not achieve the Act's goals. With respect to the suggestion that the Board otherwise failed to consider the purpose of the 2020 Amendments, however, I respectfully disagree.

[142] The Herald argues at para. 140 of its Factum that the Board failed to consider "that the purpose of the 2020 Amendments to implement the Post-Reform Solvency Funding Standard was to relieve employers of certain solvency funding obligations." A review of the Record before the Board reveals that relieving employers of certain solvency funding obligations was not the only purpose of the 2020 Amendments. It is evident from paras. 32 and 70 of the Decision, that there was a dual purpose of the 2020 Amendments, to provide flexibility and stability for employers but also to protect benefits of plan members.

[143] With respect to whether this was considered by the Board, while para. 89 refers specifically to the language of the preamble, the purpose of the 2020 Amendments is referenced by the Board in earlier paragraphs in the Decision (at paras. 32 and 70, for example). The retrospective application of the 2020

Amendments would defeat the purpose of the Act (as found in the preamble) as was determined by the Board at para. 89 and it would also be inconsistent with one of the dual purposes of the 2020 Regulations which was to protect the benefits of plan members (as identified by the Board at para. 85 of the Decision). The Board reached the correct conclusion in finding that the retrospective application of the 2020 Amendments would defeat the legislative purpose. The Board correctly decided not to find that the presumption was rebutted on this basis.

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[144] At para. 141 of its Factum, The Herald argues:

> …the Supreme Court of Canada's statement on how to conduct a statutory interpretation is well-established. "Today, there is only one principle approach, namely, the words of the an Act are to be read in their entire context and in their grammatical and ordinary sense with the scheme of the Act, the object of the Act and the intention of Parliament."

[145] This is the *Rizzo* test discussed *supra*. The Board followed the established principles of statutory interpretation. There are multiple comments made by the Board in its Decision to illustrate that it was well aware of the scheme of the legislation, the object of the legislation and the intent of Parliament and that with this information in mind, it turned to the relevant sections of the Regulations and read them in their entire context and in their grammatical and ordinary sense in determining whether they were intended to apply retrospectively.

[146] Beginning at para. 17 of its Decision, the Board discussed "the Pressure on Pension Plans that had existed over the years". The Board explained the varieties of pressures on pension plans and also the prior legislative changes that had been made in earlier years to try and address these pressures. The Board explained at paras. 20 – 21:

> [20] All of this and more had an impact on pension plans in the province (and indeed Canada) as well as on the Plan. It had adverse impacts on their viability, and made it increasingly difficult to ensure that their current and future liabilities to members could be met. Many employers began to shift from DB plans to less costly DC plans. There was also increased concern that the traditional valuation measures, at least given the economic context, were too stringent and too difficult for struggling employers to meet. Nova Scotia responded to these economic pressures by amending the provisions of the Act and Regulations from time to time. One partial solution offered by various iterations of the Act and Regulations over these years was to provide temporary solvency funding relief by amortizing shortfalls over a period of years rather than making them payable immediately. As described

in the "Pension Funding Framework Review" issued by Nova Scotia in September 2017,

> "Following an abrupt market downfall in 2007 – 2008, temporary solvency funding relief was provided to permit pension plans to elect to fund solvency deficiencies over longer time frames than the 5 Years Typically Required in Nova Scotia. In 2009, pension plans with solvency deficiencies identified in a valuation report between December 30, 2008 and January 2, 2011 could be funded over 10 years instead of five years, subject to certain conditions. In 2013, another round of temporary solvency relief was provided [to] pension plans with solvency deficiencies identified in a valuation report dated between January 3, 2011 and January 2, 2014 were permitted to fund the deficiency over 15 years instead of five, again, subject to certain conditions:" Ex. 2, Tab 1.

[21] Nova Scotia eventually moved to repeal and replace the former *Pension Benefits Act*, RSNS 1989, c.40 with a new and revised Act: SNS 2011, c.41 (the "2011 Act"). Most of the 2011 Act came into force in 2015. But significant challenges remained even after the financial recovery in the years after 2007-2008. In particular, interest rates remained low. Many DB plans had difficulty meeting the 100% solvency mark. Nova Scotia followed the example of British Columbia, Manitoba and Ontario in allowing employers to fund any deficiency by amortizing the required payment over longer periods of time. In August 2017, Nova Scotia allowed employers with DB plans with valuation dates from December 30, 2016 to January 2, 2019 to elect to fund new solvency deficiencies over a 15-year period. An existing deficiency that was being funded over five years could be consolidated with any new deficiency and funded over 15 years: Ex 2, Tab 1, p.2.

[147] Commencing at para. 27 of its Decision, with the section "Pension Reform Was in the Air", the Board reviewed the ongoing pressures and the process that eventually led to the 2020 Amendments. The Board explained:

Pension Reform Was In The Air

[27] The pressures that had led to the 2011 Act continued apace after 2015. As the Nova Scotia Framework Review noted in September 2017, Ontario had announced reforms in May 2017 that would reduce the solvency number from 100% to 85%. The question then for consideration in Nova Scotia was whether

a) To maintain full solvency funding, or

b) eliminate solvency funding and enhance going concern funding, or

c) reduce solvency funding so that solvency liabilities need only be partially funded: Ex. 2, Tab 1, p.3.

[28] The framework review process continued. There was extensive consultation with employers, unions, actuaries, industry organizations, plan sponsors and private

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individuals. The resulting report dated April 2018 noted that these groups differed on which of the three options ought to be adopted: Ex. 2, Tab 2. Unions and members of pension plans urged the maintenance of full funding. Actuaries expressed little support for maintaining full solvency funding. Other groups had mixed views. The Nova Scotia government in the end elected to follow the third option. In the report "Improved Funding Framework of Nova Scotia Pension Plans – The Road Forward," released May 2019, the government outlined its approach. Material to the issue before us is the following, under the heading "Changes to Funding Framework for Defined Benefit Pension Plans:"

> **Regulatory Changes to Funding Rules.**
>
> Permit defined benefit pension plan sponsors to elect, on a go-forward basis, to permanently fund their pension plans to an 85% solvency standard rather than the current 100%:
>
> – Solvency deficiencies up to the 85% standard must be amortized on a five-year basis with no consolidation of prior years deficiencies permitted: Ex. 2, Tab 3, p.2

[148] As noted, *supra*, the Board specifically included in its Decision (at para. 32) comments from Minister Casey relating to the dual purpose behind the 2020 Amendments:

> Nova Scotians wants [*sic*] to have peace of mind in their retirement years. That is why government is introducing that regulation was a under the Pension Benefits Act to improve the flexibility and stability of defined-benefits pension plan funding.
>
> "These regulations will help stabilize contribution requirements for employers, while maintaining the security of benefits for plan members under the Pension Benefits Act," said Finance and Treasury Board Minister Karen Casey.
>
> The regulations include amending the funding requirements for defined-benefit pension plans. This includes reducing required solvency funding to 85 percent of solvency liabilities instead of 100 percent…

[149] In addition, the Board at para. 89 also examined the preamble to the Act and stated:

> There is too the preamble to the Act both pre- and post-reform. It includes the statement that "the Government of Nova Scotia wishes to promote the development of an environment in which pension promises are fulfilled." Such promises include the promise, or obligation, of an employer to fund a pension plan to certain levels—and, where those levels fall short—to make up such payments over time. It is not a promise to do something some time in the future. It is rather a promise to commence making it up *now* (that is, in the Herald's case, as of April 2018). It is not clear that relieving the Herald of such a promise (one made before the amendments came into

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> effect) would serve or be warranted by the Act's goals. If anything, it might encourage employers to renege on their promises and obligations on the off chance that future legislative changes would relieve them of those current promises and obligations. That would not encourage adherence to existing statutory and regulatory obligations. That in turn could result in the further under-funding of pension plans and a consequent decline in their health.

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[150] It is within this entire context that the Board analysed the text of the Regulations themselves (including ss.2(1), 9, 99(1), 101, 104, as well as 105 and 107 of the regulations that were in force immediately before April of 2020). The Board did not read one section of the Regulations by itself to arrive at its conclusion, but it read multiple sections of the current and earlier regulations in their entire context and in their grammatical and ordinary sense after having reviewed and considered the "scheme of the Act, the object of the Act and he intention of Parliament" at earlier points in its Decision. The Board applied the correct principles of statutory interpretation in this case which resulted in the Board reaching a correct statutory interpretation.

Conclusion

[151] "Special payment" obligations in respect of solvency deficiencies arising under a valuation report with a valuation date prior to December 31, 2019 (calculated in accordance with the 100% solvency funding standard) are required to be paid until the first valuation report with a valuation date on or after December 31, 2019, is filed. If a plan meets the 85% solvency funding standard in a valuation report with a valuation date on or after December 31, 2019, then "special payments" with respect to a solvency deficiency will cease as of the date of the valuation report. However, any "special payments" that became due and payable under a valuation report with a valuation date prior to December 31, 2019, are required to be paid. There is nothing in the Regulations to relieve a plan from making those "special payments" that were due and owing under a valuation report with a valuation date prior to December 31, 2019, but were never paid.

[152] A correct statutory interpretation leads to the conclusion that The Herald continues to owe the Special Payment Amount into the Plan.

[153] The Board did not err in its Decision. It reached the correct conclusion. Regardless of the standard of review that is applied, the Decision is correct and should be upheld.

[154] The appeal is dismissed.

[155] If the parties are unable to agree on costs, I will receive their written submissions on or before February 29, 2024.

Norton J.

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