Federal Court of Appeal | Cour d'appel fédérale

Date: 20200124

Docket: A-46-19

Citation: 2020 FCA 22

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
LASKIN J.A.

BETWEEN:

BANK OF MONTREAL

Appellant

and

YANPING (KATE) LI

Respondent

Heard at Toronto, Ontario, on December 2, 2019.

Judgment delivered at Ottawa, Ontario, on January 24, 2020.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Ms. Yanping (Kate) Li (the respondent) worked for the Bank of Montreal (BMO, or the appellant) for almost six years. When she was terminated, she was given the option of either remaining on the payroll for a period not exceeding 18 weeks, or accepting a lump sum payment. She confirmed by letter that she had selected the lump sum option, and also signed a settlement

agreement pursuant to which she released the appellant from any and all claims arising out of the termination of her employment.

[2] Nevertheless, shortly after having signed that agreement, Ms. Li filed an unjust dismissal complaint under section 240 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code).

[3] In a preliminary decision, the adjudicator appointed by the Minister of Labour (the Minister), dismissed the appellant's objection to her jurisdiction. She held that she was bound to follow the decision in *National Bank of Canada v. Canada (Minister of Labour)*, [1997] 3 F.C. 727, 133 F.T.R. 142 [*National Bank*], aff'd 151 F.T.R. 302, 229 N.R. 1 (C.A.) [*National Bank FCA*], according to which a settlement and release agreement is not a bar to a complaint under section 240 of the Code. BMO's application for judicial review before the Federal Court was subsequently dismissed (*Bank of Montreal v. Li*, 2018 FC 1298, 2019 C.L.L.C. 210-024).

[4] In this appeal, BMO submits that *National Bank* should no longer be followed, essentially for policy reasons, and that the appeal should accordingly be allowed.

[5] For the reasons that follow, I am of the view that the appeal should be dismissed. I have not been convinced by BMO's arguments that we should depart from *National Bank* or that it was wrongly decided.

I. Factual Background

[6] The respondent began working at BMO in May 2011. On March 29, 2017, BMO terminated Ms. Li, apparently because she was unable to meet the performance requirements of her position as Financial Planner. On that same day, BMO provided Ms. Li with a package of documents which outlined information about two different severance options, one providing salary and benefits continuation, and the other providing a lump sum payment as well as other transition support services. BMO advised Ms. Li that she should review the options and inform BMO of her choice by April 25, 2017.

[7] On April 18, 2017, BMO confirmed by email that Ms. Li opted for the lump sum payment ($24,546.00 plus salary continuation of $2,608.00) and forwarded her the Agreement and Release. On April 20, 2017, Ms. Li signed the Agreement and Release, which contained a number of terms including a release of all claims arising out of the employment. Section 10 of that document reads as follows:

> … [T]he Employee hereby releases and forever discharges BMO, its subsidiaries, affiliates, and successors and each of their respective officers, directors, employees, and agents from any and all actions, causes of action, claims, demands and proceedings for whatever kind of damages, indemnity, costs, compensation, and any other remedy which Employee or Employee's heirs, administrators or assigns had, may now have, or may have in the future arising out of Employee's employment or the termination of that employment.

[8] Ms. Li did not retain a lawyer before signing the release but received legal advice from a friend who practices labour law in Ontario. After BMO received the signed Agreement and Release, it paid Ms. Li as outlined in the agreement.

[9] On May 22, 2017, Ms. Li filed a complaint of unjust dismissal under section 240 of the Code. The Minister then appointed adjudicator Jennifer Webster under subsection 242(2) of the Code to hear the unjust dismissal complaint.

[10] On January 18, 2018, BMO requested a preliminary hearing to determine whether the adjudicator had jurisdiction to hear the unjust dismissal complaint despite the release. Citing a stream of arbitration cases, BMO argued that adjudicators do not have jurisdiction to hear complaints of unjust dismissal when the parties sign a release agreement. In an amended preliminary decision rendered April 20, 2018, adjudicator Webster concluded she was bound by the Federal Court's decision in *National Bank*, and thus had jurisdiction to hear the complaint of unjust dismissal. BMO sought judicial review of this decision to the Federal Court.

II. Federal Court Decision

[11] On December 21, 2018, Justice Fothergill of the Federal Court found in favour of Ms. Li. First, he rejected BMO's argument that the adjudicator's decision raised a true question of jurisdiction and was therefore subject to a standard of correctness. He relied on the Supreme Court's decision in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 [*Wilson*], which similarly involves an adjudicator's interpretation of unjust dismissal provisions of the Code, for the proposition that decisions of labour adjudicators interpreting their home statute attract a reasonableness standard. Citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 [*Alberta Teachers*], Justice Fothergill pointed out that true questions of jurisdiction are exceptional, and that the Court has not found one since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1

S.C.R. 190 [*Dunsmuir*]. Justice Fothergill then asserted that he was bound by *National Bank*, and quoted from this Court's reasons in that case (at para. 24 of his reasons, citing *National Bank FCA*, at para. 4):

> […] we are all of the view that the motions judge made no error in his interpretation of sections 168 and 240 of the Code and their relationships with a settlement reached between an employer and an employee upon dismissal. Section 168 protects the right of an employee to complain of an unjust dismissal even if that employee has signed a contract by which his or her employment is terminated. Indeed, it is not difficult to envisage a situation where an employee could, after having signed such a contract, realize that the termination of his or her employment is not the result of a legitimate business restructuration as he or she was led to believe, but is instead a coloured or disguised attempt at wrongfully dismissing her or him. This shows the wisdom of the Code in protecting an employee's access to the remedies against unjust dismissal notwithstanding the signature of a termination contract between the parties.

[12] Justice Fothergill acknowledged BMO's policy argument that *National Bank* dis-incentivizes employers from settling with employees. However, he asserted that policy arguments alone are insufficient to overturn *National Bank*.

[13] Justice Fothergill also acknowledged that there is conflicting case law at the adjudicator level responding to *National Bank*. Some ignore it, others distinguish it, and still others follow it. However, Justice Fothergill reiterated that arbitral decisions which depart from *National Bank* are bad law.

[14] Lastly, Justice Fothergill noted BMO's argument that other regulatory regimes allow individuals to release claims that their statutory rights have been breached. These include Ontario's *Pay Equity Act*, R.S.O. 1990, c. P.7 and *Human Rights Code*, R.S.O. 1990, c. H.19. However, Justice Fothergill found these regimes to be of little help. Not only do they lack the

precise equivalent of subsection 168(1) of the Code, but the jurisprudence diverges in those regimes too. For all of those reasons, Justice Fothergill upheld the adjudicator's decision.

III. Issues

[15] In my view, the only substantive issue raised in this appeal is whether the adjudicator (and the Federal Court) erred in following *National Bank*. Before answering this question, we must also determine the applicable standard of review.

IV. Legislative Scheme

[16] Part III of the Code deals with standard hours of work, wages, vacations and holidays.

[17] Division XIV of Part III of the Code, comprised of sections 240 to 246, sets out an inspection and adjudication regime for dealing with complaints of unjust dismissal from terminated, non-unionized employees. At the time of Ms. Li's complaint, the regime was as follows. An inspector was tasked with assisting the parties to achieve a settlement (s. 241(2)). If they were unable to reach a resolution, the complaint may then have been referred to an adjudicator for decision (s. 241(3)). The adjudicator then heard the complaint and decided whether the dismissal was unjust, and granted or denied remedies accordingly (s. 242). Pursuant to subsection 242(4), the adjudicator possessed a broader range of remedies than did the courts; however, participation in the adjudication regime was not mandatory, and terminated employees retained the ability to bring claims before the courts (s. 246(1)). This regime has now been modified to replace the adjudicator with the Canada Industrial Relations Board.

[18] Of crucial importance for the resolution of this appeal is subsection 168(1) of the Code. It states that Part III applies notwithstanding any contract to the contrary, unless the contract is more favourable to the employee than the rights granted to the employee under the regime. It reads as follows:

168(1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.	168(1) La présente partie, règlements d'application compris, l'emporte sur les règles de droit, usages, contrats ou arrangements incompatibles mais n'a pas pour effet de porter atteinte aux droits ou avantages acquis par un employé sous leur régime et plus favorable que ceux que lui accorde la présente partie.

[19] It is the interpretation of subsection 168(1), in light of sections 240 to 246, that is at the heart of this appeal.

V. Analysis

A. *Standard of Review*

[20] Since hearing this appeal, the Supreme Court has released its long-awaited and much-anticipated trilogy of decisions that are meant to re-articulate the law applicable to the judicial review of administrative decisions and to clarify some aspects of the jurisprudence that followed the seminal decision of *Dunsmuir*. The gist of the Supreme Court's reasoning is found in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]. The other decision originated from two other appeals of rulings from this Court, namely *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66.

[21] Anticipating this development, counsel for the appellant made his submissions on the basis of existing jurisprudence, but explicitly sought the right to revisit them once the trilogy was released. Having carefully considered the new general framework put forward by the Supreme Court in the context of the particular issues raised by this appeal, I am not convinced that further submissions are necessary.

[22] When sitting in appeal from the Federal Court on judicial review, this Court must determine whether the Federal Court identified the appropriate standard of review and applied it correctly. For all intents and purposes, this means stepping into the shoes of the Federal Court and focusing on the administrative decision itself (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45–46). Nothing in the trilogy has changed this approach.

[23] In the case at bar, BMO argues that the Federal Court was wrong to apply the reasonableness standard. Acknowledging that the standard of review typically applicable to labour adjudicators interpreting the Code is reasonableness because of the deference owed to administrative decision-makers interpreting their home statute, BMO argues that there are three reasons why this presumption is rebutted in this case. First, it argues that the question to be addressed is of central importance to the legal system and is outside the expertise of the adjudicator. Second, BMO submits that the ability of the adjudicator to hear the complaint in the face of the release agreement is a true question of jurisdiction. Third, it contends that there is significant conflicting jurisprudence among labour adjudicators on the issue. I will address each of these submissions in turn.

[24] First, it is worth emphasizing that reasonableness is more than ever the default standard of review. Indeed, the Supreme Court starts its analysis with respect to the determination of the applicable standard of review with "a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions" (*Vavilov*, at para. 16). Such a presumption, which was already well established following *Dunsmuir* especially in those cases where administrative decision-makers interpret their home statutes (see *Alberta Teachers*, at para. 30; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46 [*Saguenay*]; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 22 [*Edmonton East*]), derives essentially from the fact that Parliament and provincial legislatures have chosen (and permissibly so) to confer on an administrative decision-maker the responsibility to administer a statutory scheme. There is no need to resort to any other rationale (such as specialized expertise) to justify a presumption of reasonableness; the mere fact that legislators have opted for the creation of an administrative decision-maker (at whichever level of complexity) must be taken as an indication that it was meant to operate with a minimum of judicial interference (*Vavilov*, at paras. 24 and 30).

[25] Since the presumption of reasonableness is meant to give effect to the legislator's preference for administrative decision-making in certain matters, it necessarily follows that heed must also be paid to the legislator when a different intention can be deciphered. Such will be the case when a different standard of review is explicitly spelled out in a statute, or where an appeal mechanism has been provided to the parties who wish to challenge an administrative decision (*Vavilov*, at para. 17). Neither of these situations apply here.

(1) Questions of central importance to the legal system

[26] The presumption of reasonableness can also be displaced where required by the rule of law. Following *Dunsmuir*, general questions of law which are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" fell into this category (*Dunsmuir*, at para. 60). The second prong of that requirement has been abandoned by the majority in *Vavilov*, such that expertise no longer plays a role in the selection of the standard of review (*Vavilov*, at paras. 58–62).

[27] The appellant argues that the issue as to when parties may validly waive statutory entitlements is a question of central importance to the legal system as a whole because it extends well beyond the employment context and has wide implications for many other enactments in addition to the Code. The appellant relies for that proposition on *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 [*University of Calgary*], a case involving solicitor-client privilege.

[28] In my view, the question at issue in the case at bar is not one of fundamental importance, "with significant legal consequences for the justice system as a whole or for other institutions of government" (*Vavilov*, at para. 59). Unlike solicitor-client privilege, there is no constitutional dimension to the question of whether an employee can contract out of a specific provision of the Code. The answer to that question will not have legal implications for a wide variety of other statutes. Indeed, this question bears no similarity to the type of questions identified by the Supreme Court as falling into that category: scope of parliamentary privilege (*Chagnon v.*

Syndicat de la function publique et parapublique du Québec, 2018 SCC 39, [2018] 2 S.C.R. 687); scope of the state's duty of religious neutrality (*Saguenay*); application of the doctrines of *res judicata* and abuse of process (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77); limits on solicitor-client privilege (*University of Calgary*). It is not sufficient to dress the issue as a matter of broad statutory interpretation relating to the distinction between prospective and retrospective waiver, as attempted by the appellant; as the Supreme Court cautioned, framing an issue in a general or abstract sense is not sufficient to make it a question of central importance to the legal system as a whole (*Vavilov*, at para. 61).

(2) True questions of jurisdiction

[29] BMO's second argument, to the effect that the ability of the adjudicator to hear the complaint despite the release signed by the respondent is a true question of jurisdiction, is also devoid of any merit. It is no doubt true, as stressed by the appellant, that the adjudicator did characterize BMO's preliminary objection as an issue of jurisdiction and that Justice Rothstein himself characterized the issue as a "jurisdictional" one reviewable for correctness in *National Bank* at paragraphs 6–7.

[30] Even if I were to assume that the question raised by BMO is a true question of jurisdiction, however, it would still be insufficient to apply the standard of correctness. Despite recognizing a narrow category of true jurisdiction questions calling for correctness in *Dunsmuir*, the Supreme Court failed to identify any such questions afterwards, which prompted many of its members to doubt the usefulness of such a category of questions. In *Alberta Teachers*, Justice Rothstein went as far as stating that "the time has come to reconsider whether, for purposes of

judicial review, the category of true questions of jurisdiction exists" (at para. 34; see also *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 25; *Edmonton East*, at para. 26; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230, at paras. 31–41 [*Canadian Human Rights Commission*]; *Québec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at paras. 32–36).

[31] In *Vavilov*, the majority decided to do away completely with that category of questions because of the "slippery" nature of the concept of jurisdiction and of the difficulty of identifying these questions and distinguishing them from other questions of statutory interpretation. Accordingly, questions of jurisdiction will henceforth be dealt with by applying the reasonableness framework. As the majority stated, "precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker" (at para. 68).

(3) Conflicting adjudicator jurisprudence

[32] Finally, the alleged conflicting jurisprudence among labour adjudicators on the issue to be decided does not warrant a standard of correctness either. Indeed, BMO itself acknowledges as much at paragraph 22 of its memorandum of fact and law, but relies on paragraph 52 of *Canadian Human Rights Commission* for the proposition that this inconsistency nevertheless lends support to a correctness standard when considered with other factors. Yet, even this does not hold true anymore following *Vavilov*. In this most recent decision, the majority espoused the view that the more robust form of reasonableness review, combined with internal administrative

processes, are sufficient to ensure legal coherence and to guard against threats to the rule of law (*Vavilov*, at para. 72).

[33] For all of the above reasons, I am therefore of the view that the presumption of reasonableness review applies and has not been rebutted either by clear legislative direction to the contrary or out of respect for the rule of law. The Federal Court therefore identified the proper standard of review. That being said, I am also of the view that applying a standard of correctness would not affect the outcome of this appeal, as I shall now endeavour to demonstrate.

B. *The National Bank Decision*

[34] The facts of *National Bank* are quite similar to the facts in the present case. A terminated employee signed a release agreement which discharged her employer from any and all claims arising from that termination in exchange for a lump sum of money plus relocation counselling. Two weeks later, after having received the funds and relocation counselling, the former employee filed a complaint alleging unjust dismissal under section 240 of the Code. The employer then brought a judicial review application, arguing *inter alia* that the Minister was without jurisdiction to appoint an adjudicator given the release, and that to find otherwise would be an impermissible intrusion into the parties' freedom to contract. The Federal Court (*per* Justice Rothstein) dismissed this objection on the basis that subsection 168(1) of the Code prohibits employees from contracting out of their statutory right to bring unjust dismissal complaints. The Court accepted the Minister's justification of this intrusion as being the establishment of a safety net of minimum requirements for employees. In the Court's view, a consideration of the subjects addressed in Part III of the Code (such as minimum wages and

maximum hours of work), as well as the text of subsection 168(1), supports this view. As Justice Rothstein wrote (at para. 8):

> In short, if a contract is more beneficial to an employee than rights under Part III, the contract will govern; if less beneficial, Part III will govern. Thus subsection 168(1) provides that while parties may freely enter into binding contracts respecting conditions of employment and termination, such contracts are subject to minimum statutory requirements in favour of employees.

[35] Justice Rothstein's reasons in *National Bank* address many of the arguments made by BMO in the case at bar. Notably, he acknowledged the potential of a chilling effect on voluntary settlements between terminated employees and employers if such release agreements are not considered binding. Justice Rothstein appreciated this concern "at a policy level", but nevertheless felt bound by the legislative scheme adopted by Parliament "which, for better or worse, is by its effect, interventionist in employer-employee relations" (*ibid.*, at para. 20). He also noted that the Minister has a broad discretion when deciding whether or not to appoint an adjudicator, and may take into consideration the existence of a prior settlement (*ibid.*, at para. 22). If and when an adjudicator is appointed, the settlement remains a consideration in their decision to make an award; if the amount received under a settlement agreement equalled or exceeded the amount that would have been ordered under subsection 242(4) of the Code, the adjudicator may well decide not to make any award.

[36] As previously mentioned in paragraph 11 of these reasons, this Court upheld *National Bank* with short reasons.

C. *Should this Court Decline to Follow National Bank?*

[37] The issue before us is whether it was reasonable for the adjudicator to follow the decision of this Court in *National Bank FCA*. As a matter of principle, an administrative decision-maker is bound to follow applicable precedents originating from any court, let alone a court of appeal; the doctrine of *stare decisis* calls for no less (*Tan v. Canada (Attorney General)*, 2018 FCA 186, 427 D.L.R. (4th) 336, at para. 22 [*Tan*]). Courts themselves may depart from precedent in exceptional circumstances. The Supreme Court has acknowledged that the certainty and predictability of *stare decisis* must sometimes give way when a case has been wrongly decided, or where the economic, social and political circumstances underlying a decision have changed (see *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 56–57; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at paras. 24–27; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 47; *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317, at para. 65; *Vavilov*, at para. 18).

[38] This Court has similarly noted that precedents may sometimes be revisited and that the doctrine of *stare decisis* is not inflexible. Such will be the case when it has been demonstrated that a decision was "manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed" (*Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149, at para. 10). Most recently, a panel of this Court reiterated that an earlier decision need not be followed if it has been overtaken by subsequent Supreme Court jurisprudence, or if there are compelling reasons not to do so (*Tan*, at para. 31).

[39] BMO submits that this Court should depart from its earlier decision in *National Bank FCA* for three reasons. First, it argues that *National Bank* was wrongly decided because it conflates prospective and retrospective waivers of statutory rights, ignoring the common law principle permitting retrospective waiver. Second, BMO insists that there are compelling policy reasons for upholding retrospective releases of unjust dismissal complaints. And third, it alleges that overturning *National Bank* will enhance certainty and predictability in the law. Let us look at each of these claims.

(1) Does subsection 168(1) allow retrospective waiver of statutory rights?

[40] At common law, employees were permitted to waive statutory rights enacted solely for their individual benefit. According to BMO, subsection 168(1) of the Code displaces that common law rule, thereby assimilating the rights protected in Part III of the Code with those enacted for the public benefit, rights that cannot be waived. Yet, BMO submits that there is a large body of jurisprudence (of which Parliament is presumed to have been aware) according to which the retrospective release of statutory rights is permissible even if the rights were enacted in the public benefit or expressly immunized from waiver. In other words, BMO argues that rights cannot be waived before they arise, but can be waived after they accrue.

[41] Following from this, subsection 168(1) would only prohibit the contracting out of Part III rights before they actually arise (e.g. in an employment agreement entered into at the outset of the employment relationship), but would not prevent an employee from waiving their rights once the facts triggering an unjust dismissal complaint have occurred. BMO thus argues that *National*

Bank should no longer be followed because it wrongly conflates the fundamental distinction between prospective and retrospective waivers of statutory rights.

(a) *Parliament's intention*

[42] Parliament is presumed to have been aware of the jurisprudence on retrospective and prospective release of statutory rights. BMO therefore concludes that in the absence of clear wording to the contrary, it must be assumed that Parliament did not want to detract from this jurisprudence in enacting subsection 168(1) of the Code.

[43] While at first sight attractive, this reasoning is nevertheless flawed in many respects. First of all, BMO's argument with respect to Parliament's intention can be turned on its head; to the extent that subsection 168(1) does not distinguish between prospective and retrospective waivers, such a distinction should not be drawn. Indeed, section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, prescribes that every enactment is deemed remedial and shall accordingly be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". This rule is particularly apposite to what Justice Rothstein characterizes in *National Bank* as a "safety net of minimum requirements for employees" (at para. 8, referring to Part III of the Code). It is also consistent with Parliament's intent in establishing the unjust dismissal scheme, which the then Minister of Labour characterized as a "protection the government believes to be a fundamental right of workers and already a part of all collective agreements" (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration, Respecting Bill C-8, an Act to Amend the Canada Labour Code*, No. 11, 3rd Sess., 30th Parl., March 16, 1978, at p. 46, cited in *Wilson*, at para. 43).

[44] Second, it is also to be noted that Parliament has amended the Code on a number of occasions since *National Bank* was released, most recently in 2017 when it repealed subsections 242(1) and (2). Had Parliament been of the view that *National Bank* was wrongly decided, it could easily have intervened and amended subsection 168(1) to allow explicitly for the interpretation put forward by BMO. It did not.

(b) *The jurisprudence on retrospective waiver*

[45] The jurisprudence relied upon by BMO in support of its distinction between prospective and retrospective waiver is, for the most part, easily distinguishable from the case at bar because the schemes at issue therein have no statutory equivalent to the anti-waiver provision at subsection 168(1) of the Code.

[46] For example, in *Potash v. Royal Trust Co.*, [1986] 2 S.C.R. 351, 69 N.R. 286, the Supreme Court held that a mortgagor could elect not to exercise its statutory right to prepay a mortgage with a term of more than five years once at least five years had expired. Far from "contracting out" or waiving his right, the Court said the mortgagor simply made a conscious decision after the expiry of five years to enter into a renewal contract which deemed a restart of the five-year clock. However, the mortgage scheme at issue had no statutory equivalent to subsection 168(1) of the Code.

[47] The same is true of most of the other cases relied upon by BMO for its distinction between prospective and retrospective waiver.

[48] At issue in *Garcia Transport Ltée. v. Royal Trust Co.*, [1992] 2 S.C.R. 499, 139 N.R. 81, [*Garcia*], for example, were provisions of the *Civil Code of Lower Canada* [CCLC] providing a debtor with the right to be discharged from a secured debt on the sale of the immovable guaranteeing the debt. Once again, the Supreme Court accepted that a valid waiver can be given after the party in whose favour the protection has been granted has acquired the right created under the legislation (i.e., after the sale has taken place). There was, however, no provision equivalent to subsection 168(1) of the Code in the chapter of the CCLC dealing with the discharge of certain debtors. In *Canada (Minister of National Revenue) v. Gee*, 2002 FCA 4, 284 N.R. 321, and *Wieler v. Saskatoon Convalescent Home*, 2017 SKCA 90, [2018] 7 W.W.R. 567, there were similarly no equivalent prohibitions against contracting out of the legislative regime as found in the Code.

[49] In *Isidore Garon Ltée. v. Tremblay*, 2006 SCC 2, [2006] 1 S.C.R. 27, there was indeed a parallel with subsection 168(1) of the Code: Article 2091 of the *Civil Code of Québec* required employers to provide reasonable notice when terminating an employee without cause, and Article 2092 expressly prohibited employees from renouncing this right. Yet, these provisions did not apply to the claimants because they were instead governed by the collective labour relations regime under the *Act respecting labour standards,* R.S.Q. c. N-1.1, which contained no similar statutory prohibition. Despite relying on *Garcia*, the majority's opinion that non-unionized employees can waive their Article 2091 right by entering into a settlement after the termination takes place is therefore pure *obiter*.

[50] The only case where parties were permitted to waive their rights notwithstanding a statutory prohibition is *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2017 ONCA 545 [*Trillium*]. At issue in this case was whether the waiver and release contained in a wind-down agreement between a car manufacturer and a number of car dealers was void and unenforceable under the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3. The releases in the agreement were comprehensive, and provided for a release of all claims under the Act. Section 11 of that same Act provided, however, that "any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void". The narrow issue in that case was whether the wind-down agreements signed by the dealers were settlement agreements and therefore fell within the judicially-developed exception to the application of section 11 of the Act articulated in another decision of the Ontario Court of Appeal. There is no such judicially-developed exception in the case at bar. More importantly, the economic objectives of the franchise legislation considered in *Trillium* are a far cry from the social policy objectives enshrined in Part III of the Code and the fundamental right of non-unionized workers not to be dismissed unfairly by their employers.

(c) *Application to the case at bar*

[51] Even if I were to accept BMO's submission that a prospective waiver ought to be distinguished from a retrospective waiver under subsection 168(1) of the Code, I am far from convinced that an employee signing a release agreement upon termination is always in a situation where the rights he or she renounces have accrued, or where it can truly be said that he or she simply decides not to exercise them. This Court explicitly referred to the possibility of an

employee not being aware of all the relevant circumstances surrounding his or her termination at the time of signing a release agreement with the employer in *National Bank FCA* at paragraph 4:

> Indeed, it is not difficult to envisage a situation where an employee could, after having signed such a contract, realize that the termination of his or her employment is not the result of a legitimate business restructuration as he or she was led to believe, but is instead a coloured or disguised attempt at wrongfully dismissing her or him. This shows the wisdom of the Code in protecting an employee's access to the remedies against unjust dismissal notwithstanding the signature of a termination contract between the parties.

[52] In the case at bar, the respondent argues that it is not entirely clear whether she was terminated "with just cause" or not. In the letter that was sent to her on March 29, 2017, BMO advised the respondent that her employment was terminated "[a]s a result of [her] inability to meet the performance requirements of [her] position". After she signed the release agreement, BMO issued a Record of Employment stating that she did not meet bank requirements, and a Form 33-109F1 ("Notice of Termination Information for an Individual") stating the reason for dismissal as "performance related". Yet, the respondent claims that she was terminated as a result of making a complaint to the human resources division and senior management of her employer alleging discrimination and harassment by her direct manager. She also contends that she is owed outstanding commission payments, and that she was misled as to her entitlement to such commissions in the event that she signed the release. Whether or not these claims have merit, it cannot be said with certainty that the respondent knowingly decided to renounce the rights provided by the Code or knew precisely what they were.

[53] In any event, if the adjudicator eventually finds that the respondent was unjustly dismissed and was terminated without cause, this is not the end of the matter. The adjudicator will then have to determine the proper remedy pursuant to subsection 242(4) of the Code, and

may require BMO to compensate the respondent, reinstate her or provide her with other relief that is equitable. There is no doubt in my mind that in assessing the proper remedy, the adjudicator will take the release agreement into consideration. Alternatively, the same will be true in those cases that fall outside the unjust dismissal regime. If an employee who has completed twelve consecutive months of employment is terminated, the release agreement will be factored in when calculating the minimum rate of severance pay pursuant to subsection 235(1) of the Code.

[54] I find, therefore, that BMO's argument that *National Bank* was wrongly decided and should be overturned because it conflates prospective and retrospective waivers of statutory rights is without merit.

(2) Are there compelling policy reasons to depart from *National Bank*?

[55] BMO argues compelling policy reasons favour overturning *National Bank*. In holding that retrospective waivers of unjust dismissal complaints are not binding, *National Bank* dissuades employers from offering more than the statutory minimum entitlements to employees until 90 days following dismissal. This creates a chilling effect on voluntary settlements and risks clogging the administrative system. This also harms the employees at a time when they are most vulnerable. Furthermore, it deprives employees of settlement leverage outside the 90-day period.

[56] There is no doubt that settlement agreements are to be encouraged, and that employers may be tempted to provide no more than the minimum entitlements in the first 90 days following

termination. But these are policy choices that are best left to Parliament. Justice Rothstein addressed that very same concern in *National Bank* and came to a similar conclusion (at para. 20):

> The concern seems to emerge in the decisions cited in Grossman that employees who have freely agreed to severance terms should not be able to resile from such agreements. Indeed, counsel for the Bank suggested that if such agreements are not considered binding and that employees, in addition, have recourse under the Code, there will be a chilling effect on voluntary settlements between terminating employees and employers. While I appreciate this concern at a policy level, and the many arguments that may be made as to the wisdom of allowing the ordinary law of contract to apply in these cases, I am bound by the legislative scheme adopted by Parliament which, for better or worse, is by its effect, interventionist in employer-employee relations.

[57] In my view, this is a complete answer to BMO's argument. Of course, Parliament could change course and recognize the binding nature of a settlement agreement entered into before an unjust dismissal complaint is filed, subject to an adjudicator retaining the authority to determine if such an agreement is vitiated by common law principles like fraud, duress or unconscionability. But this is not what subsection 168(1) provides for, and it is not for courts to change the law for policy reasons.

(3) Will overturning *National Bank* enhance certainty in the law?

[58] BMO argues that overturning *National Bank*, far from undermining the certainty and predictability of the law, will indeed enhance it. BMO's counsel contends that *National Bank* has only been followed in a handful of court cases, while others have distinguished it or referred to it ambivalently. The same would be true of adjudicators, several of whom having apparently ignored it altogether while others who have followed it have done so reluctantly.

[59] Having read the courts' cases and the adjudicators' decisions, I am of the view that they do not for the most part support BMO's claim of ambivalent reception of *National Bank*. The case which allegedly distinguished *National Bank* was a human rights case in which the Alberta Queen's Bench refused to follow *National Bank* on the basis that there was no provision in the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7 comparable to subsection 168(1) of the Code (*Chow v. Mobil Oil Canada*, 1999 ABQB 1026, 17 Admin L.R. (3d) 101, at para. 75). As for the case which referred "ambivalently" to *National Bank*, a careful reading shows that it does not pronounce on the rightness or wrongness of Justice Rothstein's decision, but merely notes that the adjudicator made no error in finding that no agreement was reached (*Bank of Montreal v. Chuanico*, 2001 F.C.T. 863 (F.C.), 2001 C.F.P.I. 863). On the other hand, *National Bank* was effectively followed in *Con-Way Central Express Inc. v. Armstrong* (1997), 153 F.T.R. 161, [1997] F.C.J. No. 1831, and in *Sigloy v. DHL Express (Canada) Ltd.*, 2015 FC 334, 2015 C.L.L.C. 210-032, aff'd 2016 FCA 78, 2016 C.L.L.C. 210-034. More importantly, *National Bank* has been endorsed by this Court unanimously.

[60] As for the adjudicators' conflicting decisions cited by BMO, they are of little help. Almost all of them do not specifically refer to *National Bank*, and it is difficult to discern if they were unaware of it or if they simply chose to disregard it and, if so, on what basis. In any event, the fact that some administrative decision-makers may not have followed judicial precedents is not sufficient to overturn them, especially when they have been standing for more than 20 years. If anything, upholding *National Bank* will create more certainty than overturning it.

VI. Conclusion

[61] For all the above reasons, and despite the able submissions of counsel for the appellant, I am of the view that this appeal should be dismissed, with costs (all inclusive) to the respondent in the amount of $500. The adjudicator made no error in refusing to depart from *National Bank*, and the Federal Court properly dismissed the application for judicial review of that decision.

"Yves de Montigny"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-46-19
STYLE OF CAUSE:	BANK OF MONTREAL v. YANPING (KATE) LI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 2, 2019
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	GAUTHIER J.A. LASKIN J.A.
DATED:	JANUARY 24, 2020

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