Date: 20170704

File: 561-02-706

Citation: 2017 FPSLREB 4

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

NELSON HUNTER

Complainant

and

UNION OF CANADIAN CORRECTIONAL OFFICERS - SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN

Respondent

Indexed as
Hunter v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

In the matter of a complaint made under section 190 of the *Federal Public Sector Labour Relations Act*

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Alain Tremblay, UCCO-SACC-CSN

Heard at Kingston, Ontario,
June 28, 2016.

I. Complaint before the Board

[1] On August 8, 2014, Nelson Hunter ("the complainant") filed a complaint with the Public Service Labour Relations Board (PSLRB) against the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN des syndicats nationaux (UCCO-SACC-CSN or "the respondent") under s. 190(1)(g) of the *Public Service Labour Relations Act* ("the *PSLRA*").

[2] The complainant filed his complaint in a Form 16, which was designated for complaints under s. 190 of the *PSLRA* (see s. 57 of the *Public Service Labour Relations Regulations* ("the *PSLRB Regulations*")). It states at paragraph 4 as follows:

> ***Concise statement of each act, omission or other matter complained of, including dates and names of persons involved:***
>
> > ***I am a Correctional Officer 2 (CX2) in the Correctional Service of Canada. I have been employed as a Correctional Officer continually since April 1991.***
> >
> > ***As a Condition of employment, I am a member of the Correctional Group, Operational category and bargaining unit. UCCO-SACC-CSN is the Bargaining Agent.***
> >
> > ***I was illegally expelled from UCCO-SACC-CSN membership in January 2005.***
> >
> > ***I filled a lawsuit against Ontario UCC-SACC-CSN President Jason Godin and UCCO-SACC-CSN for Defamation and on Aug 20 2012 a judgment was received in my favor from Ontario Superior Court of Justice; Mr. Justice John Johnston - Hunter vs Godin. –Court file No; CV-07-467-00***
> >
> > ***I applied in writing, to be reinstated to membership on March 5, 2014. I was sent a decision by Kevin Grabowsky, the National President of UCCO-SACC-CSN on April 16 2014 informing me that the UCCO-SACC-CSN National Executive, took a Unanimous decision not to reinstate my membership;***
> >
> > ***UCCO-SACC-CSN has acted arbitrarily and discriminated against my rights under the PSLRA. Division 12 Unfair Labour Practices; 187, 188 (b,c,d,e) and 189.***

[Sic throughout]

[Emphasis in the original]

[3] At paragraph 5 of the complaint form (Form 16), the complainant stated as follows for the date: "**Date on which the complainant knew of the act, omission or other matter giving rise to the complaint:** 16-04-2014" [emphasis in the original].

[4] Paragraphs 6 and 7 of the complaint (Form 16) are to be filled in only if the complaint alleges a breach of s. 188(b) or (c) of the *PSLRA*. The complainant filled out those paragraphs. At paragraph 6, he stated that the date on which a grievance or appeal was presented in accordance with any procedure established by the employee organization was March 5, 2014. And at paragraph 7, he stated that the date on which the employee organization provided him with a copy of the decision about the grievance or appeal referred to in paragraph 6 was April 16, 2014.

[5] On August 29, 2014, the respondent filed a response to the complaint, disputing the PSLRB's jurisdiction to deal with it as it concerned an internal union matter and not the duty of fair representation under s. 187 of the *PSLRA*.

[6] On September 23, 2014, the complainant filed a reply to the UCCO-SACC-CSN's August 29, 2014, response.

[7] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the PSLREB") to replace the former PSLRB as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[8] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the names of the Public Service Labour Relations and Employment Board, the *Public Service*

Labour Relations and Employment Board Act, the *Public Service Labour Relations Act* and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*") and the *Federal Public Sector Labour Relations Regulations*.

II. Summary of the evidence

[9] The complainant testified on his own behalf. The respondent called one witness, Kevin Grabowsky, who was at the material time the UCCO-SACC-CSN's national president.

[10] The complainant is currently employed as a correctional officer (classified CX-02) by the Correctional Service of Canada (CSC) at Bath Institution, in the Kingston, Ontario, area. He has been with the CSC since 1991.

[11] The UCCO-SACC-CSN is the certified bargaining agent for the Correctional Services Group bargaining unit, which comprises correctional officers (CXs) across the country. The complainant is covered by that bargaining unit. Until January 2005, he was also a member of the UCCO-SACC-CSN; he was expelled from it that month.

[12] The UCCO-SACC-CSN is governed by a constitution most recently amended in May 2013 ("the constitution"). Chapter three is entitled "Members", and the relevant portions state the following:

> ***3.01 DEFINITION***
>
> *Members are those who exercise the rights conferred by the constitution. Just because a person pays union dues to UCCO-SACC-CSN does not grant that person membership to UCCO-SACC-CSN until that person fulfills the requirements of both articles 3.02 and 3.03. Every member is entitled to have the collective agreement and the UCCO-SACC-CSN constitution made available to them.*
>
> ***3.02 ELIGIBILITY***
>
> *To belong to the Union, a person must:*

> *a) Be covered by the Union's jurisdiction or be laid-off and maintain the right to be recalled to work, be dismissed and have a grievance that is supported by the Union, be on leave of absence with or without pay, or be on strike or lock-out [sic].*
>
> *b) Adhere to the constitution.*
>
> *c) Pay the initiation fee and union dues set at the Union's national assembly.*
>
> *d) Not belong to any other association whose social principles run counter to those of the Union.*
>
> *e) Must not be in conflict of interest with the Union's principles by acting in a supervisory position or any other work group where, after seven days, the person is no longer under the bargaining authority of UCCO-SACC-CSN.*
>
> ***3.03 INITIATION FEE***
>
> *Any person who aspires to become a member of the Union must pay his initiation fee, [sic] sign a membership form that contains a commitment to abide by the Union's constitution.*
>
> *Members' initiation fee is set at $2.00.*
>
> . . .
>
> [Emphasis in the original]

[13] Chapter four of the constitution is entitled "Resignation, Suspension, Expulsion, Reinstatement", and the relevant portions state as follows:

> . . .
>
> ***4.02 SUSPENSION OR EXPULSION***
>
> *A member may be subject to suspension or expulsion by the national executive if he:*
>
> *a) Refuses to abide by the commitments he made to the Union.*
>
> *b) Causes serious prejudice to the Union.*
>
> *c) Promotes an organization opposed to the interests of the Union or its members, or distributes propaganda on its behalf.*

Any member who is suspended or expelled shall lose all entitlement to Union benefits and privileges until he is no longer suspended or expelled.

4.03 SUSPENSION OR EXPULSION PROCEDURES

. . .

c) Before making its recommendation whether or not to suspend or expel a member, the regional executive must give at least eight days' notice in writing to the member in question, inviting the member to present his version before the regional executive. This notice must give the reasons for his suspension or expulsion, in writing, and indicate the time and place where the meeting is to be held.

d) Under exceptional circumstances the national executive may suspend or expel a member, following the same procedures as c).

. . .

4.04 MEMBERS' RECOURSES

A suspended or expelled member has the following recourse:

a) If a member has been suspended or expelled wishes [sic] to appeal a recommendation made by the regional executive and ratified by the national executive, he must file an appeal in writing with the national vice president within 30 calendar days of the decision being ratified by the national executive.

b) In the event of an appeal, the member shall appoint a representative within ten days and the regional executive shall do the same. The two sides shall then try to agree on the choice of a chairperson. If they fail to agree, the national executive shall be called upon to choose a chairperson.

c) The deadline for appointing a representative is ten calendar days from the date of the appeal. To appoint a chairperson, the national executive shall have ten calendar days as of the date it was presented with the request.

d) The arbitration board thus appointed shall decide the procedure it intends to follow. It must hear both parties' presentations before rendering its decision, unless one of the parties waives its right to be heard.

> *e) A majority decision is final and obligatory for the parties involved, and must be rendered as promptly as possible.*
>
> *f) If the member wins the appeal, the Union shall pay the expenses of the arbitration board and reimburse the salary and expenses of the member who filed the appeal, where applicable. If the member loses the appeal, he must absorb the costs of his representative and his expenses and salary that ensued from presenting the case before the board. All expenses will be paid in accordance with the Union's Reimbursement Policy for Expenses and Salary.*
>
> *g) The Union is responsible for expenses incurred by the chairperson of the arbitration board.*
>
> *h) The two parties may agree to proceed before a single arbitrator.*
>
> *i) A Union member's suspension or expulsion shall not take effect until the appeal is completed, if applicable.*
>
> ***4.05 REINSTATEMENT***
>
> *a) To be reinstated, a resigned member, suspended or expelled member, must apply for reinstatement in writing and be accepted by all of the following: local general assembly from which he was originally suspended or expelled, regional executive from the region he was originally suspended or expelled and then by the national executive.*
>
> *b) A member, that was suspended or expelled directly by the national executive, must apply for reinstatement in writing and be accepted by the national executive.*

[14] The complainant testified that sometime after the UCCO-SACC-CSN became the certified bargaining unit for correctional officers, he and some fellow CXs took issue with some parts of the platform the respondent put forward in its bargaining for a collective agreement. In that vein, the complainant became active with the International Association of Machinists and Aerospace Workers ("IAMAW") and began to actively campaign to replace the respondent as the certified bargaining agent. In association with the IAMAW, they formed the National Association of Federal Correctional Officers (NAFCO). The complainant stated that during this time, he was on leave from his position with the CSC and that he was being paid by the IAMAW.

[15] The complainant stated that during this period, when he was active with the IAMAW and the NAFCO movement to unseat the UCCO-SACC-CSN as the certified bargaining agent for the Correctional Services Group bargaining unit, the respondent sent him a notice to attend a hearing in January 2005 about his proposed expulsion from membership with it. He testified that he did not attend the hearing and that he was expelled from membership in January 2005. He said that a lawyer sent a letter about the expulsion on his behalf; however, he received no response from the UCCO-SACC-CSN. He testified that its national executive expelled him.

[16] The complainant stated in cross-examination that after he was expelled in January 2005, at no time did he avail himself of the recourse provisions set out in clause 4.04 of the constitution.

[17] The complainant testified that the IAMAW's move to unseat the UCCO-SACC-CSN was unsuccessful. In 2007, the complainant and other CXs became active with the Teamsters Union, again for the purpose of removing the UCCO-SACC-CSN as the certified bargaining agent for the Correctional Services Group bargaining unit. This attempt was also unsuccessful.

[18] In 2007, the complainant and another CX commenced a defamation action against the respondent and two members of its executive. The respondent and the executives counterclaimed against the complainant. A decision was rendered in the action on August 20, 2012. Damages were awarded to the complainant, and he was liable to the respondent for damages in the counterclaim (*Hunter & Boyd & NAFCO v. Godin & Mallette & UCCO*, 2012 ONSC 4774).

[19] The complainant testified that sometime in 2008, he applied to be reinstated as a member of the UCCO-SACC-CSN. He stated that he recalled receiving a letter from it requesting him to provide more information with respect to his request for reinstatement. He said that he never responded to that request and that he received no further correspondence on the matter from the UCCO-SACC-CSN. Neither letter was provided to me in evidence.

[20] The complainant stated that sometime in early 2014, he wrote a letter to the UCCO-SACC-CSN, in which he requested reinstatement. He did not have a copy of it, but the complaint stated that it was dated March 5, 2014. In cross-examination, he agreed that the letter was short — no more than six lines long. Mr. Grabowsky recalled

receiving it and stated that he believed that he received it in March 2014 because he had the issue placed on the agenda for the next national executive meeting, which was scheduled for April 2014. He stated that his recollection of the letter was that it was very short — not even three lines long. In essence, the letter simply asked that the complainant be reinstated.

[21] According to the complaint, on April 16, 2014, via email, the complainant was advised that his reinstatement request was denied. He received the same advisory in a letter dated May 22, 2014, which stated as follows:

. . .

> *The national executive committee has examined your application for reinstatement as a member of UCCO-SACC-CSN.*
>
> *The Union's constitution stipulates as follows:*
>
> > "4.05
> >
> > (…)
> >
> > b) A member, that was suspended or expelled directly by the national executive, must apply for reinstatement in writing and be accepted by the national executive."
>
> *Your request was submitted and discussed at the April 1st and 2nd National Executive Committee Meeting. The National Executive took the unanimous decision to not reinstate you as a member of UCCO-SACC-CSN.*
>
> *Please note that this letter was also sent to you by email on April 16, 2014.*

. . .

[22] The complainant testified that his local executive supported his reinstatement. He produced a copy of an email sent to him and dated June 21, 2016, from Colin Coates, who he said was the Bath Institution local president. The email stated as follows:

> *On March 18th, 2015 the local executive of Bath Institution held a quarterly meeting chaired by myself, local president Colin Coates. One of the items on the agenda was the reinstatement of expelled UCCO-SACC-CSN member Mr. Nelson Hunter. In this meeting the local executive indicates*

> *their support for Nelson's reinstatement; and their desire to have this discussed at the next regional executive meeting of UCCO-SACC-CSN. The motion to move this forward was adopted and Nelson's case was brought forward regionally.*
>
> *At the next regional executive meeting of UCCO-SACC-CSN on or about March 25th, 2016, Nelson's request for reinstatement was deliberated. However no decision could be made because he had been expelled by the national level of the union. The constitution of UCCO-SACC-CSN indicates that a request for reinstatement must first be made at the level for which the decision to expel was first adopted.*
>
> *It is our understanding that when the national executive met in April 2015, they did consider Nelson Hunters written request for reinstatement into the union, However* [sic] *they ultimately denied it. As a result I met with the regional president Rob Finucan to discuss the details during our next regional executive meeting. On April 15th 2015 at the regional executive Rob explained to me that the rationale for denying Nelsons [sic] request was made because he did not provide enough information. It was therefore felt by the national executive that considering past actions taken by Nelson Hunter to raid the current union, that he need to explain in greater detail his reasons for now wanting to be an active part of it.*
>
> . . .

[23] Mr. Coates did not testify.

[24] Mr. Grabowsky has been with the CSC since 1979 and has been active at the respondent's executive levels since it became the certified bargaining agent for the Correctional Services Group bargaining unit. He was initially a regional president for the Prairie Region and then in 2013 was elected national president, a role he filled until May 2016.

[25] Mr. Grabowsky stated that during his tenure, suspensions and expulsions from the respondent took place. His best recollection was that between 10 and 12 occurred. He stated that also, reinstatement applications were received during his tenure, and that typically, they contain material outlining why the expelled or suspended member should be reinstated. Mr. Grabowsky testified about another situation, in which an expelled member sought reinstatement and was successful. He stated that in that case, in his application for reinstatement, the member explained why he wanted to be reinstated. He confirmed in cross-examination that that situation predated his tenure

as national president. While Mr. Grabowsky could not provide numbers, his recollection was that most requests for reinstatement have been granted and that in those cases, the applicants provided information setting out why they wished to be reinstated as union members and presented convincing dissertations for reinstatement.

[26] Mr. Grabowsky stated that he received the complainant's request for reinstatement and that he placed it on the agenda for the April 2014 National Executive Committee meeting. He said that it was discussed and that the decision was made to not reinstate the complainant. He stated that the complainant's request lacked any detail.

[27] Mr. Grabowsky testified that in his opinion, the complainant could have sought recourse under either clause 4.04 of the constitution or by reapplying for reinstatement since to Mr. Grabowsky's knowledge, there is no limit on how often an expelled or suspended member can apply for reinstatement under clause 4.05.

[28] In cross-examination, the complainant asked Mr. Grabowsky if to his knowledge other members of the National Executive Committee knew the complainant or knew of him. Mr. Grabowsky testified that he believed that some of them would have known of the complainant but that he expected that others would not have.

[29] In cross-examination, Mr. Grabowsky was asked if the constitution has changed over the years, to which he stated that it has.

[30] I was not provided with the dates of the different versions of the constitution or the specifics of any changes made to it over the years. I was not provided with any evidence of the differences between the copy of the constitution provided in evidence and any other version of it.

III. Summary of the arguments

A. For the complainant

[31] Unions are given authority to bargain collectivity under the *PSLRA*.

[32] The complainant referred to me ss. 5, 187, and 188 (b), (c), (d), and (e) of the *PSLRA*.

[33] With respect to s. 5 of the *PSLRA*, the complainant restated that he is free to join a union.

[34] The complainant said as follows about the UCCO-SACC-CSN's constitution:

- it has changed over the years;
- its language is harsh; and
- it is contrary to the provisions of the *PSLRA*.

[35] The complainant stated that he could apply to be reinstated only under clause 4.05(b) of the constitution. Nothing in that clause refers to a suspended or expelled member providing reasons or information as alleged by Mr. Grabowsky in his evidence. It merely states that an application must be made in writing. It also does not state anything about process or time frames.

[36] The complainant referred me to the UCCO-SACC-CSN's reply to his complaint, filed on August 29, 2014, which states the following on page 3 at paragraph 5:

> *Moreover, as for suspension and expulsion, the procedure of reinstatement is provided in the bargaining agent Constitution, section 4.05. This document is what governs the internal relations between the union and its members. Thus, we can see that the present case is clearly included in the scope of what constitutes "internal union matters".*

[37] There is no suggestion that the complainant skipped a step or did not follow a process.

B. <u>For the respondent</u>

[38] The respondent submitted that the complainant should have availed himself of the recourse (appeal) process set out in the constitution.

[39] With respect to the complainant's allegation that the respondent is in breach of s. 187 of the *PSLRA*, it argued that I lack jurisdiction under that section as the facts do not reflect a situation in which it acted in a manner that was allegedly in bad faith, discriminatory, or arbitrary in representing the complainant as there is no issue between him and his employer for which the respondent was required to represent or could have represented him. It referred me to *Sahota et al. v. The Professional Institute*

of the Public Service of Canada et al, 2012 PSLRB 114 at para. 46, which states as follows:

> *[46] I have no hesitation finding that the complainants' allegations and the nature of their complaint deal exclusively with internal union matters and that they fall outside the scope of the respondents' statutory duty of fair representation. Therefore, I lack the jurisdiction to deal with it.*

[40] The respondent submitted that the law in *Sahota et al.* is consistent with the decision in *Bracciale v. Public Service Alliance of Canada (Union of Taxation Employees, Local 00048)*, 2000 PSSRB 88 at para. 22, where it quotes *St-James v. Canada Employment and Immigration Union Component (Public Service Alliance of Canada)*, PSSRB File No. 100-1 (19920331), as follows: "It has been widely recognized that at least in the absence of specific provisions to that effect in its enabling statute, a labour relations board does not have supervisory authority to regulate the internal affairs of a bargaining agent…"

[41] The respondent also submitted for my consideration *Kowallsky v. Public Service Alliance of Canada et al.*, 2007 PSLRB 30, and *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103. With respect to *Bremsak*, the respondent stated that it only partially had bearing on this objection.

[42] The respondent submitted that if the expelled or suspended member has rehabilitative potential, then the process is all about that, and if that were put forward, then it would be considered. Mr. Grabowsky explained that in his evidence when he referred to clause 4.03, even though that clause did not apply directly to the complainant.

C. <u>Complainant's reply</u>

[43] The complainant submitted that *Bremsak* does apply in this case and that s. 188(e) of the *PSLRA* applies as there has been discrimination by the UCCO-SACC-CSN. The decision to not reinstate him was discriminatory. The UCCO-SACC-CSN has been discriminating against him for over 10 years, since it expelled him from membership.

[44] The complainant stated that the Ontario Superior Court of Justice found discrimination in his civil action against the respondent. He referred me to paragraph 54 of *Hunter & Boyd & NAFCO*, which states as follows:

[54] I agree with the Defendant's counsel that each of these issues in isolation do not constitute evidence of malice. Further the issue of malice is to be determined at the time the defamatory words were published: May 2007. All of the evidence must be considered as a whole, including the activity of UCCO, Mr. Godin and other National Executive members leading up to the 2004 Kingston meetings, the conduct at the Kingston meeting and the subsequent expulsion of Hunter and Boyd, without providing their lawyer with particulars for the reason of expulsion. They are factors that I can, and do, consider when considering if Mr. Godin's President's Report and specifically his defamatory comments about Mr. Hunter and Boyd were motivated by actual malice. I am left with the inescapable conclusion that there was concerted effort and plan to discredit members of NAFCO and anyone attempting to unseat UCCO as the official Bargaining agent for Federal Correctional Officers. The plan was reduced to writing prior to the Kingston meeting and I find it was pursued thereafter. The official position of UCCO was to be that NAFCO and Mr. Hunter and Boyd, in particular, were not simply mistaken when they made specific comments about UCCO and its bargaining tactics of its employer, but that they were 'liars'. The purpose of calling opponents liars was tactical and was part of the effort to defeat the raid. AS indicated earlier in this judgment, I reject MR. Godin's evidence that he independently assessed the evidence and came to his own conclusion that Mr. Hunter and Boyd were lying about UCCO. I further reject evidence that the leadership of UCCO itself considered all of the evidence and came to a similar conclusion. The evidence establishes on the balance of probabilities that all those attacking UCCO were to be called "liars" in an attempt to discredit them amongst other Correctional Officers and UCCO members. Mr. Godin and UCCO were prepared to say and do whatever they thought was necessary to defeat the raid. Notwithstanding the fact that the raid was completed by the time of Mr. Godin's Report in 2007, he and UCCO pursued its tactic of calling opponents of the Union "liars". While the raid by NAFCO stated in 2003 and concluded by 2006, Mr. Godin and UCCO were no doubt concerned about the possibility of future raids. The pattern of conduct of UCCO and Mr. Godin throughout the time of the NAFCO raid was to attack, even if it meant personal attacks on leaders of the "raiding" organization. By singling out Mr. Boyd and Mr. Hunter in 2007, UCCO at its National Assembly was sending a clear message to prospective raiders. The tactic was a continued tactic of intimidation by defamation.

For the foregoing reasons, I conclude that the evidence established, on the balance of probabilities, that the dominant purpose of the defamatory portions of Mr. Godin's comments in his President's Report as it relates to NAFCO, Mr. Hunter

> *and Mr. Boyd, was to single them out specifically. Mr. Godin's purpose was not simply to inform members of an important event that occurred in the life of the UCCO Union. Rather, the purpose was to deter Mr. Hunter, Mr. Boyd and like-minded individuals in the future from attempting to raid UCCO. The case law is clear that, where the dominant motive is an ulterior motive to the duty existing on the occasion of privilege, actual malice is proven. Given the history and circumstances in the period of the raid, Mr. Godin was consistent. He rejected and became angry when Mr. Hunter approached him in 2002 about the de-certification process; he actively participated with the National Executive of UCCO to prepare an Action Plan to demoralize Hunter and Boyd in NAFCO at its informational meeting in Kingston in 2004. He is the one who proposed expulsion from the Union of Hunter and Boyd and he is the Regional President who delivered the defamatory words at the National Assembly in 2007. Given this history, there is no other conclusion that can be reached on the evidence, other than the dominant motive of the Report relating to Hunter and Boyd was to single them out and subject them to intimidation and ridicule. This motive significantly departs from the duty he had as a Regional President, to inform the union membership of important events. Evidence of the dominant purpose is found in the consistent approach of UCCO and Mr. Godin to call adversarial organizers 'Liars', no simply people who have reached the wrong conclusion, or view facts differently.*

[45] The complainant submitted that the UCCO-SACC-CSN should have told him to provide more information as part of his application to the reinstatement process.

D. <u>Respondent's reply</u>

[46] *Hunter & Boyd & NAFCO* is not proof of discrimination; there was not any finding of any discrimination. It does not grant the Board jurisdiction. The membership issue within the UCCO-SACC-CSN was not an issue in the Ontario Superior Court of Justice proceeding.

[47] While the complainant stated that the respondent should have told him to provide more information, nothing prevented him from asking about it; indeed, in 2008, when he applied for reinstatement, the respondent's reply to him was a request for more information.

[48] The complainant should have followed the recourse (appeal) process set out in the constitution.

IV. Reasons

[49] The complainant filed his complaint under s. 190(1)(g) of the *PSLRA*, under which the Board is required to examine any complaint made to it that an employer, an employee organization, or any person has committed an unfair labour practice within the meaning of s. 185.

[50] The UCCO-SACC-CSN objected to the Board's jurisdiction to hear the complaint on the basis that this was not a matter encapsulated by s. 190 of the *PSLRA* and instead was a matter of internal union business. It also submitted that the complainant should have followed the recourse (appeal) provisions in the constitution.

[51] Section 185 of the *Act* states as follows: "In this Division, ***unfair labour practice*** means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1)" [emphasis in the original].

[52] Subsections 186(1) and (2) of the *Act* address situations of alleged employer actions, and as such have no bearing on the facts complained of in this case.

[53] The complainant submitted that he is protected by s. 187 of the *PSLRA*, which states as follows:

> ***187*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

[54] As s. 187 of the *Act* specifically refers to situations in which the employee organization is representing an employee in the bargaining unit, this case must involve such a situation. There is no evidence of one, and it was not argued that in this case, the respondent was representing the complainant in a matter involving the employer. As such, the complaint cannot be maintained under s. 187.

[55] While the complainant alleged a breach of s. 189 of the *Act*, there is no evidence and it was not argued that s. 189 of the *Act* applies to the facts of this case.

[56] The complainant submitted that the respondent breached ss. 188(b), (c), (d), and (e) of the *Act*, which state as follows:

> ***188*** *No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall*
>
> . . .
>
> ***(b)*** *expel or suspend an employee from membership in the employee organization or deny an employee membership in the employee organization by applying its membership rules to the employee in a discriminatory manner;*
>
> ***(c)*** *take disciplinary action against or impose any form of penalty on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner;*
>
> ***(d)*** *expel or suspend an employee from membership in the employee organization, or take disciplinary action against, or impose any form of penalty on, an employee by reason of that employee having exercised any right under this Part or Part 2 or having refused to perform an act that is contrary to this Part; or*
>
> ***(e)*** *discriminate against a person with respect to membership in an employee organization, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person has*
>
> ***(i)*** *testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part or Part 2,*
>
> ***(ii)*** *made an application or filed a complaint under this Part or presented a grievance under Part 2, or*
>
> ***(iii)*** *exercised any right under this Part or Part 2.*

[57] Subsections 190 (2), (3), and (4) of the *Act* state as follows:

> ***190 (2)*** *Subject to subsection (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*
>
> ***(3)*** *Subject to subsection (4), no complaint may be made to the Board under subsection (1) on the ground that an employee organization or any person acting on behalf of one has failed to comply with paragraph 188(b) or (c) unless*

> ***(a)*** *the complainant has presented a grievance or appeal in accordance with any procedure that has been established by the employee organization and to which the complainant has been given ready access;*
>
> ***(b)*** *the employee organization*
>
> > ***(i)*** *has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or*
> >
> > ***(ii)*** *has not, within six months after the date on which the complainant first presented their grievance or appeal under paragraph (a), dealt with the grievance or appeal; and*
>
> ***(c)*** *the complaint is made to the Board not later than 90 days after the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint.*
>
> ***(4)*** *The Board may, on application to it by a complainant, determine a complaint in respect of an alleged failure by an employee organization to comply with paragraph 188(b) or (c) that has not been presented as a grievance or appeal to the employee organization, if the Board is satisfied that*
>
> > ***(a)*** *the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or*
> >
> > ***(b)*** *the employee organization has not given the complainant ready access to a grievance or appeal procedure.*

[58] In *Bremsak*, the PSLRB stated that aspects of internal bargaining agent affairs are subject to its review under s. 188 of the *Act*. At paragraphs 61 and 62 of that decision, the PSLRB stated as follows:

> *61 . . . the Board's role under paragraph 188(*c*) is to ensure that the bargaining agent's standards of discipline are free from discriminatory action. Similarly, the role of the Board under paragraph 188(*e*) is twofold. First, it is to ensure that there is no discrimination against an employee with respect to membership in an employee organization and, second, to enforce the prohibition against intimidation, coercion or the imposition of a financial "or other penalty" because a person has filed an application or complaint under Part 1 of the* Act *or a grievance under Part 2 of the* Act.

> *62 Those provisions raise specific issues under the* Act *and they do not authorize the Board to act as the final arbitrator of all internal disputes within a bargaining agent. . . . Simply put, it is not for the Board to say what is a legitimate internal policy or rule or by-law of a bargaining agent except in narrow circumstances. These circumstances include where the policy, rule or by-law is itself discriminatory or its application has discriminatory consequences. Further, the* Act *prohibits intimidation or coercion because a person has made an application, complaint or grievance under Parts 1 and 2 of the* Act.

[59] In accordance with the reasoning in *Bremsak*, I have jurisdiction to hear the within complaint.

[60] Paragraph 188(c) does not apply to the facts of this case, as there is no evidence that the UCCO-SACC-CSN took disciplinary action or imposed a penalty upon the complainant by applying its standards of discipline to him in a discriminatory manner. The complaint arose from the UCCO-SACC-CSN's denial to reinstate the complainant's membership. Although he was expelled, which could be seen as disciplinary action or as a penalty, it occurred nine-and-a-half years before the complaint was filed. As such, it could not be the subject of a complaint as that was well outside the 90-day period within which the complaint had to be filed, as set out in s. 190(2) of the *Act*.

[61] Paragraph 188(d) does not apply to the facts of this case. Although the UCCO-SACC-CSN did expel the complainant, as set out previously in these reasons, it took place over nine years before the complaint was filed. There is not any evidence of and it was not argued that the UCCO-SACC-CSN denied the reinstatement request because the complainant exercised a right under Part 1 or Part 2 of the *Act*.

[62] This leaves ss. 188(b) and (e), which both refer to membership in an employee organization and discrimination. The complainant did not lead any evidence that he was discriminated against in any manner. He did not make any argument that he had been discriminated against, save for reading aloud ss. 188(b) and (e), and he also read aloud ss. 188(c) and (d) and 187. He made his argument with respect to being discriminated against only in reply, after the respondent had referred to the jurisprudence. In his reply argument, the complainant submitted that the Ontario Superior Court of Justice, in his defamation action (*Hunter & Boyd & NAFCO*), made a finding of discrimination. He referred me to paragraph 54 of that decision.

[63] I have thoroughly reviewed the decision in *Hunter & Boyd & NAFCO*. At paragraph 54, the Court deals with the issue of the evidence of malice as it relates to the action brought by the complainant and framed in defamation. While that paragraph does refer to the expulsion of the complainant from membership in the UCCO-SACC-CSN, it does so only to provide background context to the real issue being addressed, which is that of the evidence of malice as it relates to alleged defamatory statements made about the complainant and his co-plaintiff in that action. The decision does not make any findings about discrimination; nor is discrimination even mentioned.

[64] Despite that *Hunter & Boyd & NAFCO* does not refer to discrimination, it was not explained to me how the reasons in a case that was commenced in 2007 and decided in 2012 could be evidence of discrimination in a fact situation that occurred in 2014.

[65] The respondent argued that the complainant did not avail himself of the recourse (appeal) process set out in clause 4.04 of the constitution. As such, the Board would be without jurisdiction because the complainant has not exhausted the process as set out in ss. 190(3) and (4) of the *Act*. In turn, the complainant argued that the constitution and its wording have changed over the years, and he inferred that therefore he could not have known exactly what was required of him.

[66] I do not agree that clause 4.04 of the constitution states what the respondent submitted it states. It clearly states that an expelled or suspended member has the following recourse:

. . .

> *a) If a member has been suspended or expelled and wishes to appeal a recommendation made by the regional executive and ratified by the national executive, he must file an appeal in writing with the national vice-president within 30 calendar days of the decision being ratified by the national executive.*

. . .

[67] The appeal recourse in clause 4.04 of the constitution is not very clear. First, it appears to provide only for an appeal from a recommendation made by a regional executive that is ratified by the national executive. Second, the appeal must be filed

within 30 calendar days following the decision being ratified by the national executive. Third, given that it states an appeal must be filed within 30 days of the decision being ratified, that would imply that it is the decision to expel or suspend, because once the 30 calendar days have run out, the appeal period for suspended or expelled members is exhausted.

[68] While it could arguably be interpreted that it allows for a process to appeal a decision in a reinstatement request under clause 4.05(a), it would apply only if the reinstatement request were made to a regional executive that decided against the former member and if that decision is ratified by the national executive. However, that did not apply to the complainant because the national executive expelled him directly. Because of that fact, he could not apply for reinstatement under clause 4.05(a) of the constitution, only via clause 4.05(b), which applies to persons the national executive directly suspended or expelled. Therefore, the recourse (appeal) process set out in clause 4.04 does not apply to the complainant, and it was not available for him to use.

[69] So while the respondent's argument on this point fails, it does not help the complainant, as he was required to file his complaint within 90 days of the date on which he knew or in the Board's opinion ought to have known of the action or circumstances that gave rise to the complaint.

[70] Complaints filed with the Board under s. 190 of the Act are filed, according to s. 57 of the *Regulations*, in a Form 16.

[71] According to his evidence, the complainant knew of the decision to not reinstate him on April 16, 2014, as he set this out in his Form 16 at paragraph 5, where the question is posed as to the date on which the complainant knew of the act, omission, or other matter that gave rise to the complaint. Indeed, the complainant further stated the following in his complaint, in the addenda attached to his Form 16 in which he attached a concise statement of the acts, omissions, or other matters complained of, including dates and the names of persons involved:

. . .

> *I applied in writing, to be reinstated to membership on March 5, 2014. I was sent a decision by Kevin Grabowsky, the National President of UCCO-SACC-CSN on April 16, 2014 informing me that the UCCO-SACC-CSN National Executive,*

> *took a Unanimous decision to not reinstate his [sic] membership.*
>
> . . .

[72] The grievor further submitted into evidence a copy of Mr. Grabowsky's May 22, 2014, letter, which sets out the reinstatement denial and states: "Please note that this letter was also sent to you by email on April 16, 2014."

[73] In Form 16, paragraphs 6 and 7 are to be filled in only if the complaint alleges a breach of s. 188(b) or (c) of the *Act*. The complainant filled them out. At paragraph 6, he stated that the date on which a grievance or appeal was presented in accordance with any procedure established by the employee organization was March 5, 2014. And at paragraph 7, he stated that the date on which the employee organization provided him with a copy of the decision about the grievance or appeal referred to in paragraph 6 was April 16, 2014. However, it is clear from the evidence that the grievor has no appeal process to follow; that he misinterpreted this section and that he put in the dates he did alluding to appeal procedures in relation to the denial of his reinstatement, when they were not such procedures. In any event, this does not change the facts or the time frames in his case, as the relevant date remains April 16, 2014.

[74] The complainant filed his complaint with the PSLRB on August 8, 2014; that is, 114 days after the date on which he knew of the circumstances giving rise to it. Therefore, it is untimely.

[75] Unlike a grievance, for which the grievance procedure under the *Act* and the *Regulations* provides for extensions of time, there is no such power to extend the time to file a complaint under the *Act*.

[76] The complaint must fail because it is untimely.

[77] In any event, even if the complaint was not out of time, the complainant cannot fit the complaint into any of s. 187, 188, or 189(1). A complainant cannot simply state his or her belief that an injustice has taken place. The complaint must set out the facts upon which the complainant relies in proving his or her case to the Board. The complainant has failed to do so. As such, the complaint is dismissed.

[78] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[79] The complaint is dismissed.

July 4, 2017.

John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board