



LRB

British Columbia
Labour Relations Board

Workplace Sexual Harassment Grievances

When is the Labour Relations Board an option for
unionized employees

Jennifer Glougie, Chair
Jennifer O'Rourke, Staff Lawyer

Goals for today

Our goals for today are to

- discuss how employee rights are established and enforced
- explain the Code and the Board's mandate under it
- explain the three main ways individual employees may access rights under the Code (ss. 10, 12 and 99)
- suggest other potential forums for addressing issues arising as a result of workplace sexual harassment

Employment Law



- Judge-made
- You learn what the law is by reading past decisions (“precedent”)
- *Stare decisis*

Master & Servant Act, (1847)

II. And be it enacted, That after any such engagement as contemplated by this Act shall have been entered into, any person having thereby engaged to perform any service or work, and who shall, during the period of such engagement, and after the commencement of such employment, refuse to go to work, or who shall (without permission or discharge) leave the employ of the party whom he was engaged to serve, or who shall refuse to obey the lawful commands of the person under whose direction such services are to be performed, or who shall neglect the service or injure the property of such employer, shall (upon the complaint of such employer, or any person in charge under him) be liable to punishment for every such offence in the manner hereinafter provided

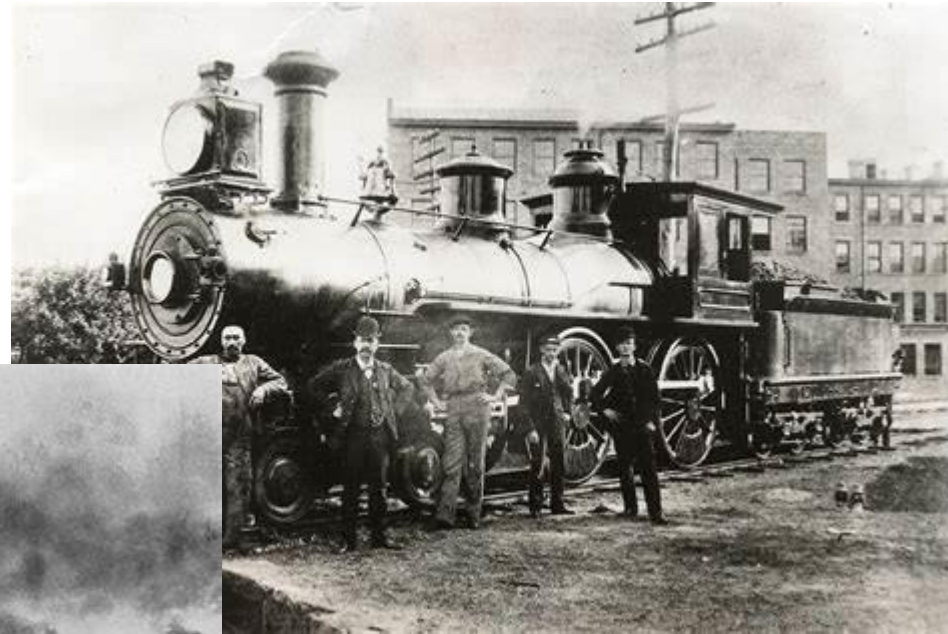
Master & Servant Act, (1847)

II. And be it enacted, That after any such engagement as contemplated by this Act shall have been entered into, any person having thereby engaged to perform any service or work, and who shall, during the period of such engagement, and after the commencement of such employment, refuse to go to work, or who shall (without permission or discharge) leave the employ of the party whom he was engaged to serve, or who shall refuse to obey the lawful commands of the person under whose direction such services are to be performed, or who shall neglect the service or injure the property of such employer, shall (upon the complaint of such employer, or any person in charge under him) be liable to punishment for every such offence in the manner hereinafter provided

Master & Servant Act, (1847)

VI. And be it enacted, That in every case of a summary conviction under this Act where the sum which shall be forfeited, or which shall be imposed as a penalty by the Justice, shall not be paid either immediately after the conviction or within such period as the Justice shall at the time of conviction appoint, it shall be lawful for the convicting Justice to commit the offender to the Common Jail of the District where such conviction shall have been had, there to be imprisoned for the time limited by such conviction.

Common law employment



Common law employment



Common law employment



Common law employment



Common law employment

- **Workers Compensation Act**
 - Provides coverage in the event of workplace injury or disease
 - Sets and enforces minimum safety standards
- **Human Rights Tribunal**
 - Prohibits discrimination on the basis of protected grounds including in the context of employment
- **Employment Standards Act**
 - Sets minimum employment standards (wages, vacation, leave, notice on termination, etc)

Common law employment



Common law employment



Unionized employment



Unionized employment



Unionized employment



Unionized employment



The Labour Relations Code

The Code regulates:

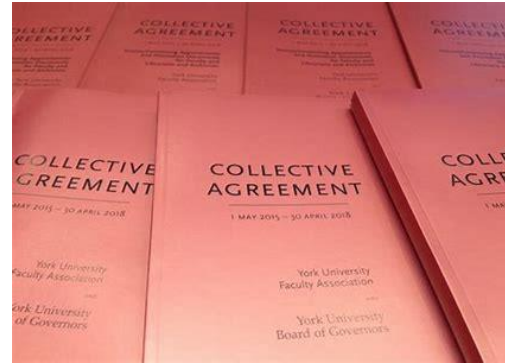
- the certification process (Part 3)
- collective bargaining procedures (Part 4)
- the exertion of economic pressure (strikes, lockouts, picketing, replacement workers) (Part 5)
- essential services (s. 72)

The Labour Relations Code

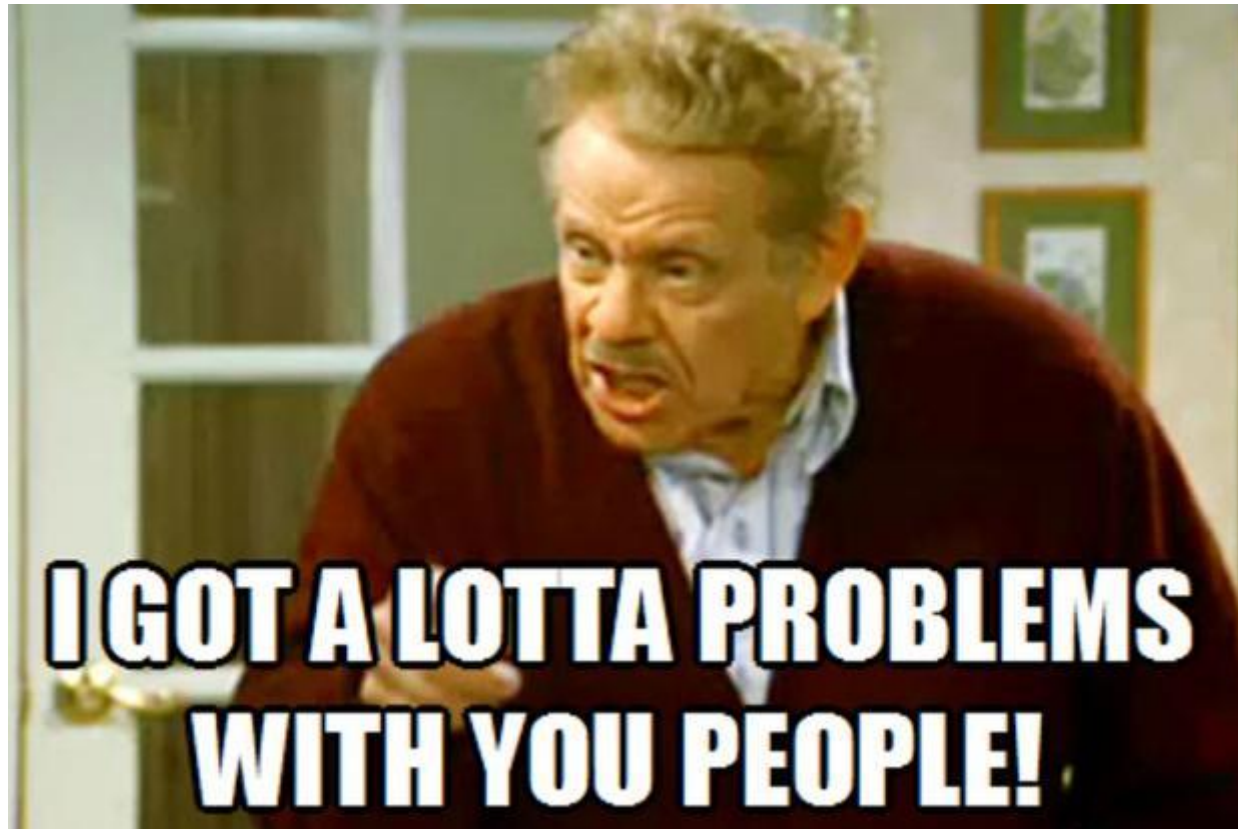
A collective agreement must include:

- “just cause” protection (s. 84(1))
- dispute resolution process (s. 84(2))
- joint consultation committee (s. 53)

Unionized employment



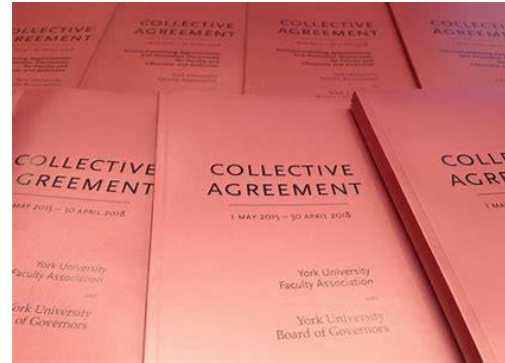
The Grievance process



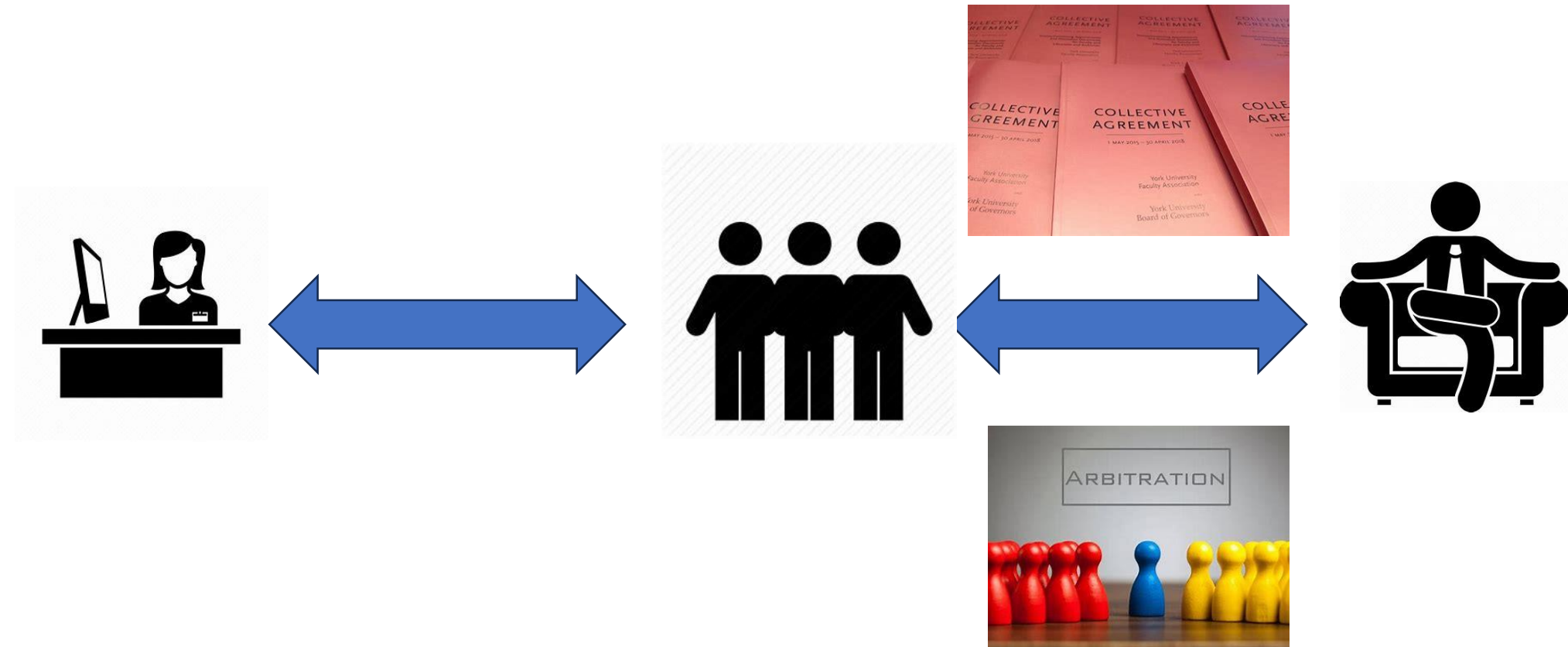
Common law employment



Unionized employment

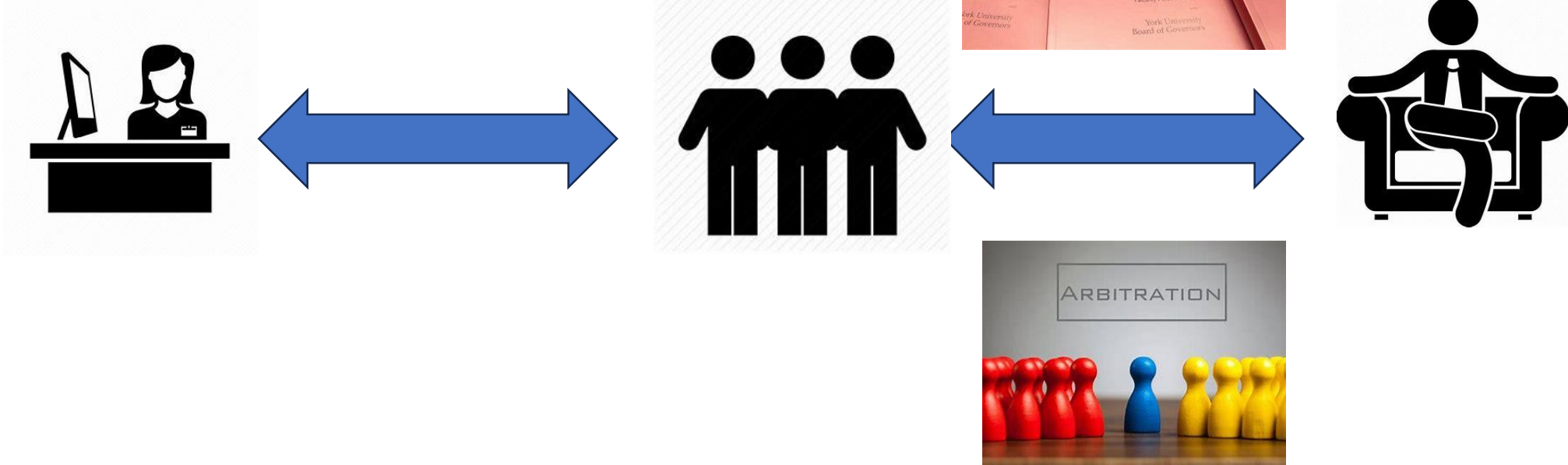


Unionized employment

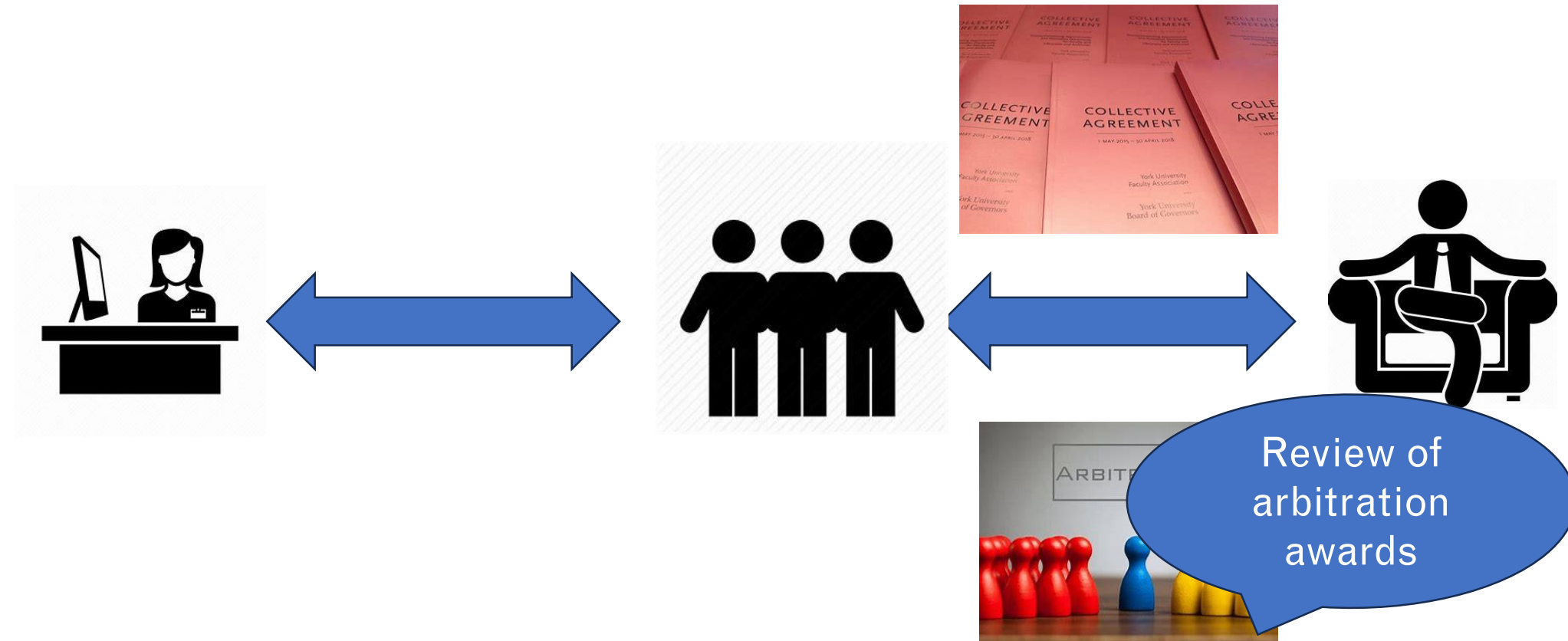


Unionized employment

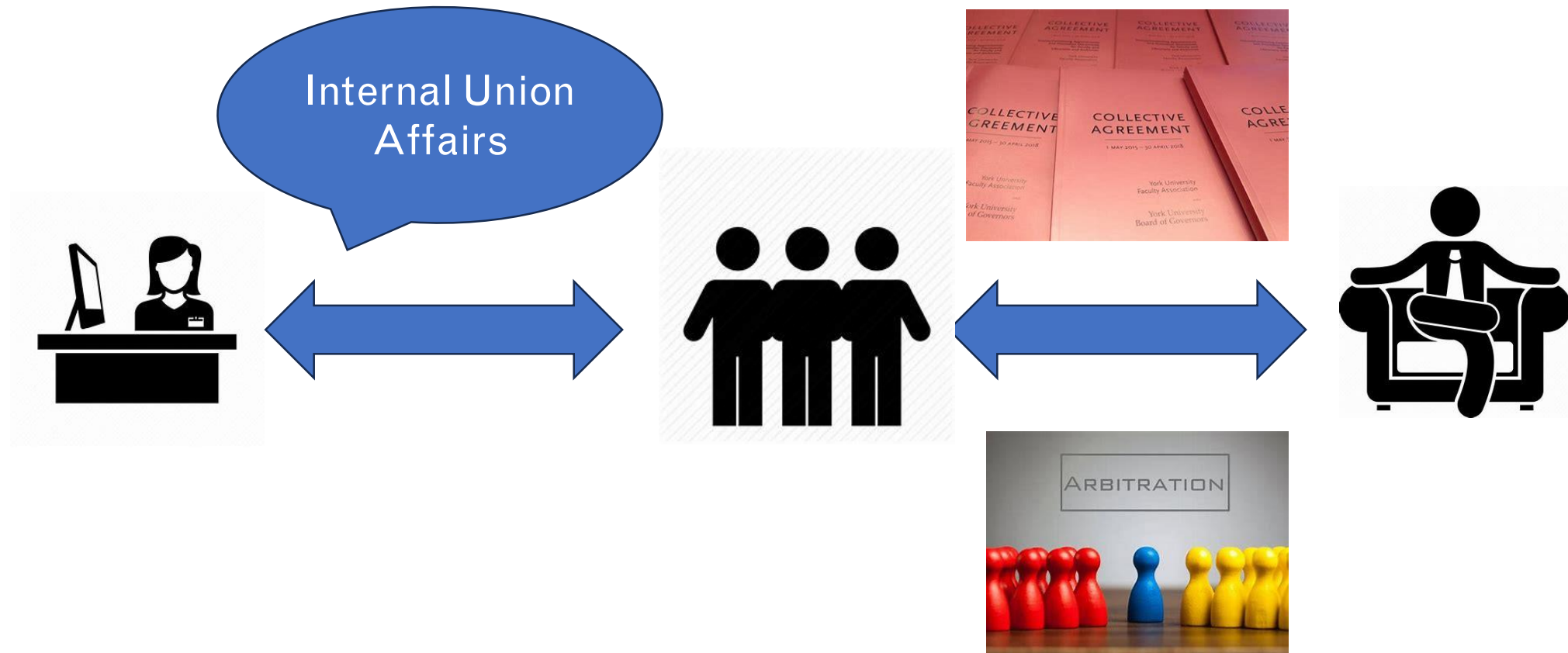
Duty of fair representation



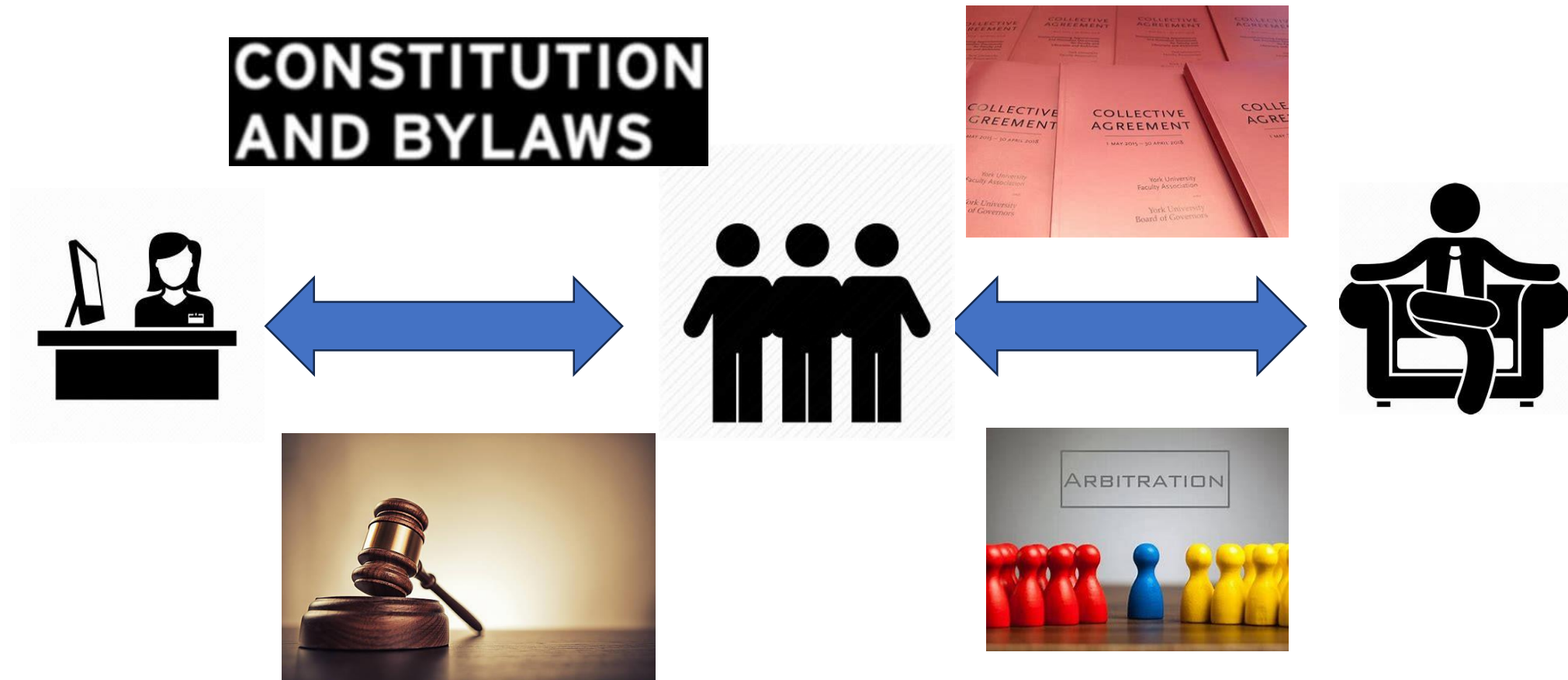
Unionized employment



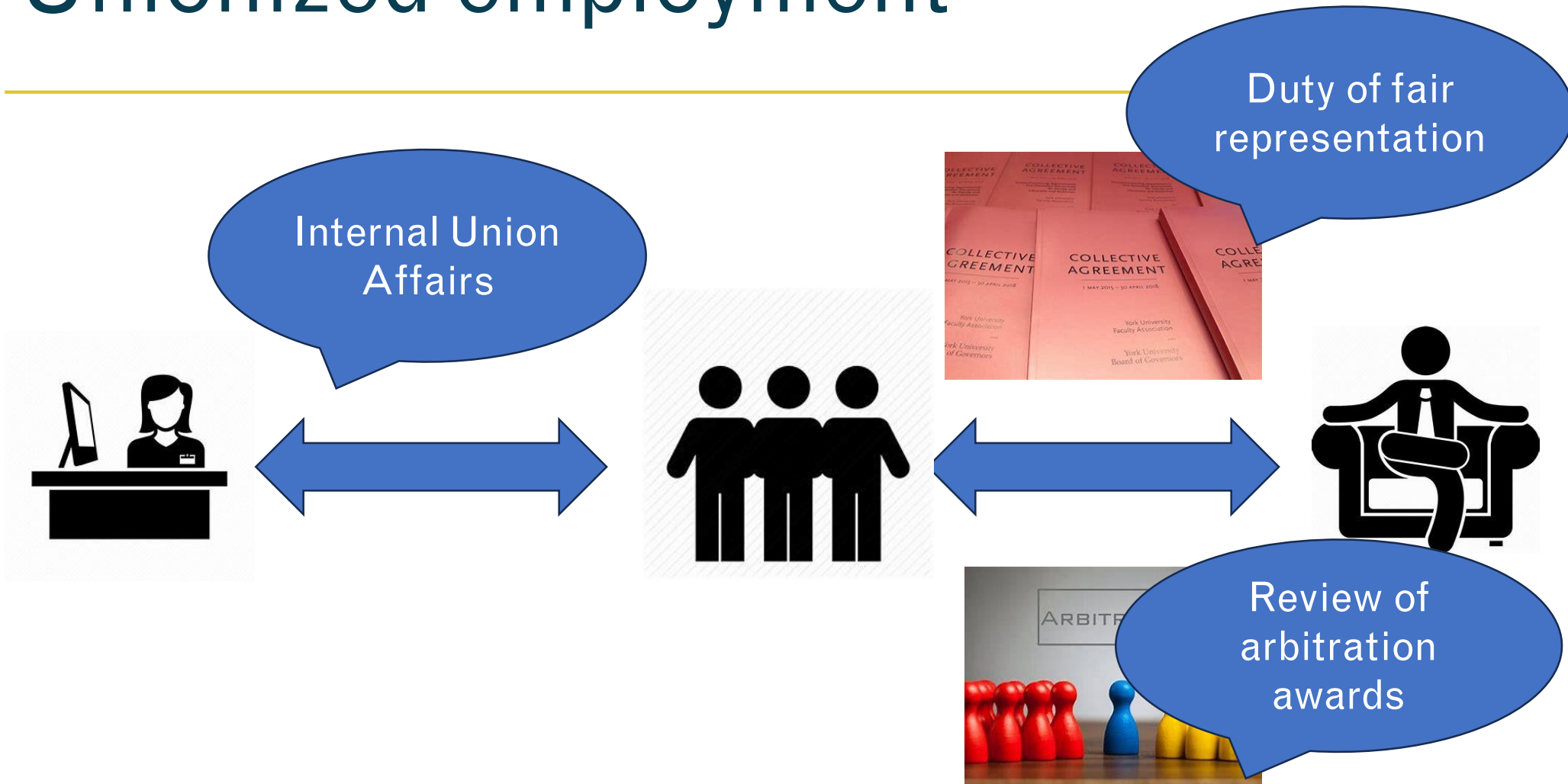
Unionized employment



Unionized employment

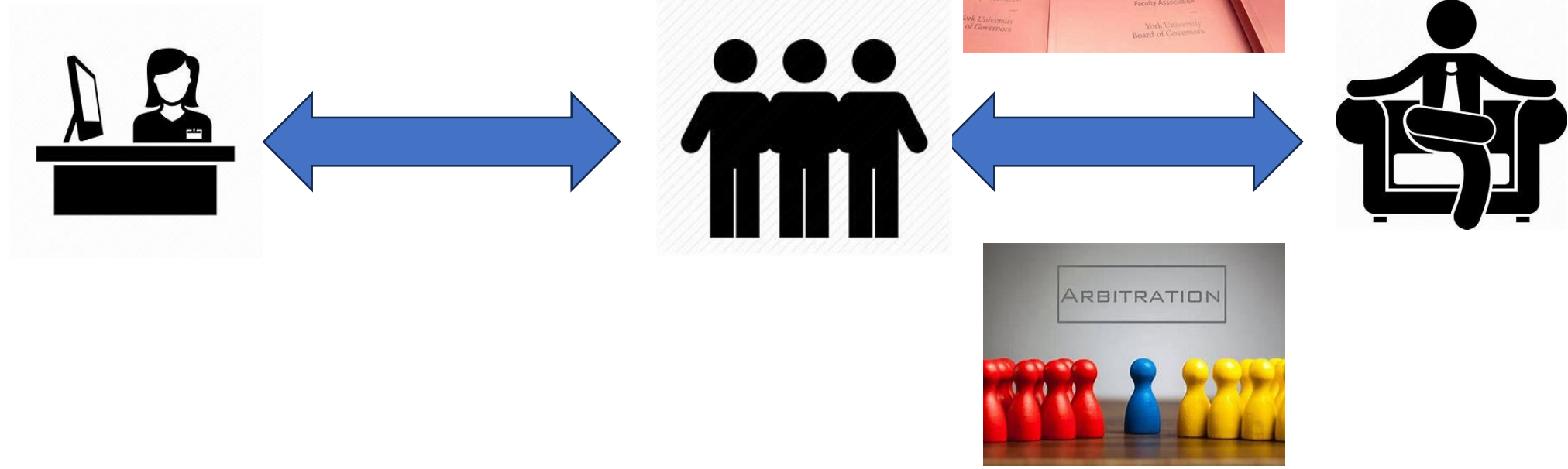


Unionized employment



Duty of fair representation

Duty of fair representation



Duty of fair representation

- 12** (1) A trade union or council of trade unions must not act in a manner that is arbitrary, discriminatory or in bad faith
- (a) in representing any of the employees in an appropriate bargaining unit, or
 - (b) in the referral of persons to employment
- whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.

Duty of fair representation

A union may make its decision about whether to pursue a grievance based on:

- consistency
- merits
- settlement
- finances

These are all “relevant workplace factors”

Duty of fair representation

- 12** (1) **A trade union or council of trade unions** must not act in a manner that is arbitrary, discriminatory or in bad faith
- (a) in representing any of the employees in an appropriate bargaining unit, or
 - (b) in the referral of persons to employment
- whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.

Duty of **fair** representation

- 12** (1) A trade union or council of trade unions must not act in a manner that is **arbitrary, discriminatory or in bad faith**
- (a) in representing any of the employees in an appropriate bargaining unit, or
 - (b) in the referral of persons to employment
- whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.

Duty of fair representation

- 12** (1) A trade union or council of trade unions must not act in a manner that is arbitrary, discriminatory or in bad faith
- (a) in **representing** any of the employees **in an appropriate bargaining unit**, or
 - (b) in the **referral** of persons **to employment**
- whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.

Duty of fair representation

- 12** (1) A trade union or council of trade unions must not act in a manner that is arbitrary, discriminatory or in bad faith
- (a) in representing any of the **employees** in an appropriate bargaining unit, or
 - (b) in the referral of **persons** to employment
- whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.**

Duty of fair representation

A few other points to note:

- the application must not be premature
- the applicant must have exhausted all internal union appeal mechanisms
- the application must be timely (filed within weeks not months or years)
- an application will be dismissed without further process if it does not disclose an apparent breach

Duty of fair representation

Rayonier Canada (B.C.) Ltd., BCLRB No. 40/75, [1975] 2
Can LRBR 196

James W.D. Judd, BCLRB No. B63/2003

Bad faith representation

Bad faith representation is:

- representation with an improper purpose or
- representation with an intent to deceive the employee

Judd, paras. 49-54

Bad faith representation

The Board has found bad faith representation where:

- the manner in which the union pursued the matter at arbitration did not represent a legitimate attempt to represent the employee
 - *Robert Habermehl*, B123/2019 (recon granted, 2020 BCLRB 56)
- the union entered into a settlement agreement that did not reflect the terms of settlement as they were explained to the employee
 - *Surjit Singh Sahota*, 2023 BCLRB 17

Discriminatory representation

Discriminatory representation is that which

- is based on any of the grounds prohibited by the Human Rights Code or
- is based on personal favouritism (or antagonism)

Judd, paras. 55-57

Discriminatory representation

Joe Vetere, BCLRB No. B147/2003

- The Applicant was the successful candidate in a job competition and had been working in the new position for six months.
- The Union president filed a grievance related to the competition on behalf of a personal friend who had not met the position's qualifications.
- Union settled the grievance on terms where the friend got the new position and the Applicant was demoted to another position
- The Board found discriminatory representation.

Arbitrary representation

Arbitrariness encompasses three requirements. The union must:

- ensure it is aware of the relevant information;
- make a reasoned decision; and
- not carry out representation with blatant or reckless disregard for the employee's interests

Judd, paras. 58-61

Arbitrary representation

The Board has found arbitrary representation where a union

- failed or refused to pursue the grievance within the timelines required by the collective agreement
 - *Katherine Wunderlich (Blair)*, B181/2013
- failed to file a grievance and, when challenged, refused to file because the employee was no longer a member in good standing
 - *Douglas Alberts*, B189/2014 (leave for recon dismissed B207/2014)

Arbitrary representation

The Board has found arbitrary representation where a union

- did not come to a reasoned decision about whether to grieve the failure to accommodate, including ignoring legal advice it received on that issue
 - *Joanne Brandon*, B153/2017
- failing to investigate in a timely way and refusing to rectify this failure when it was brought to the union's attention
 - *Lakshiminarayanan Ganapathy*, B90/2017

Arbitrary representation

The Board has found arbitrary representation where a union

- failing to ensure it was aware of the possible merits of grievance before refusing to pursue it
 - *Dyan Lover*, B9/2018; *Yvonne Allen*, B86/2019;
Deanna Breuker, 2022 BCLRB 67
- failing to explain the reason why it was refusing to pursue a grievance
 - *Alireza Shahsavarany*, B82/2018 (Recon of B199/2017)

Duty of fair representation

In the context of workplace sexual harassment specifically, 37 duty of fair representation complaints have involved allegations of workplace sexual harassment:

- In 23, the applicant was the employee accused of workplace sexual harassment or assault
- In 14, the applicant alleged that they experienced workplace sexual harassment or assault

Duty of fair representation

The issue is not whether the applicant has been subjected to harassment in their workplace, but whether the union represented the applicant in accordance with the duty of fair representation (i.e., not arbitrarily, discriminatorily, or in bad faith)

Sue Furlong, BCLRB No. B534/98

Duty of fair representation

The Board dismissed the majority of applications:

- the application was untimely
 - *Julia Kiraly*, B8/95; *Claire Richardson*, B160/94; *Rhea Margaret Siu*, B24/2015; *S.P.*, B32/2014;
- the applicant had not filed a grievance
 - *Claire Richardson*, B160/94; *Rebecca Byrne*, B88/2018
- the union's representation was not arbitrary, discriminatory, or in bad faith
 - *Sue Furlong*, B534/98; *Edward Wood*, B140/99; *Hardyal Dhanoa*, B436/99; *Kerry McBride*, B60/2001; *L.C.*, B314/2004; *Janet Pardo*, B134/2006; *Brett McDowell*, B119/2018

Duty of fair representation

Dan de Lauriers, BCLRB No. B185/99

- Applicant filed in respect of the union's representation of him in 27 different grievances, including ones that alleged sexual harassment by supervisor
- Board found “no evidence of any sexual harassment in any of the Applicant's submissions” and was “satisfied that the Union properly declined to pursue the sexual harassment grievance”
- Union arranged for meetings with the Employer to discuss the Applicant's concerns

Duty of fair representation

Diane Marie Norbert, BCLRB No. B107/2009

- Employer terminated Applicant for making false allegations of sexual harassment
- Applicant's allegations possibly caused by temporary psychiatric condition
- Union said grievance could not succeed without medical evidence or proof sexual harassment occurred
- Board allowed application finding Union failed to address whether Employer had just cause to terminate

Duty of fair representation

Geraldine (Gerry) Propp, BCLRB No. B50/2018
(Reconsideration granted, B138/2018)

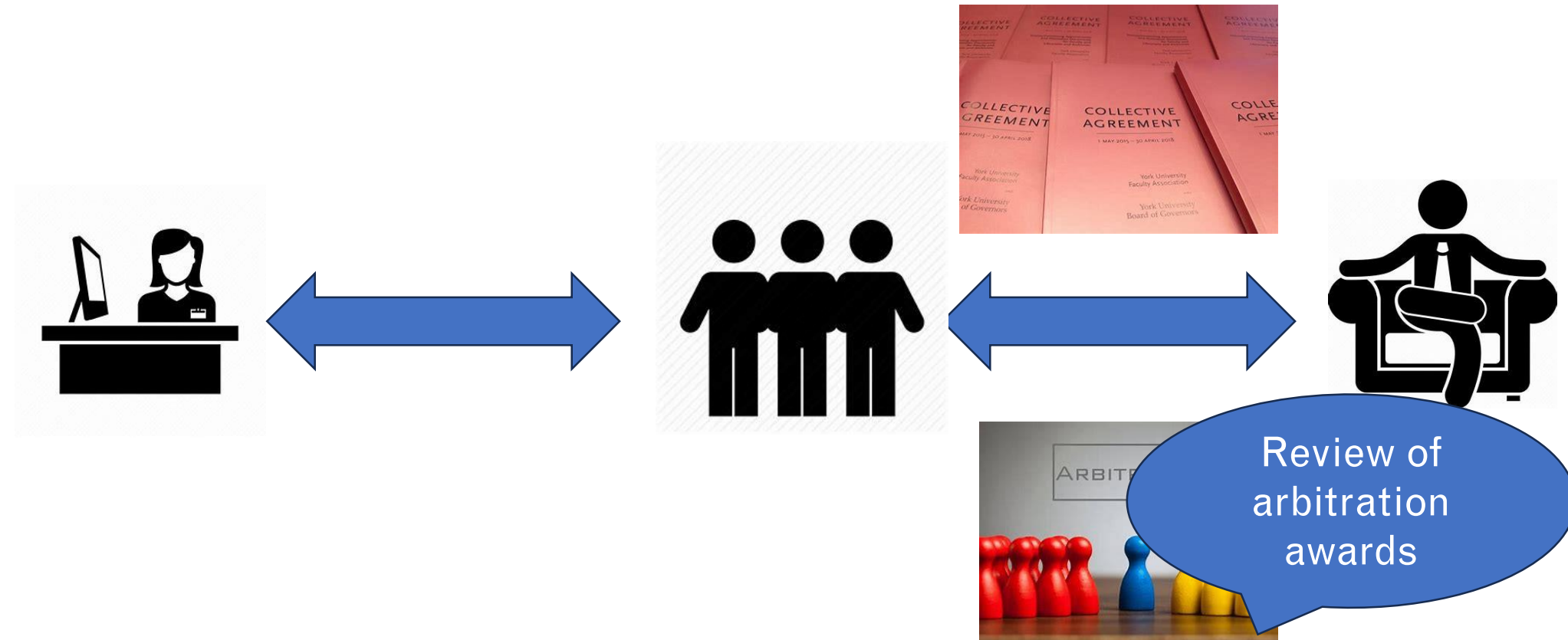
- Applicant alleged 3 coworkers sexually harassed her
- Was off work on long-term disability
- Union withdrew grievance while she was off work and made ability to refile contingent on her returning to work at a particular worksite
- In the meantime, the Union destroyed the grievance file in accordance with its document retention policy

Duty of fair representation

Take aways:

- the Board does not evaluate the employer's response to allegations of workplace sexual harassment under s. 12
- the Applicant must have filed a grievance to invoke s. 12
- the Board does not sit in appeal of the union's decision on the merits of the grievance
- the Board considers whether the union's representation is arbitrary, discriminatory, or in bad faith

Review of arbitration awards



Review of arbitration awards

- 99 (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board on the ground that
- (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
 - (b) the decision is inconsistent with Code principles

Review of arbitration awards

- 99 (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board on the ground that
- (a) **a party to the arbitration** has been or is likely to be denied a fair hearing, or
 - (b) the decision is inconsistent with Code principles

Review of arbitration awards

- 99 (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board on the ground that
- (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
 - (b) the **decision is inconsistent with Code principles**

Review of arbitration awards

In deciding whether an award is consistent with Code principles, the Board is mindful that:

- arbitration should be quick, inexpensive, and informal
- section 99 is not a full-fledged appeal of arbitration awards
- it is the arbitrator, not the Board, who is empowered to interpret and apply the parties' collective agreement

Review of arbitration awards

The Board has considered 24 Section 99 decisions where the underlying dispute involved workplace sexual harassment or assault:

- 2 were filed by the employee who alleged to have suffered the sexual harassment or assault
- 21 were filed by the employee alleged to have committed the sexual harassment or assault (and was disciplined accordingly)
- 1 was filed by a teacher disciplined for failing to report sexual misconduct allegations made by a student

Review of arbitration awards

School District No. 36 (Surrey), BCLRB No. B95/2002
(Reconsideration granted, B321/2002)

- The employee alleged she had suffered sexual harassment in the past while working with specific coworkers
- The arbitrator ordered the employer to develop a long-term accommodation plan for the employee to address her concerns
- The employer failed to establish the arbitrator made a reviewable error

Review of arbitration awards

C.S., BCLRB No. B184/2012

- The Applicant filed a complaint alleging sexual harassment against an employee she supervised
- An investigation found no evidence of sexual harassment
- The employee then filed a complaint against the Applicant alleging misuse of supervisory authority
- Arbitrator found two instances of misuse of supervisory authority

Review of arbitration awards

C.S., BCLRB No. B184/2012, cont.

- Applicant applied for review of the arbitration award
- The Board dismissed the application on the basis the reasoning in the award “satisfied the requirements for genuine effort”

Review of arbitration awards

School District No. 36 (Surrey), BCLRB No. B48/2014
(leave for reconsideration denied, B29/2016)

- The employee was dismissed for failing to report sexual misconduct a student made concerning their cousin
- The student subsequently reported the sexual misconduct to a VP and the Ministry was notified
- The arbitrator dismissed the grievance, finding the employee's dismissal was not inappropriate

Review of arbitration awards

School District No. 36 (Surrey), cont.

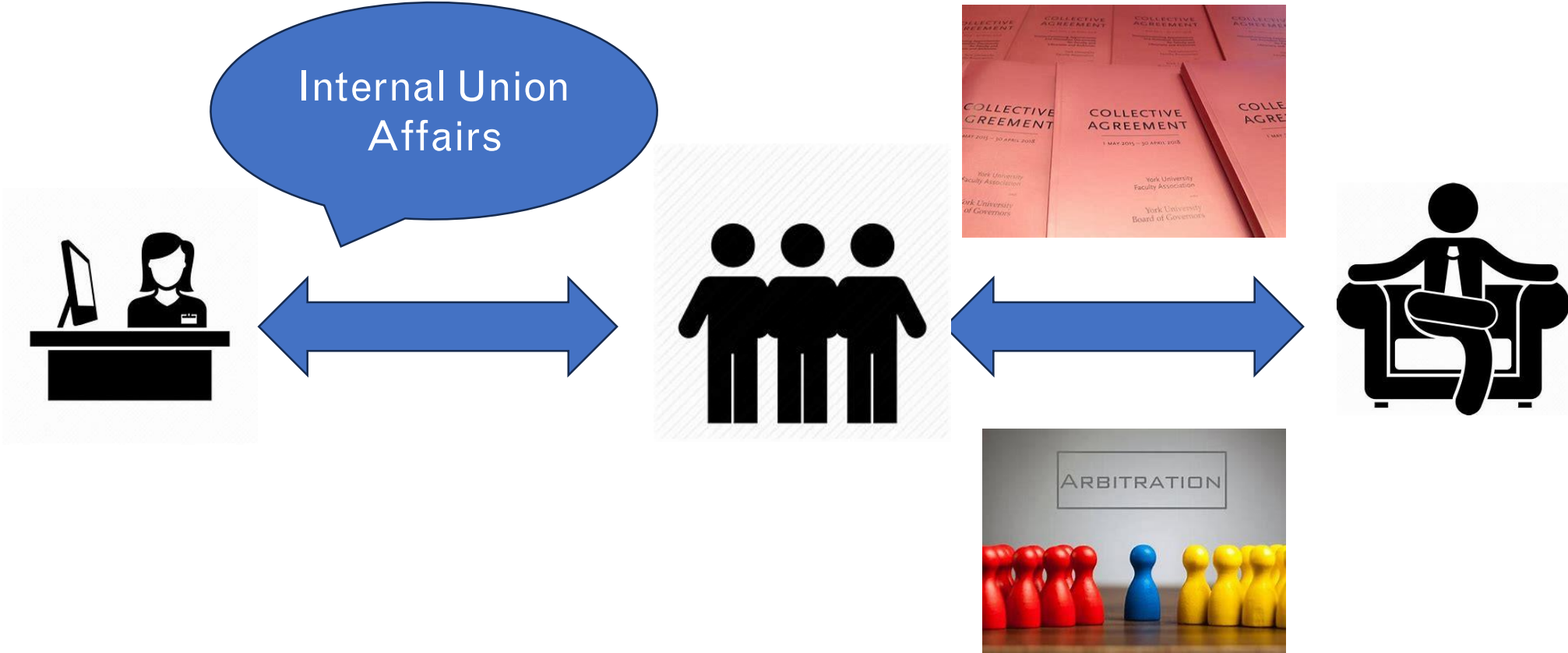
- The arbitrator found dismissal appropriate because the employee:
 - Failed to report the disclosure
 - Undermined the VP to the student
 - Suggested the student lie to the VP and their mother
 - Was not forthright during an investigation
- The Board dismissed the union's request for review finding the arbitrator did not commit a reviewable error

Review of arbitration awards

Take aways:

- the individual employee is not party to the arbitration process and has not right to procedural fairness
- An individual applicant must convince the Board the decision is contrary to Code principles
- The arbitration process will not necessarily decide whether the workplace sexual misconduct occurred; it is to decide whether the employer had just cause to discipline the alleged perpetrator

Internal union affairs



Internal union affairs

- 10 (1) Every person has a right to the application of the principles of natural justice in respect of all disputes relating to
- (a) matters in the constitution of the trade union
 - (b) the person's membership in a trade union, or
 - (c) discipline by a trade union

Internal union affairs

Gerrard Lemieux, 2022 BCLRB 112

The Board found the union breached s. 10(1)(c) by failing to provide sufficient particulars of the charges against them prior to the trials in relation to those charges.

Internal union affairs

- 10 (2) A trade union must not expel, suspend or impose a penalty on a member or refuse membership in the trade union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the trade union or council of trade unions
- (a) if in doing so the trade union acts in a discriminatory manner, or
 - (b) because that member has refused or failed to participate in an activity prohibited by this Code

Internal union affairs

Discipline imposed by a union will be discriminatory if it

- has no rational connection to the alleged infraction (*Ken Neilsen*, B144/2016)
- is not “defensive or legitimate” (*Richard Gittens*, B162/2016)
- is contrary to human rights protections (*Alicia Ferri*, 2021 BCLRB 48)

Internal union affairs

The Board has considered four applications under Section 10 where the underlying dispute involved sexual harassment or assault.

- Two involved allegation made by the applicant
- Two involved allegations made against the applicant

Internal union affairs

Brett Warner, BCLRB No. B183/2012

- The Applicant filed complaints under various Code sections asking the Board to investigate sexual harassment and assault allegations that the union had been “covering up”
- The Board dismissed the applications either because they were not properly particularized and because he did not explain how the union had violated the Code

Internal union affairs

Alicia Ferri, 2021 BCLRB 48 (leave for reconsideration denied, 2021 BCLRB 128)

- The Applicant was a union member from 2007-2015
- When she reapplied for membership in 2020, the union refused saying she had a poor experience in trades and her skills were weak
- The Applicant said she was being penalized for having complained of discrimination and for having accused a previous foreman of sexual harassment

Internal union affairs

Alicia Ferri, cont

- The Board found the union breached Section 10(2)
- The Board found the union failed to refute the Applicant's claims of gender discrimination and sexual harassment

Internal union affairs

Take aways:

- The Board's jurisdiction under s. 10(1) is very narrow and primarily concerns natural justice
- Under 10(2), the Board can consider whether a union discriminates against an individual
- The relationship between a union and its members is governed by the constitution and bylaws, which are enforceable at court

Summary

- The Board's mandate is to administer the Code
- The Code governs the relationship between the employer and the union (as the employees' exclusive bargaining agent)
- In exchange for the grant of exclusive bargaining agency, the Code imposes the duty of fair representation
- The duty of fair representation prohibits a union from representing an employee in a manner that is arbitrary, discriminatory, or in bad faith

Summary

- Section 12 is a narrow right and protection; it is not a forum to complain about employer conduct or to appeal a union's decisions
- The Board also hears applications for review of arbitration awards
- Section 99 is not a full-fledged method of appeal
- The Board will only intervene if the award is contrary to Code principles or if a party to the arbitration was denied a fair hearing

Summary

- The Board's oversight role with respect to internal union affairs is extremely limited
- Employees who experience sexual harassment or assault in the workplace should
 - make use of the employer's internal policies and complaint mechanisms and
 - get help from their union

Where to go from here...

- The Union
 - file a grievance and work with the union to advance through the grievance process
- BC Human Rights Tribunal
 - any employee can file a complaint under the HRC, including a unionized employee
 - complaint can be against employer or union
- Court
 - can consider whether a union acted in a way that was consistent with its obligations to its members under the constitution and bylaws

Thank you

Questions?