

Ontario's Human Rights Tribunal Bungles the School Boards' Human Rights Duty to Accommodate Students with Disabilities — *J.F. v. Waterloo Catholic District School Board* — An Erroneous Rejection of A Student's Request to Bring His Autism Service Dog to School

David Lepofsky¹

This article examines J.F. v. Waterloo Catholic District School Board, a controversial, widely-publicized case where the Human Rights Tribunal of Ontario ruled that a school board did not discriminate against an eight year old student with autism spectrum disorder when the board refused to let the student bring his trained autism service dog to school with him. This article examines the evolution of the procedural duty to accommodate in human rights law, and the importance of the duty to accommodate in the education context. It then explores problems in the Tribunal's reasoning that led it to find that the school board did not violate the procedural duty to accommodate or the substantive duty to accommodate students with disabilities. Attention then turns to this case's broader implications. This case typifies problems since 2008 with the way human rights are enforced in Ontario. This case also illustrates the need for the Ontario Government to adopt a reformed approach to the education of students with disabilities as well as the need for an Education Accessibility Standard to be enacted under the Accessibility for Ontarians with Disabilities Act.

1. INTRODUCTION

A child with autism spectrum disorder (ASD) can experience anxiety, challenges in self-regulating their mood and behaviours, and difficulty adjusting to transitions. Helpful measures to address these needs contribute to a child's developmental progress. An autism service dog can help with these needs.

¹ David Lepofsky C.M., O. Ont., LL.B. (Osgoode Hall Law School), LL.M (Harvard Law School), LL.D. (Hon. Queens University 1999; University of Western Ontario 2006; Law Society of Upper Canada 2016). The author is a Visiting Professor at the Osgoode Hall Law School, adjunct faculty at the University of Toronto Faculty of Law, the Chair of the Accessibility for Ontarians with Disabilities Act Alliance, and a member and past chair of the Special Education Advisory Committee of the Toronto District School Board. Twitter @davidlepofsky The indispensable volunteer assistance of AODA Alliance supporters Julie Goldstein, Emily Lewsen and Donald Bur with citation and background checking for this article, is gratefully acknowledged and appreciated.

ASD's emotional, behavioural and communicational impacts on a child cannot be measured, day-by-day, by a blood test or thermometer. It is typically not possible to isolate and quantify exactly when and how an intervention such as a service dog has helped, anymore than an omelet can be unscrambled. This does not derogate from the benefits experienced from using such a service dog. For children with ASD, as with many others, trial and error is so often the best approach.

This article examines a troubling case where a school board, and then Ontario's Human Rights Tribunal, each got it wrong when it came to accommodating a student with ASD. In *J.F. v. Waterloo Catholic District School Board*,² an eight-year-old boy with ASD benefitted at home from a trained autism service dog. His family asked the school board to let him bring the service dog to school, to help accommodate his ASD. The school board said no. The Tribunal sided with the board.

There was no showing that board employees, addressing this issue, had prior knowledge, experience or expertise with autism service dogs, or that those officials tried to observe the boy outside school when using the autism service dog. There was no indication that the board took any proactive steps to learn about the benefits of these service dogs, or considered a trial period with this boy bringing his autism service dog to school.

In contrast, some other Ontario school boards let students with ASD bring a service dog to school. If other school boards can do so, the Waterloo District Catholic School Board could do the same, rather than putting barriers in the path of a vulnerable student.

The boy's family filed a human rights complaint against the school board. It alleged a violation of his right to equal treatment in education without discrimination due to his disability, guaranteed by s. 1 of the Ontario *Human Rights Code*.³ The family argued that the board failed to fulfil its substantive duty to accommodate (its duty to provide a disability-related accommodation he needed), and its procedural duty to accommodate (its duty to adequately investigate his disability-related needs and the options for accommodating them). In a widely-publicized and erroneous decision, the Tribunal ruled against the boy on both scores.

The school board and the Human Rights Tribunal of Ontario failed to properly apply human rights principles to a vulnerable student with an undisputed disability. This case provides a powerful illustration of a Human Rights Tribunal that failed to properly apply both the human rights procedural duty to accommodate and the substantive duty to accommodate. The school board's failure to fulfil its procedural duty to accommodate this boy's disability also serves to substantially weaken the board's claim that it met its substantive duty to accommodate.

² *J.F. v. Waterloo Catholic District School Board*, 2017 HRTO 1121 (Ont. Human Rights Trib.). [J.F.]

³ *Human Rights Code*, R.S.O. 1990, c. H. 19, s.1.

As well, this case illustrates unfair accessibility barriers that students with disabilities too often face in Ontario's education system. It shows how families must repeatedly fight against the same barriers, at school board after school board. This case also highlights serious flaws in Ontario's controversial system for enforcing human rights. It shows why Ontario needs a strong and effective Education Accessibility Standard under the *Accessibility for Ontarians with Disabilities Act (AODA)*,⁴ to remove such recurring disability accessibility barriers in Ontario's education system.

Had this school board redirected more of its effort and public money towards working out a way to let this student bring his autism service dog to school, rather than fighting against him, a more positive outcome here was likely. Instead the Board marshalled its formidable legal resources to fight against this boy.

This article first delineates the case's largely undisputed facts. It then explores the evolution of the procedural duty to accommodate in human rights law. The importance of the duty to accommodate in the education context is then investigated.

Attention next turns to problems in the Tribunal's reasoning that led it to find that the school board did not violate the procedural duty to accommodate. After that, serious problems are identified with the Tribunal's finding that the school board did not violate its substantive duty to accommodate.

This article concludes with a look more broadly at this case's implications. This case typifies problems since 2008 with the way human rights are enforced in Ontario. This case also illustrates the need for the Ontario Government to adopt a reformed approach to the education of students with disabilities in Ontario schools as well as the need for an Education Accessibility Standard to be enacted under the *AODA*.

2. THE FACTS WERE LARGELY UNDISPUTED

Much about this case was undisputed: the boy had ASD, a disability under Ontario's *Human Rights Code*;⁵ education is a service, covered under s. 1 of the *Code*;⁶ the family obtained a certified autism service dog for the boy.⁷ This was to

⁴ *Accessibility for Ontarians with Disabilities Act 2005*, S.O. 2005 c. 11. [*AODA*]

⁵ *J.F.*, *supra* note 2, at para. 2; *Human Rights Code*, R.S.O. 1990, c. H. 19, s.10 (1).

⁶ *Human Rights Code*, R.S.O. 1990, c. H. 19, s.1.

⁷ This case addressed the use of a certified autism service dog. Readers may be more familiar with another category of service animals, namely guide dogs for people who are blind or have low vision. That issue is far less likely to come up in the school context, at least for students, since for many if not all organizations providing such guide dogs, the user typically must be 18 years old. The issue did not arise here whether this was a legitimate or fraudulent service animal. The school board did not dispute this, or question that the organization providing the animal was qualified to do so, or that the organization's training of the animal and the user was sufficient.

help him self-regulate his moods and behaviours, to help him be calm at night, to enable him to sit for longer periods, and to prevent him from taking flight.⁸

The family asked the school board to let the boy bring his autism service dog with him to school, as a disability accommodation. This was to help him self-regulate his emotions and behaviours, in order to help him better learn in school, and to minimize his flight risk.⁹ The school board refused.¹⁰

When not at school, the boy had difficulties at times with self-regulating his emotions and behaviours, with tantrums or meltdowns, with anxiety, and, in the earlier years of the key period, with bolting.¹¹ At a meeting with board staff, the father said he reported that when the boy came home from school, he was often greatly wound up and anxious.¹² An autism service dog aims to help address these behaviours. It was the family's experience, reinforced by the boy's autism therapist, that the service dog helped with these.¹³ The family noted for the school board that the boy said the dog helped him feel more comfortable when doing homework, and that the boy had been training to benefit from the dog to self-regulate emotions when doing a challenging task.¹⁴ Nothing in the reasons suggests the school board contested any of this.

The Tribunal's reasons don't suggest that the school board had expertise or experience with autism service dogs, or that it conducted or offered to conduct a trial period. There is no suggestion that the school board argued that conducting a trial period would cause it undue hardship.¹⁵

The Tribunal didn't find that it was impossible for the school board to effectively accommodate the boy with his service dog at school, or that the dog's presence at school would cause the board any hardship, much less *undue* hardship. According to the school board, the fact that an adult would be needed to be the dog's handler wasn't a bar to bringing the dog to school.¹⁶

⁸ *J.F.*, *supra* note 2, at para. 39.

⁹ *J.F.*, *supra* note 2, at paras. 41-43.

¹⁰ *J.F.*, *supra* note 2, at paras. 68-71, 83.

¹¹ *J.F.*, *supra* note 2, at para. 39.

¹² *J.F.*, *supra* note 2, at para. 47.

¹³ *J.F.*, *supra* note 2, at paras. 95-97, 113.

¹⁴ *J.F.*, *supra* note 2, at para. 43.

¹⁵ There was therefore no issue here that letting this student bring his ASD service animal to school, even for a trial period, was not feasible due to budget pressures on the school board. This makes sense. A bald claim that school boards face austerity and budget pressures would be insufficient to show that it would be impossible to even try this accommodation. Concrete objective evidence would be required. Moreover, it would be hard for the school board to establish that it was impossible to accommodate this student, even for a trial period, when some other school boards in Ontario have been able to do so for years.

¹⁶ *J.F.*, *supra* note 2, at paras. 128, 194.

The key disputed fact was whether the service dog could benefit the boy at school, letting him make better progress there. The boy's family said yes. The school board opposed this.¹⁷

Up to its senior levels, the school board recognized that there was a "disconnect" between the boy's behavioural challenges outside school, and the school board's sense that he was doing acceptably at school.¹⁸ The school board didn't respond to this "disconnect" by investigating what the family was witnessing with the boy *while outside school, or how the service dog helped there*. Instead, all the school board did was to send its behaviour team to his classroom to see how he was doing *in school*, as if his behaviours are geographically restricted to that one location, with all other locations being irrelevant. Encountering roadblocks, the family took its request up the school board hierarchy, from the principal to the Special Education superintendent, to the Director of Education (the board CEO), and then to the elected board trustees. Exchanges between the family and board spread over several months.¹⁹

The Lions Foundation trains these service dogs. Its Director of Program Development gave evidence about its autism service dog program. He knew of 60 service dogs that attend school with a student with a disability.²⁰ The Tribunal identified no evidence disputing this, or suggesting that this presented any difficulties at other school boards, or that this school board took any steps to investigate what those other school boards experienced, or that investigating this would cause the board undue hardship.

Several times over a long period the family offered to connect the school board with the Lions Foundation, so that the Board could learn about these service dogs.²¹ It appears, however, that the only contact between the board and the Lions Foundation took place late in the process, at a case conference held *after* the school board's behaviour team had already observed the boy in school.²²

¹⁷ Discussion of many disability issues is enriched by an exploration of the substantial literature on the social model of disability. See e.g. Michael Oliver and Colin Barnes, *The New Politics of Disablement*, 2nd ed. (Red Globe Press, 2012). This case's issues were sufficiently crisp that that scholarship likely does little to advance this analysis beyond the powerful and obvious fact that it was the school board's policies and practices that constituted the serious barrier impeding this student, due to his disability.

¹⁸ *J.F.*, *supra* note 2, at paras. 15, 54, 79.

¹⁹ *J.F.*, *supra* note 2, at paras. 41, 43, 71.

²⁰ *J.F.*, *supra* note 2, at para. 140.

²¹ *J.F.*, *supra* note 2, at paras. 46-48, 59.

²² *J.F.*, *supra* note 2, at paras. 60-61.

3. EVOLUTION OF THE PROCEDURAL DUTY TO ACCOMMODATE UNDER HUMAN RIGHTS CODES

The “procedural duty to accommodate” originates in a law journal article I wrote over a quarter of a century ago. Although I there spoke about an employer’s duty to accommodate employees and job-seekers with disabilities, these principles equally apply to the duty of the providers of goods, services and facilities to accommodate people with disabilities who seek to use and benefit from those goods, services and facilities:²³ Where that article referred to joint duties of an employer and union, it would equally apply where union action can bear on whether effective accommodations are provided e.g. in the school setting.

An assessment of an employer’s efforts at accommodation must go beyond the employer’s substantive reasons for not accommodating. It should also include an evaluation of the sufficiency of the process by which the employer reached its decision on accommodation. The duty to accommodate has both substantive and procedural components. The duty is to take steps, short of undue hardship, to accommodate the individual’s needs. One requisite step is for the employer or other parties under a duty to accommodate to undertake a thorough and adequate process of inquiry and deliberations on the request for accommodation. If an employer simply rejects a request for accommodation out of hand, without giving the matter adequate thought and attention, including thorough exploration of the possibilities, it can hardly be said to have taken adequate steps to accommodate.

An open minded and creative deliberative process significantly increases the prospects for finding a feasible accommodation to the needs of a disabled employee, or other worker with needs whose accommodation is endorsed under human rights legislation. It is perhaps a regrettable reality in the workplace, that when a person asks for something out of the ordinary, the first knee jerk response on the part of some is simply to say no. It is often only after the matter receives further thought and reflection that stereotypical concerns can give way to imaginative solutions. Investigation and deliberation can lead the parties to come up with new options for accommodation that had hitherto not been contemplated. The wider the range of discussions and inquiry, the greater the chance that a workable accommodation will be discovered. As well, such deliberations can produce a more thoughtful and critical reflection on alleged adverse consequences which initially were feared if the worker were to be accommodated. Such deliberations and inquiries do not just make sense from the perspective of effective enforcement of anti discrimination statutes. They also make good business sense.

²³ David Lepofsky, “A Purposive Approach to the Duty to Accommodate Under Canadian Anti-Discrimination Legislation” (Spring/Summer 1992), Canadian Labour Law Journal, 1, No. 1 and 2, p. 1. [A Purposive Approach]

When inquiring into the adequacy of the deliberative process, matters that could be explored include the following:

- (1) Who was involved in the original deliberations and decision on the accommodation request?
- (2) What options for accommodation were considered? Did the employer seek to identify options for accommodation which the worker had not raised? After all, the duty to accommodate goes beyond an exploration of the options which workers seeking accommodation themselves advance. A company's potentially superior knowledge of its own business operations leads one to expect that even if the worker has trouble finding options which will work, the company may well find possibilities worthy of exploration if the matter is given sufficient attention.
- (3) Was sufficient effort employed to solicit the views of the worker requesting the accommodation and of those managerial staff who might have ideas on how the problem can constructively be solved?
- (4) If proposed accommodations could impinge upon the terms of a collective agreement, what efforts were attempted to elicit the union's views on point, and to secure its agreement to waive the contract's provisions to secure an effective accommodation?
- (5) If there is a union involved, what efforts if any were made to bring representatives of the union, the company and the worker who requested the accommodation together, to try to collectively find solutions which had hitherto evaded these parties when they operated separately from each other?
- (6) If a company or union opposes an accommodation on the grounds that it might impinge on other legal requirements, whether under a collective agreement or otherwise, did these parties take sufficient steps to obtain expert advice on these matters? Inquiries could include the obtaining of legal opinions if needed, or the soliciting of advice from relevant government and regulatory agencies.
- (7) Did any of the parties who are under a duty to accommodate make an effort to find out how other organizations have dealt with similar accommodation requests, and what impact such accommodations have had on the workplace?²⁴

Shortly after that publication, Ontario's Human Rights Tribunal adopted this principle.²⁵ Seven years later, in the landmark 1999 *Meiorin* case,²⁶ the Supreme

²⁴ Lepofsky, "A Purposive Approach", *ibid.*, pp. 14-15.

²⁵ *Ghosh v. Domglas Inc.*, 1992 CarswellOnt 6682, (*sub nom.* Ghosh v. Domglas Inc. (No. 2)) 17 C.H.R.R. D/216 (Ont. Bd. of Inquiry) at para. 76.

²⁶ *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, 1999 CarswellBC 1907, 1999 CarswellBC 1908, 2 S.C.R. 1297, (*sub nom.* British Columbia

Court of Canada overhauled Canada's test for assessing discrimination claims under human rights legislation. As part of this, the court incorporated the procedural duty to accommodate into human rights law across Canada:

Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard: see generally Lepofsky, *supra*.²⁷

This was not merely a theoretical judicial pronouncement. Meiorin went on to apply the procedural duty to accommodate when analyzing that case.²⁸

Case law elaborating on the procedural duty to accommodate blossomed over the ensuing two decades. It enunciated an array of helpful principles to guide the implementation of the procedural duty to accommodate, synthesized here.

Courts, human rights adjudicators²⁹ and labour arbitrators³⁰ found human rights violations based in whole or in part on a violation of the procedural duty to accommodate. It has been invoked in employment cases where it originated³¹ as well as in service³² and housing³³ discrimination cases.

(Public Service Employee Relations Commission) v. BCGSEU [1999] 3 S.C.R. 3 (S.C.C.). [*Meiorin*]

²⁷ *Ibid.*, at para. 66.

²⁸ *Ibid.*, at paras. 76-79.

²⁹ See, for example, *Lane v. ADGA Group Consultants Inc.*, 2008 CarswellOnt 4677, 91 O.R. (3d) 649 (Ont. Div. Ct.); *B.M. (Next friend of) v. Cambridge (City)*, [2010] O.H.R.T.D. No. 1067 (Ont. Human Rights Trib.) (procedural and substantive duty); *Mazzei v. Toronto District School Board*, 2011 HRT0 400, 2011 CarswellOnt 10729 (Ont. Human Rights Trib.); *Mould v. JACE Holdings Ltd.*, 2012 BCHRT 77, 2012 CarswellBC 750 (B.C. Human Rights Trib.); *Austen v. Senior Tours Canada Inc.*, [2013] O.H.R.T.D. No. 1419; *Carriere v. Boonstra Trucking Ltd.*, 2013 AHRC 10, 2013 CarswellAlta 2944 (Alta. H.R.T.); *Lee v. Kawartha Pine Ridge District School Board*, 2014 C.L.L.C. 230-043, [2014] O.H.R.T.D. No. 1226 (Ont. Human Rights Trib.) at paras. 88-98.

³⁰ See, for example, *407 ETR Concession Co. v. CAW-Canada, Local 414*, 2007 CarswellOnt 422, 158 L.A.C. (4th) 289, [2007] L.V.I. 3701-1 (Ont. Arb.); *British Columbia (Ministry of Public Safety & Solicitor General) and BCGEU (Pearson), Re*, 2013 CarswellBC 2906, [2013] B.C.C.A.A.A. No. 116 (B.C. Arb.) at paras. 216-220; *British Columbia (Ministry of Public Safety & Solicitor General) and BCGEU (Pearson), Re*, 2013 CarswellBC 2906, [2013] B.C.C.A.A.A. No. 116 (B.C. Arb.); *Toronto District School Board v. Canadian Union of Public Employees, Local 4400 (Meyers Grievance)*, [2016] O.L.A.A. No. 506 (Ont. Arb.) (procedural duty only); *Toronto District School Board and CUPE, Local 4400 (Meyers), Re*, 2016 CarswellOnt 20819 (Ont. Arb.).

³¹ See, for example, *Lane v. ADGA Group Consultants Inc.*, *supra* note 29 [*Lane*]; *Mazzei v. Toronto District School Board*, *supra* note 29; *Mould v. JACE Holdings Ltd.*, *supra* note 29; *Carriere v. Boonstra Trucking Ltd.*, *supra* note 29; *Lee v. Kawartha Pine Ridge District School Board*, *supra* note 29. Of course, all decisions by labour arbitrators also take place in employment situations. In this regard see *supra* note 27.

Ontario's Human Rights Tribunal correctly held that the procedural duty to accommodate ". . . can be just as important as the substantive component of the duty to accommodate."³⁴ The most authoritative and oft-cited pronouncement on the procedural duty to accommodate is the Ontario Divisional Court's ruling in *Lane v. ADGA Group Consultants Inc.* [*Lane*].³⁵

The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternate work. The term undue hardship requires respondents in human rights cases to seriously consider how complainants could be accommodated. A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the "procedural" duty to accommodate.

In assessing whether the employer has met the duty, the employer's efforts must be assessed at the time of the alleged discrimination. An employer may not use after-acquired evidence to support its view that an employee could not be accommodated. After-acquired information is only relevant to remedy. (Citations omitted)

Lane, an employment case, holds by analogy that the court or tribunal can consider what the school board would have learned had it made the appropriate inquiries into accommodation issues.³⁶

A labour arbitrator held that the procedural duty to accommodate requires an employer to look closely at an employee's situation, holding:

. . . the failure to take appropriate steps to assess an employee's disability-related needs inherently has a negative effect on that employee because of disability by failing to acknowledge that employee's right to be free from discrimination because of disability. This right to be free from discrimination inherently engages the employee's dignitary interest in having her or his disability-related needs appropriately considered and assessed, whether or not at the end of the day these needs could be accommodated in a substantive sense. . . . To ignore, disregard or fail to adequately consider or follow up on medical

³² See, for example, *B.M. (Next friend of) v. Cambridge (City)*, *supra* note 29; *Austen v. Senior Tours Canada Inc.*, *supra* note 29.

³³ See, for example, *DiSalvo v. Halton Condominium Corp., No. 186*, 2009 HRT0 2120 (Ont. Human Rights Trib.); TSC-00132-15, 2015 LNONLTB 1166; *Devoe v. Haran*, 2012 HRT0 1507 (Ont. Human Rights Trib.), reconsideration / rehearing refused 2013 HRT0 500 (Ont. Human Rights Trib.).

³⁴ *Gaisiner v. Method Integration Inc.*, 2014 HRT0 1718 (Ont. Human Rights Trib.) at para. 149. [*Gaisiner*]

³⁵ *Lane*, *supra* note 29, at para. 107-8.

³⁶ *Lane*, *supra* note 29, para. 126.

documentation provided in support of an accommodation request, inherently has a negative impact on the dignity interests of a person identified by a protected Code characteristic by causing that person to experience discrimination by being ignored, disregarded or rendered invisible.³⁷

The fact that a respondent took a human rights claimant's request seriously, was not ill-intentioned, and spent considerable time trying to address it, while helpful, is not enough to ensure that the procedural duty to accommodate has been fulfilled, if there were problems with the organization's process. The focus is not on the respondent's intent but on its impact on the human rights claimant.

Ontario's Human Rights Tribunal held that it contributes to a failure to fulfil the procedural duty to accommodate where an organization ignores or dismisses without further inquiry, medical information that a claimant provides, even where that information was dated.³⁸ That Tribunal opined in obiter that the procedural duty to accommodate can be violated where an accommodation-seeker is required to produce information "that it knows or ought to know does not exist and cannot be reasonably obtained".³⁹ That Tribunal elsewhere held that the procedural duty to accommodate includes a duty to respect an accommodation-requester's privacy.⁴⁰ Doing a Google search about a condition like ADHD is insufficient to fulfil the procedural duty to accommodate.⁴¹

The procedural duty to accommodate includes a duty to experiment.⁴² Speaking much earlier about human rights defences more generally, the Supreme Court emphasized that defences to human rights claims cannot be based on speculative or impressionistic evidence.⁴³ This applies with full force when an undue hardship defence is advanced regarding the duty to accommodate.⁴⁴ Ontario's Human Rights Tribunal held that speculation that a problem "could" or "might" occur is insufficient to be undue hardship.⁴⁵ Anecdotal or after-the-fact evidence cannot establish undue hardship.⁴⁶ This applies to an undue

³⁷ *Kingston (City) and CUPE, Local 109 (A. (J.)), Re*, 2016 CarswellOnt 18593 (Ont. Arb.), labour arbitrator Paula Knopf at para. 97, quoting *Lee v. Kawartha Pine Ridge District School Board*, 2014 C.L.L.C. 230-043, [2014] O.H.R.T.D. No. 1226 (Ont. Human Rights Trib.) at para. 96.

³⁸ *Llano v. Fairweather*, 2011 HRT0 556 (Ont. Human Rights Trib.) at paras. 51-57.

³⁹ *Cohen v. Law School Admission Council*, 2014 HRT0 537 (Ont. Human Rights Trib.) at para. 81, reconsideration / rehearing refused 2015 HRT0 222 (Ont. Human Rights Trib.).

⁴⁰ *Saadi v. Audmax Inc.*, 2009 HRT0 1627 (Ont. Human Rights Trib.) at para. 76.

⁴¹ *Gaisiner*, *supra* note 34, at paras. 149-158.

⁴² *Gravelle v. Giorgio's No Frills*, 2012 HRT0 1643 (Ont. Human Rights Trib.) at para. 19.

⁴³ *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, 1982 CarswellOnt 730, 1982 CarswellOnt 730F, [1982] 1 S.C.R. 202 (S.C.C.) at 212-213 [S.C.R.].

⁴⁴ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CarswellBC 2730, 1999 CarswellBC 2731, [1999] 3 S.C.R. 868 (S.C.C.) at para. 44.

hardship defence to the procedural duty to accommodate.⁴⁷ Logically, speculative or impressionistic evidence should be insufficient where an organization claims a person didn't need a requested accommodation.

The foregoing array of principles emerge from cases that take a purposive approach to the duty to accommodate. In contrast, a minority of other cases took an unjustifiably narrow and unprincipled approach to the procedural duty to accommodate. They thereby erroneously concluded that there is no separate or free-standing procedural duty to accommodate. If an organization shows that there was no substantive accommodation to provide, without undue hardship, then it doesn't matter how faulty was that organization's process for considering the request.⁴⁸

Those thinly-reasoned cases largely gut *Meiorin*'s breakthrough recognition of the procedural duty to accommodate. Their impoverished approach included no consideration of the purposes of the duty to accommodate. They catapult formalism to the fore, erroneously defining the question as whether there is a "free-standing" or separate procedural duty to accommodate. Yet *Meiorin* creates the procedural duty to accommodate in any case where an accommodation request is made, whether or not it is labelled "a "separate" duty or a "free-standing" duty.

A purposive approach to the duty to accommodate recognizes that an employer, school board or other service provider should be liable under human rights law for failing to take investigation steps that the procedural duty to accommodate requires of them, whether or not it is assured that a workable accommodation will thereby be found. This incentivizes employers and service providers at the critical point in time to try to find workable solutions. The contrary and problematic minority view can unfairly reward those organizations who don't even try to find solutions to an accommodation request. The duty to accommodate seeks the full participation and inclusion of equality-seeking groups, such as people with disabilities, in a society that has too often been designed and operated as if they were not there.

If an organization doesn't fulfil the procedural duty to accommodate, but it turns out that no workable accommodation exists, a remedy should be ordered. It will not include ordering an actual substantive accommodation, since none is available. The remedy can include general damages for the infringement of

⁴⁵ *Krieger v. Toronto Police Services Board*, 2010 HRTO 1361, 2010 CarswellOnt 4687 (Ont. Human Rights Trib.) at paras. 130-133.

⁴⁶ *Lane*, *supra* note 29, at paras. 108, 118.

⁴⁷ *Lane*, *supra* note 29, at para. 126.

⁴⁸ *Cassidy v. British Columbia (Emergency & Health Services Commission)*, 2011 BCSC 1003, 2011 CarswellBC 1994 (B.C. S.C.), additional reasons 2011 CarswellBC 3006 (B.C. S.C. [In Chambers]); *Cruden and Canadian International Development Agency, Re*, 2014 FCA 131, 2014 CarswellNat 3039, 2014 CarswellNat 3234 (F.C.A.) at paras. 17-28; *TWU v. Telus Communications Inc.*, 2014 ABCA 154, 2014 CarswellAlta 717 (Alta. C.A.) at paras. 48-50.

human rights. It can include systemic corrective measures so that the organization will do a better job in future of investigating accommodation requests. By analogy, an employer, against whom sex discrimination is alleged, can be found to have violated the *Human Rights Code*, if in an interview, the employer let fly a sexist rant. This is so, even if it turns out that the job applicant wasn't qualified for the job and cannot recover lost wages for not being hired.

The Ontario Human Rights Tribunal and labour arbitrators have commendably rejected the erroneous minority view, critiqued here. They accepted that a violation of the procedural duty to accommodate can give rise to a violation of a person's human rights, whether or not the substantive duty to accommodate was breached.⁴⁹ A remedy, such as monetary compensation, has flowed from the violation of a person's dignity due to the failure to fulfil the procedural duty to accommodate.⁵⁰ Whether or not that is thereby recognizing a "free-standing" procedural duty to accommodate is a red herring that is beside the point.

4. EXPLORING THE DUTY TO ACCOMMODATE IN THE EDUCATION CONTEXT

Most duty to accommodate cases in the jurisprudence address the employment setting. The principles applicable in the employment context apply with full force in the education context.⁵¹ The Human Rights Tribunal of Ontario holds that the goal of accommodation at the school is enabling the student to fully participate at school.⁵²

Yet simple and straightforward doctrinal refinements can make the duty to accommodate serve its core purposes in the education setting. Workplace accommodation aims to best enable an employee to contribute to the employer's profit or other organizational goals. In contrast, a school board does not teach children in order to make profit or like goal. It does so to "... provide students with the opportunity to realize their potential and develop into highly skilled, knowledgeable, caring citizens who contribute to their society."⁵³

Accordingly, a school board's human rights duty to investigate solutions in an education accommodation case is especially important, since it bears on the right to equal treatment in education for students with disabilities. Equal

⁴⁹ *Toronto (City) and TCEU, Local 416 (T. (V.)), Re*, 2015 CarswellOnt 15790 (Ont. Arb.) at pp. 54-57; *Lee v. Kawartha Pine Ridge District School Board*, 2014 HRT0 1212 (Ont. Human Rights Trib.) at paras. 88-98.

⁵⁰ See for example: *Lane*, *supra* note 29; *Krieger*, *supra* note 45; *Campbell v. Paradigm Sports, Inc.*, 2017 HRT0 1683, 2017 CarswellOnt 21978 (Ont. Human Rights Trib.); *Llano v. Fairweather*, *supra* note 38.

⁵¹ *C.M. v. Toronto District School Board*, 2012 HRT0 1853 (Ont. Human Rights Trib.) at para. 109.

⁵² *Ibid.*

⁵³ *Education Act*, R.S.O. 1990, c. E.2, at s. 0.1(2).

educational opportunity for students with disabilities is also a constitutional right, which s. 15 of the Charter of Rights guarantees.⁵⁴ Students with disabilities are a historically vulnerable and disadvantaged group in society. Our education system has historically been designed and operated in a way that fails to sufficiently take into account the accessibility and inclusion needs of students with disabilities.⁵⁵

Thus, the measure of an effective education accommodation is broader and more inclusive than for a workplace accommodation. This is so even though workplace accommodations can, of course, contribute to an employee's dignity and self-worth. When a school board is asked to accommodate a student with a disability, it is not merely expected to do the least it can, so the student can "get by". Rather, the board should aim to ensure that the student does the best he or she can, to live up to their academic and personal potential.

This applies at school to the procedural duty to accommodate. A school board should not approach its duty to investigate solutions as if it were an employer trying to find the least expensive workplace accommodation, in order to let a worker with a disability maximize the organization's profit. It should instead seek the accommodation that will best enable the student to learn to his or her maximum potential.

5. WRONG FOR THE TRIBUNAL TO CONCLUDE THAT THE SCHOOL BOARD DIDN'T VIOLATE ITS PROCEDURAL DUTY TO ACCOMMODATE

The Tribunal rejected the boy's claim that the school board breached its procedural duty to accommodate. It held that the board acted with sufficient speed on the boy's request, that it was important for the board to hold an individualized needs assessment, and that the board's behaviour team's expertise was undisputed.

Applying this article's principles, there is a powerful case that the procedural duty to accommodate was not fulfilled in this case, based on facts that do not appear from the Tribunal's reasons to have been disputed. From the Tribunal's reasons, there is no indication that the school board had taken several obvious, easy steps to investigate this issue. In summary, the board should have at least conducted a trial period with the boy bringing his ASD service dog to school, observed the benefits when the boy used his service dog at home or elsewhere outside school, proactively learned about the benefits of service dogs from the Lion's Foundation, investigated the experience of other school boards that allow

⁵⁴ *Eaton v. Brant (County) Board of Education*, 1996 CarswellOnt 5035, 1996 CarswellOnt 5036, [1997] 1 S.C.R. 241 (S.C.C.).

⁵⁵ See e.g. "What an Ontario Education Accessibility Standard Could Include? — A Discussion Paper", *AODA Alliance*, November 21, 2016, available at: <http://www.wwww.aodaalliance.org/education/Education-Accessibility.docx>.

ASD service dogs at school, and/or arranged for this family to observe the boy functioning at school without his service dog.

The school board had the burden to prove that it took all needed steps to investigate this request, and that it was impossible to take further investigative steps without causing the board undue hardship. That is a tough test for a well-resourced publicly-funded board to meet.

Several reasons show that there were transparently obvious additional steps that the school board could have taken. The Tribunal didn't even consider them. It did not find that these steps would have caused the board undue hardship, or make findings that could support such a conclusion. None of the five options, explored here, could be proven to cause undue hardship.

These foundational factors underpin these errors: Before this request, there was no evidence that anyone at the board had prior knowledge, experience or expertise with autism service dogs, or took steps nor accepted invitations to learn about autism service dogs, until after the behaviour team observed the boy at school. The decision did not suggest that an autism service dog is a new-fangled, off-the-wall innovation for children with ASD.

First, the school board did not try a trial run, in so far as the reasons describe the unfolding events, i.e. letting the boy bring his service dog to school, even for a short day or two. If the board was uncertain that the service dog would assist the boy, a trial period was an obvious and easy way to explore this.

It is no answer to this, or to any of the following other options, that the board thought the boy was doing fine at school. The board didn't claim to disbelieve the family's reports of concerns with the boy's behaviours and moods outside of school. The board recognized that this "disconnect" required more investigation.

It is clear from the Tribunal's reasons that the school board viewed the child's behaviours inside school and outside school as isolated watertight silos. As long as he showed no behaviour issues, anxiety or self-regulation issues at school, the fact that he had such issues outside school was treated as irrelevant to the school. This view of a child's behaviour is erroneous. Children with ASD aren't equipped with an anxiety "on-off" switch, instantly toggled at the schoolyard fence.

Second, there is no indication that anyone at the board took any steps to visit and observe the boy, using his service dog, outside of school. This would help the skeptical board better assess this request.

Third, the Tribunal's chronology of events reveals no effort by the school board to proactively investigate service dog's benefits, e.g. by asking the Lions Foundation. The family proposed this to the school board several times. It was only much later, *after* the school board's behaviour team had already assessed the boy in school (for the purpose of seeing if the service dog could assist), that the school board convened a case conference, at which the family brought a Lions Foundation official. That was long after board officials had already voiced skepticism about the service dog's benefits.

Fourth, the Tribunal's chronology includes no steps by the board to investigate how things worked at other school boards that let students with ASD bring a service dog to school. This is easy to investigate. The Tribunal's reasons recite evidence that 60 autism service dogs have been allowed at schools. The Tribunal does not say that the board disputed this or didn't know about it. The February 3, 2014 *Toronto Star* reported that some Ontario school boards allow it.⁵⁶

It could be inferred that this board didn't want to know what other boards are doing. Here again, it would provide no answer that the school board didn't think the boy needed the service dog at school. This board could have inquired whether any other boards had had the same initial skepticism, but experienced something different after letting the service dog come to school. As well, the board could have reached out, through those other school boards, to other families with experience with a child bringing their autism service dog to school.

Fifth, the Tribunal's facts delineate no effort by the school board to get the family and its experts to observe the boy in school. The Tribunal variously noted that the parents, the boy's autism therapist and his psychologists (whose opinions were adduced before the Tribunal) hadn't observed the boy at school. The school board evidently discounted their opinions on this ground.

It is easy to imagine the board deploying this line of attack at an adversarial hearing. Yet school boards are expected to approach the resolution of such issues in a collaborative way, according to human rights case law and longstanding education policy. In a collaborative approach, the school board would have encouraged the family and the family's specialists to observe the boy in school. Instead, the board's case conference, late in the process, was destined to simply re-echo the same "disconnect" between the family and board since this accommodation request began.

This obvious step would also let the family point out aspects of the boy's behaviours at school which board officials may have missed. As further addressed below, school boards regularly tell parents of students with disabilities that the parents are the experts in their child's needs. Not taking this step served only to give the school board a tactical advantage at the hearing, if "winning" was the board's goal.

In this context and more generally, the school board and later, the Tribunal, failed to give appropriate respect and deference to the boy's parents' unique expertise. As noted above, school boards regularly acknowledge that parents know their child the best. This is not to say that the board must simply do whatever a parent asks.

Here, instead of showing appropriate deference to the boy's parents, the school board and later, the Tribunal appeared to downplay their perspective, because they had not seen the boy in school. Preference was instead given to the board's behaviour team. Yet it doesn't require the behaviour team's expertise to

⁵⁶ Diana Zlomislic, "Parents of kids with autism fight to get service dogs in schools", *The Toronto Star*, Mon. Feb. 3, 2014.

know that effective emotional self-regulation and a lack of anxiety are important for a child to be able to learn to their best potential, and that both of these can be issues for students with autism. What was pivotal was to assess the benefits the service dog could add, if allowed at school. Yet, as noted above, the behaviour team was not shown to have experience or expertise with this.

As addressed further later in this article, key school board officials took a paternalistic view that if anything, the service dog could set back the boy's progress. To be faithful to human rights principles, the Tribunal should have viewed that claim with demonstrable caution. The family had invested time and effort to select the accommodation of a trained autism service dog, to meet the boy's needs. The service animal came via an organization with extensive experience. A school board should be reluctant to think it knows better.

Any of the five foregoing options were enough to support a finding against the school board on the procedural duty to accommodate. Taken together, the case against the board becomes that much stronger.

Reinforcing that, but not pivotal, the school board appears to have injected a questionable red herring into this process by involving the school's parents council, before the school board made a decision on this accommodation request. This should have raised red flags for the Tribunal.

Had the board let the boy's service dog attend school with him, a meeting of the parents' council could be helpful for the board to discharge its duty to ensure that the class provided the boy with a welcoming environment. The school board could have explained to parents why the ASD service animal was being permitted at school, and could have sought the support and cooperation of other parents and their children. However, on the school board's version, this parents' council meeting took place *before* the school board made a final decision on this accommodation request. If the school board was seeking the parents council's input on whether to let the service dog accompany the boy at school, this would be problematic. The student's right to be accommodated is not subject to a veto or approval by parents of other students at that school.

A final point on the procedural duty to accommodate merits a mention. In light of the foregoing, it is difficult to understand why this family made it a core argument at the Tribunal that the school board should not have assessed the boy's situation in school at all. If that was the family's core argument on the procedural duty to accommodate, then this Tribunal decision has extremely little precedential value. It would stand for the narrow proposition that the procedural duty to accommodate does not forbid a school board from undertaking an individualized assessment of the needs of a student with a disability when deciding on an education accommodation.

6. WRONG FOR THE TRIBUNAL TO CONCLUDE THAT THE SCHOOL BOARD DIDN'T VIOLATE ITS SUBSTANTIVE DUTY TO ACCOMMODATE

The boy also argued that the school board's refusal to let him bring his service dog to school violated the board's substantive duty to accommodate. The board argued that it did not deny the boy his right to meaningful access to education, and that there was no adverse impact on him by its refusal to let him bring his autism service dog to school with him.

The Tribunal rejected the family's claim. It held the family had not proved that the boy needed his service dog at school, holding:

Based on the totality of the evidence, I find that the respondent's decision to deny the applicant's request to have his guide dog accompany him at school did not have an adverse impact on his right to meaningful access to the educational services provided by the respondent. I find that the evidence demonstrates that the supports and strategies that the respondent has provided to accommodate his disability related needs are providing him "the opportunity to realize [his] potential and develop into [a] highly skilled, knowledgeable, caring citizen who contribute[s] to [his] society, a defined purpose of Ontario's Education Act." The accommodations are provided in an inclusive and dignified manner. Many of the tools and strategies are used by his peers so he is not singled out as different.⁵⁷

The school board's evidence on this is substantially undermined by the errors regarding the procedural duty to accommodate, explored above. Beyond them, the Tribunal's reasons don't show that the school board proved that the service dog would never and could never assist the student in any way, or that the boy's autism could create no need under any circumstances for self-regulation, in order for the boy to fully benefit from education programming.

As noted earlier, it was undisputed that this boy had ASD, that he had self-regulation and anxiety issues outside school, and that these are well-known ASD features. The reasons don't conclude that these concerns vanish whenever a child isn't openly presenting those behaviours.

The question presented is not whether the boy was doing okay at school. It was whether he could have done better with this accommodation. It was not enough for the school board to show its measures helped the boy progress. To reach this conclusion the Tribunal had to be convinced that nothing else could succeed, either because the boy had reached his maximum learning potential, or because it rejected any evidence that an autism service dog can assist with needs like self-regulation and anxiety. Its reasons made no such finding, and recited no evidence supporting such a finding.

⁵⁷ *J.F.*, *supra* note 2, at para. 193.

(a) Setting the Goal of Education Accommodation Too Low

The Tribunal in effect erroneously set the bar too low when it assessed the goal of education accommodation. The Tribunal decision, evidently drawing upon the board's argument, found against the student in part because he got acceptable grades, was doing well and made progress at school. This wrongly dilutes the student's entitlement to classroom accommodation.

The superintendent talked about whether the boy needed to have the service dog to "access the curriculum."⁵⁸ This is clearly too narrow a focus. For a young child with autism, school is not just about reading, writing or arithmetic. It is about learning to live to one's potential, including in dealing with emotional self-regulation and social engagement.⁵⁹ This goal is incorporated in the Ontario *Education Act*,⁶⁰ and has been recognized by the Supreme Court.⁶¹

In this case, the Superintendent of Special Education gave her opinion that:

. . .the goal is to recognize the applicant's strengths and barriers and work with those to have the applicant be an independent learner. Those who support the applicant at school continue to work towards having him identify what tools he can use to be most successful and to manage his emotions and best allow him to access his learning. It was her opinion, that the applicant has tremendous potential to be very successful and very independent.⁶²

(b) Significant Evidence at the Tribunal of the Boy's Needs that the Service Dog Could Help Meet

The school board's psychologist gave evidence that children with ASD have ". . .very wide-ranging skills and challenges. She explained that persons with ASD may or may not have cognitive deficits. Some have other underlying disabilities or disorders such as a learning disability or anxiety disorder."⁶³

The Tribunal's reasons recite evidence showing that the boy still had ASD-related needs. It made no finding against the evidence about the boy's problems that existed at home, nor did it say that the school board contested the credibility of that evidence.

⁵⁸ *J.F.*, *supra* note 2, at paras. 73-74

⁵⁹ *J.F.*, *supra* note 2, at para. 30.

⁶⁰ *Education Act*, R.S.O. 1990, c. E.2, s. 0.1(2) provides: "The purpose of education is to provide students with the opportunity to realize their potential and develop into highly skilled, knowledgeable, caring citizens who contribute to their society." This provision was cited by the Tribunal in *J.F.*, *supra* note 2, at para. 193.

⁶¹ *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61, 2012 CarswellBC 3446, 2012 CarswellBC 3447, [2012] 3 S.C.R. 360 (S.C.C.) at para. 36: "The Court held at para. 36 that a school board has provided meaningful access to a student if it has delivered the mandate and objectives of public education to that particular student.

⁶² *J.F.*, *supra* note 2, at para. 126.

⁶³ *Ibid.*, at para. 168.

The Tribunal accepted the undisputed evidence of the boy's father and of the boy's autism therapist, that the service dog had had a positive impact on the boy.⁶⁴ He was able to calm himself much more easily with the service dog.⁶⁵ It accepted the Lions Foundation official's undisputed evidence of observing improvements to children's safety and in de-escalating behaviours.⁶⁶

Since acquiring the service dog, the father said the boy's anxiety incidents and meltdowns are less frequent and shorter. Incidents of bolting in public reduced. He is more confident about communicating with others. His interaction with his dog positively reinforced his social engagement, an area on which he received autism therapy.⁶⁷

The autism therapist reported that almost every time at his private therapy (outside school), the boy had meltdowns where he ran around screaming, throwing chairs at the therapist.⁶⁸ The therapist said other calming strategies weren't as effective as his service dog. Thanks to the dog, the boy was quicker at expressing causes for his upset. The inconsistency of having the dog outside school but not at school was hard for the boy. The therapist expressed the view that the service dog contributed to the boy's improvement with social engagement with others.⁶⁹

The autism therapist had not worked with the boy before he got his service dog. She couldn't track if he calmed down quicker than without the dog but it was her opinion that the dog had this beneficial effect.⁷⁰ The father opined that this would have been worse without the autism service dog.⁷¹

The father testified that the boy reported to his parents that he was having a hard time at school, including difficulty getting other children to socialize with him.⁷² He gave uncontradicted evidence of problems with the boy trying to bolt, when at home.⁷³

Offsetting several references in the Tribunal decision to the boy making progress and doing satisfactorily in school, there was ample evidence before the Tribunal showing that the boy had ongoing unmet ASD-related needs at school. School records reported him at times having difficulties transitioning from one activity to another, learning to take turns and coping with agitation when things do not go as he'd like.⁷⁴ While the Tribunal did not note this, these are typical

⁶⁴ *Ibid.*, at paras. 95-97, 117.

⁶⁵ *Ibid.*, at paras. 143-150.

⁶⁶ *Ibid.*, at para. 184.

⁶⁷ *Ibid.*, at paras. 95-97.

⁶⁸ *Ibid.*, at para. 112.

⁶⁹ *Ibid.*, at paras. 113-117.

⁷⁰ *Ibid.*, at paras. 115-116.

⁷¹ *Ibid.*, at para. 112.

⁷² *Ibid.*, at para. 99.

⁷³ *Ibid.*, at para. 103.

⁷⁴ *Ibid.*, at paras. 103, 111.

ASD concerns. School records showed no concerns at school about the boy bolting or going to an unsafe place.

According to the Tribunal, school records confirmed that at times when he got home, the boy reported that kids called him a loser on the school bus and in the schoolyard. A teacher reported that schoolyard observations detected none of this.⁷⁵ However, the reasons don't say the teacher observed the child full-time in the yard so as to preclude the possibility that such verbal bullying had occurred without the teacher observing it.

The school board knew that the boy's mother reported that "he replays his entire day at home at night and "he tends to over emphasize the bad." Later the teacher reported that he was engaging in "more negative talk" and that "his reactions to small issues were a bit "over the top", giving the example of the boy saying "you have ruined my life" when upset about something in class.⁷⁶

At times at home he had raging incidents for hours. The Tribunal said the father testified that: ". . . sometimes it would take him hours to tell his family what was upsetting him and often they would learn that the applicant was upset about an incident at school."⁷⁷

From the Tribunal's summary of the Special Education Superintendent's evidence, it was clear the board recognized that the boy had a need to be able to manage his emotions. The Tribunal held, referring to the superintendent's evidence:

Those who support the applicant at school continue to work towards having him identify what tools he can use to be most successful and to manage his emotions and best allow him to access his learning. It was her opinion, that the applicant has tremendous potential to be very successful and very independent.⁷⁸

The boy's special education teacher confirmed that the boy's behaviours:

. . . increased and he was struggling in the late part of the 2016. He stated that he could only speculate about the reasons for the increased behaviour and that it could be because of increased expectation on him in grade three. He stated that in his opinion it is possible that there could be other stressors that contribute to his behaviour and he would like psychological educational assessment to be completed to assist in better understanding the applicant but the parents have not consented to this.⁷⁹

⁷⁵ *Ibid.*, at para. 110.

⁷⁶ *Ibid.*, at paras. 110-111.

⁷⁷ *Ibid.*, at para. 106.

⁷⁸ *Ibid.*, at para. 126.

⁷⁹ *Ibid.*, at para. 166.

That special education teacher confirmed that the boy had meltdowns at school.⁸⁰ The Tribunal noted:

When asked about an incident when the applicant allegedly said he wanted to die one day in the school yard. It was his testimony that the applicant is very dramatic. When he is having a meltdown he may say things like he is going to burn down the school or call 911.⁸¹

Similarly, the school psychologist, presented with the boy's assessments and reports, agreed that:

...he struggles with getting his thoughts written down and that he gets frustrated which can result in "meltdowns." She stated that from a clinical psychologist perspective there should be continued accurate assessment of his capabilities and deficits and then get an understanding of the tools that can be put to allow him to succeed in the task without anxiety or avoidance so that he achieves what he is capable of.⁸²

The psychologist saw no issues in classroom observations with which the school team wasn't dealing,⁸³ but the Tribunal then noted:

When she was asked to respond to the applicant's more recent behaviours of refusal to do a task and calling out "I want [name of dog]!", Dr. Lane stated that it would be important to understand why he is avoiding the tasks and experiencing stress. She felt it was important to understand whether calling out for his dog is his way of communicating the anxiety and stress or whether this is his way of avoiding work at school because he knows that his dog is at home.⁸⁴

While in Grade 3, an educational assistant sent a note home reporting that the boy left the classroom and school yard with the educational assistant, and said he was escaping. The educational assistant took him to the principal.⁸⁵

The Special Education Superintendent's evidence acknowledged a focus on the boy's "struggles" including efforts to help him, while learning, not to become "overwhelmed or frustrated". She testified about how the school board tracks "what triggers his escalated behaviour".⁸⁶

The Tribunal noted that a behaviour team member who didn't testify wrote the superintendent:

⁸⁰ *Ibid.*, at paras. 162, 167.

⁸¹ *Ibid.*, at para. 167.

⁸² *Ibid.*, at para. 170.

⁸³ *Ibid.*, at para. 171.

⁸⁴ *Ibid.*, at para. 174.

⁸⁵ *Ibid.*, at para. 160.

⁸⁶ *Ibid.*, at para. 125.

After glancing at the data, it appears that this student is not tolerating his day well and that there may be some skills deficits...My concern is that if the parents are advocating on behalf of their child because he is not managing his do well, the data may in fact support their theory... Our team does not have the ability to consult around the use of a service dog...⁸⁷

The school board's special education liaison also gave evidence showing that the boy had ongoing unmet needs. The Tribunal said she testified: "He has strong computation skills and appears to enjoy science but he struggles with transitions; not getting frustrated when he finds things hard; and getting his thought processes on paper."⁸⁸ The special education liaison described progress the boy has made but also qualified that "...in her opinion, the applicant has not reached full independence but he has the skills to get there."⁸⁹ She also said the boy "...attempts to avoid tasks that he finds challenging. . ."⁹⁰

Similarly, the Tribunal noted the boy's special education teacher's evidence, to the effect that:

... he has seen that the applicant can become overwhelmed with a task so by breaking it down into steps and chunks, the applicant will work through the task. He described the applicant's struggles with writing and described him as "slow and meticulous." It was his evidence that key boarding and assistive technology have helped the applicant and he becomes less frustrated and overwhelmed.⁹¹

His testing showed the boy was: "... achieving close to or at grade level in most of the curriculum. His areas of challenge were identified as listening comprehension, oral and written expression."⁹²

Adding to the foregoing, undisputed facts in the Tribunal's reasons make it obvious that this boy was not fully paralleling a neurotypical student's path. Until less than two years before this hearing, the boy only attended school half time. The rest of the time he was at home, privately receiving intensive autism therapy. He had his service dog for at least part of that period.⁹³

At one point during the material period when he was attending school, the boy received A's and B's for a "modified curriculum".⁹⁴ The reasons don't note the important question of whether and to what extent these modifications fall short of the regular curriculum.

⁸⁷ *Ibid.*, at para. 120.

⁸⁸ *Ibid.*, at para. 132.

⁸⁹ *Ibid.*, at para. 137.

⁹⁰ *Ibid.*, at para. 138.

⁹¹ *Ibid.*, at para. 156.

⁹² *Ibid.*, at para. 157.

⁹³ *Ibid.*, at para. 105.

⁹⁴ *Ibid.*, at para. 104.

The father noted that in 2015-16, the boy got a pretty decent report card. However the father said he thought the boy could do better, and that “ he saw “self-regulation as something the applicant will struggle with for rest of his life . . .”⁹⁵ The father said in 2015-16, the boy’s grades dropped somewhat.⁹⁶

The school board’s spring 2016 education assessment of the boy showed he was “fairly successful student who is achieving at grade level” in grade 2.⁹⁷ He was also experiencing significant meltdowns at home, which the father had not told the school about at that time.⁹⁸

His February 2017 Grade 3 report card showed he had gotten all B’s and B pluses and C. He was not then on a modified curriculum.⁹⁹ Another school board witness, the special education liaison, gave evidence contradicting this, indicating that he was working at grade level, but on a modified curriculum.¹⁰⁰ The Tribunal did not identify this as a conflict. Yet if the boy was on a modified curriculum, this was very important. It would open the door even wider to the possible benefits of additional supports that could help him do better at school.

The boy’s special education teacher admitted not being an expert on how to include the dog at school, and recognized that the Lions Foundation could show how to do it.

It was his opinion that perhaps the only piece would be if the dog was needed to calm the applicant. It was his evidence that more recently the applicant is not reaching “meltdown” states. He stated that the applicant is in a pretty calm state and is just refusing to do the work. His evidence was that the applicant is now just smirking when he refuses to do something.¹⁰¹

The Tribunal is entitled to dismiss, minimize or place no weight on any and all of the foregoing evidence. However, that would cry out for an explanation in its reasons, for doing so.

(c). School Board and Tribunal Relied on Unfair, Irrelevant Considerations

From early on, the school board’s approach to its duty to accommodate seems tainted. Key officials, dealing with this request, engaged in bureaucratic paternalism. They voiced uninformed, unfounded and unsubstantiated fears that a service dog could be *harmful* for the boy. For example, the Tribunal summarized the Special Education Superintendent’s evidence (giving the board’s reasons for barring the service dog) as including, among other things:

⁹⁵ *Ibid.*, at para. 118.

⁹⁶ *Ibid.*, at para. 118.

⁹⁷ *Ibid.*, at para. 121.

⁹⁸ *Ibid.*, at para. 122.

⁹⁹ *Ibid.*, at para. 123.

¹⁰⁰ *Ibid.*, at para. 132.

¹⁰¹ *Ibid.*, at para. 162.

She explained that she did not see how the applicant's guide dog could assist him in the school environment and that she would be concerned that if the applicant was involved in activity that was frustrating for him he may just avoid the activity and go to his dog. She thought this might cause difficulty in having him return to task. . . .¹⁰²

Similarly, the Tribunal's reasons describe the school board's special education liaison as giving an opinion that ". . . having the applicant's dog in the class and allowing him to go to her when he is feeling frustrated could reinforce avoidance and will not allow him to feel he can be successful and independent."¹⁰³

No evidence supported those speculative opinions. As noted earlier, these school board officials had no demonstrated prior experience or expertise with such service animals. There is no evidence that any of them reached out to learn about these service animals before reaching these conclusions.

As noted earlier, defences to human rights claims, such as the undue hardship defence, cannot be based on speculative or impressionistic evidence. This should apply to the question whether the boy had a need which the service dog could help meet at school. The Tribunal recited the evidence on point of those school board officials without thereby discounting their evidence. Nothing in the Tribunal's reasons shows that others involved in the board's decision took a different view.

It should be unthinkable for a school board to bar a blind person from bringing their guide dog to school, saying they should instead use a white cane for their orientation and mobility, because they may become dependent on the guide dog. That would be even more indefensible if such a school board had not reached out to any guide dog schools, or one of the many blind people who successfully use a guide dog.

The superintendent's evidence indicates that irrelevant if not sarcastic considerations were taken into account. Giving the board's reasons for barring the service dog, the Special Education Superintendent relied, among other things, on the fact that the service dog cannot do things which are obviously beyond an animal's skills, such as teaching the boy to use a computer. The Tribunal did not identify this as such, or distance itself from any reliance on this. The Tribunal held:

It was her [*i.e.* the Special Education Superintendent's] opinion that the respondent had not been provided with any evidence through the documents provided by the applicant's parents or through the respondent's own assessments and observations that the dog would assist to meet the applicant's needs by identifying the source of his behaviours; or help him to write or process information. In her opinion, the service dog cannot ensure that his programming is aligned with how he learns and how he takes in the information. . . . She stated that a dog is not able to teach him how to use the computer or prompt him to use

¹⁰² *Ibid.*, at para. 127.

¹⁰³ *Ibid.*, at para. 138.

the tools he has to lessen his frustrations, teach him social skills, keep him on task and ease his transitions which she says those who observe him in class have identified as his challenges.¹⁰⁴

That passage should have given the Tribunal concern. Similarly, the special education teacher almost seemed to hold against the service animal the fact that it can't speak. The Tribunal noted:

The evidence given by the special education teacher was that the applicant had recently been heard yelling, "I want [name of his dog]!" Although he would not likely yell this if he had his dog with him at school, the evidence is clear that his dog could not provide indicators about why the applicant may be feeling so stressed at school. As well, both C.F. and the special education teacher stated in their evidence that the applicant was prone to exaggeration about the severity of his situation.¹⁰⁵

As well, the Tribunal applied an unfair double standard to the evidence. It weighed against the evidence of the family and its supporting witnesses the fact that they hadn't observed the boy in school. Yet it was prepared to accept the evidence of the school board witnesses, who had never seen the boy outside school, with his service animal.

7. NEED TO FIX SERIOUS PROBLEMS IN HOW HUMAN RIGHTS ARE ENFORCED IN ONTARIO

This case also illustrates a recurring unfairness in Ontario's human rights enforcement system. This has existed since the Legislature amended the Ontario *Human Rights Code* in 2006 to privatize human rights enforcement.¹⁰⁶

This boy's family had to privately hire a lawyer to investigate and prosecute this case at a costly seven day Human Rights Tribunal hearing. They were up

¹⁰⁴ J.F., *supra* note 2, at para. 127.

¹⁰⁵ J.F., *supra* note 2, at para. 192.

¹⁰⁶ The entire history of this issue and the problems with human rights enforcement since 2008 are all explained and documented in the March 1, 2012 "Brief to the Andrew Pinto Ontario Human Rights Code Review" dated March 1, 2012, by the Accessibility for Ontarians with Disabilities Act Alliance. It is available online at: <https://www.aodaalliance.org/wp-content/uploads/2016/02/march-1-2012-entire-final-aoda-alliance-brief-to-andrew-pinto-human-rights-code-review.doc>; The April 12, 2012 "Supplemental Brief to the Andrew Pinto Ontario Human Rights Code Review", available at: <https://www.aodaalliance.org/docs/AODA-Brief-to-Pinto-Review.doc> and the AODA Alliance's November 16, 2012; "Analysis of the November 2012 Final Report of the Andrew Pinto Report on Ontario's New System For Enforcing Human Rights in Ontario — Damning Findings of A Human Rights Enforcement system In Trouble, Wrongly Papered Over As A "Qualified Success"" available at: <https://www.aodaalliance.org/wp-content/uploads/2016/02/November-16-2012-aoda-alliance-analysis-of-pinto-final-report-with-Table-of-Contents.doc>. I was the author of those briefs and that analysis.

against a large, publicly-funded school board. This is not a fair fight. It tilts heavily in favour of school boards, government agencies, and large businesses. It tilts heavily against vulnerable, disadvantaged people, like students with disabilities.

Ontario's human rights enforcement system was not always like this. In 2006, the Ontario Government made major changes to it. Many, including this author, opposed these changes.¹⁰⁷

Before that, Ontario had a public human rights enforcement system. Under it, this family would have filed this complaint with the Ontario Human Rights Commission. The Commission was then a public law enforcement agency with the mandate to investigate, publicly prosecute and enforce human rights cases. The Commission would have had the duty to publicly investigate this case and to try to mediate a settlement. If the case did not settle, and the evidence warranted a hearing (obviously the case here), the Commission would have had the mandate to present this case at the Human Rights Tribunal.¹⁰⁸

Under the pre-2006 *Code*, once a case got to the Human Rights Tribunal, the Commission had carriage of the case. It could have investigated the facts, presented the evidence, cross-examined board witnesses and made closing arguments to support the complaint. The Commission was represented by publicly-funded lawyers with human rights expertise. The family also could hire its own counsel for the hearing, but it did not have to do so.¹⁰⁹ In a case like this, with obvious public importance, the Commission, taking carriage of the complaint, helps offset the huge imbalance when a private family tries to take on a large, well-resourced school board.

Ontario's new privatized post-2006 human rights enforcement system let down this family, and students with disabilities, in four ways. First, when it privatized human rights enforcement in 2006, the Government promised it would provide free publicly-funded counsel to all human rights applicants throughout the Human Rights Tribunal process. For example, The Attorney General's Parliamentary Assistant, David Zimmer committed during legislative hearings on that reform:

. . .the Attorney General did commit to introducing an amendment which would ensure that everyone before the tribunal would, in fact, have their own independent legal counsel.¹¹⁰

. . .the Attorney General in the Legislature has made a clear and unequivocal commitment to amend the bill to ensure that everybody who has a complaint before the tribunal does receive legal support has a lawyer attached to their case to see the case through with them.¹¹¹

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ontario Human Rights Code*, R.S.O. 1990, c. H.19.

¹⁰⁹ Andrew Pinto, *Report of the Ontario Human Rights Review 2012* (Queen's Printer for Ontario, 2012), Part III B(2).

¹¹⁰ August 9, 2006 Standing Committee on Justice Policy, Ottawa.

That promise was not kept, as this case typifies. A decade ago, the Ontario Government created the Ontario Human Rights Legal Support Centre, to advise and represent human rights applicants. However, that Centre is not funded sufficiently to enable it to serve all human rights applicants.

Second, even though the 2006 reforms took away the vast majority of the Ontario Human Rights Commission's enforcement mandate, it left the Commission with the right to intervene in individual cases at the Tribunal, and to bring its own systemic cases.¹¹² The Tribunal's reasons give no indication that the Commission took part in this case. The Commission's not intervening here let down students with disabilities. In 2006 when the Ontario Government privatized human rights enforcement, it promised that the Commission would be a stronger force against systemic discrimination. Attorney General Michael Bryant, sponsor of these reforms, had committed:

Under this legislation, the human rights commission, headed by Barbara Hall, would become an even stronger champion of human rights. . . . The commission would still have a critical role in the resolution of complaints. It would have the ability to intervene in or initiate complaints on systemic issues affecting the public interest before the tribunal. In this way, the commission's time-honoured roles of identifying systemic issues and bringing those issues before the tribunal would not only be maintained but enhanced.¹¹³

Third, the Government committed that the Tribunal would take a more modern, activist approach to deciding cases, practicing "active adjudication".¹¹⁴ This would offset substantial imbalances of power in the privatized human rights enforcement system.

¹¹¹ August 10, 2006 Standing Committee on Justice Policy, Thunder Bay.

¹¹² *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 Amended by: S.O. 2006, c. 30, ss. 1-11; S.O. 2006, c. 21, Sched. F, s. 136(2); S.O. 2006, c. 35, Sched. C, ss. 54, 132. SS. 29(i) and 37.

¹¹³ April 26, 2006 Ontario Legislature First Reading Bill 107.

¹¹⁴ Andrew Pinto, *Report of the Ontario Human Rights Review 2012* (Queen's Printer for Ontario, 2012), Part III B(6)(a) describes "active adjudication as "the power of Tribunal adjudicators under section 43(3)(a)-(f) of the *Code* to conduct hearings in a flexible manner that includes practices that are alternative to traditional adjudication or adversarial procedures. At a hearing, a Tribunal member is entitled to exercise greater control over the proceeding so long as a hearing is conducted in a fair manner." In the Tribunal's website, it describes these powers in part as follows: "The HRTTO's Rules of Procedure allow the adjudicator to adopt non-traditional methods of adjudication in order to best focus on the human rights issues in dispute and reach a decision about whether the *Ontario Human Rights Code* (the "*Code*") has been violated. For example, the adjudicator may, through consultation with the parties, make determinations about what the main issues are, what facts appear to be undisputed and may structure how the hearing takes place including the order in which witnesses will testify. The parties will always be able to make submissions before a determination on procedure is made."

There is no indication that the Tribunal did so here. Rather than offsetting the incredible imbalance of power between the family and the board, the Tribunal reasons leave obvious issues uncanvassed such as those that this article identifies. If the family's lawyer did not raise some or all of them, these should be obvious to an expert Human Rights Tribunal adjudicator.

Fourth, Ontario's privatized human rights enforcement system created a new, serious financial barrier to access to justice for discrimination victims. After this Human Rights Tribunal decision, Ontario's privatized human rights enforcement system left this family with a cruel choice. They could apply for judicial review of the decision in the Superior Court of Ontario, if they can prove that the Tribunal's errors justify the court in overturning the Tribunal, a high threshold.

If the family applied for judicial review, it would face a new, unfair financial risk under Ontario's post-2006 human rights legislation. The family would have to pile up thousands of dollars of more legal fees, paying their private lawyer to prepare and argue the court case. If they lose in court, the court could and quite likely would order the family to also pay the board's legal costs for the judicial review application — thousands of more dollars.

In contrast, before 2006, had the Human Rights Commission presented this case at the Tribunal and had it lost, it could appeal to court. The Commission would pay its own lawyers. The family would not have to hire lawyers. If the Commission appealed, but lost, the Commission, not the family, would have to pay the board's court costs.

8. CONCLUSION — THIS CASE'S BROADER IMPLICATIONS

This Tribunal decision can be viewed as a narrow one. It did not decide that Ontario school boards never need to accommodate students with autism by allowing them to bring an autism service dog to school. It did not decide that it would cause an undue hardship for the school board to let this boy have his autism service dog be with him at school.

All the Tribunal here decided, (albeit wrongly), was that the family's evidence had not shown that this boy was disadvantaged in his educational opportunity by this school board's barring his service dog from school. If a family brought the same request again, on better evidence, and/or if additional arguments were presented such as those in this article, the school board and the Human Rights Tribunal must reconsider this request afresh. This Tribunal ruling is not a permanent declaration that no autism service dog has any place in an Ontario school, for this boy or for any other students with disabilities.

This case also shows a need for Ontario's special education legislation to be modernized. On paper, this school board may think it took all the right steps. This case shows that those traditional procedures, which lie at the core of Ontario's 37-year old special education legislation, are out-of-date and insufficient. Large school boards can at times be resistant to innovation and modernization, as this case illustrates.

This case has implications for the proper role of lawyers who represent school boards. The school board conducted itself at this hearing like a typical adversarial private litigant, tactically poking all the holes it can in its adversary's case. That strategy worked here, from the narrow perspective of a private litigant who wants to "win".

Federal and provincial Crown lawyers are held to a higher ethical standard than lawyers who represent private clients. The role of the Crown lawyer is not simply to try to "win" in adversarial contests. The same should be so for lawyers representing a school board, whether they are public or private sector lawyers. School boards are government organizations in the public sector. Their role is to provide the public service of education to all, including students with disabilities.

This case also has implications for Ontario's Ministry of Education, which oversees publicly-funded schools. That Ministry routinely issues policy memoranda to school boards. It should direct that students with a qualified autism service dog should be permitted to bring the dog to school as an education accommodation, unless the school board can show that it would be impossible to do this without causing the school board undue hardship.

This case has broader implications regarding the need for greater enforcement activity by the Ontario Human Rights Commission. For example, the Commission should itself bring a systemic application to the Human Rights Tribunal to set province-wide requirements for families and school boards in this context, if the Ontario Government does not promptly act. Families of children with ASD should not have to privately fight these battles, one school board at a time. If a family brings another such human rights case, the Commission should intervene before the Tribunal.

Finally, this case shows a pressing need for Ontario to enact an Education Accessibility Standard under the *AODA*, something the previous Ontario Government promised and the opposition parties supported in the Legislature. The *AODA* requires the Ontario Government to lead Ontario to become accessible to people with disabilities by 2025, by enacting and enforcing all the mandatory accessibility standards needed to ensure that Ontario reaches that goal. An Education Accessibility Standard can set out detailed requirements that educational organizations like school boards must take to remove and prevent recurring disability accessibility barriers. That standard should include protections for students with disabilities, who want to bring a trained service animal to school.

Leviticus 19:14 sets out the world's earliest law against discriminating against people with disabilities. "You shall not curse a deaf person or place an obstacle in the path of a blind person." That ancient precept reinforces this article's analysis. Both this school board and Ontario's Human Rights Tribunal fell short, when applying that principle here.