IN THE MATTER of a dispute between Co-operators General Insurance Company and Her Majesty the Queen in right of the Province of Ontario (The Motor Vehicle Accident Claims Fund) pursuant to Regulation 283/95 under the *Insurance Act*, R.S.O., 1990, I. 8 as amended.

AND IN THE MATTER of an Arbitration pursuant to the *Arbitration Act*, S.O. 1991.

BETWEEN:

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

-and-

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF ONTARIO (THE MOTOR VEHICLE ACCIDENT CLAIMS FUND)

Respondent

AWARD

COUNSEL:

Steve Malach for the Applicant

Catherine Coplea for the Respondent

Robert Budgell for Melanie Chartrand

ISSUES:

Was Melanie Chartrand a dependant of Donald Chartrand or his spouse for the purposes of section 2(6) of the Statutory Accident Benefits Schedule when she was injured in a motor vehicle accident on May 21, 1999?

ORDER:

Melanie Chartrand was not a dependant of Donald Chartrand or his spouse at the time of the accident.

In the event that it is determined that there was no insurance on the Brisson motor vehicle at the time of the accident then the Motor Vehicle Accident Claims Fund is to pay benefits to Melanie Chartrand and repay those benefits already paid by Co-operators Insurance Company.

HEARING:

The arbitration hearing was held in the City of Ottawa, in the Province of Ontario, on June 13th and July 14th, 2001.

THE FACTS:

The facts of this case are relatively straight forward and can be summarized as follows.

Melanie Chartrand was a passenger in a motor vehicle owned and operated by Mr. Emanuel Brisson which was involved in an accident on May 21, 1999. I have yet to determine if there was any insurance on the Brisson motor vehicle. As a result of the accident, Ms. Chartrand was severely injured and accordingly she applied to Co-operators for statutory accident benefits under an automobile insurance policy in effect on a vehicle owned by her father, Mr. Donald Chartrand.

Having received the first completed application for accident benefits, Co-operators quite properly paid Ms. Chartrand benefits, however, they have raised the issue as to whether or not Melanie was a "dependant" within the meaning of section 2(6) of Bill 59 at the time of the accident.

In accordance with section 268 of the *Insurance Act*, if Melanie was a dependant of her father at the time of the accident, Co-operators would be responsible to pay the statutory accident benefits. If, however, she was not a dependant then the Motor Vehicle Accident Claim Fund would be responsible to pay the benefits.

Section 2(6) of the Statutory Accident Benefits Schedule defines a dependant as follows:

> For the purposes of this Regulation, a person is a dependant of another person if the person is principally dependant for financial support or care on the other person or the other person's spouse or same sex partner.

It is worthy of note that the definition of dependant, for accident benefit purposes, was originally for "financial support" only, however, in Bill 164 this was changed to include "financial support **or care**". This change was carried over into the definition found in Bill 59.

Traditionally, arbitrators in determining if a person was a dependant of another person for financial support would look not only at the money provided to the dependant, but also the value of goods and services provided by the person to the dependant. Counsel for Co-operators, however, has argued that the change in the wording, noted above, has altered the type of analysis that should be made. Counsel argues that by adding the words "or care", this changes how the

analysis should be done. Counsel points out that the word "or" is disjunctive and argues that the term "care" should include the cost of such "care". In other words, rather than including the cost of providing certain services, such as the cost of housing, transportation, food etc. as "financial support" as has been done in the past, these items should more properly be included under the term "care". To do otherwise, counsel argues, would be to deprive the amendment of any meaning, and it is trite law to say that the Legislature has a reason when altering legislation.

In support of this proposition, counsel for Co-operators relies upon the case of Pilot Insurance Company vs. Commercial Union and Her Majesty the Queen in right of Ontario as represented by the Minister of Finance, unreported decision of Arbitrator The Honourable David Griffiths dated July 12, 1999. In that case, Arbitrator Griffiths was considering whether the injured party was a "dependant" of her father or her aunt at the time of the accident. Arbitrator Griffiths correctly noted that the legislation had changed and that a person could be found to be a dependant for reasons of either financial support or care. In analyzing the particular fact situation, Arbitrator Griffiths found on the facts that the injured party was not dependant for financial support on her aunt and went on to say that with regard to the question of care, he noted that while the injured party's aunt and uncle were her legal guardians, she was an independent youngster, capable of looking after herself and making independent decisions. He accordingly decided that the injured party was not principally dependant on her aunt.

Arbitrator Griffiths then went on to examine the question of whether she was dependant for financial support on her father at the time of the accident. It is interesting to note that when examining this issue Arbitrator Griffiths stated:

> "The evidence establishes in the broadest sense that for two weeks before and up to the accident, Tracy had become principally dependant on her father for financial support. There is no evidence that she planned to move out in the foreseeable future. During the relevant period, except for modest earnings from her part-time work, the evidence would establish that she was completely dependant upon her father for room, board, school needs, transportation and clothes."

Arbitrator Griffiths then went on to say that in light of his decision with regard to financial support it was unnecessary for him to determine whether the injured party was also principally dependant on her father for care. Accordingly, I understand Arbitrator Griffiths to have made the distinction between dependency for financial support or care but he clearly took into account such items as room, board, school needs, transportation and clothes when considering the issue of financial support. Accordingly, I am not convinced that Arbitrator Griffiths decision stands for the proposition as put forward by Co-operators.

While counsel for the applicant has made a compelling argument for the proposition that the word "or care" should include the cost of providing such care as shared housing, transportation, food etc., on balance I do not agree with that position. The Legislature, when it altered the definition of a "dependant", chose to retain the term "financial support" in the definition. At the time the Legislature considered Bill 59, the term "financial support" had been considered by numerous arbitrators as well as by the courts. Had the legislature wished to exclude financial support "in kind" from that part of the definition it could have done so in clear and direct language. It chose not to do so.

The inclusion of the words "or care" were added, in my view, to reflect those cases where, for example, a dependant is emotionally dependent upon another. Under the earlier definition such

emotional dependence would not have been covered. This change has been recognized in a number of arbitration decisions including Arbitrator Renehan in Weiler vs. Personal Insurance Company of Canada (April 1, 1996) OIC A-95000259 and Arbitrator Baltman in Pereira vs. Canadian General Insurance Company (September 4, 1996) OIC A-953564. The interpretation given in these two cases allows for consistency with the earlier interpretation of the "financial support" part of the definition, but also allows for the term "or care" to have a clear and separate meaning.

Turning to the issue of whether Melanie was principally dependant upon her parents for financial support, a considerable amount of time was spent at the hearing dealing with the question of what the relevant test should be. The most recent decision of the Court of Appeal in Liberty Mutual Insurance Company vs. Federation Insurance Company [2000] O.J. No. 1234 provides us with some assistance in this regard. In that case, the hearing arbitrator determined that the appropriate time frame to examine the question was the nineteen week period before the accident. The arbitrator found that the injured party had earned sufficient monies over that time frame to provide for at least fifty percent of his financial needs. The Divisional Court specifically approved the test used by the arbitrator when it quoted from the Arbitrator's decision, stating:

> At page five of his reasons the Arbitrator said " Jonathan can only be considered principally dependant for financial support on someone else if the cost of meeting Jonathan's needs is more than twice Jonathan's resources". I understand him to be saying that if Jonathan's resources were sufficient to pay for fifty-one percent of his financial needs, then he would not be dependant on others.

The Court of Appeal upheld this view and I see no reason to deviate from it in this case.

Before examining Melanie's income and expenses in detail, it is first necessary to determine what time frame should be used when determining the issue of dependency. Numerous arbitration and court decisions have held that one should not simply take a "snapshot" of the situation as of the date of the accident, but rather consider the situation over a reasonable period of time prior to the accident. I am in agreement with this general proposition, and clearly each case must be decided on its particular set of facts.

In coming to a conclusion on this issue, it is important to have a full understanding of Melanie's situation prior to the accident. At the time of the accident Melanie was eighteen years of age and had essentially lived at home all her life. She had completed grade twelve in June of 1998. Upon graduating she had decided to take a year off school in order to work and save money so that she could attend college perhaps in the fall of 1999. While this undoubtedly was Melanie's plan when she graduated from grade twelve, it would appear that her plans and circumstances changed somewhat over time, thus, by the time of the accident in May of 1999 it is clear that Melanie was not going to attend college in the Fall of 1999. In support of this proposition I note that Melanie had not yet applied to a college at the time of the accident and had only saved approximately two thousand dollars towards her schooling. Melanie, when questioned about this testified that she would have attended college commencing in January 2000 "at the earliest". In my view, while Melanie did have an intention to go to college at some point it is by no means clear at the time of the accident exactly when she would have actually attended. Prior to completing grade twelve Melanie had worked part-time at R. E. Gilmour Limited, where her mother also worked. On August 7, 1998, having completed grade twelve, she commenced full-

time employment at R. E. Gilmour where she continued to work until the time of the accident, a period of approximately forty-one weeks. In August of 1998, she earned $8.50 an hour which was increased in January of 1999.

In 1997 Melanie had developed a relationship with Mr. Emanuel Brisson. By the time of the accident Melanie was spending weekends and one or two nights per week at his residence. While she continued to have a room of her own at her parents and ate most of her dinners there, it was clear that she was becoming progressively more independent and spent only approximately half her non-working hours at her parents.

Counsel for the applicant suggested a number of time frames for examining the dependency issue, including forty-one weeks prior to the accident (from the time when she started full-time work) or eighteen and a half weeks (from January 1999 to the time of the accident). Counsel for the respondent suggested that a one year period prior to the accident might be appropriate. After considering all of the facts of the case I am of the view that the most appropriate time frame is the forty-one week period prior to the accident. At this point Melanie had completed her high school education, started a full-time job and has established a living pattern that remained essentially stable up to the time of the accident. To go back further would include the time Melanie had been at school, which she had clearly completed. While she would have in all likelihood have returned to school at some point in the future, it was far from clear at the time of the accident when this would occur.

In turning to the question of Melanie's pre-accident income, it is relatively easy to determine what it was in the forty-one weeks prior to the accident. In 1998 she earned $5,988.78 and her tax refund exceeded the tax deducted by her employer, so her disposable income was the same as her gross earnings. In 1999 her gross earnings were $7,446.03, however, $1,201.66 was deducted for taxes leaving $6,244.37 of disposable income for 1999. Considerable time was spent examining the question of whether one should look at Melanie's gross or net earnings for the purposes of the dependency issue. Opinions were given by two experts, Dr. Jack Carr on behalf of Co-operators, and Mr. Don Ross on behalf of the Fund.

In my opinion, the correct approach would be to reflect what Melanie's actual position was as best we can determine it. In 1998, it was clear that she earned only a limited amount and that her tax refund would equal the amount previously deducted. Her disposable income from August to December 1998 was therefore $5,112.59. In 1999, but for the accident, she would probably have earned more, and therefore not have received the full tax refund. The disposable income for 1999 accordingly was $6,244.37. The combined total is therefore $11,338.96. If this were annualized it would amount to $14,381.12 or $1,198.42 per month of disposable income.

The issue of Melanie's expenses, and the amount of financial support provided by her parents raised a number of problems that must be dealt with in order to arrive at a final conclusion regarding Melanie's financial situation.

The first issue to be considered is whether or not to deduct from her earnings the amount of money that she was going to save for college. This raises the question again as to what period of

time one should consider when determining dependency "at the time of the accident". While I have already dealt with the appropriate time frame before the accident, counsel for the respondent has suggested that it is also appropriate to look at the injured party's plans for the immediate post accident period. In certain cases, they argue, expenses that had already been planned but not yet carried out prior to the accident should be taken into account.

Arbitrator Palmer in Bogdan vs. Royal Insurance Company of Canada (FSCO File A-014959) had an opportunity to deal with this type of issue. In that case the injured party was approximately five months pregnant at the time of the accident. She had planned to withdraw from the workforce immediately after the birth of her child. Arbitrator Palmer held that one could not stretch the issue of dependency forward far enough to encompass the prospective dependency planned by the injured party. The Bogdan decision was appealed to the Director's Delegate Naylor who upheld Arbitrator Palmer's decision stating:

> The focus must be on the time of the accident. For that reason, a family's plans or arrangements for the future will not generally be a factor. However, the assessment must be realistic. This may require some consideration of changing circumstances.

In our case, Melanie had already decided, in Spring of 1998, to take some time off to save money for school. While she originally planned to return to school by September 1999, this was, by the time of the accident of May 1999, not going to happen. By this time Melanie had not yet applied to a college and had only saved approximately $2,000.00 towards college. Even the money put into the college savings account had been used to lend to her boyfriend to purchase a Sea-doo. While I accept that this was a short term loan and was paid back, it is one indication of the unsettled nature of the college plans. Melanie herself testified that her plans had subsequently

become to attend college in January 2000, at the earliest. While I do not rule out, in some cases, looking to the future plans of an injured party, it should only be done with caution. In this particular case, while I accept that Melanie truly wanted to return to school at some point in the future, those plans were too vague at the time of the accident to be taken into account when considering the dependency issue.

At the time of the accident Melanie shared a residence at her parent's home with her mother, father and brother. She had her own room and had the use of the other rooms and facilities in the house. She had an informal arrangement with her parents whereby she would not be charged for rent, food etc. as long as she continued to save money to go to college. Despite the fact that Melanie had not managed to save much money for college, her parents had not changed the terms of the agreement and she was still receiving room and board etc. at no charge.

While Melanie's parents' premises were available to her, she had, in fact, been staying all weekends and one or two days per week at her boyfriend's residence. While she normally ate dinners at home, as her boyfriend worked late, I find that she essentially lived half time at her parents. During that time her parents generally made her meals for her, cleaned the house, did her dishes etc. While there was evidence that she occasionally cleaned her room and did the dishes, this was negligible.

A great deal of time was spent during the trial and in submissions considering what percentage of the various household expenses should be allocated to Melanie for the purposes of determining financial support. Mr. Peter Ross testified on behalf of the respondent. He suggested

approximately 42.5% of the household expenses should be allocated to Melanie. This was based on Mr. Ross's experience in fatality cases. With the greatest of respect, cases involving financial support in dependency cases are considerably different from financial dependency in fatality cases. To suggest that Melanie's allocation of household expenses should be 42.5% in a case where she not only shares the house with three other persons and essentially lives there only half time is totally unrealistic and I reject this approach.

Dr. Jack Carr testified on behalf of the applicant. Dr. Carr is a professor of economics at the University of Toronto and has considerable expertise in the area of financial dependency. To the extent that his testimony conflicted with that of Mr. Ross, I prefer that of Dr. Carr. Not only does Dr. Carr have greater expertise in the area in question but it was clear that he had a greater understanding of the facts of this particular case.

Having said that, I am not prepared to accept everything that Dr. Carr put forward with regard to the allocation of household expenses to Melanie. For example, Dr. Carr pointed out that the vast majority of household expenses would have been incurred by Mr. and Mrs. Chartrand even if Melanie had not been there and accordingly very little should be allocated to her. I do not agree with this approach. Melanie had clearly derived some financial benefit from being able to live, even part-time, at her parents. Numerous arbitrators and courts have allocated a value to this in previous cases where a child has lived with their parents and I see no reason to depart from that approach at this time. Taking into account that Melanie was one of four people living in the house, and the benefits she received from it, I am prepared to generally allocate 25% of the household expenses to her, subject to various specific items which I will discuss below. In

arriving at such a figure, I do note that Melanie was in the premises only approximately half the time. While this is a factor to be taken into account, it is not the only factor and I also take into account for example, that she ate most of her dinners there.

A further item of disagreement between Mr. Ross and Dr. Carr was the hourly rate to allocate to any services provided by Mr. and Mrs. Chartrand to Melanie. Mr. Ross suggested a figure of $10.65 per hour, a figure that he says is typically used in personal injury litigation. I disagree with Mr. Ross in this regard. The figure of $10.65 may be appropriate in certain attendant care situations, however, in dealing with types of services typically involved in cases such as this, the courts, and the Financial Services Commission of Ontario, have typically used the minimum wage figure of $6.85 per hour and I find this to be the appropriate figure in this case.

A great deal of time was spent attempting to determine the exact value of various items included as "financial support" provided by Mr. and Mrs. Chartrand. At the original commencement of the hearing the Chartrands and the respondents provided revised estimates for the monthly family expenses changing the figure from approximately $2,600.00 per month to approximately $4,150.00 per month. This resulted in an adjournment in order to allow the applicant an opportunity to examine the new figures. Counsel for the applicant suggests that the new figures have been inflated in order to make it more likely that Melanie be found a dependant. With the benefit of having heard all the witnesses, and examining the documents, I am satisfied that for the most part the differences are as a result of imperfect record keeping on the part of the Chartrands. I do not say this in a negative way. Very few people keep such detailed records of their expenses as is required for a hearing such as this.

Mr. and Mrs. Chartrand at the examinations for discovery gave the best estimates they could as to the household expenses of roughly $2,500 to $2,600 per month. Subsequent to the examinations for discovery they reviewed their expenditures and they increased substantially. While a number of the increases can be explained by a more thorough analysis of their expenditures, there are other items which are at best questionable as to whether they should be included as appropriate expenditures for the purposes of this hearing. I do not propose to go into a lengthy discussion of the individual items where the amounts in dispute are very small. As will be seen from my conclusion, after examining the numbers involved, the small differences do not have a great impact on the outcome. Rather, I will discuss the major items of dispute. The individual items claimed are set out in paragraph 171 of the Applicant's submissions in the amount of $4,105.82. In paragraph 194 of those submissions the Applicant's uses the same headings but arrives at a proposed figure of $2,435.06. In Appendix A of the Respondent's submissions their revised total is $4,093.96.

The first item of major dispute is the amount spent for the mortgage and property taxes. The Chartrands have included in the amount claimed the mortgage payments that go towards paying off the principal, as well as the interest. I am in agreement with the opinion expressed by Dr. Carr, that the principal payments increase the equity in the home owned by Mr. and Mrs. Chartrand and should not be included as expenses in dependency cases. The monthly amount for the mortgage, including taxes is then $693.40.

With respect to home maintenance costs, Mr. and Mrs. Chartrand are claiming $108.00 per month or $1,296.00 per year. They have no records to support this amount. While Mr. Chartrand testified that he did some repairs on the house in the year prior to the accident, he did not keep receipts. The applicant has questioned the veracity of Mr. Chartrand and has pointed out that he had misled Revenue Canada in an effort to minimize his taxes. They suggest that he is exagerating the numbers in order to assist his daughter. I am satisfied that some repairs would have to have been done on the house and that this may vary from year to year. Without records, I am prepared to allow $1,000.00 per year or $83.33 per month.

The Chartrands originally claimed $500.00 a month for food but later revised this to $612.50 per month, claiming that they had subsequently kept track of their food expenditures and the new figure was more accurate. No documentation was provided. I am prepared to allocate $600.00 per month for food.

With respect to meals outside the home Mr. Chartrand originally testified at examinations for discovery that he and Mrs. Chartrand attended hockey games one or two times a month and spent $100 to $130 on meals while attending games. His testimony was later clarified and Mr. Chartrand claimed that approximately $100 was attributable to the family eating out. The applicant points out that Melanie was away on weekends when most of the “eating out” would likely occur. In light of all these factors, I am in agreement that $60.00 per month outside of the “hockey dinners” would be appropriate.

There should be no allowance for clothing as the evidence was that Melanie bought her own clothes.

With regard to the car loan payments, the Applicant argues that this should be treated in a similar fashion to the house mortgage payments. I disagree. Whereas houses generally increase in value, automobiles generally depreciate. Accordingly the car loan payments are to be included in the amount of $653.38 per month. In terms of car maintenance expenses I am in agreement with the applicant's position that a review of the documentation suggests that $53.83 is the appropriate amount.

With regard to entertainment and recreation I am in agreement with counsel for the Applicant that the vast majority of the amount claimed would be for those other than Melanie who was away on weekends. Nevertheless, some small amount should be included and I set that amount at $50.00 per month.

Turning to the question of vacations, there was some evidence of family vacations as well as a trip that Melanie took with her boyfriend which I understand she paid for herself. In the absence of receipts I am prepared to accept $1,000.00 a year or $83.33 per month.

With regard to the issue of gifts and charitable donations, I am in agreement with Dr. Carr that they do not constitute "financial support" and as such should not be included.

In terms of the other expenses claimed the differences between the two parties is very small and I will not comment, as mentioned above, on each individual item. I have reviewed the documentation, however, and to the extent there are differences, I accept the numbers as set out in paragraph 194 of the Applicant's brief. This would result in the total for household expenses prior to the allocation of $3,036.02 per month. While applying a 25% allocation, this amounts to $759.00 per month.

As mentioned above, in keeping with numerous FSCO decisions, I am of the view that the appropriate hourly rate for tasks performed by the Chartrands is $6.85 per hour. Using the number of hours provided by Mr. Ross, but at the rate of $6.85 per hour this would result in an annual value of $4,209.00, or $350.51 per month.

By far the largest allocation for services was for transportation, and this was a somewhat contentious item at the hearing. Melanie worked for forty-one weeks prior to the accident at R. E. Gilmour. Mr. Chartrand drove Melanie there on his way to and from work, the drive taking forty-five to ninety minutes each way, depending on traffic. It is important to note, however, that Melanie's mother had worked at R. E. Gilmour prior to and during the time that Melanie worked there. Accordingly, the Chartrands never really incurred any additional vehicle expense to drive Melanie to and from work, nor did it take Mr. Chartrand additional time. Nevertheless, Melanie did receive a benefit from this and her only alternative was to take various buses which would have cost her approximately $149.00 per month. This, of course, is very close to the $145.42 per month that is the 25% allocation of time spent at $6.85 per hour by Mr. Chartrand. It does not include, however, the cost of the car, maintenance, gas etc. which has also been claimed by the

Chartrand's. I accept that the Chartrand's drove Melanie into Ottawa and elsewhere on some occasions, above and beyond work and I have included the value of their time and the expenses of the vehicle in my calculations.

Melanie's monthly expenses both actual and attributed can be summarized as follows:

Household expenses	$ 759.00
Household services	$ 350.51
Total	$1109.51

Melanie's disposable income, as calculated above was $1,198.42 per month.

Counsel for the Applicant led evidence regarding the cost of one and two bedroom apartments in the same town that Melanie lived with her parents in 1999. Ms. Sara Berger testified that she had contacted a number of landlords in the town in which Melanie lived, in June 2001 and the rents for one and two bedrooms varied from $405.00 to $715.00 per month, with the average probably being approximately $600.00 plus $70.00 per month for heat, hydro etc. In addition to this, there would of course, be the cost of telephones, food, transportation etc. In addition, most of the units were unfurnished, so there would be some furnishing costs. Even if one were to add these costs, however, it is hard to see how Melanie's costs would have been double the $1,198.00 that she was earning per month, that would be required in order for her to have been a dependant within the meaning of section 2(6) of the Statutory Accident Benefits Schedule. While I view

Melanie's expenses actually incurred while living at home prior to the accident as a more accurate estimate of her pre-accident expenses than the cost of living in an apartment, it is interesting to note that the two figures would be roughly similar.

In applying the test used in Federation Insurance Company of Canada vs. Liberty Mutual Insurance Company, approved by the Court of Appeal, it is clear that Melanie was essentially earning a sufficient amount of income to cover her expenses, and accordingly was not principally dependant for financial support upon her parents within the meaning of section 2(6) of the Statutory Accident Benefits Schedule.

Very little time was spent at the hearing dealing with the issue of whether Melanie was principally dependant upon her parents for care, being the second part of the test set out in section 2(6). The case law in this area is clear, as developed by the Financial Services Commission of Ontario, that in order to qualify under this provision, something more than the usual parent-child or husband-wife relationship is required – see: Weiler vs. Personal Insurance (April 1, 1996) OIC A-95000259. In our case, Melanie was living away from home approximately half of the time and had a full-time job. She had developed a serious relationship with another person. All these factors lead me to the conclusion that while Melanie was and remains a member of a warm and loving family, she was not principally dependant upon her parents for care as required by section 2(6).

COSTS:

I may be spoken to with regard to the issue of costs if the parties are not able to agree on this.

Dated at Toronto this day of August, 2001.

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M. Guy Jones
Arbitrator