

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Marchand v. Boudreau 2013 NSSC 93

**Date:** 20130312

**Docket:** SFPAMCA - 068129

**Registry:** Port Hawkesbury

**Between:**

Betty-Anne Marchand

Applicant

v.

Adrian Boudreau

Respondent

**Judge:**

The Honourable Justice Moira C. Legere Sers

**Heard:**

December 7, 2012, in Port Hawkesbury, Nova Scotia

**Counsel:**

Adam Rodgers, for the applicant, Adrian Boudreau  
Betty-Anne Marchand, self represented

**By the Court:**

- [1] **On December 30, 2009** Betty Anne Marchand, the mother made an application under the *Maintenance and Custody Act* for custody and child support, together with a request for a contribution to special expenses.
- [2] There is one child, born November 16, 2006.
- [3] **On February 2, 2010** Adrian Boudreau, the respondent father, responded to this application seeking an order for shared custody.
- [4] In **August 2010** counsel adjourned the matter without day for further discussion. Unable to reach agreement, they again set the matter down to for an administrative Pretrial on February 21, 2011.
- [5] The matter was heard on **May 18, 2011**. A written Decision was circulated to the parties on **July 7, 2011**. Counsel submitted the Order for signature in **January 17, 2012**.
- [6] The Decision granted the parents joint custody of their child (paragraph 1). The father was ordered to pay child support in the amount of \$286.00 per month based on his income less his union dues.
- [7] The father appealed this Decision.
- [8] The appeal was heard on **June 6, 2012** with judgement dated the 24<sup>th</sup> of July 2012.
- [9] The father argued that a shared parenting arrangement existed. That is, that he had day to day care of the child for at least 40 percent of the time.
- [10] He argued that the Court should have completed a section 9 **Contino** (**Contino v. Leonelli Contino**, [2005] 3 S.C.R. 217) analysis. This analysis might excuse him from paying a monthly base amount of child support.
- [11] He did not appeal the arrears assessment, the custody and parenting schedule nor the sharing of medical expenses.

[12] The Court of Appeal sent the matter back for a section 9 assessment on the facts.

[13] The Court noted that no reference was made to the fact that the father would have his daughter with him more than 40 percent of the time as a result of the detailed and complex access order.

[14] The Court noted that the transcript disclosed minimal evidence with which one could work with to assess the section 9 factors.

### **Analysis**

[15] The first step in this analysis must be a finding that a shared parenting arrangement did in fact exist in order for the Court to then turn its mind to the section 9 analysis.

[16] Section 9 of the *Child Maintenance Guidelines* made under section 55 of the *Maintenance and Custody Act*, R.S.N.S. 1989 c 160 is as follows:

#### **Shared Custody**

9. Where a parent exercises or has a right of access to , or has physical custody of , a child for not less than 40% of the time over the course of a year , the amount of the child maintenance order must be determined by taking into account

(a) the amounts set out in the applicable table for each of the parents

(b) the increased costs of shared custody arrangements; and

(c) the conditions, means , needs and other circumstances of each parent and of any child for whom maintenance is sought.

[17] Embarking on this exercise is not a perfect science. Each case requires an fact specific approach.

[18] In this case, the mother created the schedule and had a solid understanding of the division of time. While each counted time differently (one using nights and

the other portions of a day as a day), neither disagreed on what the schedule was for a particular 6 week cycle. Nor did they disagree on the defacto changing percentages. They lived with their shift work schedule and knew it instinctively.

[19] Their schedules were a moving target adjusted to address their every day life variations arising because of changing needs and availability and later on in **October 2012** adjusted further in some part as a result of the father's shift change and loss of his in home babysitters (his father and step mother).

[20] We are working now with potentially three different patterns:

1. The first that existed when the matter was first before the Court in May 2011 (which both courts would have used as their fact foundation). That was not a shared parenting arrangement;
2. The second the situation that appears to exist since January 2012 where there is an elevation in the percentage of time the father has the child with him; and
3. The third commencing October 2012 when the father's shift change began and when his father and step-mother moved . These appear to have again resulted in a reduction of the father's overnight time.

[21] The father's new shift position and the changes in his home circumstances made getting to work for an early morning shift and getting the child to her school later in the morning more difficult.

[22] The parents have adjusted their schedule. If he can not be available the child stays at her mother's.

[23] The father's counsel was reluctant to have the Court address the changes that became evident as a result of the subsequent appearances.

[24] However, this process had become counter productive to this family. To avoid having these parties re-litigate this issue, I have completed a section 9 analysis.

[25] I will consider not only the past but the changes that are reflected from January to October. Both parties have had an opportunity to work through these changes and both were in agreement with the evidence.

[26] Counting time is not always a productive enquiry. It can become a monetary issue that arguably depletes parents limited resources and ultimately requires an agreement or a court resolution.

[27] This was a costly, lengthy process for both parents and was not very helpful to either parent.

[28] After the initial hearing, the mother could no longer afford to be represented by counsel either at the Court of Appeal or in subsequent proceedings.

[29] The father continued to be represented by counsel thus incurring more debt and in this case accumulating arrears. This ultimately takes away from the child's financial safety net.

## Summary

[30] I will set out below the facts supporting my analysis according to the evidence tendered in the original Decision, as supplemented in subsequent appearances.

[31] From November 2009 to the end of October 2010, the father had the child approximately 32.53 percent of the time.

[32] From November 2010 to October 2011 (an end date that passed the May 2011 hearing ) he had his child with him approximately 31.47 percent of the time.

[33] From June 12, 2011 after the first hearing up to June 26, 2012 after the Court of Appeal hearing, the father had the child 35.6 percent of the time.

[34] These percentages **do not trigger** a section 9 analysis.

[35] However, post both Court processes and as a result of information submitted by Affidavit dated October 22, 2012, from November 2011 to October 2012 the percentages appeared to change to reflect an increase to between 38 and 40.5

[36] Subsequently to October 2012 other changes have affected the schedule resulting in potential reductions in the father's percentage once again.

[37] The latest information (October 2012 affidavit) is not consistent with the Court ordered schedule which would result in a 10 in 30 day split, plus or minus, depending on whether the father had access to early morning babysitters.

[38] This information about the last year up t November 2012 also did not accord with the December 7, 2012 in court discussions that yielded a 10 day 30 day split for the latest months.

[39] Clearly, this is a moving target.

### **Joint (Legal) Custody**

[40] Part of the historical difficulty may rest with the terminology joint legal custody. This can describe many different parenting strategies.

[41] Joint custody can be both joint legal custody and/or joint physical custody.

[42] Joint physical custody could lead one reasonably to believe one has a shared parenting arrangement.

[43] The father argued he had joint custody. I take it to me he erroneously believed he had a shared parenting arrangement.

[44] However, that was not an accurate description of their parenting strategy at the time of the hearing nor at the time of the Court of Appeal hearing.

[45] In this case, one parent is essentially the primary parent and the other a joint custodial parent significantly involved in his child's life.

[46] In the eyes of the parent, they may reasonably believe they are sharing the parenting duties (as they may be).

[47] That does not necessarily equate with a joint physical custody or shared parenting arrangement.

[48] Shared parenting **for the purposes of section 9 of the *Child Support Guidelines***, for the most part in Canada triggers a section 9 analysis when a parent has the child in their care for at least 40 percent of the time over the course of a year.

[49] The Quebec *Child Support Guidelines* allow for a time based adjustment when working with time share between 20 and 40 percent which they describe as “prolonged visiting and outing rights”. (*Fortin, Verdon et Pellissier-Simard, AliForm annote Bareme quebecois: Aspect civil et fiscaux*, 3e ed (Publications CCH, 2009):

“In every province, apart from Quebec, shared parenting/custody means that each parent must have custody of the child for at least 40% of the time over the year.

#### ***Alberta***

Under section 9 of the *Alberta Child Support Guidelines*, Alta Reg 147/2005, the shared parenting percentage is 40%.

#### ***British Columbia***

Section 1(2) of the *Child Support Guidelines Regulation*, BC Reg 61/98, provides that the Federal Child Support Guidelines are adopted and established as child support guidelines for the province of British Columbia. Consequently, the shared parenting percentage in British Columbia is 40%.

#### ***Manitoba***

Under section 9 of the *Child Support Guidelines Regulation*, Man Reg 58/98, to have shared custody means that each parent must have the child at least 40% of the time during the year.

#### ***New Brunswick***

Pursuant to section 3 of the *Child Support Guidelines Regulation - Family Services Act*, NB Reg 98-27, the Federal Guidelines are adopted as the child support guidelines for the province of New Brunswick. As such, shared custody in New Brunswick means that the child lives with each parent at least 40% of the time during the year.

### ***Newfoundland and Labrador***

Under section 9 of the *Child Support Guidelines Regulation*, Nfld Reg 40/98, the shared parenting percentage is fixed at 40%.

### ***Northwest Territories***

Under section 11 of the *Child Support Guidelines*, NWT Reg 138-98, the shared custody percentage is 40%.

### ***Nunavut***

Pursuant to subsection 85(2) of the *Children's Law Act*, SNWT 1997, c 14, as duplicated for Nunavut by s 29 the *Nunavut Act*, SC 1993, c 28, the Federal Child Support Guidelines are applicable where no guidelines have been established under subsection 85(1). As there are currently no established guidelines regarding child support, the shared parenting percentage in Nunavut is equivalent to the federal percentage of 40%.

### ***Ontario***

Under section 9 of the *Child Support Guidelines*, O Reg 391/97, the shared parenting percentage is 40%.

### ***Prince Edward Island***

Under section 2 of the *Child Support Guidelines*, PEI Reg EC1997-668, the province of Prince Edward Island adopted the Federal Child Support Guidelines for making orders for child support. Consequently, the shared parenting percentage in PEI is equivalent to the federal percentage of 40%.

### ***Saskatchewan***



Saskatchewan adopted the Federal Child Support Guidelines under subsection 3(1) of the *Family Maintenance Regulations, 1998*, RRS, c F-6.2, Reg 1. As a result, the shared parenting percentage in Saskatchewan is 40%.

### ***Yukon***

Under section 9 of the *Yukon Child Support Guidelines*, YOIC 2000/63, the shared custody percentage is 40%.”

## **Findings Supporting Decision dated July 7<sup>th</sup> 2011**

[50] The original Decision identified the most difficult aspect of this case: addressing a parenting strategy given the parties complex work schedules.

[51] The mother worked a six week rotational schedule, including both day and night shifts.

[52] The father worked (for the same employer) on a two week rotational schedule of day shifts.

[53] By acquiescence, if not implied consent, “the mother works out the parenting schedule”.

[54] The father complained that the schedule did not meet his requests for additional time. (paragraph 10)

[55] Since the date of their separation in November 2009, the father argued they had a shared custody arrangement and refused to pay the base amount of child support.

[56] In the past since separation he did, however, pay his share of the child care costs. The mother calculates his contribution, advises him and he pays forthwith.

[57] In the Decision, the schedule of parenting from December 2009 to February 2011, a period of 15 months, was assessed based on the evidence provided by the mother.

[58] The father did not then nor on any subsequent appearance contest the accuracy of the mother's scheduling evidence.

[59] The father also did not provide then, nor in any subsequent appearance, any evidence that would assist the Court to contrast her scheduling evidence with his except for providing on December 3, 2012, the (November 2012 one month) schedule which was provided at the Court's request.

[60] The only reliable and uncontested evidence on file in the original hearing regarding the schedule was that provided in the Affidavit of the mother filed on March 17, 2011; sworn to on the 16<sup>th</sup> of March, 2011.

[61] This covered the period of time from December 2009 to February 2011. (paragraph 15 of the Decision)

[62] What was not incorporated into the written Decision, but which can be found within this Affidavit, is the mother's calculations as to the percentage of time the child spent with each parent; a calculation I verified as I reviewed the documentation.

[63] Paragraph 15 of her **original affidavit** identifies a rough percentage identifying the percentage of time the child spent in one home versus the other. It is important to note that in this affidavit the mother uses plus or minus 30 day periods. (later evidence will use 6 week cycles)

[64] Paragraph 15 reads as follows:

November, 2009 (30 days)	Mother - 21 nights (70%)	Father - 9 nights (30%)
December, 2009 (31 days)	Mother - 21 nights (67%)	Father - 10 nights (33%)
January, 2010 (31 days)	Mother - 19 nights (61%)	Father - 12 nights (39%)
February, 2010 (28 days)	Mother - 19 nights (68%)	Father - 9 nights (32%)
March, 2010 (31 days)	Mother - 24 nights (77%)	Father - 7 nights (23%)
April, 2010 (30 days)	Mother - 17 nights (56.6%)	Father - 13 nights (43.3%)

May, 2010 (31 days)	Mother - 26 nights (83.8%)	Father - 5 nights (These numbers would have resulted from a vacation the mother took in Alberta) (16.2%)
June, 2010 (30 days)	Mother - 19 nights (63%)	Father - 11 nights (17%)
July, 2010 (31 days)	Mother - 21 nights (67.7%)	Father - 10 nights (32.2%)
August, 2010 (31 days)	Mother - 17 nights (54%)	Father - 14 nights (46%)
September, 2010 (30 days)	Mother - 21 nights (70%)	Father - 9 nights (30%)
October, 2010 (31 days)	Mother - 21 nights (68%)	Father - 10 nights (32%)
November, 2010 (30 days)	Mother - 22 nights (73%)	Father - 8 nights (23%)
December, 2010 (31 days)	Mother - 21 nights (68%)	Father - 11 nights (32%)
(**December - there was an error in Ms. Marchand's calendar such that it accounts for 32 days for December. If I err in favor of a day extra for Mr. Boudreau reducing Ms Marchand's days to 20 and Mr. Boudreau's staying at 11, the % works out to a 64.5% for the mother vs. 32.5% for the father)		
January, 2011 (30 days)	Mother - 21 nights (68%)	Father - 10 nights (32%)
February, 2011 (28 days)	Mother - 20 nights (71%)	Father - 8 nights (39%)

[65] Between November 2009, including 2010, and up to February 2011, (15 months) there were only two months (April 2010 at 40 percent and August 2010 at 46 percent) when the father's parenting time exceeded 40 percent.

[66] If I were to average the time in the months from November 2009 to February 2011 inclusive of April 2010 at 44 percent and August 2010 at 46 percent, I would get a total average time for the father for those fifteen months of **32.4 percent**

[67] This would not trigger a section 9 analysis.

[68] The Order reflects what they operated on except it incorporated full alternating weekends (which they did not implement until October 2012) and an extra night, which they also did not incorporate.

[69] Other findings of fact included:

- It is the mother who creates the schedule;
- She absorbs up front the child care costs and advises the father what his share is. He then reimburses her;
- The mother has been the primary parent since separation. It is she who attends to the medical appointments; hiring babysitters; addressing emergency situations, whether that arises from child care or issues relating to schedules of babysitter; attending pre school orientation or for other reasons;
- The mother tries to ensure the child's babysitters are consistent;
- The father hired babysitters sporadically, having lived at that time in his father's home with his father and step mother; and
- When the father had to cancel a visit for work, it was the mother who obtained a babysitter.

[70] The mother advised that the father did not take the initiative, on short notice for example, when a babysitter was needed:

- It was the mother who took time off work on sick days and snow days or hired a babysitter to ensure child care was covered; and
- Other than his father and step mother, the father did not have a cache of babysitters upon which he could rely.

[71] On the totality of the evidence, it was clear that prior to the hearing this was not a shared parenting arrangement. This was a joint legal custody arrangement with the child in the primary care of the mother.

[72] I continued this joint parenting, primary care strategy by court order.

[73] Thus, while the father wanted a shared parenting arrangement and while the Decision allowed him extra time, it did not authorize a shared parenting arrangement.

### **The Parenting Schedule**

[74] The parents' schedule is complex.

[75] In preparation for the previous Decision, I manually charted the parents' schedules to visually identify the pattern for transition of the child between the father's and mother's care.

[76] In particular, the weekend was a time of great transition for the child, made necessary because the parents worked the same weekends and had the same weekends off.

[77] In her earliest Statement attached to her Application, the mother said that the father usually took their child on her work weekend Sunday night to Tuesday morning. The following week he took her from Tuesday night to Thursday evening.

[78] Paragraph 42, page 7, of the Decision describes the parties schedule.

### **Weekday**

[79] The father has the child after school **every second Wednesday** and returns the child to school Thursday morning. He then picks the child up after school Thursday at 2:30 p.m. (now 3:00 p.m.) and keeps the child until 7:30 p.m. (this time may have changed) at which time the mother picks the child up and returns the child to her home. This occurs **every second** Wednesday and Thursday.

[80] This was translated in the Order at page 5 under "**Mid Week Parenting Time**".

[81] Paragraph 4 of the Order allowed for an extension of this parenting time to Thursday. (**Mid Week Parenting**”, p.5 of the Order.)

[82] The father’s time was increased by one overnight by directing that every second week he would have the child after school on Wednesday to Thursday morning and after school Thursday the child would remain with him through Thursday evening. He was to return the child to school Friday morning.

[83] The Decision, as drafted by counsel in the Order at page 5, paragraph (xv) states that while the current work schedule remains, this should occur every second week, leaving the remaining two weeks of the month with the schedule as it currently stood.

[84] The schedule, as it then stood, did not permit week day or mid week parenting time for the father the other two weeks.

[85] I subsequently learned (as did counsel for the father) in the course of these two subsequent appearances, that the parents never instituted this weekday clause for overnights on Wednesday to Thursday. They agreed that the father would not keep the child overnight on the Thursday evening as permitted to do so.

[86] The parents advised me that this change did not suit their schedules.

### **Every 6<sup>th</sup> Thursday**

[87] There was, however, every sixth Thursday night when the mother had to work an evening shift. That became an occasion for the father to have the child overnight.

### **Weekend Access**

[88] Page 8, paragraph 47 of my Decision noted that it made sense from the child’s perspective to have the child in each parents care during one weekend when they were off. Each parent would also have the child in their care one weekend when they were working, rather than the multi transitional schedule they had operated on up to that point. (pg.3 para.(vi) Order)

[89] The new schedule was suggested to diminish the transitions and to encourage the father to use the same caregivers as the mother for weekend parenting (ie: the mother's family or his family).

[90] This would keep the child within the extended family.

[91] However, aware that these parties have to live with their schedule and it had to make sense to them, paragraph 52, permitted as follows:

“If that does not work, the parties are free to consent to an arrangement that better accommodates their weekend schedule with a view to making sure that there are *as few transitions as possible for this child* and equal sharing of weekends. They must, however, each agree to a change from the order and their consent to a specific arrangement must be in writing.”(xi Order)

[92] The Order was drafted by the mother's counsel and was consented to “as to form” by the father's counsel. I endorsed that Order.

[93] It is reasonable to conclude that anyone who did not have first hand knowledge of the evidence or actually work with the schedule would be confused by the Order. The parents, however, were not confused.

[94] At page 3, paragraph (vi), the Order states that each parent would have two weekends a month, one when they were off and one when they were working.(3 nights in a four week cycle)

[95] For reasons set out in the following paragraphs I later learned that the parents continued their current weekend transition, as had been exercised since 2009. They did not operate under the alternating weekend schedule until October 2012.

[96] In the original proceeding there was evidence that a position that was being offered at their employment site (they are both employed at the same site).

[97] The father suggested that the mother should apply for this position as it would put them on alternating weekends off, making them more available to have the child with one parent when the other parent was working.

[98] The mother indicated she had no intent or interest in this position. For that reason, that information was not incorporated into the Decision.

[99] After the Decision was rendered and an Order issued, the father decided to apply for this position. He was the successful candidate.

[100] This created a new schedule for the father commencing October 2012, putting the parents in a position where they decided to adopt the weekend schedule as ordered by the Court and issued on January 17, 2012.

[101] This then better reflected their circumstances.

[102] Thus, since October 2012, the schedule has changed and each parent gets every second weekend. (As envisioned in the court Order)

### **Joint Custody v. Shared Parenting**

[103] The subsequent appearances caused me to conclude that the parents themselves were not at all confused by the Order nor did they disagree on what their actual schedule looked like.

[104] Counsel for the father also appeared to come to this conclusion in the December 2012 hearing as we individually and collectively, in court, mapped out the actual schedule and the court ordered schedule

[105] The facts as agreed upon by the parents did not support a shared parenting arrangement from November 2009 to at least January 2012 as it is described in Canada for the purposes of the child support guidelines.

[106] To clarify that for the father's sake while a significant parent and very important role model in his daughter's life with no question as to his dedication to his daughter, the parenting schedule did not equal a shared parenting arrangement except in those less frequent shift cycles which include birthdays and the 6<sup>th</sup> week or holiday time.



[107] There are months when the father had 40 percent but for the year 2009, 2010 and 2011 this did not amount to a shared parenting arrangement for the purposes of the guidelines. .

[108] Joint custody should, for clarification, have been drafted to read joint legal custody which continues for the parents joint legal responsibility for the decision making regarding the child, continuing their joint legal rights and responsibilities respecting her welfare. This is not intended to be an all inclusive definition.

[109] However, for the majority of the cycles the parenting schedule is not a 50/50 or 60/40 parenting arrangement.

[110] The evidence in totality confirmed by the father illustrates that the father had over 40 percent in only a few months of the preceding years until we see evidence of 4 - 6week cycles from April 1 - May 12, 2012; June 24 - August 4 and August 5 -September 5, 2012 when the averages worked out to 40.5 according to the mother's subsequently tendered evidence in October 2012 .

[111] On December 2012, the parties, counsel and myself manually mapped out the schedule that existed arising out of the Order (which was not be adopted in its entirety by agreement of the parties).

[112] The evidence covered what transpired between May 2011 and October 2012

[113] We also mapped their current schedule affected by the father's new position and the fact that his father and step mother left to reside in Halifax.

[114] The mother's Affidavit together with the November schedule was provided.

[115] In the mother's affidavit (October 22, 2012) for the first of the two appearances subsequent (to the Court of Appeal Decision), the mother used time periods reflecting a 6 week (42 day) period reflecting their actual schedules rather than a monthly (30 -31 day cycle) as per the first affidavit.

[116] The total period of time covered was from November 1, 2009 to and including October 27, 2012, a three year period.

[117] In her affidavit ( October 22, 2012) the mother corrected some errors and identified some changes that occurred since Mr. Boudreau’s initial Affidavit and recalculated the percentage of the sharing of parenting time.

[118] In paragraph 16 of her Affidavit, (starting at November 16, 2009 to the final month, which was anticipated based on their schedule up to and including October 27, 2012), Ms. Marchand mapped out exactly what happens today.

[119] Paragraph 16 of the Ms. Marchand’s affidavit reads as follows:

“16. Within paragraph 20, Mr. Boudreau is seeking to have shared custody but the court decision is that we have joint custody of our daughter. Mr. Boudreau does not have Mackenzie half of the time.

November 1, 2009 — December 12, 2009: Adrian 35.7% - Betty Anne 64.3%  
December 13, 2009—January 23, 2010: Adrian 33.3%-Betty Anne 66.7%  
January 24, 2010— March 6, 2010: Adrian 33.3% - Betty Anne 66.7%  
March 7, 2010— April 17, 2010: Adrian 31% - Betty Anne 69%  
April 18, 2010 — May 29, 2010: Adrian 23.8% - Betty Anne 76.2%  
May 30, 2010— July 10, 2010: Adrian 33.3% - Betty Anne 66.7%  
July 11, 2010— August 21, 2010: Adrian 38.1% - Betty Anne 61.9%  
August 22, 2010— October 2, 2010: Adrian 35.7% - Betty Anne 64.3%  
October 3, 2010— November 13, 2010: Adrian 28.6% - Betty Anne 71.4%  
November 14, 2010 — December 25, 2010: Adrian 31% - Betty Anne 69%  
December 26, 2010— February 5, 2011: Adrian 33.3% - Betty Anne 66.7%  
February 6, 2011 — March 19, 2011: Adrian 26.2% - Betty Anne 73.8%  
March 20, 2011 — April 30, 2011: Adrian 31% - Betty Anne 69%  
May 1, 2011 —June 11, 2011: Adrian 33.33% - Betty Anne 66.67%  
June 12, 2011 —July 23, 2011: Adrian 28.5% - Betty Anne 71.5%  
July 24, 2011 -September 3, 2011: Adrian 33.33% Betty Anne 66.67%  
September 4, 2011 -October 15, 2011: Adrian 28.5% Betty Anne 71.5%  
October 16, 2011 — November 26, 2011: Adrian 38.1% - Betty Anne 61.9%  
November 27, 2011 —January 7, 2012: Adrian 35.7% - Betty Anne 64.3%  
January 8, 2012— February 18, 2012: Adrian 40.5% - Betty Anne 59.5%  
February 19, 2012 — March 31, 2012: Adrian 38.1% - Betty Anne 61.9%  
April 1, 2012 — May 12, 2012: Adrian 40.5% - Betty Anne 59.5%  
May 13, 2012 —June 23, 2012: Adrian 38.1% - Betty Anne 61.9%  
June 24, 2012 -August 4, 2012: Adrian 40.5% Betty Anne 59.5%  
August 5, 2012 — September 15, 2012: Adrian 40.5% - Betty Anne 59.5%  
September 16, 2012 — October 27, 2012 — Adrian 38.1% - Betty Anne 61.9% (If there are no cancellations)”

[120] Both parents confirmed that as of October 2012 on Wednesday afternoon's every second week, the child goes with the father, is returned to school by the father on Thursday morning, is picked up by the father at 2:00 p.m. on Thursday and is returned to the mother at 7:30 p.m. on Thursday. He does not extend his access overnight Thursday.

[121] On every second weekend the child comes with either parent after school to and inclusive of Saturday and Sunday returning the child to school at 8:30 a.m. the next morning. That would ordinarily be an eight night parenting strategy in, for example, the month of October. This includes the two Sundays overnight into the Monday morning. The parties work opposite weekends.

[122] **If** they include an additional night every second weekend for a total of two nights to cover Monday to Tuesday, that would be 10 nights at maximum out of an average 30 day cycle which still, other than those times when they share equally a vacation or a birthday, does not equate to a 40 percent time share.

[123] The second series of work cycles in her affidavit dated October 22, 2012 shows 26 cycles; each cycle represents a 6 week shift (42 days).

[124] There are four cycles from May 2011 (after the Decision) to November 2012, (19 months) the father had in excess of 40 percent.

[125] Of those cycles, the father exceeded 40 percent in January 2012 - February 18, 2012 at 40.5 percent; April 1 - May 12, 2012 at 40.5 percent; June 24 - August 4, 2012 at 40.5 percent and August 4 - September 5 at 40.5 percent.

[126] In 14 of these 26, six week cycles the respondent had the child less than 35 percent including five cycles when he had less than 30 percent.

[127] In 8 of those cycles, he had the child with him less than 35 percent.

[128] The total average parenting time per shift sequence is 34 percent for the father and 66 percent for the mother.

[129] Subsequent to the last Affidavit filed I asked the parties to map out November 2012, (not a six week cycle). This exceeded 40 percent.

[130] A closer look at November illustrates that it is not an average month. The agreement provides that on the father's birthday, he gets an extra day and every second year the child spends her birthday with him.

[131] As well, November 2012 reflected the every sixth week that the mother has an extra shift, thus the father had fourteen of the thirty days.

[132] Inclusive of 2011 and October of 2012, the average parenting time for the father was 34 percent.

[133] Thus, it is clear from 2009 forward to June 2012 whether calculating an overall average at best or individual averages based on months, the father has not had the 40 percent time shared parenting arrangement required by the guidelines..

### **Changes**

[134] Working on a January to December basis, the evidence tendered in the subsequent appearances, while not complete to year end, marks a change in that for the first time the father appears on a 6 week cycle to be above 35 percent and higher.

[135] We do not have the balance of the year to create an annual percentage.

[136] In addition, in the examination of the limited evidence I had respecting the circumstances of the parties, the father had given up some of his parenting time due to his schedule and the changes that occurred in his household in October 2012 once his father and step mother left more permanently for Halifax. This left him without available babysitters. Therefore, I am unable to project what changes will occur in the 2012-2013 year.

[137] This is truly a moving target.

### **Section 9 Analysis**

[138] In **Contino**, the Supreme Court of Canada suggested that it may be appropriate to ask the parties to provide the required evidence against which the factors can be considered. (paragraph 57 - **Contino**).

[139] Bastarache J. wrote for the Court that:

“the specific language of s. 9 warrants emphasis on flexibility and fairness to ensure that the economic reality and particular circumstances of each family are properly accounted for. The three factors structure the exercise of the discretion and none of them should prevail.”

[140] The majority directed that:

-The parties are to lead evidence as to 9 (b) and (c); and

-Financial statements and or child expense budgets are necessary;

-the courts should:

(a) demand this information when the evidence is deficient;

(b) take the financial situations of both parents into account with the starting point the set off amount followed by; and

(c) examine the continuing ability of the recipient parent to meet the needs of the child in light of the fact that many costs are fixed.

[141] The Court also recognized that the total cost for raising a child may be greater in shared custody situations. Courts must:

-consider the payor's costs;

-consider the budgets;

-the actual expenses of both parents in addressing the child's needs; and

-determine whether shared custody has resulted in increased costs globally.

[142] These expenses should be apportioned between the parents in accordance with their respective incomes:

-The Court is directed to look at the standard of living in each household; and

-the parents ability to absorb the costs required to maintain the appropriate standard of living in the circumstances.

[143] The parties here were invited to make further submissions or provide further evidence particularly respecting their circumstances, their current income and their Statements of Income and Expenses.

[144] The parties and counsel were advised of a November 5<sup>th</sup> appearance and deadlines for filing affidavits and financial information.

[145] The father was directed to file any additional affidavits and updated financial information (with Notices of Assessment and year to date income for 2012) by October 8, 2012.

[146] The mother was directed to file her affidavits and updated financial information by October 22, 2012.

[147] The father was permitted to file a reply by October 29, 2012.

[148] The parties were advised the matter would proceed by affidavit evidence with cross examination permitted.

[149] The father's counsel advised they did not wish to file further affidavit information other than that which was filed in the original proceeding.

[150] On October 16<sup>th</sup>, the court office sent a request to the father's counsel to address the filing requirements.

[151] A Letter of Direction dated November 27, 2012 was sent by the Court office requiring disclosure to assist in the deliberations. A reminder was sent to the father's counsel on December 3, 2012.

[152] At the December 7<sup>th</sup> appearance, the Court requested that disclosure be complete, including Statements of Income and Expenses with other information about their living circumstances.

[153] Not satisfied with the sufficiency of information, the parties and counsel were called to court again on December 7, 2012 to give them the opportunity to present additional evidence and clarify / verify the access schedule.

[154] The Court directed the father pay his share of the medial expenses forthwith.

[155] Thus, directions were given to counsel and to the parties to file the required information prior to court in September and October, again in court on December 2012, repeated by letter December 14, 2012 and again by letter dated January 13, 2013.

[156] The information requested was the 2011 Notice of Assessment, Statement of Income, Statement of Expenses and confirmation of living circumstances. Year to date information was required.

### **Actual Filing Dates and Materials**

[157] The father:

November 9, 2012	<u>Summary tax information</u> for 2010 and 2011 was filed along with a pay stub for November 2012
December 3, 2012	November access schedule
December 31, 2012	Statement of Income
January 17, 2013	Statement of Expenses

[158] The mother :

October 22, 2012	Affidavit dated October 22, 2012
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November 14, 2012	medical information relating to medical plan and payment information, closing argument
December 3, 2012	confirmation of earnings to November 28, 2012, 2011 Notice of Assessment and full copy of return
December 20, 2012	letter outlining schedule
January 8, 2013	Statement of Income and Expenses; information as to who was residing in the home; confirmation of support actually received, 2012 recent pay stubs, 2009, 2010 and 2011 Income Tax Summary and Notice of Assessment and Re-assessment.

[159] While the father did not provide an Affidavit as directed, when he arrived in court on November 5, 2012 he sought permission to give oral evidence in response to the materials filed by the mother. In the interest of finality he was permitted to do so.

[160] Notwithstanding that this was not a shared parenting arrangement within the definition of the guidelines in Canada until after June 2012, the father certainly is significantly involved although he relies on the mother to be the primary managing parent.

[161] In the decision **Contino v. Leonelli-Contino**, [2005] 3 S.C.R. 217, McLaughlin spoke for the Court as follows:

“Section 9 requires a court to determine the amount of child support in accordance with the three listed factors *once the 40 percent threshold is met*.

The specific language of s. 9 warrants emphasis on flexibility and fairness to ensure that the economic reality and particular circumstances of each family are properly accounted for. The three factors structure the exercise of the discretion and none of them should prevail. The weight given to each factor will vary according to the particular facts of each case. Under s. 9, there is no presumption in favour of awarding at least the Guidelines amount under s. 3. Nor is there a presumption in favour of reducing the parents child support obligation downward from the



Guidelines amount, as it is possible that, after a careful review of all of the factors in s. 9, a court will come to the conclusion that the Guidelines amount is the proper amount of child support.

Under s. 9(a), a court is required to take the financial situations of both parents into account...”

Second:

“Section 9(b) does not refer merely to the expenses assumed by the payor parents as a result of the increase in access time from less than 40 percent to more than 40 percent. This paragraph recognizes that the total cost of raising children may be greater in shared custody situations than in sole custody situations.”

Third:

“...9(c) vests the court with a broad discretion to analyse that resources and needs of both the parents and the children. It is important to keep in mind the objectives of the Guidelines, requiring a fair standard of support for the child and fair contributions from both parents. The court will look at the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances. Financial statements and/or child expense budgets are necessary for a proper evaluation of s. 9©.”

[162] Most critically, Chief Justice McLauchlin indicated as follows:

“It is important that the parties lead evidence relating to ss. 9(b) and 9(c), and courts should demand information from the parties when the evidence is deficient. A court should neither make “common sense” assumptions about costs incurred by the payor parent, nor apply a multiplier to account for the fixed costs of the recipient parent.”

### **Disclosure for a Section 9 Analysis**

[163] The burden is on Mr. Boudreau to provide sufficient evidence to support this analysis. He did not do so (as the Court of Appeal noted) in the original Decision nor in subsequent appearances.

[164] Despite the many directions I was not provided with an abundance of information. I decided to proceed on the evidence I had at hand.

### **Considerations in Section 9 Analysis**

[165] Mr. Boudreau's parents are called to Halifax for medical treatments frequently. As he did before me in the original hearing, he continues to reside in their home, now alone and pays no rent. He has no other dependants.

[166] Mr. Boudreau informed Ms. Marchand on October 6, 2012, that his father and step mother were moving to Halifax for treatment of their illnesses and he could no longer keep the child on the days that he goes to work in the morning because his step mother is no longer available to put the child on the bus.

### **Ms. Marchand**

[167] Ms. Marchand owns her own home.

[168] Four people reside in her home, herself, her son and two daughters. I have no information as to what if anything they contribute to the household except that a daughter provides backup child care for the mother when both parents are at work.

[169] Ms. Marchand's 2011 Notice of Assessment shows a line 150 income of \$35,525.00. (Her employment income is \$27,771.70; Universal Child Care Benefit of \$1,200.00; and employment insurance and other benefits including Workman's Compensation in the amount of \$6,552.00)

[170] Her annual income in 2010 was \$35,673.00 (\$34,673.00 of which came from employment income).

[171] She will no longer receive the Universal Child Tax Benefit after their child turns 6 in November 2012.

### **Mr. Boudreau**

[172] Mr. Boudreau was mistaken in his March 2011 Affidavit at paragraphs 4, 5 and 25 when he indicated that Ms. Marchand earned slightly more than he did.

[173] In paragraph 5 he indicated that his income would not change in 2011. In fact, it increased from \$32,822.00 in 2010 to \$36,938.00 in 2011.

[174] Employees at the Richmond Villa where he works received retroactive pay for negotiations which were completed on March 31, 2011. While he would not have received that until subsequent to his Affidavit, certainly negotiations were very close to being finalized at the time the Affidavit was written.

[175] In paragraph 25 of his Affidavit, Mr. Boudreau claimed the applicant's income was \$37,000.00 which he advised was approximately \$5,000.00 more than his income.

[176] A comparative analysis will show that in 2010 inclusive of Universal Child Care Benefits, Ms. Marchand received \$35,673.00 with T4 income from her earnings of \$34,673.00 in comparison to Mr Boudreau's \$32,822.00.

[177] Ms. Marchand has not received child support nor has Mr. Boudreau paid his share of the medical expenses.

[178] This has created a financial burden and stress on the household in which the child resides primarily.

[179] The income figures were difficult to identify and were slow in being disclosed but I have prepared a table as to what I believe to be the most reliable based on Notices of Assessment.

Year	Ms. Marchand's Income	Mr. Boudreau's Income
2011	\$35,525.00 (employment income - \$27,771.00)	\$36,938.72
2010	\$35,673.00 (employment income - \$34,673.00; UCCB - \$1,200.00)	\$32,822.70
2009	\$41,911.00 (employment income - \$27,433.; WCB - \$1,994.61; EI - \$7,909.00; UCCB - \$1,200.00; union dues of \$411.48)& support payments	\$33,355
2008	\$33,683.00 (employment income -	\$30,988.72

	\$30,379.57; union dues \$455.72)	
2007	\$26,480.00 (employment income - \$7,132.86; EI - \$15,030.00; UCCB - \$1,300.00)	\$31,008.20

[180] For 2012, the father's income statement shows an annual income of \$35,920.32.

[181] His Statement of Expenses reflects a yearly surplus of \$8,081.04 not inclusive of his tax refund of \$1,137.62, however his 2011 tax liability was underestimated by \$765.20 and reduced his surplus to \$7,315.84 plus his tax refund resulting in an actual annual surplus of \$8,453.46 or \$704.45 monthly.

[182] The last pay stub of Ms. Marchand to November 28, 2012 for a 48 week period shows earnings of \$33,622.25 which would result in a 52 week pay of \$36,424.00, which may well be more accurate. Her actual estimate for 2012 is \$35,983.00.

[183] I have no information concerning what, if any, increased costs exist to the father.

[184] However, because it is the mother who pays upfront and organizes the child care etcetera, she is the one who carries the bulk of the burden until she is reimbursed.

[185] With reasonably close to the same household income, she is supporting others including the child who is the subject matter of this proceeding and she has a mortgage while he lives rent free.

[186] Mr. Boudreau has fewer financial responsibilities and fewer dependants. He does continue to pay the loan for the bathroom repair in Ms. Marchand's home.

### **Health Care Premiums**

[187] It is the mother who keeps the child on her medical plan. (paragraph 82 of the Decision.)

[188] The father decided not to add the child to his health plan.

[189] Mr. Boudreau agrees he is required by court order to share the cost of the employment health care plan (page 9, paragraph 83 of my Decision):

“If the parties determine that there is no advantage to the father adding the child to his insurer given the insurer is through the same company as insured by the mother, the parties shall share all the uninsured costs associated with health and medical necessities.”

[190] Ms. Marchand filed a letter dated November 8, 2012 which indicates that the difference between the premiums (family v. single) for 2010 is \$611.76, half of this is \$305.88.

[191] For the 2011 payroll year, Ms. Marchand paid premiums associated with her child in the amount of \$979.30. Mr Bourdeau’s share is \$489.65.

[192] For the 2012 payroll year, she has paid \$604.02 in premiums to cover their child. Mr Bourdeau’s share is \$302.01.

[193] Ms. Marchand carried this burden including periods of time when she was on Worker’s Compensation and did so without contribution from Mr. Boudreau despite the Court’s direction.

[194] At the second appearance post appeal this matter was discussed. The parties acknowledged that Mr. Boudreau has an obligation to pay. He promised to bring his responsibility up to date and to continue paying forthwith to ensure that Ms. Marchand does not have to carry his share throughout the year.

[195] For the 2010, 2011 and 2012 years he owes the sum of **\$1,097.54**. This is payable forthwith.

### **Base Amount of Child Support**

[196] Union dues paid by Mr. Boudreau as reflected in the Statement dated 11/08/2012 were \$435.31. Union dues for 2011 were \$554.10.

[197] Mr Bourdreau's actual salary in 2011 was \$36,938.72, less union dues of \$554.10, resulting in a base amount of child support in the amount of **\$305.00 monthly payable from July 15, 2011 to and including December 2011.**

[198] In the original Decision, he was given a child support grace period from separation in November to July 2011. That remains unchanged.

[199] Arrears shall be calculated by the Maintenance Enforcement Program based on this new amount from July 2011 to and including December 2011.

[200] Mr. Bourdreau shall be given credit for his actual monthly payments whether it is against arrears or monthly child support (one or the other).

[201] Commencing January 1, 2012 we see an increase in the percentage at least up to and including November 2012.

[202] Mr. Boudreau shall pay in accordance with his current income of \$35,366.00 (gross less union dues) the amount of \$296.00 per month pursuant to the *Federal Child Support Guidelines* and in accordance with the Nova Scotia table, payable on a continuing basis on the 15<sup>th</sup> day of each month continuing to date.

[203] From January 2012 forward, he shall also be given credit for the monthly payment of \$55.00 he pays on the loan associated with Ms Marchand's home.

[204] The burden to prove these payments and to confirm that the loan he has relating solely to these renovations on the mother's home still exists, is his.

[205] He shall **provide the Maintenance Enforcement Program and the mother** with sufficient documentation on this loan from separation forward.

[206] **Failure to provide this information within one month of the date of this decision shall result in the full payment being due on child support without any deduction for the loan payments.**

[207] As long as he is paying this loan he shall be credited with that payment against his child support on a monthly basis until the loan for those renovations is paid in full only as it relates to the renovations.

[208] I am giving the respondent this credit for much the same reason I gave Mr. Boudreau the grace period; in order to allow him to live up to his obligations, now aggravated by further arrears and, no doubt, legal fees.

[209] It is the intent of the Court that he continue to be involved with his daughter as in the past. It appears fair to me to give Mr. Boudreau credit for diminishing a loan that benefits the mother and the child living with the mother

[210] This can be adjusted for 2013 after the required annual filing of his Income Tax Returns in accordance with the order.

### **Income Tax Returns**

[211] Both parties are obliged to exchange their income tax returns.

[212] It is critical that both parties exchange the full particulars of their Income Tax Returns as there could be income other than the T4 that has been provided over the years.

[213] The fact that one does exchange does not excuse the other for failure to file.

[214] The reasonable costs of obtaining this through the Court system will be borne by the party failing to provide this information as required by court Order.

### **Babysitting Expenses**

[215] There is some evidence that all childcare expenses may not have been paid since September 29, 2011 when both are working on the same days.

[216] If this is the case, those after tax costs of babysitting arrears that have accumulated shall be shared equally and paid either in a manner by way of proposal agreed to by both parties, signed and forwarded to the Maintenance Enforcement Program or enforced in the ordinary way through the Program.

[217] Mr. Boudreau is obligated to pay the retro active support as established by the original court Order dated January 17, 2012. I am not, by this Decision, disturbing that finding.

[218] Paragraph 7 of the Order requiring Ms. Marchand to provide Mr. Boudreau with the after tax costs of child care shall continue and they shall be shared equally by the parties.

[219] Mr. Boudreau shall pay his share of after tax costs of child care forthwith upon receipt of the proof of payment by Ms. Marchand.

[220] He shall provide both to Ms Marchand or the Maintenance Enforcement Program by no later than April 6<sup>th</sup> , 2013 poof of all payments made against this loan from July 2011 to the present date in order to assist in the calculation of the arrears.

[221] Mr. Boudreau shall pay his half of the child care expenses and he shall pay forthwith his obligation to share 50 percent of the costs of medical insurance for the child.

### **Summary of Conclusions**

[222] In summary, given the higher percentage and the fact that the respondent is paying some of the debt related to the renovations to the extent only that this relates to the bathroom expenditures, I have reduced the monthly amount from January 2012 forward.

[223] The respondent owes \$3,432.00 as retroactive support as ordered by Order dated January 17, 2012 reflective of payments for support to the date of the court Order.

[224] The respondent owes \$1,097.54 for his share of health premiums for the 2010, 2011 and 2012 years.

[225] He owes \$305.00 per month from July 2011 forward to and including December 2011 .



[226] For the 2012 year he shall pay the sum of \$296.00 less the \$55.monthly loan payments from January to December 2012 until the loan relating solely to the renovations in the mother's home paid for by the father is paid in full.

[227] He owes for the 2013 year on a go forward basis the sum of \$296.00 per month less the loan amount as proven until further order of the Court

[228] The parties shall exchange the full and complete copy of their Income Tax Return as ordered on or before May 1<sup>st</sup> of each year with reasonable costs for obtaining the same payable in the event of failure to file.

[229] The applicant shall submit any unpaid after tax costs of child care and the respondent shall pay 50 percent of those forthwith.

[230] He shall continue to pay his 50 percent share of after tax costs of child care.

[231] The respondent shall be credited with any payments made to date.

[232] The Court will draft the order.

Moira C. Legere Sers, J.