

4-1-2011

Gimme Shelter

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Recommended Citation

Robert Leckey, "Gimme Shelter" (2011) 34:1 Dal LJ 197.

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Highlighting the family home's significance as shelter, this paper challenges the prevailing view of the demands of the equality guarantee in the Canadian Charter of Rights and Freedoms regarding unmarried cohabitants. In Nova Scotia (Attorney General) v. Walsh, the Supreme Court of Canada rejected the claim that it was discriminatory to restrict rules dividing matrimonial property to married couples. By contrast, on many views it is discriminatory to exclude cohabitants from a support obligation. Scholars and judges assume that Walsh upholds all statutory rules regarding married spouses and their property, including measures protecting the family home as shelter. But Walsh is best read narrowly, leaving open the status of the latter rules. Viewed in the light of the support/property dichotomy, the regime of the family home is akin to support. For family law and policy, it is analytically useful to unbundle conjugal unions' effects. Scholars' reading of Walsh may connect to procedural features of Charter litigation and attitudes towards judicial power inconsistent with the common-law tradition.

En mettant en lumière l'importance de la résidence familiale comme refuge, cet article questionne la conception dominante des exigences concernant les conjoints de fait quant à la garantie d'égalité de la Charte canadienne des droits et libertés. Dans Nouvelle-Écosse (Procureur général) c. Walsh, la Cour suprême du Canada a rejeté la prétention selon laquelle la limitation des règles de division des biens familiaux aux couples mariés était discriminatoire. En comparaison, il pourrait être discriminatoire d'exclure les conjoints de fait de l'obligation alimentaire. Les chercheurs et les juges supposent que Walsh maintient la validité de toutes les règles législatives concernant les conjoints mariés et leurs biens, y compris les mesures protégeant le refuge qu'est la résidence familiale. Walsh gagne toutefois à être lu de manière étroite, préservant la question de la validité de ces dernières règles. À la lumière de la dichotomie obligation de support/partage des biens familiaux, le régime de la résidence familiale est apparenté à celui des aliments. Tant sur le plan du droit de la famille que sur celui des politiques publiques, il est analytiquement utile de démêler les effets des unions conjugales. Les aspects procéduraux des litiges sous la Charte et les attitudes à l'endroit du pouvoir judiciaires ont-ils imprégnés la lecture de Walsh faite par la doctrine, par ailleurs incompatibles avec la tradition de common law?

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Introduction

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- II. *Home's significance and judicial context*
- III. *The family home as undecided*
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- V. *The reach of Charter judgments*

Conclusion

Introduction

Should the family homes of unmarried cohabitants be treated differently from their other property? Should they be protected as shelter, as are the homes of married spouses? Efforts to reform family law for unmarried cohabitants typically proceed by asking whether to extend the rights and duties of married spouses to them, and if so, how fully. As detailed below, the provincial laboratories of the Canadian federation have produced a range of legislative responses to that inquiry. The spectrum runs from according no matrimonial rights and duties to unmarried cohabitants (in Quebec) to total assimilation with married spouses (in Manitoba and Saskatchewan). Between those poles stands legislative extension of a right and duty of spousal support to unmarried cohabitants while reserving to married spouses the regime of matrimonial property. Determining sound family policy for unmarried cohabitants involves multiple factors. One is the balance between protection against exploitation and respect for autonomy; another, that between “duality and unity in conjugality.”¹ The Supreme Court of Canada’s recognition of marital status as “analogous” to the suspect grounds in the equality guarantee of the *Canadian Charter of Rights and Freedoms* has added constitutional obligation as another factor.²

Relying on the Supreme Court of Canada’s treatment of marital status under the *Charter*, provincial appellate courts have accepted that it was unconstitutional for a spousal-support regime and a regime of matrimonial property not to extend their respective benefits (and burdens) to unmarried

1. Nicholas Kasirer, “The Dance Is One” in Sylvio Normand, ed, *Mélanges offerts au professeur François Frenette: études portant sur le droit patrimonial* (Québec: Presses de l’Université Laval, 2006) 13 at 28.

2. *Canadian Charter of Rights and Freedoms*, s 15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; *Miron v Trudel*, [1995] 2 SCR 418.

cohabitants.³ In at least partial reliance on the latter judgment, the legislatures of Manitoba and Saskatchewan included cohabitants within their regimes of matrimonial property.⁴ Then, in *Nova Scotia (Attorney General) v. Walsh*,⁵ the Supreme Court of Canada overturned the Court of Appeal. It upheld the distinction between married and unmarried couples in defeat of a claim for asset division under Nova Scotia's matrimonial property legislation. That decision seems to have lessened the pressure for legislative reform.⁶ No legislature has since amended its regime of matrimonial property to include cohabitants, although at the time of writing one is considering it, absent constitutional compulsion.⁷

The legislative initiatives and *Charter* cases mentioned here have familiarized judges and scholars with the distinction between spousal support and property. A prevailing understanding takes *Walsh* as having approved the exclusion of unmarried couples from all "property" provisions under provincial family law. Those provisions include rules dividing property and protective measures bearing on the matrimonial home, be it owned, leased, or otherwise held.⁸ Some protective measures operate during the conjugal union. Thus where one spouse holds the interest in the family home, the other has nevertheless a right to possession. Moreover, the title-holding spouse must obtain the other spouse's consent in order to charge or dispose of an interest in the home. Another measure operates after separation: a court may award exclusive possession of the home, on a short- or long-term basis, to the spouse who does not hold title.

3. *Taylor v Rossu*, 1998 ABCA 193, 161 DLR (4th) 266; *Walsh v Bona*, 2000 NSCA 53, 183 NSR (2d) 74 [*Walsh CA*].

4. *The Family Property Act*, CCSM c F25, ss 13, 14; *Family Property Act*, SS 1997, c F-6.3, ss 4, 21(1), 22(1), as am. by *An Act to amend certain Statutes respecting Domestic Relations (No. 2)*, SS 2001, c 51, s 8(5). In Saskatchewan an unappealed trial judgment had concluded that the province's rules regarding the family home violated s 15(1) for excluding unmarried cohabitants. *Watch v Watch* (1999), 182 Sask R 237 (Unif'd Fam Ct).

5. *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325 [*Walsh SCC*].

6. Berend Hovius, "Property Rights for Common-Law Partners" in Martha Shaffer, ed, *Contemporary Issues in Family Law: Engaging with the Legacy of James G. McLeod* (Toronto: Carswell, 2007) 115 at 127.

7. British Columbia Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislation Office, *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act (July 2010)* at 83-84, online: <<http://www.ag.gov.bc.ca/legislation/pdf/Family-Law-White-Paper.pdf>>.

8. The paper refers interchangeably to the "matrimonial home," "family home," and "family residence." Variation in the legislative use of the adjectives does not track the rules' scope of application; for example, Quebec's regime on the "family residence" applies only to married and civil-union spouses. Inclusive terms avoid begging the question that this paper aims to prise open. On the abstract and physical connotations of "home," said to have no equivalent in the Latin or Slavic European languages, see Witold Rybczynski, *Home: A Short History of an Idea* (New York: Penguin Books, 1986) at 62.

This paper argues that, within the category of matrimonial property, rules on the family home and on division of assets are distinguishable for *Charter* purposes. It is appropriate to break up the family home, so to speak, unbundling rules that address its role as shelter from those which allocate its economic value with that of other assets. Rules protecting the family home as shelter are rightly viewed as rooted not in property, but in support, in the sense of their focus on needs and protection. They are what civilian scholars would call alimentary in nature. Whereas rules on division of assets embody corrective justice, allocating the spouses' respective entitlements as equal partners in a joint economic enterprise, rules on the family home embody distributive justice. The better reading of *Walsh* views the constitutionality of reserving special treatment of the family home for married spouses as not yet fully considered and decided by the Supreme Court. Accordingly, in Nova Scotia or elsewhere, a *Charter* challenge regarding the family home on the basis of marital status might proceed unimpeded by the contention that *Walsh* has decided the matter.⁹

Put otherwise, this paper aims to clear away a mistaken understanding of the scope of decided law at the intersection of family law and the *Charter*, laying bare the vocation and character of rules which address the family home as shelter. It deploys conventional techniques of close reading and conceptual reasoning. But its means should not obscure the stakes. The potential beneficiaries of this enterprise are economically vulnerable women and children, including those who have experienced domestic violence. If one aim is to open a space that might prove fruitful in litigation, another is to stimulate scholars and policy makers to view afresh the effects of conjugal unions, perhaps with a view to disaggregating them. The paper does not sketch the affirmative case that excluding unmarried spouses from rules relating to the family home infringes s. 15(1) of the *Charter*, although its operating assumption is that the equality analysis might well come out differently than it did in *Walsh*. The majority in *Walsh* had noted the "significant heterogeneity" of unmarried couples.¹⁰ In contrast, those who would actually deploy the protective regime of the family home, but for their marital status, presumably form a more homogeneous group. They are likely women with the custody of minor children.

9. Alternatively, it is arguable that, whatever *Walsh* decided about marital status, it did not render *res judicata* the discrimination claim that might be framed for children on the basis of their parents' marital status.

10. *Supra* note 5 at para 39.

The argument unfolds in five parts. Part I summarizes *Walsh* and characterizes the prevailing readings of it as wide. Part II presents the special character of the family home and situates the argument in relation to recent judgments. Successive parts advocate for the narrow reading by which *Walsh* determined only the constitutionality of the rules impeding the claim for a share of assets. Drawing on the materials submitted to the court, the transcript of the hearing, and the majority reasons, Part III makes the case that the constitutionality of denying cohabitants the protections accorded the matrimonial home has not been fully argued and considered. Part IV lays out the conceptual and legislative differences between the division of assets and protection of the family home as shelter. Finally, Part V tentatively suggests that the scholarly and judicial readings of *Walsh* arose from practices of adjudication and of reading *Charter* judgments inconsistent with traditional common-law methods. Since *Charter* principles apply across the federation, the argument relies on legislative and doctrinal examples from the civil law of Quebec as well as from the common law of the other provinces and territories.

I. *Readings of Walsh*

Walsh concerned the treatment of unmarried, cohabiting partners under Nova Scotia's family law. The legislature of Nova Scotia had already extended its discretionary regime of spousal support to "common-law partners."¹¹ But as its title implies, the Province's *Matrimonial Property Act* applies only to "spouses," defined in relation to valid, voidable, or void marriages.¹² Between the second and third levels of court in *Walsh*, an amendment had also attached the rights and obligations of a "spouse" under the *MPA* to declared domestic partners.¹³ The *MPA* defines "matrimonial assets" and sets out the entitlement of each "spouse" to an equal share of the matrimonial assets, title to them notwithstanding.¹⁴ It establishes protections in relation to the "matrimonial home," including an equal right of possession during the marriage, a disability on the part of either spouse unilaterally to encumber or dispose of a matrimonial home, and discretion for a court to confer on one spouse exclusive possession of a matrimonial home for life or a lesser period.¹⁵

11. *Maintenance and Custody Act*, RSNS 1989, c 160, s 2(aa).

12. *Matrimonial Property Act*, RSNS 1989, c 275, s 2(g) [*MPA*].

13. *Law Reform (2000) Act*, SNS 2000, c 29, amending, *inter alia*, the *Vital Statistics Act*, RSNS 1989, c 494, s 54(2)(g).

14. *MPA*, *supra* note 12, ss 4, 12.

15. *Ibid*, ss 6(1), 8(1), 11(1)(a).

Susan Walsh cohabited with Wayne Bona for ten years and they had two children during the relationship. She and Bona owned a home as joint tenants, which led to the sharing of its value under the general law of property. At the time of separation Bona had assets with a net value of \$66,000. Walsh claimed support for herself and the two children. In addition, she sought an equal division of “matrimonial assets.” Her claim did not involve the *MPA*’s rules on the matrimonial home. As a preliminary matter, Walsh contended that the definition of “spouse” discriminated against her on the basis of marital status, contrary to the equality guarantee in the *Charter*.

The chambers judge, assuming the truthfulness of the facts in Walsh’s affidavit, ruled against her.¹⁶ The Court of Appeal reversed, finding discrimination.¹⁷ The provincial government sought leave to appeal to the Supreme Court of Canada. The litigation seemed of obvious national interest. Each province in Canada had legislated for married spouses a presumptive rule of equal sharing.¹⁸ In most provinces, such sharing did not apply to unmarried cohabitants. The nine common-law provinces had also extended their regimes of spousal support to unmarried cohabitants. By contrast, the book on the family in the *Civil Code of Québec* imposes no reciprocal obligations on *de facto* spouses.¹⁹ Could a legislature, having recognized the functional similarity of married and unmarried couples for some purposes, rely on marital status to distinguish them for others? It was presumably with those elements in mind that leave was granted, and the Chief Justice stated a constitutional question as to whether s. 2(g) of the *MPA* “discriminate[d] against heterosexual unmarried cohabitants contrary to s. 15(1) of the *Charter*.” Although Walsh’s counsel advised the Court prior to the hearing that she and Bona had settled their property dispute, the appeal proceeded.

At the Supreme Court of Canada, eight judges allowed the provincial government’s appeal, answering the constitutional question in the negative. Where legislation “dramatically” alters the legal obligations of partners towards one another, wrote Bastarache J. for the majority, “choice must be paramount.”²⁰ On that view, many persons in circumstances similar to those of the parties have chosen to avoid marriage and its legal consequences.

16. *Walsh v Bona* (1999), 178 NSR (2d) 151 (SC) [*Walsh SC*].

17. *Walsh CA*, *supra* note 3.

18. Julien D Payne & Marilyn A Payne, *Canadian Family Law*, 3d ed (Toronto: Irwin Law, 2008) at 564-65, n 4.

19. *Interpretation Act*, RSQ c I-16, s 61.1: “Two persons of opposite sex or the same sex who live together and represent themselves publicly as a couple are *de facto* spouses regardless, except where otherwise provided, of how long they have been living together.”

20. *Walsh*, *supra* note 5 at para 43.

One judge, agreeing with the majority that excluding unmarried couples from a matrimonial property regime was permissible, distinguished the respective legal bases for spousal support and matrimonial property. For Gonthier J., spousal support, legislatively imposed, is needs-based and fulfills a social objective; the division of matrimonial property is contractual, a core incident of the free exchange of consent on marriage.²¹ In dissent, L'Heureux-Dubé J. denied any distinction between property and support. On her assessment, both helped individuals to satisfy basic financial needs following the end of an intimate, economically interdependent relationship.²²

Relevant for present purposes is that the understandings of *Walsh* vary. Many commentators adopt what can be called the *wide reading*, namely, that it is constitutional to restrict the entirety of the *MPA* to married spouses. It is said that *Walsh* determined that unmarried cohabitants cannot invoke the *Charter's* equality guarantee regarding the generic category of "statutory property rights."²³ That view is consistent with the majority's general pronouncement about s. 2(g). But it takes *Walsh* as having gone further than necessary to dispose of the claim to share the value of assets.

Other instances of the wide reading are finer-grained. They acknowledge the other features of the *MPA* for which the definition of "spouse" served as gatekeeper. Critics of the judgment in common-law Canada underline the stability and security that exclusive possession of the matrimonial home can furnish to women and children on relationship breakdown. In those scholars' view, the severe potential impact of that mechanism's unavailability grounds an objection to the judgment.²⁴ Similarly, some commentators in Quebec take for granted that the majority judgment upheld the exclusion of *de facto* spouses from rules on the family residence as well as on asset division. They do so while doubting the wisdom of the status quo thus affirmed.²⁵ Scholars who stress the importance of possession of the family home after a relationship break-up nevertheless assume that the constitutionality of restricting that possibility to married spouses is settled law.

21. *Ibid* at paras 203-04.

22. *Ibid* at para 103.

23. Payne & Payne, *supra* note 18 at 57.

24. Carol Rogerson, "Developments in Family Law: The 2002-2003 Term" (2003) 22 Supreme Court LR (2d) 273 at 287-88, n 34; DA Rollie Thompson, "*Walsh v Bona*: Annotated" (2003) 32 RFL (5th) 87 at 92.

25. Michel Tétrault, *Droit de la famille*, 4th ed (Cowansville: Yvon Blais, 2010) vol 1 at 865; Jean Pineau & Marie Pratte, *La famille* (Montreal: Thémis, 2006) at para 379; and Dominique Goubau, Ghislain Otis & David Robitaille, "La spécificité patrimoniale de l'union de fait: le libre choix et ses 'dommages collatéraux'" (2003) 44 C de D 3 at 51.

Of scholars who mention the *MPA*'s core provisions separately, only one questions the assumption that *Walsh* established the validity of excluding unmarried spouses from family-home protections. Even then, it is literally a question. Hovius notes that "the court did not expressly consider the rights of possession in a family residence." Is it inferable, he asks in "Notes and Questions," that there is no constitutional obligation to extend the protections of the matrimonial home to unmarried cohabitants?²⁶ Nobody has expressly attended to the judgment's holding or aimed to circumscribe it, contrasting the broad pronouncements with the determination necessary to dispose of Susan Walsh's claim.

With an eye on the *MPA*'s attention to asset division and to protecting the matrimonial home as shelter, the wide reading can be understood two ways. One is that two *Charter* questions regarding cohabitants are separable: issue A relates to asset division; issue B, to the matrimonial home. On this understanding, A and B might share some concerns and separately raise others. Along this line, the Supreme Court of Canada in *Walsh* considered and decided issues A and B. On the other, the provisions of the *MPA* form an indivisible ensemble [A + B], which the majority upheld.

To be sure, other commentators focus on the majority's exclusion of unmarried cohabitants from the equal division of assets without mentioning the challenged law's other provisions.²⁷ They speak of *Walsh* as if the majority had affirmed the constitutionality of the definition of "spouse" as married spouse in relation to ss. 4 and 12, the provisions on matrimonial assets. Such a focus—call it the *narrow reading*—flows from the initial claim. But it derogates enough from the question announced and answered in the negative by the Supreme Court as to require analytical work. Neither those adopting the wide reading—however critically—nor those subscribing to the narrow have viewed the judgment's precedential meaning as an open question, one inviting rigorous assessment.

26. Berend Hovius & Mary-Jo Maur, *Hovius on Family Law: Cases, Notes and Materials*, 7th ed (Toronto: Carswell, 2009) at 374.

27. See e.g. Pineau & Pratte, *supra* note 25 at para 379; Nicholas Bala, "Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships" (2003) 29 *Queen's LJ* 41 at 51-55; Mary Jane Mossman, *Families and the Law in Canada: Cases and Commentary* (Toronto: Emond Montgomery, 2004) at 391; Graeme G Mitchell, "Developments in Constitutional Law: The 2002-2003 Term: A Tale of Two Courts" (2003) 22 *Supreme Court LR* (2d) 83 at 122-28; Hester Lessard, "Charter Gridlock: Equality Formalism and Marriage Fundamentalism" (2006) 33 *Supreme Court LR* (2d) 291 at 305; and Peter W Hogg, *Constitutional Law of Canada*, 5th ed, loose-leaf (Toronto: Carswell, 2007) vol 1 at 27-11.

II. *Home's significance and judicial context*

This part briefly introduces the family home of married and unmarried partners and the complexities of legally acknowledging its significance. By reference to recent litigation, it confirms the importance of distinguishing relevantly different regimes and delineating the scope of *Walsh*.

Materials from Canada as well as from France and the United Kingdom emphasize the significance of the family home, in most cases defined in relation to marriage. Its role as asset—often the family's biggest, although a pension may compete for that distinction—is distinguished from its role as shelter,²⁸ “the place around which family life revolves.”²⁹ As shelter, the family home “connotes safety, security, continuity, a sense of place and even of identity.”³⁰ A spouse who has functioned as a full-time homemaker during the relationship might develop a particularly deep emotional attachment to the home.³¹ The abidingly gendered division of labour within many different-sex couples makes that observation most applicable to women. In the aboriginal context, a home on a reserve may be a woman and her children's sole access “to their culture, language and family.”³² Quebec's rules are said to protect “le cadre de vie de la famille en raison de son importance matérielle et affective pour les époux,”³³ to recognize the home as “essential” to the family's “stability and fulfillment.”³⁴ This sense of the family home's social importance aligns with recent anthropological work on how “kinship is produced in houses, through the intimate sharing of space, food, and nurturance.”³⁵ Sociologists connect the concept of home to “the way in which people experience and make their relationships.”³⁶

28. Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Oxford: Hart Publishing, 2007) at 25-27 [Fox, *Conceptualising Home*].

29. Berend Hovius & Timothy G Youdan, *The Law of Family Property* (Scarborough: Thomson, 1991) at 574.

30. Heather Conway & Philip Girard, “‘No Place Like Home’: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain” (2005) 30 *Queen's LJ* 715 at 716 [Conway & Girard, “‘No Place Like Home’”]; see also Isabelle Corpart, *Les régimes matrimoniaux*, 2d ed (Paris: Vuibert, 2007) at para 21; François Terré & Philippe Simler, *Les régimes matrimoniaux*, 5th ed (Paris: Dalloz, 2008) at para 59.

31. Hovius & Youdan, *The Law of Family Property*, *supra* note 29 at 574.

32. Mary Ellen Turpel, “Home/Land” (1991) 10 *Can J Fam L* 17 at 32-33.

33. Mireille D-Castelli & Dominique Goubau, *Le droit de la famille au Québec*, 5th ed (Sainte-Foy: Presses de l'Université Laval, 2005) at 106; also Suzanne Grondin, “La protection de la résidence familiale en droit québécois” in Jacques Beaulne & Michel Verwilghen, eds, *Points de droit familial/ Rencontres universitaires notariales belgo-québécoises* (Montreal: Wilson & Lafleur, 1997) 79.

34. Civil Code Revision Office, Report XI, *Report on the Protection of the Family Residence* (Montreal: 1971) at 8.

35. Janet Carsten, *After Kinship* (Cambridge: Cambridge University Press, 2004) at 35.

36. Carol Smart, *Personal Life* (Cambridge: Polity Press, 2007) at 165.

Unsurprisingly, more reticent notes temper these discussions of the family home. In Canada, any discussion of the law and policy relating to family homes must acknowledge the lack of recourse to protect an aboriginal woman's interest in the matrimonial home on an "Indian reserve."³⁷ One author notes the character of "home" to be an "essentially subjective phenomenon," the value of which is neither easily quantifiable nor readily susceptible to legal proof.³⁸ The greater the protections devoted to the family home as shelter—the possibility of a right to occupy on relationship breakdown, a requirement for the spouses' joint consent to its use as collateral—the lesser its value as capital asset.³⁹

Moreover, the diversity of contemporary family situations makes it difficult to craft rules that will consistently implement legislative policy. Rules may single out the family home too much, producing unintended consequences. They may provide the means for knowledgeable spouses to disadvantage their partners. Consider the rule in Ontario which prevents the deduction, from a spouse's "net family property," of the value of a matrimonial home owned by one spouse on the date of marriage.⁴⁰ Though falling short of the co-ownership of the home once proposed by the Law Reform Commission of Ontario,⁴¹ that measure might be expected to produce a sharing of the home's value in acknowledgement of contributions made during the marriage by the non-owning spouse, perhaps a homemaker wife. One obvious class disadvantaged by that policy choice consists of women who enter a second marriage having retained, from the first, custody of the children and title to the family home. On a further division of property, they would be prevented from deducting from their net family property what might be their chief pre-marriage asset. Meanwhile, their spouses could deduct property of any other kind that they had owned on the date of marriage.

Two final cautions against romanticizing the family home, at least regarding the measures operative on separation. First, many families lack the resources to maintain the family home post-breakup, precluding

37. While some commentators speak of the legislative "gap" resulting from the inapplicability of provincial matrimonial law and the silence of the *Indian Act*, RSC 1985, c 1-5, Turpel, "Home/Land," *supra* note 32 at 36, insists that "[c]olonial gaps are not there just to be filled" and that the solution must be aboriginal, not federal. See also Native Women's Association of Canada, *Reclaiming Our Way of Being: Matrimonial Real Property Solutions Position Paper* (2007).

38. Fox, *Conceptualising Home*, *supra* note 28 at 4.

39. *Barclays Bank plc v O'Brien* (1993), [1994] 1 AC 180 (HL).

40. *Family Law Act*, RSO 1990, c F.3, s 4(1) "net family property" (b) [*FLA* (Ont)].

41. Ontario Law Reform Commission, *Report on Family Law: Part IV: Family Property Law* (1974) at 154-55. Compare the revised view that it is "difficult to justify singling out one type of asset for special treatment": Ontario Law Reform Commission, *Report on Family Property Law* (1993) at 81.

sustained exclusive possession for one spouse and the children. Second, spouses may prefer to make a fresh start in new quarters. Calls for extending family-home protections to unmarried cohabitants must proceed with awareness of these considerations.

Still, such calls are made. The justifications for special rules for the homes of married couples may apply to unmarried cohabitants. In a comparative study of the family home, it is argued persuasively that the “policy considerations supporting non-intervention with respect to cohabitants’ assets on relationship breakdown should not apply where the family home is concerned.”⁴² A partial acknowledgement of this point is discernable in the recognition by the Quebec legislature of the *de facto* spouse’s right to maintain occupancy of a leased dwelling after the cessation of cohabitation or the death of the lessee spouse.⁴³ Extension of the occupational rights enjoyed by married spouses may be especially appropriate in the case of unmarried cohabitants with children.⁴⁴ Why should an uncritically wide reading of *Walsh* foreclose an avenue through which these matters might be pursued? Such is not an idle possibility.

In *Charter* litigation arising in Quebec, judges have inscribed the wide reading of *Walsh* into the law reports. A former *de facto* spouse challenged, under s. 15(1) of the *Charter*, her exclusion from the *Civil Code of Québec*’s book on the family. While her attack included the rules on the family residence in its sweep, the claim depended only on the obligation of support, the family patrimony, and the default matrimonial regime. By contrast to *Walsh*, the question in that litigation was whether a legislature which had never included *de facto* spouses in any marital rights and duties (although having recognized their need for shelter in connection with a leased dwelling) could constitutionally maintain that stance of *laissez-faire*. At trial, the judge rejected all elements of the challenge. Performing

42. Conway & Girard, “‘No Place Like Home,’” *supra* note 30 at 718. On the possibility of constructing a status of family home for concubines [*sic*] in the French context, on the basis of “l’importance du cadre de vie, tant pour l’établissement de relations familiales, que pour l’épanouissement individuel des membres de la famille,” see Caroline Watine-Drouin, “Le statut du logement familial” in *Études offertes au Doyen Philippe Simmler* (Paris: Dalloz, 2006) 253 at 260.

43. Art 1938 CCQ. Unlike the regime on the family residence in the *Civil Code*’s book on the family, which burdens the spouse who holds the interest in the dwelling, this provision, in the chapter on lease in the book on obligations, burdens the landlord. It affects personal rights under a lease, rather than the real right of ownership. Nonetheless, the unified treatment of married, civil-union, and *de facto* spouses in article 1938 shows legislative recognition of an inclusive notion of shared family life that might logically extend to the book on the family.

44. Hovius & Youdan, *The Law of Family Property*, *supra* note 29 at 585. In the United Kingdom, Schedule 1 to the *Children Act 1989* (UK), 1989, c 41, s 15(1), provides the possibility of the transfer of property for a child’s benefit. That might provide the adult carer of children, whether married or not, with a home for the duration of the children’s dependency.

the widest possible reading, Hallée J. saw *Walsh* as privileging freedom and legislative choice such that the *Charter* did not require extending any part of family law to unmarried cohabitants.⁴⁵

On appeal, the Quebec Court of Appeal took up the distinction between property and support invoked by Gonthier J. in *Walsh*. Following the wide reading, the Court viewed that authority as validating the restriction to married couples of all property matters, including the family residence. The crux of the reasoning was that the Supreme Court in *Walsh* had held that the freedom of choice to marry was “primordial” in relation to married spouses’ property relations.⁴⁶ In evidence of the wide reading’s traction, the Court of Appeal rejected the argument that *Walsh* was distinguishable regarding parts of Quebec’s law of matrimonial property. It deployed an umbrella category, “le partage des biens,” which on the face of the judgment encompasses the *Civil Code*’s default matrimonial regime of partnership of acquests as well as regimes, from a chapter on the effects of marriage, concerning the family residence, family patrimony, and compensatory allowance.⁴⁷ The default matrimonial regime is subject to contractual derogation.⁴⁸ In contrast, the effects of marriage are obligatory, a characteristic reasonably interpreted as revealing a legislative policy focused more on protection than on liberty.⁴⁹ The Court of Appeal nevertheless viewed *Walsh* as affirming the constitutionality of all property provisions.⁵⁰

The Court proceeded to strike down *de facto* spouses’ exclusion from the obligation of support in article 585. That provision stipulates a reciprocal support duty for married or civil-union spouses as well as for parents and children. The majority judges identified that duty’s objective as providing the resources necessary to satisfy the needs of members of “la cellule familiale.” From that angle, a couple’s marital status did not change the need for support. Furthermore, the inclusion of spousal and

45. *Droit de la famille—091768*, 2009 QCCS 3210, [2009] RJQ 2070 at paras 242, 243, 249, 263 and 264.

46. *Droit de la famille—102866*, 2010 QCCA 1978, [2010] RJQ 2259 at para 59, leave to appeal to SCC granted (*sub nom Québec (Procureur général) c A*), [2011] 1 SCR ix. For exploration of *Walsh* in the context of Quebec civil law, see Robert Leckey, “Cohabitation and Comparative Method” (2009) 72 Mod L Rev 48.

47. Respectively, arts 448-484, 401-413, 414-426, 427-430 CCQ.

48. Art 432 CCQ. See generally Brigitte Lefebvre, *Les régimes matrimoniaux: Contrat de mariage, séparation de biens, société d’acquêts* (Cowansville: Yvon Blais, 2011).

49. Art 391 CCQ. For argument that the criterion of solemnization mismatches the protective posture of Quebec family law, see Benoît Moore, “Variations chromatiques: l’union de fait entre noir et blanc” in Générosa Bras Miranda & Benoît Moore, eds, *Mélanges Adrian Popovici: Les couleurs du droit* (Montreal: Thémis, 2010) 97 at 114-23.

50. *Droit de la famille—102866*, *supra* note 46 at para 59.

child support in a single provision made it easier to reject the contention that support's basis was consensual or contractual, rather than social. For the majority judges, distinguishing by marital status appeared to perpetuate the idea of *de facto* spouses as less worthy than married and civil-union spouses of the means to satisfy basic needs after family breakdown.⁵¹ Although the plaintiff's claim did not directly bear on the regime of the family residence, that judgment shows the view of matrimonial property as an indivisible category for *Charter* purposes to be taking root.

It remains to be seen whether, in the final stage, the Supreme Court of Canada will distinguish those articles of the *Civil Code* pertinent to the initial claim from those that are not, including the family residence. In her application for leave to appeal, the claimant continued to cast her attack so widely as to include the provisions on the family residence.⁵²

If timing allows, this paper might speak to the judges of the Supreme Court resolving the *de facto* spouses' appeal from Quebec. It would counsel restraint, to pronounce only on those matters in issue and supported by a factual record of the law's impact on a claimant. If the Supreme Court retains the wide reading of *Walsh* and affirms the Court of Appeal regarding "le partage des biens," the paper's point would be that any overbroad statements on the general category of property rights are appropriately read down to the scope of the live issues. Reference to the family home would be *obiter*.

The final contextual point concerns the Supreme Court of Canada's judgment in *Kerr v. Baranow*.⁵³ Disposing of appeals concerning two pairs of former cohabitants, Cromwell J.'s lengthy reasons address five main issues. Two are germane for present purposes. First, echoing legislative recognition of marriage as a form of partnership,⁵⁴ *Kerr* recognizes the legal—rather, equitable—significance of a "joint family venture." Second, the judgment rejects the notion that a monetary award reversing unjust enrichment must be calculated on a *quantum meruit* or fee-for-services basis, while a constructive trust can effectively transfer property's increase in value. Working out the judgment's impact will take years, but optimistic readers hope that it might have substantially addressed the financial

51. *Ibid* at paras 101, 104, 108 and 127.

52. *Avis de demande d'autorisation d'appel de la demanderesse* [publication ban], File No 33990 (29 December 2010) at 2. The constitutional question stated by the Supreme Court includes the provisions on the family residence (arts 401-413 CCQ) that were extraneous to the financial relief sought at trial: "Do arts. 401 to 430, 432, 433, 448 to 484 and 585 of the *Civil Code of Québec*, S.Q. 1991, c. 64, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?" (Supreme Court of Canada, *Bulletin of Proceedings*, 2011 at 852-53).

53. 2011 SCC 10, [2011] 1 S.C.R. 269 [*Kerr*].

54. *FLA* (Ont), *supra* note 40, preamble; also art 396 CCQ.

situation of many cohabitants on relationship breakdown. Has it rendered *Walsh* irrelevant? Procedurally, making a claim in unjust enrichment remains onerous. Furthermore, such a monetary claim does nothing to address the needs for shelter and stability recognized by legislation for married spouses. It remains necessary to contend with *Walsh*.

III. *The family home as undecided*

Although the Supreme Court of Canada, on the face of *Walsh*, answered a constitutional question regarding the definition of “spouse” vis-à-vis the entire *MPA*, the best reading casts the judgment’s reach more narrowly. The proposition that the majority reasons considered and affirmed the validity of excluding unmarried couples from protective rules on the family home should be rejected. Whether one focuses on the legal propositions viewed by the judge as necessary,⁵⁵ the legal rule applied and acted on by the court,⁵⁶ or the rule announced by the court, if relevant to the issues raised by the dispute,⁵⁷ the family home falls outside the matters decided by *Walsh*.

A consideration relevant to determining what a judgment has decided might be the basis on which the Supreme Court granted leave to appeal. The Attorney General of Nova Scotia’s ground in seeking leave was that the Court of Appeal had erred by declaring s. 2(g) invalid and “thereby extending marital property rights to unmarried cohabitants.”⁵⁸ The application emphasized the “presumptive property share on separation.”⁵⁹ The Supreme Court granted leave on the same basis, namely, whether the Court of Appeal had erred “by declaring s. 2(g) of the *Matrimonial Property Act* of no force and effect, and thereby extending married property rights to unmarried cohabitants.”⁶⁰ The seeds of the wide reading of the Supreme Court’s eventual judgment are already planted by the assumption that s. 2(g) stands or falls in relation to the full statute’s “married property rights.” It would have been possible to focus argument on the provision impeding Walsh’s initial claim, s. 2(g) as it related to the division of

55. Rupert Cross & JW Harris, *Precedent in English Law*, 4th ed (Oxford: Clarendon Press, 1991) at 49.

56. PJ Fitzgerald, *Salmond on Jurisprudence*, 12th ed (London: Sweet & Maxwell, 1966) at 177.

57. Melvin Aaron Eisenberg, *The Nature of the Common Law* (Cambridge, MA: Harvard University Press, 1988) at 55.

58. Notice of Application for Leave to Appeal by the Attorney General of Nova Scotia, *Nova Scotia (Attorney General) v Walsh* (1 September 2000).

59. Application for Leave to Appeal of the Attorney General of Nova Scotia, *Nova Scotia (Attorney General) v Walsh* (1 September 2000) at para 1; also at para 14 [Leave Application].

60. Supreme Court of Canada, *Bulletin of Proceedings*, 2001 at 284 [reference omitted].

assets.⁶¹ Admittedly, leave to appeal to the Supreme Court of Canada is granted by panels of three without reasons and it is impossible to know the view of the judges granting it.

An important factor is the extent to which the written submissions and the hearing canvassed the issue. Written arguments focused on the “presumptive property share on separation,”⁶² although the respondent, Walsh, briefly noted the possibility of an order for exclusive possession of a matrimonial home.⁶³ During the hearing, Bastarache J. queried whether it was possible to isolate one aspect of the relationship covered by the *MPA* or whether it should be viewed as an ensemble. Counsel for the appellant insisted that the case was not about the matrimonial home, to which the parties had held joint title. Beyond that, counsel’s answer is hard to follow, as other judges interrupted him. He noted that the *MPA*’s asset-division provisions can effectively force a person to share his or her spouse’s debts.⁶⁴ Counsel for the respondent later spoke about the statute’s provisions relating to exclusive possession of the matrimonial home, emphasizing their mission to blunt the effects of family breakdown for children.⁶⁵ These materials indicate that the *MPA*’s several effects were before the Court, but do not speak of the thoroughness with which the reasons address them.

Although equivocally, the majority reasons support the contention that they bear chiefly on asset division. Attention to the reasons flows from the view that judicial “processes of reasoning” matter more than “their verbal formulations.”⁶⁶ The majority judges framed the appeal at the outset broadly enough to encompass the separate issues (A and B): “The question before this Court, then, is whether the exclusion from the *MPA* of unmarried cohabiting persons of the opposite sex is discriminatory.”⁶⁷ By contrast, in the majority’s summary of facts, Bastarache J. wrote more precisely that Walsh, in addition to claiming support for herself and the children, “sought a declaration that the Nova Scotia *MPA* was unconstitutional in failing to

61. The Supreme Court of Canada was imprecise in its treatment of the Court of Appeal’s declaration that s 2(g) was invalid (*Walsh CA*, *supra* note 3 at para 85). Instead of extending matrimonial property rights to unmarried cohabitants, the Court of Appeal’s declaration would have left the *MPA* with no definition of “spouse.”

62. See e.g. *Walsh SCC*, *supra* note 5 (Factum of the Appellant at para 14, and Factum of the Intervener Attorney General of Ontario at paras 33, 45).

63. *Walsh SCC*, *supra* note 5 (Factum of the Respondent at para 33 [FOR]).

64. *Walsh SCC*, *supra* note 5 (Oral Argument, Appellant at 24-25).

65. *Walsh SCC*, *supra* note 5 (FOR, *supra* note 63 at 103).

66. Robert A Samek, “The Dynamic Model of the Judicial Process and the Ratio Decidendi of a Case” (1964) 42 Can Bar Rev 433 at 447.

67. *Walsh SCC*, *supra* note 5 at para 2.

furnish her with the presumption, applicable to married spouses, of an equal division of matrimonial property.”⁶⁸

As a further sign that the majority judges’ attention to the entirety of the *MPA* was fleeting, the “Relevant Statutory Provisions” section of the judgment reproduces only the definition of “spouse” in s. 2(g) and the entitlement to apply for equal division of matrimonial assets in s. 12(1).⁶⁹ True, texts on precedent do not hold out the provisions reproduced in a judgment as a guide to what a case decided. But that editorial selection hints at the provisions considered by the judges, as well as at the scope of the principle that readers in sister jurisdictions might be expected to discern for their analogous regimes.

Crucially, statements at the heart of the analysis in *Walsh* concern only asset division. The majority judges contrasted the challenged legislation with an alternative route for an unmarried cohabitant under the general private law. An unmarried cohabitant, they noted, may attempt to invoke the doctrine of unjust enrichment and seek the remedy of the constructive trust.⁷⁰ The view of that avenue as an alternative focuses on property as value, not shelter. In a way that captures division of assets but not protection of shelter, Bastarache J. refused to accept “that the decision to live together, without more, is sufficient to indicate a positive intention to contribute to and share in each other’s assets and liabilities.”⁷¹

While the judges were aware that the challenge to the *MPA*, as framed, called into issue provisions regarding the matrimonial home, written and oral canvassing of those provisions was scattered and cursory. A precedent *sub silentio* is not authoritative, and the question of a possible order for exclusive possession might be regarded as *sub silentio*. If it was not quite “not perceived by the court or present to its mind,” the family home was nevertheless “not argued or considered by the court,” taking those verbs robustly.⁷²

Meanwhile, is there a counter-argument that the rules on property division and on the family home are inseparable, canvassed separately or not? On the view of the judgment as having decided issues [A + B], might asset division be shorthand for a complex ensemble, making it mistaken to seek separate discussion? The majority noted that whilst the respondent focused on the right to apply for a presumptive equal share of matrimonial assets, that was “only one part of the overall scheme,” which provided

68. *Ibid* at para 4.

69. *Ibid* at para 8. I owe this observation to Alexander Steinhouse.

70. *Ibid* at para 61.

71. *Ibid* at para 54.

72. Fitzgerald, *Salmond on Jurisprudence*, *supra* note 56 at 153-55.

“other significant benefits” and imposed “significant obligations.”⁷³ Those judges knew that it might be wrong to slice up a composite scheme of rights and obligations or otherwise connected provisions with the knife of constitutional remedies. For example, it would be unjust for a court to extend the right to equal division of assets to a new class of adult partners without extending the judicial discretion to depart from that presumption. Yet, however complementary their objectives, the rules on asset division and on the family home are separable. Often the benefit or detriment of both would accrue to the same partner. One is not the quid pro quo for the other in bargaining from a fictitious matrimonial original position. Moreover, the view of a unified category of “matrimonial property,” such that rejecting Walsh’s claim affirmed the constitutionality of excluding unmarried couples from rules on the family home, presents serious difficulties.

IV. *Unbundling matrimonial property*

Turning from largely procedural discussion, the argument is now, substantively, that the family home as shelter is rightly separated from property as economic value. Social congruence and systematic consistency, factors relevant to construing precedent under the common law,⁷⁴ militate against treating rules on the family home and on asset division as a whole. While rules dividing assets or equalizing their value are property-based, protections of home as shelter are alimentary in character. The idea that Nova Scotia’s *MPA* is an indivisible ensemble for *Charter* purposes emerges through three major contrasts: property versus support; entitlement versus individualized discretion; and individual contract versus social objectives. Those contrasts are too unstable, however, to underpin constitutional law in the province in which the litigation arose. Alert to the potential for interprovincial variation in family law—the natural upshot of the provinces’ exclusive competence in respect of property and civil rights in the province⁷⁵—this part observes that those contrasts are still less satisfactory in some sister provinces. The wide reading of the judgment reflects too parochially the contingencies of the statute book of Nova Scotia for it to establish a *Charter* principle of national application.

The opposition between matrimonial property and support is discernable in several places. The design choice of the legislative drafters in Nova Scotia implies a separation between the provisions on

73. *Walsh SCC*, *supra* note 5 at para 48.

74. Eisenberg, *The Nature of the Common Law*, *supra* note 57 at 52. Professional literature may assist in shedding light on the rule best viewed as emerging from a precedent (at 119).

75. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(13), reprinted in RSC 1985, App II, No 5.

matrimonial property confided to the *MPA* and those, available to married and unmarried couples, in the *Maintenance and Custody Act*. In *Walsh*, the majority judges contrasted the province's extension of spousal support to unmarried cohabitants with its regime of matrimonial property,⁷⁶ and Gonthier J., concurring, explicated their conceptual differences.⁷⁷ The opposition between matrimonial property and support is, arguably, implicit in the contrast between the majority outcome in *Walsh* and a judgment, three years prior, which had struck down the definition of "spouse" in Ontario's support regime for failing to include same-sex couples.⁷⁸ It underlies the Parliament of Canada's bankruptcy legislation, which liberates a discharged bankrupt from a debt serving to equalize family assets but not from a debt for support.⁷⁹

While matrimonial property and support are conceptually distinct, a rule or institution's form may belie its substantive characterization in relation to them. A rule may thus bear on property while still being alimentary in substance. In the contemporary context, the contrast between property and support operates against a backdrop of legislation introduced after *Murdoch v. Murdoch*.⁸⁰ But older rules, which affected property with the aim, not of allocating the proceeds of shared labours, but of protecting a potentially vulnerable partner, rightly inform the characterization of the family home as shelter. The historical backdrop includes rules at common law regarding dower and curtesy,⁸¹ as well as tenancy by the entirety, the unseverable tenancy ascribed by the common law to a husband and wife to whom property was conveyed such that strangers would have taken it as joint tenants. It also encompasses homestead legislation, protective of a wife during the marriage and after her husband's death, which dates from the early twentieth century.⁸² Indeed, scholars in the 1980s drew on these resources in grappling with the post-*Murdoch* legislation protecting the family home.⁸³

76. *Walsh* SCC, *supra* note 5 at para 60.

77. *Ibid* at paras 203, 204.

78. *M v H*, [1999] 2 SCR 3.

79. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss 178(1)(b), (c).

80. *Murdoch v Murdoch* (1973), [1975] 1 SCR 423.

81. Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 188-90.

82. MC Cullity, "Property Rights during the Subsistence of Marriage" in D Mendes da Costa, ed, *Studies in Canadian Family Law*, vol 1 (Toronto: Butterworths, 1972) 179 at 224-29.

83. Jane Matthews Glenn, "Tenancy by the Entireties: A Matrimonial Regime Ignored" (1980) 58 *Can Bar Rev* 711 (suggesting that rules on the family home constituted, without naming it as such, a tenancy by the entirety); Ernest Caparros, *Les régimes matrimoniaux au Québec*, 3d ed (Montreal: Wilson & Lafleur, 1985) at para 51 (highlighting the connections between homestead legislation and Quebec's regime of the family residence).

With this history borne in mind, it becomes apparent that in Nova Scotia and other provinces, the family home falls on the side of support. The general rule of matrimonial property in Canadian jurisdictions, in relation to a deferred sharing of gains, is that during the union the spouses have considerable freedom to deal with their property.⁸⁴ Rules operative on the family home during the spouses' shared life depart from the general logic of matrimonial property in order to preserve it as shelter. Consider the constraints on the powers of a spouse to charge or dispose of his interest, whatever its nature, in the family home.⁸⁵ Subject to protections for innocent third parties, the schemes contemplate that dealings without the other spouse's consent may be set aside.⁸⁶ Protection of the possessory right of the spouse without title may also include enjoyment of the same right of redemption or relief against forfeiture as the spouse who holds title.⁸⁷ Such measures safeguard the possessory right, during consortium, of the spouse who does not hold title.⁸⁸ In Quebec, the legislative protection of the family residence extends to the movable property "serving for the use of the household." The consent of the other spouse is thus required for a spouse to alienate, hypothecate, or remove such property from the family residence,⁸⁹ on pain of an application for annulment of the unauthorized dealing.⁹⁰ The other spouse's right to give or withhold consent constitutes a serious impediment to the capacity of the spouse holding the interest in the family home to dispose of his property, although it does not amount, in civilian parlance, to a real right.⁹¹ In addition, the freedom to manage one's

84. Constraints include the prohibition against unilateral disposition of acquets *inter vivos* except for "property of small value and customary presents" (art 462, para 1 CCQ) and the mechanism for premature equalization of family property in the event of one spouse's "improvident depletion" of her net family property (*FLA* (Ont), *supra* note 40, s 5(3)).

85. See e.g. *FLA* (Ont), *ibid*, s 21. While "interest" in Ontario's scheme embraces matrimonial homes that are leased and otherwise held, not only owned (*ibid*, s 21(1)), the *Civil Code of Québec* dedicates rules to the spouse who is lessee of the family residence (art 403), owner of an immovable with fewer than five dwellings (art 404), and owner of an immovable with five dwellings or more (art 405), as well as to the spouse who is a usufructuary, emphyteutic lessee, or user in respect of the family residence (art 406).

86. *FLA* (Ont), *ibid*, s 23(d); arts 403, para 2; 404, para 2; 405, para 2 CCQ. A spouse not having given consent may also claim damages from the other spouse: art 408, CCQ.

87. *FLA* (Ont), *ibid* s 22.

88. Hovius & Youdan, *The Law of Family Property*, *supra* note 29 at 626. The intention to protect the home as shelter only so long as consortium endures emerges from the contrast, in Ontario's legislation, between a purported release of possessory rights in a matrimonial home in a marriage contract, which is unenforceable, and the enforceable release of rights in a separation agreement: *FLA* (Ont), *ibid* s 21(1)(b).

89. Art 401, para 1 CCQ. The legislature has specified that movable property serving for the household's use includes property "destined to furnish the family residence or decorate it; decorations include pictures and other works of art, but not collections." Art 401, para 2, CCQ.

90. Art 402, para 1 CCQ.

91. Pineau & Pratte, *La famille*, *supra* note 25 at 151, n 420.

property would normally include the choice to select the form in which it is held. Where a spouse holds an interest in the family home in joint tenancy with someone other than the other spouse, however, that interest may be deemed severed immediately prior to the death of the first spouse.⁹² Note that the legislated constraints on the title holder's prerogatives relate only to the family home. The legislature does not require consent of the other spouse for all decisions foreseeably having a major financial impact on the family, such as sale of a business or resignation from a job. Instead, the measures discussed here underscore the singularity of home.

Rules that have their effect after the spouses' separation fortify the view of the family home as grounded in support. Consider the question of time. Regimes on the division of assets generally limit the sharing by spouses to the increase in wealth during the marriage. Such is the effect of deductions from net family property of assets owned by a spouse at the date of marriage and the valuation of relevant assets on separation.⁹³ But rules on the family home reveal a different temporal orientation. Ontario's rule preventing deduction of the value of a matrimonial home owned before the marriage extends the sharing further, for that asset only, before the date of marriage. Use of prior-owned property as a family home mandates its sharing between the spouses, thus translating a social judgment of the family home's significance—its ineluctably joint character—that is irreconcilable with corrective justice. As for orders for exclusive possession of the home, the period relevant to the judge's discretion follows separation, as it does for support. Qualifications may be necessary—exceptionally, division of property may look forward to each spouse's needs for self-sufficiency,⁹⁴ and the compensatory strand of support looks back.⁹⁵ But they do not undermine the general point.

Some enactments make plain the family home's alimentary vocation. Orders for support may include a right to possession of a matrimonial

92. *FLA* (Ont), *supra* note 40, s 26(1).

93. For a clear retrospective orientation on equalization of family property, see Ontario's regime, with its fixed valuation date and relatively restrictive list of factors permitting unequal variation, all of which relate to the parties' past (*ibid* ss 4(1) "valuation date," 5(6); but see *Serra v Serra*, 2009 ONCA 105, 93 OR (3d) 161). Compare judicial discretion to award unequal shares on the basis of post-valuation changes in value: *Family Law Act*, SPEI 1995, c 12, s 6(6).

94. *Family Relations Act*, RSBC 1996, c 128, s 65(1)(c).

95. *Moge v Moge*, [1992] 3 SCR 813.

home, in the case of rules limited to married couples,⁹⁶ or, where the rule also applies to unmarried cohabitants, of a residence.⁹⁷ The criteria for a support order differ from those applicable to an occupancy order for married spouses. Nevertheless, in Ontario an interim or final support order, obtainable by an unmarried cohabitant, may require the transfer of property to a dependant, absolutely, for a term of years or—more drastically—for life.⁹⁸ The connection between the provision of shelter and the performance of an obligation of support is evident in the *Civil Code of Québec*'s contemplation that a debtor of support may, "if circumstances permit," be dispensed from paying all or part of the support if he "offers to take the creditor of support into his home."⁹⁹ While circumstances are presumably favourable more often in the case of support owed to a child or parent than to an estranged spouse, the conceptual link persists. Less expansively, but still in derogation from the general law of property, in Nova Scotia an order for maintenance of a common-law partner may provide for a right to occupy or use the family residence pending determination of the partners' rights in it.¹⁰⁰

Counter-examples that would bolster the view of the family home as property, not support, are answerable. One is that the Nova Scotia Court of Appeal interprets the *MPA* as calling for the resolution of property issues at trial to terminate the joint tenancy and possession of the matrimonial home.¹⁰¹ But a provincial appellate court's practice cannot establish that asset division and possessory rights are inseparable as a nationally applicable proposition. Another is the Supreme Court of Canada's holding, in the divorce context, that an order for exclusive possession of the matrimonial home is "relevant to support" but "not in and of itself a support order."¹⁰² That is, an order for support under the *Divorce Act* and an order for exclusive possession of a matrimonial home under provincial legislation—for which there is no authorization in the federal

96. *MPA*, *supra* note 12, ss 34(1)(d), 24(1); see similarly *Family Services Act*, SNB 1980, c F-2.2, s 116(1)(d). Beyond the enacted letter of the law, judicial practice may confirm the alimentary character of the family home. Case law in Nova Scotia shows a "clear pattern of allowing a postponement of the equal division of the home on divorce if the custodial parent wishes to remain there and it is financially feasible" (Conway & Girard, "No Place Like Home," *supra* note 30 at 723). On other provinces, see *ibid* at 723, n 26.

97. *Family Law Act*, RSNL 1990, c F-2, s 40(1)(d).

98. *FLA* (Ont), *supra* note 40, s 34(1)(c).

99. Art 592.

100. *Maintenance and Custody Act*, *supra* note 12, s 7. See also *Family Relations Act*, *supra* note 94, s 124.

101. *MacLennan v MacLennan*, 2003 NSCA 9, 212 NSR (2d) 116. I am indebted to Rollie Thompson for alerting me to this practice.

102. *Lamb v Lamb*, [1985] 1 SCR 851 at 858.

legislation—do not conflict so as to trigger the doctrine of paramountcy.¹⁰³ *Lamb* is appropriately read as reflecting the practical concerns that militate against finding that a support order under the federal law should render inoperative an order for occupancy under provincial law. The conclusion, for federalism purposes, that there was no conflict need not undermine the alimentary character of measures protecting the family home.

Next comes the contrast between the automatic entitlement to the division of matrimonial property and the individualized discretion of other legal avenues. Referring to the support regime open to unmarried cohabitants in Nova Scotia, the majority judges in *Walsh* noted a court's power to consider "a host of factors" regarding the parties' relationship as well as their needs and circumstances.¹⁰⁴ They contrasted the blunt presumption of equal division of property with the equitable law of constructive trust, which can be "tailored" to the parties' circumstances.¹⁰⁵ This contrast's usefulness is questionable. In the light of variations in legislative drafting and judicial approaches, the contrast between asset division itself and maintenance as, respectively, automatic and discretionary is truer in some provinces than others.¹⁰⁶ It is sharpest where the basis for judicial departure from the presumption of equal sharing is unconscionability¹⁰⁷—Ontario's legislative drafters having devised their *Family Law Act* "to operate as a mechanical scheme with little scope for judicial discretion"¹⁰⁸—and blurrier where it is the lower threshold of unfairness.¹⁰⁹ Moreover, rules may apply automatically and impose weighty financial consequences while being substantively alimentary—think of the spousal veto on charging or disposal of an interest in the family home.

Yet to the extent that the contrast holds, rules relating to possession of the family home fall on the discretionary side. They provide that a court may "direct that one spouse be given exclusive possession of a matrimonial home."¹¹⁰ Commentators suggest that, while legislative factors have a role to play, "this is an area of law where hard and fast rules are inappropriate."¹¹¹ This flexibility is critical because in *Walsh* the majority's concerns about

103. *Divorce Act*, RSC 1985, c 3 (2d Supp).

104. *Walsh* SCC, *supra* note 5 at para 60.

105. *Ibid* at para 61; see also Gonthier J, concurring, *ibid* at para 203.

106. Thompson, "*Walsh v. Bona*: Annotated," *supra* note 24 at 91.

107. *FLA* (Ont), *supra* note 40, s 5(6). See also the discretion to depart from equal sharing to avoid "an injustice" (art 422 CCQ).

108. Ontario Law Reform Commission, *Report on Family Property Law*, *supra* note 41 at 59.

109. *Family Relations Act*, *supra* 94, s 65(1).

110. *MPA*, *supra* note 12, s 11(1)(a); see similarly *FLA* (Ont), *supra* note 40, ss 5(1), 24(1)(b); arts 416, para 1, 410 CCQ.

111. Hovius & Youdan, *The Law of Family Property*, *supra* note 29 at 609 [footnote omitted].

choice turned on their characterization of the regime's onerousness, namely, its automatic and "dramatic" alteration of cohabitants' rights and duties under the general private law.¹¹² There might be a constitutionally significant difference between the permanent loss of one-half of the value of a pool of assets and the effect of an order, justified by evidence, granting one's former partner and children temporary exclusive possession of the dwelling that all had once shared.

The final line of characterization by which the family home appears as support arises from the concurring judge's juxtaposition of matrimonial property as arising from the contract of marriage and support as emerging from legislation pursuing a social objective. Protective rules on the family home distance it from contract. They carry out, instead, a logic of social objectives. Rules in the common-law provinces and territories permit spouses to vary or opt out of asset division by a prenuptial agreement.¹¹³ But Ontario's regime, at least, shields the family home.¹¹⁴ Furthermore, the factors by which judges exercise the discretion to order exclusive possession of a family home are social ones. They include children's welfare, the inadequacy of alternative shelter, and the spouses' respective financial positions.¹¹⁵ Alimentary in character, these factors are redolent of distributive justice. As for the factors conditioning unequal division of property, while they vary from province to province, they hint at a harder-nosed corrective justice. Such an orientation, consistent with the general law of property and obligations, is discernable in references to wrongdoing or improvidence.¹¹⁶

The pursuit of social objectives through rules on the family home is further manifest in legislative attention to the problem of violence. In Ontario, a court determining whether to make an order for exclusive possession shall consider "any violence committed by a spouse against the other spouse or the children."¹¹⁷ In Quebec, a lessee may resiliate a residential lease "if, because of the violent behaviour of a spouse or former spouse or because of a sexual aggression, even by a third party,

112. *Walsh* SCC, *supra* note 5 at para 43.

113. *Hartshorne v Hartshorne*, 2004 SCC 22, [2004] 1 SCR 550.

114. *FLA* (Ont), *supra* note 40, s 52.

115. *MPA*, *supra* note 12, s 11(4); *FLA* (Ont), *ibid*, s 24(3).

116. See e.g. *FLA* (Ont), *ibid*, s 5(6)(a), (b), (d); art 422 CCQ. On "economic faults," see *MT v J-YT*, 2008 SCC 50, [2008] 2 SCR 781 at para 28. Compare the more textured discretion for reallocation enjoyed by courts in British Columbia and Nova Scotia: *Family Relations Act*, *supra* note 94, s 65(1); *MPA*, *ibid*, s 13.

117. *FLA* (Ont), *ibid*, s 24(3)(f).

the safety of the lessee or of a child living with the lessee is threatened.”¹¹⁸ In other jurisdictions, statutes dedicated to domestic violence provide the possibility of short-term exclusive possession of a dwelling without regard for the law of property or contract. Whether labelled as “victims” or “claimants,” unmarried cohabitants are potential beneficiaries of those regimes.¹¹⁹

Two further considerations militate in favour of separating the family home from asset division. One is that the functional equivalents invoked in efforts to compensate for the unavailability of rules at the disposal of married spouses come from different corners of the law. Claims for a share of assets are framed, under the general law of obligations, in terms of undeclared partnership,¹²⁰ or unjust enrichment.¹²¹ By contrast, in Quebec, attempts to stay in the family home in situations not contemplated by the *Civil Code* draw on the best interests of children,¹²² a point consistent with the characterization of the family home’s vocation as alimentary.¹²³ The doctrinal differences of these alternative avenues undermine the unity implied by the purview of Nova Scotia’s *MPA*.

The other consideration is variation across the respective regimes of Nova Scotia and the other provinces. Provincial and territorial matrimonial-property statutes have been described collectively as differing “markedly

118. Art 1974.1 CCQ. On the legislative “transfer of the social cost of protecting the economically vulnerable lessee” to the lessor, see Jean-Maurice Brisson & Nicholas Kasirer, “Note to the 2006-2007 Edition” in Jean-Maurice Brisson & Nicholas Kasirer, eds, *Civil Code of Québec: A Critical Edition*, 14th ed (Cowansville: Yvon Blais, 2006) xvi at xvi.

119. *Protection Against Family Violence Act*, RSA 2000, c P-27, ss 1(1)(a), (d), 2(3); *The Domestic Violence and Stalking Act*, CCSM c D.93, ss 2(1)(a), 7(1)(d), 14(1)(d), 14(2); *Family Violence Protection Act*, SNL 2005, c F-3.1, ss 4(1), 6; *Domestic Violence Intervention Act*, SNS 2001, c 29, ss 2, 8(1); *Victims of Family Violence Act*, RSPEI 1988, c V-3.2, ss 1(d), (q), 4(3); *Victims of Domestic Violence Act*, SS 1994, c V-6.02, ss 2(a), 3(3)(a). Alva Orlando, “Exclusive Possession of the Family Home: The Plight of Battered Cohabitees” (1987) 45 UT Fac L Rev 153.

120. *Beaudoin-Daigneault v Richard*, [1984] 1 SCR 2; art 2250 CCQ.

121. *Peter v Beblow*, [1993] 1 SCR 980; *B (M) v L (L)*, [2003] RDF 539, 231 DLR (4th) 665 (CA); *Kerr*, *supra* note 53.

122. Raymonde LaSalle, “Les conjoints de fait et le droit d’usage de la résidence familiale” in Barreau du Québec, Service de la formation permanente, ed, *Congrès annuel du Barreau du Québec (1997)* (Cowansville: Yvon Blais, 1997) 347.

123. Robert Leckey, “Family outside the Book on the Family” (2009) 88 Can Bar Rev 541 at 572-73.

in content and approach.”¹²⁴ In Ontario, the claim for a share of assets, despite an exclusionary definition of “spouse,” would have required greater reflection in framing the constitutional question. In that province, the functional equivalents of Nova Scotia’s *MPA* and *Maintenance and Custody Act* appear mostly in the *Family Law Act*. The parts on family property and on the matrimonial home apply to married spouses. The part on support obligations extends the definition of “spouse” to include cohabitants. In *M. v. H.*, relating to same-sex couples, the Supreme Court of Canada had already struck down the extended definition of “spouse” for purposes of spousal support in proceedings involving neither asset division nor the family home.

In Ontario, then, Susan Walsh’s claim for division of assets need only have challenged the definition of “spouse” in relation to the part on family property. Where the definition of “spouse” for the part on support had been struck down once, it would have been obvious that definitions of “spouse” are context-specific and may separately undergo *Charter* scrutiny within a single instrument. A finding that the restrictive definition of “spouse” was constitutionally valid for the purposes of the part on family property could have left the matter open for the part on the matrimonial home. Similarly, in Quebec the “family residence,” including the possibility of a right to its use, is treated in one section of the chapter on the effects of marriage. Partition of the value of “residences of the family,” in pursuit of a wholly different objective, is addressed in a subsequent chapter.¹²⁵

This observation of interjurisdictional variation is critical. In the national context, the claim is not that the meaning implied by the structure of Ontario’s statute or of the *Civil Code of Québec* should prevail over that of Nova Scotia’s. But neither should the contingent choices of Nova Scotia’s legislative drafters define the *Charter*’s import for all Canadian jurisdictions. Comparative study of the functionally equivalent regimes of various legislatures, as undertaken by this paper, may help to demarcate substance from form so as to yield a more solid interpretation of the

124. Payne & Payne, *Canadian Family Law*, *supra* note 18 at 566. Provincial variations include the measure of judicial discretion (see note 93 above and text accompanying notes 107 to 109) and the pool of assets, including whether an asset becomes subject to sharing on account of its use “for a family purpose” (*Family Relations Act*, *supra* note 94, s 58(2)) or its origin in the spouses’ joint efforts during their marriage (*FLA* (Ont), *supra* note 40, s 4(1) “net family property” (b)). Another is whether the regime confers a proprietary interest in each asset or provides for an unsecured claim for an equalization payment. For illustration of the latter design choice’s implications on bankruptcy of the spouse who is debtor of an equalization payment, see *Schreyer v Schreyer*, 2011 SCC 35, [2011] SCJ no 35.

125. Arts 401-413, 414-426 CCQ. Spouses have one “family residence” in the sense of the section on the “family residence” (arts 395, 407 CCQ), while they may have multiple “residences of the family” for purposes of establishment of the family patrimony and its eventual partition (art 415 CCQ).

nationally applicable *Charter* principle. Admittedly, concepts or institutions may be entwined despite their separate treatment by the common-law and distinct statutes. It became swiftly clear that an interpretation of the common law and of enacted rules permitting same-sex marriage entailed an equivalently accommodating reading of the *Divorce Act*.¹²⁶ But the link between marriage and divorce withstands scrutiny in a way that subsuming the family home within matrimonial property does not.

V. *The reach of Charter judgments*

Is the prevailing reading of *Walsh* anomalous or does it indicate a larger methodological tendency? It is perhaps revealing that even scholars hostile to *Walsh* accepted the wide reading. Adopting a speculative register, this part suggests that the reading of *Walsh* may exemplify a practice of reading *Charter* judgments as legislative pronouncements, rather than of subjecting them to the reading practices associated with the common law. Procedural practices relating to appeals to the Supreme Court intensify the need for such careful reading.

It is a fundamental feature of the common law, and of all legal systems in which judges play an oracular role, that the law “should result from being applied to live issues raised between actual parties and argued on both sides.”¹²⁷ The idea of law arising from the adjudication of live disputes underpins the doctrine of mootness, which counsels against deciding a case that no longer has a direct legal impact. The traditional view of common-law adjudication is that the components of a judgment are separable into the *ratio decidendi* and *obiter dictum*.¹²⁸ Much has been written about the techniques for applying this distinction.¹²⁹ According to the classical theory, only the *ratio*—however difficult its identification¹³⁰—constrains lower and perhaps coordinate courts. What matters in the present discussion of *Walsh* is not *obiter* in the sense of distinct statements unnecessary to resolution of the appeal, although many of those are present in the Supreme Court’s *Charter* judgments. It is the appropriate breadth or narrowness attributed to the general statements about the *MPA* or matrimonial property as ensembles.

126. *MM v JH* (2004), 73 OR (3d) 337 (Sup Ct J); *JS v CF*, 2005 BCSC 1011, [2005] 11 WWR 136.

127. Fitzgerald, *Salmond on Jurisprudence*, *supra* note 56 at 177; see also Lon L Fuller, *Anatomy of the Law* (Westport: Greenwood Press, 1976) at 89.

128. The theory of the sources of public and adjectival law in Quebec makes Quebec judges, in this context, classifiable as common-law judges.

129. AWB Simpson, “The *Ratio Decidendi* of a Case and the Doctrine of Binding Precedent” in AG Guest, ed, *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) 148; Cross & Harris, *Precedent in English Law*, *supra* note 55.

130. Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008) at 68-76.

The wide reading of *Walsh* may be associated with a particular view of the Supreme Court of Canada's power to make law by its utterances. The rise and ostensible fall of the so-called *Sellars* principle is illustrative.¹³¹ The principle was that lower courts were to regard *obiter dicta* from the Supreme Court as binding, and many courts purported to do so. Scholars' and judges' willingness to accept the principle as it evolved required ascribing to judges the authority to announce obligatory legal rules unconnected to the resolution of disputes.¹³² In *R. v. Henry*,¹³³ the Supreme Court of Canada ostensibly repudiated the *Sellars* principle. Justice Binnie rejected, as incompatible with the common law's development, the idea that "each phrase in a judgment of this Court should be treated as if enacted in a statute."¹³⁴ Yet he insisted that, while not all *obiter* are binding, the Court may nevertheless intend that "effect" be given to discussion going "beyond what was essential for the disposition of the particular case."¹³⁵ In particular, the analytical framework proposed by the Court in a *Charter* judgment, such as the *Oakes* test,¹³⁶ might be intended to be "binding on other Canadian courts."¹³⁷

The traditional understanding of the judicial role does not contemplate that judges should announce a "test" for applying an instrument—in this case, the *Charter*—in abstract, comparatively legislative terms.¹³⁸ Indeed, the traditional theory of precedent holds that it is not the Court's stated (or inferable) intent that grants a statement authority, but its function in the disposition of a dispute. Thus even the purported repudiation of *Sellars* itself required a law-making power incompatible with the traditional common-law theory. The statements in *Henry* about the intended effect of the Supreme Court's instructive discussions are themselves *obiter*. The wide reading of *Walsh*—which takes literally the Supreme Court's pronouncements about matrimonial property beyond the confines of the dispute—fits into the larger tendency.

The influence of *Charter* judgments cautions against attributing binding authority to statements that are unnecessary for resolving a

131. *Sellars v The Queen*, [1980] 1 SCR 527.

132. Mathieu Devinat, "L'autorité des obiter dicta de la Cour suprême" (1998) 77 Can Bar Rev 1 at 19. On the unhappy influence of the clumsily drafted headnote in the *Canadian Criminal Cases*, see *ibid* at 5 n 19.

133. 2005 SCC 76, [2005] 3 SCR 609.

134. *Ibid* at para 57.

135. *Ibid* at para 53.

136. *R v Oakes*, [1986] 1 SCR 103.

137. *Henry*, *supra* note 133 at para 53.

138. Robert Leckey, "Language and Judgment's Reach: Reflecting on Limits on Rights" (2010) 60 UTLJ 1031.

dispute or needlessly broad. *Charter* precedents—rather, the readings of them—influence legislative design. Proposed legislation is vetted for its compliance with human rights in advance of its reaching the legislature. Legislative drafters may be risk averse, inclined to give pronouncements of unconstitutionality an unnecessarily wide berth.¹³⁹ Conversely, the sense from a reading of a judgment that current law complies with the *Charter* may dampen reform efforts in parliamentary and judicial arenas. The potential for *Charter* judgments to function not as floors but as ceilings makes it important not to read them overbroadly. Bearing those considerations in mind, procedural features of *Charter* litigation and the Supreme Court's practice substantiate the hunch that *Charter* judgments are particularly likely to require scrutiny in order to delineate what they decided.

One procedural feature arises from the discretionary character of appeals. The criterion of “public importance” for grant of leave may incentivize litigants to downplay interprovincial variation.¹⁴⁰ It may do so even where the features of a statute that call for a particular *Charter* result in one province may not be present in another province's functionally equivalent regime. In the *Walsh* leave proceedings, the provincial government referred to matrimonial property legislation's “pervasive uniformity... across Canada,” insisting the case was “not local in nature.”¹⁴¹ Only a winner at the provincial court of appeal would have had an interest in disputing that argument. But Walsh's counsel did not oppose the government's initiative to appeal, instead arguing that the province's new law extending matrimonial property rights to declared domestic partners continued to discriminate against undeclared cohabitants.¹⁴² The Attorneys General of the provinces may intervene to flag up provincial specificity. If they contend that all their legislation is valid, however, they are unlikely to highlight the internal divisions that render some regimes more vulnerable than others. The Chief Justice's statement of a constitutional question is also relevant. That question—often in the form “Does s. X of law Y infringe

139. Andrew Petter, “Legalise This: The *Chartering* of Canadian Politics” in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: University of British Columbia Press, 2009) 33 at 34-35. See also Janet L Hiebert, “Governing Like Judges?” in Tom Campbell, KD Ewing & Adam Tomkins, eds, *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011) 40 at 64 (“[S]ceptics understate the extent of judicial influence on a polity because they do not give sufficient consideration to the extensive reliance on case law in pre-legislative processes of developing legislation”).

140. *Supreme Court Act*, RSC 1985, c S-26, s 40(1).

141. Leave Application, *supra* note 59 at paras 11, 12.

142. Response of Susan Walsh (respondent), Application for Leave to Appeal of the Attorney General of Nova Scotia, *Nova Scotia (Attorney-General) v Walsh* (4 December 2000) at 2.

s. Z of the *Charter*?”—is used to notify all provincial attorneys general of a constitutional appeal.¹⁴³ The question and the answer risk being taken as what the judgment decided, although, as in *Walsh*, the drafting may have reached further than necessitated by the underlying dispute.

As for judicial practice, the Supreme Court’s willingness to hear moot *Charter* cases and to pronounce on issues not before it heightens the need for careful reading. It is sometimes said that facts are highly important in *Charter* cases and that *Charter* determinations should not arrive in a factual vacuum.¹⁴⁴ Such statements are consistent with the common-law tradition and with discussions of human rights as indeterminate, requiring “specification in individual cases.”¹⁴⁵ Yet the justices of the Supreme Court appear amenable to countermanding considerations, such as the understandable supposition that an issue is unlikely to return to them soon, for reasons of their selection and of litigation’s cost. A number of key *Charter* cases—*Walsh* being far from the only one—have emerged from other than adversarial circumstances buttressed by a full factual record. At times the Court has said more than the dispute necessitated.¹⁴⁶ Interveners may provide some context, and five Attorneys General intervened in *Walsh*. There is no basis, however, for thinking that the Supreme Court has overcome the epistemic limits that justified restraint in common-law cases. By the time it reached the Supreme Court, *Walsh* was moot, and the stated constitutional question reached beyond what would have been needed to resolve the initial claim. Nobody’s direct financial interests hung, as they might in private litigation, on the Court’s cleaving to the facts. Does that procedural feature help account for the presence of overbroad statements at the expense of legislative details?

Sweeping findings of unconstitutionality already attract criticism as intrusions into the legislative process. The present example suggests that affirmations of compliance with the *Charter* may also merit study, particularly where they reach beyond the facts and issues. Legal scholarship is not a source of law in the common law as it may be in the civil law.¹⁴⁷ By

143. *Rules of the Supreme Court of Canada*, ss 60, 61; Hogg, *Constitutional Law of Canada*, *supra* note 27, vol 2 at 59-23 to 59-24.

144. Brian G Morgan, “Proof of Facts in Charter Litigation” in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 159; *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086; *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429.

145. H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 4th ed (Oxford: Oxford University Press, 2010) at 380 [footnote omitted].

146. Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough: Carswell, 1999) c 3.

147. Jacques Ghestin & Gilles Goubeaux with Muriel Fabre-Magnan, *Traité de droit civil, Introduction générale*, 4th ed (Paris: L.G.D.J., 1994) at para 574.

rigorously scrutinizing judgments, however, scholars have an important contribution to make to the inter-institutional process of working out human rights. By uncritically accepting the Supreme Court's affirmations as binding, might not scholars abnegate the role of "academic observer" in interpretively shaping judgments?¹⁴⁸ Scholars unhesitatingly criticize how the Supreme Court decides *Charter* cases, but they discuss much less the practices of reading that they and other jurists, including judges, should bring to earlier judgments. The experience with *Walsh* gestures to such reading practices as a promising avenue for further research.

Conclusion

Walsh is best read as having ruled on division of assets, but not on measures protecting the family home as shelter. Accordingly, an unmarried cohabitant, refused the possibility of opposing her partner's disposition of a shared home to which he held title or of applying for exclusive possession thereof, might bring a *Charter* challenge. To be clear, some examples presented already assimilate unmarried to married couples. The worry is that the wide reading of *Walsh* implies that legislatures have in such cases overshot their *Charter* obligations. The view that *Walsh* immunizes from *Charter* scrutiny a generic category of "statutory property rules" is pernicious. Presumably it would follow that a future legislature might withdraw one or more of the benefits now enjoyed by unmarried couples with the blessing of the *Charter* and the Supreme Court. It is haphazard and unprincipled to take a *Charter* judgment, supposedly upholding an entire statute of one province while dismissing a claim, as affirming the validity of all marital-status distinctions in relation to any rules bearing on property.

Beyond the reading of *Charter* judgments, another observation to draw concerns the persistence in viewing the legal attributes of conjugal unions as a bundle. Scholars' assumption that a right to share in the value of accumulated wealth goes together with protections of the home as shelter bespeaks a reluctance to separate the legal effects of conjugal union and to analyze their respective functions and justifications. It reflects a binary "logic of semblance" by which a class of family relationships should be treated as like or unlike marriage.¹⁴⁹ For *Charter* purposes and legislative and social policy, the diversity of contemporary family life calls for

148. Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law* (Vancouver: UBC Press, 2002) at 193.

149. Anne Bottomley & Simone Wong, "Shared Households: a New Paradigm for Thinking about the Reform of Domestic Property Relations" in Alison Diduck & Katherine O'Donovan, eds, *Feminist Perspectives on Family Law* (New York: Routledge, 2006) 39 at 42.

subjecting the bundles of rights and duties associated with marriage and parentage to context-specific disaggregation. The all-or-nothing approach, a modified form of which underpins the wide reading of *Walsh*, is too blunt to take into account social phenomena such as people “living apart together.”¹⁵⁰ It may similarly ill serve interdependent partners who do not sustain “dyadic relationships” that “mirror the heterosexual marriage model.”¹⁵¹

Even the obligation of support might appropriately be unbundled. Married spouses may owe one another post-dissolution support on compensatory or non-compensatory bases. On the Supreme Court of Canada’s understanding, non-compensatory support flows from the social-obligation view of marriage as “a serious commitment not to be undertaken lightly.”¹⁵² As the legal contours of family reached beyond conjugal relations,¹⁵³ the justifiable duties might be less onerous. A leading English scholar of family law conjectures that in some non-marital relationships, betrayal and loss might justify retrospective compensation, but not ongoing future support.¹⁵⁴ His musings are not directly transferable into Canadian family law; the statutory preclusion of spousal misconduct from consideration regarding support has—arguably—exiled betrayal beyond law’s reach even for married spouses, at least for pecuniary purposes.¹⁵⁵ Yet they hint that compensatory support might be appropriate in relationships where non-compensatory support would not. Of course, as queer and feminist scholars have noted in connection with same-sex marriage, extending family law’s reach is not an unmitigated good. It is wrong to assume that the general law of property and obligations fails women, “but that family law does not.”¹⁵⁶ But the disaggregation proposed here might clarify analysis.

150. Simon Duncan & Miranda Phillips, “People Who Live Apart Together (LATs)—How Different Are They?” (2010) 58 *Sociological Review* 112.

151. Simone Wong, “Caring and Sharing: Interdependency as a Basis for Property Redistribution?” in Anne Bottomley & Simone Wong, eds, *Changing Contours of Domestic Life, Family and Law: Caring and Sharing* (Oxford: Hart Publishing, 2009) 49 at 50-51.

152. *Bracklow v Bracklow*, [1999] 1 SCR 420 at para 57.

153. *Adult Interdependent Relationships Act*, SA 2002, c A-4.5.

154. John Eekelaar, “Friendship” in J Erauw, V Tomljenović & P Volken, eds, *Liber Memorialis Petar Šarčević: Universalism, Tradition and the Individual* (München: Sellier, European Law Publishers, 2006) 265 at 273-77.

155. *Divorce Act*, *supra* note 103, s 15.2(5); *Leskun v Leskun*, 2006 SCC 25, [2006] 1 SCR 920. Adultery and cruelty continue to establish the breakdown of a marriage so as to justify dissolution (*Divorce Act*, s 8(2)).

156. Anne Bottomley, “From Mrs. Burns to Mrs. Oxley: Do Co-habiting Women (Still) Need Marriage Law?” (2006) 14 *Fem Legal Stud* 181 at 206.

Realistically, the odds are low that a private plaintiff will challenge cohabitants' exclusion from statutory rules relating to the family home as shelter. The monetary value of the rights denied may be too small, and their period of acute relevance too fleeting, to induce litigation. This paper might speak, then, to an associational litigant, which might join with an individual. Or it might resonate with a government that has not reduced its conception of family policy to the execution of judicially recognized *Charter* obligations. Perhaps the present account of the scholarly gingerliness in engaging with *Walsh* is best understood as an allegory for the persistent weight on our imaginations of established categories of family law.