


Anti-Social Behaviour, Expulsion from Condominium, and the Reconstruction of Ownership

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Abstract

Statutory condominium regimes facilitate massive increases in the density of owners. The courts are responding to this spatial reorganization of ownership by reconstructing what it means to be the owner of an interest in land. This article analyzes the ten cases over eight years (from 2008 to 2015) in which Canadian courts grant eviction and sale orders against owners within condominium for anti-social behaviour. The expulsion orders are new. Until these cases, ownership within condominium in Canadian common law jurisdictions was thought to be as robust as ownership outside condominium such that owners could not be expelled from condominium for anti-social behaviour. In addition to describing a new development in Canadian property law, the analysis reveals that some form of mental disorder appears to be a contributing factor in the majority of the cases. The article then argues that eviction and sale orders are not only reconstructing ownership, but also redistributing property. This is because the orders, although diminishing the security of property for some, enhance ownership for a great many more by providing a remedy—the physical and legal expulsion of an owner for chronic anti-social behaviour—that is not available to those outside condominium. Finally, the article argues that the judicial willingness to reconstruct ownership is a function, at least in part, of the spatial reorganization of owners. What it means to be an owner of land emerged from a context where owners were dispersed over the surface of the earth. Under statutory condominium regimes, owners can now be stacked in a vertical column many stories high. The article concludes by asking whether the judicial reconstruction of ownership is an appropriate response to the spatial reorganization of owners and the resulting challenges posed by anti-social behaviour when the behaviour is frequently attributable, at least in part, to some form of mental disorder.

Keywords

Condominiums--Law and legislation; Home ownership; Mentally ill-Housing; Eviction; Antisocial personality disorders; Ontario; British Columbia

Cover Page Footnote

Associate Professor and Nathan T. Nemetz Chair in Legal History, The University of British Columbia Peter A. Allard School of Law. I wrote the first draft of this article while a visiting fellow at New College, Oxford, and first presented it at “The Precarious Home: Socio-legal Perspectives on the Home in Insecure Times” workshop, Oñati International Institute for the Sociology of Law, 26 June 2015. I thank the convenors of that workshop, Helen Carr, Brendan Edgeworth, and Caroline Hunter, for their encouragement, Oren Adamson, Joel Bakan, Emma Cunliffe, Cole Harris, Shi-Ling Hsu, Michael Johnson, Graham Reynolds, Susan Thomson, Michel Vols, Margot Young, and two anonymous reviewers for comments on drafts, and Kaitlin Green for research assistance.

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DOUGLAS C. HARRIS*

Statutory condominium regimes facilitate massive increases in the density of owners. The courts are responding to this spatial reorganization of ownership by reconstructing what it means to be the owner of an interest in land. This article analyzes the ten cases over eight years (from 2008 to 2015) in which Canadian courts grant eviction and sale orders against owners within condominium for anti-social behaviour. The expulsion orders are new. Until these cases, ownership within condominium in Canadian common law jurisdictions was thought to be as robust as ownership outside condominium such that owners could not be expelled from condominium for anti-social behaviour. In addition to describing a new development in Canadian property law, the analysis reveals that some form of mental disorder appears to be a contributing factor in the majority of the cases. The article then argues that eviction and sale orders are not only reconstructing ownership, but also redistributing property. This is because the orders, although diminishing the security of property for some, enhance ownership for a great many more by providing a remedy—the physical and legal expulsion of an owner for chronic anti-social behaviour—that is not available to those outside condominium. Finally, the article argues that the judicial willingness to reconstruct ownership is a function, at least in part, of the spatial reorganization of owners. What it

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Le régime législatif de la copropriété facilite une augmentation massive de la densité des propriétaires. Les tribunaux réagissent à cette réorganisation spatiale de la propriété en reformulant la signification du fait de posséder un intérêt foncier. Cet article analyse, sur une période de huit ans (de 2008 à 2015), les dix cas où les tribunaux canadiens ont ordonné l'éviction de copropriétaires et la vente de leurs biens en raison de comportements antisociaux. Ces ordonnances d'éviction sont nouvelles car, jusque là, sous le régime de la *common law* du Canada, le statut de copropriétaire était réputé aussi robuste que celui de propriétaire, de sorte qu'un copropriétaire ne pouvait pas être expulsé en raison de comportements antisociaux. En plus de décrire une évolution du droit canadien en matière de propriété, cette analyse révèle qu'une certaine forme de désordre mental semble être un facteur contributif dans la majorité de ces cas. L'article fait de plus valoir que les ordonnances d'éviction et de vente ne font pas que reformuler le droit de propriété, mais redistribuent également la propriété. C'est parce que ces ordonnances, même si elles réduisent pour certains la sécurité du droit de propriété, améliorent le droit de propriété de beaucoup d'autres en apportant un recours—l'éviction physique et juridique d'un copropriétaire pour comportement antisocial chronique—qui n'est pas accessible en dehors de la copropriété. Finalement, l'article fait valoir que l'accord des tribunaux pour reformuler le droit de propriété est sous-tendu, du moins en partie, par la réorganisation spatiale des propriétaires. Le statut de propriétaire foncier date d'une époque où les propriétaires étaient dispersés à la surface de la terre. Sous le régime législatif de la copropriété, les propriétaires peuvent désormais s'empiler sur plusieurs étages de hauteur. L'article se termine en s'interrogeant sur l'adéquation de la reformulation judiciaire du droit de propriété en réponse à la réorganisation spatiale des propriétaires et aux problèmes qui en découlent, résultant de comportements antisociaux, lorsque ces comportements sont fréquemment attribuables, du moins en partie, à une certaine forme de désordre mental.

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I. PERFECT STORMS

In 2010, a Toronto condominium corporation applied to Ontario's Superior Court for an order to expel Natalia Korolekh. Her neighbours alleged that she was physically assaulting, verbally abusing and threatening them, damaging their property, peering into their homes, playing loud music at night, and using her

large and aggressive dog to frighten and intimidate. Accepting the evidence, including that of behaviour amounting to criminal acts of assault and mischief and a continuing refusal to adhere to condominium by-laws, Justice Michael Code ordered Ms. Korolekh to vacate and sell her townhouse. “This case,” he wrote, “is a ‘perfect storm’ where the misconduct is serious and persistent, where its impact on a small community has been exceptional and where the Respondent appears to be incorrigible or unmanageable.”¹

A “perfect storm” describes a rare combination of circumstances that produces “the worst possible or an especially critical state of affairs.”² By using this metaphor, Justice Code was indicating that eviction and sale orders against owners within condominium were a last resort, reserved for the most egregious and destructive behaviour, where no other order would suffice. In granting the order, he cited an earlier decision that denied a similar application, but which noted two unreported eviction and sale orders from the 1990s, and Justice Code indicated that he was aware of others.³ Nonetheless, the “draconian” and “extreme” order to expel an owner from condominium was without clear precedent and certainly not common.⁴ Several decades earlier, when Dennis Pavlich authored an early text on condominium law, ownership within condominium was thought to be as robust as that outside it, such that an owner could “never be evicted” for problematic behaviour.⁵ This has changed. In fact, *Korolekh* appears to have reflected and precipitated a change in climate such that perfect storms (or the judicial willingness to detect them) have become almost commonplace.

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1. *Metropolitan Toronto Condominium Corp No 747 v Korolekh*, 2010 ONSC 4448 at para 87, 322 DLR (4th) 443 [*Korolekh*].
 2. *The Oxford English Dictionary*, 3d ed, *sub verbo* “perfect storm.”
 3. *York Condominium Corp No 136 v Roth*, [2006] OJ No 3417 at para 20, 150 ACWS (3d) 951 (Ont Sup Ct J) [*Roth*]. See also *Korolekh*, *supra* note 1 at paras 81-85.
 4. *Ibid* at paras 8, 20. In 2003, the Alberta Court of Queen’s Bench made an eviction order, but not an order for sale. See *Owners: Condominium Plan No 022 1347 v NY*, 2003 ABQB 790, 351 AR 76. See also the British Columbia Supreme Court’s eviction order in *Strata Plan NW 1080 v Verlaan*, cited in Paul G Mendes, “Bylaw Enforcement: Remedies from Fines to Injunctions and Evicting Owners” (27 April 2012), online: <lmlaw.ca/wp-content/uploads/2013/12/REMEDIES-FROM-FINES-TO-INJUNCTIONS-AND-EVICTING-OWNERS.pdf>.
 5. Dennis Pavlich, *Condominium Law in British Columbia* (Vancouver: Butterworth, 1983) at 2. Pavlich notes that:

A leasehold estate, even buttressed by the security of tenure provisions of the Residential Tenancy Act, does not, in the ordinary course of events, afford the same protection as an estate in fee simple. A condominium interest held in fee simple assures the owner that he can never be evicted.

Since *Korolekh* in 2010, there have been five reported condominium eviction and sale orders from the Ontario Superior Courts,⁶ and two more from the British Columbia Supreme Court.⁷ A third decision from British Columbia involving a 99-year leasehold interest within a multi-unit structure (which uses lease agreements to emulate condominium ownership) cited the condominium case law in ordering that a leaseholder forfeit her interest.⁸ The same courts have declined to make eviction and sale orders in three other reported decisions since 2010, ordering instead that the title holder comply with the condominium legislation and by-laws, but noting in each that an eviction and sale order remained in reserve should the behaviour continue.⁹

While *Korolekh* has become a touchstone for eviction and sale orders, there is an earlier reported case. In 2008, two years before *Korolekh*, the Ontario Superior Court ordered another condominium owner to vacate and sell her apartment. In *Metropolitan Toronto Condominium Corporation No 946 v JVM*, Justice J Macdonald concluded that JVM, who suffered from paranoid schizophrenia, created such “a health and safety risk” to the other owners that it was necessary to order her removal.¹⁰ All involved in the litigation accepted that the problematic behaviour—accumulation of garbage, pest infestations, overflowing toilets, damage to condominium property, and occasional violent outbursts—was a result of her illness. The decision to expel her turned on whether the condominium corporation had met its obligation, under the Ontario *Human Rights Code*, to accommodate her disability to the point of undue hardship.¹¹ Justice Macdonald, in ordering eviction and sale, confirmed that it had.¹²

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6. *Waterloo North Condominium v Webb*, 2011 ONSC 2365, [2011] OJ No 2195 [*Webb*]; *York Condominium Corp No 82 v Singh*, 2013 ONSC 2066, 228 ACWS (3d) 572 [*Singh*]; *Peel Condominium Corp No 304 v Hirsi*, 2014 ONSC 346, 236 ACWS (3d) 1038 [*Hirsi*]; *York Condominium Corp No 301 v James*, 2014 ONSC 2638, 240 ACWS (3d) 223 [*James*]; *Carleton Condominium Corp No 348 v Chevalier*, 2014 ONSC 3859, 241 ACWS (3d) 978 [*Chevalier*].
 7. *The Owners Strata Plan LMS 2768 v Jordison*, 2013 BCCA 484, 52 BCLR (5th) 245 [*Jordison*] (2013), BCCA; *Bea v The Owners, Strata Plan LMS 2138*, 2015 BCCA 31, 94 CPC (6th) 117 [*Bea*, BCCA].
 8. *Westsea Construction Ltd v Mathers*, 2014 BCSC 143, 237 ACWS (3d) 215 [*Westsea*].
 9. See *York Condominium Corp No 137 v Hayes*, 2012 ONSC 4590 at para 57, 20 RPR (5th) 154 [*Hayes*]; *Peel Condominium Corp No 98 v Pereira*, 2013 ONSC 7340 at para 80, 235 ACWS (3d) 832 [*Pereira*]; *Strata Plan VR 390 v Harvey*, 2013 BCSC 2293 at para 155, 236 ACWS (3d) 1003 [*Harvey*].
 10. *Metropolitan Toronto Condominium Corporation No 946 v JVM*, [2008] OJ No 5412 at paras 105, 108, 173, ACWS (3d) 1236 (Sup Ct) [*JVM*].
 11. *Human Rights Code*, RSO 1990, c H 19, ss 2(1), 10, 11, 17.
 12. *JVM*, *supra* note 10 at paras 87–98.

The courts have used *Korolekh* as precedent for eviction and sale orders within condominium, but *JVM*, with its explicit consideration of mental disorder, has hardly been noticed.¹³ However, the presence of some form of mental disorder is not peculiar to *JVM*. The courts have noted mental illness or disability in five of the other nine cases in which they have granted eviction and sale orders.¹⁴ The references in these cases are fleeting, usually limited to passing mention, and sometimes only to an acknowledgement that the owner confronting eviction and forced sale had raised the issue. The courts have largely avoided the question of whether the presence of mental disorder should bear on the outcome, even as a pattern is emerging that it is a contributing factor in the majority of cases that lead to an order for eviction and sale.

This article has three Parts. First, I describe in Part II a new development in Canadian property law: court-ordered expulsions from condominium for anti-social behaviour. I begin with a brief survey of the approaches in other jurisdictions before turning to Ontario and British Columbia, the two most populous common law jurisdictions in Canada and those in which condominium ownership is most pronounced.¹⁵ The analysis proceeds chronologically, commencing with *JVM*, then *Korolekh* and the eight reported decisions that follow. In these cases, the courts expel condominium owners pursuant to discretionary powers granted in provincial condominium statutes intended to enable courts to enforce compliance with the legislation,¹⁶ or under the rules of civil procedure and the inherent jurisdiction of the courts to fashion appropriate sanctions for contempt of court.¹⁷ There is no mention of eviction and sale orders for anti-social behaviour in either the condominium statutes or the rules of civil procedure that govern contempt of court, and until these cases there was no precedent for such orders as part of the courts' inherent jurisdiction in contempt of court proceedings. The orders, which Michael Kim describes as banishing

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13. *James*, *supra* note 6 at para 20, includes *JVM* in a list of relevant decisions. That list is acknowledged in *Chevalier*, *supra* note 6 at para 22.
 14. *Webb*, *supra* note 6 at para 12; *James*, *supra* note 6 at para 22; *Chevalier*, *supra* note 6 at para 24; *Westsea*, *supra* note 8 at paras 30, 35; *The Owners Strata Plan LMS 2768 v Jordison*, 2012 BCSC 31 at para 11, 346 DLR (4th) 721 [*Jordison* (2012), BCSC].
 15. On the proliferation of condominium ownership in British Columbia and Ontario, see Douglas C Harris, "Condominium and the City: The Rise of Property in Vancouver" (2011) 36:3 L & Soc Inquiry 694; Gillad Rosen & Alan Walks, "Castles in Toronto's Sky: Condo-ism as Urban Transformation" (2014) 37:3 J Urban Aff 289.
 16. *Condominium Act, 1998*, SO 1998, c 19, s 134 [*Condominium Act*]; *Strata Property Act*, SBC 1998, c 43, s 173 [*Strata Property Act*].
 17. *Singh*, *supra* note 6; *Bea*, BCCA, *supra* note 7.

or physically and legally expelling owners from condominium,¹⁸ are a new and significant development in Canadian property law.

Second, I argue in Part III that the eviction and sale orders are reconstructing ownership and redistributing property within condominium. By reconstruction I mean that the courts, in exposing owners to the possibility of eviction and sale orders for anti-social behaviour, are diverging from long-held and well-established conceptions of what it means to be an owner of an interest in land. Anti-social behaviour has never been a ground in common law jurisdictions on which neighbours could seek an order to evict an owner and force the sale of her property. The recent willingness of courts to use these orders is diminishing the security of property for some, but simultaneously enhancing the property of a great many more. This is because those within condominium who are grappling with a neighbour's anti-social behaviour have access to a remedy—the expulsion of an owner—that is not available to those outside condominium. As a result, the eviction and sale orders act as a sanction against a few, but a remedy for many. They are not only reconstructing ownership but also redistributing property within condominium, for the enhanced ownership that some enjoy is won through the diminished security of property that others suffer.

Third, in Part IV, I conclude that the reconstruction of ownership is a function, at least in part, of the spatial reorganization of owners. In common law systems, the freehold or fee simple interest in land is generally understood to confer the status of “owner.” Those holding long-term leasehold interests, commonly of 99 years, have also been described as “leasehold owners,”¹⁹ but the freehold interest has been the unmodified marker of ownership. The meaning of ownership in land developed in a context where owners were dispersed over the surface of the earth in a single layer. Combining multiple freehold interests within a single building was possible at common law, but difficult and rare.²⁰ Statutory condominium has changed this. Owners can now be stacked in a vertical column many stories high, and the courts are responding to the massive increase in the density of owners by changing what it means to be an owner. This article ends by asking whether the judicial reconstruction of ownership is an appropriate response to the spatial reorganization of owners and the resulting challenges

18. Michael C Kim, “Involuntary Sale: Banishing an Owner from the Condominium Community” (1998) 31:2 *John Marshall L Rev* 429 at 431 (introduces the idea of physical and legal expulsion).

19. See e.g. Susan Bright, *Landlord and Tenant Law in Context* (Oxford: Hart, 2007) at 226; Kevin Gray & Susan Francis Gray, *Elements of Land Law*, 5th ed (Oxford: Oxford University Press, 2009) at para 4.1.10.

20. Harris, *supra* note 15 at 698–99.

posed by anti-social behaviour when the behaviour is frequently attributable, at least in part, to some form of mental disorder.

Before proceeding, a note about how to characterize the behaviour that is leading to eviction and sale orders. The conduct that warrants expulsion usually involves *inappropriate personal behaviour* ranging from distasteful, disgusting, and disturbing, to violent acts and dangerous criminal activity. In a few cases, it is the *inappropriate use* of private units in violation of the condominium by-laws and, in some cases, criminal laws.²¹ The courts have also considered, but not granted, eviction and sale orders to address *unauthorized renovation*.²² In studies of disorderly conduct in the housing context, most of it focusing on rental housing in the United Kingdom and Europe, scholars have adopted the term “anti-social behaviour” to capture activities that harass, alarm, or distress neighbours.²³ However, the Ontario and British Columbia courts rarely use this term. Instead, they most commonly describe the behaviour as “misconduct,” as in *Korolekh*: “this case is a ‘perfect storm’ where the misconduct is serious and persistent.”²⁴ The principal exception is *JVM*, where the court uses the more neutral “conduct” and characterizes the effects of the conduct, rather than the conduct itself, as unacceptable.²⁵ The justices in the two other cases that engage most directly with the issue of mental disorder use the phrase “unacceptable and antisocial behaviour.”²⁶ I use “anti-social behaviour” because it best captures the

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21. *Singh*, *supra* note 6 (involved using a residential unit to sell alcohol and cigarettes).
22. *Harvey*, *supra* note 9. For more information on the distinction between inappropriate use and inappropriate personal behaviour, see Cornelius Van Der Merwe, ed, *European Condominium Law* (Cambridge: Cambridge University Press, 2015) at 230-313, 371-97 [Van Der Merwe, *Condominium Law*]. Case 4 (at 230) analyzes different approaches to inappropriate use, including unauthorized renovation, while Case 6 (at 371) considers inappropriate personal behaviour. For a study that employs finer grain distinctions between forms of anti-social behaviour, see M Vols, PG Tassenaar & JPAM Jacobs, “Anti-social Behaviour and European Protection against Eviction” (2015) 7:2 Int’l J L in the Built Env 148.
23. See Caroline Hunter, Judy Nixon & Michele Slatter, “Neighbours Behaving Badly: Anti-Social Behaviour, Property Rights and Exclusion in England and Australia” (2005) 5 Macq LJ 149; John Flint, ed, *Housing, Urban Governance and Anti-social Behaviour: Perspectives, Policy and Practice* (Bristol: Policy Press, 2006); John Flint & Judy Nixon, “Governing Neighbours: Anti-social Behaviour Orders and New Forms of Regulating Conduct in the UK” (2006) 42:5-6 Urban Studies 939; Andrew Millie, *Anti-Social Behaviour* (Maidenhead: Open University Press, 2009); Michel Vols, Marvin Kiehl & Julian Sidoli del Ceno, “Human Rights and Protection against Eviction in Anti-social Behaviour Cases in the Netherlands and Germany” (2015) 2 Eur J Comp L & Gov 156.
24. *Korolekh*, *supra* note 1 at para 87.
25. *JVM*, *supra* note 10 at para 20.
26. *James*, *supra* note 6 at para 21; *Chevalier*, *supra* note 6 at para 23.

character of the conduct and its damaging effects without importing a judgment of wrongdoing that may not be appropriate where mental disorder is involved. Finally, I use “mental disorder” to encompass mental illness and mental incapacity caused by something other than illness, such as head trauma.

II. EXPULSION FROM CONDOMINIUM

Condominium property is primarily a creature of statute. Introduced across Canada in the 1960s, it exists under a number of different labels—“condominium” or “strata property” in the common law provinces, and “divided co-ownership” in the civil law jurisdiction of Quebec—but the form of ownership is similar.²⁷ Among the various legal structures that mark out property rights within multi-unit developments, the creation of individual titles for each unit is the principal distinguishing feature of condominium.²⁸ Unit holders are title holders, and the titles are accompanied by a co-ownership interest (held with other title holders) in the common property, a right to participate in governing the private and common property (through the condominium corporation, strata council, or co-ownership syndicate), and an obligation to contribute to the maintenance of the common property. This is the package of rights and obligations that comprises ownership within condominium, but it is the presence of individual titles—and thus the status of owner—that provokes particular scrutiny when courts consider eviction and sale orders for anti-social behaviour.

The capacity to evict owners from condominium and to force the sale of their units for anti-social behaviour varies among jurisdictions, as a recent comparative study of European and South African condominium law reveals.²⁹ Toward one end of the spectrum, France does not permit eviction and forced sale, on the grounds that ownership is inviolable and the property rights of all within condominium are equal.³⁰ Spain and Catalonia do not permit forced sale but allow a court to suspend rights of use for several years (three years in Spain, two

27. For early analyses, see Alvin Rosenberg, *Condominium in Canada* (Toronto: Canada Law Book, 1969); RCB Risk, “Condominiums and Canada” (1968) 18:1 UTLJ 1.

28. See Peter Butt, *Land Law*, 6th ed (Sydney: Lawbook Co, 2010) at 854-57; Harris, *supra* note 15 at 698-99.

29. Van Der Merwe, *Condominium Law*, *supra* note 22. See also Cornelius Van der Merwe, “European Condominium Law: Nine Key Choices” in Amnon Lehavi, ed, *Private Communities and Urban Governance: Theoretical and Comparative Perspectives* (Cham, Switzerland: Springer, 2016) 127 at 136-40.

30. Van Der Merwe, *Condominium Law*, *supra* note 22 at 385. Belgium (at 377) and Portugal (at 392) also do not permit eviction and forced sale.

in Catalonia).³¹ South Africa's sectional title legislation does not address eviction and forced sale, but a judicial decision involving the use of a sectional title unit for drug dealing and prostitution suggests it may be appropriate to "deprive the owner and/or occupier of the right to reside in or use a unit" for chronic misconduct.³² The court does not mention forced sale, and it declined to make the eviction order, but nonetheless appeared to endorse the Spanish approach.³³ At the other end of the spectrum, a majority of civil law jurisdictions in Europe allow for eviction and forced sale in circumstances of inappropriate personal behaviour.³⁴ A small subset permits eviction and sale orders for inappropriate use as well.³⁵ The common law jurisdictions in Europe tend towards long-term leasehold arrangements rather than statute-based condominium to structure ownership in multi-unit developments, but there is no indication that the holder of commonhold title (the little-used version of condominium in England and Wales) would be subject to an eviction and sale order for anti-social behaviour.³⁶

Condominium statutes in common law jurisdictions do not list eviction and sale orders as a possible response to an owner's anti-social behaviour, and the courts have been hesitant to use them. In the Australian strata title regimes, Caroline Hunter et al noted in 2005 that "[i]ntransigent non-compliance [with strata by-laws] does not run the risk of forced sale and removal," and this appears to remain the case.³⁷ In his 1997 study of condominium legislation and case law in the United States, Kim found that "no condominium enabling statute

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31. *Ibid* at 249-50, 378-79 (Catalonia), 396-97 (Spain). See also Cornelius Van Der Merwe & Luis Muniz-Argüelles, "Enforcement of Conduct Rules in an Apartment or Condominium Ownership Scheme" in Sabin Arkan & Aynur Yongalik, eds, *Festschrift liber amicorum Tuğrul Ansay* (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2006) 247 at 263-65.
32. *Body Corporate of the Shaftesbury Sectional Title Scheme v Estate of the Late Wilhelm Rippert and Others*, (4542/02) [2002] ZAWCHC 15 at 11, [2003] 2 All SA 233 [Shaftesbury]. See also Van Der Merwe, *Condominium Law*, *supra* note 22 at 394-96; GJ Pienaar, *Sectional Titles and Other Fragmented Property Schemes* (Cape Town: Juta & Co, 2010) at 210, 383. In addition, see the discussion in Part IV, below.
33. See Cornelius Van Der Merwe & Juann Booysen, "A critical evaluation of the sanctions available to remove chronic troublemakers from sectional title schemes" in Johan M Potgieter, Johann Knobel, & Rita-Marie Jansen, eds, *Essays in Honour of Professor Johann Neethling* (Durban: LexisNexis, 2015) 483.
34. Van Der Merwe, *Condominium Law*, *supra* note 22 at 376-77 (Austria), 379 (Croatia), 381-82 (Denmark), 383 (Estonia), 385-86 (Germany), 389 (Netherlands), 390 (Norway), 391 (Poland), 393-94 (Slovenia), 397-98 (Sweden).
35. *Ibid* at 256 (Croatia), 260 (Denmark).
36. *Ibid* at 382.
37. Hunter, Nixon & Slatter, *supra* note 23 at 154.

expressly deals with the validity of an involuntary sale remedy provision.”³⁸ However, the absence of specific statutory authorization is not prohibition, and Kim noted that condominium by-laws commonly allow a condominium board to seek a court-ordered involuntary sale where an owner refuses to respect the rules. Notwithstanding the prevalence of these by-laws, he could not locate any appellate court orders directing an involuntary sale for failure to live by the rules of an association and he suggested that these provisions might be unenforceable.³⁹ Since that study, a 2011 decision in the Tennessee Court of Appeal to evict a “hoarder” and force the sale of her unit indicates that, at least in some states, the by-laws are enforceable.⁴⁰

Across North America, Quebec is the only jurisdiction to specify in its divided co-ownership legislation that court-ordered sale may be an appropriate response to anti-social behaviour. The Quebec *Civil Code* provides that if the actions of a co-owner, in violation of the declaration of divided co-ownership (the constituting document and by-laws), cause “serious and irreparable injury” to the co-ownership syndicate or to other co-owners, then the injured parties may seek an injunction to compel the co-owner to comply. If the co-owner does not comply, then “the court may, in addition to other penalties ... order the sale of the co-owner’s fraction.”⁴¹ In effect, the co-owner who violates the declaration and a court order to comply with the declaration may be expelled.

The condominium statutes in Ontario and British Columbia do not specify particular orders for anti-social behaviour, but instead provide the courts with broad discretion that they have used to grant eviction and sale orders. In Ontario, the orders arise from three sections in the province’s *Condominium Act*: section 117 prohibits conduct that is “likely to damage the property or cause injury to an individual,” section 119(1) compels title holders and occupiers to comply with the Act and any by-laws established under the Act, and section 134 provides the courts with discretion to make “an order enforcing compliance” with the Act or

38. For the United States, see Kim, *supra* note 18 at 436.

39. *Ibid* at 433. See also Michael R Fierro, “Condominium Association Remedies against a Recalcitrant Unit Owner” (1999) 73:1 St John’s L Rev 247 at 272. Fierro notes that “[e]victing a condominium unit owner may continue to be as difficult as expelling an annoying neighbour in the house next door.”

40. *4215 Harding Road Homeowners Association v Stacy Harris*, 354 SW (3d) 296 (Tenn CA 2011) [*Stacy Harris*]. The American Psychiatric Association recently re-categorized “hoarding” as a distinct mental disorder, but the reasons for the decision only deal with the health and safety issues and not with what bearing the presence of a mental disorder should have on the appropriate court order. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Arlington: American Psychiatric, 2013).

41. Art 1080 CCQ.

the by-laws or “other such relief as is fair and equitable in the circumstances.”⁴² As a result, in applications against a title holder for eviction and sale orders, the courts must determine, first, whether the title holder has engaged in conduct that is prohibited under the Act or the condominium by-laws, and second, whether the prohibited conduct warrants eviction and forced sale.

The Ontario Superior Court’s first reported use of an eviction and sale order to enforce compliance with the *Condominium Act* is its 2008 decision in *JVM*.⁴³ In 1992, JVM purchased an apartment in a multi-story condominium building in downtown Toronto. The other owners encountered problems almost immediately.⁴⁴ These included the accumulation of garbage in her apartment and the hallway outside, foul odours and pests emanating from the apartment, and plugged and overflowing toilets causing water damage. When the building manager attempted to investigate, JVM refused to open her door and, within a few months of buying into the condominium, she was forcibly removed from the apartment by the police and hospitalized.

JVM suffered from paranoid schizophrenia. The illness preceded her acquisition of the condominium apartment, and the behaviour that caused problems for the other residents escalated when she and her doctors were unable to manage the illness. In the ensuing years, police officers, firefighters, and paramedics were called to JVM’s apartment on numerous occasions, visits that sometimes led to her forcible removal from a filthy, garbage-filled apartment, and hospitalization. The apartment would be cleaned and JVM would return, but she would be unable to care for herself and the cycle of removal and hospitalization would continue. In 2004, the condominium corporation turned to the courts for an order to expel her. The court declined, instead making a “last chance” order that JVM comply with the condominium by-laws or face eviction and forced sale.⁴⁵ In doing so, Justice E. Macdonald found:

42. *Condominium Act*, *supra* note 16, s 134(1) and (3). In the *Condominium Act* as amended by the *Protecting Condominium Owners Act, 2015*, SO 2015, c 28, Schedule 1, s 118, Ontario added section 135.1 to indicate in 135.1(1) that the courts could order “a person to vacate a property permanently” if (a) they posed “a serious risk (i) to the health and safety of an individual, or (ii) of damage to the property or the assets, if any, of the corporation,” or (b) if non-compliance with a court order demonstrated that “(i) the person is unsuited for the communal occupation of the property or communal use of the property, and (ii) no other order will be adequate to enforce compliance.” The amendment, which does not address forced sale, is not yet in force.

43. *JVM*, *supra* note 10.

44. See the summary of the agreed statement of facts. *Ibid* at para 63.

45. *Ibid* at paras 14-16.

The Corporation has demonstrated that it has displayed great sympathy to the unique circumstances of the Respondent who is seriously disabled. The matter has a ten year history. It is this court's duty to balance her interests with those of the adjoining owners and the Corporation itself.

It is undisputed that the Corporation has done everything in its power to resolve the situation. The history of the matter suggests that there is a distinct probability that the cycles of the past w[ill] repeat in the future.⁴⁶

After this intervention, JVM controlled her illness for a time, but by 2007, her condition had deteriorated and she began cycling through periods of involuntary hospitalization. When she was in the apartment, her behaviour created health and safety risks for the other residents. In 2008, the province appointed the Office of the Public Guardian and Trustee to manage her affairs and the condominium corporation returned to court for an eviction and sale order. This time, Justice J. Macdonald ordered the eviction and sale.⁴⁷ In doing so, he declined to accept the argument of the Public Guardian that to evict JVM was to discriminate against her on the basis of disability in violation of the Ontario *Human Rights Code*.⁴⁸ The condominium corporation had a duty to accommodate JVM's disability, but he concluded that it had done so to the point of undue hardship as required under the *Code*.⁴⁹

JVM was a case involving self-inflicted harm that caused serious health and safety risks to the other residents in the condominium property. Most of the other eviction and sale orders stem from an owner's aggressive and threatening behaviour towards other residents. This includes *Korolekh*, the most widely cited eviction and forced sale precedent.⁵⁰

In *Korolekh*, the owners in the thirty-unit, two-level townhouse development in downtown Toronto sought to remove Natalia Korolekh on the grounds of "serious and wide-ranging" misconduct.⁵¹ Ms. Korolekh denied the allegations—set out in lengthy affidavit evidence from other title holders, the property manager, and a neighbouring resident who was not part of the condominium property—but did not otherwise address or engage the specific complaints about her behaviour.⁵² Justice Code concluded that she had damaged property and injured other owners, in breach of section 117, and that an eviction and forced sale order

46. *Ibid* at para 12.

47. *Ibid* at para 109.

48. *Ibid* at para 5.

49. *Ibid* at para 88.

50. *Korolekh*, *supra* note 1.

51. *Ibid* at para 2.

52. *Ibid* at paras 6-46.

was “justified in the unusual circumstances.”⁵³ Those circumstances were, first, that the community was small, with prominent communal space, and that the defendant’s conduct had “effectively destroyed” the utility of that space.⁵⁴ Second, the misconduct was extreme—including physical violence, damage to property, “extraordinary verbal abuse,” and frightening residents with a large dog—and was carried out in a “devious, persistent and vindictive manner.”⁵⁵ Third, the defendant had not complied with orders from the condominium corporation or heeded its warnings, nor had the current court proceedings caused her to modify her behaviour. Finally, given the breadth of the defendant’s misconduct, a compliance order would involve the court in supervising her behaviour and the courts “ought not to become involved in any long term attempt to oversee, manage and reform the broad array of extreme behaviour” exhibited in this case. These factors comprised a “perfect storm” and justified an eviction and forced sale order.⁵⁶ Justice Code continued:

In all these circumstances, it would be unwise to try to reintegrate Ms. Korolekh into a community that fears her and that she has persistently tried to intimidate. People join condominium corporations voluntarily on the basis that they agree to share certain collective property and to abide by a set of rules and obligations that protect that collectivity. There is no right to continue membership in this corporation or this community, once a clear intention to harm it and a persistent refusal to abide by its rules have been exhibited in the extreme ways seen in this case. Ms. Korolekh has irreparably broken the bond with her community and an effective order cannot be made that would force these parties to now join together again.⁵⁷

In highlighting the “community” aspects of condominium, Justice Code downplayed the individual titles that feature prominently in condominium ownership. In fact, the capacity to hold individual titles within a multi-unit property is one of the defining and attractive features of condominium. More commonly than not, the owners within condominium endure rather than embrace the “community” in order to hold separate titles. However, in this case it appears that the group of owners had forged some collective identity around the sharing of communal space, which the actions of Ms. Korolekh had destroyed.

The decision in *Korolekh* was followed within a year by another reported eviction and sale order in *Waterloo North Condominium v Webb*.⁵⁸ Urbane

53. *Ibid* at para 86.

54. *Ibid*.

55. *Ibid*.

56. *Ibid* at para 87.

57. *Ibid* at para 88.

58. *Webb*, *supra* note 6.

Lorenzo Webb had been convicted of and served jail time for criminal offences against other owners within the condominium. He represented himself in the proceedings and did not contest the allegations of misconduct, but instead alleged financial and procedural impropriety by the condominium corporation. In a brief decision, Justice M.D. Parayeski concluded that even accepting Mr. Webb's allegations, they "would not justify or in any way rationalize his behaviour."⁵⁹ In the penultimate paragraph Justice Parayeski acknowledged several other factors that might explain Mr. Webb's conduct:

The respondent says, and I accept as true, that he has suffered a brain injury and that he had a difficult childhood. Neither of these facts, however unfortunate and deserving of sympathy as they may be, can justify his conduct.⁶⁰

The self-represented Mr. Webb does not appear to have introduced other evidence to corroborate the brain injury or its impact on his behaviour, but it is not clear that additional evidence would have changed the outcome. Justice Parayeski acknowledged the "drastic" character of an eviction and forced sale order, but "[g]iven the history of the respondent's behaviour and that even the serving of jail time has not proven effective in curbing his conduct," determined that such an order was necessary to deliver the "basic security and the quiet enjoyment" to which the other owners were entitled.⁶¹ In listing these attributes of ownership within condominium, Justice Parayeski slipped into the realm of leasehold interests where the right to "quiet enjoyment" is at the core of every tenancy, and where eviction for the conduct exhibited in this case would be unexceptional, at least for the relatively short term leases to which the residential tenancy legislation applies and that do not secure the status of leasehold owner. "Quiet enjoyment" is not a term that is commonly associated with freehold interests; its use in this case was an early, and perhaps unintentional signal of a willingness to rethink ownership within condominium.

In 2012, the British Columbia Supreme Court turned to *Korolekh* and *Webb* when it granted what appears to be the province's first reported eviction and sale order in response to anti-social behaviour within strata property. In *The Owners Strata Plan LMS 2768 v Jordison*, the court concluded that Rose Jordison, who owned an apartment in a 137-unit strata property development, and her adult son, Jordy Jordison, who lived with her, had abused and harassed other title holders with foul language, obscene gestures, intimidating behaviour,

59. *Ibid* at para 5.

60. *Ibid* at para 12.

61. *Ibid* at paras 9-10.

and unacceptably loud noise.⁶² The behaviour had continued for four years, and neither warnings from the strata council nor \$20,000 in fines had prompted the Jordisons to temper their behaviour. In desperation, the other owners sought an eviction and sale order to expel the Jordisons from the condominium. Justice Blair concluded the province's strata property legislation provided the court with the authority to make such an order and that it was a proportionate response in the circumstances. In doing so, he noted that although the Jordisons' conduct was not "as extreme" as that in *Korolekh*, it still justified the "draconian" eviction and forced sale order so that "harmony may be reinstated within the Strata."⁶³ He also noted that Ms. Jordison had alleged discrimination against her son on the grounds of disability in another proceeding:

Ms. Jordison filed a complaint with the Human Rights Tribunal (the "Tribunal") that the Strata's actions against her were discriminatory because the activities about which the Strata complained were the result of her son's physical and intellectual disabilities caused by the autism with which she asserted her son suffered. ... The Jordisons did not file the medical evidence and withdrew their complaint from the Tribunal.⁶⁴

The allegation is not mentioned again in the decision or in the three *Jordison* decisions that would follow.

The Jordisons had not appeared at trial, but on appeal they succeeded in overturning the order. The British Columbia Court of Appeal ruled that unlike the Ontario legislation, which provides courts with broad discretionary power to make eviction and sale orders on the initial application from aggrieved owners, British Columbia's *Strata Property Act* requires a breach of a prior order before a court may expel an owner from condominium.⁶⁵ Sections 173(a) and (b) permit the courts to order an owner to perform a required duty under the Act, or to stop contravening the Act, and section 173(c) enables the courts to make "any other orders it considers necessary to give effect to an order under paragraph (a) or (b)."⁶⁶ Given the explicit reference to the earlier paragraphs, the Court of Appeal ruled that paragraph (c) was "designed to enhance the efficacy of the two preceding subsections," and therefore that the broad discretionary authority it conveys could only be exercised in support of a prior order to

62. *Jordison* (2012), BCSC, *supra* note 14.

63. *Ibid* at paras 81-82.

64. *Ibid* at para 11.

65. *The Owners Strata Plan LMS 2768 v Jordison*, 2012 BCCA 303, 35 BCLR (5th) 36 [*Jordison* (2012), BCCA].

66. *Condominium Act*, *supra* note 16.

perform a required duty or stop contravening the Act.⁶⁷ It upheld the trial court's order that the Jordisons stop making loud noises, obscene gestures, and abusive and intimidating comments directed at other title holders, and more generally that they comply with the *Strata Property Act* and strata property by-laws, but overturned the eviction and sale order.⁶⁸

In 2013, the owners in strata plan LMS 2768 were back in court, alleging that the Jordisons' misconduct had continued unabated and arguing that an order for eviction and sale was now warranted because the Jordisons were in contempt of the prior order.⁶⁹ The trial court agreed, and this time so did the Court of Appeal:

The competing private property interest ... must, in my opinion, yield to the rights and duties of the collective as embodied in the bylaws and enforceable by court order. The old adage "a man's home is his castle" is subordinated by the exigencies of modern living in a condominium setting.⁷⁰

Moreover, the Jordisons "have repudiated the cooperative foundation of strata living and their intolerable behaviour has brought about the forced sale."⁷¹ In making this order, the Court of Appeal established an approach that emulated the rule in Quebec's *Civil Code*: Orders for eviction and forced sale were available, but only where the owner was in contempt of a prior court order.⁷²

Following the decisions in *Korolekh*, *Webb*, and *Jordison*, the courts in Ontario seemed to pause in their willingness to use eviction and sale orders against owners for inappropriate personal behaviour. In *York Condominium Corp No 137 v Hayes*, the Ontario Superior Court accepted the evidence of other owners that Edna Merle Hayes "committed no less than five physical assaults on other condominium unit owners or occupiers and, in several other instances, engaged in verbal abuse, threats and intimidation in relation to a board member, other unit owners or occupiers and service providers to the condominium."⁷³ However, although she "repeatedly intimidated and instilled fear in a number of her fellow members of this community," the behaviour did not warrant expulsion.⁷⁴ That order was "the ultimate and harshest remedy available," and "should be reserved

67. *Jordison* (2012), BCCA, *supra* note 65 at para 14.

68. *Ibid* at para 18.

69. *The Owners Strata Plan LMS 2768 v Jordison*, 2013 BCSC 487, 227 ACWS (3d) 267 [*Jordison* (2013), BCSC].

70. *Jordison* (2013), BCCA, *supra* note 7 at para 25.

71. *Ibid* at para 27.

72. CCQ, *supra* note 41.

73. *Hayes*, *supra* note 9 at para 26.

74. *Ibid*.

for the most egregious cases.⁷⁵ Similarly, in *Peel Condominium Corp v Pereira*, the Superior Court found that Rui Pereira, over a period of 10 years, had “behaved in an inappropriate and abusive manner . . . including the repeated use of threatening and offensive language,”⁷⁶ but that “while the actions of Mr. Pereira are extremely serious and troubling,” they did not warrant an eviction and sale order.⁷⁷ In both cases, the Superior Court granted compliance orders, but noted that eviction and sale orders remained in reserve should the inappropriate conduct continue.⁷⁸

If *Hayes* and *Pereira* signalled a drift away from court ordered evictions and sales in circumstances of inappropriate personal behaviour, a trio of Ontario cases and one decision from British Columbia in 2014 reversed the trend. In its brief decision in *Peel Condominium Corp No 304 v Hirsi*, the Ontario Superior Court granted an order to sell Ms. Lull Hirsi’s unit following a finding that the “incorrigible and unmanageable” defendant had engaged in “outrageous and persistent conduct,” including “incidents of stabbing and shooting and other intolerable conduct,” which had an “exceptional impact on a building occupied by law abiding senior citizens.”⁷⁹ This was the “perfect storm” that justified an order to sell.⁸⁰

Several months later, the Ontario Superior Court considered another application for an eviction and sale order in *York Condominium Corp No 301 v James*.⁸¹ Valerie Victoria James was subject to an earlier court order not to enter the common areas (except as needed to access her unit), not to have any contact with other owners or employees of the condominium, not to come within 25 feet of any individuals who had sworn affidavits in the proceedings, not to come within 25 feet of the management office, and not to disturb “the comfort and quiet enjoyment” of other owners and their visitors.⁸² The order was an attempt to address what was described in the affidavits as violent, abusive, harassing, threatening, aggressive, intimidating, and inappropriate behaviour.⁸³ Within a month, Ms. James had breached the order repeatedly, and the court ordered

75. *Ibid* at para 55.

76. *Pereira*, *supra* note 9 at para 68.

77. *Ibid* at para 79.

78. *Ibid* at para 80; *Hayes*, *supra* note 9 at para 57.

79. *Hirsi*, *supra* note 6 at para 2.

80. *Ibid*.

81. *James*, *supra* note 6.

82. *Ibid* at para 6. As in *Webb*, the terminology of leasehold—“quiet enjoyment”—had slipped into the court’s characterization of freehold interests. See *Webb*, *supra* note 6 at para 7.

83. *James*, *supra* note 6 at para 5.

that she undergo a mental health examination.⁸⁴ When she breached that order as well, the court appointed the Office of the Public Guardian and Trustee as litigation guardian, and a few days later she was arrested under provisions in the *Mental Health Act*.⁸⁵

When the matter appeared before Justice B.P. O'Marra as an application for an eviction and sale order, the litigation guardian informed the court that since her release from hospital one month earlier, Ms. James had been on her medication and that there had been no further incidents. Even so, Justice O'Marra expressed concern that "[p]revious court orders were not sufficient to control the unacceptable and antisocial behaviour" and that her behaviour "presented a series of health and safety issues for other residents, management and visitors to the condominium corporation."⁸⁶ In granting the order, he addressed her mental disorder:

Unfortunately, the respondent suffers from a mental illness. I appreciate that it will be a hardship for her to vacate the unit and have the unit sold. However, it must be borne in mind that while the applicant is a corporate body, it is the men, women and children who live and work in the building and their visitors and guests who have been confronted with behaviour that ranges from disturbing to disgusting to threatening. I do not see remedies short of an order vacating the unit and ordering a sale as sufficient to address the uncontested breaches of the *Act* and the rules of the condominium corporation.⁸⁷

Several weeks after this decision, the Ontario Superior Court released another decision in which mental disorder appears to have been a factor. In *Carleton Condominium Corp No 348 v Chevalier*, the owner (Yves Chevalier) and his tenant (George Basmadji) were subject to court orders directing them to stop damaging and making unauthorized alterations to common property, to stop engaging in conduct that risked the safety of other residents, and to refrain from engaging in verbally abusive and threatening behaviour.⁸⁸ When neither police visits nor the court order caused the conduct to cease, the court issued a second order to evict the tenant, Mr. Basmadji.⁸⁹ He refused to leave, and when the police attempted to remove him, he produced a transfer instrument and claimed that Mr. Chevalier had transferred the apartment to him. Mr. Basmadji was using the status of owner to forestall eviction, and it did cause delay. The third court

84. *Ibid* at para 8.

85. *Ibid* at paras 9-11.

86. *Ibid* at para 21.

87. *Ibid* at para 22.

88. *Chevalier*, *supra* note 6 at para 17.

89. *Ibid* at para 18.

order voided the purported transfer and authorized the police to remove the tenant from the unit.⁹⁰ In making a fourth and final order, this time to evict Mr. Chevalier and force the sale of the unit, Justice R Beaudoin indicated, “it is obvious that previous court orders have been insufficient to control the unacceptable and antisocial behaviour of the Respondents.”⁹¹ He also noted that Mr. Chevalier “suffers from a mental illness.”⁹² The court (at the request of the condominium corporation) had asked the Office of the Public Guardian and Trustee to appoint a property guardian and then litigation guardian during the first proceedings when it appeared that Mr. Chevalier “was in danger of losing his house due to non-payment of a relatively small amount of condominium fees.”⁹³ He would eventually lose title to his condominium unit because of “unacceptable and antisocial behaviour” that appears to have been due, at least in part, to mental illness.⁹⁴

In the midst of the trio of Ontario decisions in 2014, the British Columbia Supreme Court in *Westsea Construction Ltd v Mathers* made a forfeiture order against a leaseholder who was in breach of the lease.⁹⁵ The residential complex in Richmond, a suburb of Vancouver, used leasehold interests to emulate a condominium, and Terrise Mathers, who held a 99-year lease expiring in 2083, was in default for unpaid operating expenses and an assessment for major repairs. She was also in breach of multiple provisions of the lease because of the conduct of her brother, Jeffery Mathers, who occupied the unit. This included dumping unsightly and hazardous junk in the common areas near the unit, theft of common property, leaving unlicensed and unregistered vehicles in the car park, keeping animals, and inviting visitors whom he “knew or ought to have known, would lead to dangerous conditions for the residents of Sussex Square, namely a shooting and hostage-taking incident involving police.”⁹⁶ The self-represented Ms. Mathers acknowledged that her brother was a hoarder,⁹⁷ and the court explained her evidence as follows:

Ms. Mathers says she bought the suite for her brother with the understanding between them that he would try and stabilize his life. Mr. Mathers suffers from mental illness for which he takes medication. She has provided a note from his

90. *Ibid* at para 20.

91. *Ibid* at para 23.

92. *Ibid* at para 24.

93. *Ibid* at para 13.

94. *Ibid* at para 23.

95. *Westsea*, *supra* note 8.

96. *Ibid* at para 19.

97. *Ibid* at para 20.

family physician that details the effect of that illness on Mr. Mathers' emotional health, ability to concentrate and complete his activities of daily living. Ms. Mathers has looked after Jeffrey for most of his life and they are very close. She says "if we lose the suite I don't know what will happen to Jeff."⁹⁸

Justice Gropper acknowledged the mental disorder and the efforts of Ms. Mathers to help her brother, but held that they did not excuse the breaches of the lease agreement or override the rights of the other residents to the quiet enjoyment of their units:

I appreciate that Ms. Mathers is doing what she can for her brother who suffers from a mental illness. However, her brother's conduct has caused Ms. Mathers to breach the terms of the agreements that she has with the petitioners. It also interferes with the quiet enjoyment that the other leaseholders are entitled to in accordance with their contracts with the petitioners.⁹⁹

In ordering that Ms. Mathers forfeit her interest for breach of the lease, and in refusing to grant relief from forfeiture, Justice Gropper drew on the Court of Appeal decision in *Jordison*. "[O]ne only need replace the word 'condominium' with the wor[d] 'leasehold,'"¹⁰⁰ she wrote in comparing the earlier case with the one before her and concluding:

Ms. Mathers, by allowing Mr. Mathers to reside in her suite and by failing to take steps to address his conduct, has undermined the cooperative foundation of this leasehold setting. As in *Jordison*, there is "ample evidence... that only a sale would resolve the problem."¹⁰¹

She also indicated that the forfeiture order was appropriate because the payments in arrears were as much or more than the unit's value.¹⁰² If there had been value to Ms. Mathers in the unit, then it appears Justice Gropper would have entertained relief from forfeiture, but would have followed *Jordison* in making an eviction and sale order instead.

In addition to these cases involving inappropriate personal behaviour, the Ontario Superior Court made an eviction and sale order in 2013 where the owners were making inappropriate use of their condominium unit. When *York*

98. *Ibid* at para 30.

99. *Ibid* at para 35.

100. *Ibid* at para 37.

101. *Ibid* at para 39. Caroline Hunter and Judy Nixon note the frequent termination of leases in women-headed households in the United Kingdom for the anti-social behaviour of sons or boyfriends. See Caroline Hunter & Judy Nixon, "Taking the Blame and Losing the Home: Women and Anti-social Behaviour" (2001) 23:4 J Soc Welfare & Fam L 395.

102. *Westsea*, *supra* note 8 at para 42.

Condominium Corp No 82 v Singh came before the court, Nutan Singh, Narayan Sundar Singh, and Namita Singh were subject to a prior court order, made under the Rules of Civil Procedure, prohibiting them from “conducting the business of selling alcohol and cigarettes” in their unit.¹⁰³ When the activity continued, the condominium corporation sought a ruling that they were in contempt of court and an order for their eviction and the sale of their unit. The action proceeded in contempt under the Rules of Civil Procedure and under the discretionary powers granted in the *Condominium Act* to enforce compliance.¹⁰⁴ The court found the Singhs in contempt of the court order and in breach of the condominium by-laws, and ordered that they vacate and sell their unit.¹⁰⁵

A third category of conduct that might lead to an eviction and sale order—unauthorized renovation—came before the British Columbia Supreme Court in *Strata Plan VR 390 v Harvey*.¹⁰⁶ This case involved Wendy Joan Harvey’s repeated and unauthorized renovation of common property within the strata complex in violation of by-laws and multiple court orders (one of which levied \$70,000 in special costs) that she and her common-law partner, Douglas Michael Edgar, refrain from renovating the common property and from impeding access to the common property. The court indicated, “a strong remedy is necessary,” but did not order Ms. Harvey to vacate and sell her unit.¹⁰⁷ In declining to grant the “severe and extreme remedy,” the court noted that the problematic renovation work was substantially complete and thus, the “opportunity for friction between [strata council and owner] is now significantly diminished.”¹⁰⁸ The resulting order included detailed provisions to prevent Ms. Harvey and Mr. Edgar from interfering with the strata council’s work on the common property, including stipulations that they not be present in the building while the work was being done.¹⁰⁹

The latest reported decision involving an eviction and forced sale order for anti-social behaviour—*Bea v The Owners, Strata Plan LMS 2138*—stems from a

103. *Singh*, *supra* note 6 at para 3.

104. *Condominium Act*, *supra* note 16, s 134; *Rules of Civil Procedure*, RRO 1990, Reg 194, r 60.11(5)(f).

105. *Singh*, *supra* note 6 at para 59. The ruling is somewhat ambiguous, but the court appears to have made the eviction and forced sale order primarily on the grounds that the Singhs were in contempt of court. As a result, the order falls within the court’s broad discretion under the *Rules of Civil Procedure* rather than the *Condominium Act*. See *Rules of Civil Procedure*, RRO 1990, Reg 194, r 60.11(5).

106. *Harvey*, *supra* note 9.

107. *Ibid* at para 146.

108. *Ibid* at paras 152, 154.

109. *Ibid* at para 161.

dispute over parking.¹¹⁰ In 2006, the owners in the 35-unit strata development voted to assign parking spaces within the complex to individual units rather than continue the practice of unrestricted access among them. Huei-Chi Yang Bea, one of the owners, objected, and she and her husband, Cheng-Fu Bea, filed a petition with the courts to overturn the decision. The petition was dismissed, but the Beas persevered, and, as the British Columbia Supreme Court relates, launched “multiple proceedings in this Court and in the Court of Appeal over the last six years that have occupied countless court hours, frustrated dozens of judges, severely tested the patience of the registry staff, and put the strata owners represented by the respondent to a great deal of expense they can ill afford.”¹¹¹ The courts made numerous orders, including orders that the Beas not file any document in relation to the parking dispute. These were ignored, and the courts fined the Beas for contempt of court. Even so, the petitions and appeals continued unabated, leading the other owners to approach the courts for an eviction and sale order against Mrs. Bea.

It was an unusual petition. Although Mrs. Bea owned an apartment in the condominium, and she and her husband were using that ownership status to launch multiple proceedings against the strata council, their actions did not appear to violate the *Strata Property Act* or the strata by-laws, so the court’s remedial power under section 173 of the *Strata Property Act* to make any order necessary to enforce compliance with a prior order did not apply.¹¹² Instead, the petition rested on the inherent jurisdiction of the court to craft appropriate sanctions for contempt of court and on the owners’ argument that the Supreme Court Civil Rules, which only provided for fines or incarceration as sanctions for contempt, did not preclude the court from using its inherent jurisdiction to order the sale of property.¹¹³ Nonetheless, Justice Grauer turned to the rulings in *Jordison* for guidance and came to a similar conclusion: Eviction and sale was the only viable and meaningful order.

Normally, a person’s property rights would be irrelevant to the question of an appropriate sanction for contempt of court. This case is not normal. Here, the property interest in question is precisely what fuels the Beas’ contemptuous acts and gives rise to the injustice that results. I conclude that a forced sale is the only appropriate and meaningful sanction for Mrs. Bea’s contempt of court. In the unique circumstances of this case, it is a proportional response to the manner in

110. *Bea*, BCCA, *supra* note 7.

111. *Bea v The Owners, Strata Plan LMS 2138*, 2014 BCSC 826 at para 1, 241 ACWS (3d) 333.

112. *Ibid* at para 64.

113. *Ibid* at paras 44-47.

which Mrs. Bea has used her ownership interest to frustrate and abuse the court's process, and afflict her fellow owners.¹¹⁴

A majority of the British Columbia Court of Appeal agreed: seizure and sale of property fell within the court's inherent jurisdiction, and the eviction and sale order was appropriate given the conduct and the circumstances in this case.¹¹⁵ The Court of Appeal's departure from "normal" sanctions for contempt of court indicates that the majority understood it was contemplating something new. Indeed, the courts are using the discretionary provisions in the condominium legislation and their jurisdiction in contempt of court to reconstruct ownership within condominium.

III. RECONSTRUCTING OWNERSHIP AND REDISTRIBUTING PROPERTY

From 2008 to 2015, the courts in Ontario and British Columbia have made nine reported eviction and sale orders within condominium and one forfeiture order in a leasehold development to address what they most commonly describe as misconduct. Described as "draconian," "extreme,"¹¹⁶ and to be reserved for the "perfect storm" of chronic, egregious, and destructive misconduct within condominium,¹¹⁷ the expulsion orders have nonetheless become one of the available responses to anti-social behaviour. In making the orders, the courts appear to understand them as a necessary diminution of ownership within condominium. This sentiment is captured in the British Columbia Court of Appeal's use of the well-worn castle metaphor in *Jordison*:

The competing private property interest ... must, in my opinion, yield to the rights and duties of the collective as embodied in the bylaws and enforceable by court order. The old adage "a man's home is his castle" is subordinated by the exigencies of modern living in a condominium setting.¹¹⁸

In short, individual interests within condominium must defer to the collective such that ownership within condominium is less robust than it is outside.

114. *Ibid* at para 66.

115. *Bea*, BCCA, *supra* note 7 at paras 76, 89. See Justice Goepel (in dissent), at paras 136-42, noting that the Supreme Court Civil Rules constrained the inherent jurisdiction of the court in sanctioning contempt.

116. *Roth*, *supra* note 3 at paras 8, 20.

117. *Korolekh*, *supra* note 1 at para 87.

118. *Jordison* (2013), BCCA, *supra* note 7 at para 25.

This change in what it means to be an owner may be described, in the terms articulated by Guido Calabresi and A. Douglas Melamed, as a shift from the stronger property rule protection for an entitlement to the weaker liability rule protection.¹¹⁹ A property rule secures an entitlement by stipulating that it can only be transferred from its owner with consent, in a voluntary transaction and for a value accepted by the owner. Conversely, a liability rule provides that an owner has a right to the objectively determined value of an entitlement, were it to be taken, but has no right to the entitlement itself. Under a liability rule, the holder of an entitlement might lose that interest involuntarily, perhaps through expropriation, but would have a right to compensation. Before the court decisions reviewed in this article, anti-social behaviour was not a basis for stripping owners of their property; owners, including those within condominium, were protected by a property rule that required their consent to the transfer of their property. Now, however, in circumstances of chronic and extreme anti-social behaviour within condominium, the courts will diminish the protection for owners such that they are entitled to the value of their interest—determined objectively in a court-ordered sale of the interest—but not the interest itself. By making condominium property vulnerable to confiscation because of anti-social behaviour, the courts have shifted from property rule to liability rule protection for owners within condominium.

Another way to describe the change is that the courts have made it a condition of continuing ownership within condominium that owners maintain a minimum standard of personal behaviour. This “conditionality” for continuing ownership is new—retaining ownership has not been subject to meeting minimum standards of behaviour—although scholars have noted the growing propensity to attach conditions in order to receive, and to continue to receive, government-distributed benefits, including welfare and housing.¹²⁰ In the context of social housing, where residents usually occupy their units as tenants, attaching conditions that require certain minimum levels of conduct to be or remain eligible for housing becomes one means of controlling behaviour. Conditions such as these have not attached to owners, but now they do, at least within condominium.

The difficulty of fitting the eviction and sale orders into Tony Honoré’s classic list of the standard incidents of ownership reveals the magnitude of

119. Guido Calabresi & A Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral” (1972) 85:6 Harv L Rev 1089.

120. Flint & Nixon, *supra* note 23 at 951.

the change that the courts are making to ownership.¹²¹ The list of incidents is comprised primarily of rights—to possess, to use, to manage, to the income, to the capital, et cetera—but also includes “liability to execution” and a “duty to prevent harm.”¹²² Honoré restricted the liability, and thus potential loss of ownership, to non-payment of debt or insolvency; he did not contemplate liability for anti-social behaviour. It is possible that the court orders for eviction and sale because of anti-social behaviour might be shoehorned into the “duty to prevent harm,” but the fit is not obvious. Honoré described this as a duty to refrain from using, and to prevent others from using, the thing owned in a manner that might harm others. He took his automobile as an example; it was something he could use freely, but not in a manner that harmed others. Similarly, he could build on his land, but not such that the building would collapse on a neighbouring property. One might characterize the owners who were expelled from condominium for anti-social behaviour as contravening the prohibition on harmful use, but the expulsions were not so much for the harmful use of property as for the effects of personal conduct on others. Fitting these orders within Honoré’s incidents of ownership requires a broader interpretation of either the liability or the duty than as Honoré described them. In short, the eviction and sale orders are reconstructing ownership within condominium in a manner that is far from trivial.

However, while the general tenor of the judgments suggests that the courts understand eviction and sale orders as diminishing the nature of ownership within condominium, the language used to describe the orders reveals something else. In almost all the cases, the courts label the order as a “remedy” rather than a “sanction.” In fact, except for the decisions in *Bea*, which involved the inherent jurisdiction of the courts to craft sanctions for contempt of court, the courts hardly use the term “sanction.” It appears in the text of the other decisions only twice: once in the first trial court decision in *Jordison*,¹²³ and then in the second decision by the British Columbia Court of Appeal in the same litigation, where the court uses it simply to indicate that it is deciding the case under the condominium legislation, not as a sanction for contempt of court.¹²⁴ Conversely,

121. AM Honoré, “Ownership” in AG Guest, ed, *Oxford Essays in Jurisprudence* (London: Oxford University Press, 1961) 107.

122. *Ibid* at 123-34.

123. *Jordison* (2012), BCSC, *supra* note 14 at para 71.

124. *Jordison* (2013), BCCA, *supra* note 7 at para 3.

nearly all the courts use the term “remedy” (or variations of it) when considering an order for eviction and forced sale.¹²⁵

This use of the term “remedy” to describe the eviction and sale orders is understandable, particularly in British Columbia where the section conferring the discretionary power to make them appears under the heading “Other court remedies.”¹²⁶ It is also meaningful. “Sanction” in this context suggests a penalty that serves primarily to diminish ownership within condominium; “remedy” connotes a beneficial intent, with the purpose of preserving or enhancing ownership. By labelling the eviction and sale orders as remedies, the courts are revealing the benefit these orders confer on owners who are dealing with the anti-social behaviour of a neighbour. In fact, the availability of the order enhances ownership within condominium in a manner not available to those who hold property outside it. Owners outside condominium can encourage the state to invoke criminal punishment where a neighbour’s activity involves assault or mischief. They may also have recourse to causes of action in tort such as nuisance. However, the cases considered in this article reveal that these responses are sometimes inadequate to stop anti-social behaviour. Indeed, it is the ineffectiveness of all other measures that leads the courts to make the eviction and sale orders.¹²⁷ The decision in *Webb*, where the Ontario Superior Court noted “even the serving of jail time has not proven effective in curbing his conduct,” is a striking example.¹²⁸

The courts in Ontario and British Columbia are providing owners within condominium a remedy that is not available to those outside condominium: the physical and legal expulsion of an owner for chronic and egregious anti-social behaviour. In doing so, they are reconstructing ownership within condominium. Perhaps counter-intuitively, the principal effect of this reconstruction is to enhance ownership within condominium, not diminish it. From the perspective of the owner subject to an eviction and forced sale proceeding, her property interest is more tenuous than if she held that same interest outside condominium. However, for all other owners within condominium—including the 29 who sought to rid themselves of Ms. Korolekh and the 136 who suffered the Jordisons—the capacity to expel an owner physically and legally with court ordered eviction and sale enhances their ownership. This is why the courts speak of the eviction

125. But see *Webb*, *supra* note 6; *Roth*, *supra* note 3 (the exceptions).

126. *Strata Property Act*, *supra* note 16, s 173.

127. For a discussion regarding escalating sanctions, see Van Der Merwe & Muniz-Argüelles, *supra* note 31.

128. *Webb*, *supra* note 6 at para 9.

and sale orders as remedy rather than sanction. Of course, the direct impact of these orders depends on an owner's position. Those who are subject to the orders suffer a newly established susceptibility and diminished security of their property, but the vast majority enjoy a remedy that enables them to expel an exceedingly difficult and, in some cases, dangerous neighbour. As a result, eviction and forced sale orders have a redistributive effect, enhancing the ownership of most within condominium, but at the expense of the property of others.

If this reconstruction of ownership is also its redistribution, does this redistribution follow identifiable patterns? Any conclusions will be tentative because of the small number of cases, but one clear pattern is emerging: The courts in Ontario and British Columbia are reconstructing ownership within condominium primarily as a response to the destructive effects of owners who suffer some form of mental disorder.

IV. THE SPATIAL REORGANIZATION OF OWNERSHIP

Condominium provides an architecture of ownership that facilitates an increase in the density of title-holding "owners." Where there was once a single owner holding a defined portion of the surface of the earth with a property interest extending (in common law jurisdictions) upwards to the heavens and downwards to the centre of the earth—*cuius est solum, eius est usque ad coelum et ad inferos*—after condominium there can be several hundred owners living cheek by jowl and stacked in a vertical column. In this spatial reorganization of ownership, property boundaries harden and become ascertainable volumes, defined in three dimensions by floors, walls, and ceilings of units within buildings, rather than by the expansiveness and vagueness of Latin maxims.¹²⁹ Condominium accomplishes the increased density of owners by combining individual titles to defined units, undivided shares of common property held in common by each title holder, and a right to participate in the governance of the private and common property. In most circumstances, this packaging of rights—coupled with an obligation to contribute to the maintenance of commonly held property—overcomes the challenges of multiple owners, each with a spatially defined private interest within a single building. Indeed, some have argued that the combination of private and common property within various hybrid or mixed models of ownership, such

129. See Harris, *supra* note 15 at 699-701.

as condominium, provide better solutions to governance challenges than either private or common property alone.¹³⁰

The density of individual titles that condominium facilitates is new, but the human density that it helps to produce is not. Residents of multi-unit buildings, living in close proximity and sharing physical structures and spaces, have most commonly occupied their private spaces as tenants under a lease, not as title holders. Within landlord and tenant law, tenants may forfeit their leasehold interests for cause, including anti-social behaviour. At some point, a tenant's disruptive conduct will justify eviction.¹³¹ In fact, a landlord may even have an obligation to evict a disorderly tenant to protect the "quiet enjoyment" of other tenants. Conversely, a title holder's right to remain in possession, and to remain as owner, has not been so fragile. Anti-social behaviour affecting neighbours has not provided grounds to remove an owner. This immunity for owners has been, in part, a function of their relative dispersal, which makes the damaging consequences of anti-social behaviour less acute. Owners have seldom been stacked on top of each other and have never co-existed in such density before. This density creates challenges for neighbours, which Michele Slatter, in her study of hoarding and housing risk, describes as one of the disadvantages of proximity.¹³² The courts are responding to the challenges of density, or the disadvantages of proximity, by changing what it means to be an owner within condominium.

Perhaps not surprisingly, the courts are turning to that body of property law more accustomed to managing a density of individual property interests—landlord and tenant law—as they reconsider ownership within condominium. The use of "quiet enjoyment," one of the essential attributes of a leasehold interest, to describe the rights of owners within condominium, is a revealing marker of the legal repertoire that the courts are drawing from as they confront the challenges created by the heightened density of owners. The sanction within landlord and tenant law for chronic anti-social behaviour in breach of a lease agreement or of applicable residential tenancies legislation is forfeiture of the leasehold interest. Forfeiture orders provide the legal mechanism to expel a tenant for anti-social behaviour, and it is this capacity to expel that the courts have adopted in the context of freehold interests within condominium. Instead of forfeiture, the

130. See Hanoch Dagan & Michael A Heller, "The Liberal Commons" (2001) 110 Yale LJ 549; Amnon Lehavi, "Mixing Property" (2008) 38 Seton Hall L Rev 137.

131. See *Residential Tenancies Act*, SO 2006, c 17, ss 61-66; *Residential Tenancy Act*, SBC 2002, c 78, s 47.

132. See Michele Slatter, "Treasures, Trash and Tenure: Hoarding and Housing Risk" (2008) 2:1 *People, Place & Pol'y* 28 at 33.

courts order eviction from, and sale of, the freehold interest. The trend appears to be, as Slatter suggests, to “infuse ‘ownership’ ... with aspects of rental.”¹³³

The transfer of inspiration is not unidirectional. Tenants holding long-term leasehold interests, commonly of 99 years in the case of residential tenancies, are generally understood as leasehold owners.¹³⁴ As with those holding freehold interests, leasehold owners appear to have been immune to expulsion from their leasehold units for anti-social behaviour. However, this also seems to be changing such that owners, whether occupying their units within multi-unit dwellings as freeholders or long-term leaseholders, may be expelled from their residences for anti-social behaviour.¹³⁵ The challenges of density are similar, regardless of the form of tenure, and the courts are finding different ways to the same outcome: expulsion of the disorderly owner-occupier. Moreover, long-term leasehold is also possible within condominium—individual units and common property are held as leasehold rather than freehold interests—although these arrangements are much less common than freehold, and there are no reported cases in Ontario or British Columbia involving anti-social behaviour within a leasehold condominium. Given the emerging willingness of courts to expel freeholders from condominium for anti-social behaviour, it seems clear that they will also remove leaseholders for similar conduct. In doing so, the courts are likely to grant relief from forfeiture and turn to the eviction and sale orders that they have deployed against freeholders. The leasehold owners would be expelled, but would be entitled to the value of their interests (following forced sale) rather than forfeiting them.

This modification of ownership in response to its changing spatial context should not be surprising. As a social institution that plays a prominent role in defining relations between people with respect to things, the law of property must adapt to its context, even as it helps to shape that context. Lee Ann Fennell has recently called for the reinvention of the fee simple absolute, recommending that its geographical fixity and perpetual existence be rethought in order to recreate the property interest in a manner that would facilitate optimal urban land use.¹³⁶ Legal historian Stuart Banner, in studies of the ownership of airspace and the idea of ownership in the 19th and 20th century United States, emphasizes the impact

133. *Ibid* at 34.

134. See Bright, *supra* note 19; Gray & Gray, *supra* note 19.

135. *Westsea*, *supra* note 8.

136. See Lee Ann Fennell, “Fee Simple Obsolete” 91 NYU L Rev [forthcoming in 2016].

of technological change on prevailing regimes of property law.¹³⁷ The invention of the airplane, for example, prompted a re-evaluation and eventual departure from the rule, as characterized by Blackstone, that “Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards.”¹³⁸ The courts would reshape what it means to own land by limiting the interests of a landowner to “the airspace directly above the ground” in order to facilitate flight.¹³⁹ This modification of the boundaries of ownership was not a necessary outcome, argues Banner, but only one among a number of possibilities that might enable airplanes to move through air spaces that had once been divided, under the Latin maxim, into many private lots protected by actions in trespass.¹⁴⁰

Statutory condominium is another innovation that, by enabling a massive increase in the density of owners, is causing courts to re-evaluate and reconstruct ownership.¹⁴¹ However, the judicial response has not been to reshape the physical boundaries of ownership, as in the case of airplanes and airspace, but to reconstruct ownership in a defined space. For some—those subject to eviction and sale orders—their property has become less secure in that they may now be expelled for anti-social behaviour.

The capacity of common-interest communities or developments, including condominium, to act as technologies of exclusion has drawn considerable critical attention.¹⁴² Some have argued that common-interest developments construct an architecture of ownership that facilitates the sequestration of those with property to create enclaves of privilege, memorably labelled “privatopia” by Evan McKenzie,¹⁴³ and “Fortress America” by Edward Blakely and Mary Snyder.¹⁴⁴ Others have described common-interest communities as a form

137. See Stuart Banner, *Who Owns the Sky?* (Cambridge, MA: Harvard University Press, 2008) [Banner, *Sky*]; Stuart Banner, *American Property: A History of How, Why, and What We Own* (Cambridge, MA: Harvard University Press, 2009).

138. Banner, *Sky*, *supra* note 137 at 16.

139. *Ibid* at 288.

140. *Ibid* at 293.

141. On the capacity of condominium to transform understandings of property in land, see Douglas C Harris & Nicole Gilewicz, “Dissolving Condominium, Private Takings, and the Nature of Property” in B Hoops et al, eds, *Rethinking Expropriation Law II: Context, Criteria, and Consequences of Expropriation* (The Hague: Eleven, 2015) 263.

142. See e.g. Gerald Frug, “The Legal Technology of Exclusion in Metropolitan America” in Kevin M Kruse & Thomas J Sugrue, eds, *The New Suburban History* (Chicago: University of Chicago Press, 2006) 205.

143. Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (New Haven: Yale University Press, 1994).

144. Edward J Blakely & Mary Gail Snyder, *Fortress America: Gated Communities in the United States* (Washington, DC: Brookings Institution Press, 1997).

of “civic secession,”¹⁴⁵ a “new enclavism,”¹⁴⁶ or the “fortress city,”¹⁴⁷ detaching those with means from a sense of responsibility for a larger municipal or public realm and enabling “government for the nice.”¹⁴⁸ Critics have shown that the proliferation of common-interest developments has exacerbated socio-economic divisions and racial demarcations.¹⁴⁹ However, the scholarship focuses largely on the common-interest developments of American suburbs, the typically sprawling character of which has made them targets of critique for reasons other than their capacity to exclude.¹⁵⁰ There has been much less critical attention devoted to condominium, which has become the ownership structure of choice for multi-unit dwelling in urban settings.¹⁵¹ However, the use of eviction and sale orders suggest that the capacity of condominium owners to exclude—to function, in the case of condominium towers, as vertical gated communities—should be viewed with a more critical eye. Moreover, it is not just the capacity to exclude those who might become owners, but also the capacity to expel those who are already owners that is at issue. The early evidence suggests that the courts are using eviction and sale orders most commonly to enable private communities of owners to expel those with a mental disorder that makes it difficult to live in close proximity to others.

Where the courts acknowledge the possibility of mental disorder when considering an expulsion order, the discussion is usually brief, not amounting to more than passing mention. In several decisions, the judges express sympathy, and in *James* the court makes the eviction and sale order almost apologetically (albeit with little analysis).¹⁵² The lack of engagement with the impact of mental disorders is partly a function of the limited evidence presented to the courts. Many of the owners attempting to stave off eviction and sale orders are self-represented, and

145. Sheryll D Cashin, “Privatized Communities and the ‘Secession of the Successful’: Democracy and Fairness beyond the Gate” (2000) 28:5 *Fordham Urb LJ* 1675 at 1677-78.

146. Rowland Atkinson & Sarah Blandy, “Introduction: International Perspectives on The New Enclavism and the Rise of Gated Communities” (2005) 20:2 *Housing Studies* 177.

147. Setha M Low, “Urban Fear: Building the Fortress City” (1997) 9:1 *City & Society* 53.

148. Paula A Franzese, “Privatization and Its Discontents: Common Interest Communities and the Rise of Government for ‘the Nice’” (2005) 37:3 *Urb Law* 335. See also Setha Low, *Behind the Gates: Life, Security, and the Pursuit of Happiness in Fortress America* (New York: Routledge, 2003).

149. Blakley & Snyder, *supra* note 144 at 148-49.

150. Comparative volumes include Rowland Atkinson & Sarah Blandy, eds, *Gated Communities* (London: Routledge, 2006); George Glasze, Chris Webster & Klaus Frantz, eds, *Private Cities: Global and Local Perspectives* (London: Routledge, 2006).

151. But see Leslie Kern, *Sex and the Revitalized City: Gender, Condominium Development, and Urban Citizenship* (Vancouver: UBC Press, 2010); David Ley, *The New Middle Class and the Remaking of the Central City* (Oxford: Oxford University Press, 1996).

152. *James*, *supra* note 6 at para 22.

the judges often have little more to work with than a respondent's assertion that mental illness or disability is a contributing factor in the anti-social behaviour.

However, with the exception of *JVM*, it is also clear that the judges do not think that evidence of mental disorder or incapacity bears on the nature of their orders. They are inclined to accept, but not probe, the evidence of illness or disability, and to grant the order anyway. In fact, the evidence of mental disorder may almost explain, if not warrant, the order. A report on the law in Sweden suggests the "draconian sanction [of eviction and sale] seems justified because scenarios encountered in this Case [obnoxious behaviour] are usually caused by some sort of mental disturbance on the part of the offender."¹⁵³ The courts in Ontario and British Columbia have not said that mental disorder justifies their rulings, but nor do they interrogate the fact that their orders, which are reconstructing ownership within condominium, are in many cases a response to behaviour that may well be attributable to mental disorder.

Are eviction and sale orders for anti-social behaviour an appropriate reconstruction of ownership in light of the enormous increase in density of owners that condominium facilitates? It may be that there are social circumstances that justify enhancing collective forms of private governance and, in the case of an owner's anti-social behaviour, strengthening the capacity of a community of title holders to sustain that community by expelling a chronically disruptive and socially destructive owner.¹⁵⁴ The South African High Court suggested as much when, in declining to evict an owner for drug dealing and prostitution, it indicated "there is a pressing 'social need' in South Africa" to provide title holders the means to enforce the rules in sectional title properties, and that sometimes this might include the capacity to exclude for "constant and deliberate contravention of the conduct rules."¹⁵⁵ The analysis in the ruling is brief. The court appears to take judicial notice of the "pressing 'social need,'" and there is no explanation of its nature or character. Cornelius Van Der Merwe and Juann Booysen suggest several justifications, including one based on the observation that the impetus for introducing sectional title (condominium) in South Africa "was the provision of real property rights to a greater segment of the population, thereby fulfilling the psychological need for a home."¹⁵⁶ They appear to suggest that in the social and

153. Van Der Merwe, *Condominium Law*, *supra* note 22 at 398.

154. There is substantial literature that makes the case for common-interest developments. See Evan McKenzie, "Common-Interest Housing in the Communities of Tomorrow" (2003) 14:1-2 Housing Policy Debate 203 at 219-25 (provides a brief overview of competing interpretations).

155. *Shaftesbury*, *supra* note 32.

156. Van Der Merwe & Booysen, *supra* note 33 at 494.

political context of post-Apartheid South Africa, it may be particularly important for owners within sectional title properties to feel safe and secure, and that the capacity to exclude the chronically disruptive title holder might help. Perhaps, but the history of South African property law in the twentieth century suggests the need for great caution when constructing forms of property that enable groups of owners to exclude, and Van Der Merwe and Booysen conclude that a time-limited suspension of the right to use, rather than permanent expulsion, is the appropriate and proportionate response to chronic misconduct.¹⁵⁷

There is little doubt that the anti-social behaviour, which led to eviction and sale orders in the cases surveyed here, substantially reduced the quality of life for many if not all of the other owners within the condominium properties involved. In some of the cases, the behaviour was so extreme as to threaten the safety of the other residents. In every case where the order has been granted, the behaviour was exceedingly disruptive and upsetting. My point in raising the apparent prevalence of mental disorder in circumstances where courts are making eviction and sale orders is neither to justify the anti-social behaviour nor minimize its impact. Instead, my intent is to call attention to the fact that these orders are reconstructing ownership within condominium and, by doing so, redistributing property. This redistribution enhances the ownership for some while diminishing the security of property for others, and those whose interests are diminished appear, more often than not, to suffer a form of mental disorder that contributes to their problematic behaviour. The eviction and sale orders, which are not available to owners dealing with chronic anti-social behaviour outside condominium, are providing owners within condominium the capacity to expel other owners and, in doing so, are transforming long-held, well-established understandings of ownership. To raise concern about this is not to conclude that owners within condominium bear responsibility for those among them who are mentally ill or have a mental disability. However, it is to ask whether, in adapting the law of property to the spatial reorganization of ownership, the courts should be reconstructing ownership within condominium in a manner that facilitates the expulsion of the mentally ill.

157. *Ibid* at 495.

