Condominium Government and the Right to Live in the City

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Abstract

Condominium is an architecture of land ownership that produces separate, privately owned units within multi-unit developments. Condominium also constructs a form of private, democratic government, described as a fourth order of government, that acts beneath federal and provincial governments, and alongside municipal government, to govern owners and their property. This article considers a conflict between residential-unit owners and a commercial-unit owner within a condominium development in Vancouver's Downtown Eastside. Drawing from material produced in litigation, the article situates the dispute within its property and urban contexts to argue that condominium government requires attention, and not just for its impact on owners, or even residents within, but also because cities must now account for, work alongside, and, in some circumstances, contend with these rapidly proliferating sites of government that are helping to shape who has the right to live in the city.

Keywords: property, condominium, cities, government, land, gentrification

Résumé

La copropriété est une architecture qui soutien une forme de propriété foncière produisant des unités séparées et privées au sein de développements à logements multiples. Les copropriétés construisent également une forme de gouvernement privé et démocratique, décrit comme un quatrième ordre de gouvernement, qui agit sous l'autorité des gouvernements fédéral et provinciaux et aux côtés des gouvernements municipaux pour régir les propriétaires et leurs biens. Cet article traite du conflit entre les propriétaires d'unités résidentielles et un propriétaire d'unités commerciales dans le cadre d'un projet de développement de copropriétés situé dans le quartier Downtown Eastside de Vancouver. En s'inspirant des documents produits dans le cadre de ce litige, l'article situe le différend dans son contexte foncier et urbain pour soutenir que le gouvernement des copropriétés nécessite une attention particulière, non seulement pour son impact sur les propriétaires, mais également sur les résidents. Plus encore, cet article soutient que les villes doivent

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maintenant rendre compte, travailler aux côtés, voire même s'opposer dans certaines circonstances, à ces sites de gouvernement qui se multiplient rapidement et qui contribuent à déterminer qui a le droit de vivre en ville.

Mots clés : propriété, copropriété, villes, gouvernement, terre, gentrification

1 A Fourth Order of Government

Condominium is an architecture of land ownership that produces separate, privately owned units within multi-unit developments. Each unit owner is also a co-owner, with other unit owners, of common property, and assumes an obligation to contribute to its maintenance. Condominium also constructs a form of private, democratic government that enables owners to manage and maintain the common property, to govern the uses of the private property, and to provide services. Indeed, statutory condominium regimes, which exist under various labels, including strata property in British Columbia,[1] grant such extensive rule-making and rule-enforcing authority within territorially defined boundaries that some have labelled condominium a fourth order, level, or tier of government beneath federal and provincial government, and alongside municipal government.[2] This fourth order of government derives its authority under statute, as do municipalities in most jurisdictions, and its powers are frequently compared with those of local or municipal government.[3]

Condominium government is private, democratic government.[4] It is private in the sense that the right to participate flows from the purchase of a parcel of land within condominium, and therefore from the status of landowner. It is democratic in that owners have rights to vote in the affairs of the condominium and in the election of an executive board or council, chosen from among themselves. Other residents, including tenants, have no right to participate; they are subject to rules that they have no voice in creating because they are not owners. This exclusion has

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1 The *Strata Property Act*, SBC 1998, c 43 [*SPA*], creates the province's condominium regime. In this article, I use condominium when discussing the legal form in general terms and strata property when referring to the details of British Columbia's statutory regime.

2 Early descriptions of condominium as a fourth order, level, or tier of government include: Cathy Sherry, "The Legal Fundamentals of High Rise Buildings and Master Planned Estates: Ownership, governance and living in multi-owned housing with a case study on children's play," *Australian Property Law Journal* 16, no. 1 (2008): 8, 11; Hazel Easthope and Bill Randolph, "Governing the Compact City: The Challenges of Apartment Living in Sydney, Australia," *Housing Studies* 24, no. 2 (2009): 248; Hazel Easthope, "The Fourth Tier of Governance: Managing the future of our cities" (paper, State of Australian Cities Conference, Perth, Australia, 27 November 2009); Randy K. Lippert, "Mundane and Mutant Devices of Power: Business Improvement Districts and Sanctuaries," *European Journal of Cultural Studies* 13, no. 4 (2010): 490; Gerry Fanaken, *Understanding the Condominium Concept: An insightful guide to the Strata Property Act* (Coquitlam, BC: Paige Condominium Services Ltd., 2013), 22. The description has also appeared in various law reform reports including: Public Policy Forum, *Growing Up: Ontario's condominium communities enter a new era* (September 2013), 10, 15.

3 See Robert Ellickson, "Cities and Homeowners Associations," *University of Pennsylvania Law Review* 130, no. 3 (1981): 1521–23; David J. Kennedy, "Residential Associations as State Actors: Regulating the impact of gated communities on nonmembers," *Yale Law Journal* 105 (1995): 787–89. See also the reasons for decision cited in footnotes 106–108.

4 For an early analysis, see Uriel Reichman, "Residential Private Governments: An introductory survey," *University of Chicago Law Review* 43 (1975): 253–306.

led some to argue that condominium government is "profoundly undemocratic."[5] Others have described condominium government as "shoestring democracy" for the lack of attention and resources that owners commonly allocate to it.[6] Moreover, the growing size and complexity of condominium developments have led others still to argue that the idea of condominium as self-governing, let alone democratic, is "increasingly fictional" and "more fantasy than reality,"[7] notwithstanding the formal democratic rights set out in enabling statutes. However, whatever its weaknesses, including a tightly circumscribed franchise that may warrant a label such as "shareholder democracy,"[8] condominium does create a form of territorially-defined democratic government, but one that limits participation to owners and that is designed to protect the interests of owners and then, only secondarily, to consider the interests of residents.

This article focuses on a prolonged conflict between owners at Carrall Station, a mixed-use residential/commercial strata property development in the City of Vancouver's Downtown Eastside neighbourhood. The conflict at Carrall Station grew from encounters and occasional altercations between the customers of the Omnicare Pharmacy, which occupies one of the street-level commercial units, and the residents at Carrall Station. The dispute escalated to the courts when the residential unit owners, through the Carrall Station strata corporation (formally identified as The Owners, Strata Plan LMS2854), attempted to hold the pharmacy responsible for the behaviour of its customers.

On one reading, the events at Carrall Station provide an unremarkable example of conflict within a mixed-use condominium development. However, if one steps beyond the boundaries of Carrall Station to situate the development in its urban context, then the conflict between owners is revealed as part of a much broader struggle over the character and future of Vancouver's Downtown Eastside, one of Canada's poorest urban neighbourhoods, and over who has the right to live there. This question of who has the right to live in Vancouver's Downtown Eastside, or, in Nicholas Blomley's recent formulation, the right to not be excluded from the neighbourhood,[9] has animated decades of political debate and social struggle.[10] Different answers derive in large part from perceptions of the area as either irredeemably blighted and in need of redevelopment and

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5 Stephen E. Barton and Carol J. Silverman, "Preface," in *Common Interest Communities: Private governments and the public interest*, ed. Barton and Silverman (Berkeley: Institute of Governmental Studies Press, 1994), xii.

6 Setha Low, Gregory T. Donovan, and Jen Gieseking, "Shoestring Democracy: Gated condominiums and market-rate cooperatives in New York," *Journal of Urban Affairs* 34, no. 3 (2012): 279–96.

7 Stefan R. Treffers and Randy K. Lippert, "Condominium Self-Governance? Issues, External Interests, and the Limits of Statutory Reform," *Housing Studies* (2019): 2.

8 Georg G. Glasze, "Private Neighbourhoods as Club Economies and Shareholder Democracies," *BelGeo* 1 (2003): 92.

9 Nicholas Blomley, "The Right to Not Be Excluded: Common property and the struggle to stay put," in *Releasing the Commons: Rethinking the futures of the commons*, ed. Ash Amin and Philip Howell (London: Routledge, 2016), 89–106.

10 David Ley, "The Downtown Eastside: 'One hundred years of struggle'," in *Neighbourhood Organizations and the Welfare State,* ed. Shlomo Hasson and David Ley (Toronto: University of Toronto Press, 1994), 172–204; Nicholas Blomley, *Unsettling the City: Urban land and the politics of property* (New York: Routledge, 2003).

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revitalization, or as the centre of a low-income community and a home for many from otherwise marginalized groups.[11]

Condominium developments, including Carrall Station, which opened in 1997, have been flashpoints of conflict in this struggle over the future of the Downtown Eastside. Understanding this history of struggle is integral to understanding the conflict between owners at Carrall Station, a context I describe more fully in the coming pages, but my intent is not to add to the literature that places condominium as a gentrifying force in low-income neighbourhoods such as the Downtown Eastside.[12] Instead, my focus is on condominium as a governing entity with statutory authority to make and enforce rules within defined territorial boundaries, and I use the decision of the British Columbia Supreme Court (BCSC) in *Omnicare Pharmacy Ltd v The Owners, Strata Plan LMS 2854*[13] to reveal that condominium, as a fourth order of government, has itself become a site of conflict and struggle over the right to live in the city.

Vancouver is representative of a movement in cities around the world towards constructing parcels of land for residential use within condominium,[14] but the city is also unusual, at least in North America, for the proportion of residents who live within this relatively new and increasingly pervasive form of land ownership.[15] According to the 2016 Canadian census, 33 percent of occupied private dwellings (including owner-occupied and renter-occupied dwellings) in the City of Vancouver (population 631,000) are within condominium.[16] In the larger metropolitan area of nearly two and a half million people, the proportion of occupied private dwellings within condominium is lower, but still a remarkable

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11 Nick Blomley, "Property, Pluralism, and the Gentrification Frontier," *Canadian Journal of Law & Society* 12, no. 2, (1997): 187–218; Heather Anne Smith, "Where Worlds Collide: Social polarisation at the community level in Vancouver's Gastown/Downtown Eastside" (PhD diss., The University of British Columbia, 2000), 289–298, https://open.library.ubc.ca/cIRcle/collections/ubctheses/831/items/1.0089665.

12 On the connections between condominium and gentrification in Canada, see David Ley, *The New Middle Class and the Remaking of the Central City* (Oxford: Oxford University Press, 1996), 1–2, 48–51; Ute Lehrer and Thorben Weiditz, "Condominium Development and Gentrification: The relationship between policies, building activities and socio-economic development in Toronto," *Canadian Journal of Urban Research* 18, no. 1, (2009): 82–103; Leslie Kern, *Sex and the Revitalized City: Gender, condominium development, and urban citizenship* (Vancouver: UBC Press, 2010); Gilad Rosen and Alan Walks, "Rising Cities: Condominium development and the private transformation of the metropolis," *Geoforum* 49 (2013): 160–172; and Gilad Rosen and Alan Walks, "Castles in Toronto's Sky: Condo-ism as urban transformation," *Journal of Urban Affairs* 37, no. 3, (2015): 289–310.

13 *Omnicare Pharmacy Ltd v The Owners, Strata Plan LMS 2854*, 2017 BCSC 25 [*Omnicare Pharmacy*].

14 For a discussion of world-wide trends, see Georg Glasze, Chris Webster, and Klaus Frantz, eds., *Private Cities: Global and Local Perspectives* (London: Routledge, 2006); Rosen and Walks, "Rising Cities," *supra* note 12.

15 See Douglas C. Harris, "Condominium and the City: The rise of property in Vancouver," *Law & Social Inquiry* 36, no. 3, (2011): 694–726. See also Nathanael Lauster, *The Death and Life of the Single-Family House: Lessons from Vancouver on building a livable city* (Philadelphia: Temple University Press, 2016), 87–88, on the corresponding decline in detached houses as a proportion of dwellings.

16 Of 283,915 occupied private dwellings, 94,835 were within condominium. Statistics Canada, *Vancouver, CY [Census subdivision], British Columbia and Canada [Country]* (table), *Census Profile*, 2016 Census. Statistics Canada Catalogue no. 98-316-X2016001 (Ottawa: released November 29, 2017). https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/index.cfm?Lang=E (accessed September 2, 2019).

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31 percent,[17] remarkable because the legal form has only been available in the province for just over fifty years. For Toronto, the largest condominium market in North America, the 2016 census indicates that 26 percent of occupied private dwellings are within condominium.[18] In these cities, condominium is an established and vigorously expanding feature of the housing market. Although less prevalent elsewhere in Canada, the proportion of Canadian households living within condominium is growing, and not just within cities.[19] This dramatic and still relatively recent turn towards living within condominium is also a turn towards a particular form of private government.

Condominium is one form of homeowners' association within the larger category of common interest community (or common interest development). There is some variation in legal form among different types of homeowners' associations, but they all create parcels of land that may be individually owned within a community of owners that has considerable rule-making and rule-enforcing authority, particularly with regard to land use.[20] This basic legal architecture can structure ownership within a broad array of physical designs ranging from house-lot subdivisions, to duplexes, townhouses, and terrace or row-housing, and to low-rise and high-rise apartment buildings. All these variations exist within Vancouver, although the vast majority of condominium units are within apartment buildings, and "the condo" now describes an individually owned apartment.

Condominium enables owners, working through democratic processes with other owners, to make and enforce rules and to provide services and amenities in a manner akin to municipal governments. Evan McKenzie, an early and prominent critic of private residential government in the United States, has written recently that the proliferation of homeowners' associations, of which condominium is one form, amounts to a "revolution in the housing market" and that the transformation "is actually best viewed as a form of local government privatization."[21] Similarly, a proponent of homeowners' associations, Robert Nelson, writing in the 1990s, described them as effecting "the most comprehensive privatization occurring in any sphere of government functioning in the United States today,"[22] while Gregory

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17 Of 960,895 occupied private dwellings, 293,765 were within condominium. Statistics Canada, *Vancouver [Census metropolitan area], British Columbia and Canada [Country]* (table), *Census Profile*, 2016 Census. Statistics Canada Catalogue no. 98-316-X2016001 (Ottawa: released November 29, 2017). https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/index.cfm?Lang=E (accessed September 2, 2019).

18 Of 1,112,930 occupied private dwellings, 292,260 were within condominium. Statistics Canada, *Toronto, C [Census subdivision], Ontario and Canada [Country]* (table), *Census Profile*, 2016 Census. Statistics Canada Catalogue no. 98-316-X2016001 (Ottawa: released November 29, 2017). https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/index.cfm?Lang=E (accessed September 2, 2019).

19 The number of Canadian households living within condominium increased by 16.6% in census metropolitan areas and by 11.9% in other regions from 2011 to 2016. Statistics Canada, Condominiums in Canada, 2016 Census of Population (25 October 2017). https://www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2017030-eng.htm.

20 Wane S. Hyatt, *Condominium and Homeowner Association Practice: Community association law*, 3rd ed. (Philadelphia: American Law Institute-American Bar Association, 2000), uses the term "community association" to describe the governing bodies within homeowners' associations.

21 Evan McKenzie, "Rethinking Residential Private Government in the US: Recent trends in practices and policy," in *Private Communities and Urban Governance*, ed. Amnon Lehavi (Switzerland: Springer, 2016), 52.

22 Robert H. Nelson, "Privatizing the Neighbourhood: A proposal to replace zoning with private collective property rights to existing neighbourhoods," *George Mason Law Review* 7 (1998): 832.

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Alexander has suggested the "rise of residential associations… is basically the story of political decentralization."[23]

In the context of vast housing estates incorporating thousands and even tens of thousands of households, private homeowners' associations have the capacity to displace local public government as the principal provider of services, including land use controls, to landowners. In the context of condominium, deployed primarily to subdivide ownership in multi-unit buildings and thus usually operating at a smaller scale, Gilad Rosen and Alan Walks also suggest the potential for "the offloading of state responsibilities to private collectivities—the condo boards, who will then become responsible for security, upkeep, infrastructure, and tenant-landlord relations,"[24] as well as the regulation of land uses, adjudication of disputes, and the provision of amenities. Moreover, they find a correlation between those who live within condominium and those who support the privatization of public services: "amongst the inner-city residents, the greatest single predictor of support for the privatization of public services is whether or not one resides in a condominium unit," whether owner or tenant.[25] However, Randy Lippert argues, instead, that "condos are not obviously being 'responsibilized' by carrying out municipal government instructions 'at a distance' within defined spaces,"[26] but rather that condominium has added to the layers of regulation that govern residents. This regulation appears in the form of condominium bylaws, but also in the proliferation of legal, managerial, marketing, security, and other professional services that are increasingly a feature of life within condominium.[27] Whether substituting for local, public government (as Rosen and Walks suggest), or layering upon it (following Lippert), condominium is, as Hazel Easthope observes, "playing a central role in the development and governance of modern cities."[28] As a result, the processes and procedures of rule-making and rule-enforcing within condominium government need attention, and not just because they affect the lives of those within condominium, but also for their potential to shape the city.

Assessing the impact of condominium as a rule-making and rule-enforcing entity on its urban context requires a great deal more than the analysis of legislation and case law, and certainly more than an interpretation of a single judicial decision.[29] This article does not engage in that broader and much-needed analysis, nor does it produce a fine-grained ethnographic study of the conflict at Carrall Station. Instead, it uses a court decision, the materials submitted by the parties in litigation, and the scholarship on the Downtown Eastside to reveal condominium as a site of conflict,

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23 Gregory Alexander, "The Publicness of Private Land Use Controls," *Edinburgh Law Review* 3 (1999): 185.

24 Rosen and Walks, "Rising Cities," *supra* note 12, 170.

25 Ibid., 168.

26 Randy K. Lippert, "Urban Neoliberalism, Police, and the Governance of Condo Life," in *Governing Practices: neoliberalism, governmentality, and the ethnographic imaginary*, ed. Michelle Brady and Lippert (Toronto: University of Toronto Press, 2016), 193 [reference omitted].

27 Randy K. Lippert, *Condo Conquest: Urban governance, law, and condoization in New York City and Toronto* (Vancouver: UBC Press, 2019).

28 Hazel Easthope, *The Politics and Practices of Apartment Living* (Cheltenham, UK: Edward Elgar, 2019), 159.

29 See Cathy Sherry, *Strata Title Property Rights: Private governance of multi-owned properties* (London: Routledge, 2017) for a legal analysis of condominium governance.

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and condominium government as a site of decision-making authority with the capacity to influence who has the right to live in the city, particularly so in low-income neighbourhoods such as the Downtown Eastside.

In Part 2, this article situates the Omnicare Pharmacy within Carrall Station, and then Carrall Station within Vancouver's Downtown Eastside. Having positioned the business in its property frame and urban context, the article, in Part 3, focuses on the 2017 decision of the BCSC in *Omnicare Pharmacy*.[30] That decision turned on the procedural protections for owners within the democratic structure of decision-making set out in the province's condominium legislation, but the BCSC also recognized that the urban context mattered.[31] In Part 4, the article follows the BCSC's attention to context, broadening the perspective to place the conflict at Carrall Station within a larger civic struggle over inclusion and exclusion in Vancouver's Downtown Eastside. Finally, the article turns back in Part 5 to consider the private, democratic character of condominium government and some of the unresolved tension in Canadian case law between these elements. In the end, it returns to the dispute at Carrall Station and to the decision in *Omnicare Pharmacy* to argue that condominium, as a fourth order of government, needs attention, not only because its rapid proliferation impacts the growing numbers of residents who live within, but also because it has become a forum in which owners are making decisions that will help to determine who has the right to live in the city. The form and structure of condominium government matters within and beyond condominium.

2 The Omnicare Pharmacy at Carrall Station in the Downtown Eastside

The Omnicare Pharmacy is a small dispensing pharmacy with little to sell except prescribed medicines. It presents a modest storefront on Cordova Street in Vancouver's Downtown Eastside. A white adhesive decal on the glass front door identifies the business. Beneath the name swings a reversible open/closed sign. The pharmacy opens every day of the year at 7:00 a.m.; it closes at 5:00 p.m. on weekdays, 12:00 (noon) on weekends and holidays. Stuck on the door between the name and the opening hours is a letter-size piece of paper with the following instructions in capital letters:

> NO SMOKING WITHIN 3M OF DOORWAY
>
> NO PUBLIC PHONE
>
> NO PUBLIC WASHROOM
>
> NO FREE COFFEE
>
> NO SHOPPING CARTS IN FRONT OF BUILDING
>
> NO ELECTRICAL OUTLET TO TEST DEVICE

Customers of the pharmacy enter an unadorned shop, occupied mostly by the working space for the pharmacists behind a counter. A stainless steel table and a garbage can stand to one side in the small waiting area for customers. The signage

[30] *Omnicare Pharmacy*, *supra* note 13.
[31] Ibid., paras 134, 164.

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above the storefront to the west announces the defunct Quik Café. That unit now serves as storage space for the pharmacy. On the other side, a few metres to the east, is the entrance to the residential apartments at Carrall Station (Figure 1).

Opened in 1997, Carrall Station includes two buildings separated by a small interior courtyard. The main building contains the Omnicare Pharmacy and seven other commercial units that wrap around the north east corner of Carrall and Cordova streets at ground level, as well as seventy residential apartments, most of which are located on the upper four levels. The apartments on the second floor are standard height, but the next three levels contain two-story loft apartments, giving the five levels of commercial and residential units the appearance and height of an eight-storey building. The small building on the other side of the courtyard includes storage space and four additional residential apartments. There are two levels of underground parking.

The residential and commercial units in Carrall Station exist as separate parcels of land within the strata property development. This subdivision of buildings into separate parcels with distinct titles has been relatively straightforward in British Columbia since 1966, when the province introduced Canada's first statutory condominium regime.[32] With the deposit of a strata plan in the land title office, an owner-developer can subdivide land into separately titled strata lots.[33]

Figure 1 The lighted interior of the Omnicare Pharmacy at Carrall Station appears on the left, the circular entranceway to the residential apartments on the right. Photograph: the author.

[32] *Strata Titles Act*, SBC 1966, c 46. For details, see Harris, "Condominium and the City," *supra* note 15.
[33] *SPA*, *supra* note 1, s 239.

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A sheet from strata plan LMS 2854, the plan that created the condominium at Carrall Station, is reproduced in Figure 2. It reveals the ground-floor layout, including eleven strata lots marked out by their horizontal dimensions as separate, individually titled parcels of land. The areas marked "C" for common property belong collectively to the owners of the individual strata lots. The plan also designates strata lots 1 to 8, which front on Carrall or Cordova streets, for non-residential use. The Omnicare Pharmacy operates from strata lot 4, the lot adjacent to the main entrance and lobby for the residential apartments.

In addition to subdividing land and establishing common property, the deposit of a strata plan also creates the third fundamental feature of condominium: a structure of private, democratic government. In British Columbia and elsewhere, this governing structure is based on a corporate model: owners are members of a strata or condominium corporation with "the power and capacity of a natural person of full capacity."[34] Individual strata lot owners, as the members of the strata corporation,[35] are in a position that has been described as "analogous to shareholders."[36] The analogy is appropriate, at least in so far as the strata lot owners have voting rights in the affairs of the strata corporation that derive from ownership. The strata lot owners elect a strata council from among themselves,[37] and the council is responsible for ensuring that the strata corporation performs its duties.[38]

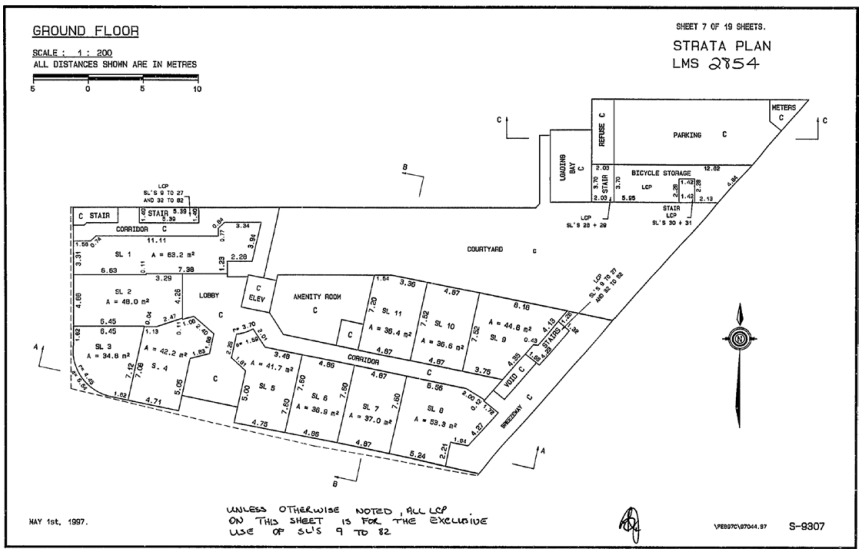

Figure 2 Sheet 7 of Strata Plan LMS2854 showing the strata lots and common areas on the ground floor of Carrall Station at 1 East Cordova St. in Vancouver's Downtown Eastside neighbourhood. The commercial lots (SL 1-8) front on Carrall and Cordova streets. Omnicare Pharmacy occupies strata lot 4, beside the street-front entrance (marked "C") to the residential apartments on the floors above.

34 *SPA*, *supra* note 1, s 2.
35 Ibid., s 2.
36 *2475813 Nova Scotia Ltd. v Rodgers*, 2001 NSCA 12 at 5.
37 *SPA*, *supra* note 1, s 28.
38 Ibid., s 4.

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In British Columbia, the default allocation of votes is one strata lot, one vote,[39] although some variation is possible where non-residential units are involved. At Carrall Station, the residential unit owners each have one vote; the non-residential unit owners have voting rights based on the floor area of their units and range from 1.2 votes to 0.66 of a vote. Together the eight non-residential unit owners hold 6.77 votes; the residential unit owners hold seventy-four votes.

The strata council, as the body responsible for ensuring that the strata corporation performs its duties, is a crucial feature of condominium government. Befitting their responsibility for managing the affairs of an entity with considerable power over the private and common property of its members, the elected members of the strata council are bound to "act honestly and in good faith with a view to the best interests of the strata corporation" and to "exercise the care, diligence and skill of a reasonably prudent person."[40] Moreover, in recognition that a strata corporation may act unfairly or prejudicially, British Columbia's condominium legislation empowers the courts to make orders to prevent or remedy actions or decisions that are "significantly unfair."[41]

A strata corporation's principal responsibility is to manage and maintain the common property,[42] but it also exercises power over the use of strata lots through bylaws. A strata corporation must have bylaws,[43] and British Columbia's legislation provides a set of Standard Bylaws that will apply unless the strata corporation creates its own.[44] The rule-making power is considerable: "[t]he bylaws may provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation."[45] As a result, bylaws commonly contain a general provision prohibiting activity that "causes a nuisance or hazard to another person."[46] There may also be specific restrictions on noise, smoking, the conduct of occupants and their guests or customers, and other activities that have the potential to disrupt residents. In British Columbia, a strata corporation may also restrict or prohibit the keeping of pets[47] and the rental of strata lots,[48] and may set a minimum age for residents.[49]

Carrall Station shares these basic features of condominium property—private property, common property, and a structure of private government—with thousands of other strata property developments in Vancouver, including The Van Horne, located on the other side of Cordova Street (Figure 3). Constructed by the same developer and opened in 1996, the year before Carrall Station, The Van Horne is a somewhat larger, 147-unit, mixed-use building, with commercial units at street-level and residential units above. It includes a small park separated from the sidewalk with a high steel fence to preserve the space for the exclusive use of residents and their guests. The fenced park at The Van Horne, and another across the street,

39 Ibid., s 53(1).
40 Ibid., s 31.
41 Ibid., s 164.
42 Ibid., s 3.
43 Ibid., s 119.
44 Ibid., s 120.
45 Ibid., s 119.
46 Ibid., Standard Bylaws, s 3(1)(a).
47 Ibid., s 123.
48 Ibid., ss 121(2)(a).
49 Ibid., ss 121(2)(c), 123(1.1).

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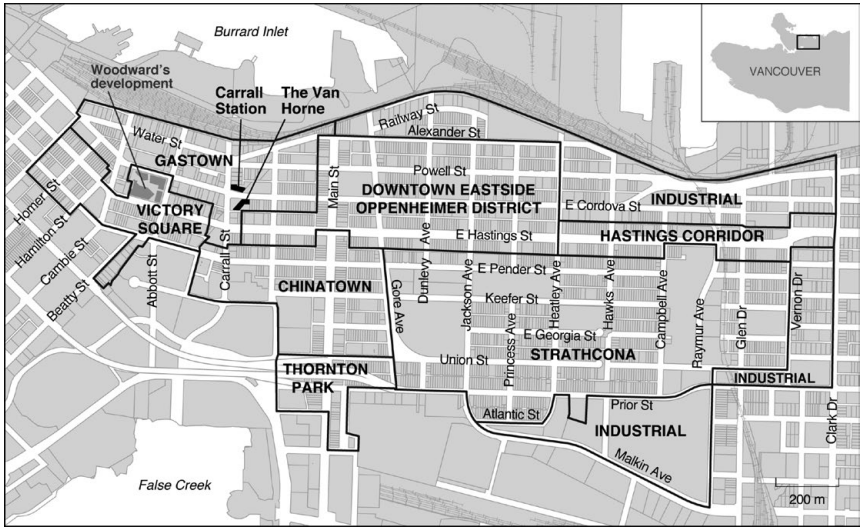

Figure 3 City of Vancouver, Downtown Eastside Local Area and neighbourhoods. Carrall Station and The Van Horne lie within a small transition zone between the restaurants, retail shops, and professional offices that occupy the heritage buildings of Gastown, and the low-income community in the Oppenheimer District. The Woodward's development occupies most of a city block within the Victory Square District.

beside Carrall Station, are shadows in the landscape of a railway line that traversed the neighbourhood when it was a commercial district between the industrial lands along Burrard Inlet to the north and False Creek to the south.[50]

The fencing that separates the private parks from the public sidewalk is notable because unusual in Vancouver. In most other neighbourhoods within the city, a small fence, a sign, or exclusionary landscaping would be sufficient to mark the spaces as privately held common areas and to discourage public use. However, Carrall Station and The Van Horne are situated on the edge of what Vancouver's city plan labels Gastown, and adjacent to the Downtown Eastside Oppenheimer District, two districts within the Downtown Eastside Local Area (Figure 3).[51]

Gastown is the original commercial centre of Vancouver. It has attracted a heritage designation and significant reinvestment, and the Downtown Eastside plan describes it as "an important mixed use commercial district, tourist destination, office/retail/services and residential area."[52] The adjacent cruise ship terminal disgorges thousands of travellers every day during the summer cruising season onto the "historic" streets and sidewalks made from brick and stone.

The Downtown Eastside plan describes the neighbouring Oppenheimer District as "the heart of the low-income community" and as "a place where low-income residents feel safe, included and accepted."[53] The transition between Gastown and

[50] See the maps displaying shifting patterns of land use by decade in Bruce Macdonald, *Vancouver: A visual history* (Vancouver: Talon Books, 1992).
[51] City of Vancouver, *Downtown Eastside Plan, 2nd Amended Edition, 2018* (approved by Vancouver City Council, March 15, 2015) https://vancouver.ca/files/cov/downtown-eastside-plan.pdf.
[52] Ibid., 42.
[53] Ibid., 47.

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the Oppenheimer District is as stark as any in urban Canada. A combination of poverty, mental illness, homelessness, and dependence on illicit drugs, and the social failure to address these issues or to grapple sufficiently with their causes, produces a street environment in the Oppenheimer District unlike that in any other Canadian city.[54] Instead of the well-kept heritage buildings of Gastown with restaurants and a range of retail outlets catering to tourists and residents from across the metropolitan region, the Oppenheimer District contains boarded storefronts, inadequately maintained single-room-occupancy hotels, and myriad social services, including homeless shelters and non-market housing, delivered by government and non-governmental providers. The neighbourhood is currently the epicentre of an opioid-overdose crisis in British Columbia that is claiming the lives of hundreds of people each year.

Drugs and, many argue, the "war on drugs" have been enormously damaging to the community and its residents.[55] Open trade in illicit substances is a common sight on the sidewalks and in the lanes of the Oppenheimer District, as is intravenous and other drug use. Although the number of overdose deaths since 2015 is unprecedented, the labelling of the Downtown Eastside as a neighbourhood in crisis is not new. In 2003, the provincial health authority, with the support of the city, opened Canada's first legally sanctioned and supervised injection facility for illicit drugs—Insite—as part of a harm-reduction strategy to enable safer drug use and to limit the spread of infectious diseases. That facility remains open, notwithstanding efforts by a former Federal government to close it.[56] Other supervised injection facilities have begun to appear elsewhere in Vancouver and in other municipalities across Canada, and the Oppenheimer District is certainly not the only neighbourhood grappling with the devastating effects of dependence on illicit substances, but the concentration and intensity of the problem in that neighbourhood is unmatched.

3 *Omnicare Pharmacy v The Owners, Strata Plan LMS2854*

The Omnicare Pharmacy serves the Downtown Eastside community. Many of its customers are methadone users, and the pharmacy fills prescriptions for this medicinal bridge away from opioid dependence.[57] The cravings induced by substance dependency and the precarious living arrangements for many in the neighbourhood

[54] For some of the literature on the Downtown Eastside see Jeff Sommers and Nick Blomley, "The Worst Block in Vancouver," in *Stan Douglas: Every Building on 100 West Hastings*, ed. Reid Shier (Vancouver: Arsenal Press, 2002), 18–61.

[55] In 1994, British Columbia's Chief Corner JV Cain produced the *Report of the Task Force into Illicit Narcotic Overdose Deaths in British Columbia* (British Columbia: Ministry of the Attorney General, 1994) and concluded: "The so-called 'War on Drugs' which is conducted by the Justice System can only be regarded as an expensive failure" (vi).

[56] See Margot Young, "Insite: Site and sight," *Constitutional Forum* 19, no. 3 (2011): 87–91.

[57] The College of Pharmacists of British Columbia has established a detailed set of guidelines for pharmacists who dispense methadone. See *Professional Practice Policy #66: Policy Guide, Methadone Maintenance Treatment* (2013), revised May 13, 2019, http://library.bcpharmacists.org/6_Resources/6-2_PPP/1029-PPP66_Policy_Guide_MMT.pdf. On access to methadone in Vancouver, see Jesse Proudfoot, "The Anxious Enjoyment of Poverty: Drug addiction, panhandling, and the spaces of psychoanalysis" (PhD diss., Simon Fraser University, 2011), 114–143, http://summit.sfu.ca/item/11256.

mean that, on some mornings, a line of customers extends along the sidewalk from the Omnicare Pharmacy before its 7:00 a.m. opening. It is not uncommon to see people sleeping on the sidewalk near the store, their belongings in bags or carts. This is hardly unusual in the Oppenheimer District and the area around it, but the Omnicare Pharmacy creates a focal point as its customers come and go.

Almost since the Omnicare Pharmacy opened in Carrall Station in 2000, the residents of the strata property development have complained about it and its customers. Issues include loitering, excessive noise, garbage and human waste on the sidewalk, damage to common property, verbal abuse, and threatening behaviour. Most of the complaints involve conduct on the Cordova Street sidewalk in front of Carrall Station, but the residents have also complained about frequent attempts to secure unauthorized entry to the building. In response to this daily and chronic nuisance, and in an effort to hold the pharmacy responsible, the residential owners, through the Carrall Station strata corporation, amended its bylaws and began to levy fines against the pharmacy for alleged infractions.

The first bylaw amendment, in 2001, established that owners were responsible for the conduct of their visitors.[58] Then, in 2004, the strata corporation introduced a bylaw to reduce the permitted opening hours for businesses and to prohibit pharmacies from operating within the commercial units (although the Omnicare Pharmacy was exempted). Finally, in 2006 the strata corporation added a bylaw that targeted the use of strata lots "for any purpose which involves undue traffic or noise in or about the strata lot or common property between the hours of 10:00 p.m. and 8:00 a.m. or that encourages loitering by persons in or about the strata lot or common property." Under these bylaws, the Carrall Station strata council levied thousands of dollars in fines against the pharmacy.

In response, Harvey Chan, the pharmacist and owner of the Omnicare Pharmacy, turned to the courts, first in 2009, in an effort to stop what he claimed was the strata corporation's unjustified harassment and unfair treatment of him and his business. These proceedings resulted in a court-supervised consent order under which Carrall Station agreed to cancel the outstanding fines against the Omnicare Pharmacy, to pay a portion of Chan's legal costs, and to permit the pharmacy to operate from 7:00 a.m. to 5:00 p.m. daily.[59]

Notwithstanding the consent order, the issues that underlay the conflict between residents and business were unresolved, and in 2016, when the matter returned to the courts, the residents at Carrall Station described the chronic nuisance in the following terms:

> 24. Most mornings starting around 6 a.m. the Petitioner's customers loiter outside the pharmacy and cause noise and disturbances. The loitering and disturbances caused by customers of the pharmacy occur on a daily basis, and are common throughout the day. These people commonly leave garbage on the sidewalks fronting the Petitioner's building, including the common areas and easement area.

[58] See *Omnicare Pharmacy*, supra note 13, paras 19–33, for a chronology of bylaw amendments.
[59] Ibid., para 40.

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25. The Petitioner provides its customers with access to coffee and coffee cups. The Petitioner's customers routinely spit their coffee on the common property of the Strata Property, such as on the exterior walls, paths or garden beds.
26. The Petitioner's customers often urinate on the exterior walls of the Strata Property which border the city sidewalk and yell obscenities at owners and their guests entering or exiting the Strata Property.
27. The Petitioner's customers have on many occasions tried or been successful in entering the common lobby for the Strata Property.
28. It is common for customers to be sitting, lying down or even sleeping on the floor, both inside the pharmacy as well as around the outside of the pharmacy against the building at the Strata Property.[60]

In sum, "(t)he conduct of many customers of the pharmacy is unacceptable to the Strata Council and owners at the Strata Property,"[61] and the strata council, acting for the majority of owners, resumed fining the pharmacy for the conduct of its customers.

Harvey Chan returned to the courts in 2016, filing a petition to expunge the fines based primarily on an argument that the amended bylaws, under which the strata council was fining the pharmacy, were invalid. As set out in Part 2, British Columbia requires all strata corporations to have bylaws, either the Standard Bylaws or a set of custom bylaws. A strata corporation may amend existing bylaws, but doing so requires a 75 percent supermajority vote among the owners.[62] However, in a mixed-use strata corporation the legislation requires 75 percent approval from the owners of each designated use.[63] Chan alleged, and the Carrall Station strata corporation accepted, that the bylaw amendments beginning in 2001 had been approved by single vote counts, with no record of how the owners of the residential and non-residential units had voted. As a result, the strata corporation acknowledged that it had not been in "strict compliance" with the legislation, but it argued that the Omnicare Pharmacy had been present at the meetings and had not objected to the amendments, that Carrall Station had operated for many years under these bylaws, that to invalidate the bylaws would prejudice the strata corporation, and, finally, that the court should exercise its discretion to uphold the bylaws.[64]

Hearing the case in the BCSC, Justice Elaine Adair disagreed with the position taken by the strata corporation on behalf of the residential unit owners. To declare the bylaws valid, she ruled, would nullify the non-residential strata property owner's "democratic right to vote separately from the residential owners and to have its voice heard" and would deprive "nonresidential owners of their democratic rights to vote as a separate group."[65] Furthermore, the strata property legislation, which

60 *Omnicare Pharmacy Ltd v The Owners, Strata Plan 2854* (Vancouver, S-164895), Response to Petition, 6 July 2016.
61 *Omnicare Pharmacy Ltd v The Owners, Strata Plan 2854* (Vancouver, S-164895), Respondent's Written Submissions, 18 November 2016, para 36. The BCSC reviewed the evidence of the residents in *Omnicare Pharmacy*, supra note 13, paras 50–66.
62 *SPA*, *supra* note 1, s 128(1).
63 Ibid., s 128(1)(c).
64 *Omnicare Pharmacy*, supra note 13, paras 102–103.
65 Ibid., para 117.

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creates a form of democracy among owners, did not provide the courts with the authority to suspend or disregard the rights of owners within the democratic structure: "the *Strata Property Act* cannot be interpreted in a way that leaves the court with a discretion to override the democratic rights" set out in the legislation.[66]

Justice Adair did find that the strata corporation had levied one $200 fine under a nuisance bylaw that mirrored the Standard Bylaws and therefore was valid, but she overturned that fine because of another procedural failing. The original Carrall Station bylaws had required that the strata council include two representatives from among the owners of the non-residential units. As part of the amendments in 2001, the strata corporation reduced this requirement to one representative, but Justice Adair ruled this bylaw amendment invalid because it too had been passed without a 75 percent vote from among the non-residential unit owners. As a result, none of the Carrall Station strata councils since 2001, all of which appear to have been in breach of the requirement for two representatives from the non-residential unit owners, were validly constituted. To uphold a fine levied against the Omnicare Pharmacy by an invalidly constituted strata council would be "significantly unfair."[67]

Justice Adair's decision to strike the fines against the Omnicare Pharmacy turned on the procedural protections for owners in the condominium legislation, and primarily on her willingness to protect what she characterized as the democratic rights of owners within condominium. However, Justice Adair also situated the dispute between owners in its broader urban context. Through a series of witnesses, the Carrall Station strata corporation led evidence of the daily and chronic nuisance that the pharmacy created for the residents. Justice Adair accepted that "the presence of the Pharmacy (and the customers it serves) has contributed to considerable discomfort for, and friction with, people residing at Carrall Station,"[68] but she was sceptical that all the conduct complained of could be attributed to the pharmacy and its customers. She noted that "Carrall Station was built in the middle of the Downtown Eastside, where nuisance, noise, garbage and disturbances are facts of daily life,"[69] and she concluded her judgment with the following observation: "Living and operating a business on the Downtown Eastside undoubtedly presents challenges, and dealing with them in a suitable way has been difficult for everyone."[70]

Indeed, residents in other neighbourhoods in the city would not tolerate the disruption and disorder on the sidewalks in parts of the Downtown Eastside, and particularly in the Oppenheimer District. As a result, it should not be surprising that the residential unit owners within Carrall Station, in seeking the relative urban tranquility and corresponding property values that most other land owners in the city enjoy, turned to the tools that private condominium government creates in their efforts to deal with the challenges of living in and owning a residence in Vancouver's Downtown Eastside.

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66 Ibid., para 116.
67 Ibid., para 151. Under the *SPA*, *supra* note 1, s 164, a determination that the actions of a strata corporation or strata council are significantly unfair enable a court to make an order to remedy the unfairness.
68 Ibid., para 131.
69 Ibid., para 129.
70 Ibid., para 164.

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4 Carrall Station and Exclusion in the Downtown Eastside

The conflict between owners at Carrall Station arises in the context of decades-long debate and struggle over the future of Vancouver's Downtown Eastside neighbourhood.[71] Once the focal point of commercial activity in Vancouver, and then, when the Canadian Pacific Railway moved the commercial centre a few blocks to the west, a mix of residential and commercial buildings situated between the port on its northern flank and industrial False Creek and Chinatown on its southern, with a sizable Japanese-Canadian community and an itinerant labour force inhabiting single-room hotels, the neighbourhood has been battered by political decisions and by the restructuring of the provincial and municipal economy in the twentieth century. Canada's internment of Japanese Canadians living in British Columbia during World War II, confiscation of their property, and then dispersal after the war, displaced a significant and stabilizing presence in the neighbourhood.[72] In economic terms, the employment opportunities in the resource sector and at the port which had drawn people to the neighbourhood began to disappear after World War II, as the city's economic base shifted from the extractive industries to the service and professional sectors, and as the port mechanized its operations.[73] Settlement patterns also changed, as automobile ownership expanded and the suburbs became an option for increasingly mobile working-class families.[74] Jobs disappeared, people left, buildings deteriorated, public spaces declined, and those who remained, or who landed there, usually had few other options.

In the 1960s, competing perceptions offered different visions for the future of the Downtown Eastside.[75] From one perspective, the district was Vancouver's skid road, an irredeemable district of vice and human and physical decay. Situated on the eastern doorstep of the city's commercial core, the blighted neighbourhood was an obvious candidate for urban renewal, redevelopment and revitalization, and the city should encourage the inevitable and desirable processes of gentrification. From a different perspective, the Downtown Eastside was a home, a community, and a place of refuge and collective memory; "skid road" was a construction imposed by outsiders, and the narrative of blight and decay devalued the people who were struggling to build lives and create homes. In this view, the processes of gentrification and the resulting displacement of individuals and community were to be resisted at every turn in order to ensure that existing residents might remain, with adequate support and services, to make decent homes and sustain community.[76]

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71 See Ley, "One Hundred Years," *supra* note 10, 172–204; Smith, "Where Worlds Collide," *supra* note 11.

72 Jordan Stanger-Ross and Landscapes of Injustice Research Collective, "Suspect Properties: The Vancouver origins of the forced sale of Japanese-Canadian-owned property, WWII," *Journal of Planning History* 15, no. 4 (2016): 271–289; Eric Adams and Jordan Stanger-Ross, "Promises of Law: The unlawful dispossession of Japanese Canadian," *Osgoode Hall Law Journal* 54, no. 3 (2016): 687–739.

73 David Ley, *The New Middle Class*, *supra* note 12.

74 See Rolf Knight, *Along the No. 20 Line: Reminiscences of the Vancouver waterfront* (Vancouver: New Star Books, 2011) for a personal account of the changing neighbourhood.

75 See Ley, "One Hundred Years," *supra* note 10, 189–191. See also Sikee Liu and Nicholas Blomley, "Making News and Making Space: Framing Vancouver's Downtown Eastside," *The Canadian Geographer* 57, no. 2 (2013): 119–132, for an analysis of media representations.

76 Blomley, "Gentrification Frontier," *supra* note 11.

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These opposing visions for the Downtown Eastside clashed in the late 1960s and early 1970s, as developers and city officials turned their attention eastward and neighbourhood associations emerged to advocate for the existing residents.[77] The conflict escalated with the massive urban redevelopment that pivoted around the world exposition in 1986 (Expo86) on the former industrial lands and railway yards just a few blocks south of the Downtown Eastside. The tenant evictions when landlords converted single-room hotels, which provided long-term residential tenancies, to short-term hotel accommodation were sharp points among myriad gentrifying pressures that bore down on the neighbourhood.[78]

In the decades following Expo86, the patterns of land use around much of Vancouver's central business district changed dramatically. The fair site and other land on the edge of the downtown core, including former industrial lands, railway yards, and low-density commercial districts, became densely populated, high-amenity residential neighbourhoods that many regard as a North American model for effective urban redevelopment and renewal.[79] The city's population grew steadily, with much of the growth in the new, densely populated, residential neighbourhoods close to employment opportunities, public transit, cultural amenities, and the ocean. In part because of these successes, the city's residential land values rose to surpass those in all other Canadian cities and to be among the highest in North America.[80]

Condominium apartment towers are the dominant physical edifice of this urban transformation, and condominium provides the architecture of ownership around which this urban transformation has been built.[81] Many individual homeowners, as well as domestic and international investors, have poured money into condominium units within the steel and glass towers or mid-rise buildings that now encircle the downtown core. A number of scholars working primarily on Toronto, Canada's other major condominium market, have sought different ways to characterize the role of condominium in the re-shaping of the city. Ute Lehrer and Thorben Weiditz emphasize connections between the proliferation of condominium property and processes of gentrification, particularly the shrinking footprint of middle-income households in describing the "condofication" of Toronto.[82] Rosen and Walks embed condominium even more deeply in processes of globalization and financialization, claiming that "condo-ism" describes a mode of development that has "usurped the role of industrialization in urban development."[83] Turning the focus inwards, Lippert uses "condoization" to describe the commodification of condominium governance and "condo conquest" to describe "the remarkable rise to dominance of the condo form."[84]

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77 Ley, "One Hundred Years," *supra* note 10.

78 See Kris Olds, "Urban Mega-Events, Evictions and Housing Rights: The Canadian Case," *Current Issues in Tourism* 1, no. 1 (1998): 6–17.

79 See John Punter, *The Vancouver Achievement: Urban Planning and Design* (Vancouver: UBC Press, 2003). Jamie Peck, Elliot Siemiatycki, and Elvin Wyly, "Vancouver's Suburban Involution," *City* 18, nos. 4–5 (2014): 386–415, provide a more critical analysis.

80 See the account from a former co-director of planning in Larry Beasley, *Vancouverism* (Vancouver: UBC Press, 2019).

81 Harris, "Condominium and the City," *supra* note 15.

82 Lehrer and Thorben, "Condominium Development," *supra* note 12.

83 Rosen and Walks, "Condo-ism," *supra* note 12, 290.

84 Lippert, *Condo Conquest*, *supra* note 27, 9.

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However, the Downtown Eastside has remained an outlier in its capacity to repel condominium property and the accompanying forces of urban transformation. Indeed, the neighbourhood has defied conventional expectations of gentrification for an urban area in close proximity to a downtown core with significant environmental and cultural amenities.[85] Even so, the gentrifying pressures have not disappeared, and one community organization—the Carnegie Community Action Project (CCAP)—has sought to document the loss of older apartments and single-room-occupancy hotels as well as rising rental costs.[86] Moreover, concerns about market-priced re-development extend beyond the use of particular building sites and lost opportunities for new social housing, to the transformation of streetscapes. Each new condominium development or market-rental building brings new and more affluent residents who seek different and more costly urban amenities, and who expect a more orderly street life. Another CCAP study maps the incursion of "gentrifying retail" into the neighbourhood—"retail that caters to and seeks to attract higher income residents and visitors"[87]—and an earlier study described the emerging "Zones of Exclusion" for existing low income residents:

> Zones of exclusion are spaces where people are unable to enter because they lack the necessary economic means for participation. As wealthier people move into the neighborhood, more spaces are devoted to offering amenities that cater to them. Grocery stores, banks, coffee shops, restaurants, salons, various retail stores, night clubs, stylish pubs, etc. begin to appear throughout the neighborhood, and are priced beyond what people on fixed low income can afford. These sites become zones of exclusion.[88]

These concerns about gentrification and the loss of neighbourhood underlay the prominent battle over the redevelopment of the Woodward's department store site after the business closed in 1993 following bankruptcy.[89] The intensity of feeling in the community that the Woodward's site should be used for social housing and other purposes relevant to existing residents was in part a function of the earlier development of The Van Horne and Carrall Station.[90] Many in the city, including the developer, viewed The Van Horne and Carrall Station projects, located just to the east of the department store site (Figure 3), as at the leading edge of an inevitable and desirable extension of the urban frontier, providing reasonably priced

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85 David Ley and Cory Dobson, "Are There Limits to Gentrification? The Contexts of Impeded Gentrification in Vancouver," *Urban Studies* 45, no. 12 (2008): 2471–98.

86 See Jean Swanson, Lama Mugabo, and King-Mong Chan, *Crisis: Rents and the rate of change in the Downtown Eastside*, (Carnegie Community Action Project, 2017 Hotel Survey and Housing Report, March 2018) http://www.carnegieaction.org/wp-content/uploads/2018/03/CCAP-2017-Hotel-Report-1.pdf.

87 Carnegie Community Action Project, *We Are Too Poor to Afford Anything: Retail gentrification mapping report* (Carnegie Community Centre Association, February 2017), 5, http://www.carnegieaction.org/wp-content/uploads/2017/02/CED-REPORT-PRINT.pdf. See also Katherine Burnett, "Commodifying poverty: Gentrification and consumption in Vancouver's Downtown Eastside," *Urban Geography* 35, no. 2 (2014): 157–176.

88 Richard Marquez, Beth Malena, Stanislav Kupferschmidt, and Dave Diewert, *Zones of Exclusion* (Downtown Eastside Neighbourhood Council Action Committee, nd), 3. The study documents how some condominium developments and retail businesses trade on the notion that they occupy an urban frontier in their promotional material.

89 See Blomley, *Unsettling the City*, *supra* note 10, 39–46.

90 Smith, "Where Worlds Collide," *supra* note 11, 289–98.

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market-based housing and spurring the urban renewal and revitalization of the neighbourhood.[91] For their part, community associations decried the developments as at the forefront of a process of urban up-scaling that would displace residents and established communities, and they denounced the decisions to approve them.

This larger struggle over gentrification in the Downtown Eastside, and the particular conflicts over condominium development in the neighbourhood, are crucial to understanding the conflict between the Omnicare Pharmacy and the residential unit owners in Carrall Station. When Carrall Station and The Van Horne were built, they were viewed, whether for good or ill, as the vanguard of change in the neighbourhood. However, the anticipated transformation has not occurred, at least not to the extent hoped for, or feared, although the pressure to change continues to circle. More than two decades after their construction, Carrall Station and The Van Horne remain in a narrow liminal space between "historic" Gastown to the west and the poverty of the Oppenheimer District to the east (Figure 3). Neil Smith describes these spaces as gentrification frontiers, establishing boundaries that serve to distinguish "areas of disinvestment from areas of reinvestment in the urban landscape."[92] Carrall Station appears to straddle this stalled gentrification frontier, the Omnicare Pharmacy facing east and serving the residents of the Downtown Eastside, the residential unit owners attempting to orient the condominium development west and seeking the ordered and stable streetscape that most residents of the city enjoy.

The struggle over and for the Downtown Eastside is occurring in many different places. *Omnicare Pharmacy* reveals condominium as one. More commonly, the struggle over the Downtown Eastside has been engaged in battles for and against condominium, not between owners within condominium. However, condominium creates a site of government and thus it should not be surprising that it has become another site of conflict and contestation over the character of the neighbourhood and over who has the right to live in the city. As such, the rule-making and rule-enforcing authority of condominium government needs attention not just because of its impact on the owners within, but also for its potential to affect and even transform the larger public sphere. The city is not just acting on condominium property; condominium, and the private, democratic government that it creates, is also acting on the city.

5 Private, Democratic Government and the City

Statutory condominium regimes facilitate a public delegation of private governing power, or, after Morris Cohen, a delegation of sovereignty.[93] Cohen's characterization of private property as a delegation of sovereignty, conferring power on owners over non-owners, is particularly appropriate within the framework of condominium, where individual property interests include rights to participate in a government with the capacity to create and enforce rules within territorially defined boundaries. Condominium produces authoritative, territorially-bounded, rule-making entities.

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91 Ibid., 291.

92 Neil Smith, *The Urban Frontier: Gentrification and the revanchist city* (New York: Routledge, 1996), 187.

93 Morris Cohen, "Property and Sovereignty," *Cornell Law Quarterly* 13, no. 1 (1927): 8–30.

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Moreover, the increasingly common description of condominium as a fourth order of government, situated beneath federal and provincial, and alongside municipal or local,[94] places condominium government with public government, and suggests that, although private, it must not be consigned solely to the private realm. Alexander captures this hybridity in describing the larger category of residential association as "a 'public' sort of civil society institution."[95]

The tension within condominium between its private and public elements is reflected in Canadian jurisprudence. In the one instance in which the Supreme Court of Canada (SCC) has considered condominium government—*Syndicat Northcrest v Amselem*[96]—the reasons for decision from Justice Frank Iacobucci for the majority and Justice Ian Binnie in dissent reveal divergent approaches to its character. The case involved an owner's claim that the syndicate's (condominium corporation's) refusal to allow temporary structures on balconies for religious observance, pursuant to the declaration of co-ownership which prohibited decorating, covering or enclosing of balconies, violated the protection for freedom of religion in Quebec's *Charter of Human Rights and Freedoms*.[97] Justice Iacobucci opened his reasons for decision by invoking the importance of respect for minorities, including religious minorities, within a constitutional democracy.[98] This starting point animates a set of reasons that highlight the "multi-ethnic and multicultural context" and that mark "mutual tolerance [as] one of the cornerstones of all democratic societies."[99] Condominium government is to be understood as embedded within a larger public context. By contrast, Justice Binnie began his dissenting opinion by noting the dispute involved a claim to freedom of religion against co-owners, not the state, and that the co-owners had accepted "contractual rules governing the use of commonly owned facilities."[100] His analysis focused on the private and the contractual, rather than the public and democratic, and he would have held the owners seeking religious accommodation to the contract in order to protect "the countervailing rights of their co-owners."[101] Condominium is to be understood as a private, voluntary contract between owners.

When it comes to the *Canadian Charter of Rights and Freedoms*,[102] which applies only to government, the Canadian courts have chosen to emphasize the private and contractual nature of condominium in ruling that the *Charter* does not apply to condominium government.[103] In doing so, the courts have turned to the SCC's jurisprudence that the *Charter* does not apply to universities on the grounds

94 See note 2.
95 Alexander, "Publicness," *supra* note 23.
96 *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Amselem*].
97 *Charter of Human Rights and Freedoms*, RSQ c C-12, s 3.
98 *Amselem*, *supra* note 96, para 1.
99 Ibid., para 87.
100 Ibid., para 183.
101 Ibid., para 208.
102 *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 32.
103 *Condominium Plan No 931 0520 v Smith*, 1999 ABQB 340, para 5; *Reid v Strata Plan LMS 2503*, 2007 BCSC 1396, paras 38–39; *Condominium Plan No. 9910225 v Davis*, 2013 ABQB 49, para 9; *Strata Plan NW 499 v Kirk*, 2015 BCSC 1487, paras 143–166, affirmed on appeal *The Owners, Strata Plan NW 499 v Louis*, 2016 BCCA 494, paras 18–38.

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that its protection of rights and freedoms was not "intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing without engaging governmental responsibility."[104] Condominium might facilitate government, but not engage "governmental responsibility."

However, in order to shield condominium government from *Charter* scrutiny, the courts have had to distinguish condominium from municipal government to avoid the SCC's jurisprudence extending the application of the *Charter* to municipalities.[105] In this, the courts have been unconvincing, particularly when describing the governing functions of condominium and municipal governments. Both derive their authority from provinces, are territorially defined, elect officers, employ bureaucracies, collect taxes, provide services and amenities to residents, and have rule-making and rule-enforcing powers, particularly with respect to land use. Indeed, in case law not involving *Charter* analysis, the courts have reasoned by analogy to municipal government[106] or noted the similarities between condominium and town hall meetings.[107] In a recent Australian decision, the Supreme Court of Victoria analyzed owners corporation (condominium) bylaws as a form of subordinate legislation comparable with municipal bylaws.[108] These decisions suggest that the differences between condominium and municipal government lie not so much in their functions as in the fact that condominium government derives from a property interest and thus is understood as private, while municipal government, without a similar connection to property, is public.

The BCSC did not have to consider a *Charter* challenge or a human rights complaint, or engage explicitly with the public nature of condominium government in *Omnicare Pharmacy*. Justice Adair's decision rested on her determination that the Carrall Station strata corporation had failed to observe the democratic processes and procedures set out in the province's condominium legislation. But even if her focus were the internal structure of condominium government, the city would not be ignored. The urban context mattered because condominium government had become a site of conflict for the issues of the city. Indeed, the owners within condominium were engaged with the most basic question of who has the right to live in the city.

The Omnicare Pharmacy is a going concern, opening at 7:00 a.m. every day of the year and providing some in the low-income community of Vancouver's Downtown Eastside with access to prescribed medicine. It has taken steps since the litigation with the other owners in Carrall Station to reduce some of the irritants for the residents—the sign on the front door indicates no free coffee, and it asks that customers not smoke or leave shopping carts in front of the pharmacy—but otherwise, the business appears to continue as it had. That it remains in business

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104 *McKinney v University of Guelph*, [1990] 3 SCR 229, 266.
105 *Godbout v Longueuil (City)*, [1997] 3 SCR 844.
106 For examples from three Canadian jurisdictions, see *Jiwan Dhillon & Co Inc v Gosal*, 2010 BCCA 324, para 17; *Condominium Plan No 822 2909 v 837023 Alberta Ltd*, 2010 ABQB 111, paras 54, 76; and *Peel Condominium Corporation No 108 v Young*, 2011 ONSC 1786, paras 21–27.
107 Shaw *Cablesystems v Concord Pacific Group et al*., 2007 BCSC 1711, para 10.
108 *Owners Corporation PS 50139P v Balcombe* [2016] VSC 384.

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at its location within Carrall Station, notwithstanding the efforts of the residential-unit owners to displace it, is a function of BCSC's decision to protect the democratic rights of owners within condominium. In one sense, this outcome is exceptional. Condominium government is designed to protect the interests of owners, not residents, and certainly not those in the wider community outside condominium, but in this instance, the decision to uphold democratic rights of individual owners within condominium protected a business serving the surrounding low-income community. However, the low-income community's suspicion of, and opposition to, condominium development in the neighbourhood reflects a view that this form of land ownership, including the structure of government within, will more commonly work against the interests of non-owner residents, particularly low-income residents.

The conflict within Carrall Station is a skirmish in the larger struggle over who has the right to live in the city. This decades-long struggle has not disappeared from the public realm—the future of the Downtown Eastside continues to be debated and contested in the public realm of municipal politics and city hall, in the formation of city plans, and in the decisions about individual development permits—but it is also occurring within condominium. That it is requires the attention of the provinces, which create the statutory condominium regime, and cities, which now operate in a context where private, democratic condominium government is also engaged in governing within the city. In particular, the conflict at Carrall Station points to the need for analysis of condominium government, and not just for its impact on owners, or even residents within, but also on those who live beyond. Cities must now account for, work alongside, and, in some circumstances, contend with these rapidly proliferating sites of private, democratic government that are also shaping the city.

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