

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Divisional Court)**

B E T W E E N:

**CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION  
AND LESTER BROWN**

Applicants

- and -

**TORONTO WATERFRONT REVITALIZATION CORPORATION, CITY OF  
TORONTO, HER MAJESTY IN RIGHT OF ONTARIO as represented by the  
MINISTER OF INFRASTRUCTURE, HER MAJESTY IN RIGHT OF  
CANADA as represented by the MINISTER OF COMMUNITIES AND  
INFRASTRUCTURE, AND THE ATTORNEY GENERAL OF CANADA**

Respondents

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**MOTION RECORD**  
*(Hearing returnable March 25, 2020)*

**VOLUME I OF II**

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January 17, 2020

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Court File No.: 211/19

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Respondents

**NOTICE OF MOTION**

The Respondent, Toronto Waterfront Revitalization Corporation (“**Waterfront Toronto**”), will make a motion to the Court on March 25, 2020, at 10:00 a.m., or soon after that time as the motion can be heard, at 130 Queen Street West, Toronto, ON M5H 2N5.

**PROPOSED METHOD OF HEARING:** The motion is to be heard orally.

**THE MOTION IS FOR:**

1. An order in the form attached at Schedule “A” striking out parts of the Notice of Application that relate to the relief sought at paragraphs 1(d) and 1(e), which are based on the allegation that Waterfront Toronto violated sections 2(c), 2(d), 7 and 8 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) by entering into the

Framework Agreement and the Plan Development Agreement (as defined below) and a declaration that Canadians' personal and collective privacy under the *Charter* has been violated by Waterfront Toronto's decision to enter into the Framework Agreement and the Plan Development Agreement on the basis that those allegations are premature and not ripe for adjudication (the "Privacy Issue").

2. Further, an order in the form attached as Schedule "A" hereto allowing the remaining allegations with respect to whether Waterfront Toronto had the statutory authority to enter into the Framework Agreement and the Plan Development Agreement (as described below) to proceed to a hearing before a panel of this Court (the "Statutory Authority Issue") so that this Application only proceeds on the grounds cited at paragraphs 1 – 4, 6, 8 – 27, 30(1), 31 – 43, and 57 (a), (b), (d) – (h) and (l) – (m), and this Court only considers the relief sought at paragraphs 1(a), 1(b), 1(c), and 1(f) of the Application.
3. In the alternative, to the extent that the Statutory Authority Issue cannot be bifurcated from the Privacy Issues, that the Application be struck in its entirety.
4. Costs of this motion on a substantial indemnity basis.
5. Such further and other relief as counsel may advise and this Honourable Court may permit.

## THE GROUNDS FOR THE MOTION ARE:

### The Parties

1. The respondent, Waterfront Toronto, is a corporation without share capital established pursuant to the *Toronto Waterfront Revitalization Corporation, 2002*, S.O. 2002, c. 28 (the “*WT Act*”) by the Government of Canada, the Province of Ontario and the City of Toronto.
2. The applicant, Lester Brown is a resident of Toronto.
3. The applicant, the Corporation of the Canadian Civil Liberties Association (“CCLA”), is a non-governmental charitable organization whose mandate is the protection of fundamental rights and freedoms of Canadians.

### Notice of Application

4. The Application seeks to set aside Waterfront Toronto’s decision to enter into agreements defined as the Quayside Agreements in the Notice of Application (as discussed below) with Sidewalk Labs LLC (“Sidewalk Labs”) on the basis that the agreements are *ultra vires* Waterfront Toronto’s enabling legislation, in that the *WT Act* does not give Waterfront Toronto authority to make policy regarding data and further because any data collection will allegedly violate privacy rights protected under federal and provincial law and that such violations are contrary to the *Charter*.
5. The Application further seeks declarations that Waterfront Toronto’s decision to enter into these agreements violates Canadians’ collective privacy rights under sections 2(c),



2(d), 7 and 8 of the *Charter* and a declaration that the City of Toronto infringed on Canadians' personal and collective privacy rights under sections 2(c), 2(d), 7 and 8 of the *Charter* by authorizing Waterfront Toronto to enter into agreements with Sidewalk Labs.

### **Waterfront Toronto's Mandate**

6. The objects of Waterfront Toronto are
  - (a) to implement a plan that enhances the economic, social and cultural value of the land in the designated waterfront area and creates an accessible and active waterfront for living, working and recreation and to do so in a fiscally and environmentally responsible manner;
  - (b) to ensure that ongoing development in the designated waterfront area can continue in a financially self-sustaining manner;
  - (c) to promote and encourage the involvement of the private sector in the development of the designated waterfront area; and
  - (d) to encourage public input into the development of the designated waterfront area.
7. Waterfront Toronto has the capacity, rights, powers and privileges of a natural person carrying out its objects, except as limited by the *WT Act*.
8. Waterfront Toronto's mandate is to plan, promote, and guide the revitalization of Toronto's waterfront lands.

## Quayside Project

9. Quayside is an approximately 12-acre development site bound by Parliament St. to the east and Lower Sherbourne St. to the west. Quayside forms part of the designated waterfront area under the jurisdiction of Waterfront Toronto.
10. On March 17, 2017, Waterfront Toronto issued a Request for Proposals (“RFP”) for an innovation and funding partner for the Quayside lands. Waterfront Toronto envisioned a partner that would create a vision for a next-generation community that would showcase urban innovations such as advanced technologies, building materials, sustainable practices (consistent with the Waterfront Toronto Resilience and Innovation Framework for Sustainability) and affordable housing (the “Quayside Project”). The deadline for submissions was April 27, 2017.
11. Waterfront Toronto published RFP documents and timelines related to the Quayside development on its website, and broadly to industry through a variety of channels, including via the MERX procurement portal.
12. Waterfront Toronto shortlisted three respondents to the RFP on May 19, 2017 and requested a Best and Final Offer by August 22, 2017.<sup>1</sup> Following an evaluation process, Sidewalk Labs received the highest score.
13. Sidewalk Labs is an Alphabet Inc. subsidiary that was formed in 2015 with the mission of reimagining cities and accelerating innovation to address urban challenged and achieve new stands of sustainability, affordability, mobility and economic prosperity.

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<sup>1</sup> <https://quaysideto.ca/project-timeline/#main>

14. On October 16, 2017, the Waterfront Toronto Board of Directors authorized the execution of the Framework Agreement. The Framework Agreement authorized the parties to continue to negotiate a more detailed Plan Development Agreement (“PDA”).
15. On July 31, 2018, Waterfront Toronto and Sidewalk Labs entered into the PDA. The PDA establishes a roadmap for the design and preparation of the Master Innovation and Development Plan or “MIDP” and implementation agreements, subject to required approvals.
16. Pursuant to section 3.01 of the PDA, the MIDP will be subject to the approval of each of Waterfront Toronto, in its sole, absolute, unfettered discretion, and Sidewalk Labs, in its sole absolute and unfettered discretion. The PDA also states that implementation of the MIDP will be governed by future agreements to be negotiated, if the MIDP is approved. The PDA does not bind Waterfront Toronto to implement any proposal from Sidewalk Labs with respect to the MIDP.
17. On June 17, 2019, Sidewalk Labs provided a proposed MIDP for Quayside to Waterfront Toronto for its consideration. The proposal, titled Draft Master Innovation and Development Plan (“Draft MIDP”) details Sidewalk Labs’ recommendations for the Quayside lands. The Draft MIDP was published on the Quayside Website on June 24, 2019.
18. On July 31, 2019, Waterfront Toronto and Sidewalk Labs entered into an amending agreement that amended the PDA to extend certain time periods provided for in the PDA (the “Amending Agreement”). The Amending PDA extended, by six months from September 30, 2019 to March 31, 2020, the deadline by which Waterfront Toronto and

Sidewalk Labs must determine whether or not to approve the MIDP. The Amending PDA also extended by twelve months from December 31, 2019 to December 31, 2020, the deadline by which Waterfront Toronto and Sidewalk Labs must negotiate and determine whether or not to approve the principal implementation agreements.

19. In October 2019, Waterfront Toronto and Sidewalk Labs reached alignment on various issues identified by Waterfront Toronto (the “Threshold Issues”). With the alignment on the Threshold Issues, Waterfront Toronto’s Board of Directors unanimously directed management to proceed with the evaluation of the proposal for the Quayside project on October 31, 2019.
20. With the Threshold Issues aligned, Waterfront Toronto has begun the formal evaluation of the Draft MIDP, based on a process created in consultation with the Waterfront Toronto Board of Directors and government stakeholders. The formal evaluation will include an integrated and collaborative due diligence review process with external experts, focusing on the potential risks and benefits of each idea and issue presented in the Draft MIDP, including but not limited to:
  - (a) whether the MIDP meets Waterfront Toronto’s goals and objectives;
  - (b) whether the MIDP aligns with the planning framework for the Waterfront area;  
and
  - (c) whether the proposed business plan is viable and in the public interest.
21. As part of the evaluation process, Waterfront Toronto will also take into account feedback from Waterfront Toronto’s arm-length Digital Strategy Advisory Panel

(“DSAP”) (described further below), public consultations and a Preliminary Human Rights Impact Assessment, which is currently underway.

22. Even if the Quayside Project receives approval from Waterfront Toronto’s Board of Directors by the approval deadline, being March 31, 2020, and the principal implementation agreements are finalized and approved by the principal implementation agreement deadline, being December 31, 2020, any implementation of the Quayside Project will continue to require approvals from the City of Toronto and will be required to meet all federal and provincial, and municipal regulations.
23. Waterfront Toronto has not yet identified all of the innovations that might be pursued at Quayside nor how they might be implemented and by whom. Neither the Framework Agreement, the PDA, nor the Draft MIDP (as will be amended by the Innovation Plan to be defined) confirm or crystalize the innovations at Quayside or how those technologies will be developed. These previous agreements and the Draft MIDP only set out the process by which such innovations would be developed and evaluated in the future. Indeed, it may be the case that Sidewalk Labs is not the solution provider for some or all of the innovations. The procurement of such partners has yet to be determined.
24. It is not anticipated that construction on the Quayside project will begin until at least 2023. Before construction can begin, Waterfront Toronto will need to consult with all three level of governments, seek permit and development approvals, and engage in RFPs to contract with developers and builders, amongst other things.

### **The Consultation Process and Evaluation Process is Ongoing**

25. Waterfront Toronto has released the draft MIDP to the public and is seeking feedback on the draft MIDP from the public through various consultation processes. Public consultations will continue into 2020.
26. DSAP, an arm's length panel of experts who are recognized as leaders or experts in their respective fields, advises Waterfront Toronto on how best to incorporate data privacy, digital systems, and the safe and ethical use of technologies throughout the waterfront revitalization area and not just with respect to Quayside. DSAP has provided Waterfront Toronto with a preliminary review of the Draft MIDP. DSAP's review is in the form of a Preliminary Commentary and Questions document dated August 19, 2019.
27. Based on the feedback from the Draft MIDP formal evaluation, ongoing public consultations and the Preliminary Human Rights Impact Assessment, Waterfront Toronto staff may seek further amendments to the draft MIDP and/or the Innovation Plan prior to seeking Waterfront Toronto Board of Directors' approval.
28. If Waterfront Toronto decides to proceed, then it is expected that Waterfront Toronto and Sidewalk Labs will then negotiate a series of principal implementation agreements, and determine whether or not to approve the principal implementation agreements before the deadline of December 31, 2020.
29. Even if Waterfront Toronto approves a MIDP with Sidewalk Labs, the Quayside Project will continue to require various approvals through the City of Toronto and will be required to meet all federal and provincial regulations.

## Prematurity

30. The relief sought in the Notice of Application is premature. A factual foundation is necessary before determining whether an action or a law is subject to judicial review.
31. Any harms that may arise from this Project, including any potential *Charter* breaches are speculative at this time. There is no complaint of any actual *Charter* infringement at this time. The applicants' case is premised on the speculation that there will be a *Charter* infringement in the future based on a draft agreement that is far from being finalized and has not been approved by Waterfront Toronto. Even when, and if approved, it will not be implemented for years.
32. The privacy harms are also speculative. The notice of application asserts that a breach of privacy may arise in the future. Theoretical privacy breaches are not privacy breaches. Under the Personal Information Protection and Electronic Documents Act ("PIPEDA"), a privacy breach occurs only when:
  - (a) an organization fails to establish appropriate security safeguards, or its security safeguards are breached,
  - (b) this failure or breach results in "the loss of, unauthorized access to or unauthorized disclosure of personal information," and
  - (c) there is a resulting "real risk of significant harm" to affected individuals.
33. PIPEDA defines "significant harm" as including "bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities,

financial loss, identity theft, negative effects on the credit record and damage to or loss of property” (s. 10.1(7)). The circumstances relevant to determining whether a breach of security safeguards creates a “real risk of significant harm” include the sensitivity of the personal information involved in the breach and the probability that the personal information has been, is being, or will be misused. This definition contemplates a specific act, or failure to act, that brings about a particular consequence that satisfies a concrete legal test.

34. Having regard to the Quayside Project, none of these components of the definition of a “breach” are met, there is:
- (a) no demonstrated failure of an organization to establish appropriate security safeguards;
  - (b) no breach of such safeguards;
  - (c) no resulting loss of, unauthorized access to, or unauthorized disclosure of personal information; and
  - (d) no resulting real risk of significant harm to affected individuals.
35. The development of the Quayside project has not yet been approved. Waterfront Toronto and Sidewalk Labs have not finalized the MIDP or any implementation agreements. Even after the MIDP is finalized, the Quayside project will be subject to approval by the City of Toronto and the Provincial and Federal governments.



36. The consultation process with respect to the MIDP is not yet complete. Waterfront Toronto will refine its position and response to the MIDP once the consultations are complete. The criticisms or concerns expressed in the Notice of Application may become moot.
37. The result of the consultation process should not be prejudged. The consultation process set out by Waterfront Toronto should follow its course and the applicants should not be permitted to bring an application that amounts to seeking a judicial opinion on a draft agreement.
38. The expert reports filed by the applicants rely upon proposal documents from Sidewalk Labs, including the Sidewalk Labs response to the RFP and Sidewalk Labs Digital Governance Proposal dated October 2018, which is marked as draft.
39. The remedial action sought by the applicants is not justified as the link between the action and the future harm is not capable of proof at this time.
40. Judicial economy and the principles of proportionality support striking the application because depending on the outcome of the consultation process, Waterfront Toronto's review process, and the federal, provincial and City of Toronto processes, the application may not be required.
41. The respondents should not be put to the unnecessary and significant expense to respond with expert evidence, cross-examinations and legal submissions to a speculative and premature legal proceeding.

### **Public Interest Standing**

42. There is no serious justiciable issue raised and thus the applicants, Lester Brown and the CCLA, fail to meet the first and third branch of the test for public interest standing. The first and third branch of the test for public interest standing involve the same considerations as those on the prematurity doctrine.

### **Statutory Authority**

43. The grounds of the application challenging whether Waterfront Toronto had the statutory authority to enter into the Framework Agreement and the Plan Development Agreement should proceed to a hearing (described above as the “Statutory Authority Issue”).
44. However, the Statutory Authority Issue should be determined without the consideration of future alleged privacy breaches as those allegations are not ripe for review. To have those issues adjudicated at this time would be contrary to the principles of judicial economy and proportionality. Further, it risks causing prejudice to the parties as the issues cannot be adjudicated on a full a factual record and would instead be based on speculation over future facts and actions.
45. The proposed draft Order at Schedule “A” allows for a hearing of the issues that are ripe for review and strikes those grounds that are premature.

### **General**

46. Section 106 of the *Courts of Justice Act*, RSO 1990, c. C-43.
47. Rule 21 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194.

48. Clause 4.7 of Schedule 1 of PIPEDA and sections 10.1(7) and 10.1(8) of PIPEDA.
49. *Toronto Waterfront Revitalization Corporation, 2002*, S.O. 2002, c. 2.8
50. Such further and other grounds as counsel may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

51. Affidavit of Kristina Lynne Verner, affirmed January 17, 2020
52. Such further and other material as counsel may advise and this Court may permit.

January 17, 2020

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