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Where The Sidewalk Ends: The Governance Of Waterfront Toronto’s Sidewalk Labs Deal

Alexandra Flynn
Mariana Valverde*

In May 2020 Sidewalk Labs, the Google-affiliated ‘urban innovation’ company, announced that it was abandoning its ambition to build a ‘smart city’ on Toronto’s waterfront and thus ending its three-year relationship with Waterfront Toronto. This is thus a good time to look back and examine the whole process, with a view to drawing lessons both for the future of Canadian smart city projects and the future of public sector agencies with appointed boards. This article leaves to one side the gadgets and sensors that drew much attention to the proposed project, and instead focuses on the governance aspects, especially the role of the public ‘partner’ in the contemplated public-private partnership. We find that the multi-government agency, Waterfront Toronto, had transparency and accountability deficiencies, and failed to consistently defend the public interest from the beginning (the Request for Proposals issued in May of 2017). Because the public partner in the proposed ‘deal’ was not, as is usually the case in smart city projects, a municipal corporation, our research allows us to address an important question in administrative law, namely: what powers should administrative bodies outside of government have in crafting smart city policies?

In Canada, the comparatively limited Canadian scholarly work regarding urban law and governance has mainly focused on municipal governments themselves, and this scholarly void has contributed to the fact that the public is largely unaware of the numerous local bodies that oversee local matters beyond municipal governments. This paper hones into the details of the WT-Sidewalk Labs partnership to understand the powers and limitations of WT in assuming a governmental role in establishing and overseeing ‘smart city’ relationships. It ultimately argues that WT has not been – nor should it be – empowered to create a smart city along Toronto’s post-industrial waterfront. Such tasks, we argue, belong to democratic bodies like municipalities. An important contribution of this paper is to situate the evolving role of public authorities in the local governance literature and in the context of administrative law.

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of public sector agencies with appointed boards. This article leaves to one side the gadgets and sensors that drew much attention to the proposed project, and instead focuses on the governance aspects, especially the role of the public ‘partner’ in the contemplated public-private partnership. We find that the multi-government agency, Waterfront Toronto, had transparency and accountability deficiencies, and failed to consistently defend the public interest from the beginning (the Request for Proposals issued in May of 2017). Because the public partner in the proposed ‘deal’ was not, as is usually the case in smart city projects, a municipal corporation, our research allows us to address an important question in administrative law, namely: what powers should administrative bodies outside of government have in crafting smart city policies?

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I. INTRODUCTION

In 2017, Waterfront Toronto [WT] issued a Request for Proposals [RFP], seeking what they called an “innovation and funding partner,” an entity that would come up with a plan to develop a small empty site on the downtown waterfront, Quayside, which was next on the agency’s development list.¹ The RFP was highly unusual for a public agency that has long been assembling and cleaning up contaminated brownfield sites along the edge of Lake Ontario, since it was not clear whether they wanted a regular developer or a technology-oriented company, or some combination of the two. Over the past twenty years, condo developers have bought and developed the bulk of the formerly public land along the lake, but WT developed and maintained a reputation for public-mindedness, and built a number of small but very aesthetically and environmentally friendly parks

¹ Waterfront Toronto, “Request for Proposals Innovation and Funding Partner for the Quayside Development Opportunity, RFP No: 2017-13 (March 2017), online: <<https://quaysidetoronto.ca/wp-content/uploads/2019/04/Waterfront-Toronto-Request-for-Proposals-March-17-2017.pdf>> [RFP].

that were very well received. WT also brokered a small amount of new public housing and a few buildings of public benefit, such as a new YMCA and community college buildings.

The RFP was won by a nearly new company, Sidewalk Labs, founded as an offshoot of Alphabet and the sister company of Google Inc., headed since the beginning by Dan Doctoroff, a financier who had acted as deputy mayor of New York City when his former boss Michael Bloomberg was mayor. According to federal government emails obtained by a journalist through Access to Information, and also according to a critical report on the Quayside procurement carried out by the Ontario Auditor General, the federal Liberal government was heavily involved in steering Google and its offshoots in the direction of Waterfront Toronto.² Former Google CEO Eric Schmidt stated in public, in 2017, that he and the Prime Minister had been talking “for a couple of years” about a potential ‘smart city’ project in Toronto.³ While this background is important, this article is not a journalistic exposé of federal backdoor interference with city planning in Toronto, however. Instead, drawing on the literature on the powerful public entities that lie beyond government proper, we focus on WT itself, putting the ‘deal’ with Sidewalk in its proper institutional context, in order to contribute to the scant Canadian literature on public authorities lying beyond government itself.

Special-purpose public authorities are ubiquitous, indeed are more numerous than governments.⁴ Some are time-limited (say an urban development corporation set up to revitalize a particular urban intersection), but many are ongoing, such as transit, housing and conservation authorities, and public utilities.⁵ Generally they are spatially limited, say to the territory of a municipality or to the area served by a particular utility. Because they are spatially restricted and thus seem ‘small’, their often significant governing powers tend to fly below the radar. For example, the Los Angeles County water authority (which covers dozens of municipalities) functioned for many years without much scrutiny, but its decisions are now more controversial

² Ontario, Office of the Auditor General, “Annual Report 2018” at 649, online: <http://www.auditor.on.ca/en/content/annualreports/arreports/en18/v1_315en18.pdf>.

³ Josh Okane, “Inside the mysteries and missteps of Toronto’s smart-city dream” *The Globe and Mail* (17 May 2019), online: <<https://www.theglobeandmail.com/business/article-inside-the-mysteries-and-missteps-of-torontos-smart-city-dream/>>.

⁴ This paper uses the term ‘public entities’ to describe the broad range of legal entities that are created by governments. Agencies, boards, commissions or corporations (ABCs) is used to mean those legal entities that have a clear and direct reporting relationship to a specific government. ‘Public entities’ is a larger and not clearly defined category.

⁵ James F Wolf, “Urban Governance and Business Improvement Districts: The Washington, DC BIDs” (2006) 29:1-3 *Intl J Public Administration* 53, online: <doi-org.ezproxy.library.ubc.ca/10.1080/0190069050040898>; Nathaniel M Lewis, “Grappling with Governance: The Emergence of Business Improvement Districts in a National Capital” (2010) 46:2 *Urban Affairs L Rev* 180, online: <doi-org.ezproxy.library.ubc.ca/10.1177/1078087410378844>; Kevin Ward, “Business Improvement Districts: Policy Origins, Mobile Policies and Urban Liveability” (2007) 2:2 *Geography Compass* 657, online: <doi.org/10.1111/j.1749-8198.2007.00022.x>; William J Mallett, “Private Government Formation in the DC Metropolitan Area” (1993) 24:3 *Growth & Change* 385, online: <doi.org/10.1111/j.1468-2257.1993.tb00132.x>

and more politicized due to recurring shortages of water from the Colorado River, which cause conflicts that cross state lines as well as conflicts between the municipalities that lie within and jointly govern the Los Angeles County water district.⁶

In Canada, the comparatively limited Canadian scholarly work regarding urban law and governance has mainly focused on municipal governments themselves, leaving a tremendous gap in the literature. The public is largely unaware of the numerous local bodies that oversee local matters beyond municipal governments despite the critical role that these entities play in their day-to-day lives. Case law has also left uncertain how much deference should be given to municipalities and such bodies, and the extent to which they are subject to constitutional requirements, including the *Charter of Rights and Freedoms*. These issues go to the heart of democratic governance in Canada.

As a special-purpose public authority, WT largely escaped critical notice – until it announced the unprecedented awarding of a vague bid for a stretch of the city’s waterfront to an American Google-affiliated corporation. Created in the wake of a failed Olympic bid - which is partly why it was from the start a tri-government agency, unusually for public agencies - WT had a good general reputation for many years.⁷ Unlike most other public authorities it insisted on serious community consultations, and was open to suggestions from local environmentalists as well as other residents. While there was some grumbling amongst the citizenry about the ‘condofication’ of the waterfront, Torontonians often compared WT’s process favourably to the cumbersome and jargon-laden planning consultations undertaken by the city proper, which in any case often generated even taller condo buildings than those on the waterfront.

It therefore came as a surprise to many when WT refused to make public any of the bid documents and to disclose its agreement with Sidewalk Labs for almost a year. Further, the initial public engagement sessions held after the RFP was awarded were run by Sidewalk Labs, not WT. Almost two years later, Sidewalk Labs delivered the Master Innovation and Development Plan (MIDP), where it proposed replacing WT with a more empowered entity, together with a number of other bodies meant to deliver on a waterfront plan.⁸ Following widespread controversy, bold

⁶ See e.g. Greg Johnson, “Drought: Officials are considering a tough new round of mandatory restrictions to cope with the shortage” *Los Angeles Times* (1 April 1990), online: <<https://www.latimes.com/archives/la-xpm-1990-04-01-me-750-story.html>>; and Scott Harris, “Metropolitan Water District: A Giant in Southern California's Success”, *Los Angeles Times* (1 April 1990), online: < <https://www.latimes.com/archives/la-xpm-1990-04-01-mn-1096-story.html>>.

⁷ At the time of WT’s creation, Toronto’s waterfront area includes parcels of land owned by the three levels of government, who each had a vested interest in waterfront development. This is another reason that WT was created as a tri-governmental body (see e.g. The Forks North Portage Partnership <<https://www.theforks.com/about/partnership/>>; Gabriel Eidelman, “Three’s Company: A Review of Waterfront Toronto’s Tri-government Approach to Revitalization” *Mowat Centre* (20 December 2013) no 79, 1).

⁸ Sidewalk Labs, *Master Innovation and Development Plan* (June 2019), online: <<https://quaysideto.ca/sidewalk-labs-proposal-master-innovation-and-development-plan/>> [MIDP]; Stephen Diamond, “Open Letter from Waterfront Toronto Board Chair, Stephen Diamond regarding Quayside” *Waterfront Toronto* (24 June 2019),

attempts by Sidewalk Labs to broaden the sweep of the project, and significant legal uncertainties, the Google sister company retreated from the project in May 2020.⁹

Despite the death of the ‘deal’, the story of the unprecedented partnership has many critical lessons for students of governance and local law. Given scandals about big American tech companies and personal data, the protection of personal data has been of particular interest to advocates. Most notably, the Canadian Civil Liberties Association [CCLA] commenced a lawsuit against WT in the spring of 2019 arguing that WT never had the power to issue and award the RFP. The action was substantively driven by concerns about data issues including privacy; although there was also a challenge to WT’s authority, in particular that WT never had the legal jurisdiction to create a smart city.¹⁰ In addition, a local advocacy group, #BlockSidewalk, raised broader questions related to transparency, focused on data but also on what was often called ‘a land grab’.¹¹

With public attention having largely focused on privacy and data mining, the governance implications of the proposed project largely escaped focus. This paper argues that WT has not been – nor should it be – empowered to create a smart city along Toronto’s post-industrial waterfront. Such tasks, we argue, belong to democratic bodies like municipalities. WT is not abandoning its ambitions, and is still (as of June 2020) planning to work on ‘intelligent community’ guidelines. It may well get involved in other ‘smart city’ planning initiatives and, as such, Sidewalk Labs’ departure does not end the urgency of the issues. An important contribution of this paper is to situate the evolving role of public authorities in the local governance literature and in the context of administrative law. This investigation is much needed given the lack of judicial analysis of the differences between municipalities and public bodies like WT under Canadian administrative law (the lawsuit by the CCLA will almost certainly be abandoned now that Sidewalk Labs has announced its withdrawal).

II. PUBLIC ENTITIES AND LOCAL GOVERNANCE

The use of public extra-municipal or supra-municipal entities in local infrastructure, transit, and urban development is nothing new. Municipalities and other governments have long adopted them,

online:

<https://waterfronttoronto.ca/nbe/wcm/connect/waterfront/waterfront_content_library/waterfront+home/news+room/news+archive/news/2019/june/open+letter+from+waterfront+toronto+board+chair,+stephen+diamond+regarding+quayside>.

⁹ Daniel L. Doctoroff, “Why we’re no longer pursuing the Quayside project — and what’s next for Sidewalk Labs,” Medium (7 May 2020), online: <<https://medium.com/sidewalk-talk/why-were-no-longer-pursuing-the-quayside-project-and-what-s-next-for-sidewalk-labs-9a61de3fee3a>>.

¹⁰ Canadian Civil Liberties Association, “CCLA commences proceedings against Waterfront Toronto” (16 April 2019), online: <<https://ccla.org/ccla-commences-proceedings-waterfront-toronto/>> [CCLA].

¹¹ Block Sidewalk (website), online: <<https://www.blocksidewalk.ca>>.

although there is a great variety amongst them in terms of legal structure, size and mandate.¹² For more than a hundred years, across Canada and beyond, private bodies supplied or managed what are considered to be local goods.¹³ In many cases large public authorities (like the Toronto Transit Commission) emerged out of a municipal take-over of one or several existing privately owned services. Other entities, such as Ontario's many conservation authorities (whose territory is generally a watershed, hence overlapping with different municipalities) were set up for more novel purposes.

If for most of the twentieth century the trend was towards public ownership and control of utilities and transit, in more recent years, across all political ideologies, "governments have increasingly turned to external providers for the delivery of public services, and we have begun to see the emergence of public-private hybrids that defy simple classification."¹⁴ The Province of Ontario was unusual in Canada for its historical reliance on public entities outside of municipal governments to deliver local services, although all provinces across the country have created public entities in various legal forms.¹⁵ Municipalities in Ontario have tended to adopt special purpose bodies to oversee municipal affairs, especially where a conflict has occurred regarding spending.¹⁶

The long-standing existence of public entities (authorities, commissions, and so on) and their use across the political spectrum defies the claim made by some critics that governments are privatizing everything.¹⁷ Justifications for the creation of and continuing support for public entities include civil servant-driven institutional reform; a purported desire to separate politics and administration; elite interests seeking to control public entities; and the perception that public entities are better able to manage projects and attract investment than municipal governments.¹⁸ These rationales may apply differently to public entities depending on their mandates and

¹² Ontario, Minister of Government Services, *Report of The Special Advisor on Agencies* by Rita Burak, (2010), online: <<https://docs.ontario.ca/documents/2031/burak-report-on-agencies.pdf>>; Zachary Spicer, "Regionalism, Municipal Organization, and Interlocal Cooperation in Canada" (2015) 41:2 *Can Public Policy* 137, online: <doi.org/10.3138/cpp.2014-078>; Jack Lucas, "Berlin, Ontario, in the Age of the ABC" (2013) 41:2 *Urban History Rev* 19, online: <doi.org/10.7202/1015378ar>; S M Makuch, "Bora Laskin and Municipal and Planning Law" (1985) 35:4 *UTLJ* 469, online: <doi.org/10.2307/825538>; Gary Sturgess, "Frugal Innovation: Beyond the Concepts Of 'Public' and 'Private'" in John Wanna, Hsu-Ann Lee & Sophie Yates, eds, *Managing Under Austerity, Delivering Under Pressure: Performance and Productivity in Public Service* (Canberra: Australian National University Press, 2015) 183.

¹³ Lucas, *supra* note 12; Makuch, *supra* note 12; Sturgess, *supra* note 12.

¹⁴ Sturgess, *supra* note 12 at 186.

¹⁵ Winston W Crouch, "Foreign Government and Politics: Administrative Supervision of Local Government: The Canadian Experience" (1949) 43:3 *American Political Science Rev* 509, online: <doi.org/10.2307/1950072>.

¹⁶ Lucas, *supra* note 12 at 22.

¹⁷ Mariana Valverde, "Ad Hoc Governance: Public Authorities and North American Local Infrastructure in Historical Perspective" in Michelle Brady & Randy K Lippert, eds, *Governing Practices: Neoliberalism, Governmentality, and the Ethnographic Imaginary* (Toronto: University of Toronto Press, 2016) 199.

¹⁸ Lucas, *supra* note 12.

visibility. In her study of private-public partnerships, Mariana Valverde concluded that North America has long utilized an ‘ad hoc’ approach to these public authorities, without a coherent or even constrained general legal framework, unlike the United Kingdom for example. She states, “[P]rovincial and state legislatures appear to have been more concerned with defining and limiting the powers of municipal corporations than with governing (or even counting) the vast number of public and quasi-public special-purpose bodies that do a great deal of the unsung work of local governance.”¹⁹ These entities have very little in common amongst them.²⁰

Legal research on these entities is rather lacking, probably because they are so diverse, and for the most part lead shadowy institutional lives removed from the kind of public and legal scrutiny faced by municipal councils. As administrative bodies, municipal governments and public entities are each tasked with facilitating public services,²¹ but the latter are created on an *ad hoc* basis without a system-wide design or singular model.²² Oversight also differs widely, ranging from official representation on the public entity’s decision-making body, control of finances, direct citizen representation, or some combination of all three.²³ In some cases, public entities may be jointly governed by multiple governments (though this is rather unusual), or responsibility for oversight may be uncertain, e.g., with regard to water utilities.²⁴ In all cases, the legal structure of local bodies shapes, usually quietly, who holds decision-making power, how it is exercised, and openness and accountability.²⁵ Valverde writes that public entities “live in the political shadows, emerging into public view only when there are spending scandals or major jurisdictional disputes. ... Sporadic local media coverage of occasional interjurisdictional or purely local infighting does not help to shed much light on the general workings of the political-legal-informal governing assemblages that underpin the formally existing entities that in turn build and operate many key local infrastructures.”²⁶

An administrative law lens on public entities broadly is important for two reasons. First, while legal scholars and political scientists often equate local governance with the formal municipal apparatus, local governance in Canada and in other countries, cannot be properly grasped by solely studying the workings of the municipality. The legal form of municipal governments are fairly consistent and standardized, even across jurisdictions.²⁷ In contrast, public entities are often legally

¹⁹ Valverde, *supra* note 17 at 200-201.

²⁰ *Ibid* at 205.

²¹ Makuch, *supra* note 12.

²² Valverde, *supra* note 17.

²³ Wilbert L Ziegler, “Acquisition and Protection of Water Supplies by Municipalities” (1959) 57:3 Mich L Rev 349, online: <doi.org/10.2307/1286339>.

²⁴ Kathryn Furlong & Karen Bakker, “Governance and Sustainability at a Municipal Scale: The Challenge of Water Conservation” (2011) 37:2 Can Pub Pol’y 219, online: <watergovernance.sites.olt.ubc.ca/files/2010/04/FurlongBakker_GovncSust_WatConsvn.pdf>.

²⁵ Richard C Schragger, “Decentralization and Development” (2010) 96:8 Va La Rev 1837, online: <jstor.org/stable/27896334>.

²⁶ Valverde, *supra* note 17 at 207.

²⁷ *Ibid* at 209.

distinct from one another. They call into question the Hegelian form as a “well ordered political life,” meaning a neutralized, bureaucratized and clear set of rules.²⁸ Local governance bodies cannot be easily reducible to the binaries of law/non-law and private/public, but are instead part of a more complex universe of local governance with an overlapping set of norms, orders, rules and practices. Municipalities and public entities, including WT, are affected by the overlapping set of formal and informal, and state and non-state laws within which it operates, as this paper investigates.

Courts, too, have recognized the complexity in what counts as a ‘public’ body. In *McDonald v Anishinabek Police Service*, the court set out a list of factors to assist in determining whether an entity is a public body.²⁹ The *McDonald* factors support a conclusion that Waterfront Toronto is a public body. Waterfront Toronto was formed by the governments of the day, at all three levels, “to oversee all aspects of the planning and development of Toronto’s central waterfront.”³⁰ The fractured land holdings by each of the governments could have continued, with discrete developments or *ad hoc* agreements. Instead, the governments created WT and gave it a mandate to carry out tasks that could otherwise have been undertaken by governments themselves.

Second, in Canadian jurisprudence, the question as to whether there is any significant distinction between municipal governments and public bodies like Waterfront Toronto remains unanswered. Under the *Constitution Act, 1982*, only two governments are named – federal and provincial – with municipalities considered ‘creatures’ of the province.³¹ As such, local governments are reviewable based on administrative law principles like any other public body. Under administrative law, a public body is subject to judicial review, meaning that a court can assess whether the entity’s decisions meet fairness standards and if the entity exceeded its powers, and what is and is not a public body and hence subject to judicial review depends more on the function it actually plays than on statutes or other founding documents. The law to determine whether an entity is a public body reviewable by the court was summarized in the case *McDonald*

²⁸ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (London: Butterworths: 2002) at 71.

²⁹ *McDonald v Anishinabek Police Service* (1996), 83 OR (3d) 132, 276 DLR (4th) 460 (Ont Sup Ct J) [*McDonald v Anishinabek Police Service*] at para 74. The factors are: the source of the board’s powers; the functions and duties of the body; whether government action has created the body, or whether, but for the body, the government would directly occupy the area, such that there is an implied devolution of power; the extent of the government’s direct or indirect control over the body; whether the body has power over the public at large, or only those persons who consensually submit to its jurisdiction; the nature of the body’s members and how they are appointed; How the board is funded; the nature of the board’s decisions—does it seriously affect individual rights and interests; whether the body’s constituting documents, or its procedures, indicate that a duty of fairness is owed; and the body’s relationship to other statutory schemes or other parts of government, such that the body is woven into the network of government.

³⁰ “Accountability”, Waterfront Toronto, online: <waterfronttoronto.ca/nbe/portal/waterfront/Home/waterfronthome/about-us/accountability>.

³¹ *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss 91 & 92.

v Anishinabek Police Service.³² The court held that “if the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may ... be sufficient to bring the body within the reach of judicial review.”³³ The court also cites *Masters v Ontario*,³⁴ summarizing: “in my view, in determining whether a body is subject to judicial review, the court must look, not only at the source of the power, but the nature of [the] body's functions. Even where the body is not constituted under statute, or prerogative power, if the body is fulfilling a governmental function, then the body is part of the machinery of government and is subject to public law.”³⁵

Municipalities are considered administrative bodies, not governments, under Canadian law.³⁶ However, the *Charter of Rights and Freedoms* applies to all aspects of government, including the legislative, executive and administrative branches, as well as municipalities and municipal by-laws.³⁷ In *Godbout*, Justice La Forest (with McLachlin and l’Heureux-Dubé JJ concurring) stated in a concurrent opinion that:

Municipalities can only be described as "governmental" entities: like Parliament and provincial legislatures, they are democratically elected and accountable to their constituents, possess a general taxing power, and make, administer, and enforce laws within a defined territorial jurisdiction. Most significantly, they derive their existence and authority from the provinces. Since the *Charter* clearly applies to provincial legislatures and governments, it must apply to entities upon which they confer governmental powers. Otherwise, provinces could simply avoid the application of the *Charter* by devolving powers on municipal bodies. The *Charter* therefore applies to municipalities.³⁸

Despite these purportedly blunt lines of authority, the SCC has carved out a rather distinct role for local democracies, with municipal decisions almost always judicially reviewed based on a standard of reasonableness. In *Catalyst Paper v North Cowichan*, the SCC noted the unique nature of municipal decisions at para 19:

The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than

³² *MacDonald*, *supra* note 29.

³³ *Ibid* at para 71.

³⁴ *Masters v Ontario*, 16 OR (3d) 439, [1993] OJ No 3091, 110 DLR (4th) 407 (Ont Ct J).

³⁵ *MacDonald*, *supra* note 29 at para 73.

³⁶ *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)* 2001 SCC 40.

³⁷ See e.g. *Godbout c. Longueuil (Ville)* (1997), [1997] 3 SCR 844 (SCC) [*Godbout*].

³⁸ *Ibid* at 4.

adjudicative in nature. Bylaws are not quasi-judicial decisions. ... [R]easonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.

The municipality has thus been given broad deference, with the proviso that bylaws conform to the rationale of the statutory regime set up by the legislature.³⁹ A bylaw is unreasonable only where “no reasonable body informed by these factors could have taken will the bylaw be set aside,”⁴⁰ sounding a lot like the now-defunct common law standard of patent unreasonableness. This approach to reviewing municipal decisions was largely unchanged in *Vavilov*.⁴¹ Public bodies that focus on ‘professional’ and ‘analytical’ decision-making may fail to consider those affected by regulations and policies.⁴² In our view, conceptualizing municipalities as governments incorporates democratic deliberation by design, in contrast to more technocratic bodies. As this paper details, the fact that the City of Toronto is an elected body is a fundamental reason why it should craft complex legal and policy frameworks, instead of a public entity such as WT, much less private entities like Sidewalk Labs.

III. WATERFRONT TORONTO AS A *SUI GENERIS* TRIPARTITE ‘PUBLIC’ BODY

Each public entity has its own legal story of how it was created, how it is regulated and how it performs its role. WT is not a ‘government’. It does not form a part of the federal Parliament, the Ontario legislature, or City Council. It does not have elected officials and can’t exercise taxation, lawmaking, or enforcement powers.⁴³ WT was created by the federal, provincial and municipal governments to deliver the Toronto Waterfront Revitalization Initiative (TWRI), to enable the City of Toronto, the Province of Ontario, and the Government of Canada to work together to address the city’s contaminated and economically undeveloped waterfront area. Each government has provided funding and land contributions to support the TWRI.⁴⁴ WT was created with a 25-year

³⁹ *Ibid* at para 25.

⁴⁰ *Ibid*.

⁴¹ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. See also Alexandra Flynn, “There’s a New Boss in Town: Vavilov and Municipalities,” *Administrative Law Matters Blog* (30 April 2020), online: < <https://www.administrativelawmatters.com/blog/2020/04/30/theres-a-new-boss-in-town-vavilov-and-municipalities-alexandra-flynn/>>.

⁴² Blake Emerson, *The Public’s Law: Origins and Architecture of Progressive Democracy* (New York: Oxford University Press, 2019) at 169.

⁴³ *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483, at para 105, 76 DLR (4th) 700 (SCC) [*Stoffman v. Vancouver General Hospital*].

⁴⁴ City of Toronto, *Waterfront Strategic Review*, staff report by Acting City Manager John Livey to the Executive Committee, action required, ex7.6 (19 June 2015), online: <toronto.ca/legdocs/mmis/2015/ex/bgrd/backgroundfile-81763.pdf> at 1 [*Strategic Review*].

mandate, which officially ends in 2027, with approximately \$30 billion in long-term funding commitments from the three governments.⁴⁵

Legally, WT is a provincial corporation. Its purposes and powers are set out in the *Toronto Waterfront Revitalization Act, 2002* [Act].⁴⁶ As a corporation, Waterfront Toronto derives its power from the *Business Corporations Act* and has the capacity, rights, powers, and privileges of a natural person, except as limited by the Act.⁴⁷ Waterfront Toronto lacks statutory powers beyond its general corporate powers. Furthermore, its ability to borrow money, raise revenue, and create subsidiary corporations is highly restricted.⁴⁸ WT is a public entity, designed to deliver its purposes within a larger government framework. But, WT does not fall within the City of Toronto's definition of a "local body," which includes hundreds of organizations that deliver part of the municipality's suite of programs and services, nor is it a provincial or a federal crown corporation. WT is therefore not subject to the same privacy and disclosure requirements of any of the three governments.⁴⁹

A key point is that most public authorities are under the control of a single government. However, in the case of WT, the three levels of government (collectively or individually, depending on the issue) must ultimately provide final approval for land transactions and non-routine financial dealings. Further, unlike many similar development bodies in the United States, Waterfront Toronto does not have its own budget or delegated powers: it cannot impose fees, and cannot independently seek financing using land it holds as collateral

The objects of WT are set out in the Act. WT's principal responsibility is 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."⁵⁰ The corporation must carry out the objectives established in the Act that ensures growth in the job market and diversity in the community with regard to the Official Plan of the City of Toronto.⁵¹ WT must ensure that development in the designated waterfront area continues in a self-sustaining manner; that it promotes and encourages the involvement of the private sector in waterfront development; and that it encourages public sector involvement.⁵² The City of Toronto has described WT's functions as follows, "WT has been the primary delivery entity through which a range of revitalization

⁴⁵ "Infrastructure Canada and the Toronto Waterfront Revitalization Initiative", Infrastructure Canada, last modified 16 October 2018, online: <infrastructure.gc.ca/twri-irrt-eng.html> at 1.

⁴⁶ *Toronto Waterfront Revitalization Corporation Act, 2002*, SO 2002, c 28 [*Waterfront Act*].

⁴⁷ *Business Corporations Act*, RSO 1990, c B.16.

⁴⁸ *Ibid.*, ss 4(2)–4(3.1).

⁴⁹ Note that WT has introduced its own Freedom of Information policy. See Waterfront Toronto, "Freedom of Information Policy," online: <https://waterfronttoronto.ca/nbe/wcm/connect/water-front/a5e2f8b0-2bc2-48f3-95fe-9529309cf74e/freedom_of_information_policy_dec_5_2012_final_approved_1.pdf?M-OD=AJPERES>.

⁵⁰ *Waterfront Act*, *supra* note 46, s 3(1).

⁵¹ "About Us", Waterfront Toronto, online: <waterfronttoronto.ca/nbe/portal/waterfront/Home/waterfronthome/about-us>.

⁵² *Ibid.*

projects have been successfully implemented. These projects have included land servicing, soil remediation, flood protection, habitat restoration and enhanced public spaces, which, in turn, have encouraged and accelerated private sector redevelopment.”⁵³ There seems little doubt that WT is a public entity serving a public purpose.

There are significant limitations to WT’s powers. Its assets and revenues cannot be used for any purpose other than WT’s objectives;⁵⁴ and it may not mortgage or encumber its assets, borrow money, raise revenue, or create subsidiaries without the consent of the three governments.⁵⁵ WT has been subject to numerous evaluations and audits by all three governments, including ones taken by the federal government in 2008-2009,⁵⁶ the City of Toronto in 2015,⁵⁷ and, most recently, the Province of Ontario in 2018.⁵⁸ The three governments have consistently declined to offer any additional powers to Waterfront Toronto despite receiving repeated requests for new powers.

Although the corporation’s entire Board of Directors is appointed by the three levels of government, they do not appear to be at pleasure appointments. Rather, the appointments are for a fixed-term, with one possible re-appointment, and each of the three levels of the government appoints the same number of board members. It was held in *Stoffman v. Vancouver General Hospital* that fixed term appointments for the purpose of ensuring balanced representation does not support routine or regular control.⁵⁹ Although the board must follow directions of the governments concerning the management and supervision of the corporation, when read within the context of the Act, it appears that the government does not provide directors with input concerning all affairs of the corporation. Rather, the board has the power to create bylaws applicable to the management of the corporation. These bylaws are not subjected to approval by the government. This indicates that routine and regular control of Waterfront Toronto is in the hands of the board rather than the governments.

The three governments fund WT projects through contribution agreements.⁶⁰ The corporation must make its financial record available for inspection upon request by the government and must provide an annual report to the governments at the end of each fiscal year.⁶¹ It may only borrow money, raise revenue, and create subsidiary corporations if the government provides authorization.

⁵³ *Strategic Review*, *supra* note 44 at 1.

⁵⁴ *Waterfront Act*, *supra* note 46, s 4(4).

⁵⁵ *Ibid*, s 4.

⁵⁶ Environment and Climate Change Canada, *Evaluation of the Federal Government’s Participation in the Toronto Waterfront Revitalization Initiative*, approved by the Deputy Minister in 2008-2009, online: <ec.gc.ca/doc/ae-ve/2008-09/638/p2_eng.htm>.

⁵⁷ *Strategic Review*, *supra* note 44 at 1, Appendix B; This review included a performance assessment undertaken by Ernst & Young LLP (Ernst & Young LLP, “City of Toronto: Waterfront Toronto Performance Assessment” (2015), online: *Ernst & Young LLP* <toronto.ca/legdocs/mmis/2015/ex/bgrd/backgroundfile-81764.pdf>).

⁵⁸ Office of the Auditor General of Ontario, *Annual Report 2018*, vol 1 (2018) online: <auditor.on.ca/en/content/annualreports/arreports/en18/2018AR_v1_en_web.pdf> at 649 [Auditor General].

⁵⁹ *Stoffman v. Vancouver General Hospital*, *supra* note 43.

⁶⁰ *Accountability*, *supra* note 30.

⁶¹ *Waterfront Act*, *supra* note 46, s 11(1).

Government supervision of WT is clearly strong, but is not very transparent. WT's work is guided by an intergovernmental steering committee (ISC), a Contribution Agreement Funding Mechanism, and a Government Audit Framework.⁶² However, these oversight mechanisms are not transparent. For example, Gabriel Eidelman noted in 2013 that the ISC had not met since 2009.⁶³

No one level of government holds exclusive control and decision-making powers over WT. However, the City of Toronto, through its powers as a municipality and also through its role as major landowner, has a great deal of power over the renewal of the city's waterfront area. Waterfront Toronto's operations are expected to align with the plans of the City.⁶⁴ Provincial legislation gives much planning power to municipalities, including the authority to create binding land-use plans for districts such as Quayside. All precinct plans and development applications must be consistent with city policies such as the Official Plan and the Central Waterfront Toronto Secondary Plan. Technical standards for infrastructure, buildings and utilities must also be followed. City Council has the final say on all necessary zoning amendments and other legal changes.⁶⁵

In its communications, WT promises openness and transparency, and public consultations.⁶⁶ These duties are what the public would expect from the government in carrying out any project that has public law consequences. The corporation forms a part of the machinery of the government in developing public infrastructure that benefits the local community as well as the province and country at large. Its function is largely public and governmental in nature, but, importantly, it is not a municipality and is limited by its purposes and powers, as set out in applicable legislation.

IV. WATERFRONT TORONTO AND THE SIDEWALK LABS DEAL

In October 2017, WT announced with enthusiasm that Sidewalk Labs, a sister company of Google, had won a bid to develop a 12-acre section of the waterfront called Quayside.⁶⁷ Created

⁶² Lisa Taylor, "Item 3h - Governmental Accountability Framework," (6 April 2017) at 1, online: *Waterfront Toronto* <waterfronttoronto.ca/nbe/wcm/connect/waterfront/8139e8df-d336-40b1-b4f6-396c6b28fdbd/Item+3h+-+Government+Accountability+Framework+-+April+6%2C+2017+consolidated.pdf?MOD=AJPERES>.

⁶³ Eidelman, *supra* note 7 at 2.

⁶⁴ Memorandum of Understanding between the City of Toronto, the City of Toronto Economic Development Corporation and the Toronto Waterfront Revitalization Corporation (31 March 2006) [MOU].

⁶⁵ See e.g. Jeff Gray & Josh O'Kane, "Waterfront Toronto, Sidewalk Labs Walk Back Plans in New Deal" *The Globe and Mail* (31 July 2018), online: <theglobeandmail.com/canada/toronto/article-new-deal-between-waterfront-toronto-and-sidewalk-labs-walks-back-some>; City of Toronto, *Sidewalk Toronto Committee Decision*, Executive Committee consideration on January 24, 2018, ex30.9 (24 January 2018), online: <app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2018.EX30.9> [*Sidewalk Toronto*]

⁶⁶ *Waterfront Act*, *supra* note 46, s 3.

⁶⁷ Alex Bozokovic, "Google's Sidewalk Labs signs deal for 'smart city' makeover of Toronto's waterfront" *The Globe & Mail* (17 October 2017), online: <https://www.theglobeandmail.com/news/toronto/google-sidewalk-toronto-waterfront/article36612387/>.

in 2015, Sidewalk Labs is an urban technology company that is led by former Bloomberg CEO and New York deputy mayor Dan Doctoroff. The announcement proudly exclaimed that Sidewalk Labs would provide \$50 million (US) for creating the WT plan. And yet, contrary to past practice, neither the Framework Agreement, as it was known, nor the bid documents were made public, despite repeated requests.⁶⁸ WT and the City of Toronto both issued summaries of the agreement, but cited exceptions to its privacy policy as reasons why the documents were not disclosed.⁶⁹ Sidewalk Labs was tasked with creating a plan to develop the Quayside area and other lands along the waterfront area, integrating technological solutions to city services, housing and other initiatives to be defined.⁷⁰ City councillor Denzil Minnan-Wong, the sole public official on the WT board during the time of the bid approval, had seen the secret agreement, and he told his fellow councillors, at a meeting of council's executive committee in January of 2018, that "I know enough about the agreement that I think you would like to know more about the agreement [before you approve anything]."⁷¹

In a process lacking in any transparency, the Framework Agreement was replaced with the Plan Development Agreement [PDA] in July 2018, and both documents were then made public.⁷² As Ellen P. Goodman and Julia Powles wrote:

“[F]or the crucial first 18 months of the venture, many of the most consequential features of the Sidewalk Toronto project were hidden from view and unavailable for serious scrutiny. On basic questions about the proposed set of innovations, the

⁶⁸ John Lorinc, "Waterfront Toronto Gets Tough with Sidewalk Labs" *Spacing Toronto* (31 July 2018), online: <spacing.ca/toronto/2018/07/31/lorinc-waterfront-toronto-gets-tough-with-sidewalk-labs>

⁶⁹ *Sidewalk Toronto*, *supra* note 65.

⁷⁰ Waterfront Toronto, "Innovation and Funding Partner Framework Agreement Summary of Key Terms for Public Disclosure" (1 November 2017) at 1–2, online: *Waterfront Toronto* <sidewalktoronto.ca/wp-content/uploads/2018/05/Waterfront-Toronto-Agreement-Summary.pdf>; As stated at 2: "For the purposes of that planning work, there will be two sites included in the planning work of the MIDP [Master Innovation and Development Plan]: (i) Quayside which is the area bounded by Lakeshore Boulevard on the north, Bonnycastle Street on the west, Queens Quay Boulevard and its future extension to the south, and including 333 Lake Shore Boulevard East on the east and any developable lands created by any road realigned within the Quayside boundaries, and excluding any lands not publicly owned; and (ii) the Eastern Waterfront which is the area bounded by the Inner Harbour on the west, Keating Channel and Lake Shore Boulevard to the north, Lake Ontario to the south, and Leslie Street to the east... Quayside is the site on which the parties expect to first pilot the technologies and strategies included in the MIDP."

⁷¹ Bianca Wylie, "Report from Executive Committee on Sidewalk Toronto. Plus a Word About Consent, Consultation, and Innovation" *Medium* (30 January 2018), online: <https://medium.com/@biancawylie/report-from-executive-committee-on-sidewalk-toronto-93bbd2bb557f>

⁷² "Plan Development Agreement between Toronto Waterfront Revitalization Corporation and Sidewalk Labs LLC Dated the 31st Day of July, 2018" (31 July 2018) at 1, online: *Sidewalk Labs & Waterfront Toronto Revitalization Corporation* <waterfronttoronto.ca/nbe/wcm/connect/waterfront/73ac1c93-665b-4fb8-b19b-6bfa23c2a427/PDA+July+31+Fully+Executed+%28002%29.pdf?MOD=AJPERES> [Plan Development Agreement].

players defied public accountability: questions about data collection, data control, privacy, competition, and procurement. Even more basic questions about the use of public space went unanswered: privatized services, land ownership, infrastructure ownership and, in all cases, the question of who is in control.”⁷³

There were few powers to require transparency and public accountability from Sidewalk, its ‘sisters’ and its offspring, or to fully understand the legal scope of ‘Sidewalk Toronto’ or the public benefits of the proposed deal. Even the CCLA lawsuit focused mainly on privacy, somewhat on the powers of WT and its constitutional obligations, and not at all on the breadth of Sidewalk Labs’ corporate relationships and the public effects of its proposals.⁷⁴

After many delays, Sidewalk Labs presented to WT the Master Innovation and Development Plan [MIDP], released in late June 2019.⁷⁵ The 1,500+ page MIDP provided a “forward-thinking urban design and new digital technology, the aim is to create people-centred neighbourhoods that set new standards for sustainability, affordability, mobility, and economic opportunity for the people who live and work there.”⁷⁶ Despite the purported partnership with WT, Sidewalk Labs neither remained within the geographic boundaries of the original proposal, developed the MIDP in agreement with Waterfront Toronto, nor respected the mandate or structure of the entity.⁷⁷ Unexpectedly, the plan proposed replacing WT with a more empowered agency, creating a new transit authority for a much larger area than the initially proposed Quayside, and changing the planning framework for the waterfront area; not to mention changing provincial building regulations and a series of other existing laws and policies.

The MIDP left three fundamental questions unsettled, which remain meaningful both for the particularities of WT’s plans for Quayside, but also for the development of smart cities in any jurisdiction. First, it was never clear whether WT and Sidewalk acted together or separately on the smart-city project. WT board chair Stephen Diamond emphasized in a June 2019 letter that WT did not ‘co-create’ the plan.⁷⁸ Even so, the WT-Sidewalk Labs deal was known as ‘Sidewalk

⁷³ Ellen P Goodman & Julia Powles, “Urbanism Under Google: Lessons From Sidewalk Toronto” (2019) 88:2 *Fordham L Rev* 457 at 457.

⁷⁴ Canadian Civil Liberties Association, “Toronto’s ‘Smart’ City,” online: <<https://ccla.org/waterfront-toronto/>> (last accessed: 5 June 2020).

⁷⁵ Sidewalk Labs, *Toronto Tomorrow: A New Approach for Urban Growth* (2019) at 138, online: <https://quaysideto.ca/wp-content/uploads/2019/06/MIDP_Volume0.pdf> [MIDP].

⁷⁶ Waterfront Toronto, Sidewalk Toronto & Sidewalk Labs, “Feedback Report: Sidewalk Toronto Community Town Hall Held on: November 1, 2017” (December 2017) at 4, online: *Waterfront Toronto, Sidewalk Toronto & Sidewalk Labs* <sidewalktoronto.ca/wp-content/uploads/2018/04/Sidewalk-Toronto-Feedback-Report-Town-Hall.pdf>.

⁷⁷ MIDP, *supra* note 75. See also the RFP, which specified the lands comprising Quayside as the focus area (RFP, *supra* note 1 at 1) and Sidewalk Labs’ proposal, which focused on Quayside (Sidewalk Labs, *Project Vision* (17 October 2017), online: <<https://storage.googleapis.com/sidewalk-toronto-ca/wp-content/uploads/2017/10/13210553/Sidewalk-Labs-Vision-Sections-of-RFP-Submission.pdf>>).

⁷⁸ *Diamond, supra* note 8.

Toronto’, and many commentators assumed that there was a legally created public-private partnership under that name. The legal structure of this supposed ‘partnership’ remained uncertain after the delivery of the MIDP.

‘Sidewalk Toronto’, the name both of the ‘partners’ routinely used to refer to the smart-city project, was never a legal Ontario company.⁷⁹ A Sidewalk Toronto Limited Partnership (LP) is registered in British Columbia, with scanty information available.⁸⁰ The corporate registry includes only the name of the ‘general’ or decision-making partner, which is Sidewalk WT Master Developer GP, Ltd. and its mailing address, which is that of Google LLC.⁸¹ It is unclear what legal connection Waterfront Toronto has to this entity, if any. Prior to the MIDP, the agreements between WT and Sidewalk Labs contradicted themselves on whether the LP was a party.⁸² The \$50M US invested in Quayside flowed through Sidewalk’s limited partnership and thus did not directly fund WT. There is thus obscurity about just where and how the \$50 million ‘investment’ was being spent; tech industry insiders report many jobs being posted on LinkedIn to work on Sidewalk Toronto projects but located in New York City. Despite formal requests for information, we were not given any information on the structure, partners, and purposes of the LP, or WT’s stake in it, if any. It is doubtful, however, that WT would have been able to participate in a business partnership, with Sidewalk Labs or anyone else, without prior government approval.

There is little evidence that Sidewalk Toronto itself was a public entity, or a public-private partnership. The 2018 agreement did not set out any particular public financial benefit from research and development undertaken in or for the Toronto project for WT.⁸³ In 2018, it was suggested that Sidewalk Labs would have an exclusive royalty-free world-wide licence to use the innovations, without any details as to whether WT or government would derive any financial benefit from developments on Quayside.⁸⁴ Under the 2019 MIDP, WT would receive 10% of profits from commercialized inventions, but only for ten years -- and only if the inventions would not otherwise have otherwise occurred, a condition which Sidewalk Labs itself would no doubt interpret to their benefit. In addition, the MIDP, despite its length, is very vague about how exactly Sidewalk Labs would finance or help WT obtain financing for the development. Mention is made

⁷⁹ Sidewalk Toronto, online: <sidewalktoronto.ca>

⁸⁰ Mariana Valverde & Alexandra Flynn, “Mystery on the Waterfront: How the “Smart City” Allure Led a Major Public Agency in Toronto into a Reckless Deal with Big Tech” (3 December 2018), online: <cfe.ryerson.ca/blog/2018/12/mystery-waterfront-how-smart-city-allure-led-major-public-agency-toronto-reckless-deal>.

⁸¹ *Ibid.*

⁸² “Plan Development Agreement vs Framework Agreement – Comparison Table”, online: <spacing.ca/toronto/wp-content/uploads/sites/4/2018/07/PDA-vs-FA-July-28-18-1.pdf> [Plan vs Framework] at 1. See also Plan Development Agreement, *supra* note 72.

⁸³ Valverde & Flynn, *supra* note 80 (A news report stated that despite the vague promises of profit sharing made in the July 31 agreement, “a new document obtained by the GM [in August] asks potential building design partners to hand over all rights to their designs’ intellectual property, and with it, the potential to further commercialize that work on subsequent projects world-wide”).

⁸⁴ Valverde & Flynn, *supra* note 80.

of “optional upfront financing”, but in several places the MIDP denied that Google or its corporate siblings intended to provide the financing, beyond \$100 million towards a transit line estimated at well over a billion, and some seed funding, two \$10m amounts, for future, undefined research centres.

Second, the Sidewalk Labs 2019 plan included proposals covering all Quayside lands and part of the nearby East Bayfront. Quayside WT, the smaller 12 acre parcel, included land mainly owned by WT, with a few parcels in city and private hands.⁸⁵ The much more extensive waterfront lands to the east of Quayside are mainly owned by the City of Toronto.⁸⁶ One of the many surprising aspects of the June 2019 plan was Sidewalk’s claimed to act as the “lead developer” in the initial phase.⁸⁷ The 2018 agreement had specifically stated that Sidewalk Labs would not in the future acquire any interest in land. The 2018 PDA stated that WT owns only part of Quayside and that the agreement “does not create any real property interest in Quayside WT and that the Sidewalk Funding Commitment [the \$50m previously mentioned] does not constitute a payment towards any real property interest in Quayside WT.”⁸⁸ Under the MIDP, the land would be leased or sold to Sidewalk by WT and/or governments at a discount, Sidewalk proposed, stating that if affordable housing is to be provided (in keeping with WT policies) then the private developer should get the land at less than market rate.⁸⁹

Third, Sidewalk’s reach included many other existing and proposed entities, some more obvious than others. In addition to the LP, there were other Sidewalk companies floating around the waterfront, including countless subsidiaries and affiliated companies. The full extent of Sidewalk Labs’ reach and the implications for Toronto were difficult to discern, because the underlying information was not being disclosed to the public. However, we ascertained that a company called Sidewalk Labs Employees LLC, a BC-based company, has a two dollar lease interest in 307 Lake Shore Blvd E., a parcel of land located in Quayside which for a couple of years served as the office and “experimental workspace” of Sidewalk Labs.⁹⁰ As the website notes, “This is where we work every day, exploring many of the ideas that might become part of a future neighbourhood.” (The site is deserted, as of June 2020, though a structure that looks like a large trailer home still has a very large sign reading ‘Sidewalk Labs’.) The parcel changed hands shortly before the initial Framework Agreement was entered into. Most concerning, the lease agreement mentioned that there are other “terms, obligations, agreement and commitments” between the owner of the

⁸⁵ City of Toronto, *Quayside*, online: < <https://www.toronto.ca/city-government/planning-development/waterfront/initiatives/current-projects/quayside/>>.

⁸⁶ *Ibid.*

⁸⁷ *MIDP*, supra note 75 at 138.

⁸⁸ Plan Development Agreement, supra note 72.

⁸⁹ *MIDP*, supra note 75.

⁹⁰ Amanda Roth, “Estimates show Waterfront Toronto’s Portion of Land, Sought by Google’s Sister Company, Worth Over Half a Billion Dollars” (17 September 2018), online: *The Logic* <thelogic.co/news/exclusive/estimates-show-waterfront-torontos-portion-of-land-sought-by-googles-sister-company-is-worth-over-half-a-billion-dollars>.

property and this BC-based Sidewalk company, and it specifies that a secret “Other Agreement” was paramount, taking precedence over the terms of the lease. Just what is contained in the secret “Other Agreement” was never publicly disclosed.⁹¹

The MIDP also referenced other Sidewalk-related entities (including subsidiaries) as crucial to the deal, including a corporation created in 2018, Sidewalk Infrastructure Partners, which would provide capital or facilitate financing for investments.⁹² The financing promise, however vague, let Sidewalk claim it was using “patient capital” for infrastructure, but whether the patient capital was to come from Google’s billions or from another source we were not told. Several wealthy Canadian pension funds have long invested in infrastructure and real estate, especially abroad, and it is unclear whether they would or would not have been invited or allowed to participate in financing the ambitious development.

As unexpected as Sidewalk Labs’ claim to be a property developer instead of a tech company was, even more surprising was the fact that the MIDP suggested a sweeping set of new public agencies, including transit regulator outside of both the provincial agency Metrolinx and the city agency Toronto Transit Commission. And as mentioned above Sidewalk Labs went so far as to propose that WT be either wholly transformed, legally, or be abolished.⁹³ Jesse Shapins, director of public realm at Sidewalk Labs, stated that the goal of the project was to “think about innovative new ways to govern, and how to build a new democratic framework that involves the public and private sectors, and civil society.”⁹⁴ WT no doubt wanted to prevent being abolished, but it has often expressed a wish to be transformed into a more powerful, more ‘normal’ corporation. For example, in WT’s 2014 ten-year strategic plan, entitled Waterfront 2.0, WT had sought legal power to create subsidiaries as well as the legal power to float bonds or otherwise borrow money on its own, which was not granted.⁹⁵ Sidewalk’s ability to create, on its own, a whole network of subsidiaries and LPs stands in stark contrast to WT’s inability to create the kinds of subsidiaries that are often used to build the legal infrastructure for complex developments. Other public entities (e.g. the Toronto Community Housing Corporation) regularly create subsidiaries that among other things can partner with for-profit developers, in such a way as to protect the main agency from any mishaps that might afflict a particular public-private partnership.

In short, as a private company affiliated with one of the largest enterprises in the world, Sidewalk Labs had huge advantages not only in annual revenues and digital expertise, as is well known, but also, what is not so well known, in legal powers. These powers resulted in a sweeping plan that proposed development far beyond the limited area originally contemplated by the RFP,

⁹¹ Plan vs Framework, *supra* note 72.

⁹² MIDP, *supra* note 75 at Vol 3, Ch 2, 147.

⁹³ *Ibid.*

⁹⁴ CBC, “Sidewalk Labs’ \$1.3B plan for Toronto’s waterfront is bad for democracy, critic says,” *The Current* (25 June 2019), online: < <https://www.cbc.ca/radio/thecurrent/sidewalk-labs-1-3b-plan-for-toronto-s-waterfront-is-bad-for-democracy-critic-says-1.5188753>>.

⁹⁵ Jennifer Keesmaat & David Stonehouse, “EX7.6 Waterfront Strategic Review” Executive Committee (June 19, 2015), online < <https://www.toronto.ca/legdocs/mmis/2015/ex/bgrd/backgroundfile-81763.pdf>>.

the dismantling of existing governance structures, and interests for an assorted set of unknown entities. WT was unable to limit Sidewalk's scope or reach for the duration of the time they ostensibly worked together to contemplate a smart city along Toronto's waterfront.

V. GOVERNMENTS MUST TACKLE COMPLEX POLICY QUESTIONS

From the beginning, Sidewalk's plans for Quayside were characterized as the creation of a 'smart city'. Indeed, the following statement from the MIDP said a great deal about the ambitions behind the project: "This effort defines urban innovation as going beyond the mere pursuit of urban efficiencies associated with the "smart cities" movement, towards a broader set of digital, physical, and policy advances that enable government agencies, academics, civic institutions, and entrepreneurs both local and global to address large urban challenges."⁹⁶

The term 'smart city' has numerous definitions and meanings, including the "creation, integration, combination, development, and effective leverage of resources and assets toward innovation, attractiveness, competitiveness, sustainability, and livability of an urban space facilitated and accelerated by the ubiquitous use of advanced information and communication technologies with local governments playing key instigating roles in this process."⁹⁷ A smart city is a series of complex combination of technical and governance implications about digitization and computing in the fabric of urban places,⁹⁸ including initiatives such as digitally controlled utility services and transport systems, and enabling residents and citizens to download apps to communicate with governments or access local services, and monitoring, managing and regulating city processes, often in real time.⁹⁹

However, the routine use of the term 'smart city projects' suggests that actual cities are not properly said to be either 'smart' or 'not smart'. The somewhat misleading term 'smart city' instead describes choices made by local governments in respect of the regulation of services or programs involving new, especially digital, technology.¹⁰⁰ It is well understood that smart city projects or

⁹⁶ MIDP, *supra* note 75 at 138.

⁹⁷ Hans Jochen Scholl & Suha AlAwadhi, "Smart Governance as Key to Multi-Jurisdictional Smart City Initiatives: The Case of the ECityGov Alliance" (2016) 55:2 Social Science Information 255, online: <doi-org.ezproxy.library.ubc.ca/10.1177/0539018416629230> at 258; "The framework encompasses eight dimensions: (1) management and organization; (2) technology; (3) policy; (4) governance; (5) people and communities; (6) economy; (7) built infrastructures; and (8) the natural environment (Hefedh Chourabi *et al*, "Understanding Smart Cities: An Integrative Framework" (Paper delivered at the 45th Hawaii International Conference on System Sciences, Institute of Electrical and Electronics Engineers Computer Society 4–7 January 2012)."

⁹⁸ Rob Kitchin, "The Real-Time City? Big Data and Smart Urbanism" (2014) 79:1 GeoJournal 1, online: <www-jstor-org.ezproxy.library.ubc.ca/stable/24432611> at 1–2.

⁹⁹ *Ibid* at 2.

¹⁰⁰ Jesse W Woo, "Smart Cities Pose Privacy Risks and Other Problems, but That Doesn't Mean We Shouldn't Build Them" (2017) 83 U Missouri-Kansas City L Rev 953, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3040397> at 955.

initiatives include multi-stakeholder partnerships, often with the private sector, but are generally municipally based, and are guided by principles including enabling residents to live in more sustainable, productive, healthy, and civically engaged ways.¹⁰¹

Governance frameworks for smart city initiatives are generally created at the local level rather than by state or federal governments, although there are benefits to the latter.¹⁰² The rationales for local frameworks include the arguments that: innovation has a geographical locus and therefore local governments are more effective in overseeing smart technologies as applied to municipal programs and services; competition and competitiveness are a matter of the urban scale as currently local characteristics are the ones that differentiate cities among each other; and cities are better able to foster citizen-centric governance.¹⁰³ Local government “experience, agility and proximity provide them the necessary knowledge and ability to set up a favorable climate for the purposes of becoming smart.”¹⁰⁴ In initiating projects, whether on its own or jointly with neighbouring municipalities, the municipality leads the process and sets the policy framework. The city’s processes include differing degrees of citizen engagement as directed and overseen by municipal departments. The city, through a department, issues RFPs and signs contracts with private sector providers. These contracts can be for a specific good or service or perhaps for a not yet identified solution to a specific problem (leaky water pipes; street lights that waste electricity; lack of citizen information on transit problems; etc.). By contrast, WT seems to have waited for Sidewalk Labs to propose all manner of technical and physical innovations, from ‘tall timber’ buildings that are currently not permitted by the Ontario building code to a box-like object called ‘Koala’ on which all manner of sensors and cameras could later be mounted in public space.

The extensive literature on smart city governance suggests that a smart city decision-making framework must acknowledge the many governmental and non-governmental actors involved, but with public and especially elected authorities in the lead.¹⁰⁵ Robert Wilhelm Siegfried Ruhlandt notes the important oversight role of local governments in crafting legal frameworks and policies for smart city governance.¹⁰⁶ There is no single way that this should be done. Some authors call for direct engagement by governments;¹⁰⁷ others suggest a steering role given the presence of many

¹⁰¹ Ellen P Goodman, “‘Smart Cities’ Meet ‘Anchor Institutions’: The Case of Broadband and the Public Library” (2014) 41:5 *Fordham Urb LJ* 1665, online: <ir.lawnet.fordham.edu/ulj/vol41/iss5/6> at 1169–1170.

¹⁰² Margarita Angelidou, “Smart City Policies: A Spatial Approach” (2014) 41 *Cities* S3, online: <doi.org/10.1016/j.cities.2014.06.007> at S3.

¹⁰³ *Ibid* at S4.

¹⁰⁴ *Ibid*.

¹⁰⁵ Barbara Ann Allen *et al*, “E-Governance & Government On-Line in Canada: Partnerships, People & Prospects” (2001) 18 *Government Information Q* 93, online: <www.sciencedirect.com/science/article/pii/S0740624X01000636> at 94.

¹⁰⁶ Robert Wilhelm Siegfried Ruhlandt, “The Governance of Smart Cities: A Systematic Literature Review” (2018) 81 *Cities* 1, online: <doi.org/10.1016/j.cities.2018.02.014> at 4–8.

¹⁰⁷ *Ibid* at 7; See: Manuel Pedro Rodriguez Bolivar, “Mapping Dimensions of Governance in Smart Cities: Practitioners Versus Prior Research” [2016] *Proceedings of the 17th Intl Digital Government Research* 312,

stakeholders,¹⁰⁸ including the view that smart city governance “calls for modern and novel [...] policy instruments to address the emerging complex urban realities.”¹⁰⁹ However, in this literature, municipal governments are always actively involved in creating a smart city framework, and usually initiate the process of procuring new technology.

The City of Toronto, unlike many other municipalities, does not have a Council-approved definition of “smart city” or a policy framework guiding decision-making in relation to ICT and IoT application to city services and programs.¹¹⁰ Neither has the provincial or federal governments elaborated appropriate guidelines covering jurisdictional issues in complex ‘smart city’ developments, such as data storage outside of Canada or regulatory frameworks for self-driving vehicles.¹¹¹ There is no express authorization for WT to create a smart city or a smart-city policy, or to develop digital and data policies. WT’s intention to create a smart city in Quayside (and potentially elsewhere along the waterfront) in 2017 was not proposed or debated in an open, transparent manner prior to the RFP, nor was the role of the City of Toronto and the city’s waterfront secretariat, which is supposed to exercise oversight, clear. In contrast, strong smart city governance regimes put cities in control of urban infrastructure and data-driven public service delivery by identifying urban needs and then seeking to investigate how technology can help solve problems identified through the democratic process.

While the three governments did not meaningfully curtail WT’s plans, as far as we know, various actors within each have voiced concerns about the Quayside project, including areas such as consumer protection, data collection, security, privacy, governance, antitrust and ownership of intellectual property. For example, the Province of Ontario auditor released an expansive audit, which stated that “these are areas with long-term and wide-ranging impacts that the provincial

online: <dl.acm.org/citation.cfm?doid=2912160.2912176> [Bolivar]; and Karima Kourtit, Peter Nijkamp & John Steenbruggen, “The Significance of Digital Data Systems for Smart City Policy” (2017) 58 Socio-Economic Planning Sciences 13, online: <doi.org/10.1016/j.seps.2016.10.001> [Kourtit].

¹⁰⁸ Ruhlandt, *supra* note 106; See: Renata Paola Dameri & Clara Benevolo, “Governing Smart Cities: An Empirical Analysis” (2015) 34:6 Social Science Computer Rev 693, online: <doi.org/10.1177/0894439315611093>; Francesco Bifulco, Marco Tregua & Cristina C Amitrano, “Co-Governing Smart Cities Through Living Labs. Top Evidences from EU” [2017] 50E Transylvanian Rev Administrative Sciences 22, online: <rtsa.ro/tras/index.php/tras/article/viewFile/519/508>; Alois Paulin, “Informating Smart Cities Governance? Let Us First Understand the Atoms!” (2016) 7 Knowledge Economy 329, online: <doi.org/10.1007/s13132-016-0368-6>; and Bolivar, *supra* note 107.

¹⁰⁹ Ruhlandt, *supra* note 106 at 7; See Kourtit, *supra* note 107 at 16.

¹¹⁰ The City of Toronto has introduced a City Council-approved 2018-2022 Open Data Master Plan in 2017 (City of Toronto, *Open Data Master Plan 2018–2022*, ex30.12 (Toronto: City of Toronto, 2018), online: <toronto.ca/legdocs/mmis/2018/ex/bgrd/backgroundfile-110740.pdf>.) and participates in the Smart City Working Group established March 2016 out of Toronto Regional Board of Trade Municipal Performance Standards Committee (City of Toronto, Executive Committee, *Smarter Cities Initiative*, ex28.1 (24 October 2017), online: <www.toronto.ca/legdocs/mmis/2017/ex/bgrd/backgroundfile-107505.pdf> at 7.).

¹¹¹ Auditor General, *supra* note 58 at 663, 692-3.

government, along with the City of Toronto, needs to address from a policy framework perspective to protect the public interest before this initiative proceeds further.”¹¹²

Months after WT and Sidewalk Labs entered into their initial deal, the City of Toronto’s Interim City Manager clarified important details regarding its position on the PDA, including that: “Nothing in the PDA . . . should be construed as binding the City in any way or in any way changing the prevailing relationship between Waterfront Toronto and the City of Toronto, or conferring on Sidewalk Labs any authorities, role or relationships accorded to Waterfront Toronto under the prevailing framework created by legislation, the MOU, and various Council decisions” and that “City staff comments should therefore not be considered approval of, agreement with, or acquiesces to the arrangement WT proposes to put in place with Sidewalk Labs.”¹¹³ In this strongly worded letter, obtained through a Freedom of Information request, the City noted its authority to introduce relevant policies and to make decisions in respect of these policy areas.¹¹⁴

Almost two years after WT issued its RFP and prior to the delivery of the MIDP, City Council belatedly decided that the City of Toronto needed a “City-wide policy framework and governance model associated with digital infrastructure, such as smart cities, and a work plan for implementation according to the following City of Toronto policy principles: (a) privacy, transparency, and accountability; (b) public ownership and protecting the public interest; and (c) equity and human rights.”¹¹⁵ No digital policy has yet been taken to city council, however, as of this writing. (The federal government too has long promised a new law regulating data, but no bill exists yet).

We argue that governments are the appropriate legal bodies to handle complex legal and governance issues like the creation of a smart city, not entities like WT or private sector bodies such as Sidewalk Labs. Indeed, the story told here serves as a cautionary tale in granting too much power to public and private bodies without clear legal and policy frameworks. The scope of legal and policy concerns in relation to complex issues like waterfront and smart city development require deliberative review. Municipalities are elected bodies, and have open forums for debate and deliberation. Municipal governments may be as large or larger than provincial counterparts, emulating governance models of senior governments, for example by having oversight mechanisms such as auditors. In Ontario, municipalities are also bound by freedom of information laws, meaning that the public may access materials related to their decisions. By contrast, while

¹¹² *Ibid.* at 649.

¹¹³ Letter from Giuliana Carbone, City Manager of Toronto, to Meg Davis, Chief Development Officer of Waterfront Toronto, (23 July 2018) entitled “Draft Plan Development Agreement between the Toronto Waterfront Revitalization Corporation and Sidewalk Labs LLC” at 1. The MOU guides the relationship among WT, the City of Toronto, and a city-run special purpose entity (MOU, *supra* note 64).

¹¹⁴ *Ibid.* at 4.

¹¹⁵ Toronto City Council, *Data Governance and Smart Cities – by Councillor Joe Cressy, Seconded by Councillor Paul Ainslie*, City Council consideration adopted on February 26, 2019 with amendments (Toronto: Toronto City Council, 26 February 2019), online: <app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2019.MM3.2>.

WT claims to be devoted to transparency, its freedom of information policy is self-generated and voluntary. From the beginning, as the RFP was being elaborated, there was little opportunity for public involvement, with the bid not having been released to the public and the initial agreement withheld from the public for almost a year. Only after significant pushback did WT agree to release the agreement. In other words, WT's RFP and the initial relationship between WT and Sidewalk were not subject to public vetting. Although WT is a public body, it does not have the transparency and accountability mechanisms evident in a municipality.

As Goodman and Powles conclude in their detailed analysis of the 'partnership', "there can be no confidence that the Sidewalk Toronto vision is compatible with democratic processes, sustained public governance, or the public interest."¹¹⁶

VI. CONCLUSION

WT is a public body created to help the federal, provincial and municipal governments accomplish the enormously complicated task of developing Toronto's contaminated waterfront. Although WT is delivering a public service, it is not subject to the same disclosure and other transparency requirements of any of the three governments. Unlike similar development bodies in the United States, WT's legal powers are very limited; WT was never given the power to approve, on behalf of citizens and governments, the sweeping plan contemplated by Sidewalk's MIDP. With Sidewalk Labs having pulled out of the proposal, we will not know how the City of Toronto would have ultimately wrestled with the project including rethinking WT's role.

Even so, WT's decision to partner with Sidewalk Labs to create a smart city along the city's contaminated waterfront raised serious questions from the beginning about governance, including the accountability of Waterfront Toronto and Sidewalk Labs to the public, and Sidewalk's reach in advocating for a significant change to governance bodies. These questions were never fully answered, nor is there clarity as to what will happen if WT decides to engage in a similar venture going forward.

Sidewalk Labs' unilateral departure gives WT's partner governments an opportunity to mitigate future confusion by clarifying both its powers in respect of smart city ventures and, most urgently, legal structures for protecting harms associated with smart cities. These 'governance' questions are as meaningful as the privacy considerations raised by many of those opposed to the Sidewalk smart cities plan. While CCLA's legal challenge could have brought some clarity on constitutional requirements for privacy protection, it would have left these crucial questions unanswered.¹¹⁷

The WT-Sidewalk 'partnership' serves as an alarm bell in municipal governments delaying intervention in overreach by public and private actors. Now that Sidewalk has left Toronto, there

¹¹⁶ Goodman & Powles, *supra* note 73 at 1.

¹¹⁷ See also Janine S Hiller & Jordan M Blanke, "Smart Cities, Big Data, and the Resilience of Privacy" (2017) 68:2 *Hastings LJ* 309, online: <<http://www.hastingslawjournal.org/smart-cities-big-data-and-the-resilience-of-privacy/>>.

is opportunity for the municipality to demonstrate its democratic leadership by ensuring accountability, transparency, and consultation for smart city plans, as well as safeguards in respect of large tech partners, especially when companies like Google come to town.