Supreme Court of Canada
Calgary (City) v. Canadian Western Natural Gas Co., (1917) 56 S.C.R. 117
Date: 1917-11-28

The City of Calgary (Plaintiff) Appellant;

and

The Canadian Western Natural Gas Company and Another (Defendants) Respondents

1917: May 14-15; 1917: November 28.

Present:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Contract—Municipal law—Interpretation—Extension of city limits—Added area—Exclusive rights.

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An agreement was made in 1905 between the city appellant and one D. the assignor of the company respondent, whereby D. was given the privilege of supplying natural gas "throughout the said city." In another agreement, made in 1911, amending the above, it was provided that the respondent should be permitted to charge certain prices for gas supplied "to the inhabitants of the city."

Held, Davies and Idington JJ. dissenting, that the privilege granted to D. was not limited to the area of the city appellant as it existed at the date of the agreement, but extended to the various extensions of the city's boundaries which were subsequently made.

City of Toronto v. *Toronto Railway Company* (1907), A.C. 315; 37 Can. S.C.R. 430, distinguished.

The agreement contained a provision that "the city shall not grant to any person, firm or corporation" a privilege similar to that granted to D. and referred also to the "exclusive rights and privileges hereby granted."

Held, Fitzpatrick C.J. dissenting, that the grant to D. was not exclusive as against the city appellant itself.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta[1], reversing in part the judgment of Ives J. at the trial[2].

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The respondent is the assignee of a certain agreement dated August 14, 1905, between the appellant and one Dingman, entered into by authority of a city by-law duly submitted to a vote of the ratepayers, and passed by the council. At that date, the area comprised within the municipal boundaries of the city appellant was approximately 1.800 acres. These boundaries were extended from time to time by Acts of the Legislature, and,

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[1] 10 Alta. L.R. 180.
[2] 25 D.L.R. 807; 9 W.W.R. 252; 32 W.L.R. 558.

at the date of the institution of the present action, the city area had been increased to approximately 25,000 acres. One clause of the agreement contained the following words:

that the exclusive right and privileges hereby granted to the said company shall continue subject to the terms and conditions herein expressed * * * and the, said city shall not * * * grant to any person, firm or corporation the right to construct or lay mains or pipes or connections on, in or through the streets of the said city for the supply of natural gas * * *.

The contention of the company respondent was that the franchise, rights and privileges conferred under the agreement extended to the new territory added since the date of the agreement, and that the said franchise, rights and principles were exclusive as against the city.

The trial judge found against the company respondent on both grounds, and maintained the action of the city appellant. But on appeal to the Appellate Division of the Supreme Court of Alberta, the appeal was allowed in part, the court reversing the judgment of the trial court on the first ground, and maintaining it on the second ground. Both parties appealed to the Supreme Court of Canada.

Lafieur K.C. and C. J. Ford for the appellant.
R. B. Bennett K.C. and Sinclair for the respondent, The Canadian Western Natural Gas Company.

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Anglin K.C. for the respondent, The British Empire Trust Company.

THE CHIEF JUSTICE.—As to the first question on which a declaration is sought, viz.: whether or not the respondents' franchise, rights and privileges are limited to and do not extend beyond the area of the city as shown on the plans filed in the Land Titles Office on the 14th August, 1905, the learned judge, who tried the action, gave judgment for the appellant, because he thought the question precluded by the authority of the decision of the Privy Council in *City of Toronto* v. *Toronto Railway Co.*[3]. That decision was upon the particular contract which the court was asked to construe, and I do not think it attempted to lay down any principle which could govern in the present case.

The agreement under consideration in that case, provided for a right to the city to require the company to lay street railway tracks on streets to be designated by the city. It was a question not of a right granted to the company, but an obligation imposed upon it. That this feature of the nature of the subject matter of the contract in dispute was what mainly motived the judgment of the Privy Council is clear. Beyond saying that their Lordships agreed with the reasons for judgment of the majority of the judges of the Supreme Court of Canada it was only added that

> the injustice involved in the contrary view, which would enable the corporation to compel the railway company to extend their lines at an indefinite expense, and for indefinite distances where the maximum fare chargeable for any distance is five cents seems to their Lordships insuperable.

I have gone through, and very carefully considered all the cases between the corporation and the company

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which are referred to in the judgment of Chief Justice Harvey, but I am unable to appreciate the difficulty he finds in reconciling them. In my opinion nothing is gained by any attempted comparison between them.

I do not underrate the weight of Mr. Justice Stuart's argument when he says:

> Even without precedent or authority I should have come to the conclusion that Dingman did not by virtue of his original contract enter into any obligation to supply gas outside of the original limits of the city and that therefore as a necessary corollary they acquired no right to do so by virtue of the mere original contract itself.

I cannot, however, agree that this is a necessary corollary. It may be a question in view of the provision of clause 18 how far the obligation extends but nothing is to be gained by a consideration of that here.

I think the grant in this case is of a right within the limits of the city as now determined.

As regards the second question, whether or not the franchise, rights and privileges granted to the defendant are exclusive as against the plaintiff, I was at first disposed to agree with the view taken by the majority of the judges in the Appellate Division, that they were not exclusive. But whilst I fully appreciate the force of the contention that the city has in terms only debarred itself from granting similar rights to any other person, firm or corporation than the defendant, I think we must again look to the whole of the contract for the purpose of ascertaining the extent of the rights thereby granted. It seems to me that, considering the circumstances in which the contract was entered into, and the whole tenor of the clauses referring to the exclusive rights, intended to be granted to the company, it is impossible to suppose that either party contemplated the reservation to the city of a right of entering into competition with the company whilst undertaking to grant to it an exclusive privilege

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[3] [1907] A.C. 315.

as against all others. The competition by the city might well be more powerful and injurious to the rights of the company than that of any private commercial body. On this point, therefore, I agree with the conclusion of Mr. Justice Beck in the Appellate Division.

The appeal should be dismissed and the cross-appeal should be allowed to the extent that it asks that the judgment appealed from should be varied in so far as it affirms the judgment of the Honourable Mr. Justice Ives, that the provisions of the statute of the Province of Alberta, being chapter 64 of 1911-12, and the by-laws and agreements therein referred to, do not exclude the plaintiff from itself exercising within the area included in the city of Calgary on the said 14th day of August, 1905, rights, powers and privileges similar to those by the provisions of the said statute, by-laws and agreements vested in the said defendants, by reversing the said judgment, and the judgment of Mr. Justice Ives to the extent aforesaid.

DAVIES J. (dissenting)**.—**The defendant respondent company is the assignee of an agreement made between the City of Calgary and one Dingman, under the authority of a by-law duly passed and approved by the ratepayers, dated 14th day of August, 1905. This action was brought by the city to obtain declarations: First, that the rights and privileges granted by the city under this Dingman agreement did not extend to the several extensions of the city boundaries which were made after the agreement was entered into, but was confined to the area of the city within the municipal boundaries at the date the agreement was entered into, and, secondly, that such rights and

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privileges were not exclusive as against the city itself but only as against grantees of the city.

The trial judge decided both points in favour of the city.

From his judgment an appeal was taken to the Supreme Court of Alberta, which reversed the decision of the trial judge on the first question, and held that the franchise (so called), granted to Dingman by the agreement of 1905, was not limited to the area of the city of Calgary as it existed at the date of the agreement, but extended to and covered the various extensions of the city's boundaries which were subsequently made. The Appeal Court confirmed the trial judge's finding as to the exclusive character of the franchise, and as to this there is a cross-appeal.

Two of the learned judges of the Appellate Division, Stuart and Scott JJ., based their judgment that the Dingman franchise must be held to extend to the extensions of the city's area solely upon the construction placed by them upon an agreement made in January, 1911, between the city and the Calgary Natural Gas Co., Dingman's assignee, permitting the gas company to charge a higher price for the gas they supplied than that fixed by the Dingman agreement.

These learned judges were of the opinion that certain words and phrases of that agreement refer to the city in a "territorial sense" and must be held to be so used with reference to the then existing conditions, at a time when the various extensions of the city's area had been made. Mr. Justice Stuart says:

> Upon this narrow ground, as I have said with some hesitation on account of the extreme narrowness of it, I think the first question should be answered in favour of the defendant.

I mention this because I am quite in accord with the general reasoning of Mr. Justice Stuart as to the

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construction of the Dingman agreement when entered into in 1905, and the effect of the subsequent conduct and action of the officials of the city upon that agreement.

I am of opinion that the Dingman agreement of 1905, when entered into by the parties, had reference solely to the territorial area of the city as it then existed and that it was not then contemplated by either party to it that it should extend to and cover any extensions of that territorial area which might subsequently be made. I do not think the language of the agreement was ambiguous. The City of Calgary at the time that agreement was made had clearly defined territorial limits which must be held to have been known to all parties to the agreement.

I am also of the opinion that the subsequent action and conduct of the city officials cannot be held to have enlarged or extended the scope of such an agreement granting a franchise over the streets of the city, or bind the corporation on any ground of estoppel or acquiescence to such enlargement or extension.

I was a party to the judgment of this court in the appeal of *The Toronto Railway Co.* v. *The City of Toronto*[4], in which appeal we decided that the right to determine, decide

[4] 37 Can. S.C.R. 430.

upon and direct the establishment of new lines of tracks and tramway service in the manner therein prescribed applied only within the territorial limit of the city as constituted at the date of the contract.

In that case there had been an agreement of sale and purchase between the Toronto City Corporation and the Toronto Railway Company, confirmed by an Act of the Ontario legislature, under which the railway company acquired not merely the material of

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the railway undertaking in suit, but also, as was clearly provided, the exclusive right "to operate surface street railways in the city of Toronto" in the fullest possible way within the period of the agreement. On appeal to the Judicial Committee of the Privy Council, that learned Board held that on its true construction territorial additions to the city made during the term of the agreement were not within its scope.

In delivering the judgment of their Lordships, Lord Collins says[5]:

> The reasons given in the judgments of Sedgewick and Idington JJ., with whom Davies J. concurred, seem to their Lordships so full and satisfactory as to make it unnecessary to say more than that they adopt and agree with them. The injustice involved in the contrary view which would enable the corporation to compel the railway company to extend their lines at an indefinite expense, and for indefinite distances, where the maximum fare chargeable for any distance is 5 cents, seems to their Lordships insuperable. Their Lordships are of opinion, therefore, that on this point the corporation fails.

I confess myself quite unable to discover any difference in principle between that case and the present appeal.

It does seem to me that if parties seek for and obtain from a city corporation an exclusive franchise, right and privilege for many years over the streets of the city, and the granting of which franchise depends upon a majority vote of the municipal voters being first obtained, such franchise will not be construed as extending to territorial additions to the city made during the term of the franchise, even assuming the power of the city to make any such agreement with such possible extensions unless there are either express words shewing an intention that the franchise granted shall be so extended or other language used from which such an intention must fairly and reasonably be drawn.

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Their Lordships in the quotation I have above made from their reasons for judgment in the *Toronto Corporation* v. *Toronto Railway*[6], approving of the judgment of this court for

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[5] [1907] A.C., at p. 320.

the reasons given by it, point out that the holding of a contrary view to the one they gave effect to in that case involved an injustice to the railway company.

And so in the case before us, the construction of the Dingman franchise agreement contended for by the respondents might have resulted in grievous injustice to Dingman and his assignee. We must put ourselves in the place of the parties at the time the agreement was entered into, and construe the agreement in the light of the facts and circumstances then known or ascertained by both parties. If the agreement is construed to cover extensions of the city then the benefits to and obligations of both parties must be reciprocally so extended.

It must be remembered that when the Dingman agreement was entered into the discovery of natural gas in enormous quantities such as was subsequently discovered had not been made.

The whole franchise to be granted is predicated in the 4th paragraph of the agreement upon the finding by Dingman within a fixed period "of a sufficient and paying supply of natural gas which can be utilized in the said city."

The "said city" there referred to is no doubt the Calgary of that day covering an area of 1800 acres with a population of about 12,500, as compared with its subsequent extension and enlargement to approximately 25,000 acres with a population of some 80,000 or 90,000.

What if Dingman, within the term fixed, had

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found a sufficient supply of gas for the city, as it was in area and population when he entered into his agreement, and had gone on under his franchise rights incurring] large expenditures to carry out his contract? Could he with each rapid extension of the area and population of the city have been forced to supply gas to these extended areas, or, the quantity discovered not being sufficient, forfeit his charter or pay damages?

It seems hardly conceivable that in the light of the knowledge then possessed, he so intended to bind himself or the city to bind itself with respect to further possible extensions of the area and population of the city. The obligations of the parties under the Dingman

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[6] [1907] A.C. 315.

contract must be construed as mutual and reciprocal, and cannot be extended as far as one is concerned and confined as regards the other party.

The words in question, "the City of Calgary," were not ambiguous at the time the Dingman agreement was entered into. On the contrary, they at that time had a clear, definite, well understood meaning and only one. Subsequently changes in the territorial area by the addition of new territory may have created conditions which, if they were to control in the construction of the agreement, might make the words ambiguous. But, in my judgment, these words must be construed and interpreted as they would have been the day after the agreement was entered into had any dispute as to their meaning then arisen. *Wallis* v. Pratt[7] *North Eastern Railway Co.* v. *Hastings*[8].

If I am right in my construction of the agreement when made, then the question arises whether any subsequent action of the city or its officials operated to create such extension.

The agreement of January, 1911, on the language

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of which two of the judges of the Appellate Division held that the franchise agreement had been extended to the enlarged territorial area of the city, had for its sole object and purpose as recited in its preamble the change in the limitation on the price to be charged for gas supplied from not exceeding 25 cents per 1,000 feet for domestic purposes to 35 cents and from not exceeding 15 cents for power purposes to 20 cents. It was made in response to an application on behalf of Dingman for the increased price on the ground of increased costs incurred and to be incurred by him in his search for gas at further points from the city than any contemplated when he entered into the agreement and agreed to the maximum prices he could charge for the gas.

I am quite unable to understand how such an agreement as this, having one only object, namely, a change in the price chargeable for the gas supplied provided for in the original agreement of 1905, could be construed as operating to effect such an important and radical change as the extension of the latter agreement to areas and populations it did not originally extend to or contemplate. I not only think it, as called by the learned judge who depended upon it, a "narrow ground," but, with great respect, an unsafe and

[7] [1911] A.C. 394.
[8] [1900] A.C. 260.

untenable one. No reference whatever is made to the area covered by the agreement, or to any extension of that area.

I have read with great care the several by-laws passed by the city after the agreement of 14th August, 1905, was entered into, and which are relied upon together with other official or *quasi* official acts and conduct as operating to create an extension of the territorial area covered by the original scope of that

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agreement, but find myself unable to reach a conclusion that, taken together, they had that effect.

An agreement such as that of August, 1905, granting such a franchise as that agreement did on its streets, requiring as it did to make it binding on the city the safeguards provided of a by-law of the City Council authorizing it and an approving vote by the ratepayers cannot, it seems to me, be altered and extended in such material ways as it is contended this agreement has been, except by equally solemn steps.

The ratepayers of the city approved of the by-law ratifying the original agreement, but there never, was any by-law enacted enlarging or extending the territorial area covered or any vote submitted to the ratepayers for that object.

After the agreement of 1905 was completed, there were many by-laws passed having reference to that agreement and altering and extending its minor terms. By-law 646 extended the time within which active drilling operations might commence to 21st May, 1906. By-law 863 extended the time within which the company might demonstrate the character of gas fields contiguous to Calgary until 14th August, 1910, and continued the exclusive term of the agreement for 15 years from August, 1905. By-law 1097 authorized further extended development works for six years from 14th August, 1910, but confirmed and continued the agreement in other respects. By-law 1114, which I have already commented upon, permitted an increased price for gas to be charged. By-law 1212 gave the city's assent to certain assignments of the Dingman franchise and agreement.

None of these by-laws, in my opinion, affect the question of the territorial area over which the agreement extended, or attempted to enlarge or extend that

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area, and the question whether the original agreement extended to new territory added from time to time must depend upon the construction given to its language.

I have already expressed my opinion on that point to the effect that the agreement does not so extend, and I am of the opinion that the by-laws passed, the letters written by the mayor and the controllers, and the action taken by the engineer and other officers of the city, cannot alone or collectively operate to create that extension.

I agree with the contention of counsel that all the evidence as to acts and statements of officials of the city could not enlarge the franchise granted, and that it was quite incompetent for city officials or employees by negligence, laches, or personal acts and conduct to change the construction which the franchise agreement originally bore or to extend that franchise over a larger territorial area than it originally covered; by any negligent administration of the affairs of the city. I am unable to find any evidence that any plans as required by sec. 5 of the agreement were ever furnished to or approved of by the City Council with respect to these enlarged areas or that any action was ever taken by the Council with respect to the extension of the operations under the franchise agreement into the new or added territory.

No plans seem to have been officially fyled with the clerk of the council, but certain plans (two) were left, it was stated by counsel, with the city commissioners and engineer. None, however, were approved by the council shewing that the company contemplated operating beyond or outside of the original city limits.

So far as the commissioners were concerned,

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their powers and duties seem to have been solely of an executive and administrative character, as defined by sec. 182 of the city charter. Nothing in the prescribed powers and duties of these commissioners would enable them to extend the limited character of the franchise granted Dingman. As to these powers and duties see sec. 16, c. 36, statutes of Alberta, 1908.

Nothing less than an act done by the corporation itself acting within its powers, under the authority of its municipal council, could extend the franchise of 1905 to the added territory. There is, of course, no pretence that such an act was done or attempted.

On the other branch of the case, I am of the opinion that the exclusive character of the franchise granted to Dingman is exclusive of any similar grant which otherwise might be made by the city to some other company or person, and not exclusive as against the city itself.

If exclusive as against the city it must be under the words in sec. 9

> the city shall not grant to any person, firm or corporation the right to construct or lay mains, etc.

The words granting the franchise to Dingman do not contain the word "exclusive," but the term is used in a subsequent part of the agreement as the

> exclusive rights and privileges hereby granted.

The terms of the grant itself are,

> doth hereby grant to the said company full power, licence and authority, etc.

I think the meaning of the term "exclusive" as used in the agreement may well be determined to be those rights which might be acquired by a grant from the city, and which the city agreed it would not during the period mentioned in sec. 9 "grant to any person,

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firm or corporation;" I do not think they included the city itself if it then had or subsequently obtained the power of operating natural gas works.

The rule of construction of exclusive grants is that they should be construed most strongly against the grantee, and I do not find appropriate words used in the agreement which would exclude the city itself. A proper and reasonable construction of the word "exclusive" in the sense used here is the one I adopt and which I think must be held to express the intention of the parties. The grant itself in the 4th section of the agreement gives to the grantee "full power, licence and authority * * * to open up and lay mains." Nothing in that section is said about the grant being an exclusive one.

In paragraph 9, the grant is spoken of as the "exclusive rights and privileges hereby granted to the company," &c, and the same paragraph goes on to provide that the city shall not "grant to any person, firm or corporation the right to construct," &c.

That seems to me, in the absence of any express words excluding the city itself to limit and define the extent of the exclusive grant—that it is exclusive as against any grantee of the city.

I would for these reasons allow the appeal, and dismiss the cross-appeal with costs.

IDINGTON J. (dissenting)**.—**I am of the opinion that the franchise granted by the agreement of 6th September, 1905, between appellant and Dingman, was limited to the area that the then boundaries of the city included, and that the same has not, as regards its territorial limits, been extended by anything which has since transpired.

If a manufacturer possessed of a large factory or

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a merchant of a large shop or warehouse had contracted with some one to supply for a fixed term of years the lighting or heating necessary for the efficient carrying on of his business in such premises, and then added thereto as the necessities of a growing business demanded, what would be thought of either party to such contract insisting that inasmuch as it was self-evident the business would grow, and it must require more light and heat, therefore that was within the contemplation of the parties, and the contract was binding in relation to the added buildings and business or work therein?

Yet, stripped of all verbiage and confusing collateral matters, needed only to be had regard to as part of the history which brought the parties concerned herein into contractual relations with each other, when we bear in mind the express definition of the word "street" in the first paragraph of the said agreement, wherein does the supposed assertion of right to apply the contract in the cases I submit to the extension differ from that set up by the respondents herein?

To carry the illustration out fairly, it may be said we must assume that in either of the given cases, the lighting or heating, without a word of agreement, had in fact been supplied and accepted for a year or two and then rejected.

Would any one contend that then either party was bound to continue it for the remainder of the fixed term of years? I cannot think so. I can see how the original contract might by inference be applied to determine the measure of remuneration or other liability in relation to that extended, but how such contract could be held as a matter to be considered in the construction of the original contract is past my com-

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prehension. I can conceive also in such a given case something transpiring between the parties to constitute a new contract.

But here there is the limited power of the appellant, which is only able to contract in such ways as the statute enables it, as an impassable barrier, and hence the respondents are driven to argue that what was done must be looked to as aiding in the construction of an ambiguous contract.

Wherein is the contract which relates to certain streets as defined in the contract at the date thereof ambiguous?

It seems to me the unambiguous thing in the case. And the conduct relied upon is something taking place years after the contract had been made.

Again that conduct is not that of the appellant, but of some of its servants, who could not be held as entitled to furnish anything a court should rely upon as the conduct of the appellant.

Then it is said there was an amendment of the contract by which the rate of remuneration was changed and increased six years later, and thereby a new contract made which must be held as an interpretation of the original contract. As it speaks of "the inhabitants of the city" which had been increased in fact, both in area and population, it is said it must be taken to have amended the contract. Unfortunately for the argument the express terms of the new agreement ratified by the legislature limit it to the substitution of prices named for those in the contract "as though the said prices were mentioned therein instead of the said prices mentioned in paragraph 17 thereof."

The term "street" is defined in the original contract of 1905 as follows:

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> That wherever the word "street" occurs in this agreement it shall be held to mean any street, avenue or lane shewn as such on the plans of the said city registered in the Land Titles Office for the South Alberta Land Registration District.

I am unable to see how the parties could have more carefully restricted the terms of the amendment, unless they had, from abundant caution, needlessly used words limiting the inhabitants to those concerned under the contract.

I cannot find in this either a new contract or an interpretation of the old one.

Again it is said the original contract might not be so in an ordinary case but that this is a contract with a growing city, and it must be presumed to have contemplated such growth, and hence intended to contract despite the express words of the contract limited to streets as defined.

Any one conversant with how cities in Canada have grown by the annexation of suburban villages or towns which usually have some lighting system of their own, dependent often upon contracts for long terms of years, would be tempted to say that the men making such a contract as here in question extend to future annexation were unfit for such positions of trust, not only as in excess of their powers but as raising a needless barrier in the way of annexing suburban villages and towns.

The obviously prudent course for such men in all such cases would be not to create such a conflict of interests, but to keep their city free to deal with the suburban village or town as little untrammelled as possible either by lighting or waterworks contracts or other public utilities.

I should not but for the force with which this argument was pressed have thought it worth considering.

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Moreover, it is to be observed that the only exercise of any right or authority within the bounds of any city or town conferred upon the company are conditional upon a consent expressed by by-law on such terms and conditions as the by-law may provide for the exercise of such power within some prescribed area. Such I take it is the meaning of the ordinance respecting water, gas, electric and telephone companies enacted in 1901, before anything in question herein. There has never been any clear assent of the character required enabling the company or those under whom it claims to operate anywhere within the city of Calgary, except in that specifically described.

As to the argument founded upon by-laws having been voted upon in the course of years after the city boundaries were extended, and final ratification by the validating Act of the Legislature, I fail to see how any of these transactions can change a line or letter of the contract, except so far as specified. And the streets as originally specified remained unchanged. As to by-laws having been voted upon where the law was duly observed and resort was had to the proper and usual form of authorization, how can all that affect the contract? Whether the subject matter directly concerned all those voting or not, or such voting was validated by the legislature matters little.

It frequently happens that a whole city is called upon to sanction what only in truth concerns a small part of it. And it is quite usual to get legislative sanction to overcome the doubts and fears of those having financial dealings based on such actions.

The fact that the contract in question was tested so often, and in so many ways as these votings and enactments shew, and that no one ever suggested

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amending it, demonstrates to my mind that the parties concerned felt they dared not venture to propose so radical a change of what was plain and clear lest their whole scheme should fall to pieces if public attention were drawn to it. Sometimes the promoter sees it wiser to trust to future development, including perhaps a lawsuit, than risk losing everything. Be that as it may, I see nothing in it all to justify our reading into all these transactions what is not there. The legislature is the proper place to go to if there has been an error.

There is, I respectfully submit, a confusion of thought in importing into the case such arguments as founded upon the primary powers and duties of a municipal corporation relative to public order, and cases decided thereon with the modern additions thereto of power to carry on certain classes of business commonly referred to as public utilities. In exercising the latter functions the municipal corporation and its contracts must be treated as any other business corporation.

I still think *Toronto* v. *Toronto Street Railway Co.*[9], was decided correctly on the question which has been referred to so much in argument herein, though I purposely abstained from reading our opinions thereon till I had formed my conclusion in this case.

I think Mr. Justice Ives was right, and that his judgment in this regard should be restored.

The respondent has cross-appealed on the question of its exclusive right barring the city itself from using its new power.

If I am right in the conclusion I have reached, this is not of much consequence.

But as the question is submitted, I may say that

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in my opinion, the terms of the contract do not seem to anticipate or provide against the city doing its own work, but only, if at all, against its granting to others the like powers conferred on respondent's assignor, and hence the cross-appeal should be dismissed.

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[9] [1907] A.C. 315.

The appeal should be allowed with costs throughout and the cross-appeal dismissed with costs.

DUFF J.—The appeal and the cross-appeal should be dismissed with costs.

ANGLIN J.—On at least two occasions the municipal corporation of Calgary formally and deliberately dealt with the franchise granted by it to A. W. Dingman in 1905 as covering territory subsequently annexed to the city. After the annexations of 1906, 1907 and 1908, it modified the terms of the franchise by an agreement authorized by a by-law submitted by the council to the vote of all the ratepayers of the city, including those in the annexed territory. After the further annexation of 1910 it again, in January 1911, modified the original agreement in most important particulars by a further agreement, authorized by a by-law likewise submitted to the vote of all the ratepayers of the city as then constituted, including those resident in the annexed area. Legislation confirmatory of these agreements and by-laws was obtained on the joint application of the city and the respondent gas company. I am satisfied that whatever may have been the proper construction of the Dingman franchise at the date of its execution, as to the area of its operation, the subsequent acts to which I have alluded have made it impossible for the appellant successfully to maintain that that area is now restricted to the limits of the city as it existed in 1905. Mr. Justice

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Stuart has pointed to language of the agreement of 1911, which makes it clear that the parties to it were then dealing with the franchise as covering the entire area of the city at that time. I would, if necessary, be prepared to support that learned judge's conclusion that

> this constitutes an agreement—an implied one, no doubt, but none the less potent—that in the original contract with which they were dealing and which they were amending those words ("the city"—"the city of Calgary") should thereafter be given a new and wider meaning.

By another act, the significance of which cannot be met by the suggestion that it was that of a mere official acting without authority, the city again recognized that annexed territory was within the franchise. By a resolution passed in January, 1914, which recited the franchise conferred on Dingman by agreement of August, 1905, and subsequently assigned to the Canadian Western Natural Gas, Light, Heat and Power Company, the City Council, exercising a right Conferred by s. 155 of Ordinance 33 of the North-West Territories, requested the Hon. Mr. Justice Stuart to investigate certain interruptions in the services of the respondent gas company in territory annexed to the city after 1905.

Throughout the entire period from 1906 to 1914, when the present contest arose, everybody interested appears to have regarded and acted upon the Dingman franchise as applicable to the subsequently annexed territory equally with that comprised within the city limits in 1905. Every official of the city who was called upon from time to time to act under the contract —the mayor, the commissioners, the engineer—so dealt with it on innumerable occasions.

I think there is a presumption that these acts were duly authorized, and that in the absence of proof to the contrary they should be taken as amounting to

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an acquiescence by the city in the construction placed on the Dingman franchise by the respondent gas company. The responsible officials of the city knew that under permits issued by them large sums of money were being expended by the company in the construction of works in annexed territory, on the assumption that they were covered by the Dingman franchise. Indeed this must have been known to every citizen. The carrying out of these works was facilitated in every way possible by the civic authorities. It would be so inequitable to permit the municipality now to set up that the operation of the franchise is confined to the area of the city as it existed in 1905 that, in my opinion, it cannot be allowed to do so. Some observations of Lord Shaw of Dunfermline, in delivering the judgment of the Judicial Committee in *Winnipeg Electric Railway* v. *City of Winnipeg*[10]*,* seem to be very closely in point. In the present case there is the added circumstance that rights of innocent third parties have intervened which would be seriously jeopardized were the contention of the city to prevail.

Without expressing any view as to what construction should have been placed upon the agreement of 1905, but for the subsequent matters to which I have referred, or as to the applicability to it of the decision in the *Toronto Railway Case*[11], I am, for the reasons I have indicated, of the opinion that the judgment *a quo* on this branch of the case should be affirmed.

On the question raised by the cross-appeal, I have failed to find in the agreement of 1905 anything which binds the city not to exercise in competition with the defendants any powers to supply its in-

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[10] [1912] A.C. 355, at pp. 372-3.
[11] [1907] A.C. 315.

habitants with natural gas which it then had or might afterwards acquire. On this branch of the case, I agree with the views expressed by the learned Chief Justice of Alberta and Mr. Justice Stuart.

The case of *Knoxville Water Co.* v. *Knoxville*[12], cited by the learned trial judge, is very closely in point. Better authority than a decision of the United States Supreme Court on such a question it would be difficult to find.

I would dismiss, with costs, both the appeal and the cross-appeal.

Appeal and cross-appeal dismissed with costs.

[12] 200 U.S.R. 22.