

28, 1951

UNIVERSITY OF LONDON

-9 JUL 1953

In the Privy Council.

30717

No. 31 of 1950. INSTITUTE OF ADVANCED LEGAL STUDIES

ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN

THE CITY OF MONTREAL ... APPELLANT

AND

SUN LIFE ASSURANCE COMPANY OF CANADA ... RESPONDENT.

CASE FOR THE APPELLANT

RECORD

1.—This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated the 21st February, 1950, which set aside a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec, dated the 25th June, 1948, and restored a judgment of the Superior Court at Montreal, dated the 20th September, 1944, concerning the assessment for municipal and school purposes of property owned by the Respondent, consisting of a heating plant and a large office building of which part was occupied by the Respondent as its head office, and part was let to tenants.

p. 1155  
V, pp. 1026-1031  
V, pp. 984-1023

2.—The assessors who, in accordance with the charter of the City of Montreal (Quebec Statutes 62 Vict. c. 58 and amendments), prepared the valuation roll in 1941, entered thereon as "the actual value" of the Respondent's property the sum of \$13,755,500 in respect of the office building and \$520,500 in respect of the heating plant. From this assessment the Respondent appealed to the Board of Revision, a tribunal specially constituted to hear assessment appeals, which, after hearing evidence, by a judgment dated the 21st June, 1943, held that the Respondent was right in contending that the heating plant should not be valued separately, but that the real value of the property as a whole was \$15,051,997.07, with the result that the Board held the Respondent's complaint against a total assessment of \$14,276,000 to be unfounded.

V, p. 983, A1-  
p. 983, A31

V, p. 983, A30,  
l. 44-p. 983, A31,  
l. 4

## RECORD

3.—From this judgment the Respondent appealed to the Superior Court, any judge of which under Section 384 of the Appellant's Charter after receiving the record including copies of the valuation certificate and of the documents annexed thereto, and "after having heard the parties, either in person or by attorney, but without inquiry, must proceed with the revision of the valuation submitted to him and with the rendering of such judgment as to law and justice shall appertain," or, to quote the French text, "il doit procéder à reviser l'estimation qui lui est soumise et à rendre tout jugement que de droit." The Superior Court judge (MacKinnon J.S.C.) reduced the assessment to \$10,207,877.40. This amount was restored 10  
 V, p. 1023, ll. 1-12 by the Supreme Court of Canada, after the Court of King's Bench by a majority had held that the Board of Revision's judgment should be restored.  
 V, p. 1031, ll. 40-45

4.—The City Charter provides by Section 375 that the assessors (each of whom before acting must by Section 374 take oath that he will faithfully, impartially, honestly and diligently perform the duties of assessor according to law) shall every three years draw up for each ward a new valuation roll of all the immovables (which by Section 361 (2) includes land and buildings) containing "the actual value of the immovables"; or "la valeur réelle desdits immeubles." 20

5.—After public notice of the completion of the valuation roll, complaints are received (Section 379a) and transmitted by the chief assessor to the Board of Revision (Section 380) which (by Section 382) consists of three members resident in Montreal, of whom the president must be a barrister or notary of at least ten years' standing, appointed by the city council on a report of the executive committee. Each member takes the oath prescribed by Section 374, and devotes all his time to the duties of his office. Complaints are heard in public, unless the Board decide otherwise, on sworn evidence, according to rules of procedure approved by the council. The president decides questions of law. The Board of 30  
 Revision may prescribe the data and information that the assessors shall obtain, may examine any valuation submitted by the chief assessor, may call any witnesses, may question parties and their witnesses, may proceed itself with the making of appraisals or causing them to be made, and may visit at any time the immovables entered on the roll. The Board may reduce, maintain or increase valuations complained of, giving briefly the reasons for any change ordered.

IV, p. 703a

6.—The Respondent's property consists of a main building with a ground floor, 25 storeys above, and 3 basement storeys below; and a separate boiler house or heating plant. On the valuation of property 40  
 the Appellant's assessors, according to the circumstances, might use one or more of several methods of assessment, viz. the comparative or market data method based on sales in the open market of similar properties, the replacement value method, and the economic value or capitalized revenue

method. In the present case, however, neither the property in question nor any similar or comparable property has been sold. Accordingly the assessors discarded the comparative or market data method as impossible and reverted to the replacement value and economic value methods. In 1941 the assessors had prepared a memorandum of guiding principles, based on jurisprudence, for the assessment of special properties or properties to the whole or part of which special conditions applied. This memorandum was used as a guide in the assessment of the Respondent's property.

Record

IV, p. 695

10 7.—On the valuation roll deposited by the assessors on 1st December, 1941, the Respondent's main building and the heating plant were assessed as two units, the value shown being as follows: Head Office—land \$730,600.00, building \$13,024,900.00, total: \$13,755,500.00; secondary building (heating plant)—land \$74,100.00, building \$446,400.00, total: \$520,500.00. The total of the two valuations was thus \$14,276,000.00.

IV, p. 713,  
section 10  
IV, p. 716,  
section 10

20 8.—The method of assessing the main building is shown by the assessor's notes. The total cost of both immovables as at 30th April, 1941, as reported by the Respondent upon statutory request to that effect, was taken as being \$22,377,769.26. From this figure were deducted the following items, of which the Respondent had supplied details: cost of the heating plant, \$709,257.14; cost of the sidewalks, \$70,335.00; price paid for the land of both immovables, \$1,040,638.20; cost of the temporary partitions required for occupancy by the Respondent's office staff during the construction, \$233,713.38; and value of the walls and floors demolished and the cost of their demolition for the purpose of uniting the old and the new building, \$1,215,450.00. These several amounts totalling \$3,269,393.72 reduced the total reported cost to \$19,108,375.54 as the cost of the main building alone, without land. This residual cost was then adjusted on the assumption that the whole building had been erected between 1927 and 1930 when average building costs exceeded 1941 costs by 7.7%. Accordingly the \$19,108,375.54 was reduced by 7.7%, or \$1,471,344.00 to \$17,637,031.00. A further deduction of 5%, or \$881,851.00, was then made for presumed unproductive extra cost because the building had been erected in three stages. From the balance of \$16,755,180.00 a depreciation allowance of \$3,081,202.00 was made, leaving a net value of \$13,673,978.00 in 1941 without the land. By adding \$730,600.00, the admitted value of the land, a total replacement value of \$14,404,578.00 was thus found for the main property.

IV, p. 714

IV, p. 717

IV, p. 714, ll. 20-44

IV, p. 715, ll. 1-23

40 9.—The commercial value of the property was calculated on the basis of an annual assumed revenue of \$1,187,225.00 capitalised at a rate of 15%, giving a valuation based on rental value of \$7,915,000.00. On the principles of the memorandum a valuation was reached by taking 90% of the "replacement value," and 10% of the "commercial value" making

IV, p. 713, section 2

IV, p. 714, section  
10 and remarks

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together a total valuation of \$13,755,500 of which \$730,600 was entered on the roll as the value of the land.

IV, p. 716

10.—The heating plant was assessed as a separate unit, on a replacement value basis. According to figures supplied by the Respondent, the cost was \$709,257.14. A depreciation allowance of 37½% reduced the valuation to \$446,400. \$74,100.00 was the value of the land. Accordingly the the actual value of the land and building was determined to be \$520,500. The actual value of both immovables was therefore \$14,276,000.

IV, p. 720, IV, p. 717  
sections 8 & 10

I, p. 11

11.—The Respondent appealed to the Board of Revision and contended that the proper valuations of the two immovables, land included, should be \$8,330,600 and \$102,600 respectively. The Board, after an exhaustive inquiry determined the total value to be \$15,051,977.07. As the complaints against the assessors' total valuation at \$14,276,000 failed, the assessment was confirmed.

I, p. 111

V, p. 983, A 30,  
l. 28—p. 983 A 31, l. 4V, pp. 983, A1—  
p. 983, A31

12.—By its judgment the Board accepted the methods followed by the assessors, but differed from the assessors on the following five points :

V, p. 983, A26,  
ll. 20-32

(1) The Board in determining the replacement value of the main building added to the figures adopted by the assessors (\$20,627,873.92) a sum of \$58,713.70 for additional admitted construction expenditures incurred between the end of the period covered by the information given by the Respondent to the assessors (30th April, 1941) and the date of the assessment (1st December, 1941), which gave a total of \$20,686,587.62, reduced by the deductions for walks, temporary partitions and for parts demolished and labour to connect up the new building, to \$19,167,089.24.

V, p. 983, A26, l. 33—  
p. 983, A27, l. 16

(2) The Board of Revision did not accept the deduction of \$1,471,344 made by the assessors in adjusting the declared construction cost to the average index figure of 1927-28-29-30, because the assessors had assumed the construction of the building as started and completed during that period. Instead, the Board deducted a sum of \$181,503.32 on this account, as it had then before it the joint admissions of the parties showing the amount spent year by year on the actual construction between 1913 and 1st December, 1941, and the uncontradicted evidence of the index cost of each of these years. This change resulted in a difference of \$1,289,840.68 between the figures adopted by the assessors and those adopted by the Board. As a consequence the above mentioned amount of \$19,167,089.24 was reduced to \$18,985,585.92. The Board having concurred with the assessors in allowing an additional deduction of 5% (\$949,279.30) "for presumed extra cost as building built in three units," the replacement cost before depreciation was therefore taken as \$18,036,306.62.

(3) Instead of agreeing to the deduction for depreciation made by the assessors, the Board accepted the depreciation of 14% put forward by the majority of the expert witnesses heard (which percentage of depreciation has not been disturbed by the higher courts) and deducted accordingly \$2,525,082.93 from \$18,036,306.62, thus arriving at a net cost of \$15,511,223.69 for the head office building without land, and of \$16,241,823.69 with the land. Record  
V, p. 983, A27,  
ll. 18-23

10 (4) The Board modified the figures arrived at by the assessors as to the replacement value of the heating plant, by making the adjustment of declared expenditures with the index cost at 109, which had not been done by the assessors, and by reducing the percentage of depreciation from 37½ to 28%. These modifications brought up the replacement value from \$446,400 to \$461,635. The Board added the replacement value thus found to that of the main building which gave a total replacement value for both immovables of \$16,777,558.69, land included. V, p. 983, A27,  
ll. 24-32

20 (5) Considering the revenue or economic approach to the valuation, the Board modified the figures of the assessors in two respects: first, instead of adopting their figures as the assessed revenue of the property at \$1,187,225 which, calculated on a 15% capitalization rate for a serviced building, gave an economic value of \$7,915,000, it took the figures of the total gross revenue as given by the Respondent, in order to remain within the limits of the joint admissions, but without approving them, namely \$1,189,055.30 and deducted with qualification the declared operating expenses of \$436,992.64, which left a net revenue of \$752,062.66; then capitalizing this net revenue at the rate of 10.7% for an unserviced building, it found a capital sum of \$7,028,623; V, p. 983, A27, 1.33-  
p. 983, A28, l. 48

30 secondly, in determining the relative importance to be given to the replacement and commercial factors the Board took into account the relative values of the space occupied by the owner and by tenants and gave a weight of 82.3% to the replacement factor instead of 90%, and 17.7% to the commercial factor instead of 10%. Thus the Board held the actual value of the whole immovable property to be \$15,051,977.07. V, p. 983, A 29,  
ll. 1-5

13.—The Respondent then appealed by summary petition under section 384 of the charter, to the Superior Court. MacKinnon, J., after having heard the parties and having examined the record “but without inquiry,” by judgment of the 20th September 1944, agreed with the judgment of the Board of Revision except on the following three points: I, p. XXVII  
V, pp. 984-1023

40 (1) As to the adjusted cost to the index number, the Superior Court adopted the reduction of 7.7% taken by the assessors, and therefore reduced the replacement cost by \$1,475,865.87 instead of \$181,503.32, a difference of \$1,294,362.55.

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V, p. 1010, ll. 30-45

(2) As to depreciation, the Superior Court deducted from the replacement cost in addition to the 14% allowed by the Board for physical depreciation, a further 14% amounting to \$2,352,932.70 under the caption of excessive cost as adding nothing to the value of the property. This deduction is based upon the difference in cost between the granite used and the limestone which might have been used in the exterior walls; between bronze sash used and the cost of steel sash; between Vita Glass used and ordinary glass; between bronze doors used and steel doors; between marble floors and terrazzo floors; between marble walls and plain plaster walls; between decorative and ornamental finish in the banking hall of the Respondent and the cost of ordinary plain construction, and between an elaborate and ornamental exterior finish and a plain one. 10

V, p. 102, l. 41-  
p. 1021, l. 11

(3) The Superior Court held that both the replacement value and the commercial value should be considered and each given equal consideration so that the actual value should be 50% of the replacement value plus 50% of the commercial value.

V, p. 1021, l. 12-  
p. 1022, l. 21

14.—In the result therefore the Superior Court found the replacement value to be \$13,387,131.80, and the commercial value \$7,028,623.00. By taking 50% of each of these figures, the Superior Court found the real value of the Respondent's properties to be \$10,207,877.40, and reduced the assessment accordingly. 20

V, pp. 1023, 1024

15.—From that judgment both parties appealed to the Court of King's Bench. By a majority of three judges against two (Galipeault, St. Germain and Pratte, JJ.; St. Jacques and Casey, JJ., dissenting), the judgment of the Superior Court was reversed and the decision of the Board of Revision was restored.

V, p. 1031, ll. 41-46

V, p. 1027, l. 44-  
p. 1028, l. 11

16.—The Court of King's Bench pointed out that the law (i) had vested the assessors with the difficult task of assessing, which required technical knowledge and experience, and (ii) had also created a specialised revising tribunal whose members are at the same time judges and experts. The Court of King's Bench therefore held that unless a gross error in the calculation, evident injustice or mistake in law is committed, the higher courts should not substitute their opinion on questions which require special expert knowledge; that the assessors and the Board did not err in the selection of the factors to determine the actual value; that the Superior Court was wrong in preferring the assessor's replacement valuation based on incomplete data to that of the Board based on complete information: that the Superior Court was wrong in deducting the additional sum of \$2,352,932.70 for granite, marble ornamentation, etc., since the result of such deduction was that it was no longer the same building which the Court was assessing; that the Board was duly qualified and trained to decide in what proportion the economic and replacement factors must be appreciated; and that the 30 40

V, p. 1028, ll. 12-37

V, p. 1029, ll. 39-46

V, p. 1030, ll. 33-46

V, p. 1031, ll. 23-35

admitted and sworn market value of \$16,258,050.22 in the returns filed by the Respondent with the Superintendent of Insurance for 1941 was a strong indication that the assessment is more in line with the actual value than the amount at which the Respondent sought to have the property assessed.

17.—St. Jacques, J. (dissenting) in determining the commercial (economic) value of the Respondent's property noted first that the assessors had fixed the annual rental value of the main building at \$1,187,225, which capitalized at 15% had given a commercial value of \$7,915,000. St. Jacques, J., however, capitalized such rental at 12% and thus obtained a commercial value of \$9,893,500. He then assumed an annual gross return of \$1,200,000 from which he deducted \$430,000 for the building services and upkeep, and \$306,000 for taxes, which left a net income of \$464,000, which capitalized at 4.5% gave a commercial value of \$10,200,000, which was practically equivalent to the amount of the actual value found by the Superior Court. In order to determine the intrinsic (replacement) value factor, St. Jacques J. took as a basis an assumed replacement value of the Respondent's property in 1931 of \$12,400,000, from which he deducted 1% per year up to 1941 for depreciation, namely \$1,240,000; then after having added to that amount an assumed sum of \$1,986,000 for expenditures made between 1931 and 1941 to complete the inside of the building, he found an intrinsic (replacement) value of \$13,150,000. Then proceeding to reach a valuation along the lines followed by the assessors and the Board, he gave a respective weight of 50% to each factor: economic or commercial, and intrinsic or replacement. As regards the commercial factor, however, instead of using the figures at which he had arrived, he took the figures of the assessors (\$7,915,000) and thus came to the conclusion that the actual value of the Respondent's property was \$10,482,500.

18.—Casey, J. (also dissenting) held that actual value means objective exchange value, and that what a willing buyer is prepared to offer for a property is that property's actual value whether or not the property is for sale or could be sold. He then proceeded to imagine a prudent investor concerned with the return alone. Finding that the return justified an investment of about \$10,000,000 and considering that the revenue approach as used in this case leads irresistibly to the correct answer, he confirmed the amount arrived at by the Superior Court.

19.—The respondent appealed from the Court of King's Bench to the Supreme Court of Canada, which by a unanimous decision dated 21st February, 1950, set aside the judgment of the Court of King's Bench, with costs, without disturbing the allowance of costs awarded by the Court of King's Bench to the Appellant on the cross-appeal of the Company to that Court, and restored the judgment of the Superior Court.

20.—In the Supreme Court, Rinfret, C.J.C., held that the judgment of the Court of King's Bench ought to be set aside, because it rests on the

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general principle that an appeal tribunal should not interfere, except if the inferior tribunal had erred in law or in the calculations or had created a real injustice, while Section 384 imposes upon the tribunal the duty of rendering "such judgment as to law and justice shall appertain." He added that a municipal valuation is not to be made in accordance with the rules laid down with regard to the valuation of a property for expropriation purposes; that the assessor should not look at past or subsequent or potential values; that, at the time of the valuation, the Sun Life property was occupied about 60% by the Company itself for its own purposes and about 40% by tenants, and that this is the only aspect of the property 10 that they had to take into consideration; that the rental value enables one to find the commercial value or the price a prudent investor would have been willing to give for the purchase of the property; that the market value cannot form the basis of valuation in this case; and that it is not the function of the Supreme Court, acting as a third appeal Court, to proceed to a detailed calculation of what the valuation should be. He states that he is fully in accord with the reasons for judgment of Casey, J., in the Court of King's Bench, and adopts his reasons; and holds that the learned judge of the Superior Court succeeded in placing a true objective exchange value on the property. 20

pp. 1161-1163

21.—Kerwin, J., held that the test of real or actual value is an objective one, which in many cases may be applied by seeking the exchange value or the value in a competitive market; but that, if there is no such market, then one may ask what would a prudent investor pay for the subject of taxation, bearing in mind the return that might be expected upon the money invested. Kerwin, J., also agreed with the reasons and results of Casey, J. Since the application of the memorandum does not indicate the actual value in the case, he thought that its formula should have been disregarded.

pp. 1163-1175

22.—Taschereau, J., adopted the views taken by the assessors, the Board, the Superior Court and the Court of King's Bench, that the comparative or market data method cannot be considered in this case and that the two last approaches only, viz. the depreciated replacement cost and the economic value found by the capitalized revenue, should be used to reach a proper conclusion. Certain features of an expensive building may reduce its market value, and a prudent investor would disregard many of its amenities and luxuries. Taschereau, J., adopts the figures for replacement value and economic value taken by the Superior Court and blends them 50% and 50%, stating that the test of real or actual value lies in the exchangeability of the property and that a prudent investor 40 would particularly be concerned with the economic value of the building in order to get a fair return for his money. He also stated that real value is the market value or the value in exchange and that the question is to find what would be the price of the building in the open market.



23.—Rand, J., held that the cost of special features unless reflected in exchange value, must be eliminated as dead value, and that money spent in exceptional form to symbolize business position and commanding power tend to limit the purchasers. Adopting the economic value and replacement value tests of the Superior Court, Rand, J., blends them in the proportions of 55% of economic value and 45% of replacement value to reach a valuation of \$10,277,708.95, substantially the same as that of the Superior Court. Record  
pp. 1175-1178

24.—Estey, J., held that actual value means exchangeable value—the price which the subject will bring when exposed to the test of competition; that actual value must be, except where there is a market in which the exchange value may be ascertained, a matter of judgment exercised after determining every item that affects the value of the particular immovable under consideration; that actual value depending on so many factors in a matter upon which men of experience will entertain different opinions, the Legislature in recognition of this fact provided that actual value as determined by the Assessors in the exercise of their own judgment shall be accepted for assessment purposes, unless some error in principle or substantial injustice is involved that the owner occupancy has been given an importance in the determination of the actual value of this building that cannot, in the circumstances, be justified; that there exists in fact no rigid rule for the valuation, which is affected by a multitude of circumstances which no rule can foresee or provide for; that the assessor must consider all these circumstances and elements of value and must exercise a prudent discretion in reaching a conclusion; that notwithstanding the judgment exercised by the assessor in fixing the percentages, there has not been that assessment of this building contemplated by the statute; and that non-productive features of a building, in so far as they do not add to its actual value (as already defined) ought not to be included among items in the determination of that value. He therefore confirmed the judgment of the Superior Court. pp. 1178-1185

25.—The Appellant submits that the judgments of the Board of Revision and the Court of King's Bench were right, and that this appeal should be allowed with costs, and that the judgment of the Court of King's Bench should be restored, for the following amongst other

### REASONS

1. BECAUSE the function and responsibility of determining municipal valuations have been vested by the Legislature in the Assessors, who valued the Respondent's property in the proper exercise of their functions;
2. BECAUSE such valuation has been confirmed by the Board of Revision, which was the trial tribunal specially appointed to revise such valuations;

3. BECAUSE there were no adequate grounds for the Superior Court substituting a different valuation for such valuation ;
4. BECAUSE such valuation has been confirmed on sound grounds by the Court of King's Bench (Appeal Side) for the Province of Quebec ;
5. BECAUSE the judgment of the Supreme Court is wrong in that such judgment :
  - (A) has given an illegal import to the expression " actual value " ;
  - (B) failed adequately to consider the depreciated replacement 10 factor as an element of value ;
  - (C) considered possible revenue as the only measure of value ;
  - (D) limited the field of possible buyers to a prudent investor, concerned with the revenue only, ignoring as a possible buyer the actual owner or any other buyer with similar requirements ;
  - (E) failed to apply a fundamental principle of valuation "*rebus sic stantibus*" by not giving weight to the actual occupancy of the building by the Head Office of the 20 Respondent ; has assimilated actual value to value to others ; and has assessed an institutional and special property as a purely commercial office building ;
  - (F) has failed to consider all elements of value objective and subjective ;
  - (G) has adopted the figures fixed by the Superior Court as to the replacement value of the property, which figure differ from the figures fixed by the Board of Revision to the extent of \$3,547,295.25, although the Superior Court took wrong dates of construction of the building 30 and a wrong index cost, and wrongly deducted \$2,352,932.70 in respect of special features ;
  - (H) has disturbed without adequate reason the percentages allowed by the Board of Revision to the replacement and economic factors in the determination of the actual value ;
  - (I) has decided that the judgment of the Court of Appeal was not in accordance with section 384 of the Appellant's charter ;

6. BECAUSE the valuation of the assessors, the judgment of the Board of Revision and the judgment of the Court of King's Bench (Appeal Side) are well founded in law and in fact ;
7. BECAUSE of the reasons given by the majority of the judges of the Court of King's Bench.

L. E. BEAULIEU.  
HONORÉ PARENT.  
R. N. SEGUIN.  
FRANK GAHAN.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF  
CANADA.

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BETWEEN  
THE CITY OF MONTREAL *Appellant*  
AND  
SUN LIFE ASSURANCE  
COMPANY OF CANADA *Respondent.*

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CASE FOR THE APPELLANT

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BLAKE & REDDEN,  
17 Victoria Street,  
London, S.W.1,  
*Solicitors for the Appellant.*