

28, 1951



IN THE PRIVY COUNCIL.

Council Chamber,
Whitehall, S. W. 1.

Monday, 2nd July, 1951.

Present:

LORD PORTER
LORD NORMAND
LORD OAKSEY
LORD REID
LORD ASQUITH

ON APPEAL FROM THE SUPREME COURT OF CANADA

Between:

THE CITY OF MONTREAL

and

SUN LIFE ASSURANCE COMPANY OF CANADA

To Judicial Committee of Privy Council,
H.M. Patent Office, &c., &c.

MARTEN, MEREDITH & Co.,

Shorthand Writers,

11 New Court,

Carey Street, W.C.2

(Midland Circuit and Leeds Assizes)

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Between:

THE CITY OF MONTREAL

(Appellant)

and

SUN LIFE ASSURANCE COMPANY OF CANADA

(Respondent)

(Transcript of the Shorthand Notes of Marten, Meredith & Co.,
11 New Court, Carey Street, London, W. C. 2).

MR. L. E. BEAULIEU, K.C., MR. HONORE PARENT, K.C., MR. R. H. SEGUIN, K.C. (Of the Canadian Bar) and MR. FRANK GAHAN, instructed by Messrs. Blake & Redden, appeared for the Appellant.

MR. F. P. BRAIS, K.C., MR. HAZEN HANSARD, K.C., MR. R. D. TAYLOR, K.C. (of the Canadian Bar) and MR. G. D. SQUIBB, instructed by Messrs. Lawrence Jones & Co., appeared for the Respondent.

MR. A. M. WEST, K.C. (of the Canadian Bar) held a watching brief on behalf of an interested party.

E I G H T H D A Y

MR. BRAIS: May I first apply myself to a question put to me towards the close of last week which is very pertinent, I think, to the case; that is the question my Lord Reid put referring to the sanction by the Board of the formula of valuation which we find in the manual. I will on that point refer to the following which is what is found in the record. First, of course, we have the resolution of the Board itself.

LORD PORTER: That means the position in this case? I want to know what you mean by "resolution".

MR. BRAIS: It is at page 94 of the manual.

LORD PORTER: That is the blue manual?

MR. BRAIS: Yes, my Lord. We find here at page 94: "If we refer to the amendment to article 382 as contained in Section 13 of 3 George VI, chapter 104, we find the following: 'in order to permit the Board of Revision to proceed with the general and complete valuation of the immoveable property'". Then it continues to say, as we had read the other day, that they shall have power to instruct on the forms and methods and so forth. That truncated quotation is, of course, Section 382 of the Statute which is found at page 170, sub-paragraph 14.

I reread it because it is important, because it is the enabling Statute passed by provincial authority. "The Board may at any time determine the manner in which the assessors shall proceed with their work, prepare the forms, documents and books which they shall use, prescribe the data and information that the assessors shall obtain and enter in their books or on the said documents, and give these instructions, accordingly, to the chief assessor". They determine the manner in which the assessors proceed with their work. I am not going to read that resolution in toto but the following lines are very important.

LORD PORTER: Where is this?

MR. BRAIS: It is the bottom of page 94, my Lord. "After due and proper consideration of the question, the Board of Revision passed the following resolution on September 21st, 1939, which gives a very clear outline of how the revaluation is to be accomplished and the manner of proceeding with the work". That paragraph, of course, does not bind the Board. We will come to what implication may arise out of it.

This is the resolution. "Whereas the city assessors are going to undertake" -- this is the Board speaking, I take it -- "the complete valuation of all immoveable property in the City of Montreal and there is reason for the Board of Revision after taking knowledge of the letter and notes of the Director of Services" -- I stress "after taking knowledge of the letter" -- "of September 9th: (a) to modify the instructions transmitted by the Board to the chief assessor on June 30th, 1939; (b) to determine the manner in which the assessors shall proceed with their work and prescribe the date and information that the assessors shall obtain and enter in their books and give these instructions accordingly to the chief assessor."

We will see the letter saying that this Sun Life building as well as all buildings were assessed in 1937 and 1938 on the method which we find in the book.

Then at page 97, the penultimate paragraph, we find that the board directs as follows. One has in mind the

letter and notes of the Director of Services as to that very

matter. The Board directs/^{that}the net replacement cost of

buildings in the third group will continue as at present.

At that time, as we will see, and I am afraid we will have to go into it in some detail, the method being employed for the valuation of buildings in Montreal was the method which we find in the exhibit which we were last looking at, where the valuation is arrived at by appraisal of the value of the building on quantities and value.

LORD ASQUITH: "The Board directs that the method for the third class of property shall continue to be employed": where does it do that?

MR. BRAIS: At page 97, the penultimate paragraph. The cost of buildings in the third group will continue as at present.

LORD ASQUITH: What is the date of this resolution?

MR. BRAIS: 1939. We have it as 21st September, 1939, my Lord.

LORD ASQUITH: The memorandum was not until 1940.

MR. BRAIS: The memorandum was in August, 1940. When the old law was still in force and on the Statute Book, the old law referred to the obtaining of values by the intrinsic ----

LORD REID: The memorandum said nothing about how you find the net replacement cost. It only said what you had to do when you had got it.

MR. BRAIS: That is so, but at that time the assessors were proceeding on the instructions of the Board on a system which, if I can draw any inference from the preamble on page 95, was the system which was followed then, because there was an exchange of letters and notes of the Director of Services on September 9th, 1939.

LORD ASQUITH: I am sorry -- it is my fault -- but I am not clear. It is 1939, this resolution?

MR. BRAIS: Yes, my Lord.

LORD ASQUITH: Did the division of buildings into four classes, of which the third is partly owner-occupied and partly let, pre-exist the memorandum?

MR. BRAIS: I cannot answer that directly without an explanation.

LORD ASQUITH: The net replacement cost of buildings in the third group: what is the third group?

MR. BRAIS: May I be permitted to say there are two separate groupings. There is the grouping of the resolution, which we find at page 97, which is one thing and has nothing to do with this, that is to say, the sub-division of the third group into the four groups of the memorandum.

LORD ASQUITH: That answers my question.

MR. BRAIS: At the top of page 97 it gives the residential buildings that are exempt and all other buildings. Then the memorandum takes all other buildings and restricts them to large buildings and forms four groups depending on occupation and use.

LORD PORTER: That comes in the memorandum. Does it come

in this manual?

MR. BRAIS: The memorandum?

LORD PORTER: The division into four groups. Does that come into this manual at all?

MR. BRAIS: It was never published in the manual. Nobody knew of its existence and it was only when Mr. Vernot came into court to try to explain why he used what was thought at the moment to be an extraordinary method that he said he had a memorandum. Until then, in spite of the book which deals in the most minute detail with the gravel per cubic yard that goes into the concrete of your building, the manual was kept completely out of sight. As I say, it was only when it became necessary to substantiate the valuation of the Sun Life building in the court that this memorandum had to be brought out by Mr. Vernot to explain why he did what he did. One would have thought a document of that importance, bearing as it does upon all the large buildings in Montreal, owner-occupied or otherwise, would have been officially issued for the information of the taxpayer. The book says, "For the information and aid of the taxpayer". One would have thought that one of the very first things to be done would be to show that memorandum.

LORD REID: Unless I mistake it, there is nothing in the memorandum which contradicts anything in this book. If I understand the case aright, the memorandum adds something that is not in the book, namely, what you do with replacement cost when you have it. There is nothing in the memorandum that contradicts anything here?

MR. BRAIS: No, my Lord. If you combine what Vernot did with the memorandum, you have Vernot assessing on a historical cost basis, which is contrary to the book and contrary to the instructions here. As regards the memorandum, I think there is nothing in the book which says you must proceed on the memorandum. The memorandum too, if there is anything against it, is the law of 1941, which says you must take the actual value.

Even if the Board gave instructions for the memorandum and the memorandum is against the law, the Board cannot go beyond its enabling powers and by a memorandum make something legal which is not legal by the law. When they have stated, if they have stated, that the valuation itself shall be made by one method rather than by another method (the appraisal method rather than the historical method) I would say this, I think without fear of contradiction, that the choice of method is something which is within the enabling authority given them by the Statute.

LORD OAKSEY: Where does it say they have to find the replacement value by the appraisal method rather than the historical method?

MR. BRAIS: That is what I am developing, my Lord. Nowhere do you have that in black and white. You have it in this book which has gone before this Board and which has not been stated to be the improper method. You have the evidence that it has apparently been applied to all other buildings. You have further the statement in this book that the historical cost method is not the proper method.

LORD OAKSEY: Where does it say that the historical method is

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not the proper method? You are coming to that?

MR. BRAIS: I am answering at the moment the question that is put to me. I will come immediately to the quotations that the historical cost method is frowned upon by assessors as being an improper method, and it says so clearly in this book in the section where Mr. Parent explains the general line and the result of his vast experience and examination into all the American valuation methods and the other valuation methods on the continent and the conclusion which has been arrived at after weighing the results in all those cases and also under the formula itself which is prescribed.

LORD PORTER: By "historical method" you mean the actual cost: by "appraisal method" you mean by cubing?

MR. BRAIS: The first method referred to by ^{YOUR} Lordship is the historical cost: that is taking the actual amount spent and adding that up. The method recognised here, which would be the appraisal method (I think we can call it that) consists in taking the plans of the building and finding out exactly what material and how much material goes into it and then building up the building in that manner.

LORD PORTER: It is cubed. It is really the quantity surveyor's method?

MR. BRAIS: It is a quantity method, a very carefully followed quantity method. If it was cubing I would be ill at ease. If the City had recommended a cubing method I would be ill at ease because no one really says that the cubing method is quite precise or is reasonably precise. This method here is the method which is used by every contractor, of course, when he prepares his prices and tenders, it is the insurance method, it is the method used everywhere and it is the method that the assessors are instructed to use.

To answer my Lord Porter's question, the replacement cost is defined at page 288, in order that we may be precise on that. "Replacement Cost: The valuation of every building calculated on the detailed system is a semi-commercial valuation of the replacement cost. All buildings, except out-buildings, are calculated according to the following procedure: (1) The total calculation of the frame, electric wiring, floors (under and finished), Chimney, ceilings, plumbing stacks, partitions, with or without cellar, and with or without cellar floors" etc. "(2) The total calculation of the preceding items with in addition the foundations, the walls and window openings, is established with the help of a graph also described below." Then you have pages and pages of details. At page 292, for example, you have a table: "To take off plaster of walls, ceilings and partitions, to take off partitions only, main storey with cellar, main storey without cellar, additional storey, artificial or rockface stone by storey of 10 feet".

Further on you have the quantities. I take, for example, page 325: "Replacement cost (residential category) (excluding walls and foundations) framework, beams and joists, rough floor, ceiling's joists, roofing, rafters, planks, tar and gravel". You take the actual material that goes on the roof: "Asphalt, felt, paper shingles, cedar shingles, rubberoid, asphalt paper, coloured slate, black slate, galvanised iron, asbestos, black tile, coloured tile." You do not take any chance at all on whether you have a four ply wood material on your roof or asbestos or

other sheeting. You take absolutely everything that goes into the building in exactly the same fashion as the contractors would in estimating for the plans and specifications to arrive at a precise figure as to a given year.

LORD NORMAND: I see at page 271 the cubic foot unit price method is condemned.

MR. BRAIS: Yes, my Lord, the cubic foot valuation is condemned. We have the evidence of an extraordinary witness, Fournier, who takes a figure of 40 cents to arrive at a figure of 80 cents in the case of the Sun Life. He comes somewhere close to the historical cost. That was the purpose of his work.

If anybody had followed the City's own system, I shall have respectfully to submit that in doing that you must lay aside those things which are a total waste. Hand-made ~~forms~~ may create pride in the mind of the owners, but from the point of view of anybody going up to the fourth floor that is not giving the building one cent more, because they could have been machine turned. I do not suppose there is one person in 200,000, in our part of the world anyway, who could tell the difference. I am getting away from the answer which I must make.

I said the other day that Perrault ~~at~~ at page 25 said he thought the memorandum had been prepared on the instructions of the Board, so it is clear -- there is

no doubt about it; my learned friends invoke it -- that

the Board was taking more than a fatherly interest in the

organisation of its whole assessment scheme in Montreal.

The Board had been organised for that very purpose and had

been instructed to prepare the forms. If we look at page

102 of the manual we see the form to be used by the Board

of Assessors is printed in and these are the forms which under the law it is the duty of the Board of Revision to prepare and order. At page 136 we have this: "Every complaint against any entry on the valuation roll received within the legal delay must be transmitted to the Board of Revision for hearing and decision". There is a special sheet which is prepared for the purpose of giving the Board the information which comes off the assessment sheet which

* we have just seen at page 102 and which sheet is prepared especially for the purpose of contestation, and of course there is no objection on that.

LORD PORTER: What does all this come to? As I understand it, what you are saying at present is: Here you get people acting upon certain principles. Those principles are not in accordance with the law. At the present moment, as far as I understand you, you are saying: I propose to show to the Board how it came that the Board of Revision adopted these methods. Is there anything further than that in it?

MR. BRAIS: Except that I do not follow, with due respect, what your Lordship has in mind when your Lordship says "these methods".

LORD PORTER: I have in mind the historical replacement method and the 90 per cent against 10 per cent. As I understand it, you say that is wrong. You say that is the wrong method on principle and you say: I now come to find out why they adopted that method, and they adopted it partly because of an alteration in the law which was not permanent and partly because of instructions given in the manual and a method recorded in the memorandum. Is that where we are getting?

MR. BRAIS: I am afraid I have not made myself clear. There are two things I say. First of all, you should have appraised my building on the only proper basis of appraising a building for replacement purposes: that is nothing to do with the memorandum. I say: You did that, but after doing that you abandoned that method of appraising my building, which is the proper one and the only safe one and the one applied to all other buildings, because you found out that my historical costs were completely out of line with the proper replacement value of my building.

LORD PORTER: So far -- it may be my fault -- I have not seen the evidence which shows that the appraisal value, as stipulated in the blue book, was in fact used to measure the value of the Sun building and was afterwards abandoned and the historical costs taken.

MR. BRAIS: Quite, my Lord.

LORD PORTER: That is one complaint. Your other complaint, as I understand it, is the fact that having taken the historic cost in itself wrong, they gave that 90 per cent of the value and only 10 per cent to the commercial value.

MR. BRAIS: Yes, my Lord, but at the moment I am far away from the 90 per cent and 10 per cent. I am far from the memorandum, because I first must try to satisfy your Lordships that I should have my replacement cost value valued according to the best principles of valuation and the principles applied to the other buildings in Montreal. That is the point I am on now and I shall not be on the memorandum until, or unless, I can satisfy your Lordships that my replacement cost valuation should be less -- it will simplify the understanding of the court, I think, to come to this point -- properly valued, than Mr. Justice Mackinnon arrived at using the Vernot formula. If you arrive at the decision that the wrong law and formula were applied to the Sun Life and you apply Mr. Justice Mackinnon's ~~50-50~~ 50-50, 40-60 you must come to the conclusion that it must be assessed at less than the figure arrived at by Mr. Justice Mackinnon.

LORD PORTER: When you are using your appraisal method are you using it in full in the first instance: before you come to deductions are you using it in full for the actual cost

of material used?

MR. BRAIS: Yes, my Lord. It has been used in full, as far as we are concerned. Subsequently a series of additions were made after the contestation and after we were assessed in the way other buildings were assessed.

LORD PORTER: You mean between the assessors and the Board?

MR. BRAIS: Yes, and after the deposit of the roll and after our complaint of the effect on the roll which was on 2nd December, 1941.

LORD PORTER: That is very much a question of fact. You told us what the complaint is. What I have not appreciated at all at the moment is where we get the facts on which you rely as showing that the historical substitute for appraisal was first used and those changes were made.

MR. BRAIS: I am going into that on the very next point, my Lord. I would wish only two minutes more to complete such information as I can give on this.

LORD OAKSEY: Which of your reasons deals with this point?

MR. BRAIS: It will be under No. 9, my Lord.

LORD OAKSEY: It does not refer to anything about appraisal.

MR. BRAIS: "Because the assessment under appeal discriminated against the respondent in that the assessment of none of the other large office buildings in Montreal ----

LORD OAKSEY: "-- was increased in proportion".

MR. BRAIS: Yes, my Lord. My learned friends have had to refer very extensively to what was raised before the other courts. It is raised in great detail. It is all set forth in the appellants' factum at page 48, line 24. It is the appellants' factum before the Supreme Court of Canada. It goes through pages 49, 50, 51 and 52.

LORD PORTER: This is all on the question of the exchangeable value, not the method by which you find out the replacement value.

MR. BRAIS: I have just given that page as the introduction into the matter. As we continue on pages 48, 49, 50, 51, 52 and 53 we see there a full discussion of the material on how the City proceeded to find the replacement cost and the evidence in condemnation of the subsequent method employed by the City to have that replacement cost increased to a figure commensurate with their own figures.

LORD ASSQUITH: The appraisal method is this: it entirely ignores what was historically and actually spent in building the thing. What it takes into account is the quantities of different materials used, the price according to a tariff at 1936, you then apply to that the appropriate index number to translate the price into terms of assessment and you also depreciate?

MR. BRAIS: Yes.

LORD PORTER: According to the length of time the building has

been erected?

MR. BRAIS: Yes, my Lord.

LORD OAKSEY: You say it is illegal to assess replacement value according to historical figures. What I do not understand is where you get the illegality or where you raise the point in your reasons in this case.

MR. BRAIS: The reasons may be somewhat laconic on the point.

LORD OAKSEY: Reasons should be laconic.

MR. BRAIS: Yes, my Lord. We always have something to learn in that connection, but it is part and parcel of the evidence and, as I say, it has been most extensively raised in the Supreme Court. In that connection all I can do is to do as my learned friends have done and refer to the Supreme Court to say that this is not a matter of surprise.

LORD OAKSEY: There are two quite distinct points. First of all, where does illegality arise, and, secondly, has the point been raised? They are quite distinct points.

MR. BRAIS: Yes, my Lord.

MR. BRAIS: I do not have to call it an illegality, as long as I call it an impropriety; as long as I satisfy your Lordships that that method (a) does not give the proper result for assessment purposes and (b) that for that reason it was not used for anybody else.

LORD PORTER: I should have thought that the way that you could put it was this: What we have to find out is whether these valuers valued in accordance with correct principles; we say that the correct method of discovering the replacement value is by appraisal.

MR. BRAIS: Yes, my Lord.

LORD PORTER: You go on to say, I think: Indeed, we find that that is the method which the City still recommend in their manual.

MR. BRAIS: Yes.

LORD PORTER: And, so far as we know, it has been used elsewhere.

MR. BRAIS: Yes, and they add: Do not use the historical method, because -- I paraphrase Mr. Perrault's own words -- the result is that in most cases you have to bring down your cost, your actual appraisal, because you find what occurs when the historical method is applied, and, if you do not do that, you will in certain instances have a fantastically or a grossly improper figure.

LORD PORTER: I was merely asking you, when you say in answer to my Lord that it is not illegal, as I gather that you do say, what the other reasons were why you say that they have gone wrong. You say that they have gone wrong in the practice, and the advised practice, of values?

MR. BRAIS: In the advised practice of values; and I would say that, as long as a method is improper and a method results in not obtaining the proper replacement value, it is then illegal.

LORD PORTER: That is all very well, but you have to found your impropriety.

MR. BRAIS: Yes.

LORD PORTER: It is not illegal to do a thing badly. It is a thing which you cannot support, if it is done badly; but it is not illegal.

MR. BRAIS: With all due respect, I do not believe that I would be prepared to go as far as that with your Lordship, when you have a principle of valuation precognised and recognised and applicable to all and you are told that, if you take another method, it is wrong. It would be as though in arriving at the actual value of a piece of ground somebody said: The proper method to find out what that land is worth is what the circus coming to down is prepared to pay for it for a one day occupation.

LORD ASQUITH: Once you are able to establish that exchange value is the proper value, I should have thought that you might be able to argue that the historical replacement value is completely out of the picture. When a man is considering how much he is going to give for a thing or how much he will invest in it, he does not ask himself how much it cost to build. He may consider the alternative of building the thing himself; but that is a totally different type of replacement value from that which we have been considering hitherto.

MR. BRAIS: That is what I have been trying to express to my Lord Porter. If an improper yardstick is going to be sanctioned by the assessors, it is improper and I would say -- I do not think that I need go this far in this case -- that, if it is improper and if there is discrimination, in so far as one owner is concerned, and an improper method is used, then in response to the question put to me by my Lord Oaksey I would say that it would be entitled to contend that that is illegal and, if a lower court indicates that such and such a method should be applied, under those circumstances an appellate tribunal would necessarily have to revise that, on the basis that it is not the law and, if it is not the law, I take it that it is illegal. I do say that I do not have to go that far and I still have to show your Lordships that there is impropriety.

LORD REID: It seems to me at the moment that there are two possible views. One is that this is a rigid question of law: that you must use the appraisal method and you must discard the historical method. The other is that it is a question of practice, in which common sense in the general case directs you to take the appraisal method.

MR. BRAIS: That is right.

LORD REID: I understand that you do not claim it as a rule of law, but you say that it is a rule of common sense. If that is so, let me assume for the moment that you have proved that in the general case common sense dictates that you should take the appraisal method. I am assuming that in your favour, without expressing an opinion. There may be exceptions, which common sense, looking at a thing by and large, does not realise. What I am interested in is whether you put to the appropriate people in the court below: Are there any exceptions here and, if not, why did you not follow the rule? I am not prepared at the moment to agree that there are no exceptions, unless you have put the matter to the right people and asked them what exceptions they acted on, because they may have had some and, if I understand the law aright, the onus is on you to displace an assessment by showing that it has been arrived at in some wrong way. Have I make myself clear, because that is what is troubling me at the moment.

MR. BRAIS: I understand what your Lordship puts to me. I will not endeavour now to do it, but when your Lordships have followed me in what was done to the original appraisal to try to bring it up to the historical cost your Lordships will understand more readily why the courts below -- I do not know if I should say this -- were more disposed to wave aside those figures and find another formula for their judgment. I am coming to that now and, in order to do so, it will be necessary for me to refer to those figures at which we looked the other day.

LORD PORTER: Before you get to that, is this the kind of proposition? The appraisal value is the correct value; that is shown by evidence and shown in particular by the fact that it was the method used by the City originally; they did change it afterwards; it is for them to establish why they changed it afterwards and they have not satisfactorily done so?

MR. BRAIS: I have a note here, my Lord, that, having the manual before me, having the fact that the assessors had given instructions as to how the replacement value was to be arrived at, having in mind the fact that, having those those instructions, this method was the law so far as the City of Montreal was concerned, if it is within and if they sanction this method and not the other, that from then on the burden of proof would

rather seem to me to be upon the City of Montreal (a) to establish why they made an exception and (b) how they could make an exception outside the formula which was herein set forth, apparently under instructions from the Board of Revision.

LORD PORTER: I want to have one more thing, in order to see that I have your argument on it. You read to us the Act, I think it is, which says that the Board have to decide how the thing is to be carried out. Are you saying that, that being the law and it having said how it was to be carried out, they then went back upon their own word?

MR. BRAIS: Yes, my Lord; but in all fairness I must say that you have to arrive somewhat inferentially at the conclusion that they have said how it was to be carried out; but I think that the inference is so clear that at least as regards that the burden remains on the City to establish that these are not the instructions of the Board, because the Board is giving instructions and has given instructions and there has been correspondence between the Board and the Chief Assessors.

LORD REID: The difficulty about that which appeals to me is this: This very matter was submitted to the Board, the same Board as give the instructions, and the Board in this case reached a decision which, if you are right, is in contradiction of their own instructions, and we do not know why. We are not to assume that there was not some reason, unless you can show us that they must have acted wrongly, are we?

MR. BRAIS: That is what I must show and that is what I propose to show.

LORD REID: Do you say that the Board, without giving any reasons, have adopted something flatly in the teeth of their own instructions, which were still current?

MR. BRAIS: Yes, and flatly in contradiction of the official book of the City of Montreal, which carries as a preamble a statement of the fact that they are giving instructions. They are giving instructions as to valuation, and then we find a formula of valuation. May I say this, and I think that I can say it with complete confidence: When you have in this book the statement that the Board has given instructions and has sanctioned in its official instructions the carrying out of the method of valuation as at present, they are sanctioning the method of valuation in their official instructions; and when they do that I think I can say without any hesitation that they are sanctioning the method which is being used in the City of Montreal and which has been referred to in the correspondence. I do not want to stress this point further, but when I find in this book, following immediately upon the approval of the Board of the continuation of the assessment on the replacement basis as at present, a formula in the most minute detail, I say that I have passed the burden of proof, if I have not established conclusively that these are the methods which the Board mean shall continue as at present, and that was the method under which the Sun Life building had been valued as of the date in June, 1939, when those instructions were given.

LORD OAKSEY: Can you give me a reference to the page? You gave us a reference to page 97: "The net replacement cost of buildings in the third group will continue as at present". Where does it say that the net replacement cost of buildings must be arrived at by appraisal?

MR. BRAIS: I gave that a few minutes ago. It is at page 288, where

they set that out very clearly.

LORD OAKSEY: Yes; I am obliged.

MR. BRAIS: There is no doubt that the Board had something in mind as to the method to be followed. It was their prerogative to indicate, if another method is used afterwards and it is the wrong method.

LORD PORTER: There is only one further matter which I have not got at the moment and that is this. How do you tie up the Board with the manual?

MR. BRAIS: No further than I have indicated: firstly, there was correspondence between the Chief Assessor and the Board as regards the methods to be used by the assessors. That correspondence we have not got, and the previous resolution referred to we have not got; but the Board says: "The method of arriving at the replacement value shall be continued as at present". That means that at that time the Board was seized of the method being used by the assessors and knew it -- there is no doubt about that; it refers to it in the correspondence -- that it was exchange. Having approved of that method and it being done according to that method, they have approved of the same method. There is no doubt about that. That can be the only method, because according to law that is the method of which they are entitled to give instructions.

LORD PORTER: Page 94 refers to what the Board of Revision have to do. It then goes on to a resolution. Where does that resolution end?

MR. BRAIS: It ends at page 100, and that is the exact counterpart of what we find on the City of Montreal assessment. That is reprinted on the valuation sheets, which have the approval of the Board and which are used.

LORD PORTER: Where shall we find this?

MR. BRAIS: Volume 4, page 712, Exhibit P.1. The valuation sheet of the Sun Life is on the third part of that exhibit. We have here procedure that is not found in the resolution. There is a preamble to this. These are the Board's forms. On the third page of the exhibit, under the heading "Procedure", it says: "The following instructions on the manner in which the assessors shall proceed with their work have been given to the Chief Assessor by the Board of Revision of Valuations, in virtue of the powers conferred on it by the Charter of the City of Montreal."; in other words, they say as a preamble: This is the law; we are telling you what to do accordingly.

LORD PORTER: When you get to buildings, as far as I can see they talk about the cubing of buildings.

MR. BRAIS: That is the cubing of certain buildings. May I be permitted to read that, because that goes to the very core of the argument? It says: "The unit prices, the cost of reconstruction and the percentage of annual depreciation of buildings are established by the Technical Service in the following manner: (a) The classification already in force for buildings will continue to apply to all buildings, no matter what their date of construction; (b) The buildings will be divided in three new groups: (1) Residential properties or semi-commercial properties (stores and dwellings) which are taxable and which were constructed before the year 1915; (2) All buildings exempt from the ordinary municipal tax; (3) All other buildings.", which, of course, is the Sun Life building and a lot of others.

LORD PORTER: You need not bother with the first one, which is the first and second groups. Then it goes on: "The construction cost of any particular building".

MR. BRAIS: That is in the first and second groups.

LORD PORTER: Is that still?

MR. BRAIS: Yes; I would say so.

LORD PORTER: Where do you get the instructions with regard to the third group?

MR. BRAIS: I wish that I had the resolution and the correspondence with the Director of Services and the previous instruction given on the 30th June, 1939, but that is where I say that when you have in this book the definite proviso that it must be done in a certain way and that the assessors have been told to continue to do that as at present -----

LORD PORTER: I follow that. Now I want to find out what was done "at present".

MR. BRAIS: What was done "as at present" is what was done in 1938, to the Sun Life building and to all the other buildings in Montreal.

LORD PORTER: Do you reach that by means of some calculation which is shown in the evidence?

MR. BRAIS: I reach that by calculations which are shown in the evidence and I reach that by the evidence of Mr. Cartier, who was examined at length on the question, and I reach that by the evidence of Mr. Houle, who was also examined at length, and I reach that by this very interesting exhibit, P.36, at which we were looking last week, which leaves no doubt whatsoever on the question.

LORD ASQUITH: What page is that?

MR. BRAIS: Page 737, my Lord; the voluminous calculations, which appear to be relevant on the basis of the manual when the work was done in 1938. I reach that also by evidence, to which we will have to refer subsequently, that all other buildings were treated on this basis.

If one may now refer to the manual, at page 269 one finds "Supplementary Notes concerning the Application of the New System". Then in paragraph 2 it says: "This system has been prepared more particularly for the use of the assessors. It will also be very useful for the interested taxpayer." Then elaborate tables are set out, as we have said before, to arrive at the cost of a building in 1936, and for that no attention is paid to the cost of construction; they take that building as of 1936 and value it.

At page 288 there appears that which we have already had.

LORD PORTER: That is the replacement cost?

MR. BRAIS: That is the replacement cost.

If we may now go back to page 42, which is the portion of the book which follows a very careful study of the working out of systems in other cities and where the systems there used arrive at a logical and satisfactory way of assessing property according to the actual cost value, we find this at the bottom

of the page: "Cost of construction differs according to the locality, the builders, the estimators and the types of the buildings." It differs also sometimes to 100 per cent, according to how busy the contractors are; but that is not put in here. "The same is true of the depreciation, which varies according to the uses made of, as well as the care bestowed upon them. Will a uniform standard of value be imposed? If so, what iniquities? If not, what complications! And then, what will happen to those buildings after, thirty, forty, fifty years or more of annual devaluation? Their valuations then will be reduced to a ridiculously low level in no way corresponding to their true value."

If we may then go back to page 19 -- I have to summarise these things, but I will do so rapidly -- in the chapter where the replacement cost is taken into account for assessing and they are considering how you come to the replacement cost, it says in the second paragraph: "Lastly, it is possible to take as the starting point of the computation what the cost of erection, or improvement or the establishment of the undertaking has been, and then to deduct a certain sum for depreciation, as already mentioned. The depreciation varies according to the type of construction, the use made of the building and the care taken of it. This method is not always equitable and sometimes leads to absurd results."

LORD PORTER: You really want your three methods, beginning in the middle of page 18. It says: "Such valuations are usually made in three ways." Then, first of all, it takes the appraisal way; then it takes the cube way; and finally it takes the actual expenditure upon the building.

MR. BRAIS: Yes, my Lord.

LORD PORTER: You have been reading the criticism of the last method.

MR. BRAIS: Yes, my Lord.

Then I would ask your Lordships to turn to page 306. The reason why I draw your Lordships' attention to page 306 is that it is part of the manual which comes from the pen of the actual assessors, of the men of ~~experience~~ technical experience - not of the City's Director of Services, who, being a lawyer, might possibly be accused of not being so close to the actual working out of these problems. At page 306 you find some very interesting information. It says: "Then follows the calculation of the different buildings, to find the perimeter, area, real and conventional cube. ~~The~~ reconstruction price is then calculated according to the graphs, lists and tables shown in respect of the items mentioned. The whole finishes with a summary of the main building and out-buildings, giving the reconstruction price for the year 1936. From this amount is deducted the normal depreciation according to the date of construction. The figure thus obtained is then multiplied by the index number of the year under consideration to obtain the replacement price. This replacement cost is then transmitted to the assessors to be used as one of the factors to determine the final assessment. The calculation of all buildings and appurtenances is based on the tables appearing on pages 323 to 376 of the present manual." Then there are some references to the list and it says: "Considerable variations might occur if prices of material and labour were sought outside the District of Montreal."

Then he concludes, and these conclusions mean something. He says: "Experience shows that the calling of tenders

for a particular building brings replies in which the prices submitted are separated by considerable variations, amounting at times to as much as 100 per cent between the lowest and highest tenders. That is why in adopting unit prices for each one of the materials going into the construction, it will always be possible to obtain definitely a cost, proportionate to the material used, but always uniform as between the buildings under consideration."

That puts the position in simple language and in the formula of men who have seen the dangers and the wide discrepancies arising from these things.

LORD OAKSEY: Who was the author of this particular document?

MR. BRAIS: That is Mr. Hulse, the Chief Assessor of the City of Montreal.

LORD OAKSEY: Was it put to him in cross-examination?

MR. BRAIS: No, my Lord. It was put to him in part, as we will see.

LORD OAKSEY: Is there any criticism in the judgment of the Superior Court on the ground that the appraisal value was not the principle which was used?

MR. BRAIS: I have told this Board and again express it, if I may, that the complications of those figures were such that once they were looked at during the course of the hearing and even during the course of this trial some of these formulae have been changed.

LORD OAKSEY: There is nothing complicated about it.

MR. BRAIS: There is nothing complicated about it.

LORD OAKSEY: You have two principles: one is appraisal and one is historical cost. The criticism put to the Superior Court was that the Board of Revision had adopted a different percentage for the purpose of arriving at the true historical cost. The Board of Revision adopted one percentage and Mr. Vernot had adopted another. The Superior Court said that they could not understand why the Board had adopted their view; but there is not a word about it being wrong to come to a conclusion upon historical figures?

MR. BRAIS: May I say with some considerable regret that this is the first time that the court has been prepared to hear us on this question.

LORD PORTER: Did you put it to them?

MR. BRAIS: Yes. Your Lordship will see that by the Factum submitted, and we have been carried into the other problems by Mr. Justice MacKinnon and so forth. We may be partly at fault in having allowed ourselves to be carried away to other considerations. Those things happen in cases and that is why the Judicial Committee of the Privy Council -----

LORD OAKSEY: That is one of the reasons why it is important to put it in your Reasons when you come here.

MR. BRAIS: I thought that it was, my Lord. I am very sorry. I will have to look at it again. It was very strongly urged,

If your Lordships will then look at page 299 as regards

depreciation, I think that we may as well look at that before we examine the figures. It says: "The replacement cost having been completed and checked, the whole is turned over to an engineer specially appointed and trained in the calculation of depreciation and the application of the index number. He checks, first of all, the dates of construction and improvements mentioned in the report, with a compilation of the building and repair permits. This compilation has been made on a special sheet entitled 'Statement of Building and Repair Permits', at the head of which we find the number of the account, the address", etc., etc. "Then, on the list, we find the numbers of the permits", etc. This compilation has been made for a long time.

Then, under the heading "Study of Depreciation", it says: "The employee specialising in the work of depreciation then studies the report of the architect to fix a depreciation by age, that is to say, a natural depreciation, according to the remarks on the reports and on the sheets of the statement of permits."

Then on page 301 there is the heading "Calculation of Depreciation and Replacement", and it says: "In possession of all the necessary data, this engineer makes a break-down of the items to figure the depreciation calculations, according to the table of structural depreciation published on page 131 of the 'Real Estate Valuation Manual'. Then, to complete his work, the replacement cost of 1936 is adjusted by the index number to the year in question."

Then we have already read from page 306 how this works itself out.

LORD ASQUITH: A point that I am not very clear about is within what limits can the Board of Revision give instructions to the assessors. I should have thought that it was limited to telling them how to apply and deal with existing principles of law. Supposing, for instance, that it directed them that they were entirely to ignore exchange values, that would be null and void - ultra vires?

MR. BRAIS: Yes.

LORD ASQUITH: It is a little difficult to see where the line is to be drawn.

MR. BRAIS: I have tried to draw the line, and I submit rightly, as being whenever the Board, whose duty it is to establish the valuation system, instructs the doing of something which is not contrary to law; and the adoption of the appraisal method and the statement that it shall be used or continued would not be in violation of the law; but, if it orders the taking of the replacement value alone into account or if it orders the doing of anything which contradicts the findings of the courts on what you do to find actual value, I submit that they have not the enabling power to do that.

LORD ASQUITH: You say that the appraisal method is not contrary to law, but that the historical cost method is contrary to law. Is that your proposition?

MR. BRAIS: I say that the historical cost has been regarded by everybody as being improper and everybody says that it is improper and it leads to improper results. In so far as the Board would order the historical cost method to be used, I would submit that I would have been entitled to argue that in so doing

they instructed that an improper method should be applied and that that would constitute a question of law.

LORD REID: Following that up, if I may, in Article 14, on page 174 of the manual, it is said that the Board is entitled to "prescribe the data and information that the assessors shall obtain". If you prescribe certain data, of course you open the door to certain principles and necessarily exclude others which require other data for their application. Can you go so far in this case as to say that the Board prescribed the data appropriate for the appraisal method, but failed to prescribe the data appropriate for the historical method?

MR. BRAIS: I am limited to what I have before me obviously.

LORD REID: Certainly.

MR. BRAIS: When the Board in reference to replacement value say that you shall continue whatever the formula is to arrive at the replacement value as at present, I say that under this section, having regard to the correspondence which did exist and where apparently the system had been carefully looked into, The Board put its seal of approval on the method being used at that time and, if it put its seal of approval on the method being used at that time, it could not put its seal of approval on any other method. I must proceed by a process of elimination and it is the only way that I can proceed and I think that I am doing it properly, because that was the method being used at that time. That was the appraisal method and that is the method which is recognised by this manual as being the actual method and being the method used.

LORD ASQUITH: The seal of its approval is not an irrevocable thing like the law of the Medes and Persians. May they not ever change their minds?

MR. BRAIS: They can change their minds and they could say: You will also take in the historical cost and, if it does not have one, well, you may want to do something about it.

LORD PORTER: Your argument is that that change, if made, is an

arbitrary change, founded upon no principle?

MR. BRAIS: Yes.

MR. BRAIS: I would say that if the Board ordered the historical cost in the face of all the criticisms of historical cost it would be arbitrary and it would be improper, especially when applied to one building only. I want to come to the evidence upon that. We would have to find it somewhere in the evidence. This is the City's own manual and it carries the Board's resolution. It carries the formula to be used as the only formula that can properly be used. If the Board ordered any other formula to be applied to this building, in face of this, the onus is on me to prove that I am either the beneficiary or the loser under a formula which has been made for my building alone.

LORD OAKSEY: Surely the onus rests upon you to cross-examine the chief assessor when he goes into the witness box as to whether the Board had given any different instructions, and to put it before the Board of Review.

MR. BRAIS: With respect, I do not think so. Here is this official document. Nobody thought of going outside it. It is printed by the City of Montreal and we buy this from the City of Montreal. They are their own instructions by their chief assessor. There have been no changes so far as that point is concerned, and this was published in 1941. We find in this book a very interesting document which shows the changes made in 1944.

LORD NORMAND: May I, before you leave this branch of your argument, call attention once more to your reasons, because I find that the second reason given by you is that "the Board of Revision and the Assessors improperly bound themselves by the instruction and the Memorandum and when considering and reviewing the assessment could not reach a proper conclusion".

The third reason is "Because in following the instructions of the Board of Revision and the Rules of the Assessors' Memorandum and thereby giving improper weight to replacement cost, the Assessor, the Board of Revision and the majority judges of the Court of King's Bench ignored the fact that these rules and instructions were conceived when the 1937 amendment was in force and that the amendment had been repealed prior to the assessment in question".

These reasons seem to me to be framed in singular language if one part of the gravamen of your case is that the instructions of the Board were not followed by the assessors.

MR. BRAIS: I follow your Lordship's suggestion there quite well, but that ~~has~~ solely in mind the instructions of the Board with reference to replacement value at large. That has not in mind the manner in which the replacement value is valued. The Board instructs. With your Lordship's consent I shall have to refer back on that point because I am not able to subscribe to your Lordship's view on that.

What we complain of in the case there is that the Board gave instructions that replacement value should be the basis of the valuation. We have in mind there the 1937 amendment with the emphasis on the replacement value, and it is only in so far as the Board bound itself to consider replacement value as the primary basis of valuation that we complain there. The Board bound itself by instructing that the replacement value basis should be continued as at present, and that the memorandum bound the assessors to give primary weight to the replacement value.

LORD NORMAND: My point is that while raising objections of that nature, one would have thought that you would inevitably have stated, if you intended to take the point, the preliminary point that replacement value was something which was ascertained by a completely erroneous method. The first thing to object to is the data of the calculation and then to object to the weighting of those data. You pointedly omit any objection to the ascertainment of replacement value.

MR. BRAIS: I must say to your Lordship that in reasons 2 and 3 we have not in mind at all that preliminary point as your Lordship has put it. There is no doubt about that.

LORD PORTER: On the contrary you say that they followed the memorandum and instructions too carefully, in reasons 2 and 3.

MR. BRAIS: Yes; but I have said to my Lord Normand on that point our mind was solely applied to following the instructions as regards weight to replacement, and not unfortunately clarifying the preliminary point which is how the replacement is to be arrived at.

LORD PORTER: Let us go on with the reasons. Reasons 4 and 5 deal with the proportion of the replacement value to commercial value.

MR. BRAIS: Yes.

LORD PORTER: Reason 6 says that Mr. Justice MacKinnon was right, but that has nothing to do with principle. I do not quite know what the end of that reason is meant to deal with: "has been demonstrated to be accurate by the tests applied to it by the use of the indicia in varying forms by the dissenting judges of the Court of King's Bench and by the five judges of the Supreme Court of Canada". I do not know what that means.

MR. BRAIS: That means that all these judges have used various formulae.

LORD PORTER: In other words, the fact that they use so many different reasons shows that if you follow all the reasons you do not get a clear result.

MR. BRAIS: It shows that if you follow various reasons and you all come to the same result that the result must be correct. It is a recognised fact in assessment that you can arrive at a correct result taking various formulae and weighting them differently.

LORD PORTER: That, again, is nothing to do with the appraisalment method.

MR. BRAIS: Except in so far as in arriving at their results they have taken the evidence generally.

LORD PORTER: Has anybody mentioned the appraisalment method?

MR. BRAIS: I do not think so. I would want to be sure of that and I do not recall that anybody has mentioned the appraisalment method. It has been mentioned to them.

LORD PORTER: Then reason 7: "Because the appellants cannot show that the revision of the said valuation by Mr. Justice MacKinnon was not in accordance with law and justice". That, again, is general and not particular. Then reason 8: "Because the judges of the Supreme Court of Canada have enunciated the

correct principle, that 'actual value' means exchange value. That, again, is not replacement value at all. Then you get to discrimination. You might raise the point under discrimination, but have not all the courts in Canada said that there has been no discrimination.

MR. BRAIS: I do not think I can subscribe to that at all, quite the contrary.

LORD PORTER: Has anybody said that there is discrimination?

MR. BRAIS: I think Mr. Justice MacKinnon said in view of the fact that the result was - no, I would have to refresh my memory.

LORD PORTER: That is one of the difficulties. Normally this Board does not allow reasons which do not appear in a case to be argued before it. You have either to get particular indulgence or you have to show that it appears there. Therefore, it is desirable if you want to rely upon discrimination that you show that that point was argued and taken in the courts below. Do not bother to do it at present.

LORD OAKSEY: In reason 9 you particularise. You say "in that the assessment of none of the other large office buildings in Montreal was increased in proportion".

MR. BRAIS: Yes.

LORD OAKSEY: That means, does it not, that whereas the Sun Life building was raised in this particular year, the other buildings were not raised in the same way?

MR. BRAIS: I think I will have to agree with your Lordship.

LORD OAKSEY: Nothing to do with the difference between the appraisal method and the historical method?

MR. BRAIS: I may have to find myself in the position of asking for a particular indulgence. I will come to that after having conferred with my associates who have been in this case from the beginning and who, of course, have worked considerably in this case.

LORD REID: On that question it might be relevant to consider whether you really raised this question before the Supreme Court of Canada. I have been reading through your factum beginning at page 45 and I am wholly unable at the moment, I agree I have only glanced through it, to reconcile your present argument with what appears in your factum. Would you just look at page 45? In the middle of the page it says "as pointed out above the original cost of the property may have " - may have - "no relation whatever to its present value. The principle reasons are" then you set out five. Surely that starts from assuming that in the absence of those reasons the historical method is the correct one. I have not found a single word in the factum, it may be my fault, to point to any other point of departure than historical cost. I have not yet found anything which says you should throw over this historical cost and start with a notional appraisal cost. Is there anything in the factum which shows, leave aside the historical cost and start with something else, because it is much better.

MR. BRAIS: To answer your Lordship's question properly I would have to put a fine toothcomb through this which I have not done. Your Lordship may be right.

LORD REID: I have only had a few minutes to look at it.

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MR. BRAIS: I do not think it would be proper for me to apply my mind rapidly to it but I will answer that question and see what we can do as to that.

My Lords, this brings me to the figures prepared by the assessors which are found at page 737, volume 4, exhibit P.36. If we look at page 26 of that exhibit we find that we must go back to the previous page, page 25, to understand the figures which we have there. There is the total value at the bottom. These are the results of all these sheets which come before. We find 9,273,401 dollars and 49 cents. To that has been added an item of $13\frac{1}{2}$ per cent en hauteur. That is because the manual says that if a building is over a certain height you put on a formula of so much and you have arrived at 10,525,000 dollars.

LORD PORTER: You mean you increase its value owing to its height?

MR. BRAIS: That is what the manual says.

LORD PORTER: After that you add 10 per cent. What is that?

MR. BRAIS: That is 10 per cent additional, because that is also found in the manual.

LORD PORTER: Is there any reason given in the manual for that?

MR. BRAIS: No. I think I had better refer your Lordships immediately to the page. It is page 323 of the manual where you have the table for calculating replacement cost as at August, 1936, "for categories of commercial, industrial and public buildings and also for hotel apartment (of ten tenants and over). Add to the computation 10 per cent for sub-contract and for buildings of five storeys and over there should be added for the construction in height 5 per cent (total height minus 10), for example, a building of (six storeys) 70 feet height: 5 per cent (70 minus 10 equals 3 per cent)". Up to five you get up free and at the sixth storey you add 3 per cent of the total amount of the contract.

LORD PORTER: I do not follow this at the moment. I see what they say there. How do you get $13\frac{1}{2}$ per cent?

MR. BRAIS: We get $13\frac{1}{2}$ per cent because at that stage of the procedure the assessor did not take the total building as being 25. He applied the formula to that portion of the building which went over six storeys. There is a large base with a tower. It is a large tower. He considered that portion of the building, which is a very large portion of the building which forms the base and does not rise to any considerable height, should not be handicapped with this further formula and he applied $13\frac{1}{2}$ per cent, basing himself he says on that portion of the building which is not en hauteur.

LORD PORTER: I am completely stumped by that. It may be my stupidity but what you have to do normally is to add 5 per cent. That is page 323.

MR. BRAIS: You add to the computation 10 per cent for sub-contracts and for building of five storeys and over there should be added for the construction in height 5 per cent (total height minus 10).

LORD PORTER: As far as I can read at the moment that says you add 5 per cent. On page 25 of P.36 you get added $13\frac{1}{2}$ per cent. I gather that 1,251,000 dollars is $13\frac{1}{2}$ per cent of 9 million. Your observations to us were that the assessor had given you certain advantages because he said that the whole building did not go up to that height but only part of it.

MR. BRAIS: Just part of it.

LORD PORTER: So far from doing that instead of taking 5 per cent for the whole building he has taken $13\frac{1}{2}$ per cent. It may be I am wrong about that, but at the moment I do not understand it.

MR. BRAIS: There is a discussion as to what this amount meant because subsequently it was blown up to 19 per cent on the total building after putting in admissions and so forth.

LORD PORTER: Is your answer at the moment: I do not know why it is $13\frac{1}{2}$ per cent?

MR. BRAIS: I can only surmise that the $13\frac{1}{2}$ per cent instead of 19 per cent is that they applied the formula subsequently to arrive at $19\frac{1}{2}$ per cent for construction for height.

LORD PORTER: I am not at the moment troubled about construction in height $19\frac{1}{2}$ per cent. I am troubled at the moment by the $13\frac{1}{2}$ per cent. The table for calculating replacement cost says 5 per cent.

LORD NORMAND: If one looks at the example it says: "For example a building of six storeys 70 feet height". Then 5 per cent of 70 minus 10 gives 3 per cent. I do not in the least understand that.

LORD REID: That is the height minus 10. If you had a height of 280 feet minus 10, 270 feet, 5 per cent would then give you $13\frac{1}{2}$ per cent, so this must be based on an estimated height of 280 feet, if I understand it aright.

MR. BRAIS: Our building is higher than that.

LORD PORTER: That would explain it if that is so. That would mean he had given you the advantage of the whole building not going up the whole way.

LORD NORMAND: I do not understand why six storeys have always been assumed to be 70 feet high.

MR. BRAIS: In all justice to the formula they do not want to bind themselves. That is only an example.

LORD NORMAND: Both height and the number of storeys in some mysterious way enter into it.

MR. BRAIS: In the Royal Bank building to which we have referred, where the bank chamber is again three storeys high, an immense vaulted chamber, I do not know if they have the advantage of not paying en hauteur when they have the scaffolding up. I cannot derive any advantage out of it. The mathematical side of my brain, however, does not permit me to follow them, but I am not criticising them. I am criticising its application and that it exists, but as a mathematical formula I am not criticising it.

LORD PORTER: You are criticising that any addition should be made because it is of a certain height.

MR. BRAIS: I am criticising the fact that any addition should be made in excess of three-quarters per cent on account of height. Mr. Cartier has destroyed his own formula because he first applies it to scaffolding and so forth and elevators and divides it up carefully, and then when he finds that that has no sense, rhyme or reason he comes forward and says that he divides it in half, all this scaffolding and so forth. He divides their construction in two, and if I can

make myself clear he then takes the other half of 19 per cent for extra cost of en hauteur. It costs $8\frac{1}{2}$ per cent more to get your money because you have a high building. You have to pay something to get your money. If it costs $8\frac{1}{2}$ per cent more to get your money because it is a high building, and you have it here in black and white.

LORD PORTER: The first thing you have to tell us is this. Here is a particular calculation. How does it come into existence and, having come into existence, what does it show, on what basis is it calculated?

MR. BRAIS: The particular calculation in support of that -----

LORD PORTER: I do not want support. Here is something produced. It must have been produced by somebody and must represent something. I want to know who produced it and what it represents.

MR. BRAIS: Mr. Cartier, the witness for the City of Montreal, produced it.

LORD PORTER: That is one thing. What does he say it represents?

MR. BRAIS: He says it represents construction of height and he explained that.

LORD PORTER: Before you get to construction in height it must be based on some method of discovering what the cost is. It is either historical or appraisalment or cube which are the only three I know. Which of those is it?

MR. BRAIS: Appraisalment. It is part and parcel of appraisalment.

LORD PORTER: That being so, when does he say it came into existence?

MR. BRAIS: He does not say when it came into existence. It did exist in 1938 when the City experts spent, I think, three months in the building taking off quantities and arriving at their result. He says the justification for it is the manual.

LORD PORTER: Having got that out, what happened to it? Here is something according to the manual produced in evidence. What happened to it if it was not used?

MR. BRAIS: It was used. It is put into this calculation and it is applied.

LORD PORTER: So that it is used by the assessor in coming to his conclusion.

MR. BRAIS: The assessor had those figures. The figures were turned over to the assessor for the purpose of permitting him to make his valuation and it is at that point that we complain that the assessor then disregarded the City's own replacement cost valuation and picked up our historical figures to compute an assessment of his own.

LORD PORTER: Using the historical figures only.

MR. BRAIS: Quite.

LORD PORTER: Was the assessor called in evidence?

MR. BRAIS: He was called in evidence.

LORD PORTER: Did he say why ^{he} had made a change?

MR. BRAIS: No, my Lord.

LORD PORTER: Was he asked?

MR. BRAIS: No, my Lord.

LORD NORMAND: Did he say he did make a change, or is that an inference?

MR. BRAIS: He did not say it. It is an inference, because Mr. Cartier only came into the case long after it had dragged on a few months.

LORD PORTER: Does that mean the assessor was first examined and cross-examined and that at that time the representatives of the Sun Life did not know of the existence of this calculation?

MR. BRAIS: That is the only proper solution, otherwise this would never have happened.

LORD PORTER: Let us go on a little further, because we have to consider it in the light of our experience here. Normally in this country we should, I imagine, have discovery. Was there no discovery?

MR. BRAIS: I think I may say that there can be no discovery under the process here.

LORD PORTER: That is to say the calculations made are matters which are not disclosable. Is that it?

MR. BRAIS: I think I might say that if the Sun Life had known anything about the manual and these regulations at the time they would, when they agreed with the City of Montreal and made joint statements of fact, have asked for this. They did not know anything about this, I am instructed.

LORD PORTER: That is No.1, but you added something on what I asked you. You said if the Sun Life had known about these calculations and the manual. Did you not know about the manual and ought they not to have known about the manual?

MR. BRAIS: They should have known about the manual.

LORD ASQUITH: Can anybody buy it in a shop?

MR. BRAIS: You can buy it for 25 cents in the City of Montreal.

LORD PORTER: That answers my question.

MR. BRAIS: I must take the position as I have it. I must be fair about this thing. This manual was in the possession of all my friends quite early in the case, there is no doubt about that.

LORD REID: You have presumably the best experts in Montreal who know all about valuations. You start with this that the historical method is not used but the appraisement is used in insurance and in all kinds of other things. It must be perfectly familiar to your experts, but in spite of that nobody ever raised during the trial a question whether the appraisement method ought to have been used or ever had been used.

MR. BRAIS: All I can say on that is that Mr. Justice MacKinnon arrived at a figure which within reason came within the appraisement method of the assessor and everybody said: Well, they had been trying to call it a day ever since the

judgment of Mr. Justice MacKinnon and was still trying to do it.

LORD PORTER: When I asked this question before I gathered that the hearing is before the Board and that the Superior Court judge takes the evidence as given before the Board, because he himself does not see or deal with the witnesses, so that if you are going to cross-examine at all you have to do it before the Board.

MR. BRAIS: Before the Board. There is no complaint in so far as the Board giving full opportunity to the parties and so forth. The Board had certain drastic views on certain matters but in proper fashion without any tension. There were views on law which they were entitled to have.

LORD OAKSEY: Mr. Vernot was recalled after Mr. Cartier.

MR. BRAIS: Yes; he was recalled after Mr. Cartier.

LORD OAKSEY: So that any question could have been put to him then.

MR. BRAIS: Yes, my Lord. I would like to go through these figures if I may. I am now looking at page 25. The amount of 11,577,000 dollars is arrived at at the bottom of the page.

LORD PORTER: Again, you cannot give us an explanation of the 10 per cent addition.

MR. BRAIS: 10 per cent additional is what we find.

LORD PORTER: You find it at the bottom of page 25.

MR. BRAIS: We find it at the bottom of page 25 and I have shown it to the Board in the manual as 10 per cent for sub-contracts. Now if we refer to page 26 we find that the assessor on the 17th June, 1938, has first indicated the proportion of the building completely terminated.

LORD PORTER: Does that mean finished?

MR. BRAIS: Yes, completely finished and arrives at 16,500,000 cubic feet on a total of 21,931,000 cubicfeet. That cubage is exact because it is the cubage of the building and he considers the amount of the cubage of the building which is finished. Then he considers afterwards the structure charpente et mur completement termine. That is the structure not yet completely terminated.

LORD PORTER: Finished.

MR. BRAIS: Yes. Charpente, the structure, the exterior walls, exterior colonnades, openings and the ceiling. That is the outside of the building. That gives him 5,708,000 dollars. Then he puts the total cost as at 1939 as 9,273,000 dollars. Then he takes away from that what is finished and that leaves him with 75.5 per cent of interior that is finished for 3,565,000 dollars. Then he takes the 1939 cost for the exterior which is 100 per cent finished. That is applying the 109 formula and arrives at 4,722,000 dollars which, added to the previous amount of the exterior finished, he takes 100 per cent interior finished in this calculation and adds to the exterior finished which he has, and that gives him 10,430,314 dollars and 25 cents. He adds on the 13½ per cent to all of that exterior en hauteur and it comes to 11,838,000 dollars. Then he adds 10 per cent for sub-contracts and arrives at 13 million dollars.

LORD PORTER: Is that a cubage calculation?

MR. BRAIS: No, actual appraisal calculation.

LORD PORTER: Is it?

MR. BRAIS: That has been arrived at by the actual figures which appear on pages 29, 30, 31 etc.

LORD PORTER: What is 11,577,841 dollars on page 25. What does that represent? You get the same sort of total, 11,577,841. That I thought was calculated by the appraisement method.

MR. BRAIS: Yes, that is right.

LORD PORTER: How, if you calculate on an appraisement method, do you get a totally different result of 13,220,247 on page 26?

MR. BRAIS: That is because on page 26 he has terminated the interior of the building 100 per cent, he has the interior of the building only 24.5 per cent finished. Then, because it is 100 per cent interior finished, instead of being 3,500,000 it is 4,700,000. He is doing that to be in a position to apportion the cost to the various buildings as of the date of construction. He has to have a totally constructed building to compare this smaller building, the older building with the newer building.

LORD OAKSEY: Are you sure that is right? There are appraisements of things here which seem to be something to do with the interior, green marble antique, page 25. It does not seem to apply the 75 per cent anywhere on page 25.

MR. BRAIS: No. On page 25 he is finding what he has in the building, what he has seen and measured in the building.

LORD ASQUITH: It does happen to be 75 per cent.

MR. BRAIS: It does happen to be 75 per cent, because at the top of page 26 he has taken off the cube of the building which is finished as 16,567,000 cubic feet out of a total of roughly 22 million cubic feet. He says all this material I see in there has only served to complete 16 million cubic feet of that building out of 22 million, so if I apply the proportion I will find that for the interior it is this. The position, if I may suggest it to my Lord Oaksey, is that there are two things, the exterior which was completely finished but the interior was the only portion finished first by getting the walls, the ceiling, colonnades and decorations and then he had to apply himself to the actual quantity of material which was applicable under the head interior of the building, and having done that he applied what he thought was the proportion of the interior finished to the proportion which was not finished. He said these figures are 75 per cent of the building in so far as the interior is concerned.

(Adjourned for a short time).

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MR. BRAY: My Lords, on the question put by the Board as to our position vis-a-vis reasons and vis-a-vis factum, on the original factum of the appellant before the Supreme Court I will have to agree that page 53 does not raise that particular point, as to whether the instructions were followed. Having re-read that, I come to that without equivocation. In the ^{answer to} supplementary factum of the respondents, at page 26 we have referred to the expose of what should be done. We say: "So much for the City's manual. We have cited from it at length because it contains explicit instructions to the Respondent's assessors which, appellant submits, should have been but never were followed. We do take strong exception, however, to the City's argument that, because these instructions had been properly given, or at least properly spelled out in its own publication, that of necessity, the court must accept the theory that the same proper principles must necessarily have been followed." This has in mind not only the activities, but has in mind what comes previously on page 25, referring to page 46 of the City's manual. We say: "A valuation so established is not in accordance with the law, which requires the amount of the valuation of the ~~and~~ land and of the building to represent the market value." That is using solely the replacement value. "The disastrous consequences of the use of this sole method are the following: so as not to overrate certain properties unjustly and run too much risk of contestation before the courts, the only resource is to establish the unit prices at excessively low rates; consequently, the real estate valuations are generally below the intrinsic value, and in certain, though much rarer cases, far above that value; lastly, it necessarily results that the general level of assessed values no longer corresponds to current ratings of the real estate market." When we applied ourselves to the manual at page 26, save and except for the cases where the results are such as one sees here, we did not have particularly in mind the criticism between the two formulae of historical and other rating. I cannot take that position.

That leaves me two alternatives. The first is very respectfully and very humbly to throw myself on the mercy of the court, and the second one is that, having in mind the position we take as regards Mr. Justice Mackinnon's decision, that substantially he arrived at the correct result in view of the evidence and so forth, these figures can be used for purposes of comparison in order to show that, whether you take his method or any other method, you would arrive at a figure which would be less than Mr. Justice Mackinnon's figure. That is an alternative proposition which I submit I am entitled to put forward. I submit that I can take these figures to show that Mr. Justice Mackinnon is not out in the figure at which he arrives.

In that connection we have said in our case - and, of course, we have said it in our reasons, which at least were clear - at page 10: "It is submitted that an examination of his reasons establishes that it was substantially the correct rule, the willing buyer - willing seller rule, that Mr. Justice Mackinnon was in fact applying. From his statement that he is discounting sums 'which do not add to its commercial value and which can never be reflected in a sale price' it is apparent that he was seeking an objective exchange value. The commercial value is the amount which the majority of willing purchasers would be prepared to pay. In setting as the replacement value a building of the same size, same aspect and of a fine quality, first class type, and depreciating only for the additional and extravagant cost incurred on special features and ornamentation which can never be reflected in a sale price, Mr. Justice Mackinnon was setting the maximum value to an occupier considered as a bidder,

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the payment of this amount being the alternative to building
anew and avoiding the mistakes made in the first construction.
Then, by taking as factors of 50 per cent. each the amount which
an ordinary investment purchaser might offer and the amount
which an exceptional purchaser, a buyer who must have that
building or a similar building, ~~by~~ bidding in a competitive
market, would have in mind as a top figure, Mr. Justice
Mackinnon, covered the factor of the higgling of the market and
thereby arrived at an objective exchange value or imaginary
market value, namely the actual value." That is on my
subsidiary contention, and, of course, that is well covered
by the reasons.

LORD PORTER: On that proposition, yes. The Board is of opinion that you must not use that as a substantive argument, but you may use it to say that Mr. Justice Mackinnon's figures represent a true value. From my point of view (I do not know about my brethren) I should not want you to be too elaborate about it.

MR. BRAIS: My Lord, I do not propose to be.

LORD PORTER: With regard to these figures, we got to the final figure on page 6 of 13,022,000 dollars. Did anybody deal at all with what would be the correct amount of depreciation on that?

MR. BRAIS: Yes, my Lord.

LORD PORTER: It is on page 28?

MR. BRAIS: Your Lordships will see it on page 28.

LORD PORTER: That gets to 9,315,000 dollars.

MR. BRAIS: That gets to 9,315,000 dollars on the 1938 figures.

LORD PORTER: Then to that you add whatever was expended after 1938. He says that at the bottom?

MR. BRAIS: No, my Lord. If I may simplify it, in the last set of figures on page 28 you have not applied the cost of construction index, which is 109.

LORD PORTER: Have they not made that distinction?

MR. BRAIS: No, my Lord. On the previous set of figures they made it the wrong way. They reversed the order. Then subsequently they applied the 1941 depreciation, in the second column.

LORD PORTER: They have done that, have they not, at the bottom? They have taken 1914, 1917, 1925 and 1931?

MR. BRAIS: Yes, my Lord. That is the depreciation.

LORD PORTER: That is what I thought. After the depreciation you get a complete depreciation of 2,262,000 dollars, and the resulting figure is 9,351,759 dollars. Then, as I understand it, from his note at the end, you have to add whatever expenditure they took between 1938 and 1941?

MR. BRAIS: That is quite right: and also you have to add to that the cost of building index, 109. If you add roughly, say, 10 per cent. to 9,300,000, which would be 900,000 dollars, you get to 10,200,000. May I suggest taking 10 per cent. instead of 9 per cent. for ease of calculation.

LORD PORTER: After all, we are not going into this; we are going into some generality in order to assist.

LORD NORMAND: Do you say that it would come to about 10,000,000 dollars?

MR. BRAIS: It would come to a little bit more than 10,000,000 dollars.

LORD PORTER: It is 10,200,000.

MR. BRAIS: That is if you add 10 per cent., but, if you add 9 per cent., it is a little less.

LORD OAKSEY: They have depreciated the cost in 1936, have they not? It is 11,577,000 dollars. They have not depreciated the cost of 13,000,000 dollars. That is on the 75 per cent. basis, is it not?

MR. BRAIS: I am on page 28.

LORD OAKSEY: The figure on page 28 is 11,577,000 dollars. That is the amount of the total cost in 1936?

MR. BRAIS: That is right. That leaves some unfinished portions. So to this figure of 9,300,000, if we come to 10,200,000 dollars -----

LORD PORTER: If you take off 9 per cent. it is about 10,000,000 dollars and if you add about half a million dollars it is about 10,500,000 dollars?

MR. BRAIS: Yes, my Lord. If we add to that the sums spent, 638,000 dollars, which is spent in 1937, 1938, 1939, 1940 and 1941, we come to a figure of approximately 10,800,000 dollars. Mr. Justice Mackinnon's figure is 12,200,000 dollars.

LORD OAKSEY: That is blending historical cost?

MR. BRAIS: That is before the blend. It is his replacement cost for the main building only.

LORD OAKSEY: What is the 600,000 dollars of which you were speaking?

MR. BRAIS: That is found at volume 1, page X, schedule "A".

LORD OAKSEY: It is blending the historical figures of cost with the appraisal figure?

MR. BRAIS: Yes. I follow your Lordship's view. This would be Mr. Justice Mackinnon comparing for purposes of verification.

LORD PORTER: What my Lord was putting to you was this. This 9,315,000 dollars is appraisal value. If you add to the appraisal value the actual cost, you are mixing actual cost with appraisal value; but in fact nobody has complained that the 600,000 dollars is wrong in the sense that it is wrongly appraised?

MR. BRAIS: Yes, my Lord.

LORD PORTER: Therefore you can take it that, as a rough calculation at any rate, there is nothing wrong with it?

MR. BRAIS: He has used the historical basis. If I go to complete that original appraisal, I add what I actually spent, whether the formula be good, bad or indifferent, I am certainly giving full value for my money, and I am arriving at that figure.

My Lords, we shall see on going through these things that there are various things which have been added as we come forward, because, with the exception of this first calculation on page 28, which does take in the 1941 depreciation, all the figures were compiled subsequently to the deposit of the roll on the 1st December, 1941, which ~~was~~ was the date fixed by the statute for the deposit of the roll. Without labouring the matter unduly, I just draw your Lordships' attention to the following calculation, which is on page 7, coming forward in these sheets of calculations. This was a result of a further

examination of the premises on the 19th December, 1941. That was after the deposit of the roll according to law. The evidence (I will not go into it) shows that Mr. Cartier and Mr. Houle went back and re-examined the premises. They came to conclusions and they added 10 per cent. for sous-contrats on page 20 to 10,000,000 dollars, and they added 13 per cent. en hauteur. They arrive at a figure of 13,004,928 dollars. If you apply to that figure not the depreciation originally granted to us at pages 5 and 6, but this 14 per cent. overall depreciation, to which we were subsequently reduced by Mr. Justice Mackinnon, ~~an~~ which is less than the 28 per cent., 15 per cent. and 19 per cent. on the actual dates, 30 per cent., 20 per cent. and 19 per cent. on the big building and 13 per cent. at the bottom of page 28, forgetting for the sake of argument this proper basis of depreciation found at the bottom of page 28, but taking this 13,004,000 dollars which we find on page 8, which was a thorough re-examination of the building by Mr. Cartier, the chief of the technical staff, and by Mr. Laquette, who had done this work and spent three months on the premises, and if we multiply that figure by the building index of 109, because these are always 1936 figures, we arrive at 14,175,371 dollars and 76 cents. Not taking into account at all the benefit of these various depreciations, which are much higher than those granted by Mr. Justice Mackinnon, at 14 per cent., but if we take 14 per cent. off that total, which is 1,984,552 dollars and 5 cents -----

LORD PORTER: That is roughly 12, 000,000 dollars?

MR. BRAIS: Yes, my Lord, roughly 12,000,000; but I am going to take the 1,984,000 dollars now, because I need those few extra dollars, because I do not have the benefit of the depreciation, which everybody has found in my favour except Mr. Justice Mackinnon, ^{and} it comes to 12,190,819 dollars 71 cents. That is only 90,000 dollars out of Mr. Justice Mackinnon's depreciated value on the main building, found in volume 5, page 1121.

LORD ASQUITH: You subtract 1,984,000 dollars from what?

MR. BRAIS: 14,000,000 dollars, my Lord.

LORD ASQUITH: Where do you get the 14,000,000 dollars?

LORD PORTER: 13,000,000 dollars is the 1936 value. You multiply it by 109 over 100, which gives you 14,000,000 dollars, then from that you deduct 14 per cent. and the result is 12,190,800 dollars.

MR. BRAIS: Yes. If you compare that with the Mackinnon figure of 12,121,796 dollars 80 cents., I am just 90,100 dollars out, in spite of the fact that I have the 10 per cent. for subcontracts and 13 per cent. construction ~~on~~ hauteur added to me; but I have the further fact that, after the assessment has gone in and after the building is on the roll, that figure we have had indicated of 14,775,000 dollars, the city has sent in its valuers to reconsider the figures and see what they can do about it.

LORD NORMAND: You gave the reference to the page/~~xxx~~ ^{where} Mr. Justice Mackinnon reaches the figure of 12,500,000 dollars.

MR. BRAIS: That is volume 5, page 1021. You have there at line 34 "Replacement cost of building in 1941. Less 14 per cent. depreciation for extra unnecessary costs." Previously you had

had the 14 per cent. physical depreciation. Then you have 14 per cent. for unnecessary costs, which was his formula.

LORD PORTER: May I understand this. As I follow, the pages from 8 to the end of these calculations, to page 28, were the original calculations made in 1938?

MR. BRAIS: No, my Lord. I shall have to look at the page and be quite sure.

LORD PORTER: I have "1938" on one of the pages, and that is where I took it from.

MR. BRAIS: No, my Lord. The original calculations for 1938 bear numbers 22 to 36.

LORD PORTER: So far so good. Now let us go back.. On page 7 we have the date 19th December, 1941. As far as I can make out there are no dates between those two, ~~but~~ namely from page 7 to page 25; but, on the other hand, you have been giving us calculations on page 7. I thought that you were treating page 7 as being part of the original calculation made before the change in 1941?

MR. BRAIS: No. The evidence (and I have been asked not to elaborate on this) is that on the date in question, and obviously after the assessment, Mr. Laquette returned with the chief assessor, Mr. Cartier, whose evidence we have, and the purpose of that was to arrive at the calculation of the cost of the building after transformation.

LORD PORTER: So far that is all right, and I understand that; but I thought these pages went backwards?

MR. BRAIS: They go backwards and forwards, because sometimes there are two together. The groups of pages go backwards.

LORD PORTER: That is what I thought. Take this case. You gave us a calculation on page 8 and transformed your 13,000,000 dollars into 14,000,000 dollars odd by multiplying it by 109 over 100. You then deducted 14 per cent., and you then arrived at a figure of roughly 12,198,000 dollars. That is right, is it not?

MR. BRAIS: Yes, my Lord.

LORD PORTER: Does that represent what you say was the result of an appraisal valuation?

MR. BRAIS: At an appraisal valuation - and the evidence says that - in 1941, after the deposit of the valuation roll by the City of Montreal.

LORD PORTER: Then that so far is appraisal?

MR. BRAIS: Yes, my Lord.

LORD PORTER: Now they go backwards. What about page 7?

MR. BRAIS: If your Lordship would permit me to exemplify that with precision, this was the cost of the building after transformation - in its then condition I take it, because there is the date, and you will have found added on page 7 the plumbing, W.C.'s and so on at 47 dollars and 80 cents each, and the elevators -----

LORD PORTER: I do not understand this a bit at the moment. Exhibit

P.36 starts on page 2, at page 737. That is right, is it not?

MR. BRAIS: Yes, my Lord.

LORD PORTER: Then there are a number of figures which go down to the end of page 2A, which is dated "2/11/42." We then get a calculation on that, which brings us to 16,000,000 dollars?

MR. BRAIS: You must take in with that group pages 5 and 6.

LORD PORTER: Then we go on. The next one is dated "12/1/42", and the next one is depreciation, 1941. That is all it says. That takes us to page 6.

MR. BRAIS: Pages 5 and 6 go together.

LORD PORTER: And page 7 is dated "19/12/41", so that all those are 1941 or after?

MR. BRAIS: The pages that belong to the same group follow one after the other, but the groups come forward. Pages 2 and 2A go together. Pages 5 and 6 go together.

LORD PORTER: For instance, pages 2 and 2A are of the 2nd November, 1942, I suppose. At any rate, they have the date after them. Page 5 is dated the 12th January, 1942, and page 6 has nothing except "1941".

MR. BRAIS: But page 6 carries the same figures as page 5. The bottom figure on page 5 is carried over to page 6.

LORD PORTER: I can understand that group of figures, because they are at the end of 1941 and the beginning of 1942. Page 7 is obviously the same group of figures.

MR. BRAIS: Pages 7 and 8 are both dated. ^{The first} ~~One~~ is dated at the top ~~at the top~~ and the second is dated at the bottom.

LORD PORTER: The result of page 8, without making the various calculations, is 13,000,000 dollars?

MR. BRAIS: Yes, my Lord.

LORD PORTER: The result of page 2A is 16,000,000 dollars?

MR. BRAIS: On page 2A it is 17,000,000 dollars, and it is only by the application of depreciation that it comes to 16,000,000 dollars. We go from 13,000,000 dollars to 17,000,000 dollars at the top.

LORD PORTER: Then say 17,000,000 dollars if you like. Are those two separate and different calculations altogether?

MR. BRAIS: Yes, my Lord.

LORD PORTER: Then I gather that the one on page 2 A is a figure based upon a historical basis?

MR. BRAIS: No, my Lord. They use, ^{historical} ~~on the one hand~~ figures solely to reapportion the cost of the separate buildings. In order to answer your Lordship's question, I will immediately go to page 7, and I will show your Lordship, having in mind your question, the difference between the two sets of figures. If we go to page 7, we see that that is "Calcul du cout de l'edifice apres transformations", and on page 8 we see a figure of 13,000,000,

and I remain satisfied with that, because, if we apply the depreciation which should have been applied by Mr. Justice Mackinnon and everybody, it would have been below 5,100,000 dollars.

Now we come to pages 5 and 6. This is interesting, because this is headed "Feuille de correction." All this as after the

assessment. Again you have an appraisal. You take the cost of the building as of the 19th December, 1941, which is the figure which we have seen before on page 8, 10,416,000 dollars. That is a figure of cost. Then they delete from there the other figures, sub-contracts, and 13 per cent. *en* hauteur, and they pick up that figure again at 10,400,000 dollars.

LORD ASQUITH: What sort of costs - historical or non-historical?

MR. BRAIS: That is appraisal. That is non-historical. There is not the slightest doubt about that. That is appraisal cost. They pick this figure up again in 1942. That is dated "12/1/42."

LORD PORTER: I am very sorry, but I do not find the figure of

10,416,442 anywhere except on page 8.

MR. BRAIS: That is the cost of construction, previous to certain additions, which are going to be modified again. That figure is picked up again at the bottom of page 5. This is a year after the deposit of the roll, which would be the 12th January, 1942. They take the figure of 10,400,000 dollars. Then they add for exterior walls certain amounts. Then they add 294,000 dollars addition for elevators as of that date. Then they add 19 per cent, instead of the 13 per cent which was used at page 8. Now they decide to add 19 per cent to the cost of construction, external walls and elevators. To the 10,400,000 dollars they add 2,000,000 dollars. For sous-contrats they arrive at a figure of 1,322,000 dollars, being 10 per cent. In that way they arrive at a figure of 14,543,000 dollars.

LORD REID: Besides the 19 per cent, they have a figure for ornamentation under the exterior walls, which appears to be sufficient and more than sufficient to explain all the additions under that head. Is that right? The fourth figure in the item "Exterior Walls", on page 5, is "ornementation, 1.50". You find that there is a surplus of 1.05 which is carried out into the total.

MR. BRAIS: Yes.

LORD REID: So that apparently without the ornamentation they would have reached a lower figure than they had before. Is that so?

MR. BRAIS: Quite, my Lord.

LORD REID: It is entirely ornamentation which causes this addition?

MR. BRAIS: No, my Lord; there is more to come.

LORD REID: I mean this particular "Exterior Walls" addition.

MR. BRAIS: Yes.

LORD REID: Then you have the 19 per cent addition and then the other if the lifts. I do not understand why they add for lifts; but perhaps that does not matter.

MR. BRAIS: Not all; they are putting in more and some J.C.4. That comes to 6.30; less the amount previously charged, 5.25, which gives a surplus of 1.05, which they are adding.

LORD REID: If they had had no ornamentation, their total figure here would have been less than their total figure in the earlier document?

MR. BRAIS: Yes.

LORD REID: Therefore, ornamentation more than accounts for all the addition on this particular heading of "Exterior Walls".

MR. BRAIS: Yes. I do not know why the ornamentation is discovered on the third visit by a man who is in there for a few hours. The evidence shows that Mr. Cartier just went through it with Mr. Laquette and Mr. Houle.

LORD REID: This appears to raise your same point in a different form: that this being exchange value you should not pay for ornamentation. Is that right?

MR. BRAIS: I am not conceding that when they put in this ornamentation they had not previously taken it into account, because it remains totally unexplained; but I do not want to go into that. There is nothing to explain those matters. We arrive at this:

that, having got to a figure of 11,100,000 dollars, we find ourselves with our tall buildings with 19 per cent for hauteur, which is 2,100,000 dollars - all this after the event. Then we have 10 per cent for sous contrats, which is 1,300,000 dollars, bringing out a figure of 14,543,000 dollars.

Now we come to the interesting portion here on page 6. This total amount of 14,543,000 dollars is then sub-divided and properly sub-divided according to the estimate previously made into what they found in the 1914 building and what they found in the 1930 building and following building, which is 800,000 dollars and 7,000,000 dollars. Then we have the 1938 fini interieur, that is, the amount spent on the building for the inside finish, which we have seen in the previous sheets this morning, 2,747,000 dollars, and which we are not complaining of, and they deduct that total of 11,577,000 dollars, which is the proper apportionment of the amounts which they have found actually spent in the building on the previous surveys, and come to an amount of 2,965,589 dollars and 79 cents, which is the difference. They do not know what to do with that; so they call it 1941 fini interieur. They have a surplus of 3,000,000 dollars there; that is as between their physical appraisal and the figures to which they have come at this moment.

LORD OAKSEY: Is not that because the 11,577,000 dollars was when it was arrived at expressly for the 75 per cent of the building which could or was estimated to have been done by 1938?

MR. BRAIS: Yes, my Lord; I agree. That is quite correct; but since 1938 and 1941 there was only 600,000 dollars actually spent on the building.

LORD OAKSEY: They were dealing with appraisal. They were not dealing with historical figures. It has nothing to do with history.

MR. BRAIS: I would say very respectfully that, if they had continued to appraise what we spent from 1938 to 1941, they could have appraised at very much more than the amount which we actually put into the building.

LORD PORTER: Will you explain to me what page 6 means? You start with the cost of construction, which is 14,543,000 dollars. Then you get ameliorations. What does that mean in that connection?

MR. BRAIS: Improvements, I would say.

LORD PORTER: If you get your improvements and you get improvements to the extent apparently of 10,000,000 dollars odd -----

MR. BRAIS: What they mean by ameliorations here are the increases to the building.

LORD PORTER: I do not understand that. Why do you get the increase of 1,000,000 dollars in 14,000,000 dollars when you have 14,000,000 dollars already?

MR. BRAIS: That is the ameliorations that you start with. Then 1914 partie erigee is the part erected in 1914.

LORD PORTER: Do you mean the whole of the complete construction in 1914?

MR. BRAIS: No. That is the whole of the building, 852,000 dollars.

LORD PORTER: Do you mean that that was the portion which was erected in 1914?

MR. BRAIS: According to the physical appraisal, yes, my Lord.

LORD PORTER: Then in 1930 a further amount of 852,000 dollars was erected?

MR. BRAIS: There are two amounts in 1930, bracketted together: 852,000 dollars and 7,126,000 dollars.

LORD PORTER: The total cost of that is 11,577,000 dollars?

MR. BRAIS: 11,577,000 dollars. If you add the fini interieur up to 1938, 2,700,000 dollars -- that is from 1930 to 1938 -- you arrive at 11,500,000 dollars.

LORD PORTER: Is that 11,500,000 dollars calculated upon appraisal?

MR. BRAIS: Upon appraisal, my Lord.

LORD PORTER: How does that compare with the 14,000,000 dollars, which is the cost of reconstruction?

MR. BRAIS: It does not compare -- the point is exceedingly well taken -- because you have arrived at a fictitious cost of construction by putting all these various figures before, and he is now testing his figures and, when he tests his figures on actual appraisal, he finds out that there is a discrepancy of 2,900,000 dollars, which is the figure at the bottom, between the two, as representing the cost of interior finishes between 1930 and 1941.

LORD PORTER: For all practical purposes the difference in those figures is made up of 19 per cent hauteur and 10 per cent sous contrats?

MR. BRAIS: Yes, my Lord, because you have, instead of finding a difference of 600,000 dollars between 1938 and 1941, which is the amount actually spent, a difference of 3,000,000 dollars found there.

LORD PORTER: You are going too fast for me. I do not follow that. Apart from this, the company spent 600,000 dollars between 1938 and 1941. What is your complaint with regard to the treatment of that?

MR. BRAIS: My complaint with regard to the treatment of that is that when the chief of the assessors tests his figure in 1941 he finds himself having to attribute or charge the building with having spent between 1938 and 1941 2,900,000 dollars instead of 600,000 dollars, which shows the fallacy.

LORD PORTER: In 1941 you get 2,994,255 dollars. Is that what you are speaking of?

MR. BRAIS: Fini interieur 1941 is the difference between 14,500,000 dollars and 11,500,000, namely, 2,965,000 dollars.

LORD PORTER: I follow that quite well. Where do you say that they attribute that to the building between 1938 and 1941?

MR. BRAIS: Because going to the left hand of that column I see "Fini interieur, 2,965,000 dollars", because your 1938 fini interieur is there and it is the correct figure.

LORD REID: Am I right in thinking that that is largely accounted for by these two additions of 19 per cent for hauteur and 10 per cent for sous contrats?

MR. BRAIS: Yes, my Lord.

LORD REID: And, instead of spreading those two additions over all the buildings, they have chosen to attribute those two additions almost entirely to the last two years and allowed no depreciation on them. Is that right?

MR. BRAIS: They could not possibly attribute them to the fourteen years, because the amount is five times the amount actually spent.

LORD REID: Exactly. That is what they have done in the accounts.

MR. BRAIS: Yes; that is what they have done in the accounts.

LORD REID: Instead of applying the proper proportion of 19 per cent and 10 per cent, they have not chosen to do that and thereby diminish the depreciation. Is that right?

MR. BRAIS: They have done two things. They have diminished the depreciation obviously, because when you get to the bottom of the page you have "Finis interieur, 1941, 2,900,000 dollars" and you have nothing to depreciation. They do not give depreciation.

LORD REID: They only give 10 per cent overall; whereas you say that you should have 14 per cent?

MR. BRAIS: The depreciation between 1930, 1938 and 1941 would be so relatively small that I am not trying to have it play a role here. The only thing that I am deducing from this is that in testing their own figures against what was actually found to be in the building, they find out that they have applying to the total buildings a surplus of 3,000,000 dollars.

LORD REID: Certainly they do. It appears to me that, if you have a point at all -- this is all that has soaked into my head -- if you look under "Depreciation" you will see on page 6 that it is almost 10 per cent of the total, 15,000,000 dollars odd; whereas you have been allowed 14 per cent with other people.

MR. BRAIS: Yes.

LORD REID: The net result to my mind of all this -- I do not use the word in a bad sense -- juggling with figures is that you have got less depreciation than you ought to have; but I have not grasped anything else at present.

MR. BRAIS: I have not been doing the juggling.

LORD PORTER: My Lord was putting it in your favour.

MR. BRAIS: I understand perfectly well. This sort of callisthenics with figures, which I am not attempting to justify, but which is used and applied to me on my appraisal value, looking after the event and to the contestation before the courts -- the contestation was before the Board on the 2nd December, 1941 -----

LORD PORTER: What I thought my Lord was saying -- he will tell me if I am wrong -- was that, as you arrive at 2,900,000 dollars as built in the last year, 1941, and you do not in fact have

any depreciation from that, you are mulcted of your proper depreciation, because that 2,900,000 dollars ought to have been spread over the years 1914 to 1938 and you ought to have had full depreciation upon it for those years.

MR. BRAIS: I am also mulcted in 3,000,000 dollars, which is added to my appraisal by the application of a new formula a year or so after the event.

LORD PORTER: That is a different matter, because either it is defensible to charge 19 per cent for height and 10 per cent for sub-contracts or it is not.

MR. BRAIS: Yes.

LORD PORTER: That is a different proposition from the question of to what year the costs ought to be attributed.

MR. BRAIS: Yes. I am not stressing very considerably the year to which it should be attributed.

LORD PORTER: I should have thought that it made a great deal of difference; but you will not take it.

MR. BRAIS: It is amongst the other things that I have not taken which have been generously given to me. If I had to stop there with depreciation and get the correct figures, I would not bother this Board so long on the record with the re-apportionment.

That brings us, I am happy to say, to the final figures, on page 2 and page 2A. There, again, they take up at the top the re-calculations of the 12th January, 1942, which was the third calculation made on the Sun Life.

LORD PORTER: Where does the 13,110,000 dollars come from?

MR. BRAIS: The 13,110,000 dollars is new. If we go to the top, we see that 11,110,337 dollars is found in the 1942 calculation, which was the third calculation and the second one after our assessment roll was filed.

LORD OAKSEY: I thought that the hearing before the Board was in December, 1941.

MR. BRAIS: Not the hearing before the Board, my Lord.

LORD OAKSEY: I thought that you said so.

MR. BRAIS: Our assessment roll was deposited on the 1st December, 1941.

LORD PORTER: This is post deposit?

MR. BRAIS: This is post deposit.

LORD PORTER: Can you tell me what "10 per cent omission and supplement", at the bottom of the page, is?

MR. BRAIS: No, my Lord. That is just something more which is absolutely and completely unjustified by the evidence.

LORD PORTER: I wanted to know, not whether it was justified, but what it was.

MR. BRAIS: I cannot help your Lordship on that.

LORD PORTER: On that you again get your addition of height at 19 per cent and sub-contracts at 10 per cent?

MR. BRAIS: Yes.

LORD PORTER: That brings you to 17,100,000 dollars odd. What happens after that? Then you have the addition, bringing the 1938 figures to the 1941 figures. Is that right?

MR. BRAIS: Your Lordships will have noted how these figures have grown as the case goes on.

LORD PORTER: At the moment I should like you to tell me this, without considering what advantage it is to you. I gather that the 17,000,000 dollars goes to 18,000,000 dollars by means of the formula of the differential between 1938 and 1941. That is right, is it not?

MR. BRAIS: No, my Lord, because the 11,110,000 dollars figure at the top is the 1936 figure. Then we have some additions which are found.

LORD PORTER: That is the previous figure?

MR. BRAIS: At page 2; they follow.

LORD PORTER: Where do I pick up the 11,000,000 dollars from.

MR. BRAIS: That figure is picked up from page 5. Those are 1936 values.

LORD PORTER: To that they add the hauteur and sous contrats?

MR. BRAIS: Yes. They again come up, with 10 per cent hauteur and 10 per cent sous contrats.

LORD PORTER: They are not adding them on there, but they increase the figures.

MR. BRAIS: Yes. They come back to the 1936 value and increase the value again. Then away on in 1942 this is a further re-valuation whilst the case on, and they throw in some more figures and then add 500,000 dollars at the bottom for surplus de charpente, re tour and forces concentrees, coming to 11,900,000 dollars. Then they throw in an entirely new figure here of 10 per cent for omission and supplement. After four appraisals, then they put on that figure for omissions. They put the 19 per cent on top of the omissions, to have another 2 per cent in their favour. Then on top of that they apply 10 per cent for sub-contracts, and they come to 17,100,000 dollars on page 2A and after that they apply the cost of building index of 1941 and arrive at 18,000,000 dollars.

LORD PORTER: Is the 10 per cent calculated upon the figure already augmented by putting on 19 per cent?

MR. BRAIS: Yes; they are cumulative. There is, first of all, 10 per cent on the 1936 cost.

LORD PORTER: First of all, there is 19 per cent and then 10 per cent?

MR. BRAIS: No. At the bottom of page 2 -----

LORD PORTER: That is a different thing. They are looking at the sub-contracts and the height?

MR. BRAIS: Yes.

LORD PORTER: Before that you get the omissions and supplements. Then on that you get 19 per cent added and then on the 10 per cent, on which the 19 per cent is added, you get the 10 per cent added again.

MR. BRAIS: This, as I say, at the date indicated is the fourth time that they have gone back to us and they have changed their formula this time by the extraordinary addition of omissions and supplements, after the fourth examination, when everything has been taken off exactly as is found in the building, and at the bottom of page 2A they have proceeded to do what they did not do on page 6: they apportion the total to the various buildings, in conformity with the historical costs which were then in their possession. That is where the historical cost comes in here: for the purpose of apportionment.

LORD OAKSEY: Did any of the courts or the Board adopt these figures?

MR. BRAIS: No. Obviously we strenuously took the position that the 18,000,000 dollars -----

LORD OAKSEY: What have we to do with them, if the courts did not adopt them?

MR. BRAIS: For no other purpose than to serve as a test -- it appears to me that I am accepting the ruling of the Board -- of Mr. Justice MacKinnon's figure, because we will see in evidence, which is exceedingly brief, that all the contractors who were called by the appellant took this figal figure and took it completely apart as being completely impossible. This is just on the test basis. I must conform to the ruling of this Board; but they all had it before them and I am sure that the original appraisals and what was said by the contractors as regards the fallacy of the final appraisal must have weighed considerably in the minds of the judges who gave figures in saying that objectively -- they have all used the formula objectively -- as we look at it, applying our minds as men of reason, we think that the amount of 12,000,000 dollars found by Mr. Justice MacKinnon is correct.

I have promised to be brief on these figures and I have. I was equipped for the day and more, my Lords, and I am glad to know that I have not had to go through them further.

LORD PORTER: I think that you have put your point and we appreciate it.

MR. BRAIS: If your Lordship pleases.

That brings me immediately to something which is very brief. Will your Lordships refer to Exhibit P.56, in Volume 5, at pages 960, 961 and 962? There we have the evidence of Mr. Archambault, to whom the Chairman of the Board in his judgment, as your Lordships will recall, gave what might be called a certificate of competency and ability, and he is, indeed, by the qualifications placed in the record, a gentleman of a great deal of ability. You have in those pages an analysis of what was done.

LORD PORTER: Mr. Archambault is one of your witnesses?

MR. BRAIS: Yes; he is, my Lord.

LORD PORTER: This is a letter written to you as a criticism of Mr. Cartier's evidence?

MR. BRAIS: Yes. We produced all the witnesses in this case. The rules of law are some like the rules of the Railway Board and

other Boards. The rules of law are not quite the same.

LORD PORTER: It is often convenient in cases of this kind to put in documents like this.

MR. BRAIS: I agree that this document, with the figures in apposition, makes it very much easier to understand than it is by reading through the evidence, which I am prepared to do, but I do not think that it is necessary, because this evidence is not contradicted; nor is the evidence of Perrault on the same subject; nor is the evidence of Walker on the same subject, who says that three-quarters of one per cent was put on construction for hauteur of the building which he himself had built, the highest building in Montreal, which is higher than the Sun Life. Mr. Perrault says that you can run to 2 and possibly 3 per cent, but 19 per cent construction for hauteur has never been heard of.

LORD PORTER: This document says: "Mr. Cartier has submitted the following valuations on behalf of the City of Montreal. Valuation signed by Georges Paquette." Who is Mr. Georges Paquette?

MR. BRAIS: Mr. Georges Paquette is the man who did the work, who spent 3,000,000 dollars on the building in 1938, and whose figures we see as we go along.

LORD PORTER: He was the contractor?

MR. BRAIS: No; he was the City valuator, the man whose job it was to analyse the building stone by stone and pebble and pebble, if the cost was to go up. Georges Paquette's is the figure which we have seen, with the corrections which are made when he is brought back on the scene by his chief. We see that the reference here is to page 28, to which we have referred. That is the figure originally arrived at. That figure of 13,004,000 dollars when it has been depreciated and increased and so forth is much less than Mr. Justice MacKinnon's figure. Those are all adjusted to 1941. He says how the figure is arrived at. "This is arrived at from report of 4th July, 1938, using as a base the figure of 9,273,401 dollars and 49 cents, which represents the replacement cost at 1936 before adding surcharge of $13\frac{1}{2}$ per cent for height and 10 per cent for sub-contracts. To the above figure has been added the cost of work done between 1936 and 1941 to complete the building. In this valuation some of the unit prices which had been used in 4th July, 1938, valuation have been raised." The dates of the valuations appear on the left hand side. He is not applying himself to the original valuation of 1938, which we have seen,

except to refer to it in his report.

LORD PORTER: Would you mind explaining this. On page 961 you see: "17,161,573 dollars is replacement cost at 1941 but nevertheless Cartier adds 10 per cent for adjustment to 1941 prices". Where do you get the proof that 17,161,000 dollars is the replacement cost at 1941 ?

Mr. BRAIS: He is referring there to the manual, and I do not think it is correctly expressed at that point. He has added the 10 per cent which we already have.

LORD PORTER: It does not follow that the 10 per cent additional was at 1941 prices .

Mr. BRAIS: No. If we take the figures on page 2 and 2(a) that would not be correct. There is an inversion there in his thinking. I will show your Lordships what he was applying his mind to there.

LORD PORTER: I do not care much about that as long as I know if it is accurate.

Mr. BRAIS: It is not.

LORD PORTER: Then we will knock it out.

Mr. BRAIS: We will have to come back to it in some other way. For the moment, on that basis, it can be knocked out.

LORD PORTER: We will knock it out for the moment.

LORD REID: Could you give me the pages upon which Mr Cartier says that he produces all this elaborate material, and any page upon which he is cross-examined about it. I think you said that Mr Cartier was the witness who produced it. I do not want it just now, but I would like to have it at sometime.

Mr. BRAIS: I have had it translated, if that would be of any assistance.

LORD REID: I would like first to get the references. Do not bother just now.

Mr. BRAIS: I can give it to you immediately. It is Volume 2, page 266. That is the beginning of his evidence. First will you look at page 266, then at page 319.

LORD REID: If that is where he first refers to the document.

Mr. BRAIS: It is actually produced on page 323.

LORD REID: Is there any cross-examination upon it?

Mr. BRAIS: Yes. We have first of all page 323. He is first examined in chief at page 266.

LORD REID: That is not about the document. What I want are the pages of the record where Mr Cartier deals either in chief or in cross-examination with the figures which you say he produced.

Mr. BRAIS: Yes. Almost his entire deposition refers to those sheets. For example, take page 269. To establish replacement value etc. they use the manual, and he gives the method of using the manual. "We take out material grouped according to our method, and we calculate it item by item"¹/₂ Cartier is almost exclusively occupied on this document.

LORD REID: I know he explains in a general way what he says he has done, but what I want to find out is whether he ever explains, for example, why he takes 19 per cent, and why he takes an extra 10 per cent, and why he does all those things.

Do not do it now, but if you could give me a note tomorrow of that, I could see how these things were justified.

Mr. BRAIS: In cross-examination he explains his 19 per cent, as Mr Archambault says, going into a great deal of precision. 10 days later he comes back; he is brought back to say that that does not hold, and he reduces all his figures as noted there. I will give those to your Lordship.

LORD REID: I only wanted the references. Do not interrupt your argument.

LORD OAKSEY: If we are to examine this sort of figure fairly, surely we must examine every witness in the case. What you are doing at present is to read what Mr Archambault says with what Mr Cartier says. I suppose the witnesses on the one side contradicted the witnesses on the other side as they generally do in these cases.

MR BRAIS: Not on that point, Mr Cartier and Mr Archambault.

LORD OAKSEY: They were only heard upon the question of replacement value?

Mr. BRAIS: Archambault was heard generally in the case on the total valuation of the Sun Life when he came back afterwards in rebuttal to discuss this built up exhibit, and he was not contradicted.

LORD OAKSEY: And none of the Courts have adopted the figures?

Mr. BRAIS: Yes, but I say they have tested their figures against that figure and the City's own figure, on a comparison basis. They have had so many figures here. There have been so many figures used here by the City appraisers. I suppose the Judge could have said: I think this figure is correct, and take the Archambault report. He could have done that. I would have wished he had because I think it a proper formula. May I answer in this way to your Lordship's question that none of the Courts have adopted those figures --

LORD PORTER: Am I right in supposing that the only cross-examination of Mr Cartier is on page 330.

LORD ASQUITH: Was he not cross-examined by Mr Geffrion on page 321.

LORD OAKSEY: He was called and recalled about four times.

LORD PORTER: I do not think that cross-examination by Mr Geffrion was anything except an interruption, because if you look at the head it is "Examination-in-chief" all the way through.

Mr. BRAIS: The pages that are in the report are the pages of the stenographer's transcript, and are not the same pages that appear in the printed copy. We want to be careful about that. Where references are made by the Board or the Superior Court to pages they are in the transcript. I have noted and will whenever they are of importance refer to them as they appear in the printed record. Page 277 is the cross-examination of Mr Cartier. He is again called at page 400 and cross-examined at page 401.

LORD PORTER: Originally he was called on page 266?

Mr. BRAIS: Yes.

LORD PORTER: He was examined in chief at that time until you get to page 277, when he was cross-examined by Mr. Geffrion. That lasted until Mr Fournier was called on page 285.

Mr. BRAIS: May I draw your attention to the fact that from page 316 on, it is headed "examination -in-chief" in the index of evidence, but it is the continuation of the cross-examination by Mr. Geoffrion.

LORD PORTER: He is re-examined on page 328 ?

Mr. BRAIS: Cartier does come in on page 316. Those are references to the transcript of his evidence before the Board. It is the original evidence; it was not printed, it was in type-written form.

LORD PORTER: That is his re-examination, is it not, on page 328, volume 2 ?

MR. BRAIS: Yes.

LORD PORTER: Where is he rappele ?

LORD ASQUITH: Would it be at the bottom of page 323 ?

LORD PORTER: He is cross-examined again by Mr. Geoffrion.

LORD ASQUITH: On page 323 he is re-examined by Mr. Sequin.

Mr. BRAIS: That is where he says the Insurance Building had been treated in the same fashion; at least they got the appraisal formula, and they must have got the appraisal value before 1941, if they had the same ~~figure~~ formula that we had. That means they had some figures on appraisal. They could not build up the Royal Bank in that fashion after December, 1941, the way they did with us, if the same formula was applied to everybody.

LORD REID: As I understand it Mr Cartier says that Mr Paquette has made a number of errors, page 319 at line 38 and at page 321. It was an error to put in 19 per cent, an error to put in a lot of other things, and the errors are shown up on page 5 of the manuscript. Is that right ?

MR. BRAIS: That is what he says, but then when he comes to show those errors, when we examine them, I submit that what he puts in constitutes the error, and certainly not what Mr. Paquette did, because Mr Paquette seems to have gone very conscientiously about his work. He says at one place: It is not quite the same building, the Sun is not quite as thick as the building Mr Paquette had in mind, and there is something about elevators. We concede the elevators, but that only amounts to about 200,000 dollars. We have one of the best elevator systems. I concede the elevators without any difficulty, but in the rest he has failed to show where Mr Paquette has made any error, except for minor items which are brought in. He has made many statements in a very general way, including the 19½ per cent statement, and the 10 per cent omission and errors was completely unjustified. The 500,000 dollars thrown in in the final thing has no justification on any basis whatsoever, and nobody has come to support it. It has been contradicted by a number of witnesses and nobody comes forward to say that what Mr Cartier says were Mr Paquette's errors was justified in any shape or form. He makes those statements and when brought face to face with them he either abolishes them like the 19 per cent, or, taking the 10 per cent omissions, that is just picked out, nobody has ever had it before. Taking the first item, on page 2 of the formula, that has just been put in there; nobody could have had that because this is put in year by year after the assessment was completed. We see what the situation is with regard to the 19 per cent.

The 10 per cent for sub-contractors cannot possibly hold. There is no contractor in the world who would get 10 per cent for the sub-contracts in that building. 10 per cent for sub-

contracts means the contractor will make 10 per cent further profit on the price of every sub-contract. Now the sub-contractors are for only a portion of the building, to begin with, and generally a small portion of a building of this type; secondly, a contractor who would try and make 10 per cent-- in this case they are making 10 per cent on the total cost of the building, and 2 or 3 per cent would be the utmost a contractor who wanted to stay in business ~~six~~ could afford to take on the price of his sub-contracts. He is already taking a profit on his own work; he is taking a profit of 5 per cent, which is not contradicted, on the totality and that includes 2 or 3 per cent. profit he is taking on the sub-contracts. He is not risking anything on the sub-contracts. He is risking something if the sub-contractor fails, but if he gives it to the right sub-contractor he is not risking anything. So that that does not hold water at all.

There is already a 10 per cent in those figures which does not appear. There has already been a charge of 10 per cent. If your Lordships will refer to page 200 of the manual you will see all these costs. At the bottom of the page it says: "In establishing the varied tables to be used in estimating buildings a 10 per cent charge has been added for cost of permits, fees etc.". That is what Mr Archambault had in mind when he referred to 10 per cent. I draw that to your Lordship's attention because that is of considerable importance. There is already 10 per cent in those figures.

LORD PORTER: The 10 per cent has nothing to do with the sub-contracts. It has to do with architects' fees, permits and so on.

Mr. BRAIS: Cost of permits, fees, etc. That has already gone into the unit figures. We see that on page 350 and following where we start the unit prices for each item. You have "Price list of walls (exterior finish)". That is just an example. "Material and labour plus 10 per cent". These things which are being recharged, fees, permits and so forth are already included in the unit cost. I would draw your Lordships' attention to that. This is apparently what Mr Archambault had in mind when he said there is already 10 per cent in there.

LORD REID: Is this right? If not all, at least some of the points you have mentioned were put to Mr Cartier in one form or another during his evidence, and there is no evidence by him of an admission that any of them is wrong. He sticks to them all?

Mr. BRAIS: He sticks to them all.

LORD REID: Therefore it is a question of fact whether his evidence is to be believed. It may be that it depends on inference and upon review. His evidence is at least not unanimous on the question. There is evidence to support the manuscript figures that you have been dealing with.

Mr. BRAIS: I must correct myself. On the 19 he capitulates completely and comes back with a new set of figures.

LORD REID: I had noticed that on page 330 he explained what went to the 19 per cent.

Mr. BRAIS: Yes, and he comes back of his own account 10 days later, and says: Abolish that altogether, I will cut that in half and I will add half of it to the extra cost of financing the building en hautier. I do not comment further. After making that careful analysis, fractionally broken up of something which clearly to the mind of everybody did not make sense, he comes

back 10 days afterwards and he wants to take at least half of that, and he adds to that. It really made him the laughing stock. He had made the assessment, he was the Chief of the Board, and he sent a man back to assess.

LORD ASQUITH: What does he add to it. He cut it in half, what does he add ?

Mr. BRAIS: He cut it in half, and then all the fractions he gives. He cuts it in half and he says: $\frac{1}{4}$, $\frac{1}{4}$, $\frac{1}{8}$ and $\frac{1}{8}$ under certain headings. Then when he comes back he says $\frac{1}{8}$, $\frac{1}{8}$, $\frac{1}{8}$, $\frac{1}{16}$, $\frac{1}{16}$, which makes half. That is page 566. In considering whether he sticks to his figures, this is important. It is volume 3.

LORD PORTER: There is some evidence in volume 2 I think.

Mr. BRAIS: We see here: "Have you something to say to the Board, Mr Cartier? (A) I would like to correct my evidence. I said in my first evidence that we did not take care of the financial part for the construction. I have found in my records that the percentage we put as construction in height, we have fifty per cent of that amount which is included for financial part". Then questioned by Mr Hansard: "For financing during construction? (A) Yes. The other 50 per cent is divided under the per centage I have given as $\frac{1}{4}$ for the fixing of the height; $\frac{1}{4}$ to bring up the materials; $\frac{1}{8}$ for machinery, and approximately $\frac{1}{8}$ for insurance and $\frac{1}{8}$ for scaffolding. (Q) $9\frac{1}{2}$ per cent is for financing during construction? (A): Yes. If we applied on the building after five stories. We did not take care for financing expenses for building less than five. (Q): That is $\frac{1}{4}$ for building materials and $\frac{1}{4}$ for bringing up materials; $\frac{1}{8}$ for machinery and permit; $\frac{1}{8}$ for insurance and $\frac{1}{8}$ for scaffolding? (A). Yes". When the witnesses come forward and are not contradicted, and then he retracts himself and says it costs $9\frac{1}{2}$ per cent extra total cost of the building for the sole purpose of getting money because the building is high, obviously it was completely different.

LORD PORTER: I do not at the moment know quite what it means. $9\frac{1}{2}$ per cent for financing ?

Mr. BRAIS: That is what he said.

LORD PORTER: Suppose you are building a building, does he mean that if you build a tower on the building it costs more money to finance than the money you have to find if you build a lower building ?

Mr. BRAIS: That is what he says.

LORD ASQUITH: I suppose the top of a building 20 storeys or more high would involve cranes and that sort of thing.

Mr. BRAIS: It is explained by the next witness, Mr Walker.

It is exceedingly important, because Cartier had re-traced and put himself in a position where, in answer to his Lordship Lord Reid, he has left the evidence completely open. When these figures are added after the former figures, there is something which, I do respectfully submit, needs to be considered.

It is the deposition of Mr. Walker, page 594, in volume 3. At line 45 he is asked: "You say you are the contractor-manager for the Foundation Company of Canada? (A). Yes, sir. (Q). How long have you held that position? (A). Twenty years. (Q). And how long have you been in the contracting business? (A). Forty years. (Q). Did the Foundation Company have anything to do with the erection of the Aldred Building?" That is apparently higher; it is undoubtedly as high as the Sun Life. "(A). We constructed everything above the foundations". It is all in height, it is not as in this case with the tremendous base which is not high. "(Q). I take it that the Foundation Company is not only concerned with foundations? (A). Oh no. (Q). So far as the construction of that building is concerned, would you tell the Board what percentage of the cost represented the additional height of that building over ten floors, or over eight? (A). I don't get the question. You mean, was there an increase? (Q). Yes. What percentage is due to height in that building? (A). The only item is the matter of hoisting the materials, practically. (Q). And the equipment for doing that? (A). That would be part of the hoisting equipment. (Q). And the scaffolding? (A). That is not increased by the height to any great extent, because scaffolding is re-used. (Q). Would you give me a percentage in that regard? (A). In that particular building I could give you about the cost.

"Practically three-quarters of one per cent ($\frac{3}{4}$ of 1 per cent), excluding structural steel, which does not enter into contractor's expenses". Cartier has not tried to pretend that structural steel was part of the 19 per cent, on the contrary. "(Q). The higher the building goes the more weight you have to put in the steel at the base? (A). Structural, yes. (Q). And that will be reflected in the quantity of steel? (A). Yes. (Q). Would you enumerate for the Board what is included in that three-quarters of one per cent? (A). In the towers required for hoisting, the construction in the tower, cables, and so forth. These are electrically driven hoists of over six hundred feet a minute lift. And the electric power and the man who operates the hoist. That would constitute the hoisting equipment for all the material in that building. In that goes everything that was handled from the inside of the building, floor by floor. (Q). You speak of hoists, and I see you have a photograph. Will you produce that as Exhibit P.44? (A). Yes. (Q). Will you state whether that is a picture of the Aldred Building during construction? (A). Yes, showing the towers. (Q). And the towers are on the right side? (A). Yes, on the Notre Dame Street front. (Q). Is there any increase in the cost for placing the building material higher up, rather than lower down? (A). For distribution on the floors by the hoisting, no. (Q). Your three-quarters of one per cent would include getting them up to the floor, and there is no other expense? (A). At that point the setters go to work, but it would be just the same. They get the materials at each floor. (Q). Is there any increase in insurance costs caused by reason of building the building higher? (A). The labour insurance costs? (Q). Yes? (A). No. Their various trades have their different rates irrespective of the building. (Q). Could you tell us the height of the hoist used in the Aldred Building? (A). Yes. That started at the second basement floor, and that was twenty-seven feet (27 feet) below the surface, and the building itself is three hundred and nine (309) feet above the ground - that is three hundred and thirty-six feet (336 feet) of building that hoist covered.

"Cross-examined by Mr. Seguin, Attorney for the City of Montreal: (Q). Do you know what is a composite

assessment? Do you know that on that building there is only one hundred (100) or two hundred (200) data, and that an expert must affect a box of his group ten or twelve times? It is what we call a composite assessment. (A). Yes. (Q). You have heard no evidence in this case? (A). No. Except what I read in the papers. (Q). You do not know what Mr. Cartier grouped in his report? (A). No. I am merely answering the questions put to me. (Q). You said for you construction in height would cost three-quarters of one per cent? (A). The hoist portion, yes. (Q). Can you put as many men at work on the upper storey as on the first and second floors?

"You are limited by the spread of the hoist, so you have to wait on your material? (A). No. By organising the hoist properly the material is waiting for the men; otherwise we would not be in the business. (Q). If you have only one hoist the men will have to wait, or if you have more you have to wait? (A). You put in the hoisting equipment to suit the conditions. We had four on that. (Q). Do you know how many were employed on the Sun Life Building? (A). No. In the Aldred Building we had to hoist all the stone, but the Sun Life did not have to hoist their stone because there outside wall was left supporting. It was handled by derricks from the upper levels. (Q). The time at your disposal to build such a building can influence the cost of the upper floors?

"If you have a building to do within nine (9) months, and another in one year or seven months, that can be reflected in the cost of the upper floors? (A). No. In laying out the plan for the building it is important to keep that building moving at a certain speed. While the upper floors are being completed the lower floors are already underway and perhaps shielded in. As the floors go up the material for these floors will be turn up and the men will be tearing the material from the lower floors. (Q). You do not know what speed the employees had to keep in the Sun Life Building? (A). No. (Q). You only know the speed you had to keep in the Aldred Building? (A). No; that and many others we built from Coast to Coast. (Q). Is the insurance on the employees higher on the upper floors? (A). No. The insurance rates on the different classes differ. Steelworkers are a high rate; carpenters are another; masons; and that carries through the operations on the job. (Q). You say your three-quarters of one per cent includes all supplementary frames of scaffolding of hoisting? (A). The cost of the hoisting operation in that job.

"The Court: (Q). Would this apply to any height? Whether twenty or forty storeys? (A). The additional storeys are simply the extension of the towers and the cable, and that is a small item in the erection of the tower, and with a fast hoist it is a small matter.

"The hoist in the building (Aldred) went six hundred feet per minute. The hoist could run up three hundred feet in half a minute.

"When you start a high building the more storeys are just a duplication of the small matter of the piping of the twoer frame.

"By Mr. Seguin: (Q). Do I deduce from your evidence that if you build a building up twenty-seven storeys and were called upon to do three other storeys, that you would charge the same cost plus three-quarters of one per cent?

"Mr. Hansard: During the building, not after.

"The Witness: It would be hard to appraise that. Just three storeys. It is not a straight proportion. The power house and switches and controls are just the same; all there is is three more storeys of tower and three more of cable. (Q). Do I assume from your evidence that if you had one building of only one storey and another to build to thirty storeys on the adjoining side that you will figure your price on the low one and add three-quarters of one per cent for the other? (A). No. We do not figure our plan that way. We figure it for our cost; what is required and the cost of what is going in. That is the way we arrive at the cost for an estimate. We have to have that information to start with.

"Mr. Hansard: The sum cubic contents.

"By Mr. Seguin: (Q). Is there some building that could cost more than three-quarters of one per cent? (A). I was using that because the Aldred is the nearest to the Sun Life that we have in Montreal. It is the only job of that height. We put in the foundations for the Bell Telephone, but we did not build the superstructure, so I could not give you another case with similar conditions. (Q). This three-quarters of one per cent does not take care of the extra weight of steel you have to put nor the extra thickness of the walls, the extra strength you have to put in your columns, and those items?" Those items are not considered by Mr. Cartier when he considers the various breakdowns. "(A). That is all taken care of in the costs. (Q). You put three-quarters of one per cent because all your other extra costs are included in the proper trade in the building? (A). No. This takes care of the hoisting for all of the trades, including our own. That three-quarters of one per cent is arrived at after the job is finished. When the estimate is made everything is put in. The motors, the power so much, for a certain length of time which we take for the development of the structure - all these are developed on sheets. As they are assembled and classified we arrive at the point of adding on three-quarters of one per cent of what it cost us on the building. (Q). Would you make a tender for twenty or thirty storeys using that figure of three-quarters of one per cent? (A). No. We don't work by classification. We arrive at absolute figures in our costs. (Q). When you risk your money you are taking no chances? (A). No. We figure it accurately".

LORD PORTER: What deduction are you asking us to draw from that evidence, because it seems to me simply to come to this. You have the evidence of Mr. Cartier, rightly or wrongly, on the one side, and you have the evidence of this gentleman on the other. This gentleman says three-quarters of one per cent and Mr. Cartier says, how much?

MR. BRAIS: 19 per cent.

LORD PORTER: $9\frac{1}{2}$ per cent now. He says 19 when you add the financing in.

MR. BRAIS: He first of all says 19 per cent. He does not come back with anybody to say all this evidence is correct, but he breaks it in two and adds $9\frac{1}{2}$ per cent for the extra cost of financing, because the building is high. I say immediately that whoever applied that 19 per cent formula shows to the experience of anybody that it is just a figure picked out.

LORD PORTER: Did Mr. Cartier say anywhere where he got the figure from?

MR. BRAIS: From the manual.

LORD PORTER: Is the 19 per cent in the manual?

MR. BRAIS: Yes.

LORD PORTER: Did anybody ask him why he put $13\frac{1}{2}$ per cent to start with? That is because it was not the whole of the building.

MR. BRAIS: There is nothing in the manual to say how you apply it. I take it that he first of all applied the $13\frac{1}{2}$ per cent which was a portion which went only to the structure inside. In the inside, if I take up a very valuable piece of equipment or a very expensive class of elevator, I have to pay $19\frac{1}{2}$ per cent on something per cubic foot, which is 1,000 dollars of mortar and brick. I have expensive material inside and I am to rate all my inside at $19\frac{1}{2}$ per cent. We see immediately how the price is boosted out of all proportion and all sense. If I take in an elevator or half a million dollars worth of very expensive equipment, and that is 19 per cent as against the outside, I say that it is surplus and it would appear rather improper. That is why in one assessment they applied $13\frac{1}{2}$ per cent; it was on a portion of the structure and it was considered only on a portion of the structure where you had heavy material. It would appear that the assessors found there is a very new unique reference to so much per span and so much per height which we find in the manual and which is not further explained. That would appear to be a very serious mistake which was made subsequently.

LORD PORTER: There are two things. First of all, was the manual right in putting 19 per cent in at all, and, secondly, if it was right, to what do you apply the 19 per cent?

MR. BRAIS: The manual does not say.

LORD PORTER: Those are the two questions and you are saying the 19 per cent is wrong?

MR. BRAIS: Yes.

LORD PORTER: Anyhow, if it is 19 per cent you ought not to apply it to the whole building?

MR. BRAIS: No.

LORD PORTER: You will probably tell us about that tomorrow?

MR. BRAIS: Yes, I will tell you tomorrow morning that that applies only to the outside structure, because it was used only at one time.

(Adjourned till tomorrow morning at 10.30).