

28, 1951



IN THE PRIVY COUNCIL.

Council Chamber,
Whitehall, S. W. 1.

Tuesday, 3rd 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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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. N. 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.

N I N T H D A Y.

MR. BRAIS: My Lords, I would propose this morning to dispose very briefly of the Cartier evidence by four or five references simply which I trust will serve sufficiently without going through it in toto and then to proceed with the judgment of the Board. It is volume 2, page 278. The point I am making here is that Cartier made only the most casual visit to the building. The other chaps had been there for three months taking off quantities, measuring the thickness of the piles in the basement, which serve to support the building, and applying their figures and taking advantage of the plans and specifications. They would be in a better position than Mr. Cartier, who came after the assessment, to tell them what to do and to proceed to the restoration of figures on the basis of historical value. Mr. Cartier was the person who

was heard as a witness and who directed the modification of the figures of the appraiser.

LORD PORTER: You said the others. Who do you mean by the others?

MR. BRAIS: Mr. Houle and Mr. Paquette. Mr. Paquette had done most of the work but he was not called.

LORD ASQUITH: Could you remind me of the dates?

MR. BRAIS: I will have those right here with precision. We have here, first of all, Cartier's own visit in 1941. That is December, 1941, as a matter of fact. That is after the assessment when he is being cross-examined and he said, at line 14: "During the course of 1941; at the end of 1941". That was in December, my Lord, 12th December. That follows the preceding question: "I do not ask you what are your tastes but your experience. Secondly, did you go to the property with Mr. Houle; you said in November? (A). In the course of 1941, at the end of 1941. (Q). He told us he was there only part of the day. (A). Yes. (Q). How long were you there? (A). Not even the day. (Q). What did you verify whilst you were there? (A). I verified the principle measurements. I went round the building. I studied the plan and the report which I verified. (Q). Tell us what you did there? (A). What I told you. I particularly verified the report of Mr. Houle. (Q). You were there a few hours? (A). Yes, a few hours. (Q). That was the only visit which you made? (A). I know the Sun Life apart from that".

If he knew the Sun Life apart from that I would submit he would not be able to correct the other man's figures. The other man spent three months there. This is Mr. Cartier's only visit to the premises and it is as the result of this visit that we see these various reports.

LORD ASQUITH: His only visit was for a time on one day, you say in December, 1941.

MR. BRAIS: That was after the assessment had been completed.

LORD PORTER: After the original assessment.

MR. BRAIS: It had to be deposited and was deposited and we complained on the 2nd December.

LORD PORTER: This was in order to see whether the assessment could be supported.

MR. BRAIS: No; this was in order to see what would have to be done with the appraisal which had been conducted by the City in conformity with its manual and what could be done to bring the appraisal up to the assessment which was based on our historical cost.

LORD REID: He reached the conclusion not with any detailed reasons arising out of the nature of the building, but because he went to the book and found that the book authorised 19 per cent for one thing and 10 per cent for another. I do not see how he could be any better off if he had known the building inside out, because he did not go by the nature of the building, he went by what was said in the book.

MR. BRAIS: The book had already been applied.

LORD REID: But he said wrongly.

MR. BRAIS: He said wrongly. Putting 19 per cent on the total building because the skylion rises here to a height of - I am

going to the ridiculous just simply to exemplify my point-
is the Festival and the Fair to be taxed by 19 per cent
because a portion of it goes to a height of 20 or 30 storeys.

LORD REID: Speaking for myself you seem to have a strong ground
of criticism but not on this ground that he did not know the
building well enough, but on the ground the book was either
misapplied or the book did not make sense. I do not see why
this point matters at all for the moment.

MR. BRAIS: Except that he says he also corrected some of Mr.
Paquette's errors as to measurement and so forth. I want to
be very brief on these little points.

LORD PORTER: Apart from passing it like any other member of the
public, he only made this single visit?

MR. BRAIS: He only made this single visit. He adds a formidable
half million dollars for the concentration of weight in the
last appraisal which we find on pages 2 and 2A.

LORD OAKSEY: It is not exactly passing it; he followed it
during the greater part of the construction.

MR. BRAIS: That would not allow him to take off any quantities
I do not know what he means by following it during the con-
struction, but for appraisal purposes, if I may submit to
your Lordships the fact that he, like everybody else in
Montreal, saw this building going up and architects were inside -
they were not in a position to treat the appraisal in the
way, I respectfully submit, it has been treated.

On page 261 there is the evidence of Mr. Houle. At
line 8: "Avez-vous fait aussi l'inspection d'une batisse
bien connue, l'edifice de la Sun Life? (A). Yes. (Q). In
more complete fashion, will you tell us what was the
inspection work which you did at Sun Life and how much time
you took to do that work? (A). In 1938 in the months of
May, June and July I spent two months and a half there
making the inspection". He says by intervals further on and
he says he returned in 1941. I think he does say he
returned in 1941 with Mr. Cartier.

LORD ASQUITH: In 1942 he went with Mr. Cartier.

MR. BRAIS: He went back in 1941, and then he went back with
Mr. Cartier in 1941. Then he continues: "I returned with
Mr. Cartier to verify all that existed to that date.
(Q). Would you say in what fashion, in a few words" and so
forth.

Then Mr. Houle does tell us, on page 265, that he
does not agree precisely with those results. Unfortunately
there had been an objection by Mr. Geffrion on page 265 at
line 15: "(Q). But you have your experience as an
architect? (A). Yes. (Q). When you say that you agreed with
the figures fixed by Mr. Cartier", and then Mr. Geffrion
objected to the question that the witness has said he agreed
in part only and the objection is admitted.

Then my learned friend comes back: "Did you agree
with the final figure of Mr. Cartier". Mr. Geffrion
objected to the question because the witness had already
answered. The witness then says "Not precisely". That is
as far as that goes. It might have been useful if it had
been further developed.

LORD ASQUITH: Do you say that Mr. Paquette was not called?

MR. BRAIS: He was not called at all, my Lord. Looking back it might have been useful if it had been attempted, but he was a City employee. I am instructed that he just was not called and I am instructed that there is nothing in the file to indicate why he was not called. Then page 318, line 38, referring to these variations he is asked: "Was it because the prices were going up or the quantities were changed? (A). The prices were correct. You will see afterwards that the prices were correct. (Q). It is not the quantities, it is the prices? (A). The quantities changed nothing". That is the answer. "The sun Life remained the same in 1938 as it was in 1941. (Q). The quantities are correct? (A). Because we do not take the quantities, yes. (Q). It is not then the quantities, it is the unit prices which have changed? (A). The catalogue prices, the prices of the manual have been increased to meet the conditions of the construction of the Sun Life. (Q). You do not apply to the Sun Life the price of construction of the manual? (A). At that moment in 1938? (Q). Did you apply to the Sun Life the unit prices of special construction or have you applied the prices of construction to the manual? (A). It is the prices of construction of the manual plus the necessary surplus to meet the construction of the Sun Life. (Q). Therefore, in the unit prices of the materials does the granite cost more when it goes into the Sun Life? (A). It costs more in the Sun Life if it is thicker than in another building. (Q). I speak of the unit prices" and so forth.

Obviously if it is thicker we have certain additions on the granite and we do not object to those additions on the granite because we have seen all the figures used and I do not propose to go through them but it does not amount to much, as long as they say we put thicker granite, even if I show it gives no additional value whatsoever to the building. But when you torture the manual and apply in toto 19 per cent, and when you apply 10 per cent for admissions and 10 per cent for sub-contractors and so forth to arrive at a new figure, as I say by torturing the manual, if I may use that expression, then I say you are applying another yardstick to the Sun Life just because the historical value does not agree with your actual assessment. We have the same thing on page 319.

Then the additions made to the granite are on page 326, line 30. He says: "It was a question of adding to each item the amount sufficient to meet the construction that we had to face, that is to say, in the composition of these walls and the thickness of those walls we have added what was necessary to be added to meet the thickness of the walls of the Sun Life. If the Sun Life has a foot of stone and so much brick and so much terra-cotta, and our manual at that moment represents only a portion of the stone, it was necessary to add what was missing understone to meet the thickness of the walls of the Sun Life".

LORD PORTER: What period is he speaking of there? You talk about additions. Does that mean that when they originally made the calculation they added to the amount in the manual to make up the thickness of the stone or does it mean they originally took the manual and later on increased the price owing to the thickness of the stone?

MR. BRAIS: They took the manual. They made an inspection of the building and took the quantities and took the manual and arrived at a price. Later on he spent a few hours there and concluded that the stone was thicker and concluded that the elevators were better. We are in agreement there, the

Sun Life has one of the finest systems of elevators. That is why the higher floors are so valuable. There is a small amount of 200,000 for elevators upon which the respondent has no objection whatsoever. That was clearly an error in calculating the power of the machinery which handled these elevators which, of course, added greatly to the value of the building from that point of view and from all points of view. We have no objection to that and it meant 200,000 dollars, but it is so little that it plays no role.

LORD ASQUITH: Can you help me over the French at line 31 on page 326 in which the word "recontrer" comes again and again? What does it mean in that passage?

MR. BRAIS: That means to face, to meet. Here is the situation we had to consider. I think the word "consider" is the best word to use there. They use the word "recontrer" in two meanings. He says it was a question of adding to the amount a sum sufficient to.

LORD ASQUITH: It does not mean "to make allowance"?

MR. BRAIS: You have the word "recontrer" twice and it does not mean the same thing. One is to make allowance for the construction which we had to consider. The second time it is "considered". The first time "we make allowance for".

LORD PORTER: Would it make sense if you translated both "to make allowance for"?

MR. BRAIS: No.

LORD PORTER: "That which we ought to allow for".

MR. BRAIS: It could be all right, I think. What he has in mind are "the walls in front of us". There, again, he has shown the items. He has put his finger on those two items which might have been disregarded. As regards this, Mr. Archambault has treated them and has indicated where they come from or where they do not come from.

LORD PORTER: What difference does the thickness of the walls make?

MR. BRAIS: If Mr. Macaulay, who was then President of the Sun Life, with a grand gesture ordered solid granite walls right down to the plaster, it might look well when he is speaking of the Sun Life as big solid granite, but it will not make that building ^{one} year longer and it does not help.

LORD PORTER: I was not on that point. I was on the question of what difference in the amount which the City used was made by the amount they allowed for the thicker granite. You have told us that 200,000 dollars for the lifts was what was taken and accepted. I want to know what the difference with regard to the thickness of the walls made in the calculation.

MR. BRAIS: I think we ought to go back to page 5 on that point. We find that on page 737(5). It is limited to exterior walls. 4 dollars 20 cents for granite. Taking everything, the granite, additional brick, terra-cotta and the ornamentation, he arrives at 6 dollars 30 cents. What had been found by Mr. Paquette in 1938 was 5 dollars 25 cents leaving 1 dollar 5 cents total surplus.

LORD PORTER: Can we get the 5 dollars 25 cents anywhere?

MR. BRAIS: We may have it. It is page 22, the third item. He has the cube of the exterior walls.

LORD PORTER: And decoration. What does that include?

MR. BRAIS: That includes everything in the same way as we have it on page 5.

LORD PORTER: You cannot tell them what was increased.

MR. BRAIS: Brick. Then there is something we cannot read, then there is decoration something passage and he calls it the exterior walls.

LORD PORTER: That does make the difference if you look at exterior walls, but which part of the material used is increased you cannot tell. It might be the walls or it might be the plastering or it might be brick.

MR. BRAIS: The only place we could tell is in the evidence which we have just read where he says he has added in the process to the thickness of the granite and you have there a total per cubic foot of 5 dollars 25 cents for the exterior walls. Then he resets his figures on page 5 and he comes to 6 dollars and 30 cents.

LORD PORTER: The additional is roughly 400,000.

MR. BRAIS: The additional is roughly 400,000. You have the same thing on page 5 for the elevators.

LORD PORTER: You have told us about that.

MR. BRAIS: 200,000 dollars.

LORD PORTER: You said 200,000.

LORD OAKSEY: It is 294,000.

MR. BRAIS: 294,000 dollars for the lifts. Those are the additions.

LORD PORTER: I thought you were admitting that you had no complaint as to the additions for the lifts because they were peculiarly good. That is roughly 300,000 dollars and not 200,000.

MR. BRAIS: It is 300,000 dollars roughly and not 200,000. When the question was put to me I did not have my eye upon it and I now have it before me.

LORD PORTER: What do you say with regard to the addition for the thickness of the walls? Are you complaining of that or are you not?

MR. BRAIS: We complain of that because we say that that does not give 1 cent more to the value of the Sun Life, because the portion of the wall which is granite is thicker than need be, because when the competent experts estimated that building they took it to have the normal thickness of granite which would go into a building of that type.

LORD PORTER: Did anybody suggest, owing to the height of the building, that you required thicker granite?

MR. BRAIS: I do not think so, my Lord. Cartier says all kinds of things. I do not want to labour all through Cartier's evidence. He has taken possession of it this way and that way until finally he is bound down to something. His 19 per cent he comes back to correct. The same thing with everything else. Here is a chap who was in the building for a few hours who has the benefit of technical men and Mr. Houle,

Who accompanied Paquette, does not agree. Every effort is made to make this employee say that he agrees with his chief and he will not do it.

LORD ASQUITH: If you apply the appraisal method does it matter whether the materials are necessary or not? Take the position in which a lot of unnecessary granite has been employed. As I understand the appraisal method it consists in this; you go along and measure up the amount of granite actually employed, you look up in the manual the scheduled prices of granite and you turn them from ¹⁹³⁵ into figures of the year of appraisal by the index figure, but in the process you do not take into account whether the granite is necessary or not, but simply whether it is there.

MR. BRAIS: No, you do not. There is nothing to show this granite was or was not the thickness that he arrived at. I say the chaps who did the work should have come. Mr. Houle is the man who should have come to say that story.

LORD PORTER: We are not told where the difference lies.

MR. BRAIS: Mr. Houle will not agree with Cartier's figures. Mr. Cartier had the benefit of a few hours in the building. It would take you to walk through that building well at least the better part of a week.

LORD PORTER: Did anyone cross-examine Cartier as to what he estimated the extra thickness of granite and where he got it from?

MR. BRAIS: He simply says "We added what was necessary to add to meet the thickness of the walls of the Sun Life". That is as far as I can go with that. May I be permitted to make a note of that and see if there is anything which would permit me to answer with precision.

I may say that I curtailed, on the instructions of your Lordships, all my comments yesterday on Cartier's evidence. I had proposed to read it completely to your Lordships and then be in a position to comment on each item as I went along. That explains why those items which your Lordships are asking about have not been indexed by me because I had proposed to go through it. As a matter of fact all that evidence has been translated into English and if your Lordships would desire to have a copy of that translation de bene esse it is here.

LORD PORTER: I think we had better have it.

MR. BRAIS: I had meant to go through it in toto.

LORD PORTER: I do not want to encourage you to do it, but anything which you think necessary you must refer to.

MR. BRAIS: Your Lordships will find there that every part of Cartier's evidence has been translated.

LORD PORTER: That is taking it from the different places where he was called and recalled.

MR. BRAIS: Yes, and from that point of view it might be useful to the members of the Board. There is only one portion which has not been translated of Cartier's deposition, but it is included, and that is when he refers to figures bearing upon the Royal Bank of Canada. That has no bearing on our argument. We have included it here so that the whole of Mr. Cartier's evidence is there including the very last

section where he says in English why he tried to re-explain his 19 per cent. You will find following that the evidence of Houle which is very short.

LORD PORTER: Do you want ^{us} to look at it?

MR. BRAIS: It fits in with Cartier. There is a short section of Houle's deposition which has not been translated but which is included. It is not translated because it also refers to matters which are completely extraneous. It relates to the Royal Bank but everything of Cartier and everything of Houle is there.

LORD PORTER: How far does the Board of Revision rely upon Cartier? You will probably be coming to that.

MR. BRAIS: I will be coming to that immediately after this point. They dispose of him very laconically. There are only two other references I want to give to this Board about Mr. Cartier and they are there so I will be still more brief. That is page 329. I do not want to go through this lengthy and rather painful cross-examination, but in re-examination by Mr. Seguin Mr. Cartier is asked this: "Now Mr. Geoffrion mentioned a figure of 19 per cent for exceeding en hauteur", for the surplus.

LORD PORTER: For the extra height.

MR. BRAIS: That is the surplus in height; yes, for the extra height, but we have not been applied on the extra height basis, we have been applied down in our basement. "Have you any explanation to give of this amount of 19 per cent added to the other figures? (A). This 19 per cent is for the construction en hauteur only, that ~~is~~ included several things. This 19 per cent includes cost of the labour to hoist the material and it comprises the excess of the labour for the installation of the material in the space, because according to our manual the construction is always calculated as a construction from the ground. We have no mention in our calculation for the surplus that it might cost to elevate a piece to the 25th floor. For us it is always taken from the ground. It is always taken on the floor. Therefore, this 19 per cent provides for a surplus on the cost to hoist the material to instal the material in the space and provides for the risk of accident, insurance and provides for the scaffolding and bridges over the side-walks. One can dividethis 19 per cent. (Q). Does it comprise anything else? (A). It comprises something else. (Q). Than what you have mentioned? (A). It comprises machinery as well to lift the material, the elevators, the necessary towers for those elevators, the special permits, the permits for the street. (Q). Will you continue? (A). This 19 per cent may be divided as follows. As a matter of fact it is divided. It is a percentage which has been calculated, it is not an approximation. On the percentage of the construction in height one-quarter is attributable to raising the material". Then Mr. Geoffrion: "One-quarter of 19 per cent? (A). In height. In the case of the ^{Sun} Life it is 19 per cent. The quarter is to instal the material, for the surplus of labour. According to the manual the cost of the installation on the ground. We provide for the making of the construction in height only on the additional installation. After that one-quarter for the machinery, the necessary elevator towers, the derricks, permits for the street, special permits, one-eighth for risk of accident and insurance, one-eighth for the scaffolding. In the case of the Sun Life the scaffolds are more expensive. (Q). You say you took that in the manual. In what manual do you find this division? (A). For the percentage? (Q). In what manual? (A). In the French manual, page 323.

▲ LORD PORTER: What is that manual in French?

MR. BRAIS: There is the French version of this manual.

LORD PORTER: Does that appear in the English?

MR. BRAIS: It is the same page "Tables for calculating replacement cost".

LORD PORTER: What he is saying here, I thought, was that you got a division up of the 19 per cent.

MR. BRAIS: Yes, but then he is corrected. This is immediately corrected by my learned friend.

LORD PORTER: Where does the 19 per cent appear? "Six storeys, 70 feet, 5 per cent". 70 less 10 is 60 and that is 3 per cent. How many storeys is this?

MR. BRAIS: 25 storeys. If this very unique example here can be applied to the tower of the Sun Life and to the whole building I am instructed that the calculation of 19 per cent is approximately correct.

LORD PORTER: I wanted to know how ~~you~~ he got at it, that is all.

MR. BRAIS: I have not tried to work it out for my own satisfaction but I am told that that part is correct. Then by Mr. Seguin: "Did you understand the question of Mr. Geoffrion? Can you read one-quarter and one-eighth? (A). No. That is comprised in the percentage I have just analysed but it is not set down in the manual one-quarter, one-eighth; but that is the analysis of the percentage which appears in the manual".

Here is a distinguished gentleman, if I may use the expression, who comes and applies 19 per cent and tells us why, after careful study of the manual. There is no doubt about it, he has broken it up and found reasons for the 19 per cent, if there is any possible reason, but then we find, after he has left with his 19 per cent, nobody bothers to take him further about it. Then he comes back at volume 3, page 566. He was just left there with his 19 per cent which, on the face of it, just simply and completely in the minds of everybody destroyed this whole story. So he comes back on page 566.

LORD PORTER: At the moment I have only got to three-quarters. There is one-quarter for raising the materials and for the additional manpower.

MR. BRAIS: He may have stopped. Your Lordship is very observant. He may have stopped in the cross-examination by Mr. Geoffrion.

LORD PORTER: I have one-quarter for raising, one quarter for hoists, one-eighth for insurance and one-eighth for the scaffolding and that is where I come to an end and I have three-quarters.

LORD REID: On page 567 at line 10 he goes over it again and says the first quarter is for the fixing of the height. That does make up the four quarters.

LORD PORTER: That is raising the material.

LORD REID: No, because the next quarter is for bringing up the material.

MR. BRAIS: He tries to explain away his previous explanation.

He goes back over again what was a long story. He is cross-examined by Mr. Geoffrion.

LORD REID: Then this is a change. Here he gets hold of 50 per cent for the purpose of finance which is not in the other one at all. Then he gives a quarter for the fixing of the height.

LORD NORMAND: What does the fixing of the height mean, can you tell us?

MR. BRAIS: I respectfully submit that there is not one item under this 19 per cent that holds any basis and we have had it from Mr. Walker.

LORD PORTER: We need not worry about the difference between $9\frac{1}{2}$ per cent and 19 per cent, because when he gets to his $9\frac{1}{2}$ per cent he still divides it up into percentages. The only difference, so far as that is concerned, is that in the one case it is a percentage of 19 and in the other case it is a percentage of $9\frac{1}{2}$, but he has got extra, I think, one-quarter for the fixing of the height. That is puzzling me, what fixing the height is as opposed to raising the material.

MR. BRAIS: He had previously said it is 19 per cent. On page 329, at line 14, he says it provides a surplus of cost to raise your material, to instal your material in space when you get up.

LORD PORTER: That is still part of the same thing, is it not?

MR. BRAIS: Yes. That is his first explanation, it provides for the risk of accident and insurance and provides for the scaffolding and the passages over the sidewalks. One can divide this 19 per cent and then he divides this 19 per cent.

LORD PORTER: I have done the best I can and I have got down one-quarter for raising the material, one-quarter for the hoists, one-eighth for insurance and one-eighth for scaffolding and I have still got a quarter left which does not appear anywhere.

MR. BRAIS: In volume 5, at page 963, it is analysed.

LORD PORTER: Machinery and permits is the other one.

MR. BRAIS: Yes. He does say that, my Lord. On page 567 he has machinery and permits.

LORD PORTER: I know he does say so there but I was looking at his original evidence and I wanted to know what he said there.

MR. BRAIS: It is on page 567.

LORD PORTER: That is his second evidence.

MR. BRAIS: It is quite possible that what your Lordship has noted may not have appeared at all and apparently did not appear at all. Then he finds himself unable to add up to one and he comes back.

LORD ASQUITH: How many times did he give evidence?

MR. BRAIS: Four times, I think.

LORD ASQUITH: For instance, on page 330, is that the third time? That is where he first talks about these percentages.

▲ MR. BRAIS: He first gave evidence on page 266. Then he comes back at page 316, then at page 400, and then on page 404 he comes in with these very delightful figures.

LORD ASQUITH: And lastly on page 566.

MR. BRAIS: Yes.

LORD ASQUITH: That is where he says he had been wrong.

MR. BRAIS: He says he has been wrong and he comes in on his own initiative after having told the Board -----

LORD REID: He had just been in at page 567 but failed to mention this .

MR. BRAIS: That is quite right. Then we have him here at page 566 and this is all I want to read. He is brought in by his own attorney: "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 50 per cent of that amount which is included for the financial part. By Mr. Hansard: (Q). For financing during construction? (A). Yes".

If that $9\frac{1}{2}$ per cent is financing during construction, there is something radically wrong to find it in the multiplication formula 326, if that is where you are going to find financing during construction. There is something so radically wrong that one can understand why the Board found itself bound, legally or illegally, to have recourse to Mr. Vernot's figures in trying to arrive at something. There it is, I cannot improve upon it.

LORD REID: Are we to take it that in the absence of any cross-examination Mr. Cartier gave false evidence about the 19 per cent? Cross-examining counsel has accepted that story of $9\frac{1}{2}$ per cent apparently and has not pursued it; he has not sought to find out what Mr. Cartier contemplated or what the $9\frac{1}{2}$ per cent really represents or whether it is an afterthought. Are you asking the Board now to hold that Mr. Cartier is an unreliable witness, or what are you asking us to hold about him?

MR. BRAIS: All I can do is to ask the Board to take this evidence at its face and its application to the manual. I can readily see myself what possibly is not on the record at that moment when this evidence came in and the financing cost was put into the cost en hauteur. The deposition does not reproduce it but I rather take it that a very caustic smile from all concerned, including the Board, must have disposed of that. I cannot go beyond that, that does happen. Somebody comes in afterwards and makes a contradiction of an obvious story, a story, on the face of it, so completely out of bounds that it just ~~is~~ not hold water and people shake their heads and say: Well!

LORD ASQUITH: They do not think any cross-examination is necessary.

MR. BRAIS: If I had been sitting there, I will not ask those who were there to be any more precise in their advocacy than I would have been, I would have looked at the Board and the Board would have looked at me. That is all I can say.

LORD PORTER: Merely reading this and nothing else if I had asked myself I should have said that Mr. Cartier originally

put in the 19 per cent, and then he forgot why he did put it in and had to find some explanation and he thought the explanation - I am not suggesting he is a dishonest man - was 19 per cent for the height only. He had to divide that up and he said it was so much and so much and then he goes and looks at his figures and, as he says on page 566, he finds that is wrong. The reason why he put 19 per cent was if you add $9\frac{1}{2}$ per cent for financing and $9\frac{1}{2}$ per cent for increased height they meet it; $9\frac{1}{2}$ per cent for financing in the case of increased height - I do not know. There the thing is lying in a mystery but that is how I should have read him on this evidence accepting it as it stands.

LORD OAKSEY: Is it to be presumed that the Sun Life would not keep all the machinery which was used for that height, the scaffolding? They would hire it, would they not?

MR. BRAIS: The contractor would be using it. The contractor is using that and it costs three-quarters of 1 per cent in the ordered building. That evidence was subsequently put in, my Lord, but to the question of my Lord Reid the only thing I can say is after this cross-examination by Mr. Geoffrion which, as I read it, just simply disposed of the 19 per cent on any constructional basis, then this chap comes back and says I really said that for $9\frac{1}{2}$ and it includes $9\frac{1}{2}$ for the portion of the financing for the height because he says so, not in so many words, for financing during construction. Then he gives figures. "(Q). $9\frac{1}{2}$ per cent is for financing during construction? (A). Yes. If we applied on the building after five storeys. We did not take care for financing expenses for building less than five".

LORD ASQUITH: He is maintaining the 19 per cent but simply says half of it is financing.

MR. BRAIS: Financing the height. He is maintaining the 19 per cent.

LORD ASQUITH: He is maintaining the 19 per cent.

MR. BRAIS: Yes.

LORD ASQUITH: Supposing the building is very high and percentage of height is en hauteur. If it is half the height the percentage is less en hauteur. Is he saying whatever the percentage en hauteur breaks down so that only one-quarter is for fixing the height, one-quarter to bring up the materials and so on?

MR. BRAIS: Yes, he says that, whatever the percentage arrived at.

LORD ASQUITH: Whether the percentage is 1 per cent, 10 per cent, or 20 per cent, you build it up in those proportions.

MR. BRAIS: He still works on those proportions. I am afraid when you are going to work on proportions for a building in height, including a proportion for finance, all I can say, my Lord, is what I have said, his first 19 per cent in the mind of the Board and in the mind of the attorneys was completely discarded. We will see when we come to the Board's decision that it is rapidly left behind.

LORD PORTER: You say that the 19 per cent was completely discredited. It may in fact be entirely wrong, but, so far as the manual is concerned, it is right, is it not?

MR. BRAIS: So far as the manual is concerned, it is right.

LORD PORTER: Now we come to the second phase, which is the division of the 19 per cent, and he gives two separate divisions. His second division, as I follow now from what he says, is this: If you build a large tower, it costs more to finance that than it does if you are building a lower building. Why I do not know; but he says that and therefore he takes $9\frac{1}{2}$ per cent for financing. He is asked: " $9\frac{1}{2}$ per cent is for financing during construction? (A). Yes. If we applied on the building after five storeys. We did not take care for financing expenses for building less than five." Then he says that, if you go up beyond five, you add something extra for financing. Was this evidence given in English?

MR. BRAIS: Yes, my Lord.

LORD PORTER: I do not know what is the meaning of "If we applied on the building after five storeys". Can anybody give me the French of it?

MR. BRAIS: I cannot improve on it by translation.

LORD PORTER: I thought that he might have misused the English word "applied" when the French word would be perfectly natural.

MR. BRAIS: Obviously if he is building his 19 per cent and using the manual at page 523 to justify 19 per cent, it must be under the heading "Add for the construction in height",--and he cannot take that as ordinary finance.

LORD ASQUITH: It works out at 16 per cent, according to my arithmetic

MR. BRAIS: 16 per cent?

LORD ASQUITH: Yes. If you take a building 380 feet high and subtract 10 feet, you get 370 feet. If you multiply that by 5 per cent, you arrive at 16.

MR. BRAIS: Except that in this case they do something rather interesting and very unique. They were not satisfied with picking the material up on the ground, where the trucks came in. They took for our hauteur our basement, sub-basement, sub-sub-basement and whatever is down below there. That is where the 19 per cent comes from. If I have a six storey building, they pick up the material on the ground; they do not drive a truck three floors below ground to go and pick up material.

LORD NORMAND: What is the reference to five storeys in the last passage of the evidence, where he returned and said that he had made a mistake; he had not taken care of five storeys?

MR. BRAIS: Because at page 323 you add to the computation 10 per cent for sub-contracts, and for buildings of five storeys and over there should be added for the construction in height.

LORD NORMAND: But these percentage increases are not for the storeys over a particular level; they are for the entire outlay upon the whole building.

MR. BRAIS: Including the three sub-basements.

LORD NORMAND: Including the three sub-basements. I do not really understand what he means by three; he has not taken care of particular storeys. His evidence is just not intelligible at all to me.

LORD ASQUITH: Can you tell me if any of the five tribunals in Canada through which this matter passed accepted the 19 per cent?

MR. BRAIS: I do not think so; no, my Lord.

LORD ASQUITH: Perhaps it is hardly worth looking into very much.

MR. BRAIS: We may find that the reason why all the tribunals had resort to other formulae, the formula adopted by the Board and the formula adopted by Mr. Justice MacKinnon, to use historical cost, is because as soon as they began applying themselves to the standard method and they used it as a verification they needed that 19 per cent to bring their proper valuation on an appraisal basis to a figure commensurate with the historical cost. Today we are testing Mr. Justice MacKinnon's figure with the appraisal cost. Then all that this was used for was to test the historical cost with this 19 per cent and 10 per cent lost in transit and this, that and the other thing, blown up by four different sets of people, who spent only half a day on the premises; but this 19 per cent was useful enough to increase the cost of the building by 2,500,000 dollars. That appears on page 2A: 2,490,000 dollars.

LORD PORTER: I asked this question before, but I am afraid that the answer has gone out of my mind at the moment. If I have this accurately, the City started with an appraisal calculation and they carried that appraisal calculation, altered and increased twice.

MR. BRAIS: Three times.

LORD PORTER: Having got that, the assessors came in. Did the assessors accept the appraisal value?

MR. BRAIS: The first time the appraisal was made was in 1938. There was only one appraisal made previously to the assessment.

LORD PORTER: What was the date of the assessment?

MR. BRAIS: 1st December, 1941.

LORD PORTER: That was the original appraisal, was it?

MR. BRAIS: At that time there was the original appraisal of 1938, purportedly in the hands of the assessor.

LORD PORTER: The assessor having got that appraisal, what did he hand on?

MR. BRAIS: When he got that appraisal he asked the Sun Life how much they had spent and he got down to reconstituting an entirely different assessment.

LORD PORTER: I wanted to know where that came in. Then, of course, if the City chose to rely upon that, there would be no necessity to deal with appraisal at all.

MR. BRAIS: There would be, to this extent: that this appraisal serves to test the figures of Mr. Justice MacKinnon and when you arrive at this figure you add 19 per cent, which is, if I may use the expression, picked out of the sky, and, if you take 10

per cent, which is added for omissions and corrections, after spending two years on the work, I say that, if Mr. Justice MacKinnon takes off 14 per cent -- this is the argument that I have to make -----

LORD OAKSEY: That was something later, though, was it not? I thought that the question that my Lord put to you was at the time of the making of the assessment.

LORD PORTER: Yes. So far as that is concerned, I do not want anything except the assessment. The assessment was made upon historical values?

MR. BRAIS: Yes; that is right.

LORD PORTER: So far as that assessment is concerned, except in order to bolster it up in some way, you do not need anything more than an historical system.

MR. BRAIS: An historical system.

LORD PORTER: The City would be perfectly entitled to say: The proper test of replacement is the historical system; we have used the historical system and that is all that you want. Then for some reason -- I do not know why necessarily; perhaps because they were forced -- the City produced a series of figures which you say was three or four alterations of an appraisement; but that does not find its way into any part of either the original assessment or of the Board of Revision. It is merely a series of figures calculated in appraisement; but it is only of use to the City, and must be, for them to decide whether the appraisement in this case comes to the same result as the historical method. On the other hand, you use it to show that the appraisement method does not come to the same thing as the historical method. On the contrary, they had to go on working on the appraisement method in order to reach anything near the result of the historical method. Is not that the result?

MR. BRAIS: With this exception, if I may make the point now, which is of importance. We are warned by the authorities of the danger of the historical method and, if you take the historical method, which is the money actually spent, you must look at the building in the light of the money spent and the money wasted. The money wasted does not give you value. There we come to the decision of Mr. Justice MacKinnon, where he applies a percentage and when you test it against the decreases in the actual value and the increases in the historical method, which we submit have to be applied -- if you use money actually spent we are warned by the manual and by all the authorities of the dangers of the historical system, because the judge has to take into account the value of money wasted, which has no use in the historical method.

LORD PORTER: I had that in view. It seems to me that you might criticise the historical method in two ways. One is to say: If we go to appraisement, let us go to appraisement and not these additions. If you take the historical method, you say that you have to reach as fair a result as you can, and you can only do that by knocking off that additional cost, which does not represent additional value. As I understand your argument, it is: I am prepared to take the proper appraisement value and that will give such and such a result, or I am prepared to take the historical method, but, if I take the historical method, I have to have my proper allowances for wasted money. Is that the argument?

MR. BRAIS: That is the argument, my Lord.

LORD REID: Is it fair to put it in this way with regard to the courts below: that either the courts below did not think much of the appraisement method and did not think that it could not be bettered, whether it corresponded with the historical method at all, and therefore did not go into it or they must have thought that the evidence on the appraisal method brought the figures sufficiently near the figure which they got by the historical method as to make it unnecessary to pursue the matter, because on one footing or another it was not necessary to pursue the matter. On any other footing it would have been necessary. Therefore the courts must have taken one or other of these two views. Is that right?

MR. BRAIS: That is the best position that I can take in the circumstances in which I am placed, of being precluded by the lack of Reasons from arguing it; and I am sure that that is what they did, because when they viewed what the appraisal was they must have come to the conclusion that that was eight. When they saw this figure of 19 per cent and other figures going in, they said: If, to arrive at a figure of a proper intrinsic value, you have to put in 19 per cent and 10 per cent lost, which do not hold water, obviously if you are to reduce by 14 per cent only for the wasted material you are well within the limits of common sense, as I submit, which, after all, is the basis of assessment. I agree with your Lordship.

LORD ASQUITH: Is this right: In 1938 there is the appraisal and in 1940 the memorandum comes along which prescribes, inter alia, the historical cost in respect of occupied buildings. Then on the 1st December, 1941, the assessment takes place on the historical basis. Did you say that there was some protest on your part on the 2nd or 3rd December?

MR. BRAIS: We wrote protesting.

LORD ASQUITH: One can imagine the person assessed saying: Look here; this is quite contrary to your own manual: so after that the City of Montreal itself, to show that if it had acted on its own manual, that is, by the appraisal method, would have arrived at the same figure (and that meant writing up the appraisal figures to an absurd extent), allows 19 per cent.

MR. BRAIS: Yes, my Lord. The protest on our part in December, 1941, was just a letter objecting to the assessment in that sum.

LORD ASQUITH: You did not say: This is on the historical basis and therefore wrong.

MR. BRAIS: No; we did not know. All this was found out and the memorandum was found out just at the hearing.

LORD ASQUITH: You did not know about the manual at that time?

MR. BRAIS: It is clear that we did not know about the memorandum. I think that I can say that.

LORD OAKSEY: You had the manual, but not the memorandum?

MR. BRAIS: The manual was brought out in court.

LORD ASQUITH: The manual was not got until after the assessment?

MR. BRAIS: The record does not say when it was obtained.

LORD ASQUITH: You told me that you could get it for 25 cents.

MR. BRAIS: As a matter of fact it was brought out in court. I am

afraid that it could have been read a little bit more; but there it is.

LORD PORTER: However that may be, there is the other problem, which is this: The actual calculations were not disclosed.

MR. BRAIS: Not until the hearings in 1943.

LORD PORTER: Do you mean the hearing before the Board or the hearing before Mr. Justice MacKinnon?

MR. BRAIS: Before the Board. All the evidence went in before the Board.

LORD NORMAND: If you take the manual as a whole, including page 323, and if one assumes that by the application of page 323 to this building you would reach an addition of 19 per cent, the result is that, for good or evil, the City of Montreal did in evidence produce figures worked out according to the instructions given in the manual, including the addition of arbitrary percentages, which roughly corresponds to the results arrived at by what is called the historical method.

MR. BRAIS: Ex post facto.

LORD NORMAND: Ex post facto. I quite understand. That being so, what further use is there in investigating the figures of the manual? It is quite true that there is no explanation given in the manual or, as far as I have yet ascertained, by anybody which would justify the addition of either 10 per cent for sub-contracts or of 19 per cent for height.

LORD PORTER: There is for height, is there not?

LORD NORMAND: There are statements made, but they are not an explanation.

MR. BRAIS: The statements destroy the manual as a matter of fact, but they are volunteered by the City.

LORD NORMAND: They are volunteered by the City. The City therefore puts in, in support of the results of the historical method, results arrived at by another method, which you can no doubt say contains a very large proportion of the arbitrary; but still what we are concerned with is not whether the manual is right, for the manual was not followed, but we are concerned with whether the principles which were followed in the assessment were principles which are in accordance with law or, as you would put it, in accordance with rational principles.

MR. BRAIS: I may say that on that point I am through with this; I cannot add any more.

We now come to the judgment of the Board and in contemplating the judgment of the Board we will have to see whether they were right or were not right in putting aside the useless expense; but I am entitled to say this, I think, on the evidence of Mr. Cartier: that, his apart, Mr. Paquette did in 1938 substantially arrive, in the exercise of his best judgment, with Mr. Houle at the proper value of the building which was arrived at on an appraisal basis, and as to all of these other additions ex post facto and put in there solely to build up, they misinterpret the manual, I say. They clearly do when we see what the City has to volunteer to explain this 19 per cent. They misinterpret the manual; and the City must know better than we do what has to happen to the others.

LORD PORTER: I have now lost the place where the addition for height is to be found.

MR. BRAIS: It is page 323, my Lord. It is, as your Lordships will note, exceedingly laconic. It has been applied twice; finally applied to the total amount. I do not think that the manual ever intended this to be applied to the total amount.

LORD NORMAND: Mr. Cartier professed to apply it, so far as I understand his evidence, and nobody chose to cross-examine him about what was the basis, of page 323, or whether, that basis being explained, he had properly applied it in the instant case. All that was just left to be now elucidated by the comparison of a great many confusing figures.

MR. BRAIS: May I be permitted to say, my Lord, that there is a very critical cross-examination of Mr. Cartier by Mr. Parent when he first comes in with his 19 per cent. There is a long and critical cross-examination, where he says one-quarter, one-eighth and so on. We have had that this morning. There is a long and critical cross-examination and that is taken up by evidence subsequently adduced by the Sun Life: that it takes three-eighths of one per cent to go on hauteur. That is Mr. Archambault, Mr. Perrault and Mr. Perry. All these people destroy that completely. In the meantime this man Cartier has come in and said that it is $9\frac{1}{2}$ per cent for the mechanical part of the rising and $9\frac{1}{2}$ per cent for the financing. His own man had previously taken $13\frac{1}{2}$ per cent applying to the portion of the building which was the structure and it would give common sense. If you take the structure of the building erected and apply this formula, you are within striking distance of something reasonable; at any rate, you have something to justify. If I have labourers to put the plastering on the fourteenth floor and all I have to do is to bring up the portland cement and so on and all the rest of the labour, it does not cost one cent more than to have the labourers working on the fourteenth floor than to have them working on the sixth floor. When you put 19 per cent on that, it is clear that page 323 intends the application of the same common sense to your 19 per cent or whatever it is and not to the whole building and not to the whole interior, because there is nothing here to say how it works.

LORD REID: If I understand your argument aright, you must be asking us to take some replacement cost other than that which Mr. Justice MacKinnon took before he applied the index. Let us leave the index aside for the moment. We have to find, if we are going to take replacement cost into account at all, what the replacement cost was. Mr. Justice MacKinnon came to a finding about that. Are you asking us on the strength of this evidence or some other evidence to come to some different finding from Mr. Justice MacKinnon?

MR. BRAIS: No, my Lord.

LORD REID: Please understand what I mean. I mean replacement cost before you apply the index. Let me assume for the moment that Mr. Justice MacKinnon applied the wrong index. You are asking us in some way or other to remedy that, without reducing the total replacement cost after the index has been applied and I do not yet understand what evidence you are trying to get us to follow in order to get that result?

MR. BRAIS: I have not arrived at that point at all yet, if I may say so.

LORD REID: I thought that it would be a convenient time to see

whether you are asking us to use this appraisal method to reach a different actual figure of replacement cost from that which Mr. Justice MacKinnon reached.

MR. BRAIS: May I now state -- I think that the question is put to me at an appropriate time, if I may say so -- the position that I am going to take. It is that we have accepted Mr. Justice MacKinnon's total overall figure and we are prepared to have this Board, if it concludes that the amount is less, re-state it. That is the first point. I think and I will say that the amount should have been less. I will say that the 14 per cent which he took off should remain..

LORD OAKSEY: That is the second 14 per cent?

MR. BRAIS: That is the second 14 per cent. I will also say for the consideration of the Board that the first 14 per cent is out of relation with the percentage of physical depreciation found by everybody else. I will say that the 7.7 per cent cost of building index, if we are to see that applied, as applied by Mr. Vernot was misapplied.

LORD PORTER: You are prepared to accept that? No

MR. BRAIS: No, my Lord. I say that, if Mr. Vernot's method of computation is to be varied and if we are not to take into account that Mr. Vernot was using a rule of thumb, in the light of the conditions as he saw them, and he put the 7.7 per cent there balancing this off with the other thing, on the question of mathematics the figure is wrong, and I will give the Board the error that the computation has caused in the figures of Mr. Justice MacKinnon; but I will say that Mr. Vernot, who found himself all of a sudden called upon to re-assess that building in the light of the historical cost, did apply his judgment on certain matters and apply a rule of thumb, including the 7.7 per cent on that building, and I will add that in calculating the depreciation at 14 per cent, which was taken on the historical cost, without giving us the benefit of the increased costs which Mr. Vernot was using or which the Board is using when it goes back to 1913, 1914 and 1915, where the index was 60, 70 and 80, we depreciated on our money and on the cost of buildings were taken in with a cost of building index on the historical cost.

LORD PORTER: I am not sure that I have followed that at the moment. What my Lord Reid was really putting to you, I think, was this. You will tell me if I am wrong. Are you asking us to keep the result of Mr. Justice MacKinnon?

MR. BRAIS: In figures.

LORD PORTER: But when you are doing that, are you saying that he was right in his argument; that he was right on the 7.7 per cent instead of 1 per cent? I think that is it.

LORD REID: I did not make myself clear, I think. I think that this is right. Mr. Justice MacKinnon reached his judgment by two statements. He first of all said: Apart from the index value, the cost of replacement is 12,000,000 dollars or whatever it was. Then he said: Index value of 7.7 or whatever the figure was. Let me assume for the moment that he was wrong in the 7.7 and that it ought to have been 1.0. Therefore, if you are going to reach some final figure, you must have a cost of replacement before you start on the index operation of estimating what the cost of replacement is to be. Are you going to say that this method of appraisal justifies us in taking a cost figure which

is sufficiently different from that which Mr. Justice MacKinnon found to bring out the same result in the end of the day after having applied a smaller index?

MR. BRAIS: Not mathematically.

LORD REID: If not mathematically, then now?

MR. BRAIS: On the basis of the judgment which is left to the assessor, whose duty it is to weigh, to apply a rule of thumb. It is not necessary for him to figure things out. He can apply a rule of thumb and he has applied a rule of thumb here, considering the other things that he has done, and he has taken the main part of the building and he has said: I will take the building as having been built during these years and that will weigh against something else and it will offset that something else in arriving at the depreciation, and in the result I am doing what as an assessor I am not only bound to do, applying to it the working of all formulae and other reasons, to arrive at a result. If there is any time in this case when the assessor tried to do it, he tried to do it then.

LORD PORTER: That is, putting it in a commonplace observation, "What I gains on the swings I loses on the roundabouts", is it not?

MR. BRAIS: That is what an appraisal is. I must say, and I do not want to overstress it, that there is no such thing as coming to a real value on a dollar and cents basis, where you can equate and work it out. Everybody is in agreement that appraisal and assessment is something where the person weighs this and weights that and he says: I come to this and I use this rule here and that rule there; I do not work it out in figures, but that is where my sense tells me to apply it.

LORD OAKSEY: That is not valuing it, but applying the actual cost of the building in order to find the replacement cost.

MR. BRAIS: That is so.

LORD OAKSEY: When they are applying the historical method, they do not apply what you say now, a sort of general opinion as to what it is worth; they apply the actual figures.

MR. BRAIS: No, my Lord. The historical method is only using the cost as a base.

LORD OAKSEY: Certainly, and you depreciate.

MR. BRAIS: Nobody would think for one moment of using and the law would prohibit the using of the historical method to the extent of taking the money spent. Then you have to do something with your assessment.

LORD OAKSEY: Of course, you have to depreciate it.

MR. BRAIS: You must depreciate it.

LORD OAKSEY: Certainly; but you first of all want to get the actual figures of the cost.

LORD ASQUITH: You start with money spent and you can then evaluate to a cent.

LORD OAKSEY: You represent that by an index figure applied to each year. You agree with that?

MR. BRAIS: I agree with that fully and, if one wants to arrive at the historical cost on a mathematical basis, that is what one must do; but I do say that from then on at some time the assessor has to begin to use his judgment in finding the value of the building, after starting from the historical cost; and to do that he has general formulae which he is generally free to take and in the process of so doing he leaves something off there and adds something on there, as he has done in this case, as I will show.

LORD OAKSEY: Not by applying the wrong index figure?

MR. BRAIS: That is a matter of argument, of course, and I am submitting that in the process he has just balanced one thing off against another and no substantial damage has been done; but for that I will have to come to the comparison of the figures.

LORD PORTER: You will have to show us what Mr. Vernot says, will you not?

MR. BRAIS: What Mr. Vernot says, very simply, is that he thought proper to consider the building as having been substantially within those years; but I will then show your Lordships -- this is of some interest -- that Mr. Vernot knew just exactly when that building was built. He knew perfectly well that the two old sections had been built before. He worked on the foundations of the new building: so he knew all about that building. He knew how old it could have been. He could have got perfectly well the approximate dates. He could have applied and he could have had our historical cost at that time. He did not ask for it and, using a rule of thumb, which is within the prerogative of the assessor once he has figures, he saw fit to apply it in this case to the main portion of the building. That may or may not be a good argument. I think that it is, when we see how he did the balance of his work, when we come to it.

LORD PORTER: In other words, I think what my Lord has been putting to you is this: The percentage which he used is logically indefensible, to which you agree; but it is a rough calculation, in which he took it for the years of construction and balanced it against other considerations. That is the argument?

MR. BRAIS: It is not mathematics. It is weighing. He knew this part of the building well.

LORD REID: If he did not use mathematics, how he got a figure correct to 80 cents I do not know.

MR. BRAIS: He used mathematics in part and an appraisal in the other.

LORD REID: If he did not use mathematics, how he got his figure I do not know. The broad exercise of judgment which brings you down to a figure at the bottom of page 10 of 12, 000,000 dollars odd and 80 cents seems to me to be a very odd exercise of judgment.

MR. BRAIS: Then he reduces that subsequently. I do not know whether it is found in round figures, but it will be very interesting to see how the other buildings come out with precision to the last sent, but a very different pattern.

LORD NORMAND: If you make a calculation at all, it must come out mathematically accurate.

LORD PORTER: Yes. It is the percentage which is the rough factor -

not the result of the percentage.

MR. BRAIS: I will not labour that further, my Lords. I will only say that when I come to it I will try to indicate that substantially he was weighing one thing against another and not going into precise figures.

LORD PORTER: You must show us what Vernot says.

MR. BRAIS: I will come to that and I will not be very long on that.

I think that I have now arrived at the judgment of the Board, which is at page 983-A1.

LORD PORTER: That is Volume 5?

MR. BRAIS: Yes, my Lord. There is nothing that can be said for page A-1 or page A-2. On page A-3 we have the statute. Then it is interesting at line 39 on page A-3. It says: "In the accomplishment of their work of assessing these immovables, the assessors have to be completely independent; they decide the amounts they put on the valuation roll and no-one, not even the Chief Assessor, is empowered to dictate to them or even influence them in the full discretion they have of valuing the immovables according to their personal judgment. They are fulfilling quasi-judicial duties and their decisions enjoy the benefit of a legal presumption. The law is clear and the jurisprudence is firmly established." It is true that the law is clear and also that not even the Chief Assessor can dictate to them; but I say that when we come to the memorandum we will see that the Chief Assessor and the other assessors lay down a formula which puts aside that formula, leaving aside market value and there is a dictation there which is contrary to law.

Then we find here a repetition and on page 4 it says in a quotation: "In brief, it is to be remembered that the municipal assessor, in the exercise of his duties, fulfils almost judicial functions: he is not to be influenced by nor to receive instructions from the municipal council, or from any other person or body. He must personally execute his duties with the fullest independence, to the best of his judgment and according to his conscience."

In that case Mr. Vernot arrived there at the last moment. He took Mr. Munns' figures. Mr. Munn's figures, as we will see in due course, had been made before and he found that they were in order and he just put them in. He was also bound by the memorandum, as he says himself. That memorandum is just as improper when it comes from the assessors themselves, who are exercising quasi-judicial functions, as it would be if the Court of King's Bench or the Supreme Court in Canada were to say: In future, in given cases, here is the formula on questions of fact. It is not because it was the assessors themselves, my Lords, who laid down this formula that it is the less an illegal document for the individual who is exercising quasi-judicial functions. It is not the joint anticipation of what should be done by a large body of people which the less affects the complete independence of the assessors.

We have therefore, I respectfully submit, an exemplification of what went wrong here, and, when it is set forth on page 4 of this judgment of the Board that the assessors action shall enjoy a presumption, we find that in this case one assessor alone did the work. He took the figures from the Real Estate Department, and he took our figures, which were historical.

LORD OAKSEY: The Board cannot interfere with the assessors on

matters which are within their discretion.

MR. BRAIS: That is right, my Lord.

LORD OAKSEY: But the Board can, according to the statute, prescribe the data which they are to take into account.

MR. BRAIS: That is quite right. That brings us back to what has been discussed before: What the Board did prescribe, if there is any evidence of anything being prescribed, is data which was not used.

LORD PORTER: With what it is said at the top of page 983-A-4 you must agree, I think?

MR. BRAIS: I do.

LORD PORTER: That he has to use his discretion?

MR. BRAIS: I do fully.

LORD PORTER: The second part is, I should have thought, right, but with dangers in it, the danger being the danger of not interfering with the assessment in cases where it goes wrong in principle.

MR. BRAIS: Yes, my Lord.

LORD PORTER: I should have thought that your main criticism of the Supreme Court was that they did place too much importance upon the findings of the Court of King's Bench and refused to correct it because they placed too much reliance upon the Board of Revision. That is the main criticism?

MR. BRAIS: Quite, my Lord. The only thing that I would add to that (and I will have very little to say about the main decision of the Court of King's Bench, because there is nothing that I can add) is that it was a mistake in law, and in the present instance it was a very serious mistake in fact, because there had not been by the assessor, Vernot, anything except the most perfunctory examination of the property. He relied on somebody else, who was no longer an assessor in Montreal. The assessors work together and he did not have a partner. The man who was to work with him did nothing; he just did not work with him.

LORD PORTER: He consciously kept out of it, because he knew too much.

MR. BRAIS: Mr. Munns was not in it at all, he having become a member of the Board. He had handed over all his figures to Mr. Vernot in September, 1941. But Mr. Vernot had a partner, according to the statute, whose name was Lynch. The two are supposed to work together, and Mr. Lynch did not. Mr. Vernot got his figures from someone else, who we were not able to cross-examine. He was a member of the Board of Revision. He took his figures and he took 90/10 and he worked on that and accepted them. In fact in this particular instance, although your Lordships will have noted that we have made it plain that we do not invoke in this case that the assessment was improperly arrived at from the mechanics of the assessment, we are still entitled to say that Mr. Vernot at no time applied his mind completely and properly or had the benefit of working with a partner in applying their collective minds to taking a correct value of the building and in going over the building to see what should or should not be taken out to arrive at a correct valuation.

LORD PORTER: I do not think that you need worry about "valeur reele". Everybody agreed about that?

MR. BRAIS: We are in agreement about that, except that he says "the parties having admitted that the words 'valeur reele' and 'actual value' are synonymous." There he is in contradiction with all the authorities, who say that you arrive at real value by hypothesis. All the authorities would say the contrary; but what he says there does not change the result one iota. I have nothing to add there. He says that they vary it ad infinitum, and then he sets forth the joint admissions, which we have all had, at pages A-6, A-7 and A-8.

At line 33 it says: "The first witness was Mr. Edward J. Lynch, city assessor, examined by Aime Geoffrion, K.C., for the complainant. Mr. Lynch declared that he is a partner of the assessor of St. George's ward, Mr. Vernot, and that he is not in a position to speak of the new assessment of the Sun Life property."

LORD REID: Before you pass from A-6 to A-8, there are there, if I understand it aright, a number of detailed admissions which were only relevant if you were considering the question of historical cost, and would not be relevant for any other purpose. Does that not make it quite clear that both parties at that stage were regarding historical cost as at least a main element in the case?

MR. BRAIS: All I can say on that is this. The admissions resulted from questions asked by the city and asked by the Sun Life. In order to simplify the proceedings and not go before the board to contest the validity of the request, it was all put in under very specific reservation.

LORD REID: Then let me put it in this way. You, or rather your predecessors, were well aware at this stage, by reason of this question having been asked, that what the city were primarily relying on was historical cost, and therefore you were forewarned that, if you thought historical cost was not the right method, you had plenty of opportunity of developing before the trial what was the right method; but you did not do that. Is that right?

MR. BRAIS: My Lord, may I avoid answering that question.

LORD PORTER: Of course, English practice has nothing to do with the last observation which my Lord has made, with which, if I may most respectfully say so, I am in accord, but in English practice this would probably be done, if there was any dispute about it, by means of interrogatories. The answer to the interrogatories would not make any difference to your admission. Your admission would not mean that you were accepting the basis upon which the questions were asked; it would merely be that you were answering certain questions put to you which you were obliged to answer. That does not interfere with my Lord's second observation.

LORD REID: That is why I re-framed my remark, because I saw the point which arose.

MR. BRAIS: As a matter of interest, as your Lordship refers to the English practice, in Quebec interrogatories must be strictly within the frame of legality, and are producible and all form part of the evidence in the record.

LORD PORTER: Here you put them in if you want to.

MR. BRAIS: Yes, my Lord; that is different. That explains the freedom that the parties have of exploring as much as they want. It is not an exploratory procedure in Quebec; it is part and parcel of the record. I understand that in regard to these questions the parties got together. Mr. Geoffrion was acting for the Sun Life. They said: "May we save a lot of time before we proceed. You ask us all you want and we will ask you what we want, and we will put all those things in and reserve our objections." The proceedings were carried on with a view to as much simplification as possible. That all these things should be asked does not in any way from a legal point of view incriminate the Sun Life or make the Sun Life admit anything.

LORD REID: I did not mean that. I only meant that you were forewarned, but nevertheless you did not bring forward any contradicting case when it came to trial.

MR. BRAIS: A lot of people have been forewarned and have not seen the warning. I may say that today our hind-side is taking warning, but that may be because our fore-side may have been somewhat lacking before. I say that without any reproach to anybody; it is easy to be wise afterwards.

LORD PORTER: You were prepared to accept the historical method provided that you were given sufficient allowance in respect of useless additions, or useless parts, and sufficient for depreciation. That is really the answer?

MR. BRAIS: That is really the answer, my Lord. As long as I come to a figure within the actual value of my building, it is rather immaterial to me how it was arrived at. We see that in the witnesses. Some of them take the replacement value, some of them take the cube value and one witness, I think, took the historical value. Subject to correction, there may be one witness who did. Everybody else arrived at it on a cube basis or appraisal basis. We were not completely lost in the historical result, as the silence of all the judgments might indicate. However, that still leaves me with the problem of satisfying this Board that the assessment we tried to support is correct. Perhaps I should say that it does not leave me with that obligation: it leaves me with the obligation of showing that my learned friend is wrong in criticising it.

My Lords, we then come to line 47 on page A-8: "Mr. Vernot admits that he did not visit the property in the capacity of assessor before making this assessment, but says that when he was with the Bell Telephone he 'was in between jobs, and helped with Mr. Cameron who was superintendent of the construction', and that he spent two months on it. 'It must have been the spring, February or March, 1928.' He also 'visited it (the building) many times after to see Mr. Cameron and also with the Engineering Institute of Canada.'" Then he refers to the deposition. "He made his valuation 'not only from a knowledge of the building; from all available information we had in the office'. (Vernot's deposition, page 14)."

My Lords, the only point I want to make there is that, if Vernot was to assess that building, it is not possible for him to arrive at a result in that casual manner. He can, from the information in the office, have the actual cost; but if to assess a building you start from the actual cost and you must from there arrive at the actual replacement value and the actual commercial value, to arrive at the real value, you cannot

do it in that casual fashion, and we see it when Vernot tells us that the Sun Life occupies the best portions of the building. It is not the casual visitor in this 24-storey high building who can find out what sections are occupied by the Sun Life and what sections are occupied by the tenants, and he did not have these figures available afterwards.

LORD PORTER: I thought that your criticism there was that Mr. Vernot was on the building some time in the early portion of 1928, and the main portion of the building was not finished until 1931?

MR. BRAIS: He worked on the foundations for some months between jobs.

LORD PORTER: Then, unless there is further evidence as to what work he did on the building, his knowledge of the building was on the foundations, gained in two months in 1928, which was before the main portion of the building was erected. Whether that is a justified criticism or not I do not know, but it is an apparent criticism.

MR. BRAIS: I do not ask the Board to attach any great importance to it. We have accepted that he made an appraisal. He is credited, then, with having done it as an appraiser; but I submit that we must remove the sanctity of his being an appraiser from him and look elsewhere for the facts. There was a visit of the Engineering Institute immediately after the building was opened. The engineers were invited to see the structure. Then it is said that he had a friend in the building. He went to see him quite often. I cannot ask your Lordships to visualise the size of that building, but if I go to one of the banks of elevators and take an elevator up to the twenty-third floor and see Mr. Cameron 50 times in a month I shall not be able to come to any conception of how much it cost to put in the pillars which support the building or where the tenants of the building are. It is only on that point. It is agreed that he did not make any full examination.

Then line 11 on page A-9 says: "A complete explanation of the method followed by Mr. Vernot in valuing the main property is contained in Exhibit D.2, which speaks for itself." He starts there with the historical cost of 22,000,000 dollars, which had been given to him by a letter, to which I must refer. That is Exhibit P.3, which is to be found in volume 4 of the record, at page 717.

May I first refer your Lordships to page 712, because this has some importance. This is a document of the 5th April, 1941. This is the city writing to the secretary of the Sun Life: "In conformity with the provisions of article 378 of the city charter as replaced by section 13 of the Act 2 George VI, chapter 105, I would be glad if you would let me know, for the information of this department" - that is the assessors' department at the city hall - "the total cost, to date of the head office building of the Sun Life Assurance Company of Canada; also let me know separately what amount is included in such total cost for (a) the cost of the sidewalk; (b) the cost of temporary partitions necessitated through occupancy by your staff during reconstruction; (c) the value of the wall of the then existing building which had to be demolished to permit the old and new building to become one building."

The answer to that is given by Mr. McAuslane on page 717, Exhibit P.3. "In answer to your letter of April 5th, addressed

to the secretary of this company, I would advise you that the total ~~27,000,000~~ before depreciation of our head office building, as at April 30th, 1941, was 22,377,769.26 dollars. This figure includes the power house building with a gross cost of 709,257.14 dollars and land for the head office building power ~~house~~ house, the cost of which totalled 1,040,638.20 dollars, so that the total cost of head office building, exclusive of land and power house, is 20,627,873.92 dollars."

Then he gives the details in answer to the three questions which are asked of him, and then he adds: "I wish to emphasise that the figures given above are gross figures before depreciation and that they also include architectural features and embellishments and other items for large amounts which, in our opinion, are not taxable." This is not prepared by a lawyer. By "not taxable" I think we understand what he means - should not be included in the taxable amount. "On a revenue basis, which is one of the chief methods used to determine value for assessment purposes, the present assessment on our building appears very high." At that time the assessment of the building was some 9,000,000 dollars odd.

Therefore Vernot had 22,000,000 dollars, and then he took off the amounts specified in the letter which has just been read, and the cost of demolishing to connect up, and he arrives at a cost of 19,000,000 dollars.

Then he comes to the figure which we shall have to look at later. He adjusts 1928 and 1928, and arrives at a difference of 7.7, which he deducts. Then he takes off 5 per cent. for presumed extra cost, as the building was erected in three units. Then on page A-10 he assessed the value of the first two buildings at 2,000,000 dollars, and then he allowed for the proportion demolished at 1,200,000 dollars. Then he applied 25 per cent. for depreciation, which I would have your Lordships note, for those buildings.

LORD PORTER: That is on the 16,755,000 dollars?

MR. BRAIS: No, my Lord; that would be on the 961,000 dollars, which is the remnant of the first two buildings after they have been opened up to allow the new building to join in.

LORD PORTER: He is talking about depreciation?

MR. BRAIS: That is physical depreciation.

LORD PORTER: What is the 240,250 dollars for?

MR. BRAIS: That is 25 per cent.

LORD PORTER: That is where you get the 3,000,000 dollars?

MR. BRAIS: No, my Lord; that is 25 per cent. of 961,000 dollars.

LORD PORTER: So I gather. I was trying to find out what the total result was.

MR. BRAIS: Then he subtracts that from the 16,755,000 at the top of the preceding page.

LORD PORTER: Then he depreciates that by 18 per cent?

MR. BRAIS: Then he arrives at 15,000,000 dollars. Then he takes 15 years' depreciation, or 18 per cent. on the residue.

LORD PORTER: On the two added together? He adds the 240,250 dollars and the 2,840,952 dollars together, which are the two depreciations, and that comes to 3,081,202 dollars?

MR. BRAIS: Yes, my Lord.

LORD OAKSEY: He deducts that from the 15,000,000 dollars?

MR. BRAIS: Yes, my Lord; he deducts that from the 15,000,000 dollars, which he has. Then he comes to the net cost at 1941, after depreciation, 13,000,000 dollars.

LORD ASQUITH: What is the meaning of the 16 years and the 15 years?

MR. BRAIS: That is the amount of average life of those buildings. You have first of all 16 years. That would be the amount of average life of those two buildings. The table in the manual indicates the depreciation rate as $1\frac{1}{2}$ per cent. per year, and that had to be applied, and you will find that 16 years at $1\frac{1}{2}$ per cent. brings you to 25 per cent. depreciation. That would be what that figure is. It is page 197 of the manual.

LORD ASQUITH: Does 16 years represent the length of time during which that 961,000 dollars' worth has been in existence? When you talk about "life" you mean that?

MR. BRAIS: Yes, my Lord; that is what he means.

LORD ASQUITH: It is a remnant of two older buildings. One thought it might have been older than that.

MR. BRAIS: He averaged those two older buildings. One started in 1913 and the other started in 1922. There were two buildings, one after the other. He uses those figures and then he puts on 15 years' depreciation for the main building, and he says "say 18 per cent", which is exactly what one finds at page 197 of the manual, in the table on structural depreciation. There are various types of building - wooden frame, brick encased and so on, and finally a building of reinforced concrete or steel frame with solid construction, which is presumed to have a life of 100 years. At 15 years the depreciation is 18.6 per cent., so he has given that building an average life of 15 years, and 18 per cent. gives you a figure of 3,081,000 dollars. Then he adds the amount and arrives at 14,404,000 dollars.

LORD OAKSEY: You are not attacking those figures of depreciation?

MR. BRAIS: No, my Lord; I am not attacking those figures of depreciation. I want to see them re-applied. May I try to be more precise. I would say that, if they were re-applied, it would still further reduce Mr. Justice Mackinnon's figure, and we should find ~~xxxxxx~~ ourselves well on the safe side of Mr. Justice Mackinnon's judgment. If I draw that to your Lordships' attention it is simply to say that the board gave 14 per cent. on the whole building, and Mr. Justice Mackinnon accepted that 14 per cent. on the whole building, thereby considerably reducing the amount of depreciation which had been granted by Mr. Vernot, which, if he was able to observe something when he went over the building, and having worked in the foundations and seen the old building, would have meant that one thing he could do would have been to form some general idea of the depreciation.

LORD ASQUITH: The depreciations are both physical depreciations?

MR. BRAIS: Yes, my Lord.

LORD ASQUITH: If you adopted them you would want the other 14 per cent. on top of them, would you not? --

MR. BRAIS: Yes, my Lord; I quite agree. Then he comes to the revenue approach. That gives him what he considers his replacement approach, using the historical cost bases.

LORD PORTER: He takes a rather higher revenue than most. The general revenue calculations are somewhere between about 7,100,000 or 7,200,000 and 7,900,000?

MR. BRAIS: No, my Lord; the general revenue calculation capitalisation -----

LORD PORTER: I am not talking about capitalisation; I am talking about the actual amount of revenue. Is it not somewhere about 7,730,000?

MR. BRAIS: Yes, my Lord. I think the decision of the board on the revenue was arrived at with the figures before them. Might we look at page A-29, just to see and dispose of that item whilst we have it before us.

LORD PORTER: Somewhere there is a list?

MR. BRAIS: I think it is in the judgment. You will find at page A-30, line 14, that the board arrives at a total gross revenue of 1,189,055.30 dollars, so that Vernot is somewhat lower but not much lower than the figure found by the board.

LORD NORMAND: Does not the board arrive at a capitalised value of 7,000,000?

MR. BRAIS: Yes, my Lord. The reason for that (and it might be useful to look at it now, because there was a question put by my Lord Asquith on that very point) is this. In arriving at the capitalisation of a building you must take into account the physical depreciation of that building, because at the end of the period you must have your amount set aside. Mr. Vernot took no depreciation at all in capitalising, whereas the board worked out a careful result. The longer the duration of the building the smaller the depreciation and the greater the capitalisation. If you have a wooden structure, as was said by one of the members of this Board to Mr. Beaulieu, and you are getting the same rental as in the case of a stone structure, your stone structure will have a much higher value, not because it lasts longer but because, in applying the depreciation, you will have so much less depreciation to take off your gross rental. Therefore it would not be possible (and on this point I am definitely in disagreement with my learned friend) to compare the rentals as between a wooden building and a stone building. Therefore you must have a different value, because one is going to last longer; and that is what is taken care of in this depreciation. If I have a wooden building that is going to last 10 years, I am going to take 10 per cent. depreciation off, whereas, if I have a valuable building that is going to last 100 years, I am going to take off one per cent. Therefore the value of my building is reflected in the proper computation of my rental if one takes into account for the moment solely the commercial basis.

Then he uses the capitalisation. He puts in 90 per cent. and 10 per cent., which we have seen before, and comes to a

result of 13,755,000 dollars, less land giving him 13,024,000 dollars.

Now Mr. Vernot explains the reasons for these operations. On page A-11 there is a quotation from Mr. Vernot on pages 33 and 34; and I warn your Lordships immediately that that does not agree with the printed case. If your Lordships wish to note it, that will be line 44, page 23 of volume one. That is a reference to the stenographic transcript of the notes before the board.

LORD NORMAND: What do we substitute for page 35 of his deposition?

MR. BRAIS: That is volume one, page 25, line 15. Then at the foot for "page 5" the reference is volume three, page 556, line 18.

If I may read from the bottom of page A-10, because the Board is considering this matter, it says: "We decided that on the large buildings in our wards that were rented, totally rented, we took into consideration 50 per cent. commercial value and 50 per cent. replacement value; that is where the building was built solely for commercial purposes and occupied solely for commercial purposes by tenants. Those that were occupied by owners we would take at 100 per cent. replacement cost and nothing for commercial value. So the Sun Life happened to fall between these two categories. The total floor space occupied by the Sun Life and the tenants is given by their list and came out to be 60 per cent. and 40 per cent."

After the adjournment I shall have to read as briefly as I can the evidence on the occupancy by the Sun Life; it is not, of course, at all in agreement with this. The proportion of space occupied between the Sun Life and the tenants comes out roughly to 60 and 40; but it also results in the fact, if we are to be assessed solely on the proportion of space occupied, in this incongruity, which shows the fallacy of the system, that, if we lose half our tenants, we increase our proportion of occupancy of space, and, if we have only 10 per cent. occupied by tenants and we occupy 90 per cent (that is, of course, taking the 50 per cent. available for tenants) the more we lose the tenants and the less we get from the building the more our proportion of owner-occupancy is charged against us and the more the building becomes valuable.

LORD PORTER: I am not sure that I follow this. Does that mean this? When you are dealing with voids, spaces meant to be let to tenants but which are not in fact let, that is treated as if it were owner-occupied and not as if it were tenant-occupied?

MR. BRAIS: Yes, my Lord; it was treated as if owner-occupied, with the obvious result that the more I am penalised by being unable to find tenants the higher does my proportion of owner-occupancy value rise, ~~and~~ and the greater the proportion that is charged against me of replacement value.

LORD OAKSEY: You mean that some part of the building was neither occupied by you not by tenants?

MR. BRAIS: Yes. It was approximately 14 per cent. I will have those figures for your Lordships immediately after the adjournment. I draw that to the attention of your Lordships for two reasons: First of all, it is unfair in general principle, and, secondly, it exemplifies the fact that the system itself is fallacious, because the more unprofitable my building is

tenantwise the greater the charge that is imposed upon me on the replacement value, because my percentage goes up, and it may go up to 99 per cent. if I lose 50 or 60 per cent. of my tenants. There is nothing I can say which more completely demonstrates to your Lordships the fallacy of this system as applied to the Sun Life building.

LORD PORTER: What do you mean by "this system"?

MR. BRAIS: The system of taking a percentage between 50 and 100 and weighting it on the ground of the tenancy-occupancy.

LORD PORTER: But leave aside that. If they treated the space intended to be let to tenants as tenants' space and said "We are going to consider what the rental value of that is", and then said that the rental value, if it were fully occupied, would be so much, but that they always wrote off 10 per cent., say, for voids, that would be all right, would it not? I am not talking about the fifty-fifty at all, but merely of the question of the correct calculation of the value of tenant-occupied space.

MR. BRAIS: If it were handled upon that basis, and if the result was then properly weighed, it would represent a proper proportion, because the evidence is clear that the Sun Life will never occupy that vacant space. To that I must come, and I will do so immediately after the adjournment.

LORD PORTER: Then the next passage is merely explaining how they arrive at their 50?

MR. BRAIS: I can pass that; but I will go to the next sentence, at line 19: "But that would be if the owner was mixed up among the tenants in the more or less poorer parts of the building as well as the better parts of the building as if the building was completely divided down the middle. In this particular case, the Sun Life occupied the best part of the building and I thought 10 per cent. was fair." In other words, we have a 100 per cent. improvement on tenancies over the rest of our tenants, because it goes from 20 to 10, and we are 100 per cent. better off. The evidence discloses that we occupy these vast lower floors with a terrific amount of waste. We have one extraordinary statement in the deposition, namely that we are being charged at a higher price per tenancy there because it cost more to build the lower floors, which support the upper floors.

Then at line 25 it says: "And on page 35 of his deposition, Mr. Vernot gives further explanations: The assessors, at a meeting, I think it was on the instructions of the Board of Revision" - that is the only reference to the instructions of the Board of Revision. That does not actually say whether the Board approved of the memorandum per se. There is nothing on that to say that they approve of the wording of the memorandum, but I draw that to your Lordships' attention for this purpose, that it was not, as in the case of the former board of assessors, passing on its own assessment. They are passing on their own instructions and their own directions to a very considerable extent.

"The assessors at a meeting, I think it was on the instructions on the Board of Revision, decided that commercial values should be taken into consideration, and at the end of our meeting we decided that in the tenant-occupied building like flats and apartments the commercial value should be taken as 75 per cent. and the replacement value as 25 per cent., and it

was the majority opinion that the capitalisation figure should not be used as one figure in estimating valuation of a property unless the result of its use given by itself is a fair indication of the real value of the property; also it is evident that it cannot be used in proprietor-occupied properties or stores in high priced retail districts." I do not know why it is evident; but it plays no role at all here. We find here that in flats and apartments, which obviously have greater commercial value than replacement value as a rule, the city takes 75 to 25 per cent. It rather seems that the whole purpose of this memorandum was to devise a formula which would permit the assessor to make his way to the highest possible basis of all types of building.

LORD OAKSEY: Surely this is saying something different from the memorandum, is it not?

MR. BRAIS: Yes, my Lord. The formula applied to the rest of the city was 72 per cent. commercial, that is 75 per cent. of the capitalised rental value, and 25 per cent. of the replacement value; but, when they come to this large building, which was supposed to be build by the owner for him, they devised another formula. We submit that, when the assessor refers to the work being done in Montreal for the purpose of applying a uniform yardstick to the whole city, that is not the position. The purpose was to apply different yardsticks to various groups of buildings in order to arrive at the highest assessment price possible for these various buildings, and in the process entirely to eliminate the possibility of referring to market value. Market value is in the valuation sheets, but in the application of the memorandum which Mr. Vernot used to justify his formula the assessor is never allowed to look at the market value.

Then at line 43 it says: "When examined later on by the respondent's attorney, Mr. Vernot on page 5 of his deposition" - I have given your Lordships the reference to that - "says: 'I must say that in the mass of data received for the building" - may I ask what that mass of data is, if it is not the Haquette figures; it is certainly not our laconic little letter, written on the 19th June, 1941, where we said that we had spent 22,000,000 million dollars - "the man who handled it, he also made a preliminary assessment on it and he put the figure of 90 and 10, 90 for replacement and 10 for commercial. After studying it, I thought it was a fair value. (Q.) It is a question of opinion. That is your opinion? (A.) It was his opinion and my own as assessor." Here is this chap who had made the most perfunctory examination so far as the occupancy of this building was concerned. I could go there very often, but I should not have the faintest idea who occupied the various portions except the actual places I had to go to.

"(Mr. Hansard): You said 'the man'. Who is that man? (A.) Mr. Munn." We find elsewhere that Mr. Munn is a member of the Board of Assessors, and that is why there are only two members of this board out of three who sat in this case. We agreed to that at the time, and all the board requires is that two should sit. Mr. Munn, the third member, had previously made an assessment.

"(The President): Can you give us some more particulars as to the proportion between the 90 and 10? Do you conclude that 90 per cent. must be given to replacement cost and 10 per cent. to the commercial? (A.) Yes. (Q.) Why not 15 and 85, or 20 and 80? You could give me some explanations? (A.) I think I will have to corroborate what Mr. Hulse said about the

principles and methods agreed upon by the assessors, and in commercial buildings, first, we agreed on 50 per cent. replacement for strict commercial buildings, and 50 per cent. commercial value. When I say strictly commercial I mean a building designed and built for revenue purposes only.

"When you come into the owner-occupied building and the renting part of it, we would have to balance the part of the building assessed for commercial purposes and the part assessed as owner-occupied. In the case of the Sun Life it was 40 per cent. tenant-occupied in 1941 and 60 per cent. owner-occupied. The occupied space. So that would mean that the 50 per cent. for commercial would be divided into 20 and 60. There would be another 30 per cent. replacement cost added on to the 50, to make it 80 and 20."

LORD PORTER: That ought to be 20 and 30 in line 39, ought it not?

MR. BRAIS: Yes, my Lord. Then he adds this, to which I take exception: "But as the revenues in this building were based on revenues of much cheaper buildings - the revenue of this building received no competition - I consider that half of the commercial value of 20 per cent., making it 10 per cent., would pay for the amenities and benefits received by the owner of the building." We shall hope to show your Lordships that not only was there competition and very careful competition, but that the amenities are all paid for in the rentals charged by the Sun Life to its tenants.

LORD PORTER: You need not bother about the next paragraph, because there is no quarrel about the power-house?

MR. BRAIS: No, my Lord; there is no quarrel about the power-house. The only quarrel about that is that one judge said that the attempt made to increase the power-house was such that it resulted in discrimination; but I should not be able to rest my case on that.

(Adjourned for a short time)

Mr. BRAIS: My Lords, I said this morning that I would wish to refer to the items of occupancy, and in that connection I would first refer to what Mr Vernet had to say. It is Volume 1, page 24, line 1.

LORD PORTER: He starts merely with the 50-50 and the 100 ?

Mr. BRAIS: Yes, my Lord.

LORD PORTER: Would you read from line 32 ?

Mr. BRAIS: It continues in that volume. "(Q): I will go back. You say here that the Sun Life occupied the best parts from the rental point of view. That is your basis ? The best parts ? (A): Yes. (Q): Second, you say the Sun Life occupied 60% ? (A): Yes. (Q): You do not count the vacant space ? (A): No. (Q): You count that in revenue ? (A): Yes. (Q): If you think the vacant space will be rented after being finished ? (A): Yes. (Q): Therefore, should you not count that amongst the rented space ? (A): It is the possible revenue from it."

LORD ASQUITH: What does that mean, that you should count it or you should not ?

Mr. BRAIS: I think he is counting the possible revenue from it, but he does not count that as being occupied by tenants. He charges that to the Sun Life. "(Q): Figuring how much is occupied and how much not occupied, should you not divide it by half ? (A): No. (Q): Can you tell me why you take 50-50 ? (A): That is for assessment purposes, not for sale. We do not guarantee. (Q) We do not ask you to guarantee it".

LORD PORTER: At the moment I should have thought he was saying this. So far from saying that where there is unoccupied space he counts that as being occupied by the Sun Life, he is saying the exact opposite.

Mr. BRAIS: Your Lordship may be right. That is the view I took on that this morning.

LORD PORTER: "You do not count the vacant space ? (A): No. (Q): You count that in the revenue ? (A): Yes. (Q): If you think the vacant space will be rented after being finished ? (A): Yes. (Q): Therefore, should you not count that amongst the rented space ? (A): It is the possible revenue from it".

Mr. BRAIS: Your Lordship is right on that, and that is the position which was taken this morning. Vernet takes the whole potential revenue of the building, and applies that in conformity with the percentage of occupation of the occupied space to the Sun Life and to the tenants. That really does not apply, according to rule, because when we come to the Board we will find that the Board is considering only the occupied space.

LORD PORTER: They take 35 to 65 ?

Mr. BRAIS: 35 to 65 per cent.

LORD REID: Are you asking us to depart from 35 to 65 per cent insofar as it is relevant to consider that ratio ?

Mr. BRAIS: Quite.

LORD REID: Are you accepting 35 to 65 ?

Mr. BRAIS: No, my Lord.

LORD REID: What figures do you want to put in their place ?

Mr. BRAIS: We want to put in their place the percentage of the Sun Life occupancy vis-a-vis space in the building.

LORD REID: Somewhat you are going to give us a different figure from the 65 as representing the Sun Life ?

MR. BRAIS: Yes, a figure which will vary according to practice from 50.0 to 48. something; really 50 - 50.

LORD PORTER: You are saying: we are adopting the system which Vernot adopted, namely, if it is rentable space count it in the revenue; if it is not rentable space but is in fact occupied, then count it in occupation, does he not. Page 24, line 30 onwards.

Mr. BRAIS: He says, in counting 60 for the Sun Life he is counting vacant space ~~xxxx~~ occupied space.

LORD PORTER: And he goes on to say: "You do not count the vacant space ? No. You count that in the revenue ? Yes".

Mr. BRAIS: What he is doing here as I see it is this. He is calculating the Sun Life occupancy vis-a-vis occupancy alone, and applying it to revenue. He is considering all the space rented.

LORD PORTER: And potentially rented ?

Mr. BRAIS: And potentially rented, yes.

LORD ASQUITH: I cannot understand how he arrives at a proportion of 10 and 90, if he does.

LORD PORTER: I can tell you how he does it, but it may be wrong. First of all he says it is 60 - 40. As it is only 50 per cent that has to be considered, that is 20 - 30, but as the Sun Life are occupying the best of the building then I halve the 20 and make it 10.

Mr. BRAIS: He has taken two wrong steps.

LORD ASQUITH: I thought he was saying he was going to treat all the space as let.

Mr. BRAIS: He commits two errors if I may explain. He takes the whole building and rents the whole building.

LORD PORTER: Tell me if I am wrong. I thought that in fact when he made his calculation the Sun Life did in fact occupy 60 per cent., and the rentable value was 40 per cent. Is that right ?

Mr. BRAIS: Not at all, if I may be permitted to say so. That is not what he did. He took the Sun Life building and found the rental for all the available rental space, whether occupied or not., and arrived at a figure. It is to apportion that figure, and apply rent to the Sun Life and rent to the tenants, he takes the proportion occupied by the Sun Life and the proportion occupied by the tenants, forgetting entirely the unoccupied portion to which he has given no rental. He commits the second error in charging us up for our proportion of the unoccupied space which is not rented.

LORD PORTER: Where does that appear ?

Mr. BRAIS: That is as I read it.

LORD OAKSEY: Is he referring to that on page 24, line 10, where he says, "The total floor space occupied by the Sun Life and the tenants is given by their list, and came out to be 60 per cent and 40 per cent". That seems to be a clear statement that the

☛ Sun Life actually occupies 60 per cent of the building.

Mr. BRAIS: 60 per cent of the occupied space.

LORD REID: I do not understand this because I turn to page 28 of their judgment which says that the total gross revenue gave a per centage to the company of 65 and the tenants of 35. The total gross revenue there, I understand, includes revenue whether actual or any otherkind, from all lettable space.

LORD PORTER: Does it. I have not the faintest notion which is right, but I thought they were saying 65 is the amount of rent of the total which is in fact attributed to the Sun Life, and 35 per cent is the amount of rent actually received or notionally received attributed to the tenants.

Mr. BRAIS: That is correct.

LORD PORTER: What my Lord was asking you was, when they get their 35 per cent is that calculated upon the whole of the lettable space, or is it calculated upon the space actually let?

Mr. BRAIS: On the space actually let.

LORD REID: I understood you were all agreed about the commercial value of the whole building, and I understood the commercial value of the whole building was arrived at by capitalising the rental value, and that rental value must therefore include everything lettable, whether let or not, otherwise you were leaving something out of the commercial value.

Mr. BRAIS: I am only telling your Lordships what is in the Board's decision, because they subsequently modify this and they do not charge in arriving at 7,200,000 the vacant space or services area.

LORD PORTER: What do you mean by "they do not charge"?

Mr. BRAIS: They do not consider in establishing the commercial value of the building anything but the amount actually charged by the Sun Life to itself or received from the tenants. Those figures are based actually on the report by the Sun Life.

LORD OAKSEY: Does that cover both space which is occupied and space which is not?

Mr. BRAIS: Not as regards the Board's decision. We are now referring to Vernot's calculations which were based on a total potential revenue from the building of so much, an estimate, and that is applied on the basis of occupancy.

LORD PORTER: The Board does it in two ways, I think. In the first place Vernot says 60 is in fact occupied and 40 in fact potentially occupied for revenue, and he calculates on rent. On the other hand the Board do not go to the actual space occupied but the rentals, treating on the one side the revenue actually received from tenants and on ~~that~~ the other the rental which is notionally applied by the Sun Life to itself, and on that they capitalise, so that they differ in two ways, one, not floor space but attributed to rent, and in the second place it is not receivable rent but received rent.

Mr. BRAIS: The only distinction on received rent is what the Company charge to itself. That is not criticised by the Board and apparently is a proper and fair contribution to itself of rental.

LORD NORMAND: I understand The Sun Life attribute to itself rental only for such parts of the building as it itself uses and not

anything which was vacant.

Mr. BRAIS: And the Board says in so many words when we come to it vacant areas and surplus areas are not included in those figures. It says so quite plainly. I went into those figures to verify where the Board had taken those figures from, and they took those figures from the report of the Sun Life.

LORD REID: If you say there are areas in your building the rent of which ought to have been taken into account and has not, the result of taking the revenue into account would be to increase the total commercial value of the building and thereby put up your valuation, would it not?

Mr. BRAIS: And thereby put up our valuation from the commercial point of view, yes.

LORD REID: This is much more like your opponents argument than yours.

LORD PORTER: That would be true if you took the proper proportion according to Mr Brais argument of the one to the other, but if you give 10 per cent to one and 90 per cent to the other you lose a great deal more.

LORD REID: What I had in mind was this. If Mr Brais is saying there is valuable space in my building which has not been taken into account, one would think that that would have its effect in raising the valuation of the total building if you took it into account.

MR. BRAIS: From the commercial point of view.

LORD REID: Yes.

Mr. BRAIS: And that would be proper, because if I get more revenue from my building, or if I increase my rents to my tenants and to myself, my building as a saleable building is increased in value, and to that extent it would be a proper application of the theory of commercial valuation if commercial valuation were used, but the fallacy of it is that as I lose tenants, and as I come down to a 50 per cent occupation along with no tenants, then I go up to 100 per cent replacement value which is basically twice the commercial value at the present time. The proportion of the commercial value which is used for the blending, as it is called, goes down, and I am going to pay more taxes. Every time I lose a tenant, the greater my difficulty on this replacement value basis on the proportion which is given in the formula. I am penalised every time the value of my building goes down. If it becomes obsolescent for any reason, competition from another building, and I lose tenants, if the value of my building goes down considerably and I lose tenants I may be down to 25 per cent occupation in the building, so far as I am concerned, then I am working on the replacement basis which is basically twice the commercial basis, and instead of being 87 per cent, or 83 per cent, I can go up to 99 per cent or to 100 per cent. If I had no tenants and occupied only 25 per cent of my building on this basis and had a building of real weight left on my hands, my price would be going up all the time. That shows, I submit, the complete fallacy in the argument which cannot take into account the ordinary matters which have to be taken into account, and there is no option.

Your Lordships will remember in the Memorandum it said that it is not what I occupy but what I value the building for to be built at some time to occupy. That is of extreme importance. I find no consolation at all in the fact that I am going down here because at the bottom of page

696 in volume 4, line 28, which applies to my building, it says: "No hard and fast rule can be given for the division of weight in these factors, as it will depend on the proportion owner-occupied".

LORD ASQUITH: Does Vernet in his evidence or in the Memorandum anywhere explain why replacement or historical cost should apply in part whatever in the assessment, or is that taken for granted. All he does is to say what proportion should be attributed to that factor. One would have wished to see somewhere some justification of it in theory. In theory taxation ought surely to fall on the widest shoulders. It cannot matter what a thing cost to produce, it depends on what it is worth now.

Mr. BRAIS: See what would happen if I really got into trouble.

"No hard or fast rule can be given for the division of weight in these factors, as it will depend on the proportion owner-occupied, the extent to which the commercial features of the building have been sacrificed to the main design with a view to the future complete use of the building by the owner".

The assessor is to take into account that some day the owner is completely to occupy the building. Considerations of the future in the matter of assessment, be they one year or three years, can have no bearing whatsoever. I respectfully submit that they can have no bearing, in the case of ----

LORD PORTER: What my Lord is putting to you is this, as I understand it: Is not the appraisal value the right system, and is not the historical value the wrong system? What is the ground upon which, in this case, the replacement system has been taken? Can you show anywhere evidence which establishes why that was taken? My answer so far as I have seen the evidence would be this, they have just taken it for granted and said this is a question of realities, what was spent. Do they ever say anything except that?

MR. BRAIS: They do not say that. They say it was spent. They do not say it is a question of realities.

LORD PORTER: They do say it is a question of realities somewhere. They say somewhere that what you have to do is to find out what was really spent.

LORD ASQUITH: You said you have to disregard the hypothetical factor and they proceed to disregard the hypothetical factor because of the actual record which can be estimated to a penny. This is a matter which goes to the root of the whole case. It operates both ways. Suppose you have a successful speculation, a man takes up a house for a song and it becomes a goldmine for some reason or another. Why should he be taxed on the song for which he picked it up and not on its real value at the time of assessment?

LORD OAKSEY: Is it not equally difficult to say that the cost of the building is entirely irrelevant, and that it cannot be submitted to the assessor for his consideration?

MR. BRAIS: Yes, the cost of the building can be submitted to the assessor for his consideration and it should be submitted to the assessor for his consideration, it must be.

LORD OAKSEY: What I thought my noble and learned friend was putting to you was that it was absolutely irrelevant.

MR. BRAIS: It is submitted because the cost is one factor which aids the assessor, but then he must apply to that the proper formula in the light of the condition of the building.

LORD ASQUITH: But what has the cost actually incurred to do with the building today? I want to put it in your favour.

MR. BRAIS: I have been trying to submit that proposition since I have come into this case but I find that the authorities do say that cost is one thing you should look at.

LORD PORTER: I am neutral in this matter to a certain extent, but if asked to state how it occurs to me at the moment I would say: Yes, cost is an element but you have to use your cost with care, and if you have a large number of cases of cost it may be a final and vital element. If you have an occasional bargain it is very little to do with it.

MR. BRAIS: Very little to do with it.

LORD PORTER: You agree with that?

MR. BRAIS: I agree with that. I agreed with it on the jurisprudence as my judgment has always been that you must look at either what you can get and there I follow Loble, but the jurisprudence does not allow me to follow him fully, because assessors are entitled to look at cost. To the question which was put by my Lord Asquith when my learned friends were asked to produce any case where 90 and 10 or 80 and 3 and 27 were used in Montreal for assessment purposes, they brought one case and that is the very case to

which my Lord Asquith has referred. It was an individual who was a contractor and who, for some reason or another, had access to material at a very economic basis and he built a garage way below the ordinary cost of a garage and he got himself a garage which was worth, on the competitive market, much more than he paid for it. Then the Board looked at it and they said: No, that is not the value of your garage, the value of your garage is so and so, and the judge confirmed the decision of the Board of Assessors saying the value of your building is not what you paid, because you paid too little compared with the value of your building today. In that case they applied 75 per cent value on the commercial basis and 25 per cent value on the replacement basis. If I buy a house or any property for some reason at an advantageous price, I cannot put that house in at the bargain price, I cannot have that house assessed on what I paid for it. If I bought it on a fair market I submit that is the first indication of the correct value; the man did not have to sacrifice it and it was not a sheriff's sale or a bailiff's sale and then I can submit that as a first indication of the correct value. But here the assessor never has a chance under this memorandum to go to any market value whether the property be sold or not. They refer to the second category and say the person who had it constructed or bought it did so because he wanted to use it for his own purposes and he would not have bought it if he had not been prepared to pay what it cost to build that building. When that language is used I find myself so far away from the principles of valuation that I do not see how that language can be used. Those are instructions which are given to the assessors and they can modify that, but within very slight defined provisions.

LORD ASQUITH: I thought it was fairly common ground that exchange value was what value meant, but exchange value has nothing to do with it because a person who is bidding for a thing wonders what it is worth for him to buy and does not consider what it cost the seller to produce. That is the difficulty I find. There may be some completely satisfactory answer to it.

LORD OAKSEY: Speaking for myself I think that he does consider what it cost to build. If I am buying a small house or cottage, which one knows from one's experience of one's friends what it cost to build, one will probably be prepared to give for that cottage something approaching the price of what it would cost to build, less depreciation, it may be in a depreciated condition. It costs now, in this country, about £1,250 to build a workman's cottage. If you are buying a workman's cottage you will consider that fact.

MR. BRAIS: May I be permitted to distinguish particularly between the conditions of the purchase of a house which is distinguished in the manual and which is distinguished everywhere. Here we have a business proposition and in one way or the other there is a distinction. When your Lordship refers to workman's property recently built -----

LORD OAKSEY: I happen to know the value of that.

MR. BRAIS: There you have a staple commodity which is on the market all over the country and is affected by location to a certain extent, but you have a staple commodity.

LORD OAKSEY: And it costs £1,250 to build.

MR. BRAIS: And you want to buy that house.

LORD OAKSEY: Or one of the same sort.

MR. BRAIS: You know just exactly that you want to buy a house and you know exactly what you have to pay to buy a new house. We would be in agreement there, if I may respectfully submit that, but if you have a property which is not a new house and which has been subjected to all the whims of its owner, nobody would go and pay for that house the cost of building that house.

LORD OAKSEY: You have to take into account all the factors. You have to take into account the age of the house. When one says that it is irrelevant to know what it would cost to build that house, that does not commend itself to me.

MR. BRAIS: I have to say under the jurisprudence the cost of the building is one of the elements that must be looked at and properly weighed, but personally as regards a commercial proposition, not a house, but a vast building, I was always viewing that the commercial value would be arrived at by the revenue and that that would be the only thing which would interest a prudent investor or there may be something extra within reasonable limits, the pleasure of having a fine house and possibly a capital gain at some time; possibly someone might want that building and might want to have the benefit of the attractiveness of it; that is the investment.

LORD PORTER: You do not really differ from either of their Lordships. You say that where there is a competitive price so that you can ascertain what the price is, then that is the price in the market. Whether you take it as the price of a new house or the price of a house already built, it is the well known figure, but you say that when you come to a house of an unusual character then you have not got that check and there the cost is of very little value. You add something more, I think, and that is this; even if you are taking a house the important thing is the appraisal value rather than the actual cost of replacement. When you are dealing with matters like workman's cottages and so forth, you have the constant competition which keeps the appraisal value and the actual cost within limits of one another, whereas ^{when} you have a building such as the Sun Life you have not that check. That is your argument.

MR. BRAIS: That is the argument. I say that there are cases where the cost may be the market price but not because it is the cost price; because the market happens to be the cost price because you are dealing with a staple, you are dealing with a series of new buildings and it is not because it is the cost but because the market corresponds under those conditions to the cost price, to that one element. Workman's cottages are a staple on the market. You have a comparison in the other workman's cottages which you are going to have to pay if you want that building.

LORD OAKSEY: I thought yesterday, on account of the fact that the question of appraisal value had never been raised in any of the courts below and is not raised in your case, that you were going to give up the question of appraisal.

LORD PORTER: Except as a check.

LORD OAKSEY: It seems you have to deal with replacement cost.

MR. BRAIS: I am giving nothing up. I have been directed not to press the matter. I have already covered that ground, that the appraisal cost would get at the proper value and in so far as the replacement value is concerned, having

particularly in mind all that has been said about this

building and the fantastic luxury, your Lordships ^{will}/realise

it cost 1,200,000 dollars just to rip the walls out, granite

walls, which were already built in order to erect this

thing. It is almost fantastic when one thinks of it. However,

that does not change the matter. The waste that went on

is reflected in the difference between the appraisal cost

and the historical cost and is always reflected in the

various figures that were arrived at in various

ways.

May I now refer your Lordships to Volume 1, page 55,
at line 15?

LORD PORTER: This is Mr. Lobley?

MR. BRAIS: Yes, my Lord. He was the Administrator of Rentals for Eastern Canada during the war and a real estate agent of high capacity and repute, referred to in the evidence. He was asked: "Did you hear the evidence of Mr. Vernot yesterday? (A). Yes; I did. (Q). Did you hear it all? (A). Yes. (Q). Speaking generally, would you subscribe to his suggestion that the Sun Life occupied the best space in the building? (A). Oh, no. Certainly not. (Q). Which, in your opinion, is the best space in the building? (A). In my opinion, there is nothing to touch the top floors. Not only in the Sun Life building, but we all know that I think your own company" -- I think that he is speaking to Mr. Hansard -- "has learned that in the Royal Bank building."

Then at page 69, in cross-examination, he was asked: "Taking a realistic view; you pay someone to build, does it not seem to you that the most expensive part of the building is the down part - from the tenth floor down?". Obviously it is the most expensive part of the building; it carries the rest. "(A). In the ground block, the main block, are all kinds of columns to support the upper part. When you get up you get no columns, so naturally the cubic cost, by reason of the supporting columns, would be higher at the bottom. (Q). All that is special in the building, is it not located mostly at that part of the building?". Certainly if you support the building you have all your heavy equipment there. "(A). I do not know what you mean by 'all that is special'." This is cross-examination of Mr. Lobley by the City. "It is a big office building and each floor has its characteristics, and lighting, and space. There is nothing special. The best space is the top storey. That is why we get more money for it."

LORD PORTER: Your criticism of that, as I understand it, is that this really is not dealing with commercial value, but replacement cost?

MR. BRAIS: Quite.

LORD PORTER: He is being cross-examined nominally upon commercial value?

MR. BRAIS: Yes; or appraisal value. The City suggest that the Sun Life should carry more of the load, because it finds itself in the portion of the building which is least attractive from a tenancy point of view, but which costs much more to build physically. The appraisal figures are much higher for the lower floors than the upper floors, because it has vast, fantastic columns and deeper floors and everything to be able to carry the weight of the upper part of the building. That does not increase in any way the tenancy value, for two reasons: First of all, we are further away from the larger part and, secondly we have more columns and divisions, which cannot be broken into for extension. Further, as everybody else says, we have the noise and dust and dirt of the streets, and the streets of Montreal -----

LORD PORTER: We will imagine it.

MR. BRAIS: There is one pleasant thing about London. It is not to hear three or four hundred toots of horns per minute. That is outside of the record, but I have found that so pleasant that I have been tempted to mention it.

LORD ASQUITH: Who actually occupies the upper floors - commercial tenants?

MR. BRAIS: Yes, my Lord, commercial tenants.

LORD ASQUITH: Not the Sun Life?

MR. BRAIS: Not the Sun Life at all.

LORD ASQUITH: The argument assumes that it is tenants?

MR. BRAIS: Yes; it is tenants.

LORD ASQUITH: This witness is saying, rightly or wrongly, that it is the cream of the building.

MR. BRAIS: He is saying that it is the cream of the building. The fact is that you have in this building banks of elevators. You have a group of elevators to the first floor; another group of elevators to the fifteenth floor and another group of elevators to the twentieth floor. You are there immediately. You are quiet and at home. You have not any of these immense columns. You have all shallow office space. Your staff is near the windows and you have not to seat your staff sixty feet from the windows, which is a very serious handicap; and the evidence is to that effect.

Then I would refer your Lordship to Simpson's evidence at volume 1, page 81, line 23. He is asked: "You said the building is a commercial building. Will you tell us whether or not in fact the building is being used as a commercial building? (A). Yes, on the 1st December, 1941, the company's occupancy was about 50.4 per cent, and about 35.7 per cent by tenants. And the balance was vacant, partly unfinished. 278,910 square feet at that time was occupied by tenants. (Q). Tell me this. So far as the space in that building which is occupied by the Sun Life is concerned as compared with the space occupied by tenants, will you tell me if there is any difference in the space in the sense of its being more valuable for office space? (A). Except for the ground floor the tenanted space is nearly all on the upper floors. And as usual in buildings of that type the upper floors are the best. That is the best part. That is the part that is rented". That would leave roughly 14 per cent of the building.

Then at page 89, line 8, Simpson was asked: "I think you said that the better part of rental area is from the tenth floor and up? (A). In my opinion, apart from the ground floor, the upper floors except the pent, are the more popular floors. They usually pay the high rentals on the upper floors, and the tenants try to get on the upper floors if they can, not down on the second or third or fourth floors. The upper floors have better light, better air, there is less noise from the street, and in a good many of the buildings the floor space is less and tenants can take an entire floor". In the tower, of course, these upper floors, the floor space is much less and less attractive. It is less attractive to a tenant to occupy a whole floor and they could not possibly do it downstairs, which is an immense area.

LORD OAKSEY: Why do you mean that they could not do it downstairs?

MR. BRAIS: The area is so large.

LORD OAKSEY: You mean that they are big rooms?

MR. BRAIS: Yes; and they have to have big rooms, because they

cannot cut it up. It is a tremendous square and, if they tried to have smaller rooms along the windows, the other rooms would be in complete darkness with no air and with no ventilation, except what they get from this type of ventilation system in the building. That is why Mr. Perrault and Mr. Archambault have, on a physical valuation depreciated it down to eight or nine times, because they say that you have things in this large area which are valueless.

LORD OAKSEY: To commercial tenants?

MR. BRAIS: To any tenants; to the Sun Life. They have to work their staff in artificial light all day. That is no good for anybody, any more for the staff of the Sun Life than it would be for the staff of Ogilvie Floors or B.O.A.C. They have built this building and have to live in it. They are occupying the less valuable space, because they could not find tenants otherwise; and the task is to find what that has to do with the assessment value.

LORD PORTER: You have your argument at the bottom of page 89. You need not read it.

MR. BRAIS: Yes, my Lord.

Then I turn to Simpson at page 94, lines 5 to 14. He was asked: "You have put lower prices for the Sun Life than the space occupied by the tenants piecemeal on the upper floors? (A). Because the space is not as good from a rental point of view. Some of the space occupied by the Sun Life are practically 60 feet from the central lighting space. 25 feet is quite another thing. If you took my figure as an average, there are offices in the Sun Life Building which are quite shallow, not more than 20 or 25 feet deep. The 1 dollar 50 cents I have put is an average figure for everything, taking the good with the bad. (Q). I do not think you charge any amenities to the Sun Life on the rental you have fixed? (A). A lot of the space has none, except that it is a good building and a good address. I put in 6 dollars for the banking hall".

LORD OAKSEY: What does that mean?

MR. BRAIS: 6 dollars per square foot, instead of 1 dollar and 50 cents per square foot. We have heard a great deal about the banking hall. The banking hall ~~that~~ is found in this building, as you find them in all good buildings. It is a high hall about two storeys high; but the evidence is that it occupies less than 2 per cent of the area of the whole thing. It has been brought up and brought up and brought up, and the slight difference that it might make, whether you put 6 dollars for the banking hall or 8 dollars for the banking hall, would be trivial.

He is then asked: "It is lower than the Bank of Montreal or any other bank" and so forth; and then at line 30: "(Q). In the Sun Life there is a modern air-conditioning and air-washing and air-regulation system? (A). I believe so. (Q). That does not exist in any other building in Montreal? (A). Probably not to the extent it is there. I have not studied the question sufficiently to compare it with other buildings. It is an engineering question rather than a real estate question".

The evidence on that, I am bound to say immediately, is that there is no air-conditioning in the Sun Life building.

There is the ventilation system to get fresh air to these deep areas; but an air-conditioning system is an entirely different thing, of course, and does permit under certain circumstances of using some more depth.

Then we have Simpson in his report, exhibit P.10, at page 870 of volume 5. At line 22 he says "In December, 1941, about 50.4 per cent of the rentable space in the Sun Life building was occupied by your company"-----

LORD PORTER: Whose report is this?

MR. BRAIS: Simpson's report, my Lord. These reports were all filed, apparently by agreement; but I am subject to verification on that.

LORD PORTER: What he is dealing with here is commercial value, and he capitalised the commercial value at 7,500,000 dollars.

MR. BRAIS: Yes. He ends with that; but, in view of the fact that an attempt is made by Vernot to handicap the company because the company occupied the better space, as I have had to point out, that gives the proportion applied to the replacement cost.

LORD PORTER: You want from line 21 on.

MR. BRAIS: Yes. It is somewhat of a recapitulation of what we have had before and I think that I can spare the Board the reading of it.

LORD PORTER: As I understand, there is not much difference between the commercial value, whoever is the witness who deals with it. If that is so and if these are dealing with commercial value, can we not take the commercial value to be somewhere about 7,500,000 dollars?

MR. BRAIS: The commercial value has been set, after deduction of depreciation, at 7,200,000 dollars odd, and has been agreed to.

LORD PORTER: Then need we worry about this, because we have really to deal with the proportion and not the quantum?

MR. BRAIS: That is so. There is a series of them right through the evidence, McAuslane and others; but the evidence is made clear on that.

LORD NORMAND: If that is so, the result of it is that all the discussions about the proportions of space and whether the space was good or bad becomes, from the point of view of commercial value, unimportant.

LORD PORTER: That is quite true; but the proportions, of course, as to the space occupied does become important.

LORD NORMAND: In arriving at the figure - whether it is 7,500,000 dollars or 7,200,000 dollars does not much matter - we need not further consider any questions about what space was occupied by different interests?

MR. BRAIS: Except to the extent that Vernot charges the replacement value a larger amount because the Sun Life occupies not only so much percentage of space taken on occupancy basis, but because it is the best space.

LORD OAKSEY: Because it was the best, did you say?

MR. BRAIS: Yes. Vernot says that not only do we occupy 60 per cent of the space (which is not correct; we occupied 60 per cent of the occupied space; so that instead of giving us 20 per cent of the replacement -----

LORD OAKSEY: How can this Board decide which was the best space? You have read the evidence of Mr. Simpson and the other witness who said that, in their opinion, the top was the best; but Mr. Vernot thought that the bottom was the best. What have the courts said?

MR. BRAIS: All that I can say is that Mr. Vernot never examined the building from that point of view. He made a very cursory examination into the building and could not decide.

LORD OAKSEY: I thought that you said that he said that it was the best.

MR. BRAIS: He said that it was the best.

LORD OAKSEY: That is presumably his opinion.

MR. BRAIS: That is his opinion; but he had gone into this building once, apart from these visits, which would not indicate where the occupancy was in a 24 storey building.

LORD OAKSEY: You have given us the opinion of two witnesses. What about the rest? Do they all think that it was the best which was occupied by the tenants, or do the courts think that it was the best?

MR. BRAIS: The courts do not think that it was the best. It was subsequently somewhat lost in the decisions; but all the other witnesses adduced by the present respondent all established that the space occupied by the Sun Life is the worst. The other witnesses gave varying reasons. They say that we will be able to occupy all the space some day; so that is some reason why we should be charged with the value of all the better space at the same time in the apportionment.

LORD PORTER: But actually the position is this, as I understand it. When Mr. Vernot was dealing with the matter, he said that the occupied space was 60/40 and that would normally give 30/20; but the Sun Life has the better space; therefore, I make it 40/10. On the other hand, the Board, whose decision we are reading, did not say anything about better space or worse space; they said that the proportions were 65/35 and we go on that proportion; we use that and it is 40 per cent. That is right, is it not?

MR. BRAIS: That is right; and they, again, commit the error that we complain of, taking the occupied space and not the available space. Whichever kind of formula is applied, we should not be handicapped by any handicaps.

LORD PORTER: At some time or other you will have to show us that the Board of Revision did take the rented space and not the rentable space. We have not that at the moment.

MR. BRAIS: We have not reached that. We had reached this morning page 983A-13.

LORD PORTER: You had got past Mr. Munns. We had got to Colonel Owen Lobley, whose evidence you had just been reading.

MR. BRAIS: Yes. It says: "Colonel Owen Lobley says that in his opinion the valuation of the land and the building and the

heating plant is 7,250,000 dollars. That is the actual value, which he defines as follows on page 2 of his report". That would be volume 4.

LORD PORTER: I do not think that you need worry about this, except for general principles. The general principles are at line 32.

MR. BRAIS: Yes. "Being cross-examined by counsel for the City, Mr. Lobley says that he did not take into account the replacement value of the building. 'Not at all'. He did not consider it. 'The depreciated replacement cost merely constitutes the ceiling over which a value cannot normally go and because I know that ceiling is higher than the income value I did not bother with it'". Then he develops that theory. "And finally to the following question put to him by the President: 'With your theory a valuation of such an immovable as the Sun Life cannot be arrived at without imagining a change of proprietor?' He answers: 'Definitely Sir. And I am capable of imagining it'".

LORD REID: I understand that you are not wanting either what Colonel Lobley or Mr. Simpson says, because Colonel Lobley says that the replacement cost is the ceiling. You are not contending that an assessor is limited in that way. Simpson says that the only way to determine the value of the property is to determine its value in the full and open market; and I understand you to admit that an assessor is entitled to go beyond that. Is that right?

MR. BRAIS: I have not made myself clear at all. I say that the assessor, in arriving at the exchange value, has to consider, take into account look at, a series of considerations: market sales, cost, commercial value. There is nothing in the law at any time which tells him that he must take them all or which tells him that he cannot take only one.

LORD REID: Certainly. Here Mr. Simpson says, if I read it aright, that he can only take one, namely, what it will bring in the full and open market. You are not denying that an assessor can take into account a lot of other things, if he wants to and thinks it right.

MR. BRAIS: No. If I have left that impression, I am quite wrong. The assessor, and Mr. Perrault has said in no uncertain terms, is entitled and has to look at various factors: the market price of that property, if it has been bought and sold, and under what conditions; the market price of neighbouring properties which have been freely sold; the replacement value; the commercial value; but, once having done all those things, he must apply his mind to one thing and one thing only: What will that property bring on the open market? That is what Mr. Perrault calls the sole solution. That is what the tribunals of this land have found and repeatedly found and that is what the jurisprudence of our provinces have accepted, with this one exception of the Canada Cement case, which everybody taboos as being peculiar, owing to certain peculiarities of the case. I would like to explain ~~the~~ effectually, for my own satisfaction, that, once having looked at all those things, the assessor is unfettered in coming to a conclusion as to what is exchange value.

LORD OAKSEY: Putting that shortly, it is to say that the memorandum is wrong.

MR. BRAIS: Yes, my Lord.

LORD OAKSEY: That very likely is true.

MR. BRAIS: Yes.

LORD PORTER: I think that it is more than that. I think that Mr. Brais is saying this: the ultimate question for any valuer is what would this building fetch as between willing buyer and willing seller? You can take any number of factors that you like which will enable you to reach that result, but that is the result which you are aiming at. That is what you are saying.

MR. BRAIS: That is what I am saying and that is what the law says; and that is what the first part of the manual said. There is something extraordinary in the manual. The first part, be it its author a lawyer or not, states the law clearly and comes to the final solution. Then, I do not know by what lack of comprehension and cohesion between the various departments, in the second part, which is Mr. Hulse's part, we have something which is at complete variance in the memorandum, of course, with what has already been said, except where it establishes the appraisal value, which I think is the proper way of arriving at one of the elements that the assessor is going to look at; but not in arriving at the value of the property.

LORD NORMAND: The point which I think my noble and learned friend was putting to you was this: that if you look at page 983-A-13, line 30, if that is a correct resume of Mr. Lobley's evidence, it is not fully consistent with the propositions which you yourself are now maintaining, because Mr. Lobley apparently would not allow the prudent investor or the assessor (assuming him to be the same person) looking for the exchange value to have regard to the replacement value (whether it be replacement in the historical sense or replacement in the appraisal sense) except for one purpose, and that is as a limit. You are not supporting that proposition, I understand?

MR. BRAIS: I cannot support it as it is put, my Lord. I do not think that under the jurisprudence the assessor is entitled to blind his eyes. That is what the jurisprudence says. He has to look at it; and Mr. Lobley does not go very far in how far he can look at it, but he can arrive at the same result that Mr. Lobley arrived at without expressing it in that fashion, because the evidence is (and we will look at that briefly in due course, with your Lordships' permission) that the amenities and the beauty of the building are, of course, reflected in higher rentals.

LORD PORTER: I think that your answer to my Lord might have been that the word "normally" appears in the sentence.

MR. BRAIS: Yes, my Lord.

LORD REID: I can quite understand that, where you cannot replace, because there are building restrictions; and, therefore, replacement value may well be exceeded, because you have to have either to pay a ransom price or not have anywhere to live. That is very commonly understood in this country. If "normally" is understood in that sense, I quite understand it.

MR. BRAIS: The judgment then continues: "Mr. Alan C. Simpson, the next witness for the complainant, is also of opinion that the only proper way to determine the 'real' or 'actual' value of this property, 'is to determine the price that it

would bring in the full and open market'. He contends that 'the original cost obviously has no bearing on the value of an old property and the depreciated replacement cost is only pertinent to the extent that it tends to set an upper limit of market value in the sense that, assuming the revenue producing possibilities were sufficient to warrant it, a prospective purchaser, rather than exceed this upper limit, would buy another site and reproduce a similar building as a source of revenue. The case of the Sun Life is a striking illustration of this. It is a large office building of the monumental type, originally built for exclusive use at the head office of a large company, and as such, with many refinements and embellishments which, while reflected in the rentals obtainable for space in the building to the extent that they add to the value of the 'address', do not add to these rentals an amount commensurate with the cost of producing or replacing them etc".

Then he gives the figures, with which I donot think that I need worry your Lordships.

"Commenting on Mr. Vernot's, Mr. Simpson says: 'I do not think I would have followed the same methods, I realise that Mr. Vernot, like the other assessors, is confronted with a great many valuations and he cannot go through every building and examine it as carefully as a man making an investigation' that is, Mr. Simpson did not know that that had been done by the City of Montreal over a three months period and that Mr. Vernot had discarded what had been done by the City of Montreal. That, again, I can only refer to on a comparative basis.

"Mr. Arthur Surveyer, the next witness, considered only the investment standpoint". Mr. Surveyer gives his views on that.

"So much for the point of view of revenue exclusively".

LORD PORTER: You do not want to re-read the whole of this, except in so far as you think that it is necessary. You might call our attention to the salient points.

MR. BRAIS: Then I will be able to pass very rapidly over the following part.

LORD PORTER: There are the main points and you will know what they are and can deal with them in your own way. On your present type of argument, shut off, as by our ruling you are, from taking appraisal as the method and only using it as a test with regard to the others, what really you have to come to, I think, are the three propositions which you have put forward, namely, the extra allowance of 14 per cent, the question of how you apply your index figure and the proportions, if there are any proportions, of commercial value to replacement value. So far as using replacement value and so forth is concerned to check that, by all means do it; but, as I see it at present, you do not take it from me, if you want to do it in another way -- those are really the problems that the board is concerned with. If you want to say that I am wrong, do not let my observations in any way prevent you.

MR. BRAIS: No, my Lord. I want to show this Board that the 14 per cent is not wrongly applied. As regards the 7.7 per cent, I will submit to your Lordships that, taken in a broad way, there is nothing wrong with it. I will submit very subsidiarily that, if the 7.7 per cent has been wrongly applied and cannot be taken as the broad yardstick, I will give to the Board the figures as to the difference that it would make with careful computation as regards the 52 per cent. I will not have a great deal to say, except that by all standards it is the highest figure that can be applied when you are working the matter on this basis. I would say that it is too high; that we should have applied to us the same method as if applied to other buildings, the 25 and 275. However, when we come to the application of percentages, I always feel that it is very like when the trial judge has to find the measure of contributory negligence in our jurisprudence. One says that one driver is so much at fault and the other is so much at fault, and the tribunals always find that very difficult and the lawyers have difficulty in aiding. I will submit my views on it. I think that that is the proper approach to your Lordships.

LORD PORTER: You have what I have in my mind at present. Whether you think that it ought to be differently dealt with is a matter for you; but it may help.

MR. BRAIS: It is not different in essentials. There are certain points that I shall have to make clear to your Lordships: the question of willing buyer and willing seller, which evidence was completely set aside. The possibility of a willing buyer was set aside by the Board and by Mr. Justice Galipeault, who says: This rara avis has not been shown to exist. To that point I shall have to call attention, because it is that that the Court of Appeal decides upon.

LORD PORTER: We shall get that from the evidence. You say that there is evidence of a market?

MR. BRAIS: Yes, of a market which is imaginary under the formula.

LORD PORTER: Of the possibility of a market?

MR. BRAIS: Of the possibility of a market.

LORD OAKSEY: I should have thought that the view of the judges who

are against you must be that there is a possibility and that the Sun Life Company is not a completely rara avis and that there might be other people who would compete with the Sun Life.

MR. BRAIS: The majority of the Court of Appeal will not recognise the possibility of any sale, because the Sun Life has not said that it is going to sell the building.

LORD PORTER: We shall have to come to that in due course. We had got to page A-14 and had got to Mr. Arthur Surveyer.

MR. BRAIS: I can pass over Mr. Arthur Surveyer.

LORD PORTER: He does it purely on the question of replacement, does he not?

MR. BRAIS: Yes. It may be useful to say that Mr. Simpson had arrived at a value of 7,500,000 dollars, at page A-14, line 32.

LORD OAKSEY: Not replacement.

MR. BRAIS: Total of assessment.

LORD PORTER: Commercial value.

MR. BRAIS: Assessment value, arrived at by the commercial approach.

LORD ASQUITH: The prudent investor?

MR. BRAIS: Yes.

LORD PORTER: He strengthens it rather by his percentage of what a man would get.

MR. BRAIS: "He concludes that the market value of the property at the time of the assessment was not more than 7,500,000 dollars." I am sorry, but I used the word "assessment". If that is the market value, the exchange value or the actual value ought to be the assessment value. He is looking at it like Mr. Loble, from the commercial point of view. He says that the commercial approach is the one which has to be taken and given weight to and is the only one in a building like this, which he is entitled to say.

Then we have Mr. Surveyer, who is a man who occupies a very high position in investment companies in Montreal, mortgage companies and so forth, and he puts a value of 7,000,000 dollars. He gives evidence and very cogently gives his reasons for his view why this building could not bring more than 7,000,000 dollars.

Then at page A-15 we have reference to what the Board call "Two important experts" and they are two important witnesses: Mr. J. J. Parrault and Mr. G. Archambault. The evidence shows that both these gentlemen have had a very great deal of experience in real estate property and been concerned in large sales. Mr. Parrault has valued the Sun Life building by using the cube method and the judgment explains how he proceeded. Then I do not have to stress before this Board how these figures were worked out. They were worked out reasonably correctly, as we shall see subsequently, by the Board.

At line 23 we come to the important part: "For the valuation of the Sun Life building, including the heating plant, Mr. Parrault has taken 22,484,061 cubic feet at 81 cents, 18,212,000 dollars; he deducted 250,000 dollars for unfinished

floors; granted a reduction of 10 per cent to reduce the valuation to the 1939 basis; then deducted 23.3 per cent" -- he was proceeding on the 1941 basis. May I say here, my Lords, that the concession made to the Sun Life of 109 is not a concession made to the Sun Life. All buildings in Montreal were treated on the same basis. Then taking it up: "granted a reduction of 10 per cent to reduce the valuation to the 1939 basis", because he was valuing on the 1940 or 1941. He made it for the purpose of the case. Then he had to go down to the 1939 instead of up from 1936. "then deducted 23.3 per cent for depreciation due to planning functional inadaptability and a further depreciation of 21.26 per cent due to loss of rental, thus arriving at an amount of 9,763,200 dollars for the two buildings, which was brought down to 8,202,600 dollars in applying a physical depreciation of $28\frac{1}{2}$ per cent for 'A', 21 per cent for 'B' and $14\frac{1}{2}$ per cent for 'C'."

Mr. Perrault says that in building this building you have so many columns and your corridors are so wide, about double the necessary space, and you have service areas, areas for wash-stands and basins and washrooms, you have waste space where you had intended to put in elevators, but you are not putting in elevators, because we have 4,500 people there instead of the 10,000 contemplated, all of which results in a total loss to the extent that you have here floors at so much rentable area in comparison with your gross area.

LORD ASQUITH: This witness proceeds by the cubic method?

MR. BRAIS: Yes, my Lord.

LORD ASQUITH: Can you explain to me now he arrives at his figure of 80 cents per cubic foot, which is the basis on which the rest of his calculation rests?

MR. BRAIS: The cubic method is not a precise method. It is often used by contractors and architects. They apply long experience to reconstructing the cost of the building, and they say that a building of that type, with all this in it, would cost about 81 cents per cubic foot, and then they multiply by the cube. It is a rule of thumb method.

LORD ASQUITH: It is an instructed guess by an experienced man. It is not carried out on any other basis?

MR. BRAIS: No, my Lord. It is an instructed guess. It is often used, and was used by Mr. Perrault. The Board says that, in so doing, Mr. Perrault and Mr. Archambault came very close to the figures which were arrived at by the other method, which was the actual historical cost.

LORD OAKSEY: I did not understand exactly what he meant at line 38 on page A-15 by "depreciation due to planning functional inadaptability and 21.26 per cent. depreciation due to loss of rental."

MR. BRAIS: I was going into the first, planning inadaptability, and the second one, 21 per cent. due to loss of rentals. The first is because you have no space for your area. That is planning inadaptability.

LORD OAKSEY: It is a bad plan, I suppose?

MR. BRAIS: Yes, my Lord, a bad plan.

LORD OAKSEY: Does not that affect the loss of rental? It causes loss of rental?

MR. BRAIS: First of all you have very limited space. Then you cannot get a proper rental for that space which you have, because it is too deep. There are two headings. In this vast building you have not the amount of available space which you should have in that frame. There is a large portion of the space which you have which is bad space, considering the type of building. I am applying myself to the first point on that. May I refer your Lordships to volume three, page 656, where you have the same thing in Mr. Archambault's report.

LORD PORTER: He comes on to Mr. Archambault?

MR. BRAIS: Yes, my Lord; he comes on to Mr. Archambault. The

reason I refer to Mr. Archambault for this purpose is that he has made a tableau of it.

LORD PORTER: Just to get it accurate, in fact Mr. Perrault takes off 44.29 per cent. from the building, thereby reducing 17,545,000 dollars to 9,401,000 dollars, and then, having got that figure, he takes off 28 per cent. or 21 per cent. or 14 per cent., as the case may be, and gets to a figure of 7,894,000. Is that right?

MR. BRAIS: That is right. The 28 per cent., the 21 per cent. and the 14 per cent. I suggest I cannot quarrel with too much. We can look at it later. That is the physical depreciation. The city assessors were using the same figures, and Mr. Archambault was using a somewhat different figure. These other two items are new. We find the reason for that in Mr. Archambault's report. It is volume 5, page 981.

LORD PORTER: That is a different one. Mr. Archambault is at page 656, and he produces Exhibit P.59. Where are Exhibits P.56 and P.60?

LORD OAKSEY: P.59 is on page 981.

LORD PORTER: First of all you look at volume three, page 656, and that refers you to volume 5, page 981, which is just before this.

MR. BRAIS: That, of course, is very precise, with the following exhibit.

LORD OAKSEY: It does not seem to contain these rates of depreciation, does it?

MR. BRAIS: No, my Lord; but he concludes in his evidence by saying that the ratio of rentable to gross is 50 per cent. He says that you must depreciate that building on account of its inadaptability as a building by the figure which we have arrived at. Then he gives figures, and he says, at line 39: "This ratio of 50 per cent. means that one half only of the total floor area throughout the building is rentable, the other half being required to give service to the rentable half. This is equivalent to having one total area of a floor rentable and using the total area of the floor above or below for services only, or, again, having each floor divided into two equal areas, one of which would be rentable and the other one would be used for services only. It is evident that there is too large a proportion of the floor area which must be used for services, and that this is a deficiency or functional depreciation."

The greater part of this is due to the fact that this building was built to meet traffic conditions which never arose and which, so far as the evidence is concerned, will never arise. If you are taking 10,000 people out of your building and down your elevators at approximately the same time, you have to construct, as they do with heavy traffic on the streets, a circus or a clover-leaf to take care of it, and, if you do not have the traffic which requires it, that part, so far as these witnesses are concerned, constitutes a waste and a total loss.

LORD OAKSEY: But when you have taken off the depreciation on account of the bad nature of the plan, surely you do not want to take off further depreciation because of loss of rental, because the loss of rental is occasioned by the bad plan?

MR. ERAIS: If I might be permitted to come to that subsequently after I have disposed of this I shall be grateful. You may think of the bad plan which results in complete loss of space. Under this present heading that is vacant space where an elevator should be, and instead of having a washroom in the corner of the floor you have immense washrooms and immense corridors. That is a total loss.

The other point is that all the space which you have built into that building is, in so far as tenancy and ~~rentability~~ rentability is concerned, bad space.

LORD REID: I can well understand this evidence to be good ground for supporting a depreciation in accordance with Mr. Justice Mackinnon's judgment. Are you using it for a further purpose than that, to say that he has not allowed enough, or for what purpose are ~~using~~ you using it?

MR. BRAIS: For the purpose of saying that he has not allowed too much.

LORD REID: If that is all I fully appreciate it; but are you going beyond that in order to have something in hand in case you lose on another point?

MR. BRAIS: If I can have something in hand I shall submit to this board briefly that what I have in hand serves for the higgling of the market and these various things that have to be taken into account.

LORD REID: I want to know whether you are contending that this evidence shows that he was right?

MR. BRAIS: This evidence shows that he was right, and this evidence shows that he could have been righter, and the same way with the Supreme Court decisions, which took various lines. They read through this, and they came to a decision, good, bad or indifferent, but they did not vary these figures, and they did not come to Mr. Justice Mackinnon's figure by accident. They had a great deal to ~~go~~ go on, and they said that would abide by the figure, because it was only a three-year figure, in any event.

Now may I be permitted to refer your Lordships to page 982, where the witness is comparing the rentable area with two of the very best floors in the Sun Life, which are admittedly the 17th and the 18th floors. They are our best floors. We have less columns. We are away up very high, and we have there produced the best plan, because we do not have to carry the building. Comparing this with other buildings in Montreal, Transportation building has a gross rental area, in the fourth column, of 82.1 per cent., Insurance Exchange Building has a gross rentable area of 81.8 per cent., Dominion Square Building has a gross rentable area of 77 per cent. Those three buildings have all got identical floors; they are square boxes. Then the Sun Life, on the best floors, has a rentable area of 57.8 per cent on the 18th floor and 55.3 per cent. on the 17th. Therefore we have put in this waste space and completely useless accommodation, which is a loss and is useless. The Sun Life will never have any employees to fill in there. That is dead space. Some of it is usable, but not much. When you have elevator shafts in the centre of the building and that is floored over, there is no salvage there. You might put in storage space and an odd tenant or two might find use at a few cents per square foot to

put in old bales or something of that sort; but there you have that functional planning inadaptability which in this building is a total loss; and the comparison is very fairly made. It is one of the best floors. If we go below we find that in that building there are two complete storeys completely given over to machinery. You will see the note on page 982: "It is to be noted that, firstly, the ratio of net to gross is much lower on the Sun Life Building floors; secondly, the ratio of outside offices to gross area is much lower on Sun Life floors; thirdly, the number of cubic feet required for one square foot of rentable floor is much higher on the Sun Life floors; fourthly, the floor to floor height is much higher on the Sun Life floors." What he says after that has just the same result.

In Mr. Perrault's evidence, volume one, page 99, line 30, he refers to the same matter. He says: "My second column shows the total occupiable area." He is working on the same plot as Mr. Archambault was. "This is a column showing figures given to me in a document between the Sun Life and the City. These areas contain certain areas which in my opinion are not rentable floor space. I have divided these into three categories because some are less so than others, and I have accordingly deducted them from the main total rentable area."

Might I now go to volume four, page 834. I will not labour this considerably, but I must show this to your Lordships, because it goes to the very basis of the matter. In that report your Lordships will find more tersely what I want to put before you. Mr. Perrault has finally there the table, which concludes on page 843, but which has the advantage that his comparative figures are set out in opposition and can be read and followed with a great deal of facility.

LORD PORTER: What do you say is the result if you have the correct figures of occupied space to rented space? You say that 65 to 35 is wrong. What do you say would be right?

MR. BRAIS: I should say that to this building the assessor, applying his mind to its actual market value and having in mind the figure given by the parties concerned (I do not want to exaggerate, and I do not think I am exaggerating in the light of the evidence) at 75 per cent. should be given to the commercial value and 25 per cent. to the cost, less the various depreciations applied -----

LORD PORTER: That is not quite what I asked. What I wanted to know was: What do you say, as a fact, as the ratio of rented space to occupied space, as the result of your evidence? I was not talking about what ratio should be taken.

MR. BRAIS: I am sorry. I am afraid I misunderstood your Lordship. I think that there has been some dispute as to what was rentable space and what was not rentable space, but I think the ratio is correct.

LORD PORTER: What ratio? Somebody said 52 to 48 and somebody else said 60 to 40, and somebody else said 65 to 35. Which of those is it?

MR. BRAIS: That is Sun Life space to total space?

LORD PORTER: What is Sun Life's space?

MR. BRAIS: The space occupied by the Sun life in the building to the total space available for occupation in the building.

LORD PORTER: What is it?

MR. BRAIS: 50-50, or 50.7 to 49.3.

LORD PORTER: ^{Do} You say that is the right figure, or do you say that some other figure is the right figure if one is comparing space?

MR. BRAIS: There is general agreement that the Sun Life occupies 50 per cent. of the available space in the building. With your Lordships' permission, I should like tomorrow morning to put that in the very tersest form possible, because I want to be precise; but the general concensus is that the Sun Life occupies 50 per cent. or very close to that - sometimes a little below and sometimes a little more.

LORD PORTER: 50 per cent. of the rentable space. Is that right?

MR. BRAIS: It occupies 50 per cent. of the rentable space. Why the figures do not agree completely is because some of the people who have examined the building are not in agreement with precision as to whether certain areas are rentable space.

LORD OAKSEY: What percentage of the rentable space is let out to tenants?

MR. BRAIS: 35.

LORD OAKSEY: 50 to 35?

MR. BRAIS: It is roughly 35 to 50 per cent. for the Sun life, and, if my memory is right, there is 14.7 per cent. unoccupied, and that difference of 0.3 per cent. is the difference between what is accepted as rentable and what is not accepted as rentable.

LORD OAKSEY: The 65 to 35 is what?

MR. BRAIS: 65 to 35 would be the proportion of occupancy of occupied space.

LORD PORTER: It is more than that. How does the figure get up to 65 instead of 60?

MR. BRAIS: Again, to answer that properly I should have to apply myself directly to the figures on that. I should prefer to give them to your Lordships tomorrow morning, and it would save a great deal of time.

LORD PORTER: We need not have it with any exactness, but with sufficient exactness to show how it comes about.

LORD NORMAND: Is the 65 per cent. figure reached upon the calculation of rental and the attributed rental of the Sun Life?

MR. BRAIS: Yes, my Lord. It is the 700,000 dollars against the 400,000 ~~xxx~~ dollars. In Vernot it was space. In the Board's rentals, you delete the vacant space and then delete the service areas. They say that we are fortunate that they have not charged against us the value of the corridors used by the tenants.

LORD PORTER: That still does not tell us why in the one case it is 60 to 40 and in the other case 65 to 35. That is to say, Vernot took 60 to 40?

MR. BRAIS: That is taking areas.

LORD PORTER: The Board took 65 to 35?

MR. BRAIS: Taking dollars.

LORD PORTER: Does "taking dollars" mean that, if you lump together a rent attributed to the Sun Life with the rents actually received but not which would be receivable, and then divide that 100 per cent. up you would ~~find~~ find 65 per cent. was for the Sun Life and 35 per cent. for the other people?

MR. BRAIS: I am subject to correction on that, but I should say that that would be approximately correct, because, as I recall, there is 700,000 dollars attributable to the Sun Life and 400,000 dollars attributable to the tenant, taken from our books. If my recollection is correct the Board took that basis but did not take into account the vacancy, and told us that we were fortunate to that extent.

LORD OAKSEY: Did the amount of the rent charged notionally to the Sun Life proceed upon the basis that the top floors which were let to other people were the best or not?

MR. BRAIS: I think the witnesses say that what the Sun Life charged to itself was a high rental for the type of space which it occupied. I shall have to tell your Lordships on that point whether it was a higher rental than would have been obtained elsewhere. I think that is in the evidence, but I do not want to present that now. I will have those figures with precision tomorrow morning.

My Lords, we find in this report of Mr. Perrault exactly what he did. That is at pages 834 and 835. He says at line 40 on page 435: "We must consider this building, from the point of view of a commercial structure; as a revenue-producing building. It is an accepted fact that in a structure of this type the net rentable floor area should vary between 70 per cent. and 74 per cent. of the gross floor area; otherwise it is impossible to obtain an adequate return on the moneys invested. In a table attached to this report will be found percentage of net rentable floor area to gross floor area as pertaining to the Sun Life Building; these ratios are computed on several interpretations."

Then comes the detail of the rentable floor area in square feet for each floor of the building, and for the moment we can pass that. Then there are the tables.

On page 838 your Lordships will see: "'Total occupied area A' comprises all areas that might be interpreted as being revenue-producing." I say this at the moment: "Area being revenue-producing" is area that is usable for tenants or for the owner. "'Areas at elevators H.J.' comprises areas at bank 'B' and bank 'C' elevator shafts and lobbies. 'Corridors and lockers F.G.' comprises areas for potential corridors, and locker room space while used as locker rooms and rest rooms by tenants. 'Locker space and service areas D.E.' comprises locker room space occupied by tenant for other use than locker and rest rooms, and also service areas included as rentable." ~~Sometimes~~ Sometimes you have the end of a corridor lost, and therefore he has included that as an area which could be used. "In computing totals, the basement and 7-A floor areas have been omitted."

LORD PORTER: This is getting rather detailed for me. I shall not keep it in my head and I shall not get much benefit from it, and I do not think you will get much benefit from my point of view from elaborating it too much. Could not you put in a table which showed the kind of thing you want to show? That will convey something to us, but merely passing over this will not.

MR. BRAIS: If your Lordship pleases. The next paragraph is of importance by itself, because you have the statement: "The entire building suffered upon completion an immediate planning functional depreciation due to the low rentable floor area in comparison to the gross floor area. The table shows rentable floor area varying from 53.7 per cent. to 58.5 per cent. and the immediate depreciation suffered by the building is shown on this table assuming nominal ratios of 70 per cent. and 72 per cent. The depreciation on a basis of 70 per cent. computed on the rentable area of 648,459 square feet is shown as 23.3 per cent." I have used this figure in computing the planning functional depreciation." That is the figure which the Board refers to in that portion of its decision which we have just read, where they say that Mr Perrault first took off this 23.3 per cent. He gives the reason for it here. He explains why he has given everything that could be fitted in there, and he gives his table at page 839. There is a very brief table there, which may be of assistance. Then he explains how he arrives at a given figure.

Then at line 19 on page 839 he uses the physical depreciation figures in Mr. Perrault's manual, which we looked at this morning.

At page 837, line 30, we have a continuation of the tableau, which results in the subsequent depreciation of 26.8 per cent. for bad space. All this is developed in his evidence, but the story that we have here is that he puts a unit rental rate for space which is nearest to the windows, and which, of course, to the minds of all concerned, except some of the City experts, is the best place and for which you get the highest price. You get a much higher price for shallow ~~xxxxxx~~ suites rather than for suites which are deep, and large companies have much less favoured employees in such cases, because some of them are in big rooms and are much further away from the windows. Then he works this out through the percentage, and he comes to the result of 26.8 per cent. in reduction of what normal space should bring, because there is the disadvantage of deep, dark space, which all costs the same amount of money, but you cannot get rental for it in the same proportion, so he reduces it by a further amount, the figure being 26.08 per cent.

LORD PORTER: These are different portions of the building, are they not?

MR. BRAIS: Whilst taking the building as a whole.

LORD PORTER: You get variations from 21.26 per cent. to 26.46 per cent?

MR. BRAIS: Yes; your Lordship is right. These are various sections. Then he totals them up. It is my mistake.

LORD PORTER: Is the 26 per cent. the total? I do not think it is. I do not think he has ever totalled them up.

MR. BRAIS: I frankly admit that I have lost myself a little.

LORD PORTER: He has divided it up into four pieces and taken a separate depreciation for each. He has never made a calculation for the lot, and he would have difficulty in doing it. It is not the simple method of calculating the ratios.

MR. BRAIS: That is so. They would have to be weighted accordingly. It is to show how he has arrived at the general figure.

Then, my Lords, we go forward to why he did this, which your Lordships will find on page 842. We go through the heating plant, and there are some more figures. All this has been very carefully done and put down in black and white for examination and comparison, and at page 842, line 33, he says: "In order to arrive at the real value for taxation purposes, that is to say, the value established in a transaction between a seller who wishes to sell but does not have to do so, and a buyer who wishes to buy but is not obligated to do so, the above valuation of 8,202,600 may be subject to a fluctuation, depending on the net revenue of the property. It is quite evident that this net revenue is a very important factor in determining the true real value of this property. The net revenue should be determined after deducting from the gross revenue all operating charges against the property and setting aside an amount to amortise the capital invested in the building, so as to compensate for the physical depreciation of the structure."

He contemplates the buyer and seller theory and the investor theory and the replacement cost theory, and arrives at his figures on that basis, but taking away from the building in dollars and cents what is lost, in so far as physical value is concerned, to that building. When I say "physical value" your Lordships will appreciate that I am using that term in a looser form than actual bricks, cement and granite. This, as your Lordships will note, has been carried through with a great deal of mathematical precision in considering and valuing, in comparison with other normal buildings, the inadaptability of this building for any use.

LORD ASQUITH: Before we leave Mr. Perrault, does he deduct three lots of depreciation? In arriving at the annual rental he says that you have to take off something to amortise the capital and to compensate for the physical depreciation. He has done that. That is depreciation No. 1. Then, secondly, he has taken two sets of functional depreciation, one of which is attributable to the fact that some of the space is wasted or cannot be used owing to bad planning, and the other of which concerns space which is used or rented but is either deep or dark or pokey or for some other reason functionally ill-adapted. Does he deduct all those three?

MR. BRAIS: Except that he does not amortise. He takes off the first physical depreciation.

LORD ASQUITH: Yes, in arriving at the net annual rental. "The net revenue should be determined after deducting from the gross revenue all operating charges against the property and setting aside an amount to amortise the capital invested in the building, so as to compensate for the physical depreciation." He has allowed for it in the annual sum which he is going to capitalise. Then he takes off two other sets of depreciation, both functional. Is that right?

MR. BRAIS: It is right; but he is not allowing it twice, any more than the Board -----

LORD ASQUITH: I am not saying that he is. He may be quite right; but there are those three separable elements of depreciation involved?

MR. BRAIS: Yes, my Lord; but he uses rentals for his amortisation. From that result he proceeds to a value of how much of that space is lost.

(Adjourned till tomorrow morning at 10.30)