28, 1951

IN THE PRIVY COUNCIL.

Council Chamber,
Whitehall, S. W. 1.

Monday, 9th July, 1951.

Before:

LORD PORTER
LORD NORMAND
LORD OAKSEY
LORD REID
LORD ASQUITH.

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ON APPEAL FROM THE SUPREME COURT OF CANADA

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Between:

THE CITY OF MONTREAL

v.

SUN LIFE ASSURANCE COMPANY OF CANADA

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Monday, 9th July, 1951.

Present:

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LORD NORMAND,
LORD OAKSEY,
LORD REID,
LORD ASQUITH.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

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Between:

THE CITY OF MONTREAL

(Appellant)

AND

SUN LIFE ASSURANCE COMPANY OF CANADA.

(Respondent)

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

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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.

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E L E V E N T H  D A Y.

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MR. BRAIS: My Lords, I would propose to terminate these judgments rapidly, submit to the Board the jurisprudence which remains to be examined and referred to by my learned friends, and the other judgments which the respondent has to cite, and then as briefly and tersely as possible set forth numerically the principles which we would wish to suggest, and submit to the Board the examples of the various calculations, which would all be compared with the figure we are interested in now and which I submit would justify that figure.

We were for all useful purposes on page A-29 of the decision of the Board of Revision of Valuations, and we see at line 21 the first point of disagreement, which is the adjuster cost for 1939 and 1940, the result of which has already appeared in an example which I have submitted to the Board, and which showed a finalised figure of 400,000 dollars.

LORD PORTER: That shows the difference between 50 per cent of commercia value and 50 per cent of the replacement value.

MR. BRAIS: That accepts the Board's restatement of the figures on the cost of building index, and then proceeds with the 5 per cent depreciation allowance for extra cost, arriving at net cost of building, and then adding the 14 per cent depreciation of the Board, and not Vernot's depreciation, and then we take MacKinnon's fifty-fifty basis, which results in a difference between Mr.Justice MacKinnon's figure and the figure which would be arrived at if the cost of building index had been used as used by the Board, by MacKinnon's, 434,000 dollars. I have and will make available to the Board the other various calculations with comparative figures. I will probably not be able to arrive at that today; but, in view of the fact that there are a large number of calculations, I should like to make it immediately available to my learned friends, so that they can verify the calculations.

Then, of course, the Board gives 14 per cent depreciation. Vernot has given 25 and 18 per cent. In due course I will show this Board, simply setting out the figures, the very considerable difference it would have made, for two reasons. First of all, the difference between 14 per cent for the whole building and 25 and 18 per cent applied to the ages of the building is very considerable, and, secondly, if the cost of building index obviously is to be applied against us, regards the reconstructing, and the age of the building, when you apply the depreciation you also should apply the depreciation to the age of those buildings in the proportion that you applied the cost of the building index. I will have to come back to that, but it does result in a very appreciable difference if that is properly applied.

LORD REID: So far as I can remember last week, very roughly the differences between the Assessor and the Board of Revision were on the index about 1,300,000 and on the depreciation about 500,000 dollars, making a total difference between Vernot and the Board of about one and three quarter millions. Is my recollection correct?

MR. BRAIS: No. The difference between Vernot and the Board on and the 7.7, if we can use that formula, and the index application, if I may refer to it, is that Vernot arrives at the index figure at 1, 471,000 dollars, and the Board 181,000 dollars.

LORD REID: That is 1,300,000 dollars approximately difference.

MR. BRAIS: 1,300,000 dollars difference.

LORD PORTER: Would you mind repeating that. The index figure and Vernot is -----

MR. BRAIS: 1,471,344 dollars, and the Board 181,503 dollars and 32 cents.

LORD PORTER: The difference there then is roughly 1 to 3?

MR BRAIS: Roughly 1 to 3. Then on depreciation Vernot arrived at a figure 3,081,000 dollars, 3,081,202.

LORD PORTER: That is Vernot's. What is the Board's?

MR.BRAIS: The Board gives 2,525,000 dollars.

LORD PORTER: That is enough, you need not bother after that.

LORD OAKSEY: It is two and a half millions, about.

MR. BRAIS: Yes; the difference is half a million.

Then at page 29, line 32, after taking off the depreciation, we have referred to, we arrive at a replacement value of the main building, land value having been added of 16, 241,000 dollars. Then the heating plant is added, and we then come on at page 30, line 18, to the third difference between the Boardand Vernot, in arriving at the capitalised net value of the building, a commercial value of 7,028,000 dollars, and then the valuation -----

LORD OAKSEY: That is the same, is it not, the commercial value?

MR. BRAIS: No; Vernot had a higher figure.

LORD PORTER: Vernot was 7,092,000, I think, and the other 7,002,000.

MR. BRAIS: But all the witnesses are in very substantial agreement, and the Board, in making the reduction, did not disagree with any of the figures submitted by the Sun Life experts, who apolied the formula of the Manual in capitalising revenue.

LORD OAKSEY: I should have said you were not challenging that figure of 7,028,000 ?

MR.BRAIS: Nor has anybody since. We are all on common ground on that figure .

Then at line 22 on page 30, the Board comes to its fourth disagreement with Vernot by applying 82.3 per cent and 17.7 per cent to arrive at a real value of both properties of 15,050,000 dollars. That is what the Board has seen fit to call the real value of both properties. The Board on any appeal can reassess and revalue.

LORD OAKSEY: Section 375 is at page 153 of the blue book.

MR. BRAIS: It is the authority to reassess. I have the wrong reference in my note and I should like to give to your Lordships.

LORD ASQUITH: It did not reassess; it confirmed the lower figure.

MR BRAIS: It confirmed the lower figure, but I should like to draw to your attention that it had power to reassess; but and I should like to get this paragraph to the Board. It is at page A-30, line 28: "The final figure of 15,051,997 dollars and 7 cents has been arrived at by making all possible concessions to the Complainant's statements. This sum is 5 per cent over the contested assessment and 7.5 per cent less than the book value and marked value in the Company's annual general statement for 1941 and the Company's return to the Superintendent of Insurance for the Dominion of Canada. (See joint admission 16 and Schedule F). Substantial discrepancies between the opinions of men of experience is of common occurrence when appraising or estimating enterprises of huge dimensions." Then it continues that the complainant is right as regards the boiler house, and then in the last paragraph on that page: "For these reasons, we come to the conclusion that these two immovables should be grouped in one for the purpose of assessment and that the complainant has failed to establish that their present assessments at a total sum of 14,276,000 dollars is excessive. Wherefore, the said assessments, being considered and grouped as a single one, are hereby maintained."

Then by the Charter of the City of Montreal, at page 334 of the Charter, paragraph 382, it says: "There is created by the present Act a Board of Revision and of valuation which shall be composed" etc. etc., and it proceeds to refer to its composition. Then at page 338 sub-paragraph 18: "The Board of Revision shall also hear all complaints produced legally each year within the required delays", and then follows some particulars. Then at page 339: "They shall hear these complaints, and render its decisions within the shortest possible ~~time without~~ delay". Then we have the law: "The Board of Revisio if it be of opinion that the estimate of the immovable value or rental value complained of should be increased rather than reduced or maintained, may order such increase; in such case the provisions of paragraphs 15,16 and 17 of this section shall not apply."

The only point I make on that, and I am obviously entitled to make it, is, although the Board has weighed and measured the various formulae that were applied by the assessor and has come to another figure, it says, and very properly says so: "Substantial discrepancies between the opinions of men of experience is of common occurrence when appraising or estimating enterprises of huge dimensions", and, with that in mind, does not see fit to modify the 14,276,000 of Vernot, because the complainant has failed to establish that that figure is excessive. I do not want to stress that point beyond saying this, that, although the Board in its figuring arrives at a difference of 800,000 dollars more than Vernot and has adopted other measures so to arrive, it has not seen fit to consider, as it was entitled to do, that the figure arrived at by Vernot that the 800,000 dollars of excess which they have arrived at requires any modification of the Vernot assessment, and have, therefore in so doing simply taken the position, I submit, that they say: We have used certain figures and formula; Mr. Vernot has used certain figures and formula; there is 800,000 dollars difference and we do not think that that justifies any change in our figures. This 800,000 dollars difference is of very considerable importance as a cushion, because all the figuring which has been done in all the examples which are before the Board, and the other figures which will go before the Board and which I have handed to my learned friends, are all based on the original figures arrived at by the Board.

We now come, my Lords, to the decision of Mr. Justice

MacKinnon at page 984, and I can go through pages 984,985 and 986, unless you, my Lords, would wish me to direct me to explain something on those pages. It is a repetition of matters which have already gone before. Then pages 986, 987 988, and I just show at the bottom of page 988, line 49, that the boiler house was increased on the figure by 135 per cent. Then at page 989, line 3, at the top of the page, the figure of the Board was 51.51 per cent over the previous assessment, which may have had a considerable bearing on the Board's mind when it decided that after all, weighing things in the way an assessor is presumed to weigh things, with the 40 some odd per cent of Vernot in the light of no attack against the previous assessment and in the light of what was happening to the other properties, and in the light of what that the Board must have thought of its own memorandum, the law changed by the time the case was being heard, one can readily understand in weighing matters why it did not see fit to increase to the figure which it had arrived at on its own computations, which all goes back to the doctrine that the assessor is not bound to lay down any figures. In the memorandum he is bound to lay down figures; but the memorandum is contrary to the law when the roll actually went in and in this case was being applied, and the assessors never have to set forth figures, except by the memorandum, and by the 1937 law, where they would have to do that, because they have to go on replacement value; but on the present law, which is the law everywhere, there is no reason for that.

Then there is nothing I think on pages 989 and 990.

LORD PORTER: There is nothing there, except that he adverts to the deduction in 1931.

MR. BRAIS: At page 991, at line 3, it says: "The Manual represents a greal deal of honest and efficient effort on the part of its author to establish uniformity in the assessments." With that statement we fully and completely agree. The only complaint was that the memorandum was never followed. The formula was devised for the Sun Life, and the formula of the Memorandum was not applied to the Sun Life.

LORDASQUITH: You mean the Manual was not followed?

MR BRAIS: The formula of the Manual and rules of the Manual were not applied to the Sun Life.

Then we have the jurisprudence at line 10 and following, which I would be very happy to restate, because they are so much what we are submitting to this Court, and it might simplify my argument if I read six lines. At line 12 on page 991 it says: "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 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".

LORD REID: How is that reconciled with the direction in the Act that the Board of Revision are to instruct the assessor in the data he is to take into account?

MR. BRAIS: That is of considerable importance.

LORD REID: I have not yet discovered how the independence of the

assessor is reconciled with the provision which allows the Board of Revision to give instructions about the data to be taken into account. Perhaps at some time you will deal with the matter; not necessarily now.

MR.BRAIS: I will deal with that matter, and when I do I will endeavour to distinguish between the data he is to compile and have before him and how that data is to be applied by the assessor in the execution of his duties.

LORD REID: You are quite entitled to say the assessor has a free hand to deal with the data. My point was that I did not understand he had a free hand in the data he was to put before himself.

MR.BRAIS: There would be no quarrel between my learned friend and I as to what data ingeneral the assessors are to compile and have compiled by the technical department. It is all compiled by the technical department for the assessors, and that gives them a whole series of information which goes before the assessors; but I say this on that point, that they are not entitled by inference or otherwise to get the assessors to compile data, which data should be used in this way or that way, because that would be outside the law, and, if the law wanted the data to override the formula of actual value, which is what the assessor has to find, that clause should be clear and precise, because a clause of exception coming in to overruled the general law, especially in this case where the present law comes in to overrule the former statute, which did instruct as to how the data was to be applied, the very fact that there is an amendment there shows that if you are going to give to the previous law any force by the formula of instructions, which would be the exception, that formula must be very precise and so in so doing they can instruct as to how that data is to be used. So much is that the case that in the City of Montreal's own Manual, which was published co-incidentally with the 1941 amendment, we did what the City of Montreal told its assessors to do, and does not suggest for a moment in its own publication, in its instructions to the assessors, and for the information of the public, there should be any modification in law and their complete freedom, because they have the data before them.

LORD REID: The Section I had in mind was Section 382, paragraph 14, of the Charter.

MR. BRAIS: Which we find reproduced ---

LORD REID: At page 174 of the Manual. If it comes in another stage of your aggument, please do not interpolate it now.

MR. BRIAS: "The Board may at any time determine the manner in which the Assessors shall proceed with their work, prepare the forms, documents and books which they shall use, prescribe the data and information that the Assessors shall obtain and enter into their books, or on the said documents, and give instructions accordingly to the Chief Assessor."

My submissions on that are twofold, my Lord. First of all, if this is to modify in any way the law as to how actual value is to be arrived at, the Section would have to be clear and explicit, and all this does is it refers to the Office Management and Assessors Department, and tells the Assessors that through the Technical Department and so forth before they proceed to a valuation they shall have certain forms filled out and certain information placed before them. It does not in any manner suggest how that information is to be used. In other words, it is a matter of housekeeping, I submit respectfully, a matter of setting forth the housekeeping of the Assessors' Department and Technical Department.

LORD REID: I have completely failed to make myself clear. If you prescribe the data and information which the Assessors shall obtain, do you tell them they need not or shall not obtain any other information, and, if they only get information of a particular kind, that ties them to a particular method, because other information they have not got and are prohibited from getting is thereby unavailable to them; surely?

MR. BRIAS: I would agree the other information is unavailable to them; but I would not agree, and I respectfully submit the inference to be drawn from the fact that they are not told to get more information would constitute the prerogative they would have to modify the general law as regards actual value.

LORD REID: You say this does not limit an assessor's discretion to require any other information besides that which he is prescribed to enter into his books?

MR. BRAIS: I would say that would be obvious, because by the inference arising from the fact that you are not told to get certain information, if from that inference, which may or may not exist in fact, you use, if I may so submit, that very slim distinction, or distinction, you cannot use that to have the legislatures say: We have changed the law as regards actual value.

LORD ASQUITH: Supposing the Board of Revision said th the Assessors: You are not to obtain any data as to other sales of this property or similar property, would not it be prescribing the data and information that the assessors should obtain?

MR. BRAIS: Yes, my Lord.

LORD ASQUITH: And, if that is so, would not that amount to a very rigid control by the Board of Revision of the alleged independence of the assessor?

MR. BLAIS: Yes, my Lord.

LORD PORTER: Will somebody consider this, which I have had in mind, whether right or wrong? This may be read as saying this: There is certain information you have got to get and put in your books; if you do not get that information and put it in your books, you are not making your calculations right; that it goes no further than that, and does not prescribe that you shall not get other information in order to arrive at your result. Does that appeal to you or not?

MR. BLAIS: Yes, my Lord.

LORD OAKSEY: Surely having got the data you cannot disregard it?

MR. BLAIS: Oh, yes; that applies to all buildings.

LORD PORTER: My Lord's suggestion is right, is it not, that you cannot neglect it? The weight you give to it, or proportion, is a different matter.

MR. BLAIS: I assure the Board I am not trying to ride two horses on that question. I say that the assessor is held to consider under the law, under the Statute, under the jurisprudence, all available data, all factors; but he is not held to take any one of those or all of them together and he is not obliged to blend, and, if he takes one factor, as Vernot says in his evidence at page 25, commercial value or replacement value, and if, applying his mind in a rough way to the factor, the commercial value, he comes to the conclusion that his figures, his working figures, on the commercial value come out reasonably in line with the actual value of the building, he is not obliged to proceed to any blend, and he is not obliged to go down the columns and work all these figures out and put them together, on condition - and I want to be well understood here - that he is well satisfied that the one formula he has worked out on, say, commercial satisfactorily results in the exchange or market value. But, in order that I may put my thought before the Board, I am not suggesting that the assessor should just simply close his eyes on any other value. He is entitled to consider. He is entitled to weigh it and weigh them all together. He is entitled to take in the one if he is satisfied it properly results in exchange value, and Mr. Vernot says it, on that point. At page 25, line 16, he says: "The assessors at a meeting, I think it was on the instructions of 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".

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LORD PORTER: I do not know what that means. I have no idea of what that means.

MR. BRAIS: My interpretation of that would be just what I have been submitting to the Board, that, if the assessor built up the commercial value of the property and arrived at a conclusion, and he looked at that figure, and assuming that there was a neighbouring property of about the same size and type in the general way and he had worked both out, he would say to himself, "I shall have to work out the replacement value of that property, because, having something to satisfy my mind, I come to the conclusion, by limiting my working figures to commercial value, that I have reached the same result, or about that." He has had something to satisfy his mind about on this. I may be wrong in my reading, but I take that to be a clear statement by Mr. Vernot that if in your judgment as an assessor you are satisfied with your work (and there would be a lot of working out of these assessments; you have to calculate rents and available space and so on) when you have gone through one method you do not want to start all over again with the appraisal, and, if you have some reason to think that your commercial result is satisfactory by your experience and by your knowledge, you need not go further. He says that; and the manual which the city has published (and I am entitled to submit this, with all due respect) nowhere suggests in its instructions to the assessors and in its information to the public that clause 14 might serve to modify the effect of the law by having the board instruct him not to obtain certain information which might be useful.

LORD PORTER: Now will you again look at page 25, line 21, "and it was the majority opinion that the capitalisation figure should not be used as one figure in estimating valuation of a property". Do you read the words "one figure" as meaning the only figure?

MR. BRAIS: Yes, my Lord. The reason for that is found in the amendment of the statute.

LORD PORTER: I dare say. I only want to know how you interpret it.

MR. BRAIS: Yes. That would be the only figure.

LORD PORTER: That would make it sense if you used it as "the only figure", but as "one figure" it does not make sense?

MR. BRAIS: The reason for that is this. If your Lordships will look at page 5 of the respondents' case you will see the way in which that word was used. That reproduces section 375 (3) as it existed in the 1937 statute; that was in force at some time. "The actual value of the building shall be", etc. (Reading to the words) "in the estimating."

LORD OAKSEY: This was repealed, was it not?

MR. BRAIS: This was repealed shortly before this assessment came in, but it was part of the law when the assessors met in August, 1940.

LORD OAKSEY: Are you saying that there is any particular difference between that amount you are contending for? As I understand it you are contending that all factors are to be taken into account, and that one of the factors is the commercial value and another factor is replacement value?

MR. BRAIS: Yes, my Lord; but under the law as it now stands ------

LORD OAKSEY: I know that the law is different, but are you saying that this as it stands here is different, and why?

MR. BRAIS: Very definitely, because if you say in one law that the last sentence, "in estimating" and so on, and if you change that law and remove that completely, then you leave the assessor free to use any factor alone, because in this instance the law specifically says that you can take the commercial value, but only as one factor. When you drop that you go back to what Mr. Vernot says. There is nothing to prevent you from taking one factor alone.

LORD REID: I should have thought your cricitism of the old law was that it begins by saying that the actual value of the buildings shall be determined by the intrinsic or replacement value, the rest being merely subsidiary?

MR. BRAIS: Yes, my Lord.

LORD REID: You say that the law as it now stands has displaced replacement value as being the main or leading element and merely made it one element along with the others?

MR. BRAIS: I am entitled to go further than that. I submit that the law as it now stands, having removed this instruction to use intrinsic value, leaves the assessor free to use any factor.

LORD OAKSEY: The commercial value alone, for instance?

MR. BRAIS: The commercial value alone, for instance. When, in answer to my Lord Porter's question, you find there the word used by Mr. Vernot when he refers to what he thinks is his right, to use commercial value alone ----------

LORD PORTER: I only wanted to know if when he said "one", which would be at any rate a step in your direction, you said that the assessors went further in their arrangements and said that they were entitled to use it as the only one?

MR. BRAIS: Yes, my Lord. That would be good under the 1941 re-statement of the law, but could not be good under the law which was in force at the time.

LORD PORTER: I suppose it could be right under the restatement of the law, but, all the same, it is a rather confused legal statement when you start by saying that you get it by means of intrinsic or replacement value and then you go on to what you neglected, and which is neglected in the original formula, the commercial value?

MR. BRAIS: That does not change anything today. The city never applied that. It is not for me to enquire why it was changed by the legislature, but in changing it the legislature certainly effected a very considerable change, in my submission, in what the law was.

LORD PORTER: I do not know what the case was which said that that change in the law made no difference, but I can quite understand that the court might very well have said it, having regard to the ending of the paragraph. I do not think it matters for the purpose of this case.

MR. BRAIS: All I can say is that that case has been negatived by the two cases I have read.

LORD PORTER: I was not saying that it was right: I was only saying that I could understand the court saying that it made no difference, having regard to the draftsmanship. I do not think it matters.

LORD OAKSEY: The 1937 legislation does seem to afford a sort of primacy to the replacement cost?

MR. BRAIS: But only as one element. The formula I would use would be more than primacy. It is a directive to use that as your basis. Then you can use the commercial, but only as one factor. That is not stated in the present law, and in my submission it is not necessary; and Mr. Vernot bears us out.

My Lords, the second point I make is that, if we had to infer from paragraph 14 that these instructions permitted the board to change the jurisprudence or the meaning of the law itself as regards the assessment simply by the process of limiting the information to be obtained, if it has been limited I submit that section 14 is not clear enough to constitute the authority to modify the general rules of law. I do not want to labour the question by citing to this Board the jurisprudence bearing upon the necessity that any exception should be stated with precision. That, in any event, would be how I should read that section and how I should apply it.

My Lords, the second point I want to stress on page 991 and which applies to us is this. At line 30 your Lordships will see: "The courts should intervene with prudence; they have not 'to judge the competency of the assessors'; they must not substitute their personal opinion to that of the assessors, whose valuation is presumed to be correct and reasonable, so long as the parties concerned have not established 'a real injustice or an important deviation', or that 'it is so erroneous that an honest and competent man could not have made it' and that 'a substantial injustice has been committed.'"

On that, we submit that that refers as much to the amounts which should be found satisfactory if they are reasonably approximating to each other, even if in the process it has been necessary to verify or modify the calculations.

LORD PORTER: Are you accepting that as the law? The Chief Justice says that it is all wrong. Are you saying with him that it is all wrong or are you saying that that is the law of Canada? He says that there is a specific stipulation that the judge of the superior court shall use his own judgment quite indepently of anything that has been done before. This says the exact opposite. Are you accepting this or are you accepting what the Chief Justice says?

MR. BRAIS: I am accepting neither this in its full text nor the Chief Justice, save that the Chief Justice says properly that under the law the judge is bound to re-assess "as to law and justice shall appertain", and there is a very great distinction between these decisions, which are ordinarily based on the doctrine that there must be a very serious discrepancy. The point I was making is quite intermediate to that. It is like an appeal from a judgment on the amount of damages awarded in a running-down case. There the appellate court might say, "We would have given 20 per cent. more or we would have given 20 per cent. less", but within that range I submit that it is not the prerogative nor the right of the other courts to modify the amount when you are within a reasonable range of the amount previously found.

LORD PORTER: The words you would use are "unless there is a substantial difference"?

MR. BRAIS: "Unless there is a substantial difference", whereas, under the Cities and Towns Act, there must be grave injustice, and various matters of that type. Here I place myself in the

ordinary position of the ordinary court judge under the Montreal statute, which gives far greater freedom to the appellate court than under the Cities and Towns Act, from which many of these decisions are culled. That would not let them go any further than the Supreme Court of the King's Bench did. They came to verify the figures. Everybody came to the same figure, more or less: some were less and some were more. They said, "That is sufficiently clear", and the Board of Revision did the same thing with Mr. Vernot, where you had a very large discrepancy.

LORD REID: Are you using it in this way? Supposing this Board were to come to a decision somewhere within sight of Mr. Justice Mackinnon or somewhere within sight of the original assessment, in either case you say that the figure should stand, notwithstanding that the Board would have come to a rather different figure. Is that what you say?

MR. BRAIS: Yes, my Lord.

LORD PORTER: Unless it is substantially different?

MR. BRAIS: Unless it is a substantially different amount. As "a substantial amount" is a matter on which it is difficult for me to instruct any tribunal, because that is a matter that has come within its practice, and we find that all courts have a rather self-imposed practice and percentage as to what is a substantial amount --------

LORD REID: You say that this rule applies as much to Mr. Justice Mackinnon's assessment as it does to the Board's assessment?

MR. BRAIS: Yes, my Lord, I should say that.

LORD NORMAND: I have read more than once what the Chief Justice has to say about the words "as to law and justice shall appertain", but I remain not clear whether these are technical words of the Canadian judicature or the law appertaining to the Canadian judicature or whether he merely says that these words throw upon the court a jurisdiction to arrive at an opinion of its own but not necessarily to displace by it another judgment which is substantially within the same range of figures. Can you tell me whether the words have a technical meaning according to the law of the Canadian judicature?

MR. BRAIS: The words have no technical meaning. They mean exactly what they say. They give the most complete freedom to the superior court - a freedom which does not exist under all the other assessment statutes of the Province of Quebec. I read to your Lordships the two statutes, the Cities and Towns Act, which covers all municipalities in the province, and the Municipal Code, which covers all lesser municipalities in the province, unless there is a special derogation by statute, as in the case of the City of Montreal. Those statutes say in most explicit terms that there must be no modification by the circuit court or whatever the appellate tribunal is.

LORD NORMAND: I have in mind the distinctive phraseology. I wanted to be quite clear that the words did not throw a special jurisdiction upon the superior court, unlike the jurisdictions belonging to most courts of appeal, to form de novo their own decision and, if it differs from the judgment under review, then to substitute their own judgment. I understand from you that there is no such rule?

MR. BRAIS: The interpretation of your Lordship is that it gives to the appellate court the ordinary right to invervene in the assessment?

LORD PORTER: I am not sure what it means. There are two possibilities.

LORD NORMAND: What I mean is that it is the same kind of right or the same duty, and is no greater than that which lies upon a ~~the~~ Court of appeal reviewing a judgment of first instance in an action at law?

MR. BRAIS: That would be my interpretation - "as to law and justice would appertain." That would be the application of law and justice as recognised. The distinction is because, under the general law of appeals in matters of assessments under section 5 (11) of the Cities and Towns Act of the Province of Quebec, chapter 233, revised statutes of Quebec, 1941, volume three, we find that this is not the general law in ordinary appeals. It says that the decision may be set aside only when a substantial injustice has been committed and never by reason of any trifling variance or informality. That is intended to go further than the general law: otherwise it would not be inserted. In section 384 of the City Charter, page 342, you will see several paragraphs. Then you will see: "He must proceed with the revision of the valuation submitted to him and with the rendering of such judgment as to law and justice shall appertain."

LORD OAKSEY: You will see the words "but without enquiry". They are rather peculiar?

MR. BRAIS: That is from our French Code.

LORD OAKSEY: It means taking further evidence?

MR. BRAIS: Yes, my Lord.

LORD OAKSEY: On the written materials which come up from below?

MR. BRAIS: Yes. In Exhibit P.11 I have, if it could be of any interest on this point, the French and English versions of the Code of Civil Procedure. You see the word "enquete" used in French. It is a derivative from the old French procedure. I think my learned friends and I were on common ground, because even the English-speaking lawyers in the Province refer to the "enquete", and the term is always used.

LORD OAKSEY: I should have thought that it would have been translated differently; but I quite agree about the word "enquete."

LORD PORTER: I think it is conventional as used in Canada.

MR. BRAIS: In Quebec only.

LORD PORTER: In other words, it is so customary to those practising in Quebec that they use it with a knowledge of what its connotation is.

LORD OAKSEY: "Without further hearing" would be better?

MR. BRAIS: Yes, my Lord. The enquete is the hearing. It is not "hearing"; it is "proof and hearing."

LORD PORTER: He does hear: he hears arguments?

MR. BRAIS: Yes, my Lord: it is "proof." We never use the word "proof" in Quebec, even the English-speaking lawyers. We speak French 90 per cent. of the time, and in the ~~formulas~~ formalised proceedings it is always "enquete." The translations of some of these statutes suffered greatly, so much so that at one time there was a law in the Province that the French version of the

statute alone could be used. I am glad to say that that was rapidly abolished, for obvious reasons.

LORD PORTER: Let us see that we have got this argument right. In certain cases the court is directed specially to follow the assessor unless he has plainly gone wrong in law or has done a gross injustice. The particular provision which you have got with regard to the superior court does not put him absolutely in the same position as if he was the judge first trying the case, but it brings him back to the ordinary law with regard to appeals, so that, unless there is a substantial difference or a difference in law, he ought to follow the assessors or the Board?

MR. BRAIS: The word "substantial" has less weight in the City of Montreal charter than when specifically used in the other instances. A judge could modify for a much more trifling difference if he was under that, whereas under the other charter if he did modify for a trifling amount the court of appeal would say: You cannot do that. Under the City of Montreal charter he is free. In the other case it would have to be a very substantial difference. When the statute says "substantial" it means much more than what the courts consider is the right to intervene and the right not to intervene.

LORD OAKSEY: You do not go as far as the Chief Justice, who, I gather, thinks that the superior court could substitute its own discretion for that of the lower court?

MR. BRAIS: Yes, my Lord; the superior court could substitute its own.

LORD OAKSEY: I thought you were saying that there must be a really substantial margin?

MR. BRAIS: No - some margin.

LORD OAKSEY: Then you agree with the Chief Justice ----------

LORD OAKSEY: I thought you said that you adopted an intermediate position.

MR. BRAIS: I would agree with the Chief Justice in the way he set out his views generally, except ----------

LORD PORTER: That he exaggerated a little?

MR. BRAIS: He exaggerated a little. That is the most I can say on it, because there is a difference, and a substantial difference, between the right under this statute and the right under an ordinary statute, and he has to proceed with the revision. That is very specific.

LORD OAKSEY: In our courts a court of appeal is in some cases almost as free to substitute its own discretion. In other cases it must not disturb the discretion exercised by the person below unless there has been some obvious efror of law or manifest injustice; but the question of which of those two positions was the true one would not depend upon whether the words "the Court of Appeal shall make such order as shall be just" were used. It appears here that the fact that it this formula occurs is relied upon, at any rate by the Chief Justice, as conferring complete liberty and latitude on the appellate superior court. I do not think that we in England would draw the same inference from the same formula.

MR. BRAIS: I would say that under Canadian law, having in mind

the other statutes and the distinction made here, in principle the Superior Court was free to do anything it saw fit, and was instructed to proceed with the revision and could substitute tis own views on all matters. In my submission there could not be any doubt on that. I think it is the only statute in the Province of Quebec that makes that distinction in the right of a judge on appeal.

LORD OAKSEY: Do the words "by summary petition" in the first paragraph of 384 apply in all cases of appeals to the Superior Court?

MR. BRAIS: No, my Lord. There are cases which are proceeded with on petition to the Superior Court - mandamus and certiorari and habeas corpus.

LORD OAKSEY: I am referring to the words in paragraph 384. It says that you shall proceed by summary petition. I was wondering whether that applied only to cases which did not exceed 1,000 dollars or to all cases. I do not see any other provision with regard to the other cases.

MR. BRAIS: Frankly, I would not try to estimate that. There must be too much brevity there. That is not at issue.

LORD OAKSEY: No; but it may have some bearing upon the degree of jurisdiction which was conferred upon the Superior Court.

MR. BRAIS: A Superior Court has exactly the same jurisdiction whether the matter comes before it by petition or by writ. There is not the slightest distinction in the jurisdiction of the Superior Court. If there was a distinction there it would have, again, to be more than an inference.

LORD PORTER: I am not sure whether I read this aright. If I thought it said that it was distinguishing between the Board of Revision and the assessors and said that there was always an appeal from the assessors and an appeal by special petition from the assessors where the value was less than 1,000 dollars. Is that right or wrong?

MR. BRAIS: That is my reading. Nobody has raised the prerogative of the Sun Life.

LORD PORTER: No. I only wanted to see if I followed what was said.

MR. BRAIS: Referring to these various distinctions, quite a distinction must, I submit, be made between a real injustice or an important deviation and any injustice and any deviation. Most of the authorities which we find cited at page 991, line 40 and following, are cases of municipalities which come under the Cities and Towns Act. That is that special statute which I have read. Shannon Realties v. Ville St. Michel would be under the Municipal Code. The Improvement Act of Alberta does not affect us. Then there is Gouin v. Cite de St. Lambert and the Vancouver Incorporated Act, and at line 46 Fortin v. Paroisse de Contrecoeur. Then Daigneault v. Notre Dame de St. Hyacinthe is under the Cities and Towns Act. Then we have Canada Cement. We saw that they could not do anything about that. All the evidence they had was on the replacement value, and Mr. Pareau, in his book, warns against the wrong interpretation. Then there is St. Denis. v. City of Montreal. Therefore of all those cases there are only two which come under the City of Montreal.

LORD PORTER: What is the other one besides Canada Cement which you

say has any bearing on this case? You said that there were two?

MR. BRAIS: I said that there were two City of Montreal Cases. There is St. Denis v. City of Montreal and McEvoy v. City of Montreal. Those two cases were respectively in 1915 and 1920. I do not know whether in 1915 and 1920 the instructions on appeal were the same as today. That would have no bearing on my argument, where I say that the very broad principles which you have are generally predicated upon in our law.

LORD ASQUITH: I am afraid that I rather missed the point about the Cities and Towns Act. You say that only three of these numerous cases are otherwise than under that Act?

MR. BRAIS: Yes, my Lord.

LORD ASQUITH: The difference it makes is what, to the scope of an appellate court's jurisdiction?

MR. BRAIS: Yes.

LORD ASQUITH: It has greater latitude?

MR. BRAIS: It has less latitude than in the present case.

LORD ASQUITH: Less latitude in a Cities and Towns Act case than in the present case?

MR. BRAIS: Yes, my Lord. It has to be a substantial injustice or an important deviation.

LORD ASQUITH: The three cases are Canada Cement, St. Denys and one other?

MR. BRAIS: McEvoy. The Canada Cement case has no application, because they have nothing to go on save the original assessment.

LORD PORTER: Have you anything to say about the other two?

MR. BRAIS: I have nothing to say about them, because I have not them before me. I do not know whether in 1915 and 1920, which are the dates of those two, the law was the same or not the same. I do not suggest one way or the other, because I was looking through the statutes the other day, and was not able to make it out.

LORD PORTER: You can rest your argument in this way, if you like: These two cases are quoted here, but it has not been shown what the facts and circumstances were, and, until it is shown what the facts and circumstances were, I say that they do not prove anything. That is what you can say at the moment?

MR. BRAIS: Yes, my Lord.

Then, my Lords, at line 42 on page 992 his Lordship says: "They are in agreement that the following methods" ----------

LORD PORTER: Then he says that only (d) and (e) come in?

MR. BRAIS: Only (d) and (e) can be taken into account.

He then says, at line 14 on page 993: "The submission of the Sun Life is almost entirely based on the fourth of these methods, namely that the value is the price which the revenue possibilities of the property will command. On the other hand

the assessment of the city is based mainly on the depreciated cost approach."

What I want to submit on that is that his Lordship has entirely overlooked the very careful and very emphatic evidence of Perrault, the architect, and Archambault, the engineer, who went into the price of the building on a replacement cost basis, depreciating the building, on the other hand, for physical depreciation.

LORD PORTER: They both of them worked it out by the cube?

MR. BRAIS: Upon the cube. Secondly, they depreciated the building for space that was a total loss. Thirdly, they depreciated the building for space which was of very little value, and with this distinction, that they did not approach the commercial approach at all, except that Perrault said that it follows that you get these figures merely of commercial value; but when you say that you have blended twice the commercial approach; but the principle is not to use the commercial approach at all, because there is a better method. But the Sun Life took both methods in its effort to satisfy the court on the replacement cost basis, and applying the proper depreciation and using that basis alone it comes out at a figure of 8,800,000 dollars, roughly, found by both these gentlemen, and they do not, like Knubley or Simpson, endeavour, wrongly, to say, "We base ourselves on revenue." They have not looked at revenue, but they have looked at the area to see what that area can bring in in competition with other buildings, and why for that reason the replacement cost has to be reduced.

Then there is a reference to the Canadian Cement case. We have had that many times. Then at line 32 he says: "It cannot be seriously contended that these five approaches are limitative".

LORD PORTER: All that is saying is that if you are going to attack the company because it has put 16 millions in its books, you can, on the other hand, attack the City because it has put 8 millions in its books.

MR. BRAIS: When it did that it was considering the assessment value. That I am entitled to do, my Lord. We will look at that when we look at Mr. Justice St. Germain's figure. May I pass to the last case on page 993 which is an expropriation case and which has nothing to do with us. Then on page 994 at line 15 is the case of The King v. Spencer which is an expropriation case and has nothing to do with us.

LORD PORTER: We have had the cases referred to and unless there is some special point, you can pass them over.

MR. BRAIS: I am passing them over, my Lord. Then he refers to Schmutz which has been cited by my learned friend. Then on page 995 you get McRossie, which is the same thing.

Then he goes into the jurisprudence and he makes a mistake, I submit, at page 995, line 38, after the decisions which we have cited there he says: "These cases all more or less follow the principle that the real value is the price which a seller who is not obliged to sell and who wishes to sell could get from a purchaser who is not obliged to buy and who desires to purchase. This is known as the 'willing buyer - willing seller' formula. The difficulty of applying this formula to a property of the nature and size of the Sun Life can well be understood". We do not agree with Mr. Justice MacKinnon in so far as he subsequently concludes with that.

LORD PORTER: What is wrong?

MR. BRAIS: It is because subsequently in the judgment, and I will refer to it, he does not consider it possible to contemplate the buying and selling of the Sun Life building.

LORD PORTER: Actually, you have no complaint of this, as I can see: "The difficulty of applying this formula to a property of the nature and size of the Sun Life can well be understood".

MR. BRAIS: So far so good, I agree, but I just draw that preliminary statement to your attention.

Then on page 996 there is a description of the building given by Mr. Lobley. Then at the top of page 997 he says: "It has many good points, but it has also a distinct number of faults in its planning. There are various things there much in the manner of wastefulness of space, the amount of service space, the lighting of many of the offices, and the fact that some of the office windows are more or less obscured or partly hidden by balustrades".

Then at line 45 he refers to the witness Cartier who says that the corridors are spacious and so forth. That is a City witness who said we have to have wide corridors because we are going to put 10,000 people there. We are not having 10,000 people and we are wasting that space, it has become a total loss.

LORD OAKSEY: This witness is not saying there is a lot of waste space, is he?

MR. BRAIS: No, my Lord.

LORD PORTER: He says you have to have wide corridors because you are going to have 10,000 people there.

MR. BRAIS: He emphasises the fact that we are going to use it for a very large number of people and he is a City witness. He emphasise the fact that the corridors are spacious. When I say to your Lordships that the vastness of the corridors was to take care of 10,000 people which will never be in that building, I think I am entitled to submit the City recognised we have vast corridors and that they say we have because we are going to have a large number of people in there in the future.

Mr. Perry, another City witness, on page 998, at line 18, says: "The planning of the building is not elaborate, but close to it. Some parts are distinctly elaborate". That is our banking chamber which was a nice hall, but that is only 2 per cent of the total area.

On page 999, if I may draw your Lordships' attention to what Mr. Justice MacKinnon says, in the light of what I have already noted as to the difficulty of selling, starting at the bottom of page 998 he says: "In order to apply the willing buyer - willing seller formula in valuing the Sun Life building one would have to imagine a hypothetical sale. This has been the main approach adopted by the Sun Life and its experts in making their valuations. They have based these on prices which would probably attract the prospective purchaser but have failed to consider the price which the Sun Life would have been willing to accept. The court cannot ignore the fact that the Sun Life carried this property at a price almost double the value given it by its own experts". Then we have the full list of prices which have been already referred to.

He continues: "Surely it cannot be contended that the Sun Life would be a willing seller at the valuation placed on it by its experts in applying the 'willing seller - willing buyer' formula. Lobley places it as 7,250,000 dollars Simpson as 7,500,000 dollars".

I say in so far as Mr. Justice MacKinnon says to himself there: You have to imagine an ordinary buyer but you cannot do it because the Sun Life would not sell, if he says that, he is misdirecting himself. I do not think I have to stress that point further, because I am taking the position that when he has arrived at a final figure, and where he has done it, as we say in our case, he has effectively taken care of the willing buyer - willing seller theory and the higgling of the market, and has effectively arrived at a result, the amount of which we are prepared to accept. So whether he misdirected himself there or not, as long as in the process he has done that kind of weighing, which a person does one way or another, we do not complain with the result.

Then we come to the pith of his judgment on page 1000. Starting at the bottom of page 999, at line 40, we have this very important consideration which has been passed over completely by the Board: "On the other hand the Board of Assessors of the City of Montreal on the 18th of November, 1931, reduced the assessment of the property from 12,400,000 dollars to 8,000,000 dollars and the following appear as the annual assessments from then on". Then we have the figures which give an annual assessment in 1941 of 9,986,200 dollars. The City of Montreal year by year has

taken into account the figures of our additions and this is one of the very few buildings which, during that period 1936 to 1941, was having a difference in its assessment because the other rolls were frozen.

LORD PORTER: Only to the extent to which fresh changes in the building took place.

MR. BRAIS: Only to that extent, to the exact dollar. We had been re-assessed in 1931 and reduced from 12,400,000 dollars to 8 million dollars. Then year by year to that was added the actual dispersements and no depreciation was applied to the building which went on year by year. We are not complaining of that, but we arrive at that amount then of 10 million dollars.

LORD ASQUITH: Was the actual expenditure not added in the case of other similar buildings?

MR. BRAIS: All buildings, during the period when the rolls were frozen, had additions added, and if there were new buildings they were added to the roll, but from 1936 on there were no changes in any valuation.

LORD PORTER: You have now said two separate and contradictory things. The first thing you said was that all buildings had added to their valuation the amount of work done upon them. Your last observation was that they remained the same. Which is accurate?

MR. BRAIS: If I was so understood it is not what I meant to say. I would say that all buildings had added to them from 1936 on. What was done before, I do not know, I have not the faintest idea except what we have in the exhibits we saw the other day when we saw there were no changes.

LORD ASQUITH: Perhaps there was no expenditure incurred in the case of other buildings.

MR. BRAIS: The suggestion has been made by my learned friend, Mr. Beaulieu, that this was the only building which was being completed during that time, but that would not change anything. I would say that there would be buildings in the same position. In the joint admissions, volume 1, page XI, Roman numerals, for example, in 1930 the Aldred building was not built. It was built in 1931 and then remained unchanged right through to 1942 and 1943. With the exception of the other long list of buildings which remained unchanged -----

LORD PORTER: All / We wanted to know was whether there was any discrimination with regard to the Sun Life in that it had added to its assessment the cost of work which it put in hand after 1936, or whether in fact the same thing was done with other buildings and that with regard, at any rate, to a number of large buildings no change appears upon the roll, because no change was made in the building.

MR. BRAIS: That would be a proper statement. We do not suggest there was any discrimination and it would only be proper when new buildings went in, I suppose. We put in our new additions and if some other smaller buildings were overlooked, we are not complaining.

LORD PORTER: That is all we wanted to know.

MR. BRAIS: As regards the other buildings, if I may refer to my Lord Asquith's questions, in volume 1, page XXI, Roman numerals, the schedules there show what happened to other buildings.

LORD ASQUITH: My impression was that they remained the same figure.

MR. BRAIS: They remained the same figure throughout. If one looks at volume 5, page 876, schedule B, one sees that 47 large buildings referred to by the City of Montreal remained constant, that any changes were down. Those that went up numbered 3, including the Sun Life.

Then Mr. Justice MacKinnon continues that point on page1000,contemplating this difference: "The roll was frozen in 1937 by the Statute 3 George VI, but this does not sufficiently explain why the assessments previous to 1937 varied so from the ones under consideration. Presumably they were prepared by assessors sworn to arrive impartially at the true and correct value after considering all the various elements entering into their estimate. While the Board has declared that the assessment of 1941 is not an increase in the previous assessments but is a new and independent one the bald fact remains that a tremendous increase was made".

Again, not only the assessor in 1931 but the Board of Assessors reduced the assessment of the Sun Life to 8 million dollars, and when we come to Mr. Justice St. Germain's decision I will show that his figures as to the amount spent are just and do not exceed in fact the amount at that time. They have been raised since.

Then at line 28: "The court considers that for a property such as that of the Sun Life both the depreciated replacement approach and the commercial approach should be considered even though the valuations arrived at show a considerable variance.

"It is recognised that in dealing with buildings such as churches, theatres, railway stations, etc., where there are no means of establishing a normal rental value or to get a true picture of net earnings that the replacement cost must have a considerable bearing on the valuation".

Then from line 40 and right through to page 1001 the court considers this case of the Federal Reserve Bank and the State of Minnesota. May I say, in order that the Board will not be confused, there are two important cases. There is this State of Minnesota case and there isanother case cited by my learned friends the Minnesota and Ontario Lumber Company which is a Canadian case and has nothing to do with the State of Minnesota.

This State of Minnesota case was not only strongly relied upon by my learned friends, but submitted and quoted by them as governing the duties of the assessors in a case such as this one, when they are considering a monumental building, as they say. Not satisfied with that, when the case was printed the judgment itself was printed into the record.

We find at line 43, on page 1001, a point whihh interests the respondent: "In substantiation of his estimate of the true market value, as contemplated by the statute, he" - that is the assessor - "figured the reproduction cost of the building as of May 1st, 1936, to be 2,600,000 dollars. He allows 25 per cent depreciation, being approximately 2 per cent per year for the life of the building" - this was a fortresslike building, and it was getting 2 per cent - "and by reason of the apparent difference of opinion as to the effect of the distinctive architecture on its market value, both artistically and as an utilitarian structure, he allowed an additional 25 per cent for depreciation. Therefore,

atotal of 50 per cent depreciation is to be found in the assessor's computation".

All I have to say on that is that if that is good law and if that is a proper assessment in this case which is submitted to us and relied upon by the appellants, there would be no reason in the world why the Sun Life building, with its own limitation in use on account of wasted space, on account of anything one wishes to take into account, should not for the same reason, the identical reason, be given the 14 per cent given by Mr. Justice MacKinnon. The City rely upon this on a replacement basis, and if that is good application to come to 50 per cent total depreciation on a replacement basis using 2 per cent with a fortresslike building which is used for one purpose only, to store the gold reserves of the Federal Bank, the Sun Life is entitled to the same depreciation.

LORD ASQUITH: On what grounds do the City rely upon this Minnesota case? I should have thought it was against them.

LORD PORTER: I think they rely upon it as showing a case where replacement in the sense of cost of erection was used and then deducted the part which gave the 50 per cent depreciation saying the proper action of the court is to take the replacement value, but in each case you have to find out what is the proper amount of depreciation and in this case 14 per cent is enough. Is not that their argument?

MR. BRAIS: May I ask leave not to try to answer. Frankly I do not understand sufficiently to try to inform this Board. I read this judgment in its plain text. There is no equivocation about it, it has been relied on, it has been filed and it has been quoted, and Mr. Justice MacKinnon makes use of it. All I can submit is that he most properly makes use of it. What the City's further contentions are as to the Minnesota case I frankly do not follow sufficiently to take upon myself to try to interpret their contentions.

LORD ASQUITH: If they do swallow it whole do you mean you are entitled to double depreciation?

MR. BRAIS: Quite, my Lord. When I say double depreciation I may be entitled to the figure given by Perrault or I might be entitled to the figure given by Archambault for the same reason.

LORD OAKSEY: It is not an authority for saying that you are entitled to double depreciation plus the difference between commercial value and replacement cost, because the only thing which was considered in this case was replacement cost. They were not considering commercial value at all.

MR. BRAIS: Of course, we are getting into something different there.

LORD OAKSEY: The point my noble and learned friend was suggesting was that it was authority for saying there ought to be double depreciation. The whole argument against double depreciation is that the second depreciation is accounted for by a division between commercial value and replacement cost.

MR. BRAIS: If I may be permitted, I make that distinction between the extra depreciation which arises out of the fact that you have nothing of value there and the other depreciation found by Perrault and Archambault where they say you have so much space but it is limited in value on account of the fact that you cannot get a proper rent for it.

LORD NORMAND: I would suggest that this is authority for this that allowance has to be made for inadaptability. How that is to be made may depend upon the methods preferred by various assessors but that no-one factor should be controlling and that the assessor must be given a reasonable latitude in exercising his own judgment in determining the value. There may be extra depreciation if you are only working on replacement value, but if you are working with two separate methods, such as replacement value and commercial value, you may make it by weighing the commercial value more heavily than the replacement value or you may combine these methods.

MR. BRAIS: Or you take less for your depreciation and put more on your commercial, or you may take off this extra material which should go to replacement and then you modify your figures. With regard to the question whether the Minnesota case does not conflict when there is blending I will say that the witness Perrault and the witness Archambault did not do any blending; they arrived at value on a cube basis which value is substantially that found by the other witness. Then they take offdepreciation, then they take off in one instance 28 per cent and a further percentage all based on the condition of the building as in the Minnesota case. Mr. Archambault did the same thing as in the Minnesota case. He did no blending and he arrived at 8 millions odd. That figure does not take the commercial value into account whatsoever. It takes into account what the building is worth physically for the purpose of receiving tenants in a general way, but in no other manner and that is what was done in the Minnesota case.

LORD PORTER: The next bit said that originally it was intended to house the whole of the staff in that building; circumstances altered and now we are decreasing them.

MR. BRAIS: That is an important finding of fact, because the Board, in applying itself to the same consideration, found that the building was to be used by, and was built for the purpose of housing, a large staff, and the company could at some future time make use of it when they saw fit, if and when they saw fit to put in a very large staff. In law in assessment cases that is a completely erroneous direction. First, because it is incorrect in fact, and secondly because obviously it is completely incorrect in law as what happens in the future cannot be carried by the assessors, but we have this finding by Mr. Justice MacKinnon at line 20 which I respectfully submit is completely in conformity with the fact.

On page 1003, at line 20, it says: "When the building was originally planned and built the Sun Life contemplated the use of the entire building by its own employees. While it was erected for a special purpose it was built to house office personnel. It is essentially an office building. The Sun Life subsequently found that instead of its staff increasing as contemplated it now requires only about 50 per cent of the building and has established that due to decentralisation of its business it will in the future require less space than it now occupies. The space not required by the Sun Life has been either rented or can be made available for tenants". That, in the light of the exhibits and the evidence, is a completely proper statement of fact.

LORD OAKSEY: The part erected for special purposes was the part to house office personnel. The lower part which was built, the banking hall and that part of it, was not built to house office personnel.

MR. BRAIS: I put the banking hall aside. The banking hall has been magnified. The banking hall is so small that it really

plays no role except to figure very strongly in Mr. Perrault's and Mr. Archambault's evidence. It is less than 2 per cent. The rest of the building was built by the Sun Life Insurance Company of Canada to house office personnel. The requirements of the young ladies who work in large numbers for the Sun Life so far as floor space and space to put up desks are concerned is identical with the requirements of any other tenants in the world, and that is in the evidence. As to the direction of the court I would just like to tell very briefly the story of the erection of the Sun Life building as it appears in the evidence.

LORD PORTER: Does anybody deny this statement that it was originally built to house the whole and now the staff is gradually decreasing and there are certain disadvantages in its features, because we cannot be too elaborate?

MR. BRAIS: As to the disadvantages in its features Mr. Mills and Mr. Desaulniers want to say that is because you made this to use yourself; they gave greater value to your building because that was at the time you had 10,000 people.

LORD PORTER: I should have thought your answer, rightly or wrongly, would be that may be so, it may have given advantages to the building as long as we intended to use it for our own staff, but now that we find we have to keep on decreasing staff rather than increasing it it is a disadvantage. That is the answer?

MR. BRAIS: Yes, my Lord. It is a very serious disadvantage.

LORD OAKSEY: Where does the disadvantage come in? If you have a number of bedrooms in a particular building which you designed for your own staff and then you do not want them for your own staff, but you proceed to let them, I do not see where the disadvantage arises.

MR. BRAIS: You do not design office space for your own staff. You make office space available for your own staff, and because the building was constructed as a square structure to retain all the architectural features of this small little building in the corner, it was less than 10 per cent of the whole, the Sun Life has built a very inconvenient building on account of its shape to house its staff, but the evidence is clear that there is no other purpose for that building than to house office staff. There is no difference in the requirements of the office staff of the Sun Life than there is in any other large commercial institution.

LORD OAKSEY: Then they can let it for office staff?

MR. BRAIS: They can but they cannot get a proper price because the suites are so dear to maintain the architectural beauty of the building that when you do let them you get a very low price, and that is reflected on the value of the building.

LORD OAKSEY: I thought you told us that they were getting a very high price.

MR. BRAIS: No, we are charging to ourselves a high price, having in mind our investment in the building, possibly; but we are not getting a high price. We are charging ourselves a much higher price, almost 50 per cent higher, if I remember rightly, at any rate 30 per cent higher, than we could possibly get for that place. Those are the figures I placed before this Board last week. The evidence so far as the respondents are concerned is absolutely clear. The Sun Life is an Insurance Company with staff to house, and it has no requirements so far as its staff is concerned that are not peculiar

to any other organisation. It has the cafeteria which you would have to have in the building anyway, if it did not have this cafeteria, and if it was totally rented, you would have to have somebody to feed 5,000 every noon. It is a small town. You would have to have an assembly hall and you would have a banking hall, which is the only element upon which there is some doubt, but that banking hall one must not exaggerate to make it appear that it is the Sun Life building. The cafeteria space is ordinary space, the gymnasium space is ordinary space. It was rented to the Army during the war for use as a cafeteria or anything else in the world, but when you come to the space between the centre columns of the building you have elevators and wasted space, and when you have put 24 storeys in the building when under all ordinary standards of proper efficacy with that type of building you should have 27 storeys, you have wasted a lot of money and you have wasted a lot of space. Somebody has, for a short time, enjoyed the glory of having done something which drew attention to him, but to the Sun Life of today, the company and its shareholders, it does not give a cent of value.

LORD REID: What I have not quite grasped iswhether you are saying that the value for assessment purposes is less, because the Sun Life are only now using a small part, or whether you are saying that the argument which you now submit would have resulted in an equally low valuation for assessment even if the Sun Life had been using the whole building.

MR. BRAIS: I have not applied myself to the second question. I have said that under present conditions we cannot make proper use of that building and that thereby the building suffers a great loss.

LORD ASQUITH: There are some of these awkward features which would have been just as awkward if the building had been filled up with the Sun Life's own staff. You talk about the depth of some of these offices. That would operate equally against the Sun Life people as against others.

MR. BRAIS: Take the lost elevator space. If we had 10,000 employees in the building that would not be a loss, and the wide corridors where these young ladies come trooping out at 12 o'clock noon, ten thousand of them, coming in at about the same hour, though they stagger them as much as they can, but you would have those people going in and out of the building and you have to build for that, and left yourself with a building which is not used as it was destined, and can never be used as it was destined. You have a complete dead loss there, and when you have corridors that are at least twice as wide and the space in between the elevators sometimes three times as much as is clearly needed by tenants from the tenth floor up, that is a dead loss. That is why that building, to the surprise of everybody, has not been assessed higher. When people visit that building and go through the corridors they refer to the dream of the man who conceived it, but that does not help in the assessment of this building.

LORD OAKSEY: For myself I find it quite impossible to form any opinion about this sort of argument without seeing a plan or without seeing the building itself.

MR. BRAIS: We have the plans here, floor by floor.

LORD OAKSEY: It is not for this Board to look into that sort of question. It is only a question of principle with which we ought to deal.

MR. BRAIS: In the light of what I have said I say that Mr. Justice MacKinnon properly applied the principle when he

marked that extra 14 per cent on the replacement value of the building, because nobody in his senses would replace that building for the Sun Life or for anybody.with similar requirements to the Sun Life. Nobody would ever have widened those corridors and left in that dead space nor would he have spent the money which was spent on the extra decoration.

I will be quite frank with your Lordships, I would have preferred Mr. Justice MacKinnon in choosing his 14 per cent to have chosen it for the waste space rather than for the waste decorations, as long as we arrive ultimately at substantially the same figure as,we will say,when we apply Perrault and Archambault.

LORD PORTER: I think it is common ground that in fact the corridors are wide, that the rooms are deep and that the other various disadvantages exist if you are considering the building purely as a lettable building, but what is said against you is not that it is a purely lettable building, but that it was built for a specific purpose, and having been built for a specific purpose you have to take it as such. That may be right or wrong, but those are the two principles and I do not see that we can get any further by going into calculations as to how much space is wasted or exactly how it happened.

MR. BRAIS: Obviously we cannot use the building as it was intended. It is that very statement which should be applicable.

LORD PORTER: Which you rely upon.

MR. BRAIS: I rely upon. Other witnesses are very prolific in describing the vastness of the building and its large space and that in the future we can put in so many more elevators and we can accommodate in the dark places so many more people and we can put in more cafeterias and so forth which we never will.

(Adjourned for a short time).

Fos adjnmt.
fcl

MR. BRAIS: May I enquire whether the Board would desire a very brief clarification on the question of proof from the Civil Code, which I have before me, or does the Board feel sufficiently informed about that?

LORD PORTER: I think that we feel that we know sufficient about that.

MR. BRAIS: I should only refer to Article 418 of the Code of Civil Procedure. There are two things. There is the Civil Code, which is the law, and the Code of Civil Procedure, which is the code bearing on procedure alone. In French, we have Article 418 in Chapter XX, the heading of which is "Enquete et Audition et Enquete dans les causes pas defaut et ex parte."

LORD PORTER: You have the French, have you?

MR. BRAIS: Yes; the French and English. If I read the French, it will be easier to follow. Article 418 says: "Nonobstant les dispositions de l'article 532, lorsque le defendeur ne comparait pas ou ne repond pas a l'action, le demandeur ou tout autre partie qui a comparu, dans toutes les causes, peut inscrire: (1) Pour proceder a l'enquete en terme ou hors du terme, si une enquete est necessaire; et la preuve se fait alors devant le judge"; that is the proof; (2) Pour preuve et audition en meme temps."

Then in English we have: "For proof in term" -- that is when it is by default and there is no hearing -- proof is put before the prothonotary, and then, secondly, for proof on hearing at the same time.

Then the Code follows on on those matters. I do not think that there is any possible dispute. That word "enquete" has become a standard word, more or less loosely used.

LORD PORTER: Used whether the discussion is in English or in French?

MR. BRAIS: It means proof; the evidence.

LORD PORTER: Whoever is arguing or putting it on paper in Canada would normally use "sans enquete"?

MR. BRAIS: Yes, if it is just argument sans enquete.

LORD PORTER: If there is proof and then argument, it is proof and hearing, and not proof enquete et audition.

MR. BRAIS: If I may now be permitted to apply myself to another subsidiary point which came out of the discussion this morning, when my Lord Reid was referring to sub-paragraph 14 of section 382 of the Charter, we have there "The Board may be any time determine the manner in which the assessors shall proceed with their work." The point that I want to make is that the assessors are not limited in proceeding with their work to the information which the Board tells them that they must obtain, because it is provided by section 378: "It shall be the duty of every ratepayer and citizen to give, when requested, all information that may be sought by any of the assessors or any member or representative of the Board of Revision of Valuations in the discharge of their duties; and any such person refusing to give such information" and so forth. Therefore, the assessor could obtain all the information that he desires, and I would say that subsection 14 of section 382 is not limitative and, if one looks at the form which is supplied -- I am referring to Volume 4, page 701 -- which is called the fiche permanente - the permanent file sheet --------

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LORD REID: Do you say that the Board were not entitled to give the instructions which they did give on the 21st September, 1939, which is to be found at page 97, namely, "The net replacement cost of buildings in the third group will continue as at present."? Was that beyond what they were entitled to do under the Charter?

MR. BRAIS: I say that under the Charter as it existed at the time when this assessment became effective they were not entitled to give those instructions, in so far as those instructions can be held to say that the net replacement value shall constitute an element or a factor in the assessment other than the law permits.

LORD REID: They exceeded their powers, according to your argument, in giving that and a number of other detailed instructions to the assessors in this document of 21st September, 1939?

MR. BRAIS: I am sorry, my Lord.

LORD REID: Is not that right?

MR. BRAIS: No, my Lord; it is not my submission in any event, if I may present it to your Lordships. They are entitled to say: You shall make a replacement valuation. In that instance it was a valuation on the basis of appraisal, as we have previously submitted; but I do not want to go further into that. The only purpose of that that could be legal is in order that the assessor may have that figure before him for consideration, if he saw fit; but that cannot be interpreted to say: You, the assessor, will take the replacement cost on the appraisal basis or on the historical basis. It would be immaterial to me. They are not entitled to say that, because when they say that they go outside the purports of the law. As long as they tell the assessor: Here are the mechanics of your department and you shall see that you get a certain amount of material before you applicable to various buildings, then they are not outside of their powers and they are not outside of the section which gives them the power to do that.

LORD PORTER: I am not sure what lies in these instructions. For instance, they say: "The reconstruction cost of any particular building will be fixed following its cubic content and the price per cubic foot already determined for the type of construction to which it belongs." Obviously they did not follow that.

MR. BRAIS: No.

LORD REID: I thought that your complaint was that the assessor was not following his instructions.

LORD PORTER: I was not dealing with his complaint. These are certain instructions which are given. Obviously they did not follow that.

LORD REID: No; they did not follow that.

MR. BRAIS: They did not follow the instructions, unfortunately; and we were equally most unfortunate in not raising this in our Reasons, so that we could have complete value of it for the purpose of my argument; but they just say there: "The unit prices, the cost of reconstruction and the percentage of annual depreciation of buildings are established by the Technical Division", and then "The net replacement cost of buildings in the third group will continue as at present."

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That does not purport to tell the assessor in so many words: You will use that alone or with any other formula in arriving at the value.

LORD REID: Of course not.

MR. BRAIS: But I say that, in so far as that instruction is given and is predicated on a law which is no longer applicable at the time of the assessment, they have gone outside of their enabling powers. As I said this morning, and I do not want to elaborate the point further, having regard to its very simple terms here and having in mind that it is for administration purposes, they cannot use this administrative prerogative in telling the assessors of the kind of department that they are going to set up to have all these things before them. There is nothing in that subsection 14, I submit, which would permit of that interpretation and, if it did permit of that interpretation, it is because thefe is a conflict between one particular item of the law which was in existence in 1937 and the amendment in 1941, which re-set the old law, and that conflict would have to be interpreted to take away from the assessors the powers of defeating the purpose of the law as it stood in 1941, because there is an administrative provision in the statute. If section 382, subsection 14, added (and it would have to add, in view of the fact that we have thrown out of the statute the word "replacement", the word "intrinsic", the words "commercial value", but as one element alone) it would be necessary to find here at the end of subsection 14: All the assessments having been completed in conformity shall be valid - something to elevate this section from a purely administrative section into one stating the law.

LORD REID: I do not want to labour this; but do I understand the proposition then to be this: That Monsieur Vernot was not legally tied by any instructions as to what method he adopted in finding replacement cost and therefore he was perfectly entitled to take the historical method, although, of course, you may well say that he was wrong in doing it; but he was not doing anything illegal in taking the historical method, because he was not tied to any other instructions?

MR. BRAIS: I cannot subscribe to that, my Lord, and for this reason: That, in so far as the Board of Revision sets forth the method, the machinery, the way that you compute replacement cost (if one is to use that word, which is a misnomer) as a prerogative --------

LORD PORTER: Why is it within their prerogative to say that you shall do it by cubing and not within their prerogative to say that you shall do it by replacement cost, but you shall find the proportion of that to commercial value and, having got that proportion, you get your figure accordingly? Why is that wrong, if the other is right?

MR. BRAIS: Because the Board did not instruct the Board as to percentages. That is the assessors' own memorandum.

LORD PORTER: What about the observation?

MR. BRAIS: On the instructions of the Board?

LORD PORTER: No; "will continue as at present". That is at page 97 of the Manual. How far does "as at present" mean in the proportion indicated?

MR. BRAID: It does not say "in the proportion indicated", and that

4

is the distinction to be made and it is clear, I submit, from the facts.

LORD PORTER: I dare say that it does not say that; but it says "as at present". What was "as at present"?

MR. BRAIS: That was the replacement value only.

LORD ASQUITH: Do you mean on historical method or what?

MR. BRAIS: I have submitted that that was the appraisal method.

LORD ASQUITH: Any particular variety of replacement value?

MR. BRAIS: The indications all are, as I have already indicated, that they had in mind the appraisal method to arrive at the value; but the question of my Lord Porter is whether that would indicate a direction as to the blending. It does not, if I may say so respectfully, because that is just applicable to this one item of arriving at a replacement value and, whether it be by historical or appraisal, it is just that portion of the information which is the assessor is to have before him and has nothing to do with the subsequent task of arriving at the actual value, which means that you have to apply the law. Again, I must draw to your Lordships' attention that when the Board applied itself and used the word "replacement" in May or June, 1939, there was a statute which said that the actual value of the building should be determined by the intrinsic or replacement value, and it was because that was there in black and white in the statute that the Board applied itself to that word. In May, 1941, it no longer existed and the definition of "replacement" as intrinsic value was no longer in the law and all that was left to us was the jurisprudence in its scope such as we have it here today.

LORD ASQUITH: "Intrinsic" does not add anything, does it? It is consistent with the other sort of indication as to value.

MR. BRAIS: Except that intrinsic value cannot be historical value. I would say that intrinsic value cannot be historical value and, if the legislature at any time had wished that the value should be arrived at by the amount of money actually spent and was using the words "intrinsic" and "replacement" interchangeably and they are used interchangeably right through, it would have used the word "historical" or "replacement" value.

LORD NORMAND: You might, I think, arrive at an intrinsic value by starting with the historical figures and making deductions or allowances in respect of any peculiar happenings which increase the cost above what it ought to have been if those happenings had not occurred. "Intrinsic value" simply means reducing the cost at which it might be constructed at a given date. That may be done in a great variety of ways.

MR. BRAIS: Yes; I am fully in agreement as to how the intrinsic value is arrived at, either by appraisal or by historical cost, eliminating things which do not exist in a building as a usable building. You would arrive at the intrinsic value or you arrive at the appraisal or you arrive at it as Mr. Perrault did, by using his formula; and so did Mr. Archambault. I do believe that that you have something to start on there. There is no objection, if you want to use the historical value. I say that there is no objection; but the authors criticise it severely and the manual criticises it severely and Mr. McRossie criticised it severely as being an unreliable method, because the costs of the contractor (and they say so in so many words) may be 100

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per cent more than the costs of another contractor.

LORD ASQUITH: Why take intrinsic value and contrast it with revenue producing value, commercial value, the subject matter of the income consideration, and terms of other things? If that is the relevant contrast, I should have thought that it would include replacement value on the historical method of replacement value on the appraisal method.

MR. BRAIS: If in considering the historical method you make proper allowances, it may be very well. I do not want to use this manual, which does not belong to me, any more than I have to do; but the manual is very precise and Mr. McRossie is very precise in saying that the use of historical cost (and nobody would build a building on historical cost) does not give you the right figure; but, applying ourselves to this particular point, I have no real quarrel, provided that we arrive at the same result, and that is where the assessor must take his freedom to weigh and control and so forth.

The point that I was addressing myself to in answer to my Lord Reid was in trying to clarify the fact that these instructions were not of a nature to give legal sanction to what the assessor did, just because the Board has given certain instructions. It is not limitative.

LORD PORTER: The Oxford Dictionary gives as the third meaning of "intrinsic" "belonging to the thing in itself; inherent; essentially appropriate" and then gives as one quotation "the intrinsic value of silver considered as money". I am not sure that it helps very much; but personally I should agree with my Lord Asquith, that it means its actual or real value; but you may arrive at that by one of three methods: the historical, the cubing or the appraisal method.

MR. BRAIS: I do not think that I have to quarrel with that, my Lord. It depends how you apply it.

LORD PORTER: It depends on this, does it not? There may be certain cases where it is right to take the replacement value at the historical value; there may be cases where it is right to take the cube as a rough and ready test; there may be cases where it is right to take the appraisal. There may be cases outside that range, where it is right to take the commercial value?

MR. BRAIS: Yes.

LORD PORTER: That is a matter which, provided that they use proper principles, is for the assessors.

MR. BRAIS: Quite, my Lord.

LORD PORTER: They have to use proper principles.

MR. BRAIS: And, whatever formula you use, you will have to weight it differently either in arriving at the final of the replacement or intrinsic value or, if you are going to take that historical basis and all the money and time and so forth used, you have to weight it ultimately and much more considerably in their blending, as my Lord calls it. It is not a blending. I cannot go with the use of that word at all. It is not a blending; it is a weighing. It is a great difference. In blending you have formulae, and in weighing you must not have any formulae; and that is, I submit, what the law has always said; and that is my submission on this point.

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My Lords, I think that I had reached page 1003.

LORD PORTER: I think that we had dealt with that. We had got to the evidence of McCaulay, at page 1004.

MR. BRAIS: McCaulay says what was the destination of the building.

LORD PORTER: That is what we have been discussing. He says that they originally intended to use it as their own building and then found that that was wrong and did other things.

MR. BRAIS: It is what we have been discussing this morning and I will not delay over that. At page 1004, line 8, he summarises all that, which is in so many words what I have been submitting to the Board this morning. He says: "It is not necessary for me to tell you that that situation has not developed. The trend in the last eleven years has been continually downward in numbers of company staff; so that at the time the designs were made the population curve was of a very steep upward trend, and which was offset and the population curve is now going downward." Previously to that he sets forth how the building became handicapped on account of the change of plans of the company.

LORD PORTER: The only part of that, it seemed to me, that you would want is: "It is considered that, while the Sun Life building is essentially a commercial building, it has certain special service features which would entitle the Sun Life to ask for a greater depreciation than allowed by the assessor Vernot and the Board."

LORD OAKSEY: In view of what you were saying you probably would not want to rely upon the sentence which preceded that.

MR. BRAIS: "Consequently the building was designed"?

LORD OAKSEY: No. "In view of the very complete and modern ventilation system in the building and the perfection of inside lighting, it would not appear that their rental value has been impaired to the same extent as that considered by the Sun Life experts."

MR. BRAIS: I want to say to my Lord Oaksey that I had not arrived there. I was not jumping this; I have this to read to the Board. "The whole building can be made available for tenants, as indicated by Messrs. Mills and Desaulniers in their evidence, but the wide corridors and design of the building will not allow the same percentage of rental space as is found in the usual office building. Desaulniers, one of the City experts, says that the floors above the tenth are advantageously planned to accommodate large companies. The monumental character of the building calls for extraordinary deep office space on the lower floors and a great deal of controversy has developed over the rental value of these floors. In view of the very complete and modern ventilation system in the building and the perfection of inside lighting, it would not appear that their rental value has been impaired to the same extent as that considered by the Sun Life experts."

There is controversy on that, my Lords. Ventilation would never offset that factor. I would say the contrary. I think that, so far as ventilation is concerned, you are just as well away from a window as near a window. I will go completely on that statement, because, being near a window is sometimes more difficult than being far from a window, because you want the window closed and your companions want the window open; but as regards the second statement, "and the perfection of inside

lighting", I am not prepared to agree, nor have any of the Sun Life witnesses been prepared to agree, because -- I would submit this, in my view, as being somewhat elementary -- if you are going to have your staff working by artificial light all day long and never otherwise than by artificial light, in this half light which comes from artificial light and outside light, our witnesses have said -- I have not the page before me at the moment -- that that is not anywhere near an ideal condition and, indeed, of course, quite the contrary.

As to the ventilation, I agree that it is an improvement when you have a ventilated room; but, when you have office space where you have to use artificial light all day long for the purpose of your staff, you are not going to get the proper rental. If you are going to divide the building up properly, you have an artificially lighted building all day long; and our witnesses and everybody would agree that nobody wants that. That is one of the reasons which has been specially invoked by Mr. Perrault and Mr. Archambault. There, as the ordinary user of office space in large buildings, I would certainly agree that you cannot get your staff to work by artificial light all day long. You cannot get the distribution of light and the proper sort of light; and the position is that, when you have this artificial light shining on your paper all day in the case of people who are typing or using these machines, that is not the true form of office space and as a result the rents are much lower; but, as I say, I will agree with my Lord Oaksey that ventilation is not a feature that one can complain of.

Then Mr. Justice MacKinnon says: "It is considered that, while the Sun Life building is essentially a commercial building, it has certain special service features which would entitle the Sun Life to ask for a greater depreciation than allowed by the assessor Vernot and the Board."

A lot of those features which consist in space are charged up against us: like the cafeteria and so forth.

"In the erection of its building the Sun Life" --------

LORD PORTER: In this next passage he is dealing with the question of limestone?

MR. BRAIS: Yes, my Lord.

LORD PORTER: Do you want to defend limestone?

MR. BRAIS: Not too energetically, my Lord.

LORD PORTER: That is what I thought. Then we know where we are about limestone.

MR. BRAIS: Yes, although, on that point, I was quite interested in a passage in a book entitled "Geology for Beginners", which consists of no more than four lines, which I may perhaps read as a matter of interest. It says: "Oolitic limestones not only occur in the Lower Oolites, but in the Corallian Rocks and in the Portland Stone, so famous for building massive structures in classical styles, like St. Paul's Cathedral. The Inferior and Great Oolites also yield splendid building stones in Somerset, Gloucestershire and Lincolnshire, which are all used for Gothic architecture."

LORD PORTER: Unless you have got much more detail than that you cannot really get anything out of it, because what kind of limestone you have got, what kind of limestone the learned judge is allowing for, what it would be like if used in the City of Montreal I do not know. It is purely speculative.

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The whole notion of replacing by another building is speculative, although you may say that you are justified in saying that this is excessive cost and you write off something by way of depreciation; but to compare one thing with another seems to me to be going beyond all normal ---------

MR. BRAIS: I do not stress it, except that I would like to have off my mind this other quotation: "Granite used for building in Canada must be protected with waterproof varnish to stop disintegration by frost, and even in our own climate, where frosts are so much less severe, porous rocks do not stand well in buildings in wintry weather."

LORD PORTER: I should be much more impressed by that if any single person in the whole world had said anything about disintegration in this particular case. Not a single one has.

MR. BRAIS: In this record Mr. Perrault says that the base of the building has already begun to crack and that nothing can be done to it now, except to plaster it up. It is round the bases of the columns that you find it. You cannot do anything in the world about it. You put up your fine granite bases of columns and what you have to do is to waterproof them or protect them from greater damage; but you do not improve the beauty of that granite.

LORD ASQUITH: I should have thought that the fact that you could have got near to the result by building the building of limestone or some cheaper material would be very relevant to the revenue value, but would have nothing to do with the replacement value.

MR. BRAIS: If I happen to be considering purchasing a building made with porous brick and I could get a building of waterproof brick for the same price, it would make all the difference in the world.

LORD ASQUITH: As to that, I quite agree. As to market value, I agree, and as to revenue producing value, I agree; but I cannot see that it has anything to do with replacement. You do not replace a building made of granite by reproducing a building made of limestone or imagining one.

MR. BRAIS: My submission on that has been this: that when you consider market value you consider what you are going to buy or what you would buy. That is on the replacement feature, if you were going to replace. If there is something much cheaper and equally as serviceable, you will not replace your granite with limestone, but in your mind's eye when you value that granite building you merely value it on the basis of what it would be worth if it were a limestone building.

LORD PORTER: That is all right with regard to market value. It is nothing to do with replacement. I am saying that positively, but I am merely repeating what my Lord Asquith is putting to you.

MR. BRAIS: The replacement value goes completely into market value at some time. It may be through faulure on my part thoroughly to grasp it, but, thinking of the ultimate result, I always consider that when you replace, if you are to use the word "replace" (and the word "replace" is no longer in the statute) or if you take the words "intrinsic value", the intrinsic value of that building is what it would be if it were in limestone or some other equally serviceable and alternative material. That is my submission on that point.

As Lord Dunedin said in the Banbury case, there are so many formulae and so many ways in which the same term has

been applied to so many things that you do reach a stage where you have to give effect to these various factors all in the light of one thing, and that is the market value. He made that very clear in speaking for the House of Lords in that case; and he was quite perplexed too.

I do not think that I shall be able to be of greater assistance to your Lordships on that point. I have laboured through it and had my companions rejecting the word "replacement" as being a misnomer and "commercial value" being a misnomer and so forth. That does not change anything, so long as we apply ourselves to the proper questions. I do submit that when you apply yourself to replacement for assessment purposes, you have to continue to go on with an erected building, but you do not have to contemplate putting in something entirely useless, as if somebody had a fantastic idea, such as having a picture of the stoning of St. Stephen.

In that connection, my Lords, my learned friends will follow me very well. There is a wonderful picture of that in a large hotel in Montreal. It emptied the hotel. Nobody would go down to the grill, when they had to see the picture of St. Stephen. If they had not been painted on the window, it would be a good deal less difficult to cope with, because it would have been whitened over completely, instanta. Further, a remember a painting in a certain dining of a club, which my friends know well. People resigned from the club; people would not go to the club, because they did not like it. Anybody buying it would have said: That has to be taken off, because that goes.

LORD PORTER: That is quite true. When you come to the question of how you arrive at the allowance, do you arrive at the allowance in that case, taking the replacement of that picture, by taking the cost of putting it there as the value or do you arrive at it by saying: So many people were chased away and the revenue of the hotel was greatly reduced from what it was, or do you say that you are entitled to use both?

MR. BRAIS: You are entitled to use both, if you are approaching it from the replacement basis alone, as Perrault and Archambault did.

LORD PORTER: If you are approaching it from both?

MR. BRAIS: If you are approaching it from both, I would take off the replacement value, because you are never going to put that back and when you buy it you are going to spend whatever money is necessary to eliminate it.

LORD PORTER: If you eliminate it and you get just as much revenue as before, are you entitled to take the revenue in addition to the cost of removing it?

MR. BRAIS: In the case of the painting, I most readily admit that it is not the same thing. I can remove the painting; but we cannot remove the granite, except in the mind's eye.

May I say that I do not think that I can help your Lordships by further development of that argument, because, if it is left there, the assessor has to take some more off on the other basis and, if it amounts to a very large amount in the replacement value of the vuilding, to that extent the proportions must be weighed.

Then what Mr. Justice MacKinnon did was to take those features, which Mr. Perry had not. I want to be perfectly fair

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on this point before the Board and to make my submission quite clear to the Board. Mr. Perry had not reduced his final estimation of the building by these figures. He said: Those are the figures as a result of the unnecessary expense which was put in thefe and that is why you, the Sun Life, should pay a high amount of tax. Mr. Justice MacKinnon used those figures to say: Here are features which are useless, that do not give anything except the pride of ownership to the Sun Life; I will remove them and I will come to the following result by taking some of those feature, using those as set forth by Mr. Perry. The ornamental work, Mr. Perry said at the bottom of page 105 and the top of page 106, was 600,000 dollars too much, because it was granite chiselling instead of limestone chiselling, which I understand is easier to do; but your Lordships will remember that that 600,000 dollars extra cost of decoration was not used by Mr. Justice MacKinnon; he used 200,000 dollars only of that extra cost.

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I should have been happier with this judgment, my Lord, if Mr. Justice MacKinnon had seen fit to use Mr. Perrault's depreciation for inadaptability, or Archambault's depreciation under another name, which was exactly the same result; but he has used that formula and has not given much for it, because after the various deductions which he took off Perry, which amounted to 3,700,000 dollars, at page 1007, line 15, and there he had already taken off the 400, 000 dollars of the extra decoration, to the extent of 600,000 dollars, and all he would grant -- it is subsequently he re-constitutes that and grants 14 per cent, which is the same amount previously granted of 2,500,000 dollars. He has just taken the same figure.

LORD PORTER: He really should have ~~been~~ 28 per cent. It is quite true it is for different things, but the total percentage is 28.

MR. BLAIS: The total percentage is 28, and it is taken off the same lump sum. It is exact for 28; it is not 13 or 14, but he is applying himself to the same building; one for this and one for that. In that connection Perrault, of course, gave much more, because his physical depreciation was 28 and 25 and 18. I am quoting from memory, subject to correction, on those figures, and they gave 28 percent I think for the physical inadaptability.

Then Mr. Justice MacKinnon goes through how the Board arrives at its figures, and then at page 1008, line 12 - it is rather difficult to find, because it is inserted between the two sets of figures - Mr. Justice MacKinnon begins: "The recapitulation of Vernot's assessment of the main building" -- I draw your attention to this, that going through this one does not know where the Board's begin and Vernot's end.

LORD PORTER: Yes, one does. The first one is the Board arrived at a total replacement value of 16 million. Then against that they say "The recapitulation of Vernot".

MR. BLAIS: When one is looking at it, one sees it, and my eye went over these pages several times and I missed it, so I thought I would draw your attention to it.

LORD PORTER: The actual depreciation, as I understand it, which Vernot allows is on page 1009, and he gives 25 per cent depreciation on 961,000, which is the corner buildings. Then he has a separate depreciation. He gives 18 per cent on the residue.

MR. BLAIS: Yes, my Lord.

LORD PORTER: That gives him a total of 3,081,000 dollars.

MR. BLAIS: Yes, because on his 25 per cent depreciation he carries on till 1925.

LORD PORTER: Why do you say he carries on till 1925? I thought that the 1925 depreciation was 961,000 and was up to date, whatever date he took, but, on the other hand, the 18 per cent was on 15,794,000, which is the residue of the building.

MR. BLAIS: That is quite right, my Lord; but when he applies

the 25 per cent depreciation he applies it to that portion of the building which was built up to 1925 when they began planning for the change. 1925 completed the two corner buildings; so that is what he has in mind.

LORD NORMAND: He has 1 per cent.

MR. BLAIS: Roughly 1½ per cent, and the 1½ per cent is found in the City Manual, of course. It is the formula for the highest ----

LORD OAKSEY: Why does a figure of 4,840,952 become 3,000,000 odd, on page 1009, line 21?

LORD NORMAND: It seems to get reduced somehow.

MR. BLAIS: It is a clerical error; the "4" should be a "2". My learned friends have been good enough to draw my attention to this, and in proof of that, if we look at page 981, A-9 ----

LORD OAKSEY: That explains it.

LORD PORTER: We are all agreed about it, so let us take it at that.

MR. BLAIS: I thank you for drawing my attention to it now. That is the result of that figure. Then of course he restates the Vernot formula of 90% and 10%. At line 45 the Board then proceeds to an application of its own formula, 82.3% and 17%, and at the bottom comes 15,051,000, and then explains at page 1010 what has also gone before, at line 4, that between the period of the report which went in, putting in the historical value which was in April, and the 1st December, there was the 58,000 dollars which was included, and with which of course we have no quarrel whatsoever.

LORD PORTER: Next he deals with the index number. What do you say about that?

MR. BLAIS: I have two things to say. What I said this morning, that the variants should not be sufficient to justify.

LORD PORTER: It is 400,000 dollars.

MR. BLAIS: Yes, it is 400,000 dollars.

LORD OAKSEY: Surely it is 1,300,000 dollars.

MR. BLAIS: It is put through the process of depreciation and being 50/50 or 83/27. That is on the top value.

LORD NORMAND: You object to a Court reviewing the Superior Court interfering with the figure, because you say the difference is small?

MR. BLAIS: First a matter of fact; secondly, it is small, and, thirdly, and this is of importance, because I have the figures here and they will be put before the Board, if the Board applies against us the cost of building index year by year from the origin of the building it is equally important when you depreciate that building to depreciate the building as it cost as at 1936, applying the cost of buidding index. It cannot be sauce for the goose, I submit

respectfully, and sauce for the gander.

LORD PORTER: I do not understand this. What did they do in the way of index performance?

MR. BLAIS: They took historically for the depreciation, and when you depreciate you must depreciate making use of the cost of building index.

LORD PORTER: Do not go too fast. Are you saying this, that, if you depreciate year by year -- I should have thought that would rather result against you than in your favour -- your actual depreciation would go through year by year and say 2 per cent or whatever it is for that year; that means so much for that year and you would have to depreciate that particular year, counting that to be the length of life of that portion of the building?

MR. BLAIS: I have not made myself clear. May I be permitted to do so. The Board says: You must apply the cost of building index to arrive at your historical cost; therefore, the part of the building which went up twenty-five years ago and cost 25,000 dollars which will now cost a million we will raise to a million, but the portions of the building which went up in 1929 and which have decreased in value will bring down your index result, because the cost in 1929 was much more considerable than the cost of the two small buildings which are affected by this depreciation figure; so, if I have three buildings formed into one and my first building which cost me 500,000 dollars would cost me to-day 1,000,000 dollars, and, if I am being charged on the cost of building index 1,000,000 dollars on those buildings, when you go to depreciate you must take that building as you have taken it itself, that is to say, on the 1936 index. You apply that to the old building, so that building to-day is worth 1,000,000 dollars instead of half a million dollars. Now when you depreciate that building you are not allowed then to depreciate the building only worth half a million dollars. You must depreciate the building as it stands as of the cost of 1936, the same as you have done to me when you level out the other figures, and, having done that, you add to each of those buildings their actual cost with the cost of building index applied, and then depreciate, with the result that, these buildings having gone up a long time ago, being much more valuable to-day to reconstruct and more valuable than they cost then, because the building index was very low, and multiply that by the number of years, you come to a very different result, and that is the formula presumed to be applied and that is the formula which is given in the Manual. That is the formula which Vernot did not apply, and, not having applied it, I think he compensated in his mind's eye by using an average in the middle of the construction, if we look at page 299.

LORD PORTER: This is the argument, is it Not? Before you use the index on certain buildings, those buildings were worth half a million and to-day are worth a million. When you depreciate, you depreciate the million and not half a million?

MR. BLAIS: Yes, not half a million.

LORD PORTER: Take it the other way round. Suppose you have got a building which originally cost a million and today is

only worth 800,000 dollars. Then you depreciate on 800,000 and not a million?

MR. BLAIS: Yes. Depreciation is set forth on page 299 of the Manual: "The replacement cost" -- I am just submitting it as an authority for the formula -- "having been completed and checked, the whole is turned over to an engineer specially appointed and trained in the calculation of depreciation and the application of the index number." That is under the heading "Depreciation". Then: "He checks first of all the dates of construction and improvements in the report, with a compilation of the building and repair permits." That is know when the work was done. "This compilation has been made on a special sheet entitled 'Statement of Building and Repair Permits'". "Then, on the list, we find the numbers of the permits, the dates of these permits" and so on. "This compilation has been made for all permits issued since 1922 up to date, and is being continued from day to day."

LORD PORTER: Have you made a calculation of the result of taking each year, giving you the advantage in respect of the earlier building and the disadvantage of the middle building? We shall see in time.

MR. BLAIS: I think it may be just as useful a time now as any. There are other matters in here which will come up later. I need not say to this Court there is nothing there except compilations; there is no argument or suggestions.

LORD PORTER: You need not worry with that now. You have told us what your principle is.

LORD OAKSEY: Was not the depreciation calculated upon the replacement cost of the building after the index number had been applied to it?

MR. BLAIS: Not as I understand it, my Lord. It was applied on the building after the index cost had been averaged; but when that is done I completely lose the benefit of the fact that where my index cost is important and useful to me in the earlier buildings which have a long period of depreciation, I had a great excess over my cost -----

LORD PORTER: Roughly what you are saying is this. I am taking purely imaginary figures. Let it be supposed that my building in the earlier stage cost a million, but would cost three million to-day, then I ought to have my depreciation at 33⅓ per cent, that depreciation ought to be one million?

MR. BLAIS: Quite.

LORD PORTER: But, if you take any period where the actual cost was four million and you reduce it to three million, because it was really cheaper, then again my depreciation ought to be one million, whereas, if you lump the two together, you get a different result? What on my particular figures that result would be I do not know, but that is the kind of proposition?

MR. BLAIS: Yes.

LORD PORTER: You need not bother to tell us why, because

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I think we have followed that. What the resultant figures are and whether it is right or not is a different proposition.

MR. BLAIS: And, if I apply that depreciation, and if the building goes down in value, I take that resultant figure in applying the depreciation. I am being perfectly fair to all concerned. If I can give one example of that, in 1915, for example, the building cost 200,000 dollars; adjusted for 1936 the same building would have cost 271,000 dollars, if you deleted those portions taken out for the new building. This is net. That is back in 1915, twenty-one years back, so I have a much larger figure there than the figure used to average for the others, 25,000 and so forth; but when I come to 1929 it costs me 3,000,000 dollars to build, and the value in 1926 is only 2,300,000. But 1929 is much closer to 1941 than 1915 is, so I have the advantage of the multiplication of those years of depreciation which are more than twice as long as the other, and, if that is the way it is applied, I come to a different figure. I will tell you why it should have been applied like that, and if the 7.7 is to be used against me.

We find it at page 301 in the Manual, which tells us the reasons for it, in the third paragraph, "Calculation of Depreciation and Replacement". It says: "In possession of all the necessary data, this engineer makes a breakdown of the items to figure the depreciation calculations, according to the table of structural depreciation published on page 131 of the 'Real Estate Valuation Manual'. Then, to complete his work, the replacement cost of 1936 is adjusted by the index number to the year in question." We have put the replacement cost behind us. The number of the page, 131, is a misprint, but on page 197 we see how the depreciation is to be calculated. We have here the depreciation table; but the cost of building index is first applied.

Then reading again at page 299, it says: "The replacement cost having been completed and checked, the whole is turned over to an engineer specially appointed and trained in the calculation of depreciation and the application of the index number." When the index number is applied, I come to this different figure.

LORD OAKSEY: Does that mean when you look at the last column but one when you take 14.2 per cent it is an assumption that the building would last eleven years if it is a solid construction?

MR. BRAIS: That is right, my Lord.

LORD OAKSEY: It will only last 11 years?

MR. BRAIS: No - at 11 years.

LORD OAKSEY: At 11 years you take 14 per cent.?

MR. BRAIS: At 11 years you take 14 per cent.

LORD PORTER: After 11 years?

MR. BRAIS: Yes, my Lord - after 11 years.

LORD OAKSEY: Does it mean that by the end of 11 years it will have depreciated 14 per cent.?

MR. BRAIS: 14.2 per cent.

LORD OAKSEY: So what the courts in Canada and the Board did was to take a round figure for the whole cost of depreciation at 14 per cent.?

MR. BRAIS: A round figure; and the building index was never applied to us.

LORD OAKSEY: The building index had already been applied?

MR. BRAIS: It was applied to the replacement value, but it was averaged out there.

LORD OAKSEY: I quite follow that.

MR. BRAIS: That is where I am penalised.

LORD ASQUITH: It was averaged out by Vernot and averaged out by the Superior Court. It was not averaged out by the Board of Revision, was it?

MR. BRAIS: Yes, my Lord; it was averaged out by the Board of Revision.

LORD ASQUITH: I thought that Vernot took four years of intense building at the average cost of the index for those four years and went on that figure?

MR. BRAIS: I do not express myself clearly. With it arrives at a replacement figure balanced by the cost of building index of 181,000 dollars, then in the process I come to an averaged-out figure. Perhaps I should not call it an averaged-out figure: I come to a resultant figure which is the result of the application of the cost of building index to each individual year, and in the process I am penalised 1,200,000 dollars. But when the depreciation was then to be taken into account, I submit that the same process should have been applied, because, in applying my depreciation only to the amount of 181,000 dollars, I have a resultant figure, and I do not have the benefit of 25 years at so much per cent., or 30 years at so much per cent., as the manual says it should be done.

LORD REID: They just made a guess at the depreciation. There was no question of number of years at all, as I understand it. At page A-27 they took the 14 per cent. as an overall figure, because some experts said it?

MR. BRAIS: Yes, my Lord; and that is not correct. That is not the proper way to depreciate, or not the proper way recommended

by the Board, not the proper way used by Vernot and not the proper way set forth in the manual.

LORD REID: Your criticism, apparently, did not impress Mr. Justice Mackinnon, because, without comment, on page 1011 he accepted the first 14 per cent.?

LORD OAKSEY: Is it not an absolutely new point now?

MR. BRAIS: I do not think so, my Lord.

LORD OAKSEY: Where is it taken in your case?

MR. BRAIS: I only say that, if the 7.7 per cent. is applied against me, I am entitled to use it on a comparative basis. Furthermore, I wish to submit to this court, and I respectfully beg leave to discuss it on a full and firm basis, placing myself at the mercy of the court, because it is a small point, but it goes to the very formula which is now applied against us, and, secondly, in its result, in which we may be interested for comparative reasons only, it brings the valuation below the amount fixed by Mr. Justice Mackinnon.

LORD OAKSEY: The historical index argument was taken before the Board of Revision, and it has been taken everywhere else since. Is not that so? The depreciation was treated as being 14 per cent. on that figure after the index had been applied. I do not know, but the point you are now raising does not seem to have been raised in any of the courts?

LORD PORTER: At the moment I do not follow what the point is. I do not know what the complaint is. I understand that it is being said that, if you take one per cent. instead of 7.7., the respondents ought to have some advantage from the fact that the one per cent. is calculated by taking each year year by year, and the depreciation ~~that~~ ought to have been taken year by year; but I do not in the least understand what effect that has.

MR. BRAIS: I think I should have dealt with this sooner. May I refer your Lordships to these examples on the new table.

LORD PORTER: You are dealing with Vernot-the Board-Mackinnon. Which one do you want us to take?

MR. BRAIS: What Vernot-the Board-Mackinnon and Archambault come to as Example 1, and then Example 2, which is a reproduction of the sheet which has already been given to your Lordships, down to the amount of difference, which is at the bottom of the computation. Then there is a paragraph which reads "Vernot's percentages of depreciation are applied to costs adjusted and for cost of building index: see Example 8. The depreciation allowance would be increased from 2,500,000 dollars to 3,600,000 dollars. The total figure of 10,600,000" - which we have above - "would be decreased by half of the difference in amount of diminution" - that is 595,000 dollars - "and the final result would be 10,045,000 dollars compared with Mackinnon's figure above of 10,200,000 dollars."

LORD PORTER: That is purely a mechanical calculation?

MR. BRAIS: It is purely a mechanical calculation, founded on Example 8, which is the second from last. That takes the City's Exhibit D.1, volume four, page 6A.

LORD PORTER: Is Example 2 on Vernot's figures?

MR. BRAIS: No, my Lord. It takes the 14 per cent. depreciation.

LORD PORTER: Twice?

MR. BRAIS: Allowed by the Board, and the Mackinnon 14 per cent. depreciation.

LORD PORTER: What I do not understand is that at the moment you are dealing with this, and you are saying that, if the depreciation were applied to the index-altered figure, you would get a great advantage?

MR. BRAIS: Yes, my Lord.

LORD PORTER: Will you show us that?

MR. BRAIS: Yes.

LORD PORTER: Will you show it to us on Example 8?

MR. BRAIS: Yes, my Lord.

LORD PORTER: Why do you put 25 per cent. on Example 8?

MR. BRAIS: Because that is what Vernot used.

LORD PORTER: That is why I asked you if it was Vernot's figure.

LORD ASQUITH: It is one of his two figures. It was 25 per cent. for one part and 18 per cent. for the other?

LORD PORTER: That is what puzzles me. 18 per cent. was used for the main building and 25 per cent. for the power-house?

MR. BRAIS: Yes, my Lord.

LORD PORTER: Why have you used 25 per cent. throughout?

MR. BRAIS: I do not use 25 per cent. throughout. If I may have your Lordships' forbearance for one moment only to follow this, if your Lordships will refer to volume four, page 680, (at the moment I am just endeavouring to show what this is) and look at Exhibit D.1, you have there the reduction of the cost of building index filed by Cartier on behalf of the City.

LORD PORTER: That goes down to 1925?

MR. BRAIS: Yes, my Lord. May I state here, for the information of the Board, that after 1925 we had the total amount. Exhibit D.11, if your Lordships will recall, although in French, takes off year by year those portions of the two old buildings which were subsequently destroyed, and makes it very convenient to apply the cost of building index, because it is applied only to what still exists in 1941 as of the years of construction. They are taken off year by year, and that gives us the fourth column. If we take that portion of the building as these have been actually figured out since Vernot's visit, we shall arrive at 25 per cent. depreciation on 3,900,000 dollars on an amount in the right hand column of Example 8 of 987,000 dollars. Then we proceed in exactly the same way.

LORD PORTER: That is all very well. I may appear stupid about this, but why do you take 25 per cent.? Vernot never gives 25 per cent. for the main building: he gives 18 per cent. for the main building?

MR. BRAIS: But this is the old building, my Lord.

LORD PORTER: I thought he gave 25 per cent. on the heating building; but I may have got that wrong.

MR. BRAIS: May I refer your Lordship to volume five, page 983, A-10, which is the continuation of Vernot's assessment set forth by the Board's decision. We come to depreciation. That says: "Assessed value of first two corner buildings, 2,176,000 dollars: less allowed for portions demolished, 1,215,000." That leaves 960,000 dollars. Then: "Say 25 per cent. depreciation, 240,250 dollars", on an average of 16 years. That applies to the old building.

LORD PORTER: I beg your pardon on that. I thought that he was applying it to the power-house. That explains that. Then what happens after that?

MR. BRAIS: That gives us 25 per cent. of the adjusted figures for those years, which is the true value of the building. It has the advantage of a larger number of years. Then we take 1926 down, as Vernot did.

LORD ASQUITH: As far as we have got, you get the difference between 987,000 dollars and something like 240,000 dollars. You gain on that computation something line 700,000 dollars?

MR. BRAIS: Yes, my Lord.

LORD ASQUITH: That is on the 25 per cent. basis?

MR. BRAIS: Yes, my Lord.

LORD ASQUITH: Now we come to the 18 per cent.?

MR. BRAIS: Yes. That is applied from 1926, 1927 and 1928 down to 1941. We proceed in exactly the same way with the last column of the City's computations at page 680. We arrive at a total of 15,044,000 dollars. 18 per cent. of that is 2,708,000 dollars. We come out almost even there. It is 2,840,000 dollars as found by Vernot on the same set of buildings on page 938 A-10, "Less about 15 years' depreciation, say 18 per cent." We do lose 133,000 dollars, but we have gained very considerably in taking the old buildings and having the advantage of the more years of depreciation, because they are much more depreciated.

LORD REID: I cannot reconcile these figures. I am looking at Vernot's figures where says: "Assessed value of first two corner buildings, less allowed for portions demolished."

MR. BRAIS: Is your Lordship looking at page 680?

LORD REID: I am looking at page 1009, but I will turn to the other if you prefer it.

MR. BRAIS: If I may refer your Lordship to page 680, this is an exhibit prepared by the City where the proportions demolished are calculated year by year. We have in that column the actual year by year removal of what was subsequently removed either when the first building went up or when the second building went up. When the first building went up our rear wall went and our roof went. When the second building went up all out side wall went and also a great deal of our roof. But, as these buildings took some considerable time, the City has seen fit to apply those reductions.

LORD REID: But there is something very funny about it, because Vernot for the first two buildings only took a net figure of 961,000 dollars. You are taking a net figure of more than

four times that, namely 3,950,000 dollars. No amount of calculating with the index will make it up to that difference. Something has happened?

MR. BRAIS: Something has happened. I am in agreement with your Lordship, and I cannot do more than take the exhibit prepared by the Technical Department, where, with the assistance of our historical figures, they show what we actually spent on these buildings. Vernot was estimating by rule of thumb. He did not have the historical cost year by year. That was subsequently filed, and when it was filed it was used against us. I want to be permitted, if for comparison purposes only, to use it on the same basis.

LORD REID: You would seem to be right in saying that Vernot must have made a mistake, because he takes the value of the first two buildings as less than 1,000,000 dollars. You say that the City figures bring it out at nearly 4,000,000 dollars?

MR. BRAIS: Yes, my Lord.

LORD REID: Therefore Vernot must have been wrong, and he ought to have attributed his 25 per cent. to a greater value than he did; but the real difference between the two sets of figures is not dealing with it on the annual basis; it is caused by Vernot taking 25 per cent. and 18 per cent, as the case may be, whereas the Board take 14 per cent. Quite bluntly, the difference between taking an average figure of 14 per cent. and taking figures of 25 and 18 per cent. must be very great indeed. That is the real reason for the difference, is it not?

MR. BRAIS: It is different for two reasons: firstly, because the figures are different, and secondly, because, if you apply the figures to the value of the building in 1941, as you should, and multiply by the number of years, it will increase considerably, because those were the years when the cost of building index was low.

LORD REID: May I ask you one other thing. Has any single judge throughout referred to the fact that the Board took, without assigning any reason, a much lower percentage for depreciation than either of the figures adopted by Vernot?

MR. BRAIS: All I have on that is what Mr. Justice Mackinnon has said at page 1010, line 23: "A depreciation of 14 per cent. should also be deducted leaving a replacement cost of 14,453,729.50 dollars. Vernot allowed a depreciation of 25 per cent. on the first two buildings and 18 per cent. on the main building, which seems reasonable enough, but of not sufficient importance to challenge the percentage of depreciation adopted by the Board." In the process I want to make my position quite clear to your Lordships. Nobody, it would seem, on behalf of the present respondents, either in the depreciation or as regards the cost of building index applied to the cost of replacement, ever took any further position on that. If I bring it up today it is because I feel that, if I am to be faced with the application of the cost of building index to my replacement value, I should be permitted to deal with it for such purpose only; but one has to consider the objective value of this building, and that leaves us completely untrammelled by any law or any formula of mathematics, as Mr. Justice Mackinnon said; but whether when he was considering this matter in his mind what the Supreme Court said was disclosed by the evidence I do not know; I cannot point to it having been looked at in so many words. That will conclude my tale on that.

The mathematics of these computations have been carefully worked out, and I am subject to correction; but I do not think there is anything wrong there. If your Lordships will look at Example 8, which is the last sheet, you will see it at a glance

there. There is the difference which results from giving me the same measure of mathematical application in my considering the year of my building and its value as is used against me in my replacement value. That would result in the following figures. If you apply Vernot's percentage to the adjusted yearly cost on the previous year, you arrive at 13,600,000 dollars. These figures are not imagined.

LORD OAKSEY: Surely if you are going to adopt this sort of principle of depreciation you should apply a different percentage for each year?

Mr. BRAIS: Yes, you ought to apply a different percentage for each year.

LORD REID: What is the calculation upon that ?

Mr. BRAIS: I can give you the calculation upon that. It was I think increased rather than decreased. The building began in 1913 which was being assessed in 1941, that is 28 years, and he has averaged the difference. The reason I do not do that is that I do not want to pursue this formula ad infinitum, but I use the formula 28 years, and I am applying it to correct figures which are completely different from the ones that he has in mind.

LORD ASQUITH: If you take the bit which was constructedin 1913, and take whatever it is, 20 years, depreciation at X per cent per ann for the bit --

Mr. BRAIS: 28 years.

LORD ASQUITH: That gives 2½ per cent or1½ per cent.

Mr. BRAIS: 1½ per cent will give me 56 per cent depreciation.

LORD ASQUITH: In regard to that particular portion of the building whichhappens to be a very small portion.

Mr. BRAIS: It is a vefylongperiod andgives me 56 per cent, so the average difference of 25 per cent between 1913 and 1925 would appear to be within some reason. I have torely upon somebody's percentages, and I am taking Mr Vernot's per-centage.

LORD REID: Mr. Justice MacKinnon thought he had not given all you were strictly entitled to here, but he thought, whether he was tol it was half a million dollars I do not know, , that the amount was not worth troubling about. You cannot put it higher than that, can you ?

Mr. BRAIS: I cannot when I examine this figure, and I will not go beyond that. I cannot ask your Lordships to re-set this figure, but I am entitled to show them in their simple form to indicate that in the process, when you apply the difference, Mr. Justice MacKinnon's figure, even when you have brought the replacement figure down to 180 ,000 instead of 1,400,000 dollars, when you do the same thing as regards depreciation using the City's own figures of values at given years, and apply their own formula of depreciation which is less than Perrault's depreciation, you come to a lower figure. When I submit that to the Court it puts me once more in the position I was in before the Supreme Court when our figure was lower, and we said we will be prepared to remain with the same figure leaving the Court to determine a formula. We come far below Mr. Justice MacKinnon's figure because if we correctly apply, if I may use that phrase, to Mr. Justice MacKinnon's figure the correction of 7.7. we come to an amount of 10,600,000. Mr. Justice MacKinnon found 10,207,000, but if we apply the same measure or yardstick for depreciation we arrive, everything else being equal, to 10,045,00 dollars, which is 150,000 less than Mr Justice MacKinnon's figure. I say, with all due deference, without ay hesitation that if one should be applied the two should be.

I can see Mr Justice MacKinnon's view because on the 25 and 18 I think the difference is about 500,000 dollars, and if that is reduced and brought down it leaves 200,000 and some odd dollars, merely as it is, eliminated from the amount of 400,000 in excess of the Mackinnon judgment,which results from the proper application of the replacement depreciation. I could cut my difference down to about 200,000 dollars, even without applying it to the index value, but if I apply it to the index value, the figure I have indicated is below Mr Justice

MacKinnon's, 150,000 below. If I donot apply the index figure to depreciation I am about 150,000 dollars below.

We are going through Mr Justice MacKinnon's application of the additional 14 per cent. I think we have gone through tha and I think your Lordships have heard sufficient argument on that point.

Might I refer to page 1011, line 23, where he says he will not change it, it is not so much at variance with the evidence to justify it. Even applying the cost index it would only be 200,000 dollars above, and when you arrive at that figure with a 10 million dollar valuation, that is 1 per cent or a little more, 1½ per cent variance.

Then it says that the Board found the commercial value to be so much.

LORD PORTER: There is no dispute about that ?

Mr. BRAIS: There is no dispute about that. Then there is the criticism of Mills and Desaulniers and they were criticised by many other persons. Then going to page 1013, there was some discussion as to what was meant at line 25: "The Sun Life has strenuously argued that any proper" -- I am instructed that shou be and not "property" -- "replacement value should be approximately the same as the commercial ~~xxxx~~ value" -- not "the cost", but "commercial value" instead of the word "cost". If those words are used that sentence makes sense, and is consistent with what he has said. I am bringing this up because my learned friend was asked what those words "property" and "cost" meant there, and they do not mean anything at all. If "proper" and "commercial" are used that is consistent with everything that he has said and it is consistent with the Sun Life argument. Whether it was made strenuously or not, I do not know, but the way it was before, it was not understand ab andmy learned friend suggested to your Lordships that there might be some error there. I am offering that for what it may be worth.

We can now go to page 1014 which is Mr Hulse's evidence on the weight to be given to this replacement. Unless the Board so direct, I will not again read the Memorandum which is on pages 1014 and 1015.

Then page 1016, line 23: "The fourth category dealt with buildings such as hotels and theatres etc. which in no way resemble the type of building under discussion". They were entitled to some extent to be treated on their own merits, which is, as I have submitted, what the law leaves us with. Then there is an explanation of the 60 - 40, and the Board will not wish me to read that.

LORD PORTER: Nor do we want the evidence because we have had that. We do not need to read pages 18 and 19 of Mr Lobley's evidence because we have that.

Mr. BRAIS: Your Lordships might make a note that he refers to Lobley's criticism of the formula. I have already given that but I have not given Mr. Surveyer, page 202, Volume 2, line 36. He is an engineer of very considerable note. I have already given the Board a whole series of citations from witnesses in criticism of that, but I do not think that I gave Surveyer.

LORD PORTER: We have had a bit: "I have readthe evidence, and I must say fairly quickly. Two things struck me, and that was the capitalizing of the gross earnings at 15 per cent and his allowing in his original calculation of 6 per cent for the

rate of return on the money; and the second was the adoption in his final calculation of 90 per cent for the replacement cost and 10 per cent for the commercial value in making his final decision". That is the only part we have had read.

MR. BRAIS: I have given a large number of citations on that point already. I have that noted and I thought possibly that I had not incorporated it with the others.

LORD PORTER: Is there any other portion of Mr. Surveyer to which you want to refer?

MR. BRAIS: Not on this point. Then there is a reference to commercial buildings and so forth on page 1020.

Then at line 42 there is a paragraph to which the respondent is not able to subscribe, that is: "The court" - that is Mr. Justice MacKinnon speaking again - "does not criticise the assessor for following the memorandum of 1940 concerning the assessment of certain large properties in order to arrive at a uniformity in the valuation of properties in the city which was intended as a guide. It does, however, question the percentages allotted by Vernot".

There are three reasons why I criticise that. I will not elaborate it further save to say that, first of all, the memorandum applying to certain large properties is proper, secondly, reproduction is not and never can be something which the assessor should seek to arrive at and, thirdly, the percentages allotted by Vernot and the Board are matters which are entirely dependent upon the assessor's view of the matter and upon what is the weight of what is said and to what extent, and that I say should not be in the memorandum,

LORD PORTER: You say line 41 ought to begin "The Court does criticise"?

MR. BRAIS: That is my view, my Lord.

LORD OAKSEY: Not only for following the memorandum but he criticises the memorandum.

LORD PORTER: I think he criticises the assessor for following the memorandum, does he not?

MR. BRAIS: That is my submission.

LORD OAKSEY: I thought you were saying what the court ought to have said.

LORD PORTER: "The court does criticise the assessor for following the memorandum", and I am not sure he might not also add "does criticise the memorandum".

MR. BRAIS: That would be my submission as a matter of law so far as the Sun Life, the respondent, is concerned, whether we arrive at it from an ordinary application of the Board's judgment or not, as long as we come to a figure which we think is consistent, we have no wish here to reset the a different system, but as a matter of law I say to this Board, and it is my duty to do so, I feel that very definitely, that so far as the appellant is concerned, as a question of law the memorandum cannot stand. It is of little importance to the Sun Life what formula isemployed as long as it is consistent, but in law I must say that.

Then "The court considers that both replacement value and the commercial value should be considered and that each

should be given equal consideration, viz, the actual value should be 50 per cent of the replacement value plus 50 per cent of the commercial value". Then he adds "In the Sun Life building the tenant situation cannot be 'considered only temporary and incidental'". That is a finding of fact and it is a finding of fact based upon the facts which I have read to your Lordships. It contradicts in fact the statement of the Board which is not a statement of fact but is based upon estimates for the future in the light of what the company's President thought in the past. What the Board found is not even based upon the present. The Board found you have a commercial building and it was your intention to use it fully, therefore, circumstance warranting, you are going to be free to use it fully and, therefore, we are going to assess you as being a fully used building. But this is a finding of fact based upon the evidence and not based upon the speculative application of the optimism of Mr. D. L. Macaulay, not the same gentleman who attended here, as found in his report to the shareholders and as read into the record.

When Mr. Macaulay built that building he reported to the shareholders in the most glorious terms possible that the company was going so fast that it had to use all this building and that it was built for that purpose. That was used as evidence by the Board to say that this building having been intended for that purpose we will be free at any time we want to do that because it is ours. They said, we have to take that as an accomplished fact as in 1941 and assessed the Sun Life Insurance Company of Canada on that basis. That is why he says, as the witnesses say, that the Sun Life is not dependent on current rental conditions for the carrying charges on the balance. The suggestion was that we were renting out half the building and the question of rental at that stage had no importance for the Sun. That comes from Mills and Desaulniers and City witnesses. Then he adds "The variance between the replacement value and the commercial value is such that the percentages adopted by Vernot and the Board appear to bring a distorted result". We have gone through those figures.

LORD PORTER: I do not think we need do that again. We have had this before and we have looked at the table.

MR. BRAIS: Then he shows two buildings together. We are on common ground on page 1022, "In maintaining the appeal ..... the court has not disregarded three cases cited by the City". Finance Nationale on page 1022 should be Alliance Nationale. Then there is Lynch-Stanton and Dominion Textile Company. The first two are under the old law incidentally. I have already drawn to the attention of your Lordships that at no time during the course of the hearing, and only subsequent to the Supreme Court hearing, has the fact that there was a replacement statute in 1937 ever been considered, obviously if it had been considered it was overlooked, nobody brought it up. There was the statute. It had all been that way in the interregnum, it had not known any buildings except new buildings, because the roll was frozen and nobody mentioned it except in the reply. Then, of course, we opened our eyes rather rapidly.

LORD PORTER: Then there is the drawing up of the judgment.

MR. BRAIS: Shall I eliminate the formal judgment?

LORD PORTER: Yes, I do not think we need have that.

MR. BRAIS: Then page 1027, line 12: "Attendu que la Compagnie s'est plainte de ces evaluations au Bureau de revision des

evaluations de la Cite conformement aux dispositions de la charte de la Cite, et que ce Bureau, apres une longue et minutieuse enquete".

Then on page 1028, at line 14, the Court of King's Bench says, applying myself again to the question of my Lord Reid whether the instructions of the Board could change the manner of assessment, "The court considered there are no rules of law which would dictate the manner of proceeding for the valuation of immovables, apart from its recognition of jurisprudence and according to which the valuation should tend to establish a standard of value which reflects what a buyer would pay on a free market and be carried out in a manner to bring about just distribution of taxes".

On page 1029, at line 18: "The court considers that the intention of the company was to use the building to house permanently and it is only ancillary to this first object and as though to accomplish a secondary purpose that a portion of the building is rented and, therefore, it is proper that this building has been valued according to the method used for immovables having a double character". That, again, is predicating the future on a badly predicated past with the result that we are being penalised because we are handicapped, and we are handicapped because we were penalised in the judgment of those who conceived this building. We are not the only ones who improperly conceived the future during those great days of 1925 to 9th October, 1929, which was zero hour on the American continent.

(Adjourned till tomorrow morning at 10.30).