28/1951

IN THE PRIVY COUNCIL.

Council Council,
Whitehall, S. W. 1.

Thursday, 12th July, 1951.

Before:

LORD PORTER
LORD NORMAND
LORD OAKSEY
LORD REID
LORD ASQUITH.

ON APPEAL FROM THE SUPREME COURT OF CANADA

Between:

THE CITY OF MONTREAL

and

SUN LIFE ASSURANCE COMPANY OF CANADA

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

MARTEN, MEREDITH & Co.,

Shorthand Writers,
11 New Court,
Carey Street, W.C.2
(Midland Circuit and Leeds Assizes)

IN THE PRIVY COUNCIL

COUNCIL CHAMBER, WHITEHALL

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Present

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LORD NORMAND
LORD OAKSEY
LORD REID
LORD ASQUITH

ON APPEAL FROM THE SUPREME COURT OF CANADA

Between

THE CITY OF MONTREAL — Appellant

and

SUN LIFE ASSURANCE COMPANY OF CANADA — Respondent

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

MR. L.E. BEAULIEU, K.C., MR. HONORE PARENT, K.C., MR. R.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.

F O U R T E E N T H   D A Y

MR. BRAIS: My Lords, I propose to be very brief this morning. There are two points I wish to clarify arising out of questions which have been asked. I then want to refer to one more case, and then I want simply to recite the conclusions, which I propose to do very briefly.

My Lord Oaksey has asked from where Mr. Justice Casey took his figure of 768,265 dollars. That is found in volume one, schedule E, page XVIII. I do not think it plays any major role, but the question was asked of me by Lord Oaksey. It is in Mr. Lobley's reports on these figures. Mr. Lobley has combined his figures on the tenancies and concessionaires, and then allowed for 10 per cent. vacancy. That is how he arrives at his figures on his own estimate.

LORD OAKSEY: Is that the yearly rental charged in the company's own books before the case?

MR. BRAIS: Yes, my Lord.

LORD NORMAND: What figure are you referring to?

MR. BRAIS: 768,265 dollars.

LORD ASQUITH: Is that what is charged by the company to itself?

MR. BRAIS: Yes, my Lord.

LORD OAKSEY: All I wanted to know was the basis of the figure, and also if it was an actual figure before the case came on?

MR. BRAIS: Yes. It has been charged right through, 1937, 1938, 1939, 1940 and 1941. That is the company-occupied space. We have seen from the witnesses that that is higher than similar space occupied by tenants.

LORD OAKSEY: You mean per cubic foot?

MR. BRAIS: No. That is on area. Rentals are always calculated on the square foot.

LORD OAKSEY: The floor space?

MR. BRAIS: On floor space. That is the basis of calculation. If you have it too high there is no way of taking that into account.

LORD ASQUITH: I suppose what actually happens is that they deduct this sum before distributing dividends or profits; but it is not actually distributed into the void; it probably goes into some reserve?

MR. BRAIS: These are just book entries.

LORD PORTER: If you charged a different sum it would make a difference to the amount of profit which you had in the course of the year?

MR. BRAIS: Yes, my Lord.

LORD PORTER: Therefore you have to do something with the rent which you charge yourself. If you are doing it properly, I should imagine that what you do is to put it to a reserve fund or something of that kind?

MR. BRAIS: A part of it would go to depreciation.

LORD ASQUITH: It goes to something. It does not just evaporate?

MR. BRAIS: No, my Lord. Part would go to depreciation, part would go to profit and part would go to the expense of the operation of the building. I presume the same would be done with as it as would be done with any other building. I have not traced that through.

LORD PORTER: It would be a bad financial arrangement if you first of all purported to charge yourself so much as rent and then put it in the pockets of your shareholders?

MR. BRAIS: I am sure that the auditors of the Sun Life of Canada would not permit that. That point has not been raised.

I have not followed it through, and I do not think that anybody has.

LORD OAKSEY: At any rate, what you say is that the rent charged to the company by itself was on a higher basis than the rent which was actually paid by the tenants?

MR. BRAIS: Yes, my Lord; and Mr. Lobley in his figures, in the references which I gave the other day on a sheet of paper, establishes that without a peradventure.

Now may I give my Lord Oaksey the further references. Mr. Justice Casey uses Lobley for the tenants' figures. That is an estimate, and that is found in Mr. Lobley's report, volume four, page 744, lines 37 and 38. Mr. Justice Casey's reference to that is on page 1132, line 15. It is from there that my Lord Oaksey's question arises.

LORD ASQUITH: Tenants, 487,000 dollars. Is that the figure? That is the tenants' figure?

MR. BRAIS: Plus a small amount for the concessionaires.

LORD ASQUITH: What or who is the concessionaire?

MR. BRAIS: They are concessionaires such as charitable organisations, the Red Cross or other organisations, who, having campaign funds, when there is a vacant space in any building, always go in and get that space for nothing. That, of course, is an estimated gross rental income, based on the building being filled, at 10 per cent. That is his figure of the possible return on the building.

One other point which I wish to draw to your Lordships' attention is with regard to a question which was asked quite early in the proceedings by my Lord Asquith of my learned friends relative to the length of the leases. If you look at volume four, page 811 to page 833, you have a list, with the details of all the leases.

LORD PORTER: It begins at page 810, "summary of leases".

MR. BRAIS: Yes, my Lord. The question was asked: What was the term of these leases? They are 10 year leases for an annual rental of 172,000 dollars, five year leases for an annual rental of 141,000 dollars and three and four year leases for an annual rental of 45,000 dollars, showing a total of 358,000 dollars. In so far as the annual rentals are concerned, there is only 67,000 dollars out of the 400,000 dollars. The rest are two years, three years or more. One year leases are for 67,000 dollars only. So that the rentals on leases on an 85 per cent. basis, spread over the full three years involved in this case.

The third point I wish to draw to your Lordships' attention before I go into the conclusions arises out of the list of cases filed by my learned friends when a request was made by the learned Chief Justice in the Supreme Court of Canada for the production of any case anywhere in the jurisprudence of Canada which sanctioned a percentage, or any percentage such as was found in the memorandum.

LORD PORTER: You mean the 50-50 and so on?

MR. BRAIS: The 50-50. My learned friends, in answer to that, produced a series of decisions. I am sorry to say that I have not before me those decisions, but they have been commented upon in the light blue book which is attached to the larger one.

This is called, as appears on the face, "Comments by appellant re unreported judgments filed by respondent since the hearing." We have commented on each of those cases.

LORD PORTER: Tell us what you say the result of it is.

MR. BRAIS: There is only one case that has any bearing on what I am submitting here today in conclusion, and that is on page 14. That is Eugene Simard v. City of Montreal. The present respondent has indicated at the top of each case the valuation and so on. Then there is the comment of the appellant, "Then the Board makes this interesting remark." Then we quote the Board of Revision's own decision, which appeared in the authorities cited by my learned friend: "To arrive at the commercial value of a property it is customary to capitalise the net revenue at the rate of 12 per cent. if the building is of recent construction, and to increase this rate of capitalisation according to age. A capitalisation of 15.75 per cent. is allowed, which results in the capitalisation of 6,450,000 dollars."

LORD ASQUITH: When it says "Then the Board makes this interesting remark", which board does it mean?

MR. BRAIS: That is the Board of Revision of Valuations. That is the Board which gave these instructions and which has sanctioned the present memorandum. This is a decision which was before the Court of Appeal in 1946, so it could not have been, I presume, very much older than two years before that. It was under the old law, at any rate.

"Its intrinsic value or replacement value, as established by petitioner's experts, being only 3,780 dollars, it is evident that it would not be just to value this property without taking into account the commercial value of 6,430 dollars, which exceeds the other by 2,650 dollars. This commercial value is, in effect, most important when considering properties of the nature of this one, as the market value depends particularly on the return. The assessors have the habit of granting an importance of 75 per cent. to this factor of commercial value and 25 per cent. to the value of replacement. We have on many occasions approved this manner of proceeding, and have ourselves generally followed it."

LORD PORTER: That was a case in which the commercial value exceeded the replacement value, and in that case they said 75 to 25; and I suspect that Mr. Beaulieu's answer to you is that this was a purely commercial building, like a series of flats or something of that kind?

MR. BRAIS: Probably.

LORD PORTER: I do not know what the property was.

LORD NORMAND: It was 75 years old.

MR. BRAIS: The particular property is of lesser interest, because it is quite an old property; but the Board says that that is a formula often followed by the assessors, and the Board generally approve it.

LORD OAKSEY: I suppose that was before the memorandum?

MR. BRAIS: It was after the memorandum.

LORD PORTER: It was in 1946. The memorandum was in 1941.

MR. BRAIS: All I can do for the date is to refer to page 15 of the

document. There is nothing to indicate date in what was put before us, but in the Superior Court Mr. Justice Denis, in January, 1946, cites all the decisions, and he approves. He says: "The actual revenue of a property must be taken into account as one of the most important factors; in the present case the revenue, relatively high, of the immovable not only justifies a valuation of 5,700 dollars but could justify a higher one."

LORD PORTER: This is your comment. Where does the Eugene Simard case appear in the appellants' answer, in which they were asked to specify the cases, because, if we can get that, we shall find when the case was reported.

MR. BRAIS: My learned friends filed this after the hearing. These are unreported cases.

LORD PORTER: This is unreported?

MR. BRAIS: This is unreported. Then they obtained permission to file a supplementary answer. We put them both together.

LORD ASQUITH: The cases in the light blue document are all unreported, are they not?

MR. BRAIS: I think they are comments, all on unreported cases.

LORD ASQUITH: It is marked "Comments by the appellant" - you were the appellant at that time - "on unreported judgments filed by the respondent."

MR. BRAIS: Yes, my Lord. That was taken from my learned friend's list. I do not want to vouch for myself or for them that the cases put into that list were all unreported, but I think I can say that these are all unreported cases which have been filed by my learned friend.

In that connection (and this will be my last reference to the evidence) we have Mr. Vernot saying the same thing at page 25, line 15, which passage I have read often, but I will just refer to it once more, because it does apply to the practice that the Board says they have often followed: "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." In Exhibit D.4, which is to be found in volume four, page 695, as regards these apartments, your Lordships will have noted in the memorandum that this is a memorandum on the assessment of large properties such as office buildings, apartments, houses, departmental stores, hotels, etc. I note the words "apartment houses". In paragraph 1 we have certain buildings mentioned by name, namely the Insurance Exchange Building, the University Tower Building, the Dominion Square Building and the Drummond & Drummond Court Apartments.

My Lords, I want to make this point on that. As the witnesses have said, when this special list had been prepared, in Exhibit D.6, which follows, and which is to be found at page 697, lists of buildings in categories one to three of the memorandum are set out. In category one the Drummond & Drummond Court Apartments, although listed as an example, do not appear on the list. I have this morning asked my learned friend to be kind enough to correct me on the matter if there is a single large apartment building on the list in category one, and there

is not. The apartments have been segregated and put aside. They have not been treated 50-50; they have been treated, I presume, like the other buildings, 75-25. I have submitted this to my learned friend Mr. Seguin for the City to be sure that in this list there was not a single one of the large apartment blocks in Montreal - and there are some very large ones - and there is not a single one - not even the one referred to in the memorandum.

LORD ASQUITH: You say that large apartment houses have all been assessed 75-25?

LORD PORTER: I think what Mr. Bray is saying is: I do not know whether that is so, but, as I have seen the references to them in Mr. Vernon's evidence, I believe that to be so.

LORD ASQUITH: I thought you said that Mr. Seguin agreed?

MR. BRAIS: No, my Lord. I asked Mr. Seguin to correct me if there was any apartment block on this list. Mr. Vernon says that the apartments are 75-25, and it does not make any distinction between big ones and the small ones; it is only the memorandum that does that.

LORD PORTER: Your complaint is that on page 695 you get large properties such as apartment houses, among other things, and no apartment houses have been put in the list?

MR. BRAIS: Yes, my Lord. That is for the purpose of submitting this argument, that the memorandum was used, and in its result made no change anywhere in Montreal except for one building. It is not because it made a change for the one building that it is wrong. I am not saying that; but I do say that that has been the result.

My Lords, may I conclude in this way, and very briefly. Firstly, I submit that the jurisprudence clearly shows that for a commercial building and one of the type of the Sun Life Building the test of actual value stipulated by the statute then applicable is the willing seller-willing buyer test, as set forth by Mr. Justice Duff, as he then was, in the case of Montreal Island Power Company, reported in 1935, Supreme Court Reports, at page 304.

LORD ASQUITH: What is the year of that?

MR. BRAIS: It is in fact 1935, my Lord. That decision is based upon the Scottish decision in the Earl of Home, the Canadian decision of the Supreme Court of Canada, the American views on that question and the English doctrine of Lord Moulton in Pastoral Finance Association, reported in 1914 Appeal Cases, at page 1083, at page 1088. I cannot possibly state it in as good words as those used there, and it is quite terse. The considerants of Mr. Justice Duff have since received the unanimous approval of practically the same court, with the exception of Sir Lyman, who had then retired, in the case of Attorney General of Alberta v. Royal Trust, reported in 1945 Supreme Court Reports, at page 267. His findings are reiterated throughout this decision, for example by Chief Justice Rinfret at page 279. The Earl of Home decision is also cited. In brief, they pick up all of the considerants of Mr. Justice Duff and approve them. That means to say that "exchangable value" means market value, and that is the test to be applied and the only test to be applied.

Secondly, in the case of a commercial building such as the one we are considering that has a number of unusual features and

some serious defects, the application of an arbitrary formula such as the memorandum would be clearly improper and illegal, and would not produce the right result.

LORD PORTER: I should like to ask you a question there on your wording. What do you mean by "a commercial building"?

MR. BRAIS: An office building.

LORD PORTER: I think the difference between you on that is really that the other side say that a commercial building, strictly speaking, is a building built to let and not built to occupy.

MR. BRAIS: I am going to refer to the authority. The House of Lords has said that there are no such things as ordinary buildings and special buildings.

LORD PORTER: All I am asking at the moment is what you say is a commercial building, and you tell me that a commercial building is one which is used for commerce?

MR. BRAIS: For commerce. Whether it be used by the owner or not, if it has been erected for the purpose of commerce it is a commercial building. It is so indicated in the City's manual at page 201: "Commercial building, office building."

LORD ASQUITH: It does not necessarily mean that it is erected in order that all of it may be let?

MR. BRAIS: No, my Lord.

LORD ASQUITH: I think that is rather what the other side say.

MR. BRAIS: Yes, my Lord. If we take the building on the basis that it was all to be occupied and it is not, you thereby accentuate, if anything, the errors of the planning; but, on that point, if I may refer to Cartwright v. Sculcoates Union, Lord Morris says (and I will only repeat the second paragraph of his judgment) very concisely that the question to be solved is: What would it be reasonably expected that the premises would let for to a tenant? "That has been paraphrased, and personally I do not object to it, by saying: What would a hypothetical tenant pay? Indeed, there does not appear to me to be any law at all in that question. I am told that two great divisions have been made by those who have built a structure of law upon that rather simple line in the Act of Parliament into what are called exceptional cases and ordinary cases; but I can find no distinction in the Act of Parliament."

My Lords, there is no suggestion in law, or in any judgment, and principally in the charter of the City of Montreal, that any distinction can be made in assessing between the destination of the building and the use to which it can be put, if it went through the test to which we have already referred.

LORD REID: Then it cannot be a matter of law that the capital value of the building must necessarily be arrived at by finding its rental value, because the two things need not necessarily, as a matter of law, correspond?

MR. BRAIS: That is not a matter of law: that is a matter of fact. That is why, in some of the decisions we were looking at yesterday, the decision arrived at could not be touched, because it was a matter of fact. Here, however, we are before the Board on both fact and law.

Thirdly, after presupposing the willing seller and then ascertaining on a hypothetical basis what the willing buyer would be prepared to pay, and including amongst the willing buyers someone with needs identical to those of the Sun Life of Canada as at today but not as at the date of the conception of the building, and the extraordinary optimism as to the future of the company and as to the continuation of centralisation, then all available indicia must be considered by the assessor.

LORD ASQUITH: Does that mean that the assessor, after assuming a willing buyer, has got to ask himself what factors a willing buyer would take into account and all such things?

MR. BRAIS: And all such things; and to help him he has these indicia which he must look at and weigh.

Fourthly, in the present case it would appear to be reasonably common ground that the indicia that would weigh most heavily with the willing buyer would be the commercial value, but that the replacement value would also or could also be considered by him.

LORD NORMAND: Why do you say that is common ground?

MR. BRAIS: My learned friends on that point take the position that there is no possible seller. They do agree that, if there is to be a sale, it would be on the commercial value, so that it cannot be a sale on that value. I may have gone a little beyond my thought in saying that it is common ground. It is certainly common ground as regards all the witnesses for the respondents.

LORD NORMAND: I should have thought that that was the main controversy in the case.

MR. BRAIS: I am afraid that I have gone a little beyond my thought. My learned friends have suggested that there could not be any sale, because the Sun Life would not be sold; and I am prepared to accept that.

LORD PORTER: It is not that. What you were saying was agreed was tha what would weigh most with the buyer would be the amount for which he could let the property. I think the reply would be: No; this is an ad hoc building for the Sun Life. What the Sun Life or anybody like them would consider would be: Is this a good building for me to occupy, with all its advantages of magnificence and advertisement and so forth? It may be right or wrong, but that would be the answer to it.

LORD ASQUITH: I thought your point was this, that you submitted that the indicia which would weigh most heavily ought to be letting value, but that you conceded, and it was so far common ground, that replacement value played some part.

MR. BRAIS: It played some part, my Lord.

LORD ASQUITH: You did not put it quite that way because you used the expression "common ground" before you said "the indicia which would weigh most heavily were rentals", and I do not think that that is common ground.

LORD PORTER: I have put down now: In the present case it was argued that the indicia which would weigh most, and so on, the replacement value should be considered also. It represents the actual dispute between you.

MR. BRAIS: So far as the use of the words "common ground" would lead to error in the way it came into my grammar, I do not want to leave any error there. My learned friends, the Board, and all concerned, are on common ground that commercial value and replacement value -----

LORD PORTER: Should play their part.

MR. BRAIS: Should play their part.

LORD PORTER: But they say the thing which would weigh with the Sun Life, or anybody like it, would primarily be replacement, and you say it would primarily be commercial value.

MR. BRAIS: The mistake I made was in reading this, and sometimes when you read you are not thinking. I put in the weight of the commercial value which is not in my note here and which explains how the words "common ground" came in. If I read it as I have it it is: In the present case it would appear to be common ground that the indicia which would weigh heavily against the Board is replacement value. Replacement value is not entitled to any weight. In our view, leaving aside the common ground, commercial value weighs most heavily.

Then No. 5 is "Commercial value is not in dispute".

LORD ASQUITH: What is that, the actual figure?

MR. BRAIS: The 7,208,000 dollars, my Lord. No. 6: In consequence the only indicia in doubt are the indicia of replacement value.

No. 7: Historical cost has been used as an indicia of replacement value but when all the evidence indicates that there has been money spent which has not produced value for exchange purposes, the willing buyer would not be guided by the historical cost. He would have recourse to the appraisal method and in employing the appraisal method he would seek to avoid the useless mistakes of the past; or, if he did use the historical method he would depreciate for these mistakes of the past, either for useless expensive materials and ornamentations, as considered by Mr. Justice MacKinnon, or more practically for functional inadaptability, as explained by the witness Perrault or for what the witness Archambault calls any functional depreciation.

LORD PORTER: You had better call it functional disability.

MR. BRAIS: Perrault calls it functional inadaptability and Archambault functional depreciation explained as a low ratio of rental area.

LORD OAKSEY: Before you pass from that, is it not an exaggeration to say that all the evidence indicates that there has been money spent which has not produced value for exchange purposes? Do the witnesses for the City say that? I do not think you have cited any of them to us.

MR. BRAIS: They refer at great lengths to the tremendous corridors and the beauty of the building. Perry, my Lord, the City's own witness, says that we have 3,600,000 dollars worth of beauties that could have been only of use to the Sun Life. He sets them out and he is one of the chief witnesses.

LORD OAKSEY: I was asking you whether "all the evidence" was not an exaggeration.

MR. BRAIS: I do not want to exaggerate. I think all the evidence indicates that this building - I mean even the City's witnesses admit faults but they say that those faults were for the glory of the Sun Life. They had conceived of it for 10,000 people. I can say that all the witnesses find that this building has certain serious what can be called disabilities, because the company contemplated putting 10,000 people in there, and they say that that is the reason why they are going on that basis as being the proud possessor of some building which, in the future, we hope to be able to occupy fully, and had put those things in for that purpose. I appreciate your Lordship's comment and I am thankful for it, but I think all the witnesses agree that this building was conceived for some other purpose than what it is being used for today.

Then No. 8: The Board of Revision was mathematically exact in finding actual historical cost.

LORD PORTER: They took it from you. You supplied the historical cost and they accepted it.

MR. BRAIS: Yes. I say in finding actual historical cost and in applying the index to that actual historical cost it did not apply the same mathematical exactitude in determining depreciation, because it did not apply the index number to its depreciation calculations. I am referring there to pages 299, 300 and 301 of the manual.

LORD ASQUITH: I think you have given us in figures how much difference that makes.

LORD PORTER: It wipes out the 400,000 dollars odd, or a bit more than that.

MR. BRAIS: Would my Lord Asquith allow me to terminate. I think it is in the tables which yourLordships have. It is all set out there.

Then No. 9: There are many ways in calculating replacement value to compensate for the mistakes of the past. The assessor can depreciate as was done in paragraph 7 in the MacKinnon and Archambault formulae.

LORD OAKSEY: Where shall we find paragraph 7?

MR. BRAIS: It is my numbered paragraph. It is paragraph 7 above so that I will not have to reiterate the formulae - by placing yourself objectively in the position of the willing buyer and willing seller. The assessor can allow a greater proportion as commercial value where money has been spent without producing value, and a smaller proportion as historical cost value. The actual method to be employed is at

the discretion of the valuer provided he applies himself to the formulae and directives of the law, and provided he reasonably arrives at the actual value.

Then No. 10: Mr. Justice MacKinnon was not bound by any formula nor by mathematics. He did not follow the necessary formula prescribed by law, a willing buyer and willing seller, in so many words, but he arrived at it through weighing the indicia in the same way as if he had been applying his mind to the willing buyer and willing seller formula and he did consider it, the higgling of the market in effect.

LORD REID: I do not quite follow that. I thought that Mr. Justice MacKinnon had taken 50 per cent commercial value because that was the figure in the memorandum appropriate for commercial buildings and he held the building to be a commercial building. I do not recollect that he applied his mind to the higgling of the market.

MR. BRAIS: I have in mind there, if I may clarify it, that he took off 14 per cent for extra depreciation which would in effect be what the willing buyer and willing seller would do if you were looking at the willing buyer and willing seller.

LORD REID: He was fortunate enough to arrive at the result at which he would have arrived if he had followed the right road.

MR. BRAIS: I think that is aptly put, my Lord. If we look at it in the light of the other tests I will submit that that is what has occurred. I cannot ask your Lordships to find that Mr. Justice MacKinnon, in using his formula, used the right words in expressing it if we want to put it that way.

Then to continue with No. 10, in accepting Mr. Vernot's approximation of the 7.7 index number and in rejecting Vernot's historical method of depreciation, he was merely applying a rough and ready test. He has, however, reached a figure which has been tested by ten judges and has been found approximately correct by seven of them. It would also appear to be correct by the tests which appear in this volume which is before the court and to which I now wish briefly to refer.

LORD PORTER: This volume we will call X.

MR. BRAIS: If your Lordship pleases. After the blue notes there is the first page, example 1. This example takes for its basis the replacement cost figure found by the Board of Revision, but an allowance is made in calculating the replacement cost for the fact that part of the building was functionally inadaptable; that is Mr. Perrault's evidence, an equal weight is then given to replacement value and commercial value. In other words, you replace Mr. Justice MacKinnon's 14 per cent with the 23.3 per cent of Perrault. We have got rid of the 7.7 error of calculation, if it is, and we are taking the 14 per cent physical depreciation found by the Board, and we arrive at a total figure, using the other calculations as used by the Board, of 10,096,000 dollars against 11,207,000 dollars found by Mr. Justice MacKinnon. So if you take all the Board's figures and you substitute Mr. Justice MacKinnon's 14 per cent for too much decoration, too much granite, and so forth, for the functional inadaptability, and use simply 50-50 there is less than 2 million dollars, 1,800,000 dollars below that found by Mr. Justice MacKinnon.

LORD REID: Mr. Justice MacKinnon must have rejected the evidence of Mr. Perrault, because he substituted 14 per cent for Mr.

Perrault's 23.3.

MR. BRAIS: There is nothing to indicate that he rejected the evidence. He used the figure of 14 per cent. These are tests.

LORD PORTER: If you like to substitute for the word "rejected", in my Lords observation, the words "did not accept", that seems to me to be accurate.

MR. BRAIS: He did not make use of it.

LORD PORTER: He did not accept it.

MR. BRAIS: I think I am permitted to say this; he could have made use of it and he could have made use of it in a lesser degree if he had seen fit.

LORD PORTER: I am not saying whether it is right or wrong, but the difficulty of it is substituting a depreciation figure which is given by one of your witnesses and accepted by nobody.

MR. BRAIS: It is considered by Mr. Justice Estey, my Lord.

LORD PORTER: What does he say about it?

MR. BRAIS: He considers Mr. Justice MacKinnon's 14 per cent and he considers at the same time the functional disability and he considers Archambault's formula at the close of his judgment very definitely. He has seen that point there, if I may refer your Lordships to it.

LORD REID: Mr. Justice Estey preferred 45 per cent and 55 to the 50-50.

LORD PORTER: That is right.

MR. BRAIS: I think that was Mr. Justice Rand. It is page 1184, line 32. Mr. Justice Estey considers what Mr. Justice MacKinnon has done and then he refers to the case of the State of Minnesota v. Federal Reserve Bank. Then at 1185, line 14, he says: "Messrs. Perrault and Archambault's valuations were respectively" so much and so much.

Then above that at line 9 he says: "The phrase 'both artistically and as a utilitarian structure' would seem to include both that which Mr. Justice MacKinnon allowed 'for extra unnecessary costs' as well as an allowance for what the appellant terms 'functional depreciation'.

"Messrs. Perrault and Archambault, whose valuations were respectively 8,625,200 dollars and 9,001,983 dollars (the lowest replacement valuations deposed to), included an allowance for 'functional depreciation'. The Board of Revision disallowed this item but stated 'that in making allowances for 'functional' depreciation and obsolescence, on top of the physical depreciation, they (Perrault and Archambault) have overstepped the field of the replacement to encroach on the one of the economic value. The deficiencies, if they exist, are reflected in the rental value on which is based the commercial value; so that Messrs. Perrault and Archambault are making double use of the same allowances". They were obviously not making double use of the same allowances because they did not take rental into account, they have no blending at all. That was brought in, and I am just offering these figures as a basis of comparison, for the result finally arrived at.

LORD ASQUITH: Example No. 1 assumes physical depreciation of 14 per cent.

MR. BRAIS: It assumes physical decpreciation of 14 per cent.

LORD PORTER: That is how you get at your 11,897,000 dollars.

MR. BRAIS: That is how we get to 15,551,000 dollars.

LORD ASQUITH: The functional depreciation on top of that is 23 per cent.

MR. BRAIS: Yes.

LORD ASQUITH: That reduces it to 11 million dollars.

MR. BRAIS: The only change we have there is that we insert Mr. Perrault's functional depreciation.

Then if we take example 2 that is the one which has given everybody so much thought. It is the assessment by Mr. Justice MacKinnon with the Board's adjustment of cost of building index; that is to say, instead of putting 1,200,000 dollars for the second item we have what the Board found, 181,000 dollars. Then we continue with Mr. Justice MacKinnon, the 5 per cent the Board gave, which is the next item.

LORD PORTER: He subtracts those two.

MR. BRAIS: Then we come to what Mr. Justice MacKinnon calls 14 per cent physical depreciation. That was also allowed by the Board. Then we have Mr. Justice MacKinnon's 14 per cent for unnecessary cost. Then we add all the figures in the usual way and we come to a different—

LORD OAKSEY: That is giving 5 millions to depreciation instead of 3,600,000 dollars which is what you have given in No. 1.

MR. BRAIS: Yes, my Lord. In this case I am taking Mr. Justice MacKinnon's additional depreciation of 14 per cent instead of Mr. Perrault's functional inadaptability of 23 per cent.

LORD PORTER: Would you mind telling me what that figure is 14 per cent of? Is it 14 per cent of 19 millions, 18 millions, or what is it 14 per cent of?

MR. BRAIS: I will tell your Lordship the precise figure. That is 14 per cent of the net cost of building in 1941 as found by Mr. Justice MacKinnon on page 1021, volume 5; or, if your Lordship will refer to Mr. Justice MacKinnon's figures, on this slip of paper in this same volume X. It is indexed as "MacKinnon J".

LORD ASQUITH: Is not the short answer: 14 per cent of 18,036,000 dollars, the figure immediately above?

MR. BRAIS: Yes.

LORD NORMAND: It is not the same figure as the first 14 per cent.

MR. BRAIS: It is applied on the Board's figure with the correction of 707,000 dollars. The 707,000 dollars has been corrected so that it increases, the amount.

LORD NORMAND: It is just Mr. Justice MacKinnon's calculation followed out step by step with that variation.

MR. BRAIS: With that variation, my Lord.

LORD NORMAND: The result is a difference between this calculation and Mr. Justice MacKinnon's of 432,672 dollars?

MR. BRAIS: Yes, my Lord. In this instance we do not at this

moment take any advantage of the fact that if you apply the cost of building index to your replacement you should apply it to the depreciation, as I have submitted.

LORD NORMAND: That is less than 5 per cent difference.

MR. BRAIS: That is less than 5 per cent difference.

LORD OAKSEY: Can that be right? Having depreciated by 5 per cent of 18 millions to depreciate again by deducting 14 per cent on the same 18 millions and not on the 15,551,000 dollars.

MR. BRAIS: That is the way it has been done. I say that the 14 per cent is too low in the process, but he has done it on the 18 millions twice. I am taking the figures as they are.

LORD OAKSEY: It seems to me to be rather like tossing a coin.

MR. BRAIS: That is what an assessment is to a large extent, to a certain extent, in arriving at figures.

LORD PORTER: If you wanted to defend yourself in a sense you could take this in a certain case and say they have deducted 25 per cent twice and 25 per cent on the same figure.

LORD OAKSEY: In the Minnesota case?

MR. BRAIS: Yes.

LORD OAKSEY: That was a case where they were only considering actual historical cost minus depreciation. It is an entirely different case from this.

MR. BRAIS: Perrault is doing the same thing and Archambault is doing the same thing, and Perrault takes 23 per cent and 18 per cent.

LORD OAKSEY: It may be so, but what I said was accurate.

MR. BRAIS: I want to leave my learned friend the opportunity of having the time that he needs, but it simply means you either take those amounts off or else you change your proportions. There is nothing that I can say in addition to that. You conceive yourself a willing buyer and willing seller and if you tie him down tight to a formula you will never get to the willing buyer and willing seller.

LORD OAKSEY: As the Board wanted to know what the 14 per cent was on, I thought it was worth while to point out that it has not been taken upon the 15,551,000 dollars, but it is twice over upon the 18 millions.

MR. BRAIS: It comes identically to the same thing as was done in the Minnesota case. This matter of replacement is not defined by law anywhere and is not found in the law as it stands today. I do not think that we should be tied in front of that and just simply look at it in one way alone and be tied to a formula once we have looked at it in that way alone.

LORD NORMAND; I understood that you submitted that the purpose of this table was to show the result of giving effect to the proper assessment?

MR. BRAIS: Yes, my Lord.

LORD NORMAND: And that brings out this difference.

MR. BRAIS: There is a footnote there to which I will refer when

we look at the last example. These only serve to test the figures in the light of the evidence.

Now we come to example 3 where you take the Board's gross replacement figure, then you make use of Mr. Vernot's physical depreciation of 25 per cent and 18 per cent and Mr. Justice MacKinnon's 14 per cent on the wasted expenditure to give the depreciated replacement cost and you come to an ultimate figure of 10,246,000 dollars. I do not think I have to explain that. Does your Lordships desire any further explanation upon that?

LORD PORTER: No.

MR. BRAIS: Then I come to example 4. This is exactly the same as example No. 3 but substitutes Perrault's functional inadaptability percentage of 23.3 per cent instead of Mr. Justice MacKinnon's 14 per cent on the net cost of the building. That comes to a figure, plus everything else equally, of 9,877,000 dollars.

LORD REID: That is simply taking both example 1 and example 3 and combining them?

MR. BRAIS: Yes, my Lord. Example No. 5 is the same as examples Nos. 3 and 4, but uses Mr. Archambault's figure of 18 per cent for functional depreciation low ratio of rentable area instead of Mr. Justice MacKinnon's 14 per cent and Perrault's 23 per cent. It is applied in the same way as in example No. 4, my Lord, and comes to 10,148,000 dollars, always proceeding on the basis of 50-50 like Mr. Justice MacKinnon did.

Then example No. 6 is the Board's gross figures on replacement value without any allowances for extra unnecessary cost or functional inadaptability or low ratio of rentable area; that is putting everything you can on replacement.

LORD PORTER: What is your 16,777,000 dollars, I have forgotten?

MR. BRAIS: The 16,777,000 dollars is the total replacement cost in 1941 found by the Board, so that we eliminate all controversial issues as regards replacement, as regards the 707,000 dollars and as regards anything else, Mr. Justice MacKinnon's 14 per cent and Mr. Perrault's 23 per cent, but we apply here what is done to other buildings in Montreal, what is done to apartment buildings and what is done to other buildings in Montreal, what would have been done if this memorandum had not been made, what the Board of Revision sanctioned on many occasions, and what would have been done if the memorandum had not been made.

LORD PORTER: I follow you saying it has been done on many occasions but why do you say would have been done if the memorandum had not been there? Why do you say they would have taken 75 and 25 if the memorandum had not been there? The 75 and 25 they say are in respect of apartment houses. That is the evidence. This is not an apartment house. It may be that they ought to have taken 75 and 25, but why do you say they would have done?

MR. BRAIS: Because if they are doing it with apartment houses there is no reason why they should not do it with office buildings, commercial buildings of this type.

LORD PORTER: I follow that if you say it is what ought to have been done, but to say it is what they will do is where I find great difficulty.

MR. BRAIS: Except that they pass this special memorandum to

create a new formula and a new way for special buildings as they call them. They did not have to pass this memorandum unless they wanted to justify some departure from the general rule, I would submit.

LORD REID: Have you any evidence of the general rule under which in no case not covered by the memorandum does the replacement percentage exceed 25? You have no evidence to show that in all cases outside the memorandum 25 is the maximum for replacement value, have you?

MR. BRAIS: Not over what I have given to your Lordships and the deductions which, I respectfully submit, would follow which would be the reasons for the memorandum, to create a new rule. On that point there is the decision where they say this is the formula which is often used by the Board.

LORD ASQUITH: I had not realised that before the memorandum came along the 75-25 formula was confined to apartment houses. Was it so confined?

MR. BRAIS: It is not confined to apartment houses. May I put this before your Lordships. I do not thinkI have exaggerated and I do not want to exaggerate, especially when I am closing or at any time. Vernot says on page 25, line 15: "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; also it is evident that it cannot be used in proprietor occupied properties, or stores in high priced retail districts.

"After that the ones who had to authorise on large buildings had to make up their table, another table, and that is the table 50 per cent."

LORD NORMAND: I do not understand the logic of this table. Your main submission to us is that the assessor ought never to be hampered by fixed ratios, and you, therefore, complain of the ratio 50-50 or any ratio which attributes 50 or more to replacement value. If that argument is not sound, what merit is there in a practice which attributes 25 per cent to a certain type of building on commercial value and 75 on the other or vice versa?

MR. BRAIS: I am not suggesting for a moment that there is merit to a formula which would be applied in all cases, but I am saying that if the formula is applied to buildings which are not handicapped by the difficulties in this building a fortiori it should be applied to the Sun Life.

LORD PORTER: I think your argument is: Look at your own practice?

MR. BRAIS: Yes.

LORD PORTER: I will take your own practice though it may be against me and it gives me a figure which defends my assessment.

MR. BRAIS: That is all I take from that, my Lord. We have here two things, the 75 and the 25 formula. Vernot is explaining

the doctrine of the assessment. He says there is a 75 formula in tenant occupied buildings like flats and apartments and then he says it cannot be used for a proprietor occupied property or stores that brought about the 50 per cent table.

LORD REID: Have you any evidence at all as to what is the percentage adopted where a small building to which the memorandum does not apply is partly owner occupied?

MR. BRAIS: No, my Lord.

LORD REID: None at all?

MR. BRAIS: No.

LORD REID: How can you say there is any practice which you can pray in aid in this case?

MR. BRAIS: I say that Vernot's testimony here says that is the practice for commercial buildings, like flats and apartments.

LORD REID: Tenant occupied?

MR. BRAIS: Tenant occupied which does not change the building. That is my submission, my Lord, and I cannot go beyond that.

LORD PORTER: That is why I asked you what you meant by a commercial building. That is one of the disputes between you, what a commercial building is. The other side say that a commercial building, properly speaking, is one which is tenant occupied, one which is built for that pupose. That may be right or wrong.

MR. BRAIS: We have been called a commercial building by all of our own witnesses and the City of Montreal puts it down as a commercial building.

LORD PORTER: I agree there is plenty of evidence we have to consider but I am not considering what the results may be, only what in fact is being said.

MR. BRAIS: I cannot go beyond what is said there and I interpret it from that. I may be wrong but I interpret from that that the formula for these buildings, the 75/25 rule, has general application and then for this special building they made a special memorandum. That is on the reading of that paragraph on page 25. I do not see any other interpretation than coming

to that conclusion, and we have here in this judgment appearing on page 14 the Chairman of the Board saying that the assessors have a habit of granting an allowance of 75 to this factor, the commercial value, and 25 per cent to the value of replacement. We have, on many occasions, approved

this method in proceedings and have generally

followed it.

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LORD ASQUITH: Where is that from?

MR. BRAIS: Page 14, in the case of Simard.

LORD ASQUITH: Do you know what sort of building was involved in Simard?

MR. BRAIS: It was a very old building.

LORD ASQUITH: Was it a purely commercial building and, if so, in what sense of the term?

MR. BRAIS: I have nothing here to enable me to say; but it must have had a commercial value, because the cost of replacement was 307,000 dollars and the net rental was 1,125 dollars. I think that I can say without being taxed with saying anything that is improper that when the Board says "We have on many occasions approved this method of proceeding and have ourselves generally followed it", you have there something which must mean something. This is a judgment of the Board which is produced in this record, my Lord. I have no other evidence than that.

LORD PORTER: Your next one, Example 7, is merely the 60;40 proportion, which was said to have been applied.

MR. BRAIS: If the 75:25, which the Board says that it has generally followed and often approved, is applied, we come to 9,400,000 dollars. If I take 60;40, I come to 10,928,000 dollars.

Then by Example 8, which we have had before, we apply the depreciation to the historical costs year by year with correction. I would like to try to make this very clear: We do not have to deduct here the amount of 1,200,000 dollars, which was deducted by Mr. Vernot and deducted by Mr. Justice MacKinnon and so forth, for the portions which had been demolished, because the figure in the last column is the net figure after the application year by year of the demolition referable to each year.

LORD PORTER: You mean that they not only knocked off the actual depreciation, but they have taken out from the figures the demolitions? It is an appraisal value and not a site value?

MR: BRAIS: It is an appraisal figure. They have taken the historical figures as we have given them; they have knocked off the actual figures taken out of that building year by year; then they have applied the cost of building index; and the column that we are working on is the net result; so that we do not have to deduct the 1,200,000 dollars under those conditions.

LORD REID: I am bound to say that I should have regarded Example 8 as rather more consistent, if you had applied the percentage depreciation which the manual approves, instead of taking the approximations of Vernot, which are considerably larger than the manual approves.

MR. BRAIS: The manual takes 1½ per cent.

LORD REID: Exactly; and, if you take that year by year, you would have got a very much less depreciation than you are claiming.

MR. BRAIS: From 1913 to 1925 I have twelve years. From 1913 to 1941 there is twenty-nine years. If you take the middle figure from 1919, which is the middle figure in the first group, if one wants to average, from 1919 to 1941 we have twenty-one years.

If I take twenty-one years at 1½ per cent, which is the manual figure (page 297), I would have 30 per cent depreciation to apply.

LORD REID: You may be right on the first, but I am looking at the second, which is the important group. If you take everything after 1930 you would not get more than 15 per cent off at the outside. You would only get a trifling amount in the later years; yet you claim 18 per cent on the whole lot.

MR. BRAIS: This goes up to 1931. I have a very large amount in 1929, for example, and in 1930. If I applied that at 1929 (and from 1929 until 1941, 1942, and 1943 is at least twelve years) and if I put 1½ per cent, which was the manual figure, for the twelve years I get 18 per cent, my Lord.

LORD REID: That goes back to 1929, when the greater part of the expense is incurred.

MR. BRAIS: In 1929 I get the average. I would submit that these figures of 25 per cent and 18 per cent are correct according to the manual, if you want to take an average somewhere and not have to work it out year by year.

LORD PORTER: Are they correct? If you look from 1926 onwards and take the year 1930, first of all, 6,000,000 dollars odd, on that you would get 15 per cent.

MR. BRAIS: On that I would get 15 per cent.

LORD PORTER: You may get 16½ per cent.

MR. BRAIS: It would be eleven years at 1½ per cent; 16½ per cent.

LORD OAKSEY: If it is eleven years, it is 14.2 per cent.

MR. BRAIS: Until 1941, 1942, 1943?

LORD OAKSEY: If it is eleven years, it is 14.2 per cent. I am looking at the table.

MR. BRAIS: That is the column.

LORD PORTER: That is not 1½ per cent then.

MR. BRAIS: It is because the witnesses ordinarily use the formula of 1½ per cent. Did your Lordship refer to page 197?

LORD OAKSEY: Page 197 in the blue book, if you take the fifth column, which is the column that you take yourself.

LORD REID: You do not get 18 per cent until you are fifteen years old.

MR. BRAIS: I am not in Mr. Vernot's shoes; but what he was doing there was applying a rule of thumb to that building, in view of the larger part having been constructed earlier. I am not trying to give you a mathematical figure for him. Some people gave more and some people gave less; but I do say that, if you take 14 per cent across the border, you are not being equitable to the building.

LORD PORTER: I think that you did explain that pretty carefully before.

MR. BRAISZ: I did, my Lord. When we apply Example 8 to Example 2, we come to 10,045,000 dollars.

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If I may now conclude very briefly, my Lords, with the last matter, it is that the determination of the actual value of the specific building is a question of fact, and it is submitted that the appellants have failed to show that the figure found by the Superior Court judge, confirmed by two of the five judges of the Court of King's Bench and five of the five judges of the Supreme Court of Canada, is not the actual value of the Sun Life building.

Then, lastly, the instructions in the memorandum would clearly appear to have been prepared and issued on the basis of a law which is now and which was at the time of the assessment non-operative.

LORD ASQUITH: The 1937 Act?

MR. BRAIS: The 1937 Act, which gave not only preponderance to replacement, but obligated the assessor to use replacement, which is otherwise not necessary

If I may add just one last word in regard to the suggestion of my Lord Reid, I take Mr. Vernot's depreciation as it is and I use it, but, if any other depreciation is used according to the manual and the index applied, it would still bring it below Mr. Justice MacKinnon's figure.

LORD REID: It would still wipe out the index if you had done it the other way, I agree.

MR. BRAIS: Yes, my Lord. There is a wide margin there and I do not want to found myself upon that.

May I express my appreciation of your Lordships' kindness and consideration.

LORD PORTER: We are much obliged to you. Do I gather that that is all the address from your side?

MR. BRAIS: It is, my Lord.

MR. BEAULIEU: My Lords, in reply I would like to say a few words about the memorandum.

The first point is this. It was said that the memorandum was inspired by a statute, the Act of 1937, which was already repealed when the roll was deposited; that is to say, on the 1st December, 1940.

My submission is that this statute did not create any new law.

LORD PORTER: Speaking for myself, I do not think that you need labour this. Either the memorandum is right or it is wrong; and I do not think that it matters what was its origin.

MR. BEAULIEU: Yes, my Lord.

LORD PORTER: The question is: Is it right or wrong?

MR. BEAULIEU: I submit that it is right. First of all, it did not go against the law which was in existence, if I am correct in stating that the Act of 1937 did not change anything in the existing law. Secondly, I would submit that the manual was purely and simply a reproduction of the general principles of law, with sufficient discretion to the assessors in the exercise of their function.

LORD PORTER: Let us take that kind of proposition. What is there in the law which justifies the statement that at best in a wholly rented house you must take fifty-fifty, and which says that in the case of an owner-occupied house you must take replacement value? What in the law justifies those two statements?

MR. BEAULIEU: My submission is that there was no obligation at all created by the memorandum for the assessors to apply 50 per cent and 40 per cent. They were purely and simply advised to do so, if they thought that it was fit. My contention is that the memorandum must be construed with the evidence of Mr. Hulse.

LORD PORTER: We will look at that in a moment; but in fact in this case, rightly or wrongly, they used the word "directed".

MR. BEAULIEU: They used it, because they thought that it was the proper method to adopt in this case - not because they thought that they were bound by the memorandum; but, having taken into consideration in the actual case what under the law they were bound to take into consideration, the construction cost and the income, Mr. Vernot thought that he could properly follow the memorandum. Of course, he could have allowed up to 50 per cent to the commercial value. He allowed only 10 per cent. His discretion at least was ranging from zero to 50 per cent, and in the exercise of that discretion, rightly or wrongly, he adopted the figure of 10 per cent, for the reason that he has given.

My first submission is that the Act of 1937 purely and simply was a re-statement of the law.

LORD ASQUITH: Why should not this discretion range from zero to 100 per cent?

MR. BEAULIEU: Because the memorandum says that in buildings in category No. 3 they had first to take 50 per cent replacement value.

LORD ASQUITH: I know that it does. That is just the complaint made against the memorandum.

MR. BEAULIEU: My submission is that, although the memorandum said that, we must read it with the evidence of Mr. Hulse at page 250.

LORD PORTER: Let us look at that. That is Volume 2?

MR. BEAULIEU: Yes, my Lord. Mr. Hulse was the Chief Assessor and as such had to see to the application of the memorandum. He says at line 43, after having explained the memorandum, as it was, reading it and explaining: "This basis or rule, or any other rule, is of course to be deviated from by the assessor if, in his judgment, it is necessary to do so to arrive at the real value of the property." Their main object and their sole object is to arrive at the real value. They are advised to take the indications of the memorandum as a general application of certain fundamental principles and, unless we say that the assessors, although they must use their own judgment, must use their judgment in an arbitrary way or in a capricious way, my submission is that there is no conflict between the exercise of discretionary power and some guiding principles in the exercise of those powers, provided, of course, that the guiding principles are not so rigid that nothing is left to the discretion of the assessors.

Then at page 253, line 1, Mr. Hulse is asked: "And it

was prepared by the assessors? (A). Yes. (Q). Now, if I understood well your evidence, the assessor is not bound to the limit by these rules? (The President); I think Mr. Hulse said that. (The Witness): He is free. He is responsible for the final figures."

I submit that the memorandum should be read in the light of these explanations from the officer who was bound to see to its execution and, if it is so, whatever might be the words used in the memorandum (and I submit that they are always used in an advisory manner: It seems that this should be done; it seems that this proportion should be adopted) and even if in the memorandum some words appear too stringent, they must be construed in the light of the deposition of Mr. Hulse and it results from the whole of that that in these difficult cases, such as the Sun Life, where there is no market value to go by, they must try, first of all, to consider the reproduction cost. Then, if there is any income, they must consider the commercial value. They must weigh one with the other and after doing all that, if they come to the conclusion that applying the proportions of the memorandum would lead away from the real value, they must correct their figures.

LORD REID: Will you look at Mr. Hulse's evidence at page 255, line 20, when he began dealing with the 50 per cent. He was asked: "When the rental market is normal you will take in a commercial building rentals for 50 per cent? (A). (Q). And replacement for another 50 per cent? (A). Yes. (Q). Regardless of how the replacement value differs from the rental value? (A). That is correct." How do you say that that is reconcilable with any discretion in fact being exercised by the assessor?

MR. BEAULIEU: That is the correct procedure in normal cases. If there is no reason not to follow the memorandum or if the assessor is satisfied that by following the memorandum he will come to the actual value, then he follows that and that is correct.

LORD NORMAND: I think that the objection to the memorandum really goes too deep for this to be a sufficient answer. The objection to the memorandum is that it is an improper hampering of the assessor's judgment and it is in itself illogical and contrary to law to attempt to fix a percentage at all. If that is sound, I think that it is not an answer to say: We have done that in the general cases, allowing some discretion to an assessor to depart from it, because you have set up a normal standard which ought to be observed, unless there are exceptions, and that normal standard is ex hypothesi, if the argument against it is correct, entirely unjustified by law and in itself fallacious.

MR. BEAULIEU: I think that we must start from the principle laid down by our law, as I understand it: that, in order to get at the actual value, he must look at and consider replacement value and then look at and consider rental value. You must consider the two.

LORD PORTER: Where does your law say that you must look at and take replacement value as a necessary element? No doubt it is very desirable, but as a necessary element where does the law say that?

MR. BEAULIEU: All the judgments that have been quoted are to that effect: that when you want to find real value you must of necessity consider all the elements of value.

LORD PORTER: Certainly.

MR. BEAULIEU: And that amongst the elements of value that you must

consider is, first, what is called the indicia of the market, when there is an actual market; second, the replacement value; and, third, the revenue value or the income value. That, as I understand our jurisprudence, is the tenour and the substance of what has all the time been held. If you come to the case where there is no market value, you are left, as Mr. Justice Latourneau said in the Canada Cement case, with the other two, if they assist; but that does not mean, as I understand our jurisprudence and If I understand it correctly, that, if, by applying the two and weighing them, you come to a figure which in your opinion is after all not the correct value, you should mathematically and mechanically apply this formula. As I understand from Mr. Hulse, that is the way that everybody understood the memorandum.

LORD PORTER: I think that the difference between what I said to you and what you have said to me is that I did not say that there was no reason why you should not consider it, but what you seem to be saying is that you ought to adopt as one of the factors among the other factors replacement value, whereas the true view, as I understand the cases, is not that you should necessarily adopt but that you should consider and then you must make up your own mind as to what are the proper proportions, if any.

MR. BEAULIEU: It may be, my Lord; but what I want to submit is that you must not only consider them theoretically; you must give some weight to them.

LORD PORTER: You must give some weight to them, if they deserve weight in the particular case.

MR. BEAULIEU: Yes. I think that those two factors, the cost of reproduction and the income, always deserve some weight. If you have the market value, all that is weighed in the market. When you have a competitive market, any buyer on the market will, first of all, consider in his mind what it has cost and what it will give him. That is done automatically. That is the reason why it is said generally that, if you have the competitive market, an actual market, you are quite safe - not that the market value is really the actual value, but that the market value is the best test. You are not to consider the other ones, because every day on the market competitors bid somewhere. They consider replacement value; they consider the income; and they come to their conclusion and you can rely upon the conclusion and common sense of the common competitors; but the difficulty is that when you have no market it is impossible to follow that course and then you must not only look at the replacement and you must not only look at the revenue, but you must give them some weight in your final computation.

LORD ASQUITH: Yes; but why should you give replacement value a minimum of 50 per cent?

MR. BEAULIEU: If it were absolutely rigid, then there might be something in that.

LORD ASQUITH: I quite agree that the memorandum says at one point that there is no hard and fast rule and that within certain limits you have a discretion; but the discretion is to be exercised within the difference between zero and 50 per cent. There is no discretion as regards the other 50 per cent.

MR. BEAULIEU: My submission is that, if we adopt this conclusion, we are purely and simply rejecting the evidence of Mr. Hulse.

LORD ASQUITH: The memorandum surely means what it says, whatever

Mr. Hulse may say. It is a question of construction.

MR. BEAULIEU: This memorandum is purely and simply an informal document. It is not a contract. It is not a statute. It is purely and simply an informal document, wherein the assessors, after conferences, have purely and simply laid down their conclusions. It is not signed by anybody. It can be changed tomorrow at their desire.

LORD ASQUITH: I am not on that. It may be formal or informal; but is there any doubt as to what it means? Does it not mean quite certainly that you are to allocate a minimum of 50 per cent to replacement cost?

MR. BEAULIEU: My submission is that, even in the case of a contract, where one wants to know what construction should be put on the contract, one looks at the way in which the parties have construed their own contract.

LORD ASQUITH: I dispute that entirely.

MR. BEAULIEU: Mr. Hulse was the Chief Assessor and he says that that is the way that it must be construed. If we divorce Mr. Hulse from the plain wording of the memorandum and if we construe the memorandum as having the same character as a contract or as a statute, I would agree that it is too rigid.

LORD PORTER: I think that your real answer to my Lord, whatever weight we may give to it, is that this is advice and not binding.

MR. BEAULIEU: That is the proper way to put it. It is purely and simply advice.

LORD NORMAND: Assuming it to be so, if it is advice which is in fact followed and it is erroneous advice, what then?

MR. BEAULIEU: If in one case, by following that advice, they have created an injustice, then the court will intervene; but it is not because it is compulsory. The assessor in that case would purely and simply have taken a wrong yardstick. My submission is that, although everybody agrees that the assessment must be left to the judgment of the assessors, it must be a judgment guided by principle - not guided by caprice or arrived at arbitrarily.

LORD PORTER: I thought that you started by saying that the correct principle was that he should be absolutely free, though some advice may be given him as to the sort of attitude that he should take; but I thought that you said that he must be absolutely free. Is that right or is that wrong?

MR. BEAULIEU: Yes, my Lord; but I think that he is absolutely free, even if he is guided by principles, even if they are only principles of reason. In many matters the courts have full discretion. Nevertheless, it has been held many times that that discretion must be exercised judicially, according to the fundamental principles of fairness and justice. Let us take, for instance, the administration of criminal justice. It has happened, in my country, at least, that, in the face of a prevalence of a certain type of crimes, the learned judges who were entrusted with the administration of criminal justice have had a conference to decide whether or not they should apply more severe sentences in the case where they have discretion to apply sentences, and they have come to some conclusion. Nobody would suggest, I think, that they were renouncing their discretion by the fact that they agreed to be more severe in a

particular instance. Here we have sixteen assessors, working two by two in different wards. If everybody is left unguided, purely left to his caprice, we will undoubtedly have discrimination and we will undoubtedly have unfairness, and the memorandum was purely and simply treated as a form of advice, to tell them ---------

LORD ASQUITH: They must not be mis-guided. The criticism of the memorandum is that it mis-guides them, under paragraph 3.

MR. BEAULIEU: That is a question of appreciation, of course. My submission is that in a system of assessment like ours, based upon the capital value, the preponderating thing under our law is the reproduction cost and it is purely and simply normal and logical for the memorandum to say: You must, first of all, consider in a preponderant way the reproduction cost; of course, you must deduct from that the depreciation and so forth; but that is the main point to be considered under our system of law.

Then I submit that in this particular case, in view of the value of what have been called the amenities, amounting to over 3,000,000 dollars, it is fair and reasonable on any view to give a preponderating influence to this reproduction cost. That is based upon what I would call common sense and reason, in view of our system of assessment, which is based upon capital value.

I may further add that in this particular case the reproduction cost factor has not only been reduced by the blending of commercial value with reproduction cost in the proportion of 82.7 against 17.3 by the Board of Revision, but besides that the Board of Revision has deducted approximately 2,000,000 dollars on what they found to be the reproduction cost for the purpose of adopting the figures of Mr. Vernot.

LORD PORTER: Do you mean by that that, whereas they came to a higher figure, they adopted a lower one?

MR. BEAULIEU: A lower one, and for that reason the proportion of reproduction cost is far less than 83.7. It is not more than 75 per cent against 25 per cent, when we consider the deduction made by the Board of Revision to maintain the figures of the assessor. With all due respect, I submit that in the present case that proportion was not unfair, even if there had been no memorandum. Even if no memorandum had existed, the assessors would have been perfectly justified to say that in the present case these proportions were fair and should be followed.

I know that it has been submitted several times that we have been giving too much weight to the reproduction cost factor. I wish to submit to your Lordships these various considerations upon that point.

LORD REID: Before you leave that matter, I wonder whether you could tell me whether you would agree that the basis of this 100 per cent for owner-occupier is that you are taking value to the owner as the value with which you are concerned in assessing? It goes on to say in the second paragraph: "It would seem that properties in this category of owner-occupied are always worth to their owners current cost of replacement less depreciation."

MR. BEAULIEU: Yes, my Lord.

LORD REID: I would like you to tell me first whether I am right in thinking that value to the owner is at least a very large element in this matter as it is worked out, and, secondly,

whether you agree that, on the jurisprudence, value to the owner must be excluded and it is some other value that you must take?

MR. BEAULIEU: I submit that under our assessment system value to the owner is the fundamental element to be considered. It is the value to the owner, provided, of course, that the owner is willing to sell; but under our system we cannot obtain exchange value, unless we know what amount the owner would accept. I am not speaking only of the actual owner, the Sun Life, but any owner being in the position of the Sun Life - not obliged to sell, but willing to sell, if he finds his price. That element of the price that the owner would accept and below which he would not sell is a fundamental element of the valuation under our system. I would not say that it would be the only one.

LORD REID: I should be obliged if you would give me a reference, and not any more than a reference, to the cases which you say support that view, because I am bound to say that up to date I have not noticed in the citations of authority anything which says that value to the owner is the right way of looking at it.

MR. BEAULIEU: Value to the owner is one factor. I do not suggest that value to the owner is the only factor; but I submit that you cannot get at the willing buyer/willing seller price unless you take the value to the owner as one of your main considerations, because it is not enough to have a willing buyer in order to obtain the exchange value; you must also consider what the seller would be willing to accept. It is in the blending of those two ideas that we come to the real value. I do not like to take the value on the imaginary market, because I submit, with respect, that the imaginary market has not been adopted in our jurisprudence as a factor of value. It must be useful sometimes, of course.

LORD PORTER: Are you saying that we ought not to regard willing buyer and willing seller as the ultimate method of discovering what the proper assessment value is?

MR. BEAULIER: As was said by the Board of Revision: We can find a market value without imagining a sale. We can find out, without going through the process of creating an imaginary market, what would be normally the price which the actual owner or an owner in the same position as this one would accept, and then the next enquiry would be whether he would find a buyer at that price.

LORD PORTER: Supposing that the owner would not sell at all but you have heaps of willing buyers at a certain price, how do you arrive at your result in that case?

MR. BEAULIEU: I would purely and simply ask myself: If this owner does not want to sell at all,, what would another owner in this same position accept, having the same needs as the present owner? Of course, I quite agree that the value cannot increase for the very reason that an owner is not willing to sell at any price. That would not create a market; but what I am attempting to show is that the value to the owner, - the actual value; not the potential one -- is one of the preponderating elements, because it is necessary to take that into consideration in order to get at the exchange value and the exchange value is nothing other than the market value.

LORD ASQUITH: The value to the hypothetical owner who is willing to sell?

MR. BEAULIEU: Yes. We must consider, first of all, that he is

willing to sell and, if the actual owner is not willing to sell, we must consider what another owner would accept, if he were willing to sell.

LORD REID: The memorandum says that the value to the owner is what he has spent. That is the justification for the 100 per cent. I have difficulty in seeing how that is consistent with imagining an owner who is willing to sell. I can understand that you can say that an owner who has spent his money must be deemed to have got value; but why that should have anything to do with what he would accept in the market I have not yet discovered.

MR. BEAULIEU: If I understand, that is a little further explained, because they say that, if you have ---------

LORD REID: Obsolescence is allowed for; yes.

MR. BEAULIEU: They say that you must consider that, because he will be willing to do so.

LORD REID: At page 695 it says: "He would have to pay current prices to secure suitable accommodation" and it is assumed that he will have the same accommodation.

MR. BEAULIEU: They assume that the owner will at all events want the same property or a property of that kind, and they say: If he has to give up that property, he will have to rebuild a new one; that is to say, he will have to go on the market and purchase the materials necessary at the market price, and so forth. They say in their reference to market value: "Properties that are completely occupied by their owners, whether constructed for that purpose or acquired with that object in view, such as the Canadian Bank of Commerce", etc. "It would seem that properties in that category are always worhh to their owners the current cost of replacement less depreciation" -- they give the reason -- "since, if the owner had not already acquired such a property, but wished to provide himself with suitable premises at the present time he would have to pay current prices to secure suitable accommodation." To pay current prices is to revert to the prices of the market.

LORD ASQUITH: That is a standard entirely different from what he has spent on the building.

MR. BEAULIEU: Yes. I do not pretend that the reproduction cost is the value; but I say that it is the first step in order to get at the value, because from that reproduction cost you will have to deduct depreciation; you will have to deduct obsolescence; and also, if there has been wastage in the reproduction cost, of course that wastage should be taken care of, as did Mr. Vernot. Mr. Vernot took off from the actual cost over 1,000,000 dollars - 1,500,000 dollars - for what had been demolished, for sidewalks, for temporary partitions, because he came to the conclusion that that was wastage, and nobody ever suggested that there was more wastage in that case than what was adopted by Mr. Vernot.

LORD PORTER: It depends what you mean by the word "wastage" in that observation. Wastage may be one of two things. It may mean that you have done work which has been pulled down and reconstructed, which is what Mr. Vernot gave; but it might also mean that you have constructed a building which is inconvenient and that, if you were going to rebuild it, you would avoid those inconveniences. That is another type of wastage. Mr. Vernot, as I follow it, has not allowed for that, rightly or wrongly.

MR. BEAULIEU: My submission is that when you take reproduction cost as one factor, you must take it as it should be taken. It is reproduction cost; that is to say, the cost to reproduce the same building, deducting what should be deducted. I know that in some cases we speak of replacement value - erecting another building. If you take replacement value, you should at least be justified not to take into consideration other elements of value; but, if you take the reproduction cost in the way that I understand it, it would not give you the actual value; you would have to make some further enquiry as to revenue or, even after having found the revenue, you might come to the conclusion that your figures were too high or too low; but that is left to the judgment of the assessor. I submit, however, that his judgment is not unduly fettered if it is said that in doing his work he should consider some fundamental principles, so that every building of the same category should be assessed in the same way.

My Lords, it has been suggested that this memorandum at all events was not the result of the free will of the assessors; that it was under instructions of the Board of Revision that it was done. Reference has been made to Mr. Vernot's evidence, in Volume 1, page 25, line 10. It has been quoted very often, but I would like to call attention to one feature of that sentence, as to the proper construction that should be put upon the words used by Mr. Vernot. I am reading only the answer, which is to be found at line 17: "The assessors at a meeting, I think it was on the instructions of the Board of Revision, decided". My submission is that the instructions of the Board of Revision were only connected with the holding of the meeting. They were instructed by the Board of Revision to hold the meeting; but they were never instructed as to the decision that should be taken at that meeting. The rest of the sentence of Mr. Vernot seems to make it clear, because he says that it was the assessors who decided. At line 33 he was asked: "Who decided that? (A). The assessors who had buildings in these wards." Therefore the decisions were taken by the assessors themselves untrammelled, but they were instructed to hold the meeting.

If that construction is accepted, we have purely and simply a version similar to the version of Mr. Hulse. Otherwise, there would apparently be a conflict between the two.

LORD PORTER: Even if you take it as being the assessors, were they justified in laying down a universal rule with regard to all buildings and leaving it to the assessor to judge with regard to the particular case?

MR. BEAULIEU: There we come to the main problem, my Lord; that is to say, is it proper for a Board of Assessors to be guided by some principles, which are not rigid, but which are only in an advisory form and which are intended purely and simply to try to obtain fairness and justice to all the ratepayers. If it goes beyond that and if your Lordships should come to the conclusion that it was so binding that in any case, even if the assessors had found that it was not the actual value, they were bound to follow the rules, I would admit that the assessors' discretion was unduly fettered; but my submission is that, taking the memorandum as a whole and looking at the memorandum in the light of the evidence of those who were employed to apply it, your Lordships should come to the conclusion that these rules or these principles were only advisory in their character and nature and that full discretion was left to the assessor if at the end of all his operations he came to the conclusion that it was not the proper, real value.

I submit that the submission made by the respondents, that there was some instruction from the Board of Revision as to the decisions, is not supported by the passage which I have just quoted.

LORD PORTER: There are two problems, are there not? One is whether on the true construction of the memorandum the assessors were ordered to adopt certain figures. The other is whether in this particular case, whatever may be the construction of the memorandum, the assessors thought that they were bound?

MR. BEAULIEU: Yes. So far as Mr. Vernot is concerned, there is no evidence that he thought that he was bound.

LORD PORTER: I am not dealing with Mr. Vernot, because his view is not what was adopted. What was adopted was the view of the Board of Revision. The question is how far the Board of Revision thought that they were bound.

MR. BEAULIEU: I am coming to the Board of Revision and I quite remember that the Board of Revision said at a given moment "The memorandum directs us"; but I submit that these words should be taken in their context, taking the whole thing together. First of all, the Board of Revision was attempting to decide whether or not the assessors' method was reasonable and just. They found as a fact that it was a method followed by them which was reasonable and just. Having found that the method was reasonable and just, they directed their minds to the point as to whether it should be possible to work it more accurately and they did make some change - not because they found that it was not fair and reasonable, but because they found that there was another way of getting at a more accurate result. Having found first that the method was reasonable and just, I submit that they were entitled to say: If we follow the memorandum, we are purely and simply following rules that are reasonable and just and consequently we are doing our duty as a Board of Revision.

(Adjourned for a short time).

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MR. BEAULIEU: My Lords, the next point on which I should like to reply is the following. It was said that Mr. Vernot was to blame because he did not follow the instruction of the manual and that he took as the basis of his production cost what has been called the historical cost - what I should like to call the actual cost - instead of taking the figure of 11,000,000 dollars arrived at by Mr. Paquette. I submit that there is no instruction whatsoever given to the assessors in the manual. There are instructions given to what is called the Technical Department of the City. These two departments, although both are under the supervision of the same chief assessor, are totally different, and their functions should not be confused. The Technical Department was given the task, when it was decided to revalue every immovable in the city, of finding the reproduction cost of every immovable in the city. Of course, it was a huge task. They had to begin by finding some data, taking measurements, and preparing plans and sketches, and then they devised certain tables of a general character tending to show what would be the reproduction cost of various groups of houses, such as brick houses and so forth. Then these tables were gradually improved, and finally they had to fix the actual reproduction cost of the specified building, and that had to be put on a card, which was to remain in the archives of the city for ever. Moreover, the Technical Department was instructed to provide the assessors with all the data they could obtain; but it is specifically provided in the manual that the assessors are perfectly free to set aside all this data and to adopt other factors of valuation; and that is what they very often did. In support of this fundamental contention, I should like to refer your Lordships to the manual, first of all at pages 68 and 69.

LORD PORTER: I think the actual argument goes rather wider than that. I think what is said in this particular is that the city went upon a figure of actual cost provided by the Sun Life. It did in fact, subject to certain deductions. It is said (though this point was not taken at the time) that that is not quite the fair way of doing it. The proper method of doing it, if you are going to do it in that way at all, is by appraisal: that is to say, you do not find out what the building cost but what it ought to have cost. If you take the principle of finding out what it cost, then you have to be very careful as to what you allow for all kinds of depreciation. What, as I understand it, they say is that the city here took the actual cost, but did not make sufficient allowance for the depreciations which ought to have been allowed when one uses that system.

MR. BEAULIEU: The question as to whether they allowed enough depreciation is totally different; but I do want to try first of all to convince your Lordships that at all events the manual is no restriction upon the perfect freedom of the assessors.

LORD PORTER: I myself do not understand that that was argued. I may be wrong about it, of course.

MR. BEAULIEU: Although there are instructions to the Technical Department, we must bear in mind any distinction between the two. That was the first point that I intended to cover. Then I would go further, and say why the figure of 11,000,000 dollars found by Mr. Paquette in 1938 was not adopted by Mr. Vernot. That would justify his taking the historical cost. I would add, further, that historical cost has been taken not only in the case of the Sun Life, but in other cases. It all depended on the good judgment of the assessor. He was given the reproduction cost by the Technical Department, and it was for

him to decide whether or not that represented the actual value. In some cases the assessor did take the reproduction cost given by the Technical Department. In other cases he disregarded it and put his own appreciation of the value. The assessors appraised the property as they thought fit to do it. That was the line of argument which I intended to submit to your Lordships; but, if it is found useless, I will not proceed any further with it.

LORD PORTER: I do not want you to think that. I wanted to follow. What is your reference in the manual?

MR. BEAULIEU: Pages 68 and 69. That is on the first point. I want to show that there is this distinction between the assessors and the Technical Department. "After having first determined the different standards of construction according to which the buildings will be classified, the technical division of the assessor's department shall establish the cost of construction of each category of buildings, with the annual depreciation to which they are subject.

"It will then prepare a sketch plan of each building and determine the value of the latter by the unit prices established in the first place, keeping in mind the difference existing between each of them and the type-building. Everything that relates to measurements, quantities, classification, or unit prices is determined by the technical division which enters this information on cards. Each immovable thus has its own.

"Lastly, this preliminary work will be strengthened and completed by an examination of the property deeds in the registry office by another employee who will compile daily precise summaries of all property transfers, together with the charges which may burden those properties. These summaries will be classified according to the wards to which the properties belong. To that will be added the building permit with date and declared cost of the projected construction. Each property will thus have its own record, with which will also be placed copies of new plans of subdivisions or of cadastral changes.

"The municipal assessor's task now begins. Having before him the plan of the ward assigned to him, with the information contained therein and the other data I have just set forth, he must now complete the property cards and determine the valuations confided to him.

"The preceding pages are reproduced, with some minor changes, from the 'Real Estate Valuation Manual', published in 1936", and so forth.

Then there are pages 79, 80 and 81. "However, let us not be mistaken - and we cannot stress this point too strongly - the value of a property is not the sum of the unit prices of the land added to the unit prices of the buildings. These rates are determined by persons who necessarily follow rigid rules. They do not take into account the surroundings of the property or its state of maintenance. Certain details of construction and certain additions do not come within the plan of the mass estimation of a category of immovables. It cannot be otherwise. The factors: special situation; cost to one person or a particular contractor; revenue; price paid; maintenance charges, etc., cannot be included in their calculations.

"It is necessary to insist on the fact that this deals only with basic prices which apply to a large number of constructions

which are not all maintained in the same manner and which, therefore, do not all depreciate at the same pace. The Technical Division proceeds only in virtue of data which apply, once again, to a group of buildings. These tables and rates are general and could not determine isolated or exceptional cases. Their object is to establish the level of uniform values, aiming towards the equalisation of valuations. If it is found in particular cases that a valuation thus fixed is not in reality what it should be, either by reason of the market price or the abnormal state of maintenance or neglect of the property, it is the work of the assessor to rectify the valuation and enter the exact value, explaining why he deviates from the established figures. After all, it is the assessor alone who has the responsibility of deciding the current value of an immovable."

Then the last paragraph on page 81 says: "The assessor's duty, therefore, commences after the measurements, the quantities and the exact areas of the property to be valued have been furnished him, as well as the proper unit prices for that property, under normal conditions. All this information is furnished to him by technicians, specialists and experts. He is then in the position of a judge who has only to pronounce himself after having heard the case. In that, particularly, consists the originality of the system adopted here. The assessor need not be an architect, a land surveyor, an engineer, a contractor or a real estate agent at the same time. Others having these qualifications supply him with the technical and definite material which he needs but which his limited knowledge and available time prevent him from obtaining. All that is expected of him is to be an honest man, of good judgment and with sufficient knowledge to funfil his duty."

Then on page 98 we find part of the resolution of the Board of Revision of 21st September, 1939. The Board of Revision passed a resolution, which begins at page 95. I do not believe that it is necessary to read the whole resolution, but I should like to read under the heading "Valuation" on page 98: "The assessors complete the permanent card by inscribing thereon the valuation figures. It belongs to them to decide if the figure shall be modified by reason of depreciation and by taking into account other factors affecting the valuation of the property, as provided by the charter. If they thus arrive at a valuation figure different from that representing the intrinsic value or the replacement cost after deduction of the normal depreciation, they should indicate briefly the reason of their valuation and initial the entry on the permanent card.

"The work of valuation divides itself into two definite operations: (a) securing and uniting all information and data obtained by the assessors and the Technical Division; (b) the definitive valuation by the assessors who are in possession of the information and data shown on each permanent card."

My Lords, my purpose in making those quotations is to show the distinction between the assessors and the Technical Department, and to show that in their work as assessors the assessors of the City of Montreal are perfectly free. They have no instruction to receive from the Board of Revision on their work as assessors. Of course, they are entrusted with some administrative work outside their work as a tribunal, and as such they have to follow certain rules.

Then, if we refer to the valuation sheet, which is exhibit P.50, at volume four, page 712, which has already been referred to very often, the only point I wish to make is that "valuation

sheet" is printed on every one of these forms, so there can be no misunderstanding. The assessor is always reminded that he is the sole master of his assessment. Mr Cartier, who is the head of the Technical Department, also gives the same explanation. That is to be found in volume two, page 267, line 20. Mr. Cartier's deposition has been translated into English and appears before your Lordships now.

Therefore the suggestion that the assessors are hampered by some instruction from the Board of Revision is, I submit, unfounded. Again, when it was said that Mr. Vernot was in some way compelled to use reproduction cost, I submit that this statement, although it was made in a very guarded manner, is not supported by the evidence.

Then we come to the next point: Why did Mr. Vernot not, after all, take the 11,000,000 dollars figure?

LORD ASQUITH: Before you come to that, it has been suggested that the memorandum is inconsistent with the manual. The manual is always insisting, is it not, that, once the assessor has got his data and so on from the Technical Department, he is as free as air to act upon it? The memorandum would appear to make him not as free as air?

MR. BEAULIEU: I quite understand that. That was the point I was trying to discuss this morning, that the memorandum, if considered in the light of the testimony of Mr. MacRosie, does not contradict what has been said if it is taken together, and as containing orders and obligatory rules which might raise some question as to the validity of the assessment. I do not feel that I could usefully add anything on that point, which I discussed this morning.

LORD ASQUITH: We are in possession of your argument about that. The other point that occurred to me is: What sort of a place does the manual occupy in this argument? It is not law?

MR. BEAULIEU: It is not law.

LORD ASQUITH: It is an extremely valuable account of the actual proceedings. If the assessment had been otherwise conducted in accordance with law, the fact that it had not been conducted in accordance with the manual would not matter, nor <u>vice versa</u>, would it?

MR. BEAULIEU: Even if the instruction of the manual were not followed that would not decide the question of validity.

LORD ASQUITH: It would not invalidate anything?

MR. BEAULIEU: No, my Lord; but we would find in the manual long extracts of the law itself. It quotes almost all the provisions of the charter. So far as it does that, it is law; but then you have a summary, and a very well done summary, of the jurisprudence of the Province of Quebec. However, the conclusions are upon the responsibility of the author himself.

LORD OAKSEY: What I understood you to be arguing about was that Mr. Paquette was not the assessor?

MR. BEAULIEU: Mr. Paquette was not the assessor and was not preparing the assessment; when he arrived at the figure of 11,000,000 I should like to explain that in a very few minutes.

The reason why the figure of 11,000,000 dollars was not adopted by Mr. Vernot was that it did not represent the replacement value of the Sun Life and was not intended to represent that replacement value. It was purely and simply the first result of the work of finding the replacement value of the Sun Life. We must bear in mind that the figure of 11,000,000 dollars was arrived at in 1938. At that time the Technical Department was just beginning its work. It was in the first stage of the work. What I am stating now is just a summary of the evidence of Mr. Cartier, to which I will refer later, giving the pages from where I am taking these statements. In 1938 the Technical Department was at the first stage of its work. It had prepared some of the tables of a general character, which have been described in the manual, applicable to certain groups of property, but these tables themselves were not complete. Mr. Cartier explains that these first tables prepared were only contemplating or covering the main parts of the building - what is called the skeleton building. Gradually the tables were completed by including additional items, more detailed items of construction, and the consequence was that the reproduction cost increased - even those which were represented by tables. Mr. Cartier says that the unit prices were not changed, but there were more unit prices included, and as a result the reproduction cost, even of buildings covered by the tables, gradually increased.

Then in 1938 Mr. Paquette took these incomplete tables and tried to apply them - not precisely to the Sun Life as it stood but, as explained by Mr. Cartier, he tried to apply them to a building which would have had the same form and the same dimensions as the Sun Life, but without any of the special features of that building. So here I have at first gist 11,000,00 dollars. That was the probable reproduction cost of a building appearing or looking on the outside like the Sun Life but which was not built with the same material and which did not have any of the ornamentation of the Sun Life. That was the first gist, and it was with those first figures that Mr. Paquette arrived at the sum of 11,000,000 dollars. Then, as soon as the tables were completed, these figures were increased. Again, further increases were found necessary on account of the fact that the Sun Life was continually completing its building, and that increased cost had to be reflected. Finally, when they came to the final reproduction cost of the Sun Life, they had to make a complete inspection and to appraise the cost of the materials, which were in excess of what was covered by the general tables, and thus they arrived in 1942, only a year after the roll was deposited, at the figure of 17,000,000 dollars. From 11,000,000 dollars it was gradually increased by the processes I am attempting to describe to 17,000,000 dollars, which in their opinion was the reproduction cost of the Sun Life as it then existed. But, of course, Mr. Vernot could not be influenced or assisted by that figure. It was never given to him. It was ready only in 1942.

LORD PORTER: What actually happened, as I understood it, was this. The original calculation was made on the first complete figures and gradually increased. That figure was supplied by Mr. Vernot. He made his report, but not stating that. But when it came to the Board of Revision, which is the first definite decision which we have, the Board of Revision took a completely different basis. They said: "What did it cost you to put it up? Now we are going to start on that figure." Is that right?

MR. BEAULIEU: Yes, my Lord.

LORD PORTER: Therefore, in the assessment with which we are concerne

and the method of arriving at it, Mr. Paquette's figures were not regarded at all?

MR. BEAULIEU: Paquette's figure of 11,000,000 dollars was not regarded by the Board of Revision at all.

LORD PORTER: Nor the later amount?

MR. BEAULIEU: With regard to the later amount of 17,000,000 dollars, Mr. Cartier was there as a witness, and he explained how he had arrived, in November, 1942, at 17,000,000 dollars.

LORD PORTER: But that was not the basis which the Board of Revision adopted?

MR. BEAULIEU: No, my Lord. They continued on the basis adopted by Mr. Vernot of historical cost; and I suggest that Mr. Vernot was perfectly free, under the law and under the manual, to take the basis of his reproduction cost, whether on the historical cost or on the cost of reproduction. That was his duty and that was his responsibility. The reason why Mr. Vernot took that historical cost was, first of all, because at the time the only figure he could rely upon was Mr. Paquette's figure, which undoubtedly had no relation to the real reproduction cost of the Sun Life. He could not take the figure of 11,000,000 dollars, but he had the admission of 20,000,000 dollars as expenses. At all events, he thought that he was justified in taking the historical cost; and I submit that historical cost has been in other cases taken by the assessors, showing that they are totally free in the choice of the factors of valuation, and I submit that they should not be blamed if they elected to take one or the other, provided that they adapt it normally to the circumstances of the case. There is nowhere in the law or in the manual any provision compelling the assessor to take the reproduction cost as it appears in the tables. The manual says exactly the contrary; and there is no law to that effect. In the absence of any law, my submission is that Mr. Vernot could not do otherwise in this case than take the reproduction cost, because he could not rely upon the figures of the Technical Department at the time.

LORD REID: I understand that there never was any attack upon the historical method throughout this case in Canada?

MR. BEAULIEU: No, my Lord. It has been suggested that this historical cost has been used only for the Sun Life. May I refer your Lordships to two valuation sheets which, incidentally, have been filed, because we are not trying to justify all the assessments in the city of Montreal. We are only concerned with the assessment of the Sun Life, but incidentally, and at the request of the respondent, we have these sheets of valuations They are found in volume five and begin at page 908 and proceed to page 916. Page 908 concerns the Godfrey Realty or Confederation Building. In this case the reproduction cost as provided to the assessors by the Technical Department amounted to 1,218,156 dollars. That appears from the first page of that valuation.

LORD PORTER: Why do you say that that represents the historical cost of construction and that the general instruction to the technical staff was to work out a sort of generic cost of construction for types of building and not a particular one referring to each building?

MR. BEAULIEU: When it comes to an ordinary common building, a standardised building, they generally apply the reproduction cost appearing on the tables.

LORD PORTER: Where does it appear in this particular case ---------

MR. BEAULIEU: It appears in the evidence of Mr. Cartier.

LORD PORTER: He says that these were actual historical costs. Here you have a cost of 1,218,156 dollars. Does anybody say that that represents the amount of money spent in order to build that building, or may it be not the amount actually spent but the amount which on ordinary figures that building ought to cost?

MR. BEAULIEU: Mr. Cartier says it.

LORD PORTER: That is what I was asking.

MR. BEAULIEU: Mr. Cartier explains the way they proceeded, and he explains it after having taken first the figures in that table to arrive at the figure of 11,000,000 dollars in 1938. He explains that they gradually increase in order to have the actual cost of the Sun Life.

LORD PORTER: With the Sun Life that may be so; but I am dealing not with the Sun Life but with the Godfrey Realty. Here you are telling us that his figure is 1,218,156 dollars, and I understand you to say that that was the actual cost paid by the company?

MR. BEAULIEU: If I did make that statement it was in error, and I apopogise.

LORD ASQUITH: It is done on a cubic system, is it not?

MR. BEAULIEU: Yes, my Lord.

LORD ASQUITH: There is nothing about historical cost in this document from beginning to end?

MR. BEAULIEU: No, my Lord. I am referring to this sheet not to show that historical cost was used. I just wanted to follow the order of the pages. My contention is that, in two cases at least, the historical cost was taken by the assessor instead of the reproduction cost given to them by the Technical Department. The first of the two instances is the Dominion Square Building, which is to be found in volume five, page 911. I intended first of all to follow the order of the pages, but I may as well put it before your Lordships at once. On page 911 there is the cost of reproduction at 4,070,649 dollars, and on the next page we have "our replacement (net) 4,540,550 dollars" - that is the replacement the assessor assigned - and there is a note at the bottom of the page which says: "This building cost 3,682,031 dollars exclusive of architect's fees and interest during construction according to the evidence of Mr. George A. Ross, given before the Board of Assessors, November 14th, 1933."

LORD ASQUITH: That is Vernot's note, I suppose - "G.E.V."?

MR. BEAULIEU: Yes, my Lord. My conclusion, therefore, is that in this case, instead of taking the reproduction cost given by the Technical Department, the assessors relied upon the actual cost that was proved before the Board of Arbitration.

LORD PORTER: Where do you get that as shown? Where do you get any

indication which you can put before us as to which of these two costs the assessor took?

MR. BEAULIEU: The cost of the building he found in the records of the Board of Revision.

LORD PORTER: I dare say; but which of those did he use when he was calculating on which he could assess the building?

MR. BEAULIEU: That I do not know.

LORD PORTER: That is puzzling me. I do not know what inference you can draw from this, when you get two figures either of which may have been used.

MR. BEAULIEU: My inference is this. Having taken the reproduction cost as prepared by the Technical Department, he set it aside, and he gives his reason for that. He says: I am in possession of some evidence as to the actual cost, and, giving weight to the actual cost, I omit or set aside the reproduction cost, and I put my own replacement cost, which is so much.

LORD PORTER: Where do you get that from? That is what is puzzling me.

MR. BEAULIEU: That is only inference. There is no evidence as to the actual calculating of these figures.

LORD REID: The actual cost was 3,600,000 dollars. The replacement is 4,500,000 dollars. How do we square those two? You are inferring that "our replacement" half way down the page of 4,500,000 dollars is derived from an actual cost of 3,600,000 dollars?

MR. BEAULIEU: That is what I am arriving at, my Lord.

LORD REID: That is on the land; but where do we get any valuation of the building?

MR. BEAULIEU: In the record of the other building they had all the deeds. They had a complete record of all the transactions.

LORD REID: Plainly I have not made myself clear. One would have thought that the replacement cost could not exceed the actual cost of the building, except on the index figure if it is a recent building. If the actual cost of the building was only 3,600,000 dollars and the replacement cost is 4,500,000 dollars, how are the two squared?

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Mr. BEAULIEU: It was the actual cost there in 1933, and he was assessing that property in 1941, and apparently he made his calculation.I cannot say to your Lordships that there was no evidence as tothe actual calculation.

LORD ASQUITH: Building costs had fallen between those dates, not risen.

LORD REID: And depreciation also. I cannot myself see any relation between these two figures.

LORD PORTER: There are three, not four. The first one is 2,845,000, it being cubed. The next one is"Valuation 4,275,000 complaint withdrawn, 1939, Board of Revision; complaint 1st. December, 1941". The next is "remarks" which puts the capital at 11 per cent, 3,440,000. The next one is a decision of the Board of Revision which is 4,000,000, and the final one i what the building cost. What they do with it, I do not know.

LORD REID: There is no relation between any of them.

Mr. BEAULIEU: That is the only evidence I can put before your Lordships.

LORD PORTER: Speaking for myself, I cannot draw any deduction fro that series of figures.

Mr. BEAULIEU: It shows my lords that the assessors, not only were free to set aside the reproduction cost as per the manual, but that in fact they very often set aside the reproduction cost given to them by the technical department, and found their own reproduction cost. That is a case where they did that. Rightly or wrongly, instead of showing us how they did compute, they compute it and simply give the cost which was paid in certain years. That is given as one of the remarks justifying their setting aside the other.

LORD PORTER: Would you look under 10 on the second page. "Our replacement (net) 4,540550". That is placed upon a building which actually cost 3,682,031.

Mr. BEAULIEU: Yes.

LORDPORTER: So that so far from having taken the cost, they added to it to the extent of nearly a million dollars.

Mr. BEAULIEU: You must also bear in mind that they included in that the land.

LORD PORTER: Is it ?

Mr. BEAULIEU: Yes. On the first page we have the reproduction cost of the building and the land. They must be added together, there is no depreciation for the land.

LORD PORTER: Where is the land ?

Mr. BEAULIEU: 1,670,250, on the previous page.

LORD ASQUITH: It re-appears in 10 under "terrain".

LORD PORTER: That is as near as we can get it.

Mr. BEAULIEU: Yes. There are eight of them, and in two cases the assessor adopted the same figure as given by the technical department, and in all the others they adopted their own reproduction cost

There is another instance where they refer to the cost

of the building, and it is page 912. That is Canadian Industri Limited. The land was 7950 dollars and the building 528,300 giving a total of 616,250 dollars. The assessor brough it to 659,340. In the remarks they said the building alone cost 711,138 in 1930-31.

LORD PORTER: You have to take off from the building depreciation; that is 11 years depreciation, whatever that may be.

Mr. BEAULIEU: When they said "net replacement cost" Iassumed they did take the depreciation off.

LORD PORTER: What they said was "Building alone cost". If that is the historical value that means without depreciation.

LORD OAKSEY: They have depreciated it from 711,138 to 571390. That is in "remarks" on page 2. They have reduced the actual co

LORD REID: That is 20 per cent, which would be rather toomuch for 10 years, if they have adoptedthat as the basis. It does not look as if they have.

LORD NORMAND: Supposing your inference is correct, what does it prove which is relevant to this case ?

Mr. BEAULIEU: It only proves this. The manual says that the assessors were perfectly free to set aside the reproduction cost given by the technical department and adopt their own figure, and that they had the right to take into consideration other factors. That is what they did when they considered the purchase price of these properties.

LORDNORMAND: That is to say, it does not impose upon them the duty to take the figure arrived at by the appraisal method.

Mr. BEAULIEU: It does not go beyond that, and there is not a word of direct evidence in the record.

All these remarks I made are to be found in Mr Cartiers evidence, and there are 13 pages which I can give your Lordships, but they have been translated into English. They run from page 267 to 329. All that is explained and re-explain by Mr Cartier. It was said that the Sun Life was the only building that was treated in the way I have explained, and that is contradicted by Mr Cartier in Volume 2, page 323, line 40. "Q: I understand that you wish to add something? (A): I would like to add that the Sun Life was not treated differently from the other buildings. I have before me a list of large buildingsþ such as the Aldred Building, Insurance Building, Dominion Square Building. All these buildings were in exactly the same case as the Sun Life. The corrections to these buildings which we have added to the Sun Life, the Sun Life was not treated differently , it was like all the others".

Then, my Lord, itxwas pointed out that Mr Cartier did not devote much time to the inspection of the building. It must be explained that Mr Cartier, being the head of the Department, had some assistants, and these assistants did make the inspection and report to him. He says on page 268, line 13, that if we put end to end all the time devoted to the inspection of the Sun Life, it would represent a whole years work for one man. I submit it is plain that due consideration was given to the building of the Sun Life.

If I may be allowed to take a broad view of the evidence, and to submit it as a whole, there was no reason justifying Mr. Justice MacKinnon disturbing the findings of the Board.

I would first fof all put before your Lordships the fact that all the experts which were heard can be divided into three main groups; you have first one group which is concerned only with the revenue assessing, or valuing the property only from the point of view of a prudent investor. They are Mr. Lobley, Mr Simpson and Mr Surveyer, and their figures vary from 7,000,000 to 7,500,000. As was said by Mr. Justice St. Germain 7,500,000 was exactly the valuation of that building in 1930-31. It was not contested at the time, so by taking the figure of 7,500,000 these gentlemen purely and simply disregard all the expenses incurred since 1930-41, and we know that that amount is very heavy.

LORD PORTER: Whatever they have disregarded, I thought it was common ground that 7,028,000 dollars was the assessed value, if you took the revenue approach.

Mr. BEAULIEU: Yes, my Lord, but I am trying to point out that there was sufficient reason for the Board of Revision not to take that method of approach, but it had to mention it and to apply it to find the actual cost. I am not disputing the figures so far as you can consider them as what a prudent investor would pay. I am sure that any prudent investor, provided he had the money, would be glad to acquire the buildin of the Sun Life for 7,000,000 dollars, but of course there is n proof, as was said by Mr Justice Mackinnon, that the Sun Life would be willing to sell at that price, or that any other owner, in the place of the Sun Life, would do so. I am trying to explain to your Lordships why the Board of Revision did not adopt these figures, and I am submitting to your Lordships that the Board of Revision was entitled not to adopt them and was entitled to adopt the figure which it did adopt in fact, because there was solid and sound evidence in support of the finding, and Mr Justice MacKinnon on the other hand should not have disturbed this finding. There was not sufficient evidence to support his making a totally new assessment. My submission will be that Mr Justice MacKinnon was not entitled in law to re-make the assessment as he did.

The Board of Revision had before it first that set of witnesses which it had undoubtedly the right to disregard. Nobody has ever attempted to justify these figures.

LORD OAKSEY: Thepoint you were making upon that, as I understood it, was that the unchallenged figure of the actual assessment for the whole building in 1930 was 7,000,000 to 7,500,000. The point is that from 1930 to 1941, according to these witnesses, no addition was to be made to that figure.

Mr. BEAULIEU: No, my Lord.

LORD NORMAND: Although there had been a large expenditure.

LORD OAKSEY: Although there had been depreciation too.

Mr. BEAULIEU: Yes, there would be depreciation and there would be a very large amount spent.

LORD OAKSEY: The actual expenditure between 1930 and 1941 had been quite as much as 7,500,000 dollars, had it not ?

Mr. BEAULIEU: It was more than that, it was over 11,000,000.

LORD PORTER: From 1927 to 1931.

Mr. BEAULIEU: From 1927 to 1931 it was 7,500,000 dollars.

LORD PORTER: How much was spent after that ?

Mr. BEAULIEU: More than 11,000,000 dollars. In Volume 1 at page X we have a statement of the expenses.

LORD ASQUITH: I have a note that from 1931 it was very little but that if you include in 1931 it was about 5,000,000.

MR BEAULIEU: If we include 1931 it was 11,000,000, and it went to 20,000,000 dollars.

LORD OAKSEY: The assessment you gave was in 1930 ?

Mr. BEAULIEU: Yes, 1930-31. That was the roll prepared in 1930 for the two years. It was the 1930 figure because when we speak of the roll 1930-31, we speak of the roll covering the two years 1930-31.

LORD OAKSEY: That is based on figures up to the end of 1930,

Mr. BEAULIEU: Yes, my Lord.

LORD OAKSEY: And after that ?

Mr. BEAULIEU: After that, if you stop at 1930, the expense is 11,000,000.

LORD NORMAND: According to a note I have, I cannot remember where it was derived from, only a proportion of the 6,500,000 would be available for the roll of 1931.

LORD PORTER: Yes, I think it is 4,500,000.

LORD REID: If it is legitimate to go back to the old assessment rolls now, it must also be legitimate to go back to the old assessment roll of 1926-27, when you are attacking the total valuation. That would be against you ?

Mr. BEAULIEU: It would be against us if you took the old assessment rolls just before the assessment roll of 1930-31.

LORD REID: I would like to know whether you say as a matter of law or of discretion that it is right or wrong to compare the assessment today with pre-war assessments ?

Mr. BEAULIEU: That is a question of law. I say it is wrong because every assessment must be considered independently of others.

LORD REID: If it is wrong, why should we be doing it now ?

Mr. BEAULIEU: I am just submitting the figure. I am not asking for any other conclusion. If your Lordships wish, I can withdraw the remark. It was just a remark of Mr. Justice St. Germain I wanted to put before your Lordships, that is all.

LORD OAKSEY: Your criticism really was on the figure for revenue value which was adopted by Lobley and Simpson.

LORD ASQUITH: You were classifying the witnesses into three groups. You said that Lobley, Simpson and Surveyer went on the revenue producing basis.

Mr. BEAULIEU: Yes, that was 7,500,000.

LORD ASQUITH: That was the assessment in 1930, and it ought to be more now.

MR. BEAULIEU: As to Perrault and Archambault they were quoted by my learned friend as having found the reproduction cost, and the submission is that after that they attempted to value the property only from the point of view of a revenue producing building. It is true that they proceeded in a different way. They, first of all, began by establishing what they called the reproduction cost by taking the cubic foot method of assessing the price of each cubic foot at 81 cents, but then, having found that, they began not only to deduct the physical depreciation but they also went on to deduct what they called functional inadaptability. This naturally means that in their view the property, as a revenue producing exploitation, was not adaptable, so they continued to consider it as purely and simply a revenue producing exploitation of the building, because they considered it had been planned in such a way that it could not give all the revenue that it should have given if it had been built for that purpose. Everybody admits, I think, at all events: it is in evidence, that this Sun Life building was not built as a revenue producing building and that what is called functional inadaptability was purely and simply the result of the fact that it was planned like the home office of the Sun Life.

LORD PORTER: How far do you go with regard to that? Suppose it was planned as the home office of the Sun Life. I am taking a purely imaginary circumstance in order to exaggerate the case and get your answer. Suppose then the Sun Life had found that it had to migrate from there to somewhere else, would it make any difference that it was planned to house the Sun Life in the value which you would put upon it? Do not quarrel with my premises, I ask you to accept my premises and answer that question. You can quarrel afterwards as much as you like with my premises, but what is your answer on my premises?

MR. BEAULIEU: I do not believe it would make any difference whether it was planned this way or that way. The point I am trying to put to your Lordships is that Perrault and Archambault must be considered as having valued the property only as a revenue producing exploitation. That is the only point I want to make and that is the reason I put them with the others, Lobley, Simpson and Surveyer. That is the point I want to make.

In the second group we have all the experts of the City, three of whom have assessed the property on a reproduction cost basis only. Their figures vary from 17,600,000 dollars to 19,365,000 dollars. That is the figure of Mr. Perry. Mr. Fournier 17,617,000 dollars, Mr. Perry 19,365,000 dollars and Mr. Cartier 17,118,000 dollars. Between these two groups we find two other experts, Mr. Mills and Mr. Desaulniers, who are the only ones, I submit, who have considered every element of value which should be considered.

LORD ASQUITH: That is your third group?

MR. BEAULIEU: Yes, my Lord. That third group is the only one, and I will refer to their evidence very shortly, which have taken into consideration every element of value. They have taken the position that an assessor should take; they did not rely purely and simply upon reproduction cost, nor did they rely purely and simply upon commercial value, and they arrived at 15,800,000 dollars. It is at volume 4, page 757.

My submission is this. In view of the very large conflict of evidence between what I have called the first

group and the second, it was proper for the Board of Review to adopt the figure of Messrs. Desaulniers and Mills and that is what in fact they did. They came to the conclusion that the real value was 15,050,000 dollars, and the difference between 15,050,000 dollars and 15,600,000 dollars represents the difference in the value of the land. Mr. Desaulniers and Mr. Mills give their own valuation of the land.

LORD PORTER: What did they put on it, what difference does it make?

MR. BEAULIEU: A difference of about 100,000 dollars.

LORD PORTER: Which way?

MR. BEAULIEU: It was higher.

LORD PORTER: They put a higher value on the land. So that if we are doing this to make it correspond it would be 15,700,000 dollars?

MR. BEAULIEU: Yes, my Lord. They were asked to give their own opinion as to the value of the land. The Board of Revision found that it was bound by the admissions but they were not bound by the admissions and that is the difference. So that the Board of Revision substantially adopted these figures, and it is respectfully submitted that the Board of Revision was entitled to adopt that middle course figure and the depositions of Mills and Desaulniers are found at volume 4, page 756. At line 38 they enumerate all the elements of value that they have considered and they say: "We have considered all of the factors of value related to the subject property, viz: (a) character and trend of the neighbourhood. (b) desirability and use of the land on which the buildings are erected. (c) purchase price and present value of the land. (d) purpose for which the buildings were erected and the extent to which they fulfill this purpose. (e) cost of erecting the buildings and their reproduction cost. (f) money income from the property - actual and potential. (g) amenities accruing to the benefit of the owner occupant. (h) correlation of the various factors of value". They give an explanation of every one of those items. I would, however, call attention to their definition of real value, which I think is proper and it is found on page 758, line 1: "The real value of the subject property, as estimated herein" -----

LORD PORTER: They put it on a willing buyer and willing seller basis?

MR. BEAULIEU: Yes, and they say according to them the figure of 15 millions is the willing buyer-willing seller value.

The next question is to find whether Mr. Justice MacKinnon was justified in changing these figures. An attempt was made, first of all, to criticise the Board of Revision on the ground that it was making its own rules and then passing upon these rules as a tribunal. I submit that that is unfounded. The Board of Revision, as I said previously, possesses an administrative function, and it acts as a tribunal, but when it acts as a tribunal here, the complaints against a valuation of the assessors, it hears complaints over which it had no control before. It could not give any instruction to the assessors, it could not tell them how they were to proceed, so that every time a complaint was made before the Board it was a new matter for the Board, and the Board was in the position of any tribunal, unless we take it for granted that it was not honest.

LORD PORTER: There is no suggestion of that.

MR. BEAULIEU: No, my Lord. I think that criticism is not founded. On the other hand Mr. Justice MacKinnon misdirected himself on the nature of his function as a judge of the Superior Court sitting in appeal. In volume 5, page 1022, line 30, Mr. Justice MacKinnon says: "The court has not questioned the judgment of the Board except as regards the adjusted cost to the index number, the percentage allowed for depreciation and the percentage of replacement value and commercial value on which the final valuation was established. The Board has not accepted Vernot's figures on any of these items".

Apparently the intimation of Mr. Justice MacKinnon is that because the Board had disturbed the figures of Mr. Vernot he was himself, as a Court of Appeal, entitled to disturb in its turn the figures of the Board, that he would not interfere with the findings of the assessors but with the finding of the Board. I respectfully submit that the Board of Revision is entitled to make a re-assessment of the property. The finding of the Board is actually the assessment. That is the reason why the members of the Board are entitled not only to hear witnesses but to visit the property, to go on to the premises to find themselves what are the actual conditions. So that the Board of Revision is really re-assessing the property and it is within its function to re-assess the property. On the other hand, I submit that the judge of the Superior Court sitting in appeal has no power to re-assess. He must revise the assessment. He has no power to go on the premises and he does not hear any witnesses. He simply sits as a Court of Appeal and as a Court of Appeal he has not the power to remake the assessment; his duty is to find out if there was any error in law resulting in some gross injustice.

It was said that all the jurisprudence quoted to the effect that the Superior Court sitting in appeal, or a court sitting in appeal, should not interefere unless there was gross injustice, was based upon a text of the Citizen Towns Act or of the Municipal Code which is different from the City of Montreal, and I pointed out that the text with which we are concerned now has been in the Charter since 1899, so that all the authorities that we have quoted before or after 1940 are formidable because they are all concerned with the same text.

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LORD PORTER: All the authorities which deal with the question of assessment under that Act remain the same, but any case which is decided upon the wording of the other two Acts has no real application to this. Is not that right?

MR. BEAULIEU: My submission is that all the decisions tending to show that the Superior Court should not interfere unless there was a grave injustice apply to the present case, even though they were rendered before the modification of the Charter, which took place in 1936 and 1937.

LORD PORTER: I am not sure that I have made myself plain. You may have a decision which says that in the case of assessments under the assessment Act you must not alter unless there is grave injustice; you may have other decisions under the other Acts which may say exactly the same thing; but the decisions under the other Acts, where you find quite different language as to what a Superior Court can do, can have no vital binding effect upon the question in reference to Acts where you do not find that wording. That is all that I was saying.

MR. BEAULIEY: I was trying to show the reason why we find special texts in the Cities and Towns Act and the Municipal Code instructing the court not to intervene unless there is serious injustice. The reason is that under the Cities and Towns Act and under the Municipal Code the court which hears the appeal from the assessment hears also the evidence. It hears the witnesses; the whole case is made before the court. Under the Cities and Towns Act and under the Municipal Code the first appeal is to the municipal council, which is not a court. Then from the municipal council there is an appeal to the Circuit Court in some cases, to the County Court in other cases, to the Recorder's Court in other cases; but it is immaterial to which court the appeal may be. There is an appeal from the decision of the municipal council to the court, and this court hears anew the entire evidence. We are entitled to put before that court any evidence.

LORD PORTER: I follow what is your argument now. I had not followed what it was before. You say saying that in this case the judge is acting as a judge of appeal; in the other case he is acting as a judge of first instance?

MR. BEAULIEU: Yes. That is why it was necessary to say: Do not interfere.

I want also, to complete this point, to call your Lordships' attention to a provision of the City Charter, which is not affecting the powers of the Superior Court as a court of appeal, but which might show that it is a general principle in all municipal matters that the court should not interfere unless there is grave reason. I would call your Lordships' attention to section 391 of the Charter, which is to be found at page 346. Section 395 comes after the section giving the power to the Superior Court, but nevertheless section 391 is of general application and it is found under the general title of "Municipal Roll Assessment" and so forth. Section 391 says: "No error, omission, or informality in the preparation, completion, publication and putting into force of any tax roll or valuation and assessment roll, shall invalidate the same, unless an actual injustice results therefrom." The word "serious" is not used; it is the word "actual"; but it seems that the general trend of all these municipal laws is to restrict the interference of the courts to matters of serious importance.

I would wish to add one word about the conclusion of

this point which I am now developing. It is submitted that Mr. Justice MacKinnon, acting as a court of appeal, was not justified in making a new assessment. He could, if he found grave injustice, adopt the figure of one expert or another, but there is no expert justifying the figures made by Mr. Justice MacKinnon. These figures are his own figures. He arrives at these figures as if he was making an assessment, with the same liberty and freedom as if he were an assessor. I submit that Mr. Justice MacKinnon misdirected himself when he took that position.

LORD PORTER: That, of course, is contrary to the views of the Chief Justice, who took a very strong view about the obligation of the learned judge.

MR. BEAULIEU: Yes. The Chief Justice has explained that, in his view, the words "rendering of such judgment as to law and justice shall appertain", made some change; but I submit that the attention of my Lord The Chief Justice and the Supreme Court was not apparently directed to the provisions of the Charter and that at all events in his decision he took a view which is opposite to all the cases decided in the Province. I admit that they were cases decided in the Superior Court, which are not binding upon the Supreme Court; but they were so unanimous in their holdings that I submit that they should deserve some consideration.

LORD REID: Supposing that the judge of the Superior Court thinks that there has been a serious error by the Board of Revision, does not accept the evidence of any witness, but thinks that something else is required, what has he to adopt? Has he to adopt a decision of which he does not approve or has he to send it back for further consideration?

MR. BEAULIEU: I think, my Lord, that he would be entitled to send it back, because he can render "such judgment as to law and justice shall appertain". If he finds that some principles have been wrongly applied and that there was grave injustice and he is not satisfied with the record, I think that he is entitled so to deal with it. We do not need any text of law to that effect. It is covered by the general principle applicable to all courts of appeal, that they can render such decision as may remedy the situation.

LORD OAKSEY: Is that consistent with the words of the clause in section 384 about "proceed with the revision of the valuation"?

MR. BEAULIEU: Yes, my Lord.

LORD OAKSEY: If he disagrees with the valuation?

MR. BEAULIEU: He must proceed with the revision of the valuation as a court of appeal must and subject to the general principle that they should not intervene unless there is some serious reason.

LORD OAKSEY: What I understand that my noble and learned friend Lord Reid was putting to you was: If he does think that there has been a substantially improper valuation and he cannot adopt either one side or the other, should he not adopt a medium figure which he thinks right?

MR. BEAULIEU: I submit, with respect, that, although the text does not say that he is entitled so to do, he must proceed; but he "must proceed with the revision of the valuation submitted to

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him and with the rendering of such judgment as to law and justice shall appertain", namely, if he has all the elements necessary, he may proceed with the revision, but otherwise he will render such judgment as to law and justice shall appertain. I submit that this is the function of every court of appeal. Unless there was a restriction, as here, on the Court of Appeal, any court of appeal, I suggest with respect, is entitled to send back the record.

LORD PORTER: I should think that it may be that he is entitled to send back the record, but is he not also entitled to make a fresh revision himself? That is the problem.

MR. BEAULIEU: That is the problem that I am putting before your Lordships.

LORD ASQUITH: The ordinary position of a court of appeal, certainly in this country since the Judicature Act, is that it can substitute, as long as it has the materials on the facts found, its own decision for that of the original court. Before the Judicature Act that could not be done; you had to send cases back right and left and order new trials and so on.

MR. BEAULIEU: That may be. I submit that all the sections under that section 382 have expressly stated that the judge sitting as a court of appeal should not substitute his judgment. These decisions may be right or wrong and not binding upon the Board, but I am submitting that that is the gist of the decisions.

LORD PORTER: I should have thought that it was that the court of appeal should not substitute its own view, unless it found that the tribunal from whose decision it was sitting on appeal had made some mistake in law or had arrived at an unjust result. Supposing that the Board of Revision has made a mistake in law or that the figures upon which it has finally assessed do make a serious error in the valuation or whatever it may be, what then? Is not the judge entitled to come to his own conclusion?

MR. BEAULIEU: I submit that if the Superior Court found that there was some error in law and that there was no evidence justifying any finding of actual value, there would be nothing left to the court but to send it back.

LORD PORTER: That may be so; but, supposing that the court comes to the conclusion that there is evidence upon which it can act and acts upon it, are they <u>ultra vires</u> in taking that step? I am not saying whether this is right or not. I am merely testing the general principle.

MR. BEAULIEU: My submission is that it is <u>ultra vires</u> to make a new assessment. Whether he did or did not make a new assessment is a matter of appreciation; but my submission is that what Mr. Justice MacKinnon did was actually to take upon himself the responsibility of fixing the assessment of that property.

LORD ASQUITH: It must be a question, must it not, of whether you have enough facts found? If you have enough facts found, you are not compelled as a court of appeal to find on the precise figures spoken to by one side or the other. If you have no materials at all, of course you have to send it back.

MR. BEAULIEU: That is my submission.

LORD PORTER: Are you going further and saying that there are no facts here or that there are not sufficient facts for the judge to act on? The judge acted upon certain evidence which he had

in the record. Are you saying that the evidence which he had did not justify him in making this assessment?

MR. BEAULIEU: No, my Lord. My submission is that he took the position of the Board of Revision, which he had no right to take, making a new assessment, and for that purpose he had to set aside all the evidence and make an assessment of his own, taking right and left what he thought suited the purpose; but that is making an assessment and I submit that the Board of Revision only (excepting the assessors themselves) can re-make the assessment.

LORD ASQUITH: Then how can the judge proceed with the revision of the valuation, which are the words at the end of Article 384? Is his only way of proceeding that he should remit the matter to the original board? "proceed with the revision of the valuation" rather suggests that he should substitute a figure of his own for that at which the Board of Revision have arrived.

MR. BEAULIEU: My submission is that "proceed with the revision of the valuation" means proceed on questions of law to the revision of the assessment. That is my submission; but to re-make an assessment is, I would suggest, incompatible with the functions of a court of appeal generally and the right to make an assessment is granted by the legislature to some definite functionary or to a definite Board.

LORD REID: Is there is your Factum to the Supreme Court, which is very elaborate and I think very helpful, anything which would be helpful about this?

MR. BEAULIEU: I must say, my Lord, that I have no benefit from the Factum. I did not prepare it. Mr. Seguin prepared it.

I would like to add a few words in reference to the various tables which constitute Volume X, but only as to the last, Example No. 8. If have no comments to offer upon the other tables, but on this Table No. 8 I would, first of all, submit that there is no reason now in the present case to take the depreciation of Mr. Vernot, which has been set aside by everybody. The depreciation of 14 per cent adopted by the Board --------

(Their Lordships conferred).

LORD PORTER: We do not think that this is open to the other side.

MR. BEAULIEU: If your Lordship pleases.

LORD PORTER: There is one question that we wanted to ask and it is this. We might come to certain conclusions. We might come to the conclusion that there ought to be an alteration from what the Supreme Court determined. We might come to the conclusion that the figures were considerably wrong in certain matters. We might come to the conclusion that the reasoning was wrong, but that the result was right. I do not know what you suggest that we ought to do or whether there is any arrangement between the parties as to what ought to be done. For instance, supposing that we came to the conclusion that Mr. Justice MacKinnon had reached a right conclusion by a wrong method, what do you want us to do then? Do you want us to send it back or do you want us to say: This is an approximate figure; it is not quite right one way or another; but we do not want to put the parties to the expense of going back? It is rather that kind of thing. It might come out fairly even; it might come out very differently, in which case we should have to send it back, or do you want us to deal

with the matter? We rather want to know what attitude the two parties take with regard to that position.

MR. BEAULIEU: So far as I am concerned, I have no instructions from the City and I think that my mandate is finished. Mr. Seguin is representing the City.

LORD PORTER: What do you say about it?

MR. SEGUIN: Would it be possible, my Lord, for us to have five minutes to consult together?

LORD PORTER: Certainly. I rather gathered, Mr. Brais, that your view was that you wanted it that way. I think that you recently said that you wanted us to keep the assessment, even though the reasoning is wrong.

MR. BRAIS: Yes. I have already stated that most emphatically under directions and under authority before the Supreme Court in the lastfew pages, if your Lordships are interested in having the reference.

LORD PORTER: I remember your saying it here.

MR. BRAIS: It is in the conclusions, from page 85 and following of the Factum.

LORD PORTER: The original Factum?

MR. BRAIS: No, my Lord; the appellant's answer to the respondent's supplementary factum. It is from page 85 to page 90, and then we conclude specifically. That was submitted to the Supreme Court and I said at the time that that was the position. My learned friends did not in so many words say that they agreed. I have made that statement already. It builds up to the position on two pages, where we state it explicitly. This roll has completely gone. It is seven or eight years behind us and there are three more rolls coming. It is, after all, a little difference, compared to the formidable cost that would result.

(Counsel for the appellants retired and after a short time returned to the Council Chamber).

MR. BEAULIEU: We on our side would be satisfied if your Lordships would, if possible, first of all, lay down the principles. We should be very glad to know what is the legality or illegality of the memorandum. Then, if, having the figures before you, your Lordships should feel that you are in a position to make an assessment according to these figures, we would ask your Lordships to make it, instead of sending back the record.

LORD PORTER: That means that it may very likely be a rough and ready one.

MR. BEAULIEU: Yes. If, on the other hand, your Lordships, after having laid down the principle, should say: We have not before us the elements necessary to fix the value, instead of purely and simply adopting Mr. Justice MacKinnon's figure we should ask that the record be sent back to fix a value, but, if at all possible, with an expression as to the principle that should be applied.

LORD PORTER: It may be a little difficult for us to fix figures with any accuracy. On the other hand, we may think that a particular figure is more or less right. In that case, do you want us to send it back or do you want us to take the figure

which we think is more or less right, though it may not be calculable exactly upon any principle which we lay down?

MR. BEAULIEU: I am purely and simply stating what I am instructed to state.

LORD PORTER: That is all that we can ask of you.

MR. BEAULIEU: Yes, my Lord; we agree on behalf of the City.

LORD PORTER: Very well. That, I think, answers all the questions which were asked.

MR. BEAULIEU: If your Lordship pleases.

LORD PORTER: Their Lordships will take time to consider the advice which they will humbly tender to His Majesty.