28/1951

In the Privy Council.

No. 31 of 1950

ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN

THE CITY OF MONTREAL (*Defendant-Respondent*) APPELLANT

AND

SUN LIFE ASSURANCE COMPANY OF CANADA

(*Plaintiff-Petitioner*) RESPONDENT.

CASE FOR THE RESPONDENT

RECORD

1.—This is an appeal by special leave from a judgment of the Supreme Court of Canada (Rinfret, C.J., Kerwin, Taschereau, Rand and Estey, JJ.) dated the 21st day of February, 1950, relating to the 1941 municipal assessment of the Respondent's Head Office building and related heating plant in the City of Montreal. The judgment *a quo* unanimously maintained the appeal of the Respondent from a judgment of the Court of King's Bench, Appeal Side, of the Province of Quebec, rendered on 25th June, 1948, whereby that Court, by a majority (Galipeau, St. Germain and Pratte, JJ., St. Jacques and Casey, JJ., dissenting) of three to two, had reversed a judgment, rendered 20th September, 1944, by Mackinnon, J., of the Superior Court for the District of Montreal. Vol. V, p. 1026 Vol. V, p. 984

2.—By his judgment, which is restored by the judgment *a quo*, Mackinnon, J., sitting under the special provisions of the Charter of the City of Montreal, revised to the figure of $10,207,877.40 the assessment of $14,276,000 made by the assessor and affirmed by a decision of the Board of Revision of 21st June, 1943. A subsidiary appeal by the Respondent regarding the rental value of the premises for business and water tax purposes was dismissed by Mackinnon, J., and, on cross-appeal, by the Court of King's Bench and is no longer in issue. Vol. V, p. 1023 Vol. V, p. 983, A 1

RECORD

3.—The relevant provisions of the Appellant City's Charter (62 Vic., c. 58 (Quebec), as amended), under which the assessment in question was made and Respondent's appeal therefrom taken, are as follows :

> " 375. (a) Every three years the assessors shall draw up in " duplicate for each ward of the city a new valuation roll for all " the immovables in such ward. Such roll shall be completed and " deposited on or before the first of December, after having been " signed by the chief assessor."
>
> This roll shall contain
>
> * * * * *
>
> 3.—The actual value of the immovables ;
>
> * * * * *

4.—The only question at issue has been what was the " actual value " of the Respondent's immovables, the Head Office building and related heating plant. The value of the land has never been in question in these proceedings.

P-6, Supplementary Volume Vol. IV, pp. 740, *et seq.*
Vol. I, pp. vii, viii

5.—The Sun Life Building, which in its present form is the largest office building in Montreal, was not originally designed or constructed as a whole. It was built in three separate and distinct stages and no overall plan for the structure as it now stands existed at the outset. Each stage produced a complete building which was occupied as such, the second and third stages in turn incorporating what had been built before. This greatly added to the overall cost and had the effect of subordinating the interior and utilitarian design of the ultimate structure to the outward architectural appearance.

Vol. I, p. 41, *et seq.*

6.—The massive cubical form of the building, rising twenty-five storeys above the ground with minimum setbacks and recesses and unbroken by courts, arose from the three stages of construction and the fact that the designers saw fit to make this immense final building conform strictly to the external appearance and architectural features of the original small building, which was one-tenth of the size of the finally completed structure. The same costly granite was used throughout and the huge ornamental columns and balustrades were repeated four times over on the lower portion and again several times over on the upper portions.

Vol. I, p. 96, *et seq.*
Vol. I, p. 139, *et seq.*

7.—In the result the Respondent found itself possessed of an office building with vast floor areas of which a great and by ordinary standards highly excessive proportion was interior, dark and undesirable space, with excessive floor to ceiling heights, excessive service areas, the whole constructed of the most costly material throughout ; in short, one of the largest, most costly, and at the same time one of the least economical commercial office buildings in the world. The total cost as at the time of the assessment amounted to $20,627,873.92. Some $50,000.00 was spent on the building up to December 1st, 1941.

Vol. I, p. x
Vol. V, p. 983, A 29

Record

8.—At the time of the 1941 assessment now in issue the Respondent occupied approximately 50% of the building, 36% was leased to independent outside tenants under leases negotiated in the prevailing rental market, and 14% was vacant awaiting tenants. This vacant 14% was comprised of certain of the upper floors, which were left unfinished internally until tenants could be found for them. Vol. I, p. 81, l. 27

9.—The assessment history of the building (including land) from the time of its structural completion down to the assessment under attack is as follows :

	Main Building	*Heating Plant*	*Total*
(a) By decision of the full Board of Assessors, November 18, 1931, Exhibit P-22, on complaint of the present Respondent the assessment of $12,400,000 was reduced to	$8,000,000	$225,000	$8,225,000
(b) From 1931–2 to 1941–2 the assessment was increased year by year by the said assessors by the amounts corresponding to the Respondent's expenditures on completion of interior floors as the same were occupied by tenants (no allowance being made for depreciation or obsolescence) with the result that for the year immediately preceding the assessment in question the property stood on the Appellant's valuation roll at	$9,986,200	$225,000	$10,211,200
(c) By the assessment roll in issue filed in December, 1941, for the tax year 1942–3 the assessment was increased to	$13,755,500	$520,500	$14,276,000

or an overall increase in the total assessment from $10,211,200 to $14,276,000. It should be noted that in this sudden increase of $4,064,800 the land values were not increased but were in fact reduced.

RECORD

Vol. I, pp. xxi, *et seq.*

10.—Faced with this startling increase, not paralleled by the assessment of any of the other large office buildings in Montreal, the Respondent lodged a complaint before the Board of Revision and contended that the total valuation of the properties should not have exceeded $8,433,200. It was only at the hearing of this complaint that the existence of and the part played in this assessment by a certain Memorandum of the Assessors, Exhibit D-5, came to light. It is not in dispute that these rules were applied in making the assessment at issue. These rules place a great, and it is submitted, improper, preponderance of weight on replacement value. They divide large properties into four main categories, to wit :

Vol. IV, p. 695, *et seq.*

(1) Properties developed and operated solely on a commercial basis ;

(2) properties completely occupied by their owners ;

(3) properties partly occupied by the owners and partly rented ;

(4) theatres and hotels.

In the case of the fourth category alone is the assessor allowed some of the freedom required by law. For this category it is provided that :

" It would seem that to some extent these properties should " be valued on their individual merits."

Vol. IV, p. 696, l. 18

As regards the other three categories, the instructions are clearly illegal. The other categories of large buildings including the third, into which this building falls, are singled out for special discriminatory treatment.

Vol. I, p. 25, l. 28

In dealing with properties in the third category the Memorandum provides :

Ibid, l. 25

" It would seem that some consideration should be given " to rental value in these cases, so that the replacement factor " should be weighted somewhere between 50 per cent. and 100 per " cent. and the commercial value factor make up the difference " between 50 per cent. and 0."

The proportion of ownership occupancy is to be weighted with special features, its use to the owner and the enhanced prestige. The Memorandum, in dealing with this category, concludes :

I d, l. 36

" Each property will have to be considered on its merits " within the limits outlined above."

11.—The law at the time of the assessment required the assessors to determine the " actual value." Respondent submits that it is contrary to the principles of valuation to assess the value of buildings on the basis indicated in the Memorandum. The Memorandum leaves no exercise of discretion to the assessor, save " within the limits outlined above."

12.—The basis of valuation enunciated in the Assessors' Memorandum was new and foreign to the principles of valuation theretofore in force in

the City of Montreal as well as to those prevailing elsewhere throughout Canada. How it came to be adopted is disclosed in the present Appellant's Supplementary Factum in the Supreme Court of Canada as follows :

> " Before 1941, two schools were fighting for legislative " recognition in Montreal of one or the other system : the replace- " ment value or the economic value by the capitalized revenue.
>
> " In 1937, by 1 Geo. VI, Ch. 103, Section 50, the sponsors " of the replacement value school succeeded in having article 375 " of the Charter amended by replacing the words ' actual value ' " by the following :
>
> " ' 375.—3—Actual value of the said immoveables.
>
> " ' The actual value of the buildings shall be determined " ' by the intrinsic or replacement value, taking into account " ' the then present situation, the capital improvements or " ' the changes made to the property and the site. The lands " ' shall be valued according to their current value, consequent " ' upon their site and general and particular economic " ' fluctuations. In estimating such actual value, the yield " ' from the property must be taken into account, but only " ' as one of the factors in the estimating.' "

13.—The Assessors' Memorandum was drawn up in August 1940 during the period in which, by reason of the 1937 amendment, it was thought that a victory had been scored by the sponsors of the replacement value school. However, the 1937 amendment requiring, as it did, the use of replacement value as the basis of valuation was abrogated prior to the assessment here in question on the 29th April, 1941, by 5 Geo. VI, c. 73, s. 33. This statute reverted to the law prior to 1937 set out in paragraph 3 above.

The assessment here in question was governed by the 1941 statute, which expressly provided that it should " be made according to the provisions of this article " (*i.e.*, Article 375(a) quoted above). Notwithstanding this, the rules of the Assessors' Memorandum were applied unchanged in the making of the assessment. Vol. II, p. 247, l. 18

14.—The 1937 amendment of the Charter, 1 Geo. VI, c. 103, s. 57, provided for a Board of Revision of Valuations. This Board consists of three members who are appointed by the City Council. Section 382(14) provided :

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

RECORD

15.—In virtue of these powers the Board of Revision of Valuations, prior to August, 1940, promulgated for the use of the city assessors certain instructions which are set forth in the valuation sheets prepared by the Assessment Department. Under the heading " Valuation " (No. 4) we find :

Vol. IV, p. 713

> " The assessors complete the permanent card by inscribing " thereon the valuation figures. It belongs to them to decide if the " figures should 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 entry on the permanent card."

The words " and by taking into account other factors affecting the value of " the property, as provided by the Charter " can only refer to the 1937 amendment with its emphasis on replacement value, inasmuch as the 1941 Charter, under which this assessment was made, makes no reference to factors. The Board of Revision drew up their instructions under the 1937 amendment and did not change these instructions with the change in the law made by the 1941 amendment.

Vol. V, p. 983, A 5, l. 27

16.—The effect of the rules of the Assessors' Memorandum and the instructions of the Board of Revision and the part they played in substitution for the exercise of the assessors' discretion and the exercise of the art of the valuer in determining actual value as required by the 1941 Charter are illustrated by the extraordinary manner in which the assessment in question was made. The Montreal Charter provides, Article 375(a)(c), that at least two assessors shall act in all cases ; only one acted here. All this sole assessor did to arrive at the replacement valuation in his final computation was to take certain cost figures furnished by Respondent, adjust them to the year 1941 by employing an index figure worked out by the city's technical service, and deduct an arbitrary percentage based on the city's depreciation table. By this means he arrived at a replacement valuation of the main building of $14,404,578. Having arrived at a commercial valuation of $7,915,000, he purported to find the " actual value " by taking as a factor of 90% his large replacement value and as a factor of only 10% his commercial value, which produced a figure of $13,755,500, to which was added the valuation of the heating plant of $520,500, to make a total assessed value of $14,276,000.

P. 2, Vol. IV, p. 716

17.—The Respondent lodged a complaint against this assessment with the Board of Revision which confirmed the assessment and expressly approved the method followed by the " assessors " [*sic*] as being reasonable and just, and thereby confirmed and approved the use of the Assessors' Memorandum and the Board's instructions to the assessors, both of which

Vol. V, p. 983, A 26, l. 17

Vol. V, p. 983, A 28, l. 15

were compiled while the 1937 statute with its directive as to replacement value was in force. Record

18.—The decision of the Board shows clearly that the Board not only refused to accept the imaginary market principle as recognized by the Judicial Committee of the Privy Council in *Cedars Rapids Mfg. and Power Co.* v. *Lacoste* (1914) A.C.569 (1929) Que. K.B.47, but that it did not appreciate the significance of the hypothetical or imaginary willing buyer-willing seller rule. Vol. I, p. 164, l. 20 Vol. V, p.983,A 21, l. 1

19.—The Board says :

> " There is no proof of the existence of such a willing buyer.
> " As to the willing seller, he could not be any other than the Sun
> " Life itself, and the only figure contained in the record as to the
> " price at which this prospective seller puts its property is
> " $16,258,050.27 (Cf. : Admission, Schedule F)." Vol. V, p. 983, A 20, l. 45

In fact, of course, there can be no proof of the existence of a hypothetical or imaginary willing buyer or willing seller. The proof was that it is quite possible to imagine a market for the property and that it is a commercial building, not one to be compared with a church, a city hall or a railway station (Simpson, MacRossie, Lobley, Archambault). The amount of $16,258,050.27 mentioned by the Board is merely a book entry appearing in the Annual Statement furnished to the Superintendent of Insurance. It merely shows the amount of money spent on the building with the ordinary annual depreciation. The figures indicate merely the actual cost less an arbitrary physical depreciation. Vol. I, p. 91, l. 47 ; p. 110, l. 39 ; p. 49, l. 10 ; p. 64, l. 14 Vol. II, p. 225, l. 48; pp. 228–9 ; pp. 233–4 ; Vol. IV, p. 694

20.—The decision of the Board shows clearly that the Board misdirected itself in the same manner as the assessors had been misdirected in substituting for the exercise of discretion and the art of the valuer the rigid rules of the Assessors' Memorandum :

> ". . . . The building being partly occupied by the proprietor,
> " the rule adopted and followed by the assessors for all the large
> " properties of this category (See D-5) directs us to give a weight
> " of between 50% and 100% to the replacement factor, proportionately to the proprietors declared occupied value. That is,
> " each one per cent. of the rental value charged to the proprietor
> " should be multiplied by 0.5 plus 50 in order to obtain the rate
> " of appreciation of this part in the net replacement cost. Thus,
> " 64·61% above mentioned multiplied by 0·5 plus 50 will give
> " 82·3% which is the ratio of importance to be given to the net
> " replacement cost.
>
> " On the other hand, the commerical value is appreciated by
> " the complement between 100 and 82·3%, that is 17·7%. In
> " other words, the commercial value factor should be weighed

Vol. V, p. 983, A 28

" between 50 per cent. and zero. The rentals paid by the tenants " being equal to 35·39% should be multiplied by 0·5 which gives " 17·695 or 17·7% as above."

21.—The Respondent appealed to a judge of the Superior Court under Article 384 of the Charter which provides (*inter alia*) as follows :—

" In the case of appeal, any judge of the Superior Court may " order that a copy of the record, including copies of the valuation " certificate and of the documents annexed thereto, of the proceed- " ings of the board of revision as well as of the complaint itself, " be transmitted to him, and, upon receipt thereof, and after having " heard the parties, either in person or by attorney, but without " inquiry, he must proceed with the revision of the valuation " submitted to him and with the rendering of such judgment as to " law and justice shall appertain."

22.—It is submitted that under the distinctive wording of the Charter of the Appellant the appeal is not an ordinary appeal to a court of appeal, as such. The judge of the Superior Court could not, for example, merely rule on questions of law and refer the matter of fact back to the Board of Revision for a new assessment—" he must proceed with the revision of the valuation." He sits as a court of revision. The word " inquiry " in the phrase " without inquiry " is a translation of " enquête " in the French text in which the enactment was introduced and passed and means " the taking of evidence." The judge does not hear new evidence. The evidence is given before the Board of Revision, but the judge of the Superior Court, sitting as a court of revision, is in the position of a trial judge dealing with questions of fact on evidence that has been made by commission.

23.—The case in due course came on before Mr. Justice Mackinnon of the Superior Court, who, in compliance with the duty imposed upon him by the Charter after hearing full argument on both sides, proceeded to revise the valuation submitted to him on the record made before the Board of Revision. By his judgment, rendered on 20th September, 1944, he did not accept the figure contended for by the Respondent or that contended for by the Appellant. On the contrary, he fixed the valuation for purposes of assessment at the sum of $10,207,877.40.

Vol. V, p. 984

Vol. V, p. 1023

24.—There were no questions of fact involved. The value of the land was not in dispute. The cost of the buildings was admitted. Both sides were in substantial agreement as to the commercial or revenue valuation :

(i) The Assessor, Vernot	$7,915,000
(ii) Lobley, for the Respondent	$7,250,000
(iii) Simpson, for the Respondent	$7,500,000
(iv) Board of Revision	$7,028,623

Record

It was in evidence that the beauty of the building is reflected in the commercial or rental value. Vol. I, p. 138, l. 44 Vol. V, p. 869, l. 29

There were substantial differences between the estimated replacement valuations. These differences, however, were not due to any question of fact but rather to varying opinions as to what was the proper basis for depreciation.

25.—Mackinnon, J., found that the subject of the assessment was essentially a commercial office building which the Respondent originally intended to occupy wholly but which due to change of circumstances and the Respondent's decreasing space requirements was half rented or available for tenants at the time of the assessment.

26.—Mackinnon, J., held that, in the case of a property such as the Sun Life Building, both the depreciated replacement cost and the commercial approach should be considered in arriving at its actual value. On the subject of the depreciation to be allowed on the former approach, he says :—

> " It is considered that while the Sun Life Building is essen- Vol. V, p. 1004, l. 39
> " tially a commercial building it has certain special service features
> " which would entitle the Sun Life to ask for a greater depreciation
> " than allowed by the assessor Vernot and the Board.
> " In the erection of its building the Sun Life spent considerable
> " sums on special features and ornamentation which do not add
> " to its commercial value and which can never be reflected in a
> " sale price. In arriving at a value by means of the cost approach
> " these features should be considered in arriving at a depreciation
> " allowance as was done in the Minnesota case."

27.—In dealing with depreciation, Mackinnon, J., allowed for special features of the building, but it should be noted that the allowance he made was merely in respect of what the City's own witnesses had testified was excessive cost. He did not grant an allowance which would have resulted from the replacement of the present building by a large unattractive looking building on the present site. He concluded that the excess cost of special features warrants an additional depreciation of 14% over and above the physical depreciation allowed by the Board. He commented on the fact that the Board had allowed considerably less than the percentages for physical depreciation employed by the assessor, which latter he said seem " reasonable enough," but he used the Board's percentages. He disapproved of the Board's application of the index figure and reverted to that of the assessor. By these means he obtained a depreciated replacement valuation of $12,831,396.80.

Vol. V, p. 1010, l. 41

Vol. V, p. 1010, l. 25

Ibid, l. 9, Ibid, l. 48

28.—To arrive at the actual value, Mackinnon, J., disapproved of the employment of the replacement and commercial valuations as factors or percentages of 90% and 10% as done by the assessor and of 82·3% and

RECORD

17% as done by the Board of Revision and concluded that they should be given equal weight, by doing which he arrived at the amount of $10,207,877.40, at which he fixed the valuation.

29.—It is submitted that an examination of his reasons establishes that it was substantially the correct rule, the willing buyer–willing seller rule, that Mackinnon, J., was in fact applying. From his statement that he is discounting sums " which do not add to its commercial value and which " can never be reflected in a sale price," it is apparent that he was seeking an objective exchange value. The commercial value is the amount which the majority of willing purchasers would be prepared to pay. In setting as the replacement value a building of the same size, same aspect and of a fine quality, first class type, and depreciating only for the additional and extravagant cost incurred on special features and ornamentation which can never be reflected in a sale price, Mackinnon, J., was setting the maximum value to an occupier considered as a bidder, the payment of this amount being the alternative to building anew and avoiding the mistakes made in the first construction. Then, by taking as factors of 50% each the amount which an ordinary investment purchaser might offer and the amount which an exceptional purchaser, a buyer who must have that building or a similar building, bidding in a competitive market, would have in mind as a top figure, Mackinnon, J., covered the factor of the higgling of the market and thereby arrived at an objective exchange value or imaginary market value, i.e., the actual value.

30.—The present Appellant then appealed to the Court of King's Bench of the Province of Quebec, Appeal Side, and the Respondent cross-appealed. This appeal is given by Article 384 of the Montreal Charter in terms restricted only as to amount. This court, by a majority of three to two, on 25th June, 1948, rendered judgment reversing Mackinnon, J., and restoring the decision of the Board of Revision.

Vol. V, p. 1026

31.—The judgment of the Court of King's Bench, which was rendered by Galipeault, St. Germain and Pratte, JJ., St. Jacques and Casey, JJ., dissenting, sets forth the " considérants " or reasons which motivated the majority.

Ibid

Reference to these " considérants " demonstrates, it is submitted, the manner in and extent to which the members of the majority of that court misdirected themselves and also the fact that they did not, on the view they took, find it necessary to deal with the merits of the case. Thus the formal judgment of the majority commences with the proposition :

Vol. V, p. 1028, l. 19

". . . . en accordant le droit d'appeler de la décision du " Bureau de révision, la législature n'a pas dû vouloir que le juge " de la Cour Supérieure ou ceux de la Cour du Banc du Roi substi- " tuent leur opinion a celle des membres du Bureau sur les points " dont la décision requiert une appréciation d'expert, mais qu'il " a plutôt entendu accorder aux contribuables un moyen de se

" pourvoir contre les erreurs certaines, de principe ou de calcul,
" erreurs qui feraient manifestement échec au principe que les
" immeubles doivent être évalués de manière à repartir l'impôt
" équitablement suivant une norme commune a tous " ;

This, it is submitted, clearly ignores the express terms of the Appellant's Charter which require the judge of the Superior Court to revise the valuation and to render such judgment as to law and justice may appertain.

32.—The formal judgment of the majority approves the Assessors' Memorandum and not only ignores the circumstances under which the rules were enunciated but says :

". . . . c'est à bon droit que cet édifice a été évalué suivant Vol. V, p. 1029, l. 22
" la méthode usitée pour les immeubles ayant un double caractère."

This ignores the fact that the " méthode " of the Assessors' Memorandum was employed for the first time in the preparation of this 1941 assessment, was evolved under the abrogated definition of the 1937 amendment, which was never applicable, was contested the first time it was used, i.e., in the present case, and was so little " usitée " that the present is the first and only case before the courts in which its existence has even been disclosed.

33.—The formal judgment of the majority also discloses that it gave Vol. V, p. 1031, l. 24
undue weight to the $16,258,050.27 " book value " figure referred to by the Board of Revision as noted above.

34.—It is submitted that the majority judges of the Court of King's Bench gave their minds to a justification of the figures arrived at by the assessor and the Board of Revision rather than to consideration of the question as to whether Mackinnon, J., sitting as a court of revision, had failed to arrive at the true objective exchange value, the " actual value."

35.—The Respondent then appealed to the Supreme Court of Canada (Rinfret, C.J., and Kerwin, Taschereau, Rand and Estey, JJ.) who on 21st February, 1950, unanimously reversed the majority judgment of the Court of King's Bench and restored the valuation fixed by Mackinnon, J. The Chief Justice stressed the special provisions of the Montreal Charter and pointed out that the majority of the Court of King's Bench had disregarded the directions they contain. He stated :

" It follows that the judgment now under appeal, in my
" humble opinion, was not rendered according to the law which
" governs the City of Montreal, and that, for that reason alone, it
" ought to be set aside."

With regard to the Assessors' Memorandum, the Chief Justice says :

" Admittedly such were the rules and the guiding principles
" followed by the assessors in the present case, and it is to that

RECORD

" memorandum that we owe the idea embodied in the assessment
" herein of a certain percentage attributed to the replacement
" factor and another percentage attributed to the commercial
" value factor. In this instance the Board of Revision came to
" the conclusion, after a very complicated calculation, that the
" ratio of importance to be given to the net replacement cost should
" be 82·3% and the ratio of the commercial value 17·7%. Counsel
" for the respondent, in the course of the argument, was asked if
" a calculation of that kind for municipal valuation purposes was
" ever accepted in any Court of the Province of Quebec, and, of
" course, he could not point to any authority to that effect. Never-
" theless, that was the yardstick applied to the Sun Life property
" for its valuation by the Board of Revision."

He adopted the reasons of Casey, J.A., in the Court of King's Bench, and was of the opinion that Mackinnon, J., succeeded in placing a true objective exchange value on the property.

36.—Kerwin, J., in his Reasons, agreed with the dissenting judges below. He held that the " book value " figure would not affect the duty of the Assessors the Board or the Courts in fixing the value of the Respondents' immovables for the purposes of municipal taxation.

Regarding the Assessors' Memorandum he held that its formula must be disregarded.

37.—Taschereau, J., reviewed the authorities dealing with " actual value " and the " willing buyer–willing seller " formula and drew the distinction between " actual value " and " value in use " to the owner.

He held that both replacement and commercial valuations must be taken into account.

He pointed out that the " book value " figure of $16,258,050.00 did not represent the " real value " for " assessment purposes."

Finally, he held that the decision in the *Cedars Rapids* case, *supra*, applied to this case.

38.—Rand, J., held that the error of the assessment made lay in the fact that actual value had been virtually identified with value to the owner.

39.—Estey, J., held that the assessment under appeal was not governed by the terms of the Assessors' Memorandum having regard to the admittedly unique, distinct and different character of the Respondents' building.

40.—In the Province of Quebec, as elsewhere in Canada, where municipal taxation is based upon the actual or real value of the land and buildings, the authorities are uniformly to the effect that such expressions mean exchangeable value ; i.e., what the property will bring in terms of money in the prevailing free market when exposed to the test of competition.

41.—The Respondent submits it is self-evident that "actual value" must mean the same thing in respect of all immovables and as said by Duff, C.J., in *Montreal Island Power* v. *Laval des Rapides* (1935) S.C.R. at page 308, constitutes an "objective standard" which must be applied equally to each and every property in the municipality, regardless of whether that actual value is easy or difficult to determine in the case of any given property.

42.—The problem of establishing a market price or exchange value for assessment purposes is of course more complex in the case of a large property than in the case of a small one, but the statute does not in any way contemplate the drawing of a line beyond which properties will be valued for assessment purposes by some other standard. What applies to the small property must, it is submitted, also apply to the large, and the actual value of the latter still has to be found. Where no immediate market can be found as at the time of assessment, recourse must be had to an imaginary market. This means that the considerations must be looked to which would weigh with an imagined willing buyer and an imagined willing seller in arriving at a price at which the property would change hands between them.

43.—It obviously must make no difference that the property to be assessed is not for sale, either because it suits its present owner, or because he does not choose to move either through whim, fancy or other reasons peculiar to him. It still must be valued as at the time of assessment. So-called "value in use" to the owner does not represent "actual value" which may be higher or lower depending upon the attractiveness or otherwise of the particular property to all possible purchasers at the time. *C.N.R.* v. *City of Vancouver* (1950) 4 D.L.R. 807, and cases there cited at p. 811; *Great Central Railway* v. *Banbury Union* (1909) A.C. 78, Lord Dunedin at pp. 94–5; *Montreal Island Power* v. *Laval des Rapides* (1935) S.C.R. at p. 307.

44.—To find exchange value it is proper to consider all available indicia of value. In the case of the Sun Life Building the assessors and the Courts have had to rely mainly on two indicia of value, one reached by the revenue or commercial approach and the other by the depreciated replacement cost approach. By the former the revenue producing possibilities of the property are capitalized at the going rates on the money market to ascertain what the willing buyer would give for the property. By the latter the depreciated original cost of the building, converted to prevailing costs at the time of valuation, is obtained. In the case of the Sun Life Building where 50 per cent. is rented or held out for rent at the prevailing rates on the market, and all the space is rentable, the first indicium, deduced from the revenue or commercial approach, can be found with comparative ease. Both sides are in substantial agreement, the figures varying only between $7,200,000 and $7,900,000. The finding of the second indicium, however, presents difficulties due to the determination

RECORD

of the depreciation to be allowed. In addition to actual physical deterioration of the materials there is deterioration for obsolescence and for inherent defect in design and excessive expenditure on materials and ornamentation which can never be reflected in a sale price. This latter is sometimes referred to as " functional " depreciation.

The indicia having been found, the question to determine is what weight, if any, each would carry in determining the exchange value, i.e., the actual value. In other words, what weight would they carry in the minds of the imaginary willing buyer and the imaginary willing seller in the imaginary market ?

45.—No fixed rules or principles can be given for the manner in which the indicia of value are to be employed in a particular case. The right results can be ascertained by employing differing methods. The indicia may be employed as factors in determining the answer. Their weight as factors may be adjusted by the proportions in which they are used or, in the case of the depreciated replacement value factor, by the nature of the depreciation allowed. Or the indicia may be employed in other manners such as by starting with the assumption that any willing purchaser must be considered a prudent man and therefore a " prudent investor " and that therefore the indicium of the return to be received on the money invested will set a limit beyond which actual value cannot lie. No matter in what manner the indicia are used, each method seeks the same result, the discovery of the actual value. It is submitted that when it is established that the available indicia have been used in varying methods by various adjudicators and they, when not considering themselves bound by erroneous instructions and rules, have all arrived at the same result, the correctness of the result has been fully tested.

46.—The Respondent submits that, in the case of the Sun Life Building, where the evidence clearly shows extravagant use of costly materials and the existence of inherent functional disabilities but where the building is a commercial office building, the use of a formula which employs as a factor of 90 per cent. or 82·3 per cent. a replacement cost indicium which allows only for physical depreciation is the improper use of the indicia and cannot but produce injustice and discrimination.

47.—The Appellant does not really deny the functional disability and extravagance from which the building suffers but contends that the excess cost represents value in use to the Respondent which should be taken into account because the Respondent built the building and is in partial occupation of it without any intention (for the time being at least) of vacating or disposing of it. This is, of course, the adoption of a so-called "value in use" doctrine based on a theory of pure presumption which the Respondent submits is clearly wrong both under the authorities referred to above and from the very nature of the objective standard laid down by the legislature.

48.—The Respondent submits that the method directed by the Assessors' Memorandum as applied by the assessors in this case and approved by the Board of Revision, with its emphasis on replacement value, is clearly unsound, particularly when applied to a building of the nature of the construction in question. On the valuations as arrived at by the assessor and the Board of Revision, its application would necessarily produce the absurd result that if the Respondent had occupied the entire building at the time of this assessment with no changes whatsoever in the building or in the market which then existed, the " actual value " of the property would be a completely different one. The assessors are precluded by the directives of the Memorandum from carrying out the duties imposed on them by the law.

49.—The Respondent submits that the Judgment of the Supreme Court of Canada was right and should be affirmed for the following amongst other

REASONS

1. BECAUSE the Assessor was not free to carry out the duty imposed on him by law.

2. BECAUSE the Board of Revision and the Assessors improperly bound themselves by the instruction and the Memorandum and when considering and reviewing the assessment could not reach a proper conclusion.

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

4. BECAUSE the use of a replacement cost indicium as a factor of 90 per cent. or 82·3 per cent. as used by the Assessor and the Board respectively and without, furthermore, allowing any depreciation for inherent defect in design and excessive expenditures on costly materials and ornamentation was an improper use of such indicium and did not produce the " actual value " as required by the Charter.

5. BECAUSE the predominance given to replacement cost in the assessment in question was founded upon an erroneous theory, as opposed to market or exchange value.

6. BECAUSE the revised valuation fixed by Mackinnon, J., under the powers conferred on him by Article 384 of the Charter of the City of Montreal, has been demonstrated to be accurate by the tests applied to it by the use of the indicia in varying forms by the dissenting judges of the Court of King's Bench and by the five judges of the Supreme Court of Canada.

7. BECAUSE the Appellants cannot show that the revision of the said valuation by Mackinnon, J., was not in accordance with law and justice.

8. BECAUSE the judges of the Supreme Court of Canada have enunciated the correct principle, that " actual value " means exchange value.

9. BECAUSE the assessment under appeal discriminated against the Respondent in that the assessment of none of the other large office buildings in Montreal was increased in proportion.

10. BECAUSE of the other reasons given by Mackinnon, J., in the Superior Court, by the minority Judges of the Court of King's Bench and by all the Judges of the Supreme Court of Canada.

F. P. BRAIS.
HAZEN HANSARD.
G. D. SQUIBB.

No. 31 of 1950.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE CITY OF MONTREAL
(*Defendant-Respondent*) APPELLANT

AND

SUN LIFE ASSURANCE COMPANY OF CANADA
(*Plaintiff-Petitioner*) RESPONDENT.

CASE FOR THE RESPONDENT

LAURENCE JONES & Co.,
Winchester House,
Old Broad Street, E.C.2.
Solicitors for the Respondent.

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4
(A56165) Cursitor Street, Chancery Lane.