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28, 1951

DOMINION OF CANADA

In the Supreme Court of Canada

(OTTAWA)

On Appeal from a judgment of the Court of King's Bench.

BETWEEN:—

SUN LIFE ASSURANCE CO. OF CANADA,

Petitioner before the Board of Revision;
Plaintiff-Appellant in the Superior Court;
Respondent and Cross-Appellant in the Court of King's Bench, Appeal Side,

APPELLANT,

— and —

THE CITY OF MONTREAL,

Respondent before the Board of Revision;
Respondent in the Superior Court;
Appellant and Cross-Respondent in the Court of King's Bench, Appeal Side,

RESPONDENT.

APPELLANT'S FACTUM

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This is an appeal from a Judgment of the Court of King's Bench of the Province of Quebec sitting in Appeal for the District of Montreal rendered on the 25th of June, 1948, whereby that Court, by a majority of three to two, reversed the Judgment of the Superior Court for the District of Montreal (Mackinnon, J.) sitting in appeal under the provisions of the Charter of the City of Montreal, and restored the municipal assessment of the Appellant Company's properties for the year 1941 as confirmed by the City Board of Revision.

PART I — THE FACTS

Appellant is the owner of a large office building situated on Dominion Square in the City of Montreal which it occupies in part as its head office, the remainder being rented on a straight commercial basis to a large number of business tenants. The occupancy by Appellant of its said building has shown a downward trend. At the time of the 1941 assessment here in issue Appellant occupied approximately 50% of the space in the building and this had been reduced at the time of the hearing to 48.25%.

The building occupies an entire city block from Metcalfe to Mansfield Streets on Dorchester Street. From Dorchester Street it extends northward for approximately one-half of an exceedingly long city block. It is of massive cubical design, rising for twenty-five storeys above the ground, with walls unbroken by courts or light wells. As a result of its unbroken rectangular shape, it has very large individual floor areas with an excessive amount of interior space.

The extremely high cost of the building arose not only from its general design and the type of materials used but also from the method of construction employed. This was due to the fact that, without any initial preconceived plan, three separate buildings were from time to time constructed, all stemming from the original design of the initial building. At the end of each stage, the edifice was occupied as a completed building.

The first building, which now constitutes the southwest or Dorchester and Metcalfe corner of the final structure, was commenced in June, 1913, and completed in March, 1918. It was a comparatively small building of five or six storeys occupying approximately one-sixth of the ground area of the present structure. It was built as the head office of the Appellant Company and the very best and most costly materials were used throughout. The exterior of the building was of granite and featured heavy ornamental columns and other embellishments.

The second stage of construction consisted in approximately doubling the size of the original building by extending it east along Dorchester Street to Mansfield Street and adding two storeys. This was commenced in the summer of 1922 and completed in December, 1925.

The third stage, by which the great bulk of the existing structure was added, commenced in May, 1927, and was structurally completed in December, 1930. A number of the upper floors were not finished for occupancy by tenants at that time, nor completed until occupancy was from time to time thereafter contracted for. At the time of the 1941 assessment, now in issue, approximately 14% of the rentable space in the building was still unfinished and unoccupied.

The design of the structure as finally completed was governed by and subordinated to the external appearance which was in turn dictated by the character and ornamentation of the original building. Thus costly granite was used throughout, the heavy ornamental columns and balustrades had to be repeated four times over on the ground floor and again several times on the upper floors, in order to preserve the architectural unity and appearance of the final structure. Above all, the massive unbroken design of the building directly resulted from this three-stage construction and the considerations of architectural appearance governed by the original design which predominated. The result was one of the largest, most ornamental and costly, and at the same time one of the least economical office buildings in the world.

In conjunction with the construction of the third and major portion of the building, a related brick structure of a purely utilitarian character, with only one storey above ground, was built on the other side of Mansfield Street to house the heating plant of the office building. While this amounted to no more than a separate furnace room, it and the land it occupied were originally the subject of a separate assessment. However, at the instance of Appellant, the Board of Revision consolidated the two assessments on the basis that this boiler house was merely an adjunct of the office building. No appeal was taken by the City from the Board's decision, and this question is no longer in issue.

The assessment history of the Sun Life Building (including the land it occupies) is as follows:—

Upon structural completion as aforesaid in 1930, the Respondent's assessors placed the same on the valuation roll for the tax year 1931-1932 at:	$12,400,000.
The Appellant thereupon appealed from such assessment to the full Board of Assessors under the provisions of the City Charter then in effect. The appeal was allowed and the assessment was reduced to:	$8,000,000.

During the 10 years which followed, in which a system of annual assessments prevailed, this last figure of $8,000,000. was increased annually by amounts corresponding to the sums from time to time expended by the Appellant on completion of interior floors as the same were occupied by tenants (but without any allowance being made for depreciation or obsolescence). For the year immediately preceding the assessment here in issue, the property stood on the City valuation roll at: ..... $9,986,200.

By the assessment under attack (valuation roll filed in December 1941, for the tax year 1942-1943) the assessment of the Sun Life Building was suddenly increased, from the $9,986,200 above, to: ..... $13,755,500.

The assessment of the boiler house and land occupied by it had likewise remained constant throughout the same period at a total of: ..... $225,000.

By the assessment under attack this sum was increased to: ..... $520,500.

The above startling increases represented approximately 40% for the office building and approximately 135% for the boiler house. Since the land values were not increased but rather slightly reduced, it follows that the percentages of increase on the buildings as distinguished from the total included in the land were even greater. *The overall increase of the Appellant's property* effected by the assessment under attack was ..... $4,064,000.

The overall assessment as so increased was: $14,276,000.

It may be said at once that the land values as contained in the assessment roll under attack have not been questioned by the Appellant and are not in issue here. Except for the small reduction above noted they have remained constant and unchanged during this period.

At the same time the annual rental value of the space occupied by the Company in its said building was increased from $357,280 to $423,280 for water tax purposes and $421,580 for business tax purposes.

As a result of the consolidation of the assessments by the Board of Revision, it may be noted that the annual rental value of the "boiler house", assessed at $26,000, disappears.

The Company appealed to the Board of Revision of the City of Montreal from the foregoing assessment of $14,276,000, contending that the total valuation of its properties should be inserted on the said roll at: ..... $8,433,200.

and that the rental value of the space occupied by it in the office building should be reduced to: ..... $352,034.50.

During the hearing of this appeal, the Respondent asked the Board to increase the combined assessment of the property to: ..... $15,651,100.

By its Judgment the Board refused this increase but maintained the assessment as made, subject to consolidation of the "boiler house" assessment with that of the main building and to the consequent disappearance of any annual rental valuation on such "boiler house".

Appellant then appealed to the Superior Court, under the provisions of the City Charter. Mr. Justice Mackinnon sitting in that Court reduced the assessment of the property to: ..... $10,207,877.40.

but refused to disturb the Board's decision as to the annual rental value.

The City then appealed from the Judgment of Mackinnon, J. to the Court of King's Bench, Appeal Side, and the Appellant cross-appealed. By the majority Judgment *a quo*, the Court of King's Bench restored the Judgment of the Board of Revision and dismissed Appellant's cross-appeal.

At the instance of the Respondent and subject to a reserve as to the relevancy thereof, the amounts shown by the Appellant Company under the respective headings of "Book Value" and "Market Value" in respect of the entire property in question in its annual returns to the Superintendent of Insurance under the Insurance Act were set out as Schedule "F" to the

Joint Admission filed by the parties (Vol. I, p. XIX). These figures, for the years following structural completion of the building, are as follows:

Year	*Book Value*	*Market Value*
1931	$20,772,288.	$17,974,907.
1932	21,392,282.	18,594,901.
1933	21.586,939.	18,789,558.
1934	21,632,504.	18,835,123.
1935	21,676,198.	18,878,817.
1936	21,676,198.	17,676,198.
1937	17,357,230.	17,357,230.
1938	17,008.969.	17,008,969.
1939	16 670.793.	16,670,793.
1940	16,644,571.	16,644,571.
1941	16,258,050.	16,258,050.

The evidence regarding such figures is clear and uncontradicted (v. McAuslane, Vol. 2, p. 225, l. 45, p. 227, l. 41— p. 229, p. 233, l. 10; Ex. D-4, Vol. 4, p. 694). They are arrived at, following standard accounting practice, by deducting from actual cost fixed arbitrary annual depreciation of 2% and 5% for the main building and boiler house respectively. From 1937 on, the amounts under the captions "Book Value" and "Market Value" are identical. Prior to that date there is an apparent difference between the two but, as pointed out in the above evidence, this is solely due to a change in the method of setting up the accounts.

During this same period the property was assessed by the City and appeared upon its public valuation rolls at figures ranging from $8,000.000 to $10,000,000 approximately (see Schedule H, Vol. I, p. XXV). Notwithstanding this, there is nothing in the record to indicate that the higher "book value" figures were questioned by the Superintendent. Obviously such higher figures resulted from the application of the arbitrary standard practice above noted, and, as is well known, "book value" figures are usually much higher than real or actual value determined for assessment purposes. Moreover, during this depression period there was a pronounced temporary shrinkage in the immediate market value of the assets of many insurance and other companies which gave a distorted picture of the position of companies with long term liabilities. Real estate was not specifically dealt with but Parliament, in 1932, recognizing the above situation, empowered the minister, on the report of the Superintendent, to authorize the use by insurance companies in their returns of values on all their security holdings in excess of the prevailing market value thereof (v. 22-23 Geo. V, c. 46, s. 71 (2); c. 47, s. 25 (2)). Previously this latitude had only been afforded in respect of bonds and debentures redeemable at a fixed date (Insurance Act, 1917, s. 34 (a), added 1922).

Notwithstanding the obvious irrelevancy of these figures in Appellant's submission, both the Board of Revision and the majority in the Court below appear to have attached great weight thereto and to have completely ignored the fact that the reports so made were made openly throughout the entire period and obviously were intended to serve an entirely different purpose.

While a more detailed discussion of the evidence as to the method employed in arriving at the assessment under attack and of the opinions advanced by the expert witnesses produced by both sides will be found below under the heading of "ARGUMENT", it is convenient here to note briefly the facts in this respect. The City Charter requires that the "actual value" (or "real value", or, "valeur réelle") of the immoveable to be entered on the valuation roll shall be determined in each case by two assessors working together (Art. 375 (a) 3; 375 (c)). No other statutory direction is made then that the actual or real value shall be so determined.

In the year 1937 all municipal valuations in the City of Montreal, except those relating to new construction, were "pegged" by Provincial statute (v. Art. 375 (a) 7) at the level then prevailing on the City's valuation rolls. This is stated to have been done in order to enable the City to make a general revaluation of all taxable immoveables within its limits.

At the same time the City Charter was amended to provide that, commencing with the valuation roll here in question, such rolls should be prepared only every three years instead of annually as theretofore. The provisions of the City Charter regarding review of assessments so made were also amended, and the Board of Revision, which dealt with the present case in the first instance, was set up with power to hear evidence and other powers similar to a Court of first instance. The decisions of this Board were made subject to an unrestricted right of appeal first to the Superior Court and thereafter to the Court of King's Bench, Appeal Side. The present is the first case under this new system which has been carried to the Court of King's Bench and beyond.

The Respondent's officials charged with the duty of preparing the new rolls resulting from the amendments evolved a system of assessment based upon the so-called "Parent Manual". This "book of instructions", which seems to play such an important role in this case, is a thesis prepared by Honore Parent, K.C., then Director of Services of the City of Montreal, setting forth

inter alia a commentary on systems of municipal valuation and a review of the decided cases on the question of the determination of actual or real value. It is supplemented by a system of "rules of thumb" apparently intended to enable the City's Engineering or Technical Department to calculate the depreciated replacement cost of all buildings which might be encountered in the City. It contemplates that the figure thus determined by the City's technical employees shall be furnished by them to the assessors for valuation purposes as hereinafter indicated.

The "Parent Manual" does, of course, recognize that the problem of assessment presented by the City Charter is the determination of the *actual* or *real value* of the immoveable and that such actual or real value would be the price which the immoveable would command in a *free market* at the time of assessment. It also recognizes that, to determine such price, *all* indicia of value ought to be taken into account. The "practical part" of the Manual, parenthood of which is acknowledged by Respondent's Chief Assessor Hulse (Vol. 2, p. 241), gives, however, a preponderance of weight to one only of the indicia of value, namely, depreciated replacement cost.

Briefly stated, the system evolved in this connection contemplated the theoretical breaking-down of every immoveable structure into bricks and mortar to determine initial cost, the adjustment of the figure so obtained by an index figure related to prevailing construction costs and the application to the adjusted figure of a *fixed* depreciation table covering physical depreciation on an age basis only and without any allowance for *obsolescence*. The figure so arbitrarily arrived at is then furnished to the assessor as representing the *depreciated replacement cost* of the particular immoveable.

As will be seen, the assessor, notwithstanding his sworn duty to assess, is furnished under such a system with a figure purporting to represent one of the major indicia of real or actual value without ever having seen the immoveable in question or exercised any of the talents or aptitude for valuation which his office presupposes him to have. Accordingly, if the figure so supplied him is wrong, — and it readily can be, with the system employed, — the assessor is bound to be wrong to the extent that he uses it.

Superimposed on the system envisaged by the "Parent Manual", and apparently evolved after its preparation, was a further set of "rules of thumb" embodied in a memorandum

said to have been prepared by a meeting of all the assessors, governing the application of the City's system to large buildings. This presupposes, according to the memorandum, that there exists no actual market for such buildings. *It is the application of this memorandum,* coupled with the use of a grossly inaccurate depreciated replacement cost figure, which produces the extraordinary divergence referred to below and the real difference between the parties in this case.

Under this memorandum, it is provided in advance for the governance, — and not mere guidance, — of the assessors, that, in the case of large buildings, they shall employ the *depreciated replacement cost* figure which has been furnised them as a factor of at least 50% in arriving at their final valuation figure. It further provides that, depending upon the extent to which the particular building happens to be occupied by the owner thereof, the *remaining* 50% shall be divided between the depreciated replacement cost figure and a commercial valuation figure also furnished the assessor by the City Technical Department. Accordingly, a large building wholly owner-occupied would be assessed at 100% of the depreciated replacement cost figure under this memorandum. An identical, but wholly tenant-occupied, building would be assessed by using a factor of 50% of each. The same building, if partially occupied by the owner and partially by tenants, would be assessed with a factor for depreciated replacement cost lying somewhere between 50% and 100%, the remaining factor being based on the commercial valuation figure.

We will seek to demonstrate below the obvious fallacy and indeed the complete illegality of this memorandum. It is sufficient here to point out that the use of such a system would enable the assessors to arrive at an assessment figure which they place on the valuation roll as being the actual or real value of a property without ever so much as having visited the building assessed or even having any knowledge of its situation, condition or true value. It is exactly this that occurred in the present case.

Thus the evidence is that Messrs. Vernot and Lunch were the assessors charged with the duty of assessing the Sun Life Building in 1941. Two assessors were called for by the Statute but Lynch informs us that he did absolutely nothing. He saw nothing, said nothing and did nothing. He merely signed Vernot's valuation sheet as his "partner". Vernot in turn admits that he never visited the building in connection with the assessment. He claims that he was familiar with it because he was employed for a short period during the construction of the foundation of the

second extension and visited the building on its completion on a courtesy tour made by the Engineering Institute of Canada and on several subsequent occasions to see a friend there.

All that Vernot did was to take certain figures furnished to him by others as representing the replacement cost of the building and depreciate them in accordance with tables "in our Manual" to arrive at a figure of $14,404,578. as representing "1941 replacement costs". Again taking figures furnished him by others, he arrived at a commercial valuation figure of $7,915,000. or slightly more than one-half of his replacement cost figure. His work in arriving at these figures was purely mechanical and involved no exercise of discretion or assessment whatever. He then proceeded, under the memorandum above quoted, and for reasons which are not made clear, to take 90% of the said replacement cost figure and 10% of the said commercial valuation figure to arrive at the final result which was inserted on the valuation roll as the actual or real value of the property. It even appears that the proportion in which he used these "factors" was suggested to him by Mr. Munn, the former assessor in the ward in question from whom he took over in September, 1941, when Munn was appointed to the Board of Revision. Vernot says that he adopted this proportion because he thought it was "fair"!

It may be noted in passing that only two of the three members of the Board of Revision sat on the present case because the third was Mr. Munn, who recused himself on the ground that he had been concerned with the assessment in question.

It should also be noted that the figures employed by Vernot in the proportion of 90-10 include the value of the land in each instance. Since this value is a constant, it necessarily follows that, if it were deducted from the calculation, the weight given to the "factor" of replacement cost as against the commercial "factor", allegedly to take account of the character of the building's occupation, would be even greater than 90%.

The Appellant will contend that the assessors and the Board of Revision in confirming the assessment in question, proceeded on a wrong and illegal principle of valuation. Quite apart from this however, in view of the stress laid by the Judges who constituted the majority in the Court below on the weight to be given to the opinion of the assessors and of the Board as "experts" the following facts, which appear to have been completely overlooked in this regard, should here briefly be noted:—

(a) The assessors, as indicated above, completely failed to perform their sworn function of assessing and contented themselves with relying on and employing figures supplied to them by others;

(b) The Board of Revision was a newly constituted "Court" working under a new "system" which had not the sanction of law or of judicial authority. The composition of the Board was such that its members, from their previous and continuing association with the City and its assessment problems, were bound to be affected by bias in favour of a "system" designed to oversimplify the work of the assessors and of the Board. Only two out of the three members of the Board sat in this case because the third had worked as an assessor on the assessment in question up to three months before the Roll was deposited;

(c) The "system", and the methods employed thereunder which have produced the extraordinary result complained of in this case, had received the blessing in advance of the Board. This appears quite clearly from the printed instructions to assessors on the second and third pages of the valuation sheet adopted by the City (Exhibit P-1, Vol. 4, p. 713). These instructions commence:—

> "PROCEDURE. The following instructions on the manner in which the Assessors shall proceed with their work, have been given to the Chief Assessor, by the Board of Revision of Valuations, in virtue of the powers conferred on it by the Charter of the City of Montreal:—. . . ."

PART II — THE JUDGMENT A QUO

The formal Judgment of the Court of King's Bench (Vol. 5, pp. 1026 et seq.) was rendered by a majority of three to two. The judges comprising the majority were Galipault, St-Germain and Pratte, JJ. St. Jacques and Casey, JJ. who dissented, were both for confirming the Judgment in favour of the Appellant Company rendered by Mackinnon, J. in the Superior Court.

As will be seen from the formal Judgment, the majority in the Court below recognize that the jurisprudence lays down that the assessment must tend to establish a value which as far as possible reflects the price which a buyer would pay in the free market (p. 1028, l. 15) they have however based their decision not on an application of this doctrine, but on the proposition that

neither the Judge of the Superior Court nor the Judges of the Court of King's Bench should substitute their opinion for that of the Board of Revision. They so hold, because in their view the members of the Board must be regarded as "experts", whose opinion should not be disturbed in the absence of obvious errors of principle or of calculation. They hold that no such errors have been shown, and this notwithstanding the gross and manifest errors both of principle and of calculation which, Appellant respectfully submits, the record discloses. In so doing, they approve of the *Assessors' Memorandum* and its application. Finally they support their view that the decision of the Board of Revision should be restored by reference to the figure of $16,258,050.27, contained in the Company's returns to the Superintendent of Insurance to which reference has been made above. This figure, which was never put forward as the actual or real value of the property, they describe as a serious indication that the value established by the Board of Revision is much more exact than that for which the Company contends.

Specifically, Appellant respectfully submits that the Judgment of the majority below is erroneous in the following respects:—

(a) The majority Judges have wrongly interpreted the Charter of the Respondent, in regard to the powers and functions thereby accorded to the Board of Revision, by confounding the functions of the Board with those of the assessors and at the same time placing too much weight upon the opinion of the Board;

(b) They have wrongly minimized the powers of the Superior Court and of their own Court sitting in appeal under the provisions of the said Charter;

(c) They have wrongly treated the opinion of the Board of Revision as being that of "experts" rather than of an impartial Court of Review, although such opinion is not supported by reason or authority, is contradicted by the evidence of record and is based upon a "system" which the Board itself had approved of in advance;

(d) While they have recognized that actual or real value, which the Statute prescribes as the basis of the assessment, represents the price which a buyer would pay in the free market, they have failed to appreciate that the application of the City's system and in particular of the Assessor's Memorandum, which they expressly approved, cannot be relied on to produce that result and, as applied in this case, did not produce that result;

(e) They have ignored the evidence as to the actual or real value of the property in question;

(f) They have confused value with the means employed to determine value;

(g) They have wrongly found that the value of a property may be determined by reference to the momentary use to which it is being put rather than to the use to which it is capable of being put;

(h) They have erroneously stated that the question in issue turns on whether Appellant's building should be valued by taking into account both "replacement value" (sic) and "economic value" (sic) or only by taking into account its "economic value as the Company contends". In so stating, they have overlooked the fact that the Appellant Company has always contended that all available indicia of value must be looked at, including that derived by the depreciated replacement cost approach, as is proved by its introduction of a large volume of evidence supporting replacement cost valuations;

(i) They have failed to recognize that, whatever the means employed for determining value (e.g. by the comparative market data approach where available, by the commercial or economic approach, or by the depreciated replacement cost approach), the result obtained should be the same;

(j) They have accepted without question replacement cost and commercial valuations by the Assessors, by the Board and by the Respondent's witnesses which differ by anywhere from 100% to 150%;

(k) They have failed to recognize that, in order to produce an accurate result, in seeking actual or real value (i.e. free market value) by the replacement cost method, the replacement cost figures must be accurately determined in the first place and then fully depreciated to allow for the physical deterioration, obsolescence, useless ornamentation and functional deficiencies of the building being valued;

(l) They have failed to attach any significance to the fact that all of the witnesses on both sides as well as the assessors and the Board arrived at valuations by the commercial approach which were substantially identical, and the further fact that the valuations of the Appellant's witnesses, arrived at by the depre-

ciated replacement cost approach, produced results which, while slightly higher, definitely tended to support the commercial valuations;

(m) They have in effect approved the proposition that where two valuations seeking the same end produce results differing by 100%, that difference (which must indicate that one or both valuations are wrong) can be reconciled by using a proportion of one result and a proportion of the other;

(n) They have found that the same norm has been applied to the Appellant's property as to other properties in the City by the use of the City's system and the Assessor's Memorandum. In so doing they have ignored the fact that where the replacement cost and commercial valuations come out at substantially the same figure, as was proven to have been the case in all other buildings examined in the evidence here, it makes no difference what proportion of either is taken to obtain the final result, whereas if the valuations differ by 100% and more and a larger proportion of the higher and erroneous valuation is taken, substantial injustice and discrimination must result;

(o) They have failed to apply the only true principle for determining actual value or real value, namely, the ascertainment of the current price which would prevail in the free market;

(p) Finally they have adopted as probative of actual or real value a figure taken from the Company's records and returns to the Superintendent of Insurance which, while described as "market value" in such return, was to the knowledge of all concerned, and as definitely proved in this case, a purely arbitrary figure arrived at by deducting a set percentage per annum from original cost, which figure was neither put forward nor intended by anybody to represent the assessment value of the property in question.

The majority Judgment *a quo* restores the Judgment of the Board of Revision on the ground that it represents the opinion of "*experts*" for which that of an Appellate Court should not be substituted in the absence of obvious errors of principle or calculation or of manifest injustice.

It is, therefore, appropriate at this point to examine the Judgment of the Board of Revision to see whether it is entitled

to be accorded such weight as to direct and to a certain extent dictate the decision of an Appellate Tribunal. At the very least, if the Board's ruling is to have any such effect, it must first be ascertained that the evidence it accepted was based on proper legal principles.

The Judgment of the Board is reproduced at Volume 5, pp. 983-A-1 to 983-A-31. At page 983-A-3, l. 39 the Board makes the following general statement:—

> "In the accomplishment of their work in assessing these immoveables, the assessors have to be completely independent; they decide the amounts they put on the valuation roll and no one, not even the Chief Assessor, is empowered to dictate to them or even influence them in the full discretion they have of valuing the immoveables according to their personal judgment."

This is an entirely proper and accurate statement of what the assessors should do. It cannot however be applied by any stretch of the imagination to the conduct of the assessors in this case. Notwithstanding this the Board, in complete disregard of the evidence, enunciates the proposition that the work of the assessors should be regarded as sacrosanct and in the next breath proceeds to adopt the work of the assessors in this case. They refer without comment at page 983-A-8 l. 34 to the declaration of the assessor Lynch that he was merely a "partner" of the assessor Vernot and was not in a position to speak of the assessment in question and then proceed to excuse Vernot for not having visited the property in connection with the assessment because he had spent two months helping the Superintendent of construction in 1928 and had visited the building to see a friend and with the Engineering Institute at the time of its completion. The Board states: "He made his valuation 'not only from the knowledge of the building; from all the information he had in the office'." We are not told what this "information" is supposed to have been.

At page 983-A-26 the Board proceeds to reconstitute the assessment *"along the same lines as the ones followed by the assessors whose method we find reasonable and just"* (l. 17). The evidence of course is that Vernot worked purely from figures supplied to him by others and even in adopting the 90% replacement valuation and 10% commercial valuation proportions to get his final result, tells us (Vol. 1, p. 23, l. 34):—

> "That is one of the things that was in Mr. Munn's notes and I considered it, after study, to be fair."

To suggest therefore, as the Board does, that the sole assessor who acted in this instance was completely independent is preposterous.

At pages 983-A-4 and -5 the Board brushes aside Appellant's argument, founded on the unbroken series of assessments based upon the $8,000,000 valuation fixed in 1931 as the result of the Company's appeal at that time, by alluding to the fact that the rolls from 1939 to 1941 were "pegged" and by the curious argument that each new roll as it comes into force is a new assessment and the existing roll is thereupon no longer in force.

At page 983-A-5, ll. 41 et seq. the Board makes the following general statement which indicates the extent to which it misdirected itself:—

> "Now the words 'valeur reelle', 'actual value' of Art. 375, paragraph 3 of the Charter of the City of Montreal are not defined, their interpretation being left to the discretion of the assessors in each particular case . . . . The coupling of the word 'real' with the word 'value' indicates that real value is a fact not an hypothesis. Because this conception of real value is overlooked or ignored, the means, the elements to determine the said real value are often taken for the value itself. Such elements are unlimited in number. They vary '*ad infinitum*' as the cases. There is no fixed rule to determine in what proportion every element must be taken into account and what importance should be given to any element in particular. The same element may have more importance in one case than in another."

The foregoing passage indicates an entire misconception of the functions of the assessors, whose duty obviously is not to interpret the language of the statute but rather to find the thing which the statute directs, namely, actual or real value. Furthermore, the use of the word "proportion" indicates the Board's preoccupation with the City's system, approved in advance by the Board, of endeavouring to rectify shortcomings in their method of valuation by using the varying results they obtain in different proportions. This preoccupation is further illustrated by the following passage from the Board's Judgment (p. 983-A-22, l. 3):—

> "The stereotyped formula which is so frequently quoted: 'la valeur réelle . . . est le prix qu'un vendeur qui n'est pas obligé de vendre et qui n'est pas dépossédé mal-

> gré lui, mais qui désire vendre, réussira à avoir d'un acheteur, qui n'est pas obligé d'acheter, mais qui désire acheter' does not constitute a complete definition of the real value, but is merely a qualification of one of the numerous elements which may help in determining same."

This makes it clear that the Board considered the definition of real or actual value as being merely one of what it calls the "elements" of actual value. This is further confirmed by the statement they make at page 983-A-20, l. 40 regarding the evidence of Appellant's witnesses, namely:—

> "For Messrs. Lobley and Simpson there is only one way to value the Sun Life property: it is to imagine a 'willing seller and a willing buyer' and to figure what maximum price the buyer should pay, if he wants to make a reasonably safe investment.
>
> 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.)"

It may be noted that the figure of $16,258,050.27 they mention as being "the price at which this prospective seller puts its property" is the "book value" figure mentioned above which the majority in the Court below also stressed. There is no evidence anywhere in the Record to show that the Appellant ever offered or was willing to sell its property for such figure or any other amount.

It is clear from the foregoing that the Board completely failed to understand what all authorities on the subject make clear, namely, that the so-called "willing buyer - willing seller" formula is a definition of the thing which the statute directs must be established and necessarily involves recourse to an imaginary market, as pointed out in the authorities discussed below. The Board appears to have thought that, before this "formula could be applied" there would have to be an actual buyer and an actual seller. This is an evident misconception of the principle involved.

At page 983-A-21 the Board refers to the Appellant's contentions that actual or real value, being the value which the pro-

perty will command on the market, must be the result of a meeting of minds between a buyer and a seller, whether existing or imaginary, as "this disconcerting argument" and intimates that it has been suggested by the decision of the Privy Council in the Cedars Rapids cases referred to below. On the following page at l. 18 the Board says:—

> "To sustain the thesis developed by their experts, the learned Counsels for the Complainant have also had recourse to the authority of Honore Parent, K.C., and invoked the following passage of the 'Real Estate Valuation Manual' (English version, 2nd edition, 1941, p. 57):—
>
> > 'Whatever be the angle from which this problem is considered, there is only one solution possible—that the property tax rolls should have current value for their sole basis; that is to say, the valuation should be based upon "the price which a person who is not obliged to sell could obtain from a buyer who is not obliged to buy".'
>
> This general statement made with reference to immoveables which do not fall out of the ordinary, must not be singularized and interpreted wthout reading the context."

It is only necessary to point out that the above quoted passage from Mr. Parent's work, the very Manual produced by the City and adopted as the guide for the work of its assessors, is so little removed from its context that it is in fact his own final summary of the effect of all the authorities to which he alludes. It is indeed the last paragraph of his dissertation on the law affecting the value of real estate for municipal tax purposes.

At pages 983-A-13 and following, in dealing with the evidence of the Company's witnesses Perrault and Archambault, who valued the building by the depreciated replacement cost method, the Board appears to criticize these witnesses first for having employed the cube method in arriving at their replacement cost figures and second for having valued the Sun Life Building as a revenue producing enterprise. On the first point it may be noted that the cube method is the one approved by the Court of King's Bench in the Canada Cement case referred to below, Furthermore, both Perrault and Archambault are in substantial agreement with each other and with the City's witnesses on the gross replacement cost before deducting depreciation.

On the second point, it cannot be controverted that the building in question is a revenue producing building. Over 35% of its space at the time of the assessment was rented to outside tenants and the uncontradicted evidence is that all of its space, capable of occupation at all, is capable of being so rented. The fact that the City's own witnesses Mills and Desaulniers placed a rental value on all of the space, including the space occupied by the Company, is the best evidence of this.

At page 983-A-25, l. 48 the Board says:—

> "The wide margin between the commercial value and the replacement cost is not a proof of discrimination. It is due to the fact that the Sun Life property is a very exceptional one, not built to be rented to tenants, but for the use of the Company itself with special amenities and facilities; it is also due to the fact that the commercial value has been arrived at in accepting the actual rentals as declared by the Company based on the tenants' rental, which are not a just yardstick to fix the value of the space occupied by the Sun Life itself; it is also to be noted that the service space, the vacant space are not accounted for in the revenue."

The above passage again illustrates the gross error of principle upon which the Board proceeded and its complete disregard of the facts proved before it. In the first place it entirely ignores the fundamental and obvious fact that both commercial and replacement cost valuations are seeking the same result. The 100% to 150% difference between the City's figures in this regard, which the Board casually refers to as a "wide margin" are not to be so easily explained away. The fact of the matter is that all commercial valuations, whether made by the Company's experts, or the City witnesses or by the assessors or by the Board arrive at substantially identical results. All of such valuations, notwithstanding the statement of the Board in the above passage to the contrary, are based upon the potential revenue producing capabilities of the entire building, regardless of whether the space therein is occupied by the Appellant or by outside tenants. The further fact is that there is no real disagreement as to the gross replacement cost employed by the Company's or the City's witnesses as the basis of their several replacement cost valuations. The huge variance between the City's witnesses, the assessors and the Board on the one hand and the Appellant's witnesses on the other is in large measure accounted for by the failure of the former adequately to depreciate their gross figures in order to

allow for those deficiencies and features of the building which, while adding to its cost, either do not add to or actually detract from the price which it would command on the market. The implication in the above statement of the Board that the space in the building occupied by the Appellant is preferable or more valuable than the space occupied by tenants is entirely erroneous. The evidence discloses that the space occupied by the Appellant is in the main less desirable. Furthermore, the Appellant's witnesses did not merely apply the tenants' rentals to the space occupied by the Company. On the contrary, they made a complete valuation of all space and used the tenants' rentals, negotiated in the free market, as a yardstick to indicate the value of all space, but with full adjustments up or down where these were indicated.

At page 983-A-19 ll. 44 and following the Board refers to the evidence of the witness Cartier, Chief of the City's Technical Service and his assistants without any comment whatever on the extraordinary and highly irregular methods by which they arrive at their replacement cost figure, as to which see below.

At page 983-A-25 ll. 7 et seq., again dealing with the evidence of Perrault and Archambault the Board makes the following extraordinary statement:

> "b) that in making allowances for 'functional' depreciation and obsolescence, on top of the physical depreciation, they 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."

This passage clearly shows once again that the Board laboured under a fundamental misconception as to the meaning of the word "value" and confused the means of determining value with value itself. Obviously deductions made by these witnesses for functional depreciation and obsolescence could only be made from a valuation starting with cost as its base. These deductions, as well as deductions for physical depreciation, are made in order to reduce the replacement cost figure to an amount which will represent the price that the property would command in the market. If a thing cost more than it was worth at the outset, the excess must be deducted in order to find out what the thing is worth at any subsequent date in addition to deductions which

may have to be made to take care of the depreciation of the thing in the intervening time. There is clearly no duplication in so doing and no encroachment on the field of commercial or economic valuation. The point is that these deductions have to be made in order to bring the replacement cost valuation in line with the commercial valuation and it is the Board's failure to appreciate this that represents their fundamental error of principle. The duplication notion furthermore only arises because of the Board's insistence on the employment of two different valuation figures as percentage factors in arriving at the final result. Obviously, if the two valuations are accurate and accordingly show the same result, it makes no difference what proportion of either is used since the final result will be the same. The question of duplication therefore cannot arise.

At page 983-A-25 the Board makes the following statement, in direct contradiction of the evidence:—

> "If the present assessment is correct, the previous one was wrong, or the property was not in the same condition, which is the case of the Sun Life Building which has been gradually completed and occupied at various periods. It is not proven that other large properties in a similar condition have not been increased."

The uncontradicted evidence is that the only amounts spent on the Sun Life Building from 1931 to the time of the assessment in question were so spent for interior completion of certain floors as and when tenants could be found for them and that the assessment in each year was increased by the equivalent of the amounts so spent. Yet in the year preceding the assessment, when only some $3900 were spent, the assessment is suddenly jumped by approximately $4,000,000. Furthermore, it is not only proven, but admitted, that the assessments of other large properties were not increased (See Admission, Schedule H, Vol. 1, pp. XXI-XXV).

As final and conclusive evidence that the Board proceeded on a completely wrong principle of valuation, adopting such wrong principle from the assessors who in turn had derived it from the system approved in advance by the Board, reference should be made to the following passage of the Board's Judgment at page 983-A-28:

> "The total gross revenue as given, namely $1,189,055.30 divided into $768,265.56 for the Company and $420,789.74 paid by tenants, gives a percentage of 64.61%

and 35.39%. 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 it to give a weight of between 50% and -00% 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."

In the Superior Court, Mackinnon, J., whose Judgment appears at Vol. 5, pages 984 and following, recognized the principle that deduction should be made from gross replacement costs of an amount representing useless expenditures on embellishment and ornamentation and the functional deficiencies of the building, allowing a deduction of 14% in this connection. The Appellant submits that this deduction, although properly made was not adequate in the light of the evidence made. As a result, the depreciated replacement cost figure arrived at by Judge Mackinnon was too high. Although it appears from his Judgment that the learned Judge did not approve of the "weighting" of the replacement cost valuation and the commercial valuation in the proportions of 90 and 10 adopted by the assessors or 82.3 and 17.7 adopted by the Board, he fell into the error of employing each of his valuations for 50% in arriving at his final figure, which resulted in the fact that, to the extent that his replacement cost valuation was too high, its use as a 50% factor produced a final figure which was too high. This substantially accounts for the fact that he reached a real value of $10,207,877.40 (p. 1022) instead of the lower figure contended for by the Appellant.

PART III — ARGUMENT

Article 375 of the Charter of the City of Montreal (62 Viet. Ch. 58 as amended) provides as follows:—

> "Every three years the assessors shall draw up in duplicate for each ward of the City a new valuation roll for all the immoveables 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 immoveables; . . . . "

As will be seen, it is the exclusive function and duty of the assessors to determine the actual value of the immoveables to be inserted on the roll. By Article 374 of the Charter they must be sworn to perform such duty and by Article 375 (c) it is expressly laid down that:—

> "the Chief Assessor shall divide the work in such a manner that at least two assessors shall act together in drawing up the valuation roll or the supplementary rolls."

In the present instance, as noted above, only one assessor acted. Purporting to act in virtue of a system evolved by the City officials and approved of by the Board in advance, but in no way sanctioned by the law, he inserted on the valuation roll in question a figure which was arrived at by pure calculation from component figures supplied to him by others. He made his "assessment" without so much as visiting the building, and the figure he arrived at in no way represented any exercise by him of the function of assessing.

A proper appreciation of what is meant by "actual value" is essential to a determination of the present case. The Appellant submits, without fear of contradiction, that, as dictated by reason and the authorities noted below, "actual value" and "real value" are interchangeable expressions which mean no more nor less than the price which the thing to be valued will command in the free market. On the question of the interchangeability of the expressions "actual value" and "real value", as employed in the statutes and authorities, comparison may be made between Article 375 of the Charter under subsection (a) (3), where "actual value" is used, with Article 375 (a) (2) and Article 380 of the same Charter, in both of which the expression "real value" is used, obviously to denote the same thing. Furthermore, the French version of Article 375 renders "actual value" as "valeur réelle". See also Sections 485 and 488 of the Cities and Towns Act, which use these expressions interchangeably, and the several authorities cited below.

The Legislature has established, as the basis for the determination of the proportion of municipal taxation which each

property owner in the City of Montreal shall bear, the actual value of the property he owns and has placed upon the assessors the duty of determining that actual value in respect of every property. The actual value so determined must accordingly be the same for all properties in the City whether they be vacant land, residential property, commercial property or industrial property, and whether their nature is such as to render the determination of that actual value relatively simple or relatively difficult. See in this connection the remarks of Chief Justice Duff in *Montreal Island Power Co. v. Town of Laval des Rapides* (1935 S.C.R. 304) where he says at page 307:—

> "These assessment provisions (i.e., the sections of the Cities and Towns Act calling for the determination by the assessors of real or actual value), like other assessment provisions, contemplate an objective standard which can be applied with fairly reasonable uniformity to all classes of owners alike."

As to what constitutes actual or real value the Court is respectfully referred to the following authorities:—

Montreal Island Power v. The Town of Laval des Rapides above cited, where Chief Justice Duff after quoting the provisions of sections 485 and 488 of the Cities and Towns Act, says at page 305:—

> "Obviously, 'real value' and 'actual value' are regarded by the legislature as convertible expressions. The construction of these phrases does not, I think, present any difficulty. The meaning of 'actual value' when used in a legal instrument, subject, of course, to any controlling context, is indicated by the following passage from the judgment of Lord MacLaren in *Lord Advocate v. Earl of Home* (1891, 28 Sc. L.R. 289 at 293).
>
> > 'Now, the word "value" may have different meanings, like many other words in common use, according as it is used in pure literature, or in a business communication or in conversation. But I think that "value" when it occurs in a contract has a perfectly definite and known meaning unless there be something in the contract itself to suggest a meaning different from the ordinary meaning. It means exchangeable value — the price which the subject will bring when exposed to the test of competition.'

When used for the purpose of defining the valuation of property for taxation purposes, the courts have, in this country, and generally speaking, on this continent, accepted this view of the term 'value'.

In *Grierson v. Edmonton* (1917, 58 Can. S.C.R. 13; 1917, 2 W.W.R. 1139) Sir Charles Fitzpatrick, with, I think, the concurrence of all the members of the Court, used these words:—

> 'Speaking generally the intrinsic value of a piece of property must necessarily be the price which it will command in the open market and the local Judge sitting with his knowledge and experience in ascertaining the price or real estate within his jurisdiction would, under normal conditons, be in a better position to judge of the value of such property than I can assume to be.'

In *Cummings v. Merchants' National Bank of Toledo* (1880, 25 Law. Ed. 903 at 906), Mr. Justice Miller, speaking for the majority of the Supreme Court of the United States, said:—

> 'It is proper to say in extenuation of the rule of primary valuation of different species of property developed in this record, that it is not limited to the State of Ohio, or to part of it. The constitutions and the statutes of nearly all the States have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to be taxed. The phrases "salable value", "actual value", "cash value", and others used in the directions to assessing officers, all mean the same thing, and are designed to effect the same purpose. Burr, Tax., P. 227, sec. 99. But it is a matter of common observation that in the valuation of real estate this rule is habitually disregarded.'

The Court in that case virtually adopted a passage in Burroughs on Taxation at page 227. The writer of that well known text-book treated the rule as settled in the United States, and the Supreme Court of the United States adopted his view.

I mention also the judgment of the Court of Appeal in Ireland in Curneen and Tottenham (1896, 2 Ir. Rep.

356), (Lord Ashbourne, Chancellor, Fitzgibbon, Barry and Walker L.JJ.) and particularly the judgment of Fitz-Gibbon L.J. at p. 362-3."

Lacroix v. City of Montreal, 54 S.C. 130, Bruneau, J. 1918 held:—

"1. La 'valeur actuelle' à laquelle les estimateurs de la cité de Montréal sont tenus d'évaluer les immeubles doit s'entendre de la valeur vénale savoir, celle que le propriétaire pourrait obtenir pour sa propriété, d'un acheteur qui, sans y être obligé, désirerait en faire l'acquisition.

2. Les estimateurs ne doivent tenir compte que de la valeur des immeubles au moment de la confection du rôle; ils ne peuvent prendre en considération la perspective de travaux publics, comme l'ouverture des rues projetées, la construction de canaux d'égouts et autres travaux de même nature."

Cassils vs. City of Montreal, 14 S.C. 269, Mathieu, J. 1896 held:—

"Les mots 'valeur actuelle' dans l'article 92 du statut 52 Vic. (Qué.) ch. 79 (charte de la cité de Montréal, 1889) qui règle le mode d'évaluation de la propriété immobilière aux fins du prélèvement des taxes et cotisations, s'entendent de la valeur vénale, c'est-à-dire la valeur que le propriétaire pourrait obtenir pour sa propriété s'il y avait un acheteur qui en eut besoin."

Compagnie d'Approvisionnement d'Eau vs. Ville de Montmagny, 24 K.B., (1913), 416, held:—

"La valeur réelle est le prix qu'un vendeur qui n'est pas obligé de vendre, et qui n'est pas dépossédé malgré lui, mais qui désire vendre, réussira avoir d'un acheteur qui n'est pas obligé d'acheter, mais qui désire acheter."

Pelletier, J. says as follows at page 418:—

"Il y a une preuve à peu près sure et qui, à mon avis, est la meilleure sous ce rapport; c'est celle des ventes faites par des gens qui possèdent les propriétés en question, et qui trouvent des acheteurs qui achètent au prix que fixe le vendeur, ou au prix sur lequel le vendeur et l'acheteur s'accordent.

Dans la cause de *Dodge v. The King* (10 Exch. Ct. Rep. 208), la Cour d'échiquier dont le jugement a été confirmé par la Cour suprême a trouvé que cette preuve était la plus satisfaisante possible, et la même chose a été sanctionné dans plusieurs autres jugements.

Dans la cause du *Roi v. Macpherson* (1 Exch. Ct. Rep. p. 53) je trouve une définition donnée par le juge Cassels de la Cour d'échiquier qui me parait excellente. Voici cette définition: 'C'est le prix qu'un vendeur qui n'est pas obligé de vendre et qui n'est pas dépossédé malgré lui, mais qui désire vendre réussira à avoir d'un acheteur qui n'est pas obligé d'acheter, mais qui désire acheter'."

Gouin vs. The City of St. Lambert, 67 S.C. 216, held:—

"La valeur réelle que vise la loi des cités et villes (art. 485) quant aux immeubles imposables d'une municipalité urbaine consiste dans leur valeur vénale à l'époque de la confection du rôle d'évaluation par les estimateurs."

Archambault, J. at page 219 says:—

"Le sens des mots valeur réelle de l'article 485 de notre Loi des Cités et Villes est fixé par la doctrine et la jurisprudence. Les mots valeur réelle signifient valeur actuelle, valeur marchande."

The principle that value must be determined by establishing the price which would prevail in an imaginary market, if evidence of recent or current free sales of the same or comparable properties is not available, is recognized and applied by the Privy Council in a case arising in the Province of Quebec of *Cedars Rapids Manufacturing and Power Company vs. Lacoste* (1914 A.C. 569) where Lord Dunedin speaking for the Court says at page 576:—

"Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Fletcher Moulton, L.J. in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the

bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility."

10 See also page 579 where he says:—

"The real question to be investigated was, for what would these three subjects have been sold, had they been put up to auction without the Cedars Power Co. being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers."

See also the remarks of Lord Warrington in the 1928
20 Cedars Rapids appeal to the Privy Council (reported in Quebec Offical Reports — 47 K.B. 271) where he says at page 285:—

"It is the price likely to be obtained at an *imaginary sale,* the bidders at which are assumed to ignore the fact that a definite scheme of exploitation has been formed and compulsory powers obtained for carrying it into effect."

While the Cedars Rapids cases dealt with expropriation,
30 the problem there, as here, was one of determining value and the above quoted passages are accordingly directly in point. It is, of course, axiomatic that an expropriated party is entitled to receive compensation made up (a) of the value of the thing expropriated, and (b) of the damages occasioned by the compulsory taking. See in this connection Article 421 of the Montreal City Charter where this is expressly laid down. The references in the above quoted judgments of the Privy Council to the determination of value by reference to an imaginary market relate, of course, only to the first of the above constituents.

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It should be borne in mind that in expropriation matters the expropriated party is entitled to receive compensation for all the advantages, both present and future, of which he is deprived once and for all. On the other hand, in matters of taxation the present value only is taken into account. See in this connection *Montreal Island Power vs. Laval des Rapides,* 1935 S.C.R. at page 307. See also the decision of the Ontario Court of Appeals in *Ontario and Minnesota Power Company vs. Town of Fort Fran-*

cis (28 D.L.R. 30) and particularly the remarks of Hodgins, J.A. where he says at page 39:—

> " . . . . the fact, that the municipality appraises the land each year as it then is, and in that way gets the benefit, from time to time, of each realized possibility as it occurs, must be considered. The reason for the rule in compensation cases that 'all advantages which the land possesses, present or future,' must be paid for, is that the land is finally taken, and the owner loses both those present and future advantages, and the taker gets them."

It is to be observed that the classic definition of "real" or "actual" value adopted by the Court below in the case of *Compagnie d'Approvisionnement d'Eau vs. Ville de Montmagny* cited above, sometimes loosely described as the "willing buyer - willing seller formula", namely:—

> "La valeur réelle est le prix qu'un vendeur qui n'est pas obligé de vendre, et qui n'est pas dépossédé malgré lui, mais qui désire vendre, réussira, à avoir d'un acheteur qui n'est pas obligé d'acheter, mais qui désire acheter."

is no more nor less than a description in words of the process of determining the free price which would prevail in an imaginary market. Thus "actual" or "real" value is free market value and this is what the assessors are bound by law to determine. See the remarks of Pelletier, J. speaking for the Court of Appeal in the Montmagny case, where he says, at p. 419:—

> "L'intimée était obligée de se soumettre à la loi qui l'oblige d'évaluer à la valeur réelle, et elle parait s'obstiner à ne pas le faire. Il y a un intérêt public considérable à ce que cette loi soit observée, et tout contribuable a droit d'invoquer ces raisons d'intérêt public pour que l'intimée suive la loi qui la régit. De la fixation de la valeur de la propriété sur le rôle peut dépendre la franchise électorale et une foule d'autres questions qu'il serait trop long d'énumérer."

Two cases were relied on by the City below as authority for the proposition that the so-called "willing buyer — willing seller formula", which they both recognize, would not be applicable to the case of the Sun Life Building because of the obvious difficulty of finding an existing "market" for so large a property. These are:—

Canada Cement Co. vs. Montreal East (35 K.B. 410) and *Grampian Realties Co. vs. Montreal East* (1932-1 D.L.R. 705).

These cases are both clearly distinguishable from the present one. Thus the Canada Cement case concerned the valuation, not of a commercial office building, the actual and potential revenues of which can be directly determined, but of a cement manufacturing plant and its machinery plus a quantity of vacant land which the taxpayer sought to have valued as farm land. On the other hand, the Grampian Realties case concerned the valuation of a large tract of vacant land which had originally been subdivided but was unsaleable in the form of subdivision lots because of the proximity of oil refineries which had since been erected.

The Canada Cement decision clearly turned on the failure of the appellant company to make out a case of substantial injustice for setting aside the decision appealed from under the specific requirement of the Cities and Towns Act that —

> "La décision ne peut être infirmée que dans le cas ou une injustice réelle a été commise et nullement à cause d'une variante ou d'une irrégularité de peu d'importance." (R.S.Q. 1909, Art. 5722).

Thus Letourneau, J., (the present Chief Justice) says at page 416:—

> "Une injustice réelle et une variante de grande importance doivent exister et il faut qu'elles soient prouvées dans la cause. Qui donc devra faire cette preuve, sinon les plaignantes, les appelantes? Or, il se produit en cette cause un fait extraordinaire, c'est que les appelantes semblent avoir cru qu'elle n'avaient qu'à se plaindre et qu'il incombait dès lors à l'intimé de justifier son évaluation; et, quand on demande aux représentants et témoins des appelantes ce qu'ils ont à dire à ce sujet, ils affirment bien d'une façon générale que l'évaluation faite est trop élevée, ils soutiennent ensuite que la méthode employée par l'intimée est fausse, voire même ridicule, qu'une seule méthode devra prévaloir du moins quant aux machines: le coût de construction moins une diminution de 7½% ou 10% par année; mais quand on leur demande quelle est, selon eux, la valeur réelle de ces propriétés imposables, ils se contentent de dire, ou du moins les mieux autorisés d'entre eux, se contendent de dire: 'I cannot say'."

And again at page 419:—

"L'évaluaiton faite et dont il s'agit est-elle strictement correcte? Je le crois; mais si même la chose pouvait encore être mise en question, il faudrait dire que les appelantes n'ont quant à cette évaluation, ni établi une injustice réelle, ni fait voir une variante importante. En l'absence de cette preuve, elles ne pouvaient prétendre à ce que la Cour de Circuit du district de Montréal annulat ou changeat l'évaluation faite et dont il s'agit."

While the above quoted provision of the Cities and Towns Act is not reproduced in the Montreal City Charter, it is to be observed that, in the present case the Company has, as stressed elsewhere in this Factum, made out a case of very substantial injustice.

At pages 416-7, the then Mr. Justice Létourneau said:—

"Il existait, nous disent les procureurs des appelantes, une méthode d'évaluation éprouvée et reconnue par les tribunaux: trouver la valeur réelle en recherchant le prix qu'un vendeur, qui n'est pas obligé de vendre et qui n'est pas dépossédé malgré lui, mais qui désire vendre, réussira à avoir d'un acheteur qui n'est pas obligé d'acheter mais qui désire acheter. Oui, c'est en effet là une base qui eut pu donner satisfaction, mais cette base ne peut valoir que dans un temps où la propriété est susceptible d'être sur le marché, d'être vendue ou achetée. Or, et la chose est admise par les appelantes, la propriété dont il s'agit est à nulle autre pareille et une propriété dont la vente ne pouvait en aucune façon être considérée; du moins à l'époque où l'on en devait faire l'évaluation qui nous occupe. Ainsi, il faut renoncer à cette méthode possible pour les propriétés ordinaires et qui jouissent d'un marché."

It is evident from this that appellant's counsel in that case put forward the "willing buyer — willing seller formula" as one of the methods of valuation rather than as the definition of what actual or real value is, and the learned judge so treated it and dismissed it as inapplicable to that case because the appellant had made no proof to support its application and even appears to have made admissions which would preclude its use as a "method of valuation". Even if this passage could be said to hold that the so-called "formula" or "method" was not the true definition of real or actual value, which it is submitted it does not, it would clearly be "*obiter*" in view of the basis on which the decision turned, and it would also constitute a negation of the elementary but fundamental concepts of value alluded to elsewhere herein.

Similarly in the Grampian Realties case, Lamont, J., in the Supreme Court treated the definition as a "rule" for determining real value. He says at page 708:—

> "This rule, however useful it may be in cases where the property is suitable for general business purposes and there are buyers for such property, can have no application in a case like the present, where the property, owing to its location or surroundings, is restricted in the use which can be made of it, but which when required for a suitable purpose is saleable at a high price."

There the appellant company was urging the Court to adopt as the real value of the vacant land in question a valuation based on a sale of adjacent land which the Court expressly found had been a "forced" sale by the liquidation of an estate (see page 707 of the report). The appellant's witnesses had also conceded that, while the land had no particular value as subdivision lots, it would have value as a possible factory site. Again, this was a case decided under the same provision of the Cities and Towns Act as was applied in the Canada Cement case and the Court found that there was absolutely no evidence of unjust discrimination aganst the appellant.

If what Mr. Justice Lamont treated as a rule in the "obiter' passage above quoted had been considered by him in its true light as the definition of real or actual value, it would have been at once apparent to him that the willing buyer would have only been willing to buy at a price which discounted the restricted use to which the land could be put and which at the same time made due allowance for its adaptability as a factory site; that the price which the willing seller would have been willing to accept would also have reflected these advantages and disadvantages. It is of course fundamental that the imaginary buyer and seller of the definition are "informed" as to all the factors affecting the relative desirability of the property.

To sum up, it is the Appellant's contention in the present case that, under the statute and the relevant authorities, there is one thing and one thing only to be determined; namely, the actual value or price in money which the immoveable being assessed will command in the current free market; that the so-called "willing buyer-willing seller formula" is only a convenient way of defining the conditions under which that price must be established, with emphasis on the freedom of the real or imaginary transaction; and that all the recognized methods of valuation,

conveniently summarized by the Judgment of the Superior Court at Vol. 5, page 992, lines 41 et seq. are intended to arrive at that one result and if properly applied should do so.

The five main methods of valuation enumerated by Mackinnon, J. are as follows:—

(a) A recent free sale of the property itself where neither the condition of the property nor the market has since changed;

(b) Recent free sales of identical properties in the same neighbourhood and market;

(c) Recent free sales of comparable properties;

(d) The price which the revenue producing possibilities of the property will command; and

(e) The depreciated replacement cost.

An analysis of such methods makes it immediately apparent that they all seek the same result. Methods (a), (b) and (c) obviously depend upon finding the current market value by reference to actual transactions in the market relating to the same or comparable properties and the result they produce is the current market value of the property.

In the case of properties which are unusual by reason of their size (e.g., the Sun Life Building), or their special purpose (e.g., the Canada Cement Plant) and comparative sales are accordingly not normally available, however, the assessors are still charged with finding the same actual value as in the case of the commonplace properties and other means must be employed to find the price in money which the property under consideration will command on the current market. The two main approaches to this problem are covered by methods (d) and (e) above; namely, the revenue or commercial approach and the replacement cost approach.

Where a property such as an office building is capable of being rented, its potential net revenue can be readily determined by reference to the current rental market and accordingly an accurate estimate of the price which a willing buyer would be prepared to pay and a willing seller would be prepared

to take can be arrived at by capitalizing the potential net revenue at the prevailing rates. This method is particularly accurate where, as in the case of the Sun Life Building, a large proportion of the space is in fact rented to outsiders under leases negotiated in the current rental market since the rentals thus prevailing provide an accurate yardstick for finding the rental value of the remaining space in the building. This method directly reflects all the advantages and disadvantages of the building since it only takes into account those attributes of the building which produce value in the market and any attributes of the building which may have contributed to its original cost but do not contribute anything to its present value are duly discounted. Thus in the case of an out-of-the-ordinary building such as the Sun Life Building, with its extravagant materials and design, its functional disability, this method tends to give a more accurate result than the depreciated replacement cost method by reason of the inherent difficulty of determining the amount of depreciation to be deducted in order adequately to reflect not only the physical state of the building and the obsolescence from which it as a whole or any of its components may suffer, but also the effect of its functional disability and the unproductive expense entailed by the employment of extravagant materials and excessive ornamentation.

Method (e), the depreciated replacement cost method, however, is also useful in determining the actual value of such a building providing the depreciation allowed is adequate. In the case of an industrial plant, such as the Canada Cement Plant, where it is not possible to determine the net revenue produced by the property itself as distinguished from the operations carried on in it, this may even be the only method available. It cannot be too strongly stressed that, where the depreciated cost method is the only one available, however, it is still the actual value or current market value of the property which is to be determined, and the sole purpose of deducting depreciation from the replacement cost as established at the time of the assessment is to arrive at a figure lower than that replacement cost which the willing buyer would be prepared to pay and the willing seller to accept, having regard to the functional design and physical condition of the property at the time of the assessment.

Examining the evidence in this case and the conclusions to be drawn therefrom in the light of the foregoing statements of the law and the principles of valuation, it is convenient to deal with the matter under the following headings:—

(1) The evidence as to valuation in general;

(2) Determination of actual or real value by the economic or commercial approach;

(3) Determination of the actual or real value by the depreciated replacement cost approach:

(a) Physical depreciation;

(b) Functional depreciation;

(c) Obsolescence.

(4) Discrimination;

(5) The boiler house;

(6) Business and water tax assessment;

(7) Conclusion.

(1) *The evidence as to valuation in general*:

In dealing with a property such as the one in question, where no current sales either of the property itself or of comparable properties could be referred to, it is obvious that the so-called market data approach based on actual sales in the current market was excluded. There accordingly remanied two methods of determining the actual or real value of the property, namely, the commercial or economic approach based upon its revneue producing possibilities, and the depreciated replaiement cost approach based upon original cost adjusted to 1941 level and adequately depreciated. In the majority Judgment *a quo* it is erroneously stated that the Appellant's contention is that only the first of these methods should be applied. This statement is based upon a similar statement made in the Judgment of the Board of Revision which, as indicated above, was completely unfounded. It possibly arose from a misunderstnadng of the evidence of the Appellant's witnesses, who maintained that the commercial or economic approach was preferable because it produced a more accurate result tending to reflect all the advantages and disadvantages of the property, whereas the replacement cost approach, by reason of the difficulty of arriving at adequate depreciation, tended to produce a high valuation indicating the "upper limit of value".

The striking similarity of result obtained by all the commercial valuations of the property in this case, whether made by the City or by the Company or by the Board of Revision is of the utmost significance. Quite apart from the fact that they closely approximate one another, it may also be noted that they definitely confirm the valuation for which the appellant contends. These commercial valuations are as follows:—

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(1)	The Assessor Vernot, as employed for 10% in the assessment complained of (Ex. P-1, Vol. 4, p. 712)	$7,915,000.
(2)	Lobley for the Appellant (Ex. P-5, Vol. 4, p. 738)	7,250,000.
(3)	Simpson for the Appellant (Ex. P-10, Vol. 5, p. 868)	7,500,000.
(4)	The Board of Revision, as adopted by the Superior Court (Vol. 5, p. 783-A-30, l. 23 and p. 1011, l. 46)	7,028,623.

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It will also be noted that the Board of Revision's commercial valuation produces the lowest result of all.

Contrast with the uniformity of the foregoing the extraordinary variation between the replacement cost valuations of the City Assessor, witnesses and Board, ranging as they do from 100% to 150% greater than the commercial valuations of everybody, and the replacement cost valuations of the Appellant's experts in this field, which are only slightly larger than the commercial valuations and definitely tend to confirm the same and the intermediate figure contended for by the Appellant. The replacement cost valuations in question are as follows:—

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For the City:

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(1)	Vernot, the Assessor (Ex. P-1, Vol. 4, p. 713)	$14,404,578.
(2)	Cartier of the City Technical Service (Ex. P-1 and Sheet 2A of Ex. P-36, Vol. 4, p. 737)	16,795,560.
(3)	Fournier (Ex. D-12, Vol. 4, p. 732)	16,387,966.
(4)	Perry, (Ex. D-13, Vol. 5, p. 887)	18,060,070.

(5) Mills and Desaulniers (Ex. D-16, Vol. 4, p. 810) ..... 15,244,000.

(6) Board of Rivision, (Vol. 5, p. 983-A-30) 16,777,558.

For the Appellant:

(1) Perrault (Ex. P-11, Vol. 4, p. 842—with land value added for comparative purposes with the above) ..... 8,625,200.

(2) Archambault (Ex. P-12, Vol. 5, p. 846—with land value similarly added) ..... 9,001,983.

It it to be noted that all of the above replacement cost valuations are exclusive of the boiler house and the land it occupies.

It is submitted that the inclusion of Mills and Desaulniers with the other witnesses for the City who produced replacement cost valuations is entirely proper. These witnesses, who spoke as one and filed a joint report, were qualified only as real estate experts and went to elaborate lengths to establish rental values for the whole property. However, they made no use of their work in this connection in arriving at their final valuation. A study of their report (Exhibit D-16, Vol. 4, p. 756), erroneously there described as the report of Mills only, discloses that their valuation was based purely and simply on cost figures supplied to them by others. Thus in paragraph 1 of their report (Vol. 4, p. 810) they state that the real value of the main building as at December 1st, 1941, was $16,967,656. They refer back to page 25 of their report (Vol. 4, p. 782) as the source of this figure. From this and also from paragraph (g) at page 809 it is apparent that this figure is derived by means of a replacement cost valuation. All they do to arrive at their final figure, put forward to represent the real value of the building, is to deduct 15% from the foregoing replacement cost figure. (See paragraph (k) on p. 809).

The extraordinary difference between all the commercial valuations, which are substantially the same, and the City's replacement cost valuations is easily accounted for. While the commercial valuations, based upon the revenue producing possibilities of the property determined with relation to the current rental market, directly reflect all the good and bad features of the building which would be taken into account by a purchaser in the free market, the replacement cost valuations, based as they are on the cost of everything that went into the building, whether

desirable or not, only reflect the undesirable features to the extent that adequate deductions are made to cover such features. The assessor, the City's witnesses and the Board, in arriving at their so-called replacement cost figures, deduct from their gross cost figures only certain small and, it is submitted, inadequate percentages for physical depreciation. They do not even allow the percentages called for by the table at page 197 of the Parent Manual (Exhibit P-4, Vol. 4, p. 718) which, as the foot-note thereto informs us, in turn makes no allowance for obsolescence. Their valuations accordingly make no deduction from the cost of the property in respect of those features thereof which contributed very largely to its cost but either did not add a proportionate or any amount to its value or actually detracted from such value. Nor do they allow anything for obsolescence which has been proved to exist in respect of a number of features of the building.

The comparison, made by the witnesses Perrault and Archambault for the Appellant between the relatively low proportion of net rentable space (representing value) which the cube (representing cost) of this building produces and the proportion of such space available in the normal building, indicates at once the quantitative deficiency from which the Sun Life Building suffers by reason of excessive service areas, corridors, elevators, columns, high storeys, etc. In addition to this quantitative deficiency there is also a very heavy qualitative deficiency due to the excessive amount of deep dark space produced by the huge unbroken rectangular form of the building. There is accordingly less space in this building than its cost should have produced, and of that space much is less valuable than it should have been.

The reason, therefore, for the difference on the one hand between the cost valuations of Perrault and Archambault and those of the assessor, the City witnesses and the Board and the proximity of the former on the other hand to all the revenue valuations, lies in the fact that Perrault and Archambault have deducted from their gross figures proper allowances for the elements of this property which contributed to its gross cost but added nothing to or detracted from its value.

(2) *Determination of Actual or Real Value by the Economic or Commercial Approach*:

The valuations of $7,250,000 and $7,500,000 respectively arrived at by Messrs. Lobley (Exhibit P-5, Vol. 4, p. 738) and Simpson (Exhibit P-10, Vol. 5, p. 868) for the Company, were in each instance based upon the opinion of these experienced ex-

perts as to the actual rentable value of every square foot of space in the building, tested by the actual rentals paid by outside tenants for similar space in the buildng and by rentals prevailing in the Montreal market generally. As to Lobley's qualifications, he was the Rentals Administrator for Eastern Canada of the Wartime Prices & Trade Board (Vol. 1, p. 41) and his extensive experience in real estate matters appears from the enumeration at the back of his report. Simpson is the head of one of the oldest real estate firms in Montreal and has equally extensive experience. (See last page of his report). These witnesses, having arrived at a gross revenue figure in this way and adjusted the same to take care of foreseeable trends in the immediate future rental market, then arrived at a net expectable annual income by deducting operating expenses, a very conservative amount for depreciation and/or major repairs and replacements and taxes calculated at the valuation contended for by the Company (Lobley, Vol. 1, pp. 44 et seq.; Exhibits P-7, Vol. 4, p. 752 and P-9 not reproduced; Simpson, Vol. 1, pp. 82 et seq). The operating expenses employed in this connection by these witnesses are based on actual expenses incurred in the operation of the building itself and both testified that the amount thus employed is well in line and even lower than might be expected in the case of a building of this kind (Lobley, Vol. 1, pp. 56 et seq; Simpson, Vol. 1, p. 82). Having thus arrived at an expectable annual revenue for the property, both these witnesses capitalized these figures at 5% to arrive at the above valuations. According to the evidence, a capitalization rate of 5% on a real estate investment is extremely conservative and even low (see evidence of Knubley, Vol. 2, p. 208; Surveyer, Vol. 2, p. 200 and MacRossie, Vol. 1, p. 111). In fact this rate has not been seriously challenged by the City witnesses, which is not perhaps surprising since everyone arrives at substantially the same commercial valuation and indeed the Board's valuation is somewhat lower than those of Lobley and Simpson.

The witnesses Mills and Desaulniers, for the City, after spending, as they claim, seven full months' time on the building (Vol. 2, p. 376, l. 10) and in preparation of their elaborate report and book of exhibits, and after going to great lengths to determine what they claim to be the potential revenue of the property, make absolutely no use of all the figures they have compiled in this connection in arriving at their valuation. As pointed out above this valuation, which amounts to $15,800,000 for the entire property (see their report Exhibit D-16, Vol. 4, p. 757) is based solely on cost figures obtained from the Company, adjusted and depreciated as there indicated (paragraphs (g), (k), (l) and (m), pp. 809 and 810). The only use they have made of the net

revenue figure they derive is in paragraph (n) on p. 810 where they show that it indicates a yield of only 2.63%. The inconsistency between this yield of 2.63% and the 6% figure given by the City's own assessor (Vol. 1, p. 13) is worthy of note.

While Mills and Desaulniers do not in fact make a commercial valuation it is pertinent to note the following points in connection with the methods employed by them in arriving at their estimate of net income:—

(a) They exaggerate the net rentable area in the building by every conceivable means. The principal and, it is submitted, unwarranted additions they have made in this connection are shown in Exhibit D-18 (Vol. 5, p. 906) and include the following:—

(i) 24th Floor — 9328 feet, none of which is rentable for storage because of floor construction nor is accessible for other purposes and most, if not all, of which will be occupied by additional ducts when the 20th, 22nd and 23rd floors are finished, but all of which is treated as rentable by Mills and Desaulniers.

(ii) Additional imaginary floors in the banking hall, auditorium and gymnasium totalling 20,373 square feet charged at their full rates. Note that they use these three spaces as giving the building institutional character on the one hand, to justify the high rental rate they have applied, and they then proceed to destroy these spaces by putting in imaginary floors in order to increase the number of rentable feet to which that high rate is to be applied.

(iii) Locker and wash room space which at best is of very doubtful rentable character, corridors, service areas, as to which they admit they may have made a mistake, and elevator shafts which will have to be used as such upon completion of the remaining unfinished floors, all totalling 8,504 square feet.

(b) Having thus obtained as many rentable square feet as possible, they proceed to apply different methods of valuation to tenant occupied and Company occupied space, although there is no physical difference between the great proportion of such space on either hand (v. Cross-examination of Mills, Vol. 3, p. 479, l. 27 to p. 499).

(c) It is important to bear in mind that, by placing a rental value on all of the space occupied by the tenants *and by the Company* in the building, these witnesses for the City have conceded that it is all capable of being rented.

(d) In valuing the tenant occupied space, they have applied their own modification of the Sheridan-Karkow formula (v. Exhibt P-47, Vol. 5, p. 956, and evidence of Macaulay, Vol. 3, p. 624 et seq; pp. 629 et seq.) Note that the modifications they have made in the formula work against the Sun Life in that:—

(i) they reduce the equalizing factor for deep space, which is the outstanding characteristic of the Sun Life Building;

(ii) they multiply by a corner influence factor which is not justified under the formula;

(iii) they determine their "base rate" of $1.95 by taking floors which are not typical, but which include a greater proportion of desirable outside space at high rentals and the figure of $1.95 is a "round figure" jumped as in many other instances from the figure of $1.91 which their calculation produced;

(iv) they make comparisons under the formula between the Sun Life Building and the Dominion Square Building and Royal Bank Building which are not accurate because:

1. they do not select the basic 8th floor in the Dominion Square Building,

2. the Dominion Square Building has no deep space (v. Exhibit P-16, Vol. 5, p. 867a),

3. the Dominion Square Building has far more windows per lineal foot of perimeter,

4. they use an erroneous calculation (since corrected) of the gross floor area of the Dominion Square Building (compare Exhibts D-24 and D-25 with the correcting Exhibits D-49 and D-50; Evidence of Cartier, Vol. 3, pp. 551 and 552),

5. they employ the light well factor instead of the court factor to the Dominion Square Building, thus unduly depreciating its space,

6. they neglect to put additional imaginary floors in the banking hall of the Royal Bank Building which is proportionately much larger than that in the Sun Life, and ignore the semi-ground floor of the Royal Bank Building which is rented to outside tenants.

(e) In dealing with Company occupied space, they apply an over-all rate of $2.00 per square foot for all "outside space" regardless of depth or quality and an over-all rate of $1.00 per square foot for all "inside space". See evidence of Mills, Vol. 3, pp. 485, l. 6 and 496, l. 39; Exhibit D-15. It should be noted that if this $2.00 rate were broken down and applied to the space on the basis of depth and quality in the ordinary manner, it would produce absurdly high per square foot rates for space in the outer 25-foot band.

(f) Their justification for this different treatment is

(i) the space is "institutional";

(iii) value-in-use to the Sun Life.

When cross-examined as to what space they considered "institutional", Mills finally claimed that all space occupied by the Company fell in this category and that the space was "institutional" because it was occupied by an institution (Mills, Vol. 3. p. 483). In pursuance of this extraordinary theory, we find that identical space on the same floor is valued by Mills and Desaulniers at $2.00 if it is occupied by the Company but at lesser amounts if it is occupied by tenants. Thus on the 6th floor tenant occupied space identical with the Company space is valued at from $1.33 to $1.69. See Mills, Vol. 3, pp. 490 and 491.

Mills attempts to justify this discriminatory treatment by the theory that value-in-use by the Sun Life, due to so-called "amenities", makes the space worth more (Mills, Vol. 3, pp. 484-5). As pointed out above, actual value is value in the market generally, not to the particular owner of the moment, and all the authorities bear this out. It is interesting to note in this connection that the book "The Appraisal Process" by George L. Schmutz, which was referred to and relied on by the witness Mills as an authority and was put in as Exhibit P-37 on cross-examination, at page 12 reads as follows:—

"There are two major concepts of property value, the one referring to market value, called 'value-in-exchange',

the other referring to the value to a specific owner, called 'value-in-use'. These are basic terms and have to do with the nature of value and not with techniques for its measurements or with matters considered evidentiary of value.

As defined by the Supreme Court of one State,

'Market value is the highest price estimated in terms of money which the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all the uses and purposes to which it is best adapted and for which it is capable of being used (*Sacramento etc. vs. Heilbron,* 156 Cal. 408)'."

On page 14 the following is stated:—

"Most appraisals of real estate contemplate an estimate of market value, or value-in-use to persons generally in contradistinction to value-in-use to any particular person. Notwithstanding the variety of meanings that may be attached to the term 'market value' the essence of the concept lies in the exchangeability of property as the test of value."

It may be noted that this work is a textbook of the American Institute of Real Estate Apprasers and that in the Preface the author makes acknowledgment of his indebtedness for advice and assistance to the Company's witness, MacRossie.

(g) Mills and Desaulniers place an exaggerated rental value of $2.25 per square foot on the unlighted inside space in the first basement, apparently because of the existence there of a vault (Mills, Vol. 3, pp. 487, l. 25, 480, l. 35). The importance of this vault becomes considerably minimized when its true cost, as against the exaggerated cost estimated by the City's witnesses, is made known (Perrault in rebuttal, Vol. 3, p. 588). This vault occupies approximately 5% of the area of the first basement, the remainder of which is used for storage, filing, a print shop and the like, none of which has any connection with or reference to the vault. Notwithstanding this, Messrs. Mills and Desaulniers give a per square foot rental value of $2.25 for the whole of this basement which is higher than their standard valuation of $2.00 for the best outside office space above the ground floor (v. Exhibit D-15).

(h) In calculating gross income they allow only 5% for vacancies and that only in respect of tenant occupied and vacant space (see their report, Exhibit D-16, Vol. 4, p. 801). As the tenant occupied and vacant space represents only approximately 50% of the net rentable space, this means that they have allowed only 2½% for anticipated vacancies for the whole building. The evidence of the Company's witnesses as to standard practice in this respect calls for an allowance of from 10% to 15% (e.g., Simpson Report, Exhibit P-10, Vol. 5, p. 871).

(i) Instead of working from the actual operating expenses incurred in the operation of the building itself, they employ purely arbitrary figures said to be based upon the operations of certain other buildings in Montreal and New England, the identity of which is not known to them. See evidence of Grimstead, Vol. 3, pp. 546 et seq. No allowance is made for the admitted difference in labour and material costs prevailing in the New England district and it is conceded that there is no building comparable to the Sun Life building in size or in other respects either in Montreal or in the New England district. A mass of irrelevant and unproved information regarding a number of large office buildings in New York City is set out on page 67 (a) of the book of Exhibits produced by these witnesses. It is significant, however, that no attempt is made by them to investigate the operating costs of these buildings, several of which are comparable in size to the Sun Life Building.

(j) They give no opinion as to a proper capitalization rate and ignore obsolescence. Furthermore, the only allowance they make for functional depreciation is in respect of their application of their version of the Sheridan-Karkow formula to tenant occupied space. This formula, properly applied, is intended to compensate for functional depreciation to the extent that it takes account of the poorer *quality* of interior unlighted space. It, of course, makes no allowance for a deficiency in *quantity* of rentable space due to bad functional planning or design (v. Macaulay, Vol. 3, pp. 623 et seq.).

(k) A word should be said as to the qualifications of the witnesses, Mills and Desaulniers, to give expert evidence on the subjects they purported to cover. As pointed out above, the only opinion they express on the value of the property is an opinion based upon costs. Neither of these witnesses has had any experience whatever in regard to construction or construction costs and such information as they did not obtain from the Company's records appears from their report to have been supplied to them

by other witnesses. They were clearly not qualified to give the opinion they did as to replacement cost of the Sun Life Building. Apart from the fact that they do not purport to express an opinion on the value of the building from a real estate point of view, all their work having been directed to a building-up of the rental value of space in the building which they never use to reach a valuation, neither of these witnesses has had any experience as a real estate man either in the sale or management of a property in any way comparable to the Sun Life (v. Mills, Vol. 3, pp. 468 et seq.; Desaulniers, Vol. 3, pp. 537 et seq.).

(3) *Determination of the Actual or Real Value by the Depreciated Replacement Cost Approach*:

Where other methods of determining actual or real value are not available, the fully depreciated replacement cost of a property may be taken as the upper limit of its value on the theory that no one in the market would pay more for such property than it would cost to reproduce the identical building or an equivalent revenue producer under current conditions.

As pointed out above, the original cost of the property may have no relation whatever to its present value. The principal reasons for this are:—

(a) Extravagant and costly methods of construction (e.g., three stages).

(b) Extravagant materials, ornamentation and design, which do not now and never did add an amount to the value commensurate with their cost.

(c) Functional errors in planning.

(d) Physical deterioration.

(e) Obsolescence.

In seeking actual value by the replacement cost approach, therefore, allowances must be made not only for depreciation representing the physical deterioration of the property due to the passage of time but also for functional depreciation and obsolescence and for extravagance of materials and ornamentation. See in this connection Chapter 19 of "The Appraisal Process", (Exhibit P-37).

The actual or real value of immoveable property cannot be ascertained by the application of a mere rule of thumb method of calculation. From the very nature of actual or real value, as well as the fact that each property differs in some respect from all others, it necessarily follows that individual treatment must be afforded each property by way of inspection and direct application thereto of such of the means of calculating actual value as may be available. See in this connection the statement of Chief Justice Duff in the *Montreal Island Power* case where he says at page 308:—

> "It seems to me clear that the assessors in this case proceeded upon some rule of thumb and they did not really attempt to ascertan the actual or real value of the particular lands they were assessing.
>
> .....
>
> I am disposed to think that market value, present or prospective, is really the only practical basis of the assessment of this property under the enactments by which we are governed; .....
>
> I have no doubt, I should add, that the assessors did not perform the act of valuation in respect of the submerged lands as required by the statute as essential to a valid assessment, and, consequently, that there was no valid assessment in point of law;....."

The system adopted by the City, as outlined in the Parent Manual, is an attempt to reduce everything to tables and rules of thumb so that assessors, who may have no experience whatever in building or building costs, can calculate from the Manual and its tables and from certain general data supplied by the Technical Department, the supposed net replacement cost of *any* building. Such a system, however, necessarily breaks down where a buildng such as the Sun Lfe, with all its many variations from the normal, falls to be dealt with. While such a system may produce results which, in the majority of ordinary cases, will be sufficiently accurate not to invite contestation of the valuations thereby arrived at, the mere demonstration that it has been followed will not, in any individual case, establish that the result it produces represents the actual current market value of the property.

Nor can this necessary shortcoming of such a system be compensated for by an arbitrary weighting of the so-called "com-

mercial" and "replacement" factors. The fact that a building is wholly or partially owner occupied can have no bearing on its actual market value. The best illustration is the Sun Life Building itself. The uncontradicted evidence is that the trend of occupancy of that building is away from owner occupancy toward tenant occupancy and space in the building formerly occupied by the owner is now rented to tenants (McAuslane, Vol. 2, pp. 217 et seq.). The evidence also is that the entire building could be tenant occupied (Lobley, Exhibit P-5, Vol. 4, p. 738; Simpson, Exhibit P-10, Vol. 5, p. 868; MacRossie, Vol 1, p. 115). Obviously the value of the building depends not upon the use to which it is being put but rather upon the use to which it is capable of being put (MacRossie, loc. cit.).

There can be no justification for a replacement valuation being almost twice a commercial valuation nor for attempting to reconcile such extraordinary discrepancy by averaging the two figures out on an arbitrary percentage basis said to be determined with reference to the use to which the property is being put. See page 158 of "The Appraisal Process", Exhibit P-37:—

> "The test of the appraiser's judgment is found in his correlation of the various estimates and interpretations into a conclusion of value. Unfortunately there are some who conclude that the value of a property is the arithmetical average of the three estimates — market data, cost and income. This is just as sensible as saying that the correct time is the average of the times shown by three different watches."

The only way to be sure of the "correct time" is to have all three "watches" right or, if they differ, to know which one of them is right. In the present instance there are only two "watches", namely, the commercial approach and the replacement cost approach. Leaving aside for the moment the highly significant fact that Appellant's witnesses who employed the replacement cost approach substantially agree with and confirm the "time" shown by the commercial approach, there is a "time" shown by the second "watch" which differs by anywhere from 100% to 150%. In the first place, it is obvious that both "watches" can't be right. Both may be wrong, but the fact that everyone agrees on the former is a strong indication that it is probably right. In any event, averaging the time shown by the two cannot give the "correct time", i.e., actual or real value. Nor can the "correct time" be determined by taking a proportion of the one and a proportion of the other. This illustrates the fundamental fallacy

and inherent error of principle involved in the Assessors' Memorandum, which presupposes that one or both of the valuation figures, which the assessors are thereby directed to apportion, is or are wrong. If both were right they would be the same and there would be no need for apportionment.

Appellant contends that it is obviously the replacement cost valuations of the assessor, the City's witnesses and the Board which are out of line. Confronted with the extraordinary difference in result, which incidentally does not exist in the case of any other building for which the figures were given, the Respondent does not deny such difference but seeks to justify it by the contenton that the Sun Life Building is "a special purpose" or "institutional" building and that the results are therefore bound to be different because of the "amenities" such as a banking hall, cafeteria and auditorium which the Appellant enjoys. The answer, of course, is that all of these features have been fully taken into account and appropriate rental values assigned thereto by Appellant's witnesses in arriving at the revenue producing possibilities of the building.

When we come to examine how the replacement cost valuations relied on by the City were made, what had been an indication that they are out of line becomes a certainty. Dealing first with the evidence of Vernot, the sole assessor who acted, the Court is respectfully referred to his entire deposition appearing at Vol. 1, pp. 7 to 40 inclusive. In view of the weight given by the majority below to the Judgment of the Board as being the opinion of "experts" and of the further fact that the Board, as pointed out above, expressly approved of the work of Vernot and the methods he adopted and contented itself with re-casting his figures, it is of the first significance to note that Vernot was not an experienced assessor. At page 9, l. 20 he admits that this was his "debut" as an assessor. Furthermore it should not be forgotten that he had only worked in the ward in question, and consequently on large buildings, since September, 1941, when he replaced Mr. Munn.

It has been noted above that Vernot did not visit the premises or produce any figures himself but merely worked from figures supplied to him by others, both in respect of his commercial valuation and in respect of his replacement cost valuation. He was asked to produce a statement showing the work he had done and this appears as Exhibit D-2, (Vol. 4, p. 714). This statement, which is a species of running calculation, in fact shows the entire work done by Vernot. Above all, it shows that, in arriving

at his net replacement cost figure, he made inadequate allowance for physical depreciation, no allowance for obsolescence, no allowance for excessive ornamentation and no allowance for functional disabilities of the building. It also shows that, at the time the assessment in question was made, Vernot did not have, or at all events did not use, replamement cost figures furnished him by the City's Technical Department.

In this connection it should be borne in mind that the valuation roll containing the assessment under attack was filed on December 1, 1941, but the valuation sheets Exhibits P-1 and P-2 (Vol. 4, pp. 713 and 716), which are supposed to contain the information compiled by the Technical Department for the use of the assessors in making their final assessment, were not prepared until March 6th, 1943, long after the assessment in question was disputed and in fact at or about the time of the hearing before the Board.

These sheets show a "technical service replacement" of $16,795,560. The manner in which this figure was arrived at, apparently with a view to bolstering the assessment under attack, is worthy of particular note. The witnesses Houle and Cartier, both employed in the City's Technical Department, were examined by the City in defence and testified at length on the work of their Department. It was only on cross-examination, however, that it became apparent that their work was not available to Vernot at the time he made the assessment and that the figure of $16,064,960. inserted in paragraph 1 of the Valuation Sheet Exhibit P-1 as being the Technical Department's determination of the replacement value of the building, was only arrived at by a series of the most extraordinary calculations made long subsequent to the assessment under attack.

The closest possible scrutiny of the evidence of these witnesses is invited. From their several depositions (Houle, Vol. 2, pp. 259 et seq., 402 et seq.; Cartier, Vol. 2, pp. 266 et seq, 316 et seq., 400 et seq., 404 et seq. Vol. 3, pp. 551 et seq. and 566 et seq.) it appears clearly that, at the outset, they sought to create the impression that their work had been available at the time the Valuation Roll was completed and filed. Thus Cartier, in answer to the question,

> "D.—En quoi consiste votre travail, le travail de votre département relativement aux estimateurs?",

gives a detailed description of the work of his Department at Case, Vol. 2, p. 267, ending with this statement:—

"Ce travail-là nous revient entre les mains pour être vérifié et nous dressons ensuite une carte qui donne un aperçu assez bon de la disposition des lieux avec un croquis de la bâtisse que nous transmettons aux évaluateurs pour leur servir de base à l'évaluation comme renseignements. L'évaluateur de cette carte-là peut à son gré la modifier suivant les besoins de la cause pour faire son évaluation."

He then testifies from lines 26 to 46 on page 267 as follows:—

"D.—Vous avez entendu le témoignage de monsieur Joseph Houle, un de vos employés? R.—Oui.

D.—Il se serait rendu à diverses reprises à l'édifice de la Sun Life et aurait fait des relevés complets de la bâtisse principale de même que de la chaufferie et vous aurait transmis son rapport? R.—Oui.

D.—Lequel rapport est produit au dossier ou le sera? R.—Oui.

D.—Vous êtes-vous contenté de l'inspection de monsieur Houle ou si vous avez vérifié vous-mêmes les travaux faits par monsieur Houle? R.—Non, je suis allé moi-même faire une visite de vérification, je crois que c'est au mois de novembre mil neuf cent quarante-et-un (1941). Au cours de novembre mil neuf cent quarante-et- un (1941), je suis allé faire moi-même une vérification, pas détaillée mais assez pour me rendre compte que le travail de monsieur Houle était l'exacte vérité. J'y suis allé avec monsieur Houle."

At page 269, line 32, he testifies as follows:—

"D.—Voulez-vous continuer votre témoignage en ce qui concerne les travaux que vous avez faits pour parvenir à établir la valeur de remplacement des édifices de la Sun Life? R.—Pour établir la valeur de remplacement, comme je le disais, nous nous sommes servis de tableaux publiés au Manuel de la page 325 à 390, suivant la méthode indiquée même au Manuel de la page 269 à 325, les moyens de se servir des tables qui sont publiées dans le même Manuel.

Nous avons pris nos matériaux groupés suivant notre méthode, nous avons calculé, je pourrais dire, item par item les prix de remplacement de ces différentes choses, nous avons trouvé un coût de remplacement total, final, de dix-huit millons sept cent six mille cent quinze dollars

($18,706,115). Nous avons préparé le cube de la bâtisse, nous avons trouvé vingt-et-un millions neuf cent trente-et-un mille sept cent soixante-et-un pieds cubes (21,931,761) et à ce moment-là nous avons divisé notre coût de revient par le cubage trouvé et nous avons trouvé un taux unitaire de .833 le pied cube pour la reconstruction de la bâtisse."

At Vol. 2, p. 285, Cartier is asked to produce his work sheets. Up to this point in his evidence there is no suggestion whatever that the gross replacement cost figure before depreciation of $18,706,115. mentioned in his evidence quoted above and also shown in the valuation sheet Exhibit P-1, had not been determined at the time the assessment was made. His cross-examination on these work sheets produced as Exhibit P-36 (Vol. 4, p. 737) appears at Vol. 2, pp. 316 to 328. It should be noted that these pages are wrongly captioned "Examination in chief" in the Joint Record. From this cross-examination and a study of the work sheets Exhibit P-36, it appears that the final figures of the Technical Department inserted in the valuation sheet Exhibit P-1 were only arrived at long after the assessment in question was made and published and in the following extraordinary manner:—

"(a) As at April 7th, 1938, a replacement cost was arrived at (including 13½% for construction 'en hauteur' and 10% additional, apparently for sub-contract profit, both applied over the whole cost) of $11,577,841.76, or .528 cents per cubic foot (v. sheets numbered 22 to 25 inclusive in Exhibit P-36).

(b) The above replacement cost, when depreciated according to the Parent tables and converted to 1941 construction cost figures, produced a net replacement cost valuation as at 1941 of $9,315,759.30 (v. sheet numbered 28 in Exhibit P-36).

(c) Sheets numbered 26 and 27 in Exhibit P-36 show a further calculation under date June 17th, 1938, arriving at an increased gross replacement cost of $13,022,247.34, apparently intended to represent the gross replacement cost of the building, 100% completed, before depreciation and adjustment to 1941 figure. Here again it will be observed that the result is arrived at by the cumulative addition of 13½% of the whole cost for construction 'en hauteur' and 10% additional.

(d) Apart from the foregoing, no other figures or calculations tending to show the replacement cost of the main building, made prior to the preparation and filing of the assessment under attack on December 1st, 1941, appear in the Technical Department's work sheets Exhibit P-36.

(e) On December 19th, 1941, (i.e. after the assessment in dispute) a further calculation of the replacement cost of the building was made (v. sheets numbered 7 and 8 in Exhibit P-36), which, it will be noted, starts with the total figure of $9,273,401.49 arrived at in the calculation of April 7th, 1938 (sheet numbered 25), and consists of adding to that figure a number of amounts to reach a total of $10,416,442.32, to which are added the same cumulative percentages for construction 'en hauteur' and for additional on account of sub-contracts, although this time in the inverse order, to arrive at a gross replacement cost figure of $13,004,928.23, representing .593 cents per cubic foot.

(f) We next find sheet numbered 5 entitled 'Feuille de correction 1942' dated 12th January, 1942, whereby arbitrary additional amounts of approximately $400,000. for exterior walls and $300,000. for elevators, both items already included in the previous calculations, are added to the figure of $10,416,442.32 determined in the calculaton of December 19th, 1941, and cumulative percentages are again added to the total thus obtained for construction 'en hauteur' and for sub-contracts but the percentage for 'construction en hauteur' has now been increased from 13½% to 19%. By this amazing process a gross replacement cost figure of $14,543,431.55 is obtained, representing .663 cents per cubic foot. On sheet numbered 6 this gross figure is adjusted to 1941 figures and depreciated to arrive at a net replacement cost figure of $14,205,577.27.

(g) Finally we find sheets numbered 2 and 2A entitled 'Correction finale après inspection de vérification avec Jos. A. S. Houle le 2 novembre 1942 (Sgd. J. A. Cartier)'. It will be recalled that Cartier had testified (Case Vol. 2, p. 278, ll. 10 et seq.) that he had visited the property in November 1941, i.e., prior to the assessment under attack. By this final correction made at a time when Vernot's assessment was under attack, lump sums total-

ling over $800,000, were added to the figure arrived at in the 'feuille de correction 1942' to produce a figure of $11,918,587.32. To this is added an arbitrary 10% for 'omission et supplément' and the total thus obtained is again increased by cumulative percentages of 19% for 'construction en hauteur' and of 10% for sub-contract, giving a gross figure of $17,161,573.88. This is adjusted for 1941 construction costs to the gross replacement cost figure of $18,706,115.53 mentioned in Cartier's evidence at Case Vol. 2, page 269, line 45 (quoted above) and inserted in the valuation sheet Exhibit P-1. This gross figure is depreciated to the net replacement cost figure of $16,064,960.74 appearing in the said valuation sheet as the Technical Department's determination of the net replacement valuation of the main building."

It is in this way that the employees of the City's Technical Department arrived at their so-called Replacement valuation, and it was in the manner above indicated that they gave thier evidence, apparently hoping to delude the Appellant and those responsible for reviewing this assessment into the belief that the Assessor Vernot had the benefit of a *bona fide* Replacement cost valuation from the City's Technical Department at the time the assessment under attack was made. What obviously happened was that the Technical Department did not have a Replacement valuation sufficiently high to suit the purpose of the assessor at the time the valuation roll had to be filed on December 1st, 1941, and the figure finally produced by the above means and inserted in the valuation sheet Exhibit P-1 prepared only as of March 6th, 1943, was a clumsy attempt, after the event, to bolster the assessment put on the roll, in the hope that they would get away with it.

The ridiculousness of the method followed by the City Technical Department, and particularly of the addition to the total cost they found of 19% for "construction en hauteur", is self-evident. Apparently not satisfied with the explanation he had given on cross-examination, (Vol. 2, pp. 320 et seq.) as to the addition, first, of 13½%, and subsequently, of 19% for "construction en hauteur", Cartier made two subsequent attempts to justify the 19% figure. First at page 329, lines 35 et seq., he breaks it down into 1/4 for raising materials, 1/4 for machinery, lifts, etc., 1/8 for accident insurance, 1/8 for scaffolding, and the remaining 1/4 is not allocated. His second attempt to justify his figure is at Vol. 3, pp. 566 and 567, where he now says that 50% of the 19% represents the cost of financing

during construction and the remaining 50% is divided into 1/4 "for the fixing of the height", 1/4 to bring up the materials, 1/4 for machinery, and approximately 1/8 for insurance and 1/8 for scaffolding. This question is the subject of extended comment by the Company's expert witnesses, whose evidence will be referred to below. It is only necessary here to refer to the evidence of Mr. F. W. Walker of the Foundation Company, an entirely independent witness who tells us at Vol. 3, pp. 594 et seq. that in the actual case of the Aldred Building, where the materials had to be hoisted even higher than the Sun Life Building due to the method of construction followed, the entire increase in the cost of that building due to construction in height was 3/4 of 1%.

So much for the evidence of the Assessor and the City's other employees. At the hearing before the Board of Revision, in order to bolster the assessment under attack, the City examined the witnesses Fournier (Vol. 2, p. 285) and Perry (Vol. 2, p. 331). The methods employed by these witnesses in arriving at their valuation has been criticized in some detail by the Company's experts in rebuttal. (See in this connection Perrault, Vol. 3, pp. 574 et seq.; Archambault, Vol. 3, pp. 643 to 676; Paine, Vol. 3, pp. 589, 600 and 626). It is only necessary here to point out that, like the actual City employes, neither Fournier nor Perry has any qualification to give evidence as to the construction and/or cost of construction of a building such as the Sun Life. Furthermore, the accuracy of their work may be tested by the fact that in many instances, in giving their opinion as to the *additional* cost of materials and/or component parts of the building, they have stated figures in excess of the entire actual cost of the item in question. Also in a number of instances they have stated that more expensive materials were employed than was actually the case (e.g., Perry and the brass and copper pipes). See in this connection the rebuttal evidence of Perrault, Archambault and Paine above referred to.

Contrast with the foregoing the reports and evidence of the Appellant's witnesses, Perrault and Archambault, their obvious experience and the soundness of the methods they have employed (Perrault, Exhibit P-11, Vol. 4, p. 834 and Vol. 1, pp. 96 and 121; Archambault, Exhibit P-12, Vol. 5, p. 846 and Vol. 1, pp. 139 et seq.)

(a) *Physical Depreciation.*

There is no dispute as to the principle involved in the allowing of depreciation, on a replacement cost valuation, to re-

duce the adjusted gross replacement cost figure by an amount intended to represent the physical deterioration of the property due to the passing of time and the action of the elements and of wear and tear to which its use subjects it. Everyone including the Board has made some allowance on this head.

Much has been made by Respondent's witnesses, by the Board and by the majority in the Court below of the contention that the building in question is not a commercial building and ought therefore not to be valued as such. In the City's own Parent Manual, commercial buildings are categorized into class and type by reference to the materials and type of construction used. At page 201 of the Second Edition, English Version, we find a photograph of the Sun Life Building itself captioned "Commercial Building" and as being typical of an "Office Building — Class 1 — Type 1". This is in so-called "practical" portion of the Manual for which the Chief Assessor Hulse was apparently responsible.

The classification of buildings made in the Manual is related to a depreciation table reproduced therein at page 197, which page was made an exhibit in this case (see Exhibit P-4, Vol. 4, p. 718). As pointed out by Appellant's witnesses, the City has not even allowed as much depreciation as this table calls for although the building in question is classified as typical in the Manual.

The fact that physical depreciation is allowed and recognized by everybody points the Appellant's argument that replacement cost valuations are designed to produce the true or actual value of the property just as much as are commercial valuations. In an absolutely normal building, before obsolescence has come into play, the only deduction which requires to be made to produce the actual value is a deduction for physical depreciation based upon the length of time the building has been in existence.

(b) *Functional depreciation.*

The main difference in principle, as distinguished from questions of accuracy and method, between Appellant's experts Perrault and Archambault, who valued the property by the depreciated replacement cost method, and the City witnesses, lies in the fact that the former each agree that in addition to physical depreciation, the Sun Life Building suffers from very serious functional disability, resulting from the inherent design of the

building. This produces an unusually low percentage of net rentable floor area, when compared either with the gross floor areas or with the cube of the building and of that rentable area an excessively high percentage is undesirable deep dark interior space. In other words, due to the uneconomical design of the building, the Company has provided itself at full cost,

(i) with a tremendous amount of waste space which cannot be utilized, and

(ii) with an excessive amount of utilizable but undesirable space which is too deep, is not readily divided and is either inadequately lighted or altogether dark. Both this waste space and this excessive undesirable space detract from the value of the building whether to a prospective purchaser or to the Sun Life Company itself. This condition prevails throughout the building both in the tenant occupied and Company occupied space. Cost not represented by space or represented by undesirable space is not an element of value in the building, either to the Company or any other possible owner, and due allowance must, therefore, be made by deduction of adequate functional depreciation.

Reference at this point may well be made to the decision of the United States District Court in *State of Minnesota vs. Federal Reserve Bank of Minneapolis,* which was first referred to by the City's Counsel in argument, is referred to and quoted from at length in the Judgments below and has been reproduced as an appendix at Vol. 5, pp. 1137 et seq. This case was apparently relied on by the City to support its theory that the Sun Life Building ought to be dealt with as a special purpose building designed for the sole use of the present owner. It involved a specially constructed building for the Federal Reserve Bank, described in the Judgment as resembling a fortress. The following passage from the Judgment is noteworthy in this connection:

> "Obviously, it is in the nature of a semi-public structure erected for special use. It was not intended for general business purposes."

It is, therefore, in no sense of the word a revenue producing property but was of the nature of a railroad station or some other such structure designed for a *"special purpose"*. It is submitted that the overwhelming weight of evidence in the present case is to the effect that the Sun Life Building, on the contrary, is an office building, all capable of being used for ordinary business purposes and all rentable as such. Much is made, by the

City's witnesses and Counsel for the City, of the existence of a banking hall, auditorium, gymnasium and certain cafeterias as distinguishing the Sun Life Building from all other office buildings. This, of course, has no foundation in fact, and furthermore all of such spaces are rentable and have been valued as being rentable by the City's witnesses, Mills and Desaulniers.

In the circumstances, there is no analogy between the two cases. However, it is extremely interesting to note that the Minnesota case clearly recognizes the very principle for which the Company is contending, namely, that where a replacement cost valuation is employed, deduction must be made not only of physical depreciation and obsolescence but also of functional depreciation. This is clear from the following passages in which the Minnesota Court approves the method followed by the Assessors in that case:—(Vol. 5, p. 1141, l. 39)

> " . . . . in substantiation of his estimate of the true market as contemplated by the Statute he figured the reproduction cost of the building as of May 1, 1936 to be $2,600,000. He allowed 25% depreciation, being approximately 2% *per year* for the life of the building *and by reason of the apparent difference of opinion as to the effect of the distinctive architecture on its market value both artistically and as a utilitarian structure, he allowed an additional* 25% *for depreciation.* Therefore a total of 50% depreciation is to be found in the Assessor's computation."

At page 1147, l. 16 this Judgment reads:—

> "Furthermore, it appears that due consideration and allowance have been given by the assessor on account of the architectural and structural limitations that may exist in this building."

When due allowance is made for the comparable disabilities from which the Sun Life Building suffers, and the replacement (reproduction) cost figures are adjusted accordingly, a net valuation is arrived at which, as will be seen from the reports of Perrault and Archambault, approximates the valuations arrived at by all the witnesses who approached the problem from the revenue angle. This approximation illustrates:—

(i) that the two types of valuations made by the Company's experts are accurate;

(ii) that the valuation contended for by the Company, which lies between the two, is extremely conservative;

(iii) that by contrast the discrepancy between the City's replacement and commercial valuations indicates that at least one of these is far out of line and that since the City's commercial valuation is within reasonable proximity of both of the Company's valuations, it is the City's replacement valuation which is erroneous.

The only attempt made by the City to meet the Appellant's contentions regarding functional disability was to make certain comparisons wih the Dominion Square Building and The Royal Bank Building to show that the percentage of net rentable area in those buildings was not much higher than in the case of the Sun Life. As pointed out by the Appellant's expert witnesses, however, these comparisons were altogether misleading because:—

(i) in the case of The Royal Bank Building, no attempt was made to include additional imaginary floors in the banking hall or to take into account the half ground floor and basements; and

(ii) in the case of the Dominion Square Building a serious error was made calculating the gross floor areas, the Sheridan-Karkow formula was wrongly applied and the large basement garage occupying three full floors was ignored.

Apart from the foregoing, the City witnesses claimed that the type of space occupied by the Appellant in the Sun Life Building was ideally suited to its business. This, in any event, only touches on the quality and not the quantity of the space, but is based on the fundamental fallacy of valuing the space at the so-called value-in-use to the Sun Life. The only value which space can have is its value when put to its highest use. No one for the City has ventured to suggest that the occupation of this space for office purposes is not the highest and most profitable use to which it could be put. Furthermore, it is clear from the evidence that division of office space into small offices produces the highest rental return per square foot of space. If the exigencies of a particular business require the construction of space which is less desirable in the market, surely that does not make that space more valuable in the market because it happens to be used at the moment by the person for whom it was constructed. The fewer the people are who want that kind of space, the less valuable it will be in the market.

(c) *Obsolescense*:—

The contention of the City witnesses, apparently adopted by the Board and by the Courts below (Case, Vol. 5, p. 1011, l. 36), that no allowance should be made for obsolescence in respect of the Sun Life Building because that building is one of the "most modern" buildings in the City, is submitted to be clearly without foundation. The City witnesses harp on the fact that the building is constructed of granite and the finest materials throughout. They therefore argue that the building will last indefinitely and accordingly allow a smaller percentage of physical depreciation than is provided for in their own tables. They also contend that it is not obsolete in any respect. As pointed out by the Appellant's witnesses, and particularly the witness Archambault, commencing at Vol. 1, p. 144, l. 21, obsolescence affects various component parts of a building long before the building as a structure has reached the end of its useful economic life. Thus in the Sun Life Building various items such as the electrical fixtures, radiators, ventilation system, elevators, tile used in portions of the building, and others, are already obsolete and should be replaced in order to have a first-class building by present-day standards. Archambault (Case, Vol. l. p. 145, l. 13) allows 5% for obsolescence. While this is a comparatively small percentage, it is obviously something which should not be ignored as has been done below.

4. *Discrimination*:—

It is fundamental that the tax burden must be disributed equally amongst all taxpayers and that one taxpayer or class of taxpayers should not be discriminated against to the benefit of all other taxpayers and, on the other hand, one taxpayer or class of taxpayers should not be favoured to the detriment of all other taxpayers. The witness Hulse (Case Vol. 2, pp. 241 et seq.) testified that the City's scheme, as outlined in the Parent Manual, and amplified by the Memorandum Exhibit D-5 (Vol. 4, p. 695), was intended to provide for equalization of the tax burden. This it may to some extent accomplish in the case of ordinary residential and commercial properties which do not depart from the normal in any material respect. Its application, however, tends to have exactly the opposite effect when the assessors are called upon to deal with a large exceptional property such as the Sun Life Building. It may well be that, for reasons above indicated, there are exceptional cases where the application of the Parent scheme and the "rule" evolved by the assessors of arbitrarily weighting or averaging the so-called replacement and commer-

cial valuations, would produce an under-valuation. In the case of the Sun Life Building, however, a comparison with the treatment afforded other office buildings in the City of Montreal clearly demonstrates that the exact opposite result has been produced. This is in large measure due to the complete disregard by the Parent system and the assessors of functional disability.

It must not be forgotten that, in the case of an ordinary or normal office building, there is for all practical purposes no functional disability present and, accordingly, the failure to allow a depreciation for this does not work any hardship in the case of such a building. When, however, we come to the case of the Sun Life Building, which the Appellant's witnesses have demonstrated suffers from a very serious functional disability in the matter of the quantity and quality of rentable space it provides in relation to its gross area and/or cube and consequently in relation to its original cost, it becomes at once evident that a very serious injustice is worked against this taxpayer unless due allowance is made for this disability. Over and above this, of course, further allowance, not made under the Parent system and the assessors' calculations, must also be made for obsolescence and for extravagance of materials and ornamentation which do not add to the value of the building an amount proportionate to their cost. The evidence is that all of these features are reflected in the rentals which space in the building will command in the open market. Under the revenue approach, therefore, no special deduction need be made. Where the deduction must be made is in the replacement cost approach, and this is what has been done by the Company's witnesses, Perrault and Archambault. The gross unfairness to the Sun Life of taking 90% of the higher and, it is submitted, entirely inaccurate replacement valuation and only 10% of the much lower and more accurate commercial valuation is obvious.

In considering the different treatment afforded other office buildings in Montreal, the following points may be noted:—

(a) Reference to Exhibit P-35 and the valuation sheets produced as Exhibits P-29 to P-34 inclusive (Vol. 5, pp. 913, 910, 885, 908, 909, 911 and 912) discloses that in the case of the eighteen large office buildings other than the Sun Life Building thereby covered, there is relatively little difference in any instance between the City's replacement valuations and commercial valuations. As a result, the use of a greater or less proportion of one or the other of such valuations makes no such difference, as it

does with the huge discrepancy between the City's Sun Life valuations.

(b) In four instances, namely, the Royal Trust Building, Architects Building, one M.L.H. & P. Co. Building, and the Bell Telephone Building, only the replacement value is given, presumably because these are treated as wholly owner occupied.

In four cases, namely, the C.P. Express, Tramways, the other M.L.H. & P. Building and the St. Catherine and St. Denis Building of The Royal Bank, the City's replacement and commrecial valuations are substantially the same.

In five cases, namely, Guarantee Company of North America, Banque Canadienne Nationale, Canada Cement, Confederation and University Tower Buildings, the City's commercial valuation is higher than its replacement valuation, and in the remaining five, namely, the Dominion Square, Star, Royal Bank Head Office, Bank of Toronto and Bank of Nova Scotia, the City's commercial valuation is slightly lower but not in any proportion even approaching the difference in the Sun Life case.

(c) The reason given by the witness Vernot for allowing only 50% of the commercial valuation as a factor, even in the case of the wholly tenant occupied buildings, was that current revenues might not reflect normal revenues. This, of course, is open to the criticism that the current revenue can be corrected to the normal revenue as has been done by the Appellant's witnesses. The difference between these cases, according to Vernot, and the cases of wholly owner occupied buildings where the City Assessors took 100% of their replacement valuation, is an adjustment of the relative proportions of the valuations used depending upon the percentage of owner occupancy. It will be observed at once that although the Sun Life Building is only 50% owner occupied, little attempt is made to follow the actual percentage of owner occupation as shown in Schedule "I" of the Joint Admission in any instance. Thus, in the case of The Royal Bank Building which is 41.5% owner occupied, the proportions are 80% replacement and 20% commercial. In the case of the Dominion Square Building which is 100% tenant occupied and where the ordinary rule would require a fifty-fifty divis-

ion, the City has taken a considerably higher figure than this would bring out. In the case of the Canada Cement Building which is 10% owner occupied, the City has taken a straight fifty-fifty division of its replacement and commercial valuations and similar variations occur throughout. In no instance, however, where there is only a 50% owner occupancy as in the case of the Sun Life Building is a proportion as high as 90% and 10% taken.

(d) The City Assessors admittedly make no allowance for functional depreciation. The fact that the City's commercial and replacement valuation of the typical office buildings referred to in Exhibits P-29 to P-35 inclusive show a uniformly close approximation is, therefore, an indication that in the case of these other office buildings, and they include buildings which are at least as "institutional" as the Sun Life Building (e.g., The Royal Bank Building), the element of functional disability is negligible. In other words, it is only where an exceptional case such as the Sun Life Building with its extraordinary functional disability is encountered, that the failure of the City assessors and of the Parent system to make any allowance for functional disability, where it does exist, produces discrimination against the taxpayer who is unfortunate enough to be the owner of such a building.

(e) A comparison of the assessment valuations of the eighteen buildings listed in Schedule "I" of the Joint Admission (almost all of which appear in Exhibit P-35) plus the Aldred, Confederaton, Dominion Square and University Tower Buildings, with the rental assessments of these same buildings again shows an extroardinary discrimination against the Sun Life Building as appears from the following tabulation:—

Building	*Municipal Assessment* 1941-42	1942-43	*Rental Assessment* *May* 1941	*% of* 1941-42 *Assessment*
Aldred	1,800,000	1,800,000	183,450	10.19
Architects	640,000	650,000	50,700	7.92
Canada Cement	1,400,000	1,339,000	148,730	11.10
C.P. Express	1,060,000	1,100,000	93,150	8.78
Confederation	1,160,100	1,200,000	138,980	11.98
Dominion Square	4,275,000	4,275,000	296,120	6.92
Guarantee Co.	395,500	350,000	35,590	9.0
M.L.H. & P.	567,000	640,000	86,600	15.27
Tramways	900,000	750,000	89,920	9.99
Royal Bank H.O.	4,700,000	4,550,000	357,540	7.60
Royal Bank (St. Denis)	355,000	300,000	36,620 (May 1940)	10.31
Royal Trust	981,500	980,000	74,000	7.53
Star	700,000	671,500	65,140	9.30
University Tower	1,500,000	1,500,000	180,750	12.05
Bell Telephone	3,000,000	3,000,000	167,980	5.60
Bank of Nova Scotia	700,000	670,000	63,250	9.04
Banque Can. Nat.	600,000	600,000	52,800	8.80
Bank of Toronto	550,000	550,000	55,400	10.07
	25,284,100	24,925,000	2,176,720	1942 8.72 1941 8.61
Sun Life (including Boiler House)	10,211,200	14,276,000	650,140	4.52

It will be observed that in the case of all of such buildings other than the Sun Life, there has been no material increase in the municipal assessment between the 1941-42 and 1942-43 figures and, in fact, there is a slight over-all reduction in the latter assessment year. The average ratio of rental assessment to municipal assessment for these buildings is 8.72% for the latter year and 8.61% for the former. This contrasts with a ratio of only 4.52% in the case of the Sun Life Building, which is by far the lowest of all. Thus the protested municipal assessment of the Sun Life Building is 22.1 times its rental assessment whereas in the case of the Bell Telephone Building, which has the next lowest ratio and is wholly occupied by a public utility owner, the property assessment is only 17.85 times

its rental assessment, and the average property assessmen of the entire group is only 11.4 times the average rental assessment. In other words, the Sun Life Building is assessed approximately 25% higher on this basis than the Bell Telephone Building and 92% higher than the average of all these buildings. It may be noted also from the above table that the municipal assessment of The Royal Bank Building, the building in Montreal most nearly approximating the Sun Life Building from a monumental, owner occupied and so-called "institutional" point of view, is only 13.3 times its rental assessment as compared with 22.1 times in the case of the Sun Life Building.

(f) The indication above that there has been no appreciable increase, but rather a slight decrease in the assessments of all other large office buildings in Montreal, is borne out by the assessment history of such buildings and of other important buildings as set forh in Schedule "H" (Vol. 1, pp. XXI to XXV) of the Joint Admission. The attempt to increase the valuation of he Sun Life Building by approximately $4,000,000 overnight is the only example of such treatment afforded to any building in Montreal (notwithstanding the Board's statement to the contrary in its Judgment at Vol. 5, p. 983-A-25, l. 46, which is not supported by the evidence) and, it is submitted, is clear evidence of discrimination.

5. *The Boiler House*:—

Reference has been made above to the extraordinary increase in the value assigned to the boiler house, in the assessment complained of, over the constant and unchanged valuation which has been placed on it under all previous assessments. The evidence is that there has been no increase in this building or additional expenditures thereon (v. Admissions, paragraph 7, Vol. 1, p. VIII) and the only change in the previous assessments which would be justified, if the boiler house is to be assessed as a separate entity, would be a substantial reduction in the previous assessment to allow for depreciation and obsolescence both of which are naturally heavy due to the preponderance of mechanical equipment and for which no allowance has yet been made in any year by the City assessors.

The boiler house is erroneously described in the City's valuation sheet as a "power house". It is nothing more nor less than a building situated across Mansfield Street from the main

head office building for the purpose of housing the steam boilers employed for the heating of that main building. To describe it as a power house is to imply that it is used for the manufacture of power or steam, which is not the case. This may account for the apparent attempt on the part of the assessors under the assessment complained of to value the plant contained in this unit on a horse-power basis. There is obviously no justification whatever for this. Mention was made in the evidence of the fact that steam from the boiler house was supplied to Loew's Theatre. As explained by the Appellant's witnesses, however, this is a purely non-profit arrangement whereby the Appellant was able to get rid of the serious smoke nuisance caused by the operation of the Loew's Theatre furnaces (v. McAuslane, Vol. 2, p. 217).

It is the Company's contention that, since this boiler house and the plant it contains is designed and used solely for the purpose of heating the main building, it must be considered as an integral part of that building and should not be valued separately. It is obvious that, without this boiler house, the main building could not function. It must also be borne in mind that, included in the value of the main building, is the space which would otherwise be taken up by the heating plant and its appurtenances (e.g., the chimney stack running through the entire building) if they were incorporated in it. It, therefore, follows that to value the boiler house separately necessarily involves a duplication of valuation. If the furnaces were included in the basement of the Sun Life Building, their value would be included in the total valuation and no one would suggest that they should be valued separately, least of all on a horse-power basis. It is noteworthy in this connection that the City's witnesses in discussing the cost per cubic foot of the Sun Life Building and in making comparisons on a cost per cubic foot basis with their real and imaginary buildings, have not made any allowance for the fact that the Sun Life Building has no heating plant in its basement. The Board of Revision has apparently recognized the soundness of the Appellant's contention in this regard by combining the two assessments and doing away with the Business and Water Tax Assessment on the boiler house, but both the Board and the Courts below have failed to make any reduction in the grossly increased amount placed by the assessment under review on the boiler house as a separate entity.

The Appellant respectfully submits that the valuation of its boiler house ought to be reduced from $520,500., the amount of the assessment under attack, to at least a figure lying somewhere between the valuation of $331,534., including land, arrived

at by the witness Archambault (Case Vol. 5, p. 846) and the valuation of $282,200., including land, arrived at by the witness Perrault (Case Vol. 4, p. 841).

6. *Business and Water Tax Assessment*:—

Of the total assessed rental value of the Sun Life Building, put on the roll for the year in question at $704,960., $421,580. represented the space occupied by the Appellant. The balance of some $280,000. represented space occupied by tenants (v. Complaints dated August 19th and 20th, 1942, Case Vol. 1, pp. V and VI; Board's Judgment, Case Vol. 5, p. 983-A-31). So far as the tenant occupied space is concerned, the amount of $280,000. represents two-thirds of the gross rentals paid by the tenants. Particulars of these appear from Schedule "A" of the report of the witness Simpson (Case Vol. 5, p. 874). The 50% thus deducted by the City is intended to cover the cost of so-called "services". See in this connection the evidence of Vernot at Case Vol. 1, pp. 39 and 14. The Board justifies its refusal to interfere with the assessment so far as the space occupied by the Appellant is concerned, by relying on the amount of yearly rental which the Appellant had charged to itself in its books for the year 1941. The evidence is that this amount was nothing but a book entry (v. Case Vol. 5, p. 983-A-31).

The Appellant's contention is that it should receive the same treatment as its tenants in regard to this assessment. A breakdown of how the amount of $421,580. was arrived at in the assessment appears from the assessment notice (Document No. 25 in the record produced by the City; not reproduced in the Case) as follows:—

Basements	55,661 sq. ft. @	$0.50 =	$27,830.
Ground Floor	23,530 " " "	$2.00 =	47,060.
Above ground floor	228,909 " " "	$1.20 =	346,690.
			$421,580.

Applying to the foregoing the same two-thirds rule employed by the assessors for the tenant occupied space, we find that the foregoing represents gross rental values of 75¢ per square foot for basement space, $3.00 per square foot for ground floor space, and $1.80 per square foot for space above the ground floor. The Appellant submits that in determining the rental assessment for

business and water tax purposes, the gross rental values established by the witnesses Lobley and Simpson in respect of the space occupied by the Appellant, which is based upon their experienced opinion of the value of that space as compared to similar space in the Montreal market, ought to be adopted over the arbitrary valuation placed on this space by Messrs. Mills and Desaulniers or the somewhat lower and unexplained valuation apparently made by the assessors in connection with the foregoing computation. It will be remembered that Mills and Desaulniers admit that their valuation of the Appellant occupied space is not the market value thereof, but is enhanced by reason of their erroneous theories of institutional space, amenities and value-in-use to the Sun Life, all of which are founded upon the obvious fallacy that space should be valued by reference to the use to which it is being put rather than to the use to which it is capable of being put. Rental value of space for taxation purposes must be the current rental value in the market and the only evidence of this in the record is that of Messrs. Lobley and Simpson.

Accordingly, the Appellant submits that while the above figure of 75¢ per square foot for the basements is in accordance with the evidence of Lobley and Simpson, the ground floor figure ought to be reduced to $2.25 per square foot and the figure for the floors above the ground floor ought to be reduced o $1.50 per square foot in order to conform to their evidence. On this basis, and adopting the two-thirds ratio followed by the City in the case of the tenant occupied space, the rental assessment should be made up as follows:—

Basements	55,661 sq. ft. @	$10.50	=	$27,830.
Ground floor	23,530 " " "	$1.50	=	35,295.
Above ground floor	288,909 " " "	$1.00	=	288,909.
				$352,035.

7. *Conclusion*:—

On the whole, therefore, the Appellant respectfully submits that its present appeal should be maintained; that the combined valuation of the Company's property involved in this appeal should be fixed at not greater than the sum of $8,433,200. contended for, which amount lies midway between the commercial valuation of all the witnesses and the replacement cost valuation of the Appellant's witnesses Perrault and Archambault; that

the assessed rental value of the space occupied by the Appellant for business and water tax purposes should be reduced to the sum of $352,035.; that the disposition of costs made by the Superior Court should not be disturbed; and that he Company should be awarded costs both in this Court and in the Court below.

The whole respectfully submitted.

Montreal, 4th April, 1949.

F. P. BRAIS, K.C.,
HAZEN HANSARD, K.C.,
Of Counsel for Appellant.

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HAZEN HANSARD, K.C.,
Of Counsel for Appellant.

DOMINION OF CANADA

IN THE SUPREME COURT OF CANADA

OTTAWA

On Appeal from a Judgment of the Court of King's Bench.

BETWEEN:—

SUN LIFE ASSURANCE CO. OF CANADA,

Petitioner before the Board of Revision;
Plaintiff-Appellant in the Superior Court;
Respondent and Cross-Appellant in the Court of King's Bench, Appeal Side,

APPELLANT,

— and —

THE CITY OF MONTREAL,

Respondent before the Board of Revision;
Respondent in the Superior Court;
Appellant and Cross-Respondent in the Court of King's Bench, Appeal Side,

RESPONDENT.

APPELLANT'S FACTUM

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