28, 1951

IN THE PRIVY COUNCIL.

Council Chamber,
Whitehall, S.W.1.

~~Monday, 18th June, 1951~~.
Thursday 21st June 1951

Present:

LORD PORTER
LORD NORMAND
LORD OAKSEY
LORD REID
LORD ASQUITH

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Between;

THE CITY OF MONTREAL. (Appellant).

and

SUN LIFE ASSURANCE COMPANY OF CANADA (Respondent).

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

MR. L. E. BEAULIEU, K.C., MR. HONORE PARENT, K.C., MR. R. N. SEGUIN, K.C. (of the Canadian Bar) and MR. FRANK GAHAN, instructed by Messrs. Blake & Redden, appeared for the Appellant.

MR. F. P. BRAIS, K.C., MR. HAZEN HANSARD, K.C., MR. R. D. TAYLOR, K.C. (of the Canadian Bar) and MR. G. D. SQUIBB, instructed by Messrs. Lawrence Jones & Co., appeared for the Respondent.

MR. A. M. WEST, K.C. (of the Canadian Bar) held a watching brief on behalf of an interested party.

F O U R T H D A Y

MR. BEAULIEU: My Lords, when we adjourned last night I was reading from the reasons for judgment of Mr. Justice Taschereau. On page 1168 at line 43 he continues: "This building has been rightly described as monumental and unique" etc. (reading to the words at page 1171, line 20) "mais qui desire acheter'".

LORD PORTER: What is the 10 Exchequer Court Reports referred to in that passage? Is that Montreal or the Supreme Court or what is it?

MR. BEAULIEU: The King v. MacPherson was a case in the Dominion Exchequer Court, my Lord. The learned judge continues: "I may also add the following authority" etc. (reading to end of judgment).

LORD ASQUITH: The Supreme Court of Canada was unanimous, was it

not, in allowing the appeal?

MR. BEAULIEU: Yes, my Lord.

I now come, my Lords, to the reasons of Mr. Justice Rand. He says: "This appeal raises the question of the basis of valuation" etc. (reading to the end of judgment).

My Lords, we now come to the reasons of Mr. Justice Estey. He said: "The appellant's main contentions are that the assessment" etc. (reading to the words at page 1180, line 3) "In the American and English Dictionary of Law" -----

LORD PORTER: That is not the American Re-statement, is it? I do not know the American and English Dictionary of Law, but it does not matter.

MR. BEAULIEU: It states: "'The advantages and disadvantages of location'" etc. (reading to the end of judgment).

Is it now your Lordships' pleasure that I should read the formal judgment# of the Supreme Court?

LORD PORTER: I do not think that it is necessary. We have got the learned judges' reasons. If there is any particular observation to which you desire to draw attention, by all means do it; but I think we are in possession of the reasons which the learned judges in the courts adopted in coming to their conclusions. How do you propose to deal with the matter now?

MR. BEAULIEU: I will state briefly my submissions, my Lords. I respectfully submit the four following propositions. The first one is that, under the City Charter the assessors are duty bound to find the actual value and not the market value or exchange value or anything of that kind; and actual value, as I understand it, means the value resulting from a consideration of every tangible element of value; that is, every factual element of value without omitting any one of them.

My second proposition will be that in fact the Board of Revision, in maintaining the finding of the assessors, did apply that principle and fix the value according to the Charter and to the jurisdprudence of our province.

My third proposition will be that the learned judges of the Superior Court, in modifying the findings of the Board of Revision, decided contrary to the evidence and to the principles fixing actual value.

Finally, my Lords, I submit that, even if there was some difference of opinion, there were no adequate reasons under our jurisprudence for the judges of the Superior Court, acting as a Court of Appeal, reasonably to disturb the findings of the Board of Revision.

My Lords, as to what constitutes actual value, of course, it has been said (and there is no dispute about this) that actual value and real value are similar. We can use one or the other; they are interchangeable; and the meaning of one might be assisted by the meaning of the other. Of course, there is no definition of "actual value", but the word "actual" or "real" at first sight, and giving to the word its normal construction, eliminates all that which is fictitious, all that which is potential and all that which is hypothetical. "Real" means something real, as a fact. As is said by the Board of Revision, real value is a fact.

Again, if, first of all, "actual value" excludes what is fictitious, I submit that, if you want to find actual or real value, you must take into consideration all the factual elements of value and not eliminate any one of them. If you do eliminate one of them, such as the cost of construction, for instance, then you are bound to have an incomplete real value and, consequently, a false real value.

LORD ASQUITH: I am not quite sure how far this proposition carries you. Supposing actual value, as you say, eliminates all that which is fictitious and hypothetical, then one would have thought that would rule out replacement value as a test altogether, because replacement is a hypothetical thing.

MR. BEAULIEU: I will endeavour to submit that it is based on facts and that that is why it should always be taken into consideration. It should be appropriately weighted, of course, but it should be taken into consideration, because it is a fact. In my submission, reproduction cost is based, first of all, upon original cost; that is a fact. Then that original cost is adjusted to the current prices at the time of the assessment; that also is a fact. Then there is depreciation, which is also a fact. Of course, the estimation of depreciation is another matter; but in the reproduction cost we have three factual elements; namely, the original cost, the current price at the time of the assessment, and the depreciation. Everybody admits that there is depreciation. It has been said many centuries ago that time is always depreciating [redacted] things, so that that is a fact.

LORD ASQUITH: You take those facts into account to answer the question: What would it cost to replace?; but ex hypothesi it is not going to be replaced. I should have thought, therefore, that you are not eliminating what is fictitious, potential or hypothetical.

MR. BEAULIEU: In my submission - it is for your Lordships to decide whether I am wrong - there is nothing hypothetical in the reproduction cost, because it is based on the original cost (which is a fact), the adjustment of that cost to the current prices at a given date (which is a fact also) and then on the appropriate depreciation to be deducted (which is a fact). It requires some expert knowledge and experience, but it is a fact nevertheless.

LORD PORTER: I was wondering how you deal with this type of problem. Let us imagine that a certain type of decoration was very popular at the time when a building was erected and had become anathema to the inhabitants of the place where the building was erected at the time when you had got to make the assessment. Would it be right then to say that you take off nothing for that decoration, because that is what its actual cost was, and that you should only take off something for depreciation? What do you say about that? I think that it is the same problem that my Lord has been putting to you.

MR. BEAULIEU: Of course, when I speak about depreciation I speak about obsolescence.

LORD PORTER: What do you mean by "obsolescense"? All questions of this kind give rise to a very careful consideration of what the language used means. If by "obsolescence" you mean unpopularity of the type of decoration, then your answer is the answer to the question that I have asked. If, on the other hand, "obsolescence" means rather that there is a wasting in the building, that is the other type of

depreciation, namely, what you allow for actual depreciation in the building. I am not quite sure when you talk about "obsolescence" which of those two factors you have in mind, or whether you have in mind both of them, as you may well have.

MR. BEAULIEU: In our province, generally the word "depreciation" includes obsolescence. When we speak of "depreciation" we generally speak of obsolescence. It is a matter of decision; but, of course, if that was the only element to consider in arriving at actual value, I would be quite willing to admit that we should arrive at it with that as the only element. I submit, hoever, that at least we should give consideration to the reproduction cost. Any assessment which ignores reproduction cost takes away an essential element of value and must necessarily arrive at a distorted result. I am not contending that it is the only factor and I admit that there are possibly replacement costs and other factors. The assessors must use their own minds and find in the circumstances of the case if there are other elements. I am not restricting the elements constituting real value to what I have called actual elements of value; but I say that the actual cost must at least include all of them adjusted to the circumstances. If we have a valuation which has been made on the principle that reproduction cost must be ignored, I submit we might arrive at something like commercial value or we might arrive at something like saleable value, but we will not have the actual value which is contemplated by the Charter. We must consider that actual value is taken in respect of the valuation of immovables: the land and the building. There is always a replacement value with these things. It might be different if you were appraising a potentiality or a possibility. Then, of course, there cannot be any reproduction cost in those things. Actual value within the meaning of the Charter and applied to the valuation of the immovables, including land and buildings, must, in my submission, always take into consideration the reproduction cost.

LORD REID: Before you leave the question of reproduction cost, I have not yet understood this point. I can understand that which I believe to be your submission, that you must imagine the replacement of that building and not any other comparable building.

MR. BEAULIEU: That is our submission, my Lord.

LORD REID: But how can you reproduce that building without expending the whole cost? If you take off, let us say, 25 per cent for depreciation and you have only got 75 per cent of the cost of the building left, how can you reproduce the building with that 75 per cent?

MR. BEAULIEU: We are not, of course, attempting to rebuild the building. We take the building as it stands rebus sic stantibus. You have to ascertain what is the actual value of the very same building at the time of the assessment. I submit that, when we take the 25 per cent depreciation, it is 25 per cent of the building actually in contemplation and of the building as it was built.

LORD REID: I understand that, but what I do not understand is how 75 per cent of the present cost of reproducing that building can in any true sense be the reproduction cost of that building, because you cannot build that building with the sum that you arrive at after allowing for that depreciation.

MR. BEAULIEU: You would be building it again, if you could so build it, in its depreciated condition; but, of course, you cannot do that.

LORD REID: That is very hypothetical. You would have to buy second-hand material.

MR. BEAULIEU: Yes, my Lord. It is a method or a factor of valuation and it is not the only one; but, in my submission, its merit lies in that it is based upon facts. As I understand it, under our jurisprudence all these factual elements of value are divided into three groups; namely, market value, reproduction cost and what is called commercial value. It is my submission that all these three factors are factual elements of value which must be considered if they are available. I have already stated what I understand by "reproduction cost". If we take commercial cost, we know that, according to the method in our province, it is based upon the actual earnings capitalised at a given rate. The actual earnings of a building or of an enterprise are also a matter of fact. It is a factual element.

LORD PORTER: Will you repeat that as I have not quite followed it?

MR. BEAULIEU: I was submitting to your Lordships that the second factor was what we have called commercial value. My submission is that commercial value is also based upon a fact; that is to say, the actual rentals received at the time of the valuation, capitalised at a certain rate. The rate itself depends upon factual elements, because it depends upon existing circumstances. If the valuer has taken a wrong rate in view of all the circumstances, he has made a mistake in fact; but he had all the facts necessary.

LORD OAKSEY: It is worth while remembering, is it not, that, when you have a building like this which is 60 per cent occupied by the owner, the commercial value (which is arrived at by assuming what the owner would pay) is not a matter of actual fact: it is a matter of estimate.

MR. BEAULIEU: That is why I say that they could not estimate upon the commercial value.

LORD OAKSEY: That is not against you at all. I think that it is rather in your favour.

MR. BEAULIEU: The way I understood that they proceeded is that, if the owner is occupying one portion of the building, the difference only is submitted to valuation according to the earnings. There is only one earning, the earning of the rent of the tenants.

LORD OAKSEY: As I understand it, in this case the owner is occupying all the best part of the building. For the purpose of arriving at the rent of that part, an estimate has to be made. It is not what he actually pays for it.

MR. BEAULIEU: You could do it in that way. The way they proceeded to do it is that they purely and simply said: "In view of the fact that 60 per cent is not rented but owner occupied, then it must be added to the reproduction cost". It is purely and simply an element of reproduction cost."

LORD PORTER: That is not quite accurate, as I see it, because what they have done is that they have taken the whole of the rental value, including that which notionally the company pays

itself. They have not dealt with it on the actual rent paid; they have decided it upon a notional rent which includes the whole building. Then they have made up for the fact that it is notional rent and not an actual rent by attributing 90 per cent to replacement cost and 10 per cent only to rent. That, as I understand it, is what they have done.

MR. BEAULIEU: There were two methods followed. Mr. Vernot purely and simply estimated the percentages according to the space occupied. He said: "The owner is occupying 60 per cent and the tenants are occupying 40 per cent". The Board of Revision took as the basis of its consideration the total amount of rent first received from the tenants, and, secondly, charged by the company itself in its own books. The Board of Revision said: "We find on that basis that 82.3 per cent is occupied by the owner, so we cannot give it a commercial value. We will give a commercial value to the part which is occupied by the tenants (that is to say, 17.7 per cent). The only percentage that should be given to the commercial value is the amount occupied by the tenants as compared with the space occupied by the company; but, so far as the space occupied by the company is concerned, it is purely and simply set back upon the reproduction cost value, because the owner is not receiving any rent for that, so that we cannot say that he had an income which could be capitalised". They did not capitalise the amount charged by the company to itself in the books. They capitalised the amount representing the portion which was actually rented.

LORD PORTER: Is that right? I thought they got over the difficulty of their original 90 and 10 per cent and their ultimate 83 and 17 per cent by taking the whole of the rent, both that paid by the tenants and that notionally attributed to the company, and then capitalised that. Is that not right?

MR. BEAULIEU: That is the way I understand it, my Lord. They capitalised only what was received from the tenants, but they took into consideration the rents charged to the company in its books only for the purpose of determining what was the proportion between the rents payable by the tenants and the balance of the building, for which there was no tenant except the owner itself. The Board of Revision came to the conclusion that it was 82.3 per cent against 17.7 per cent.

LORD PORTER: How do you get your figure of 17 million dollars odd?

MR. BEAULIEU: I must apologise, my Lord, as I am making a mistake myself. They proceeded in the way that your Lordship has put to me. I misunderstood the evidence on that. I have been corrected and I want to apologise to the Board for my mistake.

LORD PORTER: I only wanted to be sure that I had understood it aright.

LORD ASQUITH: Did anybody proceed in this way? Did they say to themselves: "Let us take the rents which were paid by the 40 per cent, the tenants, and assume that the corresponding rents could be taken to be paid in respect of the other 60 per cent"; and, instead of taking the figure that the company charged itself in its books, take what they could have charged other tenants if they had let out the 60 per cent as well as the 40 per cent? Did any of the court deal with the matter on that basis, because that is a possible basis? You might say that what the company charges itself is an artificial figure; but let us suppose it had been a tenant

who had not had 40 per cent, but who had had the whole 100 per cent.

MR. BEAULIEU: If the owner is occupying 100 per cent of the building, then, of course, the entire building is valued upon the reproduction cost basis only, because of what is said in the memorandum. I think it is logical; it is not because it is to be found in the memorandum that it must be right; but its merits allow logical consideration. It is not said: "If you have a large company build a property for its own use as a head office and it is intended for them to keep it as long as can be foreseen, then, of course, for such a building the only proper valuation is the reproduction cost less depreciation", because, if this owner were obliged to sell that property - if it was expropriated, for instance - he would require a similar property and pay the same amount". They say (and I think it is logical) that in that case the real test - it is subject, of course, to the various circumstances, but the fundamental test - for a building occupied by the owner is the reproduction cost.

LORD PORTER: Answering my Lord's question as far as I am able to do it, the answer is that nobody took a comparison between the rents paid and the rents the company attributed to itself but they assumed that the amount which the company attributed to itself was a reasonable amount to attribute and added that to the rents that the tenants actually paid. I think that that is so;

MR. BEAULIEU: I would not be prepared to admit that it was a proper amount charged, because the Board of Revision makes many reservations upon that.

LORD PORTER: That may be true; but in this particular case they never seem to have challenged it. They seem to have calculated upon that basis. Therefore, I think they must have regarded the amount which the company attributed to itself as, anyhow, a reasonable figure to go upon. It might not be accurate, but reasonable.

MR. BEAULIEU: At all events they adopted it.

LORD OAKSEY: Mr. Justice Casey, in the Court of King's Bench, decided the case solely upon that figure.

MR. BEAULIEU: He decided the case solely upon the figure of commercial value, yes; but commercial value considered from a particular point of view, namely, the point of view of a prudent investor. I shall have to consider this matter later on, but the principle, so far as this case is concerned, is that he considered that it was a figure in regard to the property which could be assessed by a revenue which the prudent investor would obtain if he liked to purchase the property.

LORD PORTER: Is this right, because it may be, to some extent, lighten the task we have all to undertake? There never has been any dispute with regard to what you have called commercial value; that is to say, the 7 million odd dollars has been accepted substantially by all the courts and by the judges, so that really what we have got to get back to are the facts: first of all, what do you regard as replacement value, and, secondly, what portion do you attribute to replacement value as opposed to commercial value? Those are the real points we have got to decide, are they not?

MR. BEAULIEU: As Your Lordships are aware, almost all the judgments adopted the principle of blending the two, so it comes

to a question of percentage.

LORD PORTER: But before you get to that - I quite agree that it is one of the most important points we have to bear in mind - the other main dispute is with regard to this extra depreciation for the type of building that has been erected. Substantially those are the two points we have got to bear in mind, have we not?

MR. BEAULIEU: There is also, if I may say so with respect, the difference in the index cost, which amounts to over a million dollars. There is a big difference between the Superior Court and the Board of Revision.

LORD PORTER: That means the difference between the proportion attributed to the value owing to the period at which the erection took place. In one case it is 7.7 per cent and in the other case it is 1 per cent, is it not?

LORD NORMAND: In the Supreme Court was not the position taken up by the appellant that, if the court thought that the Board of Revision had not made a proper allowance in respect of what is called the dead expenditure upon this building (that is, ornamentation and the like) and if it also thought that the Board of Revision had erred in taking what we call the 90 and 10 per cent as the two percentages to weight the replacement value to commercial value, the appellant would then be content with the restoration of the judgment of the Superior Court? That is what is stated on the last page of Mr. Justice Estey's judgment. Is that not correct?

MR. BEAULIEU: As far as the Supreme Court is concerned, I suggest that we must make some distinction. The learned Chief Justice and Mr. Justice Kerwin purely and simply adopted the theory of the prudent investor. They said: "We agree with Mr. Justice Casey". Of course, there are various remarks and various principles enunciated, but they follow Mr. Justice Casey in arriving at them. It is also true that in the other judgments the prudent investor theory is reflected in some of the remarks; but I do not believe that the other judges purely and simply adopted the point of view of Mr. Justice Casey as to the prudent investor. As regards Mr. Justice Estey, if I understand his judgment, it is because in his opinion the assessors of the City of Montreal were not free to act as they should have been free to act. He said that there was not in the present case the assessment contemplated by the Act and by the law, because on account of their memorandum he took the position that they were fettered or restricted to a certain degree by that memorandum, and to an undue degree.

LORD NORMAND: I was asking not about what the learned judges in the Supreme Court said in their judgments, but about the attitude taken up by the appellant. I was asking whether the appellant had not said that, if the Supreme Court were against them on the two points of the proper deductions to be made and of the proper figures with which to weight the replacement cost and commercial value respectively, they would then be content with the restoration of the judgment of the Superior Court.

MR. BEAULIEU: What I understood is this, if I may refer to page 1185. They said in substance: "Instead of sending back the record to the Board of Revision to make a new assessment, we would rather have a decision at this moment from this court. There is now before your Lordships first the judgment of Mr. Justice MacKinnon making the reduction from 14 million dollars to 10 million dollars and there is the Board of Revision finding". Instead of having the record

sent back again to the Board of Revision to make a new assessment, as undoubtedly the Supreme Court had the right to do, the appellant said before the Supreme Court: "We prefer you to decide whether or not Mr. Justice MacKinnon is right or wrong". May I refer your Lordships to page 1185. The learned judge says at line 35: "The errors in principle involved in the foregoing determination of actual value would, in the ordinary course, justify a reference back to the assessors. However, at the hearing the parties intimated that they would prefer, should we find such errors, a direction fixing actual value as determined by Mr. Justice MacKinnon. In compliance with that suggestion, the appeal will therefore be allowed and the judgment varied".

LORD NORMAND: Does not that come to this: if the Supreme Court were minded to reverse the Court of King's Bench, the parties would then accept the conclusions of the Superior Court?

MR. BEAULIEU: It might not be as clear as it should be, but I think that the alternatives were sending back the record or having a decision on the merits. That is my respectful suggestion.

LORD PORTER: Perhaps we should look at the formal judgment and see what they say. The formal judgment is at page 1155 before we come to the opinions of the Supreme Court.

MR. BEAULIEU: Yes, my Lord.

LORD PORTER: We have seen that; but I will tell you what is troubling me. I do not know how far it troubles my brethren. My difficulty is to understand what the learned judge means when at page 1185 he talks of "the errors in principle involved in the foregoing determination of actual value." I do not know how far by that he means all the errors in principle or whether he is saying: If there are errors in principle at all, then you should go back to the Superior Court. My own reading of it would be that he is saying: If you find that the errors complained of in the Board or in the High Court exist, you do not want it to go back on small matters for readjustment, but you will accept the decision of the Superior Court; but I am not sure -- you will tell me this about it -- that they were saying: Supposing that you find some errors and not all the errors complained of, you are going to be content to accept the view of the Superior Court.

MR. BEAULIEU: I think that it must be admitted that the wording of the sentence is not very clear; but it is not probable that the appellants would have said to the Supreme Court: Instead of being sent back to the Board of Revision, we want you to confirm the judgment of the Superior Court. That would be purely and simply stating that the appeal would have to be dismissed.

LORD NORMAND: Perhaps someone acting for the appellants at that time could tell us what they actually did say to the Superior Court?

MR. BEAULIEU: Perhaps Mr. Sequin may explain it. He was there and I was not.

LORD PORTER: Would you like him to do that now?

MR. BEAULIEU: At your Lordships' pleasure. Perhaps my junior might explain that point, which is a particular point to him, after the adjournment.

LORD PORTER: Very well; that will be convenient.

MR. BEAULIEU: Coming to the formal judgment of the Supreme Court, it says: "The appeal of the above named appellant" ---

LORD PORTER: I do not think that you need trouble until it says: "This Court did order and adjudge".

MR. BEAULIEU: "This Court did order and adjudge that the said appeal should be should be and the same was allowed, that the said judgment of theCourt of King's Bench for the province of Quebec (Appeal Side) should be and the same was reversed and set aside, and that the said judgment of the Superior Court for the Province of Quebec, sitting in and for the District of Montreal, should be and the same was restored".

LORD PORTER: We need not bother about the rest, because that deals with costs.

MR. BEAULIEU: Yes, my Lord.

LORD PORTER: They came to the conclusion that substantially the Superior Court was right.

MR. BEAULIEU: Yes.

LORD PORTER: What would have happened if they had come to the conclusion that the Superior Court was partly right and partly wrong, I do not know.

LORD ASQUITH: They held that the Court of King's Bench had made only one of the three mistakes.

LORD PORTER: Yes. I think that we shall have to discuss it at large.

MR. BEAULIEU: It is not the Board's pleasure that I shall read the formal judgment of the Court of King's Bench?

LORD PORTER: No.

MR. BEAULIEU: If I may resume where I left off a moment ago, my Lords, my submission is that, under our jurisprudence and practice, all what are called factual elements of value are divided into three groups. I have already spoken of the reproduction cost, what is called the commercial value, and capitalisation of income. The third element of value is the market price; but may I suggest that market value in its normal meaning is also a fact, and for that purpose I would refer to a definition by Mr. Zangerlee, an American author, which I would adopt as forming part of my argument, because it is probably put there in a better form than I myself could put it.

LORD PORTER: What is his work called?

MR. BEAULIEU: "The Manual Principles of Real Estate Appraising." It is at page 257. The work could not be found in the library, so I am quoting from the factum before the Supreme Court, where it appears at page 70. The definition of market value by Zangerlee is as follows: "By market value is meant the fair and reasonable cash price which could be obtained in the open market, not at a forced sale or under peculier circumstances, but at a voluntary sale as between persons who are not under any compulsion or pressure of circumstances and who are free to act or, in other words, as between one who wants to sell and is not compelled to do so and one who desires to purchase and is not obliged to do so. The value is that for any and all uses, present and potential; the value not only to the buyer, but to the seller and the public."

My submission is that under that definition the market value is also a fact, because there must be a competitive market where sales actually take place, and that market value is the result, not only of the consent of the buyers or bidders, but also of the consent of the seller. If every bidder would agree not to pay more than such a sum, but if no owner would be willing to sell at that price, there would be no exchange and consequently no market value. Bids do not make the market value. The bids accepted by the owners make the market value.

Therefore, again, I submit that when we have a real, actual market, this is a factual element of value which must be considered when it does exist.

As a matter of fact it is conceded, I think, that when there is such a market it is, generally speaking, the best factor to determine the actual value, because we have on such a competitive market, where buyers and sellers agree, the general consensus of opinion of more or less a number of persons and we have also the fact that at any time when there is a market the owner can obtain the price of the market. He may purely and simply put the property on the market. Such a market does exist in normal, ordinary dwelling houses. There is always a market for them, and also generally for land purposes. May I suggest that the formula, so often quoted in the judgments, of the willing buyer and willing seller has nothing to do with market value.

LORD PORTER: Mr. Zangerlee says the same thing?

MR. BEAULIEU: It is the same thing.

LORD PORTER: The only difference is that he adopts the English principle, namely, that, when you are discovering what would be paid for the particular property, you take into consideration, not only buyers at large, but the particular owner, and considering what he would do as part of the element in discovering what would be paid.

MR. BEAULIEU: Yes, my Lord. That is Zangerlee's definition. I can understand it and beg leave to rely upon it, because my submission is that, if there is no will on the part of the owners to sell, you cannot obtain a market value. We have the consensus of the general opinion of bidders, but, if you have not anything to purchase at that price, if no exchange is made, there will not be any market value or exchange value. There must be an exchange, real or imaginary, if you want to come back to the imaginary market; but so far I am just purely and simply considering what I have been calling the factual elements of value, all of which must be considered by the assessor, not in the sense that they should only be considered, but in the sense that, if one of those which is a factual matter of value is eliminated, the result is distorted.

LORD ASQUITH: This case has been treated throughout, has it not, on the basis that the criterion of market value fails us?

MR. BEAULIEU: Yes, my Lord. In view of the fact that we are dealing with a case where there is no market value (and everybody is agreed upon that) the question is: What is our jurisprudence in such a case? If there is no market value under the law of the Province of Quebec, I submit that the two other factual elements of value must be combined and considered together and, because there is no market value under our jurisprudence, it is not sufficient to refer to an imaginary market value; except, of course, if you want to introduce into that imaginary market the two elements of value: the reproduction cost , plus depreciation, and exchange value. Of course, when we come to an imaginary market there are no doubt some cases where the imaginary market formula will be very helpful. If we have, for instance, to value the potentiality, of course there cannot be any reproduction cost or commercial value and then that imaginary price which the imaginary purchaser would pay might be of some assistance; but in cases of assessment of immovables there is always at least that element of value which is reproduction cost less depreciation. In our provinces, therefore, when there is no actual market, the rule, as I understand it, is to consider the other two factual elements of value, combine them together and, even if there is no actual reproduction cost value, that is considered as the actual value, subject always, of course, to the particular circumstances of the case. What I am trying to submit to your Lordships is that other elements of value may be considered, but, if you omit one of them, you have a distorted result.

LORD NORMAND: I do not remember that any of the learned judges who have considered this case so far have said that the cost of replacement has to be left out of account.

MR. BEAULIEU: Mr. Justice Casey.

LORD NORMAND: I think not, if you look at page 1132.

MR. BEAULIEU: I remember that page. What he says is this: Of course, the prudent investor will consider reproduction cost, but only as a test for his offer; by that test he will know whether or not he will become an investor.

LORD NORMAND: I quite agree. I was only pointing out that not one of the judges says that it is an element to be left out of account -- not even Mr. Justice Casey. With the exception of him and those who follow him, I think that all the others give it a much larger place than that.

MR. BEAULIEU: But the particular feature of Mr. Justice Casey's remark is this: that, when he comes to fix the actual value, he refuses to enter into the blending anything for the reproduction cost. He says: We are not concerned with that, because that is objective value. Of course, he says, as your Lordship pointed out a moment ago, that the prudent investor would test the offer that he intends to make by looking at the reproduction cost; but what he has refused to do is to blend the two factors together and to come at a definite result. My submission is that it is useless to consider reproduction cost purely and simply as a test for the offer, if you do not take it into consideration when you come to make up your actual or real value, because you are omitting an essential element of actual value.

LORD REID: I should like to ask about the word "value". We have heard a good deal about the word "actual". I can understand a value to somebody, a value to the owner, a value to the bidders that you find in an actual market, a value to a prudent investor, whom you are required to imagine, or a value to some other person, real or imaginary; but what is meant by "an objective value" without reference to the person to whom the value is to be a value?

MR. BEAULIEU: "Objective value" also has been defined by an American author. I do not know if it will be accepted, but I must simply and purely say that the meaning given by Mr. Justice Casey to "objective" and "subjective" is not the meaning always obtaining in textbooks. I would refer your Lordships to a work of Mr. George L. Schmutz, entitled "The Appraisal Process."

LORD NORMAND: Is this in the factum too?

MR. BEAULIEU: It is in the factum in the Court of King's Bench. I am told that the book was produced as an exhibit in the case.

LORD PORTER: Where shall we find it in the factum?

MR. BEAULIEU: Page 69, line 10, my Lord. It says: "Briefly, the objective value of a thing is the cost of creation", by which I mean the original cost; "whereas the subjective value is the price that people will pay for it, irrespective of its cost".

LORD ASQUITH: They say then, if that is right, that, where you have a market price, that is not objective, which is a very extraordinary statement. The Stock Exchange, I am sure, would differ.

MR. BEAULIEU: I am trying to point out that Mr. Justice Casey says that the objective value is the price that the owner will require for the thing. He says that we are not concerned with that. That is where you have a difference. He says that the objective value is the exchange value of the thing. Probably that is right; but, in order to obtain that objective value, according to Mr. Schmutz, you must look at the cost of creation, which is the original cost.

LORD PORTER: Whether that is right or not is a rather different problem and it does mean that you are taking too opposed criteria when you are deciding what you mean by "objective", because Mr. Schmutz says that it is what it actually cost to put up the building. The other view is that it is what you would get in the market. You can say, if you like, that Mr. Schmutz's definition is the correct definition of objective value in a case where you cannot find out any selling price; but, nevertheless, it is a different approach.

MR. BEAULIEU: I am not contending that Mr. Schmutz is right, my Lord; but I am just submitting the point that Mr. Justice Casey's mind might be a little confused when he comes to his conclusion to eliminate entirely the price that the owner would require for his property. I do not think that we can have either an exchange value or a market value unless we have a price which is accepted by the owner, so that there is an exchange taking place.

LORD PORTER: The difficulty of that is that, unless you have an actual sale of the property in question, there is no criterion.

MR. BEAULIEU: That is true so far as immovables are concerned, my Lord. Then, when you have no market and you are looking for that imaginary market, I would make purely and simply this qualification. If we create an imaginary market, the next step will be to find out what would the imaginary buyer consider. I submit that he would have to consider, if he is prudent, the original cost depreciated and the economic value; so that we come back to the same point.

LORD REID: Are you saying, then, that you would want the value to be assessed on the basis of what the value would be to some imaginary person whom you will define to us, or do you say that the value must be assessed in the abstract, without reference to anybody?

MR. BEAULIEU: I do not believe in the abstract value. I believe in the reproduction cost (because that is a fact) coupled with the economic value and adjusted to the circumstances of each case.

LORD REID: Is that on the footing that some imaginary person must be deemed to consider that value to be the value to him, or is it value in the abstract?

MR. BEAULIEU: I am not adopting an imaginary market. I think that it was quite properly adopted when it came to assessing the possibility or potentiality, but I submit that when we are trying to assess actual things, tangible things, the main consideration must be given to the cost of reproduction, plus the economic value, and that they are the foundation of the real value -- subject, of course, to certain adaptations as to the various details or circumstances. I am not concerned with the question of whether the Sun Life is willing to sell or not; but I submit that we must consider, if we are looking for the market value where there is no actual market, what the Sun Life would require before selling. If we do not consider that, as Mr. Justice Casey did not consider it, we have a distorted result.

LORD REID: I fully understand you, if your case is that we must take the value to the Sun Life, considering the Sun Life as prudent people. I understand that and, if that is what you ask us to take, I could appreciate it, whether I agreed with it or not; but is it that or something else that you want us to take?

MR. BEAULIEU: I take the actual value, resulting from the two elements which I have considered: reproduction cost plus economic value. Those are the fundamental considerations, in my submission. Then, when I am speaking of the price that the Sun Life would require I am purely and simply, with all due respect, criticising the theory of Mr. Justice Casey when he says: My prudent investor is not concerned with the price that the Sun Life would require. He is purely and simply concerned with the net revenue that he would derive from his investment. This, I believe, my Lords, with all due respect, is erroneous; but my fundamental principle is what I have expressed before at the beginning: that real value, actual value, is the resultant of all factual elements

of value appertaining to the thing that must be considered, and we cannot get at that unless we consider the three elements of value, which are the main ones, if they are available.

LORD PORTER: For this purpose we strike out the first one, market value, because that is not available. When we come to deal with the replacement cost, on your argument you make no allowance for this being a highly ornamented building or anything of that kind; you just give the ordinary allowance for depreciation and then you come to what is, perhaps, the most difficult problem of all: the proportions of importance which you contribute to your replacement cost and commercial values.

MR. BEAULIEU: I must admit that that is a difficult task on any basis.

LORD OAKSEY: As I understand it, you say that by introducing that differentiation between commercial value and replacement cost you make allowance for the ornamental features in the building?

MR. BEAULIEU: Yes, my Lord. That is our contention and one of our main contentions. As a result we say that Mr. Justice MacKinnon made two allowances for the same thing.

(Adjourned for a short time.)

MR HANSARD: My Lords, to the best of my knowledge the case was pleaded in the same way in the Supreme Court, and then the Honourable Chief Justice Rinfret asked Counsel whether, in case the Court found some faults or that some principle was misapplied, they were desiring to have the Record sent back to the Board of Revision. The case had already dragged on for six years at the time, and I expressed the desire that they should re-make the assessment, if possible, because there were only three points raised. The first point in the case was the question of the index costs. There was a difference of 1,200,000 dollars. That was the first point. The second was the replacement value: If the Court was saying either white or black, it was a difference of 2,200,000 dollars. The third point was the point of blending -- 60 to 40, or whatever it was. Therefore the Court had all the elements, whether it was deciding black or white, to fix the assessment. That was what I asked the Court to do.

MR BEAULIEU: My Lords, at the adjournment I was attempting to put before your Lordships what, in my opinion, constituted the actual value and the elements that should be considered. I may perhaps be allowed to add that I submit that, when the assessor is working out the production cost and value less depreciation, he cannot lose sight of the fact that, in a case of a specially adapted building built by the owner for its own purposes, that building has special benefit for its actual owner, and he must take into consideration the value that might result to the owner on account of the special features and adaptability which were created by the owner himself. Later, if a new owner comes in, it might be that it would be a different set of circumstances; but, as long as the owner who built the property for his own benefit according to his own plans is in possession, I think it is only fair that that element of value should also be considered. Of course, I am not contending that it should be considered purely a simply from the owner's point of view, as in an expropriation case. My submission is that the only difference between the two is that we must take into consideration actual as well as depreciation value, while in an expropriation case actual value only must be taken. But it is an element of actual value if the actual occupier and owner has built exactly the property which he wanted for his own use.

My Lords, it is not enough for the Assessor to take into consideration every element of value. He must -- and on this point nobody can I submit have any other view -- value the thing rebus sic stantibus, as it stands at the time. It is no use for me to develop that point. Everybody understands it. However, it will probably come later in the argument.

My Lords, if I may be allowed to do so, I should now like to quote to your Lordships some of the decisions of our Courts to support the point of view which I have just submitted to your Lordships. I should first of all like to ask your Lordships' attention to the case of Grampian Realties Co. v. Montreal East, which is reported in Volume 1, 1932 Dominion Law Reports, at page 705. It is a decision of the Supreme Court of Canada delivered in 1931 and published in 1932. The judgment is the judgment of Mr Justice Lamont speaking for the whole Court.

LORD NORMAND: Is it narrated or dealt with in any way in the factum?

MR BEAULIEU: Yes, my Lord. Your Lordships will find it referred to at page 62 of the Respondents' factum.

Might I read first of all the details concerning the object of the case before I come to the principal extract. On page 705 Mr Justice Lamont says: "This is an appeal from a judgment of the Court of King's Bench, Appeal Side, affirming a judgment of the Circuit Court of Montreal, which dismissed the petition of the appellant. The appellant had appealed to the council of the respondent against the assessment made of his property by the assessor, but the council confirmed the assessment as it appeared in the assessment roll.

"The appellant company is the owner of a part of cadastral lots 78 and 79 of the official plan and book of reference of the Parish of Pointe-aux-Trembles. It had acquired the property in 1914 or 1915, just after it had been subdivided. Since the year 1920 the respondent has adopted the zoning system as a guide to its valuators when valuing property for assessment purposes. To this end the whole territory of the respondent was divided into certain defined zones, and the valuation assigned to the respective zones varied in a decreasing ratio with the distance of a zone from the water front, while within each particular zone the value given to each individual lot was the same, unless, from its location or other cause, it had acquired a value not shared by the other lots in that zone.

"Prior to the year 1929-30 the respondent had assessed the appellant's property at so much per lot. In 1929-30 the property was assessed at so much per square foot. The property extended across four zones. In the first of these zones it fronted on New Sherbrooke (formerly Forsyth) St., and extended northerly to old Sherbrooke St.; in the second it extended from old Sherbrooke St., northerly to Cherrier St.; in the third it extended from Cherrier St. to Pine Ave., and in the fourth it extended north from Pine Ave., to the limit of the subdivision. Zone 1 was valued at 7c per square foot; zone 2 at 6c, zone 3 at 5c, and zone 4 at 4c. The appellant attacks the assessment on three grounds:-

"1. That the assessed value is in excess of the real value of the property; 2. That the streets and lanes shown upon the appellant's subdivision plan have no value and should not have been assessed; 3. That the assessment of the property at $204,130 constitutes a gross and unjust discrimination against the appellant. Sections 485 and 531 of the Cities and Towns' Act, R.S.Q. 1925 c. 102 in part read as follows:- '485. The assessors shall each year, at the time and in the manner ordered by the council, assess the taxable property of the municipality, according to its real value . .'.

"531. Whenever the subdivision of any property has not been registered in the registry office for the registration division within which such property is situated, the assessors may assess it as a whole, without taking any notice of the subdivision, and the corporation may levy the tax on the whole or on any part of such property; but if a subdivision thereof has been registered, the assessors shall assess each subdivided lot separately, and the taxes shall be imposed on each of the lots according to its valuation.' As the appellant's subdivision was registered it was the duty of the respondent to assess each lot separately and at its real value.

"To establish the value of its property the appellant called three witnesses. Mr. Findlay, the managing director of

the company, testified that prior to 1923 they had offered lots in the subdivision for sale at $100 a lot, but had been unable to effect a sale, in fact he said that they had not received an offer at any price. The appellant sold to the Imperial Oil Co. several blocks of land lying immediately to the south of the lots now in question to be used in connection with the company's refinery. The last of these sales was made in 1926 and brought a price of over 7c per square foot. It is, however, evident from Findlay's evidence that the appellant has not for some years been attempting to sell its property by the lot as he was not sure whether their sign-board offering the lots for sale separately, was still on the property. Findlay's valuation for the 1,083 lots in question was as follows, - for the 34 lots fronting on Sherbrooke St. $2,760, which is the assessed valuation; for 308 lots lying immediately to the north, between Sherbrooke and Forsyth Sts., $30 per lot, and for the remaining 741 lots $15 per lot, making a total of $23,515.

"In support of his valuation he produced a deed of 609 lots adjacent to the three northerly blocks of the appellant's land and corresponding to them in their northern and southern boundaries, which were sold to the respondent at an average of $12.50 per lot. This sale, however, was a forced sale made by the liquidator of an estate. On being asked if his company would sell the lots at the valuation he put upon them, his answer was that he had no instructions to sell either at those prices or at any others. Findlay further said that the streets and lanes should not have been assessed for they had no value, their value being included in the value of the lots.

"The next witness was D. Ogilvie, a real estate agent. He testified that it was very difficult to value the appellant's property. He said:- 'As a subdivision I cannot see it at all. I cannot imagine how anybody can sell lots so far from the tramway, and adjoining two oil refineries. Personally I would think the only value the property would have, would be as a large factory site, principally as a refinery. Now, to value it in lots, it is extremely difficult.'

"Ogilvie also pointed out that there was only one street running up to this property and that street had oil refineries on each side, the McCall Frontenac on one side and the Imperial Oil on the other, and, for that reason, the appellant's property was not suitable for a residential subdivision, but it had some value as commercial or manufacturing sites. The value he placed upon it was $500 an arpent, or $42,500 in all.

"The appellant's third witness was J.A. Davis, also a real estate agent. He agreed with Ogilvie that for subdivision purposes it was almost impossible to place a value upon the property in question, but thought it would have a value to the adjacent oil companies and he estimated its value at $400 to $500 an arpent.

"For the respondent two witnesses testified as to the value of the appellant's property. J.N. Langelier, chairman of the board of valuers, and J. Versailles, the founder of the respondent town and also its mayor. Both witnesses agreed with the witnesses for the appellant that for residential purposes the subdivision was not well situated unless for the residences of workmen employed in the oil refineries, but they pointed out that it was not its possibilities as a residential district that gave the real value to the appellant's land, but

its situation in the very centre of the industrial district, and its suitability for manufacturing and other industries.

"Versailles pointed out that there was an increasing demand for factory or other industrial sites in Montreal East and, while the number of persons desirous of erecting factories was always more or less limited, the existence, beside the appellant's property, of two very large oil refineries would tend to draw new industries to that region, thus giving a greater potential value to the appellant's property. He also said that he himself had, on several occasions tried to purchase some of the appellant's property but had not been able to get the appellant to fix a price therefor. He further said that he was then (the time of the hearing) buying property for the National Cement Co. farther east and farther north than the appellant's land, at 11c per square foot; and that another industrial company was negotiating for land north of Sherbrooke St. at 10c per foot. Both Langelier and Versailles placed the value of the appellant's lots at the amounts set out in the assessment roll. These valuations, and the reasons therefor, given by the witnesses were accepted in all the Courts below, and I see no reason for not accepting them here.

"For the appellant it was contended that the rule applicable to determine the 'real value' of land was as follows: 'It is the price that a vendor who is not obliged to sell and who is not dispossessed against his will, but who wishes to sell succeeds in obtaining from a purchaser who is not obliged to buy, but who wishes to buy.' 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 salable at a high price.

"Considering all the evidence, I agree with the Court below that the assessed value of the appellant's lands cannot be said to exceed its real value." I think that the balance does not apply to this case. The point which I amtrying to make is that here was a case where there was no real value.

LORD NORMAND: How did they fix the real value? I was not able to determine that from what you read.

MR BEAULIEU: It was so much a lot. They divided it into zones.

LORD NORMAND: I follow that; but how did the assessor in that case determine what was the proper figure to fix as the real value of this somewhat special property?

MR BEAULIEU: It is not in the report, but I assume that they were purely using their experience and knowledge of the locality. They were all directed in their assessments by the neighbourhood of the St. Lawrence river. If the lot was close to the St. Lawrence river, that would be at a higher value than if it was a little further away.

My Lords, the points which I wish to make on this case are these. First of all, there were definite rules adopted -- the dividing into zones -- and then there was a kind of general principle laid down by the assessors, that in each zone the lot would be assessed according to its neighbourhood to the river.

LORD ASQUITH: I quite understand how these zones would be assessed in diminishing values as they receded from the river; but what principle was applied in deciding, for instance, at what figure a zone next door to the waterfront should be assessed?

MR BEAULIEU: There was no principle there; but I assume that they had their experience of the locality.

LORD PORTER: I think that the explanation of the case is to be found at page 62 of the Factum, where it says that the property, owing to its location or surrounding, is restricted in the use that can be made of it, but that, when required for a suitable purpose, it is salable at a high price. He is saying: "You consider this: You do not just take what somebody is going to buy for the moment, but youthink that, supposing you do get a suitable purchaser and supposing it is the kind of property which at certain times will find a suitable purchaser, you take him into consideration in deciding what the value shall be. I think that that is right?

MR BEAULIEU: Yes, my Lord. I think that is a proper construction to be put upon that case; but the point I want to make is that there was some kind of general principle laid down first of all, and then they considered every objective element of value, that is to say the sales that were taking place at the time for residential purposes. Then it was that the rule "Willing buyer, willing seller" did not apply, and they did not attempt to apply an imaginary market, but relied upon the indicia of market value existing at the time.

LORD PORTER: I do not know whether they did, but that is not what they say. So far as they talk about anything they talk about a sale at a particular price. This is looking at the sale price, not confining the sale price to the immediate circumstances but having regard to the future and the possibility of purchase.

MR BEAULIEU: With respect, my Lord, I am putting my construction on the case. That is why they were relying upon the actual attempts at sales which had taken place in the neighbourhood and on offers which had been made. The man said:

I offered 11 cents, and they refused.

LORD PORTER: But that is nothing to do with replacement value.

MR BEAULIEU: If we can find a sale, everybody agrees that it is a very good guide; but they said that there was not the application of the willing buyer, willing seller rule, but that the case should be considered according to the elements of value disclosed by the evidence.

Then there is the case of *Canada Cement Company and St. Lawrence Land Company v. The City of Montreal* which is reported in volume 35, Banc du Roi at page 410. I think that the facts of this case can be summarised as follows. The Canada Cement Company owned a very large building, which was a one purpose building, that is to say, a building erected for the manufacture of cement. It was entirely occupied by the owner; there were no rents to be derived from it. The question arose as to how it should be valued. There are two sets of remarks by two learned judges, Mr. Justice Guerin and Mr. Justice Letourneau. At that time the Court of King's Bench was composed of only three judges. Mr. Justice Guerin, purely and simply, I think, laid down the general principle that every element of value should be considered, and then Mr. Justice Letourneau, approving the assessment, said: In this particular case, in view of the fact that there was no market and that there was no income to be derived from that building, the only method of assessment was replacement cost value.

His remarks, which are in French, begin on page 415, where he says: "Nous restons avec une seule question dans la cause: y a-t-il eu sur-evaluation des proprietes? Les estimateurs de l'intimee, son conseil municipal et enfin la cour de Circuit du district de Montreal devant laquelle les appellantes ont voulu se pourvoir par voie d'un premier appel, ont-ils erre quant a cette question de fait d'une sur-evaluation des proprietes en question? Oui, disent les appellantes; non, dit l'intimee.

"L'article de la loi qui nous regit en la matiere, article 5722 S.R.Q., 1909, dit:

"La decision ne peut etre infirmee que dans le cas ou une injustice reelle a ete commise et nullement a cause d'une variatne ou d'une irregularite de peu d'importance.

"Ainsi, il faut une injustice reelle et plus qu'une variante de peu d'importance. Cet article ne fait d'ailleurs que reproduire un principe bien etabli par notre jurisprudence quant a l'ingerence des tribunaux dans les decisions administratives des corps municipaux.

"Une injustice reelle et une variante de grande importance doivent exister et il faut qu'elles soient prouvees 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 appellantes semblent avoir cru qu'elle n'avaient qu'a se plaindre et qu'il incombait des lors a l'intimee de justifier son evaluation; et, quand on demande aux representants et temoins des appellantes ce qu'ils ont a dire a ce sujet, ils affirment bien d'une facon generale que l'evaluation faite est trop elevee, ils soutiennent ensuite que la methode employee par l'intimee est fausse, voire meme ridicule, qu'une seule methode devra prevaloir du moins quant aux machines: le cout de construction moins une diminution de 7½ per cent ou 10 per cent par annee; mais quand on leur demande quelle est, selon eux, la valeur reelle de ces proprietes imposables, ils se contentent de dire, ou du moins les mieux autorises d'entre eux, se contentent de dire: 'I cannot say'.

"Il existait, nous disent les procureurs des appelantes, une methode d'evaluation eprouvee et reconnue par les tribunaux: trouver la valeur reelle en recherchant.

"le prix qu'un vendeur, qui n'est pas oblige de vendre et qui n'est pas depossede malgre lui, mais qui desire vendre,

reussira a avoir d'un acheteur qui n'est pas oblige d'acheter mais qui desire acheter.

"Oui, c'est en effet la une base qui eut pu donner satisfaction, mais cette base ne peut valoir que dans un temps ou la propriete dont il s'agit peut se vendre, et s'il s'agit d'une propriete susceptible d'etre sur le mache, d'etre vendue ou achetee. Or, et lachose est admise par les appellantes, la propriete dont il s'agit est a nulle autre pareille et une propriete dont la vente ne pouvait en aucune facon etre consideree; du moins a l'epoque ou l'on en devait faire l'evaluation qui nous occupe. Ainsi, il faut renoncer a cette methode possible pour les proprietes ordinaires et qui jouissent d'un marche.

"A quelle autre methode fallait-il donc recourir? Rappelons d'abord que peu importe que la methode soit discutable ou douteuse, pourvu qu'elle ne conduise ni a une 'injustice reelle' ni a une 'variante importante'.

"Faudra-t-il prendre le prix d'achat et de construction et en deduire chaque annee 7½ ou 10 per cent sous pretexte de depreciation ou d' 'obsolescence', comme le suggerent les appelantes? J'en doute, car a ce compte, il faudra, apres 10 ans ou 12½ ans, dire que la valeur initiale qui pouvait etre de centaines de mille dollars, qui etait de millions dans l'espece, sera reduite a zero? Cette methode repugne au sens commun et je ne crois pasqu'elle ait jamais ete acceptee par nos tribunaux du moins en matiere d'evaluation municipale. L'obsolescence est ce qu'il convient de mettre chaqueannee de cote pour renouveler des machines, bonnes encore mais remplacees sur le marche par d'autres plus perfectionnees, plus modernes. C'est la, je crois, un item qui peut avoir son importance dans le budget d'une industrie, mais qui ne doit pas compter pour les evaluateurs municipaux qui, eux, doivent trouver que la machine est bonne et conserve sa valeur tant qu'elle marche bien. Or dans l'usine dont il s'agit, tout marchait bien au moment de l'evaluation.

"M. Brooks, ingenieur expert de New York, dit: in a matter of municipal valuation, we are dealing with the property as it stands today and not at all with a question of finance in proportion or due to what might happen ten or twenty years from now. et il ajoute plus loine: The machinery is usually rebuilt in replacements.

"Quelle methode fallait-il donc prendre? Aucune ne se recommandait d'une facon particuliere, sauf qu'il fallait trouver la valeur reelle. Pour les terrains, on a evalue au meme taux que pour les voisins et cette evaluation que l'on a ainsi faite est justifiee par un grand nombre de ventes et par l'opinion de personnes qui connaissent la valeur du terrain dans cette partie de l'ile de Montreal. Trois experts entendus pour les appelantes, MM. Findlay, O'Gilvie et Dandurand, trouvent cette evaluation trop elevee. Rien de bien surprenant, puisque pour ces temoins la carriere en exploitation au centre de ces terrains est plutot sans valeur et une cause de depreciation. Cette carriere a deja produit pour les appelantes 2,700 tonnes de pierre et a 85 cents la tonne, cette production represente 2,295.00 dollars. Il en reste autant et plus; c'est la la reserve de matiere premiere de l'usine; c'est a cause de cette carriere que l'on a investi la des millions. Dire qu'elle ne vaut rien cette carriere et qu'elle deprecie les terrains dont il s'agit, c'est prendre un point de vue si particulier, qu'il est impossible de tenir compte de l'opinion que l'on en fait resulter.

"Si toutefois il fallait dire que dans la partie nord les proprietes en question ont une evaluation forcee, il conviendrait d'admettre que ceci est amplement compense par le fait qu'au sud, l'evaluation donnee est restee en dessous de la valeur reelle.

"Quand aux constructions et machineries, on a procede a mesurer l'espace occupe, puis a en faire une evaluation au pied cube, suivant diverses bases de prix qu'une visite minutieurse des lieux a pu inspirer. Des temoins experts disent que cette methode est bonne, qu'elle a ete employee ailleurs; les officiers des appelantes disent que cette methode 'is certainly at best only a kind of guess'. Quoiqu'il en soit, elle parait generalement reconnue et usitee pour les constructions; elle ne parait en aucune facon repugner quant aux machines; et, sur le tout, elle a produit ce resultat d'etre a moins de 10 per cent pres ce que l'ont a debourse pour l'achat et l'installation de produire, un montant qui reste en dessous de ce que les ingenieurs experts de Boston et de New York et d'un tres grande experience disent etre la valeur reelle, et en dessous aussi d'un calcul fait l'annee suivante et cette fois en vertu d'une autre methode (celle d'une unite multipuliee, methode qui n'est peut-etre pas non plus infaillible, mais qui egalement est recommandee et tres plausible.

"Les estimateurs de l'intimee, en 1918, lors de l'evaluation dont il s'agit, ont fait une reduction de 10 per cent comme marge de surete et s'il est vrai que la confirmation de cette evaluation que l'on trouve dans celle de l'annee suivante, depend elle-meme d'une methode discutable, il convient de se rappeler que pour cette annee aussi, la preuve revele des compensations; d'ailleaurs pourquoi discuter plus longtemps quant aux methodes, si le resultat a ete-bon.

"La loi nous fait presumer que l'evaluation que l'on a ainsi faite est juste, tant et aussi longtemps que les interesses n'ont pas etabli une injustice reelle ou une variante importante. Mais il y a plus, dans l'espece, c'est que l'intimee qui pouvait quant aux constructions et machines s'en tenir a cette presomption jusqu'a ce qu'on ait etabli une injustice reelle et une variante importante, a fait une preuve par des ingenieurs de grande experience: M. Leonard L. Griffiths de Boston et M. Oliver C. Brooks de New York, et tous deux donnent des chiffres qui depassent l'evaluation faite par le estimateurs et homologuee par le conseil de l'intimee.

"L'evaluation faite et dont il s'agit est-elle strictement correcte? Je le crois; mais si meme la chose pouvait encore etre mise en question, il faudrait dire que les appelantes n'ont, quant a cette evaluation, ni etabli une injustice reelle, ni fait voir une variante importante. En l'absence de cette preuve, elles ne pouvaient pretendre a ce que la Cour de Circuit du district de Montreal annulat ou changeat l'evaluation faite et dont il s'agit.

"Le Juge de la Cour de Circuit a renvoye le recours en appel des appelantes et confirme la decision des estimateurs et du conseil de l'intimee quant a l'evaluation en question, et je crois qu'en droit et en fait, il a eu raison. Je renverrais avec depens les presents appels, et je confirmerais, dans chacune des deux causes, le jugment a quo."

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LORD NORMAND: I see that these two cases are also dealt with on page 30 of the present respondents' factum.

LORD PORTER: I found it a little difficult to follow.

LORD ASQUITH: What it does appear to say unquestionably is that the ordinary method of willing seller and willing buyer not being available, they adopted some other method, but I am not sure what that method was.

MR. BEAULIEU: Reproduction cost by cubic calculation. They said that it took so much per cubic foot to reproduce it and then there would be a depreciation of so much. Then there was no other element, and they took that one.

LORD REID: There was something about the revenue which they got. Was that used as a check?

MR. BEAULIEU: No. It was used to answer the contention that the presence of the quarry there was a nuisance instead of being an element of value.

LORD REID: It was not their quarry?

MR. BEAULIEU: No.

LORD REID: I did not understand that.

LORD ASQUITH: Can you tell me what sort of building it was in that case and why it was unsaleable?

MR. BEAULIEU: It was a building for the manufacture of cement, totally occupied by the company, and no part of it was rented. There was the ordinary machinery there and so forth.

LORD PORTER: I had not followed that. It is quite true that when you are dealing with that kind of thing you might get difficulty in getting a purchaser, but there was not any question of there being a peculiar type of manufacture or anything of that kind; it was only that you could not get a purchaser because this was a company running the business itself and to sell to somebody who did not want to run the business, unless you got some exceptional conditions, would not help you much.

MR. BEAULIEU: The way I understand the report is this. Having found that there was no market, the judge purely and simply omitted that factor of value and proceeded to consider reproduction cost only.

LORD PORTER: Yes, but reproduction cost on a building which was naturally built for that type of work and not one, as this is, which is a peculiar building, exceptional in construction and in ornamentation. That is right, is it not? Whatever conclusions we may draw from the assistance of this case, they did differ from the present case in that it was an ordinary factory as opposed to a particular building of a particular kind.

MR. BEAULIEU: It will be our submission that the Sun Life building is not an ordinary building.

LORD PORTER: No; but this one was an ordinary building.

MR. BEAULIEU: This was a specially adapted building for a particular purpose, namely, the manufacture of cement. As a matter of fact, it could not be used for any other business. The point is this. Instead of trying to discover how it could

be converted into a revenue producing enterprise or how it could be sold on an imaginary market, the judge said: There is only one way and that is reproduction cost. He adopted that as the sole factor of value in that particular case, because every element of value which I have mentioned before was absent; there was no market and no income.

LORD NORMAND: I am not sure if I followed it all. Was the learned judge laying down a rule that, when there is no actual market value and the building is in the possession of an owner who has no intention of selling, then you must not look for a hypothetical market? Is that the rule he was laying down?

MR. BEAULIEU: That is one of the deductions which must be made from his judgment.

LORD NORMAND: That seems to reduce the kind of tests to two: market value and cost of construction or replacement, that is to say, cost of construction written down to the cost of replacement. Is that what he is saying?

MR. BEAULIEU: He said that in this actual assessment there was no market so that the rules could not be applied using the consideration of willing buyer and willing seller, and therefore one must look elsewhere.

LORD PORTER: Then I think he went on to say: Equally in this particular case there is no method of calculating what you will get in revenue, because you do not ~~xxx~~ let out cement works. He then said: Having got rid of those two, the only thing you are thrown back on is the cost of erection. He had no particular difficulty with regard to the cost of erection in that particular case because it was just the kind of thing which anybody who was putting up a building for the purpose of manufacturing cement would have put up. I think that is right. You will tell me if I am wrong.

MR. BEAULIEU: Yes; I think that is right. That is one of the distinctions between this case and the Sun Life. In the Sun Life case we have the actual original cost. In this case there was no original cost known, so that they adopted the cubic foot method to come to the same result: trying to find out what was the original cost and then the deduction to be made.

LORD ASQUITH: He ruled out the prudent investor.

MR. BEAULIEU: He disregarded the prudent investor totally.

In the factum at page 63 there is reference to the case of Quebec Appartements Limited v. City of Quebec, reported in Volume 45 (1939) of La Revue Legale (Nouvelle Serie), page 283. The Legal Revue is one of our official reports.

LORD PORTER: Speaking for myself, I am not sure that I shall follow it sufficiently accurately if you read it in French, unless we have copies before us.

MR. BEAULIEU: It might assist if I attempt to make a translation.

LORD PORTER: Yes. I see from the report I have been handed that the judgment was given in 1938 although it is reported in a 1939 report.

MR. BEAULIEU: Yes. Again it is dealing with municipal assessment of immovables for which there was no market.

I will read the relevant parts of the judgment of the learned judge of the Superior Court.

LORD PORTER: I should like you first to read the head note and then you can give us the passages to which you particularly want to refer.

MR. BEAULIEU: Yes, my lord. The head note states: "The words 'real, actual, commercial, saleable value' in Article 27 of the Charter of the City of Quebec have the same meaning and do not affect in any way the principle generally followed in matters of municipal valuation because the valuation must represent the actual or real value of immoveables and because the real value is nothing else but the saleable value or the commercial value or, according to the rule laid down by the jurisprudence, the price that a vendor who is not obliged to sell but is willing to sell can obtain from a purchaser who is not obliged to purchase but is willing to purchase. The method of valuation suggested by this rule does not apply to immovables which are not susceptible of sale in the ordinary course of affairs. The revenue of a house built for renting purposes (an appartment house) constitutes in normal times a special element to be considered in order to control the value by taking into account the other contingencies of the immovable such as cost of construction, its age, its position, its condition of maintenance, but these revenues considered separately cannot be used as the sole basis of the valuation of the immovable, more particularly in a time of crisis. A court of appeal should not reform the conclusions adopted by a court of first instance (in the present case a Recorder's Court) in the matter of valuation except in the case of error in law or evident mistake in the appreciation of the evidence".

The relevant paragraphs appears at page 285: "Considering that the words 'real, actual, commercial, saleable value' in Article 212 of the Charter of the City of Quebec are synonmous and do not affect in any way the principle generally followed in matters of municipal valuation, because, inasmuch as the valuation must represent the real value of immovables and inasmuch as the real value is nothing else but the saleable value or the commercial value or, according to the rule laid down by the jurisprudence, the price that a seller who is not obliged to sell but is disposed to sell will obtain from a purchaser who is not obliged to purchase but is willing to do so" ----

LORD PORTER: What he says there and what he says in the next paragraph is just what has been said in the headnote.

MR. BEAULIEU: I think this is a repetition of the headnote; I think the next paragraph is also mere repetition.

LORD PORTER: I think we do get what was said from the headnote itself.

MR. BEAULIEU: The headnote appears to quote the judgment verbatim. I think , after reading the headnote, we have the complete position.

LORD ASQUITH: It is the Cement Works case again; it is almost exactly the same as what they said in the Cement Works case.

MR. BEAULIEU: Except for this, that this was a house fitted out to be rented and they said: You must take into consideration the rental value, but it cannot form the main basis of your valuation because rentals are susceptible, particularly in a time of crisis, to induce the assessor into error; rentals

will decrease or increase according to the times, whereas the reproduction cost will remain the same all the time. One should give a greater weight to reproduction cost than what we have called commercial value.

LORD REID: I did not quite understand why a house which was composed of appartments to let was not a saleable object in the market.

MR. BEAULIEU: Because I understand it was too large to be sold regularly.

LORD REID: Regularly, yes.

MR. BEAULIEU: We must bear in mind, as the judge said, that it was in the middle of a crisis.

LORD REID: I follow that. Therefore you might say: You must not take present day prices, but former prices or prices which you can look forward to. But I did not understand why they held that a market price was not possible.

MR. BEAULIEU: Because no sale of that kind had occurred for several years, I understand, on account of the prevailing conditions.

LORD PORTER: Was this a time of slump? Were values very low and therefore you could not sell or people would not buy?

MR. BEAULIEU: You could not sell it. The rentals were very low. It was said: You cannot rely purely and simply on the rental value: first of all, you cannot do it because a time of crisis does not give you a good indication.

LORD PORTER: Do you know for what period valuation in Quebec was made at that time, when this case was decided? In this case there has been a considerable amount of discussion of the fact that this is a three year basis and that, if things alter at the end of three years, then you can alter your valuation and, not being a final valuation, it does not do much harm; the alteration in the general circumstances, such as a crisis and so on, do not do much harm. That might have been applied to this Quebec case if it was only for about a year. I do not know what the rule in Quebec is as regards the period for which you make your valuation.

MR. BEAULIEU: It does not appear from the report whether they have it every three years, as we do in Montreal. The valuation rolls are made every three years since 1940; before that Montreal also had a yearly valuation roll.

Then there is the case of The Attorney General of Alberta v. The Royal Trust Company, reported in Supreme Court of Canada Reports 1945 at page 267. It is referred to in the factum at page 60.

LORD PORTER: This is a case dealing with succession duty?

MR. BEAULIEU: Yes; it is succession duty and it may be that it has no application, but I wanted to put to your lordship that here again we say that, if there is no market, then you must look to the other additional values. In view of the fact that it was succession duty, they said that the income approach was probably the best.

LORD PORTER: Yes. The position is set out in the headnote. I do not think that you need worry much about it until you get to the last paragraph dealing with what the Chief Justice and Mr. Justice Rand held.

MR. BEAULIEU: Yes. That is the part I should like to read in the decision itself. In the headnote it says: "Per the Chief Justice and Mr. Justice Rand: It may be that the true basis of valuation is the 'exchange value' (what could be got in the open market), but this can only be so when such 'exchange value' can be ascertained, and in this case it could not be obtained; there was no real evidence of any such value. The Commissioner had to value the land and the building qua theatre as it was at the time of the owner's death, and he had to take the conditions as he found them as of that date. It was proper for him to take into consideration the revenue-producing qualities of the property, and the value of the lease in effect at the date of the owner's death. The capitalization of revenue method (using eight per cent as an interest factor, and allowing a discount for contingencies) used by him in determining the land value should not be held to be a wrong principle, in the circumstances with which he was faced as a result of the evidence before him. As it could not be said that he had acted on any wrong principle of law, and as his valuation was supported by evidence, his finding should not have been disturbed".

LORD PORTER: That is what the Chief Justice and Mr. Justice Rand say. On the other hand, we have what Mr. Justice Hudson and Mr. Justice Taschereau say. They said: "In the circumstances of this case, the capital value must in large measure be determined by reference to revenue-producing capacity of the property. Factors tending to reduce the value attributable to the lease were taken into account by the Commissioner and a generous allowance made in respect thereof. Agreement was expressed with his finding." Then Mr. Justice Estey held: "The Commissioner did not adopt a wrong principle in arriving at his valuation. He would seem to have appreciated that he had to determine the market or exchange value. He had to determine the market value, and when, as in this case, no market existed, it was his task (a difficult one) so far as possible to construct a normal market and determine the value by taking into account all the factors which would exist in an actual normal market (one not disturbed by factors similar to either boom or depression and where vendors, ready but not too anxious to sell, meet with purchasers ready and able to purchase)", and so on. There were three separate methods of approaching the decision. Three judges were in favour of revenue producing as the most important consideration. The others did also say that exchange value came into it, but as you could not get that you had to value the building qua theatre as it was at the time

of the owner's death and take the conditions as he found them; and he ought to take in revenue-producing qualities and value of the lease in deciding what the price should be. I should have thought in that case the ultimate effect of it is that the biggest factor which was taken into consideration in the case of a threatre was its revenue-producing qualities.

MR. BEAULIEU: Yes, my lord. Our submission is that, providing you take into consideration the two main elements of value, the only difficulty is percentages, but those must be taken into consideration if they are applicable. We have quoted the Canada Cement case as a case where the only element of value considered was the replacement cost. In this case it is income which is the only one. The assessors took the two together. Whether they blended them in a proper proportion we will have to discuss later on when we come to see whether it was at all events so erroneous that it justified Mr. Justice MacKinnon, acting as a Court of Appeal, in interfering.

LORD PORTER: So far, in none of the cases which you have quoted to us have you got a building which was possibly adapted for the use which the owner had for it, but grossly extravagant apart from the use which the owner desired to make of it.

MR. BEAULIEU: Yes; but the point I am trying to make is that when there is some factual element of value then they do not have recourse to an imaginary market or the prudent investor theory which takes into consideration only an investor looking for a net revenue.

LORD PORTER: Are you saying this? Suppose you get somebody erecting a building to his own taste, though that building is extravagant having regard to ordinary building, you ought to take the cost of the building built according to his taste and neglect the cost which a building built to the ordinary taste would come out at?

MR. BEAULIEU: If you have an owner building a monument or a house for his own purposes and adapted to his own uses, as long as he uses it the additional value resulting to him from the fact that this house is built as he wanted it must be taken into consideration. You must then bear in mind also what kind of depreciation you may have, but I respectfully submit that it is not depreciating the property to do what Mr. Justice MacKinnon did. To wipe out entirely an important part and a valuable part, an extension of three million in a building of twenty million, might be to depreciate it very little more, but to wipe out completely is, in my submission, to make a wrong application of the principle of reproduction cost.

LORD NORMAND: Does that mean that when an owner builds a house for himself in a very extravagant and perhaps tasteless way, so long as he lives in it and occupies it its value must be determined by its replacement cost, because nobody would buy it?

MR. BEAULIEU: Yes, my lord.

LORD NORMAND: But if he were to die and leave it to his son, it would be valued in a totally different way?

MR. BEAULIEU: There might be possibly then a reason for treating it as obsolescent.

LORD NORMAND: But it is not the building which is obsoloscent;

it is the late owner who is obsolescent.

MR. BEAULIEU: But the building is not adapted to the use for which it is built. When you speak of extravagant building, there is always the extreme and there is always what one might call normal extravagance. Let us take the present case. It was not extravagant for the Sun Life to have a monument showing its splendour and prosperity. When they used granite instead of stone, it was not extravagant. They had the means to do it. I submit that extravagance is a matter of appreciation. What may be extravagant for one man is not extravagant for another, because it is adapted for his own purposes. Many people have not the means to adapt their houses to their own purposes; but all that additional value is reflected in the house itself; it is not the case of the price being affected. All these ornamentations are in the building and they are adapted to the building as the head office of a powerful company. Therefore, in this sense I submit that when we talk of extravagant building, as Mr. Justice MacKinnon said, taking as a pomparison an ordinary office building, as he did, it is not doing justice to the subject of valuation. This must be valued in that sense and for the purpose for which it was built. If it is extravagant for that purpose, then it may be that there is something to be said about it, but, in my submission, it was only extravagant if considered as against an ordinary, common office building; it was not extravagant if considered as the head office of a powerful company.

LORD REID: Can you tell me this? Before we leave the authorities, is there any case where it appears that the valuation is at a higher figure than the owner could ever reasonably hope to get if he had to dispose of the property? I can see that there was no immediate chance of disposing of the property in the Quebec Apartments case and also in the Grampian Realties case, but there would no doubt be ultimate chances of selling. Is there any sign of the element of value to the owner, which I fully appreciate, being allowed to put the value of the building up beyond anything which you could ever hope to get in the market?

MR. BEAULIEU: I can only refer you to the reference which was made by Mr. Justice St. German to the work of Mr. Bonbright, which particularly discussed that point. Taking the reverse position, he says: Supposing a rich man should build an extravagant mansion at a very high figure, would that rich man be allowed to say, "It is so extravagant that nobody would buy it and therefore you have no right to tax me"? Mr. Bonbright says that we cannot adopt that; the only point of view applicable is whether it is important for taxation purposes.

LORD REID: I appreciate your argument on the principle, which, if I may say so, is strong; but is there any authority to back it up?

MR. BEAULIEU: I do not know of any at the moment. I will try to find some authority, but I must say candidly that I have not so far found any.

LORD OAKSEY: Is it not implicit in the English authorities that the people who may bid for the place include the man who is in possession?

LORD REID: Yes; but the trouble is he will not be run up to his limit unless there is somebody to bid him up to it.

LORD PORTER: The only thing you can do then is to consider a case where he is going to be put out to make him bid up.

MR. BEAULIEU: May I refer again to the case of the Attorney General of Alberta?

LORD PORTER: I do not think there is anything further in it, unless you want to draw attention to any further part.

MR. BEAULIEU: I want to call your lordships' attention to a short passage on page 279, where it says: "There was no evidence that the Administrator ever offered the property for sale. As to this point, in Montreal Island Power Co. v. The Town of Laval des Rapides, Chief Justice Duff Stated: 'Of course, it may be that there is no competitive market at the date as of which the value is to be ascertained. In such circumstances, other indicia may be resorted to. There may be reasonable prospects of the return of a market, in which case it might not be unreasonable for the assessor to evaluate the present worth of such prospects and the probability of an investor being found who would invest his money on the strength of such prospects; and there may be other relevant circumstances which it might be proper to take into account as evidence of its actual capital value'".

I wish to call your lordships' attention to this point, that under the Charter of the City of Montreal what they have to look at is capital value and not rateable value.

I would next refer your lordships to the case of the Bishop of Victoria v. City of Victoria, which is reported in Dominion Law Reports, Volume 4, 1933, at page 524. It is a case in the Court of Appeal in British Columbia. There is first a judgment by Mr. Justice MacDonald, the Chief Justice of British Columbia, and then there is a judgment by Mr. Justice MacDonald, who is not the chief of the Court but a member of the Court.

I would first like to refer to the remarks of the Chief Justice: "The City assessed the property of the respondent consisting, so far as this appeal is concerned, of a college building known as St. Louis College. The building had been completed a short time before the assessment, I think within a year. It was intended as a permanent home for the Christian Borthers (as a college) who for a considerable time past had used the old college building which had become unfit for their use. The contract for the construction of the new building was let to reputable contractors at the sum of 58,425 dollars and the building was constructed in accordance with that contract and there is no suggestion that it was not constructed economically by the contractor. On the contrary it was shown to be exceptionally well built. It was built of material and of a structure which was intended to last, it was said, for hundreds of years. It was not built for sale but for use, and for permanent and continuous use.

"The Court of Revision reduced the assessment of the building alone to 50,000 dollars. An appeal was taken to a judge of the Supreme Court who, after hearing evidence de novo adopted as the standard of value a price which he thought could be got for the building at the present time at a forced sale. McPherson, the principal witness for the respondent was asked in examination-in-chief: '(Q). If the Bishop, the owner, was compelled by force of circumstances to sell that site and building, what do you consider the most likely business or undertaking that would be apt to be in the

market for it? (A). The business that I have just cited, that of an apartment house'. Similar evidence is given in two other places in the evidence. This may not mean exactly by forced sale, but it shows that respondent's counsel was coming very close to it.

"In the recital in the final judgment after same had been submitted to him for his approval, the learned trial judge used these words after objection to them by respondent's counsel: '"Actual value" in section 212(1) of the Municipal Act should be construed to mean the sum which could be realized for the property in question upon a forced sale'.

"I shall deal with this question further when I come to consider the counterclaim. I think the learned judge's valuation of the property was founded on a wrong basis. There is no definition of 'actual value' beyond what the words themselves import. The only appeal allowed to this Court is one on the point of law and the point of law which has been raised is that the learned Judge was wrong in deciding that the market value at a forced sale was the actual value. Counsel for the appellant contended that the market value at a forced sale was not the actual value; that cost of construction and other surrounding circumstances should have been considered by the learned Judge as well as the market value, in arriving at what he considered the actual value to be, and that in excluding the recent cost of construction and the circumstances of time and place, he was guilty of an error in law. I think there is a question of law involved in this case. The selling value is no more the actual value of the property than is the cost of construction and, in my opinion, the learned judge ought to have taken into consideration, although he might not have founded his judgment upon it, the cost of construction and all other circumstances affecting the actual value of the property, for instance, the depression which now exists, the cost of construction, the deterioration of the building, if any, and any relevant local circumstances were appropriate subjects for consideration. All facts which might affect what the judge might consider the value ought to have been canvassed by him and by excluding these the learned Judge was in error in his law. This Court has not power to deal with anything other than the question of law. It may be mentioned, however, that the law respecting valuation of property for assessment purposes has been frequently changed by the Legislature in past years. In 1914 the law gave directions as to how the value for assessment purposes should be found in these words: 'For the purpose of taxation, land and improvements shall be estimated at their value, the measure of which as to land shall be the actual cash value, and as to improvements shall be the cost of placing at the time of assessment such improvements on the land, having regard to their then condition, but land and improvements shall be assessed separately'. (Municipal Act, 1914, British Columbia, chapter 52, section 199).

"This may be called the replacement value. Earlier the statute read as follows: 'For the purposes of taxation, land and improvements within a municipality shall be estimated at their value, the measure of which value shall be their actual cash value as they would be appraised in payment of a just debt from a solvent debtor; but land and improvements shall be assessed separately'. (Municipal Clauses Act, 1896, British Columbia, chapter 37, section 112).

"Finally by section 212(1) of the Municipal Act, R.S.B.C., 1924, chapter 179: 'For the purposes of taxation,

land, except as hereinafter provided, shall be assessed at its actual value, and improvements shall be assessed for the amount of the difference between the actual value of the whole property and the actual value of the land if there were no improvements: provided, however, that land and improvements shall be assessed separately'.

"The effect of this statute is to direct the assessment of the building in question at the 'actual value'.

"This Court, while it has no power to deal with anything other than the question of law, must I think look at all the circumstances of the case fairly and I think may also consider the history of the section in order to ascertain what the actual value is. In the quotations which I have just made from previous Acts we have the view which the Legislature took of the different methods of appraisement. Some cases in the Supreme Court of Canada were cited to us by counsel for the respondent, in which opinions were expressed to the effect that the actual value of land was what it would bring in the market. In those cases the Court was dealing with wild land which had no other ascertainable value. In this case, however, there are other criterions which ought to have been considered, namely, what the property cost those who own it, and who intended to use it and continue to use it for the very purpose for which it was built. One of the witnesses who gave evidence in the Court below for the respondent said it was unsuitable for any other purpose than that of a college or for conversion into an apartment house for which purpose he would be willing to pay 20,000 dollars for it.

"One cannot doubt that the assessor, considering the actual value of the property, might very well say: 'Respondent has built this property for a special purpose; it is a permanent purpose. He has considered the cost before building it and has agreed to pay 58,425 dollars for it. There are no circumstances local or otherwise which would make that property less valuable to the owner than the price paid for it and while no outsider would be willing to pay that cost having no use for the building, except as an apartment house, the actual value to the owner who has use for it and who has built it and paid for it the price above mentioned and will continue to use it for an indefinite time, may be exactly what it has cost, less any depreciation since its construction'.

"This, I think, would be something that ought to appeal to the valuator taken in connection with any other circumstances which might affect the value including its market value. He ought not to accept the selling value at a forced sale or the selling value at an open sale as the basis of assessment to the exclusion of all other relevant facts any more than he should accept the cost of construction as the actual value to the exclusion of all other circumstances. The value would depend upon his own judgmentafter having taken all circumstances into consideration and since the property was not so valued but to the exclusion of some of the most important of them, there must be a new trial by a Judge of the Supreme Court.

"Respondent cross-appealed objecting to the inclusion in the final judgment of the words: '"Actual value" in section 212(1) of the Municipal Act should be construed to mean the sum which could be realized for the property in question upon a forced sale'.

"These words were inserted on the settlement of the formal judgment. The learned Judge did not define in his very meagre reasons for judgment the basis of his decision and when he came to settle the formal judgment he was requested to state the basis of his decision and, after arguments pro and con, he did so in the words quoted above. The insertion of these words was strongly opposed by respondent's counsel, but was allowed as the Judge's settled opinion. It was argued that a statement of this character is never found in formal judgments in our practice. No authority was cited for this except a recent case in this Court. The probable reason for the absence of other authority is that no one in the past presumed to raise the question. There is no set form. It must be conceded that the words aforesaid could properly have been inserted in the reasons for judgment or for that matter orally on the pronouncement of judgment. There is no reason to doubt the truth of the language complained of. We have the authority of the Judge himself and no better authority could be got. It is said that the words were inserted in order to permit the appellant to found his appeal on the question of law. If that be so, the insertion was all the more justifiable".

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Those are the relevant parts of the remarks of Chief Justice MacDonald.

Then there are the remarks of Mr. Justice MacDonald, at page 536.

LORD PORTER: This is Quebec, is it?

MR. BEAULIEU: No, my Lord; British Columbia. He says: "Section 212 (1) of the Municipal Act, Revised Statutes of British Columbia, 1924, chapter 179, is the governing section and its proper construction is a question of law. We must state the principles which should be followed on a proper interpretation of the section as applied to the special kind of improvement under consideration. It reads as follows: 'For the purposes of taxation, land, except as hereinafter provided, shall be assessed at its actual value, and improvements shall be assessed for the amount of the difference between the actual value of the whole property and the actual value of the land if there were no improvements: Provided, however, that land and improvements shall be assessed separately.'

"It is recited in the order under review that in the opinion of the judge 'actual value' should be construed to mean 'the sum which would be realised for the property upon a forced sale.' This phrase, showing the ground of the decision, should not, with deference, be included in the order. It should appear only in reasons for judgment. We need not, however, ignore it; it shows the basis upon which the learned judge fixed the assessment. It was urged that respondent did not advance this proposition below as a guide to the interpretation of the words 'actual value' and offered no evidence to support it. A reference, however, to the record discloses evidence which, although not precise, might possibly appear to support the view that 'actual value' might be found by seeking an answer to the question: What would a hypothetical or actual purchaser pay for the property at a forced sale? At all events, rightly or wrongly, the order is based on that viewpoint. With great respect, I do not think that is the proper avenue of approach. Appellant contended (and the Court of Revision acted upon the view) that the dominant consideration was the structural cost of the building; or cost of replacement. Some deduction was made from the actual cost, but it was on that basis that the assessment on the improvements, namely, the school building, was actually made. This basis, too, in my opinion, is erroneous.

"The history of section 212 (1) was referred to. In 1897 the corresponding section was section 113 of the Municipal Clauses Act, Revised Statutes of British Columbia, 1897, chapter 144, and read as follows: 'For the purposes of taxation, land and improvements within a municipality shall be estimated at their value, the measure of which value shall be their actual cash value as they would be appraised in payment of a just debt from a solvent debtor.'

"In Re Municipal Clauses Act and Dunsmuir the late Mr. Justice Walkem reduced the assessment on a residence costing 185,000 dollars to 45,000 dollars. This, he thought, was the amount at which it could properly be appraised in payment of a debt,

"In Re Vancouver Incorporation Act, 1900, and Rogers, dealing with a similar section in the Vancouver Incorporation Act, the judge refused to reduce an assessment fixed at 6,000 dollars less than the actual cost of construction, namely, 50,000 dollars.

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"In 1899 section 113 was repealed (Municipal Clauses Act, 1899 (British Columbia), chapter 53, section 7) and the following substituted: 'For the purpose of taxation, land and improvements shall be estimated at their value, the measure of which as to land shall be the actual cash value, as to improvements shall be the cost of placing at the time of assessment such improvements on the land, having regard to their then condition, but land and improvements shall be assessed separately.'

"This meant as to improvements reproduction cost (or replacement value) of a structure in the condition of the one assessed and if still in force would justify the method followed by the Court of Revision. This section, however, was repealed and section 212 (1) virtually as it now reads appeared in the Municipal Act, 1915 (British Columbia), chapter 46, section 30.

"All we can say from this history is that in ascertaining 'actual value', where we have not the benefit of additional phrases, the old aids, namely, 'payment of a just debt from a solvent debtor' and 'replacement value', while they may possibly be considered as factors in taking a general view of the whole problem, no longer form the true basis for assessment purposes.

"In Re Municipal Act, Gates' case, Judge Thompson, dealing with the present section, considered the passing of British Columbia Prohibition Act as an element affecting the value of an hotel. I think he was right in doing so. So, too, although it does not necessarily follow from the case referred to, a school or college engaged, not in commercial pursuits, but in academic work, carried on, to some extent at least, on a charitable basis should be viewed from the standpoint of the 'use' to which the building is devoted. It does not follow that its assessment should be unreasonably low because it is non-productive in a commercial sense; it does mean that a proper valuation cannot be reached without due regard to that feature.

"There are two kinds of value known to economists, namely, value in use and value in exchange. An article may have great value in use because of special properties or characteristics not susceptible to measurement by commercial standards and have comparatively little value in exchange. It is the latter measure of valuation, properly understood, however, that should be applied. In doing so we have a guide in the judgment of the late Mr. Justice Idington in Pearce v. Calgary. In interpreting the words 'fair actual value' (and the word 'fair' adds little to the phrase), as applied to land, at the time unsaleable, and likely to remain so for many years, he said: 'In the course of liquidation, which always follows and has to be faced by those concerned in disposing of such properties under such circumstances, there are generally some prudent persons possessed of means or credit who will attempt to measure the forces at work making for a present shrinkage in values for a time and again likely to arise making for an increase in value.

"'Such men are few in number and of these only a very small percentage perhaps are able to make a rational estimate of these reversible currents, and a still smaller percentage willing to venture the chances of their investment on the strength of their best judgment. They know that the shrewdest and most far-seeing may be mistaken.

"'I take it that the "fair actual value" meant by the statute quoted above is when no present market is in sight and

no such ordinary means available of determining thereby the value, what some such man would be likely to pay or agree to pay in way of investment for such lands.'

"This test may be applied to lands on which is erected a school, practically unsaleable at present as such, with the qualification that in determining 'what some such man would be likely to pay or agree to pay in way of investment' regard must be had to the likelihood that the 'reversible currents' which affect land, causing it at times to depreciate and again to appreciate in value, will not, at least to the same degree, affect a building of this character dedicated for all time to academic and moral pursuits. This latter consideration would induce the mythical investor to reduce his estimate accordingly. That I think is a fair conclusion. I refer only to the building. There is no appeal in regard to the assessment of the lots. Their value will change with changing conditions. The valuation of the 'improvement' may remain stationary while that of the land advances.

"The building must be treated as an adademy as long as it remains as such in making assessments. It is improper, for assessment purposes, to mentally convert it, so to speak, into a revenue-producing commercial structure (for example, an apartment house) and value it accordingly. That would be placing a value not on this special 'improvement', but on something else, not in existence. To follow this method one would be taking into account potential values, whereas the meaning of 'actual' is 'as opposed to potential'. It must be valued qua school and, although the task is difficult, it cannot be shirked by adopting an easier or unsound method.

"As we have no jurisdiction over questions of fact, I would remit the matter" and so forth.

LORD PORTER: Their procedure is rather different, too, because they are tied down to appeals on questions of law.

MR. BEAULIEU: Yes.

LORD PORTER: That is not true in this case, except in so far as you say that it is the practice in Montreal not to interfere unless there is some wide divergence of principle.

MR. BEAULIEU: That is one point, my Lord.

The next point that we find in this decision, I think, is that when you value a property for assessment you must take it as it is and not convert it into what it is not. It will be our contention that when his Lordship, Mr. Justice McKinnon, decided that the Sun Life building was a purely commercial property, because it could be converted into renting offices, he fell into the same error which is condemned in the case which I have just cited. If later on the Sun Life building is so converted, it will be the duty of the assessor to look at the property from that angle, but, as long as it is not converted into offices and as long as the main part of it, and the most beautiful part of it, is occupied by the Sun Life for its own purposes, I submit that it is a mistake to try and convert it by imagination and assess it as so converted. That is one of the principles, as I understand, if I am not mistaken, which results from the judgment. Then the other principle is that every element of value must be considered.

LORD PORTER: Broadly, of course, in that case they said that you had to estimate in some way what the capitalised lettable value was.

MR. BEAULIEU: Yes.

LORD PORTER: As that was their chief factor, was it not?

MR. BEAULIEU: It was a school.

LORD PORTER: The chief factor was to take the sellable or lettable value, though they said that you must take every consideration.

MR. BEAULIEU: Yes, qua school.

LORD PORTER: But the chief factor that they did take into account was what you could get for it.

MR. BEAULIEU: Yes.

Then, my Lords, there is the case of In re Phillipps Estate, which came before the Court of King's Bench, Manitoba, and which is reported in 1934. Western Weekly Reports, Volume 1, page 449.

LORD NORMAND: Is this in the factum?

LORD PORTER: I think that we have come across it in one of the judgments. perhaps somebody will look it up and you might go ahead meantime.

MR. BEAULIEU: I think that we should, first of all, read the relevant provision of the law and then come to the construction. The relevant provision of the law which was in issue at the time is quoted at page 451.

LORD PORTER: I see that contrary, I think, to what was the law in the other case, here you value the land and building together.

MR. BEAUDIEU: Yes, because I understand from the text that in Manitoba that is the way in which they were proceeding.

LORD PORTER: Yes; that was the Act.

MR. BEAULIEU: At page 451 it says: "In these rolls he is to set forth the particulars required by schedules D and E to the charter. Section 285 provides: 'The general assessment roll shall be in the form in schedule D to this Act, or to the like effect, and shall contain the description of all the rateable property in the city, save the business assessment, hereinafter provided for, which shall be in the form of schedule E to this Act, or to the like effect.'

"Schedule D has different headings. One of these is 'Description and value of Real Property' and there are sub-headings to this calling for values of land and buildings.

"This brings me to section 294. Theoriginal and present form of part of this is shown below: '294 (1) Land, as distinguished from the buildings thereon, shall be assessed at its value at the time of the assessment.'

"Subsection (2) was deleted in 1926. It read: 'With regard to land having buildings thereon the value of the buildings shall be the amount by which the value of the land is thereby increased.' The original subsection (3) was then re-numbered (2). It reads as follows: '(2) In assessing land having buildings thereon, the value of the land shall be set down in one column. In another column shall be set down the sum which shall represent two-thirds of the value of the buildings thereon. The value of the land and the said proportion of the value of the buildings, shall together form the assessment in respect of the property.'"

At page 457 there are some comments upon the word "value" as used in the Statute. It says: "The word 'value' as used in section 294 requires, then, no further discussion, but in determing value every factor past, present, future or potential which enables its owner to 'exchange' property for money, must be taken into account. The different creating factors will vary in all properties, in all communities and localities and at all times and the emphasis to be attached to each will likewise vary. But there is this that is certain -- all the factors must enter into the valuation the assessor is to make. He must consider every element. In the ultimate analysis he must reduce each one to its monetary value. Admittedly at the present time he has a difficult task.

"It was contended by counsel for the city that one of the things which the assessor and the board of valuation and revision are entitled to consider in assessing the property in question is evidence as to the assessment of other properties in the city, whether they adjoin or are in close proximity to this property or not. He submits that the principle of assessment is uniformity, that the equality of assessments is what is required, and that the policy of examining adjoining and other lands was for the purpose of creating uniformity and equalisation. I point out that there is nothing in the charter which authorizes 'uniformity' or equalisation. The charter contains no section similar to section 89C (5)(e) of The Assessment Act" and so forth.

LORD PORTER: One thing that one will have to consider with regard to that case is what has been used, I think, against the memorandum in this case, which is that you have no right to say that other property has been valued at so much and, therefore, in order to equalise property in the City, one ought to take the same standard,

so as to form an equalised basis throughout the city. So far as I understand this case, as in some of the opinions in this particular case, it has been said: No; you have no business to take equilisation into consideration, because the method of assessing the other properties may be wrong.

MR. BEAULIEU: Yes, my Lord.

LORD PORTER: The fact that you have twenty wrongs or, if you like, a hundred wrongs in the city does not make the particular one right because it is equalised with the others.

MR. BEAULIEU: I think that that is quite true; but I do not think that that was done in our case.

LORD PORTER: No; but it was used as an argument and it is, of course, a matter we have to consider when we are considering the effect of the memorandum.

MR. BEAULIEU: Yes, I know; but our submission is that you must, to a certain extent, have uniformity (otherwise you will have arbitary decisions), but without unduly fettering the discretion. That is the problem.

LORD PORTER: That is the kind of criticism which you will meet. We shall have to deal with it, but one criticism will be this: to lay down a memorandum like this and say that in every case you shall not exceed 50 per cent. for revenue value, though you may bring it down to as small a quantity as you like, is fettering the discretion, which ought to have been left more widely to the board of revision. However, that you will consider.

MR. BEAULIEU: If your Lordship pleases.

(Adjurned till Monday morning at 11.o'clock.)
