28, 1951

(15)

IN THE PRIVY COUNCIL.

Council Chamber,
Whitehall, S. W. 1.

Monday, 25th June, 1951.

Before:

LORD PORTER
LORD NORMAND
LORD OAKSEY
LORD REID
LORD ASQUITH.

ON APPEAL FROM THE SUPREME COURT OF CANADA

Between:

THE CITY OF MONTREAL (Appellant)

and

SUN LIFE ASSURANCE COMPANY OF CANADA (Respondent).

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Present:

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and

SUN LIFE ASSURANCE COMPANY OF CANADA (Respondent)

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

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

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

Mr. A.M. WEST, K.C. (of the Canadian Bar) held a Watching Brief on behalf of an interested party.

MR BEAULIEU: My Lord, in support of the first point which I am now developing I would like, with your Lordships' permission, to quote a few additional cases. In the first place there is the case of Lounsbury Co. Ltd. v. Bathurst (Dominion Law Reports, 1949, volume 1, page 52).

LORD PORTER: Is it in the Factum ?

MR BEAULIEU: Yes, my Lord, it is in the Factum. It is referred to on page 46 of the Respondents' Factum, my Lord, but I understand there is only a reference to it.

LORD PORTER: Yes.

MR BEAULIEU: I would like, my Lords, to read from page 63 where the text of the statute is given. "Harrison J.: This is an appeal by the Lounsbury Co. Ltd. from the assessment by the Assessors of the Town of Bathurst, New Brunswick, on their building known as No. 3 in the Town of Bathurst for the year 1948. The Town of Bathurst Assessment Act, 1929, New Brunswick, Chapter 93 provides: '6. Subject to the exception and provision hereinafter contained, all real estate, within the town shall be assessed at the true and real value thereof in the judgment of assessors, subject to appeal'. Section 56 provides for an appeal: 'Either to the Town Couucil or to a Judgeof the Appellate Division of the Supreme Court'.

"Section 35 provides: 'The Board of Assessors shall determine the assessable value of all real estate liable to taxation under this Act to the best of their judgment. In appraising land having any building thereon the value of the land and the building shall be ascertained separately. The Board of Assessors shall have authority in their discretion, to call in the assistance of an architect, builder or skilled person to aid them in valuing any property subject to taxation'".

Then, my Lords, I think that the relevant quotation is at page 70, about the middle of the page: "And in Bishop of Victoria v. Victoria in an assessment appeal under an Act providing that land 'shall be assessed at its actual value' Chief Justice Macdonald said: '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 subject for consideration'.

"In this case the statement of Anglin J. in re Rogers Realty Co. v. Swift Current is much in point. He said on page 313 of the Dominion Law Reports: 'It must always be extremely unsatisfactory for an Appellate Court, lacking the local knowledge, the familiarity with assessment work and the opportunity of personal inspection possessed by a local tribunal, to attempt to revise its valuations on the mere record of oral testimony of witnesses called before it. While such a duty is imposed upon us, however, we must discharge it as best we can.

"Now, in my opinion, the valuation arrived at by the Hachey Board of Assessors in 1948 was an honest valuation and I cannot find that the Assessors proceeded on any wrong principle. I do not think the appraisals in 1945, nor the Hachey Board of Assessors in 1948 can be held to have proceeded upon a wrong principle because they based their valuation upon the prices and values of the years 1939-40.

They had a right, in the exercise of their best judgment, to consider present day prices and valuations as stationary. They also have the right to consider the assessed value of similar properties though the governing principle must be the 'real value' of the property to be assessed and not a fictitious value arrived at for the sake of uniformity. The value of a property for assessment purposes is not necessarily the selling value at the time of assessment. Neither a boom price nor a depression price would be the 'real value' but rather a price which a prudent investor under normal circumstances would pay rather than fail to obtain the property.

"In arriving at such a valuation assessors have the right to consider not only the selling value of the property in question and of similar properties, but also the actual cost of construction, replacement cost, depreciation, revenue-producing capital, location and all the relevant local circumstances".

LORD PORTER: Does it appear from that for what length of time the assessment was made. One of the chief points which he makes there is that you ought not to take an inflated or, I suppose, a depressed value at a particular moment when the assessment is being made. Then, on that, the length of time for which the assessment is made, as has been pointed out in a number of these cases, may make a difference. For instance, if you are assessing for three years you would have a wider right, I should have thought, not to include a fictitious temporary valuation which you woul d not have the right to disregard if you were onlydoing it for a year.

MR BEAULIEU: My Lord, I think the assessment in that case was for one year, because they speak only of the annual assessment. They say: "The Board of Assessors in 1948 was composed of Mr. J.B. Hachey, Chairman and Messrs. McKie and Boirier; they were also the assessors for the year 1947", and so forth; so, apparently, they always speak of a yearly assessment in this case. Of course, in our case it is three years.

LORD PORTER: Yes.

LORD REID: That is the Supreme Court of New Brunswick, is it ?

MR BEAULIEU: That is the New Brunswick Supreme Court, my Lord, yes. Then, my Lords, there is a decision of Ontario & Minnesota Power Co. Ltd. v. The Town of Fort Frances. It is a decision of the Ontario Supreme Court Appellate Division. It is reported in Dominion Law Reports, 1916, and it is volume 28 of the Dominion Law Reports. In 1916 there was, apparently, only one volume of the Dominion Law Reports because no other mention is made. The case begins on page 30 and I would like ~~the~~ to quote, first of all, from page 31.

LORD NORMAND: Is this case in the Factum ?

MR BEAULIEU: Yes, this is in the Factum, my Lord. It is mentioned at the foot of page 28 of the Appellants' Factum and it is continued on page 29. The remarks, my Lords, are the remarks of Chief Justice Meredith: "This is an application by Ontario & Minnesota Power Co. for leave to appeal from an Order or Decision of the Ontario Railway & Municipal Board dated 25th November, 1915, respecting the assessment of the real property of the company in the town of Fort

Frances and the leave is asked only as to the assessment of that part of the land designated as Water Power Block 2, which was assessed at $400,000, and the assessment of it was confirmed by the Board.

"Water Power Block 2 with other lands was acquired by Edward Wellington Backus and those associated with him, called the purchasers, from the Crown under the terms of an agreement between His late Majesty, King Edward VII, and them, which bears date the 9th day of January, 1905. The agreement recites that the Rainy River, in the neighbourhood of Fort Frances 'forms a valuable and extensive water power' and that application had been made by the purchasers for "a grant in fee of such lands adjacent to the said river and of such lands covered by said river and of such privileges as are necessary to enable the purchaser to develop the said water power and to render the same available for municipal manufacturing and milling purposes'.

"The agreement also recites that this water power can be more advantageously developed and more power be produced by works embracing the entire width of the river and dealing with it as a whole than by an independent development on the Canadian side of the international boundary, and that it was, therefore, in the public interest to adopt that plan of development; that the purchasers were the owners in fee simple of the land and water power on the Minnesota side of the international boundary opposite Fort Frances and were desirous of obtaining from the Government of Ontario a grant in fee of the land and water power on the Canadian side of the international boundary 'for the purpose of developing the water power to the full capacity of the stream from side to side at high water mark and of utilising such storage facility as may be available for maintaining the river at such high water mark, thereby rendering available a large amount of power on the Canadian side of the river for municipal purposes and for the operation of pulp or paper mills, flour and grist mills and other manufacturing establishments'.

"By the agreement the Government agrees to sell and the purchasers agree to buy certain lands in and adjacent to Fort Frances including water power block 2 together with 'all water powers and privileges and all rights, easements and appurtenances thereto belonging or appertaining'.

"By the agreement the purchasers covenanted to erect 'a dam, conduit or such other works on or near the river at Fort Frances, in accordance with plans attached to the agreement 'sufficient to develop powers to the full capacity of said river (including any increased capacity of said river by reason of the construction of storage dams or works)' and provision is also made as to the character of and mode of construction of the dam and work".

Now, my Lords, this being the description of the property to be assessed, I may, perhaps, be allowed to refer to the remarks which are found on page 37.

LORD PORTER: This is Mr. Justice Meredith, is it ?

MR BEAULIEU: This still Mr. Justice Meredith, my Lord. "As I have said, as we are not called upon to determine whether the 'scrap iron' decisions are now to be followed". There

was a long discussion previously as to the "scrap iron" method of valuation, which I suggest respectfully has no application in the present case. "The subject of the assessment in them was not land, in its ordinary sense, but the poles and wires of a telephone company in In re Booth Telephone Co. v. City of Hamilton; the rails, poles and wires of a street railway company in In re London Street R.W. Co. Assessment; a bridge crossing the Niagara River, in In re Queenston Heights Bridge Assessment; and it was rails, poles, wires and other plant of electric light companies and a telephone company erected or placed upon highways in In re Toronto Electric Light Co. Assessment". All these cases were referring to scrap valuations.

LORD PORTER: Yes.

MR BEAULIEU: "In none of these cases was the Court called upon to determine the question which is before us, viz, whether in assessing land it is proper to take into consideration its special adaptability to such a use as Water Power Block 2 is being put to -- its use in developing a valuable water power which without it could not have been developed.

"I have no doubt that it was proper, in determining 'the actual value' of the block to consider whether its value as a town lot or as agricultural land was enhanced owing to its being so situated that it was capable of being used in developing the water power which has been developed and to assess it accordingly. If the block had been expropriated before being so utilised in determining the compensation to be paid to the owner its value would have been take to consist in all advantages which it possessed, present or future, in-so-far as the possession of them enhanced the then value of the block. That is settled by well-known cases to two of which, and those the most recent, I may refer: Cedars Rapids v. Lacoste and Pastoral Finance Association Ltd. v. The Minister, that the same principle must be applied in ascertaining the 'actual value' of land for the purpose of assessment subject to the qualification that it may be that in expropriation proceedings the fact that the land is taken without the consent of the owner may be considered, is not, I think, open to question. In both cases what is to be determined is the same - the actual value of the land.

"If in ascertaining the value of land which has not yet been used for the purpose for which it is specially adapted, its adaptability for that use must be considered, it is, I think, an a fortiori case that, where land is used for that purpose, its enhanced value by reason of its being so used must be taken into account. That appears to be covered by the second of the two propositions stated by Lord Dunedin in the Cedars Rapids Case where he says that the value 'consists in all advantages which the land possessed, present or future'.

"The fact that, before the land could be put to the use for which it was specially adapted, the consent of another person would be needed, is a factor to be considered, and in some cases it might be that it was so improbable that the consent could be obtained that nothing ought to be allowed on account of the special adaptability, but that is a question of fact for consideration in determining the value of the land.

"In this case no such difficulty exists. Practically the same persons own the land on both sides of the

river. The recitals of the agreement seem to indicate that a dam extending beyond the international boundary line was not essential to the development of the water power on the Canadian side. I refer to the recital that 'The said water power can be more advantageously developed and more power produced by works embracing the entire width of the river and dealing with it as a whole than by an independent development on the Canadian side of the international boundary'.

"This, it is to be remembered, is the language used in an agreement to which the owners of the land on the Canadian side of the river were parties: for, as the agreement states, the purchasers were the owners of the land on both sides of the river, and the very object of acquiring the land on the Canadian side was that the purchasers should be enabled to build their dam from bank to bank, and that they covenanted with the Crown to do. I have no hesitation in coming to the conclusion that the assessor and the Board rightly took into consideration the enhanced value which Water Power Block 2 had by reason of its adaptability for the use to which it has been put and by reason of its having been put to that use. If that be the proper conclusion the application for leave to appeal must be refused".

The last case, my Lords, which I should like to quote, if I am allowed, is the case of In Re Municipal Act and Dixon. This case, my Lords, is not referred to in either of the Factums, I understand. It is reported in the British Columbia Reports, 1941, volume 55, at page 546. There are some remarks of Mr. Justice Fisher: "The section of the Municipal Act governing the assessment in question herein is Section 223 of the revised statute of British Columbia: 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 improvement: provided, however, that land and improvements shall be assessed separately".

LORD PORTER: In "improvements" there does he include building on the land ?

MR BEAULIEU: That is what I understand, my Lord. I was not in that case. On page 551 are the relevant remarks: "It is or may be argued on behalf of the appellant that the sole guide as to actual value is the price that the property should bring in the present market but having in mind what has been said in the passages above set out I refuse to consider the selling value on the basis of assessment to the exclusion of all other relevant facts. I take into consideration the selling value along with such other relevant facts as have been proved relating to the following matters, inter alia, viz: the original cost of construction, the replacement cost, the depreciation of the building, the trent of business or of traffic away from Government Street to Douglas Street and the nature and the assessments of other properties on Yates Street n the said neighbourhood. Having said this and adding also that I appreciate the fact that the position of an assessor assessing lands and improvements in the city of Victoria, British Columbia, and perhaps in the whole of Western Canada, for many years has been a most difficult one, I still have to say with all respect for Mr. O'Kell, the Victoria City assessor, and the expert witnesses called on behalf of

the city on the hearing before me, that in extimating the actual value of the whole property for the purposes of assessment and taxation they, in my view, have given too little weight to the real selling value of the property and too much weight to the replacement cost and to potential or speculative values".

Now, my Lords, that completes the first part of my first proposition, to wit, that actual value can only be determined by considering all factual elements of value including particularly market value, if there is any, replacement value, and what we have called commercial value, that is to say, the capitalisation of income from the building. Now, in opposition to this contention of ours Mr. Justice Casey has adopted the theory of the prudent investor, and I might say that his opinion is expressly adopted by the learned Chief Justice of the Supreme Court of Canada and also by Mr. Justice Kerwin.

LORD ASQUITH: Really, he has adopted the third alone of the three criteria, the three factors you have mentioned, market value, where you can get one, replacement value and capitalised revenue. The prudent investor is really the third, is not it ?

MR BEAULIEU: What we have called in our Factum and what we now call commercial value, but we submit that commercial value is nothing but the capitalisation of actual income from the building.

LORD ASQUITH: That is what Mr. Justice Casey has adopted as his sole test, has not he ?

MR BEAULIEU: Mr. Justice Casey, my Lord, has not adopted, with all due respect, the commercial value as we understand it, that is to say, the capitalisation of the actual income, but he has adopted what has been called a prudent investor theory under which the only question that has to be asked is what would a prudent investor pay in a free and competitive market for the property in question. Mr. Justice Casey does not consider the actual rentals but he says we must put ourselves in the position of what he calls a prudent investor, and what that prudent investor would pay is the actual value of the property, and he further adds, of course, the prudent investor will be interested solely, or at least principally, in the revenue that the property might give later on.

LORD PORTER: That really is at the back of his mind, is not it. He says this: a prudent investor investing so much money would expect to get so much return.

MR BEAULIEU: Yes, my Lord.

LORD PORTER: And that in itself is capitalised commercial value, is not it ?

MR BEAULIEU: Yes, it is in a sense, my Lord, but it is not the capitalisation of the actual revenue at the time of the assessment. It is the capitalisation of the probable or possible revenue in the course of years because a prudent investor, I submit, is not considering only the revenue of today.

LORD PORTER: The immediate return, no.

MR BEAULIEU: Yes, my Lord. In order to express accurately the position stated by Mr. Justice Casey I think we can submit as a summary of his opinion the following: he says, first of all, actual value is nothing but the objective economic value; second, in order to get at that actual economic value one must ask what price would a prudent investor operating on a free market be willing to pay. He further adds: we are not concern ed with the question as to whether the owner would be willing to sell at that price because what the owner would require for his property is subjective value and in an assessment we are not concerned with subjective value but only with what he calls objective exchange value. Then, he further goes on, my Lords, and says: in deciding what price this imaginary prudent investor would pay, no doubt a prudent investor would be interested in the net income that he will derive from that proper ty. He may possibly, says Mr. Justice Casey, also consider the reflection cost, but only as a check, upon the offer he intends to make; in other words, if he finds out that the replacement value is so much, he might decide not to offer more than the replacement value duly depreciated. But, says Mr. Justice Casey, and this is the last submission I want to put before your Lordships as a summary of Mr. Justice Casey, in no event should objective and subjective value be blended together because by doing so we are blending two conflicting elements of value, and in municipal assessment we are only concerned with one, that is to say, the objective value. So, it appears clear, my Lords, that if Mr. Justice Casey is willing to consider that his prudent investor would look at the replacement cost, it is not for the purpose of blending the replacement cost with the capitalisation of income but purely and simply as a check upon his offer.

Now, my Lords, this theory did not originate in the Province of Quebec.

LORD PORTER: Which theory do you mean, Mr. Justice Casey's theory ?

MR BEAULIEU: Yes, my Lord, the theory of the prudent investor. The prudent investor theory was for the first time, so far as I can ascertain, adopted or relied upon by Mr. Justice Idington of the Supreme Court of Canada in the case of Pearce v. The City of Calgary. The case is reported in the Western Weekly Reports, volume 9. It is the report from September 15th to March, 16th, and the case begins on page 658. It is referred to in the Respondents' Factum at page 93. It starts at line 45, at the bottom of the page. The summary of the facts is given on page 94 with the reference to the case.

LORD PORTER: It really begins at line 12 on page 94.

MR BEAULIEU: Yes. The facts, my Lord, of this case can be briefly summaried as follows, I think: the subject of re-valuation was a bare piece of land, with no building. It had been offered for sale for some time, for several years but nobody had ever made any bid for it. At that time there was a crisis in the value of properties in the Western Provinces and actually there could not be any market for such land, so Mr. Justice Idington was trying to discover whether the assessment was made properly in these particular circumstances which were, of course, depressed circumstances, and not normal circumstances, and Mr. Justice Idington said, beginning at page 670: "This is an assessment appeal from the judgment

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of the District Judge upon an appeal to him against the assessment of some land in Calgary. The appeal involves the assessment of two parcels. One consists of 67,398 acres assessed at $335,895, which was reduced by the Court of Revision to $200,512 and again by the learned District Court Judge to $167,225. The other consists of a small block reduced by same Judge from $700 to $350.

I think the latter may be allowed to stand at that. The former, however, should be reduced to at least $2,000 an acre plus the assessed value of the buildings thereon, that is 25 per cent. of actual value. The evidence might warrant a much more substantial reduction, but for the circumstances I am about to refer to.

The statute requires lands to be assessed as follows: lands should be assessed at their fair actual value; buildings and improvements thereon shall be assessed at 25 per centum of their actual value; provided, however, that the council by by-law provide that the said percentage of actual value at which buildings and improvements are to be assessed shall be reduced each year by at least 10 per cent. of such actual value until such assessment on buildings and improvements shall have been extinguished and may assess such buildings and improvements at the same percentage of actual value for more than one year.

It is admitted the land is and was at the date of the assessment practically unsaleable at any figure at all approaching that set down by the assessor, or Court of Revision, or District Judge. No-one ventured to say it is saleable at any such figure. It is shown that the land is a trifle over half ~~xxpx~~ of a parcel appellant once owned. The history of its acquisition and sales of part of that originally so acquired is given and attempted comparisons are made between that so sold and the remainder which is now in question.

This attempted comparison is most illusory and entirely worthless as a safe guide to determine the actual value of that we have to deal with. The utmost that can be said in relation thereto is that these sales indicate a very remarkable rise in value between the time of the appellant's acquisition of the entire parcel and the time of the sales. That which has passed into the actual use thereof by the C.P.R. Co. to facilitate some irrigation plans of the company would of course have a special value for that particular purpose had in view, and thus bring much more than in the open market, for either residential purposes, or for industrial sites. That which was sold and sub-divided for residential purposes is much more eligible therefor than any that remains, save a small part whereon appellant has a resident.

The sub-divisions can be served by a proper sewerage system. The greater part of the remainder now in question cannot be so served or even satisfactorily drained for purposes of cultivation. It is indeed as to a great part of it liable to be overflowed yearly by the river which forms a great part of its boundary and as to a good deal more of it periodically, as shown by experience.

To talk of the sub-division of such land for purposes of selling to those desiring to reside thereon seems, under the present conditions relative to real estate for such purpose in Calgary and its neighbourhood, idle in the extreme.

The suggestion seems to have been made that it could be filled in so as to be made useful for such a purpose. And we have a rather elaborate statement from an engineer as to the cost of doing so. We also have evidence of appellant bearing upon same subject. But who possessed of a sane mind would, if he had the money, venture upon such a hazardous scheme, now or for many years to come ? Time enough to apply such tests when anyone is bold enough to come forward and say he will give the assessed value.

The property in part is about two miles from the C.P.R. Station, in other words, if I understand the facts aright, two miles from the centre of a city of 70,000 population in and about which are vast quantities of city and surburban lots well situated, easily accessible by means of electric railways and at the present moment unsaleable and likely to be so for many years to come".

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"The appellant is an engineer by profession, whose memory extends back to the time when cities like Toronto and other places could exhibit the result of over-speculative and consequent long years of depression, so ruinous to those who had indulged in a mad carnival of the kind which seems periodically to seize all communities.

"Counsel for the respondent criticised the evidence of the appellant setting forth some history he could recall as to other places in this regard. The cricitism seemed to be misplaced. Such evidence is needed for the benefit of those who fail to be able to comprehend the actual situation thus created and the consequent difficulty, if not impossibility, of finding and fixing a fair actual value of vacant land in a city which has passed through such a crisis, aptly described by the appellant as the worst he had ever known and akin to madness. Those unfortunate persons possessed of such vacant land when the financial aftermath of such a crisis had to be reaped for many years are not only entitled to present to the court dealing with the assessment of such land historical evidence of such comparison with similar situations elsewhere, but also entitled to have the court admit the evidence and fix a fair actual value, seized with as full a realisation as possible of the remarkable situation created by one of such spasmodic frenzies. Unless and until we try to realise the effect of such a situation upon the marketing of such land, we must be incapable of determining what the present fair actual value is. Consequently there is no ready market in sight at the present time.

"How can we then determine the fair actual value which has to be determined? 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 of credit, who will attempt to measure the forces at work making for a present shrinkage in value for a time and again, likely to arise, making for an increase of 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 farseeing 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 the way of investment for such lands."

LORD PORTER: As I gather, there were for all practical purposes no buildings on the land?

MR. BEAULIEU: No buildings on the land.

LORD PORTER: Except one house or something of that kind. The second thing that strikes me upon that is what I do not know why he reduced such buildings as there were to 25 per cent of their cost.

MR. BEAULIEU: My understanding of it is that there were buildings on other parts of the same lot, which were sold previously.

LORD PORTER: He took the selling value of those and consequently reduced the buildings on this to one quarter of the cost of erection. Is that right?

MR. BEAULIEU: Yes. Your Lordship will no doubt remember the text.

Lands only were to be assessed at their actual fair value and, so far as buildings were concerned, there were specific rules that the buildings should be assessed only at 25 per cent and so forth, decreasing.

LORD PORTER: I follow. That is part of the Act or whatever the provision was.

MR. BEAULIEU: Yes. So far as the buildings were concerned, they were governed by special provisions. The only question was as to the land. Mr. Justice Idington, seeing that he had no buildings on the part that he had to assess and seeing also that there was no market, thought that in such distressed conditions, in view of the abnormal crisis, there was no other way of valuing the property than under the theory of the prudent investor.

LORD PORTER: In that particular case you could not get any test of replacement value, because there was nothing to replace.

MR. BEAULIEU: There was nothing to replace in this case and there was nothing on which to capitalise the income, because there was no income. There was nothing else, and he had to come to some imaginary method by finding in imagination what a prudent inventor who would be willing to invest would take and who, in the remarks of Mr. Justice Idington, would not, after all, have been so prudent if he had been investing by expecting increasing values.

Therefore, my contention is that this case, on which the respondents lay the basis and which is quoted by Mr. Justice Casey, relates to circumstances which are so different from the circumstances in our actual case that it has no application. At all events, I submit, with respect, that Mr. Justice Idington never had the intention of raising his theory of the prudent investor as a rule of law - a general rule of law of general application. He was simply and purely trying to get out of a most difficult situation, in view of the fact that, after all, all lands, whatever the difficulty, must be assessed and taxed, so that they might bear their proper burden of taxation.

LORD PORTER: Supposing that you had a free market and free sales, would you object in those circumstances to the free market selling price being the test?

MR. BEAULIEU: If the circumstances were as described by Mr. Justice Idington, even if there had been what we might call a free market it would have been a liquidation market.

LORD PORTER: I was not dealing with a liquidation market, but supposing that you had the ordinary conditions of sale, freely given. Would you object then?

MR. BEAULIEU; If it was an ordinary free competitive market, I would give the greatest weight to the value on that market; but, of course, it has been held several times that market value is not always the proper measure of real value, because you have in view liquidation markets and so forth; but, generally speaking, we are agreed that the assessor's first duty is always to try to find, if there is such a market, a fair and competitive market.

On the same point I would like to refer your Lordships to another case, namely, Willson v. Alberta Assessment Commission, reported in Dominion Law Reports, 1937, Volume 2, at page 718.

LORD PORTER: Is that in your Factum?

MR. BEAULIEU; It is not in the Respondents' Factum; nor in the other Factum, I understand.

LORD PORTER: Who is the judge?

MR. BEAULIEU: Mr. Justice Ewing. I would like to quote from page 719, where there is a summary of all the facts. "The matters in dispute arises out of the provisions of the Charter of the City of Calgary and of the Alberta Assessment Commission Act, 1929. A brief resume of these provisions may be made. The Calgary Charter provides for the appointment of an assessor, whose duty it is to make an assessment annually of all ratable property in the City of Calgary. Section 25 G. as amended provides that lands, exclusive of buildings, erections and improvements, shall be assessed at their fair actual value; buildings and erections thereon shall be assessed at not less than 50 per cent of their fair actual value. It is the duty of the assessor to make the assessment as uniform as possible. Section 39 provides that no assessment shall be changed by the Court of Revision or Judge which appears to be in practical uniformity in regard to value throughout the City." Apparently there were statutory provisions requiring uniformity as much as possible. "In December, 1932, the Calgary Council, by resolution pursuant to section 32 of the said Alberta Assessment Commission Act, applied to the Lieutenant-Governor in Council for a declaration that the City of Calgary be subject to the provisions of the said Alberta Assessment Commission Act.

"By amendment in the City Charter, in 1933 this resolution was validated. A reading of the relevant sections seems to me to make doubtful the effect of this resolution, but both the parties to these proceedings agree that the effect is to make the provisions of the Town and Village Act, 1934, as to appeals to the Commission applicable to appeals in the case of the City of Calgary. Section 325 of the Town and Village Act provides that the Commission shall have jurisdiction to determine not only the amount of the assessment, but also all questions as to whether any things are or were assessable. Section 329 of the same Act provides that the decision and judgment of the Alberta Assessment Commission shall be final and conclusive in every case adjudicated upon.

"In 1935 the Alberta Municipal Assessment Act was revised and amended by Chapter 63 of that year. Section 23 of this Act reads as follows: 'Notwithstanding the provisions of any Act to the contrary, the assessment of any parcel of land situated in any municipality shall not be varied on appeal if the value at which it is assessed bears a fair and just proportion to the value at which lands in the municipality are assessed.'

"In effect the applicant's contention is that the Commission proceeded on a wrong principle in making the assessment on appeal and that therefore the finding is a nullity and the appellant now seeks a mandamus to compel the Commission to proceed to fix the assessment on principles laid down by the statute and by the relevant law."

Then, my Lords, there follows a long discussion as to whether mandamus was available in the case, and we come to the question of valuation on page 723. "The wrong principle on which the Commission is alleged to have acted was its failure to apply the principle laid down by Mr. Justice Idington in Pearce v. Calgary" -- that is a case which we have already read, my Lords -- "delivering the majority judgment of the Supreme Court of Canada. In part it is as follows: 'There are generally some predent persons, possessed or 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 of value. 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."

LORD PORTER: That is the quotation from Pearce?

MR. BEAULIEU: That is the quotation. "The Commission did not apply the prudent investor theory, because it said that, as far as the Commission was aware, such individuals do not at the present time exist as far as Calgary real estate is concerned. Perhaps this is not a sufficient answer, because the prudent investor is merely a hypothetical person created in the imagination of the assessing authority and endowed with the attributes described in the judgment; but it is apparent that the prudent investor theory is not a foot-rule to be applied rigidly in every case. On its face it applies only when no ordinary means are available.of determining the value."

LORD RIED: Did they say in Willson's case that the prudent investor would have paid more or less than the Commission fixed?

MR. BEAULIEU: I really do not know, my Lord.

LORD RIED: It does make a difference, does it not? Here it is said that the prudent investor would have paid less than the valuation. In Pearce, if I understood it right, it is said that the prudent investor would have paid more than a value to be fixed on every other ground. I would like to know, if it may be relevant, what was the position in Willson.

MR. BEAULIEU: I will try to find it, my Lord.

LORD NORMAND: It was an objection taken by the owner, was it not, that the assessor had not applied the Pearce principle?

MR. BEAULIEU: Yes.

LORD NORMAND: Therefore he must have said that the application of the Pearce principle would have yielded a smaller figure than the figure arrived at otherwise.

MR. BEAULIEU: Following what I have already read we find these remarks: "In Montreal Power case, Chief Justice Duff, who concurred in the majority in Pearce v. Calgary said: 'Of course, it may be that there is no competitive market at the time as at which the value is to be ascertained. In such circumstances other indicia may be resorted to. There may be a reasonable prospect 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.'

"In the result I am not satisfied that the Commission proceeded on a wrong principle; but in any case I am of opinion that mandamus does not lie in this case. This application will therefore be dismissed."

Then there is a judgment of the court, which was delivered by Mr. Justice Clarke. He says: "This is an appeal

by the applicant from a judgment of Mr. Justice Ewing, refusing an application for a mandamus requiring the respondents to fix a sum not exceeding the fair actual value of the applicant's property in the City of Calgary as a proper assessment thereof.

"After careful consideration of the arguments advanced by both sides I have come to the conclusion that the judgment appealed from should not be disturbed. It sets out the facts and the principles governing the remedy by mandamus and I think nothing useful can be added. I would therefore dismiss the appeal."

The application for mandamus was therefore dismissed; but what was decided was that it was not a wrong principle not to apply the prudent investor theory and therefore the prudent investor theory was not considered to be the only method of approach, as was said by Mr. Justice Casey, who expressly states that the only way of knowing the actual value is to ask the question: What would a prudent investor pay for that property?

LORD NORMAND: There was a finding, as I understand it, that no prudent investor would at that time have invested in any land in Calgary?

MR. BEAULIEU: Yes, my Lord; In this case there was a finding to that effect.

LORD NORMAND: There was no possibility of applying the test of the prudent investor.

MR. BEAULIEU: If it be a rigid principle of law, it had to be applied anyway. The prudent investor is purely and simply an imaginary person. We can always imagine the prudent investor investing his money. What is said is that at that time there was nobody investing in lands, because it was considered a poor investment.

LORD PORTER: What was taken as the standard in that particular case by which you valued the property was in fact, I imagine, this. I can imagine the case where somebody owning land, in a slump, in any city might say: If I have to pay taxes on this land, I shall never get them back and I would sooner give it away. In those circumstances I should have thought that you could apply the prudent investor principle and say that nobody would invest at all.

MR. BEAULIEU: Yes, my Lord. There are cases where it occurred in the City of Montreal. Many people were giving away vacant lots.

LORD PORTER: In that particular case of Willson what was the standard which they did apply?

MR. BEAULIEU: They said: You should rely on all circumstances -- as Chief Justice Duff said, every indicia of value.

LORD PORTER: As far as I can make out, it was not built on in Willson's case.

MR. BEAULIEU: In the last case the only question was whether there was a wrong principle. They were not trying to assess again.

LORD PORTER: I know; but I wanted to know what principle they did use; in other words, did they say: Were there any buildings?, and what method did they adopt? They said that the prudent investor was not the right one. What was the right one?

MR. BEAULIEU: They refused to apply the prudent investor theory.

LORD PORTER: I know. Mr. Justice Ewing in the court below must have used some principles.

MR. BEAULIEU: The judgment of the court below is quoted at length.

LORD PORTER: I do not want it at length; but I rather wanted to know, if I could, what was the principle which was said to be the right principle or, rather, the principle which was not to be interfered with in that case.

MR. BEAULIEU: Apparently, as the case was brought before the appellate court on a mandamus, they did not consider that it was necessary to discover what method had been adopted. They purely and simply said that there was no reason for a mandamus; and the only reason to suggest that they did not apply the prudent investor theory is not a proper reason.

LORD ASQUITH: Does it not appear what the Assessment Commission did and what principle it applied?

MR. BEAULIEU: I have been reading it, my Lord, but I could not find any statement as to the actual principle.

LORD ASQUITH: I thought that you said that indicia ought to be taken into account.

MR. BEAULIEU: That was Chief Justice Duff's remark in the previous case of Pearce v. Calgary. They referred to those remarks, apparently approving them; but it is not, so far as I could see, the decision of the first judge.

My Lords, my submission is that the prudent investor theory is nothing but a special form of the imaginary market and it is, I may say, an aggravated form of the imaginary market, for the following reasons. The first is that the prudent investor theory restricts the possible imaginary buyers to one class of persons only: an investor looking for an income. There are many investors who are not looking for income, but for a capital profit. There are many other buyers than investors who are interested to buy. If we are to accept the imaginary market theory, we should not restrict it, I submit, with respect, to that particular class of person: the investor looking only for a return on his investment.

Then, my Lords, I submit moreover that in this theory of the prudent investor, as enunciated by Mr. Justice Casey, there is a failure to consider as an investor the owner himself, who might be the most interested person, if there were an imaginary auction, not to let this property be sold for nothing or below what he thinks is the proper value. There is, my Lords, under the laws of this country the method of valuing for renting purposes, based upon the rents.

LORD PORTER: We do not capitalise. We take the rent and we take as one of the people who would rent the person who is assessed.

MR. BEAULIEU: Although under the British law, as I understand it -- of course, I am not going to go very far upon that point -- when it comes to determine what would be the rent that a tenant would pay, we consider the actual tenant as a possible bidder: so we have a better chance to obtain a true picture of the value.

In this case, if you consider only bidders and not the owner, you might have as a result the price that every bidder would be willing to pay; but, if the owner is not willing to sell, that will never constitute an exchange value.

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There is no exchange unless there is a sale; and there cannot be a sale unless there is agreement on both sides. I can understand that it is not necessary to have an actual sale; but at all events, if we are in the realm of imagination, we should at least measure what the owner would require for his property and put the two together in order to see what would be the imaginary price, first, that the bidder would offer and, secondly, that the owner would be willing to accept.

Exchange value means the price that you could obtain in a competitive market, but in order to have an exchange value there must be an exchange, real or imaginary, otherwise I respectfully submit that the doctrine of Mr. Justice Casey is too narrow.

LORD PORTER: That is, I think, in most cases where the difficulty comes in. Suppose that you do say, as we do say, take the owner as one of the competitors. How do you arrive at the owner's bargaining price?

MR. BEAULIEU: The owner will fix the price according to the feeling he has for the property, and according to what he paid for it and according to what he received as income.

LORD PORTER: That is the problem I am putting. He fixes it at the price he paid for it, because if that is so, then in all cases the expenditure upon it, as long as the property does not change hands, will be the assessable value. Is that right?

MR. BEAULIEU: May I just say it would be the expenditure of money less depreciation.

LORD PORTER: Yes, I agree.

MR. BEAULIEU: It is not our contention that this is the only approach to real value. We also admit that the income must be taken into consideration, but if the two are essential elements of real value the two must be blended together. There is no objection to considering the prudent investor as one approach, but then I say if we take that approach we must complete it by asking ourselves not only what the bidders would bid, but what the owner would be willing to accept, the owner or an imaginary owner of the same building having the same use of the building.

LORD ASQUITH: Does the prudent investor test mean that you only take into account what the prudent investor would put up? I should have thought that what you ought to do was to imagine that the building is the sole asset, if you like, of a limited company in which the shares are held by people who may wish to sell them and there are people who may wish to buy them. What figure you have to arrive at, which a prudent investor would put up, is such a figure as the sellers of the shares would be willing to accept, not only one which a prudent investor would be willing to put up.

MR. BEAULIEU: That is my contention.

LORD ASQUITH: I am answering your contention, or trying to.

LORD PORTER: Do you accept that?

LORD ASQUITH: You would accept that test. It is a tug of war always between the seller of a share and the buyer, and the value is the value which results from the tug of war. It is not simply what the investor would pay if he was perfectly free and if there was no other bargaining party. It is the result of the higgling of the market, as they called it in the old-fashioned economical textbooks.

MR. BEAULIEU: My suggestion is that we cannot take market value or real value or anything by only considering what the bidder would bid. Every day on the Stock Exchange we have bidders.

LORD ASQUITH: I quite agree. Mr. Justice Casey does not, I should have thought, say that. I should not have thought that he meant the only price you had to take into account was what an

investor would bid and there was no other bargaining party. I should have thought he meant the price was the result between the higgling purchaser and the person who had the asset to sell.

MR. BEAULIEU: He says the contrary. He says: We do not mind what price that the owner would be willing to accept, because he says: The price that the owner is willing to accept is purely and simply a subjective value.

LORD ASQUITH: I do not think he went quite as far as that.

MR. BEAULIEU: I may be wrong, but that is my recollection.

LORD PORTER: Whether he says that or not, you say that if he did say that it was wrong?

MR. BEAULIEU: Yes, my Lord.

LORD REID: He says on page 1127 at line 20: "Since the determining factor in establishing the market price, real or imaginary, is what the buyer will pay, why should we be concerned with what the company would be willing to accept?" That is a pure buyer's market .

LORD ASQUITH: No doubt he is putting it too high, but in the sense I put it you would accept that, I gather?

MR. BEAULIEU: Yes, my lord; that is the part.

LORD PORTER: I am not sure that you will accept my Lord's proposition, because that, in a sense, means that you have a willing seller and I am not sure you are accepting the willing seller theory, because you might say that the person who put up the building for his own purposes was never a willing seller, but would pay a great deal more than would be arrived at in a mere bargain reached by two people who are just entirely free to purchase in the market.

MR. BEAULIEU: May I further add that even within the restricted area or limits of the prudent investor, the real value remains most uncertain, because everything depends upon the revenue that would satisfy the prudent investor. As evidence of this total uncertainty, we have, first of all, the various valuations put upon the property on that ground by the experts of the respondent.

LORD PORTER: Yes, the percentage of interest which a buyer will be expected to require in order to satisfy his economic
p position.

MR. BEAULIEU: What I intended to submit to your Lordship was, first of all, that this is too restrictive; that even within these limits it is uncertain, because even if we admit the prudent investor is the only test then we will have to say what revenue will satisfy the prudent investor. We have had that by the three witnesses called by the respondent. They have given figures on that basis, taking the position that there was only one approach, that is to say, the capitalised income and Mr. Lobley came to a figure of 7¼ millions, Mr. Simpson 7 millions and a half and Mr. Surveyer 7 millions, but none of them came near to the valuation put upon the property by Mr. Justice MacKinnon and accepted by Mr. Justice Casey, that it was over 10 millions. So it shows that even if we do try and obtain something from a prudent investor theory we do not object very much, because it would be from 7 to 10. None of these experts ever attempted to say that on that basise the property would be worth something like

10 millions; nevertheless, Mr. Justice Casey adopts his prudent investor theory, and he accepts the figure of Mr. Justice MacKinnon, 10 millions. There is no expert who ever said that on that basis the property was not worth 10 millions.

Mr. Justice MacKinnon did not take that approach at all and although we are criticising some of his figures we do not criticise his approach. Mr. Justice MacKinnon came to the figure of 10¼ millions on replacement cost and commercial value, and yet Mr. Justice Casey says: All these things are wrong, there is only one way of approach and it is the prudent investor. Notwithstanding the expert evidence of the respondent, he adopts the figure of 10 millions which was adopted by Mr. Justice MacKinnon on a totally different basis.

I understand that what counts at the end is the amount, but we are trying to discover between these two theories, prudent investor on one side and replacement cost plus commercial value on the other side, which method is most likely to be in conformity with the actual value expressed by the Charter. After all, we have to consider that actual value is the object of all the inquiries. We submit respectfully that a prudent investor will not assist us, but that the only way is the way adopted, not only by the assessor, not only by the Board of Revision, but also by Mr. Justice MacKinnon himself and by the majority of the Court of King's Bench, that is to say, the blending in given proportion of the two essential elements of valuation. In this case where there is the building there is land and these two essential elements are, I submit, replacement cost and capitalised income.

LORD PORTER: The real difficulty, when you get to that, is that the resultant figure, even when the same principle is adopted, differs so widely.

MR. BEAULIEU: What I am trying to submit to your Lordships is that the prudent investor theory really must be wrong.

LORD PORTER: That may be so, and you are criticising Mr. Justice Casey on that principle, but, on the other hand, you have Mr. Justice MacKinnon. He comes earlier. Mr. Justice MacKinnon has arrived at 10 millions, which is the same as Mr. Justice Casey, but in an approach with which you do not quarrel although you quarrel with his figures.

MR. BEAULIEU: That is why I will try, later on, to show that although adopting the proper method Mr. Justice MacKinnon did not apply it properly.

LORD OAKSEY: You do quarrel with Mr. Justice MacKinnon, because you say he has made a mistake about the index figure, and he has made a mistake in giving double depreciation.

MR. BEAULIEU: And, further, because we believe the findings upon certain figures are contrary to the evidence and that his findings are contrary to the rule admitted by everybody, that the building should be valued as it stands and not in an imaginary condition. We say, when Mr. Justice MacKinnon says "This building is a commercial building", it is against the evidence, and when he says "It is a commercial building, because it can be converted into a rental building", we say: Let us wait until the conversion is made and then we will have to assess it on a purely commercial basis, but on the actual conditions, rebus sic stantibus, it is not a purely commercial building, because it has not been built for that

purpose. So we quarrel with Mr. Justice MacKinnon, not on principle but on the application of these very principles.

LORD NORMAND: Go back for a moment to the prudent investor. What I have not been able to follow in the judgment of Mr. Justice Casey is why the prudent investor is assumed to pay no attention to the possibility of capital appreciation or capital depreciation. I should have thought that that was the very thing a prudent investor did pay particular regard to.

MR. BEAULIEU: I do not think the prudent investor theory, as accepted by Mr. Justice Hillingdon, did not contemplate the possibility of capital profit, but I suggest that Mr. Justice Casey, according to his own prudent investor, has stated in his remarks that his prudent investor would be only concerned with the revenue. That is what has been adopted by the Chief Justice of the Supreme Court. We are quarrelling with the theory as expounded by Mr. Justice Casey.

LORD PORTER: I think what my Lord was asking you was this: Would not the prudent investor not only consider the immediate revenue but the possibility of diminution or increase in that revenue? I thought Mr. Justice Casey's answer was: Well, this is a three year assessment only and future increase or decrease must take care of itself and be reflected in the next calculation.

MR. BEAULIEU: That is the way I understood his remarks, because he says: We are here in an assessment case which is totally different from an expropriation case, because we are only concerned with three years.

LORD NORMAND: The difficulty about that is that it is almost impossible to apply the conception of a prudent investor if you are going to limit the considerations affecting his mind in that way. He is no longer a recognisable prudent investor.

MR. BEAULIEU: This is one of our criticisms. That is not the only one but we suggest that the prudent investor created by Mr. Justice Casey is not at all the prudent investor created by Mr. Justice Hillingdon in Pearce v. Calgary. Although we do not agree with the prudent investor in Pearce v. Calgary, in the circumstances of this present case we do not agree with Mr. Justice Casey who is restricting this prudent investor so much that it does not give to us any picture, real or imaginary, of exchange value. By "exchange value" I mean a figure which is going to be accepted by the owner, real or imaginary.

LORD ASQUITH: Whatever Mr. Justice Casey says, you would agree that the real prudent investor always is alive to the importance of capital appreciation.

MR. BEAULIEU: I think we will find two categories of prudent investor, some who would consider the rent, the income, only, and some who would be interested in capital profit.

LORD ASQUITH: Some have a more short term consideration in mind than others, but none of them would be indifferent to a rise in the capital value, surely.

MR. BEAULIEU: That shows how uncertain is that criterion. We must imagine every kind of prudent investor in trying to find out what is the mind of the prudent investor and what he is going to expect as a reasonable year or as a reasonable capital profit. When we proceed with factual elements of value like the production cost, capitalisation of actual income or actual rental, we know where we stand. Of course,

besides these two fundamental elements, consideration must be given, as it is always given, to the other circumstances, the particular circumstances of the case, but at all events, my Lords, when we rely upon these two factual elements, irrespective of the market value where there is none, we have something actual definitely established.

LORD REID: Are you bringing in, I have not quite got this into my mind, the conception of value to the owner, and are you saying that replacement cost less depreciation must be deemed to be the value to the owner, or are you leaving aside value to the owner and saying: that apart from any other consideration replacement cost by itself, apart altogether whether it represents value to the actual owner, must be taken into account?

MR. BEAULIEU: We take the position that the value to the owner when it is restricted in sums of money actually expended for the special adaptability of the building, and not for caprice of the owner, is part of the actual value; for instance, in this case what has been called the ornamental features represent money actually spent by the owner; it is not a pure whim or caprice. For instance, there are sometimes things to which we give great value on account of the affection we have for them, because they come from our father or fore-father. That, I agree, is not part of the actual value but the cost of the building, whether it is the cost of an ornamental part of the building, when it has been really incurred, is undoubtedly, with due respect, part of the actual value and that is what we are looking at.

LORD PORTER: You are saying, if I understand you aright, that the sum which the owner expended is a relevant thing to take into consideration, because it shows what the result of the expenditure is worth to him.

MR. BEAULIEU: Yes, my Lord; that is the proper way to put it. That would conclude my first point.

My second point will be very short, I think. It is purely and simply to say to your Lordships that whereas our assessor and Board of Revision did actually follow the principle the Board enunciated and did actually make their assessment according to the jurisprudence of our province, we all know what Mr. Vernot did, it has been read several times. Briefly speaking, he first of all tried to ascertain the replacement cost less depreciation. He made various deductions on account of the special circumstances in this case. He did not purely and simply consider what we would call the production cost less depreciation normally, but he took in view, this shows the flexibility of the roll, the particular circumstance of the case and made particular deductions for that, for instance, the temporary partitions, he deducted them. Then he deducted the cost of the walls which had to be demolished when the new building was connected with the old one. These were actual costs undoubtedly, yet he totally wiped them out on account of the particular circumstance. Then on top of all that, considering that this building had been erected in three stages at different intervals, he thought that it was also a source of additional expense which should not be taken into account and he made a further deduction of 5 per cent on that account. So the reproduction cost is not purely and simply mechanical; it is the reproduction cost adapted to the particular circumstance of the present case. Then he tried to find out what was the commercial value and he blended them together. That, briefly speaking, is what he did. I submit respectfully that doing this he took into account the only two factual

elements of value but he adapted them to the particular circumstance of this case.

Now as to the Board of Revision. The Board of Revision followed the same method. The Board of Revision purely and simply did not agree with Mr. Vernot at certain particular points which do not affect the method adopted. First of all, as to the index cost. We have to come back when discussing that point in the judgment to Mr. Justice MacKinnon, but for the present I am attempting to point out the points upon which the Board of Revision disagreed with the assessors. Then we will have to find out whether Mr. Justice MacKinnon was right in adopting in some cases the figures of the assessors instead of adopting the figures of the Board of Revision.

LORD PORTER: The chief difference there is the Board of Revision took the actual variation from year to year of the cost of production, whereas the assessors took 7 per cent, I think it was.

MR. BEAULIEU: Yes, that is one of the differences and perhaps one of the main differences.

LORD ASQUITH: And on the percentage they differed.

MR. BEAULIEU: Yes. Mr. Vernot had taken 7.7, he says in his report, purely and simply because he took four years and made an average of four years, 1927 to 1930 inclusive, while the Board of Revision tried to obtain a definite particular and certain index of the cost for every year and applied it to the money actually spent less the deductions made, as I have stated, by Mr. Vernot for the temporary partitions and so forth.

Then the next difference between the Board of Revision and Mr. Vernot is the depreciation rate. First of all, Mr. Vernot had adopted a different rate of depreciation while the Board of Revision took 10 per cent applied to the main building, and this is accepted by the learned judge in the Superior Court and there is no more conflict about that. The Board of Revision further adopted a rate of depreciation of 28 per cent for the power house because there was machinery in there.

LORD PORTER: There is no quarrel about the power house at all.

MR. BEAULIEU: No, there is no quarrel. I am mentioning, as quickly as I can, the main differences. The third difference is that the Board of Revision added to the amount of the expense as given by the respondent the sum of 58,000 dollars which was expended between the 1st April and the time the information was given by the company on the 1st December, the time at which the roll was deposited. The last difference is in the percentage, one being 90 against 10 and the Board of Revision being 83.7 against 17.7. These are the main differences.

LORD PORTER: One thing you will have to come to, you will come to it in your own time, is the whole conception which starts with not less than 50 per cent for replacement as a rigid figure, and then 50 per cent in certain cases for the commercial revenue figure, with the ability of the assessor or Board to vary the amount of 50 which is given for revenue, but unable to vary the amount which is given for replacement. In other words, you have a rigid formula and we shall have to consider as to whether that rigid formula is justified.

MR. BEAULIEU: I was just coming to that point.

LORD PORTER: I wanted you to know we had that very much in mind.

MR. BEAULIEU: After having explained the data of the two assessments, I am coming to the objections which were made against these assessments. The first was that this assessment was not the assessment of the assessors themselves; they were fettered by the instruction of the memorandum. It appears to me that that is the main reason of the judgment of Mr. Justice Estey. Mr. Justice Estey on page 1184 at line 7 precisely says that the assessment in question is not the assessment contemplated by the Act. If we refer to his previous remarks we understand what he means. First of all, he admits that it is a very good practice for the assessors to have conferences between themselves and try to lay down general principles, but he says in this particular case they were bound by instructions which fettered their discretion and, therefore, it was not a decision of the assessor. That is the first objection which we will have to meet.

The second one is that there was an undue increase in valuation between the valuation roll of 1941 and the previous one which was not made in 1939 but which was made in 1937, as your Lordships will remember, because since 1937 to 1941 the valuation rolls of the City were stabilised or pegged, as we said, by various enactments of the legislature.

The third criticism is that the respondent has been discriminated against because for the year 1941 they were within a restricted list of buildings.

The first point is whether there was in the memorandum as it was finally settled a limitation to the discretion of the assessors. I think on that point we should have, first of all, the evidence of Mr. Hulse, the chief assessor, who gave the origin of this memorandum. If I understand it correctly, it shows that this memorandum is not binding whatsoever; it is purely and simply an indication or instruction without any compulsory powers, without any binding effect. These instructions were laid down by the assessors themselves freely, all of them together. They thought that they should have some guiding principle, because, after all, there must be not equality of valuation but some uniform rules of valuation in a city like Montreal where there are several wards and assessors do their work in one separate ward. If you have in one ward a set of instructions, and another set in another ward, you might have such discrepancies between the two as to the fundamental principle that there would be an awkward situation not only from the legal point of view but from the political point of view.

First of all, I would refer your Lordships to the explanation given by Mr. Hulse, the chief assessor, which is in volume 2, at page 244, line 10: "Since the time I was placed in charge of the Department in 1934, I have carried out such reforms in the department as I found necessary, and as far as property valuations are concerned such reforms as would ensure that valuations were made according to well defined principles as to ensure a uniform basis of valuation for all property in general, and thus achieve as a final result, as near as is humanly possible, uniformity of valuations.

"These rules and principles are fully explained in the Montreal Real Estate Manual.

"By Mr. Geoffrion, K.C: (Q). You mean this (holding

up book)? (A). Yes.

"It is true, and that is where our system differs from those in many other cities, that the assessor is free to make and is responsible for the valuation figures which are entered on the Roll. But the assessor himself realises that he is better equipped and more qualified to do his work if he is in possession of the rules, principles and methods which apply to his type of work and which are the result of long use and experience and consideration and considered good assessment practice".

LORD PORTER: We have had this read down to page 247, line 29. I think that sets out the principles and experience of Mr. Hulse with reference to the matter. I think we have that in mind, but if there is any particular part of it you want specially to draw attention to, by all means do that.

MR. BEAULIEU: As it has already been read I will simply refer your Lordships to some supplementary remarks.

LORD PORTER: It has been read.

MR. BEAULIEU: And I do not think it is necessary to read it twice. Then I would refere your Lordships, first of all, to page 250, line 43.

(Adjourned for a short time).

LORD PORTER: We are on Mr. Hulse on page 250, line 43.

MR BEAULIEU: Page 250, line 43, my Lord. Mr. Hulse had previously read the memorandum and then he said: "This basis or rule, or any other rule, is of course, to be deviated from by the assessor if, in his judgment, it is necessary to do so to arrive at the real value of the property". Then, on page 252, line 43: "(Q) Mr. Hulse, at the beginning of your evidence, if I remember well, you have said that all the factors must be considered in every assessment. (A) Yes. (Q) You have also stated, I think, that the Exhibit D-5" — that is the memorandum, my Lord — "was prepared many, many months before the deposit of the Roll on December 1st, 1941 ? (A) That's right . (Q) And it was prepared by the assessors ? (A) Yes. (Q) Now, if I understood well your evidence, the assessor is not bound to the limit by these rules ? (The President) I think Mr. Hulse said that. (The Witness) He is free. He is responsible for the final figures".

Now, my Lords, my respectful submission is that this memorandum is not a set of rules imposed by a superior party, it is purely and simply a series or set of deductions arrived at by the assessors themselves as the result of their own experience in assessing and, of course, with the object and purpose of avoiding discrimination in the assessment of the various roles and establishing a fundamental principle for the purpose of reaching such uniformity as may be reached without fettering a discretion of the assessors. There is no sanction for the non-compliance with these rules, in fact, there could not be any sanction because they were laid down by the assessors themselves, not imposed by Mr. Hulse, but discussed by the assessors amongst themselves and finally settled down as a set of conclusions.

My Lords, in view of the origin of this memorandum we might now, perhaps, look at the memorandum itself to see if it did reflect the real character and the real origin of the document. Now, the document is "D.5", volume 4, page 695, but I want to suggest to your Lordships that you read the document in Mr. Hulse's evidence itself -- it is in the same volume and it begins two or three pages before, volume 2, page 248, -- instead of referring to the exhibit itself. On page 248 there is purely and simply a recital of the first category of property with which we are not concerned.

LORD PORTER: Are not we concerned with every branch of property and every branch of property is treated in this memorandum. Take the first problem, which is that, suppose, the building is for purely commercial purposes and intended to be let, and nothing else, there is then laid down a standard and that standard must affect the standard in all other cases, of 50 per cent. for replacement value and 50 per cent. for value in use. What justification is there for that ?

MR BEAULIEU: Well, my Lord, there is first of all the question of fact, is it a purely commercial building.

LORD PORTER: No, I am going behind that at the moment and trying to discover what justification lies in the principle which the memorandum lays down, and I am asking this question: do not go to this property at all for the moment, but imagining a building which is put up purely to let.

MR BEAULIEU: Yes.

LORD PORTER: What justification in a building which is put up purely to let is there for saying replacement value shall be half at least and value for letting purposes shall be the other half ?

MR BEAULIEU: My Lord, my respectful submission is that the memorandum does not say exactly that they must dothat. They give that purely and simply as an indication of what should normally be done, but if we read the memorandum as it is laid down together with the remarks of Mr. Hulse, even in the case of a purely commercial building, the assessor shall be perfectly free not to follow the 50/50 per cent. rule. It is purely and simply an advice given to him based upon the general experience of them all, but looking at the building, it is a purely commercial building and the assessors would be quite justified in saying: "Well, although normally I should consider that buildinghas a 50/50 replacement value and commercial value, I am not going to do it this time because there are this and that particular element which give me the right to do otherwise".

LORD ASQUITH: Assuming they are free to disregard the memorandum altogether, nevertheless, I suppose it is circulated to them and compiled by them with a view to its being observed rather than departed from, but why should replacement value play any part at all in assessing a building which is all let out at rental,

MR BEAULIEU: Well, of course, if it was binding, I would quite agree that it is not proper.

LORD PORTER: In this particular case have not the assessors treated it as being binding ?

MR BEAULIEU: Yes, my Lord, because they found that in that particular case it was proper to apply these rules, but if they had come to another conclusion, that this was an exceptional building, then they would have been totally free to follow their own discretion and not apply the memorandum because that is exactly what Mr. Hulse has said several times and it appears from, I would say, the origin of the memorandum. These rules, if I might call them rules, or instructions, were laid down by the assessors themselves, not imposed upon them by superior authority, but if it is true that they came to the conclusion that normally it should be done that way, My Lords, I submit respectfully that it was most proper for them in order to obtain at least the uniformity which would result from some general guiding principles, to say: "Unless there is something abnormal we think that we should in that case give a 50 per cent. value to the replacement cost and 50 per cent. value to the commercial cost".

LORD PORTER: Now, when you are saying that, what strikes one, and tell me if I am wrong in this, is that though this is a matter in which, as you say, Mr. Hulse said they were free to regard or disregard, they did not so treat it as far as I can make out from the decisions of both the assessors and the Board. They seem to have treated it as something which was binding on them. Is that right or wrong ?

MR BEAULIEU: My Lord, I do not think there is any evidence showing that they thought they were bound to do it. They did it in the present case although they applied their discretion as to

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the percentage, as a matter of fact one took one percentage and the other took another percentage. Mr. Vernot took 10 per cent. because he thought it was proper in the circumstances and the Board of Revision took a percentage of 83 to 17, so it shows that none of them thought they were bound precisely by the rule.

LORD PORTER: No, they did not think they were bound precisely by the rule, but they did think, as far as I can make out, that they were bound by the 50/50 and to the limits of the 50/50. What I am asking you now is, what justification there is for the 50/50 ?

MR BEAULIEU: The question, my Lord, is whether or not they were justified in taking the percentage. That, of course, is, I respectfully submit, a different question that I will have to consider later on, but my first point is trying to submit to your Lordship that if they did it it was not because they were bound to but because they thought in their discretion as assessors that these conclusions to which they had arrived previously applied to the present case. They did it freely in the exercise of their discretion but they could have done otherwise if they had found that these general principles were not applicable to the present case. Of course, it all depends upon the character of what has been called the memorandum, what you might call the instruction, the name does not matter much, but if we consider what Mr. Hulse said, and he did not give advice on that, he said "we xxx all together, the assessors all together, came to these conclusions and we wrote them down", so, applying these conclusions they were purely and simply applying their discretion and they were free if there was a particular case, not to apply it. That is why Mr. Vernot, for instance, before applying the rate of depreciation to which he had arrived, began by deducting so many things, he deducted the temporary partitions, the old wall that had been destroyed, he had a further deduction of 5 per cent. which is not allowed generally, all that because he felt that there was in this building some particular feature that had to be taken care of. But, it is true that generally they take it as a good principle of valuing to blend together commercial value and replacement cost value, and I submit respectfully that in blending these two elements together, they are purely and simply following the guide of the predominant jurisprudence of our province.

Now, as to the percentage limits, I respectfully submit that it is very difficult to fix percentages, and if the legislature has given to the assessor, I would say, the authority or the duty to fix these percentages, they are in a better position than a superior court or the Court of King's Bench to say whether or not these are proper in view of the fact that they have considered the building as it was, which is the privilege neither of a superior court nor of the Court of King's Bench. So, when it comes to percentages we will have to consider who was vested with the responsibility of fixing those percentages, and if it was the assessors, did they so wrongfully exercise their discretion that the Courts must interfere.

My first point and, of course, I understand that it is a fundamental point, is to show whether or not this memorandum, or these instructions, as I have called them, deductions, whatever might be the name, are binding so that they are not free to act. I submit, my Lords, that that might affect the validity of the assessments as was stated by

Mr. Justice Estey, and that is why I was submitting respectfully to your Lordships that it was never intended to do so and it does not do so if we consider not only the evidence of Mr. Hulse but even the text of the memorandum, and all through this memorandum I respectfully submit, my Lords, that the form of it is only a form showing that it has no binding effect.

LORD REID: Can you reconcile that with the decision of the Board of Revision on page 28 of page 983 in volume 5, for they say this: "The building being partly occupied by the proprietor, the rule adopted and followed by the assessors directs us to give a weight of between 50 per cent. and 100 per cent. to the replacement factor". Is not it fairly plain that whatever Mr. Hulse may have said, the Board of Revision took a different view.

MR BEAULIEU: My Lord, it may be that the Board of Revision misconstrued the memorandum, but even if they did misconstrue it, if in the final analysis they came to the same conclusion as the assessor, I submit that that should not be a reason to invalidate the assessment. I understand his remarks as being purely and simply a reference to the memorandum and to the memorandum as it is. The wording might be a little faulty.

LORD REID: What I would like to get from you is whether you want us to construe the second paragraph on that page as meaning that the Board of Revision thought that this was purely directory or whether you want us to hold that the Board of Revision thought that this was mandatory but were wrong ?

MR BEAULIEU: My Lords, I submit, respectfully, that the word "direct" means purely and simply that it instructs us; it is an instruction. The President of the Board of Revision was writing in English, although he is of French origin, and he might possibly have not understood exactly the distinction one was trying to make, but there is nothing in the evidence to show that anybody thought it was mandatory, not even the Board. Now, the wording directs us; whether it means exactly that he felt bound to do it, I do not know. I must admit that I would have felt better if the other word had been used, but I do not believe that it is enough to invalidate the whole assessment in view of the evidence which is in contradiction as to the origin of this assessment, even Mr. Justice Estey thought he was directed to do that if the evidence showed he would be directed to do that.

LORD PORTER: Would not that make it even more wrong if he thought he was and acted upon that when he ought not to have acted upon that. Then, surely, that would be a heavy criticism, would not it, of the finding ?

MR BEAULIEU: Yes. Then, my Lords, as a final analysis, as everybody knows, they did not disturb the finding of the assessors.

LORD PORTER: No, that is exactly what he says. He says: "The building being partly occupied by the proprietor, the rule adopted and followed by the assessors for all the large properties of this category directs us to give a weight of between 50 per cent. and 100 per cent. to the replacement factor".

MR BEAULIEU: The rule was followed undoubtedly by the assessor.

LORD PORTER: And by him.

MR BEAULIEU: But he does not say they were bound to follow.

LORD ASQUITH: He says: "It directs us".

MR BEAULIEU: He is speaking for himself. He says: "That rule directs me".

LORD PORTER: The real criticism of that is this, that he does not seem to say "This is a matter of my discretion" or anything of that kind. He seems to say: "The discretion is taken from me. I am directed to do this". Whether that is what he meant or not may be open to question, but that is what he said.

MR BEAULIEU: It seems to me, my Lord, that he is applying the same rule to the assessor and to himself.

LORD PORTER: He is.

MR BEAULIEU: Manifestly he did not believe that the assessors were bound to make an assessment, otherwise he would not have disturbed it.

LORD PORTER: He did not disturb it, in truth. What he does say is: "We have got to find some figure between 50 per cent. and 100 per cent.". He sticks to the figure of between 50 per cent. and 100 per cent., but he says: "When I am considering the correct figure between 50 per cent. and 100 per cent. I do not think it is 10 per cent. and 90 per cent., I think it is 83 per cent. and 17 per cent."

MR BEAULIEU: In my respectful submission, what is meant by that, taking the whole judgment together, is that "In the present case I consider that I should follow the memorandum. I am directed in the present case because there are no special reasons why I should not follow that". My attention is called to a previous passage which might help us to understand that part, on page 983-A-26.

LORD PORTER: Two pages back, yes.

MR BEAULIEU: At line 17 the Board of Revision said: "In reconstituting these assessments, along the same lines as the one followed by the assessor whose method we find reasonable and just, and in taking the figures contained in the joint admission, we would proceed as follows". He feels directed because he feels that the rules are reasonable and just, but if he had felt in the present case they were not reasonable and just he would have acted otherwise. So I submit, my Lords, that the word "directed" must be construed in regard to the previous quotation. That appears from the whole judgment of the Board of Revision, that he felt --

LORD OAKSEY: And I should have thought it ought to be read in the light of the memorandum itself.

MR BEAULIEU: Yes, my Lord. I was coming to that point. If we take the particular wording of the memorandum, I would respectfully submit that there is no binding wording in that memorandum itself. Supposing the Board of Revision thought he was directed, it was because, first of all, he

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passed upon these instructions in the present case and he said: "They are fair and just, I am going to follow them".

LORD ASQUITH: Supposing he did not think he was bound or directed at all as he thought, he was a perfectly free agent. It may yet be that the opinions expressed in the memorandum are all wrong.

MR BEAULIEU: Yes, my Lord.

LORD ASQUITH: It would have just the same effect in invalidating his decision as if he thought he was bound by them and was not.

MR BEAULIEU: I respectfully submit that the Board of Revision, as the assessor himself, should be entitled to say: "We are not going to follow the memorandum in the present case".

LORD ASQUITH: I am assuming in your favour for the purposes of this particular argument that it is wrong to say they thought they were fettered when they were not. Supposing they felt they were perfectly free agents and applied this rule because they thought it reasonable and just, yet if it was not reasonable and just, that is a ground for invalidating their decision.

MR BEAULIEU: Then, of course, if it is not reasonable and just, of course ----

LORD ASQUITH: What I, at any rate, find difficulty about is the 50 per cent. principle at all, quite apart from any fetter it may have exercised on them. Assume it did not. What rhyme or reason is there about it ?

MR BEAULIEU: They gave the reason in the memorandum.

LORD ASQUITH: Yes, you are coming to the memorandum.

MR BEAULIEU: Of course, your Lordships are perfectly free not to admit the reasons, but it seems that their reasoning is at least fair and reasonable. We might not agree with it, but if we do admit that in order to take the actual value you must take into consideration replacement cost and commercial values, then there is only the question of percentage. Who is going to be the judge of percentage. We agree it should be the assessor and the Board of Revision which is nothing but a superior assessor. The Board of Revision is not a Court of Appeal like a superior court. The Board of Revision is purely and simply a number of assessors.

LORD PORTER: All I was considering at the moment was the approach, with what views the assessors and the Board approached the subject, and that is, I think, all we have been considering in reading page 983-A-26 and 28; what was the approach. Did they approach it feeling themselves free to do as they pleased and taking into consideration the position without feeling tied in any way by the memorandum, or did they approach it in the light of the memorandum. If you make up your mind that they did approach it in the light of the actual memorandum, is that the right approach. Those are the only two problems which I have in mind at the moment.

MR BEAULIEU: My submission is that it is the right approach, and I suggest respectfully the only right approach under our law is to combine the two, replacement cost and commercial value,

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and as to the percentage, of course, there is no rule of law, then somebody must decide.

LORD PORTER: There is no rule of law in a sense either except the practice of the Court and the experience and, I suppose, commonsense.

MR BEAULIEU: Yes. Of course, there is no text stating that we should take into consideration these two factors of value, but it seems to me that under our jurisprudence our Courts have made it, I would say, binding upon the assessor at least to take into consideration the two, in what percentage nobody ever decided.

LORD PORTER: Of course, the other thing you will have to deal with there is, as far as I can make out, that your Supreme Court does not seem to have taken that view. The Supreme Court seems to have said: "This is something which was for the first time promulgated in the year 1941 and it is a new theory by which we do not think the Courts of this country are bound". That is the other problem. Of course, I follow that certainly the majority in the High Court took the view that this was the finding of the experience of assessors over a long period of years.

MR BEAULIEU: My Lord, so far as the Supreme Court is concerned, I suggest respectfully that Mr. Justice Estey is the only one who said that the valuation was not properly done. The other judges, Chief Justice Rinfret and Mr. Justice Kerwin said they adopted the prudent investor theory of Mr. Justice Casey. Mr. Justice Taschereau and Mr. Justice Rand followed the same practice as the lower courts, binding together replacement cost less depreciation and commercial value. Mr. Justice Estey thought 50/50 per cent. was the best proportion. Mr. Justice Rand thought 45 per cent. should be allotted to replacement costs and 55 per cent. to commercial value. That is the percentage question, and if the assessors being free to act have adopted a wrong percentage, then, my Lords, the next question is whether it created any injustice, and if there is any real injustice, the Courts might interfere.

On the other hand, if that memorandum is binding, of course, it might be a reason for nullity of the assessment irrespective of the percentage. That is why I am submitting respectfully to your Lordships first that it was never intended by the assessors themselves as a binding set of rules and, second, if we look at the memorandum itself we see by the words used there that it was not intended as a binding agreement.

LORD PORTER: I am afraid we took you off the quotation from the memorandum and probably we had better have that, had not we. That is at the bottom of page 695.

MR BEAULIEU: At the bottom of page 248.

LORD PORTER: You thought we had better take it from volume 2 ?

MR BEAULIEU: I had the volume in my hand, that is all. I can readthe same thing from volume 5. Volume 2, page 248 is the beginning of the various categories. There is, I think, nothing to be pointed out to your Lordships on page 248 as to the point I am trying to make out, but if we go to page 249 at line 4, it reads as follows: "It is recommended

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that these two factors, viz., replacement cost and commercial value be given equal weight in valuing these properties for a three-year period". It is only a recommendation and it is not an order. Of course, I do not intend to read the whole memorandum, but then I would refer your Lordships to page 250.

LORD OAKSEY: On page 248 do not they really indicate why they think 50 per cent. should always be attributed to the replacement costs ?

MR BEAULIEU: Yes.

LORD OAKSEY: Are not those their reasons for it, as to the return on the investments and the demand exceeding the supply, and that sort of thing ?

MR BEAULIEU: Does your Lordship want me to read from page 248 ?

LORD OAKSEY: I do not mind what you read, but it seems to me that those are the reasons which justify them, or which they think justify them, in attributing 50 per cent. to replacement value in any event.

MR BEAULIEU: I might read from page 248, my Lord, line 47.

LORD PORTER: What the memorandum really is saying there, quite shortly, is: the reason why we put replacement value and commercial value on an equality is because it makes allowance for the fluctuations in values over the three years, and it is not fair to take merely the commercial value because the commercial value in a time of slump may be too small and in a time of prosperity may be too large. That is really all it is, is not it ?

MR BEAULIEU: That is in substance what they say, and they say: "In order to obtain an element of stability we must give consideration normally, at least, at 50 per cent. in the actual value. That would stabilise what is fluctuating when we consider only the income point of view". But, I was trying to say that there is no compulsion in these rules, and I am going back to page 249, line 10, and I am pointing out to your Lordships that there is here purely and simply a recommendation. "It is recommended that these two factors, viz., replacement cost and commercial value, be given equal weight in valuing these properties for a three-year period. A revaluation at the end of that time would, of course, take into consideration the conditions then prevailing", and previously they had said the reason why they thought that commercial value was too unstable to be considered as the main foundation of a real value assessment.

LORD ASQUITH: Will you tell me one thing: so far as these places are let out to ordinary people, is the 40 per cent. that is let and not retained by the company let at long leases or short leases, periodic leases, quarterly, monthly, or what. This business about fluctuations in rents would not apply if they were all let on long leases.

MR BEAULIEU: The rule speaks about three years.

LORD ASQUITH: I know, I am talking about the rents, the leases.

MR BEAULIEU: Of course, they may be let for any length of time.

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LORD PORTER: I do not think we have any information as to that, have we ?

LORD ASQUITH: Perhaps we do not know it.

MR BEAULIEU: No.

LORD PORTER: I think that is the answer.

LORD ASQUITH: I thought that might be relevant.

MR BEAULIEU: The normal period of leases in our province is one year, but, of course, that is the rule which is not followed generally in commercial buildings. Then, you have five years or ten years, and the tenant really tries to obtain the longest he can at a reasonable rate, but for office buildings, for instance, the rents are only for one year. All the leases are for one year as a rule; there may be exceptions.

Then, my Lords, on page 250 at line 10: "It would seem that some consideration should be given to rental value in these cases, as that the replacement factor should be weighted somewhere between 50 to 100 per cent. and the commercial factor make up the difference between 50 per cent. and zero. No hard and fast rule can be given for the division of weight in these factors, as it will depend on the proportionowner-occupied, the extent to which the commercial features of the building have been sacrificed to the main design with a view to the future complete use of the building by the owner, or the enhanced prestige of an elaborate and expensive construction. Each property will have to be considered on its merits within the limits outlined above".

My Lords, the Respondents, of course, lay much stress upon the words "within the limits outlined above", but I respectfully submit that the limits outlined above apply not only to this paragraph where we find the words, but to the preceding paragraph, and the preceding paragraph begins by saying: "It would seem that some consideration should be given", and then this paragraph from which are extracted the words: "Within the limits outlined above", taken with the words "No hard and fast rule", so even that expression "within the limits outlined above" is not a hard and fast rule but is purely and simply an indication that normally it should be done that way. My submission is, taking together the evidence given by Mr. Hulse which is not contradicted and the very wording of the memorandum, it seems that this document is purely and simply a set of conclusions arrived at by the assessors themselves, not imposed upon them and they arrived at that set of rules by their own experience in assessing matters. I further submit, my Lords, that the words of the Board of Revision "I am directed" must be considered in the light of the previous paragraph when he says: "First of all I think that is fair". If he thinks that is fair and reasonable, then he is justified in saying: "I am directed by these rules", because he first of all passed upon them and decided that they were fair and reasonable.

LORD NORMAND: Before you leave these three categories, would you look at the end of paragraph 4 of the memorandum which deals with theatres and hotels and ends by saying in the last sentence: "It would seem".

LORD PORTER: I think you have to go to volume 4, page 696, because it is not quoted in the other volume.

LORD NORMAND: It is the last sentence, I think, of the memorandum in paragraph 4: "It would seem that to some extent these properties" -- that is, theatres and hotels -- "should be valued on their individual merits, bearing in mind the condition mentioned above of extra depreciation or obsolescence". Now, we have a good deal about the similarity of the building in the present case. Would not it have been a very suitable thing to have said about this present building that there are buildings other than those dealt with in that and the preceding paragraph which ought to be valued on their individual merits, bearing in mind special conditions such as extra depreciation and obsolescence. Would not that have been very appropriate for the kind of building we have been dealing with in this case. My noble and learned friend points out the contrast between that concluding sentence and the concluding sentence in the previous paragraph, paragraph 3, which says of the properties in paragraph 3: "Each property will have to be considered on its merits within the limits outlined above". So, there is a sharp contrast between the two categories of buildings, between paragraph 3 and paragraph 4 and the assessors are continually given a guiding direction that the properties which fall under heading 3 are only to be considered on their own merits within certain limits, whereas the theatres and hotels are not subject to that limitation.

MR BEAULIEU: Of course, again, my Lord, it all depends upon what meaning we should put to the words "Within the limits outlined above". If the limits outlined above include the principle that no hard and fast rule can be given, then, the last paragraph, paragraph 4, is simply saying in different words what paragraph 3 already says.

LORD NORMAND: I would suggest that the words "no hard and fast rule can be given" mean, no hard and fast rule for distributing a weighting, which must amount to not less than 50 per cent. in the case of the reconstruction value and must amount to less than 50 per cent. for the commercial value.

MR BEAULIEU: Of course, my Lord, we have first laid down the principle that it is necessary to put together the true picture of replacement costs and commercial value, if there is any.

LORD NORMAND: I am not assuming that, but why was it necessary to divide buildings up in rather an arbitrary way and suggest that there should be limits within which you should apply these weightings for these first two categories of buildings but that theatres and hotels should not be within that.

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MR. BEAULIEU: As a matter of fact one of the reason which I would suggest is that theatres generally are not rented. They have no commercial value, because they are occupied by the owner; so that the blending of the two cannot be made. Moreover, in paragraph 4, the preceding paragraph, the reason is given for that separate category. It says: "In the first place, buildings of this nature have not as long a useful life as the other classes of buildings, and should be allowed, in addition to structural depreciation, an allowance to cover obsolescence or periodic remodelling and renovation. Secondly, their operation is usually in the hands of the owner or an affiliated company, and there is no way to establish a normal rental value, or to get a true picture of net earnings, as these are so seriously affected by the cost of management, the allowance set up for depreciation and maintenance, etc."; and then comes the conclusion, which is purely and simply a conclusion on the facts stated before.

If we have a theatre, which is as a general rule, owned and occupied by its proprietor, the commercial value, which acts always as a check upon the replacement cost value, is absent and consequently, if we are left purely and simply in front of the construction cost, the assessors believe that there should be, in view of the particular circumstances of that category, some further depreciation on account of obsolescence, and they give the reason, rightly or wrongly.

LORD NORMAND: Other theatres and hotels are exposed to extra depreciation and obsolescence, and very much of your speech has been directed to showing how that was so in this case and how due allowance has been made for it.

MR. BEAULIEU: The allowance, I would respectfully submit, has been made by the percentage for depreciation and then by the blending of the commercial value, which is abnormally low, on account of the fact that the ornamental feature did not represent an increase in the rental value; and it was done purposely. The 3,000,000 dollars additional amount for extra cost of ornamental features did not give a proportionate increase in the rental value, because it was not intended for that purpose. Therefore we came to the result that in the case of the Sun Life the commercial value, on account of the special features, was only 50 per cent of the replacement cost, and by blending of the values representing only 50 per cent with the replacement cost there was already a depreciation allowed for that, while theatres can normally be purely and simply considered from the point of view of the replacement value. That is why the assessor said: We might have to consider obsolescence, for that reason; and, furthermore, for the reason that the public is always tempted to go to the newest and best equipped theatre.

Therefore, they take all that into consideration. They have to make up their mind with the data which they possess and from the point of view of their own experience.

I submit, with respect, that there is no conflict between paragraph 4 and paragraph 3, if we take them together, in view of all the circumstances. When there is replacement cost and commercial building, we agree that the two must be considered - not only one; not only the replacement cost.

LORD ASQUITH: Is not the contrast between paragraph 3 and paragraph 4 that paragraph 3 ends with the words "within the limits outlined above", and that means that at least 50 per cent is to be attributed to replacement value; you can do what you like with the other 50 per cent, exercise your discretion on that

and sub-divide it in any way that you like, but you attach the first 50 per cent; whereas, when you go to paragraph 4, as I read it, there is no corresponding limit to be attributed to replacement value. Is that right or wrong?

MR. BEAULIEU: My submission is that the 50 per cent rule must be observed in normal circumstances, but there is no hard and fast rule.

LORD ASQUITH: But it is not even a hard and fast rule in paragraph 4.

MR. BEAULIEU: Yes, my Lord; it should be that way, but, if you find some particular circumstance in the case, you must take care of that and separate it.

LORD REID: Is there any evidence that in any single instance the assessors have disregarded any of these rules and substituted their own discretion for them?

MR. BEAULIEU: I do not know of any. Of course, there may be some such instances; but I do not know of any. I do not believe that there is any evidence of it, because it is done as a matter of practice.

LORD PORTER: We have to construe as best we can the findings of the assessors and of the Board.

MR. BEAULIEU: I have nothing further to add on that point, my Lords.

The next objection which was made against this assessment was that it represented an excessive increase from the previous assessment. I respectfully submit that the increase in the assessment from the roll of 1937 to the roll of 1941 is corresponding to the additional expenses made not only during that period but before, and which have not been taken care of; in other words, it is my submission that this increase was long overdue and that, when finally the City decided to have a re-valuation of the whole territory, that was one of the cases which had to be taken care of.

The first point is to show that the increase was corresponding to the increase in expenses or in cost. To make good that point, I should point out, first of all, to your Lordships the dates. I am now referring to Schedule A.

LORD PORTER: What is the page?

MR. BEAULIEU: Page X, Volume 1. If we refer to the various figures there, we see that at the end of 1929 the total cost amounted to 9,351,288 dollars.

LORD PORTER: Where does that appear?

MR. BEAULIEU: We had to make the computation; but I can refer your Lordships to a note by Mr. Justice St. Germain.

LORD PORTER: Do not bother about that. Tell me what figures are included.

MR. BEAULIEU; The figure to 1929 is inclusive.

LORD PORTER: It is for years?

MR. BEAULIEU: All the figures, from the beginning; from 1912 down to 1929 inclusive. The total cost was 9,351,288 dollars.

LORD PORTER: Up to the end of 1929?

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MR. BEAULIEU: Yes, my Lord. At that time the valuation roll of the City of Montreal had to be completed and deposited, not on the 1st December, as it is done now, but on the 1st September of each year. As a consequence, the assessors had to make their visits to the property during the spring of the year for which they were preparing the assessment; so that the assessment of 1930-31 could not include the expenses upon cost incurred during the year 1930, unless they had been incurred during January, February or March. These are not months during which buildings are constructed in Canada. As a rule, therefore, all the expenses incurred during the year 1930, taking that as an example, could not be reflected in the valuation roll of 1930-31.

Again, at that time, when we speak of a valuation roll of 1930-31, it means that after the valuation roll had been deposited, after the expiration of twenty days, during which the Board of Assessors had the authority and the duty to revise the roll, and after it had come into force, it came into force retroactively and the roll of 1930-31, although completed in September and October, 1930, ruled the assessment for the year beginning on the 1st May, 1930, and extending to 1st May, 1931. That is why we have called it roll 1930-31.

Therefore, when we have the roll 1930-31, we have a roll which includes only the expenses incurred up to 1929 inclusively. It could not include in fact the expenses incurred during the year 1930, which amount to 6,510,749 dollars and so forth.

This being so, we have an admission from Mr. Macaulay, the President of the respondents, that the roll of 1930-31, which did not, as I stated a moment ago, include the cost of 1930, showed an assessment of 7,500,000 dollars. That appears from a quotation of Mr. Macaulay in Volume 2, page 214, line 19. He was asked: "In the same year of 1931 you spent 3,207,000 dollars? (A). And the year before. (Q). Not the year before. The year you made the complaint for the assessment. (A). Quite. You have the figures. Presumably that is correct. (Q). And at that time, how many storeys? (A). The assessment of the year before, the assessment of the building the year before was 7,500,000 dollars, and 3,000,000 dollars, according to your assessment, was expended and the assessment was increased to 12,400,000 dollars, which we protested successfully. And the Board heard us and that was the award of the Board. And the same situation has developed again." I think that it appears from that quotation that the roll of 1930-31 was 7,500,000 dollars.

From 1930, that is to say, from the end of 1929, the sum of 11,000,000 dollars was expended.

LORD PORTER: Is that up till 1940 or 1941?

MR. BEAULIEU: To 30th April, 1941. It appears also from the admissions, Volume 1, page X, because we have the total expenses at 20,000,000 dollars, and, if we deduct 9,000,000 dollars, there is necessarily left 11,000,000 dollars, and this does not include the 58,000 dollars which was spent after the 30th April, 1941.

There was, therefore, an increase of cost of 11,000,000 dollars and at the same time the valuation was only increased by 7,917,000 dollars in 1931 - 7,000,000 odd dollars in 1941; so that we submit respectfully that it was not an undue increase that the assessment was put at 14,000,000 dollars instead of 7,000,000 dollars in 1950 as compared to 7,500,000 dollars in 1930-31.

The same increase of value appears from the rental

value. If we look at the admissions, Schedule H. of the first Volume, which is at page XXV, Schedule H. begins with 1931 and at page XXV we have the assessed rental value occupied by the proprietor and occupied by tenants. So far as the Sun Life building is concerned, it is the second part of the page and we see that in 1932-33 the assessed rental value was 25,120 dollars, while in 1941-42 it was increased to 273,460 dollars.

LORD PORTER: I do not know that I have this. I have Schedule H., page XXV, with a reference to various buildings and "Municipal Assessments", "Year", "Land", "Building", "Total" so much; "Proprietor", "Tenants", "Vacant", "Total". Is that the right page?

MR. BEAULIEU: I think so, my Lord.

LORD ASQUITH: Sun Life is the lower half. The other part is some other building.

MR. BEAULIEU: Yes. We have the year; then the assessment of the land, the assessment of the building, the total; and then the assessed rental value occupied by the proprietor, occupied by tenants, vacant and so forth. There are three columns for the assessed rental value, and the purpose of this reference is only to show that there was a very high increase, not only in the cost, but also in the rental value, and it is explained by Mr. Macaulay when he says that during all these years they were continuing to complete stœys and renting spaces which previously to 1931-32 had been left vacant. As a matter of fact in 1931-32 there were no spaces rented at all. The first year of rental was 1932-33.

Therefore, there was, first of all, an increase of 11,000,000 dollars in the cost and there was a large increase in the rental value; and this, I submit with respect, justified the assessors in raising the valuation of 1930-31 from 7,500,000 dollars to 14,000,000 dollars odd.

There is then another attack upon the assessors and the Board of Revision. It is that the respondent was discriminated against. It is said that the Sun Life was the only building of that kind for which the assessment was increased, while the other buildings of the same character more or less were not increased from 1931-32 to 1941.

This also results from the reference to Schedule H, beginning at page XXI and going to page XXV. Schedule H. gives a list of nine buildings, exclusive of the Sun Life, which are compared with the Sun Life building. This Schedule H. was filed at the request of the respondent and it indicated exactly the name of the building that they wanted to be shown on that exhibit; so that it is their own choice. It is true that, if we consider only these nine buildings as compared by the Sun Life, we will say that nine other buildings were not increased in 1941; but, my Lords, the reason is obvious. There can be no comparison made between the Sun Life and the other buildings, for this reason: all the other buildings were totally completed and totally occupied in 1931; so that there was not that increase in expenses or that increase in rental value which we find in the Sun Life. The Aldred building had been occupied completely for many years, and also the other buildings.

We might add that in 1931 up to 1935 in Montreal there was a crisis in that kind of buildings, and it was one of the reasons why undoubtedly no increase was made, although the main fact is that all these buildings were completed and occupied in 1931. There were no further expenses except

maintenance expenses, and there was no increase in the rental value.

LORD ASQUITH: There were not very big increases in the Sun Life in expenses after 1931, were there? The big expenses came before?

MR. BEAULIEU: They came before they were completed. In the other buildings the increases came while the buildings were completed. While they were under construction the increase was gradual. I am speaking without the record, because nothing of that appears. In the Sun Life we have a building being built in three stages and, of course, at every different stage we have an increase in the cost, and that increase begins to appear more particularly from the year 1929, when 3,000,000 dollars was spent, 1930, when 6,000,000 dollars was spent, and 1931, when 3,000,000 dollars was spent. We have, therefore, 12,000,000 dollars spent in three years. That additional expense had to be reflected in the assessment, which was not the case for the other nine buildings, in view of the fact that they were already completed and occupied in 1931.

LORD PORTER: I think that the question which my Lord Asquith was putting to you was this. The complaint is not of an increase from the year 1931 to 1941, but an increase from the year 1937 to the year 1941; the comparison is with certain other buildings; it is quite true that those buildings were completed in 1931 and were still completed in 1937; but the Sun Life building was completed in 1937 and you had got the calculations of the assessment then. As both types of building were finished in 1937, the discrimination is said to be an increase between 1937 and 1941 in the case of the Sun Life as compared with an increase in none of these other buildings. That is the criticism, rightly or wrongly.

MR. BEAULIEU: The reason is the fact that from 1937 the municipal rolls of the City were stabilised by statute; so that there could not be an increase.

LORD PORTER: No; but there was an increase in 1941 in the case of the Sun Life. Why could not there have been an increase in the others?

MR. BEAULIEU: There was no increase in the others either. All the rolls were stabilised in 1937.

LORD PORTER: I know; but you did increase the Sun Life in 1931. You put them up from 7,500,000 dollars to 14,000,000 dollars.

MR. BEAULIEU: Yes.

LORD PORTER: You did not increase the others between 1937 and 1941, though I can see very little increase in cost in the Sun Life to justify that increase. That is the complaint.

MR. BEAULIEU: The reason is that in 1941 the assessors took care at the same time of all the expenses which had been incurred since 1931.

LORD PORTER: Why did they not take that increase between 1931 and 1937?

MR. BEAULIEU: The reason why, I was submitting, was that it was long overdue. The reason is that there was, first of all, in 1931-32 an assessment by the assessors at 12,000,000 dollars. Then that was the subject of complaint by the Sun Life, which complained to the Board of Assessors. There was no court at that time. The Board of Assessors was sitting and, as appears from

the Charter at the time, they had only twenty days to dispose of all these things; so they did the best that they could. When that assessment came, there was the crisis in immovables; so that they thought -- there is no evidence about it -- or as a matter of fact they agreed that decrease the 12,000,000 dollars, which was the result of the judgment of the assessors, who had seen the building, to 8,000,000 dollars, and it was left there, in view of the fact that at that time there was discussion of the re-valuation of every building in the City and also taking account of the fact that there was the very great crisis in real estate at the time.

LORD ASQUITH: Can you remind me in what year the decrease was from 12,000,000 dollars to 8,000,000 dollars?

MR. BEAULIEU: 1931-32.

LORD ASQUITH: Notwithstanding all this tremendous expenditure in the three previous years in the Sun Life, they put it up to 12,000,000 dollars and then put it down again to what it was before, in 1931-32?

MR. BEAULIEU: Yes. The Board of Assessors did that.

LORD ASQUITH: There it more or less stayed, did it not, until it was frozen in 1937 till 1941?

MR. BEAULIEU: It was frozen after 1937.

LORD ASQUITH: The freezing was from 1937 to 1941?

MR. BEAULIEU: Yes.

LORD ASQUITH: Then there was a general thaw in 1941 and up went the Sun Life by 4,000,000 dollars and the others stayed where they were?

MR. BEAULIEU: Yes, my Lord.

LORD ASQUITH: That is the criticism.

LORD OAKSEY: As I understand it, your explanation of that, in part, is that, so far as rental values is concerned, the rental value of the Sun Life went up very greatly in 1940 to 1941 and in the other buildings did not go up at all. In fact it went down?

MR. BEAULIEU: Yes. That is what I am trying to explain to your Lordships. Not only did the cost increase, but the rental value in fact went up.

LORD OAKSEY: As a matter of fact the rental value was more than doubled in 1940-41, as opposed to the other buildings, which did not go up at all. Is not that so? Look at page XXV, Exhibit H.

LORD PORTER: I do not know how far the others went up.

LORD OAKSEY: The other buildings are all there. Several of them certainly went down.

LORD REID: Have any of the learned judges who decided against you placed any weight at all on either an unjust increase in 1941 or on discrimination?

MR. BEAULIEU: No, my Lord, except Mr. Justice St. Germain who discussed the matter, but he was in our favour.

LORD REID: He was in your favour?

MR. BEAULIEU: Yes, my Lord. He said that there was no discrimination and he gave the explanation that I am now giving. Mr. Justice Tachereau said that there was injustice, in the fact that we raised the assessment to 14,000,000 dollars.

LORD REID: Yes; he did. That is the only one?

MR. BEAULIEU: Yes; that is the only one.

LORD NORMAND: We have been looking at the results of certain assessment for various buildings for these years; but was it suggested that any akhx method of computation or assessment was applied to you which differed from the method applied to the other buildings?

MR. BEAULIEU: No, my Lord; there is no intimation that we treated them differently. As a matter of fact it is in evidence that the same method was applied to everybody.

LORD NORMAND: Therefore, the discrimination, so far as it is a separate charge, is simply another way of saying that that method of calculation does not work out evenly for different buildings in the same class?

MR. BEAULIEU: Probably that is what they intended to say.

LORD NORMAND: It is not a criticism of a discriminating method of computing.

MR. BEAULIEU: No; it is the fact that we increased their immovables, while the others were not increased. The reason for that increase I have already stated to your Lordships.

LORD NORMAND: I understand that. I wanted to define in my own mind what the charge against you was, because discrimination can be a very nasty charge; but I gather that no element of bad faith was charged against you.

MR. BEAULIEU: There is no charge, so far as I can see, of bad faith. They probably charged that the assessors were lacking in judgment; but I have not bound any evidence to the effect of a charge of bad faith.

Also with a view to showing that there was discrimination, the respondent compared the valuation of 1941 of this building with the valuation of the other buildings. There is on that point the comparison made with six other buildings, and comparison is made in a table which we find in the Factum of the respondent, at page 86. There is first a reference to the admissions concerning the cubic feet of each of the buildings enumerated in that table. There is first the Sun Life; then Bell Telephone, Royal Bank, Aldred Building, Sun Life, by the assessment of the Superior Court. We know the cubic feet of the Sun Life, first of all, by the admissions, and we know the number of cubic feet of the other buildings by Schedule G, at Volume 1, page 20. The cubic contents shown in that table result from figures on admissions as to the Sun Life and as to the others. The Sun Life, which is undoubtedly the most beautiful of all these buildings, is valued at 59.9 per cubic foot; the Bell Telephone at 58.9; the Royal Bank at 52.2; the Aldred Building at 46. That is a purely commercial building, without any ornamentation. Then we finally we take the Sun Life and take the assessment of the Board as confirmed by the Superior Court, from which it would follow that the Sun Life would be valued only at 41.8 per cubic foot, although the expert for the Sun Life stated that the cubic content should be multiplied by 81 cents per cubic foot.

This is to show that instead of their being some discrimination against the company there was rather discrimination in favour of the company, and I submit that no discrimination at all has been shown, and I submit that if in 1941 the assessment was increased by a large quantity it was purely and simply because the previous year the cost was going down; it was not taken care of and left in abeyance. It might have been a very good reason for attacking the assessment of the previous years but it is no reason to say that the valuation of 1941 is bad because the other one was low if this one is not higher than it should be.

My submission on this second point is that the valuation made by the assessors and the Board of Revision was made in accordance with the jurisprudence of our province which on that point was also in accordance with the memorandum, taking together the replacement cost and the commercial value and blending them in a given percentage; that, on the other hand, there was no discrimination, that the increase in valuation can be rightly understood and that the discretion of the assessor and the Board of Revision was not unduly fettered by the memorandum.

My next point is to try and show to your Lordships that the Superior Court was wrong in some of its conclusions, and that that is the reason why, although adopting the proper method, the result was, we submit, erroneous. It may be pointed out at once that the Superior Court adopted exactly the method adopted by the assessor and the Board of Revision, and, moreover, the Superior Court states expressly that the prudent investor theory should not apply and that it was really the proper method to proceed as did the assessor and the Board of Revision.

Again, my Lords, his Lordship Mr. Justice MacKinnon said that he did not criticise the memorandum and that this could not affect the validity of the roll, but he disagreed with the Board of Revision which, after all, purely and simply, confirmed the assessor; he disagreed with the Board of Revision on three points; first, the index cost, second, the addition of 14 per cent supplementary depreciation factum, and also he disagreed as to the percentage that should be accepted in the blending of the two.

First of all, as to the index cost. On this point we submit that the learned judge of the Superior Court, without keeping to the index cost of Mr. Vernot, did make a finding which was contrary to the weight of the evidence. We know how Mr. Vernot came to his index cost by purely and simply taking four years, computing the index cost for each of those years and making an average. He found that there was a difference of 7.7 between the index cost of the years 1927 to 1930 inclusive and the index cost of 1941, or, more exactly, the index cost adopted for the roll of 1941. It may be at once pointed out that the index cost adopted for the roll of 1941 was based not upon the cost of 1941, because the assessor had to be given instructions before the time, but the index cost adopted for the roll of 1941 was based upon the cost during the last six months of 1939 and the first six months of 1940. It is in evidence that this index cost was more to the advantage of the company than would be the index cost of 1941 and, I think, on that point there is no disagreement.

LORD ASQUITH: You agree Mr. Vernot was wrong, do you not?

MR. BEAULIEU: We agree that Mr. Vernot was wrong.

LORD ASQUITH: On this particular point he ought to have taken every year.

MR. BEAULIEU: He ought to have taken every year into consideration.

LORD ASQUITH: Not the 7 per cent.

MR. BEAULIEU: Not only four years and make an average. These four years accidentally were some of the years where the costs were higher, it happened that way.

LORD PORTER: I understood you to be saying before that you have to have two things to compare. One is the figure of what it would cost in 1941 and the other what it actually cost to put up in previous years. Your explanation with regard to the 1941 figure is that the comparable figures for then were the cost of erection in 1939 and 1940, the last six months of 1939 and the first six months of 1940. That is the comparison you have to reduce to actual figures in the previous years.

MR. BEAULIEU: Yes. We add further that the respondent cannot complain because the index cost at the beginning of 1941 was higher.

LORD PORTER: If you have not got it you cannot help it, but if you could help it you say it is better for the claimant?

MR. BEAULIEU: Yes. The index cost adopted by Mr. Vernot made a difference of 7.7 in the cost during the four years he adopted and the cost of 1941 which was 109.

LORD PORTER: I do not know whether there is any quarrel about this. I am not talking at the moment as to what the result is but I am wondering at the moment whether there is any dispute as regards the facts. What do you say, Mr. Brais?

MR. BRAIS: I must say on that point that we will suggest this to your Lordships, that the valuation of the building should have been made according to the method laid down in the Manual applied to all other buildings, and that we should not have been taken on historical cost which was applied to the Sun Life only.

LORD PORTER: I follow. You are saying that but there is no dispute that Mr. Vernot, if you are going to deal with the actual cost, took a false figure.

MR. BRAIS: He took a false figure. I have something to add to that, but if we are going to deal with actual cost he took a false figure. If he applied it he should have applied it on the depreciated value of the whole buildings.

LORD PORTER: Then you need not trouble about that question.

MR. BEAULIEU: The question is to know whether the Board of Revision adopted the better method of computing the reproduction cost than did Mr. Vernot. They, first of all, took, as did Mr. Vernot, theactual cost. Then having the actual cost for each year they endeavoured to find the index cost of each year, and having found what they thought was the index cost for every year they adjusted the actual cost to the cost of 1941. Were they right in contending that they obtained the actual index cost of every year, or were they in error? I submit that the evidence on that point, which is not contradicted (it is not enough; it should be contradicted; it must be satisfied by itself) is quite complete and satisfying on that point as to how they proceeded.

LORD PORTER: I understood Mr. Brais to say this. If what you are

doing is finding out the comparative cost between the years year by year and 1941 that they have done that right, but he says that does not end the matter. So far as the actual question of comparison is concerned, a mere comparison of figures, he accepts that that is right.

MR. BRAIS: The mathematics of the computation alone are right, but we will argue that they are definitely ill-applied.

MR. BEAULIEU: I understand if the mathematics are correct I need not proceed further.

LORD PORTER: You will have your reply.

MR. BEAULIEU: Some explanation might be added to what I said as to the Exhibit D.2. which is found on page 680 of volume 4, that is when the Board of Revision tried to apply actually to the figures expended each year the index cost of every one of the years. I think I was myself somewhat confused about that, and if further explanation is useless, I will drop it at once, but what I want to show your Lordships, if I was not clear enough on that point, is that we have here on page 680 of volume 4 an adjustment which was made between the actual cost and the cost of 1941.

The three first columns are self-evident. We have, first of all, the index cost, the year and the amount. The amount spent is found in the admissions, there is no question about that, but the fourth column may probably need some explanation. It is entitled "Deduction made". The exact meaning of this is that the figure in the fourth column is the actual cost of each year less the amount which was deducted therefrom to take care of the three items which are found at the bottom of page 680 which was eliminated by Mr. Vernot and also by the Board of Revision. So the deduction is not a figure which may be taken out from the third column, it is a column by itself, it is the exact cost less deduction.

The deduction was made this way. For the year 1930 the sidewalk is 70,000 dollars. That was deducted entirely during that year, because it was in 1930 that the sidewalks were built, but the other two items at 215,000 and 223,000, that is to say, when walls were demolished and there were temporary partitions, were gradually deducted every year.

LORD PORTER: I do not think I have any difficulty. I do not know if my noble and learned brethren have, but what I am troubled about and do not follow is that if you deduct the column deductions faites, I do not know what those figures represent. I could understand this being said if you took the actual expenditure. Take the first year 1913. I can imagine it being said that the actual figure expended in 1913 was roughly 233,000 dollars, but that off that was taken 106,000, leaving 126,000 dollars.

MR. BEAULIEU: The figure of 126,000 is not taken out.

LORD PORTER: I said you add together 126,000 and 106,000 and adding those together you find that that is the total expenditure, but you did not take the total expenditure, you took off 106,000 and then you increased the 126,000 to 159,000. Is that right or wrong?

MR. BEAULIEU: My submission is that the figure 126,000 is the actual figure expended. The figure of 106,000 is the figure expended less some proportion of the three figures at the bottom of the page. There are three figures there. At once

they made a deduction every year proportionately to the amount spent in that year.

LORD ASQUITH: Suppose you have 126,000 and suppose 20,000 dollars worth of wall had been knocked down in that year, you deduct it and you arrive at 106,000.

MR. BEAULIEU: Yes.

LORD ASQUITH: You then translate 106,000 into terms of 1941 prices by multiplying by 109 over 72.

MR. BEAULIEU: Yes.

LORD ASQUITH: And you find the result is 159,000. I think that is right?

MR. BEAULIEU: Yes.

LORD ASQUITH: I did the arithmetic and it came out with astonishing accuracy.

MR. BEAULIEU: 106,000 is the difference between 126,000 and what was deducted to take care of the last three figures, the external walls, the temporary partition and the sidewalk. These three figures which were eliminated by everybody and by Vernot are deducted year by year in proportion to the amount spent during that year except for the sidewalks which were deducted totally during the year 1931.

LORD PORTER: The mathematics of them are admitted.

MR. BEAULIEU: If the index cost is practically correct, there is no question that the deductions are correct.

LORD PORTER: The only question is whether the correct principle has been applied with regard to the deductions. You can leave that, I think, for Mr. Brais to deal with in his answer, because I do not know what the proposition is which you propose to put before us.

MR. BEAULIEU: My proposition is that there is a difference of over a million between the index cost of Vernot and the index cost of the Board of Revision.

LORD PORTER: That, again, is a figure which is admitted.

MR. BEAULIEU: If it is true that the Superior Court adopted Vernot against the evidence, which I think is uncontradicted, then I submit that this should be corrected. That is one of the reasons why, I think, the Superior Court, adopting the same method, the results were different. There is a 4 million dollar difference between the assessment of the Board of Revision and the assessment of the Superior Court.

LORD PORTER: On this particular matter there is a difference of 1 million?

MR. BEAULIEU: Not upon the index cost, but in all.

LORD PORTER: There is about a million?

MR. BEAULIEU: Yes.

LORD PORTER: The admission which Mr. Brais makes is that those calculations are mathematically correct, but do not take into consideration all the matters which require discussion.

MR. BEAULIEU: Yes. The next point of difference between the Superior Court and the Board of Revision is the 14 per cent

additional depreciation for ornamental features. First of all, the Superior Court adopted the rate of 14 per cent physical depreciation which was found by the Board of Revision to be contrary to the depreciation found by Mr. Vernot. On that point the rate of 14 per cent physical normal depreciation was not in issue any longer but besides that the learned judge of the Superior Court made a further deduction of 14 per cent on account of what he calls the extra unnecessary cost by the ornamental features. These ornamental features are given in detail on page 105 but I do not think I should refer to them. They were read and they amount to 3,725,000 dollars. It is true that his Lordship only deducted 2,352,952 dollars, but if the 3 million dollars for ornamental features are first of all submitted to the normal depreciation of 14 per cent, like all the other parts of the building and then those 3 million dollars are further subjected to the diminution resulting from the index cost 5 and 7.7, and, further, if they are reduced by the 5 per cent additional depreciation given by Mr. Vernot on account of the fact that the building was erected in three stages, we come, roughly speaking, to that amount of 3,725,000 dollars.

LORD PORTER: I suppose that is how he arrives at the 2 millions. He said "I have already taken certain deductions and if I then again deduct from the total 14 per cent, I shall be deducting too much, because I ought to be deducting it really from a diminished value.

MR. BEAULIEU: The learned judge purely and simply said: All these deductions I now mention have been taken care of. He does not give details of how he did it. Mr. Justice Galipeault tried to make the computation at page 1040, line 48, of volume 5. It continues on page 1041 up to line 30. There is a calculation made there showing that as the result approximately at least the whole amount of 3 millions after the proper deductions have been made has been eliminated by the 2,552,952.

LORD PORTER: Why does it call it un chiffre arbitraire at page 1041? I thought you were saying it was not arbitrary at all but that it was a calculated sum reduced by subtracting the appropriate amount after you had taken account already of previous deductions; that is to say, instead of taking 14 per cent from the figure you took it from the figure after previous deductions of 14 per cent and so on.

MR. BEAULIEU: At the conclusion Mr. Justice Galipeault says that the judge eliminated completely the depreciated value of these items as adding nothing to the commercial value. So apparently he made the calculation deducting first the 14 per cent.

The result of this evidence is clearly stated by the learned judge, because it does not add anything to the commercial value of the building. In the first place, it is our submission that in fact it is erroneous because the evidence shows that granite will last longer than limestone. Your Lordships may remember that Mr. Justice MacKinnon said this building, being a commercial building, should have been built of limestone. The difference between between limestone and granite is useless, it does not add anything. I respectfully submit that granite adds to the commercial value, because it lasts longer than limestone. The same can be said of the marble as compared with plasto walls, and the same can be said of bronze as compared to steel, and finally to marble in the floor of the great hall as compared with terrazzo. So on this point there is, I respectfully submit,

the mistake which is, in fact, contrary to the evidence.

LORD PORTER: What did they have instead of plastic, was it a marble decoration?

MR. BEAULIEU: The whole of that grand hall, what is called sometimes the banking hall, where the customers used to pay their premiums. The walls were in marble and there were marble columns and the floor was also made of marble.

The learned judge said: Instead of having marble walls they could have obtained plasto walls, and instead of a marble floor they could have a terrazzo floor, and instead of having granite they could have limestone. The difference between the building built as he suggests and the actual building of the Sun Life amounts to 3 millions.

So my first point is that in fact it is erroneous to say that these matters did not add anything to the commercial value, because it would last longer, it will cost less for repairs and maintenance, and every purchaser would take that into consideration, and consequently the commercial value would be increased.

My second point is that by proceeding in that way the learned Judge purely and simply disregarded the rule that buildings must be valued as they stand at the time of the valuation. Instead of proceeding to establish the replacement cost of the building as it stood, the learned Judge imagines another building totally different, built of limestone, with plasto-walls and terrazzo floors, and said: Now this building is a building which is now going to be depreciated. It is I suggest a disregard of the rule that the building should first of all have been considered from the point of view of the replacement cost, as it stood at the time, subject to any depreciation which the assessor should have found necessary, when you take first of all the building as it is. To re-construct in imagination a totally different building and to proceed to establish the replacement value of that imaginary building is, I suggest, my Lord, an erroneous method of proceeding to establish the replacement value of a building for the purpose of assessment.

LORD ASQUITH: It might be a legitimate procedure if you had the commercial basis in view alone. You say it is erroneous when replacement is your basis. If the earning power of the building is concerned, and it would have earned as much if you had limestone, these considerations are relevant, I suppose.

Mr. BEAULIEU: My submission is that it is a little more.

LORD ASQUITH: I accept that, subject to your point that granite lasts longer.

Mr. BEAULIEU: There is one other point, that depreciation which, as a result, eliminates totally a portion of the building, is no longer depreciation. The result of his supposed depreciation, whatever he calls it, he calls it depreciation 14 per cent, is after all to eliminate totally over three millions of the cost of that building. My suggestion is that when finding the the replacement cost we should first of all find the cost of the building as it is. Replacement cost is nothing but the original cost less depreciation, adjusted to the time of the assessment. It is not the replacement value of that building to say, if that building had been built in limestone there would have been saved, from the view of replacement cost, the sum of so much. I submit that that is a mistake in law, it is a wrong principle.

LORD PORTER: I think this is the kind of view he has in mind, and you can tell me what view you take of this. I am not saying it is this case at all. Suppose they had used some medium with which to erect their building, which in fact was at the time when they used it very popular, but was neither as long lived nor in the end as artistic as another medium. Would you not say in that case that if they had used the other medium, suppose that was more expensive, that would be the correct value and not what they had chosen to expend upon useless and more quickly deteriorating ornamentation.

MR. BEAULIEU: We are not suggesting that the replacement cost is the actual value. It is only one element, we are suggesting, and if it is taken into consideration, it must be taken into consideration, as it should be, then we solve the correction, by blending the other value which is the commercial value.

I know that the learned Judge has relied upon the Minnesota case; he says so in plain terms, but the Minnesota case was fundamentally different in this, that in the Minnesota case the assessors took into consideration only replacement value, and having taken that he thought that the ordinary physical depeciation was not enough, and he added an additional 25 per cent on account of additional depreciation resulting from the fact that, in his opinion, or in the opinion of experts, these ornamental features were out-moded, and atxall events were of very doubtful artistic taste. So he was proceeding purely and simply with the replacement cost as representing actual value, but in this case thetwo factors have been blended together, replacement cost and the commercial value.

I submit, my Lords, thefact that these ornamental features did not increase the commercial value, as they should have done if they had been made for the very purpose of creating a commercial enterprise, and the fact these ornamental features are totally reflected is already taken care of by the fact that the commercial value is only 50 per cent approximately of the actual replacement cost, and that with blending a value which is 50 per cent lower than that replacement cost, we have already taken care of the fact that these ornamental features did not constitute the same value as if they had, purely and simply, been made according to what we might call the commercial standard of the building. In other words, the learned Judge first of all said: this is a commercial building, I am going to consider it as a commercial enterprise, and since it is a commercial enterprise I must first of all eliminate all that is not commercial, and then I will purely and simply blend the two, 50 - 50.

In doing this, first of all the Judge was wrong in suggesting that it was a commercial buulding,and in his blending he was taking care of too much of the depreciation resulting from the uncommercial character. Here we have a building which was not built as a commercial building. Every witness gives a description and they all agree it was not an ordinary commercial building. It was designed purposely to be used as the home of a great Company, and all these ornamental features were done for that purpose. No doubt they did not add to the commercial value the same amount that would have been added if they had been built for the very purpose of creating a commercial value. That was not the purpose. As a result, the commercial value did not increase in proportion to the expense, but that fact is reflected by that other factorwhich was not in the Minnesota case, I mean the commercial factor. When blending together the commercial factor, which was 50 per cent lower than the replacement cost, we already take care of the uncommercial feature of this additional expense.

The learned Judge says that these ornamental features did not add to the commercial value. If that is so, it should have been considered and it has been considered without determining the commercial value. I submit that this is no reason to takean erroneous point of view of the replacement cost which is purely and simple the actual cost depreciated and adjusted to the time of the assessment.

By doing what it did, my Lords, it is submitted that the superior Court made a double deduction for the samefactor, because these expenses were not equivalent to the increase in commercial value. That was already taken care of by the blending and when it added a further depreciation of 14 per cent it is submitted that it was a double deduction for the same purpose.

LORD PORTER: It might give some consideration to your blending. The assessor gave 10 per cent. Suppose they had given 1 per cent pf

half per cent, and you could say they have blended the two. The fact that you blend them would make very little difference in the calculation. That is an argument which seems to me requires consideration, when you are urging that you get this blending and that the blending takes care of the fact that the replacement value has not been more reduced. In a sense you could say if you gave no blending at all but calculated your replacement value with sufficient deductions, you would be better off than if you blended the two. I think you would, it depends on the proportion.

Mr. BEAULIEU: If there had been no blending at all it would have been the case of Minnesota. Whether the addition of 14 per cent was too much or not enough, I am not in a position to say, My submission is that in principle the learned Judge should not have made a double deduction on the same ground, that is the ground that these ornamental features did not add anything to the commercial value.

(Adjourned till tomorrow morning at 10.30).