28, 1951

IN THE PRIVY COUNCIL.

Council Chamber,
Whitehall, S. W. 1.

Tuesday, 26th June, 1951.

Present:

LORD PORTER
LORD NORMAND
LORD OAKSEY
LORD REID
LORD ASQUITH

ON APPEAL FROM THE SUPREME COURT OF CANADA

Between:

THE CITY OF MONTREAL (Appellant)

and

SUN LIFE ASSURANCE COMPANY OF CANADA (Respondent).

SIXTH DAY

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THE CITY OF MONTREAL, Appellant,

and

SUN LIFE ASSURANCE COMPANY OF CANADA, Respondent.

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

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

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

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

S I X T H D A Y.

MR. BEAULIEU: My lords, before resuming my argument I may perhaps be allowed to give a more completely accurate answer to one of the questions submitted to me by my Lord Asquith. It is concerning the duration of the various leases granted by the Sun Life to its tenants. All the details of these leases may be found in a summary of leases, which is in Volume 4, beginning at page 810, line 45, and running to page 833. There is a complete analysis of all the leases. Briefly speaking, I would first of all refer your lordships to the longest of them, which is to be found at page 812. It is a lease to the Bank of Montreal, beginning from the 1st August, 1940, and running to the 31st August, 1950. It is a ten years lease. There are besides various leases of five years, but the majority are leases from one to three years, some of them being purely and simply monthly leases.

LORD ASQUITH: I am very grateful to you. That is just what I wanted to know.

MR. BEAULIEU: At the adjournment yesterday I was considering the various points upon which the learned judge of the Superior Court disagreed with the Board of Revision. The third was the percentage allowed respectively to the replacement value and to the commercial value. The learned judge adopted the percentage of fifty for each one of these two elements of value, and his reason is that the building of the Sun Life was essentially a commercial building.

If in fact this building was at the time of the valuation a purely commercial building, we cannot disagree with the learned judge, because that is in accordance with the memorandum. Properties which are totally commercial are valued as to 50 per cent on the basis of replacement value and 50 per cent on the basis of commercial value.

LORD PORTER: Do you agree with this reasoning?

MR. BEAULIEU: Yes, my lord.

LORD PORTER: It was partly occupied?

MR. BEAULIEU: Our submission is that it is not a totally commercial building and in respect of this submission I think it is sufficient to refer to the description of the building given by every witness, whether heard on behalf of the respondent or on behalf of the appellant. They all agreed that it was a wonderful building, an institutional building, and it is shown in the evidence that its main purpose and object was precisely that it should be used as the home office of the Sun Life, to lodge the entire personnel of the Sun Life, and with the hope and expectation that in later days it would be totally occupied by the personnel of the Sun Life.

We must also bear in mind that at the time of the assessment only 40 per cent of the building was commercially occupied. Sixty per cent of the building, and the most beautiful part of the building, was precisely used as it had been intended from the beginning that it should be used: as the home office of the Sun Life and as a symbol of the greatness and of the financial power of the company.

May I suggest moreover, my lords, that the learned judge seems to admit, impliedly at least, that it is not shown that it was not at the time a purely commercial building, since he says that there is a sum exceeding 3,000,000 dollars of costs which are not generally found in commercial buildings. That is the reason why he eliminated totally that cost of over 3,000,000 dollars. The learned judge says that it is essentially a commercial building, because it can be converted totally as office space, to be rented as offices.

My submission is that, if and when such conversion takes place, then no doubt the assessors would have to take that fact into consideration and to decide that it is a totally commercial building; but as long as that conversion is not made, I suggest that to value that building as an essentially commercial building is to disregard the rule that buildings must be valued as they stand at the time of the valuation.

LORD PORTER: There is some evidence which I have seen in the course of the case that the Sun Life started the building with the intention, as you have just been saying, of wholly occupying it in due course?

MR. BEAULIEU: Yes, my lord.

LORD PORTER: Somebody gave evidence and I think that two people gave evidence saying that that hope was disappointed and that, so far from occupying the whole building, they were diminishing the amount of occupation which the Sun Life intended to have. How far is that evidence accepted and what effect has it on the argument which you have been presenting?

MR. BEAULIEU: I submit that, if it was intended to be used totally as the home office of the company, that is the real explanation of the special expenditures that were made on that building, and the fact that later on circumstances have changed does not change the fact that these extra costs were made deliberately for the purpose for which they are now used. They are nevertheless and still used as the home office of the company.

LORD PORTER: Supposing that in fact the Sun Life found that their necessities compelled them to leave the building altogether and occupy a smaller building, what effect would that have, in your submission, upon the value which was to be placed upon it?

MR. BEAULIEU: We will have to consider how that building is used at the time of the assessment and, if it is converted into offices, it would be a commercial building, with probably some disability on account of its original design and plan; but, taking the building as it now stands, it serves the purpose for which it was built. It was mainly built as a home office and is used as a home office and all the personnel of the Sun Life is lodged in that building. There are spaces left that were incidentally rented to other people, but any day the Sun Life can decide to occupy the whole building.

LORD PORTER: They can, but, according to their evidence, not only were they not deciding to do so, but they were considering the question of decreasing their occupation.

MR. BEAULIEU: That may be actually the trend.

LORD PORTER: I was wanting to take your submission. Your submission is that you take things as they are?

MR. BEAULIEU: My submission is that you take things as they are.

LORD PORTER: Things as they are is 60 per cent Sun Life and 40 per cent let?

MR. BEAULIEU: Yes, my lord.

LORD PORTER: Does not that make a difference to the argument that the Sun Life built this for themselves and for their aggrandisement and a good deal of what was meant to be aggrandisement for themselves is quite useless for that purpose?

MR. BEAULIEU: If I remember correctly, what has been said, it was that the actual trend was rather to decrease, but nevertheless it is not so decreased as to have ceased to be the home office and as to be occupied as to 60 per cent. Those are the actual facts which we must take into consideration. The trend of events is not a factual element of valuation. We must take things as they are and as they are, whatever might be the trend, we know that 60 per cent is occupied by the Sun Life as its home office, as it was intended to be. With all due respect, I would suggest that, when the learned judge found as a fact that it was a totally

commercial building, he was misdirecting himself and the whole basis of his allowing the percentage of 50 per cent to the building is based upon an error of fact and it should not therefore be considered.

LORD PORTER: Supposing that he had said 60-40, would that have been justified?

MR. BEAULIEU: So far as the learned judge is concerned, I am trying to find out if in law he was in error or if his finding is contrary to the whole evidence of the facts. As to the percentage that should be allowed to each one of those two elements, my submission is that it is a pure question of fact which must be left to the assessors and which should not be disturbed, unless, of course, there is some error of fact or gross injustice. Of course, if there are miscalculations, also there must be a departure from his findings. It all comes to this: Where does the responsibility lie to determine the percentage, which is a pure question of fact. My submission is that the Legislature has vested that in the assessors.

LORD PORTER: Let us suppose that you had a building which was purely let and nothing else and the assessors said: This is a matter for our discretion; we shall decide that this is not a commercial building and we shall decide that it is a building which might well be occupied by the builders and charge them for the replacement value and nothing else. Would they be justified in doing that?

MR. BEAULIEU: No; I do not believe that they could be justified in deciding contrary to the specific facts. To state that this building was entirely owner-occupied, when it was not, would be a misdirection -- a wrong principle. Of course, I admit that, if there is an application of a wrong principle, creating grave injustice (because, whatever might be the principles applied, if there was no injustice there is no reason for the Courts to interfere), the Courts must interfere; but my submission is that the learned judge of the Superior Court when he did interfere was, first of all, finding things which were contrary to the evidence and applying wrong principles, more particularly disregarding the principle that he should have valued that property as it stood at the time and not as it was not at the time; that is to say, not a commercial building.

This normally and naturally, my lords, brings me to my last point and it is whether in the particular circumstances of this case the learned judge of the Superior Court was justified in interfering. Of course, the principle is well known that the Courts should not interfere with the assessments of municipal officers unless there are wrong principles of law applied or miscalculations, and in both cases only where there results from that an injustice sufficiently substantial to justify the interference of the Court.

LORD OAKSEY: The Chief Justice of Canada, I think, was against that view, was he not?

MR. BEAULIEU: He mentions that principle. I am now putting before your lordships that that applied to the City of Montreal on account of the very terms of its Charter. Of course, I will have to consider that.

I would like, first of all, to lay down the general principle that in assessment matters, as in all questions of pure management of municipal matters, the court

should not interfere, unless there is violation of the law, and so forth.

That principle which I am now submitting has been discussed in various of the cases which I have already quoted on that point and more particularly the Canada Cement case. So far as those cases are concerned, if I may I will not read them again; but there are two additional cases on this particular point which I would like to submit to your lordships.

The first is Mersey Docks and Harbour Board v. The Assessment Committee of The Birkenhead Union and Others, reported in 1901 Appeal Cases, page 175. It is a decision of the House of Lords. The remarks of the Lord Chancellor, Lord Halsbury, are at page 179 and following. It is to those remarks that I should now like to direct the attention of your lordships. The remarks give the explanation of the whole case. Lord Halsbury says: "My lords, in this case it appears to me, for the reasons which have been given by the Court of Appeal, and having regard to the subsequent explanation of the learned recorder, that this appeal ought to be dismissed with costs.

"I cannot help thinking that a great deal of the hesitation and confusion which has arisen upon the subject-matter which your lordships have heard debated now on the part of the appellants has arisen from the advisory character of the judgments which have been given from time to time by the various Courts before whom this rating question has come. The thing that the Legislature has called upon the overseers to do is to solve a simple question of fact, and although it may be by no means simple as regards the mode in which they are to arrive at it, the question of fact is simple enough as stated -- that is to say, they are to make the rate 'upon an estimate of the net annual value of the several hereditaments rated thereunto -- that is to say, of the rent at which the same might reasonably be expected to let from year to year free of all usual tenant's rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent'.

"That is the proposition which is put before the parish officers -- that is the question which they have to answer; and they are to arrive at that value, so far as I know, unfettered by any statute as to the way in which they can do it. I am not aware of any rule of law or any statute which has limited them as to the mode in which they shall arrive at it. It is not a question of law at all; it is a question of fact. These questions have from time to time come before the Courts, and have been argued as questions of law; but that is where, instead of doing what the statute has directed them to do, the overseers, or those who were acting on the part of the parish, have thought proper either to include something which by law ought not to be included, or to exclude something which ought to have been included. Of course in that sense, when you are dealing with a question of fact which has to be answered by any tribunal, it may be that a question may come up in the argument as a matter of law; but still one must bear in mind that the thing to be done is to answer a plain question of fact, namely, what is the rent which a tenant might reasonably be expected to give for the premises, subject to the deductions mentioned in the statute, as a tenant from year to year?

"Now, my lords, the first part of the proposition

is that you are to rate -- what? Not the tenant's trade. I will deal presently with some questions, and see how they arise with reference to whether you are entitled to go into the question of profit and loss. The trade is excluded from valuation by the terms of the statute. You are to rate the premises according to their value; therefore it would be very wrong indeed to rate the trade, or to treat it as you would if you were dealing with the question for the income tax. You are not rating the income; you are rating the premises; so that where you have premises of a similar character with equal facilities for carrying on trade you have a very facile mode of coming to the conclusion what sum would reasonably be given by any tenant from year to year for such premises. But if, instead of doing that, you choose to go into elaborate calculations of how much the building cost to erect, and when erected what would be the value of it, you are only elaborating and makingmore complex and difficult the simple proposition which the Legislature has put before the overseers to answer.

"My lords, observations have from time to time been made by some learned judges saying that this should have been done or the other should not have been done in rating cases; but that was not as pronouncing judgment upon the law of evidence as to whether or not such and such a topic was legitimate or not in order to arrive at the conclusion which the Legislature had directed the overseers to arrive at, but merely indicating what was the ordinary and reasonable means of arriving at the conclusion at which they were bound to arrive.

"My lords, I am the more anxious to point this out because I think in these later days we have got rid of a good many of those sources of confusion which arose from the advisory character, as I have said, of the judgments given by various Courts -- we have, I hope, got rid of the confusion arising from words being used not in the strict sense, but as matter of advice to the justices in determining such questions, and sometimes getting printed in the Law Reports as if they were decisions upon the law of evidence in this country. My lords, I protest against any such view; and in this very case, although, as I said, during the last half-century we have arrived at conclusions which get rid of a great deal of the confusion that at one time existed, I find that one learned judge, Mr. Justice Channell, uses a phrase which I am afraid I cannot assent to, namely, that 'wherever you can arrive at' the value 'in that way which is the ordinary way' -- that is, 'by comparing it with other similar tenements' -- 'you are bound to arrive at it in that way'. If that means that that is the facile and proper mode of doing it, I should agree; but if it is laid down as a proposition of law that that is the only means by which it can be arrived at, I am bound to say I am not able to assent to that view.

"Again, my lords, I find that Lord Justice Collins says in the same way: 'Hence the rule that in ordinary cases where the standard of rent is applicable evidence of actual profit made cannot be received. But it is equally true that where no such standard of comparison exists, it is legitimate to inquire into the profits actually earned'. Again I am compelled to say that I cannot concur with the form in which that proposition is put. It is not a question of deciding what according to the law of evidence is receivable, but what is the natural and ordinary and usual mode by which you can answer the proposition put by the Legislature to the overseers.

"My lords, that proposition appears to me to be a

very intelligible one if unclouded by all those questions which have from time to time been raised by ingenious persons, for a good many academic questions have been discussed at the expense of the parishes. What you are to find out is what a tenant will reasonably give, looking, surely, at all the circumstances of the particular occupation, including therein the business that has been done on the premises. I think I had occasion to say in a former case that it would be a very extraordinary thing if, although you can give evidence by expert testimony as to what kind of business might be done, you are not at liberty in point of law to ascertain what business has been done. It seems to me that no such proposition could reasonably be maintained. To go into the amounts of profits and losses as if you were finding out what a man's income is would be absolutely irrelevant; but for the purpose of ascertaining what a tenant would be likely to give, to suggest that that is something which in point of law you have no right to inquire into would be equally absurd. All the circumstances of the particular occupation, the mode in which the trade is being carried on, and the circumstances affecting either the restriction or the amplitude of the trade, are all legitimate subjects of inquiry, and the only question of law is whether the particular tribunal has followed the line I have indicated or not. Surely those who are complaining of what has been done by the tribunal must establish either that something has been excluded from the calculation which by law ought to be included, or that something has been included which by law ought not to have been included.

The question is a question of fact, and the only way in which you get in a question of law at all is with regard to the mode in which the question of fact has been dealt with."

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My Lords, there is, of course, this distinction between the law of this country and our law: that the assessment in our country is based upon the capital value; but, apart from that difference, I think that we can say that in our country, as here, it is, after all, a question of law which has been particularly entrusted by the legislature to a set of officers. It is more particularly so in our case, in view of the fact that, besides the assessor, we have a special tribunal, the Board of Revision, which actually corrects the assessment, if necessary - not making a new one, but simply and purely taking its part in the performance of the assessment.

LORD PORTER: Roughly that case says this, does it not, as a broad proposition: Considering the English method of rating, it is that you find out at what the property would let and you consider as one of the tenants the actual occupiers. I think that, broadly, that is what it says. It is a little difficult to apply it to Canadian affairs, because it is dealing purely with the letting value and to that extent it is more unfavourable to you than it would be if it were dealing with capital value.

LORD OAKSEY: Does it not also say that the tribunal who has to decide what the rent is, decides it as a matter of fact and that that decision is final and is not a question of law?

LORD PORTER: Always provided that the correct principle is applied, yes.

LORD OAKSEY: Always provided that the proper deductions have been made.

LORD PORTER: I think that that is true; but, taking that case, supposing that they had left out the Mersey Docks and said: All that we have to consider is at what somebody would take it from the Mersey Docks, I think that Lord Halsbury would have said that that was wrong, because they had not assumed one of the elements which in fact exists and ought to have been observed.

LORD OAKSEY: That may be so, if it were shown upon the judgment; yes.

LORD PORTER: I think that that is so. He quotes what the Recorder in fact said in that particular case and then says that there is nothing wrong with the principle.

LORD ASQUITH: The gist of the decision is at the top of page 183, is it not: Unless you are able to say that something has been excluded which ought to have been included, or vice versa, it is all fact.

LORD PORTER: Yes.

MR. BEAULIEU: There is then the Mackenzie, Mann & Company, Ltd., Assessment case, which is a decision of the Court of Appeal of British Columbia, which is reported in 22 British Columbia Reports, page 15.

LORD PORTER: What year is that?

MR. BEAULIEU: 1915, my Lord. The facts of the case are recited, beginning at page 15. "Appeal by the owners of lots Nos. 2, 26, 109 and 120 Sayward District, from the decision of the Court of Revision and Appeal for the Comax District, of the 29th April, 1915, whereby the assessment of the said lots was confirmed. The property had been assessed at 102,000 dollars for the year 1915, whereas the assessment for the year 1913 was 41,000 dollars. The main ground of appeal was that there was no evidence before

the Court of Revision to show that said lots had increased in value from the amount at which they had been assessed in the year 1913."

There are then set out the arguments of counsel, which I think that I can omit, and the judgments of the various judges. First, there is the judgment of Mr. Justice Macdonald, Chief Justice of Appeal, who says: "I would dismiss the appeal. I think the evidence is not such as to entitled us to reverse the valuation put upon this property by both the assessor and the Court of Revision. The assessor is in a much better position than a judge of the Court of Appeal to come to a conclusion as to the value of land. In the first place, if the assessor has acted honestly, and there is no suggestion here that he has not, without any mistake in principle or law, great weight ought to be given to his valuation.

"Then, again, the Court of Revision is in a very good position indeed to review and rehear the case on appeal from the assessment. It has come to the conclusion that the assessor was right in the valuation he put upon these lots, and I think he has done so on the right principle and without any mistake, either of the law or in respect to the standard which he should apply."

Then Mr. Justice Martin says: "I also think the decision of the Court of Revision should be maintained. There is no more evidence before us than there was before it, although, of course, this is a rehearing and fresh evidence could be adduced. But, in the case of a property of this very peculiar description, I shrink from interfering with an assessment which, I think, has been made in a difficult matter and which is as satisfactory as would be possible in the circumstances.

Mr. Justice McPhillips says: "I would dismiss the appeal. I think in acting in all these matters of appeal from assessors and Courts of Revision that too much reliance cannot be placed upon what may be the exact language in the statutes. The statutes are always supposed to be speaking and must be applied to the conditions involved.

"If we had to look at cash value as being the concrete statement, or the language could be taken without paying attention to conditions, we might get into the anomalous position of not being able to say there was any value, but such is not the way to apply the statute law, which has to be applied according to the varying conditions.

"In this case Mr. Boggs seems to have gone upon the premise that it is only agricultural land. I think the evidence also absolutely disproves that. If we were to look at it as agricultural land, it might have very little value. There it is on a good bay or harbour, but it is very far away, and there is no nearby market. On the other hand, we have evidence that this land is looked upon as of a character suitable for a town site - for a proposed terminus of a railway - and everything points to it that the purchasers have looked upon it as such. Then we have the express evidence of Mr. Smith that he put this valuation upon the lots from inspection on the grounds, and his evidence, to my mind, well supports it.

"On the whole, then, I would not think the Court of Revision erred at all in the matter."

Then, my Lords, of course the learned Chief Justice of the Supreme Court agreed in principle to what I have already read, that in general the Court should not interfere lightly with the finding of the Assessors, but, says the learned Chief Justice of the Supreme Court, in the present case we have a particular statute and he relies particularly on one part of Section 384 of the Charter to show that these general principles should not apply to a valuation made under the Charter of the City of Montreal. This Section 384 has already been read, but I will purely and simply refer your Lordships to the end of the third paragraph of Section 384.

LORD PORTER: What page is it ?

MR BEAULIEU: It is page 142, my Lords, of the Charter.

LORD PORTER: We have got it, I think.

MR BEAULIEU: The copy of the Charter, my Lord, has been given to you.

LORD PORTER: We have got it here. I was finding the page; it differs in ours.

MR BEAULIEU: Page 342, Section 384; it is my mistake.

LORD PORTER: This is the appeal provision ?

MR BEAULIEU: Yes. "In the case of appeal any judge of the Superior Court may order that a copy of the record including copies of the valuation certificates and of documents annexed thereto of the proceedings of the Board of Revision as well as of the complaint itself is transmitted to him and upon receipt thereof and having other parties either in person or by attorney but without enquiry he must proceed with the revision of the valuation submitted to him and with the rendering of such judgment as to law and justice shall appertain". These last words have been stressed by the learned Chief Justice of the Supreme Court as indicating that the general rule that Courts should not interfere with the finding of the assessors was eliminated by the words "rendering of such judgment as to law and justice shall appertain". The French text says, purely and simply: "Rendrement de jugement que de droit". [illegible]. There is little difference between the two texts in this; of course, in the French text "que de droit" covers law and justice.

LORD PORTER: Yes.

MR BEAULIEU: Now, my Lords, my humble submission is that these words do not add anything to the normal functions of the Court of Appeal and they do not detract from the normal function of the Court of Appeal. Every Court of Appeal and, as a matter of fact, every Court is bound to render judgment as to law and justice may appertain. That does not mean, I respectfully submit, that the Court of Appeal, which in this case is the Superior Court, shall act as a trial judge. The contrary clearly results from the preceding text. There is no doubt that the complaint when lodged before the Supreme Court becomes an appeal because Section 384 says: "An appeal shall lie from", and so forth. The features of the Superior Court trial show that the

Superior Court is not going to enquire into the evidence, the Superior Court must take the evidence as it stands; there is no enquiry.

LORD ASQUITH: Does "without enquiry" mean without having fresh evidence ?

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

LORD ASQUITH: What does it mean, that the Appeal Court is bound by the findings of fact of the Court below ?

MR BEAULIEU: The fact is that first of all the Superior Court gets the entire record from the Board of Revision and then this wording, that he should give judgment without enquiry, leads, I submit, to the conclusion that no evidence should be taken and that consequently the Superior Court is acting as an ordinary Court of Appeal taking the record as every Court of Appeal should take it, but not adding anything to it. Now, of course, the Judge of the Superior Court has no right to visit the premises as the Board of Revision has the right to do. So, the Board of Revision not only hears evidence, but it can by itself take some personal evidence by looking at the premises.

Now, my Lords, Section 384, I respectfully submit, manifestly makes of the Superior Court in this case a Court of Appeal, and if it is so, then the words that this Court acting as a Court of Appeal "shall render judgment as to law and justice shall appertain" do not deprive the Superior Court of its functions as a Court of Appe al, and on the other hand, do not give to this particular Court of Appeal the power and functions of a trial judge. It therefore remains, as it is undoubtedly a Court of Appeal, the general rule that Courts of Appeal should not interfere in findings of fact, coupled with the decision in the Mersey Dock Case to the effect that valuation, after all, is purely and simply a matter of fact, and I submit that we are entitled to conclude that this particular text does not change the ordinary rule of Courts in connection with the assessment of the assessors, more particularly, my Lords, if I may point it out, when the legislature has expressly provided for a special tribunal entitled to revise the first decision of the assessors.

My Lords, again I would submit that this text upon which the learned Chief Justice has relied is not new in the Charter. It has been in the Charter since the beginning and it has been, of course, several times construed by the Courts of the Province of Quebec, and in every case it has been held that the Superior Court, acting as a Court of Appeal, should not substitute its own opinion for the opinions of the Board of Revision but should interfere only when there was wrong application of the law creating grave injustice or miscalculation. Of course, that was again decided in the present case, but before this case, and according to the unanimous decisions of our Superior Court in the Province of Quebec, the same principle has always been applied. All these decisions, my Lords, concerning the functions of the Superior Court when hearing an appeal from the Board of Revision have been referred to by Mr. Justice St. Germain in his notes. We have already read them and I may purely and simply refer your Lordships to volume 5, page 1062, line 32, to page 1067, line 40. There is a long list of decisions

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to the same effect, that is to say, that the Supreme Court when hearing an appeal from the Board of Revision should not substitute his own opinion purely and simply to the opinion of the Board of Revision but should interfere only if there are wrong principles of law applied creating grave injustice.

I may perhaps, my Lords, be allowed to read anew, although it has been read when reading the judgment of Mr. Justice St. Germain, one of these cases, but unless otherwise directed I would purely and simply rely so far as the other cases are concerned, on the remarks of Mr. Justice St. Germain giving all these cases. This case, Lynch-Staunton is found on page 48 of the Respondents' Factum, beginning at line 25. One of these cases is the case of Lynch-Staunton v. City of Montreal and Board of Revision. I am now quoting from the official judicial reports of Quebec, of the Superior Court.

LORD PORTER: Is that printing right; is it Lynch-Sataunton ?

MR BEAULIEU: Lynch-Staunton.

LORD PORTER: There is a superfluous "a".

MR BEAULIEU: Yes. I am reading, if I am allowed, from the Official Reports of Quebec of the Superior Court, volume 76 of 1938.

LORD PORTER: What does "C.S." there mean, Canadian Supreme Court ?

MR BEAULIEU: Superior Court, my Lord, Cour Superieure.

LORD PORTER: I see, yes.

MR BEAULIEU: And when we refer to it in English, it is "S.C."

LORD PORTER: Quite.

MR BEAULIEU: It is page 286, my Lord. The judgment is a judgment of Mr. Justice Gibson of the Superior Court. "Appeals by the aforesaid Petitioners against valuation certificates issued by the Board of Revision of the assessors of the City of Montrea l, the same dated 28th February, 1938; one of such certificates being to fix the assessment roll valuation of the civic number 2,777 Hill Park Circle, St. Andrew's Ward, the property of Mr. Lynch-Staunton, at $37,000, the other certificates being

similarly to fix the valuation of civic No. 2815, Hill

Park Circle, the property of Mr. Colville Sinclair

at $23,500, the appeals being joined for hearing

and Counsel being heard:

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Seeing that the present application is made under the provisions of Article 384 of the Charter of the City of Montreal (as enacted by 1 Geo. VI., c.103 s.59), and that the jurisdiction thereby conferred upon a judge of this Court as now acting, is to view and consider the proceedings of the Board of Revision, to hear the parties upon the appeal made against the said proceedings and against the valuation declared by that Board, and, without the admission of otjer or further evidence, to render: 'such judgment as to law and justice shall appertain'; Seeing that the expression 'such judgment as to law and justice shall appertain' is one which is wide and unrestricted; by its terms it authorises judicial authority (a judge of this Court in first instance, and the Court of King's Bench in appeal) to review, in any respect, the valuation complained of such as; by giving a different interpretation, or a different relative value, to all or to any of the evidence, or by applying some different rule for the ascertainment of value, or by correcting some error in law as to ownership or liability: Considering that, in the opinion of the undersigned, it must be assumed and held that the jurisdiction so conferred is to be exercised with reserve, and with careful regard for the following considerations namely (a) The undoubted purpose of Article 382 of the Charter of the City of Montreal is to secure mature deliberation upon any contested valuation, after a hearing of all interested parties, and this by a Board whose members have been selected on account of their special qualifications for the task; (b) The undoubted purpose of Article 382 is to secure uuiformity of valuation and of relative valuation for all parts of the City, namely by having all such valuations passed upon by one single specially constituted Board; (c) By this very nature, valuations are matters of opinion, (susceptible of factual test only in very few cases), and opinions as to value may differ by considerable percentage from each other without it being possible to say with certainty which of them approximates most closely to reality, - and the 'reality' in this connection is a relative term -; (d) If it were to be allowable that the individual opinionof the Judge of the Superior Court, called upon to hear the appeal, would prevail over the opinion of the Board of Revision, the purpose of the said Article 382 would be defeated, for the appeals would be unlimited in numbers, and there could never be uniformity or relative uniformity in the valuations by the many judges of this Court; - in such case the very existence of the Board would be of doubtful utility:

Considering that, in the opinion of the undersigned the jurisdiction above mentioned should be exercised ex debito justitae in cases such as the following: (a) If the proceedings before the Board of Revision are defective or illegal by reason of the inobservance of some essential legal requirement, or if the finding appealed against has been reached in disregard of some provision of law, or if it is based upon some error of law as to title or liability or other such matter, or if the complainant has been refused or has not had a full hearing of his case and evidence, etc.: (b) If the finding appealed against is tainted with fraud or some improper motive; (c) If the valuation is so excessive or so insufficient that it could not reasonably be arrived at from the evidence, and the Board must have been induced into some error; But, in general, the jurisdiction should not be exercised if the purpose and effect is merely to substitute the appraisal of a judge of this Court for the appraisal made by the Board of Revision; in general, it should be assumed

that a valuation which has been made by the Board of Revision has been made with capacity, care and judgment after full consideration of all evidence to be found in the record, and after full consideration of the contentions of the owner; in general, it must appear from the application under Article 384 that there is some serious reason for intervention and not merely a quest for a revaluation". Then, my Lords, there is a formal judgment which does not add anything to the reasons of the judge.

LORD PORTER: Yes, that merely gives figures as opposed to principle.

MR BEAULIEU: Yes. There is a series of about 10 or 12 judgments all on the same principles and with all due respect I submit that the learned Chief Justice of the Supreme Court disregarded this well-known jurisprudence of our Province when he held that the Superior Court was not subject to the general rules to the effect that Appellate Courts should not interfere with the findings of the assessors except when there are wrong principles applied creating injustice or errors of calculation.

LORD PORTER: Did not he think, rightly or wrongly, that he had found wrong principles. I am not saying that he was right in it at all, but did not he think that he had found wrong principles.?

MR BEAULIEU: The learned Chief Justice of the Supreme Court thought Mr. Justice Casey was, and he was of the opinion, apparently, that the replacement value and the commercial value were not the proper factors to be considered, but it was the theory of the prudent investor that should be the guiding principle.

LORD PORTER: He did not say that.

MR BEAULIEU: He purely and simply said, my Lord, that he agreed with Mr. Justice Casey.

LORD PORTER: I beg your pardon, I was misapprehending to whom you were referring. I was thinking of Mr. Justice McKinnon.

LORD ASQUITH: The Chief Justice did quarrel with the principle of the decision appealed from inasmuch as he wanted to displace replacement value altogether. He like Mr. Justice Casey wanted to take commercial value. That is a disagreement in principle; it may be sound or unsound.

MR BEAULIEU: What is clear is that he adopts the reasoning of Mr. Justice Casey; he says so in express terms and Mr. Justice Casey's judgment, of course, we might consider was purely and simply the capitalisation of income, but with this particular feature that in the opinion of Mr. Justice Casey what must be considered is not the actual income but what a prudent investor would pay, of course, considering the income actual or future. I think, my Lord, that Mr. Justice Casey's doctrine is not purely and simply an appraisal on the capitalisation of income as we understand it generally because the assessors did, of course, consider that approach also, but they took the actual rental and they said: "If we do capitalise that rental at such a rate, it would represent a value of so much", so under the assessment the two approaches are concerned; while Mr. Justice Casey says, first of all, that he was not concerned at all with the replacement

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value, omitting that factual feature of valuation, and I have respectfully submitted it is essential to have actual value, and then instead of taking purely and simply the actual income he adopts that doctrine of the prudent investor.

LORD ASQUITH: Mr. Justice Casey thinks that the Board of Revision and Mr. Vernot both went wrong in principle.

MR BEAULIEU: Yes.

LORD ASQUITH: And the Chief Justice agrees with Mr. Justice Casey on that point. He may have been wrong or right, but that is the line they take, is not it ?

MR BEAULIEU: There is no question of that, my Lord.

LORD PORTER: Just before you finish with Section 384, what is the meaning in line 6 of "rental value". What influence has rental value got upon the assessment in Montreal ?

MR BEAULIEU: Rental value, my Lord, concerns the water tax and the business tax.

LORD PORTER: Yes, but it is the only value mentioned, is not it. I suppose it is merely a method of calculating when an appeal lies ?

MR BEAULIEU: Yes, my Lord.

LORD PORTER: I suppose that is so, yes.

MR BEAULIEU: But it has nothing to do with the real estate tax.

LORD NORMAND: There is one phrase in the last paragraph of Section 384 which might, perhaps, be worth consideration. It is the direction to the Superior Judge to proceed with the revision of the valuation.

MR BEAULIEU: Yes.

LORD NORMAND: In the context I am not saying it has this meaning, but if it stood alone it would suggest that he had a duty to review all valuations submitted to him.

MR BEAULIEU: My submission is that he is directed to review as a Court of Appeal does. Of course, the Court of Appeal, strictly speaking, can review all the findings of fact of the trial Judge, but the Court of Appeal themselves have laid down the rule that they will not interfere in findings of fact unless there is grave injustice or great difference. I might say, the Court of Appeal themselves have created that jurisprudence, and if it is true that the actual values are fact, then we are saying that these principles should be applied, and if there is no other fact of law, it is sufficient. Generally speaking, the Court of Appeal under our law are entitled to intervene in every finding, fact or law, but they have restricted themselves not to interfere with findings of fact unless there is a gross error, and I think that has been consistently held by our Courts, more particularly in questions of assessment because not only is an assessment a question of fact, but it is also a fundamental principle of the municipal government and again, my Lords, our Courts are unanimous that there is no interference

in municipal administration unless there is some breach of law or gross injustice. It is a general principle applied by the Court to the Court itself.

LORD PORTER: This principle as you have expounded it, is similar to an appeal in the Court of Appeal in England in respect of an appeal from a jury. What you ask is, could twelve reasonable men have arrived at that decision. Even if you differ very much yourself from what they have found you do not interfere with them unless twelve reasonable men could not have arrived at that result. I do not say that you go as far as that because we do not go as far as that when we are dealing with an appeal from a judge, but that is the kind of principle you have in your mind.

MR BEAULIEU: In our Courts the Judge sits without a jury, he is acting as a judge and a jury. It is different in France where there are appeals only on questions of law, but we have adopted the British practice of giving an appeal of fact as well as in law, but with the restriction imposed by the Court of Appeal themselves.

LORD ASQUITH: In this Country the principle which you have been citing has been laid down in respect of all appeals on quantum for damages from a judge sitting alone. It is exactly the same principle, namely, that unless there is an error of law or something has been taken into account which ought not or left out of account which ought to have been taken into account, or unless the result is so grotesquely high a figure or so grotesquely low a figure that it cannot be right, the Court of Appeal will not substitute its own judgment Outside the sphere of damages and that type of sphere the Court of Appeal in this Country is perfectly free to reverse so long as it pays due attention to the fact that the trial judge has seen the witnesses and heard them.

MR BEAULIEU: Yes. Now, my Lords, if we apply these principles to the present case, I respectfully submit first that no wrong principle was applied, the assessor not only had the right, but had the duty under our jurisprudence to take into consideration the two factors of commercial value and replacement value. If I understand our jurisprudence correctly, that is the tenor of such jurisprudence and I submit, my Lords, that the very words "actual value" mean that. "Actual value" means the value resulting from the consideration of every factual element of value and these are factual elements of value. Moreover, I submit that in a system of assessment such as our system based upon the capital value it is most logical to give a preponderant influence to the replacement value because, after all, it is the actual cost less depreciation and I submit, my Lords, that in considering actual value the original cost less depreciation is a preponderant element. Even if there was no mention to that effect in the memorandum I submit, respectfully, that from the logical principle resulting from our jurisprudence that preponderance should be given to the replacement value and, of course, if it is so, I submit that even if the assessors wrongly thought that they were bound by the memorandum, the result would have been the same and it is, after all, the result only that can count.

Then, the next point is to know whether, if there was no error in law, there was some gross injustice. Now, it is true, my Lords, and I refer your Lordships to that

remark of Mr. Justice Taschereau at volume 5, page 1174, line 35: "In coming to this conclusion I have kept in mind that it is not the function of a court of appeal to disturb the valuations made by assessors. But in certain cases it is its duty to do so, particularly when the assessors have proceeded on a wrong principle, and when there is a manifest injustice. Here in refusing to allow an additional 14 per cent. for extra unnecessary costs, and in giving a disproportionate consideration to the replacement value, they justified this Court to interfere".

I respectfully submit that these remarks do not show that the assessor adopted wrong principles of law because Mr. Justice Taschereau himself says in his remarks that there were only two possible approaches in the present case, replacement value and commercial value, but what he means, I suggest, is that by giving too large a percentage to the replacement value the assessor committed an injustice. My submission is that the percentage to be given is a pure question of fact and that, moreover, it is hard to conceive that there was a grave injustice committed against a respondent when we are first considering that, after all, the assessment is $14,000,000 for a building which cost $22,000,000, and this is the admission, and, moreover, the assessment is only $14,000,000, while on the other hand the company itself valued its own property at over $16,000,000, and that appears from the admissions, Schedule F.

LORD PORTER: We remember, I do not think you need worry to look at that.

MR BEAULIEU: I just wanted to point out to your Lordships that the market value has not been purely and simply the repetition of the book value. That is on page X.

LORD PORTER: That is volume 1 ?

MR BEAULIEU: Because there are divergencies. Sometimes they adopt a figure for the book value and another figure for the market value showing that they have seriously pondered and weighed the two values together and knowing that they were giving statements under oath we can assume that they were not given lightly and, consequently, we must on the contrary assume that they weighed the various figures and it was their deliberate opinion which they gave under oath when they made the statement.

LORD PORTER: I follow your observations. I do not know what volume 1, page 10, has to do with it.

MR BEAULIEU: Page 10 is Schedule A. I am referring to Schedule F, my Lord, it is page 19. We can see that in the beginning when there was not much money invested the company did conside that market value and book value was the same, but from the date when the most important expenditures were made, 1931 and 1932, there is a large difference between the two figures. For instance, we have in 1930 $17,000,000 for the book value, only $14,000,000 for the market value and in the next year, 1931, we have $20,000,000 for the book value and $17,000,000 only for the market value, and so forth. So, my respectful contention is that we cannot take these figures concerning market value as purely and simply book entries. First of all, they were to be given in official documents

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and second it shows, my Lords, that by these figures the company weighed carefully what represented the book value and what represented the market value. So, if we have the fact of an assessment of $14,000,000 when in the opinion of the company the market value of the building was 16½ million dollars, it is hard to conceive, I submit respectfully, that there was gross injustice in fixing that assessment.

LORD ASQUITH: What is meant by the book value; it is not just the de facto cost, is it, because after a certain point, in 1936, it declines.

MR BEAULIEU: I understand that by "book value" they purely and simply consider the actual expense less what they consider what were useless and should not be taken into consideration for their bookkeeping.

LORD PORTER: You do not really know whether it is depreciation or whether it is writing down somet hing because of the type of building.

MR BEAULIEU: No, I have no evidence of that.

LORD ASQUITH: They marked down $4,000,000 between the years 1936 and 1937. The book value goes down from $21,000,000 odd to $17,000,000 odd. We do not know what the explanation of that is. Something has been written off, I suppose, as useless.

MR BEAULIEU: No. I am putting these figures before your Lordships to show it was not purely and simply a book entry but it was the considered opinion of the company so that a valuation of $14,000,000, which is 2½ million dollars approximately less than the book value fixed by the company and it was $3,000,000 less than the actual cost, does not seem, prima facie at least, a serious injustice to the Respondents. We might really submit, my Lords, that this Respondent has been given every possible concession and the assessors have shown very good faith by making all deductions that could possibly be thought of. We have, first of all, the fact that the Board of Revision although giving it a figure $800,000 higher than the assessors, finally adopted the figures of the assessors. We have the second fact that the land which had cost over $1,000,000 was assessed by consent at $800,000. Then, we have the deductions made for the side walks which, after all, were built by the company and form part of the building, over $70,000,000, and then we have the deduction of the temporary partition and we have the deduction of the old walls which were destroyed, and that amounted to practically a million and a half dollars.

Now, my Lords, when it came to taking the index costs, instead of taking the index costs of 1931 which were higher, the assessors were agreeable to take purely and simply the index costs of 1939 and 1940 and finally in the actual cost nothing was included for interest during construction or for taxes, and that again amounted to about $2,000,000. So, it is our respectful submission that there was no injustice; that, on the contrary all every possible concessions were made and, secondly, that there was no error in law by adopting the two factors of valuation which have formed the basis of this appeal. For these reasons, my Lords ----

LORD PORTER: Just before you finish, you told us that interest, and I follow that, had not been taken into account, but also taxes had not been taken into account. Why should you

take taxes on a building into account as forming part of its value ?

MR BEAULIEU: Well, my Lord, when we come to the assessment upon reproduction cost it is generally admitted that interest during construction should be considered.

LORD PORTER: Interest I did not ask you about, and interest I follow. What I am asking about is taxes.

MR BEAULIEU: As to taxes, opinions are divided, my Lord. Some say that taxes also should be taken into consideration; I am speaking of opinions in, I would say, the Canadian jurisprudence which has been on some points at least following the American jurisprudence. Taxes is a matter of discretion; interest during ~~discussion~~ construction is generally considered as being part of the reproduction cost and interest at 5 per cent. would mean $700,000 and as to taxes it means $61,000. My respectful submission, therefore, my Lords, is that this appeal should be allowed.

LORD PORTER: I am much obliged. Mr. Parent, have you anything to add ?

MR PARENT: There is nothing I desire to add, my Lords.

LORD PORTER: Very well. Then, Mr. Brais.

MR BRAIS: My Lords, I had proposed first to apply myself to a statement of the law of the Province as regards valuations, the law as it existed when this valuation was conceived and made and then to examine with the aid of a rather useful book which is published by the City of Montreal exactly what should have been done, and subsequently to return to point out to this Court certain matters in the evidence which, in our opinion, bear a considerable importance, but a subsidiary importance only in the case, but in view of the question of my Lord Porter this morning with reference to the destination of the building, I think it might be useful if I immediately clarify this point, what this building was conceived of as and what it is today, quoad the owners. That is found, my Lords, in Mr. McAuslane's evidence in Volume 2, page 218 at line 43, and that is the only portion of the evidence which I will consider before we go into the problems of law which I would wish to submit. "By Mr. Hansard. (Q) Let us take the question of the company of space in the building by the Sun Life Company. Will you produce this graph as Exhibit P.24 ? (A) Yes, Sir. According to my opinion, and the opinion of the various people in the Sun Life who should know, there is no likelihood of the Sun Life staff increasing. That condition is not peculiar to our company, it applies to all large insurance companies at the present time. It is a condition that has been apparent for a number of years. On the question of expansion, it just won't be as far as anyone can see for some years to come".

If I stress that here it is because the assessors and the Board laboured continuously that this building had been built to house the whole of the Sun Life staff and it was only temporary that the Sun Life was occupying only a portion, occupying, as a matter of fact, less than one-half of the building and they are going to occupy less and less as time goes on. Then: "(Q) On the question of occupancy by the Sun Life of its own building. You show me a statement

which I would ask you to produce as Exhibit P.25, giving percentage from the year 1938 to date. Would you explain that, please ? (A) You will notice that as in the case of the staff that our occupancy has been decreasing. In 1941 it was approximately half the entire space of the building -- the entire rentable space. Since then it has gone down. In March of this year it was 48.25 per cent. By Mr. Seguin: (Q) I am objecting to all reference after December 1st, 1941. That was when the assessment was made".

He is quite right in the objection, my Lords, but if we take taxes on the basis that in future years, in generations to come, we will occupy the whole building, on a problemmatical basis, we are certainly entitled to show that even after the assessment our occupation went down. Then, Mr. Geoffrion, K.C.: "(Q) My point is, if this is incidental, temporary, the conditions of the trend is material. (The Witness) At the present time considerable of our people have gone. They have been replaced to a large extent by people who are not permanent employees and will not remain. Basically, what we are interested in is the number of people we got and the amount of space required to do the business. If we don't need the space we don't use it. (By Mr. Hansard): (Q) Do your remarks with respect to the trend of the number of employees of head office for the future apply as well to the occupancy of the building by the company ? (A) Yes, they do. (Q) Would you just explain to the Board what the original intentions as to the occupancy of this building by the company were, and what are the present prospects in that regard ? (A) As already stated, the intentio was that this company would finally occupy the entire building. However, it was to be occupied as an office building. By Mr. St. Pierre, K.C.: (Q) And was built for that purpose ? (A) Oh yes, as an office building. It was intended to be occupied as an office building. It has now been found that we do not want all that space and we are renting all we can find tenants for. It is quite apparent that the space we have is worth while to other companies also. There is nothing particularly peculiar about the Sun Life space that does not render it worth while for others. It is a commercial building and is being used as such. We have a number of tenants occupying more than one floor -- one floor and more. One is occupying several floors; one two; and others one" -- that is the whole floors in the building -- "It is the same kind of space as the others, and they are occupying it as office space. We have at present one indication of the trend we expect, and that is at present we have two possibilities of renting, which are restricted on the ground of not getting priorities for certain things. The possibilities are of renting two different floors to different people. The lease is for ten years in one case. We do not anticipate using that space or we would not enter into a lease for that space. (Q) Would you tell the Board whether there is any difference as office space in the space occupied by the tenants and the space occupied by the Sun Life Company ? (A) A few years ago, included in the figures I already gave, we occupied from the eighth floor downwards -- from the ground floor to the eighth inclusive. Since then, we have released the eighth, a good part of the seventh, and a good part of the sixth, and a good part of the fourth. I mean particularly the seventh and sixth floors. The sixth was intended as a cafeteria, one-half of which is being used as such. The other half -- the west side is exactly like the east -- is rented to a tenant and is being used as office space".

That was Military District No. 4 which was in there. It was an immense floor. One half was converted into a cafeteria for the company's employees. The company charged itself full rent for that half. The other half, which was also meant for their cafeteria, has simply been rented to tenants.

The evidence continues: "Similarly, on the seventh floor we had two places, one to be used as a billiard room and one as a men's lunch room, and presumably might be figured for special purposes. We took out the billiard tables and rented all as office space with a minimum of expense. And always with the expense of putting in adequate equipment to take care of adequate modern lighting, which we do not have in the Sun Life space." — I will come back to that later on.

"(Q) There is still some vacant unfinished space in the building? (A) Yes. (Q) Will you tell the Board whether, if and when that space is finished, it will be for occupancy by the Sun Life or by tenants? (A) It will be all for occupancy by tenants. One other thing. At the beginning when the building was built, it was figured out by someone that the population of that building, for the Sun Life I suppose, would be ten thousand people." That is the capacity for the building. That is the reason for the corridors, the lavatories, the vast space and the wide stairways, because it was built for 10,000 people, that is, the anticipated Sun Life staff.

"The population of the building approximately ninety per cent complete is some forty-four hundred to forty-five hundred people. If you add the other ten per cent it would be five thousand".

LORD PORTER: 10 per cent. means when the building is totally complete.

MR BRAIS: Yes, totally complete. "(Q) The population of the building? (A) When complete will be in the vicinity of five thousand. (Q) The population you speak of is both Sun Life and tenants? (A) Yes. The final population will be in the vicinity of five thousand. As I said, the services, I refer particularly to elevators and washrooms, were laid out for ten thousand people. The merest look at the space will show that we don't need the washrooms we have, and do not use them. That accounts inpart for the wide discrepancy in rateable space as against any other building of good calibre. (By Mr. Geoffrion, K.C.): (Q) What about space reserved for elevators? (A) They are not there, the space is there. The shafts are there. (Q) Doing nothing? (A) No. Just lying there."

There was a time when the management did call a halt to the fantastic spending which had been going on in the erection of this building. As we will see as we proceed certain things were done; I think pride took control and the great market of 1929, which is referred to in the evidence, is a factor; the earnings of the world, it was thought, were never going to stop, but they did.

May I now refer to Exhibit P.24, in volume IV, page 679. It is a photostat which shows graphically the staff totals. On August 14th, 1930, the total staff employed by the Sun Life was 2,774 with the graph mounting at an almost perpendicular rate. Then if we go from the peak in August, 1930, and come down to March, 1943, it has fallen to 1,505 employees, when we should have according to the planning 10,000 employees in the building at that time working with the Sun Life Company, doing the insurance policy work, the stenographic work, the

research work, the actuarial work and so forth in ordinary office space.

If I have brought that in now it is to show that the conception of this building was one thing and its resultant utility to the Sun Life was another. Although we have been very chary in applying the correct description to it which has been applied by this Court, the word which has been used by this Court -- I think I can apply it -- is that in so far as the Sun Life is concerned, as a building for the purpose for which it was conceived this building is totally and completely a white elephant. The Sun Life is doing as much as it can to recoup as much of the loss as it can by renting out this excellent office space to its tenants; but none the less the fact remains that it has 1,500 employees when it expected to have 10,000 employees. In a building in an industry of this nature everybody comes in at the same time and everybody goes out at the same time; they go out to lunch at the same time and they go out for their coffee or tea break at the same time. Therefore the corridors were installed in that building on a scale which was quite unnecessary for ordinary tenants who go in and out piecemeal.

LORD OAKSEY: You have told us that they expected a staff of 10,000, and we see from the graph that there were 2,774 in 1930; but it had been building since 1913. Had they been expecting to have 10,000 employees all that time?

MR BRAIS: The Sun Life Company expanded very rapidly.

LORD OAKSEY: I am suggesting they did not expand very rapidly because from 1913 to 1930, which is 17 years, they had only reached 2,774 during all that time.

MR BRAIS: That is a considerable number of employees, and it had for the last five years been going forward very rapidly. The explanation is given that from 1925 to 1930 the staff had more than doubled; that is, in five years the staff had more than doubled. An insurance company which doubles its staff is progressing at a rather phenomenal rate. It is completely unusual. It had certain very advantageous points in its management and its policies, and it did go forward very rapidly. It is explained in the evidence that having crowded out two successive buildings they made up their mind before 1930 -- in fact in 1927 -- to build a building which was to house the complete staff of the Sun Life as it was contemplated to the extent to which it would develop.

LORD PORTER: I thought the sort of problem which you were facing or which you contend you were facing was this: This was a gradual development up till about the year 1927. Then boom conditions began to exist, particularly in the United States and in Canada. Thereupon the Sun Life, like a considerable number of other bodies of the same kind, became very optimistic as to how long the boom was going on, and decided to build a very large building. Then came the crash in 1929 and 1930, and that scheme had to be abandoned. Is that the kind of problem you are putting to us?

MR BRAIS: The occupancy was reduced: (a) on account of the crash, to some extent, and (b) on account of the fact that all insurance companies began to realise that you could not centralise all your departments in one city and in one building.

MR PORTER: Who says that?

MR BRAIS: I think we come to it in the evidence of Macaulay in Volume 2, page 212, line 30. It is not only in the evidence. The Board of Revision stress very strongly the fact that this building was conceived and built for the total occupancy of the Sun Life. We have the evidence of Macaulay at page 212, line 30, which is as follows: "(Q) Now, we have heard about the Sun Life Building being designed as an office building to house the head office staff of the Company. Have you anything to say about that? (A) Well, at the time that the design of the building was being undertsken the company was growing at a very high rate. The staff was increasing very rapidly. The actual figures will be given by another witness, and consequently it was anticipated that eventually the company's Head Office would require a building of the approximate proportions of the present building. Consequently the building was designed with the object in view of its being used for offices for the Head Office Staff and rented to tenants, with the idea always in the back of the designer's mind that eventually it would probably become one hundred per cent. occupied by the Sun Life. It is not necessary for me to tell you that that situation has not developed. The trend in the last eleven years has been continually downward in numbers of company staff; so that at the time the designs were made the population curve was of a very steep upward trend, and which was offset and the population curve is now going downward. The occupancy has more or less followed that curve.

"(Q) Are you able to say whether this is a temporary situation at the present time, or what are the prospects? (A) Well, the trend shows no indication of being advanced. There are various causes, with which I won't worry the Court by attempting to discuss them. Actually, I can see no prospects in my lifetime or the lifetime of that building, of that building being wholly used by the Sun Life Company for the housing of the Sun Life Staff." So far decentralisation is not dealt with there.

LORD PORTER: Decentralisation is not there at the moment.

MR BRAIS: May I refer you to volume 2, page 215, line 39. "By the Board: (Q) You were not centralising any more? (A) There were several reasons. Change of policy, and such like." Centralisation had been dealt with previous to that, but it is referred to there, and shows there that it has been given in evidence.

LORD PORTER: Somewhere or other, whatever the effect is, I remember seeing the statement which you made to us. It appears somewhere in the evidence that the modern trend is towards decentralisation. I do not remember where it was, but perhaps somebody will tell us later.

MR BRAIS: I will have that looked up. I know it is in the evidence, and it has been referred to by Mr Justice Mackinnon.

LORD PORTER: It does not matter about looking it up now; it can be given to us later.

MR BRAIS: That is in the evidence. It is referred to by the President in his question, because he has already had that evidence. I thought I would draw that portion of the evidence to the attention of your Lordships in opening, because that has had a great deal to do with the situation of the Sun Life. That is the position the Sun Life takes to-day. On account of the fact that it is not using and cannot use the building, and is being charged with taxes as though it were using the whole of the building, presents a state of affairs which goes to the

very core of that important matter, which is the exchange value, which has been discussed at length in the jurisprudence.

I do not and I cannot subscribe to the suggestion made by my learned friend that you get exchange value by proceeding arithmetically to take replacement cost and then to take commercial value and blending them by the use of arithmetical figures in pursuance of any formula anywhere in the world and certainly not in the jurisprudence of the Province of Quebec. I have gone through all the jurisprudence exhaustively. It has never been done that way. No hard and fast formula has ever been applied to any building and, as required by the law in all other cases, the matter was left to the discretion of the valuers. In the case of all other buildings that could possibly be affected by this formula the method of arriving at the replacement value was one which was entirely different from the one applied to the Sun Life Building.

My learned friend does not subscribe to what has been decided by all courts, that actual value is exchange value, and that exchange value is arrived at by allowing the assessor the privilege of weighing the elements which have to be taken into account and to do that in an unfettered fashion. I do not suggest for one moment that because we were assessed at 14 millions, or 10 millions, or 8 millions, that that might not be the correct valuation, but in creating a formula which in its application to us resulted in the figure in question, the formula itself in its application shows, first, that the assessor could not apply a proper consideration to our building, and secondly, by using that formula he had to come to a wrong figure; thirdly -- and I re-state the argument -- so far as anybody is able to see we are the only building to which this formula was applied.

As regards real value being exchange value, there is the decision that has already been quoted in the case of Lord Advocate v. Earl of Hopetoun, 18 Court of Sessions, page 397. I quote from the judgment of the learned judge, Lord Kinloch, at page 403: "But I think that 'value' when it occurs in a contract has a perfectly definite and known meaning, unless there be something in the contract itself to suggest a meaning different from the ordinary meaning. It means exchange value, the price which the subject will bring when exposed to the test of competition." I should say immediately in relation to the expression "exposed to the test of competition", that I will consider the owner of the building as one of the possible bidders in that competition.

LORD REID: In that respect if you are having a competition the rise stops when the second top man reaches his limit. Do you say that in assessing you have got to imagine what the next most interested person besides the owner would run him up to, or do you say you have got to imagine circumstances in which the owner would be forced up to his limit?

MR BRAIS: No. The owner is competing. Take the case which was suggested to me the other day. We have in the Province of Quebec many 99-year leases. At the end of 99 years the owner has built on that property, and you have a similar position in England where buildings are so constructed. In that year the owner of that building wants to buy in that building. Supposing it is a 30-years' lease, the owner of the land on which that building stands is also interested. He will weigh with the owner, or he will place the property to auction with a reserve price. He will not have to sell it. The owner of the land can bid his building in; but there will come a time when

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the owner of the building itself will have reached a price where the owner of the land will say to himself: "I have no more interest in that building in the condition in which it is because I cannot go out and build that building and put it back, replacing it, and so forth; it is not worth to me more than a certain amount." Here is a perfectly willing vendor anxious to buy that building in if there is 10 dollars' profit by way of rent or capital to be made out of it. The owner of the building is in it, but I want to buy that building and buy the land on which the building stands, which means with the building. He has the incentive to go as high as he reasonably can go to with the value of the building as it stands. There you have the higgling of the market in the way which so often happens, the higgling of the owner who wants to preserve his property, but he will not go beyond what it is reasonably worth, and he will not go beyond what the other person is prepared to give to have the land and building belonging to him.

LORD PORTER: I am not sure about your last sentence. I think one of the difficulties is this question of the reserve price. The owner going into the market might say: "Quite true I am going into the market, but I am not prepared to let my property go under a certain price". That price does not necessarily stop where somebody bids against him. That is the kind of problem which always creates a difficulty where you are dealing with questions of value or rental value. It is a difficult problem.

MR BRAISE: Yes, it is a difficult problem. Probably I have stopped too soon. When the person who is bidding against him ceases to bid then the owner makes a further bid and obtains the property.

LORD PORTER: That may not go far enough. I am not sure that the proper way to regard it is not this. Supposing the property belongs to a third person altogether, and then you have the owner and everybody else bidding except the owner of the property, you would then get to a stage when you might get all bidding ceasing except that of the person who really wanted to occupy it.

MR BRAIS: I prefer that formula because it will cost me less money.

LORD PORTER: Then you might get to the stage of the imaginary owner of the property saying: "That is all very well, but I am not going to sell except at a higher price than the person who really wanted it is prepared to pay" -- because the imaginary owner, the person taken out from ownership, may say: "It is worth my while to give so much more for this building". That to my mind is a difficult problem.

MR BRAIS: With due deference I think we have there lost sight of the fact that the whole theory is predicated on the thought that the owner wants to sell.

LORD PORTER: Certainly.

MR BRAIS: He has abandoned the desire to use it which is attributed so often to the owner whenever this theory is advanced. He wants to sell. He does not have to sell. He is out to make the best bargain possible. If there is any sacrifice price mentioned to him not commensurate with the value of the building, he does not sell. To put it as it was put in one of the judgments, it is predicated on the thought that the person who is going to sell wants to sell but is not going to sacrifice the property. We go through these judgments one after another, and there is never any exception to that. You must start with

a man who wants to sell; he does not want to keep the property any more; but he is fully capable of holding that property until he can find a suitable buyer to get every last cent.

LORD OAKSEY: You do not always have to take into account the owner who wants to sell. He may not want to sell. He may want to keep the property for himself. That may lead to a very much higher valuation.

MR BRAIS: It cannot, my Lord, because when you do that you run into what has been said in the Banbury case; it is what you have taken into account by all the assessors. When you consider in this imaginary market an owner who does not have to sell, and if you assess him on the basis that he will not sell, then you are applying what Lord Halsbury once called the blackmail argument. We have it in the case of The Great Central Railway Company v. Banbury Union, and Sheffield Union v. The Great Central Railway Company, which was a decision of the House of Lords.

LORD OAKSEY: There will be a price at which he will sell, and the question is whether there is any buyer at that price.

MR BRAIS: If the owner does not want to sell -----

LORD OAKSEY: I do not say he does not want to sell for anything. Of course there are people who will hold their property whatever the price which is bid for it, but there are other people who will sell at an extreme price if there is a buyer. It happens every day. Properties are not always sold at auctions. They are being sold all over the country every day. People go and make bids for them. The owner holds out for a very high price, a price which is far above the replacement value, possibly, but he may get a particularly attractive bid for his property. He may have an attractive property, and he may get a bid for that property. It is happening all over England at the moment.

MR BRAIS: He may have a property; he may like it, and he may not want to sell that property.

LORD OASKEY: But he is tempted.

MR BRAIS: Temptation is another thing. My answer to your Lordship's observations is this: Under those circumstances you cannot apply the willing buyer and willing seller formula because the property is not on the market. Let me give an example. I buy a property that I like, and some trust company or somebody else is commissioned to buy that property. They come to me and say: "Put a price on the property". I say: "No. I have bought this property to live in, and I like it. I will not sell it".

LORD OAKSEY: If they want it they will bid you for it.

MR BRAIS: But my property is not on the market.

LORD OAKSEY: What has that got to do with value?

MR BRAIS: With respect, it matters a great deal if you are going to apply the willing buyer and willing seller formula.

LORD PORTER: Your answer is, I think, that in this case you are applying the unwilling seller and the willing buyer formula.

MR BRAIS: Certainly, my Lord.

LORD OAKSEY: He is not the willing seller at first, but he becomes a willing seller when he consents to the sale.

MR BRAIS: I am the seller who has just been bought out, who is ashamed to refuse the price, who has made a fantastically good bargain; that is my position there as I see it. If what I have said is not the application of the formula, there is nothing more I can add to it.

LORD OAKSEY: Then it comes to this, that you cannot find the actual value of such premises.

MR BRAIS: When the vendor does not want to sell?

LORD OAKSEY: Yes.

MR BRAIS: Most assuredly. That is why the formula has been found and has been applied in all these cases, because it is not fair to the taxpayer to assess him on the basis of the amount of money that he would require to be dispossessed of his property. He has his house. He has a house in the countryside; he has an estate in the countryside. He has business premises in town which bear his name and to which a certain amount of pride, and it may be pride going back for a long while, attaches. Those are things which have no value; they cannot enter into the valuation to inflate it to an unreasonable extent. It is for that reason that it is for the assessors to apply their mind, putting aside the fact that the owner does not want to sell and considering what he would get if he did want to sell and did put it on the market and as a prudent man held it until he got the best sort of price that he could get, not to another individual who had the same bug, if I may use that expression, as the individual who does not want to sell, that is, an individual who wants the property at any price, but to an individual who wants to buy the property.

LORD PORTER: Let me see if you accept this illustration: Assume a property would in an auction get the price of £5,000 but the owner will not let it go at under £10,000. Eventually he finds somebody who so admires that property that he will give £10,000 for it. Then comes the question whether, when you are assessing that property, you should assess it at £10,000 or assess it at £5,000.

MR BRAIS: It gets £10,000 because the vendor has been fortunate enough to find somebody who wanted that property at any price. If that is the formula which is to be used, then that does not create the market value of that property. I agree that that leaves a great difficulty in finding what the correct price is, but you cannot get it unless you apply your mind to that and eliminate completely from the picture the fact that the vendor at that moment does not want to sell. I cannot add more to that, because otherwise my own property and the property of lots of other people who own property where they live would be assessed at three times the price they are being assessed at now.

LORD ASQUITH: I think it is a little confusing to talk about willing sellers and willing buyers, and unwilling sellers and unwilling buyers, in the abstract, because it is all relevant to the price. Every seller is willing to sell if he can get enough; every buyer is willing to buy if he has to pay little enough. The word "willing" means willing at a particular price and is really quite meaningless apart from that.

MR BRAIS: Yes; it is a price which has to be arrived at.

LORD PORTER: Is not the same difficulty present when you are considering "the reasonable man"? Taking the reasonable buyer and the reasonable seller, then you do not get into questions of a particular peculiar buyer or seller.

LORD ASQUITH: Yes; I agree. This is an abstract position.

MR BRAIS: May I read from the case of Great Central Railway Company v. Banbury Union and Sheffield Union v. Great Central Railway Company, reported in 1909 Appeal Cases, page 78. At page 94 Lord Dunedin says: "And here I must pause for a moment to say that I respectfully differ from the view as to competition expressed by Lord Justice Vaughan Williams in the Appeal Court in this case. I recognize the authority of the London School Board case and of the Erith Sewer Works case. They seem to me to fix conclusively that rateable value is not destroyed either because (1) there is no profit de facto derived from the land, or (2) the occupants were disabled from making profits, or (3) there is no one in the world, except the actual occupant, who, if the land as occupied were given up, would have any possible use for it. But while they thus settle that the absence of all possible competition does not destroy the value of a subject, they do not seem to me for one moment to infringe the proposition that the existence of competition may enhance the value of a subject. It seems to me, therefore, that where there is the fact of possible competition and evidence of what the competitors might give, the assessors may well base on that the sum that would be given by the hypothetical tenant, and that such evidence was seemingly available in the three cases I have mentioned. The Cannock case, I admit, cannot be so explained. No actual assessment was confirmed, and what was the ultimate position of the case I do not know.

"Where, however, there is no extrinsic evidence available, and the assessors have nothing to go by except the actual occupant's own experience, how is the inquiry to be conducted? We have been told what is called the ordinary way, which has been described by the Lord Chancellor. I confess that if there is no other evidence the matter seems to me here to end. I entirely agree with the remarks of the Lord Chancellor in this matter. The assessing authority cannot, I think, be heard to say, 'All your Great Western through traffic is dependent on this piece of line; therefore it has an enhanced value because you could not do without it.' The same might be said as regards each and every isolated mile of line over which the through traffic goes. It is really what Lord Halsbury in one of the cases calls the blackmailing argument." In that case the suggestion was: "You cannot do without that piece of line", and here the corresponding position would be that the Sun Life cannot do without that building.

"You may spoil the ship for want of a pennyworth of tar. A prudent shipowner would pay a great deal not to spil the ship. Yet to the hypothetical buyer the value of the tar still remains a penny. Nor do I think this consideration is altered by the fact that this portion of the line may have been made last. Indeed, though you may certainly take the existing occupant as one of the possible takers, and as thus, so to speak, competing with the hypothetical tenant, I am not satisfied that you are entitled to assume that the existing occupier is to be hampered by each and every one of his present conditions. I think that is what Mr Justice Mellor meant in the Llantrissant case when he said, 'Some difficulties have been introduced by confusing the hypothetical tenant with the actual tenant; it is not because a particular tenant will give a large sum as rent that that is any criterion of the rateable value.'"

I think that this judgment is what is cited in our

jurisprudence as governing on this matter. It is the basic decision which has often been cited in the Province of Quebec and, if anything outside the jurisprudence of Quebec tells you how to arrive at a value, we have it in that case.

LORD REID: Can you tell me how in your jurisprudence you determine Lord Dunedin's third case, when there is no one in the world except the actual occupant who could have any possible use for it if the land which was occupied was given up by the occupant. How do you determine the value of such land according to your jurisprudence?

MR BRAIS: I do not want to avoid your Lordship's question, but I will say first of all that that does not enter into account in this particular case.

LORD REID: I follow that.

MR BRAIS: It does not enter into account in the establishment of the principle which we have from Lord Dunedin when he quotes from the other decision, but if we consider the position of a piece of land for which there is no other possible use, then you have the decision of the Supreme Court of Canada in the case which has been cited previously, the Montreal Island Power Company v. The Town of Laval des Rapides case. In that case there was a piece of land which was more closely in the condition which your Lordship has in mind than in this railroad case, because it was land which had been flooded by the Power Company in order to have a greater head of water for its dam and its water power. In that decision of the Supreme Court of Canada we have the finding of Chief Justice Duff which I think answers the point. That case is reported in 1935 Supreme Court Reports, page 304.

LORD PORTER: This is a case where they sought to say: This is useful as building land. The Court said the difficulty of that was the fact of the flooding.

MR BRAIS: The land in that case was the same sort of land as is postulated in the question which is put to me by my Lord Reid.

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Chief Justice Duff says at page 305: "I do not find it necessary to dissent from the judgment upon which my colleague have agreed. The amount involved is insignificant and although, I humbly think, we should follow the logical course by referring back the question of value with instructions as to the principles upon which that value is to be ascertained in accordance with the views I am about to express, still, I think, it is really a case of de minimis and that, whatever the result of such a reference, the pecuniary advantage to the appellants would be merely negligible. I wish to make it very clear, however, that I disagree with the principles upon which the majority of the court proceeds. We have to apply a statute of the legislature of Quebec. That statute lays upon the assessor a duty which is defined in sections 485 and 488 of The Cities and Towns Act. Those sections are in these words".

Although Chief Justice Duff was dissenting in his reasons for judgment, the Supreme Court of Canada has subsequently approved of his judgment by a judgment where in toto they have gone back to it as the establishment of the principle of valuation in Canada.

LORD PORTER: Do you remember where it was confirmed in the Supreme Court?

MR. BRAIS: Subsequently it was referred to in the Supreme Court.

LORD PORTER: I thought you said it was confirmed. As I follow in that particular case the majority of the Judges really said in answer to the question which my Lord has asked you: "We do not know"; but in order to get rid of the difficulties in the case they said: "We will take half of what it was assessed at"; but they apparently established no principle at all. However, as I understand Chief Justice Duff he did establish a principle and his principle has now been confirmed by the Supreme Court of Canada.

MR. BRAIS: This was in the Supreme Court. Sir Lyman Duff was a Judge there.

LORD PORTER: Then another Supreme Court, acting afterwards, went back to it. I think it is probable -- you will tell me if this is right -- that no principle was laid down by the majority in that case, but Sir Lyman did lay down a principle and they said: "We think that that principle was right".

MR. BRAIS:"And should henceforth be followed and we think it is right".

LORD REID: What was the principle?

MR. BRAIS; I am about to read that, my Lord. His Lordship refers to sections 485 and 488 of the Cities and Towns Act. I will read those sections: "485. The assessors shall each year, at the time and in the manner ordered by the council, assess the taxble property of the municipality, according to its real value. 488. The actual value of the real estate in the municipality assessable for purposes of taxation shall comprise lands and buildings, workshops and machinery and their accessorie thereon erected, and all the improvements made thereto."

His Lordship then says: "Obviously 'real value' and 'actual value' are regarded by the legislature as convertible expressions. The construction of these phrases does not, I think, present any difficulty. The meaning of 'actual value', when used in a legal instrument, subject, of course, to any controlling

context, is indicated by the following passage from the judgment of Lord MacLaren in Lord Advocate v. Earl of Home." Then there are the words which I read from the previous judgment: "Now the word 'value' may have different meanings, like many other words in common use, according as it is used in pure literature, or in a business communication or in conversation. But I think that 'value' when it occurs in a contract has a perfectly definite and known meaning unless there be something in the contract itself to suggest a meaning different from the ordinary meaning. It means exchangeable value -- the price which the subject will bring when exposed to the test of competition."

Sir Lyman Duff continues: "When used for the purpose of defining the valuation of property, for taxation purposes, the courts have, in this country, and, generally speaking, on this continent, accepted this view of the term 'value'." That is the English view or the Scotch view.

LORD REID: It is perhaps the same.

MR. BRAIS: Then his Lordship goes on at page 306: "In Grierson v. Edmonton, Sir Charles Fitzpatrick with, I think, the concurrence of all the members of the Court, used these words: 'Speaking generally the intrinsic value of a piece of property must necessarily be the price which it will command in the open market and the local Judge sitting in appeal with his knowledge and experience in ascertaining the price of real estate within his jurisdiction would, under normal conditions, be in a better position to judge of the value of such property than I can assume to be.'

"In Cummings v. Merchants' National Bank of Toledo, Mr Justice Miller, speaking for the majority of the Supreme Court of the United States, said: 'It is proper to say, in extenuation of the rule of primary valuation of different species of property developed in this record, that it is not limited to the State of Ohio, or to part of it. The constitutions and the statutes of nearly all the States have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to be taxed. The phrases 'salable value', 'actual value', 'cash value', and others used in the directions to assessing officers, all mean the same thing, and are designed to effect the same purpose. Burr. Tax. page 227, section 99. But it is a matter of common observation that in the valuation of real estate this rule is habitually disregarded.' The court in that case virtually adopted a passage in Burroughs on Taxation at page 227. The writer of that well known textbook treated the rule as settled in the United States, and the Supreme Court of the United States adopted his view.

"I mention also the judgment of the Court of Appeal in Ireland in Curheen and Tottenham, (Lord Ashbourne, Chancellor, Lords Justices FitzGibbon, Barry and Walker) and particularly the judgment of Lord Justice FitzGibbon, at pages 362 and 363." He does not cite them; he just refers to them.

"Of course, it may be that there is no competitive market at the date as of which the value is to be ascertained. In such circumstances, other indicia may be resorted to. There may be reasonable prospects of the return of a market in which case it might not be unreasonable for the assessor to evaluate the present worth of such prospects and the probability of an investor being found who would invest his money on the strength of such prospects; and there may be other relevant circumstances which it might be proper to take into account as evidence of its actual capital value." There are prospects up hill and prospects

down hill.

LORD PORTER: You can leave out the next paragraph which deals merely with the statement which has been made over and over again that the value for taxation purposes is not the same as value for compensation. We can start with the paragraph beginning: "There is no room".

MR BRAIS: If your Lordship pleases. "There is no room for the application of any such formula" -- that is the expropriation formula; that is the value in use; there is an important distinction: the exchange or sale or market value; that is the important point.

LORD PORTER: He says that is subjective and this is objective.

MR BRAIS: Yes. This is eliminating the reference to value in use; or, summarising what he says, that value in use cannot be taken into account in expropriation. He says: "There is no room for the application of any such formula in the administration of an assessment act, because the amount ascertained under the formula depends upon the special position of the owner with regard to the land". That is the expropriation formula. "If the owner were a golf club, it would be influenced in determining the amount it would be willing to pay by reference to the convenience of having the particular piece of land in view of its situation and adaptability as a part of the particular golf course. That is not a principle of valuation contemplated, in my opinion, by the assessment provisions of The Cities and Towns Act. These assessment provisions, like other assessment provisions, contemplate an objective standard which can be applied with fairly reasonable uniformity to all classes of owners alike.

"It seems to me clear that the assessors in this case proceeded upon some rule of thumb and they did not really attempt to ascertain the actual or real value of the particular lands they were assessing.

"Moreover, it is very important to insist on two things; first, there is not a scrap of evidence before this Court by reference to which we can determine the value of this property to the appellant; its value, let us say, as part of the appellant's undertaking considered as an integer. We do not know that the undertaking as a whole, or this particular part of it, has any value whatever to the appellants. For all we know it may be damnosa haereditas. On that basis, we cannot judicially find that it has any value and any figure assumed to be the result of such a process could be nothing but a guess. Second, there is no evidence before us that there is not any market for this property, nor do we know that there may not be some method according to which, by reference to other circumstances, some actual value might not be arrived at."

If I may interpose here, we have evidence from a large number of witnesses as to what would be the market value of the Sun Life building and why that market value would be at a given price.

His Lordship continues: "I am disposed to think that that market value, present or prospective, is really the only practical basis of the assessment of this property under the enactments by which we are governed; but if some other method were admissible, we have been left entirely without information as to the necessary facts to enable us to apply it.

"I have no doubt I should add, that the assessors did

not perform the act of valuation in respect of the submerged lands as required by the statute as essential to a valid assessment, and, consequently, that there was no valid assessment in point of law; nor do I doubt that this Court has no materials before it by which it can perform the act of assessment itself."

(Adjourned for a short time)

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LORD PORTER: Mr. Brais, at the moment we have got to this: that Sir Lyman Duff in Montreal Island Power Co. v. Laval des Rapides stated his view of how the assessment should be made, and you told us that that was affirmed. Can you give us the case in which it was affirmed by the Supreme Court?

MR. BRAIS: With your Lordships' permission, may I eliminate one matter on the centralisation reference which was asked of me this morning. It is just a reference to the evidence of Mr. Perrault, in Volume 1, at page 100, line 35. He says: "We must not forget that the building was constructed by the Sun Life when the curve of employees showed an upward trend which in ten or fifteen years would fill the entire structure. This condition did not materialise. Their operations were further decentralised, thereby further reducing their staff." I take the opportunity of bringing that forward, so that it may be before your Lordships.

In answer to the question that your Lordship has just put to me, there are two references that I would give. The first of them is in the Supreme Court in the case of Inrre Withycombe's Estate: Attorney General of Alberta v. Royal Trust Company, which has been already cited and which is reported in 1945 Supreme Court Reports, page 267, at page 279. There Chief Justice Rinfret says: "There was no evidence that the administrator ever offered the property for sale. As to this point, in Montreal Island Power Company v. Town of Laval des Rapides Chief Justice Duff stated: 'Of course, it may be that there is no competitive market at the date as of which the value is to be ascertained. In such circumstances, other indicia may be resorted to. There may be reasonable prospects of the return of a market, in which case it might not be unreasonable for the assessor to evaluate the present worth of such prospects and the probability of an investor being found who would invest his money on the strength of such prospects; and there may be other relevant circumstances which it might be proper to take into account as evidence of its actual value'."

Then Chief Justice Rinfret continues: "The Montreal Island Power case was, of course, a case of the assessment of a property for taxation purposes; and the majority of the Appellate Division in the present case alluded to what they said was 'notorious', that municipal valuation was rarely to be relied upon as representing the fair or true value of a property.

"In the case at Bar there was no evidence that the property in question had ever been offered for sale and the Commissioner had to rely on the other indicia, referred to by Chief Justice Duff in the passage of his judgment above quoted. He very properly took into consideration what seems to me the most important indicia, to wit: the revenue producing qualities of the property. An examination of the evidence of Mr. Bagley shows that he entirely disregarded that factor (but his method of valuation appears to have been accepted by all the members of the Appellate Division who delivered the majority judgment), thus failing adequately to take into account the revenue producing quality of the property and to give consideration to the value of the lease in effect at the date of the death of Mr. Withycombe."

It has been referred to in many decisions, but that is the one where the Supreme Court has approved of its dissenting judgment per Mr. Justice Duff.

Now we must look at another case which has been cited before this Board; that is, Canada Cement Company v. La Ville de Montreal Eat, reported in 35 Quebec Reports (King's Bench), page

410, as being the judgment where replacement value is made use of in the Province of Quebec for the purpose of arriving at valuation.

I would submit that that case does not direct us in the present instance, for the very simple reason that the case as made left no other indicia whatsoever to the assessor.

That is found, first, in the notes of Mr. Justice Guerin, at page 413, which have not been read to this Board. At page 414 he says: "To do justice to the parties, the Court of Appeal must place itself in the position of the Circuit Court and render the decision which the Circuit Court should have rendered, if the judgment a quo is not to be confirmed.

"Two articles of the Revised Statutes of Quebec, 1909, indicate the course to be followed. They are Articles 5721 and 5722.

"The argument of the appellant" -- that is, the taxpayer -- "seems to suggest that the burden of proof to justify the decision of the assessors is upon the respondent. Just the contrary, however, is the case. The position of the Town Council, confirming the assessment made by the assessors, must stand, unless the person who deems himself aggrieved can establish that a substantial injustice has been committed. The burden of proof is upon the appellant under Article 5722 of the Revised Statutes of Quebec.

"In the case of People v. Jackson, Mr. Justice Barnard expressed himself as follows: 'The general rule is, where a body of assessors have made the assessment using their judgment and not capriciously or in an arbitrary manner, the assessment will not be reviewed'.

"The appellant has made a strenuous attack upon the method adopted by the assessors to fix the value of the appellant's property.

"The Cities and Towns Act, which applies to this case, gives no method or rule to be followed, nor measure to be used by the assessors. In fixing the assessment the assessing officers act judicially, and the law simply requires an intelligent and fair exercise of the powers conferred upon them."

Then there is a citation from the American and English Encyclopaedia of Law, under the heading "Methods of Value. Elements of Value", where it says: "There is in fact no rigid rule for valuation, which is affected by a multitude of circumstances which no rule can foresee or provide for. The assessor must consider all the circumstances and elements of value and must exercise a prudent discretion in reaching a conclusion. Where property is not correctly valued, the assessment is not void because an erroneous method was followed by the assessing officers in fixing the valuation".

Then the judgment of Mr. Justice Guerin continues: "The task imposed upon the assessors was not easy. Mr. Kilbourn, who is the general superintendent of the Canada Cement Company, tells us that he built the original plant, with which he has been connected even before Canada Cement Company had any interest in it. ~~First~~ Still he will not risk himself to put a valuation on the plant.

"After a lengthy perusal of the voluminous evidence which this record contains, it is impossible to conclude that a substantial injustice towards the appellant has been committed,

and the following doctrine, contained in numerous decisions cited in the American and English Encyclopaedia of Law, is replete with wisdom: 'In the absence of evidence to the contrary, it will be presumed that the assessing officers performed their official duty and authenticated the assessment in the manner and form directed by the statute'."

The Canada Cement Company had given no value and they said: It is for you, the respondent before this Court of Appeal, to establish that what you did was correct. They offered no assistance whatsoever to the assessor of the Court as to what would be the correct value.

We then come to the judgment of Mr. Justice Latourneau and we see how that works out. At page 416 he says: "The articles of the law which governs us in the matter is Article 5722 of the Revised Statutes of Quebec, 1909, which says: 'The decision can be reversed only in the case where a real injustice has been committed and cannot be on account of a difference or of an irregularity of little importance'.

Therefore, you require a real injustice and more than a variation of slight importance. This article, then, reproduces what is the law in municipalities.

"A real injustice and a variation of great importance must exist and they must be proven in the case. Who, therefore, should make this proof? If not the complainants, the appellants. We find that in this case the following extra-ordinary situation arises, in that the appellants seem to have believed that all that they had to do was to complain and that it was from that moment incumbent upon the respondent to justify the valuation; and when the demand is made of the representatives and witnesses of the appellant and they are asked what they have to say on that subject, they affirm that in a general fashion the valuation is too high. They then maintain that the method employed by the respondent is false, even ridiculous; that there is a single method which must be used, at least as regards the machinery: the cost of construction, less diminution of $7\frac{1}{2}$ or 10 per cent a year; but when they are asked what is, according to them, the real value of these assessable properties they content themselves to say, or at least the persons in the better position amongst them content themselves to say: I cannot say.

"There existed, tell us the attorneys for the appellant, a valuation under that provision and recognised by our tribunals: find the real value; seek for the price which a vendor who is not obliged to sell and is not dispossessed in spite of himself, but who desires to sell, would be able to obtain from a purchaser who is not obliged to purchase, but who desires to purchase. Yes; that is in effect a base which should give satisfaction; but this base can be used only when the proprietor wants to sell and if it is a property susceptible of being sold on the market. In this case it is admitted by the appellants that the property which they mention is comparable to no other and a property the sale of which could not possibly be considered, at least at the time when the valuation was made. Therefore, it is necessary to renounce this possible method for the ordinary properties, a sale of which can be made and for which there is a market.

"To what method should one have recourse? Let it be first realised that it does not matter what method is used, even if the method is disputable or doubtful, provided that it does not lead to a real injustice nor an important difference."

Then at page 418 he says: "What method should be adopted? None recommended themselves in a particular fashion, save that it was necessary to find the real value." Then he goes on and the judgment continues and talks of real value and says that, of course, the appellant complains of the conclusion.

At page 419 he says: "Is the valuation as made strictly correct? I believe that it is; but, if this question could be in doubt, it is necessary to say that the appellants have not, in so far as this valuation is concerned, either established a real injustice nor shown a variante importante." In the absence of this proof they cannot establish that the Circuit Court of Montreal has committed an injustice."

LORD ASQUITH: Can you tell me what "variance" means exactly? Does it mean a deviation from good law?

MR. BRAIS: No; a variation from the amount of the assessment.

LORD ASQUITH: The amount of the assessment is out of line with what it ought to be?

MR. BRAIS: Yes. They have in mind that the appellant must show by some evidence that the assessment is wrongly arrived at. In the present instance, through some misconception of the law, they thought that all that they had to do was to complain and then the assessors or the respondent had the burden of showing that the complaint was not well founded.

LORD OAKSEY: Were these words "variance importante" in the statute?

MR. BRAIS: Yes. That is under the statute of the Cities and Towns Act, to which I will refer later, and the Municipal Code, which is entirely different from the provisions of the City of Montreal statute. All municipalities are subject to the Cities and Towns Act or the Municipal Code, depending upon whether a village or a city and town. When the City of Montreal puts into its statute that there is an appeal to the Superior Court and that the Superior Court shall do, as we have seen this morning, as to justice shall appertain, it has deliberately gone out of the formula of the general statute of the Province of Quebec covering all municipalities. That is, of course, a question of some considerable importance when we consider the duty of the judge of the Supreme Court.

May I now refer to the other case cited by my friend, namely, Grampian Realties Company v. Montreal East, reported in 1932, 1, Dominion Law Reports, page 705, which is another case urged before this Board by my learned friend as indicating the law of the Province of Quebec, except that the law of the Province of Quebec does not vary from the general law. We had in that case, not a building, but vacant lots in a large area of other vacant lots held for sale purposes. The Grampian Realties Company was a company whose business it was to sell lots, and there was some discussion as to whether the assessment had been properly arrived at. The statute applicable is the same as the one of the City of Montreal at the time of the present assessment. We find that at page 706, where Mr. Justice Lamont says: "'The assessors shall each year, at the time and in the manner ordered by the council, assess the taxable property of the municipality, according to its real value'."

Mr. Justice Lamont says: "The appellant sold to the Imperial Oil Company several blocks of land lying immediately to the south of the lots now in question to be used in connection with the company's refinery. The last of these sales was made in 1926 and brought a price of over 7 cents per square foot.

It is, however, evident from Findlay's evidence" -- he was the president or, I think, acting for the Grampian Realties Company -- "that the appellant has not for some years been attempting to sell its property by the lot as he was not sure whether their sign-board offering the lots for sale separately was still on the property. Findlay's valuation for the 1,083 lots in question was as follows". Then he gives the details: 30 dollars per lot for a certain number and for the remainder 15 dollars per lot, making a total of 23,515 dollars.

"In support of his valuation he produced a deed of 60 lots adjacent to the three northerly blocks of the appellant's land and corresponding them in their northern and southern boundaries, which were sold to the respondent at an average of 12 dollars 50 cents per lot. This sale, however, was a forced sale made by the liquidator of an estate. On being asked if his company would sell the lots at the valuation he put upon them, his answer was that he had no instructions to sell either at those prices or at any others. Findlay further said that the streets and lanes should not have been assessed" and so on.

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

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

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

"Versailles pointed out that there was an increasing demand for factory or other industrial sites in Montreal East and, while the number of persons desirous of erecting factories was always more or less limited, the existence, beside the appellant's property, of two very large oil refineries would tend to draw new industries to that region, thus giving a greater potential value to the appellant's property."

Then, at page 708: "He also said that he himself had, on several occasions, tried to purchase some of the appellant's property but had not been able to get the appellant to fix a price therefor". These were lands held for sale. "He further said that he was then (the time of the hearing) buying property for the National Cement Co. farther east and farther north than the appellant's land, at 11c per sq. ft.; and that another industrial company was negotiating for land north of Sherbrooke St. at 10c per ft. Both Langelier and Versailles placed the value of the appellant's lots at the amounts set out in the assessment roll. These valuations, and the reasons therefor, given by the witnesses were accepted in all the Courts". There was evidence of value by men of experience who had bought lands further east and further north. When one considers that the river is south one will recall that in those circumstances, my Lords, as you went away from the river the value became less, and they had bought or were in negotiation for land less valuable at 10 and 11 cents a foot, and their value was accepted because the assessment rule placed 7 cents per square foot on what was apparently the more valuable ground "The third ground of attack upon the assessment was that it constituted an ubjust discrimination against the appellant. There is absolutely no evidence to support this contention. On the contrary it was shown that the appellant's land was assessed at the same rate". It is not because it was at the same rate, my Lords, that the assessment is good, but at least there was that to add.

Now, the case of Attorney General of Alberta v. Royal Trust Co. I am just going through those that were cited at the inception by my learned friend to indicate that the law permits taking into account the replacement value and that you can then proceed in some way under a formula. That case is the one to which we have already referred. In substance it confirms the decision of the Supreme Court as to how property should be assessed. It confirms the minority view of Mr. Justice Duff in the Canada Cement Case, and apart from that there is nothing here that I can see that can afford any help save that it comes to the rental value and has taken that into account to establish the exchange value. I think for the moment I will not need to read any of the other extracts of the decision because it proceeds exactly on the same basis as the law of the Province of Quebec as it has in confirming the Quebec appeal.

LORD ASQUITH: Did you give us the reference ?

MR BRAIS: I am sorry, my Lord, I gave it earlier. It is in re Withycombe Estates, Attorney General of Alberta v. Royal Trust Co. (1945 Supreme Court Reports, page 267). Search as I may in these decisions to see anything which would warrant a proceeding by a memorandum fixing beforehand for the valuations on a matter proceeding and then suggesting that there can possibly be in our law anything in the law of the Province of Quebec which permits in such a memorandum a blending according to the memorandum, the only point I can say on that is that it is in the notes of Chief Justice Rinfret that the appellants were asked before the Supreme Court whethe there was any law, any decision or anything in the Province of Quebec which justifies that formula and he says the appellant, the respondent then, obviously had been unable to cite any. If we look at these decisions and find that under certain circumstances replacement value was used, the judges

complain of the fact that they had to use replacement value whether it is just or unjust and did it because there was no other basis upon which to arrive at a decision, and the appellant in the Canada Cement Case had not seen fit to offer any other suggestion as to what would be the correct value, but did say that they could not and would not sell their property because, obviously, the building which forms part of a cement plant is the nucleus of the whole organisation. You certainly would not sell your crusher and your mixer separately and be the owner of the valuable limestone quarry from which the cement is extracted.

Then, if we may look again briefly at the case of Bishop of Victoria v. The City of Victoria (1933 4 Dominion Law Reports at page 524), the headnote says this: "Under Section 212(1) of the British Municipal Act, for assessment purposes the term 'actual value' means 'value in exchange', that is what a prudent man of business, taking into consideration the 'reversible currents which affect the value of land' would be likely to pay for a property of the character under assessment", and it resembles this case to a certain extent in that the property then under assess ment was a special type of property which suited its owners because it was a school, a Christian Brothers school, belonging to the Bishop of Victoria. In this case, in-so-far as it can be argued that there is something special about the Sun Life office, it is bigger, higher and better than any other building and it has certain characteristics of its own. There always be one property somewhere, especially in our Continent, my Lords, that will always be a bigger and better property, and that applies to almost everything. It is a little bit less now than it used to be in the days of what we would call the Roaring Twenties but you always have a bigger and better building, and until somebody else comes along, it is the biggest building in the British Empire or the one that has used the most expensive material, but that still leaves a building that will be the biggest and the best until another building comes along and takes its place, and you will no longer be able to use that against a building as an assessment in rating cases.

At page 525 we read in the decision of Mr. Justice Macdonald: "I shall deal with this question further when I come to consider the counterclaim. I think the learned judge's valuation of the property was founded on a wrong basis, There is no definitionof 'actual value' beyond what the words themselves import". Intrinsic value is not used, replacement value less depreciation is not used, they use actual value the world over. Those are my own words. "The only appeal allowed to this Court is one on the point of law and the point of law which has been raised is that the learned Judge was wrong in deciding that the market value at a forced sale was the actual value". Of course we all agree with the finding there.

Then, we go to page 527, towards the end of the first paragraph: "One of the witnesses who gave evidence in the Court below for the respondent said it was unsuitable for any other purpose than that of a college or for conversion into an apartment house for which purpose he would be willing to pay $20,000 for it. One cannot doubt that the assessor, considering the actual value of the property might very well say: 'Respondent has built this property for a special purpose; it is a permanent purpose'". It has been said, and that is the chief basis of all the decisions including the three majority decisions of the Court of Appeal, even

that company is a company which makes lots of money; we have even got inthe evidence the number of policy holders of the Sun Life Insurance Co. who consider that their policy has a greater value to them because it comes from a large building. That evidence is all in the records, delineated at length.

We continue: "One cannot doubt that the assessor, considering the actual value of the property might very well say: 'Respondent has built this property for a special purpose; it is a permanent purpose. He has considered the cost before building it and has agreed to pay $58,425 for it. There are no circumstances local or otherwise which would make that property less valuable to the owner than the price paid for it and while no outsider would be willing to pay that cost having no use for the building, except as an apartment house, the actual value, to the owner who has use for it and who has built it and paid for it the price above mentioned and will continue to use it for an indefinite time, may be exactly what it has cost, less any depreciation since its construction'. This, I think would be something that ought to appeal to the valuator taken in connection with any other circumstances which might affect the value including its market value. He ought not to accept the selling value at a forced sale or the selling value at an open sale as the basis of assessment to the exclusion of all other relevant facts any more than he should accept the cost of construction as the actual value to the exclusion of all other circumstances", and by this formula if we did not have any tax and did not have any tenants like the Christian Brothers, we would be assessed at 100 per cent. of the construction cost.

LORD REID: Mr. Brais, in the Bishop of Victoria Case, was there a blending ?

MR BRAIS: No, my Lord.

LORD REID: It seems that there ought to have been, according to that judgment, of replacement cost and selling value because the learned Judge appears to approve of both of them.

MR BRAIS: Yes.

LORD REID: Now, how can you have two factors both taken in unless you blend them ?

MR BRAIS: Well, in this particular case there was no other indicia of value apart from the cost of construction; there was nothing else to go on. There was no way of coming to a value by what the building would be worth commercially on exchange basis as you have in the case of the Sun Life.

LORD REID: Do you mean that in the Victoria Case they took the replacement cost alone as the proper indication of value ?

MR BRAIS: Yes, and the case was sent back. In the Victoria Case there could be an appeal on a question of law only.

LORD REID: I am afraid I have not got it yet, I am sorry, but was it sent back for them to take replacement value alone or for them to blend replacement value with such other elements as they could find ?

MR BRAIS: The only answer I can give to your Lordship's question

is that the valuator would depend upon his own judgment after having taken all circumstances into consideration, and since the property was not so valued but to the exclusion of some of the most important of them, there must be a new trial by a judge of the Supreme Court.

LORD PORTER: They never set out what they say were the most important of them or what they say was the neglect of the most important.

MR BRAIS: The Assessor should be completely free, it would appear, to weigh those circumstances in the light of the duty of the man who has that difficult task of looking at a building, examining it thoroughly, considering its destination, considering its cost, considering what it is worth to the owner at that time and using his proper judgment as an assessor.

LORD PORTER: I was going a little further because they say that he left out in that particular case certain things which he ought to have taken into consideration, but they do not condescend to tell us what was left out which ought to have been taken into consideration.

MR BRAIS: If I re-read that paragraph I will go as close as I can to answering the question. "There are no circumstances local or otherwise which would make that property less valuable to the owner than the price paid for it" -- he is citing here; he is saying this is the assessor talking -- "And while no outsider would be willing to pay that cost having no use for the building, except as an apartment house", which would require a complete rebuilding or reconversion, that is, a physical reconversion, not rebuilding the Sun Life with all its office space, continuing to use it for office space, as one has applied to the Respondents in this case. That would be a physical reconversion of an empty shell of a building used as a house. "Except as an apartment house, the actual value, to the owner, who has use for it and who has built it and paid for it the price above mentioned and will continue to use it for an indefinite time, may be exactly what it has cost, less any depreciation since its construction". The Chief Justice says this is what the assessor was saying to himself.

LORD ASQUITH: Was saying to himself, or ought to have said to himself ?

MR BRAIS: Was saying to himself. This is what they say he should not have addressed himself to in that talk to himself. "This, I think, would be something that ought to appeal to the valuator taken in connection with any other circumstances which might affect the value including its market value".

LORD ASQUITH: The complaint against him was that he attended exclusively to the value to the owner himself and did not take the market value as another parallel factor into consideratio n, is that it ?

MR BRAIS: Yes, my Lord.

LORD REID: If he had taken, following on that judgment, 50 per cent. or 75 per cent. of replacement value and only 25 per cent., it may be, of market value, he would not have been wrong on that judgment, would he, if he had applied his mind to it and said that was the right way out.

MR BRAIS: He would not have been wrong as long as he, in assessing the school at Victoria, was free as an assessor to apply, if he wanted, solely the market value, if he wanted all of them together, but he had to be free to do that and if he did not ——

LORD OAKSEY: I still do not understand which it was he left out. Was it the market value or was it the replacement value he left out ?

MR BRAIS: He took solely the replacement value. He left out market value.

LORD OAKSEY: I see.

LORD ASQUITH: He gave exclusive weight to the replacement value.

MR BRAIS: Yes.

LORD REID: The Bishop said: "selling value only" and the Court said "selling value at a forced sale is not right either".

MR BRAIS: Yes. I do not think we have to quarrel with part of the judgment because the Bishop was going much too far himself. He said: "What I could get at a forced sale would be $20,000 for this building". I do not think that anybody would want to take that valuation although there had been in the law at one time a definition which he used for his purposes and which we will see would have led to an erroneous result, as we have in the present case, but I take up the law which was in force at the time the valuation was made, and the law which was in force at the time the valuation became operative. Then, to come to exactly what was arrived at: "This, I think, would be something that ought to appeal to the valuator taken in connection with any other circumstances which might affect the value including its market value. He ought not to accept the selling value at a forced sale or the selling value at an open sale as the basis of assessment to the exclusion of all other relevant facts any more than he should accept the cost of construction as the actual value to the exclusion of all other circumstances. The value would depend upon his own judgment after having taken all circumstances into consideration and since the property was not so valued".

I cite this case, but I also would draw to the attention of the Board that in that case you are dealing with a special purpose building destined for life to serve as a school, the property of the Bishop of Victoria and which had been built for that particular and exclusive purpose, and it could not be used for any other purpose, and that as we will see when we examine into the law becomes more important. The indicia of cost becomes more important when you have no other indicia -- there is no other indicia here -- so that the indicia of cost becomes more important but it still has tobe weighed against the market value, but when you have the further indicia of commercial value then, of course, you have to further take into account the commercial value in ariving at the amount. Now, page 537.

LORD NORMAND: This is still Chief Justice Macdonald ?

MR BRAIS: No, this is Mr. Justice Macdonald. There are two Macdonalds on that Bench. At the bottom of page 536: "It is recited in the order under review that in the opinion of

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the judge 'actual value' should be construed to mean 'the sum which would be realised for the property upon a forced sale'. This phrase, showing the ground of the decision, is not, with deference, to be included in the Order". That is a discussion as to whether it should be in the Order, then on page 537, at the end of the first paragraph: "Some deduction was made from the actual cost but it was on that basis that the assessment on the improvements, viz., the school building, was actually made. This basis too, in my opinion, is erroneous'

Then we proceed into the most important portion of the decision because it shows the view of the judge on the sale. "The history of s.212(1) was referred to. In 1897 the corresponding section was section 113 of the Municipal Clauses Act, R.S.B.C. 1897, c. 144, and read as follows: 'For the purposes of taxation, land and improvements within a municipality shall be estimated at their value, the measure of which value shall be their actual cash value as they would be appraised in payment of a just debt from a solvent debtor'. In Re Municipal Clauses Act and Dunsmuir (1898), 8 B.C.R. 361, the late Mr. Justice Walkem reduced the assessment on a residence costing $185,000 to $45,000. This, he thought was the amount at which it could properly be appraised in payment of a debt. In Re Vancouver Incorporation Act, 1900, and Rogers (1902) 9 B.C.R. 373, dealing with a similar section in the Vancouver Incorporation Act the Judge refused to reduce an assessment fixed at $6,000 less than the actual cost of construction, viz., $50,000. In 1899 section 113 was repealed (Municipal Clauses Act, 1899" -- and then he reviews the statute -- "The following was substituted: 'For the purpose of taxation land and improvements shall be estimated at their value, ~~as to improvements~~ the measure of which as to land shall be the actual cash value, as to improvements shall be the cost of placing at the time of assessment such improvements on the land, having regard to their then condition, but land and improvements shall be assessed separately'". I will draw to your Lordships' attention that at one time we had a statute in the Province of Quebec that was approximately the equivalent of this. "This meant as to improvements reproduction cost (or replacement value) of a structure in the condition of the one assessed and if still in force would justify the method followed by the Court of Revision. This section however was repealed and Section 212(1) virtually as it now reads appeared in the Municipal Act, 1915 (B.C.) c.46, s.30. All we can say from this history is that in ascertaining 'actual value', where we have not the benefit of additional phrases the old aids, viz. 'payment of a just debt from a solvent debtor' and 'replacement value', which they may possibly be considered as factors in taking a general view of the whole problem no longer form the true basis for assessment purposes. In Re Municipal Act, Gates Case (1918) 2 W.W.R. 930, Thompson, Co.Ct.J., dealing with the present section, considered the passing of British Columbia Prohibition Act as an element affecting the value of an hotel. I think he was right in doing so. So too, although it does not necessarily follow from the case referred to, a school or college engaged, not in commercial pursuits but in academic work, carried on, to some extent at least, on a charitable basis should be viewed from the standpoint of the 'use' to which the building is devoted".

I am drawing here the distinction between that building and our building when we examine it further and why the Court in that instance was considering the replacement cost with more emphasis than for another building. "It does not follow that this assessment should be unreasonably

low because it is non-productive in a commercial sense; it doe mean that a proper valuation cannot be reached without due regard to that feature. There are two kinds of value known to economists, viz., value in use and value in exchange. An article may have great value in use because of special properties or characteristics not susceptible to measurement by commercial standards and have comparatively little value in exchange. It is the latter measure of valuation, properly understood however, that should be applied. In doing so we have a guide in the judgment of the late Mr. Justice Idington in Pearce v. Calgary (1915) 9 W.W.R. 668, at pages 672-3. In interpreting the words 'fair actual value' (and the word 'fair' adds little to the phrase) as applied to land, at the time unsaleable, and likely to remain so for many years, he said".

LORD PORTER: We have had this read.

MR BRAIS: We have the "reversible current" and the suggestion that the speculator may be adding something more because he can afford to hold, but ~~that~~ it reduces the speculator's down to a very narrow margin, and that is why the assessor has to perform his task according to law.

LORD PORTER: You might, if you like, begin at "These tests may be applied to lands", because he is distinguishing in the case of a school, which is what he refers to as property in use as opposed to selling value.

MR BRAIS: That part, of course, applies to the building and applies to the Sun Life building as it applies to any building.

LORD PORTER: Yes.

MR BRAIS: Then, the concluding paragraph answers one of the questions of my Lord Porter as to how they set forth what should be done, and they did not set it forth because it is not their duty, apparently, to do so. That is the assessor's task, and for the same reason when the assessor is hampered by his own memorandum which is certainly no better than directions from this Court or from any other Court, he has something before him which precludes him from carrying out, I would say, his duties properly.

LORD PORTER: Does that come to this, that a Court or a Board hearing a case of this k ind can say whether they follow or does any other place, subordinate tribunals, point out whether they acted wrongly, but cannot say what was right ?

MR BRAIS: Oh, yes, I am not suggesting that; if that has been the implication from what I have said, I would wish to withdraw that immediately. No, they can and they must with this difference in the present case, and I have not come to that point, that in the present case there is an appeal of law and fact and your Lordships are not only free to state for them what should have been done, but to arrive at the conclusions in the ordinary sense, as Mr. Justice McKinnon who was for all practical purposes the first Court of origina jurisdiction over which this court has jurisdiction, I would say, in-so-far as directions are concerned.

Now, he concludes here: "As we have no jurisdiction over questions of fact I would remit the matter to the same learned Judge to fix the assessment on the improvements on the principles outlined. He, as a jury, must, as

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best he can on the evidence already heard, fix the amount following the principles laid down by Idington J. qualified as herein indicated because of the special nature of the 'improvement'." -- I would stress that -- "On the principles laid down by Idington J., qualified as herein indicated because of the special nature of the 'improvement'. The appeal should be allowed but, as appellant sought to invoke a wrong method of assessment, viz., replacement value, it should be without costs. Formally the cross-appeal is dismissed without costs".

Without stressing further, I just would mention that that is a case where you are dealing with a one purpose unconvertible building which could not be used by anybody else save the Bishop of Victoria and possibly some other school establishment if it was so situated with reference to the other church activities that it could be used that way.

LORD REID: Suppose that one element of your building is a one purpose unconvertible use, namely, to advertise the Sun Life Co., I do not say that is the case, but if that were the case, what would its effect be on analogy with the Bishop of Victoria and the other cases ?

MR BRAIS: I must say to that, my Lord, that that is value in use, and once we become a willing seller that value in use disappears completely. I cannot go beyond that, that is what happens to be the necessary result of all these decisions.

LORD REID: You mean that even though the advertisement value of your building was a very high percentage of its value, as it might be in conceivable circumstances, nevertheless, when it came to a question of value for municipal purposes it must be disregarded entirely because nobody else would pay a halfpenny for it. Is that what you mean ?

MR BRAIS: That is what I have to say, my Lord, because there is not one judgment that I have been able to find anywhere, nor a single judgment cited by my colleague's, which says that the advertising value of a property constitutes real value to any extent because, obviously, as I see it, my Lords, and with all due deference, once you have reached the stage where the owner wants to sell, is willing to sell, he cannot sell that advertising value, he cannot pass on to another man except in a very, very minor degree, the newness of a building which strikes the public's imagination as the largest, has been built by the Sun Life and is ~~in~~ its own building. A certain building has no potential similar advertising value to any new owner and it is not suggested by anybody and nowhere in that record is it said by anyone of the purchaser of this building, first of all, that he would not purchase the building for his own exclusive use, no other company is, apparently, in a position to do that, but it might be that somebody would, it might be some other insurance company.

LORD OAKSEY: General Motors, perhaps, or somebody of that sort.

MR BRAIS: General Motors would not get any advertising out of a building.

LORD OAKSEY: No, out of having a big building. I took General Motors because they are a well known American and Canadian Company, but there must be an enormous number of departmental stores and places of that sort who get value out of having big buildings, otherwise why do they build them ?

MR BRAIS: Departmental stores build big buildings in order to

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have a larger number of departments and more goods to sell and make more money. That is the only reason.

LORD OAKSEY: They also build them with very ornamental facades. Perhaps you know Selfridge's in Oxford Street. You would scarcely say that that was an ordinary commercial building.

MR BRAIS: They would make just as much money and I am sure they would realise today that they would make just as much money if they did not have that ornamental facade. We have none of our departmental stores in Montreal or any in New York which have ornamental facades. They have ornamental show windows which are there for a demonstration piece and they spend a lot of money on the ornamental show windows, but with the sole exception of the Sun Life nobody has put them up with advertising value. The Chrysler building was the other large building in New York. They are all nice buildings, but the facade is of stone veneer, and they make nice lines, but they are simple lines in order to be able to build your building economically.

LORD ASQUITH: Would the mere scale of the thing have a certain advertising value ?

MR BRAIS: I am very sorry, my Lord, I did not catch your Lordship's question ?

LORD ASQUITH: If a building is big enough, is not it calculate d to impress the beholder ?

MR BRAIS: It does.

LORD ASQUITH: Does not it, to that extent, have an advertising value through mere bulk ?

MR BRAIS: It does have an advertising value.

LORD ASQUITH: I am leaving aside ornamental facades and that kind of thing. If you see an immense imposing colossus before you you are apt to think better of business done inside it.

MR BRAIS: That is why banks build large buildings and that is why trust companies also build large buildings. I am prepared to concede that when this building was planned for the requirements of the company, as is well established, they had in mind that the building being an imposing building, there would be some advertising value. I am quite sure of that.

LORD PORTER: I think your answer tomy Lord, and tell me if this is right or wrong, might be "Yes, a large building is impressive and would impress the clientele of the Sun Life", but they would have their large building and let such portions as they wanted to let without any exceptional ornamentation". Is that the answer ?

MR BRAIS: That is one answer for which I am thankful to your Lordship. The other answer is, obviously, that when you apply the formula and we find in all these decisions by the time you apply that formula the advertising value of that building is nil or practically nil.

LORD PORTER: Take the other question of exchange, and take the fact which you have admitted that you have got to have to some extent the price which the owner would give for the

building as well as the price that anybody else would give. May not it be true to say that when you get a large building the owner would give a larger price because of its advertising value and, therefore, an advertising value deserves some consideration when you are asking what the value in exchange is.

MR BRAIS: I follow quite well, but that higher price would only be one bid higher than the next bidder.

LORD PORTER: It might be that someone would bid higher, I am not sure that one can confine oneself to that, but I follow the answer.

LORD OAKSEY: That assumes, does not it, that the owner is absolutely unique. Of course, if you say that the Sun Life Insurance Co. is the only company which wants a building of anything like this nature that answer would be perfectly correct, but if there are other companies who possibly would not build the exact same building but who also want a very big building, they would come into that notional market.

MR. BRAIS: On that the evidence discloses that there are no other purchasers who would be buying for their own use or who could possibly occupy that building.

LORD OAKSEY: Occupy the whole of it possibly.

MR. BRAIS: But if they occupied part of this building which has been known all over the world as the "Sun Life" building, and then it becomes the General Motors building, one does not advertise one's second-hand purchase, one will not advertise something which has been constructed and built for the Sun Life. I do not think it is suggested anywhere in the evidence that there is advertising value for somebody who buys a building to use it. In my limited experience in the purchase of buildings, when people buy buildings of a large size, and a lot of large buildings have been purchased, a lot of them, they buy them for use for a commodity, for a place that is required by any trust company or bank. I could cite them out of the list that my learned friends have here. About half of them have been bought and sold. They come within these schedules that we have. Half of them have been bought and sold, but once they are bought the people move in there and it is just their building. There is no advertising feature attaching to it. The advertising value of a building like this goes to a very scant extent. Here you have a building known all over the world. Its only advertising value is when you reproduce, as the Sun Life have done, a picture of their building, but if it became the General Motors building, if that happened, and that is not possible, they are completely decentralised, they have an office in each area around the continent and in Canada, but if they did occupy the Sun Life, if they did centralise their office and buy it for 7 million or 10 million dollars, they would not be using the advertising feature of the former Sun Life building for the General Motors. It is like one's own child and a foster child.

LORD OAKSEY: Are you meaning the name?

MR. BRAIS: The name that has become attached to the building.

LORD OAKSEY: It may be attached for the time being, but it can be discontinued.

MR. BRAIS: Yes. I submit that when any person bought any other building for his purpose there has never been any attempt made to profit by advertising the building as one does when one builds a new building of one's own. The new building is a matter of interest and the advertising value would be there, but once it is sold, and I cannot develop the point further, I submit the advertising value as such is gone.

LORD PORTER: I am still a little troubled about this distinction between objective and subjective. In a sense the price which the owner would give is subjective, it is not purely objective. How far is one entitled to take into consideration in a case of this kind that the Sun Life built this building, that they are known to have a building of this large ornate character and that their reputation might suffer if they went out?

MR. BRAIS: If they sell it, they go out.

LORD PORTER: I agree, and that is what I am asking; how far is one entitled to say they would give more for this building, being the owners, because their reputation would suffer if they went out?

MR. BRAIS: All I can say to that is that nowhere in the world in any treatise on valuation, expropriation is another thing, but nowhere in the world in valuation for assessment purposes have I ever seen the doctrine considered that they would, if they had to sell, withhold because their reputation would suffer. There are many cases where they would have to sell. Some of the large banks and trust companies have gone to larger quarters. They have gone to larger quarters and sold their building to another bank and the other bank has never advertised that building. The same with the Montreal Trust when they used the building of the Quebec Bank. The Montreal Trust has gone in there and made it its own home.

LORD OAKSEY: It does not call it the Quebec Bank.

MR. BRAIS: No.

LORD OAKSEY: It has its advertising value in the nature of the building. It may not use it in actual verbal advertisement but there it is. If it is a big building then it has a value from the fact of its size and it has a value because of its beauty.

MR. BRAIS: It has the advertising value that every other building the business district has, because of being owners of the building.

LORD OAKSEY: Certainly.

MR. BRAIS: Because a company owns a building. It has not one iota of further advertising value. This has not the advertising value which is specially placed on this building to justify an increase, for example, as one of the reasons of the increased amount indicated, which was not applied to any other building.

LORD OAKSEY: But the value we are talking about is the value which comes from the cost of the building, not the cost of the advertisements which there have been of the building. The cost of the building is part of the actual structure and that building retains that value.

MR. BRAIS: I follow, my Lord, quite well there. The advertising value, the cost and size and the decorations of the building, taking the building as it is, is apparently not an element which at any time has been taken as an element of value for taxation purposes. It is the argument used by Lord Halsbury: We would not sell that building because it is our home and we would not have it said that we have left our home.

LORD OAKSEY: For the moment what you were saying was that directly it was sold it lost that value and if the value actually inheres in the bricks and mortar and it does not lose it when it is sold. The Montreal Trust Company buys the building of the Quebec Bank. The value which is due to the actual cost of the building still inheres to the building.

MR. BRAIS: With all due respect I would find it exceedingly difficult to subscribe to that in view of the advertising value placed on this building in the evidence in this case. We must take that into account. It arises out of the fact that the building was built by the Sun Life Insurance Company and that all the policies of the company carry a portrait of this building. It is known as the Sun Life building. It was built by the Sun Life and there lies its advertising value.

LORD ASQUITH: That is not its sole advertising value. Suppose it

passed from hand to hand, it was sold by the Sun Life to X and from X to Y. Is it not going to continue to make customers say: That must be a tremendously stable concern, anybody who is able to purchase it must be a concern of great financial resource and power?

MR. BRAIS: It has some value from that point of view.

LORD ASQUITH: The size of the thing does not advertise the Sun Life only, it advertises anybody who can afford to take it and run it.

MR. BRAIS: Anybody who could afford to do that and there are no concerns, I think, who would contemplate putting into that building the extra money for advertising purposes which it would cost if one capitalised the advertising value on the basis I suggested by the City witnesses. It is not possible to conceive it.

LORD PORTER: On that answer theoretically it is right to take into consideration the imposingness of this building, but for practical purposes it would have very small effect on the value of the building, because there are so few competitors for it.

MR. BRAIS: Very few competitors, and the only known purchasers, except potential persons, and one finds it difficult to contemplate, are those who would purchase for investment purposes and they, of course, would get no advertising value to themselves; they would get higher rents out of the beauty of the building. The building, in evidence, is getting higher rents. The rents are enhanced by the beauty of the building but, say the witnesses, not at all commensurate with the tremendous expense of the building. Then, my Lord, there is a question there. There are some tenants in that building, some of the biggest companies in Canada and the United States, who have one, two or three floors in that building. They have what is called an address. They are located in the Sun Life. They have the benefit of the beautiful entrance, they have the benefit of the location, the benefit of the wide corridors and of the marble, and the evidence is that they are paying higher rents on account of that. That is reflected in the commercial value but, say all the witnesses, and says the City of Montreal, of course, no tenant, no matter how much he is prepared to pay for that enhanced value, would think of paying a rent commensurate with the cost of the building.

My Lords, may I now refer to the case of in re Phillipps Estate. It is reported in 1934, 1, Western Weekly Reports at page 449. It is a decision of the King's Bench of Manitoba and it has also been cited by my learned friend. "Under the Winnipeg Charter where land has buildings thereon the land and buildings must be valued for assessment purposes as a unit. The 1926 amendment deleting the then subsection 2 of section 294 did not have the effect of authorising separate valuations of the land and buildings." That has no bearing here at all. As a matter of fact everything has been brought together in this case.

"The 'value at the time of the assessment' which, under section 294 of said Charter, the assessor is required to ascertain, ~~is~~ is that amount which a prudent investor, taking into account all the factors creating value, might reasonably be expected to pay for the property". Then he refers to Pearce v. Calgary and the Bishop of Victoria case, and the C.P.R. v. Bredenbury.

"In determining such value, every factor past, present, future or potential which enables its owner to exchange property for money must be taken into account.

"There is nothing in said Charter which authorises 'uniformity' or equalisation of assessments. The assessor is not entitled to consider the assessments of other properties". We will see here in this case the very purpose of the memorandum.

"The system of valuation and assessment adopted by the city, whereby the value of land is based on a graduated scale of reflection from the assumed values or assessments of 'peak points', is illegal since it encourages, if it does not result in, an evasion of section 545 of the Charter wherein it is provided that the yearly rate for controllable expenditure shall not exceed 12 mills on the dollar.

"On an appeal from an assessment to the board of valuation and revision under said Charter the board is acting judicially and should not violate the fundmental rules governing Courts of law with respect to the admissibility of evidence."

LORD PORTER: What is the meaning of "shall not exceed 12 mills on the dollar" ?

Mr. BRAIS: I think if I tried to explain I should be making a guess. It has no bearing here.

LORD ASQUITH: Is a mill one thousandth of a dollar ?

Mr. BRAIS: Yes.

LORD PORTER: That I can imagine. What I thought it might be is this. It has to be 12 mills on the dollar. If you make your assessment too great, you are then using another method and making itmore than 12 mills on the dollar, because on the true value your assessment is too great. It is more than 12 mills on the dollar of real value. Whether that is right or not, I do not know.

Mr. BRAIS: It did not seem to play any role here, and as I say I would be in the same position as your Lordship, I should just be speculating.

On page 456, quite briefly the finding of Judge Macdonald (that is not the Chief Justice whom we have already had) is that the phrase "fair actual value" does not add anything. I may say for my own part that I cannot see how there is any difference between the actual value of the property and the value at the time of the assessment.

At the bottom of page 457 we read: "But Mr. Proudhomme says that the absence of a statutory provision makes no difference, uniformity is an underlying principle implied in all assessment statutes and entitled to be applied in assessments made thereunder" He refers to Double v. Southampton Assessment Committee, and then continues:"I cannot see anything in the reasons of Lord Trevethin for the reversal of a manifestly unfair assessment, which supports Mr. Preudhomme's present contention".

"Counsel for the City also cited Ladies Hosiery and Underwear Ltd. v. West Middlesex Assessment Committee as justifying the Board receiving and considering the assessments of other properties - but in my opinion this authority is the other way", and we will have seen it here throughout the evidence. I may have to discuss before this Board those comparisons, because after what was said as the basis of the decision of the Court of Appeal not only is it improper as I submit in law, but in the present instance I hope to satisfy the Board that the comparison made is wrongly construed in fact.

LORD PORTER: The argument as I understand it is this, whatever results it may have. If you are going to consider a particular assessment with regard to all other assessments you have to first of all show that the other assessments are right. As that is not a possible step to take, it is confined to the particular assessment that you are considering.

MR BRAIS: This judgment, apart from approving of the reasons of Judge Macdonald in the Bishop case, discusses a whole series of matters which are more pertinent to that case and with which I do not think I need weary the Board at this moment.

So much for the general principles of assessment as recognised by courts of the Province of Quebec, as approved of by other courts and the courts of England. There are decisions which I shall have to discuss later which were discussed by my learned friend Mr Beaulieu, but I think I should now more properly proceed to try to show the Board that the assessment was improperly made because I do not pretend that because the figure is large I am wrongly assessed, and I must show the Board my reasons for saying it is improperly made.

In that connection may I refer to the Statutes of the Province. This is the Charter of the City of Montreal in 1903; I promise not to go back later through the Charter. It is the only old one which I shall have to refer to; this is to show the origin of it. In 1903 by 3 Edward VII, Chapter 62, it was provided that Article 375 of 62 Victoria, Chapter 58 should be replaced by the following: (Reads same). I read those words because there were two things which had to be found, the actual value of the property as well as the bona fide rent.

LORD PORTER: Is that Article 375 or Section 41 of 3 Edward VII?

MR BRAIS: That is Section 41 of 3 Edward VII which replaced the former Article 375 of the City Charter by this new section. We need not go back further because that article is replaced in toto.

LORD PORTER: The one which we have got now is with the amendments up to 1942, but I do not know when the change took place.

MR BRAIS: The next effective change, so far as this case is concerned, is found in 1937 by Statute 1 George VI, Chapter 103, Section 50, which provides: "Article 375 of the Act 62 Victoria, Chapter 58, as replaced by" a series of amendments, "is further amended (a) By replacing the first paragraph thereof by the following: '375. Each year the assessor shall proceed, according to the provisions of the Charter, for each of the wards of the City, with the preparation in duplicate of a new valuation roll for all the immovables situated in such wards. Such roll shall be completed and deposited on or before the first of December. It must be signed by the Chief Assessor'," and so on.

In (b) it says: "By replacing paragraph 3 thereof by the following: '(b) The actual value of said immovables. The actual value of the buildings shall be determined by the intrinsic or replacement value, taking into account the then present situation, the capital improvements, or the changes made to the property and the site. The lands shall be valued according to their current value, consequent upon their site and general particular economic fluctuations. In estimating such actual value, the yield from the property must be taken into account but only one of the factors in the estimating.'" There is a misprint there. It is set out in the City Supplemental Factum and it is printed "but only as one of".

Your Lordships have before you, and it might be of some use if I refer to what has been called the Appellants' Answer to the Respondents' Supplemental Factum. During the hearing before the Supreme Court the Chief Justice asked my learned friend whether they had any authority in support of the formula of blending and they filed a list of cases and subsequently obtained permission from the Supreme Court to file a further Supplemental Factum in support of the Memorandum per se. Permission was given by the Supreme Court on condition that the other parties should be allowed to answer the Supplemental Factum. That explains why there was not only a factum by the Respondent in the Supreme Court but a supplemental factum which was the answer plus the comment by the Appellants on the unreported cases filed by the Respondents since the hearing. So it became a voluminous matter, going on rather like a see-saw.

LORD PORTER: This paragraph 3 is surely some support for blending.

MR BRAIS: Yes; it is support for the blending very definitely. There is no doubt about that. At page 33 of the Supplemental Factum it refers back to page 16 of the City of Montreal Supplemental Factum which is called "Supplementary Notes", of which I have a copy here. It begins at page 15. I must say here that this was the first time the present Respondent had any knowledge that there had been in force in the City of Montreal a section which would not only permit of blending but which directed a blending or a consideration of the two factors at the same time. We were quite startled when this was drawn to our attention. It was drawn to our attention in this fashion: "The Memorandum. The memorandum of the assessors" -- This was from the City of Montreal.

LORD NORMAND: Does it differ from what is given on page 33 of the Supplementary Factum?

MR BRAIS: Yes; that is an extract from the City's own Memorandum. I am now reading from this Memorandum so that we shall have the full story.

LORD ASQUITH: Which side put in these notes?

MR BRAIS: The City of Montreal.

LORD ASQUITH: Is the blue document from the other side?

MR BRAIS: That is produced by the Sun Life attorneys. This Memorandum came to us after the hearing before the Supreme Court. It says: "The memorandum of the assessors is the result of the combined experience of 16 assessors comprising architects, engineers, builders, etc. some of them doing nothing else besides assessing full time for the last twenty or twenty-five years. The memorandum as already pleaded applies for large or special properties for which there is no market data actual or available. If there is a sale of the subject property or of fairly comparable properties that price is a starting point and the memorandum will serve as a check to ascertain if said price is bona fide justified, between parties fully aware of the conditions of the market, in normal time and conditions, free from any keen need or compulsion, etc., etc. The memorandum illustrates the 'other indicia theory' which was already argued. The conflicting theories of assessments are not now, even in Montreal. Before 1941, two schools were fighting for legislative recognition in Montreal of one or the other systems the replacement value or the economic value by the capitalised revenue. In 1937, by 1 Geo. VI, Chap. 103, section

50, the sponsors of the replacement value school succeeded in having article 375 of the Charter amended by replacing the words 'actual value' by the following" ------

LORD PORTER: That is what we have just read. Then it says at the bottom: "The upholders of the straight replacement value theory thought that they had scored a victory".

MR BRAIS: Yes. "The upholders of the straight replacement value theory thought that they had scored a victory upon the tenants of the revenue theory, and against Mr. Honore Parent who in his first edition of the manual in 1936, was a tenant of the theory that all factors of value must be weighted and reflected in the rolls. In the very first case which went to the Superior Court, it was held that the new definition did not change at all the law on the subject, since all the elements menttioned in the definition were elements which had to be considered before in the determination of the actual value. As a result in 1941 1941 by 6 Geo. VI, Chap. 73, section 33, the definition was abrogated and the former section 3of article 375 was restored to read as it is now: '3. - The actual value of the said immovables.'"

LORD PORTER: We have had called to our attention in the present Act Section 384 which deals with appeals. Where does the substantive requirements for valuation appear in theAct of 1942?

MR BRAIS: The words "the actual value of the said immovables".

LORD PORTER: Where does it appear? There must be some instruction given to the assessors as to what they are to do, and that must come before you come to appeal at all.

LORD NORMAND: It is Section 375.

MR BRAIS: What your Lordship has before you in Article 375 of the City Charter is this: "Every three years the assessors shall draw up in duplicate for each ward of the City a new valuation roll for all the immovables in such wards. Such roll shall be completed and deposited on or before the first of December, after having been signed by the Chief Assessor. This roll and each of the supplementary rolls mentioned in paragraph (b) shall contain" -- Now we come to sub-paragraph (3) --"3. The actual value of the immovables". If we compare that with the 1937 amendment which was in force when the two schools were fighting for legislative recognition, one sees what the difference is.

LORD OAKSEY: If the Factum is right it would appear that when the Legislature reintroduced the words simpliciter, "the actual value of the immovables", they did in the view of the courts in Quebec bear the meaning which is put upon them in the preceding Statute.

MR BRAIS: No, my Lord; I could not agree with that. The reason for the amendment was because there was one group, as stated here, that wanted to use replacement value as the foundation of valuation, and the other group who wanted to use the economic value as the foundation of valuation.

LORD ASQUITH: It is a pity they did not say which was right; it would have solved a lot of our troubles.

LORD OAKSEY: In this Factum it says that in the very first case in the Superior Court it was held that the new definition --

that is the one which refers to replacement value -- did not change the law on the subject since all the elements mentioned in the definition were elements which had to be considered before any determination in regard to value. If that decision was right, then the reintroduction of the words "the actual value of the immovables" made no difference at all.

MR BRAIS: If that decision was right, but that is not the reason for the conflict between the two groups. In my submission that decision obviously is not right.

LORD PORTER: At any rate it is sufficient to say this, that there was doubt as to whether the first decision was right or not, and for the purpose of showing that it was not right or might not be right they jettisoned 375 and substituted the old definition. Speaking for myself I can well understand that because in 375 you start with references to intrinsic or replacement value. What intrinsic or replacement value means, I am not at all sure, and I am not at all sure that it is not contradictory of "as only one of the factors". It seems to me as at present advised -- I do not think it makes any difference -- that the change to the present definition was deliberately made in order to make sure that no confusion should take place owing to 375 and the decision under it.

MR BRAIS: My learned friends are much more explicit in their own explanation for the amendment when they say that before 1941 two schools were fighting for legislative recognition in Montreal of one or other system. They are very explicit; there is no doubt about that. There is no doubt that a judgment came out, and to the surprise of the City authorities, and in contradiction to their strenuous objection, in that decision the learned trial judge saw fit to hold that it had not made any difference. I do not agree with that decision at all, and the City of Montreal does not agree with that decision and did not agree with it then. It is a case of minor importance; we have no reference to it, and the name has not been even given to us; but I have not the slightest doubt that when they went before the Court, obtained that decision and then did not agree with it, it may have helped to swing the battle in favour of those who wanted to remain on the old basis of valuation, which is the actual value; but all I have to say is that before this rule came into force, and after it was made, so far as the Sun Life Building was concerned, and after the Memorandum was made -- the Memorandum was made on the old law -- this new Statute which had got the general principle which is recognised the world over and adopts the general principle of actual value, left it to the assessors ----

LORD PORTER: Are we entitled to accept that the Memorandum was made under the new Section 375?

MR BRAIS: We can accept that for two reasons: First as regards its date, which was 15 months before the amendment, secondly and more important on account of its phraseology.

LORD NORMAND: What was the date of the assessment in relation to the various amending Acts?

MR BRAIS: The rolls were frozen in 1937; from 1937 until 1940 or early 1941 all the assessments in Montreal were re-made. There was a complete reorganisation of the assessment department. It is during that time that the Board of Revision gave its own instructions to the assessors and instructed the assessors to prepare this Memorandum. That Memorandum was passed in August,

1940. The new law came into force ------

LORD NORMAND: It is 1941, 6 George VI, Chapter 73. When did that come into force?

MR BRAIS: The law came into force on the 29th April, 1941.

LORD NORMAND: That is before the date of the assessment.

MR BRAIS: Yes, and it specially ordered in that Statute by Article 375(e): "The roll which shall be prepared and deposited on the 1st of December, 1941, shall be made according to the provisions of this article". That is the article which brought back the law to the basis of actual valuation.

(Adjourned till to-morrow morning at 10.30.).