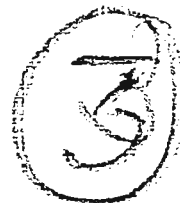


28, 1951



IN THE PRIVY COUNCIL.

Council Chamber,
Whitehall, S.W.1.

Wednesday, 20th 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).

-v-

SUN LIFE ASSURANCE COMPANY OF CANADA

(Respondent).

THIRD DAY.

To Judicial Committee of Privy Council,
H.M. Patent Office, &c., &c.

MARTEN, MEREDITH & Co.,

Shorthand Writers,

11 New Court,

Carey Street, W.C.2

(Midland Circuit and Leeds Assizes)

Council Chamber,
Whitehall, S. W. 1.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Between:

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.

T H I R D D A Y.

MR. BEAULIEU: My Lords, at the adjournment I was reading from page 1083, line 18: "Ici, je dois faire remarquer que le juge oublie" etc. reading to the words on page 1087, line 11 "de la compagnie Sun Life, aussi avec depens".

Then there are the notes of Mr. Justice St. Jacques who was dissenting. "Quelle etait la valeur réelle des immeubles de la compagnie d'assurance Sun Life" etc. reading to the end of the judgment.

We now come, my Lords, to the notes of Mr. Justice Pratte.

LORD PORTER: Mr. Justice St. Jacques really found it himself on two things: first of all, upon the valuation of 1931, which he said formed the basis on which it should be estimated in the future; and, secondly, upon neglecting the memorandum and saying that 50-50 was right and not 83 and 7.7 or whatever it is. That is substantially what he is saying, is it not?

MR. BEAULIEU: That is substantially what he is saying. Mr. Justice Pratte says: "La Cite de Montreal et la Sun Life Assurance Company" etc. reading to the words on page 1096, line 1 "la valeur des immeubles sous examen".

LORD ASQUITH: This is a dissenting judgment, too, is it not?

MR. BEAULIEU: No, my Lord. Mr. Justice Pratte formed the majority with Mr. Justice St. Germain and Mr. Justice Galipeault. The majority judges were Mr. Justice St. Germain, Mr. Justice Galipeault and Mr. Justice Pratte. The learned judge continues: "De la decision rendue par le Bureau de revision" etc. reading to the words at line 49 "d'evaluation qui est exposee dans le memoire ci-apres recite". It is the same memorandum, my Lord.

LORD PORTER: Need we read this?

MR. BEAULIEU: I would like to be relieved from reading it once more, my Lord.

LORD PORTER: I do not think we need it.

MR. BEAULIEU: Then I can go to page 1099, at line 14, where the learned judge says: "Si j'ai cru devoir citer le texte du memoire des estimateurs" etc. reading to the words on page 1100, line 49 "qu'ils ont evalues comme suit".

LORD PORTER: I do not think you need trouble to read the figures, because we have had those before.

MR. BEAULIEU: Yes, my Lord. Continuing at line 22 the learned judge says: "Quelques mois plus tard, et toujours en conformite des prescriptions" etc. reading to the end of the judgment.

We come now, my Lords, to the judgment of Mr. Justice Casey, who was also dissenting. The two dissenting judges were Mr. Justice St. Jacques and Mr. Justice Casey. Mr. Justice Casey said: "This appeal and cross-appeal are from" etc. reading to the words at line 33 "the Company's Head Office was subsequently built".

LORD PORTER: I do not think we need have the facts again. I think we might start again at line 30 on page 1114.

MR. BEAULIEU: Yes, my Lord. The learned judge says: "Concerning these rolls, the following points may be noted" etc. reading to the words at line 49 "was not subject to the payment of business taxes".

LORD PORTER: Stopping there for a moment, so far I have not been conscious of any argument based upon points (3) and (4) in that statement.

MR. BEAULIEU: Points (3) and (4) have no longer any importance.

LORD PORTER: That is what I thought. I was trying to eliminate them if they had not.

MR. BEAULIEU: He is only mentioning all the facts. It will appear that they are now of no importance. The learned judge continues: "In due course the Company appealed from these valuations to the Board of Revision provided for by section 382 of the City's Charter, the Company's main contentions being that the total valuation of both properties should be limited to 8,433,200 dollars, and that the rental value of the properties should be reduced to 352,034.50 dollars".

LORD PORTER: I do not think you need the next passage, because we have already had it. I think you can go to the bottom of page 1116.

MR. BEAULIEU: Yes, my Lord. The learned judge says: "It is from this judgment of the Superior Court" etc. reading to the words on page 1118, line 10 "the following passage from the judgment of Lord MacLaren in Lord Advocate v. Earl of Home".

LORD PORTER: Do you know where that case is reported?

MR. BEAULIEU: Yes, my Lord; we have the report and we shall have to refer to it later.

LORD PORTER: But can you tell me now where it is reported so that I can put it down?

MR. BEAULIEU: It is reported in volume 28 Scottish Law Reporter, page 289.

LORD PORTER: In what year was that?

MR. BEAULIEU: The volume is for 1890-91, my Lord. The passage reads: "'Now the word 'value' may have different meanings" etc. reading to the words on page 1121, line 50 "without being obliged, desires to purchase his property"."

LORD ASQUITH: I suppose those last two cases are cases of assessment and not expropriation?

MR. BEAULIEU: Assessment cases, yes, my Lord. "This decision is in conformity with the one cited above" etc. reading to the words on page 1126, line 50 "at a price almost double the value given it by its own experts"."

LORD PORTER: That means the 16 millions. The Sun Life carried this property at 16 millions.

MR. BEAULIEU: Yes, my Lord, 16 $\frac{1}{4}$ millions. "I cannot agree that the willing seller formula is intended to cover" etc. reading to the words on page 1129, line 11 "but equitably in comparison with other property assessed in the community"."

(Adjourned for a short time).

MR. BEAULIEU: My Lords, Mr. Justice Casey continues at line 13 on page 1129: "On this judgment I make the following comments" etc., etc. (reading to the words on page 1131 at line 19) "these two factors cannot play the same role."

LORD PORTER: I do not follow why he says that the cost of erecting a new building comparable with that which he proposes to buy has never been discussed, because the whole question of exchanging limestone for granite, for instance, was considered at length. Therefore, I should have thought that the question of erecting another building was very carefully considered, both before the Board of Revision and in the Court.

MR. BEAULIEU: I do not know whether I understand his Lordship correctly, but the way in which I understand it, speaking generally, is that, in his view, all that which he called subjective value must be eliminated from his consideration.

LORD ASQUITH: He has an entirely different approach from the other dissenting judge. This distinction between the subjective and objective value was entirely his own.

MR. BEAULIEU: Yes, my Lord; that was adopted for the first time by Mr. Justice Casey.

LORD ASQUITH: Here, too, when he is talking about the cost of a new building comparable with the other, he is talking about the buyer and not the seller. The words are "comparable with that which he proposes to buy". I do not know whether that makes any difference, but that is not quite the point of view from which the other judges considered the matter.

MR. BEAULIEU: It probably is explained later, but he is entirely concerned with the cost of reproduction in erecting a new building only as a check upon the offer that a prudent investor would make. He refused to blend together the two elements of value, reproduction cost and income from the rental.

LORD OAKSEY: He does that on page 1130, but contradicts himself on page 1131. He says at the bottom of page 1130: "The fact of owner-occupancy, however, can never justify a blending of two opposed values", by which, I suppose, he means the rental value and the replacement value.

MR. BEAULIEU: What I understand, with respect, is that by "subjective value" he means the price that the seller would require before selling. He says: "We are not concerned with what the Sun Life would ask as a price; that is only subjective. We are only concerned with what the prudent investor would offer." It is the bids of investors between themselves irrespective of the question whether the seller would be willing to accept them, because he says that the price that the company is willing to accept is a subjective element and he is not concerned with subjective elements in taxation.

LORD NORMAND: He does not blend the replacement value in the rental value; he simply treats it as a check.

MR. BEAULIEU: That is so; it is only a check, so that his own approach is the revenue; but what he says is: "As a check, no doubt the prudent investor would ask himself: Would it cost me less if I wanted to build another building just like this one?" Mr. Justice Casey continues: "The prudent investor is interested in a reasonable return" etc., etc. (reading to the words on page 1136, line 43) "should be dismissed with costs in each case against the loser."

My Lords, on the following page there is printed in full the judgment in the Minnesota case, to which every judge has referred and which was relied upon by by all the learned judges. Is it your Lordship's desire that I should also read that?

LORD PORTER: At the moment I do not really know how it helps us. I think that we should leave it and come to the Supreme Court judgment first.

LORD ASQUITH: Will you, first of all, for my information remind me what the Minnesota case decided. In the first place, it is an American case, is it not?

MR. BEAULIEU: Yes.

LORD ASQUITH: Secondly, I think what you said it decided was that when you had this fortress-like building you could take into account not only the willing buyer and willing seller criterion, but also its probative value for some future use?

MR. BEAULIEU: If I understand that case correctly, it purely and simply decided that, in the case of a bank building having particular adequacy, the only thing that should be considered was the reproduction cost and nothing else, but, on account of the ornamentation of the building, there was deducted first the physical depreciation of 25 per cent and then a further depreciation of 25 per cent for the ornamentation, which possibly might go out of mode very quickly. They refused to consider the approach of the income if the bank had been converted into a boarding-house, for instance. The experts for the other side were insisting that this bank ~~was~~ it was could not be rented, but that, if it was transformed or converted into a boarding-house, then it would have a reasonable yield, and that that was the only approach to the valuation. This view was rejected by the Court. The Court said: "You must take the building as it is, and not a hypothetical building".

LORD ASQUITH: I did not want to deflect you from reading the other judgments, but what I had in mind was the passage in the Minnesota case given on page 1128, line 41. It says: "The Supreme Court of the State has not ruled upon the construction and purpose of the amendment. However, it is evident that there is to be noted in the statute a direction to the assessor and the Board to consider other factors in determining the valuation for tax purposes than the traditional, hypothetical query: What price could be obtained by an owner who was ready, willing and able, but not forced to sell, from a buyer who was ready, willing and able, but not forced to buy." It does say that, in addition to the criterion of the willing seller and willing buyer, you are to take other factors into account.

MR. BEAULIEU: As I understand it, the Court was there discussing a later amendment not ruled upon by the Supreme Court, which had changed the law as to the actual value. They said that that amendment does not change the proper foundation of their valuation. I think that I am right in stating that the only thing they considered was reproduction plus a double depreciation.

LORD ASQUITH: I wanted to get that clear in my mind, if we are not going to read the Minnesota case.

LORD PORTER: It will be read later, no doubt. As I understand it, the judgments that we have got so far have quoted the Minnesota case and said that that was a case sui generis, because the only value which it had was replacement value and rental value did not come into consideration, because it never would be rented. On the other hand, they make up to some extent for the refusal to consider rental value by giving two sets of

depreciation, whereas in this particular case the majority have refused to give two sets of depreciation, I imagine because they say: "We are not taking solely the replacement value; we are taking the replacement value and giving some effect to rental". Is that right?

MR. BEAULIEU: That is the position that was stated, my Lord. In substance there might be some -----

LORD PORTER: I am taking it broadly. I am not trying either to tie you down or come to complete grips with the matter; but I want a general aspect.

MR. BEAULIEU: That is the general aspect, my Lord.

In the Supreme Court the Reasons for Judgment appear at page 1156. Between the judgments of the Superior Court and the judgments of the Supreme Court, we have the Minnesota case, and the proceedings on appeal.

LORD PORTER: I think that we might leave that for the moment.

MR. BEAULIEU: The learned Chief Justice said: "The subject matter of this appeal is the assessment" etc. reading to the words on page 1161, line 21 "the appeal to that Court of the Sun Life Assurance Company of Canada should not be disturbed".

Then there is the judgment of Mr. Justice Kerwin. "This appeal is concerned with (1) assessment by the City of Montreal of the appellants' main office building" etc. reading to the words on page 1162, line 27 "There would be another 30 per cent replacement cost added on the 50, to make it 80 and 20".

LORD PORTER: Why is it 20 and 60? I could understand 60 and 40 and I could understand 30 and 20 which is half 60 and 40 when you attribute it to 50 per cent, but why 60 and 20?

MR. BEAULIEU: My Lord, the 20 and 60 per cent is a little confusing, because when the assessor speaks of 20 per cent he refers to the part occupied by the tenants and he comes to that figure by multiplying 40 per cent by 50 per cent and that gives 20 per cent. Then he converts the result at 20 per cent but he did not make the same conversion with the 60 per cent.

LORD PORTER: This ought to be 20 and 30.

MR. BEAULIEU: Instead of 60; it should be 20 and 30.

LORD PORTER: That is all right so far. Now let us go on. "There would be another 30 per cent replacement cost added on the 50!" That is for the half.

MR. BEAULIEU: That 30 per cent which is not given to the commercial value ^{reverts} to the replacement value.

LORD PORTER: What he is really saying here then, if that is so, is: I have now to find out some sort of method of discovering the relationship of replacement and revenue; I take that to be 80 and 20 in the normal case, but in this particular case, as the Sun Life have the best part of the building, I will reduce the 20 to 10. Is that it?

MR. BEAULIEU: That is it exactly, my Lord. "On appeal to the Superior Court, Mr. Justice MacKinnon, while arriving at a

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different total for the replacement value" etc. reading to the words on page 1163, line 31 "should be borne equally by both parties".

LORD ASQUITH: Before we pass from that I would like to see if I have understood the formula in the memorandum. Does it really say this, that supposing you have a purely commercial building, all of which is let out to tenants, even so you have to apply this dual formula, 50 per cent replacement and 50 per cent commercial?

MR. BEAULIEU: Yes, my Lord; that is the memorandum.

LORD ASQUITH: What is the justification of it?

MR. BEAULIEU: The assessment is made against the owner, and because the entire building is rented, nevertheless, his interest as owner must be valued.

LORD ASQUITH: But his interest as owner surely is measured by the rents he receives and by nothing else?

MR. BEAULIEU: That is why they are attempting to blend the two.

LORD ASQUITH: I should have thought it was a reason for not blending the two.

MR. BEAULIEU: The interests of the owner must be valued also.

LORD ASQUITH: But is not the value of the building which you owned for the purpose of letting it and which you have let out in its entirety at certain rents to be measured by the rents which you receive and by nothing else?

MR. BEAULIEU: That is the position taken by some of the learned judges.

LORD ASQUITH: Why import replacement value? There may be some obvious reason for it, but I cannot see it.

MR. BEAULIEU: Our contention is that actual value, and we must stick to the Charter, means the determination of the value taking into consideration every possible element of value, so that you cannot disregard the element of value of replacement cost. If you do disregard that one element, then you have a distorted result.

LORD ASQUITH: That is the theory I know. Suppose we have a house or a building intended to be let out and nothing else for commercial purposes and which is wholly let out. I cannot see that there is any relevant factor except the amount which you get by letting it.

MR. BEAULIEU: Our submission is that even in that case the market price will be one factor and the cost. You must even in that case find what did it cost, because you might have the same return from two houses, one of which will last fifty years and the other one only ten years. That is reproduction cost, that is to say, the actual original cost, and a deduction being made for depreciation, so that if you have, like you have in the present case, a building with granite walls, undoubtedly it will last longer and the rentals will last longer.

LORD ASQUITH: It will have a longer earning life, I quite see that.

MR. BEAULIEU: That element with all respect must also be considered. You consider the two and blend them. There might

to be some mistake in blending, but that is totally different.

LORD NORMAND: Why is that measured by a fixed ratio of 50 per cent to each, because it may vary from one to another?

MR. BEAULIEU: It is 50 per cent for each, because these experts met together and discussed the matter and came to the conclusion that it was a fair equitable percentage.

LORD PORTER: It is a rough and ready method of calculation and it is the best you can get in a rough and ready world. That is the real argument.

MR. BEAULIEU: The intention was, on the contrary, to have a scientific method of valuation.

LORD PORTER: It may be a scientific method but not necessarily a scientific result. All these things are bound to be rough and ready to some extent.

MR. BEAULIEU: That is why, in the memorandum, after laying down the principle they say: Nevertheless, in every case you may make some changes. You may, if you think that the rule does not apply equitably, make some change, but they lay down as a general proposition that it should be that way. It is for the assessor, looking at the building, to say: In this particular case this does not apply or that will not be fair, and he is entitled to change it. The general principle, after serious discussion, was that in such a matter there were two fundamental elements of value which had to be given equal consideration. It is not the case of the Sun Life. We have a third case where we have a building partly occupied by the owner and partly rented.

LORD NORMAND: I should have thought that when the building was entirely in tenant occupation, it might have been fair to say that the tenant occupation part of it shall not amount to less than 50 per cent, but I find it difficult to justify in my mind how it was to be fixed at precisely 50 per cent.

MR. BEAULIEU: If I read the memorandum correctly, that is left to the discretion of the assessor.

LORD REID: I was impressed, I will not say whether I agree, because I have come to no view, by what Mr. Justice Pratte said on page 1110 where he seems to offer a justification for this in logical terms. Is that the case as you present it or do you wish to present it from a different angle from that adopted by Mr. Justice Pratte?

MR. BEAULIEU: I intended to present it by the evidence of Mr. Hulse, as I understand it, the chief assessor, who said these were rules laid down by common consent, but in every case it is left to the discretion of the assessor.

LORD REID: But it is not, because if I understand the memorandum aright, the assessor must take in every case at least 50 per cent of replacement.

MR. BEAULIEU: If you look at the very wording of the memorandum that is the rule, but there are safeguarding provisions before and after saying that in each case the assessor must use his discretion, but it is right as a general rule. They came to that conclusion that, generally speaking, 50 per cent of each in a commercial building should be blended together.

Then there is the judgment of Mr. Justice Taschereau. "The appellant is the owner of a large office building situated

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on Dominion Square, in the City of Montreal, and which occupies an entire city block from Metcalfe to Mansfield Streets on Dorchester Street. From Dorchester Street, it extends northward for approximately one half of a long city block. Part of this building is occupied by the Company itself as its head office, the remainder being rented on a commercial basis to a large number of business tenants.

"The appellant is also the owner of a boiler house situated on Mansfield Street, where is located the heating apparatus. The office building and this boiler house, together with the emplacements whereon they are erected, were placed on the municipal valuation roll deposited by the assessors of the respondent on December 1st, 1941, at the respective valuation of 13,755,500 dollars and 520,500 dollars. The appellant was also assessed in respect of its occupancy of the main building, at 423,280 dollars for water tax purposes, and at 421,580 dollars for business tax purposes. In the case of the boiler house, the assessment was placed at 26,000 dollars".

LORD PORTER: Is the 423,000 dollars and the 421,000 dollars based on the portion of the building occupied by the Sun Life; in other words, is it the fact that the water tax is imposed upon the person occupying as opposed to the owner?

MR. BEAULIEU: Upon the tenant.

LORD PORTER: Therefore, this water tax is imposed only upon a portion of the building?

MR. BEAULIEU: Yes, my Lord. "The appellant feeling that it was aggrieved by these valuations" etc. reading to the words on page 1168, line 42 "and confirmed the judgment given by the Board, Mr. Justice St. Jacques and Casey dissenting".

(Adjourned till tomorrow morning at 10.30).