

28, 1951



IN THE PRIVY COUNCIL

Council Chamber,  
Whitehall, S. W. 1.

Wednesday, 27th June, 1951.

Present:

LORD PORTER  
LORD NORMAND  
LORD OAKSEY  
LORD REID  
LORD ASQUITH

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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).

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SEVENTH DAY  
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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)*

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

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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.

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S E V E N T H D A Y.  
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MR. BRAIS: We were yesterday referring to the City's views on the memorandum and on the state of the law at the time the memorandum was being prepared. I gave yesterday the date of the sanction of the Statute 5 George VI, chapter 73. The Statute provides, as we have seen, that we go back to the actual value of immovables. Section 90 provides "This Act shall come into force on the day of its sanction" and on page 305 at the head of the Act we see that it was assented to on the 29th April, 1941. That date, I may say, is of very considerable importance, because during all the time that these assessments were being made from 1936 until April, 1941, the Charter of the City of Montreal obliged the assessor to arrive at the actual value of the buildings "according to the best formula that shall be determined of

the intrinsic or replacement value taking into account the then present condition and the commercial improvement and the changes made to the property and site. In estimating such actual value the yield from the property must be taken into account but only as one of the factors in the estimating". In other words, the law then directed that there should be a blending of the intrinsic or replacement value and the yield from the property, which means the capitalisation, of course, but only as one of the factors in the estimating.

LORD ASQUITH: You say that the concluding words of the section govern both the previous parts of it.

MR. BRAIS: Yes. I would agree that the formula is not perfectly worded but it has to apply, I would say, to both and especially to the buildings.

LORD ASQUITH: I should have thought so.

MR. BRAIS: Obviously, if it does not apply to the buildings, then it just simply says that you are to value on intrinsic value, but I do not see how it would be there without applying to the building also.

LORD ASQUITH: I think it must apply to both. There is one other point. That was the 1937 Act?

MR. BRAIS: Yes, my Lord.

LORD ASQUITH: In 1937 or later, the assessments were frozen until 1941.

MR. BRAIS: Yes.

LORD ASQUITH: Therefore, I suppose this provision in the 1937 Act, for what it is worth, never really became directly applicable until the amending Act came along.

MR. BRAIS: It did for new buildings. The new buildings were not frozen.

LORD ASQUITH: So they were assessed in conformity with the 1937 Act.

MR. BRAIS: They were assessed in conformity with the 1937 Act, but what we must not overlook is that the purpose of freezing the roll from 1937 to 1941 was to permit, during that time, the assessors to re-organise the assessing system of Montreal and to assess all buildings. They did not wait until the last days before the roll came in to begin that work, they travelled around and then they started assessing. The work on the Sun Life building was completed in 1938 as I will indicate to your Lordships later. Then the 1941 Statute, which returned us to the actual value, specifically provided that the 1941 assessment should be made on that basis. So that no new roll of old buildings was brought in during that period, except as I said, for new buildings or tangible increased expenses to old buildings as reported by the Sun Life year by year; its expense on the building went up year by year 20,000, 30,000 or 40,000 dollars each year as we finished off the various floors for tenants.

LORD REID: I notice the word "intrinsic" in the 1937 amendment, "intrinsic or replacement value". Is that word "intrinsic" one which occurs elsewhere or is it simply a new word brought in here for the first time in valuation practice?

MR. BRAIS: It occurs sometimes elsewhere but it occurs often in the City's valuation manual which we will have to look at

→ this morning where the words are used indifferently.

LORD REID: So that in your submission both intrinsic or replacement value, the two words, mean the same thing.

MR. BRAIS: I would say that they are intended to mean the same thing and that they have been acted upon in that way.

LORD ASQUITH: Intrinsic is contrasted with commercial, I take it.

MR. BRAIS: It is contrasted with commercial.

LORD ASQUITH: It is a fluctuating value.

MR. BRAIS: It is contrasted in some places with commercial; in some places with actual value and in some places with exchange value or market value or current value.

LORD ASQUITH: There is one other thing. I want to get one date from you. The three years period was substituted at some stage for the one year period on assessment. What was the date of that? We have section 375 now which says three years.

MR. BRAIS: I would say that for all ~~practical~~ purposes in which we are interested we were under the three year period. I will verify that but I think that is correct.

LORD ASQUITH: I thought under the 1937 Act it was one year.

MR. BRAIS: Yes, and then it was from year to year. You are perfectly right, my Lord. My colleague tells me it is 1941 when the three year period was first brought in. Will your Lordships refer to the City's supplementary notes. At the bottom of page 16 you will find: "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". Then we read on "it was held that the new definition did not change at all the law on the subject since all the elements mentioned" etc.

In that connection I would draw your Lordships' attention to two decisions one of which was mentioned to your Lordships that of Lynch Staunton v. City of Montreal reported in 76 Superior Court Reports at page 286. We see there that the roll was still operative for new buildings.

LORD OAKSEY: What is the date of it?

MR. BRAIS: It is in 1938, the judgment of 20th June, 1938. We find there Mr. Justice Gibson on page 289 in maintaining the valuation made by the City at 37,000 dollars for a building which had cost 37,350 dollars plus extras and so forth said: "Considering that by article 375, paragraph 3, of the charter of the City of Montreal, (as enacted by 1 George VI, chapter 103, section 50) it is provided that it is the actual value of the immovables that is to be entered upon the assessment roll, and the article continues: 'The actual value of the building shall be determined by the intrinsic or replacement value, taking into account the present situation, the capital improvements, or the changes made to the property, and the site . . . . the yield from the property must be taken into account but only one of the factors in the estimating'".

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Then he continues: "And considering that in the case of these two buildings which were only just completed, there appears, in the opinion of the undersigned, no reason to find that the 'intrinsic or replacement value' is other than the figures fixed by the Board of Revision, or indeed other than the cost price". So that that just leaves nothing to the imagination.

LORD ASQUITH: There would be no depreciation in that case.

MR. BRAIS: There would be no depreciation in that case. There is not the shadow of doubt that you have this reported judgment which does not take into consideration the position that the value is a market price or actual value. It actually quotes the section and says (indeed other than the cost price". There can be no possible ambiguity, and I am sure that my learned friends had overlooked this decision when they said in the first case it was decided that the Statute had not changed anything. There is no Statute about actual value.

LORD PORTER: Have you any idea what the first case was?

MR. BRAIS: It is not mentioned. However, we have decisions in Quebec which are reported and which say the contrary.

The other case is the case of Alliance Nationale v. City of Montreal and the Board of Revision of Valuations. That is on page 281 of the same volume, 76 Superior Court Reports. It is the same day and by the same judge and exemplifies what happens in our province. One of the decisions is in French and the other in English. The building there had cost 494,000 dollars. I am reading from page 284. It was assessed, I think, at the figure of 494,900 dollars. Then we come to page 285 where it says: "Considering that according to article 373, paragraph 3, of the Charter of the City as enacted by 1 George VI, chapter 103, section 50" - the Statute to which we have just been referring - "what was to be estimated was the real value of the

immovables and the real value of the building must be

determined by the intrinsic or replacement value. In the

present case the building had just been completed, it had

cost, and there had been paid, more than 494,000 dollars and

none of the means invoked obliged the Board to admit or

declare a value less than that adopted".

\* LORD REID: What was the contention for the appellant in that case? What principle did he want to adopt?

MR. BRAIS: He had a new building and he wanted to reduce the estimation to 300,000 dollars and he wanted to have the valuation reduced by the extra cost for putting in some deep foundations. It was bad clay soil and there was also some 11,000 dollars of linoleum in the building, special paint work, and heating of the building during the construction. He was charged with that too, what it cost to heat the building during the construction, it having been built during wintertime and similar reasons.

LORD ASQUITH: They did not say you ought to take into account commercial value along with replacement.

MR. BRAIS: They did not attempt to do it.

LORD ASQUITH: He could have done it within the Statute of 1937.

MR. BRAIS: He could have done it within the Statute of 1937, but apparently they were trying to proceed on a more proper valuation of the replacement than had been proceeded on in this case.

LORD PORTER: There are various sums mentioned as additional but only a small quantity. They do not set out the grounds at all.

MR. BRAIS: Except for those items. They seem to have put aside anything else he said. He must have said a great deal but they do not set it out.

LORD OAKSEY: Was the building let at the time of the assessment?

MR. BRAIS: No, my Lord.

LORD OAKSEY: Just built and not let.

MR. BRAIS: In so far as the record shows here the construction had just been completed.

LORD ASQUITH: What was it built for?

MR. BRAIS: For an insurance company.

LORD ASQUITH: For offices.

MR. BRAIS: For offices, yes.

LORD REID: Do we get any information as to what Messrs. Lynch Staunton said was the proper principle to be adopted?

MR. BRAIS: No. The judgment is wholly occupied with the question of the duty of the judge not to substitute his opinion of mere value. Then he says: And furthermore, here is what the law tells the City to do and they have done that by arriving at the cost of construction. Neither judgment gives the contentions raised, but it is to be borne in mind that they are both written by the judge on the same day. He finds the same formula so it is not because both are silent that there is something to be concluded.

That brings me to the preparation of this memorandum. May we look at Mr. Hulse's evidence, volume 2, page 246.

LORD ASQUITH: You have read us some passages from these supplementary notes, whatever they are called, which are answered, are they not, in this bright blue document? Have

you referred us to this document yet?

MR. BRAIS: Yes.

LORD ASQUITH: You have said what you want to say about that.

MR. BRAIS: Yes, yesterday, my Lord.

LORD ASQUITH: You did call attention to one passage. I did not know whether you had done with it.

MR. BRAIS: It is the passage as regards the two schools and the conflicting formulae.

In order to take this in chronological order I think I should, if I may be permitted, my Lords, to refer first to volume 1, page 25, lines 15 and 16: "The assessors at a meeting, I think it was on the instructions of the Board of Revision, decided that commercial values should be taken into consideration, and at the end of our meeting we decided that in the tenant occupied building, like flats and apartments, the commercial value should be taken as 75 per cent and the replacement value as 25 per cent, and it was the majority opinion that the capitalisation figure should not be used as one figure in estimating valuation of a property unless the result of its use given by itself is a fair indication of the real value of the property; also it is evident that it cannot be used in proprietor occupied properties, or stores in high priced retail districts".

LORD PORTER: Is this the meeting leading up <sup>to</sup> the memorandum?

MR. BRAIS: Yes, my Lord; that is the meeting.

LORD ASQUITH: They changed their minds about 75 per cent and 25 per cent.

MR. BRAIS: They left that. Those are for apartments. That is an interesting point. It is for the larger buildings that they then made this memorandum. They were applying 75 commercial and 25 replacement as the ordinary rule.

LORD ASQUITH: When you get a big building it is only then you apply 50 per cent as a minimum for replacement.

MR. BRAIS: As a minimum.

LORD PORTER: "After that the ones who had to authorise on large buildings had to make up their table, another table, and that is the table. 50 per cent".

MR. BRAIS: Yes.

LORD PORTER: That is the 50 per cent.

MR. BRAIS: That is the 50 per cent table. "(Q). Who decided that? (A). The assessors who had buildings in these wards. (Q). You conferred with the other assessors? (A). I happened to be in St. Ann's at that time. Mr. Munn did mention the fact". St. Ann's, as we all know, is one of the poorer wards. "(Q). It was a total of the ward assessors, who said 50-50 would be right? (A). Yes. (Q). The 100 per cent idea followed the same process? (A). Yes. (Q). There is no decision as to mixed properties? (A). That was up to the assessors own judgment. (Q). And you decided in the present case on 90 per cent and 10 per cent? (A). Yes. (Q). And you cannot give us a sample? (A). No. (Q). Do you remember many other big buildings where you put it at 90 and 10? (A). Not now. I can't remember. (Q). I would like you to



get that with the other information. (A). I am afraid you are putting too much on me for one day. (Q). Take two, if you like. (A). This is one case in twenty thousand. (Q). There are not twenty thousand monumental buildings in Montreal. We want to know why we get a jump of four million, when no one else does apart from us. And I want the same treatment meted out to the other fellows". We are not interested in the same treatment to the other fellows, my Lord.

LORD PORTER: He said he was going to give something tomorrow. Did he?

MR. BRAIS: Yes, we have that.

LORD PORTER: That of tomorrow is 90 opposed to 10. "You decided on one solitary building in Montreal for a jump of any size, and quite a jump. In Schedule 'I' you have a dozen buildings there. Partly owner occupied. I would like very much to know who got 90 per cent replacement and 10 per cent commercial, and who got a greater commercial". Then Mr. St. Pierre said: "Can you give that to me?" He says "Not right now. Tomorrow". I wanted to know if tomorrow ever came. Then he gives a list of buildings and he puts in the same increase.

MR. BRAIS: I am told it is P.35, volume 5, page 913. That is what Mr. Vernot brought back on the next day, figures for a series of large buildings. Then he put down what he called the percentage of replacement value used in valuation. The Royal Trust is 100 per cent. The Canadian Pacific Railway Express building 50 per cent. Owner occupied, 50-50, and so on down the line. These are all owner occupied or partly owner occupied buildings.

LORD REID: Is the Bell Telephone the next biggest building to the Sun Life?

MR. BRAIS: The large buildings for comparison purposes are the Royal Bank where the valuation is furnished just immediately before. The four larger buildings in Montreal are the Dominion Square, we will go back to that, the Aldred building, the Royal Bank building and, I think, the other will be the Bell Telephone building.

LORD PORTER: The Bell Telephone is the only one mentioned here and that is 3 million.

MR. BRAIS: The Royal Bank valuation sheet is furnished and if we turn back we find that on page 910. It is a building called the Globe Realty Corporation. That is the Royal Bank building. You have the valuation sheet there.

LORD PORTER: The total cost was 4 million.

MR. BRAIS: This is page 910. When you turn over you see "Assessors Valuation" and that is 4,500,000 dollars. It is arrived at this way. 40 per cent owner occupied arriving at a commercial value of 3,901,000 dollars. Then extending that on the right hand side our replacement net is 4,696,000 dollars, 80 per cent replacement 3,756,000, 20 per cent commercial 780,000 and they arrive at 4,537,160. The building is valued at 4,550,000 dollars.

LORD PORTER: I do not follow this. If you take up "Evaluation Des Estimateurs" you get the building at 3,615,800. That with the land makes 4,550,000. Then when you get to 40 per cent owner occupied you get 80 per cent replacement. Is that 80 per cent of 3,65,000 or is it 80 per cent of 4,696,000

dollars which comes to 3,700,000.

MR. BRAIS: It purports to be and the 20 per cent commercial is taken from the left hand side in the same section, 3,901,000 dollars. They are added together and that makes 4,500,000 dollars. Then in the preceding section which is the assessors valuation we see that 4,537,000 dollars becomes 3,615,800 dollars and that added to the value immediately above makes a total of 4,550,000 dollars.

LORD NORMAND: On the previous page under the heading "Valuation according to annual rental value" or annual letting value there are two figures. One is real revenue 585,000 dollars and then letting value or rental value 357,000 dollars. I do not quite follow these figures.

MR. BRAIS: Quite frankly I found it a little difficult to follow these various sheets to which we shall have to go back, because there are some startling things there. In this particular instance I would be rather inclined to say, I am subject to correction, that that is the rental value in so far as the Royal Bank occupancy of the building is concerned. I think that is the answer. There is the business tax and the water tax. They are included according to rental value and they would be calculated, I think, on the portion of the building which is occupied by the Royal Bank, because a tenant pays his own business tax and water tax according to his occupancy.

LORD NORMAND: What was the figure 585,000 then, which is the figure used, I notice, for the purpose of capitalisation?

MR. BRAIS: That would be the figure of the actual rental value of all space.

LORD OAKSEY: It says "Gross possible value".

LORD NORMAND: I did not know what "poss." meant. I suppose it is "possible".

MR. BRAIS: That is right, my Lord. It is in the case of the Sun Life where all possible revenue was considered for the purpose of capitalising for commercial value.

LORD PORTER: I am not sure I follow this, it might be, I do not know if it is, that they have two figures, one is the gross which includes the occupancy of the bank, and the other is the net which deals with the letting to other people only but I have not the facts and I do not know whether that is right or not.

LORD OAKSEY: It is a strange description to call the total, which includes an estimate of the bank's own property, the real revenue. I should have thought it was the unreal revenue.

LORD REID: Have we the sheet for the Sun Life building?

MR. BRAIS: Yes, that is the exhibit on page 713 of volume 4.

LORD ASQUITH: Could we, before we go to that, just finish with this, the Royal Bank one? If you take it from the top it starts with the figure of 934,000 odd dollars, that is the land, is it not?

MR. BRAIS: That is the land.

LORD ASQUITH: Then the 3,120,000 dollars is the cost of reconstruction less depreciation of the building.

MR. BRAIS: That is right.

✕ LORD ASQUITH: Then come to the next item. You get a rental of 585,000 dollars. I gather from you that is the potential rent of the whole space?

MR. BRAIS: The whole potential.

LORD ASQUITH: Supposing the whole thing had been let it would be let for that.

MR. BRAIS: Yes.

LORD ASQUITH: It was not all let but what was let was let for 357,000 dollars.

MR. BRAIS: I do not think that is the explanation.

LORD ASQUITH: What does it mean?

MR. BRAIS: Valeur locative is the rental value of the occupancy of the Globe Realty Corporation which is the holding company for the Royal Bank of Canada.

LORD ASQUITH: That is the part retained.

MR. BRAIS: Yes.

LORD ASQUITH: That is the part occupied by the company.

MR. BRAIS: Yes. I am subject to correction there but I think my learned friends would agree that that would be the explanation.

LORD PORTER: If you are going to do that you should tell us what 585,160 dollars means.

LORD ASQUITH: Did you not say that that was the potential rent of the whole lettable space?

MR. BRAIS: That is what I think it is.

LORD ASQUITH: If we go over the page the other thing I do not understand is the 80 and 20. Why have they divided it into those proportions, 80 per cent replacement and 20 per cent commercial? I see 40 per cent is SunLife occupied but I cannot see the connection.

*Laving*  
MR. BRAIS: I think you are having there an application of the formula which Mr. Vernot and the Board have been trying to explain to us.

LORD ASQUITH: That is the blending.

MR. BRAIS: It is a blending of 50 per cent.

LORD PORTER: I think the explanation is this, and you will tell me if I am wrong about this. You, first of all, start with 50-50. 50 is to be replacement value. You then have to deal with the other 50 and you then deal with the other 50 in the proportion of 40 to 60 which means 20 to 30.

MR. BRAIS: Yes, and the Royal Bank, as everybody knows and as the record describes, has just as many advertising and other potentialities. It is just as part of the building in its way as the Sun Life.

LORD PORTER: The answer, rightly or wrongly, which is made with regard to that is, I do not know what the conditions of the bank are but they say that you must not take 20 and 80 in the case of the Sun Life because the Sun Life occupies far and

away the best part of the premises. Of course, that might be the explanation. If you said: Well, the bank do not occupy the best part of the premises, they are just occupying premises which are comparable to those occupied by other people.-----

MR. BRAIS: The evidence discloses that the Royal Bank is in an identical position with the Sun Life. They have their immense banking chamber downstairs, three storeys high, occupying the whole ground floor save the section for the elevators and they occupy offices above that the same as the Sun Life do. On that question of occupancy I would like not to have to take the details in it up now but the evidence in the record is in the clearest form possible, that the Sun Life, with the exception of this section of the ground floor which it occupies, has by far the worst part of the building.

LORD PORTER: That may be so.

MR. BRAISE: That I do not want to go into for the moment because that is a fact we will have to look at.

LORD PORTER: That, I think, was the explanation given and I think that was the explanation, rightly or wrongly.

MR. BRAIS: We enjoy amenities and we were being charged with the space for the amenities such as our cafeteria and other things like that, but that was the reason for the 90 to 10. It has been changed but it does again show there is a definite discrimination so far as the Sun Life is concerned, because all the other buildings are rated in the same way and the Royal Bank building has been fully discussed in the evidence.

LORD PORTER: You were going to volume 4, page 713.

MR. BRAIS: That was the Sun Life valuation sheet. I will have to come back to that when I come to the memorandum. I think it would be more useful if I went to volume 2, page 247. That is the evidence of Mr. Hulse. The law came into force in April, 1941, but the date of this meeting under the instructions of the Board, as we have seen, we find on page 247 when Mr. Hulse is discussing the meeting. He says at line 1: "As regards the weight which should be given to different factors in the case of residential properties, very little difficulties are experienced in that class of property for the reason that they are easily comparable.

"It was, however, necessary to make a more detailed study of the matter as regards large properties such as office buildings, apartment houses, departmental stores, and so forth, as the style and special design of the building seemed to differ in almost every case".

Then we come to the important thing: "It was about the month of August, 1940, about fifteen months before we had to deposit the new Roll, that after having fixed certain rules and tables for residential properties, the question of the weight to be given the different factors in the case of large buildings came under discussion, and eventually the following decision was arrived at". They were looking at the memorandum itself.

Before we look at it, we must find out what these instructions of the Board were under which the memorandum was prepared. The Board had authority under the Charter to set down the procedure. I have already read that out. They had authority to set down the procedure, to direct the work of the

assessors in matters of procedure, and so forth, which is quite in order, but the Board issued its instructions and we find those instructions reproduced on these various sheets. Any one of those various sheets that we have been looking at will do. We have, for example, the Sun Life sheet which is on page 713 but any one can be taken.

If we look at the printing on the second page we see: "The following instructions on the manner in which the assessors shall proceed with their work, have been given to the Chief Assessor, by the Board of Revision of Valuations, in virtue of the powers conferred on it by the Charter of the City of Montreal.

We will not consider the matter of land, it has no bearing here.

We come to paragraph 2 which is "Buildings". "The unit prices, the cost of reconstruction and the percentage of annual depreciation of buildings are established by the Technical Service in the following manner: (a) The classification already in force for buildings will continue to apply to all buildings, no matter what their date of construction; (b) The buildings will be divided in three new groups: (1) Residential properties or semi-commercial properties (stores and dwellings) which are taxable and which were constructed before the year 1915; (2) All buildings exempt from the ordinary municipal tax; (3) All other buildings".

I take it that we come within the category of "All other buildings." "The buildings of the first and second groups will be classified by categories, classes and types, according to the system already in force, with such sub-divisions as is deemed proper to add, and a price, per cubic foot only, will be determined for each type of building.

"The reconstruction cost of any particular building will be fixed following its cubic content and the price per cubic foot already determined for the type of construction to which it belongs." Those are the instructions given by the Board.

"The cubing of buildings, the determination of the category and type in which they should be classified, and the entry of the cubage figures on the permanent cards will be made by the Technical Service and the Assessors when the latter are available. In order that the work may be accomplished within a reasonable delay, we recommend the immediate engagement of additional temporary employees of which the number and the duties will be determined by the Chief Assessor."

Then we come to the last and the important clause: "The estimation of the net replacement cost of buildings in the third group will continue as at present."

These instructions were given prior to August, 1940, and as a matter of fact were given in 1939.

LORD ASQUITH: I do not understand that, because, according to Mr. Hulse's evidence, the discussion which resulted in the memorandum eventually was initiated in August, 1940. Therefore "eventually" means that the memorandum was issued later. How much later? Do you know that?

MR. BRAIS: We do not know how much later.

LORD ASQUITH: Certainly it was not issued in 1939.

MR. BRAIS: Not the memorandum. I am talking of the instructions. Vernot says that that memorandum was made on the instructions of the Board. We have those instructions: "The estimation of the net replacement cost of buildings in the third group will continue as at present." We do not know what the "as at present" is; but we do know that there have been previous instructions.

LORD OAKSEY: How do you know when these instructions were issued?

MR. BRAIS: They were issued previous to August, 1940.

LORD ASQUITH: As I read the evidence, they were not issued previous to that, but in August, 1940. I think that he said at page 247 of Volume 2 that they were sent in August. I may have misread it. He says: "It was about the month of August, 1940".

MR. BRAIS: About the month of August, 1940, my Lord.

LORD ASQUITH: Not 1939, but 1940.

LORD PORTER: Have I got that down wrongly? I thought that that was the memorandum.

MR. BRAIS: The memorandum was August, 1940.

LORD ASQUITH: The discussion which resulted in the memorandum was initiated in August, 1940, according to Mr. Hulse.

LORD PORTER: Yes; but, if I understood Mr. Brais aright, these instructions have nothing to do with the memorandum. They were instructions given before the memorandum was prepared.

MR. BRAIS: Mr. Vernot said in his evidence at page 25 of Volume 1, which we have read: "The assessors at a meeting, I think it was on the instructions of the Board of Revision, decided that commercial values should be taken into consideration". Then further down he said: "After that the ones who had to authorise on large buildings had to make up their table, another table, and that is the table: 50 per cent."

LORD PORTER: Let us get this accurately, if we can. I thought that page 25 was referring to the memorandum.

MR. BRAIS: Yes, my Lord; it refers to the memorandum.

LORD PORTER: That is one thing. The other thing is, as I gather from your contention, quite separate, namely, the instructions.

MR. BRAIS: Yes.

LORD PORTER: Therefore we do not get any help with regard to when any instructions were issued by looking at when the memorandum was prepared.

MR. BRAIS: Save to this extent: that, if the memorandum was prepared on instructions of the Board and if the assessors met in August, 1940, to discuss the preparation of the memorandum, the discussion must have been previously.

LORD REID: That appears at page 247 of Volume 2, does it not? Mr. Hulse says: "It was about the month of August, 1940, . . . that, after having fixed certain rules and tables for residential properties, the question of the weight to be given the different factors in the case of large buildings came under discussion". Therefore, the thing must have been settled for the ordinary buildings before August, 1940, must it not?

LORD NORMAND: At page 25 of Volume 1 Mr. Vernot says: "After that -- that was after the position regarding small buildings, flats and apartments and such like, was settled -- "the ones who had to authorise on large buildings had to make up their table". That is the table for the larger buildings.

MR. BRAIS: That is right, my Lord.

LORD NORMAND: It would appear that at some earlier date than August, 1940, instructions had been received and the first thing done after that was to deal with flats and apartments, and the next thing was in August, 1940, to deal with the larger buildings.

MR. BRAIS: Although there might be some ambiguity in the use of the words "coming under discussion", it has never been suggested by anybody -- by the Board, the Superior Court or anybody -- that that memorandum was not prepared. At or about August, 1940, it was under discussion and eventually it was prepared.

LORD PORTER: And issued in April, 1941.

MR. BRAIS: No. It was applicable to the roll which was to be deposited in April, 1941, and, of course, it had to be issued forthwith, in order that the work might be carried out.

LORD REID: Issued to the assessors - not publicly.

MR. BRAIS: To the assessors.

LORD PORTER: At the moment you are making this distinction between the dates and you are stressing to us that the instructions must have been made before August, 1940.

MR. BRAIS: That is right, my Lord.

LORD PORTER: What deduction are you asking us to draw from that?

MR. BRAIS: A deduction in fact of possibly no great importance in law, but of some importance. If the instructions were issued under the old law, when the old law was in force, presumably there is some presumption at least that they were applying their minds to the old law; but I am not asking the Board to take the dates as the sole indication, because the Board of Revision might perfectly well have had in mind that in 1941 the law was going to be amended and have decided on and anticipated what the legislature would be able to do, and might have been directing their minds to a valuation on the proper system, of actual value; but the fact that it was done at that time and so long before the law was changed does evidently create some presumption. That is why I have to refer to both the memorandum and the instructions, and I think that I must satisfy your Lordships from the instructions themselves that they are in violation of the law and that the memorandum itself is in violation of the law.

LORD PORTER: That it is in violation of the law as it existed in reference to the 1941 valuation?

MR. BRAIS: In violation of the law which had not yet been enacted; not in violation of the law which was in force at the time. When I say that I have in mind the words "The estimation of the net replacement cost of buildings in the third group will continue as at present". That wording can only be found under an intrinsic or replacement value legislation.

Then if we turn over to the next page of the document at page 713 of Volume 4, under the heading "Valuation" it says: "The assessors complete the permanent card by inscribing thereon the valuation figures." That is the valuation figure which we find, I presume, in paragraph 2. It says: "The assessors complete the permanent card by inscribing thereon the valuation figures." Those are the figures given to them by the technical department, which has been valuing for replacement cost. Then I have to draw the following to the special attention of the Board: "It belongs to them to decide if the figure should be modified by reason of depreciation and by taking into account other factors affecting the valuation of the property, as provided by the Charter." Under the 1941 law there were no "other factors . . . as provided by the Charter" to be taken into account by the assessors. It is the 1937 amendment which provided the other factors, (a) of depreciation and (b) of commercial value, as one factor only; but this wording; "as provided by the Charter", could not be used if there had not been something in the City Charter, and it is only under the 1937 amendment that you have those matters in the City Charter.

LORD NORMAND: And not in 1941?

MR. BRAIS: And not in 1941. There is nothing provided in 1941, except to find the actual value.

LORD ASQUITH: Can you give us the date of this document? I cannot find it anywhere.

MR. BRAIS: I have looked everywhere and I cannot find it, but these would be the instructions which are referred to by Mr. Vernot as having been received some time up to the period of



the month of August, 1940.

LORD REID: These sheets must have been printed and issued to the assessors before the assessors started making up final results for the 1941 roll, must they not?

MR. BRAIS: That is our case, my Lord; and they have been working on the 1941 roll since 1937.

LORD ASQUITH: Mr. Vernot retired at a certain date. Perhaps we can fix it by that.

LORD OAKSEY: There is a date on it: 6th March, 1943. It is at the back of the first page.

LORD PORTER: If you look at head 8, where it says "For Account 140896", you find the date 30th April, 1941. I think that that means that they were taking account in that case of any additions up to 30th April, 1941. Then 6th March, 1943, is when it is ultimately issued.

MR. BRAIS: This document must have been made up for our assistance. Whether that means the date when this exhibit was made up for the purpose of the hearing I do not know. I think that that must be the explanation of that; otherwise I submit that it could not stand. That exhibit was made up as a copy, I presume, of the permanent sheet, as an exhibit, in March, 1943.

LORD PORTER: You think that that was made up for the purpose of the case?

MR. BRAIS: If it was made on 6th March, 1943, it was not available for the assessors when they made the assessment.

LORD ASQUITH: It is made in relation to the period up to 30th April, 1941. That appears under head 8.

MR. BRAIS: Yes, my Lord. It must have been made, therefore, before the 1st April, 1941.

LORD PORTER: It must have been after April, 1941; otherwise you would not get in figures up to April, 1941.

MR. BRAIS: I think that this was made up with the additional figures for the purpose of the case.

LORD PORTER: You can check that, because the total cost they arrive at as 20,627,837 dollars and 92 cents, and that figure must be somewhere. It can be checked in that way. You have given us the figures at some time, but I cannot keep them in mind. Whether that includes the extra amount, the extra 50,000 dollars, I do not know.

MR. BRAIS: That had not come to my attention, my Lords; but the assessment certainly could not have been made in 1943 which appeared on the assessment roll for 1941.

LORD REID: The other thing is that in the other volume the other four bear dates March 25th, 26th and 27th, 1943; so whether the assessments were two years in arrears in Montreal at that time I do not know.

MR. BRAIS: Our complaint on this assessment had been in being since 1941. Nobody has noted that. The only thing that I can see is that this assessment sheet must have been dated as of the date when it was copied out for the purposes of the case. That is the only explanation that I can see.

LORD PORTER: What time did the hearing first take place?

MR. BRAIS: We have that here, where Mr. Vernot's evidence comes in. At page 1 it appears that it was March, 1943.

LORD PORTER: That being so, it would appear that this document was prepared for the case.

MR. BRAIS: That would answer that.

LORD PORTER: It is a copy of the roll made for the purpose of exhibition to the court.

MR. BRAIS: Yes. It is quite possible that that date was not filled in. It is clearly a clerical error, because it is signed by Mr. Vernot and Mr. Lynch and should be a reproduction of what was signed at the original date, if it was signed by Mr. Vernot and Mr. Lynch; but there is nothing to be derived from that; it is clearly a clerical error on the part of whoever was copying.

LORD PORTER: It may not have had a date at all.

MR. BRAIS: It may have been with no date, and the clerical staff thought fit to put in a date. On the valuation sheets there is reference to what is to be done in the case of a contestation.

LORD PORTER: If you want a date -- I do not know whether this matters -- if you look at the first page you will see: "Cout de reconstruction, moins la depreciation, mais y compris les dependances, jusqu'en 1941." You have got that again.

MR. BRAIS: Yes. That is up to 1941. That is added afterwards. These larger figures are the reproduction of what was typewritten on these exhibits; but what I am applying my mind to is not when this actual sheet was filled in, or its counter-part, which was the original sheet from which this was copied, but when the instructions which are printed on the sheet would have been given. We do find, however (and this may explain everything), in paragraph 5, if we continue on the back of the valuation sheets, that the valuation sheets are filled in according to the formula indicated below in every case of contestation of a valuation, for the use of the Board of Revision and of the Superior Court and for each case for which a request is made by the Board of Revision. They may also be given at the wish of the chief assessor or of the assessors. These sheets are made up as a permanent card in the system and I think that these sheets are made up just to transcribe the necessary information from the permanent card for the use of the Board in the case of a contestation. That would explain that date which we find there, which would then be correct.

Then it says: "Relating to the inscriptions to be made on the valuation sheets in space No. 1 reserved for unit prices, it is understood that in all cases of properties included in group No. 3, the cost of reconstruction of the building should be inscribed as specified, also the price per cubic foot according to the total price determined in the first place." That, again, contemplates that on these sheets everything, for the information of the Board, has to be prepared on the replacement value.

Then in "Remarks" we find that the commercial value is taken into account.

Therefore, I say that, if it was necessary that I

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should be able to say that from the very formula of the instructions, it would appear quite clearly that the Board of Revision was applying its mind to the 1937 statute, with not only an emphasis on replacement cost, but a statement that replacement cost shall be the basis of the valuation.

LORD ASQUITH: You deduce that mainly, do you not, from page 4, paragraph 4?

MR. BRAIS: Yes, my Lord.

LORD ASQUITH: That is the paragraph which talks about taking account of other factors.

MR. BRAIS: Yes, because, if it had been under the law in force previous to 1937 or the law in force subsequently, there were no factors as provided in the Charter which would permit the use of that thing.

LORD PORTER: I am not sure that I follow this at all. I can understand the proposition and I can understand the argument, but it does not seem to me consistent either with the evidence or with the document itself, because the evidence is that they take the fifty-fifty and then reduce that to ninety-ten because of the exceptional advantages which the Sun Life had.

MR. BRAIS: Yes.

LORD PORTER: They do not appear to have acted solely upon the replacement value at all, neither in fact as set out here nor as set out in the evidence. To draw the deduction that they were acting under the 1937 law when in fact they adopted another seems to be a very difficult thing to do. Am I wrong in that?

MR. BRAIS: I have not made myself clear, my Lord. That is quite evident. When the assessment sheet proceeds on the replacement basis and when you apply the rental to such a small extent and as only one factor and when your assessment sheet considers the replacement or intrinsic value in all its instructions, I would say that the assessors were being told to assess under the formula of the 1937 statute.

LORD PORTER: I do not seem to have made myself clear either. Look at what you have here on the second page of the assessment sheet. If you look at "Remarques", you get Replacement costs, 14,404,578 dollars; Commercial value, 7,915,000 dollars; allowing 90 per cent replacement and 10 per cent commercial. That is not done purely upon the replacement value. It is 90 per cent and 10 per cent. It may be ridiculous, according to your argument or it may not; but they have in fact taken that into consideration and they give evidence which explains their grounds for doing that. Their grounds for doing that are not that they were following the 1937 statutes, but that they were following the memorandum.

LORD ASQUITH: There is nothing in the 1937 law which requires you to take into account both?

LORD PORTER: It does to some extent.

MR. BRAIS: It does to some extent. That is why they have minimised the rental value to 10 per cent, because the 1937 law said that you take it into account as one factor; but why go completely out of the usual formula of taxing statutes by describing that the replacement of intrinsic value (or whatever the words are that you use) shall be the basis of the valuation?

LORD PORTER: If you said that the memorandum was prepared under the influence of the old law, I could follow that; but, if you once neglect that, then it seems to me to be neglecting one of the plain factors which they took into consideration when they made this assessment.

MR. BRAIS: All that I can say to that is that under the 1937 law they had to take into account the commercial value, but they are warned to use it only as one factor, after having used as their basis of valuation the intrinsic or replacement value, and they add that the rental value can be taken into account only as one factor. That is what they have done here. They proceed to value this building, not on any market value, not on any exchange value, not on any comparison with any other building in Montreal. There is nothing here to tell the assessor to go and do what he should do if he was not tied down by these instructions and the memorandum: to value by finding out the comparative land value between the land that he is assessing and the land in the neighbourhood, the buildings that he is assessing and the buildings in the neighbourhood; or to put it in these words, if these instructions were under the present law: What price did that property bring on the open market; has it been sold; how often has it changed hands; what is the situation as regards the neighbouring properties? We have it that the first thing to consider as the principal guide in assessment is what is the condition of the market. Everybody says that. When you have no market, you delete that item; but, when you have a market, it is the first thing that you must go to. It is the market: either the market as regards that building or the market as regards comparable buildings. These valuation sheets, applicable to all buildings, do not even consider the possibility of the assessor finding out what the market is. I am not talking about an imaginary market here; I am talking here of the actual market, which is the very first consideration which the assessor must give to the valuation of land or buildings.

LORD PORTER: You will tell me if I am wrong, but will you look at page 1 of the actual document that we are talking about, under the head "Other Information", where they refer to offers of sale or purchase, expropriations, and so forth. There is the very instruction that you have been complaining is not there.

MR. BRAIS: I have lost myself in the small print and I must beg to be completely excused for that. That is there; but that is "Other Information". All that I can say on that, after that faux pas, is that that should be the primary information. However, it is there.

LORD REID: Does that mean offers for sale of this building or offers for sale of comparable buildings?

MR. BRAIS: It says: "Any other data such as offers of sale or purchase, expropriations, settlement of estates, sales by decisions of the courts or of the Board of Revision of Valuations, etc., of a nature to show the value of the property."

LORD REID: Does that include comparable sales which are of a nature to touch the value of this property?

MR. BRAIS: It does not say "comparable sales". I presume that that should be implied, but it does not refer particularly to comparable sales.

LORD ASQUITH: This form is in exact conformity with the 1937 Act, is it not?

MR. BRAIS: Yes, my Lord.

LORD ASQUITH: It asks for the various factors, including market value, which the 1937 Act provides that you should take into account?

MR. BRAIS: Yes, my Lord.

LORD OAKSEY: I thought that that was the exact opposite of what you had just told us.

MR. BRAIS: It is, my Lord, the exact opposite of what I have said.

LORD ASQUITH: It also appears to act on the principles of the memorandum. The 90 per cent and 10 per cent is purely memorandum stuff, is it not?

MR. BRAIS: Yes, my Lord.

LORD REID: Have I your argument right: that there are two stages really? You say that the instructions and the memorandum are plainly based on the Schedule of the 1937 Act; and then you say, secondly, that the assessment of which you complain is confessedly based on the memorandum?

MR. BRAIS: It is confessedly based on the memorandum.

LORD REID: So that your assessment is based at second-hand on the 1937 Act. Is that it?

MR. BRAIS: That is the proposition that I make, my Lord. It will be of some interest to know (and I will verify that) whether as regards any other property there was ever given any other information based upon the sales or comparative sales and so forth.

LORD PORTER: I think that they said not in this particular case.

MR. BRAIS: I mean as regards the Sun Life. We are in full agreement that there can be no comparisons as regards the Sun Life.

LORD PORTER: I am not sure as to that also. You will be able to tell me this, if necessary. I think that all the other exhibits that we have of other buildings are buildings like the Sun Life, which were buildings sui generis and which, therefore, you could get no comparison for as to sales or anything of that kind. I think that these particular assessments were used for that purpose.

MR. BRAIS: I cannot go outside the record, my Lord. I do not think that there is anything in the record which says that the other buildings were sui generis and could not be sold.

LORD PORTER: I am not sure that, if you look through carefully, you will not find that that is what they were talking about all the time.

MR. BRAIS: I am trying to be even more careful than I have been in trying to be careful, but you do sometimes get lost in the small print, though that should not be said when representing an insurance company.

That, my Lords, brings us, of course, to the memorandum, which we find in Volume 4, at page 695. It says: "On the assessment of large properties, such as office buildings, apartment houses, departmental stores, hotels, etc. These properties seem to fall into four main categories, which determine to a large extent the relative importance of the different factors to be used in arriving at their valuation."

I only want to say here that it is a sacrosanct

principle that buildings cannot be divided into categories. Buildings cannot be segregated into categories for the purpose of assessment. Every single authority which has been cited by my learned friends (and we will see shortly the instructions to which the City is to operate and the directives given) says that that cannot be done. For the reasons given on this memorandum as regards the first category, where the buildings are listed -- and I do not think that anybody will suggest that this first category of buildings are buildings which are sui generis; - the basis is 50 per cent on the replacement and then 50 per cent on the revenue.

LORD PORTER: They give their reasons, right or wrong, at line 20 for making the division in that way.

MR. BRAIS: They give their reasons. One thing to be borne in mind is that there is no suggestion made that the assessor for those buildings should consider market prices. It is not even suggested that he should consider the market prices. When that is done, the fifty-fifty formula is basically wrong.

Now we come to the second category, which is "Properties that are completely occupied by their owners, whether constructed for that purpose or acquired with that object in view" - second-hand buildings. There are some buildings in that category listed here. Whether constructed by the owner or whether the owner needs a building and goes and buys a building, that price would have to be taken into account. "It would seem that properties in that category are always worth to their owner the current cost of replacement, less depreciation, since, if the owner had not already acquired such a property, but wished to provide himself with suitable premises at the present time, he would have to pay the current prices to secure suitable accommodation." What are the current prices we do not know. "In this theory of value being based solely on current cost of replacement, less depreciation, it is assumed that the building is of a type suitable to the location. Otherwise, consideration will have to be given to the factor of obsolescence."

When they say that he would have to pay the current prices to secure suitable accommodation, they are within the law; but then they insert a definition in this theory of value being based solely on current cost, less depreciation, which is another thing altogether.

LORD PORTER: Are you saying that "current prices" there ought to mean what you would pay for a suitable building in the market?

MR. BRAIS: On the market.

LORD PORTER: Not what it costs to build this building?

MR. BRAIS: No, my Lord. In those two sentences you have a direct exemplification of the conflict which may arise when this formula is applied. Obviously, when they say that, if he wants to buy, he would pay the current prices to secure suitable accommodation, I am in full agreement with that; but then, when you traverse that term "current cost" and add to it "of replacement, less depreciation", you are talking about another thing altogether.

LORD PORTER: Then they go on to put a slight limitation after that: "it is assumed that the building is of a type suitable to the location". I am not sure how much qualification is contained in those words and how far you are merely speaking about the position in which the building is situated and how far you are

thinking of location as implying the objects for which the building is to be used. It may or may not mean location in the proper sense. I do not know.

MR. BRAIS: Why should that be the only factor to be considered, my Lord, in valuing that building? "Otherwise, consideration will have to be given to the factor of obsolescence." A building in a bad location is not obsolete. That is not obsolescence.

LORD PORTER: No. They use it as a loose term, just as in this case 15 per cent extra has been written off, I think they said for obsolescence. If you are criticising the word "obsolescence", I am with you every time; but it does not matter which word they use, provided that this gives what they mean.

MR. BRAIS: Obsolescence is when a building starts to be depreciating; its plumbing is out of date; its corridors are too wide or too narrow for current demands; there is waste space or not enough space at certain places. That is obsolescence; but the fact that the building is in a worse location cannot by any stretch of imagination be called obsolescence; but it is interesting to note that that is the only factor which can be taken into account when valuing a building which has been bought by Canadian Industries, Ltd., for example. They bought what was a former commercial building for their offices. From that moment on that building is no longer valued on its actual value. It cannot be valued on the price which was paid for it by the willing buyer to the willing seller, when that has actually taken place. It must be valued on replacement cost, less depreciation; and, if the location is noisy or it is down in a bad part of the town, that would be obsolescence. That would be contrary to all principles of valuation, in our submission. Nowhere in the world is it suggested that you have to delete the most essential feature, and, if I may stress that which is not out of case, I have to do it because it has to be 82.7 per cent of our case and 90 per cent at one time.

LORD REID: Is it possible that the jump from "current prices" to "current cost of replacement" can be explained in this sort of way? People who want large buildings of this kind are extremely unlikely to find one readymade and will have to build one for themselves. Therefore, if they want to provide themselves with suitable premises, they will have to pay current prices, in the sense that they will have to build one at current cost of replacement. Is that what it means?

MR. BRAIS: That may be the explanation, making a more suitable application of the language. It would not change at all the illegality of it from an assessment point of view.

LORD REID: I follow that, because then it would be purely value to the owner and not value in the market.

MR. BRAIS: It would be purely value to the owner and nothing else.

LORD REID: Is not that what your attack comes down to in the end: that this is really directing attention to the value to the owner rather than exchange value?

MR. BRAIS: Yes. Giving the words used there the best interpretation possible, it still leaves the situation exactly as clear: that the assessor is under instructions to value the property illegally, in contradiction of the law as laid down by this Board and as laid down by all the tribunals.

LORD OAKSEY: It is worse than value to the owner, is it not, because owners may have white elephants, like everybody else.

MR. BRAIS: Quite, my Lord.

LORD OAKSEY: Unless that is covered by the last two lines, by the reference to obsolescence, it seems to mean that owners, if they are in occupation of the building, must always pay the replacement cost.

MR. BRAIS: It may be a white elephant anyway, my Lord. Without going into the realm of politics, buildings have cost so much more than it has been estimated that they would cost. They do not have any more value. They may cost more than estimated because they were late in starting the buildings and the organisation took some time. I am just referring to matters of public notice right at the moment. What it cost, less depreciation, cannot possibly be the basis. You can have a white elephant anywhere. You can have a white elephant in the finest location in London or Montreal.

LORD NORMAND: A white elephant is nothing really to do with location.

MR. BRAIS: No, my Lord.

LORD NORMAND: Nor has obsolescence anything to do with white elephants or locations, as far as I understand the English language.

MR. BRAIS: No, my Lord.

LORD NORMAND: But it is very difficult to understand what are the factors which are to be taken into account in the way of mitigating the incidence of the replacement value under that paragraph.

MR. BRAIS: One thing is sure: The memorandum does not tell the assessor to proceed in any of the manners indicated by any of the judgments to arrive at actual value. The fact that a building would be in a bad location might be one of the causes of making a white elephant out of a building.

LORD NORMAND: Yes; but white elephants are born white. They do not become white by obsolescence.

MR. BRAIS: Then we come to paragraph 3: "Properties that are partly occupied by the owners and partly rented, such as the Royal Bank, the Canada Life, the Bank of Toronto, the Sun Life, etc. etc." We see that "It must be remembered" -- and I am afraid that I will have to ask your Lordships to allow me to read this -- "that properties of this class have been constructed or acquired" -- again we have that -- "as a permanent home for the enterprise in question and that frequently the building is laid out for future development" -- I stop there; by all the principles of valuation you cannot take into account future development or future prospects when assessing for taxation purposes; future development is part of the presumptive owner-user -- "the tenant situation being considered only temporary or incidental. In other cases, the space rented is provided to help carry the cost of the land, or to increase the size of the building, thereby adding to the prestige of the owner and giving what might be called advertising value to the project. In these cases the owner is enjoying the full utility only of the space occupied by himself, and is dependent on current rental conditions for the carrying charges on the balance of the building. It would seem that some consideration should be given to rental value in these cases, so that the replacement factor should be weighted somewhere between 50 and 100 per cent, and the commercial value factor make up the difference between 50 per cent and zero. No hard and fast rule can be given for the division of weight in these factors, as it will depend on the proportion owner occupied" -- we come to the important proportion



-- "the extent to which the commercial features of the building have been sacrificed to the main design with a view to the future complete use of the building by the owner or the enhanced prestige of an elaborate and expensive construction. Each property will have to be considered on its merits" -- which is fine; but then we find these words "within the limits outlined above."

The "limits outlined above" is "the extent to which the commercial features of the building have been sacrificed to the main design with a view to the future complete use of the building by the owner or the enhanced prestige of an elaborate and expensive construction".

LORD NORMAND: Is not the "limited outlined above" that it must never be less than 50 per cent for replacement value, but that the replacement value itself may be reducible because of sacrifice in the main design of something of that kind? Is not the limitation that you must never go past the 50 per cent?

MR. BRAIS: It might be that; but, seeing that you consider the merits of the building and that the reasons for the consideration of the merits have been set forth in the sentence immediately preceding, which is "the future complete use of the building by the owner or the enhanced prestige of an elaborate and expensive construction", I had taken it that "within the limits outlined above" would be the basis of the consideration of the merits of the building. It does not make any great difference.

Whether you consider it within the limits of that description

or the limits of fifty-fifty, you have the instruction there

to carry it to 50 per cent and then to weigh the tenant

situation as the other feature.

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Again I say, my Lords, after we have listened to my learned friend reading all these judgments that have come before us and we have read the statutes and we have read the decisions, I do not say that the memorandum can be legal as regards this building, at least, that we occupy when it gives those instructions. It does ~~not~~ not give the instructions to proceed to the valuation according to law and that is the memorandum which bound the assessors and there is no use saying otherwise. The Board said it was bound. The appeal to this Court was granted on the basis that this memorandum was part of the law. My Lord Porter put the question at the time, if that is the case, that might be the whole question in the case, the Board says they are bound.

LORD PORTER: The Board says "We are directed".

MR BRAIS: The Board says "We are directed".

LORD PORTER: You may argue that that is "bound".

MR BRAIS: It is the usual meaning which one would interpret, and I cannot follow my learned friend's suggestion that the decision of the Board drafted as it is in English is not drafted in good, clear plain English clearly by a man with full understanding. The judgment of the Board is well drafted, it is clear, it is simple, and when the President wants to say something he says it and it is well understood. So, he considered himself to be directed to follow and he did follow this memorandum, and why, if the Royal Bank had bought the building, or the Canada Life, although the Canada Life gets lost completely in the record; we never hear of it any more, or the Bank of Toronto leaving aside the Sun Life, but if this building should be sold or if there is an equivalent building which has been bought and sold, well, there is no reason in the World why that should not be taken into account, and these instructions that provide: "Within the limits outlined above", that is the only thing that can be considered and nothing else.

That memorandum could possibly find some justification in law if the 1937 statute were applicable. It could find some justification, but not a complete justification, for the excellent reason that the matter of the merits must be left to the assessor who must read the law, obtain such advice direction and aid as he may see fit, but they cannot possibly bind the assessor to a formula within limits which are restrictive. What does show in my respectful submission the complete illegality of the instructions which are produced is the fourth category where you have theatres and hotels, and there are two reasons why they are put in a separate category, and it is rather naive but interesting: "In the first place, buildings of this nature have not as long a useful life as the other classes of buildings, and should be allowed, in addition to structural depreciation, an allowance to cover obsolescence or periodic remodelling and renovation". That would apply to any building in the World. The same formula must apply to any building for assessment purposes. "Secondly, their operation is usually in the hands of the owner or an affiliated company, and there is no way to establish a normal rental value". Well, that does not sound very sensible to my ears because it is the duty of the assessor to establish a normal rental value as it is done every day and under all circumstances in every municipality in England where the rental value has to be established, and although you do have the same difficulties in working

out the formula, they have no difficulty in establishing their ratings.

In any event it is the assessor's duty to do that. "Or to get a true picture of net earnings, as these are so seriously affected by the cost of management, the allowance set up for depreciation and maintenance etc. It would seem that to some extent" -- it is rather interesting to read the words "to some extent" -- "these properties should be valued on their individual merits, bearing in mind the conditions mentioned above of extra depreciation of obsolescence".

Why, my Lords, should any building, be it a theatre or a hotel, why a hotel, why a theatre, generally some of the finest buildings and most long-lived buildings for their utility, be separated with this formula and to say that to some extent they should be valued on their individual merits, adding "bearing in mind the condition mentioned above of extra depreciation or obsolescence".

LORD NORMAND: Does not that last sentence contrast with the last sentence in that preceding paragraph. Apparently, buildings under category 4 are to be considered to some extent on their individual merits, but the other ones are not to be considered on their individual merits, outside certain limits.

MR BRAIS: Outside certain limits.

LORD NORMAND: That is what I find very difficult to understand.

MR BRAIS: And those limits are either that you must enhance the dominating factor if the building is used for advertising or for prestige or for any other thing. It is of considerable interest to know that in the preceding paragraph nothing is said of anything which would not be of a nature to instruct the assessor to further enhance the dominating or more expensive feature of the assessment. It does not say there: "You will take into account obsolescence if the location is bad". It does not say: "You will take into account special maintenance features". It does not say: "You will take into account something foolish which the proprietor has done which makes that building much more costly than its actual value on any normal standard", but they specifically put in there those very things which are now applied to the Sun Life and which would seem to be a description of the errors of conception of the Sun Life converted into a formula which would increase the taxation basis.

On that word "advertising" as a basis to increase the assessment I have had from Mr. Squibb, who has again examined into the question most thoroughly, who tells me that nowhere in any case or in any authority is the advertising value ever referred to as a matter to be taken into account.

The only thing that has any bearing on advertising under the laws of England is an old statute -- not old for this Country -- 1889, 52 and 53 Victoria, Chapter 27. I do not know if I should let your Lordships bother about noting it because I do not think it has any application except that the only thing that refers to it is: "This Act may be cited as the Advertising Stations Letting Act of 1889", the purpose of which is to fix the basis of taxation for the hoardings and posters which are used normally for advertising purposes.

LORD PORTER: I am not familiar with the Act. Does that differ from the ordinary principle that you find out what they let for ?

MR BRAIS: I do not think so. I have not examined it, my Lord. I was told that there was some difficulty previously in being able to fix a value on these posters, and this Act was passed to clarify that and, obviously, would not have any bearing. On this point I am subject to correction, but to my knowledge we have no such statute in Canada or in Quebec, and as I have said, as to this advertising feature, we have been through all the directing cases and I think it would have come up in due course because at all times there have been in all cities, at least for a certain length of time, the largest and biggest and finest building, and as we look back in our part of the World these bigger buildings pass within one, two, three, four or five years depending especially on the economic conditions.

LORD PORTER: Leaving aside your question of building, would not you in Canada let hoardings erected for the purposes of containing advertisements ?

MR BRAIS: Yes, they are assessed. I do not know of any special Act covering the assessments of hoardings. They would be either a separate structure as bill boards are, or they are erected on top of certain large buildings, immense signs and they are assessed obviously like the rest of the structure or against the owner if the owner is the person using them.

LORD PORTER: They would be assessed, would not they, as part of the building ?

MR BRAIS: They would not always be assessed as part of the building because many of these signs are erected by separate owners on a roof which is rented, but that would not make any difference at all. They would be assessed against the owner and if the owner of the building is the owner of the sign, it would be assessed as part of the building.

LORD REID: Replacement value would not be a very good test of its value ?

MR BRAIS: No, in those cases I think that the owner would be quite happy to have the replacement value taken. It would be a most excellent test, and it is what is applied to many buildings. With a rate of these assessments of 100 per cent. replacement value, the owners are perfectly satisfied; if you have a highly paying proposition, they would be satisfied.

LORD ASQUITH: Of course, they are two rather different questions, are not they, whether a hoarding or something like that can be or ought to be rated or is rated or, on the other hand, whether the massive character, the imposing character of the building does not increase its value for the purposes for which we are considering value here.

MR BRAIS: There are certainly two questions, my Lord. The only reason I referred to this statute, and said to your Lordships at the same time that I did not think it did have any bearing, was because it is the only thing that is drawn to my attention on advertising. There is no authority, no jurisprudence, no reference in the authors,

I would respectfully submit, as I said on that point last night that that becomes a value in use, and I would further submit that if that was a feature which could be taken into account it would on many occasions have been taken into account and would have led, of course, to very considerable dispute. I do not know to what extent any assessor is ever able to satisfy the owner that he has correctly valued the advertising. On all other things they might reach common ground on debate, but the value of advertising as between the assessor and the owner is a matter which would be subject to very considerable discussion, and, I respectfully submit, would have come to the attention of the Courts, if not to the attention of the authors.

LORD PORTER: You have finished on the memorandum, I think ?

MR BRAIS: We have finished the memorandum, my Lord. The only thing that I can add there, it is drawn to my attention, is, as I think I have said before, the owner occupancy with the sole possible exception of this advertising value which, I submit, cannot be taken into account. The owner occupancy cannot possibly affect the market value of the property. It is true that there is some possibility that the owner may not wish to sell as much as an individual who is exploiting a building for solely commercial purposes, but that, as I said yesterday, would be begging the question because to arrive at the market value it is necessary to consider an imaginary sale, and that has been very well established by all judges, and in that imaginary sale you have to consider that the property is for sale.

LORD PORTER: And that the owner is one of the bidders.

MR BRAIS: And that the owner is one of the bidders.

LORD PORTER: That is the sense in which "owner occupancy" may make a difference.

MR BRAIS: To that degree, and that is why -- I will come on that point later -- when we were before the Supreme Court and had submitted our basis of value and so forth, we said we were prepared to take Mr. Justice McKinnon's decision which, in our opinion, very amply would take care of the difference between the value of the building arrived at under any of the required formulae and that circumstance. When Mr. Justice McKinnon delivered his judgment there was an appeal by the present Respondent to the Court of King's Bench against the amount of that judgment and there was no appeal, and this will appear very clearly from our supplemental Factum which I might immediately draw to the Board's attention. That question was put by the Board arising out of the observation of Mr. Justice Casey. I am referring to page 88 of the deep blue volume, "Appellant's Answer to Respondent's Supplementary Factum", at paragraph 6: "Appellant suggests that in a commercial building such as the Sun Life building the principal valuation basis must be on the revenue or return from the property, controlled by such other indicia as may be available. Appellant submits, however, that no matter what factors are used and no matter what method is followed, if the factors are properly weighed and if the method is properly applied, all by the free use of good judgment, the same approximate results will

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be reached. When, however, by the use of one method, the 'return' or 'economic' method, all the experts on both sides are in substantial agreement as to the value, i.e., somewhere between seven and eight million dollars" -- I have to read this because it leads into the submission made to the Court -- "while the City's experts, in employing the other cost method by means of an improper formula, arrive at figures which vary between fourteen million dollars and over eighteen million dollars, it is obvious that there is something wrong with their work, the formula and the method in which it is applied, or both. 7. Mr. Justice MacKinnon of the Superior Court, and St. Jacques and Casey JJ. of the Court of King's Bench, arrive, by somewhat different methods, at the same approximate figure, namely \$10,207,877. This figure, having regard to the proof and the 1931 assessment of \$8,000,000 as set on appeal to the then full Board of Assessors (plus expenditures on the building in the interim) has at least the merit of being closer to actual value. Yet no depreciation since 1931 is there taken into account. 8. On the other hand, the Board itself has fixed the commercial value at \$7,028,623. The Appellant contends that it is entitled to submit that that is the actual value of the building which should have appeared in the assessment roll. On the other hand, the 1941 roll is now of the past, and the cost, inconvenience and delay of returning before the Board of Revision would be considerable.

The undersigned have, therefore, been properly authorised, in answer to the query of this Court, to state that, in-so-far as the 1941 assessment roll is concerned, they would remain satisfied, for the reasons given, to accept the restoration of the dispositive of the judgment of the Superior Court mentioned in paragraph 7 of these conclusions to wit, the amount of \$10,207,877".

LORD ASQUITH: I gather that you are content with the figure of the Superior Court, but you agree with hardly any of its reasoning, is that it ?

MR BRAIS: That is right, my Lord.

LORD REID: Does it follow that if one were to find -- of course I express no opinion -- that some of the reasons of Mr. Justice McKinnon were wrong, you would still say that you were entitled to stick to his figure.

MR BRAIS: Yes.

LORD REID: And that this Board should find that figure for different reasons, is that it ?

MR BRAIS: Yes, quite. It arose out of this: during the course of the discussion before the Supreme Court on the figures we were employing, and when we see the figure found by the City itself in the valuation of this building, using the figures of anybody who was applying himself to market value, exchange value, the sum got within \$7,000,000 and \$8,000,000, and the Supreme Court put the same question to us: "Well, if we come to the conclusion that there is an error in the assessment, what do you wish us to do. Do we refer the case back". We decided then, and I repeat after obtaining formal instruction that if the Board came to the conclusion that by applying the proper formula and using the evidence which is in the record as to what the application of that proper formula would bring in dollars, we did not desire to go back on the assessment. This assessment is now almost eight years old and there have been two or three assessments since, and we are waiting for the disposal of that and so is the City of Montreal. There is a substantial amount involved and they want their money and if we are wrong we want to pay our money. If we are right, we want to know.

LORD PORTER: You think this, I gather: this, you say, is a wrong assessment. No doubt you say that the assessments made after it were also wrong, but if you get a correct principle laid down then you will be able to agree the other assessments.

MR BRAIS: Then you will be able to agree on the other assessments.

LORD PORTER: That is the way you narrow the issues ?

MR BRAIS: That is quite right. I think it is a practicable solution. But, Mr. Justice Estey says that the parties were in agreement; in any event, there is no disagreement. In all fairness to my learned friend I must say that when we made that statement in Court, and we made it in our memorandum in the most formal fashion possible and he did not disagree. He did not acquiesce. When asked by the Chief Justice -- and this is my clear recollection -- what he would have to say on that, he remained mute and that was taken as an agreement, but there was no statement from my learned friend in so many words that he agreed with what we were saying.

LORD PORTER: Of course, the difficulty of the Board, if they differ in principle from both sides to any extent, would be to assess what the proper figure is. To that extent it might be necessary for the Board to lay down principles.

MR BRAIS: Yes.

LORD PORTER: And leave the assessors and the Board of Revision to deal with the principles so laid down. You will have to consider that, probably, both of you.

MR BRAIS: Yes, we have, and I may say for my part and I am sure for the City's part, it would be far better if it were possible to have the matter disposed of by this Board without starting new evidence and re-assessments, going before the Superior Court with the present evidence and rearguing it all out in the light of further instructions. In the Lacoste Case instructions have been given by the Court, it went back and then came right up before the Court to see that the instructions have been followed. That we would like to avoid.

LORD PORTER: Nobody is anxious to do that.

LORD ASQUITH: The assessment is ten years old already. It is hard to go back to the bottom of the ladder again.

MR BRAIS: It is ten years old, and the amount involved when you consider the difference for the three years only, would hardly justify the attorneys of record to recommend to their clients that they should carry on with this case very much longer. But the tremendous importance, of course, is that the principles which maybe laid down by this Board doubtless will apply to all the other seven years which have passed now and in perpetuity ahead of us. There, of course, it is no longer a matter of the simple amount involved in this particular assessment.

Before I enter into the final chapter I have some more of these photostats. They do not take in all the cases, but certain of the cases that were discussed. There is one of each case for your Lordships. (Documents handed to their Lordships).

Now, your Lordships will have noted that the question of the Real Estate Valuation Manual of the City of Montreal has been often referred to in the evidence. It was produced in the Supreme Court by my learned friend as an authority and it is referred to in the evidence -- I think I have counted approximately 90 times -- and quoted. It would be quite a hardship if we had to run through those quotations. I have copies available so perhaps I may make them available to the Court. They were produced in the Supreme Court and referred to in the same way in all the Courts, not by us, but by the City attorneys. (Manuals handed to their Lordships).

There are two reasons why I want to refer to it, and will have to at some length. It is because it is quoted at length by the Chairman of the Board and is also quoted by the judges in most Courts, but the suggestion of the Board is that the inference which is to be drawn from this has been misapplied by the Respondent. This is a book which has a great deal of self-praise inserted into the evidence by the assessors and they narrate how other assessors in other municipalities say it is a very carefully prepared and useful improvement, and so forth. I do not presume it has any official status but it is issued by the City of Montreal for the direction of its assessors and, therefore, by the City.



The first part of it is "Municipal Valuation of Real Estate" by Mr. Parent who was then director of Municipal Departments of the City of Montreal. . There are some highly important matters in this first section which will greatly simplify the study of the principles involved, I respectfully submit, and we will just point out where we do not agree with these portions that have been cited against us. On the first page you have the introductory remarks which refer to the problem which we have at hand. "The Municipal Valuation of real estate in Montreal has, for some time past, been under discussion of various circles. Property taxes, it is feared, may yield less, on account of the general depreciation in property value".

LORD PORTER: Do you know what date this was published ?

MR BRAIS: This is a reprint in 1941. This is a second edition in 1941. There was a previous edition in 1936.

LORD PORTER: I gather, from page six of the introduction: "Since the publication of the 1936 manual the reforms then proposed have been adopted". That is page 6 of the introduction; that gives the basis.

MR BRAIS: Yes, we have that.

LORD PORTER: Why I asked was on account of the "general depreciation in property values", which would be in the middle 30's.

MR BRAIS: The middle 30's, yes, my Lord, and further on we see that these introductory remarks have been carried over from 1936, and then there is a chapter with further remarks.

LORD PORTER: Yes.

MR BRAIS: "Some propose a stabilisation of the tax rolls for a certain number of years to come, by a degree against any revision for that length of time. Others consider the criterion of valuation should be the yield of each property. Certain self-styled specialists in the matter, on the contrary, consider the last practice as defective and suggest the adoption of the intrinsic value, or cost of replacement of building, as a basis. Finally, a few contrast the unequal valuations of different properties, which are identical in appearance, so as to call attention to a seeming lack of judgment or of competence on the part of our assessors".

Then we can go to the last paragraph on page 9, my Lords: "Systems have been proposed and put into operation with the object of creating an ideal world in this realm. Some of them were good; others were indifferent and some were bad. The main purpose of a municipal valuation of real estate, is not to bring, or to stabilise, or to swell municipal revenue; it is not to create artificial value: it is to evidence real value and real value only. Any ~~system~~ system must be judged first by that standard. If this is achieved its real value is secured everywhere, equalisation of valuations does surely follow". Then, in the second chapter on page 11 we have two paragraphs there of some importance. "On what, then, is based municipal valuation of property ? One must reply unhesitatingly that it is based precisely on the value of such property. How is that value to be established ? According to the indications

of supply at the mart. This law, however, is modified or completed by elements which make their appearance at the moment of application and, as a result, ensure a certain stability to tax rolls, or open a way to valuation of a somewhat synthetic character when there is no market or when the property in question is, so to say, out of the market because of special circumstances. To reduce this problem to its simplest expression, the value of a property, according to authorities and jurisprudence, is governed by "the price the owner who is not obliged to sell could obtain from a buyer who is not obliged to buy",

Then, we go to the next chapter, chapter 3, page 13: "We now come to the practical application of the principles just expounded, which application encounters certain difficulties not as a general rule, but because of exceptional cases. The error made by those who have recently commented on this question has been to hold to one special method of valuation while, to reach a solution, consideration must be given to everything tending towards a determination of the current price of real estate. A method which departs from the premises already decided is erroneous because it can create only fictitious value. No surer means exist to find the value of a property than to act as would any prudent buyer. I intend to proceed in such a manner. Here are the questions the buyer should answer for himself before he agrees to a contract. (a) Purchase price. What price has been paid for the property in question?", and then there is a dissertation on that.

On page 15: "(b) Market price. Knowing the conditions surrounding the purchase of the property, the interested party would then next draw up a statement of sales of property of the sale type recently effected in the neighbourhood where it is located or in a similar locality, and he will proceed in the same manner with regard to solicitations or offers to sell. In the study of the real estate market", and he goes through that.

Then, he goes to the third item to be considered, that is, revenue: "But it is not sufficient to be informed as to market prices, because, at times, they are abnormally either high or low. The real estate exchange has also its rises and falls. Moreover, certain buildings are erected for special purposes and would be of no utility to anyone other than the owners or the occupants, they would find no buyers if offered for sale, and do not lend themselves to comparison with other buildings. There must, therefore, in such cases, be different standards of value to replace those that are wanting or inoperative, to complete those which are deficient, or to corroborate proof already in the record. They are of two kinds, revenue and intrinsic value or cost of replacement. Let us first agree as to the meaning of the word 'revenue'. It has nothing in common with the 'revenue' of the economist and still less with 'rent' as conceived by Ricardo. It has a much more restricted meaning. It signifies, for purposes of municipal valuation, the yield a property should give to its owner; whether it is rented or not is without importance, since the rental price can always be estimated in case of vacancy. Be it noted, moreover, that the rent agreed upon between the interested parties does not necessarily represent the revenue of the property. It is only a presumption and not a proof beyond question. It remains subject to examination. The difference made in accounts between revenue and receipts is also admissible here".

I dispense with the two following sections to save time. Then, the last paragraph at the bottom of the page: "This study is necessary to the purchaser so as to allow him to verify whether the price asked for the property under consideration is reasonable, and to the lender who should know whether the property can produce sufficient to cover costs of administration, taxes and interest. Thanks to rental value the buyer, the lender and the municipal assessor can just rectify anything which market values may have that is excessive one way or the other". Then he summarises these three elements: "Purchase price, market price and revenue as well as a fourth remaining to be defined, buttress and balance one another in such a manner as to ensure a solid basis for tax rolls. To these factors there must still be added intrinsic value or cost of replacement".

Then we come to page 18. I drop the first paragraph there under "Synthetic value" to read on page 18: "In practice, the method of valuation, according to the intrinsic value or cost of replacement, consist in valuing a building, a dry dock or a quarry (to cite) three examples of widely different characters) not on the basis of the purchase price or the sum obtainable by sale or by rental, but according to the total expenditure which the construction or the preparation for operation have required, or what it would cost to rebuild or replace them, less the depreciation resulting from use or obsolescence. Such valuations are usually made in three ways. Sometimes the current prices of material and labour needed for building are computed and to those are added the general expenses of the enterprise. This is the most precise method. Another way is to multiply the cubic contents of the building by its price per cubic foot; or, instead of the contents, the floor areas by their cost per square foot. In each case, these units of price are determined according to certain standards of value recognised by builders, and which vary according to different types of construction. This method is not always proof against error and can yield only an approximative solution" -- that is the cubic method -- "some experts start their cubic measurements from the bottom of the foundations, others from the floor of the cellar or from the ground floor - or do not end it at the same height. . . measuring by the square foot presents difficulties no less great; all buildings are not square or perfectly rectangular; some have two outside walls, others three, still others four. If to these features are added", and then there is ~~some~~ just some repetition.

In the next paragraph: "Lastly, it is possible to take as the starting point of the computation what the cost of erection, or improvement or the establishment of the undertaking has been, and then to deduct a certain sum for depreciation, as already mentioned. The depreciation varies according to the type of construction, the use made of the building and the care taken of it. This method is not always equitable and sometimes leads to absurd results. It is quite probable to employ these different tests concurrently and thus, by comparison, secure proof of the results obtained. I would carry the investigation farther. I would in the final analysis check the figures so obtained by comparing them with the amount of risk assumed by the assurers. That is not always conclusive, but at times may be very efficacious, if only to confound an owner who insists that his building is over-valued, when his own valuation, for purposes of insurance, shows the contrary". Then we come to this interesting section: "The same applies to the sum at which the property is carried in his books", and to which I will have to refer later on.

So, we have the elements of the purchase price, the market price, the revenue and then this synthetic valuations, as he calls them, to be taken into account. Now, we can go from there, my Lords, to page 27, paragraph 1. He refers to the actual and real value all having the same meaning, and then he says: "'Actual value' at which assessors of the City of Montreal are held to assess property should mean selling value, that is what the owner could obtain for his property from a buyer who, not being obliged to do it, wished to acquire it. 'Real value' is the price at which a vendor who is not obliged to sell". He is quoting here from a series of judgments which are cited down below, and I think we have had them all in various ways, and I will spare the Court on that.

Then, on page 30: "Before we take up the second point, let us pause for a moment to examine the validity of the theory, that it is unimportant whether the property valuation is generally either too high or too low, provided it remains totally proportional or uniform so as to ensure a parity among the taxpayers. This opinion was raised to the dignity" -- well, that does not interest us.

Now, on page 32: "Finally, a third and last point there remains to treat briefly of the role conferred by the law upon assessors and courts in this matter. In brief, it is to be remembered that the municipal assessor, in the exercise of his duties, fulfils almost judicial functions: he is not to be influenced by nor to receive instructions from the municipal council, or from any other person or body. He must personally execute his duties with the fullest independence, to the best of his judgment and according to his conscience" and then follows the list of cases where that has been stated and restated. That, of course, would preclude the possibility of a memorandum which would direct the assessor and subsequently the Board to follow certain formulae.

LORD ASQUITH: What he has done in this case is to receive certain instructions for himself, has not he?

MR BRAIS: The Chairman of the Board?

LORD ASQUITH: The assessors themselves, in compiling a memorandum.

MR BRAIS: The assessors have received the instructions from the chief assessor and the assessors together. They have worked out a formula which is to direct all of them on a given basis. There is no objection to the assessors working together and discussing.

LORD ASQUITH: The instruction does not come from the Municipal council. It is not obnoxious to the Respondents here.

MR BRAIS: No, it is not obnoxious to that extent, but if it is binding on him and intended to be, it is instructions given --

LORD ASQUITH: More or less self-administered.

MR BRAIS: Self-administered. If he is told certain buildings are to be done a certain ~~xxxxx~~ way he does not have to go into the building and he did not go into the building to see where the tenants were and where the Sun Life were.

He has made one short visit, worked on the foundations of the buildings and went there certain times to visit a friend of his, but assessments on that basis do not leave him with the freedom of direction and judgment even to apply it within the limits outlined above, if that applies to who has the better part of the property. That memorandum was prepared, if I may again draw your Lordships' attention to it, under the instructions of the Board which we have, and they were told that the work of the valuations should be on the replacement basis as we have seen.

Now, on page 39 we come to what is called "False doctrines". I am reading a quarter of the way down the last paragraph: "Whatever be the standard of measure adopted, it must not be modified in the course of application as between one object and another". I would draw that particularly to the attention of your Lordships because we will see in due course what has been done in the preparation of our assessments. "Whatever be the standard of measure adopted it must not be modified in the course of application as between one object and another". We have the assessment working papers in the record which we will be able to look at this afternoon. "Thus, as regards property value, whether one or several, or the entire group of factors be chosen to establish a level, those employed must be used in the same way for all analogous cases. If I compare two properties according to their yields, those yields must be calculated on the same scale for each. If I compare two buildings according to their cost of construction, it is evident that the cost elements must be established, in each case, by the same method and by using similar current prices. Does that prove impracticable? If so, it is because the method followed is defective. I cannot compare two objects except in common terms of comparison". He refers to the yield and, on page 40, the sum calculated on the similar basis, and at the bottom of that page: "The same may be said of the so-called intrinsic value of buildings. In the first place, it would be useless in the case of vacant lots, as well as for land under exploitation, such as stone-quarries. In the second place, it would sometimes carry the tax rolls far above current prices, and sometimes far below them. There are, therefore, two major reasons for the rejection of these proposals. The first is that they lack simplicity. Their application calls for standards of measurement which differ with each type of property, thus greatly complicating the levying of taxes. The second is that considered separately, they fail to indicate current prices with certainty". Then we come to the intrinsic value: "The advantages resulting from the use of this single method of valuation would, according to its inventors, be the stabilisation of property valuation, the withdrawing of it from the vagaries of supply and demand, the maintaining of it at a fixed level from which neither fluctuating conditions in the real-estate market nor social and economic perturbations could drag it. However, if these innovators before setting forth their theory, had analysed their formula, they would have immediately discovered that their proposal held within itself a germ of destruction. It is easy, in any explanation of this theory, to perceive many contradictions of such a character that the theory destroys itself before our very eyes, and with a many-edged weapon. That proceeds from the fact that as every building depreciates through the effects of time, use, or exploitation, one must, at the moment the cost is determined, figure depreciation for the past and for the future, at so much per cent per annum. To that must be added what is known as

'obsolescence' or the becoming out-of-date of the building. Therefore, if at a certain moment it is possible to establish the replacement value of a house, it is necessary at the same time to show what its descending curve of minus-value for the future will be".

Now, we go to the bottom of the page: "Cost of construction differs according to the locality, the builders, the estimators and the types of the buildings. The same is true of the depreciation, which varies according to the uses made of, as well as the care bestowed upon them. Will a uniform standard of value be imposed? If so, what iniquities! If not, what complications", and the then what would happen to buildings after 30, 40, 50 years.

Then he refers to the criticism of those methods and refers particularly to a house in Montreal on Sherbrooke Street and others which are in locations, which have degenerated. "Many people go on repeating that a building has the same value whether it is in one locality or in another", and he refers to cottages and so forth and Westmount and Outremont. We can pass that. Now, page 44: "As I shall soon prove the result is, when valuations are based solely on the intrinsic value of buildings, that it becomes necessary, in order to avoid clearly apparent injustice, to establish unit rates on a very low scale, thereby reducing the total valuations to a level much below what they should be, without anything to support them, either cost price or current value or rental value . . . Moreover, the view point of the buyer and of the city assessors is not the same as that of the builder. The latter must keep account of all the expenditures his business requires him to make. Thus, in a locality, where the soil is loose, muddy or of clay formation, the outlay is much higher than where the soil is of a favourable character. Does that mean that a house built under these conditions is worth more than another and less expensive one? Will a buyer consent to pay more for the first than for the second? Obviously not. That is the attitude which must be adopted by the city assessor as well as the expropriation commissioner".

Then we can refer to page 46, <sup>of the way</sup> a third down the top paragraph: "It is admitted that this is scarcely legal, but other factors of value are considered only in cases contested before the courts. Beyond that, little or no attention is paid to them" -- that is, the cubic method and the other method -- "The aim is solely to secure uniformity or equalisation of valuation, without regard for current value or for the elements which compose it. This process has the advantage of levelling the valuations in an almost absolute manner. It is the perfect, ideal parity for taxation purposes. It has another quality -- if it may be so termed -- it prevents the assessor from using his own judgment. In fact, once the building is rated in the class to which it belongs, the assessor has only to figure the cost, according to the measures and the unit price already determined for this type of construction", and he refers to "Such standardisation has numerous inconveniences which more than offset the few merits it may have to its credit. A valuation so established is not in accordance with the law, which requires the amount of the valuation of the land and of the building to represent the market value. It is furthermore arbitrary and fictitious in that it does not correspond to the indications of the real estate market, since the cost of a building does not necessarily equal its current value. The disastrous consequences of

the use of this sole method are the following: so as not to overrate certain properties unjustly, and run too much risk of contestation before the courts, the only resource is to establish the unit prices at excessively low rates; consequently, the real estate valuations are generally below the intrinsic value, and in certain, though much rarer cases, far above that value; lastly, it necessarily results that the general level of assessed values no longer corresponds to current eatings of the real estate market. A valuation roll drawn up according to this principle has not only, no judicial basis, but it does not even rest upon that intrinsic value which is supposed to be its unique foundation". Then we come to the subsequent paragraph which is important: "The second authority invoked in support of this theory

to the effect that the valuations of buildings should

correspond to their intrinsic values is a judgment of

the Court of Appeal".

(Adjourned for a short time).

LORD PORTER: You had got to page 47.

MR. BRAIS: Yes, my Lord. "A valuation roll drawn up according to this principle" - that is, the principle of intrinsic value - "has not only, no judicial basis, but it does not even rest upon that intrinsic value which is supposed to be its unique foundation. It is still farther from the current value which rests on legality and common sense. From all this, it is to be deduced that it is reasonably and equitably impossible to apply a rigid, constant, uniform and blind rule for the establishment of the value of properties.

"The second authority invoked in support of this theory to the effect that the valuations of buildings should correspond to their intrinsic values is a judgment of the Court of Appeal.

"It has been held that the last mentioned court decided that valuations of buildings are to be made according to their intrinsic value. That is not so. But before reproducing in full the text of the judgment in question, I should like to recall what I have already stated several times in the preceding pages, and which may be summed up as follows: there are four principal elements which generally need to be considered in the process of property valuation. If in a particular case, certain of those elements are not utilisable, the others are used; if but one is available, everything possible is drawn from it. I have mentioned cases where the assessor found himself reduced to that extremity. I shall not refer to them again. Here is an extract from the judgment referred to; it is entirely in conformity with the exposition already made of this question".

Then on page 48 we have the holding of the Canada Cement case which has been strongly relied upon by my learned friends and which, I submit, must be differentiated as to the facts, because in that case the complaining taxpayer saw fit not to offer any evidence to set aside the one basis which was available, which was a basis of intrinsic value, after having occupied the building and arrived at a price on that basis.

I do not think I would wish to weary the Board with re-reading that judgment which we have read and of which your Lordships have photostat copies. So we can go to page 49: "I should add that what has furnished grounds for some people to take it upon themselves to use this decision" - and the reference for identification purposes is at the bottom of the page - "to spread their errors, and what has caused some confusion in certain minds, is that only the fourth paragraph of the above judgment has usually been cited.

"It should be noted that the judgment is far from corroborating the new doctrine, since it enunciates the general rule and fixes the exception.

"This theory of intrinsic value of property as sole criterion of value in principle, is therefore neither sound nor practicable. It conforms neither with law nor jurisprudence".

Then there is another paragraph which amplifies that.

Then he considers the other basis, revenue. "Others hold that yield should be the sole measure of property value



H2

and raise their voices against the rule that the present basis of valuation should be what is called the 'fixed and arbitrary value' of the property. But, in the first place, what do they propose?"

Then he criticises and says: "Two theses are placed face to face. According to the first, the basis for taxation requires to be changed; it is no longer the value of the property that ought to be taxed, but the revenue received by the owner. According to the other, valuation of property should be fixed solely on revenue without respect to the other factors we have studied".

Then he enunciates in detail why, in his opinion, the taking of the rental value as the sole basis is not proper.

Then he concludes on page 53 at the end of his third paragraph: "This is enough, I think, to demonstrate that such a project is unacceptable". That is the basis of revenue alone.

We can go from there, my Lords, to page 55 where he summarises it in chapter 4.

LORD ASQUITH: Before passing from that, can you tell me in a sentence why he thinks revenue alone is the wrong basis?

MR. BRAIS: He says that revenue fluctuates too much in times of depression or otherwise. That is to say it in one sentence. I am not trying to evade the reading of it. Mr. Parent does not agree.

LORD ASQUITH: If that is the gist of it, that is all I want to know.

MR. BRAIS: In that chapter he discusses that and other things and makes comparisons, but it is summarised in that and he does not agree with the revenue approach alone.

Then in chapter 6 on page 55 he reconsiders all the various matters which have been considered before and begins in this way: "Therefore, all proposals tending to erect civic valuations of property on a fragile and fictitious foundation should be laid aside. Attempting to render the rolls stationary is only an Utopia".

Then he gives various reasons for the various citations on page 56, and he refers again on page 57 to a case already cited "cancelling an assessment roll of property; 'because the valuation of immovables was too low'". That has nothing to do with us.

Then he concludes, and that is the conclusion of all his thinking, in the last paragraph on page 57 under the heading of the chapter "The sole solution": "Whatever be the angle from which this problem is considered, there is only one solution possible - that the property tax rolls should have current value for their sole basis; that is to say, the valuation should be based upon 'the price which a person who is not obliged to sell could obtain from a buyer who is not obliged to buy'".

In that connection, my Lords, the Board has taken the present respondent to task on page 983, A.22, of volume 5 at line 18.

Before I draw your Lordships' attention to that, I would just recall that the evidence offered by the Sun Life was divided into three categories, one the evidence of

Lobley and Simpson, real estate agents and experts of high experience and also of high repute, who had considered the value of the Sun Life and who had said that in a building of this nature it is the revenue approach which would fix the value of that building on the real estate market. We see that the City's manual does not wish to see that approach alone used. They arrive by that process at a value of somewhere between 7,200,000 and 7,900,000, the exact figures are of no great importance now.

There were two other witnesses further who valued the building, both of them contractors of very considerable experience, men who had been not only contractors but engaged in the administration of properties on their own account and for others. They valued the building on the basis of the replacement value taking off the depreciation, and also taking off from the value of the building substantial sums which detracted from the value of the building when in use, be it the Sun Life or tenants. In a general way what they had subtracted was the fact that some of the offices had a depth of 60 feet from the light, and that a building of that type cannot be properly used or completely used by anybody, because you have to have artificial light all the time and your ventilation problem is very serious and the space beyond the usual 25 feet from the windows has so little value in a building, as a building, that the building is depreciated for that reason to a certain extent. They had also taken away from the value of the building the very large areas of totally wasted space that resulted from the fact that a square building, this building, without any indentations had been erected, which was dead space and useless space for any purpose whatsoever. They arrived on that basis, replacement cost basis taking away from the building what was, in their view, completely useless, at a value of 8 millions to 9 million dollars.

LORD ASQUITH: What were the names of those two witnesses?

MR. BRAIS: J. J. Perrault and Archambault. In the interrogation the Board's Chairman himself mentions Mr. Archambault particularly as being a man of great experience and good repute.

LORD REID: You disagree with Mr. Beaulieu that replacement means replacement of that building. You say it means replacement by another building which, for practical purposes, is just as good.

MR. BRAIS: It is either replacement by another building or taking away from the building that part which has been spent on it and which is valueless one way or the other, valueless to anybody.

We will see later on that there are some extraordinary figures. There are some places where the granite is of such thickness that even City experts initially saw no reason for giving to this building a value resulting from the fact that it had granite walls which were four or five or six times beyond the necessary depth. It would be like somebody who had, I do not know what comparison to make, put into a building for some whim or fancy or some desire to maintain the form of the structure, certain material which is lost in its own depth, visible to nobody and of no use to anybody. When I do that in granite I disagree with my learned friends when they say that granite is such a wonderful material. It is not such a wonderful material. All the walls of granite in the building was a mistake but that is quite subsidiary for the moment.

LORD ASQUITH: Instead of doing as Augustus did, he found the roll made of brick and left it marble, you take the brick

value. If you go on replacement value you take the brick value.

MR. BRAIS: I would not suggest that. I would say as was done by the City of Montreal in its original assessment, you take that building as it is, but if you have a fixture, for example, of granite, which is totally and completely useless you would do what a prudent contractor or builder would do, and put as much granite as is necessary to arrive at exactly the same result of beauty and facade and use, but you are not going to charge as a market value something which would be a total waste. However, I am giving for the moment the theories that have been expounded and I am quite at sea on the matter of the granite, because there I will be with the City's own witnesses. After the assessment was made of this building as other buildings were assessed and only after the City had found out our historical cost, which doubtless staggered them, there is not the slightest doubt about that, when they obtained our historical cost in 1940, I think it was, they were staggered by the figure that they saw, they had to get busy reconstructing their own valuation made to their rules and regulations used for all other buildings. That brings me to the third item of evidence which was considered, the detailed valuation of the building made by the City's own technical department in strict conformity with the rules laid down to arrive at such valuation.

I have to say that because you have those three separate valuations made, one on rental, the other on the intrinsic value of the building, deleting what was a total loss, and the third valuation by the City's own technical department following the City's own rules on a replacement basis of a building just as good and as useful and as pretty and as convenient as the Sun Life building.

LORD OAKSEY: You did not state the figure for that.

MR. BRAIS: The figure for that was 11 million dollars odd. We will be coming to that shortly. The document is in the record with all the details. That was the replacement value as ordered to be found by the City's own method of valuation of buildings, and that is the figure that was subsequently corrected, not once, but three times, in order to build up to a figure which would be comparable with our construction cost which had subsequently been obtained.

That brings me back to what the Board had to say about the citations in this first section of the City's manual.

I may say that the letter which disclosed the total cost of this building is to be found in volume 4, page 717. It was in reply to a request by the City of the 5th April, 1941, to which Mr. McAuslane, Inspector of Real Estate, replied on the 10th June, 1941. It is addressed to Mr. A. E. Hulse, Chief Assessor, City Hall, Montreal, and says: "In answer to your letter of April 5th, addressed to the Secretary of this Company, I would advise you that the total gross cost before depreciation of our Head Office Building, as at April 30th, 1941, was 22,377,769.26 dollars. This figure includes the power house building with a gross cost of 709,257.14 dollars and land for the Head Office Building power house, the cost of which totalled 1,040,638.20 dollars, so that the total cost of Head Office Building, exclusive of land and power house, is 20,627,873.92 dollars.

"In answer to the other specific enquiries contained in your letter, the information is as follows: (a) The cost

of the sidewalk was 70,335 dollars. (b) The cost of temporary partitions required for occupancy by our staff during the construction period was 233,713.38 dollars. (c) The value of the walls and floors demolished and the cost of demolishing to permit the old and new buildings to be blended into one building was a total of 1,215,450 dollars.

"I wish to emphasise that the figures given above are gross figures before depreciation and that they also include architectural features and embellishments and other items for large amounts which, in our opinion, are not taxable. On a revenue basis, which is one of the chief methods used to determine value for assessment purposes, the present assessment on our Building appears very high".

To return, if I may, to what the Board had to say about what instructions are in the manual, we find that the Chairman is very critical. He says, on page 983, A.22, line 18: "To sustain the thesis developed by their experts, the learned Counsels for the Complainant have also had recourse to the authority of Honore Parent, K.C., and invoked the following passage of the 'Real Estate Valuation Manual'. (English version, 2nd edition, 1941, page 57)". Then he reads it: "'Whatever be the angle from which this problem is considered, there is only one solution possible - that the property tax rolls should have current value for their sole basis; that is to say, the valuation should be based upon 'the price which a person who is not obliged to sell could obtain from a buyer who is not obliged to buy'".

"This general statement, made with reference to immovables which do not fall out of the ordinary, must not be singularised and interpreted without reading the context. We could quote abundantly from the 'Manual' to show that Mr. Parent, never thought of stressing the opinion that the assessors should pay attention merely to the 'current Values'".

This is the conclusion and he says "Whatever be the angle".

LORD PORTER: Which is the page now?

MR. BRAIS: I am looking at pages 55, 56 and 57 of the Manual. There is no doubt about that, that that is the concluding chapter. Then he considers all the matters together and he comes to that conclusion, but the Board suggests that the Board has taken a very strong view on the willing buyer and willing seller theory. He calls it, first of all, a disconcerting argument, but it cannot be disconcerting for everybody, I humbly submit. In his own evidence Mr. Archambault says: You cannot value this building on any current basis; it is not a church, it is like Windsor Station, which is a railway station in Montreal, and it is like a city hall. Nobody ever wants you to consider this building with all our tenants, and our tenants would not consider they are housed in a city hall or church or railway station. It is a commercial building, a first class office building according to the City's own description.

When the Board takes that attitude in directing itself as to its duties as a Board of Appeal, then it is, I submit, clearly outside the law and has directed itself incorrectly. To justify that the Board then, at line 40, says: "By instance, see page 17".

LORD PORTER: You say "page 17". I do not know to what document you are referring.

MR. BRAIS: I am back now on page 983, A.22, and I am reading

again from the judgment of the Board which says: "This general statement, made with reference to immovables which do not fall out of the ordinary, must not be singularised and interpreted without reading the context". Then he says "By instance, see page 17". We have had this. That was part of his argument building up to his final solution and we then get his final solution at the close of his chapter.

Then the Chairman of the Board goes backwards and considers backwards the separate opinions that have been considered separately before they are merged together. "See page 17". He quotes at line 40: "By instance, see page 17: 'These three elements, purchase price, market price and revenue, as well as a fourth remaining to be defined, buttress and balance one another in such a manner as to insure a solid basis for tax rolls'".

Then he goes back to page 19, again, of the Manual and he says: "I would carry the investigation farther". Then at line 14 he refers to page 24 of the Manual, which is still dealing with the preceding matters at which we have been looking, and then at line 35 he refers to page 29 of the Manual. Then at line 42 he refers to page 40 of the Manual, which, as we have seen, are all the other elements considered separately which give the solution which is the sole solution and which is the willing buyer and willing seller.

When the Board says that that conclusion has been taken out of its context, I am entitled to say the Board has gone very, very far to argue that what has been said here is the final solution is wrong, because something else is said in the preceding pages either in criticism or in support on weighing the various factors when you take them separately.

LORD ASQUITH: On page 983, A.23, is the quotation from page 24 of the Manual where it says "purchase price, market price" and so on. That passage and the next five lines do appear to indicate that the cost of replacement and so on is one of the things to take into account.

MR. BRAIS: It is one of the things to be taken into account but the final solution is the merging of all that.

LORD ASQUITH: These are the four elements, the combination of which will establish the value of the property and one of them is the cost of replacement.

LORD REID: But you must look at them with the eye of an experienced buyer.

MR. BRAIS: You must look at them with the eye of an experienced buyer.

LORD ASQUITH: It says "buyer" and not "assessor"

MR. BRAIS: Not assessor. To suggest that his conclusion of all this is taken out of its context when he says with the greatest clarity: Possibly there is only one conclusion; you look at these things this way; you cannot take any artificial value because it is bound to be fictitious and dangerous, but you do consider it as one element and then you apply your judgment, the judgment of the assessor placing himself in the position of the buyer. He says all these things, and he says: Revenue gives so much, and the intrinsic value is so much; now how much must I add to revenue, which is something

which is tangible, in dollars and cents for the additional price that this property would bring at a free sale, because besides having this revenue which is the tangible portion of the consideration it also has exceptional beauty.

LORD ASQUITH: The difficulty I have, and this is in your

favour, if this is right, is why an experienced buyer should pay the slightest attention to replacement cost at all.

MR. BRAIS: He does as a check, my Lord.

LORD ASQUITH: There is a building; Either I want it or I do not, if I think it is worth so much to me. The fact that if I pull it down and put it up again it might cost so much, would not enter my head. Why should it? If what an experienced buyer will give is the test, then replacement value cannot figure in it at all.

LORD OAKSEY: On the other hand, supposing that you are buying a cottage now and you know that in England building a cottage costs about £1,200 and you have the opportunity of buying a cottage, you take into account when you are bidding for a cottage which has been already built what you would have to pay if you had to build the cottage.

MR. BRAIS: Yes, my Lord.

LORD OAKSEY: It may be an old cottage. You have to take into account all sorts of factors; but you do not disregard the cost of building the cottage.

MR. BRAIS: You must take it into account and all the authors are in agreement; and the witness Lobley has said that you take into account, first of all, the replacement cost, less depreciation, of course, for the building in the condition in which it is, in order to be sure that you not bidding more than it would cost, building a similar cottage today. That is your first consideration. It is your top price; it is your ceiling, beyond which you will not go. You also take into account depreciation, because, if you have a building twenty-five years old, it is going to last twenty-five years less and, if you are going to build a new building, you will have a building which is twenty-five years younger. Take it one way or the other; but the building which you are buying is a depreciated building and will cost you more or less. That is why Lobley says that you take the replacement cost.

Mr. Perrault says that you must also consider replacement cost when buying a building, because it does help to guide your judgment and to the extent that that replacement cost has advantages which go beyond the capitalisation of the revenue of this commercial building we must always distinguish, and we are told to distinguish all the time, between houses, which go with the taste and caprice of the owner, and a commercial office building, where the element of investment is much more predominant.

My Lords, that brings me to something which I will tell this Board immediately has been stressed by the respondent before the courts, but which, although it is referred to in some of the judgments, has not been considered in any final way in arriving at a final decision; that is, to the assessment of this building, as I would say, properly made by the technical service of the City of Montreal, whose duty it was under this re-organisation to arrive at the proper cost of replacement of this and all the other buildings in Montreal on a uniform basis.

LORD ASQUITH: Is that the 11,000,000 dollars?

MR. BRAIS: I will refer your Lordships immediately to that exhibit. We will have to have it before us. Will your Lordships turn to Volume 4, page 737, Exhibit P.36. You will see there the working figures of the technical service, a branch of the City of Montreal, whose particular duty it was to inform the assessors and, as we have seen by the instructions by the Board, give the assessors the replacement cost.

LORD PORTER: It has not anything on it which enables one to recognise it as P.36.

MR. BRAIS: No. This document comes from the City of Montreal and was produced in cross-examination, of course.

LORD ASQUITH: It is dated 1942.

MR. BRAIS: There are several dates. These pages are numbered and,

if I may say so, they have been put in backwards and the last page is on top, for reasons which we will see later on. At the top right hand corner there are numbers in circles. The first page before you is page 2; then there is nothing after that and we come to page 5 and then further on page 7. They are not all numbered.

LORD PORTER: They are numbered in that sequence.

MR. BRAIS: They are numbered in that sequence. Some of them have no numbers. We come to page 7 and then there is an unnumbered page and then we come to page 22, with a circle around it; then page 24 -- sometimes they have the number on the left hand side -- then page 25, then page 26 and then page 28. I wish to refer to page 28, which has at the top the words "Depreciation. 1936. Cout de reconstruction". We see that this sheet is part of a standard multigraphed form that is apparently used by the City for fixing the value of the buildings. Then, if I may skip the intervening pages and come back to page 2, we see "Correction finale apres inspection de verification aved Joseph A. S. Houle, le 2 Novembre, 1942". Then your Lordships will see the figure of 11,110,337 dollars and 32 cents, which is the figure at the top of page 28, which we have just left: "Depreciation. 1936. Cout de reconstruction, 11,577,841 dollars and 76 cents". That is the same figure, with certain corrections. Then at page 2 you have a whole series of additions which are put in there and which result, at the bottom of page 2A, which is the immediately following page, in 18,706,115 dollars and 53 cents. On that same line there is a percentage of depreciation - an interesting percentage too, when we find out that we have been left with 14 per cent - 2,641,154 dollars and 79 cents, and then net 16,064,960 dollars and 74 cents.

LORD NORMAND: It does not give the rate of depreciation.

MR. BRAIS: Yes, my Lord; it does: 28 per cent, 19.7 per cent, 13 per cent, 6.8 per cent and 1.5 per cent.

LORD ASQUITH: I am not quite clear about the dates.

MR. BRAIS: I will have to look into this document, because there are three sets of dates. The dates are very confusing.

LORD ASQUITH: No doubt it will appear why on page 28 you get this third figure of 11,577,000 dollars odd under the date 1936, which you get here under 1942.

MR. BRAIS: Yes, my Lord. That is why we now have to refer to the evidence of Mr. Perrault and to the manual, and that is why when my Lord Porter asked the other day what our view was on the 7.7 per cent I made a statement that it is mathematically correct if you apply the Vernot formula of cost of building index, according to Vernot's method, and then you allow the Board to correct that on the same method.

LORD PORTER: I thought that the difference was this: That Vernot took four years and acted upon them, and that what the Board did was to take each year, year by year, accurately with the amount for that year and then make their calculation accordingly.

MR. BRAIS: That is correct, my Lord; but I made the statement at the time that mathematically that would be correct. We have verified it as much as we could and it is within a very few dollars, and there is no question of that at all; but the point that I would now make to the Board is that the Sun Life was the only building where that system was applied; that all other



buildings are valued on a standard 1936 construction formula used by the City; they have prices and charts which indicate how much each building is to cost in 1936, which was the year in which they applied prices to each item of trade: to brick, to labour, to steel, to elevators, to roofing - to everything.

LORD OAKSEY: You mean that when they were seeking replacement value they applied the index figure for 1936, regardless of the fact that the actual cost of construction had taken place in other years?

MR. BRAIS: What they do is this. I neither have to condone nor criticise the system; but they say: You cannot take historical cost to arrive at the proper cost of a building; the City of Montreal says that and takes that; there are too many variations in construction that mean nothing: stone foundation; solid rock, for example. Supposing that we were in solid rock and we hit clay on going down and spent 200,000 dollars in foundations, it should not give this building any value at all. Another building, more fortunate, will have nothing to spend on useless cost, on foundations, for example - going down into these fantastic constructions, underpinnings. To take another example, the building next door caves in when you are putting up your building and you have to spend a small fortune buttressing and going down into the clay to support that building. That is part of your historical cost.

LORD OAKSEY: That is a criticism of the replacement value system. It is not a criticism of applying a particular index to the particular amount spent in a particular year.

MR. BRAIS: I am not making myself clear at all, my Lord; I am very sorry. The City has established this system and to a very considerable length of minute details, in order that the replacement cost of all buildings should be valued on the same basis. They have said: We will give you, the technical department, what it cost to put in so many thousand square feet of roofing, to put in so many thousand square feet of marble, to put up so many thousand cubic feet of walls, and we will give you what those costs were in 1936.

LORD ASQUITH: Were they treating all buildings as though they were built in 1936?

MR. BRAIS: That is right, my Lord.

LORD ASQUITH: That is what it comes to?

MR. BRAIS: That is so. They do that and they explain why: in order to get replacement cost on a uniform basis for all buildings.

LORD OAKSEY: As I understand what you are saying now, it is that they, not only disregard the index figure for the particular years during which the construction was made, but they disregard also the actual cost and take a notional cost for putting up, say, brick walls in 1936, another notional cost for putting up marble and that sort of thing?

MR. BRAIS: Yes, my Lord.

LORD OAKSEY: So that it is entirely notional, based upon 1936. Is that right?

MR. BRAIS: Yes. The reason for that is this. It works both ways and there is a decision which has been cited by my learned friends to which we refer as an exemplification. They will not

take the builder's historical cost, for two reasons. On the one side, the historical cost may be out of line with the actual intrinsic replacement value of the building. I am not considering there commercial value, but the intrinsic price which it would cost to put up that building. That may be out of line. He may have had to meet misfortunes; he may have made serious mistakes in buying his material; he may have had a contractor who submitted a price which was 100 per cent too much. There are a number of reasons. On the other hand, one has an example the case which is given by my learned friends and to which I will refer later, where a garage man put up a garage. He was the contractor himself. He kept his own books and so forth, but apparently bona fide. He put up that building at about 60 per cent of what it would cost to put up that building for the ordinary owner in Montreal. He came in with his historical cost and they said: No; we are not going to take your historical cost; that is not the replacement value of that building; that is not the fair replacement value or the actual intrinsic value of your building there today, just because you as a contractor and using all kinds of fresh methods and avoiding this and avoiding that, were able to build it for that; that is not the value that you put on that land; the value that you put on that land we have here on our tables, because, if that building went up in 1936, here is what we are charging the Sun Life for putting up these bricks; here is what we are charging the Royal Bank for putting in these foundations; here is what we are charging Mr. So-and-so, who has a private house, for making foundations; and they assessed him up, say, 60 per cent to 100 per cent. (which was arriving at the intrinsic value and which put that element out of it) of the price fixed by this manual.

LORD ASQUITH: I suppose that this links up somehow with the year 1936 being 100 ~~per cent~~ index.

MR. BRAIS: The year 1936 is 100; and the reason that they put 1936 is that it is the year when they began to inaugurate this system of using a standard yardstick for the reconstruction of a building. Obviously, before they reconstruct that building for him in the technical department, free from any erroneous evasive answers and free from having to consider wasted money -- by "wasted money" I mean money actually thrown away, having no value at all -- they build that building from his plans and from his specifications and they say: We have these figures here and that is exactly what that building costs when applying the same yardstick of reconstruction to everybody. Then they do not have to go back. They go from 1936 or 1937, 1938, 1939, 1940, 1950, 1951, because from then on they have the increase or diminution of construction cost, according to the government tables, as between 1936 when they have rebuilt that building; and they installed this new system for the purpose of doing that.

LORD OAKSEY: Were Vernot's figures not actual figures of cost at all, but notional figures of cost?

MR. BRAIS: Vernot first had the work of the technical department. Then he enquired, to see if that figure was too high, I presume, of the Sun Life and got this figure of 20,000,000 dollars odd.

LORD ASQUITH: Vernot did something to the Sun Life which he had never done to anybody else, I gather.

MR. BRAIS: Exactly.

LORD ASQUITH: If he had behaved in the ordinary way, he would have taken the datum year, 1936, and compared 1941 with that. As it was, he took the average of four years in which most of the big

5 building went on, and the average of them was 116?

MR. BRAIS: Yes. I really think that he did that with a little bit of worry on his conscience.

LORD ASQUITH: Why did he do it? Did he explain why he did it? It seems odd to depart in one single instance from the system, whatever the reason may be.

LORD PORTER: Most of the building was built in that time. That is all the recollection that I have.

LORD ASQUITH: That is quite true.

MR. BRAIS: He took another method. He departed from the method on the City's own working sheets. The technical department is supplied with a multigraphed and quasi printed form to fill in the result of the work that has been done and then follows in the most minute detail superficialities and volume and the types of floors and the walls. If you go through this you will find that we have everything: exterior walls, granite, windows.

LORD ASQUITH: It is a strange thing, because one would have thought that other buildings besides the Sun Life could be built in stages or that parts could be put up in stages; yet he only applied this method in this one instance.

MR. BRAIS: So far as the record shows, it was only applied in this one instance. There is nothing in so many words in the record which says that it was only applied in this instance; but no other building is indicated as having received this treatment and when one sees how the values varied in such a limited way in the other buildings -- I will submit them and we looked at them in the court -- there is no other conclusion.

LORD PORTER: I want to know where we are getting on this. Some complaint has been made in this case and, I think, rightly made probably that when you are calculating the value of a building you have no business to say: Another building was valued at so much. That is immaterial.

MR. BRAIS: That is right, my Lord.

LORD PORTER: You are complaining now, as I understand it, that this building was not valued in the same way as other buildings were, in that they took the wrong basic year to compare.

MR. BRAIS: No, my Lord. That is not the extent of what I am saying. I am saying that the City did not use historical cost and would not use historical cost to value the intrinsic or replacement value of the building.

LORD PORTER: I thought that you were talking -- you will tell me if I am wrong about this -- about comparison of cost in the year 1941 with the actual cost in other years and that you were using some basic figure or figures in order to equiparate the cost of 1941 with the actual cost, which might be more and in fact would be more.

MR. BRAIS: That is so.

LORD PORTER: It would have more or less value than 1941; it would depend when the higher cost came. If that is so, what the Board actually did was to use the actual figures of cost and translate them into the 1941 cost?

MR. BRAIS: Yes.

LORD PORTER: In fact you were saying, as I understood you, that in the case of all other buildings the City had worked out some sort of scheme by which you made that comparison - not an actual scheme, but some imaginary scheme which they thought best represented a correction of the original figures to the figures which then existed. Is that right?

MR. BRAIS: To this extent: that they did not do this calculating to correct the historical cost. They got the historical cost after they had made their calculation of the replacement value of our building and then, when they got our historical cost, they proceeded to correct their own figures, in order to arrive at something commensurate with our historical cost.

LORD PORTER: Are you saying that they used a peculiar and special calculation for your building which they used for no other building?

MR. BRAIS: I do not want to go too far. I will say that they applied to our building the Vernot formula, which is contrary to the instructions given to their own assessors and valuers, and that these instructions are given for the use of the assessors and the technical department to be applied to all buildings.

LORD PORTER: I am not sure that I follow that. You talk of the Vernot figures. Vernot took year to year.

MR. BRAIS: No. We complain of Vernot because he took historical cost. If he takes historical cost, he has to take the cost of building index of the several years.

LORD PORTER: He did not in fact.

MR. BRAIS: No; he did not. I would agree with your Lordship, supposing that he did.

LORD PORTER: So far as that is concerned, if you take historical cost there is nothing to complain of in the Board's figure?

MR. BRAIS: Yes, for several reasons, because by taking historical cost you are getting, first, a building value which does not exist and, secondly, you are applying to that building a yardstick of valuation which is discriminatory, because it has not been used for everybody else.

LORD PORTER: That is a different thing: not used for everybody else. That may be right or wrong; but, supposing that they used the wrong system with everybody else, it would not matter that they had used the right one with you.

MR. BRAIS: No.

LORD PORTER: That would be perfectly justified.

MR. BRAIS: If they used the right one with me, that is all right; but, when they lay down reasons for not using historical cost and those reasons appear valid, I think that I am entitled to the benefit of that reasoning. Then, when I take their historical cost (and I will, as I will be bound to do, indicate to your Lordships what changes were made between the City's assessment of my building to arrive at my historical cost) and we see that they have bridged the gap in a way which I will have to criticise as being improper, I submit that I am entitled to the value of my building as properly assessed on the yardstick used by the City.

LORD PORTER: That depends whether the yardstick used by the City is the right yardstick or not, does it not?

MR. BRAIS: I will submit that it is the right yardstick. It is the yardstick worked out.

LORD PORTER: If what you are saying is that this is not historical cost, but it more truly represents the correct comparison between actual cost and the cost attributed to your building, well and good.

MR. BRAIS: I say that.

LORD PORTER: If you make that good, so far so good; but I do not think that you make it good merely by saying: This was done to other people, unless you show that that is some indication that it was the correct method.

LORD ASQUITH: I am not quite clear about this. You want the replacement value, assuming that it is relevant for any purpose, to be as small as possible, do you not? I should have thought that Vernot would suit you better than anybody else. Vernot is  $2\frac{1}{2}$  per cent better for your purpose than the 1936 basis; and the 1936 basis, I should have thought, was better than the year by year method. No doubt you will come to that.

MR. BRAIS: I think that I will have to come to that.

LORD PORTER: On this question of the 1936 basis, I do not know what it is. All that I know is that there is some sort of formula which the City, for reasons which it indicates and which we have not seen, adopted. At the moment I do not know whether it is better or worse or what it is.

LORD REID: There are two quite different points, are there not, if I understand it aright? The first is that you say that, whether you take 1936 or any other year, the City take original cost in every other case, but Vernot takes historical cost. That has no relation to 1936 or any other year. That is a difference of principle, as I understand it.

MR. BRAIS: That is a difference of principle.

LORD REID: Then there is a subsidiary point: as to which year you ought to take.

MR. BRAIS: Taking 1936, what you have subsequently to take is the ensuing years, because 1936 cost is what it would cost to put up the Sun Life building at 1936 prices.

LORD REID: You may have taken 1940 for the basic year and there would still have been the same difference in principle between Vernot's method and the City's method adopted for any other building.

MR. BRAIS: Exactly.

LORD REID: Whichever year you take makes no difference at all to this principle.

MR. BRAIS: It makes no difference to the principle, so long as you are seeking to take my proper cost and making an assessor's valuation of my building. Unless and until it is shown that this assessment made on the 1936 basis is not correct, I think, in view of the criticisms made of the historical cost and the reason why it is not used anywhere else in the City, I am

entitled to have recourse to the proper assessment of my building. If I want to insure my building and send to outside valuers and assessors, they go through my buildings and my plans and they say: Today your building is worth so much to reconstruct.

LORD OAKSEY: To build.

MR. BRAIS: Is worth so much to build; we will place a depreciation of so much. That is done currently and very consistently today, because for insurance purposes, for example, you can insure your building at the total replacement cost. You can insure it today at a replacement cost valuation and, if you rebuild completely the building that you had before, the insurance company will give you a profit on your insurance by giving the depreciation which you would have had to write off and say: For business purposes you may not want to write off. That is where you can get a direct precise and complete intrinsic valuation of the cost of replacement of your building. When you do that you never go to this index, which, like the cost of living index, is more or less a rule of thumb. You do not know in that index how much of it is applicable to labour, how much of it is applicable to material. It is a broad base applicable to all kinds of buildings; but, especially when you come to the Sun Life building, it is much preferable to reconstruct that building with the work of a competent technical man, whose job it is to do that and nothing else, and say: That building would cost so much to reconstruct.

LORD ASQUITH: When you insure for replacement value of a building in Canada, it would not take a new for old allowance? You know what I mean by a new for old allowance?

MR. BRAIS: I rather think that that is what we call a replacement cost policy.

LORD ASQUITH: You can insure and get a new building, without giving any allowance for it.

MR. BRAIS: You can get a new building, on one condition: that is, that you rebuild.

LORD ASQUITH: I suppose that your premiums are all the bigger?

MR. BRAIS: Yes. There are two conditions to it. You cannot lose your buildings and make a profit over and above your loss, because your loss is the replacement cost, less depreciation, and you will only get your new for old if you rebuild within a given term of years. Of course, if you do not rebuild, you get the actual cost under the policy, which is the cost of that year less depreciation.

LORD ASQUITH: If you rebuild, you get a brand new building?

MR. BRAIS: Yes. I am in pocket by the amount of my depreciation on that building.

LORD ASQUITH: No doubt that is reflected in the premium.

MR. BRAIS: Yes, it is reflected in the premium; but it is more and more used by people, because people do not always put aside their replacement money; it is re-invested in the property and the money is not there to reconstruct. The replacement money is no longer set aside; it is invested and so forth, and it accumulates in the building. When those losses occur the valuers of the insurance company and the owner set the two

values on proof of loss and to arrive at the replacement cost in toto they would never think of going through historical cost, which might present all types of difficulties, but they take the plans and they take the specifications and, with the aid of competent experience man, they put down dollar for dollar what that is going to cost, plus the legitimate profit to the contractor, plus the architect's fees, if they are necessary, and arrive to the cent at what what value is.

LORD PORTER: That means that you are neglecting altogether on that basis the original cost.

MR. BRAIS: Quite; the historical cost.

LORD PORTER: It is just wiped out.

MR. BRAIS: It is wiped out completely, my Lord.

LORD PORTER: Actually in this particular case, with things as we have seen, it was based upon some past figure of historical cost. Vernot did not do, because when Vernot was comparing the historical cost he did it on a basis of taking four years, which were not the actual years - just by way of easing the calculation, I suppose.

MR. BRAIS: Possibly easing the calculation; possibly easing his own conscience in working out this special form to try to build up to our historical cost.

LORD PORTER: Anyhow, he did in fact take that.

MR. BRAIS: He did.

LORD PORTER: And the Board did the same thing.

MR. BRAIS: And the Board did the same thing.

LORD PORTER: Can you furnish us with what you say has been done in other cases and ought to have been done in other cases?

MR. BRAIS: Yes.

LORD PORTER: At the moment you have told us what ought to be done, because you say that it was nothing to do with what in fact was the cost, but you take this cost and say: That is the cost of that building, and, whether you do it that way or in some other way, you get an actual cost.

MR. BRAIS: You get an actual cost. I have given this explanation in order to indicate with what this portion of the evidence will be dealing.

LORD REID: It would help me, before you come to the detailed consideration of the City's method, if you would give me the reference, without reading it, to Vernot's explanation of why he departed from the usual method and adopted this method in this case. You must have asked him that question.

MR. BRAIS: I was not acting at that time. The late Mr. Geoffrion was acting as counsel for the Sun Life. May I make a note of that? So far as my memory serves, I do not think that Vernot was questioned on that point, and these papers came in during the course of the hearing, which lasted about a month, I understand, in Tasse's evidence and by that time I think that Vernot was out of the picture. I do not think that Vernot states why he made the other calculation; but I will verify that, with your Lordships' permission.

LORD REID: If there is some other passage in the evidence which Vernot was not asked but somebody else was, that will do as well, but if you were building up a case of discrimination your predecessor, surely, must have asked why the discrimination was made.

MR BRAIS: Your Lordship will appreciate in a vast volume such as this, when I have just been reading and re-reading some of the evidence it does not place itself in the back of one's mind with that readiness when you have been through the case.

LORD REID: Perhaps by Monday it can be found, anyway.

MR BRAIS: Yes, if it is, I will obtain everything that is there. I am not trying to evade the question, I should very much like to be able to say there is an explanation of it.

LORD PORTER: I think what I find a little difficulty about is, so far, I have been assuming that there were only two methods.

MR BRAIS: Yes.

LORD PORTER: One was to take the four years or some conventional years and the other was to take the actual years. Now, you are putting before us a third limb, namely, an actual estimation of the costs today and doing the work, and you are also telling us that there is some fourth method which the City adopts?

MR BRAIS: No, I do not think so, my Lord.

LORD ASQUITH: Would not this be right: Vernot took four years of history into account. The Board of Revision took 28 years of history into account. The City in its method took no years of history into account and I gather you rather favour that course, do not you; you take the actual cost of replacement today without reference to what it costs to put the building up originally?

LORD OAKSEY: Not the actual, the notional cost.

LORD ASQUITH: Yes, notional.

LORD OAKSEY: What a valuer says it would cost.

LORD ASQUITH: What a valuer says it would cost to put up the thing, making due allowance for depreciation.

MR BRAIS: What experts usually did, which is to proceed in the fashion in which valuation is carried out for all other purposes in all other walks of business life to arrive at replacement cost.

LORD OAKSEY: That is not always found to be the most accurate. When one builds a house oneself one finds sometimes that the people who have told one what it will cost are a good way out.

LORD NORMAND: I suppose that what the City by this method desire to arrive at is what is called intrinsic cost rather than replacement cost.

MR BRAIS: Intrinsic cost, yes.

LORD NORMAND: That is the cost which in a given year this



building would cost if it was carried in an economical way by competent people and without any accidents of misfortune to increase the cost or accidents of good fortune to decrease the cost.

MR BRAIS: Yes.

LORD NORMAND: That is what is aimed at, and as I understand it, these calculations with reference to the Sun Life are as contained in these pages 737 and following.

MR BRAIS: Precisely.

LORD NORMAND: And that bears no relation at all to actual expenditure incurred from time to time by the Sun Life in the course of this construction. Vernot, on the other hand, took the figures which were actually incurred and along with them all the misfortunes and good fortunes which befell in the course of construction, added them together, and then started to relate them to the cost in 1940 by using a ratio. That is the difference in the two systems.

MR BRAIS: The whole difference. It is the same thing as the example given about building a house by my Lord Oaksey. If I build a house and my good wife, as generally happens, has the plans changed for the length of the kitchen or the length of a dining room and the plumbing upstairs, that is where the contractors make all their money on the extras. The cost of the building may have been twice what it would have been if the plans were followed, and I have no more building to boast of and no more utility to make use of and nothing additional to sell to anybody than if the plans had originally been made the way the building was finally built.

LORD PORTER: I think Lord Oaksey had a different view in mind, as I have, not from anything I have built myself, but from what some of my friends have built. One of them said he was going to build a house and asked his architect how much it would cost and the architect told him how much. He said: "Are you sure about that" and the architect said he was quite sure. When the estimate came in it was just about double what the architect said, and my friend did not build his house. I think that is the kind of thing that Lord Oaksey had in mind, rather than any change of plan and more costly proceeding.

MR BRAIS: If I may add to that story, which is the one that occurs so often, if he would have given that price at twice the cost which he originally estimated, then he would have started building his private house, and that is why private houses cost so much when you build them yourself and you have got to buy a house which is built by a contractor, otherwise you pay double the price. It is because you start modifying your plans and all these changes and modifications in the plans do not add one cent to the value of the building. If I may say, my Lords, this example has some particular application, and I am taking the liberty of continuing your Lordship's first question.

LORD PORTER: My illustration had nothing to do with change of plans. My illustration was simply putting down your plan and sticking to it and yet finding that the building was going to cost double what your architect had estimated.

MR BRAIS: Yes, but I think your Lordships will know that very

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few architects take the responsibility of fixing prices of plans. They make a vague estimate, but it is not within their function.

LORD PORTER: They will not undertake that it will cost that.

MR BRAIS: It is the contractor who takes the plans and takes the specifications and from them figures out how much it is going to cost him to put up the building, the scaffolding, put up the building and put in the wainscoting and plastering and the roof and so on.

LORD OAKSEY: He is going to bind himself to it by contract, to do it for that price, which is a very different thing from an expert witness who comes and says: "The cost of this will be in a particular year, so and so". There is no sanction for him at all.

MR BRAIS: I must take for granted -- I think I am entitled to take for granted -- that when the City proceeds to value with men who have no axe to grind and who go through the details according to set tables and formulae, they will neither under-estimate for the purpose of trying to get the contract or over-estimate to make a larger profit because there is no competition.

LORD PORTER: Then we have got really to this: as I understand, we have got certain calculations made on page 737, beginning with "p.36". Is that the calculation which you say ought to be adopted?

MR BRAIS: The calculation which I say ought to have been adopted is the calculation on page 28; that is the official report.

LORD PORTER: Yes, that is the final one.

MR BRAIS: No, that is the first one.

LORD PORTER: Yes, the first one, page 28. You say that is the calculation. Now, is this a calculation which was, in fact, made?

MR BRAIS: Oh, yes.

LORD PORTER: And, made by the City?

MR BRAIS: Made by the City and all their working papers are here -- not all their working papers, but the totals of each of their working papers are there.

LORD NORMAND: What is the figure that is relevant in that page?

MR BRAIS: You have at the bottom of the page 11,599,841.76, in the left-hand corner.

LORD PORTER: At the top?

LORD ASQUITH: At the bottom, headed with the figure "1936".

MR BRAIS: Yes, that is what it would have cost in 1936.

LORD PORTER: In fact, it is both at the top and at the bottom.

MR BRAIS: Yes, but here it is worked out by buildings.

We will see in a moment how important it is why it should have been worked out for each building because it makes an extraordinary difference, and for two reasons: the first building, 1914, another building 1917, then 1925 and 1931.

LORD REID: Before you come to that, I do not understand why the relevant figure is the 1936 figure when, as I understand it, you have a 1941 figure on the right-hand side of the page, namely, 9,315,000.

MR BRAIS: That is after depreciation, my Lord.

LORD REID: Exactly. I must have misunderstood you. I thought you were saying that 11,000,000 was the proper figure to put in. That is the final replacement figure?

MR BRAIS: No, my Lord, was the cost of construction in 1936.

LORD REID: The total cost.

MR BRAIS: And you will see that that was extended. Then, of course, subsequently you would have to apply that to the cost of building index of 1941 or 1939 according to which of the two cost of building indices you are going to take.

LORD ASQUITH: Why 1939?

MR BRAIS: 1939 was applied to all buildings and to the Sun Life.

LORD ASQUITH: 1939?

MR BRAIS: 1939, yes, because you could not get 1941 at the time, they were not available. You could not get 1941 figures to begin with; the war was on.

LORD ASQUITH: Do you ignore the 1936 figures, or not?

MR BRAIS: No, I do not ignore the 1936 figures.

LORD PORTER: I am afraid I am being very stupid about this, but I do not know why 1936 appears there at all. What has 1936 got to do with it. Opposite I find: "Batisse 1914, Batisse 1917", another, 1925 and another, 1931, and written over the resultant figure is 1936. That is what I do not understand.

MR BRAIS: The only reason for the 1914 Batisse is that that is to identify the buildings one by one.

LORD PORTER: Does that mean this, that the 1914 figure is altered so as to come to the figure 852,052 in comparison with the year 1936, and if not, why is 1936 written above the top?

MR BRAIS: They have taken the 1914 building, or what is left of the 1914 building and they have reconstructed that at 1936 prices.

LORD ASQUITH: Said what it would cost to build in 1936?

MR BRAIS: Yes.

LORD PORTER: Why 1936?

MR BRAIS: It was because it was used by the City and it was the last year previous to the putting of the new assessment. I would like to make that clear if I can. There is a reason for 1936. In 1936 it was decided to put in the new system of

valuation and you had to start from a standard there and they started from the year in which they then were, or the closest year that they could get the figures of. You could not get in 1937 the cost of building in 1937 so they established the standard building as 1936 because in 1937 they could get the cost of what it would cost in 1936. They knew in 1938, because they would have it by then, the cost of building for 1937, and in 1939 they could get what it cost to build in 1938. You are always a year late in getting your statistics.

LORD PORTER: I follow that, yes.

MR BRAIS: That is the only reason.

LORD PORTER: Then, this calculation was not being made in 1937, it was being made in 1940.

MR BRAIS: Oh, this one was being made in 1938 at the time, my Lord.

LORD PORTER: So, it is only a year out.

MR BRAIS: It is when we were valued.

LORD PORTER: What is the meaning of the next phraseology: "Percentage 1941".

MR BRAIS: That is depreciation.

LORD PORTER: Is it. You depreciate between 1936 and 1941, is that it?

MR BRAIS: That is the depreciation on the 1914 portion of the structure, 30.8 per cent.

LORD PORTER: Yes, I see. You gradually decrease because you get a younger building.

MR BRAIS: Because you get a younger building.

LORD REID: Where do you get your change of index from 1936 to 1941, or has not that been brought in yet?

MR BRAIS: No, it has not been brought in yet, but it is brought in for 1947, and we have it here.

LORD REID: What I mean is that that 9,000,000 at the end is not a true 1941 figure because it has got to be adjusted by applying the difference of index between 1936 and 1941; is that it?

MR BRAIS: Quite, my Lord.

LORD ASQUITH: You ought to add 9 per cent. ought not you?

MR BRAIS: With your kind permission, my Lord, with this sole difference, that you will see that the 1937 cost of building index was applied, and if you look in the second series of printed figures you have, about a third down the page "Classe 1936".

LORD REID: Yes, and I see 10½ million. Would that have been the proper figure for 1937?

MR BRAIS: That would have been the proper figure for 1937 previous to depreciation.

LORD PORTER: Now I am getting puzzled again. I cannot understand what you have told me about the bottom of these figures. Above that is another row of figures, and if I were asked to interpret them as best I can, I should have said that having got your 1936 figures in the lowest bunch you then wanted to discover what the 1937 figures were.

MR BRAIS: Yes, my Lord.

LORD PORTER: Having then taken as an index 1937 instead of 1936 and got that index accurately at 12½ million dollars, you then depreciated that and found out that the ultimate figure, the depreciated figure, was 10,695,000, and I should have thought, upon the calculation you were putting before us, that that is the figure you would take.

MR BRAIS: Well, I would take that figure, but it would have to be then adjusted. First of all, it would have to be further adjusted for the 1939 or 1941 cost of building, that would be an addition, and you have to subtract subsequently for your depreciation as to each given year.

LORD PORTER: You have got, I suppose, to take a different depreciation because the building has become a year older.

MR BRAIS: Quite, my Lord, but for the moment I am dealing with a document that was made in 1938. Then, we will do these various other adjustments and we will see further figures from them.

LORD ASQUITH: What is clear is this, is not it, that on page 28 nothing is said about any adjustment for the difference between the index figures. Between 1936 or 1937 and 1941 is something like 9 per cent.

MR BRAIS: Not on that sheet, because this sheet was made and completed — I do not know whether it is signed.

LORD ASQUITH: On a later sheet, perhaps.

MR BRAIS: We have other sheets.

LORD ASQUITH: That is why I said on page 28 that there is no indication of it.

MR BRAIS: You do not come to 1941 until further on.

LORD REID: There is a reference to 1941 here, but is it interpolated later. In the middle of the last line of figures you have 1941, and then there are much bigger depreciation figures than there were in the 1937 account. Do you say that that column was added later?

MR BRAIS: I rather think so, my Lord. You have the depreciation in 1937 and again the depreciation subsequently added in 1941.

LORD PORTER: The difficulty I feel about that, and again it seems to me to be a difference of principle is that up above you ~~have~~ have got the index figure altered to 1937 and you have some sort of percentage. I do not know what is taken then. What you have got is another alteration there to 1941.

MR BRAIS: No, not there, my Lord.

LORD PORTER: Then, why take it below. There is a percentage

of depreciation below but no appreciation because of the extra cost of building.

MR BRAIS: I think, as we go through the documents, we will find that that has been applied, my Lord. As the chief of the valuation department says, these are the working papers and then he explains through the testimony what was subsequently done and that will be clarified, and I think I will have to take that in order now in order that I may endeavour to satisfy the Court as to what has been done on these figures.

LORD ASQUITH: It looks as though the reference to 1941 on page 28 was an afterthought or insertion because of the last three lines on that page: "Voir ci-apres depuis 1938 et suivis de la depreciation". They are going into the question of depreciation after 1938, in subsequent pages.

MR BRAIS: Yes, my Lord.

LORD OAKSEY: Not only depreciation, but in the cost of the building.

MR BRAIS: The cost of building index, yes. That will have to be applied, and it is applied subsequently. I rather think it would be useful, my Lords, if the Board would now bear with me if I proceed to endeavour to substantiate what I am submitting. We find on page 269 of the 'City of Montreal Manual', in much clearer language, I am sure, this system and formula which I have been endeavouring to explain. "Supplementary notes concerning the application of the new system. Introduction". Now, this part of the Manual is prepared by Mr. Hulse. It is not prepared by Mr. Parent. Mr. Parent explained the legal principles and the principles of valuation, but all this vast amount of technical work has been put in by Mr. Hulse who is the chief valuer. "Following the last part of the 'Real Estate Valuation Manual' published in 1936, we have yet to explain the system of inspection, the technical data and the method of calculating all buildings and their appurtenances. We will also give some explanations on the method of establishing the index number of the cost of construction". That is one of the items. "This system has been prepared more particularly for the use of the assessors. It will also be very useful for the interested taxpayers. It was established in order to compile on a record card, the cubic content and the dimensions of every building, its cost of reconstruction, the age of the building and its normal depreciation, as well as the principal details necessary to establish a more equitable valuation for the tax-payer. This work has required the combined application of approximately 60 engineers and architects during a period of about three years, not to mention the work of preparing tables and formulae by a smaller group".

Then, on the top of page 271 we have: "Such was, in August, 1936, the starting point of the work of compilation, research, study and calculation, undertaken to establish the replacement cost figures which we are using today".

Now, my Lords, may I refer to page 288: "Replacement Cost. The valuation of every building calculated on the detailed system is a semi-commercial valuation of the replacement cost. All buildings, except out-buildings, are calculated according to the following procedure". That is under the heading of "Replacement Cost". "1. The total

calculation of the frame, electric wiring, floors (under and finished) chimney, ceilings, plumbing stacks, partitions, with or without cellar, and with or without cellar floors, is established with the help of 12 tables described below. 2. The total calculation of the preceding items with in addition the foundations, the walls and window openings, is established with the help of a graph also described below".

Then we see with what care the matter is carried out. "Calculation of the skeleton of a building", then "Further calculation of the skeleton of a building" as we turn over the various tables and we go ad infinitum to electric wiring, pitched roofs, reinforced concrete roof, tables of prices of plaster, tables of elevators, dumb-waiters, in table 112 we go into all the details of exterior or interior staircases, table 114, refrigerators for industrial plant, butchers' establishments, hotels, refrigeration of drinking water and finally refrigeration for residences. Everything is put in.

LORD PORTER: The interesting observation is at the bottom of page 297: "All the tables described have been calculated and based on market prices in 1936".

MR BRAIS: Yes. As I have indicated, the reason for that is that that was the closest year available.

LORD REID: When they speak as they did in the instructions on the back of the valuation sheet, that the net replacement cost of buildings is to continue as at present, are they referring to this artificial system of getting a notional replacement cost or can you identify that?

MR BRAIS: The question was put this morning on that matter, whether there was a date.

LORD REID: The date is here, I have found it, in the Manual on page 95. The date of these instructions is 21st September, 1939. It was an instruction by the Board of Revision.

MR BRAIS: That is right, my Lord.

LORD REID: That this method was to be continued. Now, what I want to know is whether we can link up this provision with regard to the third class of buildings to which you belong, the net replacement cost directed to be taken by the Board of Revision is not the historical cost but the notional cost. Now, if you can establish that that is the instruction of the Board of Revision to the assessors, of course, you go a very long way, but I do not know whether you can.

MR BRAIS: I can only go this far: you have these instructions printed in this very book, and then you have the method of using the replacement cost which follows immediately on the instructions, and I think it would be not only a proper inference, but a necessary inference that the reference to the manner of calculating the replacement cost would be the method which is being carried out in the book which contains the instructions. My Lord, I would like to be able to go further than that, but I have nothing to allow me to pinpoint the two together.

LORD REID: I only raised the point because you may have a little later to pursue it before we meet again.

MR BRAIS: Yes, thank you, my Lord.

LORD REID: I should like to be sure whether the instructions of the Board of Revision which the assessors were bound to carry out were or were not disobeyed by Vernot.

MR BRAIS: All I can say at the moment with propriety is that the inference would be absolutely clear.

LORD NORMAND: Apparently, ~~xxx~~ upon receipt of the instructions from the Board the assessors resolved to modify the instructions given by the chief assessor of June 30th, 1939 -- I am reading from page 95 -- "by giving him new instructions which follow", but we do not get as far as I see the resolutions which led to the formulation of this method of calculating.

LORD REID: All you get here is a direction as to what the meaning of "replacement cost" is. What proportion of replacement cost you are to take comes in the memorandum later.

MR BRAIS: It comes in the memorandum later. I think I might well draw the attention of the Board immediately to Article 382 of the Civic Charter, under which the instructions are given by the Board, which is found on page 174 of the Manual, my Lords, at paragraph 14. That is the law: "The Board may at any time determine the manner in which the assessors shall proceed with their work, prepare the forms, documents and books which they shall use, prescribe the data and information that the assessors shall obtain and enter in their books or on the said documents, and give its instructions, accordingly, to the chief assessor". That is part of the law, and when the Board of Assessors instructs how they shall proceed with their work, "prepare the forms, documents and books which they shall use, prescribe the data and information that the assessors shall obtain and enter in their books or on the said document", they are doing something there which is according to law, and when they have done that, I take it if they prescribe that, then they have established the proper method to be applied as long as it is not contrary to law, and there I make a great distinction, of course, between using one method of arriving at replacement and using a wrong method in applying the replacement figures once you have them. The method of arriving at replacement is just a matter of procedure. If the Board of Assessors have enabling authority by the statute to give those instructions and have given the instructions within the frame of the statute then, when those instructions are carried out I think I can submit it is not outside of the law to have chosen one method of assessing against the other. Some have their disadvantages and advantages. The Board thought this was the better method, but on that slight variation of opinion as to the most preferable, the historical cost if not the reliable and technical method here used, which only shows to be unreliable is presumed to be reliable because it was being done within the statute.

LORD ASQUITH: Could you give me the reference again to the article in the City of Montreal Charter?

MR BRAIS: It is Article 382, which is found on page 170 and it is paragraph 14 which is found on page 174 of the City Manual. Now, I was on page 288. Your Lordships have, doubtless, found the picture of the Sun Life building in the Manual on page 201. I am sorry they have taken our most



attractive advertising picture, but it is called a commercial building. It is an example of a commercial building, office building class 1, type 1.

LORD ASQUITH: That is the actual building, is it ?

MR BRAIS: That, my Lord, is the actual building.

LORD ASQUITH: It is not named.

MR BRAIS: Your Lordship will note by the simplicity of its lines they have achieved a very artistic result. There is nothing elaborate except the colonnade, but it is illustrated here as an example of a commercial building, "Office building class 1, type 1".

Now I am on page 288, "Replacement cost". "The valuation of every building calculated on the detailed system" etc. "The total calculation of the frame, electric wiring", etc. "is established with the help of 12 tables and a graph", and we see how detailed those graphs are.

LORD PORTER: You took us through the details down to page 2, line 7.

MR BRAIS: We will note as we go through this further ----

LORD PORTER: What year are you on ?

MR BRAIS: This is just introductory. I will then go to page 295 to indicate this. It might be useful that I preface my remarks with this: the date of construction, according to the "annual and according to what we have seen is used only for the measure of depreciation after the replacement cost is found. It is to be noted that the date of construction is used only for that purpose and we find that on page 299. "The replacement cost having been completed and checked, the whole is turned over to an engineer specially appointed and trained in the calculation of depreciation and the application of the index number". I stress that there is a great deal of good in what the City has been trying to do. "Is turned over to an engineer specially appointed and trained in the calculation of depreciation". I think that engineer would know more than Mr. Vernot and Mr. Justice McKinnon how badly that building is depreciated. It is his job. "He checks, first of all, the date of construction and the improvements mentioned in the report, with a compilation of the building and repair permits. This compilation has been made on a special sheet entitled 'Statement of Building and Repair Permits', at the head of which we find the number of the account, the address, the municipal ward and cahastre as well as the cadastral number. Then, on the list, we find the numbers of the permits, the dates of these permits, the dimensions of the buildings, the number of storeys and the class, the declared costs of the works, the dates of the completion of the works, and a column for details of repairs and short description of the buildings. (This sheet is reproduced on page 313 of this volume). The compilation has been made for all permits issued since 1922 (after the fire in the city hall) up to date, and is being continued from day to day. Study of Depreciation. The employee specialising in the work of depreciation then studies the report of the architect to fix a depreciation by age, that is to say, a natural depreciation, according to the remarks on the reports and on the sheets of the

statement of permits". They were going to a lot of trouble to instal a good system.

LORD OAKSEY: Forgive me, but I do not quite understand. Is this on the same formula that you have been telling us about. Why do they speak of the application of the index number ?

MR BRAIS: For the depreciation.

LORD OAKSEY: Is that a particular year, do you mean ?

MR BRAIS: That is the application of the index number from 1936 on. We will come to that, my Lord.

LORD OAKSEY: Why do they want the dates of construction ?

MR BRAIS: They want the dates of construction to apply the depreciation.

LORD OAKSEY: I see, yes.

MR BRAIS: And they check that through the permits at the City Hall.

LORD PORTER: Up to this moment they have only got the 1936, as you will see by page 298. "The fluctuation of market price and the purchasing power of the dollar require that values be adjusted as needed. That is why each year an index number is made up to adjust the replacement cost of 1936 to that of the required year. A list of these index numbers is compiled in our files, continuing a compilation made for the years 1920 to 1936". But nothing made after 1936.

MR BRAIS: "1920 to 1936 by the bureau of statistics". That may very well be.

LORD PORTER: So far we have got to 1936 in our case.

MR BRAIS: That may well be. Those must have been written in 1936 and there may be discrepancies in the book. There are one or two, from neither of which can I derive any consolation at all because this book was the work of men of the trade. It was not the work of an author, and if there are some places where there are figures applicable to previous years we have today to give the necessary interpretation to them.

LORD ASQUITH: How do they arrive at their 1936 values. Do they imagine the thing is built in 1936 and then write off something for the actual depreciation which it has sustained ?

MR BRAIS: There are two things, there is the 1936 cost of construction.

LORD ASQUITH: That would be a new building ?

MR BRAIS: For a new building, and then you take that new building which you have in your mind and then you look at your present building and it has been built in 1914 or 1920, whatever it is, so you have so many years of depreciation.

LORD ASQUITH: Which you deduct ?

MR BRAIS: Which you deduct.

LORD ASQUITH: And that gives you your 1936 100 index.

MR BRAIS: Less depreciation, your 100 index is less depreciation. It is the cost of a new building in 1936.

LORD PORTER: I thought the proposition was this: I have got to find out what this building would have cost in 1936. Let us find that out. So far as we have got in this book there is nothing whatever about adapting that to some other year, but having got your 1936 cost you then say, how do I depreciate this?

MR BRAIS: Yes, my Lord.

LORD PORTER: And for that you will take the actual years in which it has been constructed and have a formula for deducting in respect of this. Is that right?

MR BRAIS: That is right. The book even gives you the amount of depreciation which is to be given to each type of building per year.

LORD ASQUITH: You have got to apply the sum for depreciation to arrive at your 1936 values as well as depreciation afterwards.

MR BRAIS: No, I do not think so, my Lord. You are told to build a new building and to simplify the whole procedure you build a new building in 1936 and you have a brand new building. Then you want to know how much must be taken off that building because it is an old building, and then you are told to find out the year it was built. You are given in a table here how much depreciation is to come off every year for every separate type of building. You multiply the percentage for your type of building by the number of years ~~at~~ and you arrive at your depreciated value, but your standard 1936 is the cost of a new building. That, of course, simplifies this.

LORD ASQUITH: What I mean is this: when you are attempting to deal with the year 1941 you have to deduct from the new value at 1936, the depreciation which has occurred before 1936 and the depreciation which has occurred after 1936.

MR BRAIS: And after it. I get my 1936 figure, I put to it the figures for 1941 and then I go back to the cost of my building and I have so many years, and I multiply this number of years by the percentage of depreciation set forth in the special depreciation tables and then I apply that to each separate building that I have for the number of years, and I come to the figure which the Manual says should be the one to be arrived at on this basis.

(Adjourned to Monday next at 11 o'clock.)