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*Oct. 4, 5, 6, 7, 11, 12
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*Feb. 21

SUN LIFE ASSURANCE CO. OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Assessment—Municipal—Office building partly owner and partly tenant occupied—Actual value—Exchangeable value—Prudent investor—Replacement cost—Commercial value—Non-productive features.

In the municipal assessment of a very large office building in Montreal, which is approximately 50 per cent owner-occupied and the remainder rented, and whose size, design and particular architectural features make it impossible to be compared with any other building in that city,

* PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

(1) [1947] A.C. 66; [1947] 1 D.L.R. 417.

Held: That the actual value which the assessors must find pursuant to the city charter is the exchangeable value or what the building will command in terms of money in the open market, tested by what a prudent purchaser would be willing to give for it; and, on an appeal to either the Superior Court or the Court of King's Bench (Appeal Side), by force of the charter of the City of Montreal, these Courts must render "such judgment as to law and justice appertain". Moreover, a municipal valuation for assessment purposes is not to be made in accordance with the rules laid down with regard to the valuation of a property for expropriation purposes. The valuation must be made of the property as it stands and as used and occupied when the assessment is made.

Held: That the actual value of this building should be determined by giving to the percentage of the replacement cost, after allowing for the extra unnecessary costs of the construction, a figure of no more than 50 per cent.

Held: On principle, the non-productive features of a building, in so far as they do not add to its actual value ought not to be included among items in the determination of that value for municipal assessment.

Per Kerwin J.: The formula used by the assessors, having failed to produce the actual value, should be disregarded and the commercial value only should be considered.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing, St-Jacques and Casey J.A. dissenting, the judgment of the Superior Court, MacKinnon J., and confirming the municipal assessment made by respondent's Board of Revision.

F. P. Brais, K.C., and *H. Hansard, K.C.*, for the appellant.

D. A. McDonald, K.C., and *R. N. Séguin, K.C.*, for the respondent.

The CHIEF JUSTICE:—The subject matter of this appeal is the assessment for municipal purposes of the properties of the Sun Life Assurance Company of Canada in the City of Montreal. While there may be recognized general principles concerning municipal valuations, yet the main concern of the Courts in this case is evidently to apply the several provisions of the charter of the City of Montreal having reference to the subject.

Section 361 of the charter provides that all immovable property situate within the limits of the city shall be liable to taxation and assessment, with certain exceptions with which we are not concerned. It declares that immovable

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property shall comprise lands, buildings erected thereon, and everything so fixed or attached to any building or land as to form part thereof, but shall not include machinery, tools and shafting used for industrial purposes, except such as are employed for the purpose of producing or receiving motive power.

Under section 375(*a*) every three years the assessors shall draw up in duplicate for each ward of the city a new valuation roll for all the immovables in such ward, and this roll shall contain, amongst other things, the actual value of the immovables. However, whenever buildings or constructions erected upon an immovable entered in the previous roll have been changed or altered, or whenever a lot has been subdivided or divided, a new valuation of such property shall be made according to law and entered on the valuation roll by the assessors. The same section provides that at least two assessors shall act together in drawing up the valuation roll. The roll is deposited on the first of December. A public notice thereof is published and, during the delays fixed by the notice, the chief assessor is directed to receive complaints filed with him respecting any entries in the roll and to transmit them immediately to the Board of Revision.

By Section 382 a Board of Revision was created to be composed of three members appointed by Council on the report of the executive committee. The Board hears complaints at public meetings at which witnesses are called. The President decides questions of law. The Board may compel the appearance before it of one or several assessors in order to know in what manner and according to what principles they have proceeded to establish their valuations generally or in a particular case, or on what basis such valuations are founded, after which it may determine itself, or with the assistance of experts, the valuation in question; and, in so doing, it may increase, or reduce, or maintain, the valuation.

By force of section 384 of the charter an appeal lies from any decision rendered by the Board of Revision to any one of the judges of the Superior Court, by summary petition. The judge may order a copy of the record, including copies of the valuation certificate and of the documents annexed thereto, of the proceedings of the Board

of Revision, as well as of the complaint itself; and, after having heard the parties, but without inquiry, he must proceed with the revision of the valuation submitted to him and with the rendering of such judgment as to law and justice shall appertain.

A further appeal lies from the decision of the judge of the Superior Court to the Court of King's Bench, when the amount of valuation contested for the property concerned exceeds five thousand dollars, or when the amount of the rental contested and under examination exceeds one thousand dollars.

I only want to emphasize that, in the case of an appeal, the judge of the Superior Court, under the charter (sec. 384) shall render "such judgment as to law and justice shall appertain." Although this is not repeated with reference to the decision which the Court of King's Bench must render, it cannot be understood to mean that such Court is not to be governed by the same direction as the judge of the Superior Court. If we carefully examine the judgment rendered by the Court of King's Bench (1) in the present instance, and the reasons given by the majority, I am of opinion, with respect, that, in the judgment appealed from, that direction of the charter of the City of Montreal has not been followed. That is apparent by the following considérant of the formal judgment:—

Considérant, par conséquent, que si la base d'une évaluation faite par le Bureau de revision n'est pas manifestement fausse; si le Bureau n'a pas commis d'erreur évidente dans ses calculs, et que la méthode suivie pour déterminer la valeur n'a pas eu pour effet de créer une injustice certaine, ni le juge de la Cour Supérieure ni la Cour du Banc du Roi ne devraient intervenir pour modifier la décision du Bureau.

It is also apparent throughout the reasons given by the learned judges who formed the majority.

Now, of course, the principle embodied in the considérant, above reproduced, is the general principle followed in appeals from municipal assessments, but, as can be seen from the text of the charter, it is not the principle laid down by the latter. The Court of King's Bench professed to be governed by the general principle and applied it to the judgment it rendered and disregarded section 384 of the charter which prescribes, as we have seen, not that they ought not to interfere in the assessment only if the Board of Revision was manifestly wrong and had committed an

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evident error, or created a clear injustice, but that both the judge of the Superior Court and the judges of the Court of King's Bench should render "such judgment as to law and justice shall appertain." It follows that the judgment now under appeal, in my humble opinion, was not rendered according to the law which governs the City of Montreal, and that, for that reason alone, it ought to be set aside.

On the other hand, the learned judge of the Superior Court undoubtedly followed the principle laid down in the charter as to the powers which he was entitled to exercise, to such an extent, as a matter of fact, that the majority of the Court of King's Bench found that he had been wrong in doing so.

I need not insist on the point that a municipal valuation for assessment purposes is not to be made in accordance with the rules laid down with regard to the valuation of a property for expropriation purposes. One main ground why such a course should not be followed is that the expropriation of a property means the permanent divesting of the owner and should legitimately, therefore, take into account the present value and all the prospective possibilities of the property, while the municipal valuation is, generally speaking, only made for one year, or, in the case of the City of Montreal, for three years, with certain provisions for modification if certain events happen, such as alteration, improvement, fire, etc. The rule was laid down by Lord Parmoor in *Great Western and Metropolitan Railway Companies* v. *Kensington Assessment Committee* (1), that in such a case "the hereditament should be valued as it stands and as used and occupied when the assessment is made." In the yearly valuation of a property for purposes of municipal assessment there is no room for hypothesis as regards the future of the property. The assessor should not look at past, or subsequent or potential values. His valuation must be based on conditions as he finds them at the date of the assessment. In particular, in the preent case, there was no ground for considering any other condition, as no suggestion of any kind appears in the record that there was, throughout the period of assessment, a prospect of any change.

(1) [1916] 1 A.C. 23 at 54.

The Sun Life property, as it stood at the time of the valuation now in question, was occupied about sixty per cent by the company itself for its own purposes and about forty per cent by tenants. That is how the assessors found the property at the time they made their valuation, and that is the only aspect of the property that they had to take into consideration. If some material change took place during the three year period following the valuation, the charter of the City of Montreal provided for a fresh valuation taking into account those changes. Again, at the end of the three years, if the situation had been modified, there was then the opportunity to modify the valuation accordingly. But, for the valuation which had to be made and which is now the subject of the litigation, the property had to be taken as it stood then and as it was used and occupied.

The parties agreed on certain admissions showing the gross rental receipts for each tenant and each floor, including the basements, for the year 1941, being the material year. By these admissions the yearly rental actually charged to the company for the years 1937-1941 inclusive, as appears in the books of the Company, in the Company's annual statements and in statements supplied to the Superintendent of Insurance for the Dominion of Canada, for the floor space occupied by it per floor, was established. The amount shown, therefore, establishes the rental value for the year 1941, with which alone the assessors were concerned in their valuation. In turn, such rental value enables one to find the commercial value of the building, or, to adopt another expression which was used throughout the case, to estimate the price which a prudent investor would have been willing to give for the purchase of the property. An increase in rents in the City of Montreal might mean a higher rental value, but that would be the concern of the assessors who would have to render a decision at that time. For the moment, the assessors and the Court cannot be concerned with any other value than that of 1941. It is on such a basis that the judgment in this case must be arrived at.

Now, it is evident from a reading of the record and the opinions expressed by the many experts who were heard, that there is far from being an agreement on the approach

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that should be made to reach a proper valuation in these matters. Some speak of market value, but there is a general consensus of opinion, in the circumstances, that this cannot form the basis of valuation here, as everybody, witnesses, experts, assessors, Board of Revision, judge of the Superior Court, and judges of the Court of King's Bench, state most positively that the Sun Life building now in question is unique and that there is no comparison between it and any other building in either the City of Montreal or the immediate vicinity. We were invited to apply certain *dicta* of a United States court in a judgment dealing with the Federal Reserve Bank of Minneapolis, in the State of Minnesota. I do not find it necessary to pause to consider such a judgment dealing with a property several thousand miles from the one which we are now considering. Counsel for the respondent in the case at bar stated several times in the course of his argument that one way to estimate the value of the Sun Life property would be to look at the valuation of comparable buildings. Of course, that should first mean comparable buildings in the City of Montreal, or the neighbouring country. But I have been so far unable to understand how a comparison of that kind could be helpful. It cannot assist the Court in reaching a conclusion because, of course, that would assume that the so-called comparable buildings have themselves been correctly valued by the assessors. And the Court really does not know anything about those buildings in that respect, more particularly because the owners of such buildings have not been heard in this case. At all events, the evidence is clearly to the effect that there is no building in Montreal comparable to that of the appellant. (*Grampian Realties Co.* v. *Montreal East* (1)).

Moreover, if there is one basis upon which we should be clear as to the method which should be followed for municipal valuation purposes, it is the one which is recognized by the assessors themselves in the memorandum prepared by them on the assessment of large properties. It states:—

> Each property will have to be considered on its merits within the limits outlined above.

(1) [1932] 1 D.L.R. 705.

The Board of Revision expresses the same view as follows:—

> The coupling of the word "real" with the word "value" indicates that real value is a fact, not an hypothesis. Because this conception of real value is overlooked or ignored, the means, the elements to determine the said real value are often taken for the value itself. Such elements are unlimited in number. They vary "ad infinitum" as the cases. There is no fixed rule to determine in what proportion every element must be taken into account and what importance should be given to any element in particular. The same element may have more importance in one case than in another. The law imposes on the asssessor the duty of finding the real value of an immoveable and of inscribing it on the roll, but does not in any way put any limit to the assessor's discretion in considering all the elements he thinks it advisable to consider in exercising his judgment and arriving at a decision.

The "limits outlined above", referred to in the memorandum of the assessors, (Ex. D-5) proceed to divide the properties such as office buildings, apartment houses, departmental stores, hotels, etc., into four main categories. They are as follows:—

(1) Properties that are developed and operated solely on a commercial basis as investment propositions.

(2) Properties that are completely occupied by their owners.

(3) Properties that are partly occupied by the owners and partly rented, among which the Sun Life property is specifically mentioned.

(4) In a separate category all buildings like theatres and hotels.

With respect to the properties in the third category, of which the Sun Life is said to be one, the memorandum proceeds to state that these properties have been constructed or acquired as a permanent home for the enterprise of their owners, and that frequently the building is laid out for future development, the tenant situation being considered only temporary or incidental. In these cases, the memorandum continues, 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; and it is mentioned that some consideration should be given to the rental value in these cases, so that the replacement factor should be weighted somewhere between 50 and 100 per cent, and the

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commercial value factor make up the difference between 50 per cent and zero. Then the memorandum goes on to say:—

> 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, 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.

Admittedly such were the rules and the guiding principles followed by the assessors in the present case, and it is to that memorandum that we owe the idea embodied in the assessment herein of a certain percentage attributed to the replacement factor and another percentage attributed to the commercial value factor. In this instance the Board of Revision came to the conclusion, after a very complicated calculation, that the ratio of importance to be given to the net replacement cost should be 82·3 per cent and the ratio of the commercial value 17·7 per cent. Counsel for the respondent, in the course of the argument, was asked if a calculation of that kind for municipal valuation purposes was ever accepted in any Court of the province of Quebec and, of course, he could not point to any authority to that effect. Nevertheless, that was the yard-stick applied to the Sun Life property for its valuation by the Board of Revision.

I do not think that it is the function of this Court, acting as third Appeal Court, to proceed to a detailed calculation of what the valuation should be. In that view I am fully in accord with the reasons for judgment of Casey J.A. in the Court of King's Bench (Appeal Side) (1), and I adopt his reasons. Like him, I think that "the learned Justice of the Superior Court acted properly in intervening and in fixing the value of the Company's property, land and buildings at $10,207,877.00." I think the learned judge of the Superior Court succeeded in placing a true objective exchange value on the property and that the result he arrived at should be affirmed. As was said by Casey, J.A. the amount fixed by that Court more closely approaches the actual value of the property, as prescribed by the charter of the City of Montreal, and it should be allowed to stand.

The appeal should, therefore, be allowed and the judgment of MacKinnon J. should be restored with costs both

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here and in the Court of King's Bench (Appeal Side) against the respondent. The award of costs by the Court of King's Bench (Appeal Side) on the appeal to that Court of the Sun Life Assurance Co. of Canada should not be disturbed.

KERWIN J.:—This appeal is concerned with (1) the assessment by the City of Montreal of the appellant's main office building and what is called a secondary building, containing the heating plant; (2) the annual rental value of the two buildings for the purposes of business and water taxes.

The main question is the first and as to it there is no dispute as to the assessable value of the land itself. Article 375 of the charter of the City of Montreal provides for the preparation, every three years, by the assessors, of a valuation roll in each ward of all the "immovables", which expression includes lands and buildings. The roll is to contain "the actual value of the immovables" and the controversy turns upon the method of determining that value or, as it is put in the French version "la valeur réelle des dits immeubles". The rule applicable in determining compensation in expropriation cases is not that to be followed in municipal assessment cases where the land and buildings are to be assessed at their value, or real value, or actual value. The test is an objective one which in many cases may be applied by seeking the exchange value or the value in a competitive market. If there is no such market, then one may ask what would a prudent investor pay for the subject of taxation, bearing in mind the return that might be expected upon the money invested.

The differences between the assessors and the Board of Revision need not be set out since the latter confirmed the amount of the assessment set by the former. Both, however, proceeded in the following manner: Taking the actual rents received by the Company and estimating the rents from other parts of the building available for tenants, and adding to that an estimate of what the Company should pay for the space occupied by itself, and deducting therefrom the operating expenses, gives a net revenue which when capitalized resulted in a commercial value which may be taken as $7,028,623. The assessors and the Board then proceeded to fix the replacement cost of the buildings,

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which may be put at $13,387,131.80. Holding the view that there was no market and that both the replacement value and commercial value should be taken into consideration, it then became necessary, in their opinion, to take certain percentages of the above figures, which in the case of the assessors were put at 90 per cent of the assessed value and 10 per cent of the commercial value, and by the Board at 82·3 per cent and 17·7 per cent. The explanation of how the assessors arrived at their assessment appears in the evidence of one of them, Mr. Vernot, at page 556 of the Case, where he states:—

> I think I will have to corroborate what Mr. Hulse said about the principles and methods agreed upon by the asssessors, and in commercial buildings, first, we agreed on 50 per cent replacement for strictly commercial buildings, and 50 per cent commercial value. When I say strictly commercial I mean a building designed and built for revenue purposes only.
>
> When you come into the owner occupied building and renting part of it, we would have to balance the part of the building assessed for commercial purposes and the part assessed as owner occupied. In the case of the Sun Life it was 40 per cent tenant occupied in 1941 and 60 per cent owner occupied. The occupied space. So that would mean that the 50 per cent for commercial would be divided into 20 and 60. There would be another 30 per cent replacement cost added on the 50, to make it 80 and 20.
>
> But as the revenues in this building were based on revenues of much cheaper buildings—the revenue of this building received no competition—I consider that half of the commercial value of 20 per cent, making it 10 per cent, would pay for the amenities and benefits received by the owner of the building.

On appeal to the Superior Court, Mr. Justice MacKinnon while arriving at a different total for the replacement value, took 50 per cent of that total and 50 per cent of the commercial value in order to arrive at an amount of $10,207,877.40 for land and buildings. The majority of the Court of King's Bench (1) restored the order of the Board but Mr. Justice St. Jacques and Mr. Justice Casey dissented as they would have affirmed the judgment of the Superior Court. Casey J. decided that the commercial value was the proper method of approach and that the net rental revenue at which he arrived, $432,957, would represent a yield of approximately 4·2 per cent on the figure found by the Superior Court. He considered that in view of the evidence of Mr. Vernot that the rate should be 3 per cent for an owner occupied building and 4½ per cent

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for one that is tenant occupied, while Mr. Lobley and Mr. Simpson, for the Company, felt that a yield of 5 per cent was indicated, the figure of 4·2 per cent would not be far out of line. With those reasons and the result, I agree. While the Company sought to obtain a lower valuation on the basis of the evidence of its experts as to a possible purchaser, that evidence is not of such a character as to warrant it prevailing against the almost unanimous evidence of the commercial value.

I have not overlooked the fact that in the Company's annual general statements and in its returns to the Superintendent of Insurance for Canada for the years 1914 to 1941 inclusive, sums of a like amount appeared under the headings "book value" and "market value", which represented actual cost less depreciation. Much was made by the respondent of this fact. Whatever bearing the figures might have when related either to the annual statements or the returns to the Superintendent of Insurance, they cannot, I think, affect the duty of the assessors and of the Board and of the Courts in fixing the value of the Company's immovables for the purposes of municipal taxation.

There remains the City's contention that the assessors and the Board of Revision proceeded in accordance with a memorandum adopted by the asessors at a meeting held at the suggestion of the Board, and that failure to adhere to that memorandum would result in discrimination. The assessors must, of course, proceed so as to cause no discrimination but it is also their duty to see that every ratepayer is assessed for its immovables at their actual value. Where it is demonstrated, as is the case here, that by attempting to use the formula of the memorandum the result arrived at is not such value, then the formula must be disregarded.

As to the second point in the appeal—annual rental value—the appellant has not convinced me that all the judges were wrong and that item should therefore stand. The appeal should be allowed to the extent indicated, with costs, and the judgment of MacKinnon J. restored. The appellant is entitled to its costs in the Court of King's Bench in the appeal of the City of Montreal, but should

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pay the costs of its own appeal in that Court; the cost of printing the case in the Court of King's Bench should be borne equally by both parties.

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

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

The appellant feeling that it was aggrieved by these valuations, appealed to the Board of Revision of the City of Montreal, and contended that the true and proper valuations of the said buildings should be $8,330,600 and $102,600 respectively. The valuations placed on the land in both cases (viz: $520,500 and $74,100) were not challenged, but the appellant also appealed regarding the assessed rental value for business tax, claiming that it should be reduced to $352,035. It also asked that the assessment of the rental value of the boiler house, fixed at $26,000, should disappear. During the hearing before the Board, the respondent submitted by counter-appeal that the combined assessment of the main building and boiler house should be increased to $15,651,100. The Board refused this increase, but maintained the assessment as made by the assessors, subject to consolidation of the boiler house assessment with that of the main building, with the result that the annual rental valuation of the boiler house

disappeared. The Board also dismissed the complaint against the assessment of the annual rental value on the roll.

The appellant then appealed to the Superior Court, under the provisions of the City Charter. Mr. Justice Mackinnon sitting in that court, reduced the assessment of both properties, including land, to $10,207,877.40, but refused to disturb the Board's decision as to the annual rental value. He therefore allowed in part the appeal of the Company with costs against the City of Montreal.

Both parties then inscribed the case before the Court of King's Bench of the Province of Quebec (1), which, Messrs. Justices St-Jacques and Casey dissenting, allowed the appeal of the City of Montreal with costs, dismissed the appeal of the Company also with costs, and restored the decision given by the Board of Revision. The appellant now appeals to this Court.

A brief account of the erection of this massive cubical designed building, which rises twenty-five storeys above the ground, is I think useful for a better understanding of this case. It was erected in three different stages. The first building, which now constitutes the southwest, or Dorchester and Metacalfe corner, was commenced in June, 1913, and completed in March, 1918. It was intended to be the head office of the Company. Although a comparatively small building of five or six storeys, occupying only one-sixth of the ground area of the present structure, it was made of very costly materials. The second stage of construction consisted in approximately doubling the size of the original building by extending it east, along Dorchester Street to Mansfield Street, and adding two storeys. This was commenced in the Summer of 1922 and finished in December, 1925. Finally the third stage, during which the great bulk of the existing structure was added, started in May, 1927, and it was only in December, 1930, that it was nearly all completed. Only a number of upper floors were not finished for occupancy by tenants at that time, nor completed until occupancy was from time to time, thereafter contracted for. At the time of the 1941 assessment, which is now in issue, approximately 14 per cent of the rentable space in the building was still unfinished and, therefore, unoccupied.

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Its cost up to April 30th, 1941, was $20,627,873.92, excluding the cost of the land and taxes and interest during construction, and the amount spent from April 30th, 1941, to December 1st of the same year, the date of the roll, was $58,713.70. The cost of the boiler house which was commenced in November, 1928, and ready in March, 1930, exclusive of the land and of interest and taxes during construction, was $709,257.14 plus $154 spent in 1938. The cost of the land, as given by the Company to the assessors, was $1,040,638.20. By adding together the above mentioned amounts, we come to a total of $22,436,636.96.

In 1930, the respondent's assessors placed these properties on the valuation roll of the City of Montreal for the tax year 1931-1932, at $12,400,000, but the present appellant appealed from such assessment to the full Board of Assessors under the provisions of the City Charter then in effect, and the appeal being allowed, the assessment was reduced to $8,000,000. During the ten years which followed, up to 1941, this figure of $8,000,000 was increased annually by amounts corresponding to the sums from time to time expended by the appellant on completion of interior floors as the same were occupied by tenants, and for the year immediately preceding the assessment now in issue, the property stood on the City valuation roll at $9,986,200 and it is from the sudden increase to $13,755,500 that the present appellant now complains. The assessment of the boiler house and land occupied by the appellant had likewise remained constant throughout the same period, at a total of $225,000 and by the assessment now under attack, this sum was increased to $520,500. These increases represent approximately 40 per cent for the office building and approximately 135 per cent for the boiler house. It must be noted that the land valuations were not increased, but on the contrary, slightly reduced, and it follows that the percentages of increase on the buildings as distinguished from the total included in the land, were even greater. The overall increase of the appellant's property affected by the assessment under attack was, therefore, of $4,064,000, and the overall assessment was $14,276,000.

At the same time, the annual rental value of the space occupied by the Company in its building, was increased from $357,280 to $423,280 for water tax purposes and $421,580 for business tax purposes.

In 1940, before the valuation of the properties now in question was made, the assessors of the City of Montreal prepared a "Memorandum" laying down certain rules concerning the assessment of large properties in Montreal, as office buildings, apartment houses, departmental stores, hotels, etc. These properties were divided into four main categories in order to determine the relative importance of the various factors used in arriving at their valuation.

The category with which we are concerned, is the third, and it includes properties that are partly occupied by the owners and partly rented. The "Memorandum" indicates that in order to determine a proper valuation, the replacement and commercial values have to be taken into account, but the replacement factor should always be weighed somewhere between 50 per cent and 100 per cent, and the commercial factor between 50 per cent and zero. This "Memorandum" was produced as exhibit and with it was also produced a list of properties, the valuations of which have been made in accordance with those directions. It appears that in assessing the Sun Life Building, the assessors have thought that the replacement factor should be 90 per cent, and the commercial factor 10 per cent.

Mr. George E. Vernot was the City assessor who made the assessments now challenged. The method followed by Mr. Vernot to value the main property was the following:—

He took the total cost of both properties as at the 30th of April, 1941, which as reported by the Company was $22,377,769.26. From this figure, he deducted the amounts paid for the erection of the boiler house, the construction of the sidewalks, the price paid for the land of both properties, the costs of the temporary partitions during the construction and of the parts demolished to connect the new buildings. These various amounts totalling $4,269,393.72 were then substracted from the total costs, leaving a balance of $19,108,375 for the main building alone, without the land. He then adjusted the cost of replacement to the 1941 figure, using the index of 1927-28-29-30, when most of the money was spent, and having found the difference to be $1,471,344 which he subtracted, he reached a figure of $17,637,031. He allowed 5 per cent for presumed extra cost, as the building was erected in three units, viz: $881,851, giving a balance of $16,755,180.

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He figured the depreciation at $3,081,202 and came to a final figure of $13,673,978 as being the cost of the main building in 1941, after depreciation and without the land. His next operation was to add to this last figure $730,600 value of the land, giving a total *replacement value* of $14,404,578.

The commercial value of the property was also considered by Mr. Vernot. By capitalizing at a rate of 15 per cent, the total revenue of the property which he figured at $1,187,225, he thus gave to the property an economic value of $7,915,000.

Then in order to apply the principles enunciated in the Memorandum, he reached the conclusion that the factor "replacement value" should be 90 per cent, and the commercial factor 10 per cent. By taking 90 per cent of $14,404,578, he obtained $12,964,120 and 10 per cent of $7,915,000, gave the figure of $791,500. His final operation was to add both these figures, subtract the value of the land, with the result that, in his opinion the "real value" of the main building alone, is $13,024,900, or $13,755,500 with the land. To this figure, he added the amount of the valuation of the boiler house, including the land, $520,500, making a grand total of $14,276,000.

When the case was heard by the Board of Revision, Mr. Vernot explained as follows how he arrived at 90 per cent "replacement" and 10 per cent "commercial":—

> We decided that on the large buildings in our Wards that were rented, totally rented, we took into consideration 50 per cent commercial value and 50 per cent replacement value; that is where the building was built solely for commercial purposes and occupied solely for commercial purposes by tenants. Those that were occupied by owners we would take at 100 per cent replacement cost and nothing for commercial value. So the Sun Life happened to fall between these two categories. The total floor space occupied by the Sun Life and the tenants is given by their list and came out to be 60 per cent and 40 per cent.

Later in his evidence, he added:—

> Q. Can you give us some more particulars as to the proportion between the 90 and 10? Do you conclude that 90 per cent must be given to replacement cost and 10 per cent to the commercial?—A. Yes.
>
> Q. Why not 15 and 85, or 20 and 80? You could give me some explanations?—A. I think I will have to corroborate what Mr. Hulse said about the principles and methods agreed upon by the assessors, and in commercial buildings, first, we agreed on 50 per cent replacement for strict commercial buildings, and 50 per cent commercial value. When I say strictly commercial I mean a building designed and built for revenue purposes only.

When you come into the owner occupied building and renting part of it, we would have to balance the part of the building assessed for commercial purposes and the part assessed as owner occupied. In the case of the Sun Life it was 40 per cent tenant occupied in 1941 and 60 per cent owner occupied. The occupied space. So that would mean that the 50 per cent for commercial would be divided into 20 and 60. There would be another 30 per cent replacement cost added on to the 50, to make it 80 and 20.

But as the revenues in this building were based on revenues of much cheaper buildings—the revenue of this building received no competition—I consider that half of the commercial value of 20 per cent, making it 10 per cent, would pay for the amenities and benefits received by the owner of the building.

The members of the Board of Revision accepted the method adopted by the assessors, but reached a higher figure because they reduced the adjustment cost to the index number 1939-40, and reduced also the amount of depreciation. They also applied the formula indicated in the "Memorandum" to the boiler house, which was dealt with separately by the assessors. They thought however that the "replacement" factor should be 82·3 per cent and the "commercial" factor 17·7 per cent. On account of these slight differences, they came to the final conclusion that the "real value" of both properties was $15,051,977.07, and that therefore, the valuation made by the assessors, viz: $14,276,000 was not excessive.

In the Superior Court, Mr. Justice Mackinnon agreed with many of the figures arrived at by the assessors. He however slightly reduced the depreciation on the building, but thought that a further depreciation of 14 per cent, viz: $2,352,932.70, should also be subtracted from the 1941 net cost of the building, being for extra unnecessary costs for granite, monumental work, ornamental stones, bronze sash, bronze doors, etc., as explained by the witnesses Perry, Mills and Désaulniers. He therefore reached the conclusion that the replacement value of the main building was $12,100,786.80 and after adding to this figure, the value of the land, viz: $730,600, plus the value of the boiler house and land, viz: $535,735, he arrived at a total replacement value of $13,387,131.80.

Mr. Justice Mackinnon expressed the view that both the replacement value and the commercial value should be considered, but that each should be given equal consideration, that the "actual value" should be 50 per cent of the replacement value, plus 50 per cent of the com-

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mercial value. He capitalized the net revenue of $752,062.66 at 10·7 per cent which equalled $7,028,623. Adding this last figure to the replacement value, as found by him, and dividing by 50 per cent, he concluded that the real value of both properties including the land, was $10,207,877.40.

Then, the Court of King's Bench (1), to whom both parties appealed, considered the case. The majority found that the valuation of immovables is an operation which requires technical knowledge and an experience that can be found only with specialists in the matter, and that if a valuation made by a Board of Revision composed of experts, is not manifestly wrong, does not contain obvious errors in its figures, if the method followed to determine the value of the property did not cause a manifest injustice, neither a Judge of the Superior Court nor a Court of Appeal should intervene to modify the conclusion arrived at by the Board.

The Court (1) held that, for the proper determination of the real value of immovables one must take into account 1° the indicia of the market, 2° the replacement value, 3° the economic value of the immovable, by capitalizing the revenues that it is susceptible of producing. The Court said that it was impossible to give to the Sun Life Building a market value, because such a building has no market, there being no seller and no purchaser, and that the safest way to come to a proper conclusion is to take into account the replacement value and the economic value. The Court thought that the Board had made no error in choosing these two factors to determine the real value, and it concluded by saying that, the Board having weighted all the elements of the problem that was submitted to it, the decision to apportion 82·3 per cent to the replacement value and 17·7 per cent to the economic value, should not have been disturbed.

The Court, therefore, dismissed the appeal of the Sun Life Assurance Company with costs, maintained with costs the appeal of the City of Montreal, and confirmed the judgment given by the Board, Mr. Justice St-Jacques and Casey dissenting.

This building has been rightly described as monumental and unique. Its external appearance, with its ornamental columns and balustrades, its granite walls, bronze doors,

(1) Q.R. [1948] K.B. 569.

the lavishness of the interior decorations, the unsparing use of marble and other expensive materials, the vastness of its rooms, its cafeterias, gymnasiums, elevators, etc., all contribute to make of this building one of the most sumptuous in the City of Montreal. For the same reasons, however, it is undoubtedly one of the least economical office buildings, and at the same time, one on which it is not easy to place a municipal valuation, and give to it a "real" or "actual" value.

The Charter of the City of Montreal, Art. 375, provides:—

> Every three years, the assessors shall draw up in duplicate for each Ward of the City a new valuation roll for all the immovables in such Ward. Such roll shall be completed and deposited on or before the 1st of December, after having been signed by the Chief Assessor
>
> This roll and each of the supplementary rolls mentioned in paragraph *b*, shall contain:—
>
> 3° The actual value of the immovables.

It is admitted that the words "real value" and "actual value" are interchangeable, and as Sir Lyman Duff, then C.J., said in *Montreal Island* v. *The Town of Laval des Rapides* (1):—

> Obviously, "real value" and "actual value" are regarded by the Legislature as convertible expressions.

But for the purpose of municipal valuation, they do not have the same meaning as the one attributed to them in expropriation cases, and therefore the necessary distinction must be kept in mind. In expropriation matters, "real value" means "value to the *owner*", which is not the case in municipal valuation. In *Pastoral Finance Association Ltd.* v. *The Minister* (2), Lord Moulton who was there dealing with an expropriation case, enunciated the following formula:—

> The owner is entitled to that which a prudent man in his position would have been willing to give *for the land sooner than fail to obtain it.*

Discussing this formula in *Montreal Island Power Co.* v. *The Town of Laval des Rapides* (cited *supra*), at page 307 Sir Lyman Duff expressed the following views:—

> There is no room for the application of any such formula in the administration of an *assessment act,* because the amount ascertained under the formula depends upon the *special position* of *the owner* with *regard to the land.*

(1) [1935] S.C.R. 304 at 305. (2) [1914] A.C. 1083 at 1088.

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And on the same page he added:—

In the case of expropriation, the rule is undisputed. The person whose property is taken is entitled to be compensated for the loss he has suffered by being deprived of his land compulsorily; the value of the land, for ascertaining such compensation, *is the value of the land to him.*

See also *Diggon-Hibben Ltd.* v. *His Majesty the King* (1).

In *Cedars Rapids* v. *Lacoste* (2), Lord Dunedin, speaking for the Judicial Committee, also in an expropriation case said:—

For the present purpose it may be sufficient to state two brief propositions: (1) *the value* to be paid for is *the value to the owner* as it existed at the date of the taking, not the value to the taker. (2) the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

The reason for this rule is obvious, and I do not think I can put it more clearly than Mr. Justice Hodgins in *Ontario & Minnesota Power Co.* v. *The Town of Fort Frances* (3):—

* * * * the fact that the municipality appraises the land each year as it then is, and in that way gets the benefit, from time to time, of each realized possibility as it occurs, must be considered. The reason for the rule in compensation cases that "all advantages which the land possesses, present or future," must be paid for, is that the land is finally taken, and the owner loses both those present and future advantages, and the taker gets them.

It naturally follows that a building may for municipal purposes, be valued at a much lower amount than the amount of the compensation its owner would be entitled to if expropriated. In the latter case, the "value to the owner" would be considered, but ignored in the former.

In order to reach a proper conclusion in a case of municipal assessment, it is the "real value" that has therefore to be considered. As in many other statutes, these words are not defined in the Charter of the City of Montreal, but they have been the subject of many judicial pronouncements. It is settled law I think, that they mean what the building will command in terms of money in the open market.

In *Lord Advocate* v. *Earl of Home* (4), Lord MacLaren said:—

It means exchangeable value—the price the subject will bring when exposed to the test of competition.

(1) [1949] S.C.R. 712.
(2) [1914] A.C. 569 at 576.
(3) (1916) 28 D.L.R. 30 at 39.
(4) (1891) 28 Sc.L.R. 289 at 293.

In *Grierson* v. *City of Edmonton* (1), Sir Charles Fitzpatrick, C.J., with whom all the Members of this Court concurred, said:—

Speaking generally, the intrinsic value of a piece of property must necessarily be the price which it will command in the open market.

In *Gouin* v. *The City of St. Lambert* (2), it was held:—

La valeur réelle que vise la loi des cités et villes (art. 485) quant aux immeubles imposables d'une municipalité urbaine consiste dans leur valeur vénale à l'époque de la confection du rôle d'évaluation par les estimateurs.

At page 219, Mr. Justice Archambault says:—

Le sens des mots "valeur réelle" de l'article 485 de notre Loi des Cités et Villes est fixé par la doctrine et la jurisprudence. Les mots "valeur réelle" signifient "valeur actuelle", "valeur marchande".

In *Bishop of Victoria* v. *City of Victoria* (3), the British Columbia Court of Appeal decided:—

Under section 212, para. 1, of the British Columbia Municipal Act, for assessment purposes, the term "actual value" means *value in exchange*, that is, what a prudent man of business, taking into consideration the reversible currents which affect the value of land would be likely to pay for a property of the character under assessment.

The respondent itself accepts these views, and in its factum also agrees with the "willing buyer" and "willing seller" formula, which has often been recognized by the courts, and cites the case of *La Compagnie d'Approvisionnement d'Eau* v. *La Ville de Montmagny* (4), where Mr. Justice Pelletier said:—

Dans la cause du Roi v. MacPherson (10 Exch. Ct. Rep. 208), je trouve une définition donnée par le juge Cassels de la Cour d'Echiquier qui me paraît excellente. Voici cette définition: "C'est le prix qu'un vendeur qui n'est pas obligé de vendre et qui n'est pas dépossédé malgré lui, mais qui désire vendre réussira à avoir d'un acheteur qui n'est pas obligé d'acheter, mais qui désire acheter.

I may also add the following authority—In *Lacroix* v. *City of Montreal* (5), Bruneau J., said at page 130:—

La valeur actuelle à laquelle les estimateurs de la Cité de Montréal sont tenus d'évaluer les immeubles doit s'entendre de la valeur vénale savoir, celle que le propriétaire pourrait obtenir pour sa propriété, d'un acheteur qui, sans y être obligé, désirerait en faire l'acquisition.

In order to find this "actual value" it is of course, as Mr. Justice Mackinnon and the Court of Appeal have said, quite in order for the assessors to consider various elements

(1) (1917) 58 S.C.R. 13.
(2) Q.R. 67 S.C. 216.
(3) [1933] 4 D.L.R. 524.
(4) Q.R. [1915] 24 K.B. 416.
(5) Q.R. 54 S.C. 130.

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as recent free sales of identical or comparable properties, the depreciated replacement cost, the economic value of the property itself. The first of these approaches cannot be considered in this case; the Sun Life Building being in a class by itself, no sales of identical or comparable buildings have taken place, and I therefore agree with the courts below, that the two last approaches only can help to come to a proper conclusion.

Dealing first of all with the replacement value, I think there are considerations that have to be kept in mind, and which apply particularly in this present case. Although this method of valuation for municipal purposes is of frequent use, there are cases where it would be dangerous to attach to it too much importance, in view of the particular circumstances which may arise. I do not disagree with the method recommended in the "Memorandum", when of course no other indicia are available, but the rule must not be too rigid. It must have enough flexibility so that it may be applied to certain exceptional cases, as for instance the one with which we are now dealing. Otherwise, a manifest injustice would be the inevitable result. It is not always, although it might happen, that the "market value" or the "exchangeable value" of a building is represented by the amount of the investment made by the owner less depreciation. Some investments are good, some others are not, and certain features of an expensive building may contribute considerably to reduce its "market value."

What I have said previously of the Sun Life Building as to its most expensive construction, is sufficient, I believe, to show that its "replacement value" placed in the books of the Company at $16,258,050 in 1941, is not the figure that a "prudent investor" would consider in trying to determine its "real value". He would obviously disregard many of its amenities and luxuries, thinking rightly that they are superfluous and not productive of a proportionate return.

This amount of $16,258,050 which the Company showed in its books as being the value of the property, and which in the relevant year appeared in its annual statement furnished to the Superintendent of Insurance, does not represent the "real value" of the property for "assessment pur-

poses." It merely shows the amount of money spent in the circumstances already mentioned, with the ordinary annual depreciation. It indicates to the shareholders and to the Superintendent of Insurance how the funds of the Company were invested, but it surely does not reveal all the elements of the "replacement value", which has to be considered with the "economic value".

The proper method to be followed in order to determine the replacement value of a building, is first of all to ascertain the cost of construction, to adjust that cost to the index figure of the year when the valuation is made, then to deduct a reasonable amount for depreciation, and in certain exceptional cases a further amount on account of the special features of the building, keeping always in mind that the "replacement value" is one of the important factors that must be considered in the determination of the "real" or "market value". Expressing in a different form what I have said previously, it would be quite impossible to determine what the building will command in terms of money, if too expensive materials, sumptuous decorations and luxuries are value at their cost price. There must necessarily be an allowance for those special items, the value of which is not commensurate with their cost.

The assessors, the Board of Revision and the Court of King's Bench have refused to allow any reduction for such items as granite, ornamental work, marble floors and walls, etc., which Mr. Justice Mackinnon believes could have been replaced by less expensive materials, as explained by witnesses Perry, Mills and Désaulniers. He therefore, and with this view I fully concur, allowed a further depreciation of 14 per cent for those extra unnecessary costs, which do not add to the "real value" of the property. This additional depreciation amounted to $2,352,932.70. By doing so, he followed the judgment delivered by the U.S. District Court of Minnesota in *Federal Reserve Bank* v. *The State of Minnesota.* This case, of course, is not a binding authority, but an expression of opinion with which I entirely agree. The judgment, after referring to the building of the Federal Reserve Bank, as a "fortress", said:—

* * * * in substantiation of his estimate of the true market as contemplated by the Statute he figured the reproduction cost of the building as of May 1, 1936 to be $2,600,000. He allowed 25 per cent

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depreciation, being approximately 2 per cent per year for the life of the building and by reason of the apparent difference of opinion as to the effect of the distinctive architecture on its market value both artistically and as a utilitarian structure, he allowed an additional 25 per cent for depreciation. Therefore a total of 50 per cent depreciation is to be found in the Assessor's computation.

The judgment also reads:—

> Furthermore, it appears that due consideration and allowance have been given by the assessor on account of the architectural and structural limitations that may exist in this building.

I also agree with the other figures arrived at by Mr. Justice Mackinnon, which are not materially different from those of the assessors and of the Board of Revision. I therefore accept his finding that the "replacement value" of the building is $12,100,796.80.

Turning now to the commercial value of the property, it is necessary to consider its gross revenue and its operating expenses. The Board of Revision and Mr. Justice Mackinnon both accept the same figures, viz: Total gross revenue $1,189,055.30 and operating expenses $436,992.64, leaving a net revenue of $752,062.66. After having capitalized this net revenue, they all came to the conclusion that the commercial value of the building, at the relevant date, was $7,028,623, and I find no satisfactory reason why this amount should be changed.

The "replacement value" and the "economic value" having been ascertained, it now remains to determine what consideration should be given to each element. The assessors thought that 90 per cent and 10 per cent were the right figures, while the Board was of the opinion that 82·3 per cent and 17·7 per cent should be adopted. Mr. Justice Mackinnon gave to each factor an equal importance of 50 per cent. It is not an easy task to reach mathematically the exact figure in such a matter, but I have no hesitation in reaching the conclusion that the assessors and the Board have given too much weight to the "replacement" factor. Having in mind that the test of "real or actual value" lies in the exchangeability of the property, I believe that the "prudent investor" would particularly be concerned with the "economic value" of the building, in order to get a fair return on his money.

The "real value" is the "market value" or the "value in exchange", and in order to ascertain it, one must neces-

sarily, even if there has been no sale of the building, try and find what would be the price of the building in the open market. The rule is not that because there is no buyer and no seller, as in the present case, the well-known theory of "willing buyer and willing seller" does not apply. We must ask ourselves this question: What would occur if there was a buyer and a seller? In *Lacoste* v. *Cedar Rapids* (1), Lord Warrington speaking for the Judicial Committee said at page 285:—

> But the proper amount to be awarded in such a case cannot be fixed with mathematical certainty but must be largely a matter of conjecture. It is the price likely to be obtained at an *imaginary* sale, the bidders at which are assumed to ignore the fact that a definite scheme of exploitation has been formed and compulsory powers obtained for carrying it into effect.

I do not agree with the Board of Revision when it says that this case does not apply. True, this was an expropriation case, but the principle of an imaginary sale may as well help to determine the real value of a building, as it does when the courts have to value the future advantages of a water power. Moreover, several witnesses heard before the Board are clearly of opinion that it is quite possible to imagine a market for the property, and that it is a commercial building (Simpson, MacRosie, Archambault, Lobley).

Under these circumstances, I am satisfied that the assessors and the Board have considerably undervalued the "economic factor" which, in a very large measure. would guide the "prudent investor" or "the willing buyer", always anxious to obtain "value in exchange" for his money. I believe that a proportion of at least 50 per cent should be attributed to it, although the replacement value has already been reduced by 14 per cent.

As I do not think that there has been any substantial error in the valuation of the boiler house, the figures should not be altered.

It follows that if we add to the replacement value of the building, viz: $12,100,796.80, the value of the land which is not challenged $730,600 and $555,735, the value of the boiler house and land, we have a total replacement value of $13,387,131.80. This figure added to the economic value, viz: $7,028,623, will give $20,415,754.80, which divided by 50 per cent, will equal the "market value" of

(1) Q.R. (1929) 47 K.B. 271.

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the property, viz: $10,207,877.40. This amount is $2,207,-877.40 higher than the valuation given to the same premises in 1931-32, by the respondent's Board of Assessors.

In coming to this conclusion, I have kept in mind that it is not the function of a Court of Appeal to disturb the valuations made by assessors. But in certain cases it is its duty to do so, particularly when the assessors have proceeded on a wrong principle, and when there is a manifest injustice. Here in refusing to allow an additional 14 per cent for extra unnecessary costs, and in giving a disproportionate consideration to the replacement value, they justified this Court to interfere.

After having carefully read the evidence, I have come to the conclusion that there is no justification to modify the judgment of the court below as to the complaint that the annual rental value is too high.

I would allow the appeal wtih costs, and restore the judgment of Mr. Justice Mackinnon. The appellant should also be entitled to its costs in the Court of King's Bench in the appeal of the City of Montreal, but should pay the costs of its own appeal in that Court; the cost of printing the case in the Court of King's Bench should be borne equally by both parties.

RAND, J.:—This appeal raises the question of the basis of valuation and its application for assessment purposes of the large building in Montreal owned by the Sun Life Assurance Company.

For property designed for business or ordinary private purposes, it is, I think, settled, that, as stated by Duff, C.J., in *Montreal Island Power* v. *Laval des Rapides* (1), "actual value" in article 375 of the charter of Montreal means exchange value, the value actually or theoretically ascertained by the test of competition between a free and willing purchaser and a like vendor. It seems quite evident that the draftsman of the article had not fully explored the conception of "actual value", and in spite of the controversy to which these words have given rise, they remain the legislative language of value for tax assessments. The legislature, in other words, has left it to the courts through experience with the many forms in which

(1) [1935] S.C.R. 304.

property value presents itself, to develop a formula which, adaptable to the generality of property, will produce a rough fairness and uniformity.

In the ordinary case, a commercial building constructed with due regard to the necessary relation between cost and utility presents little trouble whether the exchange value is arrived at by capitalizing revenue or by depreciated reproduction: there are no elements of cost not reflected in competitive value. There may be values imbedded in special features or conditions, but unless they are reflected in exchange value they must be eliminated in its ascertainment.

That value may thus become a highly theoretical conception; for assessment purposes, it is, in any case, an approximation; but in the practical administration of local government, the impact on the individual owner is lessened by the uniformity of the mode and by the small fraction of challenged differences in assessments which reaches him in the tax levied. But notwithstanding that fact, a formula suitable even for substantially the whole body of property must possess a flexibility sufficient to adjust the measure to exceptional features.

Admittedly a great deal of money has been expended in exceptional form in the building in question. It is monumental in design and massive in dimensions, and is seemingly intended to symbolize a business position of commanding power; but it is essentially an office building. The floor space is used both by the company and by tenants, of which approximately 50 per cent is occupied by the company, about 38 per cent is under lease, and the remainder unoccupied. Its total cost, as built in three stages between 1914 and 1930, though still not fully completed, was somewhat over $20,000,000. It is marketable only to a limited number of purchasers; the highest bidder would be one for whom the special features had the greatest attraction; the most likely buyers would be investors in office buildings, for whom the funded excess or uneconomic surplus would be written off. The potential market would thus present competition between investing groups and bids in the course of time of persons having purposes in mind more or less similar to those of the appellant.

In the theoretical market which, by the necessities of the case, must be constructed, competition in some form is

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essential. The case of *Vyricherla* v. *Revenue Officer* (1), although one of expropriation, illustrates one of its difficult aspects. The possibilities of buyers, sellers and properties is to be conceived in all manner and degrees. It is said by the respondent that, in an imagined sale, as the company would concede value to the total expenditure, it would, accordingly, be willing to pay the entire reproduction cost. But that ignores the test. The company, as bidder, would be influenced by the fact that there would likely be no other immediately available bidder with similar purposes in mind and it would drive the price down to the point at which the possibilities of owner bidders of diminishing interests or investment buyers would induce the seller to hold his property: both owners and investors could properly regard the value for the other secondary object as a reserved interest in their purchase.

The Assessment Department, in developing a working basis of valuation of general uniformity, in 1940 drew up a memorandum containing three directions to guide the assessors. Where the commercial building was occupied by the owner and no special characters present, the depreciated original or reproduction cost was to be taken as actual value; where the building was occupied by tenants, one-half of reproduction was to be added to one-half of the capitalization of income; and where occupied in part by owner and in part by tenants the former portion was to be treated as in the first case and the latter as in the second, with the percentage attributable to capitalization to range from 50 per cent to zero. Allowance was to be made for unusual factors by means of the percentages applied.

As exemplified here, the building being in the third class and as to 60 per cent of its available space, deemed occupied by the owner, the first figure would be the reproduction of that 60 per cent; the second would result from the division of the 40 per cent into fractions representing reproduction and capitalization. The assessor attributed first one-half of the 40 per cent to reproduction but by reason of the special enjoyment of the unique elements by the company, divided the remainder, 20 per cent, into one-half to reproduction and one-half to capitalization. In the result, 90 per cent of reproduction and 10 per cent of capitalization produced the assessed valuation. Reproduction cost together

(1) [1939] A.C. 302.

with the land but exclusive of the power plant on a nearby site, was found to be $14,404,578, 90 per cent of which is $12,964,120; capitalization was $7,915,000 which at 10 per cent gave $791,500; total actual value $13,755,500.

For the purchase of the building as an investment for business offices, the price would admittedly range between $7,500,000 and $8,000,000.

Although the latter would be the most likely object of purchase, the appellant does not ask us to take it alone as the determinant of exchange value. There are always the possible purchases for owner purposes, on the chance of which, rather than a sale solely on an income basis, the company would no doubt put a not inconsiderable value. The gradation of increasing possibilities of purchasers with lessening degrees of interest would extend to the purely investment basis; and the crux of the problem would be in estimating the present value of those possibilities.

The error of the assessment made lies in the fact that actual value has been virtually identified with value to the owner. That is clear from the influence on the percentage applied to construction cost of the special features as owner interests. Although the rule in expropriation would take their peculiar value to the owner into account as the assessor has done, that rule has no place in assessment: *Montreal Island* v. *Laval des Rapides* (*supra*) at p. 307. For the purposes here, those values must be subjected to the competitive test.

On the foregoing basis and taking the reproduction cost accepted by the Superior Court at $14,453,729.50, there would be deducted from it what is dead value for any purpose, such as differences in cost between marble and terrazzo flooring, between marble and plaster walls, and excessive decorative and ornamental work, which, as adjusted by McKinnon, J., is $2,352,932.70. To the remainder there would be added $730,000, the value of the land, and $535,735, the value of the heating plant: a total of $13,367,131. Placing the commercial value at the sum of $7,750,000, there remain the percentages to be applied to these two amounts.

As already stated the assessor attributed 90 per cent to reconstruction cost and 10 per cent to capitalization. The modification in this made by the Board of Review was on the basis of estimated rentals, rather than space, 65 per

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cent of which was imputed to the company and 35 per cent to lessees. Adding to the 65 per cent one-half of the 35 per cent gave 82·5 per cent to be attributed to reproduction value and 17·5 per cent to capitalization. This on an increased reproduction cost produced a figure somewhat higher than that of the assessor, but the latter was allowed to stand.

Having regard to the whole group of possible purchasers, the weight to be attributed to the one or other primary basis of price must depend upon the likelihood of their appearance as bidders. A heavy demand from prospective owners and few commercial investors would call for a correspondingly small percentage to be referred to the latter basis; when these proportions are reversed, as here, a like reversal of percentages becomes necessary.

McKinnon, J., was of the opinion that an equal percentage should be applied to each factor, but even with the deduction of surplus expenditure, that does not seem to me to reflect sufficiently the relative possibilities. Taking into consideration all special elements such as functional depreciation and obsolescence, and the comparative chances of sale, I should say that not less than 55 per cent should be related to the commercial figure and 45 per cent to that of reproduction cost. The former yields $4,262,500 and the latter $6,015,208.95, a total of $10,277,708.95. As this is substantially the amount found by McKinnon, J., I accept his figure as the proper valuation. In agreement with him I would allow the assessment of the power house and those in respect of both the business and school taxes to stand as confirmed by the Board of Review.

The appeal should therefore be allowed and the judgment of McKinnon, J., restored; the appellant should have its costs here and in the Court of King's Bench.

ESTEY, J.:—The appellant's main contentions are that the assessment dated December 1, 1941, upon the Sun Life building in Montreal is erroneous: (1) That the plan or method adopted by the assessors did not determine the actual value as required by the Charter of the City of Montreal, and (2) Certain allowances or deductions were improperly disallowed.

The assessment made by the assessors of land and building at $14,276,000 was affirmed by the Board of

Revision, reduced by Mr. Justice Mackinnon in the Superior Court to $10,207,877.40, and restored by a majority of the learned Judges in the Court of King's Bench (Appeal Side) (1), Mr. Justice St. Jacques and Mr. Justice Casey dissenting.

The issues in this appeal are restricted to the assessment of the building, there being here no contest with respect to the assessment of the land.

The assessors determined what they called the commercial value by ascertaining the net rental revenue of the building and capitalizing that amount; and the replacement value by making certain deductions for depreciation and other items from the cost of construction and the adjustment of the cost to the index number 1939-40. Then by apportioning these two amounts on the basis of 90 per cent replacement valuation and 10 per cent commercial valuation they arrived at the actual value. The Board of Revision suggested slight changes might have been made in certain items as well as the percentages in the apportionment but in the end affirmed the decision of the assessors. Mr. Justice Mackinnon allowed a further deduction for extra unnecessary costs and considered that both of these valuations should be given equal consideration as follows:—

50 per cent of replacement value of $13,387,131.80	$ 6,693,565.90
50 per cent of commercial value of $7,028,623.00	3,514,311.50
Real value of both properties....	$10,207,877.40

The appellant submits that this plan or method is not justified within the meaning of the Charter of the City of Montreal.

The assessors under the Charter of the City of Montreal, 62 Vict., c. 58, as amended by S. of Q. 1941, c. 73, s. 33, are required to determine the actual value of the immovables.

375—a. Every three years the assessors shall draw up in duplicate for each ward of the city a new valuation roll for all immovables in such ward .....

This roll and each of the supplementary rolls mentioned in paragraph *b* shall contain:—

3. The actual value of the immovables.

(1) Q.R. [1948] K.B. 569.

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The term "actual value" is not defined in the Charter. The legislature therefore in imposing upon the assessors the duty of determining actual value, without defining that term, intended that the assessors should accept the meaning of that phrase as it has been interpreted by the Courts in decisions respecting assessments. Chief Justice Duff in construing the phrase "actual value" in *The Cities and Towns Act*, R.S.Q. 1925, c. 102, stated in *Montreal Island Power Co.* v. *The Town of Laval des Rapides* (1) at p. 305:—

> Obviously, "real value" and "actual value" are regarded by the legislature as convertible expressions. The construction of these phrases does not, I think, present any difficulty. The meaning of "actual value", when used in a legal instrument, subject, of course, to any controlling context, is indicated by the following passage from the judgment of Lord MacLaren in *Lord Advocate* v. *Earl of Home* (1891) 28 Sc.L.R. 289, at p. 293:—
>
> > Now, the word "value" may have different meanings, like many other words in common use, according as it is used in pure literature, or in a business communication or in conversation. But I think that "value" when it occurs in a contract has a perfectly definite and known meaning unless there be something in the contract itself to suggest a meaning different from the ordinary meaning. It means exchangeable value—the price which the subject will bring when exposed to the test of competition.
>
> When used for the purpose of defining the valuation of property for taxation purposes, the courts have, in this country, and, generally speaking, on this continent, accepted this view of the term "value".

And at p. 307:—

> These assessment provisions, like other assessment provisions, contemplate an objective standard which can be applied with fairly reasonable uniformity to all classes of owners alike.

Mr. Justice Pelletier in *Compagnie d'Approvisionnement d'Eau* v. *Ville de Montmagny* (2), stated at p. 418:—

> Dans la cause du *Roi* v. *Macpherson*, 1 Exch. Ct. Rep. p. 53, je trouve une définition donnée par le juge Cassels de la Cour d'échiquier qui me paraît excellente. Voici cette définition: "c'est le prix qu'un vendeur qui n'est pas obligé de vendre et qui n'est pas dépossédé malgré lui, mais qui désire vendre réussira à avoir d'un acheteur qui n'est pas obligé d'acheter, mais qui désire acheter".

Actual value must be, except where there is a market in which the exchange value may be ascertained, a matter of judgment exercised after determining every item that affects the value of the particular immovable under consideration. *The Bishop of Victoria* v. *City of Victoria* (3); *Massachusetts General Hospital* v. *Belmont* (4).

(1) [1935] S.C.R. 304.
(2) Q.R. [1915] 24 K.B. 416.
(3) [1933] 4 D.L.R. 524.
(4) (1919) 233 Mass. 190 at 191.

In the American and English Ency. of Law, Vol. 27, p. 690, it is stated:—

> The advantages and disadvantages of location, earning capacity, cost of construction, market price, or other elements which enter into and constitute the value of property, should be considered by the assessing officers in arriving at their determination. The method to be followed and the elements of value to be taken into consideration in a particular case must generally be determined by the character and situation of the property involved. There exists in fact no rigid rule for the valuation, which is affected by the multitude of circumstances which no rule can foresee or provide for. The assessor must consider all these circumstances and elements of value, and must exercise a prudent discretion in reaching a conclusion.

Actual value, as above defined, determined upon a consideration of so many factors is unavoidably a matter upon which, in respect to many properties, men of experience and capacity will entertain different opinions. The legislature in recognition of this fact provides that actual value as determined by the assessors in the exercise of their own judgment shall be accepted for assessment purposes.

The relevant provisions of the Charter of the City of Montreal may be summarized: Sec. 375 above quoted requires that every three years the asssessors shall draw up a new valuation roll for all immovables; sec. 375-c. that "the chief assessor shall divide the work in such a manner that at least two assessors shall act together in drawing up the valuation roll;" sec. 373(10) provides that "the assessors shall be held to perform all the duties imposed upon them by the charter;" and sec. 374 requires that each assessor shall, before entering upon his duties, declare upon his oath that "I will faithfully, impartially, honestly and diligently perform the duties of an assessor according to law." The statute gives to them a wide latitude in determining their method of procedure and the source from which they may obtain their information, but requires that the amount when finally determined must be the result of their own independent judgment.

This requirement is in accord with that which exists in similar assessment legislation where it has been held that the assessors must act independently even of their own council. *In re Denne and The Corp. of the Town of Peterborough* (1); *Lounsbury Co. Ltd.* v. *Bathurst* (2).

(1) (1886) 10 O.R. 767.

(2) [1949] 1 D.L.R. 62.

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In *Dreifus* v. *Royds* (1), the statute provided in sec. 40(1) "land shall be assessed at its actual value" and then in sec. 69 "the court may, in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed." The board largely determined the actual value of the land in question from that of neighbouring lands assumed to be of the same character. Duff, J. (later Chief Justice) stated at p. 336:—

> It is very clear to me that the board has proceeded upon the theory that the enactment of sec. 40 ss. 1 is modified by that of ss. 16 of sec. 69 and that the actual value for the purpose of assessment may be something other than the actual value in fact, the determination of which is governed by the practice of the assessor as applied to similar lands in the vicinity. This I think is an erroneous view. The governing enactment is that of section 40, ss. 1, and the rule laid down by ss. 16 of sec. 69, is a subsidiary rule which has been enunciated with the object of facilitating the application of the governing rule. The assessment of other lands may be referred to for the purpose of ascertaining the actual value, that is to say as affording some evidence of the actual value but only for that purpose.
>
> The appeal should be allowed and the matter referred back to the board to enable them to determine the assessment in accordance with this principle.

See also *Rogers Realty Co.* v. *City of Swift Current* (2).

The fixing of a flat rate over a large acreage throughout which values vary has been held to be invalid: *In re Assessment Act* and the *N. & F.S. Rly. Co.* (3); *In re Wauchope School Dist.* (4). These authorities illustrate the personal responsibility of assessors whose duty it is to determine actual value. It is in recognition of this responsibility so placed upon assessors by the legislatures that Courts have refused to interfere with assessments unless they involve some error in principle or substantial injustice.

That the assessors in the City of Montreal should confer with respect to the factors that enter into the making of assessments is to be commended. They may adopt rules and standards which they believe to be of assistance in the more accurate determination of actual value and in the attainment of uniformity in the distribution of the tax burden. In so far, however, as such rules, formulae or plans interfere with, restrict or eliminate the discharge of the assessors' statutory duty, to that extent they cannot be upheld.

(1) (1920) 61 S.C.R. 326.
(2) (1918) 57 S.C.R. 534.
(3) (1904) 10 B.C.R. 519.
(4) (1909) 2 Sask. L.R. 327.

A Real Estate Valuation Manual prepared for and used by the assessors in the City of Montreal contains the following in its foreword:—

> The object of this manual is to explain the system and methods to be used in the municipal valuation of real estate and to demonstrate how the problems which originate with the latter may be analyzed and solved by the adoption of certain recognized rules and standards.

In addition thereto, and about fifteen months before the roll containing the items here in question was completed, the assessors of that city at a conference adopted a memorandum entitled "Memorandum on the assessment of large properties, such as office buildings, apartment houses, departmental stores, hotels, etc." It states: "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."

This memorandum requires that the two assessors in the ward would first determine whether a building should be classified as one of the "large properties." If so classified, they shall then determine both its replacement and commercial valuations.

The assessors having arrived at what they deem replacement and commercial valuations, are then required by the memorandum to decide whether it is wholly or partially owner or tenant occupied. If tenant occupied these valuations shall be apportioned equally, or 50 per cent of each. If wholly owner occupied 100 per cent replacement cost shall be accepted as the assessment valuation. Then when the property is, as here, partially owner and tenant occupied, the assessors must give the replacement valuation at least 50 per cent or such higher percentage as they may decide and the balance to make up the 100 per cent is the percentage of the commercial valuation in the apportionment. The total of these two percentages constitutes the assessment.

The assessors arrived at the percentages in this case as follows:—

> In the case of the Sun Life it was 40 per cent tenant occupied in 1941 and 60 per cent owner occupied. The occupied space. So that would mean that the 50 per cent for commercial would be divided into 20 and 60. There would be another 30 per cent replacement cost added on the 50, to make it 80 and 20.

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But as the revenues of this building were based on revenues of much cheaper buildings—the revenue of this building received no competition—I consider that half of the commercial value of 20 per cent, making it 10 per cent, would pay for the amenities and benefits received by the owner of the building.

The actual computation was:—

Replacement: 90 per cent of $14,404,578	$12,964,120
Revenue: 10 per cent of $7,915,000	791,500
Say	$13,755,500
Less land	730,600
Building	$13,024,900

The foregoing indicates that the assessors followed the provisions of the memorandum in determining the assessment of the Sun Life building, notwithstanding that the assessor who did the greater part, if not all, of the work in arriving at the amount of the assessment stated "There is no other building in the city to compare with the Sun Life." This statement, founded upon the size and particular architectural features of the building, emphasizes what the authorities insist upon and the Charter of the City of Monreal requires that every building should be assessed upon the judgment of the assessor after considering all the relevant factors. These same authorities indicate that there is an inherent danger in grouping buildings, variously used and located, according to their size. Such is no doubt the paramount reason for the absence in the Charter of the City of Montreal of any rules or other aids or guides to assist in determining actual value.

The Sun Life building is an office building and in following the provisions of the memorandum the assessors because its offices were in part occupied by the owner and in part by tenants were required to accept in the apportionment at least 50 per cent of the replacement valuation and, indeed, it is largely this factor that eventually leads to the apportionment of 90 per cent replacement and 10 per cent commercial valuation. Counsel for the appellant stressed occupancy as between owner and tenant is not a determining factor in the determination of actual

value of a building. He illustrated his contention by pointing out the mere fact that the tenants move out and owners move in and occupy the premises does not, without more, affect actual value and there is support for this contention in *Regina* v. *Wells* (1). In any event, it appears that it has been given an importance in the determination of the actual value of this building that cannot, in the circumstances, be justified.

The assessors themselves computed the commercial value of the land and building at $7,915,000 and the replacement value at $14,404,578. Even if it be granted that these valuations include all relevant factors, the Charter of the City of Montreal contemplates that the assessors shall consider the difference between these valuations, give to the factors that make for that difference such importance as the circumstances warrant and in the exercise of their own judgment determine the actual value. This is far different from their proceeding as they have under the direction of the memorandum that fixes the apportionment largely upon the basis of occupancy. In fact as stated above, proceeding upon this basis they arrived at an apportionment of 80 per cent and 20 per cent and then as "the revenue of this building received no competition" it was decided that a 90 per cent and a 10 per cent apportionment "would pay for the amenities and benefits received by the owners of the building."

It is significant that while in their computation of the assessment only commercial and replacement valuations were considered, upon this appeal respondent submitted that the book and market values as computed by the company and reported to the Superintendent of Insurance should be taken into account. These values were computed and so reported each year. In the year 1941 they were the same and in the sum of $16,258,050.27. On the other hand, the appellant contended that consideration should be given to the fact that after the building was constructed in 1931 it was assessed for the year 1931-32 at $12,400,000, and upon appeal was reduced to $8,000,000, which was increased from year to year as the interior of the building was completed and occupied by tenants until in 1940 the property was assessed at $10,211,200. Both might well be considered but neither is conclusive. These

(1) (1867) 36 L.J.M.C. 109 at 111.

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requests of the respective parties but emphasize again the statement included in the quotation from the American and English Ency. of Law, Vol. 27, p. 690, where it is stated:—

> There exists in fact no rigid rule for the valuation, which is affected by the multitude of circumstances which no rule can foresee or provide for.

Notwithstanding the desirability, if, indeed, not the necessity of the assessors conferring for the purpose, as already mentioned, in a city the size of Montreal, it does seem that having regard to the admittedly unique, distinct and different character of this building that, in the main, it has been assessed as any "large property" within the terms of the memorandum. In these circumstances, notwithstanding the judgment exercised by the assessors in fixing the percentages, there has not been that assessment of this building contemplated by the statute.

The second contention raises issues as to what ought to be made by way of allowances and deductions. The assessors allowed a deduction for the fact that the building was built in three completed buildings, the first in 1918, the second in 1925 and the third in 1930. A further deduction for structural depreciation and an allowance to adjust the cost figure to that of 1941. Mr. Justice Mackinnon allowed a further deduction of 14 per cent for extra unnecessary costs of construction. The appellant, however, contends that there should be a further allowance for functional depreciation, that "the Sun Life Building suffers from a very serious functional disability resulting from the inherent design of the building." This, it is pointed out, involves a large amount of waste space which cannot be utilized, as well as additional space which is undesirable because it is either inadequately lighted or altogether dark. The contention is "this waste space and this excessive undesirable space detract from the value of the building whether to a prospective purchaser or to the Sun Life Company itself."

It is a very large building occupying an entire city block, rising 25 storeys above the ground and appropriately described as of a "massive cubical design . . . with walls unbroken by courts or light wells," that the heavy columns as well as other architectural features and embellishments,

together with the fact that throughout the finest materials and equipment were used made the construction cost excessive in relation to its exchange value.

Mr. Justice Mackinnon granted depreciation for extra unnecessary or excessive costs upon the evidence that the granite walls, bronze sashes, vita plate glass, marble floors and walls, ornamental structure and interior decorations, though adding much to the attractiveness of the building, did not increase its revenue or earning possibilities in a commensurate amount. Mr. Justice Mackinnon stated that:—

> In allowing this additional 14 per cent for depreciation the court has not taken into consideration the excess cost of the hospital, auditorium, kitchen and cafeteria services and private elevators as they all form part of the special services enjoyed by the Sun Life although adding little to the actual value of the building * * * *

The unreported case of *State of Minnesota* v. *Federal Reserve Bank of Minneapolis,* a copy of which was included in the record, was cited in support of a functional allowance. The State of Minnesota required the assessor to determine the "true and full value." It was there contended that because the building was constructed for and solely occupied by the bank that it had "considerable waste space even in its present use," and as its maintenance was excessive, it was unsuitable as a business property. The assessor determined the cost of reproduction in the year in question and then allowed 25 per cent for physical depreciation and a further 25 per cent to cover "the effect of the distinctive architecture on its market value, both artistically and as a utilitarian structure." The Court affirmed the assessment at this valuation. The phrase "both artistically and as a utilitarian structure" would seem to include both that which Mr. Jusice Mackinnon allowed "for extra unnecessary costs" as well as an allowance for what the appellant terms "functional depreciation."

Messrs. Perreault and Archambault, whose valuations were respectively $8,625,200 and $9,001,983 (the lowest replacement valuations deposed to), included an allowance for "functional depreciation." The Board of Revision disallowed this item but stated "that in making allowances for 'functional' depreciation and obsolescence, on top of the physical depreciation, they (Perreault and Archam-

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bault) have overstepped the field of the replacement to encroach on the one of the economic value. The deficiencies, if they exist, are reflected in the rental value on which is based the commercial value; so that Messrs. Perreault and Archambault are making double use of the same allowances."

On principle, it would appear that such non-productive features of a building, in so far as they do not add to its actual value (as already defined) ought not to be included among items in the determination of that value. In so far as such items do not enter into or form a part of the actual value and yet are included in the computation thereof the taxpayer is called upon to pay an annual tax thereon which ought not, within the accepted definition of "actual value", to be included. When, therefore, these factors are established the assessors ought to make such fair and reasonable allowances as the particular circumstances may justify.

The business and water assessments have been affirmed in each of the lower Courts and while in many cases the contention of the appellant would be applicable, there is in the particular circumstances of this case justification for a difference such as has been here computed.

The errors in principle involved in the foregoing determination of actual value would, in the ordinary course, justify a reference back to the assessors. However, at the hearing the parties intimated that they would prefer, should we find such errors, a direction fixing actual value as determined by Mr. Justice Mackinnon. In compliance with that suggestion, the appeal will therefore be allowed and the judgment varied to fix the actual value of the Sun Life Building at $10,207,877.40.

The appellant should have its costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Montgomery, McMichael, Common, Howard, Forsyth & Ker.*

Solicitors for the respondent: *Saint-Pierre, Choquette, Berthiaume, Emard, Martineau, McDonald & Séguin.*