Standing Committee on Crown Corporations

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Channel Lake Petroleum Ltd.

The Chair: — We will reconvene the Channel Lake hearings now.

And we have with us today, committee members, Mr. Tavender of the Milner Fenerty law firm in Calgary to provide testimony. Following the break, we will hear testimony from Mr. Sutton of Gilbert Laustsen Jung. And as agreed to by committee members yesterday, we will move . . . we will rotate in 20-minute questioning blocks amongst the parties.

And I note that there's an independent member present. Mr. Goohsen, did you wish to direct any questions to Mr. Tavender or do you want to wait and reserve decision on that until after all three parties have been heard from?

Mr. Goohsen: — I'll take your latter suggestion.

The Chair: — Thank you. Okay. Welcome, Mr. Tavender, to Regina and to the most interesting show in town, notwithstanding the fact that the Rankin Family were here yesterday.

Before we begin, I have a statement that I read to all witnesses appearing before the committee, and I would read that and then I will take your oath.

Witnesses should be aware that when appearing before a legislative committee, your testimony is entitled to have the protection of parliamentary privilege. The evidence you provide to this committee cannot be used against you as the subject of a civil action.

In addition, I wish to advise that you are protected by section 13 of the Canadian Charter of Rights and Freedoms which provides that:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

A witness must answer all questions put by the committee. You are advised that you may be recalled to appear again before this committee at a later date if the committee so decides.

You are reminded to please address all comments through the Chair. Thank you.

Now, Mr. Tavender, did you wish to swear or affirm?

Mr. Tavender: — Swear.

The Chair: — Good. Take the Bible please. Do you swear that the evidence you shall give on this examination shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Tavender: — I do.

The Chair: — Thank you very much.

Committee members, the Clerk is distributing the opening statement from Mr. Tavender.

As well, we are tabling an additional document. Mr. Tavender, in going through his files, discovered one handwritten page of notes that is germane to this inquiry, and Mr. McKillop of the Department of Justice has procured that page of notes and they are being distributed and will be tabled as a formal document before the committee. As soon as that's complete, we will begin the questioning . . . will begin with the opening statement from Mr. Tavender and then begin the questioning.

Mr. Tavender, you may proceed with your opening statement.

Mr. Tavender: — I take it people know that I'm a senior litigation lawyer in the Milner Fenerty law firm in Calgary.

On Thursday, June 5, 1997, I was approached by several of my partners to see if we were prepared to act and able to act in respect of a potential dispute arising out of the sale of SaskPower . . . by SaskPower of Channel Lake resources to Direct Energy. We concluded that we were willing and able to act. I met with my partner, Michael Hurst, reviewed documents, and later in the day, met with Larry Kram, general counsel at SaskPower, who had travelled to Calgary to provide us with instructions and a general briefing.

It was impressed on us that this was an urgent and important matter that required from us a quick preliminary opinion as to Saskatchewan Power's legal position.

On Friday, June 6, 1997 I spent some time in the law library and worked with my partner, Tom Mayson, who was to assist in researching law and drafting an opinion. On the same day I reviewed a copy of Mike Hurst's draft letter revisions which were to be incorporated into a letter sent by SaskPower to Direct Energy, and that's a letter dated June 6, 1997, and my files indicate that we received a copy of the letter that was actually sent by SaskPower to Direct Energy dated June 6.

I was in Toronto on Sunday, June 8 and Monday, June 9 on other matters. On Tuesday, June 10 I reviewed a draft opinion which had by then been prepared by Tom Mayson. I made some minor changes to that draft and a copy of the resulting draft was faxed on June 10 to Mr. Kram. Tom Mayson's covering letter asked for Mr. Kram's comments as to the accuracy of the facts stated in the opinion and indicated that our final opinion would proceed the following day.

On Wednesday, June 11, I met with Messrs. Hurst and Mayson and reviewed and revised the June 10 draft opinion. Make Hurst received, and I reviewed, a fax dated June 11 from Mr. Kram. From this fax I learned: Mr. Dufresne of Direct Energy would be arriving in Regina on Friday, June 13 for discussions with SaskPower; Direct Energy, in its letter of June 11, indicated that there existed a March 12, 1997 letter from SaskPower respecting Mr. Portigal's authority to represent SaskPower in negotiations involving Channel Lake.

On June 12, my daytimer reads: "Review Direct Energy letter,

Conf. (for conference) Mayson. Call Kram. Revise opinion." On that same date, we received a fax from Mr. Kram enclosing a copy of the March 12, 1997 letter from Mr. Messer of SaskPower to Direct Energy relating to Mr. Portigal's authority. In the March 12, 1997 letter, Mr. Messer stated: "I have directed Lawrie and other SaskPower officials to proceed with these negotiations and, hopefully, completion of an agreement, as expeditiously as possible."

On June 12 I substantially rewrote portions of the June 10 draft opinion which reflected my view that there was a serious issue as to whether there had been a holding-out by SaskPower of Lawrie Portigal's ostensible authority to bind SaskPower to an agreement on April 3, 1997.

My reasoning is, I believe, reasonably set out in the June 12 draft opinion and was influenced by the following points:

The March 12, 1997 letter held out Mr. Portigal as having authority to represent SaskPower in the negotiations.

Mr. Portigal was entrusted by SaskPower with the delivery of the April 2, 1997 form of agreement which had been executed by officers of SaskPower under seal.

That April 2, 1997 form of agreement included in paragraph 6.3 a requirement that SaskPower establish from its assets a $5.2 million trading account to fund natural gas trading losses, with the amount payable at closing to be reduced by the amount remaining in that trading account.

While Mr. Portigal on April 3 agreed to an alteration of the provisions of paragraph 6.3 of the April 2 form of agreement, he reported those changes to SaskPower in a memorandum dated April 3, 1997.

SaskPower knew then, and on a continuing basis for two months, that a closing involving Mr. Portigal had in fact taken place on April 3 and yet did nothing to challenge or set aside that closing.

By June 2, 1997 SaskPower recognized that the transaction did not conform to what had been previously approved by its board of directors and had the means of knowledge, if not the actual knowledge, of all of the material terms negotiated by Mr. Portigal on April 3. Nevertheless SaskPower permitted Mr. Portigal to attend at the second closing on June 2 without revoking his authority and without alerting Direct Energy to the existence of any problem.

For these reasons, I expressed a serious reservation about the ability of SaskPower to succeed in setting aside the agreement in a court of law. I called that an open question at page 2 in the opinion, and arguable either way, with significant risk both to SaskPower and to Direct Energy at pages 10 and 11. I also said at page 12 that SaskPower had a reasonable case but that the outcome is not certain.

In respect to the reference, "Call Kram" in my daytimer on June 12, I have no notes on file which indicate precisely what was discussed in that conversation. Mr. Kram had no comments that I can recall on the contents of our June 10 draft opinion. I know that I was vitally interested in any evidence that related to the holding-out of ostensible authority by SaskPower for Mr. Portigal to represent the company in those negotiations. I was also aware that settlement negotiations were to take place in Regina on June 13 and I have a recollection of inquiring whether SaskPower would like to utilize my services in connection with those negotiations.

On June 12 I sent our current draft of our opinion for your review and comments together on a second fax with a memo of mine on negotiation strategy.

On Friday, June 13 my daytimer indicates that I had a telephone call with Mr. Kram. My notes of that discussion indicate that I found the case troublesome and that SaskPower's chances of succeeding in court were 50/50 or worse.

On Monday, June 16 Mr. Kram reported on the Friday meetings with Direct Energy. I was advised that we would not be required to initiate immediate litigation. I was not asked for a final opinion nor instructed to carry out further inquiries. I had no further involvement with the client on this matter.

I have these other general observations that may be relevant to this inquiry. My draft opinions were necessarily tentative because of the very short time frame in which we were asked to work, the absence of evidence from key witnesses, and the limited legal research we were able to conduct. If an early settlement did not occur, this was not going to be easy litigation, and it would involve substantial cost and exposure to all of the parties without any reasonable certainty as to the outcome.

I pointed out at page 3 of the June 12 draft that a significant and onerous undertaking as to damages could well be required from SaskPower if SaskPower were successful in obtaining an interim injunction. I felt then, and on review feel now, that there was a serious risk that Mr. Portigal might be found to have had ostensible authority to bind SaskPower to an agreement on April 3, 1997, and SaskPower did not improve its position in that regard by doing nothing to rescind that authority or challenge the April 3 agreement through the second closing on June 2.

There appeared to be a number of what I called unusual and suspicious circumstances in the entire negotiation process, and I refer you to pages 8 and 9 of the June 12, 1997 opinion. The ones that I identified at the time are set out in the opinion at that location. I could not at the time, nor on review could I now draw any compelling conclusions from those unusual and suspicious circumstances, except to say they were sufficient to preclude me from expressing an opinion that SaskPower had little or no chance of success in the event that it proceeded with litigation.

SaskPower was clearly concerned about the potential conflict of interest issue involving Mr. Portigal. I had insufficient facts on which to express an opinion on that issue particularly as it related to the critical April 3, 1997 time frame. I certainly thought and expressed the opinion that an early, amicable settlement would avoid the costs and inconvenience of protracted litigation.

I've not set in this statement, but I would like to add, that in my

opinion of June 12, on at least two occasions, I made it clear that if an immediate response was not forthcoming from Direct Energy, then I recommended SaskPower would commence a lawsuit and bring an application.

In other words, it's clear settlement discussions were possible. I encouraged an effective negotiation leading to a settlement, if that was possible, based on my understanding of the facts and the risks. I clearly recommended that if there was not that ability to achieve an early settlement, then litigation on an early basis should be commenced in order to protect SaskPower's claim against Channel Lake, but that that could be a very serious and costly endeavour with no certainty of outcome.

The Chair: — Thank you very much. We will now move to questioning by the various party caucuses. Mr. Gantefoer for the Saskatchewan Party till approximately 9:40.

Mr. Gantefoer: — Thank you very much, Madam Chairman. Good morning and welcome, Mr. Tavender. Mr. Tavender, from your opening statement this morning, I appreciate the fact that your June 10 draft report really became irrelevant, in that as more information was made available to you, the June 12 report perhaps had more relevance. Is that fair?

Mr. Tavender: — Yes. I have worked with my partner, Tom Mayson, who is junior to me, on a number of occasions. He is a very able lawyer. We work well together. The first draft was heavily influenced by what he understood of the facts of the law and represented his then views, which I then was able to review when I came back from Toronto. But it didn't perhaps represent, certainly after the pursuit of the extensible authority issue and learning of the March 12, 1997 letter from Mr. Messer that related to Portigal's authority, an opinion that I was content with. I think the changes are, however, modest. I think the issues were identified in both opinions; I think the emphasis changed. I think I had, at the end of the day, a greater concern about the ostensible authority argument than was expressed by us in the June 10 letter.

Mr. Gantefoer: — In the March 12 letter that came to your attention from Mr. Messer indicating that he wished the negotiations to proceed, and I guess ostensibly appointed Mr. Portigal as to represent SaskPower's interests, in your experience, when someone is given the authority to clearly negotiate a contract of this magnitude, is the authority given in what seemed to be a fairly careless wording, or is it generally, in your experience, much more precise and easily interpreted clearly?

Mr. Tavender: — I don't have the range of experience as a commercial practising lawyer that your question implies. So any answer I give you is one step removed . . . I tend to look at disputes once they've arisen and have litigation as the focus.

Having said that, I cannot, I guess, agree with the premiss of your question. I do not see in my practice, which involves many sophisticated companies, oil and gas companies and so on, the kind of formal delegation of authority that your question implies as a matter of course.

But I'm not an expert on that. I can only reflect on what I've seen, and I see nothing particularly unusual here in terms of empowering Mr. Portigal to go forward on behalf of SaskPower. I think that's a choice that any client makes.

Mr. Gantefoer: — So that wording of appointing Mr. Portigal was really a key factor in giving you more caution, if you like, in terms of advising SaskPower to proceed with litigation.

Mr. Tavender: — The caution that you emphasize in your question was certainly enhanced by the wording of this letter, which was an unequivocal holding-out of some authority on behalf of Mr. Portigal representing SaskPower.

Mr. Gantefoer: — Thank you. In the notes from the June 13 meeting that were circulated today, you indicate that the issue is 50/50 or worse. Most of us in the committee are not of the legal profession and we would tend to think more of hockey pool bets or things of that nature. Is that what it clearly infers in the legal profession, in litigation — that the chances were less than 50 per cent in favour of a satisfactory result from a litigation?

Mr. Tavender: — Are you in the mood for a story?

Mr. Gantefoer: — Sure.

Mr. Tavender: — This may be out of . . .

The Chair: — If it's entertaining, I think we'll accept it. Not scatological, please.

Mr. Tavender: — Probably the finest litigation counsel of this century in Canada was J. J. Robinette of Toronto. I had the great privilege to work with him on two files, one of which involved a major corporate transaction and a challenge to some constitutionality of legislation. And I worked with J. J. as he prepared his opinion, as Tom Mayson worked with me, but at a much lower level in the whole universe of the law, as we prepared our opinion in this case.

J.J.'s opinion was unequivocal in saying that in his view the client should win. The client was ecstatic about this opinion. I was not in the same firm. He was giving a second opinion. I had given the usual qualifying opinion — on the one hand; and on the other hand, and it's very risky, but on the other hand I think, well, maybe pretty good chance.

Robinette was quizzed at a meeting with the clients over his . . . the certainty of his opinion. And they said, this is a very clear, unequivocal opinion; we're thrilled, but we have here a CEO (chief executive officer) and a CFO (chief financial officer) who are engineers; they're not lawyers, and they don't understand exactly your question.

Could you rate this on a scale of 100 per cent? I mean are you saying it's a 90 per cent chance at winning or is it only 85 per cent? Robinette refused to answer the question. He said, no, no, I think you have an excellent case. No, no, but how would you rate it out of 100 per cent? Well he says, so-so. And finally he was pushed and he said, well 50 per cent, I should think. And everybody just fell back and they were appalled with an unequivocal opinion from the best litigator in Canada and now, push came to shove, he said 50/50.

I won't go on with the story, but it is one of the most difficult

things for litigation counsel to express an opinion as to the probable outcome of any case. And that is when all of the facts and all of the law are known. And in this case I was troubled. I found that in my judgement, there was strong evidence of a clear holding-out by SaskPower of the entitlement of Portigal to represent.

I saw a record of Portigal reporting back in considerable detail on a concurrent basis to SaskPower. I saw SaskPower hand an executed copy of an agreement under seal by the officers of SaskPower and empower Portigal to go to a meeting in Calgary. And I believe that there is a limit to the ability of a client, of a party to negotiation, to then later disown the acts of a party that is ostensibly in power to act on their behalf.

That bothered me. And the subsequent history of not doing anything to set it aside or to challenge the authority gave me a fundamental sense in my gut that this was a difficult case; as opposed to Tom Mayson's wording, and before we had the March 12 letter of the holding-out, where he was saying it's a reasonable case. And that language, reasonable, is still in my opinion — and I'm not trying to divorce Tom from me or separate. I mean we do work together — but it is a very, very difficult thing.

I had a gut instinct that said this is a tough case. It's an open question and yes, we can rely firmly on it, but on the need to get a board approval, and that is part of the record, and if we pressed on in court we'd have explored all those things. At the end of the day, would we have been any smarter? I don't know.

Mr. Gantefoer: — Thank you. Mr. Tavender, as well in those notes, your notes say: "bottom line, want Portigal out of here."

I seem to get the sense from your comments and from your notes, that Mr. Kram became more interested in distancing themselves from this mess — getting rid of Mr. Portigal — than fully exploring the possibility of litigation. Would you like to comment or would that be a fair question?

Mr. Tavender: — Well first of all, I can't speculate on what was in Mr. Kram's head. What I can tell you is my limited recall of that discussion, and with it comes discussions I had had over the few days. I believe Mr. Kram was, as general counsel, representing the interests of his client and I am certain from what he told me that he was in contact with others in senior management levels in SaskPower. And what he was communicating to me was not his personal view, but was his understanding of what he believed the client, SaskPower at a senior management level, was after.

Very clearly, the recognition that Portigal had taken on responsibilities with direct power and not alerted SaskPower to that was of great concern, as expressed to me, to, I would say the client, SaskPower. And I could well understand that. My sense was clear that they treated that as a very major ingredient, but that wasn't the only ingredient and they were very much concerned about the fundamental issue of whether they could get out of this deal.

So it was a two-barrelled thing and I couldn't . . . I mean the statement "no litigation" suggests to me that by June 13, SaskPower was reaching towards a position where they didn't want me and Tom Mayson to prepare the documents that we would require. I had said in the letter, give us instructions to proceed with the drafting of legal documentation that would be necessary to bring an interim injunction application. And I think from this note, as cryptic as it is, by June 13 they had made sufficient progress in their discussions with Direct Energy, and internally amongst themselves, to feel that it was not worthwhile to instruct us on June 13 to start the preparation of documents for a lawsuit.

Mr. Gantefoer: — Again on your note, it says there's a "phone call from Gary Drummond, friend." Would that be Gary Drummond, your friend, Portigal's friend, SaskPower's friend, whose friend?

Mr. Tavender: — I do not know Gary Drummond. My recall is that Gary Drummond and Larry Kram were friends. And I believe, but I may be wrong, that Gary Drummond had some connection with Direct Energy, but I don't know any more than that. What you read there is all that I can recall about that.

Mr. Gantefoer: — So you wouldn't be aware of any relationship between Gary Drummond and DEML (Direct Energy Marketing Limited) and SaskPower.

Mr. Tavender: — No.

Mr. Gantefoer: — Thank you.

Mr. Tavender: — I might have at the time. I don't today.

Mr. Gantefoer: — The issue of the time line. You expressed a concern that SaskPower waited for some two months, doing virtually nothing, seemingly aware that a deal had been negotiated and completed and had gone into escrow and things of that nature. How damaging, in your opinion, was that inaction, to the case as well?

Mr. Tavender: — We have a concept of election that as litigation lawyers, we fall back on from time to time when a party is possessed of knowledge of a situation that calls for a choice either to affirm and go forward or to disaffirm and distance. I tend to think in terms of an obligation to make a choice, to make an election. And in the back of my mind that concept — not literally — but that concept applies here.

When a party is fully possessed of the information and has to make a choice, then they can't . . . that party cannot sit on its rights. It was not clear here whether SaskPower was fully possessed of all of the information that it needed to make truly an election. And you don't have to make an election if you don't have full information. No.

So I was operating with partial facts and not certain how much knowledge SaskPower actually had. I expressed the opinion that they had the means of knowledge through the documents and the Portigal memos. So I was halfway down the road of saying you have not . . . well I've certainly said, you have not improved your case, and I think you've weakened your case by doing . . . by sitting on your rights for two months.

I think that is more of a feel thing than a pure law thing. I think the instinct of a judge . . . and this is how we litigation lawyers,

as some of you know, have to think. We know that ultimately a judge calls a case on sympathies and reactions and emotions. And I think the fact that SaskPower had done nothing to challenge Portigal's authority or put Direct Energy on notice that they were concerned prior to June 6, was damaging on that level to SaskPower's position.

I don't say it had the legal effect in a technical, doctrinal way, but I do say I think it did not help their position and may have hurt it. It's not a very good answer but it's how I feel about it.

Mr. Gantefoer: — Finally, in my time, how did the whole issue that was raised, I believe, by SaskPower of the potential conflict of interest of Mr. Portigal and his subsequent employment by Channel Lake when it was owned by DEML — so in essence becoming an employee of the purchaser at a time where he was potentially acting on behalf of the seller as well — how did that issue play into the possible litigation here? I'd ask you to comment on the whole issue of that potential conflict of interest.

Mr. Tavender: — I hope I covered it in both of our draft opinions in an adequate way. We did not know and had no information available to us as to whether or not on April 3 when Portigal signed the acknowledgement agreement, and purportedly bound SaskPower to the fundamentals of this deal, whether or not Portigal was then in a conflict of interest. We had no information that he at that time had been entering into any arrangements or negotiations to have an ongoing position with Direct Energy or Channel Lake.

Absent that information, which I think we clearly advised we did not have in the letter, I could not form an opinion as to whether the subsequent, clear evidence of personal benefits that Portigal stood to gain from an ongoing relationship, would have any material bearing on the outcome of this case. I assume, for the purpose of this opinion, by June 1, or whenever, June 2, the closing, that by that time Portigal was in a conflict of interest.

But if the June 2 closing were construed by a court to be no more than the implementation of the decisions that had been made on April 3 — and I didn't see that Portigal had any discretionary power at that point — that would give rise to any serious relevance to the so-called conflict of interest issue. I was concerned, and I think I pointed this out in the opinion, that nobody from the other side, or Portigal, was saying we now will go to the SaskPower board and get a board resolution ratifying this deal we made on April 3 on these new terms.

And from my perspective, that was one of these, what I called, unusual circumstances. I would have thought that the normal course of all of the parties — SaskPower, Direct Energy; SaskPower represented by Portigal, and Direct Energy — would have asked for and got, if it was appropriate, a new resolution from the board of directors of SaskPower approving the deal as it finally was, and that didn't happen.

So that was one question that I highlighted I think, and bothered me. Why wasn't it asked for? That was the only area where, you know, that the conflict of interest I could imagine . . . I mean I used words — suspicious, uncertain, and troublesome. I mean those are not words I'm used to using because they raise red flags; they warn people that there's something that's not normal here.

I talked about some changes in some documentation that bothered me. I mean I just don't expect to see that without somebody explaining it. And we didn't have access to Portigal or Burnet Duckworth or Direct Energy, so we didn't have answers for those questions. So I outlined them and left it at that. I couldn't say much more.

Mr. Gantefoer: — Mr. Tavender, I appreciate your candour. It strikes me that in the very short order of you reviewing this issue, you identified very clearly a good number of issues that begged resolution.

In your experience, and I appreciate your litigation specialty rather than corporate clients, do you run across incidents often where there seems to be a fairly callous disregard to detail that you seem to have identified on SaskPower's behalf, and very clearly identified very quickly yourself, as being issues that should have been resolved?

Mr. Tavender: — How many people have heard how many times after the event, even the fool is wise. That's the hindsight that we litigation lawyers, and even worse, the judges in the Supreme Court in Canada, bring to bear on every problem.

I really cannot say that in my experience, if that's what you're really asking for, that there's anything here on what I saw that is categorically different from a range of other files. I mean the facts are different and what people looked at and didn't look at, what they twigged to and what they didn't twig to, they're all different.

But you know, we litigation lawyers would be unemployed if everybody lived up to the standard that you are espousing with the premiss in your question. Literally these situations always arise under a series of circumstances that when a litigation lawyer gets in and looks at and writes his brilliant opinion in four days or whatever it was, you know, everybody says, oh God, how could we have done that. But that's a pretty high standard. And in my experience, I would be unemployed if everyone held themselves to the standard you're talking about.

Mr. Gantefoer: — There are lots of people that would suggest that there's too many lawyers anyway. But thank you.

The Chair: — I think our function here today is to question, not to comment.

Mr. Gantefoer: — I couldn't resist, Madam Chair.

Mr. Tavender: — I think I held myself out to there.

The Chair: — Well we've had enough pot-shots at lawyers in these hearings already.

Mr. Gantefoer: — Sorry. It was an unkind remark.

The Chair: — Mr. Gantefoer, have you completed your line of questioning?

Mr. Gantefoer: — Yes, thank you.

The Chair: — Thank you. Mr. Hillson, till just a little after 10 o'clock.

Mr. Hillson: — Yes, Mr. Tavender, if we can turn to the handwritten notes that you supplied us with this morning. The very last item I see is: plan to go to our board this week — ratify. Now this appears to be written on June 16, 1997?

Mr. Tavender: — Correct.

Mr. Hillson: — Now just explain what you mean by the last entry.

Mr. Tavender: — I'm recording in a very brief way, as is my custom, the sense of a point that was obviously discussed in that telephone conversation with Mr. Kram.

Mr. Hillson: — With Mr. Kram?

Mr. Tavender: — With Mr. Kram.

Mr. Hillson: — Now it says, ratify.

Mr. Tavender: — What I . . . You know, my sense of what was being discussed was that they had not, as of the time of my telephone discussion, reached a decision. They had not and did not make an agreement with Direct Energy in the meeting or in the meetings, but that SaskPower internally was moving towards what I call a negotiated resolution, settlement, disposition of this matter, that would include the concept of ratifying — that is, making then the final election to affirm the transaction rather than to go the litigation route and move to set it aside.

Mr. Hillson: — So by June 16 the leadership of SaskPower had made the decision to seek ratification from its board. That's the way I read this.

Mr. Tavender: — Well I can't tell you how to read it. And I can only tell you that those words are there.

Mr. Hillson: — Ratify.

Mr. Tavender: — And in the context of the rest of the points, you get from me an understanding that the parties had been at a confrontational point in the prior week, with SaskPower saying, we're going to court to set this aside; with Direct Energy responding, saying, we're amazed, we're outraged and so on; however, we will talk.

In that context I have encouraged my client, SaskPower, to look seriously at a negotiated resolution, settlement, which is always a very high standard and object for clients to reach towards and something we always endorse in our practice, rather than fighting it out in the courts.

My notes here take you through a progression in thought that occurred in the course of one telephone conversation with Mr. Kram that led me to understand that there would be no immediate litigation, and their plan — their thinking — was probably to resolve it on some basis.

Mr. Hillson: — By ratifying?

Mr. Tavender: — Well you're . . .

Mr. Hillson: — That's the word.

Mr. Tavender: — Yes, but . . . I know. But you're asking me to today reflect on a . . .

Mr. Hillson: — Well is that . . . Where does that word come from?

The Chair: — Excuse me. Mr. Hillson, again I have to caution you. We do have to accord witnesses the opportunity . . .

Mr. Hillson: — No, I know we are.

The Chair: — . . . to fully answer the questions you put as completely as they are able or wish to.

Mr. Hillson: — Where did the word "ratify" come from?

Mr. Tavender: — It's not my word. Or if it is, it's my word that summarized what I believed I was procuring from Mr. Kram.

Mr. Hillson: — Thank you.

Mr. Tavender: — But my point is, please be careful in reading my notes as carrying with them the implication that they had made a decision to ratify — that is, not negotiate, not make any other deal or whatever, and that that was necessarily Mr. Kram's word. It could just as easily have been my interpretation of what he was saying. I wrote down the word "ratify."

Mr. Hillson: — Yes.

Mr. Tavender: — And I didn't have it in quotes.

Mr. Hillson: — Now, sir, when we get to . . .

Mr. Tavender: — And I . . . Could I just explain. I did have in quotes . . . I'm looking at my . . . Well your typed copies have the same. I had in quote "liaison and transition" in point 4. I'm just pointing out, please be very careful about putting too much legal significance, for example, on a word I used in this memo.

Mr. Hillson: — However, when you talk about negotiation, you correctly point out that all lawyers would always prefer negotiation to . . .

Mr. Tavender: — Except litigation lawyers. Have to look for another file.

Mr. Hillson: — . . . to the uncertainties of litigation that you've spoken of.

But as I understand, that when you make a clear recommendation at the end of your draft opinion, that failing an immediate response, SaskPower should file quickly a statement of claim, that is . . . not necessarily to go to court but because that would be required to give any strength to the negotiations. There's nothing to negotiate if SaskPower ratifies, if SaskPower doesn't issue a statement of claim, is there?

Mr. Tavender: — I'm not quite following your question.

Mr. Hillson: — Well first of all, when we get to the end of your draft opinion, it makes a very clear, unequivocal recommendation that failing an immediate response by SaskEnergy . . . by Direct Energy, SaskPower's best interest would be to quickly file a statement of claim.

Mr. Tavender: — Right. And be clear what I'm saying.

Mr. Hillson: — Yes.

Mr. Tavender: — I've told them already: this is an arguable case, it's an open case, it's a difficult case, it could be costly; and there are a lot of problems on both sides of the fence.

Mr. Hillson: — Right.

Mr. Tavender: — Secondly, I'm dealing now with an ongoing entity, Channel Lake, which now will be caught in a fight over ownership and control.

With trading loss litigation and other corporate issues which need to be resolved, the worst thing in my judgement would be to sit and do nothing for an extended period of time. What I was encouraging the client to do was to get down quickly and deal, if possible, on an amicable basis with Direct Energy to bring it all to an end, to get closure.

Or alternatively, if they couldn't get a quick response from Direct Energy, if the negotiations weren't going anywhere, if SaskPower and Direct Energy just couldn't get a resolution to this matter, then I was saying, sue and sue quickly, because you've got to stake out now your position that you are electing to disaffirm Portigal's authority, and you'd better move very quickly to do that and you'd better instruct us to start drafting some documents for interim injunction applications and so on.

Mr. Hillson: — Right. However, it strikes me that part of your recommendation to quickly file a statement of claim is on the basis that that would bolster negotiations then. If you ratify, there's no longer anything to negotiate. Is that not correct?

Mr. Tavender: — If they enter into a settlement or if one side capitulates, there's nothing left to fight over. But I was not recommending immediate litigation as part of a settlement strategy. I was talking about making an election to undo the two months of history which had indicated to me that SaskPower had sat on their rights for a period of time, and if they were going to disavow Portigal's authority and try and rescind the transaction, they should do it quickly and do it strongly — not for settlement power but to enhance their legal position.

Mr. Hillson: — Now you used the word, capitulate, and I guess that's what we see here — that there was in fact in June no negotiated settlement, there was no revision, there were no alterations — what we see is SaskPower capitulate.

Now is there anything you can see where in June SaskPower obtained any concessions, or did SaskPower simply capitulate?

Mr. Tavender: — I may have been loose with my language — capitulate, I thought I put it in the context that there are choices available to clients. I know nothing of what happened after June 16.

Mr. Hillson: — Okay. And now, sir . . .

Mr. Tavender: — And I can say this: that when faced with a deal which would put in SaskPower's pockets $15 million rather than 20 million, if that's what the numbers roughly work out to, it's perhaps hardly capitulation to take $15 million. A bird in the hand is worth something.

Mr. Hillson: — Now I see you have here: "signed deal April 29." Can you tell us what that means, sir?

Mr. Tavender: — Where are you reading? Yes, I see now. On the June 13, point 4?

Mr. Hillson: — Yes, I'm on the same handwritten notes.

Mr. Tavender: — Yes, but this is an earlier discussion.

Mr. Hillson: — Can you tell us what that means?

Mr. Tavender: — No, I really can't. I haven't focused on that particular entry. I think there was something or other that went on, on April 29. You have the documents. I don't recall today what that referred to.

Mr. Hillson: — I'm not sure we have any information to tell us what that . . . We know that some of the documents were signed on different dates by the two parties but I'm not sure we're aware of anything that would have been signed on April 29.

But at any rate — I'm not here to argue — you're saying you can't shed any light on that notation.

Mr. Tavender: — Not without reviewing . . . I thought in the Closing Book or in some of those other things, there were some interim documents. Without checking it, I can't answer.

Mr. Hillson: — In your discussions, in these June 13 and June 16 conversations, was there any discussion about the March 31 deadline and the possibility of public disclosure and filing of information with the provincial legislature should SaskPower move to repudiate the sale?

Mr. Tavender: — I don't remember anything of that sort.

Mr. Hillson: — The June 10 and June 12 opinions are issued in draft. Is that your usual procedure, sir?

Mr. Tavender: — It's not unusual at all. Particularly when working in an intense environment with a short time frame, we are absorbing a great deal of information. And we're not the custodian of the facts; the clients generally are. And it is very common to send out opinions, interact, asking the clients to correct errors and fill in omissions. That's very common. And I can say that I do that today on matters that don't involve tight time frames.

Mr. Hillson: — However it doesn't appear that a final legal opinion was issued in this case.

Mr. Tavender: — That's correct. I wasn't asked to deliver one.

Mr. Hillson: — So what was said after you delivered the second draft in terms of where you take it from there? You say you weren't told to put that into a final form?

Mr. Tavender: — The record of what I know is on these two conversations of June 13 and June 16. We rendered a quick draft opinion in response to the client's needs and the client did not ask us to go beyond that. And we don't, on our own, spend our time doing work for clients that they have not asked.

Mr. Hillson: — Now I take it from reading the draft opinions that your view is that at the time of the April signing, that there had been no meeting of the minds between the parties and therefore those agreements would not have been binding at that time.

Mr. Tavender: — I think you've got to be more precise. I expressed the opinion that as of April 2, there was no agreement that would be legally binding on either party. On April 3 however, with the April 3 acknowledgement letter and the April 2 signed agreement, I expressed the opinion that if Portigal had authority, there was indeed a binding agreement on that date.

Mr. Hillson: — So you believe that on April 3 there was a binding agreement entered into?

Mr. Tavender: — I think that's the thrust of our opinion, assuming ostensible authority tests have been met. In other words, the requirements of offer and acceptance have been met.

Mr. Hillson: — So the difficulties for Saskatchewan Power, as I understand what you are saying, is that: (1) Mr. Portigal had been clothed with ostensible authority by Saskatchewan Power; and (2) Saskatchewan Power had failed to act timely after the April signing. Is that a fair summation of what you're telling us?

Mr. Tavender: — I hesitate to accept somebody else's summary of an opinion that's considerably longer than the two sentences that you've just used. I think the two positions you've outlined are almost incompatible.

It is that on April 3 there arguably was an agreement that would meet the legal requirements of offer and acceptance, and certainly agreement if Mr. Portigal had binding authority.

The next step in this is really inconsistent and incompatible. If Mr. Portigal did not have binding authority, then SaskPower should have known, in my opinion, that he nevertheless — he, Portigal — had been doing an awful lot of things, including attending on a closing and saying he'd entered into an agreement and there would be a further closing and he was continuing to represent them. And if it were the position of SaskPower that Portigal lacked authority to bind them in that way, they had an obligation to notify quickly Portigal and Direct Energy of those positions. And it seems that they did not do so in the ensuing two months.

Mr. Hillson: — Okay. So your disagreement with what I say is that if SaskPower wanted to take the position that Portigal had exceeded his authority, did not have authority, then they should have acted quickly to repudiate the actions of Mr. Portigal?

Mr. Tavender: — Which they could only do if they had sufficient knowledge. And as my understanding was from Mr. Kram, SaskPower management did not truly understand what had gone on on April 3 or April 2; April 3, in that time frame. So that that would be a reason why they would not have perhaps responded the way you and I are now discussing. And I was conscious of that and that is another factor that would have to have been explored in a pursuit of the facts.

Mr. Hillson: — Now as you know, there's been much discussion in this inquiry on the memoranda of Mr. Portigal in the first week of April. And of course you make reference to them in your opinion.

In your view, sir, do you find those memos clear in signalling substantial changes to the sale deal and to the purchase price?

Mr. Tavender: — I, on reviewing these matters a year ago and in rendering my opinion, believe that the April 2 agreement with its paragraph 6.3 was reasonably clear to me — that there was now a net purchase price that couldn't possibly be $20 million, round figures. And as I read the Portigal memos, I thought I saw sufficient disclosure of that fact. So that's how I interpreted them as I read them at that time.

Mr. Hillson: — So you read those memos as disclosing that the purchase price has changed.

Mr. Tavender: — But I also read, and this is why I was caught in a troublesome situation, where Portigal in a same memo is saying, and this is net favourable to SaskPower. Oh? Where's the rest of the 5.2 million? I mean I couldn't answer that. I didn't have information to answer that.

So I found his memos — I was going to say conflicting — bothersome. I mean there were things in them when I read them, with my very limited knowledge as a lawyer, as a litigation lawyer on the one hand, and on the other hand . . . are typical lawyer escape hatches. That's where I was.

Mr. Hillson: — But I guess, Mr. Tavender, where my question's coming from, I'm asking you now to use in a sense very little good knowledge. If you just read those memos — that's all he knows, reading those memos — do they, or ought they to, signal to you that there has been a substantial change to the purchase price?

Mr. Tavender: — I'm not going to speculate on what ought to be and I'm not . . . I'm really going to answer that question in the context of what I saw at the time. And what I saw at the time was not just the memos, but also the April 2 agreement, as being in my mind together a pretty clear indication that I thought the price had changed. And I thought that was clear enough to me that it had changed.

Mr. Hillson: — Thank you.

The Chair: — Mr. Hillson, can you start to wrap up your questioning please.

Mr. Hillson: — Yes. I don't have a lot more, thank you,

Madam Chair.

Now as I say, when we get to the conclusion of your draft opinion, failing an immediate response by Direct Energy, SaskPower should quickly file a statement of claim. Now you've added to that that the outcome is uncertain. I would put to you, sir, that as a careful counsel, I suggest you probably advise all of your clients that when one goes to court, the outcome is uncertain.

Mr. Tavender: — I don't on a typical case, if this is your question, say to clients in case after case after case, that the outcome is arguable either way, that there is significant risk to both sides. I don't say 50/50 or worse unless that's what I feel. I am not presumptuous enough to be able to cite Robinette as my standard because I am not at that standard.

But I express opinions that clients have a very good chance of success on many occasions and mean it. And when I'm pressed to get passed the Robinette problem of quantifying it, I have on occasions expressed opinions saying 75 per cent or some number, with all of the qualifications that you quite properly are identifying.

But this is an opinion that, in my judgement, was intended to communicate to the client that this is a tough case, this is a difficult case. This isn't a zero per cent case — don't get me wrong. But on the limited basis of what I see here, you'd better look very seriously at your options, because I think otherwise you're going to get into a very tough lawsuit where you're going to be putting up security, perhaps of your own, on an interim injunction, in the event that Channel Lake, for example, can't be utilized by Direct Energy the way they wanted it; and you go ahead and you plough into court, you freeze everything and you ask for very strong remedies and you're wrong.

You may — at the end of this — be paying big time in terms of damages or improperly obtaining an interim injunction.

I saw all kinds of risks, so this is not a typical opinion for me and not typical qualifications for me.

Mr. Hillson: — Okay. I just want to put to you, on page 11 of the draft, you venture the view that if Portigal was not in a position of conflict on April 3, he most clearly was by the June 2 closing. That continues to be your view, sir?

Mr. Tavender: — Well I have no new view. I have only looked at this as of the time of this opinion. I saw evidence that as of June 1, he was president and had signing authority on behalf of Channel Lake, and I made the assumption then, in this opinion, that that carried with it the fact, assumption I made, that those were the dates when he was in power as opposed to at some later date, whether retroactive . . . you know, there could have been a very innocent explanation of that, but I made the assumption that he was in a conflict of interest on June 1.

The Chair: — Thank you very much, Mr. Hillson. I'll now recognize the New Democratic Party till approximately 10:30. It's my intention to call a break at 10:30. I will just at this time formally ask again, Mr. Goohsen, did you wish to put any questions to Mr. Tavender?

Mr. Goohsen: — Not at this time.

The Chair: — Thank you very much. I understand that Mr. Gantefoer will probably have one more question, and if we're running true to form, I'll bet Mr. Hillson will also have one more question as well. So if we can try to accommodate all that and still have a break at 10:30, I'd appreciate it.

Mr. Trew: — Thank you, Madam Chair. Good morning, Mr. Tavender. Milner Fenerty have two draft legal opinions. The first one was dated June 10, the second one June 12, two days later. The material difference between the two letters is a result of you becoming aware of Jack Messer's letter respecting Lawrence Portigal's authority?

Mr. Tavender: — That was a major influence in the change. I don't think I should go so far as to say that is the reason for the change. I'm merely explaining that I was working with Tom Mayson. He's another lawyer; he had his views. He wasn't I think at the . . . With the benefit of the March 12 letter, it was clear that the ostensible authority issue was front and centre. And was that exclusively based on that letter? I'm not sure I can say that, but it certainly was a significant influence on the difference.

Mr. Trew: — Okay, thank you, Madam Chair. Mr. Tavender, on item 3 of your opening statement you say you sent a draft, that would be of the June 10 legal opinion, and you sought Mr. Kram's comments as to the accuracy of the facts. I'm wondering what Mr. Kram's comments were.

Mr. Tavender: — I have no note on my file of any response from Mr. Kram to either the facts set out in the June 10 opinion or indeed the rest of the opinion. My practice is to make notes when any client gives me significant information — information I treat as being significant — and hence you have this typed copy of my notes of the June 13 and June 16.

Because I have no such notes and because I have no memory of a discussion with Mr. Kram in those areas, I believe today that I received nothing of contextual comment from Mr. Kram on the contents of the draft opinion. I think he was much more concerned, and I remember him being concerned, about how do we negotiate; what do we do; these people are coming down to Regina. What are we going to say to them; that sort of thing.

Mr. Trew: — So you don't consider the fax received from Mr. Kram on June 11 to Mike Hurst of your firm, in which you learned that Mr. Dufresne of DEML would be arriving in Regina on June 13 for discussions with SaskPower, and secondarily, you learned from that fax that Direct Energy in its letter of June 11 indicated that there existed a March 12, 1997 letter from SaskPower respecting Lawrence Portigal's authority to represent SaskPower in the negotiations involving Channel Lake — that you don't consider to be a response to your request for information?

Mr. Tavender: — I mean it's hard for me to answer your question looking at it that way. What was happening was this, as I recall it. Yes, I wanted Mr. Kram to respond in detail to this draft opinion, if he had anything relevant. And I don't remember receiving anything of that sort. But is it related, what you just said. It could have been, it could have been in his mind

related. But what I did see was the response of Direct Energy to the SaskPower June 6 letter. And Mike Hurst sent a copy of that to me. And there's no doubt that I read that letter and I put a circle around the March 12 and an X in the side saying, oh oh, I want to know about that.

So maybe it's just a question of form, how I got interested in that.

Mr. Trew: — Thank you.

The Chair: — Mr. Trew, if I may. You may wish either to put those questions to Mr. Kram if he's recalled as a witness or perhaps they can include it in their closing statement when they provide it to the committee.

Mr. Trew: — Certainly, thank you, Madam Chair.

Mr. Tavender, on page 3 of your opening statement you've referred to "ostensible authority". I don't think you need to refer to that page other than I want you to define ostensible authority for my benefit and I suspect a few other people.

Mr. Tavender: — There's a doctrine of agency and principal law that permits the opposite party to rely on the ability of the agent to represent the principal. Mr. Portigal, in this context, I'm calling an agent; SaskPower I'm calling a principal. Under the laws of agency, Mr. Portigal, if he's expressly empowered to do something, can go forward and represent SaskPower, and Direct Energy is entitled to rely on that authority of that agent.

In this case I have called it ostensible authority because I'm assuming, for the purpose of this opinion, that there was not express authority given by SaskPower to Portigal to execute agreements and bind SaskPower on SaskPower's behalf.

So I'm saying it's not . . . I didn't treat it as an express authority case. Ostensible authority is holding out by the principal, SaskPower, that a representation, in other words, to Direct Energy, that its agent, its representative, Portigal, is entitled to act on its behalf and that the internal approvals that are required for Portigal are not the concern of Direct Energy. They can rely on the clothing of authority that, in the context of the commercial dealings, Direct Energy was entitled to rely on. And that's, I'm sorry, that's not a very good definition.

Mr. Trew: — I think it's a difficult area to define. I thank you for that though, Mr. Tavender.

When you were reviewing Mr. Portigal's authority, did you take into consideration that on April 1 he had to take some documents to SaskPower, Regina, for signatures. And two signatures appeared, namely Mr. Kram and Mr. Christensen, and not Mr. Portigal, on April 1. Did you take that into consideration with your authority views?

Mr. Tavender: — Well I was certainly qualified in my opinion on whether or not a court would conclude that Portigal had ostensible authority. You make a good point. And I think the . . . I'm not sure that I addressed my mind to the very specific question of whether the fact that Portigal went to Regina to get signing authority from two officers, meant that he didn't personally have signing authority.

I looked at that really from two different perspectives. First, I was concerned that the fact that he could go to Regina and get two officers to sign a formal agreement that contained 6.3, that contained very . . . I thought to be material changes, indicated, consistent with the holding up by Mr. Messer in the March 12 letter, that Portigal did indeed have negotiating authority on behalf of SaskPower. He could deliver and did deliver. So that was one thing. And it seemed to me that with the signing officers under seal handing to Portigal that signed document under seal without needing any board resolution or anything else was evidence of a holding out that Portigal had a lot of authority. But in my opinion, I said, you know I'm not sure he has the ultimate authority; I've waffled on that issue.

But then I said, you know it's very interesting. All the way along here, it's the board of directors' resolution that was a requirement in the deal, and yet that was something that Direct Energy could waive, and you know I just couldn't solve all that. So you ask a very good question, and I'm not sure that I have answered it or that I addressed it the way you phrased it at the time.

Mr. Trew: — Thank you, Mr. Tavender. Madam Chair, you're right in that I'm somewhat perplexed — to put it mildly — in that on April 1, from the way I've seen it having heard the evidence I've heard in this hearing, Lawrence Portigal had to go to Regina to get signatures from officers of SaskPower that had authority to sign on April 1. Two days later DEML assumes that he has signing authority and I just . . . you make a persuasive argument why they might, but from where I'm sitting it seems like that's a fairly long bow and I can see why perhaps in your legal opinion this is arguable in a court.

The Chair: — Mr. Trew, would you put a question please?

Mr. Trew: — I would love to. I always follow the advice of the Chair. I'm still curious how Mr. Portigal would gain the authority to sign a document. It seems the evidence points the opposite way. Can you have one more try at that? How did Mr. Portigal gain even ostensible authority to sign on behalf of SaskPower.

Mr. Tavender: — We have people shake hands. A corporation has to be represented by somebody and deals are usually a handshake. And usually there's some paper that's wrapped around those handshakes. And who's at the meeting and who's empowered the person to be at a meeting.

Every time I have a settlement — I mean I'm talking to a lawyer on the other side usually — does that person really have authority and what does that person have to go through to get authority. You know the reality is in my experience — I'm not a commercial lawyer but, seeing the litigation side, a lot of these kinds of files — you really on both sides have to have a degree of trust. And this is where the element of ostensible authority has, I think, its origin.

You cannot commercially function if every single step along the way has to be documented with a shareholders' resolution, approving the board of directors' resolution, approving the signing authority of Mr. Christensen and Mr. Kram, authorizing Mr. Portigal to show up a meeting and shake hands. Life is not that simple in my experience. And I have strayed beyond what

I'm supposed to be talking about.

Mr. Trew: — Thank you, Mr. Tavender. Madam Chair, I'm going to try a little different direction here. In your opening statement, you say that SaskPower's position would be 50/50 or worse. Was that premissed in any way that SaskPower had received fair market value for its assets? Did you take that into consideration at all?

Mr. Tavender: — No.

Mr. Trew: — Okay, so you would not have been troubled at all or involved in reading the Gilbert Laustsen report.

Mr. Tavender: — I know nothing about it.

Mr. Trew: — Yes. You referred in your opening statement to unusual and suspicious circumstances in the entire negotiating process. I think I understood you to say that one of those suspicious circumstances, or unusual and suspicious circumstances, was that Lawrence Portigal for awhile was working for both SaskPower and DEML. Did I understand you correctly?

Mr. Tavender: — No, that is not listed. I'm looking very quickly at pages 8 and 9 of my opinion and I did not in that context . . . I did not list that point in those seven items that I identified.

These were more things that I saw on the paper that I couldn't understand. Why wasn't the board of directors involved? I mean, they were up front, the deal contemplated their approval, the Closing Book said you've got to have directors' resolutions. You know, why didn't somebody go back to the SaskPower board of directors and say, look, we had all these changes, approve it. I didn't understand that.

And then I looked at this 6.3 and I saw, you know, in the Closing Book there's different language here and there's no initialling of the changes. That didn't make any sense to me.

Anyway, I've listed them, but that point that you raised was not listed as that. I mean I can understand if you want, you know . . .

The Chair: — Go ahead, you can answer as completely as you want.

Mr. Tavender: — I am sure that in every single corporate take-over the position of the officers of the target company, management, the employees is always at issue. Are they all going to be let out on the street, or are they going to carry on in the new entity? If they're going to carry on in the new entity, somebody has to be talking to them or they'll be deemed to have been terminated, or you know, they won't be loyal to the new cause. So there must be a transition.

And so that's the kind of issue that I would expect people would have to address. My concern was not that, but rather where was the disclosure going on between SaskPower and Portigal if those things are going on. But the fact of it doesn't surprise me.

Mr. Trew: — Okay, thank you, Mr. Tavender.

Madam Chair. Mr. Tavender, you've had an opportunity to look at, in some detail, the engagement letter entered between your firm and SaskPower.

Mr. Tavender: — No, I have not.

Mr. Trew: — You have not.

The Chair: — Do you want to put your question and, if it's germane, the Milner Fenerty law firm of course will be providing the closing statements, so perhaps they can include it.

Mr. Trew: — Fair enough, yes. Thanks, Madam Chair. Mr. Tavender, Mr. Gerrand, Q.C. (Queen's Counsel), reviewed this matter, and he provided a written report to the committee which stated at paragraph 230 on page 83 of his report, and I'm going to quote that:

> Despite the clear provisions of the retainer agreement, it does not appear that any draft or finalized document or any correspondence that came to the attention or possession of Hurst was forwarded by Hurst to Kram in a timely way, or at all, other than a copy of the final and executed copy of the share and note purchase agreement as mentioned above.

Mr. Gerrand arrives at the conclusion that your firm was negligent in its failure to fully report to SaskPower, which was its client. And I'm just wondering if you wish to comment on that matter?

The Chair: — Mr. Tavender, you may wish simply to take notice on that.

Mr. Tavender: — That's fine. I will tell you I was unaware of all of that historically. I probably learned last week that there was something out there along these lines, in discussion with Mike Hurst, and I know nothing more than that. And I certainly know nothing of Mr. Gerrand's comments. So I don't think I'm the person you should talk to about those matters.

Mr. Trew: — Fair enough. I'll accept that you're not the person at this stage that we should be talking to about that. I thank you, Mr. Tavender, for your answers. Madam Chair.

The Chair: — You've completed your line of questioning? Mr. Gantefoer, then.

Mr. Gantefoer: — Yes, very briefly, Mr. Tavender, back to the handwritten documents and arising out of some questions about . . . from Mr. Hillson where he talked about the signed deal of April 29. I believe that followed out of conversation you had with Gary Drummond. And, if I perhaps could give you an opinion of what went on there, is that . . . We're talking about Portigal perhaps, and after the April closing, Mr. Drummond felt that the deal was done, they had a discussion with Portigal about employment. And that the signed deal on April 29 was a deal between Mr. Drummond, who owns DEML now, and Mr. Portigal for continued employment.

Would that perhaps jog your memory as to the relevance of

those dates? And the key thing in this is it says that: "advised that he had disclosed to SaskPower." I assume that "advised that he" would be Portigal, had disclosed to SaskPower that he was going to undertake this agreement which was signed on April 29. Does that jog any recollection?

Mr. Tavender: — I regret to say that does not jog any memories of mine. It's not inconsistent with what I read here, but I can't say that it assists me in reviving those distant memories because they're gone from that point.

Mr. Gantefoer: — So, if that assertion is correct, that in this phone call conversation with Gary Drummond and, if that had indeed been discussed with Portigal as you indicate, would it be a normal transition type of discussion for the new owners to have with an individual who may be in their continued employment? You, I think, just testified that that would be a very normal thing.

But the key issue here was the disclosure. And, from what I read here, it would assume that Mr. Drummond was advised that Portigal had disclosed this discussion to SaskPower. Would that have a material influence, if that would be the case, on the issue of conflict of interest?

Mr. Tavender: — I mean the question is when, and I don't see that answered in this note, but clearly disclosure is important and the timing of the disclosure is also important.

Mr. Gantefoer: — From the notes, the deal was signed April 29 and I assume that would be the employment deal?

Mr. Tavender: — I don't know.

Mr. Gantefoer: — SaskPower has certainly advised us in their testimony that they had not been advised at any time about Mr. Portigal's employment . . . indicate from this that perhaps Mr. Portigal had advised Gary Drummond that he had disclosed that.

Mr. Tavender: — All I can tell you is I have no memory of anyone from SaskPower, which would be my only source of information, telling me that Portigal had in fact disclosed this matter of conflict to anyone in SaskPower until very late in the day.

Mr. Gantefoer: — Thank you.

The Chair: — Mr. Hillson do you have any further questions?

Mr. Hillson: — Yes, Madam Chair. Your discussion earlier about Mr. Portigal having ostensible authority to bind SaskPower, and that's the way it would have appeared to Direct Energy. I'm going to ask you, sir, to venture an opinion as to whether, in your view, that would change once Direct Energy had entered into discussions with Mr. Portigal to hire him. Would that ostensible authority in the eyes of Direct Energy, does that change when they enter into discussions to have Mr. Portigal on their payroll?

Mr. Tavender: — What I considered at the time was the duty of Portigal, as agent, to be forthright with his principal, SaskPower, on the one hand; conflicting with his personal interest of securing, maintaining his own benefits of Channel Lake in discussion with Direct Energy on the other hand.

And once you have that situation, then the courts impose a very high standard on the parties. It doesn't follow from that, that just because those circumstances are found to exist on a given date, that the transaction can be . . . will be set aside by a court.

But then there's a much higher burden of proof on the part of Direct Energy and Portigal, and so that would be an area of careful review and analysis, no doubt, with days of discovery and cross-examination on affidavits in order then to explore whether or not there would be any significant different opinion I would have expressed if that had been pursued.

Mr. Hillson: — Okay. And finally, when you wrote that Mr. Portigal was clearly in a position of conflict, is that based on him acting as a lawyer or is that independent of the question of whether he was or was not acting in the scope of a lawyer?

Mr. Tavender: — I didn't consider him as acting in the capacity of a lawyer at any time. I seem to recall I knew he was a lawyer. I treated him as an agent, a representative of SaskPower in a negotiation, and not performing legal services. I didn't consider that aspect of it.

Mr. Hillson: — So you don't have to be a lawyer to be in conflict of interest.

Mr. Tavender: — No.

Mr. Hillson: — And I think the record should show the no.

Thank you, Mr. Tavender. Thank you, Madam Chair.

The Chair: — Thank you. Are there any further questions from the New Democratic caucus?

Mr. Tavender, you will now be excused and we will of course expect a closing statement from your law firm, if you could provide it. We discussed this yesterday . . . (inaudible interjection) . . . If you wish. That's true. I'm sorry.

You have the privilege of providing a closing statement and I believe that . . . I had the impression yesterday that Mr. Hurst would be providing one. In any case, I hope that you catch your plane to Calgary. Thank you very much for attending.

Mr. Tavender: — Thank you very much.

The Chair: — We will now have a break until 10:45.

Mr. Tavender: — Thank you very much.

The committee recessed for a period of time.

The Chair: — This committee would come to order please. We will resume our hearings with Mr. Sutton of the Gilbert Laustsen Jung firm in the witness chair. Mr. Sutton, I have a statement that I will read to you before I take your oath, and then I will expect an opening statement from you.

I will advise committee members that copies of Mr. Sutton's

opening statement have been circulated as well as a letter regarding . . . I believe it's a summary of their opinion that was provided March 5, 1997. There is also a larger document that we have made four photocopies available, and in due course there will be copies . . . sufficient numbers of photocopies made of this document. But right now we just have one for each party caucus. And I thank you for your cooperation in that.

Mr. Sutton, I will now proceed to read the statement to the witnesses.

Witnesses should be aware that when appearing before a legislative committee your testimony is entitled to have the protection of parliamentary privilege. The evidence you provide to this committee cannot be used against you as a subject of a civil action.

In addition, I wish to advise you that you are protected by section 13 of the Canadian Charter of Rights and Freedoms which provides that:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

A witness must answer all questions put by the committee. You are advised that you may be recalled to appear again before this committee at a later date if the committee so decides.

You are reminded to please address all comments through the Chair.

Thank you and welcome to Regina.

Mr. Sutton, did you wish to affirm or to swear?

Mr. Sutton: — I'll swear.

The Chair: — Do you swear that the evidence you shall give on this examination shall be the truth, the whole truth and nothing but the truth so help you God?

Mr. Sutton: — I do.

The Chair: — Thank you very much. If you would then give us your opening statement please.

Mr. Sutton: — Good morning. My name is Doug Sutton. I work for Gilbert Laustsen Jung Associates in Calgary. I should point out that I am a newcomer to these proceedings and not too well informed as far as what has gone on so far, but hopefully my attendance here will help clarify some things. I was asked to come here today to discuss the reserve appraisal and economic evaluation of the Channel Lake properties prepared by our firm effective January 1, 1997 and to comment on my opinion of the value of the assets at that time.

I'm a vice-president of Gilbert Laustsen Jung Associates, which firm provides various petroleum consulting services and has specialized in independent oil and gas property evaluations for the past 26 years. We are one of the largest petroleum consulting firms in Canada; I'm a professional engineer and have been employed by the firm since 1981. I have personally coordinated many evaluations with value totalling in the billions of dollars for purposes of corporate mergers and acquisitions, security commission filings, bank financings, and property sales and purchases.

I have worked with the subject properties off and on for the past 10 years, firstly for Dynex and then for Channel Lake. In late 1996, I was asked by Channel Lake to conduct a standard corporate evaluation of its oil and gas holdings. This typically includes a geological and engineering review of each property to estimate recoverable oil and gas volumes. The reserves are classified as: proved; probable; or in some cases possible, depending on probability of their recovery. Production forecasts are prepared along with capital forecasts for further development. Financial and land data is reviewed to determine product ownership, royalty burdens, operating costs, and product price adjustments. Cash flow projections are then prepared using computer economic software. The resulting product we provide is a summary document outlining the assigned reserve volumes and the cash flow projections for each reserve category.

Details with respect to the individual property evaluations are provided in separate supporting volumes. In the summary report, various economic indicators are presented including the calculated present values at various discount rates. This summary report does not specify an opinion of value. I should point out that in a summary report we actually state, and I'll read it: "Present values of revenues documented in this report do not necessarily represent the fair market value of the reserves evaluated herein."

An opinion of fair market value can be provided by our firm but these are seldom requested. Generally independent evaluation firms do not get involved in transaction pricing negotiations. On occasion a fair market value opinion is provided. These usually are indicated by a range of values due to the many factors that go into evaluating oil and gas properties. Sometimes for tax or estate purposes, a single value is required. Similarly on occasion a fairness opinion of a negotiated price can be required; if the price is considered to be within a reasonable range, it would be considered fair.

The factors often considered in fair market value opinions include but are not limited to: price assumptions, reserve life, quality of reserves, reserve classification, product type, current and expected cash flow, development potential, tax pools, Alberta royalty tax credit eligibility, and environmental issues.

One of the biggest uncertainties in valuating properties, or valuing properties, is the pricing assumptions used, the price forecast used. These usually differ between buyer and seller. One common but simplified indicator of value is the discounted cash flow method. By early 1997 the preferred discount rates for valuing assets on a pre-tax basis had declined from the 15 to 20 per cent range to the 10 to 15 per cent range.

The lower the discount rate, the higher the value. This decline in range resulted from declining lending rates, declining inflation, and a competitive market-place for petroleum properties. Other benchmarks used in market value opinions can

include cash flow multiples, years to pay out, and value per barrel of oil equivalent.

With respect to the subject assets in early 1997, I'd like to use three types of potential purchasers to illustrate a range of bids that might be expected if offered for sale to a wide audience.

The first type which would be by far the largest group would be a typical oil and gas producer, of course of which there are hundreds of these in western Canada. This type of a purchaser would likely view these assets as in a blowdown mode with limited development potential. The operating costs are relatively high, royalty burdens are relatively heavy, and individual well producing rates are very low.

In this situation a bid using a discount rate of 15 per cent might be expected. Using proved plus half the probable reserves, this would be approximately 19 or $20 million depending if the company can use the Alberta royalty tax credits. Alberta royalty tax credits, it's about $1.4 million would be the present value of those. Some corporations can use them; some may not be able to use them.

The second type of purchaser that I've used as an example is the emerging royalty trusts of which there were about a dozen or so in early 1997. These types of organizations would likely be interested in these properties because they're fairly predictable, fairly long-life reserves. A key difference between these types of organizations is the fact that producing companies often prefer to find and explore for reserves whereas the royalty trust prefer to — generally prefer to — produce out known and found assets.

The royalty trusts have been known to bid aggressively and a discount rate in the 12 per cent range might be expected from some of them — not necessarily all of them — but certainly some might and have been known to bid in that range. Using a 12 per cent discount rate would result in a bid of approximately 22 or $23 million, again depending on the Alberta royalty tax credits.

Some deals have been done at discount rates in the 10 per cent range. These likely result from a perception of higher reserves or development potential in the eyes of the buyer or going concern value in the case of a corporate transaction. These situations probably do not apply here.

However, other situations in which a premium may be paid include where a company is desperate to do a deal for certain business reasons, and sometimes for the case of an initial public offering of royalty trusts where the assets are sometimes valued at higher than typical market value as stated in some of their prospectuses. In such cases application of a discount rate of 10 per cent is possible and would result in a maximum value of about $25 million for the Channel Lake properties.

In conclusion, my opinion of the fair market value of Channel Lake properties as of early 1997 is 19 to $25 million. And once again, it's important to note that many other factors as previously mentioned can affect the market value of oil and gas properties.

The Chair: — Thank you very much, Mr. Sutton. The committee views your opinions and testimony here today as expert evidence.

I would advise you that we rotate amongst the three party caucuses so that we will be . . . First of all, you will be addressing questions from the Saskatchewan Party for approximately 20 minutes, then from the Liberal Party for approximately 20 minutes, and then finally, from the New Democratic Party for approximately 20 minutes.

And it would appear at this point that we will be extending the sitting past the hour of 12 noon, and hopefully we'll be wrapped up by 12:30.

Mr. Gantefoer: — Thank you very much. Good morning, Mr. Sutton. On your report, on the summary page — and I appreciate all the other stuff, none of which I understand — I want to ask you about the difference between proved and probable producing and those columns. Can you explain to me what the significance of those terminologies are, please?

Mr. Sutton: — Sure. Proved producing reserves are wells in production that are happening now; wells that are physically on production. With the classification of proved, meaning high likelihood of their recovery in our opinion and by that I mean 80 per cent plus — that's what we instruct our people to assign reserves at — so not 100 per cent but say 80 per cent certain that the reserves are going to be there; so physically on production. That's proved producing, the first column you have in the . . . I assume you're looking at the letter report.

The second column, total proved, that would bring on non-producing reserves, meaning wells that are not tied in yet — maybe perhaps wells not drilled yet — where we are forecasting some development to recover those reserves. So capital was involved to get from the proved producing up to the total proved case.

The third column is a confusing one: proved plus probable producing. What that involves is, again going back to wells that are actually on production, our firm generally specifies a range of expected recoveries for even producing wells. So the proved, where it's a proved is 80 per cent confident that they'll be recovered. The proved plus probable producing incorporates probables that maybe there's 40 per cent plus, 40, 50 per cent plus chance of being recovered; so higher risk reserves from the existing producing wells. Generally it's higher recovery factors or shallower declines to get the production and get the reserves out.

Proved plus probable, the fourth column, incorporates all . . . it's the same as the previous one but it again incorporates where capital is involved to drill additional wells or tie in additional wells where we see reserves.

The last one there, the next page, what we call established, that's a common indicator people like to use where we take the total proved reserves and half of the probables. So that because the probables are riskier, a common way of using our reports is to use half the probable reserves assigned and that gets you to this established number.

That's not to say that there is other ways of doing it. Some

firms will ignore probables, some will risk them at different rates, but this established term is meant to be all of the proved reserves and half the probables. Is that clear?

Mr. Gantefoer: — So if we look at the undiscounted section then across that, I would assume that that is the value that you assign under these five categories for the dollar value undiscounted.

Mr. Sutton: — The undiscounted present values that you see is just, that's right, it's just a sum of the future net revenues of these properties that we're forecasting for each reserve category. So keep in mind that there is price growth, there is inflation built into the forecasts. And so with no discounting of those future revenues, those are the values that would result.

Mr. Gantefoer: — And you said that built into that are expectations of price fluctuations or inflation or things of that nature.

Mr. Sutton: — Yes, this incorporates our firm's view of prices at the time which did have some real growth in prices. I'm just going from memory, but if we were about a 1.60 per thousand cubic feet for gas initially, that was going to grow to probably 2.50, $2.50 per thousand cubic feet in dollars of the day into the future. And then you have additional inflation . . . I think there's a 2 per cent inflation built into the forecast as well. So the actual cash flow forecasts do show a pricing. You would see that fairly large growth in price over time.

Mr. Gantefoer: — Thank you. Now what are the discount rates and how do they reflect to that estimated undiscounted income?

Mr. Sutton: — All the discount rates do is they take the future dollars of revenue that we're forecasting and if I take — this is a January 1, 1997 evaluation. So the 1997 revenues, we wouldn't discount those. Those are the first year.

Let me use a 10 per cent discount as an example. You wouldn't discount the first year revenues. The 1998 revenues, and lets pick a number, $3 million, you would discount that by 10 per cent as far as the present day value. I'm not sure if that helps any.

So each successive year you go out and you're discounting, you're multiplying by essentially point nine times the number of years into the future that you're . . . as far as the revenue is being received.

Mr. Gantefoer: — Is that an accumulative figure so that if it's . . . (inaudible) . . . then it would be 80.

Mr. Sutton: — That's right.

Mr. Gantefoer: — In 10 years, it would have no value.

Mr. Sutton: — Revenue is 10 years out, but it is a declining balance. So revenue is 10 years out, probably you know, $1 revenue 10 years out is probably worth 10 cents then in this evaluation.

Mr. Gantefoer: — Okay.

Mr. Sutton: — And so the various discount rates just, you know, more and more penalize the future revenues with no penalty on the first year revenues.

Mr. Gantefoer: — Now that, compared to the undiscounted rate where you make expectations of inflation and the growth factor of pricing and things of that nature, the discount rates then are an arbitrary number.

Mr. Sutton: — These are just an array of numbers we pick for presentation purposes. We can pick any discount rate that someone likes. It's just an illustration.

Mr. Gantefoer: — Okay. Now in this exercise, is it your company's — and I am absolutely not questioning any of your calculations; they look extremely thorough — is this type of a report the general form in terms of having an array of numbers to pick at? You haven't really established an opinion. You've established, I guess, a pretty absolutely undiscounted numbers based on your evaluation and all the professional work that you've done, but then you make a pretty broad array of discount rates.

Is it your normal practice then to really not make further comment in terms of what discount rate — which is a more arbitrary number — is applicable.

Mr. Sutton: — The standard in the industry is to do what we've done here — prepare a summary report, quantifying the reserves, forecasting future revenues. And all this is, is just a summary showing values at various discount rates. And this is common as well, the actual numbers presented can vary between companies. And they're just meant to bracket typical ranges that people are interested in looking at.

And we do not direct anybody in these reports to pick a number. We don't say use 10, use 15, use 20. We put them all here, and we bracket whatever we think people may be interested in is the intent of this table. And that is a standard practice, yes.

Mr. Gantefoer: — So in your being here as an expert witness, I absolutely accept your expertise to establish this range in numbers. What is your background and expertise then to tell us that in your opinion at this present time in the market conditions and things of that nature, that one of these discount rates may be the most appropriate.

Mr. Sutton: — I guess, first of all, I think I was . . . I hope I was clear in my opening remarks that a range of discount rates and other factors is almost always appropriate; that I never think of value in terms of a present value discounted at X per cent. That's too simple. It's not how I view value. However, it is a very good indicator.

As far as providing an opinion of what typical values are, you know, what is a problem is that buyers and sellers generally negotiate prices themselves, leave us out of it. Our reports are sometimes used as a tool to help maybe to arrive at some figures. Often sale prices are published and we're then able to go back to our report and see, okay, how does that come in at in terms of our report. Is it 15 per cent? Is it 10? Is it 12?

However, you have to keep in mind too that there may be

another report. Another engineering firm or the producing company themselves will have their own opinion of reserves. This is just one opinion. And so what actually occurs in a transaction, it's not necessarily pulling a number out of a consultant's report.

Mr. Gantefoer: — I appreciate out of your opening statement that you seem to give three different scenarios in your mind that would result in a range again of value depending on how this was done.

In your opinion and your experience, have these rates been in a state of volatility over the period of time particularly in question in terms of the impact of the changing market-place, interest rates, competition, royalty trusts. Have these discount rates been in a high state of volatility or are they a general curve? Or what type of comment could you share with us in terms of how these discount rates have been applied over the general period in question.

Mr. Sutton: — Well you know I would definitely say some volatility over the longer term. You know, we went with 15 to 20 per cent being a pretty good norm for 10 years I'd say up until about three, four years ago, 1996, with the emergence of these royalty trusts.

And there are other reasons; I don't want to pin this just on the trust. There are other reasons that prices had risen at this point in time. But they certainly did fuel property transactions and increased prices. And that did tend to lower typical discount rates that you're using those as your benchmark. And for a period of time, you know, through '96, I would say that, you know, things volatility changed quite a bit over say the previous year but then maybe settled into a reasonable range for a time.

But then as things change . . . I look at what's happening today with oil prices soft but gas still strong. Now depending on the product you might see companies valuing oil and gas a little differently. Oil they might use a 15 per cent discount rate, gas maybe they use 12, and so things do change.

Mr. Gantefoer: — So would you provide an opinion on the pre-tax discount rate reflective of long-life gas assets being sold in the first half of '97?

Mr. Sutton: — I guess going back to my examples that I tried to use, most producers, if I had to pick a number, would probably use something like 15 per cent for gas in the first half of the year. And the reason, the main reason I'm sticking to, say, a 15 as typical for most producers is the fact that there's no up side here. Most producers wouldn't be too interested in these assets because there's nothing they can do with them. They can just produce them out.

However, there would be a small market for companies that would like these assets because they're fairly long life, fairly predictable, and the royalty trusts . . . some of them are a very good example of that, that they would have more value to them.

But we're talking a much reduced market there. We're talking possibly a dozen companies as opposed to 3, 4, 500.

So if you can catch their interest with these things, and I think it would be a reasonable target to try and get, say, a 12 per cent discount rate for the assets from them. That would be a reasonable target.

And that the last case that I used is sort of an outside shot. When you have initial public offering of these trusts — and I have seen examples where numbers look like they're in the 10 per cent range — those don't come along too often. The royalty trusts, the emergence of them was starting to taper off. There were fewer coming out. If you could catch one at the right time perhaps you could maybe get the price as high as a 10 per cent discount rate.

The one negative about this set of properties is they're not big enough to really . . . you know, some of the bigger IPOs, as I call them, or initial public offerings, are in the 50 million to 200 range. So this is on the small side for trying to make one of those work. But still there would be an outside chance of say a 10 per cent discount rate being applied.

Mr. Gantefoer: — The 10 per cent rate, was that based on the royalty trust type of program and is that . . . I guess what were the royalty trust rates typically at the time of the sale of Channel Lake and what are they now?

Mr. Sutton: — Okay. I can't speak specifically to how they buy properties. I'm just dealing from what I've seen of some of the transactions occur. And I have been involved in some, but I think at the time the initial public offerings were probably in the 10 to 12 per cent range as far as what they were valuing properties at when they were being sold to the public. I'd say 10 to 12 per cent for initial public offerings of which you're only seeing one of those every three to six months, if that, versus quite a number that were created through 1996. So they're starting to diminish as far as the chances of landing one of those.

As far as the existing royalty trusts, the ones that are already in place that do continue to buy properties aggressively — they have to, or their assets shrink and they disappear, so they have to continue to buy properties — as far as what they would pay for these, I think some would pay in . . . possibly pay in the 12 per cent range at that time. And they would today. I'm aware of some transactions that occurred recently where 12 per cent seemed to be a number where a deal was done at on long-life shell gas properties.

But I say in the 12 to 15 per cent range maybe would be typical for possibly a royalty trust a year ago. Producing companies, I go back to say the 15 per cent range because of the nature of the properties. He might have some that are interested in the long-life reliability where they need a steady base set of properties for cash flow and they don't want to take risks and drill. So there might be a small number of producing companies interested in these properties as well.

Mr. Gantefoer: — You indicate in your opening statement that there are situations where a premium may be paid, other circumstances perhaps that might influence a company to pay a premium. Would a 10-year gas supply contract potentially be a premium?

Mr. Sutton: — A 10-year gas supply contract . . .

Mr. Gantefoer: — For the company that's buying these assets, if they were assured that the company that was selling them would enter into a 10-year gas supply contract as a part of this deal, would that be the kind of incentive that would be considered a premium?

Mr. Sutton: — I guess depending on the pricing terms, it certainly could be. But there are situations like a marketing issue, could be one of the reasons that they, you know, might pay a premium. That's possible.

Mr. Gantefoer: — If that supply contract was generous or seemed to be very lucrative and was a condition precedent to the completion of the sale, would that influence the consideration of a potential discount rate evaluation?

Mr. Sutton: — It probably would, sure.

Mr. Gantefoer: — Have you had an opportunity to look at the 10-year contract that was part of this Channel Lake deal?

Mr. Sutton: — No I haven't seen that at all, or reviewed it.

Mr. Gantefoer: — But you do indicate that if that was there that might influence the discount rate. Would there be any relationship in terms of the profitability of this contract and how many points the discount rate might be shifted, you know, from the 12. If the standard might have been 12, would that have moved it a couple of points to 10? Or what kind of shifts would occur because of a premium?

Mr. Sutton: — If somebody asked me to try and quantify that, what I would do is I'd run out our cash flow forecasts with the change in price that might be affected. Or if it's a pricing issue — I don't know if it's a pricing issue or not here — if it's a pricing issue I could easily run it out and then discount it back using a standard, you know, typical numbers, and see what the effect would be. And it wouldn't be that hard to quantify.

If it's more just a security of having a place to sell your gas, that's a different kind of thing to pin a value to. You know, it's an intangible maybe so . . .

Mr. Gantefoer: — So are you telling me for example that if I could tell you that a contract would result in a $500,000 profit per year for 10 years you would then be able to run that back against the discount rates and . . .

Mr. Sutton: — I could give you an opinion of value using that approach, yes.

Mr. Gantefoer: — And then if that contract was such that it guaranteed a return of that level then that would be included in your formula or your model as extra cash income that would be considered on today's present value.

Mr. Sutton: — Yes. And we have been given situations where there are contracts in place that would cause us to use different prices, different assumptions on marketing. And those, if we're made aware of them, if they're things that are in place contractually, we can include those in our evaluations and would do so, if asked.

Mr. Gantefoer: — Is it an onerous type of recalculation?

Mr. Sutton: — It's not that bad, no.

Mr. Gantefoer: — Thank you. Did you, when this evaluation was done, did you give an opinion to anyone as to what the appropriate discount rate might be?

Mr. Sutton: — No, I had no discussions a year ago with anyone on the value of these assets. I had provided to — it sort of did twig my memory a little bit, I was wondering about that — but I think five years ago I gave an opinion and I think even 10 years ago to Dynex. But in the last five years I'm not aware of giving anybody an opinion of the value of this set of properties.

The Vice-Chair: — Mr. Gantefoer, I understand we'd agreed to 20 minutes; I'm asking if you can start to wrap this round.

Mr. Gantefoer: — Thank you, I certainly will. In your opinion, is a broad-based auction the best way to assess the fair market value of oil and gas properties?

Mr. Sutton: — Okay, a wide-based auction that's . . . and there are lot of those that occur. We have some very good brokers in Calgary that advertise and market and flog, if you will, do a very good job of attracting as much interest as they can in selling properties. That gives you an opportunity to expose, you know, the properties to a wider range of organizations and would increase chances of maximizing value, if that route was chosen.

You know you see everything done between a deal like that with a wide auction down to a one-on-one deal. There's advantages of both. An auction takes time, takes money, takes organization depending if timing is an issue. I guess one has to question what's you know what's the gain of . . . how much money do you gain by going that route. But as far as testing the market-place for the best possible bid, yes, an open auction is probably the best way to do that.

Mr. Gantefoer: — In your experience, would there be a 5 per cent premium resulting from that broad-based auction or what kind of premium? You said that there's generally a much better price under that process.

Mr. Sutton: — I wouldn't say there's generally a much better price. But the likelihood of maximizing . . . I'm not sure about how much is better or whatever and it depends on the situation, but obviously if you're — let me put it this way — given the range that I've quoted for these properties, which is fairly wide and the reason it's wide is because these assets you can't see and touch, there's a lot of interpretation that goes into every aspect of the evaluation, including pricing, the amount of reserves, many, many issues.

The fact that there's quite a wide range — and I've given a number of examples of why there's such a range — if you're limiting your audience to one or a few or whatever, then obviously your chances of getting a high end of the range shrink unless you go directly to the people you think are going to bid the strongest in the first place. And sometimes that is done.

Mr. Gantefoer: — If you're in a hurry that isn't workable.

Mr. Sutton: — Auctions don't work if you're in a hurry. You're probably talking months and months to get things organized, get things advertised, go through the review and data room processes. Then you lock the top bidders in a room for a week or two and try and squeeze a little more out of them, sort of thing. So it's a . . . you know, it takes time to do that.

Mr. Gantefoer: — If you have a five-week time line, it's impossible.

Mr. Sutton: — I would say probably so, yes.

Mr. Gantefoer: — Thank you.

The Chair: — Thank you, Mr. Gantefoer.

Mr. Hillson: — Yes, Mr. Sutton, I just want to be sure I understand you, although I think you've answered. When you give us a 19 to $25 million value on the assets of Channel Lake as of early 1997, that is a valuation of the company as opposed to a valuation of the sale agreement.

Mr. Sutton: — I'm just talking about the value of the assets that were described to me a year ago.

Mr. Hillson: — So you have not reviewed the sale agreement?

Mr. Sutton: — I haven't seen that, no.

Mr. Hillson: — No. And specifically you have not taken into account what impact on the selling price would come from the 10-year supply contract, back to the purchaser.

Mr. Sutton: — No, that's not considered in my numbers.

Mr. Hillson: — But if that was a very lucrative contract, obviously that's an important component in deciding whether or not we obtained a fair price.

Mr. Sutton: — Sure.

Mr. Hillson: — Sure. And you say that if you have access to this 10-year supply contract you can put a valuation on it and you can tell us what impact that would have on your valuation of the company in terms of selling price.

Mr. Sutton: — Well I don't know exactly what we're talking about, but if I had the chance to understand this contract you speak of, and try to understand its implications on these properties, I could give you an opinion of what I think the effect on the value could be.

Mr. Hillson: — So you're told like if it's a 10-year supply contract, 3 per cent management fee, 1.19 million a year, you can value that 10-year supply contract and then you can relate it back to the value of the company in terms of a selling price?

Mr. Sutton: — That's possible, yes.

Mr. Hillson: — Well, Madam Chair, I have no further questions, but I think it's quite obvious that that's what we have to ask this witness to do. And while, I mean, I take absolutely nothing from what Mr. Sutton has given us, he's certainly done what he was requested.

But on the other hand, it's quite obvious that the 19 to $25 million value he's given us really doesn't have a lot of meaning in terms of relating it to the selling price; that what he's given us really doesn't relate to what we're talking about. And it won't relate to what we're talking about until we bring into the mix the 10-year supply contract.

He says he can do that so I think we should request that he do that, and I have no further questions at this time.

Mr. Sutton: — I'll just make the one comment. Depending on the nature of this contract, it may not be . . . I don't know what I'd be looking at. I'm not sure how clear the answer would be. If it's plain and simple it's a price premium, I can quantify that. If it's subjective type things relating to marketing of gas, I have to compare it to other options.

Again, I don't know what I'd be looking at but . . .

Mr. Hillson: — I appreciate you don't want to prejudge before you've even seen it, but my understanding is you're talking about a mathematical formula as opposed to subjective factors.

So that's everything I have now. Thank you, Madam Chair. I've asked for that undertaking.

The Chair: — Well I'm not going to make that undertaking on behalf of the committee. I'm going to let you know that we have a motion moved by the Saskatchewan Party and agreed to by all committee members that we will contact a long-term gas supply contract expert. The Saskatchewan Party has provided me with one name of one potential expert. I understand that the Department of Energy and Mines have been contacted on behalf of the government to provide a possible name.

And so before we would be requesting of Mr. Sutton that he engage in that, I would have to have agreement from all three parties. I have not as yet received a name from the Liberal Party, Mr. Hillson, though I'm assuming from what you're saying today that you would be putting forward the name of Mr. Sutton as that expert.

So we will leave that whole matter of the long-term gas supply contract expert in abeyance. We will continue now dealing with the discount rates and the testimony that Mr. Sutton has to give on that, and I will recognize the New Democratic Party.

Mr. Tchorzewski: — Madam Chair, I don't think my questions will take a great deal of time. I do want to spend a little time on the factors involved in preparing an evaluation which you've outlined here. So that sort of shortens some of the pursuit that I was going to make here. But before I get to that I just wanted to ask you about royalty trust.

You do indicate that one of the three types of potential purchasers would be in royalty trust, and you've explained how that works and that's been very helpful. I understand that royalty trusts in nigh about 1976 were relatively common, although in terms of the big play, not that common. There were

other things that were . . . other ways that were more popular or more advantageous. Have they declined in . . .

A Member: — In '96.

Mr. Tchorzewski: — '96, did I say . . . what did I say?

A Member: — '76.

Mr. Tchorzewski: — '96, I'm sorry. Has the action through a royalty trust declined since then?

Mr. Sutton: — What occurred was a huge amount of royalty trust activity through '96. A very popular item, very strong, a lot of them created a lot of properties bought by them and they definitely fuelled prices to some degree in 1996. What's occurred since then is quite a reduction in the rate of new royalty trusts coming out. However, keep in mind that there are substantial holdings by royalty trust today and they continue to do huge acquisitions.

I'll give you an example. Pengrowth, one of the longer time royalty trust outfits bought the Swan Hills assets from Imperial for hundreds of millions of dollars. They're an existing royalty trust and that transaction was done, I can't even recall, six months ago sort of thing. So there still is large activity by the existing trusts. So there's quite a difference between the new ones, IPOs, (initial public offering) and the existing ones.

The existing trusts are very strong and very active, no question about it.

Mr. Tchorzewski: — Thank you. That's how I wanted to know about whether they have sort of . . . whether basis of operation now are mainly on existing ones or new ones. And you've indicated there's not that many new ones.

Mr. Sutton: — Far more the activity is related to existing trusts than to the trusts this year.

Mr. Tchorzewski: — Coming back to your basis for evaluation. You've given the list of criteria which are normally used, and I was going to ask you to . . . because we have something in a document called 801 by John Bakken of Denver, Colorado titled "Oil and Gas: Valuation Aspects of Natural Resources" in which he gives similar criteria for doing an evaluation.

He talks about estimates of future prices, which is what . . . you mentioned that.

Mr. Sutton: — Yes.

Mr. Tchorzewski: — And obviously reserves, appropriate discounts rates, I think you've mentioned that.

Mr. Sutton: — Yes.

Mr. Tchorzewski: — Predictions of remaining economic life for all interests including on drilled acreage. So all that is consistent with the kind of work that . . .

Mr. Sutton: — I've considered those kinds of factors, yes.

Mr. Tchorzewski: — Thank you. Now I'm sure that you're aware that Channel Lake properties were acquired by SaskPower from a company called Dynex Petroleum Ltd.

Mr. Sutton: — Yes.

Mr. Tchorzewski: — So I want to refer you — and I don't think you have the document, so I'll read it for you — but for the purposes of the record of the committee, it's document no. 328 which provided a detailed analysis of SaskPower objectives at the time of purchase of the Dynex properties. And it's a quote that's in clause 7, for the record. It says:

> SaskPower is seeking natural gas reserves which are substantially fully developed and thus will not require significant future capital expenditures. The types of properties being looked at are those reserves which are of little or no interest to major players in the oil and gas industry. And in a sense SaskPower is looking to acquire relatively small properties which have little or no development potential and thus are not attractive to oil and gas players.

And then it went on to clause 8 and it said:

> The Dynex Medicine Hat area properties meeting the above guidelines in that they are more than 90 per cent development, have little if any up side potential.

Mr. Sutton: — Yes.

Mr. Tchorzewski: — Is this the way you see the properties?

Mr. Sutton: — Absolutely.

Mr. Tchorzewski: — So the criteria that SaskPower had outlined was sort of met by these properties.

Mr. Sutton: — That's what they bought. Yes.

Mr. Tchorzewski: — Thank you. So can you then help me with this one then. Isn't it true that developed properties with little up side potential face a higher discount rate than properties with good up side risk?

Mr. Sutton: — That you would apply a higher discount rate to those kinds of properties? Not so with companies like, say, a trust that are looking for predictable long life properties.

Mr. Tchorzewski: — Okay. Thank you. Just trying to go right through here so I don't repeat some of the questions. Another thing that Mr. Bakken said, and this was on page 32 of the same document from which I referred to earlier:

> The reserve engineer must determine how much fluid will come out and when. The analyst valuer must then use that data along with oil and gas sales prices discount, both developmental and wildcat under lease, future drilling plans compared to past success ratios, and a host of subjective evaluations are all important depending on the level of appraisal as described above.

Do you agree that these are the factors that go into an evaluation

of properties like Channel Lake?

Mr. Sutton: — Well the latter comments you make about wildcats and that, that gets into drilling and exploration of which none of that was considered here and that there's a . . . we see limited potential for that.

Mr. Tchorzewski: — Okay. Thank you. Isn't it true that developed . . . No, I've asked that one. I will take you back to John . . . No, I've done that one too. I'm almost finished here.

Now let's go back to 1997. Was in 1997 a time when . . . a period of time when prices were declining, natural gas prices were declining?

Mr. Sutton: — I'm going from memory here. Oil prices were very strong early '97, and there was more interest in oil at that time and probably more premiums for oil. However, you know, gas was still not bad. It was a little bit soft but people still had some longer term thoughts on improvement for gas. So gas was a little soft but . . .

Mr. Tchorzewski: — But it had softened some.

Mr. Sutton: — But not a lot.

Mr. Tchorzewski: — Not a lot. Okay.

Mr. Sutton: — I think some of its interest in gas had slowed down a little bit because oil was so strong at the time.

Mr. Tchorzewski: — Right. So that would be if . . . that could have been a factor . . . or could it have been a factor in determining discount rates? Or was it a big enough factor at that time?

Mr. Sutton: — Yes, yes. Certain companies may have been more interested in oil at that time.

Mr. Tchorzewski: — Okay, so it could have made a difference. In your January 24 report for SaskPower you provided a discount rate from 10 to 25 per cent. You've talked to that to some extent yet today. Is this a customary way of doing it, and if so, why?

Mr. Sutton: — Yes, it's customary to just show quite a range of present values of discount rates just to bracket all possible interested values the parties may see. So it's not meant to select a given number but it's just meant to bracket all possible considerations. And we let the reader pick a number he likes; if he likes 10 it's there, if he likes 20 it's there.

Mr. Tchorzewski: — Thank you. I'm just going to talk about . . . and you may not know much about this but let me try this. During the period of time when bids were asked by Channel Lake for the purchase . . . or of SaskPower for the purchase of this property of Channel Lake, Management Ventures Inc., a company which helped manage the Channel Lake properties, made an offer to purchase these assets. And in their offer they provided a valuation basis for the assets and they specifically state that the value that was placed on the oil and gas asset at an equivalent rate of 16 per cent discounted cash flow value based on your report.

Why would a third party such . . . this is one of several parties bidding. Why would you think it would provide a discount rate of 16 per cent? This may be an unfair question but . . .

Mr. Sutton: — No, it's a fair question. I mean you can expect bids of anything. And 16 per cent, that's slightly outside the range that I've quoted.

I'll just point out a couple of other examples of how people were buying properties five yeas ago. They often would buy just on a straight multiple of cash flow. If the market was soft they might bid based on two or three or four years cash flow.

This particular set of properties, the 15 per cent discount rate, that equates to about six years cash flow and that's pretty typical of a set of properties for sale. That's a reasonable bid, six years cash flow. The higher numbers of 22, 25 million, that's getting into seven, seven and a half, almost eight years cash flow. That's starting to get to be a long time for payback of your investment. But these are all just various indicators, and people use many different things.

Hon. Mr. Shillington: — Just a couple of quick questions. I take it the area of expertise of your firm is evaluating gas and oil properties, ascribing a value, or a range of values as you put it, to gas and oil properties. That's your area of expertise, is it?

Mr. Sutton: — Our area of expertise is trying to provide an independent opinion of the reserves in the properties, and forecast a future revenues to be generated from them. That's our main business.

Hon. Mr. Shillington: — What about the area of marketing? Is that an area you have expertise in?

Mr. Sutton: — We don't market properties. The main reason is we may not be viewed as independent if that was the case.

Hon. Mr. Shillington: — And what about providing advice on markets and marketing. Is that something your firm does?

Mr. Sutton: — Advice on markets and marketing of properties?

Hon. Mr. Shillington: — Yes. In other words, marketing of the gas itself.

Mr. Sutton: — Of the gas itself. We're involved indirectly, but that's not necessarily our area of expertise.

Hon. Mr. Shillington: — Have you ever been accepted as an expert witness in court, Mr. Sutton?

Mr. Sutton: — Personally, no. The firm has many times. Personally, no.

Hon. Mr. Shillington: — Okay. Do I take it from your comments that the fact that this was a relatively mature field and that it was relatively small meant that there was a narrower range of people or buyers who might be interested. Did you . . . I think you said that, did you?

Mr. Sutton: — That's true. Although there's a . . . you know,

probably, that's right, a narrower range of people interested. That would be fair.

Hon. Mr. Shillington: — And it is therefore a reasonable conclusion that an auction would be less attractive because you're dealing with a smaller range of buyers. A broad based auction might be less attractive.

Mr. Sutton: — Perhaps.

Hon. Mr. Shillington: — Okay. Those are my questions. Madam Chair.

The Chair: — Thank you, Mr. Shillington. I have an indication . . . oh, I'm sorry. Mr. Kowalsky.

Mr. Kowalsky: — I have one question. Explain why the discount rates may vary depending on the type of purchase. Royalty trust versus say a share option or an asset value purchase.

Mr. Sutton: — Why it might vary between those types of things?

Mr. Kowalsky: — Well would you apply the same discount rate to purchases whether it was being purchased by a royalty trust or whether it was being . . . a sale was being conducted on their share value . . . share sale. Or asset sale, asset value . . . sale.

Mr. Sutton: — I'm not really sure how to answer that. I mean, you know, each company here or entity interested in purchasing properties will have their own criteria. You know, I have a sense of what royalty trusts sometimes pay. Other, you know, a company that's looking at buying the shares will have to compete with an offer say, if a set of properties are being marketed and have to address that. And they'll each have their own ways of buying things. I'm just trying to show a range of discount rates depending on the view of the various people that might be interested in these properties. But generally speaking, royalty trusts tend to use lower discount rates if that's what they're working with than some other types of organizations.

Mr. Kowalsky: — But you can't explain why it is that they use the lower discount rates.

Mr. Sutton: — Why?

Mr. Kowalsky: — Yes.

Mr. Sutton: — The reason is because they can make money at that. They can buy the properties, sell the royalty trust units because there's a market for them, and it enables them to do this. The properties have more value to them because of the price that they are able to sell their units for. It's created some value here because of this type of an arrangement. Whether it lasts or not is, you know, we'll see, but it was a new issue — or a new item the last couple of years. There's demand for it and that has helped drive prices somewhat.

The Chair: — Have the New Democratic Party concluded their questioning? I will then recognize Mr. Gantefoer again.

Mr. Gantefoer: — Thank you, Madam Chair. One brief question again on your summary. To completely understand, at the bottom of the summary the first six years after tax cash flow projections, that would be like the net profit anticipated given the different categories of reserves, etc. Is that correct?

Mr. Sutton: — Yes, that's just the net revenues by year after operating costs, capital, that sort of thing. That's the revenue left in your pocket based on these forecasts.

Mr. Gantefoer: — So that is the base number that you use then to establish the undiscounted rate for example.

Mr. Sutton: — That's right. You would just take each of these years and then those into the future that we don't show here, and discount them back to today. That's exactly right.

Mr. Gantefoer: — Thank you very much.

The Chair: — Thank you, Mr. Gantefoer. Mr. Goohsen, I apologize. I overlooked your presence. Did you have questions that you wish to put to the witness?

Mr. Goohsen: — They've all been asked.

The Chair: — Thank you very much. Mr. Hillson, do you have any further questions?

Mr. Hillson: — No, Madam Chair. But I would ask to put my motion while Mr. Sutton is here because I think that it could be helpful if he's present when I put my motion.

The Chair: — All right. You mean on the witness stand? You wouldn't be asking him to participate in the debate.

Mr. Hillson: — Well, I think he . . .

The Chair: — You just want him physically present in the room while we discuss your motion.

Mr. Hillson: — Yes, I think it has to be clear that I haven't misunderstood him and that he's in a position to supply certain information that actually hasn't been requested yet. And I think that it would be of help in our work.

Hon. Mr. Shillington: — On that basis, before we finish with Mr. Sutton, can I ask you why you don't put those questions to him right now?

Mr. Hillson: — Well it's relating to the analysis of 10-year supply contract, which of course he says he hasn't even seen. So if I may, Madam Chair, I realize that we had already intended to have some interpretation of the 10-year supply contract. But it seems to me we're dealing with two separate figures that have to be married before either of them really make much sense in terms of our work.

Over here we have the value of the Channel Lake assets which Mr. Sutton has given us today; over there we're going to get the value of the 10-year supply contract. Now say those are two figures which, with all due respect to the experts we've heard from, they don't have much meaning until you link them.

The Chair: — And are you putting the question, Mr. Hillson, to Mr. Sutton, if that is an appropriate position and those two figures need to be blended?

Mr. Hillson: — Yes. So, Madam Chair, the first thing is that he has to be given an opportunity to review the 10-year supply contract and value that, and then to tell us what impact that has on the actual sale of Channel Lake say, to blend those two concepts. And then I think we have a figure that means . . .

Mr. Sutton: — Can I offer one comment on that. Depending on the nature of the contract you're speaking of. If it's clear, simple, easy for an engineer to understand — and that's our main . . . engineering and geology. We're not marketing experts. If it's something that's fairly simple for us to incorporate into an evaluation, then I think what you're asking for does make some sense. It's possible, depending on the nature of the agreement you're speaking of, that I would need to get further clarification or an opinion of an expert for myself to provide a proper value to you. So I don't know for sure if I can answer it without seeing it first.

The Chair: — Thank you, Mr. Sutton. Mr. Shillington, did you have a further question of Mr. Sutton as a follow-up to that?

Hon. Mr. Shillington: — No, I was just going to make a comment to Mr. Hillson. And that is that . . .

The Chair: — Through the Chair.

Hon. Mr. Shillington: — Through the Chair, of course. That Mr. Hillson can put forth whatever name he wishes as an expert. I think, however, he may be disappointed in this case; that was specifically the point of my questions with respect to marketing. Marketing of gas is not his field of expertise, it's the evaluation of real property fields.

And I think Mr. Hillson can put forth the name if he wants and we'll consider it as a committee. I suggest though, to Mr. Hillson, that the evaluation of contracts as complex as this one is not a matter about which they claim to have expertise.

The Chair: — Thank you, Mr. Shillington. Mr. Gantefoer, before I recognize you, I think we are in danger of dragging the witness into a committee debate.

Mr. Gantefoer: — Agreed, agreed.

The Chair: — And I would prefer that we complete this line of questioning with the witness. I would ask before we get into a debate and discussion of Mr. Hillson's possible motion, which he has given me notice of, do any committee members have any further questions of Mr. Sutton along the lines that you've already been questioning?

Mr. Gantefoer: — Just following up then, and partly recognizing the conversation that's just gone on, Mr. Sutton, if it was the testimony before the committee — there has been I believe the number mentioned by DEML officials that the contract amounted to a profit of them of $500,000 a year — if the testimony from the expert witness, which I . . . that you've said you're not in terms of this gas supply contract, using that hypothetical, at this stage, number that was given to us under testimony and you then applied that to this discount rate, so that when you told me that the cash flow profit, for example 1997, was $3.5 million, if it was then appropriate given the testimony of this other expert, that a further $500,000 of profit would be the result of the long-term contract, if in that circumstances would you then be able to make an evaluation of the blended numbers then that would have the impact of this premium because of the contract.

Mr. Sutton: — If the issue is as simple as $500,000 extra income over and above what these properties, you know, would do on their own, I can easily add $500,000 of cash flow for 10 years and add it to this analysis. That's very simple to do. Whether it's as simple as that, I don't know.

Mr. Gantefoer: — I'm not asking for the opinion of that. I think that clearly . . .

Mr. Sutton: — But if that's the case, if somebody . . . and we schedule other income of various sorts on a regular basis with . . . depending on what the nature of it is, but then we'll clarify what it is. But if instructed that we have an arrangement where there's $500,000 of additional income due to a marketing arrangement, and it's scheduled over the next 10 years, I can easily add that to this evaluation; that's very simple. And I would just state that that's what I've done.

Mr. Gantefoer: — Thank you very much, Madam Chairman. Then I would suggest that indeed these numbers do have to be married but we have to receive the testimony of the expert witness to establish independently if that $500,000 number that we heard in previous testimony is appropriate.

But I would like to support Mr. Hillson's intent that if that $500,000 number is indeed substantiated by the independent witness, that we do indeed serve notice that we will ask Mr. Sutton then to provide that blended, if you like, or modified evaluation of the assets, given the fact that this long-term gas supply contract was part of the total deal negotiated for the sale of these assets, Madam Chair.

The Chair: — Thank you. And again, the Chair has no opinion about the qualifications of the expertise of this particular witness to deal with that. What I'm trying to do is ensure that we follow the spirit and the intent of your original motion, Mr. Gantefoer, and the subsequent discussion which was, and I will read from *Hansard*:

> A discussion ensued and it was agreed that the Chair would consult with the special adviser and representatives of each caucus in the selection of the independent oil and gas industry expert.

So I'm going to test the committee once more. Do you have any further questions of Mr. Sutton with respect to his testimony, on his report prepared last year, or on the discount rates? Hearing no further questions, Mr. Sutton, did you have a closing statement that you wish to make?

Mr. Sutton: — No I don't.

The Chair: — Thank you. I would thank you then for your testimony before this committee. You are excused right now.

But you are aware that you may be recalled at a later date, or may be asked to provide a written opinion.

Mr. Sutton: — Okay.

The Chair: — Thank you. We will then move into procedural items. And, Mr. Hillson, you have a notice of motion that you wish to give or a motion you wish to put?

Mr. Hillson: — A motion.

The Chair: — Right. Would you read it for the record.

Mr. Hillson: — Yes, Madam Chair, my motion is:

> That this committee request Doug R. Sutton to review the 10-year supply contract with DEML and provide in writing an opinion (1) as to the value of the 10-year supply contract; (2) the impact of the 10-year supply contract on the value of the sale of Channel Lake.

Now, Madam Chair, I don't think this in any way detracts from the decision of the committee a week ago to have expert opinion as to value this 10-year supply contract. And in fact, Mr. Gantefoer may be right that that opinion should also be part of the information we give to Mr. Sutton.

But my main point is that what has occurred to me all along is we were moving to getting two separate values that in isolation by themselves frankly have little meaning. The two values have to be joined before they really have meaning to us — namely the value of the assets, the value of the supply contract. These came together in the sale agreement; so they're both part of the sale agreement and you can't consider whether or not we got full market value unless you join the two of them together. If you look at either one in isolation, you're looking at half the picture and you're simply not getting a full valuation.

Now Mr. Sutton of course has not given a final opinion as to whether he would in fact be able to do that, but he certainly told us that he thinks there is at least a possibility that he can do that. And as I say, I think it has to be done by him or somebody else, or we end up with say two figures that don't really have a whole lot of value to our deliberations. Thank you, Madam Chair.

The Chair: — Thank you, Mr. Hillson. In putting your motion, just for the guidance of the Chair, can you tell me, are you then contemplating that you would not want me to go forward and in consultation with Mr. Priel, determine, and in consultation with all the other committees, determine an additional expert witness on this matter?

Mr. Hillson: — No, no, as I say, this is not in conflict with the motion we passed last week.

The Chair: — So you're asking then for an expert to follow through on Mr. Gantefoer's motion and then an additional expert in the form of Mr. Sutton to provide an opinion on the blended values.

Mr. Hillson: — Precisely, yes.

The Chair: — This is a separate expert that we're looking at.

Mr. Hillson: — No . . .

The Chair: — Excuse me, could we have some order here. I will recognize the New Democratic Party in due course. I'm simply trying to clarify the intent of Mr. Hillson's motion.

Mr. Hillson: — Yes. No, I appreciate that, Madam Chair. I think that where it's breaking down here in some of the committee members' understanding, this is not a duplication. I agree with what we did last week. We need to know the value of the 10-year supply contract.

But the value of the 10-year supply contract out there on its own doesn't have much meaning for us. The value we got of the Channel Lake assets to date doesn't have much meaning for us. The only way these figures have much meaning for us is when we pull them together. Then we get a real idea of what this contract value should be. Thank you.

The Chair: — Thank you, Mr. Hillson. I will now recognize other committee members to debate this motion.

Hon. Mr. Shillington: — I'm going to urge that the committee defeat the motion without prejudice to Mr. Hillson to put forth this name if he wants to.

My reasons for it are as follows. I think we agreed last week that we need to value the 10-year supply contract. If it is unusually rich, then it has a value, an intrinsic value in and by itself. DEML said they'd make . . . I think they said they'd make a profit of $500,000. That doesn't strike me as excessive over a 10-year period. But, Mr. Gantefoer, maybe you're right — that may not be an accurate value. One I think would not expect them to overstate the value of the contract. So we want an independent contract.

When we get that, and if there is a value to it, then you can add that or subtract that to the value of what DEML received. That's a fairly simple bit of mathematics. I don't think we need Mr. Sutton to marry the figures; I think we can do it. It's just a bit of simple arithmetic. If it's worth $500,000, then DEML received an asset worth that much more. I think it's just a simple bit of mathematics.

I don't think Mr. Sutton, for all his expertise, is going to add very much to the expert testimony we get on the 10-year contract. So I would urge that Mr. Hillson's motion be defeated, again without prejudice to his right to put forth Mr. Sutton as an appropriate expert, if he feels that on the valuation of the 10-year market contract.

The Chair: — Thank you. Any other committee members who wish to comment on this motion?

Mr. Hillson, in some summary, please.

Mr. Hillson: — The 10-year supply contract has a value. I didn't use the word "excessive." Mr. Shillington did. I think the word excessive is irrelevant. It has a value, and therefore it has an impact on what we should have sold Channel Lake for. Now whether that 10-year supply contract is quote "excessive" or not, it's an irrelevant consideration. So the word has no meaning here. It should not be used.

It is part of the sale agreement. So when assessing whether we got a good value, you can't answer that question unless you look at the 10-year supply contract. That's all I'm saying. So that's all I'm asking for here.

And is it simply . . . I do agree with Mr. Shillington when he says that, well, Direct Energy itself has given us a valuation of $5 million. They would not be expected to have overvalued. But they themselves, they've worked on the figure of 5 million.

I'm not sure, frankly, that Mr. Shillington is right when he says, well, you just deduct 5 million off the purchase price. I'm not sure it is that simple and that's why I think someone like Mr. Sutton can help us on that. Do we simply take 5 million off the purchase price — I'm not at all sure that's the case. That's why I want an expert opinion.

The Chair: — The question has been called. I don't see any other committee members who wish to add to this debate. So all those in favour of Mr. Hillson's motion, please indicate — Mr. Heppner, Mr. Gantefoer, and Mr. Hillson. Those opposed please indicate — Kowalsky, Thomson, Tchorzewski, Stanger, Shillington, and Trew. The motion is defeated.

Again, I have received the name of one potential expert on long-term gas supply contracts from the Saskatchewan Party. I would appreciate if the other two parties could give me their names by the end of the day so that we can get on with this one.

Finally, are there any other procedural matters that committee members which to raise? Then I will inform you that we have had . . . we've checked witness availability and I am informed that Mr. Gerry Gerrand is available next Tuesday and Wednesday to attend upon this committee, and Mr. Bogdasavich of the Department of Justice is also available for Tuesday and Wednesday.

I don't wish to predetermine how long committee members might take with those lawyers. It is my intention to call Mr. Gerrand first and then Mr. Bogdasavich. And if the committee agrees, I will also contact Deloitte & Touche to determine their availability for the Wednesday.

So I will put that on the agenda that will be circulated in the House and we may get to testimony from Deloitte & Touche next Wednesday as well, depending on the length of questioning of the two lawyers. Is that agreeable to committee members?

Hon. Mr. Shillington: — Is the person who would come from Deloitte & Touche local here in Regina? Are they resident in Regina normally?

The Chair: — As I said, we have not yet contacted Deloitte & Touche so I have to determine that. Okay.

The hour being past 12 o'clock the committee is now adjourned.

The committee adjourned at 12:01 p.m.