

**CROWN INVESTMENTS  
CORPORATION**

**SUMMARY OF THE SASKPOWER SMART METER REVIEW OF  
CONTRACTUAL ADEQUACY AND DUE DILIGENCE**

Robertson Stromberg LLP  
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## **Introduction**

On August 12, 2014, CIC engaged Robertson Stromberg LLP to conduct an independent investigation and produce a report about the legal issues surrounding SaskPower's Smart Meter Program. While that report is covered by legal privilege, the following summary outlines the basic findings.

In the course of preparing its report, Robertson Stromberg reviewed thousands of pages of contracts, reports, emails and general documentation. In addition, the law firm interviewed 20 different employees and consultants of SaskPower, and used its own resources for contract review and information gathering.

## **Summary of Findings**

### The Essence of the Problem

It became apparent early in our review that, until well after contract formation, there was a breakdown in risk assessment, in that no one at SaskPower had considered the possibility that there might be a defect in the smart meters, critical to customer safety, that would require all of the installed meters to be removed from service. The risk that there would be such a defect was one that was therefore improperly protected against in the contractual documents.

Customer safety does not appear to have been a consideration until after reports of smart meter fires involving PECO (Philadelphia Electric Company) arose. It did not become a matter of central importance until June of 2014.

Notwithstanding a well-crafted and thorough set of contracts, there was, in our opinion, a significant gap in protection for SaskPower, in the Sensus procurement contract, in that it limited the rights of SaskPower to claim indirect and consequential damages from Sensus where these losses flowed from a safety defect of the sort that was fundamental to the meters themselves.

The reason behind the presence of this gap in contractual protection is more difficult to determine. It cannot be assumed that it was the fault of the contractual drafters, who cannot be expected to protect against risk of which they are unaware, or against risk accepted by SaskPower as part of the negotiation process. One might expect that the risk of a safety defect is one that can be more readily identified by engineers, or by specialists in meter procurement and deployment. One of the key elements of this review is that no such risk was identified prior to the completion of the major contractual documents.

In the end, the process did not appear to sufficiently identify and allocate the risk associated with the very problem which arose, being a safety defect in the meters, with the possibility that they might ignite, and cause property damage and/or personal injury.

Notwithstanding the contractual limitations in the Sensus procurement contract, there were a number of opportunities presented to SaskPower to protect itself from the economic loss flowing from the safety defect. In this regard, additional due diligence might have led to a decision to stand down the project, by stopping the procurement and installation of Sensus meters. These opportunities presented themselves as possible "red flags". Taken in combination, these red flags, and due diligence flowing therefrom, might reasonably have been enough to cause SaskPower to stand down its program, until they could be certain that the Sensus meters did not present a risk.

Our review also showed that the risks inherent in the Sensus procurement contract were not present in the Grid One contract.

## General Observations

We made a number of general observations that might assist in giving an understanding as to what led to the apparent failure of the AMI project team to identify, prior to executing the Sensus procurement contract, the most significant risk, that of a safety defect, justifying the total removal of all of the meters that had been installed.

The first is the apparent lack of "ownership" for the project, in the time-frame before February 2012. The apparent deficiency in leadership during the early stages of the AMI project occurred during a critical time for risk identification, when there does not appear to have been any one individual who took responsibility for risk identification and in particular, for the identification of the risk that would flow from a safety defect.

This leadership issue may never have been resolved. During the course of this investigation, on the issue of risk management, we had difficulty determining with certainty where the "buck stopped" as many simply felt it a group effort.

Another issue was the fact that SaskPower relied on a variety of consultants, whose authority to interact with the SaskPower legal department may not have been clear. This may have contributed to a disconnect between those who drafted the contracts and the buyer procurement team. During the interview process we heard that at times it was difficult to know who was an employee and who was a consultant resulting in a situation where some key individuals in this process did not appear to have knowledge of critical facts.

Once Sensus was selected and the process continued, there were a number of red flags that failed to elicit an adequate response from SaskPower. Three such examples were:

1. Correspondence from one of the proponents of the RFP process whose proposal was ultimately rejected in favor of Sensus. This correspondence raised the prospect that more due diligence should have been directed towards both Sensus and the product they offered. This flag was dismissed by SaskPower consultants.
2. Litigation initiated in 2010 in Alabama (Baker litigation) that alleged fault with the Sensus product that resulted in fires similar to those that occurred in Saskatchewan. While this litigation appears to have been dismissed by April, 2011, there was no mention of this litigation by Sensus at the time it was negotiating its contract with SaskPower. SaskPower became aware of the Baker litigation in late March 2012; after the Sensus procurement contract was effective but prior to any significant work orders being executed. This flag was dismissed by consultants as involving an earlier version meter and thus concluding that the litigation should not be of concern.
3. In August 2012 SaskPower became aware that PECO was dealing with issues related to overheating in meters provided by Sensus. Subsequently PECO announced the replacement of several thousand Sensus meters. We found that the implications of PECO's actions were clearly appreciated by the legal department. This concern was shared with other members of the team, who then visited PECO to learn more. However, one of the lessons available from that visit was the need to have the meters independently tested by UL, which was not done.

SaskPower received advice from its external legal counsel that a "stepped procurement" process would have been valuable, where small numbers of meters could have been purchased and installed in a gradual manner in order to allow time to judge performance. However, for budgeting reasons, SaskPower

departed from this process when it bought more than 100,000 meters in a three week period between October 23 and November 15 of 2013.

### Recommendations

Given that no one involved in the AMI project was alert to the risks that would flow from a safety defect, advice from risk management consultants should be sought for projects such as the smart meter initiative in order to establish processes and procedures to better identify and manage associated risks.

Consideration should also be given to the possibility of allocating risk through the use of product liability insurance or recall insurance, which would be purchased by the vendor to protect the buyer, or SaskPower in this case.

Roles and responsibilities with regard to risk management and for how to deal with external legal counsel should be more clearly defined.