

CANADA WEST FOUNDATION

# The Audacity of Nope

FOREIGN INVESTMENT DENIED



## KEYNOTE



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Good evening. Thank you for that kind introduction and thank you to the School of Public Policy and the sponsors for bringing us together on this important topic. In some ways, *the* important topic since investment is precisely what we need to maintain our quality of life here in western Canada. And of course a huge shoutout to Eugene Beaulieu, the singular force behind this event. Thank you, Eugene.

Being here again in beautiful, growing Saskatchewan brings me back five years to 2010. On the 17<sup>th</sup> of what was a somewhat sleepy August, a file landed on my desk at the legislative building in Regina. Apparently, BHP Billiton wanted to buy PotashCorp and the management of PotashCorp was not impressed with the offer.

As the head of intergovernmental affairs, I had the predictable defensive reaction. “This is federal jurisdiction. I’m happy we won’t have to get stuck in the middle of it”. How wrong I was!

Wrong that we weren’t going to get involved but also wrong that we shouldn’t.

Tonight, I’m going to talk about that experience, reflect on some of my learnings and end with a small but I think very important suggestion about how to better manage decisions about foreign investment in the future.

So, back to August 2010. The Premier of Saskatchewan – Brad Wall – immediately recognized something that I had not. The entire PotashCorp business was extracting, under licence, potash owned by the people of Saskatchewan. Of course we had an interest in who exercised those licences!

The Premier made it clear that he wanted to understand every dimension of the transaction and its implications for Saskatchewan people – legal, financial, social – every detail.

A team was formed, of which I was a part, and we met over the next two months at least once a week, often more than that, sometimes with the Premier participating himself.

And if you will permit me an aside here – this is one of the great strengths of the Saskatchewan public service – the extent to which ministries work together and not in silos. The debates at these meetings were everything citizens could wish for – actual evidence was tabled and explored, debate was vigorous, honest and – almost always – intelligent. Our singular focus was understanding the Saskatchewan public interest and ensuring it was protected. We were, within the team, quite divided on several key points but the Premier was extremely clear that he wanted information and advice, delivered fearlessly.

Now, there were many reasons to support – or at least not oppose – the takeover.

A key consideration was that BHP was already developing a large potash mine at Jansen Lake. If BHP bought PotashCorp, it would be able to write off its development costs at Jansen against the current revenues of PotashCorp, creating an excellent tax advantage. One view was that this was actually a benefit of the deal because it would ensure rapid development at Jansen, creating new jobs and ultimately broadening the tax base.

In addition, there was an argument that BHP would bring – as foreign direct investment does – new technologies and ideas into Saskatchewan from what was truly a great and very successful global mining company.

But the foremost argument in favour was simply that opposing the deal would deter other foreign investment into the province. This issue of the reputation of Saskatchewan was a driving anxiety for many of us at the time.

On the other hand, after study, we assessed the potential tax-related costs to Saskatchewan people of likely being upwards of 2 billion dollars – the near-term value of the tax writeoff benefits I described earlier. This was a lot of schools, hospitals and roads for citizens stacked against more ephemeral and ideological concerns.

Another big concern was the future of Canpotex – the joint marketing and logistics firm for Saskatchewan potash. While many people absurdly talk about Canpotex as a cartel, the opposite situation is actually in play. Canpotex handles about 18% of global supply of potash while China alone buys – in one negotiation each year – 22% of global supply. Potash prices are driven by some powerful and integrated buyers and ending our ability to meet that marketing power with some of our own was risky.

The CEO of BHP – Marius Kloppers – indicated that after the buyout it would be his intention to withdraw from and essentially break up Canpotex.

Aside from the loss of ability to balance the buying power in the global potash market, Canpotex was – and still is – one of Saskatchewan's and Canada's great companies and one of the world's best logistics companies. So, really two important Saskatchewan companies were in play as part of this deal.

The final big issue is a bit more philosophical: mind and management. The fear was that having such a large Saskatchewan company owned by an Anglo-Australian company would mean that Saskatchewan would lose the benefits of having local executives vested in the interests of Saskatchewan communities.

On this issue, I have to tell you that at the time, I was a skeptic. However, oddly, since my personal move to Calgary, I understand it better. Calgary is a city full of industry leaders, associated mostly with the oil patch, who are an amazingly active group when it comes to philanthropy and city building. Basically, a head office town has a leadership pool, and a wealth pool, that makes a big difference. And since big philanthropy and city building really requires the support of CEOs and Board Chairs, it matters where they live. And this group is also a source of new business ventures and entrepreneurship. I have come around a bit personally on the importance of mind and management.

Another way of saying this is that many of us who believe in market freedom can easily make the classic mistake of assuming perfect information and rationality. In the real world, economies are deeply driven by who has what information and who is talking to whom. Relationships and location matter a great deal.

As our understanding of the file grew in 2010, it became increasingly clear that the risks of the buyout for Saskatchewan people were considerable – a massive tax hit, potential deep loss of market power for a key industry and a move backwards on our efforts to increase head office intensity.

The risks on the other side – basically, reputation and the potential slowdown of the Jansen development – seemed easier to manage. And indeed, after the deal ultimately was rejected, I would suggest that Saskatchewan's very deliberate and active charm offensive, was largely successful and the calculation that Jansen would ultimately be developed at a pace driven by global potash prices seems to have been accurate.

Now, you may be wondering where the federal government was in all of this. Under the *Investment Canada Act*, Industry Canada was expected to consult with the province. And they did.

However, the problem was that because the details of takeover bids are so commercially sensitive, the *Investment Canada Act* requires extreme secrecy on the part of Industry Canada. The officials were just complying with their statutory obligations but the consultations became completely absurd as a consequence of them. We would have meetings where the federal officials would start by unplugging the phones from the wall just to be sure no one was listening in. Then we would get into conversation where we were given details that had already been made public by the companies and yet we were supposed to behave as though they were the codes to the nuclear vault.

In fact, Industry Canada maintained – and served us with legal notice – that their discussions with us meant that it was illegal for the Premier or the Ministers to make any public comments on the file. This in the middle of the most important public debate happening in Saskatchewan that year.

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So, my sense was that while federal officials were taking the rules seriously, the consequence was a conversation that was stilted.

In addition, my impression was that the federal process was very much focused on the conditions that would be imposed on the deal rather than a broader assessment of its value for Canadians. I might be wrong because the process was so opaque, I really don't know what was being discussed in private in Ottawa. However, my sense was that the statutory review was about finding the conditions necessary to enable approval of the transaction rather than about a broader public interest balancing. Indeed – other than the highly unique situation with MacDonald Dettwiler – no prior request had ever been denied under the statute. One national security denial versus over 1500 approvals.

It was also my impression that BHP and its Canadian lobby firm felt strongly that the game was in Ottawa and they did not need overly to worry about concerns being raised in Saskatchewan.

And I think they came by that view quite honestly. If the Saskatchewan government had stayed within the standard process, I have no doubt the deal would have proceeded.

What was different here was that the Saskatchewan government moved quickly to get internal and independent financial, legal and other advice to become highly informed about the deal and then released much of that information into the public domain so that Saskatchewan people could engage in an informed debate on the topic.

Now, many people at the time criticized Saskatchewan for playing politics. I hate this criticism. If politics means involving the public in decisions that affect them tremendously, I will stand firmly in defence of politics. How is it that we in general can be so positive about the idea of democracy and yet so simultaneously negative about the idea of politics?

I am a deeply committed advocate of free trade and I am also – for all the good reasons enunciated at this conference – a defender of the general good in the exchange of investment between countries. I will go further and say that the general well-being of humanity is advanced by economic integration and interdependence.

However, that doesn't mean that every individual transaction is in the interests of Canada. The world out there does not necessarily play fair and there are lots of examples of lack of reciprocity. We need to be smart about these things and whatever our ideology, we need to be willing to look at the facts of individual cases. Also, in some cases where for example there are transfer pricing problems or potential tax avoidance opportunities, it is far better to address these issues in advance rather than trying to regulate after the fact to catch up.

I am not even saying that I am entirely sure that we got it right on the BHP buyout decision. It is something I still debate with myself and others. But I do think that the process initiated by Saskatchewan and the public engagement was superior to a star chamber process where Canadians and potential investors have no idea what the criteria are, have no useful signals about what needs to be done differently in the future, don't even know what the conditions are when a deal is approved and aren't engaged in any effective way while a deal is under consideration.

And I also believe that if BHP had paid less attention to this star chamber process and more attention to the issues being raised in the Saskatchewan discussions, they might have fashioned a superior proposal that better advanced both their own long-term interests and Canadian interests.

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But we also need to be willing to assess large transactions and make sure Canadian interests are protected.

I entirely support the Conservative decision to lift the limits on enterprise value before a review is triggered. I will concede to having no useful definition of a “strategic asset” so firm size is a good trigger – with the exception perhaps of national security issues and certain transfer pricing problems that can arise even for smaller companies and are difficult to deal with through generic regulation.

I also think that multilateral negotiation of more open investment regimes – with full reciprocity – is an excellent way of allowing us to open up while also ensuring we’re getting fair access to opportunities in other countries.

However, when a review is being conducted in Canada, I believe that a more informed public discussion is a good thing.

I suggest that at the outset of a review, investors be required to create a plain language disclosure document that is made public and contains key information on local and national implications of a transaction. This should, in most cases, include public disclosure of undertakings the investor is willing to make to address potential public concerns. In rare cases, some undertakings could remain

private but I actually think that much could be revealed without creating any serious risk of commercially sensitive disclosure. Certainly, in the BHP case, it was laughable that Industry Canada was going to such lengths to protect information that had already been made public by the company itself.

And for those of us in this room who are cynical about what the public would do with more information, I will remind you that after full and vigorous political debate, Canadians chose the Free Trade Agreement in 1988. And because of the fullness of that debate, we grew up a bit as a country and subsequent trade deals have been politically easier.

The case for engagement with the world is a good one. It will win hearts and minds. It is actually strengthened when Canadians have confidence that we are remaining vigilant in protecting our interests – and that can best be achieved when we rip down the star chamber and talk about these big decisions right out in the open. And, I suspect, such an approach will inherently improve the understanding of potential investors about what matters to Canadians, make our system more predictable and – since predictability is bankable – improve both the quality and the quantity of foreign investment.

*Thank you for being such an attentive audience.*