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RECENT DEVELOPMENTS

Of Takeovers, Foreign Investment and Human Rights: Unpacking the Noranda–Minmetals Conundrum

Aaron A. Dhir*

1. INTRODUCTION

In September 2004 Toronto-based Noranda Inc. (“Noranda”), one of the world’s largest producers of nickel and copper,1 and China Minmetals Corp. (“Minmetals”), a state-owned Chinese company whose 2005 revenues exceeded US$17.78 billion,2 announced exclusive talks regarding a potential 100 percent buyout of Noranda.3 The proposed friendly takeover was expected to be valued at approximately US$7.4 billion. In late October, Noranda CEO Derek Pannell stated that due-diligence on the deal was nearing completion and that legal documents were in preparation.4 The dynamic, however, shifted in mid-November when Noranda announced that the exclusivity period for negotiations had expired and would not be renewed. While Noranda’s shareholders

* Assistant Professor, Faculty of Law, University of Windsor. I gratefully acknowledge those who have discussed the ideas articulated in this piece with me, including Ian Lee, David Wiseman, Maureen Irish, Brian Masse, Poonam Puri and Tony VanDuzer. I owe particular thanks to Bruce Elman and to Vincent-Joël Proulx and Mercedes Perez for their helpful comments on earlier drafts. I also acknowledge with appreciation the research assistance of Eli Udell, the research and editorial assistance of Faran Umar-Khitab and the support of grants from the Foundation for Legal Research and the Law Foundation of Ontario. Last, I am indebted to Stephanie Ben-Ishai, General Editor of the Banking & Finance Law Review.


2 See online: China Minmetals Corporation <http://www.minmetals.com/English/e_2_4.htm>.


4 Kevin Foster, “Noranda Open to Suitors; Minmetals won’t Commit” American Metal Market (17 November 2004) 1.
were informed that discussions between the two companies would con-
tinue on a non-exclusive basis, Noranda had left itself open to offers
from other parties. In early March 2005, Pannell stated that Minmetals
was still interested in purchasing Noranda but expressed frustration at
the lengthy process, which was depressing Noranda’s share value.

At the time, Noranda owned 59 percent of leading Canadian nickel
producer Falconbridge Limited (“Falconbridge”). On March 9th, it was
announced that the boards of Noranda and Falconbridge had unani-
mously agreed to a merger that would be effected by a share exchange
takeover bid by Noranda. The successful amalgamation was announced
on June 30th and had the effect of ending Minmetals’ interest as pur-
chasing the merged company would prove too costly. Most recently,
Falconbridge, Inco Limited and Phelps Dodge Corporation announced
a US$56 billion three-way combination which, if all necessary precon-
ditions are met, will create one of the largest global mining companies.

While this factual matrix is seemingly innocuous, Minmetals’ pro-
posed takeover of Noranda actually catalyzed an intense controversy.

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5 Noranda Inc., News Release, “Noranda Update on Negotiations with China Min-
metals” (16 November 2004), online: CCNMatthews <http://cnmp.ccnmatthews.com/
6 “China Minmetals Still Keen on Buy: Noranda” (1 March 2005), online: Peoples’
Daily Online <http://english.people.com.cn/200503/02/eng20050302_175244
.html>.  
7 See Austen, supra, n. 1.  
8 Noranda Inc., News Release, “Noranda and Falconbridge Agree to Combine” (9
March 2005), online: CCNMatthews <http://cnmp.ccnmatthews.com/client/noranda/
9 The amalgamated company continued under the name Falconbridge Limited. See
Falconbridge Limited, News Release, “Noranda and Falconbridge Complete Amal-
gamation” (30 June 2005), online: CCNMatthews <http://cnmp.ccnmatthews.com/
client/falconbridge/release_en.jsp?actionFor=547261&releaseSeq=25&year
=2005>.  
10 “Chinese Encounter Pitfalls Abroad” Taipei Times (14 April 2005), online: Taipei
11 The new company would operate under the name Phelps Dodge Inco Corporation.
Billion Three-Way Combination, Creating One of World’s Largest Mining Com-
panies” (26 June 2006), online: Inco <http://www.inco.com/newinco/en/news/re-
leases/june_26_2006.asp>.  
12 “There has not been a fuss quite like it since the turn of the century when a C$50
billion wave of takeovers pushed U.S. control of Canadian oil and gas production
The proposed transaction reflects a current wave of Chinese expansion. After decades of preventing its companies from overseas investment, the Chinese government has permitted a dramatic increase in outward cross-border merger and acquisition activity. In 1995, the outward foreign direct investment (“FDI”) stock holdings of Chinese companies were valued at US$15.8 billion. In 2003, this figure increased substantially to US$37.0 billion. In order to facilitate this outward growth, by 2003 China had entered into over 100 bilateral investment treaties with various other states.

This trend has seen Chinese companies make a number of high-profile movements, including a failed 2005 bid by the China National Offshore Oil Corporation (“CNOOC”) for U.S. oil and gas producer Unocal Corporation (“Unocal”). While Unocal’s shareholders eventually approved a merger with Chevron Corporation, U.S. Congressional reaction to the CNOOC offer was characterized by a suspicion and hostility that was predicated on economic nationalism and concerns over national security. These factors were undoubtedly present in the...
Canadian debate surrounding the Noranda-Minmetals affair. However, unlike the CNOOC bid, the Noranda-Minmetals affair was distinguished by the prevalence of human rights issues. While these issues were relevant to the CNOOC bid, they appear to have been peripheral. In other words, some in the U.S. argued that allowing the CNOOC transaction to proceed would strengthen the fist of an already repressive Chinese regime. In contrast, while this argument was certainly made in Canada (and will be discussed in more detail below), the Canadian discourse also focused on substantive human rights concerns that were specific to the bidder, Minmetals.

Had a final agreement between Noranda and Minmetals been reached, it would have required the approval of the Canadian government. For example, a finalized deal would have engaged Canada’s foreign investment review process under the *Investment Canada Act*. The human rights concerns associated with Minmetals were considered to be of such salience that the federal government, acknowledging its own trepidation, surprisingly announced that these concerns would be taken into consideration during any governmental review of the takeover.

Thus far, the proposed Minmetals bid has not been the subject of scholarly inquiry. I hope to offer a beginning point for discussion by exploring certain issues arising from the proposed transaction. As such, this article proceeds in three parts. The first provides the landscape of to a Chinese Company’s Bid to Buy Unocal is Not Only Hysterical, It’s Foolhardy” *The Toronto Star* (3 July 2005) A18.

The former Liberal government subsequently introduced Bill C-59, which would explicitly allow issues of national security to form part of the foreign investment review process. See Bill C-59, *An Act to Amend the Investment Canada Act*, 1st Sess., 38th Parl., 2005. It should be noted that Minister David Emerson stated the Minmetals bid did not motivate the Bill’s introduction. Rather, it was designed in light of “post-9/11 concerns about transfers of sensitive technology and military hardware.” See Steven Chase & Simon Tuck, “National Security Bill Not Aimed at Energy Takeovers: Emerson” *The Globe and Mail* (15 July 2005) B1. Although the Bill died with the fall of the former Liberal government, the Conservative government recently indicated that similar legislation is currently being crafted. See Simon Tuck & Steven Chase, “Feds Eye New Hand on Foreign Ownership” *The Globe and Mail* (15 May 2006) B1.

Lohr, supra, n. 18.

*R.S.C. 1985, c. 28 (1st Supp.) [ICA].*

the Canadian foreign investment review process by discussing its recent historical background and delineating the mechanics of a proposed foreign investment. Following this is an overview of the human rights issues germane to Minmetals and the resulting public discourse. A puzzling disconnect between the rhetoric and the reality is revealed. Namely, despite the federal government’s overtures, it appears that it actually has no legal basis for integrating human rights issues into the foreign investment review process. Further, while Noranda publicly defended the proposed bid and was dismissive of the broader context at issue, it will be argued that this position was unfortunate and merits reconsideration. In that regard, the balance of this article attempts to situate the Noranda-Minmetals conundrum within the context of directors’ duties owed to the corporation. In particular, employing a progressive construction of the fiduciary duty and the duty of care, it is suggested that the preferred approach would have been for Noranda’s board to have incorporated the human rights concerns into its consideration of the proposed bid and any actual bid that may have followed.

2. OVERVIEW OF CANADIAN FOREIGN DIRECT INVESTMENT LAW

(a) Recent Historical Background

Throughout the 1960s and 1970s, the Pearson and Trudeau governments pursued protectionist policies aimed at regulating foreign investment. Set against the backdrop of a forceful nationalist stance,23 the Foreign Investment Review Act,24 which came into force in December 1973, was the first piece of legislation generally applicable to foreign investment in Canada.25 FIRA served to subordinate the promotion of foreign investment “to the achievement of national economic policy objectives.”26 The legislation required foreign investors to apply to the Foreign Investment Review Agency (“the Agency”), which was de-

24 S.C. 1973-74, c. 46 [FIRA].
25 Sheppard & Hardwicke-Brown, supra, n. 23 at 7.
signed to provide close scrutiny of proposed foreign investments to ensure they would yield tangible domestic economic benefits.27 Indeed, in order to be permitted, the new investment or proposed takeover was required to be of “significant benefit to Canada.”28 In the early 1980s, the federal government’s desire to closely regulate and monitor the economic activities of foreign investors in Canada continued to have momentum.29 For example, in October 1980 it advanced the National Energy Program (“NEP”), which sought to enhance local ownership in the oil and gas sector.30 In furtherance of this goal, the Agency was directed to thwart any takeover attempts by foreign oil businesses while the NEP simultaneously exposed outside oil businesses to “massive takeover attempts by Canadian capital.”31

The Canadian government’s austere approach resulted in friction with countries such as the U.S. The U.S. Secretary of State objected to Canadian requirements that American investors undertake to bank with Canadian financial institutions, employ Canadian advertising companies and accountants, transplant manufacturing operations to Canada etc.32 The friction, and proceedings commenced by the U.S. under the General Agreement on Tariffs and Trade,33 resulted in a softened stance.34 But

28 FIRA, supra, n. 24, s. 2(1). The factors to be considered in determining if this standard was met were enumerated in s. 2(2) of FIRA.
29 In a Winter pre-election speech, Prime Minister Trudeau remarked as follows:
We want to expand and strengthen FIRA, not weaken it. FIRA’s mandate will be broadened to include the periodic review of all foreign firms of large size to assess the performance of these companies in such areas as export promotion and research and development. FIRA will also be required to publicize proposed foreign take-overs beyond a certain size once they have been submitted to the Agency. This will encourage counter-offers from Canadian-controlled interests. Most importantly, through government guarantees of bank loans, FIRA will help provide financial assistance to Canadian companies that want to compete for foreign take-overs or repatriate foreign ownership of assets.
Sheppard, supra, n. 23 at 9, citing Robert Donaldson, & Craig Thorburn, “Foreign Investment in the 1990’s in Canada. The Investment Canada Act” (Address to Insight Seminar, 18 May 1989) at 16 [Donaldson & Thorburn].
30 Ibid., at 8.
31 Ibid., at 10.
32 Ibid., at 11, citing Donaldson & Thorburn at 20.
34 Sheppard & Hardwicke-Brown, supra, n. 23 at 11 – 12.
by 1982, it was clear that the \textit{FIRA} review process, and other initiatives perceived as being hostile to foreign investors, had alienated various foreign governments and foreign companies in the oil and gas industry.\footnote{Ibid., at 12.}

The pendulum swung the other way, however, beginning in the mid 1980s with the election of the Mulroney government. True to its campaign platform,\footnote{Ibid.} the Progressive Conservative party acted quickly to implement a more liberalized investment and trade regime.\footnote{Sheppard & Hardwicke-Brown, \textit{supra}, n. 23 at 11-5 – 11-6. As stated by the Minister of Finance at an International Monetary Fund meeting, “Canada’s ‘welcome mat’ is out once more for foreign investment – Canada is a good place to do business; we are opening our doors to those who want to share in the tremendous opportunities with which we have been endowed.” See Sheppard & Hardwicke-Brown, \textit{supra}, n. 23 at 13, citing Donaldson & Thorburn at 23.} The new climate of deregulation and investment promotion, which reflected broader trends and the globalization of international markets, gave rise to the new \textit{ICA}.\footnote{ICA, \textit{supra}, n. 21.} The philosophy underlying the new legislation represented a significant departure from its predecessor. \textit{FIRA} explicitly provided as follows:

\begin{quote}
\ldots the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of national concern. \ldots
\end{quote}

In sharp contrast, the purpose of the \textit{ICA} is expressed as follows:

\begin{quote}
Recognizing that increased capital and technology would benefit Canada, the purpose of this Act is to encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities and to provide for the review of significant investments in Canada by non-Canadians in order to ensure such benefit to Canada.
\end{quote}

While the new legislation maintained a review process (discussed below), the prior austere review was abandoned in favour of a “net benefit” standard (rather than the more onerous “significant benefit” standard).\footnote{Campbell, \textit{supra}, n. 27 at I/128. This standard is discussed in more detail below.} The liberalization of the foreign investment climate was subsequently enhanced by the \textit{Canada–U.S. Free Trade Agreement}.\footnote{22 December 1987, Can. T.S. 1989 No. 3, 27 I.L.M. 281 (Part A, Schedule to the}
and the *North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States*.43 Correspondingly, FDI into Canada increased dramatically from CDN$131 billion in 1990 to CDN$349 billion in 2002.44

**b) The Mechanics of a Proposed Foreign Investment**

Subject to certain exemptions,45 if a non-Canadian investor46 (such as Minmetals) proposes to acquire control of a Canadian business47 (such as Noranda) it must give notice to the Director of Investments and provide the prescribed information.48 Certain proposed investments are considered reviewable under the *ICA*, thus requiring ministerial approval before they can be implemented. As mentioned above, in order to extend approval, the Minister must be satisfied that the proposed investment “is likely to be of net benefit to Canada.”49 To be considered reviewable, the asset value of the acquired Canadian business must meet or exceed a certain monetary threshold. By increasing the applicable threshold, the *ICA* has had the effect of decreasing the number of reviewable transac-

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44 Campbell, *supra*, n. 27 at I/127.
45 See *ICA*, *supra*, n. 21, s. 10.
46 The definition of “Canadian” is set out in the legislation as follows:

“Canadian” means

(a) a Canadian citizen,
(b) a permanent resident within the meaning of the *Immigration and Refugee Protection Act* who has been ordinarily resident in Canada for not more than one year after the time at which he or she first became eligible to apply for Canadian citizenship,
(c) a Canadian government, whether federal, provincial or local, or an agency thereof, or
(d) an entity that is Canadian-controlled, as determined pursuant to subsection 26(1) or (2) and in respect of which no determination or declaration has been made under subsection 26(2.1) or (2.2). . .

*Ibid.*, s. 3.

47 The rules pertaining to acquisition of control are set out in s. 28 of the *ICA*. While somewhat intricate, they “basically involve presumptions that a voting interest of greater than 50 per cent constitutes control, a voting interest of less than 33.33 per cent does not constitute control and, in between these levels, control will exist unless it can be established that control in fact has not been obtained.” See Campbell, *supra*, n. 27 at I/129.
48 *ICA*, *supra*, n. 21, ss. 11, 12.
49 *Ibid.*, s. 21(1).
tions as compared with FIRA. For direct investments, the threshold is currently CND$5 million; for indirect investments, it is CND$50 million. However, non-Canadian investors from World Trade Organization (“WTO”) member countries (such as China) benefit from a higher threshold for direct acquisitions. For these investors, the threshold is calculated annually using a statutorily prescribed formula and is published in the Canada Gazette. For 2006, the amount is CND$265 million. As mentioned above, the proposed Minmetals bid would have been valued at over US$7 billion and therefore would have qualified as a reviewable transaction.

In order to determine whether the proposed investment meets the “net benefit to Canada” standard, the ICA delineates six analytical factors that the Minister is to take into account:

For the purposes of section 21, the factors to be taken into account, where relevant, are

(a) the effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;

(b) the degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada of which the Canadian business or new Canadian business forms or would form a part;

(c) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

(d) the effect of the investment on competition within any industry or industries in Canada;

Sheppard & Hardwicke-Brown, supra, n. 23 at 11-7.
ICA, supra, n. 21, ss. 14(3), 14(4).
For the definition of “WTO Investor”, see ibid., s. 14.1(6).
Amount for the year 2006, Can. Gaz. Pt. I, p. 132 (January 21, 2006). It should be noted that the threshold of CND$5 million for direct investments and CND$50 million for indirect investments is applicable, regardless of the investor’s nationality, if the proposed investor would acquire control of a Canadian business in one of four sectors (uranium production, financial services, transportation services and cultural businesses). See ibid., s. 14.1(5). Further, the federal government has the discretion to conduct reviews of proposed investments that would not otherwise be reviewable if the investment “is related to Canada’s cultural heritage or national identity.” See ibid., s. 15(a).
(e) the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and

(f) the contribution of the investment to Canada’s ability to compete in world markets.56

It has been noted that employment is a factor that is typically assigned much weight in the review process; in particular, if it is expected that the proposed investment will result in the loss of significant employment in regions of the country that are economically weak. Other factors of significance include research and development activity, capital investments, local managerial autonomy and local head offices.57 The acquiring investor will sometimes be required to submit undertakings to the Minister to ensure the “net benefit” factors are met. For example, to secure approval of its acquisition of Canadian retailer Woolco, Wal-Mart undertook to make “commercially reasonable efforts” to use “Canadian-based suppliers.”58 The merits of the Minister’s decision do not appear to be subject to judicial scrutiny.59

3. DISCOURSE ON THE PROPOSED NORANDA TAKEOVER

(a) Human Rights Issues Associated with Minmetals

The impugned conduct of Minmetals relates to the issue of forced labour. In 1997, the U.S. Senate Foreign Relations Committee (“the Committee”) heard evidence which detailed the common process in

56 Ibid., s. 20. In its Guidelines, Industry Canada has said the following with respect to the “net benefit” standard:

In reaching a decision, judgments will be made both in measuring the effects of a proposal in relation to the relevant individual factors of assessment and in measuring the aggregate net effect after offsetting the negative effects, if any, against the positive ones. An investment will be determined to be of net benefit when the aggregate net effect is positive, regardless of its extent.


57 Campbell, supra, n. 27 at I/131.


China of: (1) sentencing convicted prisoners to “reform” via labour (i.e., prison labour); or (2) sentencing those who have not been criminally convicted but have committed minor offences to “reeducation” via labour (i.e., forced labour camps). With respect to the latter, leading non-governmental organization Human Rights Watch has decried the practice of reeducation through labour as being in contravention of international human rights law, given that the process is arbitrary, involves no judicial authority, does not involve a public trial, does not allow the individual to raise any defence, does not afford a right to counsel and does not incorporate a presumption of innocence. Further, such sanctions are used to incarcerate religious and political dissidents and often the term of detention is extended even after the individual’s sentence has expired.

In his testimony before the Committee, Chinese dissident Harry Wu cited information estimating that approximately 1.78 million people were held in reeducation through labour camps at the time. Wu himself spent 19 years in various Chinese camps as a political prisoner. He was subjected to both forced labour and various forms of torture before being released and eventually entering the U.S. in 1996 as a visiting professor at the University of California, Berkeley. With respect to Minmetals specifically, Wu referenced evidence from California litigation involving a U.S. company called Excel Industries (“Excel”) and MM Rotors (“MM”), one of Minmetals’ U.S.-based subsidiaries. MM manufactured brake rotors and Excel was a purchaser. In the litigation, an Excel official testified that he personally visited the relevant manufacturing plant in China and that it was, in fact, a prison factory. He was advised that Minmetals was purchasing the majority of brake components produced by the facility. Thus, although Minmetals does not directly run these

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62 U.S., supra, n. 60 at 44.
65 U.S., supra, n. 60 at 50.
camps, the allegation is that it is “part of the network that markets [forced labour] products overseas, acts as trading agents for the [forced labour system], and serves as a reliable partner in keeping the system hidden and profitable.”\textsuperscript{66} As put by English journalist Nick Rufford with respect to another Chinese camp:

As with China’s other labour camps, the authorities disguise the mine’s penal use. Graphite is sold exclusively through Minmetals, a profitable, state-run foreign-trade corporation, though the prison is run by the Shandong bureau of labour reform. The mine earns at least £2-million each year in foreign exchange. Last November, delegates from Minmetals visited Britain and Germany to build on their sales and to seek new customers.\textsuperscript{67}

(b) Considering Non-economic Factors in the Foreign Investment Review Process

On October 8, 2004, the Globe and Mail reported that former Industry Minister David Emerson said he would “look at human rights concerns” if called upon to assess the proposed takeover of Noranda.\textsuperscript{68} He also suggested he would consider the human rights records of potential acquirers when assessing any future foreign takeovers. Emerson, however, stopped short of endorsing the inclusion of human rights in the enumerated “net benefit” factors, suggesting that this “would set a thorny precedent because it could lead to a host of new behavioural tests.”\textsuperscript{69} While none of the factors expressly mention human rights, an Industry Canada official was reported as suggesting that such concerns could be validly considered given that “approval for a foreign takeover is at the discretion of the minister.”\textsuperscript{70} Further, while former Prime Minister Paul Martin welcomed the bid for Noranda, he similarly stated that human rights concerns would be taken into account.\textsuperscript{71}

In reality, however, it is highly unlikely that human rights considerations could have lawfully formed part of the Minister’s decision-making process. As noted by Paterson and Band, the s. 21 factors are seemingly exhaustive and it is presumed that the Minister is not able to

\textsuperscript{66} Wu, \textit{supra}, n. 63.

\textsuperscript{67} \textit{Ibid.}

\textsuperscript{68} Tuck & Stueck, \textit{supra}, n. 22.

\textsuperscript{69} \textit{Ibid.}

\textsuperscript{70} \textit{Ibid.}

consider any additional factors.\textsuperscript{72} Thus, as posited by the Conference Board of Canada, it is not possible for foreign investors to be blocked as a result of non-economic grounds.\textsuperscript{73} Martin and Emerson were therefore either being disingenuous, or were simply ill-informed as to the correct interpretation of the legislation. Whichever the case, this raises a pressing set of normative questions. Should the criteria by which foreign buyers are judged be broadened to incorporate non-economic factors? Should the human rights record of foreign buyers be taken into consideration? According to one critic, to do so would result in “absurd situations” where Canada might, for example, be inclined to thwart future American takeovers due to the moral and legal questionability of Bush’s invasion of Iraq.\textsuperscript{74}

(c) The Public Debate

While the purview of the foreign investment review process is beyond the scope of this article, the purview of directors’ duties to the corporation as they apply to the situation will be discussed. Before doing so, it is useful to have a sense of the fascinating public debate produced by Minmetals’ proposed acquisition. Human rights activists, labour leaders and academics cited the Chinese government’s dismal human rights record and its authoritarian control over virtually all institutions, including the judiciary, government organs and the media.\textsuperscript{75} For these groups, countries like Canada have a role to play in “encouraging” China to undertake democratic reform through sanction. As argued by one commentator “a price should be paid for clinging to the authoritarian faith. . .[t]he leadership of China must realize that it cannot enjoy full participation in free economies and open societies until it becomes one, too. As a state-owned agency of an authoritarian government, China

\textsuperscript{72} Paterson & Band, supra, n. 26 at 11-24, n. 135.
\textsuperscript{73} Conference Board of Canada, “Should Canada Update Its Foreign Investment Rules?” Executive Action (November 2004) at 4 (noting, however, “the exception of investors in sectors such as telecom, media and culture, where there are caps on the percentage of foreign ownership. . .”).
Minmetals should not be allowed to own the assets of our free society until China itself joins the community of the free.”76

In response, some interventions were based on the belief that the adoption of democratic norms can only take place with increased exposure to Western values and structures. In other words, the use of economic liberty as a vehicle for the achievement of political liberty.77 Others reflected a neoliberal economic ideology of unregulated investment and heightened business autonomy. These commentators argued that thwarting the deal would result in severe economic risks and would prevent Canada from rising back to the top of the FDI ladder.78 Indeed, with foreign companies becoming more interested in emerging markets such as India, Mexico and China, there have been recent concerns about the level of FDI that Canada is attracting.79 By way of illustration, consulting firm A.T. Kearney Inc. publishes an annual “FDI Confidence Index” which ranks the 25 most attractive destinations for FDI. While Canada placed 8th in 2002,80 it dropped to 21st in 2005.81 For these commentators, the issue of Minmetals’ labour practices was moot. With respect to practices in Canada, if the takeover proceeded the company would be bound by Canadian labour laws. As with Canadian businesses, non-Canadian investors must comply with all applicable provincial and federal laws. This includes non-derogable minimum standards relating to conditions and terms of employment, such as hours of work, wages, overtime remuneration and working conditions.82 With respect to practices in China, it was argued that our society should leave such issues to specialized bodies like the International Labour Organization.83

The calls for caution were not limited to those on the left. Columnists Peter Foster and Terence Corcoran, normally staunch proponents

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76 Ibid.
77 Reguly, supra, n. 74.
79 Rob Ferguson, “Canada Losing Ground in Foreign Investment” The Toronto Star (18 September 2003) C.01.
80 Ibid.
82 Campbell, supra, n. 27 at I/133.
83 Wiebe, supra, n. 78.
of free markets, vehemently objected to the proposed deal. Corcoran’s hesitation was rooted primarily in business considerations. He argued, among other things, that Minmetals would bring no degree of particular expertise to Noranda’s global operations and that the resulting combination would yield no competitive advantages in terms of creating market efficiencies. However, he also issued one of the most searing indictments based on moral grounds:

OK, Noranda shareholders might get a premium on their shares and make off with a nifty profit; so probably did the German steel mills when they struck cozy arrangements with Hitler.

. . .

. . . there’s the moral issue of selling through market systems to a government that is still essentially totalitarian in its style and outlook. It is not a democracy, it has no serious property rights, no recognizable human rights, no economic freedom. In fact, China’s economic record – despite the progress made to date – is one of economic repression.

Maybe there’s nothing Ottawa can do. But there is too much going on there to justify silence on the part of Canadians. Above all, we cannot continue to treat this story the way we have – as just another corporate takeover between free – enterprise nations. It is not.

What then of those closest to the proposed deal? Rather than constructively engaging the hesitations of government officials, civil society etc., Noranda adamantly defended the proposed sale. Other than painting a picture of Minmetals as a well-intentioned corporate citizen, it gave no indication that it would seriously incorporate the human rights concerns into its consideration of the proposed bid and/or any actual bid that may have ensued. Quite the opposite, company executives in fact “expressed . . . disappointment [that] . . . criticism has centred on the rights issue, and ignored the economic opportunity” and went so far as to

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84 See, for example, Peter Foster, “Canadian Bull in the China Shop” The National Post (8 October 2004) FP15.
86 Ibid. Arguably objections from these quarters are not surprising. While they are in part informed by rights-based considerations, they also demonstrate the classical neoliberal rejection of communism: “Mr. Wiebe also suggests we might send out the wrong “signals.” But surely only to other communist countries who want to take over Canadian assets.” See Foster, supra, n. 84.
88 Ibid.
state that the proposed bid was being “exploited” by activists such as Wu.

4. THE PROPOSED TAKEOVER IN THE CONTEXT OF DIRECTORS’ DUTIES

(a) Framing the Issue

The commentary of participants in the debate such as Corcoran seems to impose a dichotomy between the economic dimensions of the proposed transaction and the human rights dimensions. Noranda appears to have implicitly adopted this myopic view by failing to view the latter as relevant to its decision-making process. However, the two dimensions are not necessarily severable. Rather than seeing the issue as “it would not have been an economically advantageous takeover and, in addition, it would have been unethical” or “it would have been an economically advantageous takeover and the human rights aspects are irrelevant,” the issue could also have been framed as “it may not have been an economically advantageous merger because of the human rights-related aspects.” In other words, could Minmetals’ complicity in rights-violating activities have had a detrimental impact on Noranda’s bottom line and thus on its shareholders? Putting the whole ICA review process aside, in considering the proposed takeover, and any actual bid that may have followed, should Noranda’s directors have considered Minmetals’ human rights record in accordance with their prescribed duties? This issue engages two legal duties that Canadian directors and officers are subject to, which impose upon them certain standards of behaviour. Both were developed at common law and are now codified by statute. Specifically, the duty to “act honestly and in good faith with a view to the best interests of the corporation” (i.e., the fiduciary duty) and the duty to “exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances” (i.e., the duty of care).91

90 Business Corporations Act, R.S.O. 1990, c. B.16, s. 134(1)(a) [OBCA].
91 Ibid., s. 134(1)(b). While the Canada Business Corporations Act, R.S.C. 1985, c. C-44 contains parallel statutory provisions, reference is being made to the OBCA since Ontario was Noranda’s governing jurisdiction. See: “Noranda Inc.” online: SEDAR <http://www.sedar.com/DisplayProfile.do?lang=EN&issuerType=03&issuerNo=00004438>. 
(b) Fiduciary Duty

With respect to the fiduciary duty, the precise normative content of the phrase “best interests of the corporation” has been the subject of judicial and academic debate and engages one of the most interesting aspects of corporate law theory. To whom exactly is this duty owed? In discharging this duty to “the corporation”, is it appropriate to consider the positions of non-shareholder stakeholders? For example, should Noranda’s directors have assessed the potential impact of the acquisition on the company’s suppliers, creditors, employees and the broader community?

In the 1930s, this issue was famously debated by Professors Berle and Dodd. For the former, corporate powers were held in trust for the shareholders exclusively.92 This view forms the basis for the contractarian or shareholder primacy model of the corporation.93 For the latter, managerial powers were held in trust for the entire community and not just for shareholders: “[p]ublic opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function. . . .”94 This serves as the basis for what has been referred to as the communitarian or social entity model of the corporation.95 The debate is as relevant now as it was in the 1930s. In 2001, Professors Hansmann and Kraakman declared the “[e]nd of [h]istory for [c]orporate [l]aw,” arguing “the triumph” and

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93 In his influential essay “The Social Responsibility of Business is to Increase its Profits,” economist Milton Friedman argued that “there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception and fraud.” See Milton Friedman, “The Social Responsibility of Business is to Increase its Profits” The New York Times Magazine (13 September 1970) at 122–26.
94 E. Merrick Dodd, Jr., “For Whom Are Corporate Managers Trustees?” (1932) 45 Harvard L. Rev. 1145 at 1148.
95 These theoretical models have been the subject of much academic commentary. For an excellent overview of their fundamental tenants, see William T. Allen, “Our Schizophrenic Conception of the Business Corporation” (1992) 14 Cardozo L. Rev. 261 at 264.
“ideological hegemony” of the shareholder primacy model. While this model has, without doubt, functioned as the dominant paradigm in modern corporate law, its dominance in Canada was recently thrown into question by the Supreme Court of Canada in People’s Department Stores Ltd. (1992) Inc., Re. While the decision leaves various issues unresolved respecting the scope of directors’ duties, scholars have commented on the Court’s noteworthy rejection of the shareholder primacy model, given its following pronouncement:

[I]t is clear that the phrase the “best interests of the corporation” should be read not simply as the “best interests of the shareholders” [. . .] [I]n determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

This aspect of the ruling departs from prior jurisprudence that interpreted the “best interests of the corporation” as being synonymous with maximizing shareholder return. But notwithstanding this, the issue can also be considered in light of traditional discourse. Indeed, in the context of takeover bids, the “best interests of the corporation” at least entails a duty to seek the best value that was reasonably available to shareholders in the circumstances. Accepting this premise, if Minmetals’ complicity in rights-violating activities could have had a detrimental impact on the return of Noranda’s shareholders, would not the directors’ fiduciary duty have obligated them to at least consider this complicity in assessing the proposed takeover bid and any actual bid that may have followed? If it was not considered, can it be said that the directors really attempted to gather the best information available to

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100 Peoples, supra, n. 97 at para. 42 [S.C.R.].
101 Sarra, supra, n. 98, citing various Ontario and Saskatchewan decisions.
them in deciding on a particular course of action vis-à-vis the proposed bid? In other words, linked with the duty of care standard discussed below, if the directors were not willing to even entertain the issue, much less follow up with a degree of inquiry/investigation, how could they be reasonably certain that pursuing the chosen course of action would actually result in value maximization? Is it possible that a different strategy may have been adopted had the issue been considered (for example, canvassing the market to determine if other, more suitable, bidders existed)?

Studies have certainly identified a positive relationship between socially responsible corporate behaviour and financial success, in particular with respect to share value.102 For example, businesses with ethically sound environmental policies enjoy less share value volatility than those without103 and organizations “with a serious commitment to ethical behavior outperform those without such a commitment over the long term.”104 Unfortunately, this is of limited assistance in addressing whether the fiduciary duty of Noranda’s directors would have obligated them to consider Minmetals’ human rights record. As noted by Professor Anand et. al., courts have interpreted the directors’ fiduciary duty to mean that decisions can serve either the short or long-term interests of shareholders. Thus, even if a particular course of action will have a positive economic impact for shareholders in future, but not immediately, the course of action is permissible under the business judgment rule (“BJR”).105 But even if this affords corporate management the ability

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105 Anita Anand & Jessica Penley, Book Review of The Corporation: The Pathological Pursuit of Profit and Power by Joel Bakan (2005) Queen’s L.J. 943. The content and application of the BJR is a somewhat nuanced issue. At a general level, it is understood as the principle that courts should afford deference to the business decisions of corporate directors and officers. See Peoples, supra, n. 97 at para. 64 [S.C.R.].
to incorporate human rights-related considerations into its decision-making processes, it does not obligate them to do so. Even accepting the financial value of doing so in the long-term, such a course of action could prove costly in the short-term. As such, under the BJR, management could simply decide to avoid costly endeavours such as establishing a board committee on human rights, or adopting a human rights policy and accompanying monitoring mechanisms, in favour of effecting an immediate return for its equity holders in the form of dividends or enhanced share value. This, of course, would also be in the directors’ own interests given a North American corporate culture that links short-term profits with the earnings and bonus structures of corporate executives.106

Most importantly though, this discussion is moot since Minmetals was proposing a 100 percent buy-out of Noranda. In other words, concerns relating to long-term economic performance would not have been an issue for Noranda’s existing shareholders at the time of the proposed bid, since they would no longer be in the picture after any successful takeover. Despite this, however, there is arguably still room to assert that the fiduciary duty may have compelled Noranda’s directors to assess Minmetals’ human rights record. For example, as public scrutiny heightened, if all signs indicated that the board was considering the deal in a contextual vacuum, what effect would this have had on the return of Noranda’s shareholders during the board’s consideration process and the subsequent foreign investment review process? Could the association with Minmetals – without clear indications that the relevant human rights issues were “on the radar” – have produced a negative economic result? If so, would any such result have continued if, for example, the takeover ended up falling through?

As recently noted by Professors Williams and Conley, allegations of corporate linkages to human rights abuses can pose serious risks to business reputation, regardless of whether there is an actual finding of

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legal liability.107 Citing studies that have employed qualitative and quanti-
tative research methods to explore business operations’ legal compliance, the authors note that the decisions of top management in particular operations are informed not just by the threat of legal enforcement/sanction, but also by “the ‘enforcement’ of various social actors such as investors, NGOs, consumers, and community members reacting to in-
formation about companies and the companies’ reputations.”108 In light of potential detrimental economic repercussions to shareholders, they conclude that “well-counseled board members are increasingly attending to the underlying conditions in efforts to assess and mitigate those risks.”109

Similarly, SustainAbility Ltd., an international strategy consultancy and independent think-tank, produced a 2004 report titled “The Changing Landscape of Liability: A Director’s Guide to Trends in Corporate Environmental, Social and Economic Liability.” Significant among its recommendations is a call for corporations to move away from passive responsibility, in favour of active responsibility, in order to best mitigate risk to shareholder value from society’s increasing expectations of environmental, social, and economic responsibility. According to the report, “[t]he greater the damage companies are perceived to have caused, the greater the business loss that can occur—making moral liability . . . one of the most significant areas for concern.”110 Examples cited include a decrease in Nike’s share value as a result of allegations that it benefited from child labour and a decrease in sales for Shell as a result of its controversial activities in the Nigerian Delta (inter

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107 Williams & Conley, supra, n. 103 at 93.
108 Ibid.
109 Ibid.

In our view, moral liability arises when a company violates stakeholder expectations of ethical behaviour in such a way as to put business value at risk. Societal expectations of responsible business behaviour are broad and often fast evolving, spanning norms of fairness, honesty, promise-keeping, respect for rights, and due care to protect the interests of people and the natural world. Breaches of basic ethical norms can seriously undermine critical business assets, including the trust and loyalty of customers, the pride and advocacy of employees, and the confidence of shareholders in the probity of management.

Ibid.
alia, Shell was accused of involvement in the executions of activists protesting the company’s environmental and development policies in Nigeria.111

Further, a recent legal analysis of trustees’ obligations in the context of the investment industry is of assistance. As with directors and officers who owe a fiduciary obligation to the corporation, the concept of fiduciary law is the primary limitation on trustees’ decision-making discretion. Also similar to directors and officers, it is generally accepted that the primary responsibility of trustees is to guarantee the financial return of their beneficiaries.112 In 2005, the international law firm Freshfields Bruckhaus Deringer (‘Freshfields’) produced a study at the request of the Asset Management Working Group of the United Nations Environment Programme Finance Initiative (‘UNEPFI’). The report considers the fiduciary duties of trustees with respect to institutional investment funds (e.g., public/private pension funds and mutual funds). In particular, the UNEPFI asked Freshfields to determine whether incorporating environmental, social, governance and ethical factors (‘ESG’) into investment decision-making (e.g., portfolio construction, asset allocation, stock-picking) is “voluntarily permitted, legally required or hampered by law and regulation.”113 In reviewing seven major jurisdictions (both common and civil law), the report concluded as follows:

One element of the law governing investment decision-making that is common to all the jurisdictions is the requirement that decision-makers follow the correct process in reaching their decisions. . .Conforming with the correct process requires decision-makers to have regard to all considerations relevant to the decision, including those that impact upon value. In our view, decision-makers are required to have regard (at some level) to ESG considerations in every decision they make. This is because there is a body of credible evidence demonstrating that such considerations often have a role to play in the proper analysis of investment value. As such they cannot be ignored, because doing so may result in investments being given an inappropriate value.

...
...the links between ESG factors and financial performance are increasingly being recognised. On that basis, integrating ESG considerations into an investment analysis so as to more reliably predict financial performance is clearly permissible and is arguably required in all jurisdictions.\textsuperscript{114}

In light of the above, it can be argued that an assessment of Minmetals’ complicity in rights-violating activities would not just have been of benefit over the long-term. Rather, given the level of discourse and debate received by the proposed acquisition (even though a formal bid did not materialize and the investment review process was not engaged), it is likely that serious scrutiny would have continued, intensified and further mobilized stakeholders such as consumers, community members, activists etc. Indeed, even at the preliminary stage there were calls for public hearings into whether Canada should maintain an investment review process that would allow such an acquisition to proceed.\textsuperscript{115}

In that regard, the situation is analogous to that of Calgary-based Talisman Energy which previously ran its operations in Sudan and, in particular, in the context of the Sudanese civil war. Among other things, it was alleged that government forces and their allies took advantage of Talisman’s oil facilities for rights-abusing activities and that the same forces enhanced security for Talisman’s business operations.\textsuperscript{116} While vehemently denied by Talisman, allegations such as these sparked a huge controversy. Human rights groups protested and mounted a divestment campaign. Shareholders demanded the board assure them that the company was not aiding the Sudanese government in the civil war or in its repeated violations of international human rights law.\textsuperscript{117} In the end, although there was no judicial finding of impropriety, the public outcry had such an impact on Talisman’s reputation and immediate bottom line that the company withdrew from Sudan in 2002. The vola-

\textsuperscript{114} \textit{Ibid.}, at 10, 11, 13 [emphasis in original].
\textsuperscript{115} The former Liberal majority of the House of Commons Industry Committee defeated a motion to hold such public hearings. See Laghi, \textit{supra}, n. 71.
Utility of Talisman’s share price in 2000 was described by the Wall Street Journal as follows:

Largely because of the Sudan cloud, Talisman’s stock languishes at only 10.3 times this year’s earnings as projected... Jonathan Wolff, an analyst with Dresdner Kleinwort Benson in New York, says Talisman’s stock trades at a 6% discount to net asset value, compared with a 20% premium before its Sudan involvement.118

Indeed, before its withdrawal from Sudan, Talisman suffered from a thirty-three percent decline in the value of its shares.119 In announcing the withdrawal, CEO Jim Buckee stated that Talisman “could no longer support the pressure its Sudan operations put on its resources and its share price.”120

It is entirely conceivable that Noranda could have been similarly situated. Further, it is noteworthy that taking stock of Minmetals’ human rights record would, in fact, have been in harmony with the “Ethics & Values” section of the company website, which provides that “every business decision” is based on “an ethical standard” that, inter alia, takes human rights issues into consideration. In addition, the company states:


120 Lily Nguyen, “Talisman to Pull out of Sudan” The Globe and Mail (31 October 2002) A1. The Globe and Mail further reported as follows:

“It was time to turn the page,” [Buckee] said in a news conference about the $1.2-billion sale of Talisman’s 25-per-cent stake in the Greater Nile Petroleum Operating Co. to India’s Oil & Natural Gas Corp. . .

“We felt the controversy detracted...from the strength of our other assets,” Mr. Buckee said.

“Every newspaper mention of Talisman was qualified under ‘involved in Sudan.’ We hope to move on from that instant association.”

Critics who have dogged the company for over three years, urging a boycott of its shares, hailed the announcement as a triumph both for human rights and social activism.

... Eric Reeves, another prominent activist, said in an interview: “We have here an extraordinary example of grassroots activism forcing a Fortune 500 company to withdraw from an extremely lucrative venture, because that venture is immoral.”

“The Talisman episode is a striking example of the future of social advocacy,” said Mr. Reeves.

Ibid.
“[w]e believe that the community, not the economy, is the starting point of economic life. For a community to be sustained, all members must be recognized and treated with respect – consumers, employees, shareholders, the community at large and corporations.”121

(c) Duty of Care

While I have primarily situated this discussion within the context of directors’ fiduciary duty, it could also be framed under the rubric of the duty of care. Similar to the fiduciary duty, whether a director has exercised the requisite “care, diligence and skill” in the circumstances is not readily apparent. While no Canadian litigation has yet been pursued, Professor Sarra has argued that “the duty of care could encompass an obligation to ensure processes [are] in place for compliance with human rights law and corporate codes of conduct.”122 In that regard, in addition to the “Ethics & Values” section of the company website, Falconbridge has adopted a formal code of ethics which provides the following commitment under the category of “Respect Human Rights”: “[w]e know that abuses of what we consider to be fundamental human rights. . .are accepted in some parts of the world. While we do not believe we can independently change this reality, we support the protection of human rights within our sphere of influence and are not complicit in human rights abuses.”123

Most important for present purposes are two statements made by the Supreme Court in Peoples. First, the duty of care dictates a contextual approach that “not only emphasizes the primary facts but also permits prevailing socio-economic conditions to be taken into consideration.”124 Second, the decisions of directors and officers “must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known.”125 Both of these statements would appear germane to the Noranda-Minmetals affair given the considerations discussed above. With respect to the first, ex-

122 Sarra, supra, n. 98 at 1140.
124 Peoples, supra, n. 97 at para. 64 [S.C.R.].
125 Ibid., at para. 67.
pressly permitting directors to consider “prevailing socio-economic conditions” is an important step forward, even if permissive rather than obligatory. With respect to the second, the Court references a requirement that directors’ decisions be informed (i.e., that they be made in light of all relevant circumstances). In the famous U.S. case of Smith v. Van Gorkom, the Supreme Court of Delaware expressed this concept in terms of directors making decisions by informing themselves of “all material information reasonably available to them.” The Court found the directors in breach of their duty of care, inter alia, because the directors accepted a friendly takeover bid without considering all material information. On the facts, this included information as pivotal as documentation respecting the value of the corporation. This information was considered so essential that the directors were found to have met a standard of gross negligence and thus could not avail themselves of the BJR’s protection. While factors such as the human rights record of a potential buyer may not meet such a heightened standard now, it is important to note the increasing importance such factors have taken on (as demonstrated by the Freshfields report).

5. CONCLUDING REMARKS

The issues considered in this article will continue to be relevant, in particular given that China’s Foreign Minister Li Zhaoxing stated the Noranda bid was “the tip of the iceberg” with respect to Chinese investment in Canada. Indeed, after the Noranda-Minmetals talks began, it was reported that China Petroleum & Chemical Corporation (Sinopec Corp.) was consulting with Beijing about the possibility of direct investment in Alberta’s oil sands. Talks were also held between Sinopec

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126 488 A.2d 858 (Del. 1985).
127 Ibid., at 872.
128 Ibid., at 874.
129 Ibid., at 881.
130 Laghi, supra, n. 71. The Foreign Minister explained:

Given our rapid economic growth, we’re facing an acute shortage of natural resources... [n]o matter how plentiful our natural resources, when you divide them by our population of 1.3 billion, the figure will be very small... [t]he Chinese government is encouraging Chinese enterprises to make investments in Canada, particularly in the field of resources exploitation.

I have attempted to offer a beginning point for discussion. In particular, by exploring the Noranda-Minmetals conundrum within the context of directors’ duties and arguing that a progressive construction of the fiduciary duty and the duty of care suggest that Noranda’s board should have incorporated human rights concerns into its consideration of the proposed bid, and any actual bid that may have ensued. I recognize that this progressive construction is somewhat aspirational. It is worth noting, however, that other jurisdictions have recognized the application of directors’ duties in the manner I have advocated. Consider the case of Japan, with respect to its evolving understanding of fiduciary duty:

The Commercial Code of Japan establishes the fiduciary duty of directors, pursuant to which directors are responsible for constructing a risk control system corresponding to the scale and characteristics of their business. For instance, if a director of a Japanese corporation realized that an unfair labour practice occurred in its foreign contract factory, which then attracted media attention and damaged the corporation’s reputation or business, the director may be liable for damages as a result of violating his fiduciary duty. The director could also be sued in a shareholders representative suit. Although no such case exists in Japan, the required level of fiduciary duty is heightened as the complexity and specialization in society progresses, and as the public consciousness regarding international human rights improves. The above scenario is more realistic under current circumstances than it had been in the past.

As stated in the Freshfields report “[l]ast century...fiduciary duties were held to preclude local authorities from applying a standard minimum wage for adult men and women and providing subsidised public transport,”133 This reflects the fact that duties ascribed to directors, such as the fiduciary duty, are organic in nature and “evolve over time to reflect changing social norms and values.”134

Many difficult questions surrounding the Noranda-Minmetals affair remain unanswered and underexplored. Should Canada’s foreign investment review process be revised so as to specifically allow for the

133 Freshfields, supra, n. 113 at 87, n. 350.
134 Ibid., at 87.
consideration of non-economic factors? What are the implications of revising this process so as to allow issues of national security to be considered, as was contemplated by Bill C-59? In seeking to preclude foreign investment from business operations that are implicated in rights-violating activities, what standards do we use in judging which activities are permissible and which are problematic? At a philosophical level, do we accept the universality of Western liberal democratic norms? If so, is it appropriate to impose them on others, without interrogating whether these norms are in fact applicable to every society? Should the “rights” that we are considering be seen as relative in nature, thus depending on cultural context? If not, are we – through our economic policies – promoting a form of Western cultural imperialism? It is questions such as these that will face lawyers, academics, policy-makers and other interested stakeholders as future situations present themselves and we, as a society, are compelled to respond. For the present, the Noranda-Minmetals affair and its surrounding issues remain a perplexing conundrum.