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One of these things is not like the other: A Canadian amalgamation is similar to a Delaware merger, but there are critical differences

OCTOBER 6, 2020 3 MIN READ

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Business combinations are typically referred to in Canada as "mergers;" however, this shorthand obscures the fact that under Canadian corporate law, unlike in Delaware, the concept of a "merger" does not exist. Rather, Canadian corporate statutes provide for several different alternatives for effecting a "merger," including amalgamations, which are generally regarded as the functional equivalent to Delaware mergers.

A recent decision of the Delaware Superior Court (the Court) serves as a useful reminder that there are important differences between a Canadian amalgamation and a Delaware merger that can impact contractual interpretation and deal structuring.

In *MTA Canada Royalty Corp v. Compania Minera Pangea, S.A. de C.V.*, the Court's conclusion that a Canadian amalgamation had the same legal effect as a Delaware merger resulted in a dismissal of the plaintiff's claim for relief.

The decision centred on the interpretation of an anti-assignment clause in a Delaware law-governed acquisition agreement which prohibited the plaintiff from assigning the agreement or any of its rights, interests or obligations, "by operation of law or otherwise," without the defendant's prior written consent. Under Delaware law, in the context of a merger in which one entity is designated as the "surviving entity" and the other is merged out of existence, such a prohibition on assignment generally applies where the contracting party is the non-surviving entity in the merger.

Critically, the plaintiff conceded—and the Court accepted—that a Canadian-law governed amalgamation undertaken by the plaintiff was equivalent to a merger under Delaware law, and more specifically, that the plaintiff's participation in the amalgamation was analogous to the non-surviving entity's participation in a merger. As such, the Court accepted that the amalgamation resulted in the entity that was party to the acquisition agreement ceasing to exist. The amalgamation therefore constituted an assignment by operation of law of the acquisition agreement, and was rendered void by the anti-assignment clause. Accordingly, the Court dismissed the plaintiff's claim.

Canadian amalgamations do not, in fact, extinguish the existence of any of the amalgamating entities or result in the creation of an entirely new entity. Rather, as Dickson J. of the Supreme Court of Canada famously held in *R. v. Black & Decker Manufacturing Co.*, an amalgamated corporation is akin to "a river formed by the confluence of two streams." Dickson J. distinguished amalgamations from other acquisition structures and observed that amalgamations are undertaken "usually for the express purpose of ensuring the continued existence of the constituent companies." Canadian corporate legislation reinforces Justice

Dickson's analysis. In addition, British Columbia's *Business Corporations Act*—which was the statute under which the amalgamation at issue proceeded—expressly contemplates that an amalgamation does not constitute an assignment by operation of law.

The decision in *MTA Canada Royalty* may have been informed by a misunderstanding of the effect of a Canadian amalgamation. Had the Court been presented with a clearer picture of the effect of an amalgamation on the amalgamating entities, it may have reached a different conclusion. More generally, the Court's decision serves as a reminder that subtle, yet critical, differences between Delaware mergers and Canadian amalgamations may impact parties' contractual rights and need to be considered when conducting due diligence and structuring cross-border transactions.