THE NEWSLETTER
OF THE MERGERS AND
ACQUISITIONS COMMITTEE

# Deal Points




**VOLUME XXVIII**
Issue 3, Fall 2023


***AGENDA AND SUBCOMMITTEE REPORTS***
*INSIDE*

# "*Great Hill* clauses" in Cross-Border M&A: Canada Follows Delaware (Again), But How Far?

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## Introduction

In 2013, the Delaware Court of Chancery endorsed what has subsequently been called a "Great Hill clause" (i.e., the provision pursuant to which M&A parties expressly address post-closing control over pre-closing privileged communications between the target and legal counsel).[1] The typical "Great Hill clause" provides that the seller retains control over the target's pre-closing attorney-client communications. This is important, at least in part, so that the buyer does not have access to them post-closing thereby potentially enhancing a post-closing claim against the seller.

**Are "*Great Hill* clauses" effective in cross-border M&A, particularly in a transaction governed by Canadian law?**

Are "Great Hill clauses" effective in cross-border M&A, particularly in a transaction governed by Canadian law? Early indications suggest they are, including given a June 2023 Ontario decision. Canada's largest province is now the country's second jurisdiction to endorse "Great Hill clauses" after Alberta did so ten years ago. We therefore explore "Great Hill clauses," their component subclauses, and their recent judicial treatment (and remaining open questions) for the benefit of M&A lawyers on both sides of the border.

## Alberta Follows First

*NEP Canada* arose from the sale of an oil and gas company when, post-closing, the buyer alleged the fraudulent non-disclosure of various target regulatory issues. The buyer sought to rely on pre-closing communications within the target's possession between, on the one hand, the target and the seller, and, on the other hand, their external deal counsel. Specifically, the buyer argued that because external counsel was advising both the target and the seller in connection with the transaction, the attorney-client privilege was jointly held by the target and seller such that the seller could not prevent the target from using the otherwise privileged communications. After considering U.S. caselaw (although of New York and Illinois rather than Delaware), the Alberta court agreed, citing a failure of drafting foresight by the seller:

> *When [the Seller] sold [the Target] to [the Buyer], they could have inserted a provision into the SPA under which any rights [the Target] had to exercise or waive privilege over documents relating to the SPA negotiations would terminate on closing,*

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[1] See Great Hill Equity Partners IV, LP et al v. SIG Growth Equity Fund I, LLLP, C.A. No. 7906 (Nov. 15, 2013) (Strine, C.) [Great Hill] at 160-162: "Of course, parties in commerce can – and have – negotiated special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation in the merger... Thus, the answer to any parties worried about facing this predicament in the future is to use their contractual freedom in the manner shown in prior deals to exclude from the transferred assets the attorney-client communications they wish to retain as their own."

resolved by accounting experts. But the scope of this provision could be expanded to permit ADR in a broader range of earnout disputes.

For example, in one Delaware state court case that was ultimately decided in December 2022, a judge observed that the arbitration provision in the parties' agreement required an accounting expert to resolve disputes related to the calculation of an earnout amount but not to resolve other disputes arising from the earnout. Since the issue before the court was not about the calculation of earnout payments but rather one of whether earnout targets had been achieved at all, the court proceeded to hear the case in a three-year long trial.

Had the parties written a wider arbitration provision to cover earnout disputes and not just calculations, they could have avoided trial and achieved a quicker resolution to their dispute.

*This article was originally published on Bloomberg Law as "ANALYSIS: Earnouts Are Showing Up in More M&A Deals—and Lawsuits (1)" on June 23, 2023.*



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> *leaving [the Seller] in sole possession of the privilege. They did not.*[2]

## Ontario Tags Along

*Dente* arose from the sale of two safety product companies. Like in *NEP Canada*, the share purchase agreement ("**SPA**") did not include a "*Great Hill* clause." Also, as in *NEP Canada*, the buyer sought to use pre-closing communications between the sellers and targets, on the one hand, and external deal counsel, on the other hand, against the sellers in a post-closing dispute. Unlike in *NEP Canada*, however, the court did not view the sellers and targets as being joint clients of external counsel. The court in *Dente* instead held that external counsel was only representing the sellers during the SPA's negotiation. As such, there *"was no joint solicitor-client privilege shared between the [Sellers] and [the Targets], and therefore there was no joint privilege to be passed on to [the Buyer] when it purchased [the Targets]."*[3]

Nonetheless, both echoing and citing *NEP Canada*, the court instructed that the sellers could have avoided this potential exposure via the SPA:

> *When an owner of a company shares the services of counsel with their company prior to closing, there is a joint privilege. The owner can insert a clause in the [SPA] that would leave the former owner in sole possession of the privilege upon closing. When they fail to do so, the prior owner cannot claim privilege over documents as against the new owner, who now owns the documents…*[4]

## Great Hill Clauses – Common Components

Interestingly, although *NEP Canada* considered New York and Illinois caselaw, neither it nor *Dente* cited any Delaware decisions, whether *Great Hill* or otherwise. Nonetheless, the parallels are apparent such that we expect *Dente* may lead to the increased use of "*Great Hill* clauses" in M&A transactions governed by Canadian law.

**What, then, are the common components of a "*Great Hill* clause"?**

The clause first establishes the privileged communications at issue (e.g., those between the seller and/or target and external deal counsel regarding the M&A transaction and other sensitive pre-closing communications). Second, the clause addresses control over such communications post-closing (e.g., that sole possession of the privilege remains with the seller and that any joint or common privilege the target would have

[2] NEP Canada ULC v. MEC OP LLC, 2013 ABQB 540 (CanLII) at para. 44.
[3] Dente et al. v. Delta Plus Group et al., 2023 ONSC 3376 (CanLII) [Dente] at para. 9.
[4] Dente at para. 61.

otherwise enjoyed is released or waived). Third, the parties will typically include a "no use" clause that expressly prohibits the buyer from relying on the subject communications in any post-closing dispute against the seller.

Additional provisions may also be desirable. The buyer, for example, may wish to address otherwise privileged communications the buyer will need control over to effectively manage the target operations, assets and liabilities acquired at closing. The seller, for example, may wish to address its ability to retain external deal counsel in any post-closing dispute with the buyer arising from the transaction. To avoid confusion post-closing, the parties may include a covenant requiring the pre-closing identification and segregation of potentially privileged communications. For greater certainty, the parties may also wish to expressly identify external deal counsel in the transaction agreements and the client(s) they represent.

### *Great Hill* Clauses – Open Questions in Canada

While both *NEP Canada* and *Dente* clearly endorse the notion of "*Great Hill* clauses," both do so in a very brief and high-level manner. Much therefore remains to be seen regarding how closely Canada will follow Delaware in this area, even in these two provinces. Caution is warranted, and two examples are illustrative.

An initial caveat is that, while *NEP Canada* and *Dente* addressed "*Great Hill* clauses" in share acquisitions, we have not yet seen a similar discussion in Canada regarding asset acquisitions. Delaware has tackled the issue, including in *DLO Enterprises, Inc.*[5] where the court distinguished between the two acquisition contexts and highlighted that in asset sales the issue will largely be decided by the scope of "*acquired assets*" and "*excluded assets*" as defined by the asset purchase agreement ("**APA**"). The court then held that, because "*excluded assets*" in the subject APA included "*the [Sellers'] rights under or pursuant to this Agreement*", the "*sellers retained privilege over communications related to the [APA] negotiations.*"

A second caveat is that Delaware courts have wrestled with whether a seller could retain privilege contractually only to then inadvertently waive it by subsequent conduct.

In *Great Hill*, the court repeatedly noted that, even if the seller had contractually retained control over the privileged communications at issue, the seller might have waived that privilege "*through its lengthy failure to take any reasonable steps to ensure the Buyer did not have access to the allegedly privileged communication" (i.e., for not "taking any action to ensure that those attorney-client communications did not [at closing] pass to the surviving corporation in bulk and remain in the surviving corporation's full possession and control for an entire year…*")[6].

In *RSI Holdco*,[7] the court revisited this issue. Unlike in *Great Hill*, the seller had secured a "*Great Hill* clause" in its favour but, relying on the foregoing obiter comments in *Great Hill*, the buyer argued that the seller had waived its privilege by failing, pre-closing, to remove the privileged communications from the target's computers and email servers. The buyer further highlighted that the seller had "*done nothing*" post-closing to "*get these computer records back*."

The court rejected the buyer's arguments on three grounds. First, the buyer's "*argument for waiver would undermine the guidance of Great Hill – which cautioned parties to negotiate for contractual protection*." Second, even if privilege had been waived, the "*no use*" component of the "*Great Hill* clause" would still preclude the buyer from relying on the relevant communications. Third, the "*Great Hill* clause" also included a component requiring the parties to strive to preserve and protect the seller's retained privilege through and after closing. As such, had privilege been waived, "*it would necessarily be due in part to [the Buyer's] own failure*" to abide by this undertaking. The court would therefore not countenance a situation whereby the buyer's "*own failure to preserve*" the seller's privilege could "*inure to [the Buyer's] benefit.*"

[5] DLO Enterprises, Inc. v. Innovative Chemical Products Group, LLC, C.A. No. 2019-0276-MTZ (Del. Ch., June 1, 2020).
[6] Great Hill at 162 (emphasis in original).
[7] Shareholder Representative Services LLC v. RSI Holdco et. al., C.A. No. 2018-0517-KSJM (Del. Ch., May 29, 2019).

## Takeaways for Cross-Border M&A

**Given that Ontario, Canada's largest province, has become the country's second jurisdiction to endorse "*Great Hill* clauses" as a means for contractually addressing pre-closing privileged communications, we expect to see an increase in the frequency of these clauses in Canadian-law governed M&A transactions.**

U.S. and Canadian deal lawyers alike should carefully consider the treatment of such pre-closing privileged communications and impress upon their clients the risks involved if left silent in the purchase or business combination agreement. Clear and unambiguous drafting around pre-closing privileged communications will be key to avoiding disputes post-closing.

That said, caution is warranted: while both *Dente* and *NEP Canada* clearly endorsed the notion of "*Great Hill* clauses," each did so in a very brief and high-level manner. Moreover, because neither court scrutinized an actual "*Great Hill* clause," it remains to be seen how Canadian courts may interpret the actual provisions often found in such clauses.

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## Recent M&A Trends in the Indian EV Market

**The M&A landscape in India's EV sector has been dynamic, reflecting the industry's vibrancy.**

Over the past couple of years, the Indian EV sector has seen an uptick in M&A activity. The Indian EV industry has attracted significant investment and is becoming steadily more attractive to strategic players, private equity, and venture capital investors. Some of the most notable M&A deals in the EV space in India include:

### Ola and Etergo

In May 2020, Ola Electric, the EV branch of the Indian ride-hailing giant, acquired Etergo, an Amsterdam-based electric scooter startup. This acquisition was aimed at bolstering Ola's own manufacturing plans for electric two-wheelers.

### Hero MotoCorp and Ather Energy

In October 2016, Hero MotoCorp, India's largest two-wheeler manufacturer, acquired an up to 34.58% stake in Ather Energy, an Indian electric scooter manufacturer. This strategic investment helped Ather Energy in product development and market expansion.

### Mahindra & Mahindra and REVA

One of the earliest significant M&A moves in the Indian EV space occurred in 2010 when automotive giant Mahindra & Mahindra acquired a majority stake in Reva Electric Car Company, which was then rebranded as Mahindra Electric.

### Greaves Cotton and Ampere Vehicles

In 2018, engineering company Greaves Cotton bought a majority stake in EV manufacturer Ampere Vehicles. The acquisition was aimed at diversifying Greaves Cotton's product portfolio and gaining a foothold in the electric mobility sector.

### Tata Motors and Miljo

In 2019, Tata Motors European Technical Centre acquired a 50% stake in Miljo Grenland/Innovasjon, a Norwegian company, to form a joint venture that would develop innovative solutions for electric vehicles.

### Minda Industries and Cellestial E-Mobility

In 2020, auto component maker Minda Industries acquired a 27% stake in the EV startup, Cellestial E-Mobility. The acquisition gave Minda access to key technologies in the EV space.