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Governing Law in Contractual Disputes – The Importance of Choice of Law Clauses

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In *Lilydale Cooperative Limited v Meyn Canada Inc.*, 2015 ONCA 281, the Court of Appeal affirmed both the "closest and most real connection" test and the malleable nature of its application, demonstrating the importance of incorporating choice of law and other dispute resolution clauses in contracts at the drafting stage to streamline resolution if and when disputes arise.

The dispute in *Lilydale* was straightforward. One of the parties, Meyn, was a multinational company incorporated in Canada and operating in Ontario. The other party, Lilydale, was an Alberta corporation operating in Edmonton. The parties entered into an agreement in 1993 through which Lilydale purchased a fryer and oven system from Meyn for its poultry processing plant. In 2004 a fire broke out at the plant. Lilydale sued Meyn, claiming that the fryer and oven system was defective and caused the fire.

At the outset of the proceeding, the parties moved to have the court determine whether the contract was governed by Ontario or Alberta law. This was important because Alberta has a 10 year ultimate limitation period as compared to 15 years in Ontario. As a result, the claim would be barred from proceeding if the contract were governed by the laws of Alberta, since over 10 years had passed since the cause of action arose.

The Court of Appeal applied the "closest and most real connection" test – that is, whether Alberta or Ontario law applied hinged on which jurisdiction had the "closest and most real connection" to the contract – and listed a range of factors which should be considered in applying the test, including:

- where the parties reside;

- the national or provincial character of a business and where its principal place of business is situated;
- the place where the contract was made and where it is to be performed;
- whether the style in which the contract was drafted indicates one system of law over another;
- the economic connection of the contraction with some other transaction;
- the nature of the subject matter of the contract; and
- any other factor which serves to localize the contract.

The Court of Appeal focused on two of these indicia – the nature of the contract, and the place of performance – to determine that the contract should be governed by Ontario law.

By casting the contract as being for the design of the fryer and oven system, which occurred in Ontario, as opposed to merely the sale, delivery, and installation of the system, the Court determined that the contract was more closely tied to Ontario, notwithstanding that the system had been assembled, installed, and operated in Alberta. In this respect, the Court of Appeal candidly acknowledged that "another judge might have found that performance of the contract favoured Alberta instead of Ontario".

The decision underscores the malleable nature of the "closest and most real connection" test, which in turn should spur parties to incorporate choice of law and other dispute resolution clauses in their contracts in order to streamline litigation and avoid wasting time and money getting to the real issues in dispute between parties when disputes arise.