Date: 2025-09-12
S-1-CV-2020-000 239

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IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ACHO DENE KOE FIRST NATION

Plaintiff/Applicant

-and-

PARAMOUNT RESOURCES LTD.

Defendant/Respondent

MEMORANDUM OF JUDGMENT
ON SUMMARY JUDGMENT APPLICATION

OVERVIEW

[1] In 1999, the Acho Dene Koe First Nation (ADK) and Paramount Resources Ltd. (Paramount), a corporate body involved in the production of petroleum and natural gas, entered into a Community Investment Plan Agreement (the CIP Agreement). In 2020, ADK brought an action against Paramount alleging Paramount breached the CIP Agreement by failing to make annual payments of $100,000 to ADK from 2009 until the termination of the agreement in 2022.

[2] ADK filed an application for summary judgment. It submits there is no genuine issue requiring a trial. It asks this Court to find that Paramount breached its obligation under the CIP Agreement and seeks contractual damages. Paramount takes the position the action is statute barred, and, in the alternative, it argues it did not breach the agreement. Paramount seeks the dismissal of the action.

[3] For the following reasons, I dismiss ADK's application for summary judgment and I also dismiss the claim.

BACKGROUND

[4] ADK is a First Nation Band situated in Fort Liard, Northwest Territories, with settlements located in the Northwest Territories, the Yukon and British Columbia. Paramount's involvement in the production of petroleum and natural gas includes the operation of wells, pipelines and facilities used in production operations.

[5] In 1997, Paramount became one of the interest holders in an exploration license related to lands situated south of Fort Liard (the Lands), which allowed Paramount to explore and drill for petroleum and gas. In March 1999, Paramount discovered and drilled a well on the Lands. It kept developing the Lands and later obtained a Significant Discovery License and Production Licenses.

[6] On December 14, 1999, ADK and Paramount entered into the CIP Agreement. The agreement acknowledges ADK's rights over their traditional lands. It provides benefits to ADK and ADK businesses. Amongst other measures intended to benefit ADK, the CIP Agreement creates a committee responsible for the assessment of the community's needs and for the administration of a budget. The agreement stipulates that this budget comes from $100,000 yearly payments from Paramount to ADK commencing with the first production from the Lands and continuing each year on the anniversary date of the first production. The annual payments of $100,000 end when distributions to ADK under the Shiha Energy Transmission Limited Partnership Agreement (the Shiha Partnership Agreement) reach $10,000 per year.

[7] On February 1, 2000, Shiha Energy Transmission Limited (Shiha Ltd), Paramount, ADK and Berkley Petroleum Corp. (Berkley) entered into the Shiha Partnership Agreement. Shiha Ltd is the general partner, and the three other parties are limited partners. ADK holds 10% of the limited partnership units. The main purpose of the partnership was to acquire, construct, and operate a natural gas pipeline from the Northwest Territories to British Columbia. On February 1, 2000, the same parties entered into a shareholder agreement of Shiha Ltd. Although the ownership and control of the corporation varied over time, ADK has always held 10% of the shares. At all times since Shiha Ltd's incorporation, two representatives of ADK served as directors on a board of six directors.

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[8] The Shiha Partnership Agreement provides that the limited partners are entitled to distributions from revenue generated by the petroleum and gas developments on the Lands provided certain conditions are met. One of these conditions is that distributions will occur only if the Shiha Partnership is not indebted to Berkley or Paramount at the end of the fiscal year. The Shiha Partnership borrowed capital from Berkley and Paramount, who advanced all the funds necessary for the construction, rebuilding, expansion, refurbishing, reclamation and abandonment of facilities, including a pipeline (the Shiha Pipeline), on the Lands. ADK did not provide any funds. The Shiha Partnership Agreement also stipulates that Shiha Ltd would enter into a construction and operating services agreement with Paramount for the construction and operation of the Shiha Pipeline.

[9] In 2000, the Shiha Pipeline was constructed and put in operation. From 2000 to 2008, Paramount made the yearly payments under the CIP Agreement of $100,000 to ADK.

[10] By 2004, there was a significant decline in production from the Lands and a corresponding decline in revenue for the Shiha Partnership. In 2007, the situation had not improved, and Paramount started to plan the decommissioning of the Shiha Pipeline. Paramount informed ADK of this plan and of the steps it would take to carry out the decommission. In 2008, the operation of the Pipeline was suspended. On April 18, 2008, the National Energy Board approved the deactivation of the Shiha Pipeline, and the deactivation occurred on December 5, 2008.

[11] Shiha Ltd also informed ADK how the winding down of the Shiha Pipeline would affect the Shiha Partnership's financial affairs and distributions made to the partners under the Shiha Partnership Agreement. In November 2008, ADK received a Notice of Meeting of Directors of Shiha Ltd, a Notice of Meeting of Shareholders of Shiha Ltd and a Notice of Meeting of the Limited Partners of the Shiha Partnership to which were attached documents that set out a wind-down plan for the Shiha Partnership. Although the Shiha Partnership was never profitable, the plan included a proposal to make distributions to partners of a total amount of $175,000, including $17,498.25 to ADK. The directors of Shiha Ltd, including the two ADK representatives, signed and approved the Directors Resolution that adopted the wind-down plan, including the distributions to the partners.

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[12] On December 19, 2008, ADK received the payment of $17,498.25 as a distribution under the Shiha Partnership Agreement (the Shiha Distribution). Thereafter, Paramount ceased making annual payments of $100,000 to ADK.

[13] On March 31, 2014, ADK sent a letter to Paramount requesting that Paramount explain why it had stopped making payments under the CIP Agreement. On April 9, 2014, in a letter sent in reply, Paramount indicated it considered that following the $17,498.25 disbursement, no further payments were required under the CIP Agreement.

[14] In May 2018, ADK wrote to the Director of Mineral and Petroleum Resources with the Government of the Northwest Territories reporting Paramount had failed to comply with its obligations under the CIP Agreement. The Director replied that it was not a party to the CIP Agreement and therefore, had no authority to enforce any obligations arising from the agreement. ADK launched an application for judicial review of the Director's decision. On May 1, 2020, this Court dismissed the application finding that the CIP Agreement was a private agreement between ADK and Paramount to which the Government of the Northwest Territories was not a party and, therefore, had no authority to enforce it.

[15] On September 3, 2020, ADK filed its original Statement of Claim in the present case.

[16] In 2022, Paramount surrendered its Significant Discovery License and Production Licenses related to the Lands. These licenses are no longer in force since April 4, 2022. Paramount informed ADK that they surrendered these licences on June 13, 2022, which terminated the CIP Agreement.

[17] The parties agree that I should decide whether ADK's claim against Paramount should be granted by way of summary judgment. Paramount does not argue that there is a genuine issue that requires a full trial. In fact, Paramount takes the position that I can, and I should, deal with all the issues raised by this claim and dismiss both the application for summary judgment and the action against Paramount. ADK submits that if I agree with Paramount and dismiss this application for summary judgment, I should not dismiss the action. ADK claims that because Paramount did not file its own application for summary judgment, I must not grant a relief that is dispositive of the action in favour of Paramount.

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[18] On the substantive issues, ADK argues that Paramount is liable for breach of contract and for failing to comply with its duty of good faith. ADK submits that when properly interpretated, the CIP Agreement clause requiring yearly payments by Paramount to ADK provides that the annual funding can only cease once the Shiha Partnership achieves profitability and ADK obtains a share of these profits. It further argues that Paramount manufactured a distribution under the Shiha Partnership to extinguish its contractual obligation under the CIP, breaching its duty of good faith.

[19] Paramount claims that this action is statute barred because the cause of action arose in December 2008 and the Statement of Claim was filed in 2020, after the six-year limitation period had been reached. It further submits that ADK should not be allowed to argue a breach of the duty of good faith because ADK abandoned this cause of action when it filed an Amended Amended Statement of Claim on December 17, 2024. Paramount also argues that it did not breach the CIP Agreement and that it did not act in bad faith in the performance of this contract.

[20] I find that this action is time barred and, therefore, I dismiss ADK's application for summary judgment. In addition, I am satisfied that I can also dismiss the action although Paramount did not file a cross-application for summary judgment.

ANALYSIS

Summary Judgment

[21] Although they take different positions on the relief the court can grant, the parties agree that this matter is suitable for summary disposition. I agree. The material facts are undisputed. The parties have admitted most of the facts by way of a Notice to Admit, which includes a large portion of the evidentiary record. The credibility of witnesses is not at play. There would be little benefit to embarking upon a full trial. Applying the principles set out by the Supreme Court of Canada in *Hryniak v Maudlin*, 2014 SCC 7 [*Hryniak*], I am satisfied that I can make the necessary findings of facts, apply the law to the facts and arrive at a just conclusion based on the record that has been presented to me.

[22] Where the parties' positions differ is on whether, if I agree with Paramount and find that ADK's claim is meritless, I can go one step further and summarily

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dismiss the action. ADK submits that because Paramount did not file its own formal application for summary judgment, it is not a relief I can grant.

[23] The procedural history related to the application for summary judgment is important to understand the position of the parties.

[24] On March 12, 2024, ADK filed a Notice of Motion seeking summary judgment. On October 3, 2024, counsel for ADK sent a letter to this Court about the scheduling of the hearing for this application copying counsel for Paramount. Counsel for ADK wrote: "The motion, as amended, is a debt action with no general damages being claimed. As such, this is *de facto* a complete, not partial, summary judgment application. It is for this reason the Plaintiff is of the view a one-day hearing should suffice". Counsel for ADK further indicated that counsel for Paramount had not provided their availability for a hearing of the application but that, "[i]nstead, counsel for the Defendant has advised that the Defendant intends to bring its own motion. However, the Defendant has not advised the basis of such motion nor the relief it will be requesting."

[25] On October 8, 2024, counsel for Paramount wrote to the Court, copying opposing counsel. In the letter, counsel for Paramount mentioned:

> […] It was unclear from the filed summary judgment motion that they were seeking a determination of all issues in the Claim.
>
> When [counsel for ADK] inquired about scheduling a summary judgment hearing, it was the Defendant's position that it also intended to bring a summary judgment motion. This will allow for an efficient use of the Court's time, as the Defendant intend[sic] to seek on its summary judgment motion that all matters in the Claim be determined at the same time, and for a dismissal of the Claim.
>
> Given the position taken in the Plaintiff's letter dated October 3, 2024, which clarifies that their summary judgment motion, as amended, is not a partial summary judgment motion, but a full summary judgment motion to finally determine all issues in the Claim, and that it is a discrete debt action with no general damages being claimed, we agree that one day is sufficient for the hearing, as we will not be required to file a separate summary judgment motion.

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[26] Counsel for ADK did not send any further correspondence to the Court on this issue until May 2025.

[27] On May 28, 2025, I held a pre-hearing conference by teleconference with counsel after which, I issued a Pre-Hearing Conference Memorandum. The memorandum contains the following passage:

> At the last pre-hearing conference, counsel for the Defendant mentioned that the Defendant might take the position that this matter was not appropriate for summary disposition. Today, counsel for the Defendant confirmed that she does not intend on raising this argument. The parties agree that this case can be decided by way of summary judgment.

[28] On the same day, counsel for ADK wrote to the Court indicating that ADK took issue with the last sentence of the preceding paragraph. Counsel for ADK specified that ADK's understanding was that because Paramount had not brought its own motion seeking to dismiss the action, it was not a relief the court could grant. The next day, counsel for Paramount sent a letter to this Court setting out why they took the position a dismissal of the action was an available relief.

[29] Upon receiving the letters from counsel, I convened an appearance on the record. At this appearance, on May 30, 2025, ADK was provided with the opportunity to seek an adjournment of the summary judgment application hearing to remedy any prejudice it felt ADK suffered because of the parties' different understanding of the scope of hearing. Counsel for ADK declined this offer and insisted the hearing of its application for summary judgment proceed on June 3, 2025, as scheduled. Counsel for ADK requested a further opportunity to make submissions on the reliefs available to Paramount and I agreed that the parties could make further submissions on this issue. I heard the application for summary judgment on June 3, 2025.

[30] ADK says there is no authority in this jurisdiction that supports the dismissal of the action by the non-moving party on an application for summary judgment, which has been referred to as a "boomerang summary judgment" or a "reverse summary judgment". ADK argues reverse summary judgments have not been widely accepted outside of Ontario. It submits that the foundational case on reverse summary judgments is *King Lofts Toronto I Ltd v Emmons*, 2013 ONSC 6113. ADK claims that the outcome of this case is grounded in the Ontario *Rules of Civil Procedure*, which are different from the *Rules of the Supreme Court of the*

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Northwest Territories (the *Rules*). ADK acknowledges that a majority of the Alberta Court of Appeal endorsed such approach in *Pyrrha Design Inc v Plum and Posey Inc*, 2016 ABCA 12 [*Pyrrha Design*] but it notes that this decision is not binding on this Court and invites me to adopt the position of the dissenting judge. In the alternative, if I accept that this relief is available to Paramount, ADK claims that it would be unfair to ADK to allow Paramount to seek this relief in the circumstances of this case. ADK relies on *Canada Trust Company (McDiarmaid Estate) v Alberta (Infrastructure)*, 2021 ABCA 53 [*Canada Trust Company*], *Drummond v Cadillac Fairview Corporation Limited*, 2019 ONCA 447 [*Drummond*] and *Graham v Toronto (City)*, 2022 ONCA 149 [*Graham*], which have found that granting a reverse summary judgment would be unfair in the absence of a proper formal or informal notice of a cross-application for summary judgment.

[31] Paramount recognizes no decision from this jurisdiction has considered this issue, but it relies on judgments from two appellate courts, *Pyrrha Design* and *Kassburg v Sun Life Assurance Company of Canada*, 2014 ONCA 922 [*Kassburg*], which support the proposition that a court can make final determinations on the issues in dispute despite the absence of a formal cross-application for summary judgment when the other party received sufficient notice and when the record before the court is comprehensive enough to determine the issues. Paramount also relies on Rule 3 of the *Rules*, which provides that "the object of these rules is to secure the just, speedy and inexpensive determination of every proceeding", and section 27 of the *Judicature Act*, which stipulates that a court can grant all remedies any of the parties are entitled to and as far as possible, determine all disputed issues completely and finally to avoid the multiplicity of proceedings. Finally, Paramount stresses that ADK has been on notice since October 8, 2024, that Paramount would be seeking a dismissal of the action without bringing its own cross-application. Paramount further submits that allowing it to seek a dismissal of the action is the most efficient way to proceed in this case and in keeping with the Supreme Court of Canada's guidance on summary judgment applications in *Hryniak*.

[32] There are no precedents in the Northwest Territories that address the issue of reverse summary judgments. Although there is no authority binding on this Court that has endorsed reverse summary judgment in the absence of a formal cross-application, I find the appellate cases cited by both parties persuasively support the position that a court can entertain a cross-application in the absence of a formal motion if it allows for a just and fair determination of the issues in dispute.

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[33] ADK argues that there are significant differences between the Ontario *Rules of Civil Procedure* and the *Rules* such that cases from Ontario granting reverse summary judgment are of little assistance in this jurisdiction. It points more specifically to the fact that the *Rules* have no equivalent to Rule 37.13(2)(a) of the Ontario *Rules of Civil Procedure* which provides that a judge who hears a motion may, in a proper case, order the motion be converted into a motion for judgment. I acknowledge this difference, but I am not convinced that the absence of such a provision in the *Rules* is determinative of the issue.

[34] Rule 175, which deals with summary judgment applications by a defendant, provides that a defendant: "may […] apply with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim". Rule 382 stipulates that applications shall be made by a notice of motion, supported by affidavit evidence. In that regard, the *Rules* are like those in force in Alberta, where there is a similar requirement to bring an application by formal notice of motion.

[35] The decisions of the Alberta Court of Appeal are particularly persuasive in the Northwest Territories because the Court of Appeal for the Northwest Territories is largely composed of members of that Court (see for example *Brost v Bullis*, 2019 NWTSC 30, para 66 and *R v Whittle*, 2024 NWTSC 30, para 53). In *Pyrrha*, the Alberta Court of Appeal found that despite the absence of a formal notice of motion supported by affidavit as required by the *Alberta Rules of Court*, the appellant was not taken by surprise before the application judge, having been notified that the opposing party intended to seek a full dismissal of the action at the summary judgment hearing. The majority concluded that the appellant was not prejudiced by the failure to file and serve a formal notice of application for summary dismissal and dismissed the appeal. The situation was different in *Canada Trust Company* where at a hearing for summary dismissal, the application judge made a final ruling on an issue when neither party had sought such a relief. Because there was no formal or informal cross-application for summary judgment and no opportunity for the parties to address the argument the application judge relied on, the appeal was allowed. The Ontario Court of Appeal, in *Kassburg*, *Drummond* and *Graham*, and the New Brunswick Court of Appeal, in *Abrams v RTO Asset Management*, 2020 NBCA 57 (leave to appeal to SCC refused, 2021 CanLII 20336 (SCC)), adopted a similar approach. The central consideration in all these decisions is fairness.

[36] In this case, I agree with Paramount that it would not be unfair to ADK to entertain Paramount's request to dismiss the action. Paramount gave ADK informal

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notice of the intention to seek the dismissal of the action. On October 8, 2024, almost eight months before the hearing of this application, Paramount put ADK on notice that it would not bring a formal cross-application for summary judgment but that it would seek a final determination of the issues in dispute at the hearing. The question was again raised, this time by ADK, following the May 28, 2025, pre-hearing conference. On May 30, 2025, I offered ADK the opportunity to seek an adjournment if it considered proceeding with the application would cause ADK prejudice. Instead, ADK insisted on proceeding on June 3, 2025, knowing that Paramount would be seeking the dismissal of the action.

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[37] At the oral hearing, ADK argued that it might wish to adduce additional evidence at trial and that it should be given the opportunity to do so. However, it did not point to any specific evidence it intends to tender. As indicated above, the facts are largely undisputed. Both parties filed comprehensive affidavits with documentary evidence. They also conducted examinations. ADK takes the position that the record before me would allow me to grant the claim in its favour. In addition, it is settled law that on an application for summary judgment, all parties have the obligation to put their best foot forward (*Northwest Territories (Commissioner) v 923115 NWT Limited,* 2018 NWTSC 24, para 60). As Schuler J. stated in *Arctic Environmental v Northern Mgmt. & Komaromi,* 2000 NWTSC 53 at para 23:

> A judge hearing an application for summary judgment is entitled to assume that the parties have put their best foot forward. It is not sufficient for the responding party to say that more and better evidence will or may be available at trial; the judge is entitled to assume that the parties would present no additional evidence at trial.

[38] Entertaining Paramount's informal application for summary judgment is not unfair or prejudicial to ADK. It would be overly formalistic and contrary to the principles set out in *Hryniak* on the importance of efficiency and judicial economy to require the filing of a formal cross-application for summary judgment in this case.

Limitation

Pleadings on Limitation

[39] Before I turn to the parties' substantive arguments on limitation, I must address a preliminary issue raised by ADK. It argues that Paramount should not be allowed to advance an argument based on limitation because it was not pled.

[40] I agree with ADK that Rule 111 imposes an obligation on a defendant to explicitly raise limitation in their pleadings. However, in this case, that is what Paramount did at paragraph 26(a) of its Statement of Defence filed on February 4, 2022, when it alleged "Some or all of the Plaintiff's claims are barred by the *Limitation of Actions Act*, R.S.N.W.T. 1988, c.L-8". ADK has been on notice since 2022 that Paramount claims this action is time-barred.

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Positions of the Parties on Limitation

[41] Paramount argues that the cause of action arose and was discoverable in 2008 when ADK received a distribution exceeding $10,000 under the Shiha Partnership Agreement and Paramount ceased making $100,000 annual payments to ADK. In the alternative, Paramount advances that ADK was clearly aware that Paramount claimed it was not required to make any further annual payments under the CIP Agreement on April 9, 2014, when ADK received a letter from Paramount in response to its correspondence asking Paramount for an explanation for the interruption of the annual payments. Paramount stresses that in both scenarios, the period between the discovery of the cause of action and the filing of the Statement of Claim on September 3, 2020, exceeds the statutory six-year limitation period.

[42] ADK advances that because the CIP Agreement is an executory contract, the limitation period did not start running until the termination of the contract in June 2022. In the alternative, ADK argues that the cause of action was only discoverable by ADK on May 1, 2020, when this Court released its decision dismissing ADK's application for judicial review. It submits that until then, ADK did not know the CPI Agreement was a private contract enforceable against Paramount. In the alternative, ADK claims that the CPI Agreement creates an obligation to make periodic payments that justify applying a rolling limitation period such that only the part of the claim that predates 2014 is statute barred.

The Commencement of the Limitation Period

[43] Section 2(1) of the *Limitation of Actions Act* provides that:

> 2(1) The following actions must be commenced within and not after the following times:
> […]
> (f) actions for the recovery of money, except in respect of a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether

> on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied, and actions for an account or for not accounting, within six years after the cause of action arose;

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[44] The parties agree that the limitation period in this case is six years. Where they do not agree is when the cause of action arose.

[45] The determination of when the cause of action arose is assessed on an objective standard. The question is when the plaintiff "discovered or ought to have discovered by the exercise of reasonable diligence, the material facts" (*Base v Hadley*, 2006 NWTSC 4, para 25).

[46] ADK argues that the CIP Agreement is an executory contract under which the parties had mutual obligations they continued to perform from 2009 until 2022. It relies on *S.W. Mackay & Associates Ltd v Park Lane Ventures Ltd*, 1997 CanLII 2051 (BC SC) [*S.W. Mackay*] to support the position that when a party alleges a breach of an executory contract, the cause of action arises on the day of the termination of the contract. Paramount submits *S.W. Mackay* is distinguishable on its facts and that the position advanced by ADK is inconsistent with the rationales behind limitation periods.

[47] I agree with Paramount. In *S.W. Mackay*, the contract allowed the parties to terminate the contract and extinguish ongoing mutual contractual obligations, while it also created an obligation for one of the parties to pay 10% of net profits to the other party even after the termination of the contract. In such circumstances, the Supreme Court of British Columbia found the agreement binding the parties was not an executory contract but rather an executed contract and the limitation period started to run when the party under such an obligation failed to pay 10% of the profits, even if it occurred years after the mutual termination of the contract. Although it makes a distinction between executed and executory contracts and the impact of such a qualification on limitation, the decision is focused on the time the cause of action arose. The outcome of this decision makes sense as reaching the opposite conclusion that the limitation period started running at the time of the formal termination of the other terms of the contract would have meant that limitation was reached before the obligation to pay a portion of the profits arose. *S.W. Mackay* is distinguishable on its facts.

[48] I also agree with Paramount that the position put forward by ADK would lead to absurd results inconsistent with the rationales for limitation periods. The approach

suggested by ADK is not in line with the reasons limitation periods exist. As explained by the Supreme Court of Canada in *M(K) v M(H)*, 1992 CanLII 31 (SCC), [1992] 3 SCR 6 [*M(K)*], there are three main rationales behind limitation periods: the certainty, the evidentiary, and the diligence rationales. Limitation periods exist because there, "comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations" (*M(K)* at 29), because evidence can become stale with the passage of time, and as an incentive for plaintiffs to act diligently in the pursuit of their rights. Adopting ADK's submission would lead to decades old claims not being captured by the limitation period only because the party who is alleged to have breached certain terms of the contract continued to perform other obligations under the same contract even when the party claiming it was wronged was fully aware of the situation at the time the alleged contractual breach occurred. As a result, I reject the proposition that the limitation period only started to run when the CIP Agreement was terminated in 2022.

[49] I am also not convinced that, as argued by ADK, the cause of action was only discovered or discoverable by ADK on May 1, 2020, when this Court released its decision on ADK's application for judicial review.

[50] Discoverability relates to the facts, not the law. An error of law or the ignorance of the law by the plaintiff does not delay the start of the limitation period (*Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, para 56 [*Weir-Jones*]; *Janus v The Central Park Citizen Society*, 2019 BCCA 173; *Salna v Awad*, 2011 ABCA 20, para 28). In *Weir-Jones*, there was uncertainty whether the breach of contract alleged by the appellant was covered by a collective agreement and consequently, whether it had to be raised through the arbitration process. The Alberta Court of Appeal found that, "[r]eliance on the possible efficacy of other procedures amounts at most to an error of law, which does not have the effect of delaying commencement of the limitation period" (para 56).

[51] The same principle applies here. ADK submits it mistakenly believed the CIP Agreement was part of a Benefits Plan enforceable by the Government of the Northwest Territories, and it is only when this Court ruled that the agreement was a private contract that ADK acquired the knowledge of the cause of action. This amounts to an error of law that does not affect the commencement of the limitation period.

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[52] In addition, I find that ADK ought to have known that the CIP Agreement was a private contract enforceable against Paramount from the moment the contract was signed in 1999. ADK was assisted by counsel in the negotiation of the CIP Agreement, the agreement contains a mandatory arbitration clause and when ADK wished to enquire about the cessation of the $100,000 annual payments, it did so by contacting Paramount directly. Considering these facts, I do not accept that the cause of action was only discovered and discoverable on May 1, 2020.

Periodic Payments and Rolling Limitation

[53] Under the CIP Agreement, Paramount had the obligation to make annual payments of $100,000 commencing with the first production from the Lands and continuing each year on the anniversary date of the first production. The evidence before me does not establish the anniversary date of the first production. However, between 2000 and 2008, Paramount made such payments on different dates, the earliest in the year being April 22, in 2003, and the latest November 17, in 2008. From this, I infer that if Paramount still had the contractual obligation to pay $100,000 annually following the Shiha Distribution, the next payment to ADK was due at the latest on December 31, 2009, and yearly thereafter.

[54] ADK submits in the alternative that the limitation period started running again every time a payment was due, what is commonly known as a rolling limitation period and, therefore only payments due before September 3, 2014, are statute barred. Paramount claims the Shiha Distribution over $10,000 made on December 19, 2008, is a single event that extinguished Paramount's obligation to make the $100,000 annual payments. It argues that as a result, the limitation period started running on December 19, 2008, almost 12 years before the Statement of Claim was filed and consequently, the claim is time-barred.

[55] ADK argues that several cases support the proposition that the nature of the contractual breach determines the type of limitation that applies in any given case. It relies on the following cases: *Pickering Square Inc. v Trillium College Inc.*, 2016 ONCA 179 [*Pickering Square*], *Fernandes v Jennings Capital Inc*, 2016 ABQB 594 [*Fernandes*], *Richards v Sun Life Assurance Co. of Canada*, 2016 ONSC 592 [*Richards*] and *Marvelous Mario's Inc. v St. Paul Fire and Marine Insurance Co.*, 2019 ONCA 635 [*Marvelous Mario*]). ADK submits that these cases identify three categories of contractual breaches that attract different types of limitation periods. The first type of a breach is the failure to perform a single obligation at a specific time, a "once-and-for-all" breach, in which case the limitation period starts running

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from the date of the breach. The second type of breach is the failure to perform a periodic obligation, which gives rise to a new claim each time the obligation is breached where a rolling limitation period applies. The third type of breach is the failure to perform a continuing obligation. In such a case, "a new claim arises every successive moment the obligation is not performed" (*Fernandes*, para 82). ADK says that the alleged contractual breach in this case is the failure to perform a periodic obligation and therefore, a rolling limitation applies.

[56] Paramount argues that the cases ADK rely on do not support a strict application of the three categories of breaches but rather adopt a more flexible approach.

[57] I agree with Paramount. As noted by the Ontario Court of Appeal in *Pickering Square* when discussing the breach of a periodic obligation: "[a] failure to perform any such obligation ordinarily gives rise to a breach and a claim as from the date of each individual breach" (emphasis added). A similar conclusion was reached in *Marvelous Mario* at paragraph 35, where the court wrote: "[t]he jurisprudence suggests that a rolling limitation period may apply in a breach-of-contract case in circumstances where the defendant has a recurring contractual obligation" (emphasis added). The analysis is more fact specific and nuanced than what ADK advances.

[58] For example, in *Pedersen v Soyka*, 2014 ABCA 179 [*Pedersen*] the Alberta Court of Appeal examined the issue of limitation in a case involving an allegation that a party to a contract breached the terms related to the sharing of profits. The court found that the profits were not automatic defined payments, such as an annuity, but rather amounts that had to be determined at the end of the financial year. In addition, there was no certainty that this business would be profitable. As a result, the material facts were not discovered or discoverable until the profits were generated and therefore, a rolling limitation period applied. The court further noted "[t]his is not an automatic process, as the word 'rolling' might imply; it depends on facts occurring and becoming known (or discoverable)" (para 39). In the present case, unlike *Pedersen*, the periodic payments envisioned by the CIP Agreement are automatic defined payments: $100,000 on the anniversary of the production from the Lands annually.

[59] ADK relies on *Richards v Sun Life Assurance Co. of Canada*, 2016 ONSC 592 [*Richards*], a case involving a claim for disability benefits under a group policy insurance. That decision makes a distinction between two types of cases. The first

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type of cases is when the issue is whether certain payments to which the plaintiff is entitled have been made, where the material facts arise on a periodic basis. The second type of cases arise when the question is whether the plaintiff was entitled to the periodic payments in the first place, where the material facts arise when the plaintiff alleges it became entitled to the periodic payments. The court found that a rolling limitation period does not apply in the later as "it would be unfair to require the defendant to litigate those facts, for a potentially unlimited period of time" (para 26). In the present matter, the issue is not whether certain payments were made. The parties agree Paramount only made the annual payments from 2000 to 2008. The question is whether ADK was entitled to any further payments following the Shiha Distribution, making this case fall into the second type of cases described in *Richards* where a rolling limitation does not apply.

[60] In *Karkhanechi v Connor, Clark & Lunn Financial Group Ltd*, 2022 ONCA 518 [*Karkhanechi*] (application for leave to appeal to the SCC refused, 2023 CanLII 31583 (SCC)), the plaintiff alleged a breach of a post-retirement agreement. Shortly after the date of retirement, the plaintiff received the first of payments that were to be made each fiscal quarter for a limited period. There was a disagreement between the parties on the plaintiff's entitlement to receive additional amounts. The plaintiff raised concerns about the amounts paid but after receiving a response from the respondent's counsel, took no action for over two years (the statutory limitation period). The motion judge found the action was statute barred, ruling that no fresh cause of action arose with each quarterly payment the plaintiff claimed was deficient. The plaintiff appealed, alleging the motion judge failed to apply a rolling limitation period.

[61] The Ontario Court of Appeal helpfully reviewed several of the authorities ADK relies on and summarized the legal principles that apply to periodic contractual obligations and rolling limitation periods. It found that a rolling limitation period does not apply in all cases that involve a breach of a periodic obligation (para 23) and rejected the proposition that the three categories of breaches identified above operate as the test for identifying when a rolling limitation period applies (para 25). The Court of Appeal emphasized that because rolling limitation is premised on the notion that from each new breach arises a new cause of action, there is a material distinction between cases that allege a single breach giving rise to continuing loss and those where more than one breach is alleged with separate damage claims (para 27). It stressed the importance of discoverability in determining the type of limitation that applies (para 28) and decided that "once the plaintiff has sustained a loss from a breach of contract, and the plaintiff knew or had the means of knowing

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that there would be ongoing damage arising from that breach, there is no basis for applying rolling limitation periods relating to that ongoing damage" (para 29). The Court of Appeal concluded that in that case there was a single breach with continuing consequences and consequently, upheld the decision of the motion judge to refuse to apply a rolling limitation period.

[62] The circumstances of the present case are similar to those of *Karkhanechi*. Although the CIP Agreement created an obligation for periodic payments, it was a single event, the Shiha Distribution of December 19, 2008, that triggered the cessation of the annual payments. By the end of the year 2009, when Paramount did not make the next annual payment, ADK knew, or ought to have known, all the material facts that give rise to this action. A rolling limitation period does not apply in this case.

[63] Even if ADK did not have knowledge of all the materials facts by the end of 2009, there is no doubt that it did on April 9, 2014, when it received the letter from Paramount explaining why Paramount took the position that its obligation to make annual payments under the CIP Agreement was extinguished by the Shiha Distribution. At that time, Paramount unequivocally rejected ADK's claim it was entitled to additional payments. More than six years elapsed between this letter and the filing of the Statement of Claim. Pursuant to Section 2(1)(f) of the *Limitation of Actions Act*, the limitation period had expired when ADK launched this action on September 3, 2020.

[64] ADK also advances the argument that the limitation period could not have been triggered by the Shiha Distribution because the CIP Agreement did not contemplate a single distribution. ADK claims that the word "distributions", in the plural form, in the relevant clause of the agreement establishes that the obligation to make annual payments was not extinguished by a single distribution. Whether this interpretation of the agreement is valid or not does not change when the cause of action arose. This is a position that ADK could have put forward to argue that Paramount failed to comply with the CIP Agreement if the action was not time-barred but it has no bearing on the issue of limitation.

[65] Considering my conclusion that this action is statute barred, I do not need to address the issues related to the interpretation and the performance of the CIP Agreement.

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CONCLUSION

[66] The plaintiff, ADK, applied for the summary disposition of this action for breach of contract arguing that Paramount failed to comply with a term of the CIP Agreement when it ceased to make annual payments of $100,000 in 2008. I find that ADK is not entitled to damages for breach of contract because it did not bring this claim within the limitation period. This conclusion is dispositive of ADK's application for summary judgment, and it is also dispositive of the action. Considering my conclusion that the action is statute barred, I grant Paramount's application for summary judgment, and I dismiss the action.

[67] I make the following orders:

a. I dismiss Acho Dene Koe First Nation's application for summary judgment;
b. I grant Paramount Resources Ltd.'s application for summary judgment;
c. I dismiss the action, with costs.

Annie Piché
J.S.C.

Dated at Yellowknife, NT, this
12th day of September 2025

Counsel for Plaintiff: L. Douglas Rae

Counsel for Defendant: Wenqi (Wendy) Zhang and Nathania Ng

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IN THE SUPREME COURT OF THE

NORTHWEST TERRITORIES

Between:

ACHO DENE KOE FIRST NATION

Plaintiff/Applicant

-and-

PARAMOUNT RESOURCES LTD.

Defendant/Respondent

MEMORANDUM OF JUDGMENT
ON SUMMARY JUDGMENT APPLICATION
OF
THE HONOURABLE JUSTICE ANNIE PICHÉ

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