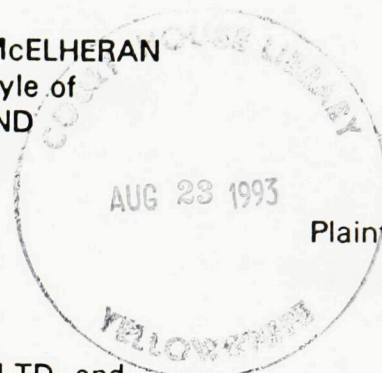


IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GORDON McELHERAN and MARVIN McELHERAN
operating under the name and style of
GORD-MAR ENTERPRISES AND
GORD-MAR ENTERPRISES



Plaintiffs

- and -

GREAT NORTHWEST INSULATION LTD. and
WESTERN SURETY COMPANY

Defendants

Trial of action brought by a subcontractor against a general contractor for breach of contract; counterclaim by general contractor for damages. Judgment granted in favour of subcontractor for \$22,750.00 plus interest and costs; counterclaim dismissed.

Trial held at Yellowknife, Northwest Territories
on April 2-8, April 19, 1993

Reasons filed: June 29, 1993

Counsel for Plaintiffs:
Counsel for Defendants:

A. Wright
J. Brydon

CV 0017

CV 0017

IN THE SUPREME COURT OF THE TERRITORY OF YUKON

BETWEEN

GORDON MATHIAS and MARVIN McLEHMAN
Respondents
vs
GREAT NORTHWEST ASSURANCE CO. LTD. and
WESTERN SURETY COMPANY
Appellants



GREAT NORTHWEST ASSURANCE CO. LTD. and
WESTERN SURETY COMPANY

Defendants

This action brought by a subcontractor against a general contractor for breach of contract, was dismissed by general counsel for Yukon Territory. Judgment granted in favour of subcontractor for \$22,750.00 plus interest and costs, amount of \$10,000.00.

This case is Yellowknife, Northwest Territory
on April 28, April 18, 1933

Reasons filed June 20, 1933

A. W. J. J. J.
J. B. J.

Counsel for Plaintiffs:
Counsel for Defendants:

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GORDON McELHERAN and MARVIN McELHERAN
operating under the name and style of
GORD-MAR ENTERPRISES AND
GORD-MAR ENTERPRISES

Plaintiffs

- and -

GREAT NORTHWEST INSULATION LTD. and
WESTERN SURETY COMPANY

Defendants

REASONS FOR JUDGMENT

This action arises out of the construction of a nurses' residence in Gjoa Haven, a remote community of eight hundred residents situated on King William Island 150 miles above the Arctic Circle. The Defendant Great Northwest Insulation Ltd. (GNI), based in Surrey, B.C., was the general contractor, having been awarded this construction contract by Public Works Canada (PWC) subsequent to a competitive tendering process.

The Plaintiff Gordon McElheran and his uncle the plaintiff Marvin McElheran, from Calgary, Alberta, are both carpenters and carried on business as such in partnership under the name of Gord-Mar Enterprises (Gord-Mar). Gord-Mar was a subcontractor on this project, having contracted with GNI to provide the labour necessary to build the nurses' residence. Although Gord-Mar and GNI may each have entered into this mutual business

arrangement with bona fides and the best of intentions, their contractual relationship turned tumultuous and was unsatisfactory to both of them, leading ultimately to the present litigation. Even though the principals of Gord-Mar had considerable carpentry experience, neither had previously worked on a project north of the Arctic Circle. For its part, the defendant GNI's experience in the Arctic was minimal.

3 In this litigation, Gord-Mar seeks damages in excess of \$80,000, whereas the defendant GNI counterclaims for sums exceeding \$60,000.

4 GNI was awarded this contract by the owner PWC on May 27, 1987. The project was to be completed by November 28, 1987. It was understood that GNI would be shipping its construction materials to Gjoa Haven by barge. The last barge was scheduled to leave in late July, with anticipated arrival in Gjoa Haven in late August.

5 Gordon McElheran met Rick LeTroy, the principal of GNI, in Surrey in the summer of 1987 in connection with some other unrelated business transactions. Their conversation turned to the Gjoa Haven construction contract, and to the possibility of Gordon McElheran providing the labour for this job. Gordon McElheran reviewed the blueprints and specifications for the project, and travelled to Calgary to discuss it with his uncle Marvin McElheran (who was at the time a superintendent with a large construction company Stewart & Olson Ltd.).

An oral agreement was reached during a telephone conversation in late August/early September between Gordon McElheran in Calgary and Rick LeTroy in Surrey. Gord-Mar was to provide the agreed labour services for the sum of \$38,000. The McElherans left for the Arctic within a relatively short time and without any written contract.

Having heard the viva voce testimony of Gordon McElheran, Marvin McElheran and Rick LeTroy, I am satisfied that the following terms were expressly included in the oral agreement between Gord-Mar and GNI at the time that the McElherans left southern Canada to travel to the jobsite in Gjoa Haven:

1. The contract price was \$38,000.
2. An additional \$3,000 was to be paid to the wife of Marvin McElheran for her services as cook and housekeeper.
3. The labour services were to be performed by Gordon McElheran, Marvin McElheran, Kevin McElheran (Marvin's son), and whatever other labourers Gord-Mar decided to hire, locally or otherwise.
4. The labour services to be performed were:
 - a. construction of foundation;
 - b. framing;
 - c. insulation;
 - d. installation of doors and windows;

- e. drywalling (except the specialized work of a taper);
 - f. interior painting;
 - g. installation of siding and flashing on exterior;
 - h. installation of kitchen and bathroom cabinets;
 - i. installation of flooring.
5. GNI was to be responsible for site preparation prior to construction of foundation.
 6. GNI was to supply all materials.
 7. GNI was to supply all tools and equipment.
 8. GNI was to be responsible for the cost of transportation to and from Gjoa Haven.
 9. GNI was to provide room and board for Gord-Mar personnel.
 10. The completion date for the performance of the services was November 28, 1987.

8 Gordon McElheran arrived in Gjoa Haven on September 11, 1987. Marvin McElheran, his wife and son arrived on September 14, 1987. Almost immediately the McElherans saw that things were not as they expected them to be.

9 At this point I wish to address the testimony of the witnesses who gave evidence at trial, in particular my assessment of the credibility of each of the main witnesses.

Each of Gordon McElheran and Marvin McElheran gave his testimony in a forthright and straightforward manner. This contract in Gjoa Haven was a very frustrating experience for them, and their frustration was caused in part by the different (for them) circumstances of construction work in an isolated Arctic settlement, and also by the actions and inactions of GNI. Although as litigants they have an obvious interest in the outcome of these proceedings, I am satisfied that each was a truthful witness and genuinely attempted to present the facts to the Court without embellishment.

Brian Heacock at relevant times was a PWC employee and was the project officer who had primary responsibility for this construction contract on behalf of the owner. In his testimony he stated that he had initially recommended to his superiors that PWC not award this construction contract to GNI, and explained that his reason for so doing was the unsatisfactory performance by GNI on a previous PWC contract in Gjoa Haven. During the course of the nurses' residence contract, there were times when Mr. Heacock was of the view that GNI's contract should be cancelled for non-performance but, again, Mr. Heacock's superiors decided to allow GNI's contract to continue. Notwithstanding Mr. Heacock's acknowledged negative opinion of GNI as a general contractor, I found Mr. Heacock to be a credible witness. I found that he gave his evidence at the trial as an impartial witness and without bias for or against either of the litigating parties. As will appear from my reasons which follow, Mr. Heacock's initial concerns about GNI were justified, in my view.

12 Broderick (Rick) LeTroy is the founder and president of GNI and gave evidence at the trial on behalf of GNI. I regret to state that I did not find him to be a very credible witness. In answering questions put to him by his own counsel and by opposing counsel, he appeared evasive and uncertain. His evasiveness was evident throughout virtually all of his testimony. Having heard his testimony, it is clear to me that, in the time frame relevant to this litigation, Mr. LeTroy did not place a great deal of importance on his company's contractual obligations to Gord-Mar, or to PWC. Characteristic of this was his steadfast resistance to compliance with specific terms of his contract with PWC, e.g., hiring of a site superintendent, provision of shop drawings, provision of materials in accordance with agreed specifications, etc.

13 Taking into consideration all of the evidence adduced at trial, I am unable to place much weight or reliance on the testimony of Mr. LeTroy. Where his testimony is in conflict with that of Gordon McElheran, Marvin McElheran or Brian Heacock, I prefer that of these witnesses to that of Mr. LeTroy.

14 Returning now to the situation which presented itself to Gord-Mar in September 1987, there were a number of matters which gave immediate concern to Gordon and Marvin McElheran. GNI did not have any superintendent on site (Mr. LeTroy indicated to PWC that Gordon McElheran was GNI's superintendent but this, of course, was not the case, and was not part of the agreement between Gord-Mar and GNI). The site preparation had not been done by GNI and Gord-Mar was unable to proceed with the

initial stage of its contract, i.e. the construction of the building's foundation.

5 The barges containing the construction materials had not arrived in late August as anticipated but arrived on September 10 and September 17. Some of the materials (in particular plywood and drywall) had been left exposed to the elements while on the barge and were wet. The resulting damage to the drywall rendered it useless and PWC rejected the drywall. Of the materials necessary for this construction project, some were missing altogether, while others simply did not meet the specifications required by GNI's contract with PWC. Some of these discrepancies were noticed by Gord-Mar in the first few days (e.g. the absence of lagbolts for construction of the foundation) while other discrepancies did not reveal themselves until a few months later (e.g. missing baseboards, inferior kitchen cabinets, incorrect siding material, incorrect flooring material).

6 GNI did not provide all of the tools and equipment required by Gord-Mar to perform their contract. As a result, the McElherans resorted to scrounging, borrowing and renting what they could within this small community (a task which GNI's site superintendent would normally be expected to do) but were not very successful in that regard.

17 The accommodation which had been promised to Gord-Mar was not ready for occupancy when the McElherans arrived in Gjoa Haven. The accommodation was a GNI-owned trailer which had been left on an adjacent construction site the previous year. It was in a messy condition and was without electricity or running water.

18 The McElherans put the accommodation venue into a liveable condition, and then proceeded to do the site preparation (which was the responsibility of GNI not Gord-Mar) and the construction of the foundation. They were severely handicapped in their performance of these tasks, as they were throughout the course of the project, by the shortage of proper tools and equipment.

19 In their testimony at trial Gordon McElheran and Marvin McElheran provided many details of the difficulties they encountered in the ensuing months in attempting to perform this labour contract. Upon my assessment of the whole of the evidence at trial, I am satisfied that most of the difficulties which were encountered by them are attributable to the actions and inactions of GNI. These difficulties - lack of timely site preparation, lack of proper tools and equipment, missing materials, substandard materials, no site superintendent - naturally led to delays in the construction schedule. This project was hopelessly behind schedule from the outset.

20 I accept the testimony of Mr. Adam, the defendant's expert witness, when he was asked about the reasonableness of the scheduled completion date of November 28 (as at mid-September). His opinion is that this projected completion date was "ambitious" in the circumstances.

21 In mid-October the McElherans became increasingly concerned that they did not have a written contract with GNI. In late September Mr. LeTroy had sent to them in Gjoa

Haven a draft contract which they did not accept. Its terms included, inter alia, a contract price of \$33,000 (with an additional \$5,000 bonus if the contract was completed by November 28) and purported to assign to Gord-Mar a supervisory role over the mechanical and electrical subtrades. The McElherans rejected this document and sent to Mr. LeTroy their own version of a draft contract, a document which he denies receiving. Eventually, Gordon McElheran flew to Surrey B.C. and went to Mr. LeTroy's office, unannounced, and presented a further draft to Mr. LeTroy. On October 23, 1987, Gordon McElheran and Rick LeTroy signed a written contract (Exhibit 1-11) which reads as follows:

AN AGREEMENT made this 23 day of October, 1987, in the City of Vancouver, between

**Great Northwest Insulation
#102, 14727-108 Ave.,
Surrey, British Columbia
V3R 1V9
(hereinafter known as GNI), and**

**Gord-Mar Enterprises
G 204, 3805 Marlborough Dr. N.E.,
Calgary, Alberta
T2A 5M7
(hereinafter known as Gord-Mar),**

with respect to the labour required to build the Nurses' Residence in Gjoa Haven, Northwest Territories, Canada, and begun on September 11, 1987:

Work to be performed

1. Gord-Mar agrees to perform for GNI all of the labour necessary to complete the work described below:

- a. The framing required to build the foundation and erect the building;**
- b. Install exterior windows and doors, insulation and vapour barrier;**
- c. To drywall and paint the interior of the building;**
- d. Install kitchen and bathroom cabinets and accessories, and finish carpentry;**
- e. Install flooring (carpet and linoleum);**
- f. To apply siding and flashing to the building.**

Work not included in agreement

2. Gord-Mar is not responsible for:
- a. Subtrade work including electrical, mechanical, roofing.
 - b. Exterior caulking and painting, which cannot be applied during the winter;
 - c. Workmanship performed on materials prior to their being shipped to Gjoa Haven;
 - d. Work arising from delays due to lack of tools and equipment; insufficient or substandard materials shipped to Gjoa Haven; late arrival of materials shipped to Gjoa Haven; materials damaged during shipment to Gjoa Haven.
 - e. Work required to prepare or finish the worksite.

Supply of Materials

3. GNI agrees to supply and be responsible for:
- a. Airfare and travel expenses for Gord-Mar to and from Gjoa Haven as required; (return trip for 3 people)
 - b. Board and Room for Gord-Mar in Gjoa Haven;
 - c. All materials and tools necessary for the work mentioned above;
 - d. Temporary heat required for the building; (fuel only)
 - e. Insurance for the building, materials and tools, and for Workers' Compensation;
 - f. Wages for a cook/housekeeper, to total \$3,000.00 for duration of job;

22

Compensation for labour

4. Gord-Mar agrees to perform the above mentioned work in a good, workmanship-like manner in keeping with the standards set by Public Works Canada, GNI agrees to pay Gord-Mar the sum of \$41,000.00 (forty one thousand dollars.) for performing the above work to the standard agreed upon. Payment shall be made by certified cheque and delivered to Gord-Mar at the above address in Calgary. Payments shall be made according to the following schedule, not subject to progress payments made to GNI by Public Works Canada:
- a. \$5,000.00 (five thousand dollars) upon completion of the foundation;
 - b. \$10,000.00 (ten thousand dollars) upon completion of framing to erect the building, insulation and vapour barrier, and installation of exterior windows and doors;
 - c. \$7,000.00 (seven thousand dollars) upon completion of kitchen and bathroom cabinets and accessories, and finish carpentry and flooring (carpet and linoleum);
 - d. \$4,000.00 (four thousand dollars) upon completion of siding and application of flashing;
 - e. \$11,000.00 (eleven thousand dollars) upon granting of occupancy by Public Works Canada.

Additional Work and payment

5. GNI agrees to pay Gord-Mar (\$20.00 (twenty dollars) only for (Gordon and Marvin McElheran) per hour for any extra work required. (only as per approved agreement)

Upon obtaining a written contract, Gordon McElheran immediately returned to the jobsite in Gjoa Haven and continued with the work.

Officials from PWC made visits to the jobsite in Gjoa Haven for the purpose of inspecting the work and its progress on September 29, 1987, October 30, 1987, November 25, 1987, December 3, 1987, January 13-15, 1988, and on subsequent dates throughout 1988. Mr. Heacock of PWC was present on each visit and prepared a detailed report on each occasion. These documents and a great deal of other documents from the PWC files relating to this project were entered as exhibits at trial. The PWC documents confirm the many problems encountered on this construction project.

The Gord-Mar labour contract took much longer to perform than was anticipated by the parties at the time of the verbal agreement in early September and of the written agreement on October 23. From my assessment of the evidence at trial, I find that the reasons for the delay were:

- a) No site superintendent to coordinate resources and generally to solve problems which were the responsibility of GNI (GNI was required to have a superintendent on site pursuant to its contract with PWC);
- b) lack of proper tools and equipment;
- c) shortage of materials, and waiting on replacement materials;
- d) materials which did not meet PWC specifications, and waiting on replacement materials or PWC rulings;

- e) lack of proper or timely site preparation;
- f) lack of a professional "taper" at appropriate times;
- g) cold weather.

26 The building was not "closed in" until sometime in mid-November. Roofing and siding installation took place in late November and during December and January. Had the other factors mentioned above not delayed the project past its scheduled completion date of November 28, cold weather would not have been a significant contributing factor to the overall delay.

27 The McElherans remained in Gjoa Haven and worked through the Christmas holiday period, including Christmas Day and New Years Day.

28 During the jobsite inspection by the owner on January 13-15, 1988, the PWC officials pointed out further discrepancies and deficiencies in the materials provided by GNI. Baseboard material was missing, kitchen cabinets were of inferior quality, siding material was not in accordance with specifications (even though one third of it had already been installed). The PWC officials directed the McElherans to take all remaining materials from the supply trailer so that they could be inspected and when this was done further problems were exposed - damaged furniture, incorrect paint, incorrect flooring material, etc. With this, the McElherans finally became totally disheartened. As Marvin McElheran stated: "From what I could see, nothing that we were going to do was going

to be approved by the owner". The McElerans realized that they would be unable to do anything on the interior of the building until these problems were rectified and that they were going to be further delayed in completing their work. After considering the matter for a week or so, they decided to quit.

9 Gord-Mar abandoned the project and left the jobsite on or about January 21.

0 Rick LeTroy attempted to persuade Marvin McElheran to continue with the project (without his nephew Gordon) but Mr. McElheran declined.

1 Eventually, many months later, GNI completed this construction project, using other personnel to finish the remaining part of the Gord-Mar labour contract. In its counterclaim filed in these proceedings GNI claims damages against Gord-Mar in reimbursement for expenditures made in having the labour contract completed.

32 At the time of abandoning the jobsite, Gord-Mar had been paid only \$22,000.00 of its contract price. The quality of Gord-Mar's work had not been questioned by GNI or PWC.

33 Taking into consideration all of the circumstances I find that Gord-Mar was justified in quitting the jobsite on January 21. Its contract with GNI had become incapable of performance due to the fault of GNI. Because of the fundamental breaches of contract

committed by GNI, Gord-Mar was entitled to refuse to perform its obligations under the contract, and without legal liability to GNI for doing so.

34 The breaches of contract committed by GNI were those mentioned earlier in these reasons - lack of proper tools and equipment, shortage of materials, unsatisfactory materials, lack of adequate site preparation, and delay in providing materials and replacement materials. In addition, GNI breached a further implied term of the contract, i.e., that there would be a GNI superintendent or representative on site to speak for GNI in its dealings with Gord-Mar and also in its dealings with the owner. Communications with Mr. LeTroy in Surrey were unsatisfactory. Mr. LeTroy visited the job site only once (for a few hours) during the entire 4 month period that Gord-Mar was on the job.

35 The breaches of contract committed by GNI directly resulted in damage or loss suffered by Gord-Mar. In my view Gord-Mar's damages are to be assessed simply on the basis of the monies it would have received under the completed contract. The purpose of a damages award is to place the innocent party in the position it would have occupied had the contract been dutifully carried out by both parties to the contract.

36 Gord-Mar, however, asserts a claim to damages based on per-diem compensation for Gordon McElheran, Marvin McElheran, Kevin McElheran and local hires for the time period from November 1, 1987 to January 21, 1988. The basis of this claim is an assumption that Gord-Mar could have completed the portion of its contract that it did

complete in seven weeks, i.e., by October 31, 1987, had it not been for the numerous breaches of contract by GNI.

7 With respect, this proposition ignores the fact that this was a fixed price contract. Gord-Mar agreed to a fixed contract price of \$41,000, whether they completed the work in seven weeks, two and one-half months, or four months. As stated earlier in these reasons, because of the numerous fundamental breaches of contract committed by GNI, Gord-Mar was legally justified in terminating its performance of the contract on January 21, 1988 (or earlier); however it can hardly seek payment for that portion of the work performed in an amount greater than the total fixed price it had agreed to. Gord-Mar was not "forced" to remain on the jobsite, notwithstanding the submission of its counsel to that effect. On the evidence I am satisfied that Gord-Mar would have been legally justified in leaving the jobsite earlier, but it chose to remain. It is true that Gord-Mar could not, at such earlier time, be certain of successfully suing GNI for the full contract price; however, without being facetious, life is full of such uncertainties.

8 Gord-Mar similarly advances a claim to damages for all of the "additional" days worked, calculated at \$20/hour, on the basis that this is "extra work" contemplated by paragraph 5 of the October 23, 1987 contract document (Exhibit 1-11). However, there is no merit in basing the plaintiffs' claim on that paragraph, as a plain reading of that paragraph indicates that GNI's agreement to invoke the "extras" paragraph is a pre-requisite, and there is no suggestion in the evidence that GNI did so, either expressly or

by necessary implication.

39 The Plaintiffs advance an alternative claim on the basis of the doctrine of quantum meruit, i.e., that in the circumstances it is entitled to be paid by GNI, on a per diem basis, a reasonable sum for the value of the work it performed for the benefit of GNI.

40 Quantum meruit payments are awarded by the Court on the basis of an "implied" contract. In situations where there is no actual agreement between the parties for payment for services performed, the law will, in certain circumstances, imply a promise to pay a reasonable amount. However, the doctrine of quantum meruit does not apply where there exists an actual contract providing for payment for the services rendered.

41 Therefore, subject to one exception which I shall discuss below, the quantum meruit doctrine does not apply to the Gord-Mar - GNI relationship for the simple reason that these two parties did have an actual agreement.

42 The exception is the site preparation work. Gord-Mar did this work, even though it was not required to do so under the terms of its agreement with GNI. GNI received the benefit of this work. There was no agreement between the parties for this particular work to be done or for Gord-Mar to be paid for doing it. Gord-Mar no doubt considered it necessary to do the site preparation work, in order to be able to commence its own work in constructing a foundation. In these circumstances the law "implies" an obligation

by GNI to pay Gord-Mar a reasonable sum for this work. Taking into consideration a) the amount of time spent by Gord-Mar on site preparation; b) the lack of proper tools or equipment (such as a backhoe); c) the agreed \$20 hourly rate for "extras"; and d) the cost breakdown in the PWC contract for site work, I award Gord-Mar the amount of \$2,500.00, which I find to be a reasonable sum for this work in the circumstances.

In the result the Plaintiffs shall be entitled to recover the balance of its contract price ($\$41,000 - \$22,000 = \$19,000$) plus an additional \$2,500 for the site preparation work. The Defendant GNI shall pay to the Plaintiff Gordon McElheran the further sum of \$1,250 in reimbursement for tools belonging to Mr. McElheran which were not returned to him by GNI.

In this action the Defendant GNI filed a counterclaim. In the principal claim therein GNI seeks damages from Gord-Mar arising out of Gord-Mar's alleged repudiation of the contract and failure to perform the contract satisfactorily. As indicated earlier in these reasons, I find that Gord-Mar was diligently performing its obligations under the contract, and was justified in abandoning the jobsite in January 1988 following repeated breaches of contract by GNI. In these circumstances there is simply no merit to GNI's counterclaim in this regard.

GNI's counterclaim also contains other incidental claims for

- a) unauthorized removal of GNI building materials;

b) unauthorized removal of GNI-owned tools;

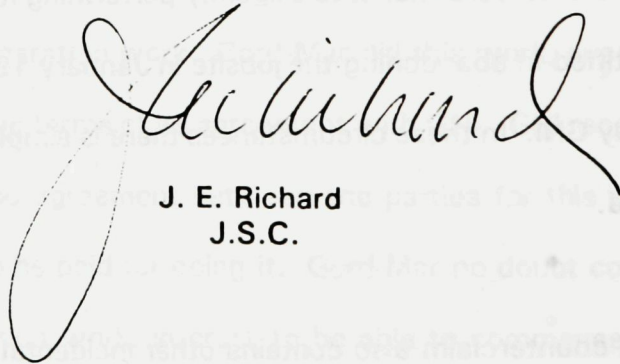
46 c) unauthorized purchase of personal items on GNI's account.

47 As to b) and c) I find that GNI has not provided any evidentiary basis for these claims. As to a) I find that GNI has not established that materials having any value were removed at the instance of Gord-Mar.

48 The counterclaim of GNI is accordingly dismissed.

49 By way of summary, the Plaintiffs shall have judgment against both Defendants (the liability of Western Surety Company under the bond not being in dispute) for \$21,500, plus interest pursuant to s.55 of the Judicature Act from January 21, 1988. The Plaintiffs shall have judgment against the Defendant GNI for a further sum of \$1,250 plus interest as above.

50 The Plaintiffs shall be entitled to their costs, in double Col. IV.


J. E. Richard
J.S.C.

IN THE DISTRICT COURT OF THE

STATE OF TEXAS

IN THE DISTRICT COURT OF THE NORTHWEST

STATE OF TEXAS, DISTRICT COURT OF THE NORTHWEST
COUNTY OF [illegible]

STATE OF TEXAS, DISTRICT COURT OF THE NORTHWEST
COUNTY OF [illegible]

STATE OF TEXAS, DISTRICT COURT OF THE NORTHWEST
COUNTY OF [illegible]



Approved for Applicant

[Signature]

Approved for Respondent

[Signature]

CV 01237

IN THE SUPREME COURT OF THE NORTHWEST
TERRITORIES

BETWEEN:

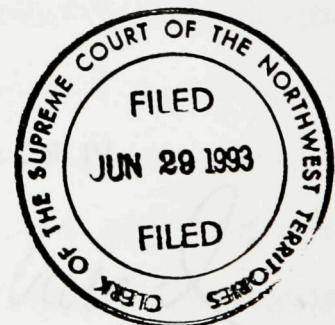
GORDON McELHERAN and MARVIN McELHERAN
operating under the name and style of
GORD-MAR ENTERPRISES AND
GORD-MAR ENTERPRISES

Plaintiffs

- and -

GREAT NORTHWEST INSULATION LTD. and
WESTERN SURETY COMPANY

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE J.E. RICHARD



J. E. Richard
J.S.C.