

COURT OF APPEAL OF
NEW BRUNSWICK



COUR D'APPEL DU
NOUVEAU-BRUNSWICK

83-23-CA

MCLAUGHLIN BROTHERS FARMING
OPERATIONS LTD., LEIGH JOSEPH
MCLAUGHLIN, MICHAEL JOSEPH
MCLAUGHLIN and BRYAN JOSEPH
MCLAUGHLIN

APPELLANTS

- and -

GRAND FALLS AGROMART LTD.

RESPONDENT

McLaughlin Brothers Farming Operations Ltd. et
al. v. Grand Falls Agromart Ltd., 2025 NBCA 91

CORAM:

The Honourable Justice Baird
The Honourable Justice French
The Honourable Justice LaVigne

Appeal from a decision of the Court of King's
Bench:
August 1, 2023

History of Case:

Decision under appeal:
2023 NBKB 138

Preliminary or incidental proceedings:
N/A

Appeal heard:
March 13, 2025

Judgment rendered:
July 31, 2025

Reasons for judgment by:
The Honourable Justice French

Concurred in by:
The Honourable Justice Baird
The Honourable Justice LaVigne

MCLAUGHLIN BROTHERS FARMING
OPERATIONS LTD., LEIGH JOSEPH
MCLAUGHLIN, MICHAEL JOSEPH
MCLAUGHLIN et BRYAN JOSEPH
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APPELANTS

- et -

GRAND FALLS AGROMART LTD.

INTIMÉE

McLaughlin Brothers Farming Operations Ltd. et
autres c. Grand Falls Agromart Ltd.,
2025 NBCA 91

CORAM :

l'honorable juge Baird
l'honorable juge French
l'honorable juge LaVigne

Appel d'une décision de la Cour du Banc du Roi :
le 1 août 2023

Historique de la cause :

Décision frappée d'appel :
2023 NBBR 138

Procédures préliminaires ou accessoires :
s.o.

Appel entendu :
le 13 mars 2025

Jugement rendu :
le 31 juillet 2025

Motifs de jugement :
l'honorable juge French

Souscrivent aux motifs :
l'honorable juge Baird
l'honorable juge LaVigne

Counsel at hearing:

For the appellants:
Rodney J. Gillis, K.C.

For the respondent:
Blair C. Fraser, K.C. and Caitlin Mahoney

THE COURT

The appeal is dismissed with costs of \$3,500.

Avocats à l'audience :

Pour les appelants :
Rodney J. Gillis, c.r.

Pour l'intimée :
Blair C. Fraser, c.r. et Caitlin Mahoney

LA COUR

L'appel est rejeté avec dépens de 3 500\$.

The judgment of the Court was delivered by

FRENCH, J.A.

I. Introduction

[1] In the summer of 2011, the individual appellants, carrying on business in partnership, lost a substantial portion of their potato crop to late blight despite having applied a chemical fungicide to prevent blight. While the corporation identified above as an appellant had been a plaintiff in the underlying action, it is not involved in this appeal since, as the trial judge found, it did not carry on business during the times material to the action and it was “irrelevant” to the action and his decision. This finding is not contested.

[2] The appellants used a fungicide produced by Dow AgroSciences Canada Inc., called “Dithane DG Rainshield” that they purchased from Grand Falls Agromart Ltd. in 20-kg sealed bags (300 bags) in June 2011. The appellants, and/or their father before them, have used Dithane during numerous growing seasons since the 1960-70s and they purchased it from at least three other local vendors.

[3] Seeking damages for the loss of their crop, the appellants commenced an action against both Dow and Grand Falls. The claim against Dow asserts negligence in manufacturing and selling a product that “did not contain the appropriate chemicals in sufficient quantities so as to be effective in relation to blight,” among other things. They maintained that the bags of Dithane they purchased did not contain the guaranteed 75% Mancozeb (the active ingredient for the prevention of blight) specified on the packaging. The claim against Grand Falls asserts a breach of an implied contractual condition that the goods were reasonably fit for their purpose, under s. 20(a) of the *Sale of Goods Act*, R.S.N.B. 2016, c. 110.

[4] After discovering that Dithane was produced and bagged by Bayer S.A.S under contract for Dow, at Bayer's facilities in France, the appellants added Bayer as a defendant to their negligence claim.

[5] At the end of the 3-week trial, the appellants acknowledged during closing arguments that the evidence did not provide a basis for their assertion of negligence against Bayer. This included the results of Bayer's testing of the batch of Dithane that it shipped from France (around April 15, 2011) to Dow in Canada, and from which a portion was later delivered to Grand Falls and sold to the appellants around June 27, 2011. The Certificate(s) of Analysis, which were accepted as accurate, indicated the Dithane contained more than the guaranteed 75% level of Mancozeb represented on its packaging.

[6] The appellants' claim against Dow was dismissed based largely on the trial judge's finding that there was no evidence the sealed bags of Dithane had become defective after they were shipped by Bayer to Dow (in Ontario), and before Dow delivered 960 of the bags to Grand Falls in early June 2011. He rejected the appellants' argument that the existence of blight in their crop and the absence of additional testing of the product by Dow justified an inference that the product had become defective, and its use contributed to the loss of their crop. On the contrary, the judge found the appellants' failure to modify its fungicide application program during the exceptionally wet 2011 growing season was more likely the factor that contributed to the spread of late blight and the loss of the crop.

[7] The appellants have not appealed the dismissal of the claim against Dow.

[8] The trial judge also dismissed the claim against Grand Falls - for a couple of reasons. First, he decided that the appellants failed to establish the existence of an implied condition of fitness for purpose under the *Act*. He rejected the testimony offered by the appellants to establish that Grand Falls had expressly recommended the use of Dithane. More significantly, the judge found as a fact that the appellants did not rely on Grand Falls' skill or judgment when they bought the Dithane in June 2011. Reliance is a condition precedent to the implied condition under the *Act*. Prominent among the factors

considered by the judge in deciding the appellants had not established that they relied on Grand Falls was evidence that (1) the appellants had initially learned about Dithane from another vendor many years before their purchase in 2011, (2) they had experience using Dithane on many occasions since at least the 1980s, and (3) they purchased it in the past from at least three different vendors. Grand Falls did not become a distributor of Dithane until 2006-2008.

[9] Second, the judge concluded that, even if there was an implied condition of fitness for purpose, the evidence led did not establish either that the Dithane was defective, thus constituting a breach of the implied condition, or that the product contributed to the loss of their crop. The judge rejected the appellants' argument that the circumstances justified an inference that the Dithane was defective, not reasonably fit for its purpose, and/or contributed to the crop loss. It is not disputed that the Dithane was not defective when it was shipped from Bayer in April 2011, or that the evidence of its subsequent shipping, handling and storage had not established it had deteriorated. Additionally, the judge accepted the evidence led by the defendants to establish that the loss of the crop to late blight was more likely a consequence of the appellants failing to (1) apply Dithane consistent with the "directions for use" on its packaging, and/or (2) make any modification of their spray program to account for the unusually and extremely wet conditions that existed during the spring and summer of 2011. It was suggested these conditions should have caused the Dithane to be applied by the appellants in greater concentration and more frequently than would otherwise be the case. In short, the judge decided the appellants had failed to establish that (1) the Dithane was defective; (2) there was a breach of the implied condition (if there were a condition); or (3) the Dithane contributed to the crop loss.

[10] The appellants' grounds of appeal contend the trial judge erred in fact and law in failing to find that:

- 1) Grand Falls made a recommendation with respect to the use and function-nality of Dithane;

- 2) The appellants relied on the recommendation of Grand Falls; and
- 3) The use of Dithane contributed to their loss.

[11] I would dismiss the appeal for the reasons that follow.

II. Analysis

[12] The first ground of appeal, like the second ground, challenges the trial judge's finding that the appellants did not rely on Grand Falls' skill or judgment when purchasing Dithane in June 2011. Reliance is a necessary condition precedent to the implied condition of fitness for purpose, under s. 20(a) of the *Act*.

[13] The third ground challenges the judge's finding that, even if there were an implied condition of fitness for purpose, the appellants did not establish that the Dithane was defective, that the implied condition was breached, or that the breach contributed to the loss of their crop.

[14] To succeed, the appellants must satisfy this Court that both challenged decisions are the product of a reversible error. In my opinion, neither reflects error.

A. *The judge's finding that the appellants did not rely on Grand Falls - a factual finding necessary to give rise to an implied condition of fitness for purpose under s. 20(a)*

[15] The *Act* provides that there is no implied warranty or condition as to the quality or fitness for any purpose of goods supplied under a contract of sale except as provided in s. 20(a), the implied condition that the goods are reasonably fit for purpose, and s. 20(b), the implied condition that the goods are of merchantable quality. Only the implied condition under s. 20(a) is at issue in this case. There was no assertion of a breach of an express warranty.

[16] The implied condition of fitness for purpose under s. 20 arises only where (1) the goods sold are of a description that it is in the course of the seller's business to supply and, (2) the buyer "makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment."

20 Subject to the provisions of this Act and of any statute on the subject, **there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:**

(a) if the buyer, expressly or by implication, **makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment**, and the goods are of a description that it is in the course of the seller's business to supply, whether the seller is the manufacturer or not, **there is an implied condition that the goods are reasonably fit for the purpose**, but in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose; [Emphasis added]

20 Sous réserve des dispositions de la présente loi et de toute autre loi à ce sujet, **il n'existe pas de garantie ou de condition implicite quant à la qualité ou quant au caractère adéquat à un usage particulier des objets fournis en vertu d'un contrat de vente, sauf dans les cas suivants:**

a) si l'acheteur, expressément ou implicitement, **fait connaître au vendeur l'usage particulier auquel les objets sont destinés d'une façon montrant qu'il s'en remet à la compétence ou au jugement du vendeur** et si les objets correspondent à la description des objets que le vendeur fournit dans le cadre de son commerce, qu'il en soit ou non le fabricant, **il y a condition implicite que les objets sont raisonnablement adéquats à cet usage**, mais dans le cas d'un contrat de vente d'un article déterminé sous son brevet ou sous une autre appellation commerciale, il n'existe pas de condition implicite quant à son caractère adéquat à un usage particulier; [Les caractères gras sont de moi]

[17] It was acknowledged at trial that Dithane was a product of a description that is in the course of Grand Falls' business to supply. Thus, the first of the condition precedents was not in issue at trial.

[18] It was the second of the condition precedents that was contested. It requires two things: (1) a buyer must make his or her purpose for the goods known to the seller; and (2) he or she must do so in a manner that shows that they are relying on the seller's skill or judgment.

[19] Depending on the circumstances, it is not a particularly onerous task to establish the first of these requirements. Indeed, even where a buyer does not expressly state to the seller his or her intended purpose for the goods, that purpose may be obvious and/or inferred from the very nature of the goods being purchased. As explained by G.H.L. Fridman, Q.C., F.R.S.C., *Sale of Goods in Canada* 5th ed. (Toronto: Thompson Carswell, 2004):

On the other hand, if no particular purpose is expressly stated, it may nonetheless be obvious from the character of the goods. Thus, a bottle of Coca-Cola is normally for drinking; therefore the purpose for which it was bought was sufficiently known to the seller in *Yelland v. National Cafe*. So, too, where a buyer was purchasing a motorcar, it was held to be implied that it was for the purpose of travel from place to place. Similarly with the purchase of a milch cow; "guaranteed used cars"; weedkiller; air conditioning equipment; a hearing aid; and hammers to be used in the rotors previously bought from the same seller.

The distinction was made clear in the leading English case of *Priest v. Last*. There what was in question was a hot-water bottle which burst, causing injury to the purchaser's wife. It was held that there was a breach of this implied condition. Although nothing was said about the purpose of the goods, there was knowledge of such purpose on the part of the seller. [p. 172-173]

[20] Understandably, there was no dispute at trial that Grand Falls knew the appellants intended purpose for using Dithane. Thus, the contentious issue regarding the application of s. 20(a) was whether the appellants showed they relied on Grand Falls' skill or judgment in making the purchase. As the trial judge stated, Grand Falls sold the product "with knowledge that [it] was being purchased for use in the prevention of early and late

blight. Hence, the sole issue with respect to the applicability of section 20(a) is the issue of reliance.” (para. 107)

[21] The necessity of a buyer relying on “the seller’s skill or judgment,” and the nature of that reliance are both explained by Fridman, as follows:

It is not enough that the seller knows of the particular purpose of the goods sold (and possibly manufactured) by him. **The buyer must also have relied upon the seller’s skill or judgment. If he relies on his own skill or judgment then the implied condition as to fitness for the particular purpose will not operate.** The onus is on the buyer to prove that he made known to the purpose for which the goods were [required] so as to show that he relied upon the seller in this way, **as long as the reliance was “a substantial and effective inducement” to the buyer to make the purchase.** [Emphasis added; p. 176-7]

[22] The last of Fridman’s comments, that “as long as the reliance was ‘a substantial and effective inducement’ to the buyer to make the purchase,” reflects the view expressed by the Supreme Court of Canada in *Preload Co. of Canada v. City of Regina et al.*, [1959] S.C.R. 801, 20 D.L.R. (2d) 586 (QL), which favourably cited an earlier decision regarding the English legislation, *Medway Oil and Storage Company, Limited v. Silica Gel Corporation* (1928), 33 Com. Cas. 195. Writing for the Supreme Court in *Preload Co.*, Martland J. stated, at page 820:

In *Medway Oil and Storage Company, Limited v. Silica Gel Corporation* [(1928), 33 Com. Cas. 195.], Lord Sumner, giving the judgment of the Court, stated the following propositions in respect of the operation of this subsection:

(1) **The buyer's reliance is a question of fact to be answered by examining all that was said or done with regard to the proposed transaction on either side from its first inception to the conclusion of the agreement to purchase:**-- (2) The section does not say that the reliance on the seller's skill or judgment is to be exclusive of all reliance on anything else, on the advice, for example, of the buyer's own experts, or the use of his own knowledge or common sense nor would it ever be

possible to be sure that the element of reliance on the seller entered into the matter at all, unless the buyer were so foolish as to volunteer some statement to that effect. **It follows that the reliance in question must be such as to constitute a substantial and effective inducement, which leads the buyer to agree to purchase the commodity:** -- (3) This warranty, though no doubt an implied one, is still contractual, and, just as a seller may refuse to contract except on the terms of an express exclusion of it, so he cannot be supposed to assent to the liability, which it involves, unless the buyer's reliance on him, on which it rests, is shewn and shewn to him. The Tribunal must decide whether the circumstances brought to his knowledge shewed this to him as a reasonable man or not, but there must be evidence to bring it home to his mind, before the case for the warranty can be launched against him. [Emphasis added]

[For New Brunswick cases that address the issue of a buyer's reliance see, for example: *Claude and Conrad Toner Ltd. v. Hetteima Inc.*, 222 N.B.R. (2d) 292, [1999] N.B.J. No. 571 (QL) (C.A.); *Givskud v. Kavanaugh*, 147 N.B.R. (2d) 1, [1994] N.B.J. No. 138 (QL); *Lloyd's Heating Service (1979) Ltd. v. Nilsson*, 46 N.B.R. (2d) 70, [1983] N.B.J. No. 142 (QL); *Superior Propane Ltd. v. Levesque*, 50 N.B.R. (2d) 362, [1983] N.B.J. 318 (QL); *Conary v. Harvey Hooper Lobster Ltd.*, 38 N.B.R. (2d) 670, [1982] N.B.J. No. 125 (QL); *Eastland Const. Ltd. v. Village of Gondola Point*, 26 N.B.R. (2d) 604, [1979] N.B.J. No. 179 (QL) (C.A.); *Godsoe v. Beatty*, [1958] N.B.J. No. 36 (QL) (C.A.); *Gagnon v. Geneau*, [1950] N.B.J. No. 8 (QL) (C.A.).]

[23] I now turn to the first two grounds of appeal, which the appellants appropriately combined in their submissions to this Court.

[24] The first ground asserts the trial judge erred by rejecting Leigh and Kent McLaughlin's testimony that Danny Blanchette, a representative of Grand Falls, had represented to them that Dithane is a "good product" and "it will work well" for the prevention of blight. In essence, they maintain the rejection of this evidence led the judge to erroneously find as a fact that they did not rely on Grand Falls' skill and judgment.

[25] The appellants do not expressly state that the trial judge's determination respecting the existence of reliance had to be, as a matter of law, confined to the

consideration of only evidence relating to any discussions between a buyer and seller; however, to the extent the somewhat narrow scope of their submission implies or suggests this is the case, I do not agree. No authority for such a proposition was provided, and I am aware of none.

[26] I state this because, even if it was accepted that Danny Blanchette had represented Dithane to be a “good product,” that “works well” for the prevention of blight, such evidence would not be, on the facts of this case, determinative of the issue of reliance. Such evidence, if accepted, would only be a part of the evidence relevant to a determination of whether, as a matter of fact, the appellants relied on Grand Falls. As an example, in determining actual reliance, the statements attributed to Danny Blanchette would have to be considered in light of Kent McLaughlin’s own testimony that, despite knowing how Dithane worked, he rhetorically asked Grand Falls, and the other vendors, the same questions regarding Dithane’s suitability every year.

[27] Indeed, although the trial judge did not accept that Danny Blanchette made these statements to the McLaughlin’s, the judge concluded that, even if he had accepted Leigh and Kent McLaughlin’s testimony, the totality of the evidence led to his finding that the evidence did not establish the appellants relied on Grand Falls, as contemplated by s. 20(a):

[...] However, even if I had determined the "it will work well" discussion took place with Leigh in November 2010 and/or the "it's a good product discussion" with Kent in June 2011, where would that take us? In *Antworth v. Fagan*, 1969 Carswell NB 190, Justice Creaghan, while discussing the application of section 20 of the Act (then section 15), observed as follows:

11 A leading case of the Supreme Court of Canada dealing with section 16 of the *Sales of Goods Act of Saskatchewan*, which is similar to section 15 of our Act, is *Hayes, Trustee of Preload v. The City of Regina* (1960), 20 D.L.R. (2d) 586. Mr. Justice Martland in delivering the unanimous judgment of

the Court approved of the following propositions under the Act at page 604:

(a) the buyer's reliance is a question of fact to be answered by examining all that was said or done with regard to the proposed transaction on either side from its first inception to the conclusion of the agreement to purchase.

(b) The section does not say that the reliance on the seller's skill or judgment is to be exclusive of all reliance on anything else, on the advice, for example, of the buyer's own experts or the use of his own knowledge or common sense. Indeed it would never be possible to be sure that the element of reliance on the seller entered into the matter at all unless the buyer made some statement to that effect. **It follows that the reliance in question must be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity. (Emphasis added)**

[...]

As already noted, the evidential record establishes that in 2011 the decision to purchase Dithane was made based on personal preference and price. The McLaughlins knew what was in Dithane and how it worked. They were motivated to acquire the Mancozeb-based product they could acquire for the best price with a preference for Dithane if all other considerations were equal. Further Leigh acknowledged that he did not treat Danny's "it will work well" comment as a recommendation (paragraph 24) and **Kent confirmed that he already knew how Dithane worked, but asked the same questions rhetorically every year when he went in to discuss pesticides with Danny (paragraph 41). In these circumstances, those statement, if indeed made, fall well short of demonstrating reliance by the Partnership on the skill or judgement of Grand Falls in making the decision to purchase Dithane in 2011.**
[Emphasis added; paras. 113,115]

[28] The appellants' second ground of appeal challenges this finding; however, their submissions of error focus on the trial judge's rejection of Leigh and Kent McLaughlin's testimony, with no meaningful allegation of any error related to the judge's

consideration of the substantial body of evidence relating to the appellants' long-standing use of and preference for Dithane.

[29] In the absence of a reversible error in the judge's finding based on the totality of this evidence, and I can see none, the second ground of appeal must be dismissed, and it is not necessary to address the appellants' challenge to the judge's rejection of Leigh and Kent McLaughlin's testimony regarding Danny Blanchette's alleged representations respecting Dithane. This said, I will address that ground of appeal.

[30] At trial, Kent McLaughlin testified that in June 2011 Danny Blanchette said Dithane is "a good product." Kent McLaughlin is a brother of the partners who own the farming business. For many years he was employed by the partnership and responsible for its purchase and application of pesticides/fungicides, among other things. His testimony at trial also provides important context to the issue of reliance. He testified that, each year after potato planting was done, he would approach Grand Falls to obtain that season's pricing for pesticide/fungicide products and he would subsequently approach other vendors to obtain their pricing of the same products. He said that after doing so, he would return to Grand Falls, even if they did not have the best price, in order to give Grand Falls the last opportunity for the sale before deciding where to buy. Kent McLaughlin stated that Mr. Blanchette made the comment during the first of the two discussions that led to the appellants' purchase in 2011.

[31] Leigh McLaughlin testified that on a Saturday morning in November 2010, Danny Blanchette said that Dithane will "work well." He stated that this occurred when both he and his brother, Michael McLaughlin, were together at Grand Falls, during one of their near weekly Saturday morning "drop-ins" to chat with Danny Blanchette. Michael McLaughlin did not testify at trial.

[32] At trial, Grand Falls disputed the veracity of these statements. Kent McLaughlin's evidence regarding Mr. Blanchette's "good product" comment (at the time of purchase in June 2011) was first disclosed to Grand Falls weeks before trial, when it

was characterized as a correction to Leigh McLaughlin's statements at discovery in 2018, which indicated that Grand Falls did not make any representation regarding Dithane prior to their purchase in June 2011. Kent McLaughlin is not a party to the litigation and, as noted, not a partner in the business.

[33] Leigh McLaughlin's evidence regarding Danny Blanchette's statement at one of their Saturday morning chats in November 2010 was not disclosed at Leigh McLaughlin's discovery in 2018. In fact, the alleged statement was not raised during his direct examination at trial. The statement was made by Leigh McLaughlin during his cross-examination. At the same time, he also stated that he did not consider Danny Blanchette's comment to be a recommendation.

[34] The trial judge explains in some detail why he did not accept the comments attributed to Danny Blanchette by Leigh and Kent McLaughlin:

Turning to the issue of reliance, I am compelled to observe that Leigh and Kent were, simply put, not credible witnesses. I will begin with Leigh's November 11, 2022 statement and subsequent Affidavit. **It defies belief and common sense that Leigh, having participated in lengthy discoveries in 2018, would suddenly recall a few days before trial that it was in fact Grand Falls who first introduce the McLaughlin family to and recommended Dithane.** The incredulity of this 11th hour revelation is compounded by the reality that **the evidential record presented at trial reflects that the principal factual elements of this narrative are false - the McLaughlins purchased Dithane from a variety of other suppliers pre-2011 (Leigh testified Carmel Godbout of Grand Falls Milling first introduced them to Dithane), knew what was in it and how it worked (the formulation having been substantially consistent since the late 1980's) and liked the product. Moreover, Grand Falls did not obtain distribution rights for Dithane until post - 2006.**

Even if I could somehow make sense of Leigh's statement, I then need to reconcile it with the "it will work well discussion" between Leigh and Danny Blanchette in November 2010 (that Leigh testified he only recalled

between November 24 - 28, 2022) and the "it's a good product discussion" between Danny [Blanchette] and Kent in June 2011 (that Kent did not tell anyone about until he was on the stand). The sheer unbelievability and incredulous nature of these ascertains, arriving 11 years after they purportedly took place and after eight years of litigation, defies belief.

[...]

Moving to Danny [Blanchette] and Brian Savage, I found both to be credible and consistent witnesses. As the owner of a business that is dependant on the local agricultural community, Danny [Blanchette] endeavored to be a careful and factual witness. When pushed during cross-examination regarding his statement that he had no recollection of making any recommendation to Kent with respect to the usage of Dithane his response was we do not recommend commodities.

I accept that statement for its truthfulness, Moreover, it is consistent with the reality that the evidential record reflects that the McLaughlins' decision of what pesticides to purchase and where to make those purchases was driven by price. This was understandable. They were a well-established farming operation who had operated successfully for many years. Kent knew he wanted to purchase the Mancozeb-based product he could acquire for the best price, with a preference for Dithane if pricing and supply considerations were no issue.

Bottom line, on the basis of the evidential record before the Court and my credibility assessments with respect to the testimony of Kent and Leigh, I find that Danny [Blanchette] made no recommendation to Kent or Leigh with respect to the purchase, use or functionality of Dithane in November 2010 or June 2011 [...] [Emphasis added; paras. 108, 109, 111-113]

[35] In arguing the trial judge's reasoning reflects error, the appellants submit Danny Blanchette had no recollection of the relevant conversations with Leigh and Kent McLaughlin, and that if Kent McLaughlin did not ask for a recommendation from Grand Falls each year, as he testified, he simply would have placed an order for the product. These and other secondary arguments in favour of accepting the testimony were argued at trial

and were addressed by the judge. For example, he states that “[w]hen pushed during cross-examination regarding his statement that he had no recollection of making any recommendation to Kent with respect to the usage of Dithane [Danny Blanchette’s] response was we do not recommend commodities.” (para. 111)

[36] In my opinion, there is no palpable, let alone overriding, error in the trial judge’s assessment of the relevant evidence, and his findings of fact and credibility are therefore not open to intervention on appeal.

[37] The absence of a reversible error in the trial judge’s determination, namely that the appellants had failed to establish the existence of an implied condition as to fitness for purpose regarding the appellants’ purchase of Dithane in 2011, is sufficient to dismiss the appeal in its entirety.

[38] However, I will address the appellants’ third ground of appeal.

B. *The judge’s finding that even if there were an implied condition of fitness for purpose, the appellants did not establish a breach of that condition*

[39] This ground of appeal contends the trial judge erred in failing to find that the use of Dithane contributed to the loss of their crop.

[40] Appellate review and reversal of this decision requires identification of either an error of law or a palpable and overriding error in the judge’s assessment of the evidence or his findings of fact.

[41] I understand the appellants’ submission to be that the judge should have inferred from the loss of the crops that the Dithane was defective, which both breached the warranty that it was fit for the purpose of preventing blight and contributed to the crop loss.

[42] In this regard, the appellants' written submission begins by stating that, in a "sale of goods context, one may infer that the cause of damage was defective goods if other possible causes, including the buyer's conduct, are ruled out as possible causes of damage," citing *United Grain Growers Ltd. v. Genesis*, 2002 ABQB 851, [2002] A.J. No 1146 (QL), which follows *Schreiber Brothers v. Currie Products*, [1980] 2 S.C.R. 78, [1980] S.C.J. No. 43 (QL).

[43] The judge referred to both of these decisions in his reasons for decision. The relevant passage from *United Grain Growers* is:

In the sale of goods context, one may infer that the cause of damage was defective goods if other possible causes, including the buyer's conduct, are ruled out as possible causes of the damage: See *Schreiber Brothers. v. Currie Products*, [1980] 2 S.C.R. 78, (1980), 108 D.L.R. (3d) 1 at 6, where Laskin C.J. stated "the plaintiff purchaser, suing for damages for breach of the implied condition of merchantable quality, had the burden of proof, in the light of the pleadings, of excluding its faulty workmanship as a probable cause of the blistering of the asphalt"; and see *Fridman*, where the case is summarized as follows:

Where a buyer alleges that goods are not of merchantable quality it may not be necessary for the buyer to prove affirmatively that the goods were defective. **The trial court is entitled to draw the inference of defective quality even though the cause of the defect remains unknown, as long as the buyer provides evidence from which the buyer's own faulty workmanship is excluded as a possible cause of the defect in the goods:** *Sale of Goods* at 212-13

For *Genesis* to succeed, then, he must prove not only that the feed was not fit for the purpose or that it was of unmerchantable quality but also that the feed was an effective or dominant cause of his losses. **In absence of evidence of faulty feed, Genesis can only succeed if his own practices are excluded as a cause of the damage.** If *Genesis*' own conduct or practices contributed to the loss in a substantial enough fashion, he may not be able to prove causation. Further, if the Unifeed feed caused the losses, but

Genesis' practices also contributed to the losses, his damages may be reduced. [Emphasis added; paras. 58-59]

[44] This statement of the law is not disputed, and the appellants do not assert an error of law in the trial judge's analysis on this point.

[45] Additionally, the appellants contend in their written submission that the evidence at trial indicates the crop loss was not a result of any of the many factors and variables that may bear on crop success, including their conduct; they maintain Dithane is the only "common thread" that could have contributed to the loss. They state that in 2011 their conduct played no role in the loss of the crop to blight, given that (1) their spray equipment was of good quality, (2) their spray program was in accordance with the Dithane packaging and advice received, and (3) there was nothing about their discovery of blight and subsequent response that could have negatively impacted the crop. Their written submission concludes that "[t]here is no evidence of any improper conduct by the [appellants], which would have caused or contributed to the damage suffered," and the "mere speculation is insufficient to place a burden on the appellants to disprove the allegation of misuse of the product."

[46] Despite making assertions of fact that are inconsistent with the findings made by the trial judge, the appellants do not identify any factual finding by the judge that they contend is wrong, or the product of a palpable and overriding error. Indeed, in their written submission, they accept as correct all findings of fact made by him at paragraphs 1- 99 of his reasons for decision, excluding only: (1) para 28, which is not relevant to the breach issue; (2) paras 85-89, which summarize the evidence of Dr. Johnson, an expert; and (3) para 99, which summarizes the evidence of Bayer's Quality Manager.

[47] In sum, although accepting the judge's account of the key evidence as largely correct and not identifying any palpable and overriding errors in his assessment of that evidence, the appellants assert the judge erred because he did not (1) find that their conduct did not contribute to the infestation of blight, and (2) infer that it was the use of defective Dithane that contributed to the loss of their crop.

[48] In my opinion, this ground of appeal must be dismissed.

[49] The trial judge correctly stated that to establish a breach of the implied condition of fitness for purpose (if such a condition existed), the appellants had to establish that the Dithane was defective, constituting a breach of the condition, and further, that the defect contributed to the loss of their crop.

[50] While the claims against Bayer and Dow are not in issue on appeal, the appellants and the judge were all undoubtedly mindful of the uncontested and accepted evidence that the Dithane contained approximately 76% level of Mancozeb when it left the Bayer facility in France around April 15, 2011. It was in this context that the judge considered the appellants' submission that he should infer it was defective Dithane that contributed to the crop loss.

[51] The trial judge correctly explained, in order to do so "the evidential record must rule out other possible causes, including the conduct of the [appellants], for the loss." He stated:

This brings into focus the issue of the McLaughlin farming practices in 2011. To begin, as I have already observed, the McLaughlin family are long-established potato farmers. If they did not know how to grow potatoes they would no longer be in business, and certainly would not have enjoyed a 60-year relationship with McCain. However, 2011 was a very bad year for potato farmers. Danny (paragraph 92), Monica Everett (paragraphs 68 and 71) and Dr. Johnson (paragraphs 87 and 89) all testified that 2011 was an extraordinarily wet year that was conducive to the spread of late blight. All impressed the Court as knowledgeable and forthright witnesses. Monica's rain gauge (paragraph 68) reflected that the McLaughlin fields received approximately 500% more rain than normal in 2011, and Dr. Johnson observed in his 2011 communication to Leigh that 2011 saw both record rainfall and "weather-related maladies, late blight and pink rot included" (paragraph 89). Consistent with this evidence internal 2012 communications for the Minister

of Agriculture and Agri-Foods Canada (Exhibit Dow - 19) reported in a memo titled "Potato Insurance Plan in New Brunswick" that "in 2011, the Province of New Brunswick experienced extreme levels of precipitation. In addition to the excess moisture, producers had to contend with abnormally cool weather which created very difficult growing conditions". Finally, consistent with the foregoing, in the September 13, 2011 Notice of Loss submitted by Leigh under the Canada - New Brunswick Crop Insurance Program, Leigh noted as follows:

"Briefly describe loss or damage. Excess moisture and rainfall during the season have caused sever[e] late blight infection. Tubers are severely infected by pink rot and late blight... I am requesting permission to abandon or destroy the damaged acreage". Bottom line, it is clear from all perspectives that 2011 was an extraordinarily difficult year for potato farmers in the Grand Falls area. So how did the McLaughlins react? The record before the Court reflects that for them it was business as usual. The sprayer was calibrated to deliver a volume of 15.56 gallons per acre (paragraph 31) and Kent sprayed at seven - eight day intervals based on their long-established practice. We also have Monica Everett's testimony that she observed late blight in Field 5 - 1 on August 4, marked the plants and notified a member of the McLaughlin family (paragraph 69). Her next report on August 18 (paragraph 70) reported that late blight was present throughout Field 5 -1 and was consistent with Leigh's testimony late blight was everywhere by mid-August (paragraph 16). Monica impressed the Court as a credible witness. She was cautious and factual in her testimony, and clearly cognizant of the fact she was giving evidence contrary to a long-standing contract grower with whom her employer has done business for many years. I accepted her testimony in its entirety. [paras. 121-122]

[52] The judge then embarked on an exhaustive review of the evidence of the appellants' practice during 2011, which included the following observation regarding the testimony of Dr. Johnson:

Dr. Johnson testified that the McLaughlin's spray program was one that worked well a generation ago, but by 2011 required adjustment to deal with more aggressive late blight and the extremely wet weather conditions. Consistent with

Dr. Coffin (paragraph 78), Dr. Johnson testified that in 2011 that meant spraying protectants (Dithane) on a five-day cycle while at the same time adding systematic and translaminar treatments. **On the basis of Dr. Johnson's testimony, backed up by the testimony from Dr. Coffin, it is apparent that the McLaughlin's 2011 spray program was ineffective to combat the extraordinary weather conditions confronting potato growers that year. In making this observation, I am also mindful of the Dithane label instruction that "during period of wet weather favoring late blight...spray intervals may be reduced to 5 -6 days" (paragraph 59) [...]** [Emphasis added; para. 123]

[53] As noted above, the judge's summary of Dr. Johnson's evidence (at paras 85-89) comprised the bulk of the judges' findings that the appellants did not accept. This said, the appellants' submissions do not directly assert an error in relation to either the judge's findings at paras 85-89, or at para 123, reproduced above. Paragraphs 85-89 warrant reproducing here, in full:

Dr. Johnson holds a M.S. from the University of Maine at Orono and a Ph.D. from the University of Florida, both in plant pathology. He has been employed as a Crops Specialist with the University of Maine since 1988 and was confirmed as having the same scope of expertise as Dr. Miller (paragraph 50). Dr. Johnson testified that he has worked most of his life in blight prevention, detection and control.

Dr. Johnson testified that what happens in Northern Maine can be expected to happen in New Brunswick's potato growing region because the Northern Maine growing region is directly across the border from the Grand Falls area. He advised that there was a late blight outbreak in Northern Maine in 1994 and that, following same, he developed an algorithm to predict late blight and established a hot line to warn growers when there was a risk of late blight. He stated that he had made his blight prevention software available to Dr. Khalil Al-Mughrabi of the New Brunswick Potato Centre, and for purposes of his modelling collected data from 17 weather stations situate within one to seven miles of the New Brunswick border.

Dr. Johnson prepared a report that was marked Exhibit GF - 5. In it he notes as follows:

a) "The 2011 growing season was one of the worst growing seasons for late blight in the past 30 years. Record rain falls were set nearly every month of the 2011 growing season".

b) Late blight was discovered in Maine on July 18, 2011 and in New Brunswick on July 20, 2011.

c) The McLaughlins started their spray program nine days late. Specifically, Dr. Johnson observed that only three of the McLaughlin fields (representing 122.7 acres) were first sprayed with Dithane pre - July 5, 2011 (over one month after most of their fields were planted (Exhibit P/D 1 - 1 -Tab 7)). Dr. Johnson observed that the potato plants would have been out of the ground, unprotected and susceptible to attack by late blight in early July which is when he opined (estimated) late blight first arrived in New Brunswick.

d) The McLaughlins applied four fewer applications of protectant (Dithane) than Dr. Johnson recommended by September 2, 2011 and, in addition, should have applied one systematic material and two translaminar materials post the presence of late blight in New Brunswick

e) Maine growers who followed Dr. Johnson's recommended spray program suffered minimal impacts from late blight in 2011.

In his testimony Dr. Johnson described late blight as having become more aggressive in the 2000's. As noted, because of the weather conditions and corresponding risk of late blight in 2011, he recommended spraying protectants on a five-day cycle and also spraying systematic and translaminar treatments at the same time. **He described the McLaughlin weekly spray program as a plan that worked well a generation ago, but stated that by 2011 it was no longer effective against more aggressive late blight. Dr. Johnson testified you now needed to adjust your spray program based on the weather, and in 2011 that meant moving to a five-day program (similar to Dr. Coffin's testimony**

regarding the need to adjust spraying schedules based on weather - paragraph 78). Specifically, Dr. Johnson would have recommended the addition of Revus and Allegro in addition to (as opposed to in substitution for) Dithane in the McLaughlin spray program.

On October 24, 2011 Dr. Johnson corresponded with Leigh with regard to potato samples Leigh had brought to him for testing. In that correspondence (marked as Exhibit GF - 6), Dr. Johnson observes the "potatoes are exhibiting symptoms of late blight and pink rot" before continuing on to observe:

"The 2011 growing season is rivaling the 1994 and 2004 seasons as one of the worse years for weather-related maladies, late blight and pink rot included. As expected, these diseases have been showing up in areas of most potato fields in Aroostook County this season. Record rainfalls were set nearly every month of the growing season. Potato production areas bordering Canada have been especially hard hit with late blight. We are now seeing the evidence of late blight and pink rot as some tubers start to breakdown in the field. Please feel free to contact me if you have any questions or require further information." [Emphasis added; paras. 85-89]

[54] Following the judge's review of the evidence of the appellants' practice during 2011, he concluded the record would not support the inference sought by the appellants:

Consequently, the evidential record will not support an inference that defective Dithane caused or contributed to the loss of the Partnership's 2011 potato crop, as I am unable to reasonably rule out other potential causes for the loss; namely, the extraordinary weather conditions coupled with the farming practices of the McLaughlin family. As an aside, the best hard evidence with respect to the functionality of the Dithane supplied to the Partnership is as summarized in paragraph 118. [para. 124]

[55] Since the judge's statements refers to the "best hard evidence" regarding the Dithane sold to the appellants being summarized at para 118, I reproduce that paragraph for ease of reference:

We have evidence that the Dithane contained an approximate 76% level of Mancozeb when it left the Bayer facility in Marle (paragraphs 97 - 99). We also have the testimony from Danny (paragraph 92) and Michel (paragraph 62) that there were no other complaints with respect to Dithane shipped to Grand Falls or elsewhere in the Maritime Region in 2011. Finally, we have the testimony of Danny respecting the adequacy of the Grand Falls warehouse (paragraph 93) and Brian Savage that he observed no foul odor or deterioration in the bags of Dithane from which he took the samples for forwarding to RPC (paragraph 47).

[56] As stated, the appellants do not identify a palpable, let alone an overriding, error in the judge's characterization of or findings respecting this evidence, nor do they indicate any reason for not accepting this account of the evidence.

[57] In essence, the appellants seek to have this Court consider the totality of the evidence and come to a different conclusion than the trial judge respecting the appropriateness of inferring that the Dithane was defective, and that this defect contributed to the loss of their crop.

[58] I discern no error in the judge's reasoning, let alone an error that would permit this Court to interfere with his determination that the record before him did not justify an inference that defective Dithane contributed to the loss of the appellants' 2011 potato crop.

III. Conclusion and Disposition

[59] For these reasons, I would dismiss the appeal with costs of \$3,500.

[60] Considering the effect of this decision, and with the consent of the Chief Justice, the decision will be released first in the English language and the French version will follow under s. 24(2) of the Official Languages Act, S.N.B. 2002, c. O-0.5.