

LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 238

Date of Decision: 2021-10-28

IN THE MATTER OF AN OPPOSITION

**Institut national de l'origine et de la
qualité and Comité interprofessionnel
du vin de Champagne**

Opponents

and

Sugarfina, Inc.

Applicant

1,711,478 for CHAMPAGNE BEARS

Application

[1] The *Institut national de l'origine et de la qualité* (INAO) is a French government agency that has for responsibility, *inter alia*, to define the controlled designations of origin (*appellation d'origine contrôlée* (AOC)) applicable to certain French wines, including the requirements that these wines meet with regard to, *inter alia*, their geographical origin and conditions of production. For its part, the *Comité interprofessionnel du vin de Champagne* (CIVC) is a French organization regrouping winemakers and wine houses of the Champagne winemaking region in France and has for mission, notably, to insure the recognition and the protection around the world of the Champagne controlled designation of origin.

[2] INAO and CIVC (collectively, the Opponent) oppose registration of the trademark CHAMPAGNE BEARS (the Mark), subject of application No. 1,711,478 which stands in the

name of Sugarfina, Inc. (the Applicant). The application for the Mark was filed on January 19, 2015 in association with “candies; candy; gummy candies” on the dual basis of use in Canada since at least as early as November 16, 2012 and registration and use in the United States.

[3] For the reasons that follow, the application is refused.

RECORD AND PLEADINGS

[4] The Mark was advertised for opposition purposes in the *Trademarks Journal* on February 17, 2016 and on July 18, 2016, the Opponent filed a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). All references in this decision are to the Act as amended on June 17, 2019, with the exception of references to the grounds of opposition which refer to the Act before it was amended.

[5] The grounds of opposition as pleaded by the Opponent are reproduced in full below:

- a) The [Mark] is not registrable pursuant to [s]ection 7(d) of the [Act] as the use of the CHAMPAGNE controlled designation of origin in association with the goods covered by the [a]pplication is prohibited in that it amounts to a description that is false in a material respect and is likely to mislead the public as to the character, quality, composition, geographical origin or the mode of manufacture and production of these goods.
- b) Section 38(2)(b) of the Act, in that the [Mark] is not registrable pursuant to [s]ection 12(1)(b) of the Act as it is either clearly descriptive or deceptively misdescriptive, in English or French, of the character, quality, conditions of production and place of origin of the goods in association with which it is used or proposed to be used.

[6] The Applicant filed and served a counter statement denying the allegations contained in the statement of opposition.

[7] In support of its opposition, the Opponent filed a certified copy of geographical indication No. 1,683,704 for Champagne and the affidavits of Jennifer Dyal and Van Khai Luong both dated April 5, 2017 (the Dyal and Luong affidavits, respectively), which are summarized below. In support of its application, the Applicant filed the affidavit of Natasha

Gulati, dated August 4, 2017 (the Gulati affidavit), which is also summarized below. None of the affiants was cross-examined.

[8] Both parties filed a written argument and were represented at a hearing.

OVERVIEW OF THE EVIDENCE

Opponent's evidence

[9] Ms. Dyal and Luong are both employed by the Opponent's trademark agents and introduce into evidence the results of various online searches, of store visits and of searches completed at a library, namely, at the *Bibliothèque et archives nationales du Québec*.

Dyal affidavit

[10] Ms. Dyal provides excerpts from the Applicant's website at *sugarfina.com* dated March 8, 2017 showing goods offered in association with the Mark [para 5, Exhibits JHD-1 to 10]. I note that, overall, these display information which appears to be consistent with the Applicant's own evidence in this regard provided by Ms. Gulati and summarized below.

[11] Ms. Dyal also provides the results of her visit to stores in Montreal on April 4 and 5, 2017 to purchase third party Champagne-containing products (*produits au Champagne*), namely jelly, mustard, vinegar and jam, all of which display the word Champagne on their labels [para 6, Exhibits JHD-11 to 14].

[12] Lastly, Ms. Dyal provides a copy of an August 25, 2016 online article from the *Toronto Star* titled "I Ate This: the most coveted candy of the summer", which includes a mention and review of the Applicant's "Dom Perignon-infused Champagne bears" [para 7, Exhibit JHD-15].

Luong affidavit

[13] Ms. Luong provides extensive background information on the Opponent [paras 5 to 8, Exhibits VKL-1 to 10]. She also provides information with respect to the Champagne designation of origin, the Champagne region, as well as to wine originating therefrom

[paras 9 to 11, Exhibits VKL-11 to 22]. Amongst the submitted documentation, her evidence in this respect comprises:

- Multiple online articles which refer to the Champagne region and its wine, including:
 - Online articles by Jacques Benoit from *le Droit* and *La Presse* titled *Le champagne: charme, séduction, Dix champagnes pour les fêtes* and *Champagne bien aimé* respectively published on December 1, 2014 and December 10 and 11, 2015. The printouts are all dated May 17, 2016. [Exhibit VKL-12]
 - Online articles by Guénaël Revel published on his website *MonsieurBulles.com* between October 2011 and September 2015. The printouts are all dated May 19, 2016. [Exhibit VKL-16]
 - Online articles by Nicole Barrette Ryan and Guénaël Revel from *Vins & Vignobles* titled *Champagne et mets – partager le plaisir*, *Le champagne est-il immuable?* and *Le Champagne Veuve Clicquot remercie le Québec* published in September and November 2015. The printouts are all dated May 17, 2016. [Exhibit VKL-17]
 - An online article by Frédéric Arnould titled *Vins mousseux canadiens : les bulles du profit* published on the website *ici.radio-canada.ca* on February 14, 2014. The printout is also dated May 17, 2016. [Exhibit VKL-18]
- Multiple excerpts from books and magazines which refer to the Champagne region and its wine, including:
 - Roger Des Roches, *La Dolce Vita : Champagne* (1999); Guénaël Revel and Chrystine Brouillet, *Couleur Champagne* (2006); Guénaël Revel, *Vins mousseux et champagnes* (2007), *Revel 2011 – Guide des Champagnes et des autres bulles* (2011), *Guide Revel 2013 des Champagnes et des autres bulles* (2013) and *Guide Revel 2014 Champagnes et autres bulles* (2014). [Exhibit VKL-13]
 - Chantal Gagnon, *Test Champagnes* (Protégez-Vous, 1999); David Cobbold, *Champagnes, semblables, mais tous si différents...* (*Vins & Vignobles*, 2000); Janine

- Saine, *L'art et le vin en Champagne - dans les crayères champenoises* (Vins & Vignobles, 2006); David Cobbold, *Champagne - Comment gérer le succès?* (Vins & Vignobles, 2007-2008); Guénaël Revel, *Heidsieck - Une famille champenoise* (Vins & Vignobles, 2009-2010); Véronique Rivest, *Bulles en fête - du champagne pour tout le monde* (Cellier, 2013). [Exhibit VKL-14]
- Several articles from Taste magazine published by BC Liquor Stores between 2007 and 2015. [Exhibit VKL-15]
 - A copy of what appears to be a PowerPoint slide deck for a course titled *Atelier Bulles - Cours sur les vins, bières et spiritueux*, offered by the *Société des alcools du Québec* (SAQ) in 2012. [Exhibit VKL-18]
 - An excerpt from a 2013 trend report titled *Tendances de la consommation Vin, bière et spiritueux au Canada*, published by Agriculture and Agri-Food Canada. [Exhibit VKL-18] Amongst other information, I note that the report includes yearly sales volumes for Champagne wine in Canada for 2006-2012 and 2016 and that at least 800,000 liters of this wine were sold every year between 2006-2012.
 - The results of searches for “Champagne” on the websites of four provincial liquor boards, namely the SAQ [Exhibit VKL-19], the Liquor Control Board of Ontario [Exhibit VKL-20], the New Brunswick Liquor Corporation [Exhibit VKL-21] and the Saskatchewan Liquor and Gaming Authority [Exhibit VKL-22]. Those printouts which are dated are all from May 18, 2016.

Applicant’s evidence – Gulati affidavit

[14] Ms. Gulati is employed by the Applicant’s trademark agents and introduces into evidence the results of various online searches and of a store visit during which she purchased some of the Applicant’s goods sold under the Mark. Her evidence mainly means to support the Applicant’s contention that there is widespread use of the term “champagne” as a flavour and as a colour, as well as other uses, including to suggest high quality or luxury. More specifically, Ms. Gulati provides:

- Definitions for “champagne” from online dictionaries, amongst which:

- Dictionary.com [Exhibit A, Subsection 1]

champagne

noun

1. (*initial capital letter*) the sparkling, dry, white table wine from the region of Champagne in France.
2. a similar sparkling wine produced elsewhere.
3. (formerly) the nonsparkling, dry, white table wine produced in the region of Champagne in France.
4. a very pale yellow or greenish-yellow color.
5. anything considered the best or luxurious.

adjective

6. having the color of champagne.
7. luxurious or expensive: *champagne tastes*.

Champagne

noun

1. a region and former province in NE France.

- The Oxford online dictionary [Exhibit A, Subsection 2]

champagne

NOUN

1. A white sparkling wine from Champagne.
 - 1.1 A pale cream or straw color

Champagne

PROPER NOUN

A former province of north-eastern France that now corresponds to the Champagne-Ardenne administrative region. The region is noted for the white sparkling wine first produced there in about 1700.

- The Merriam-Webster online dictionary [Exhibit A, Subsection 3]

champagne noun

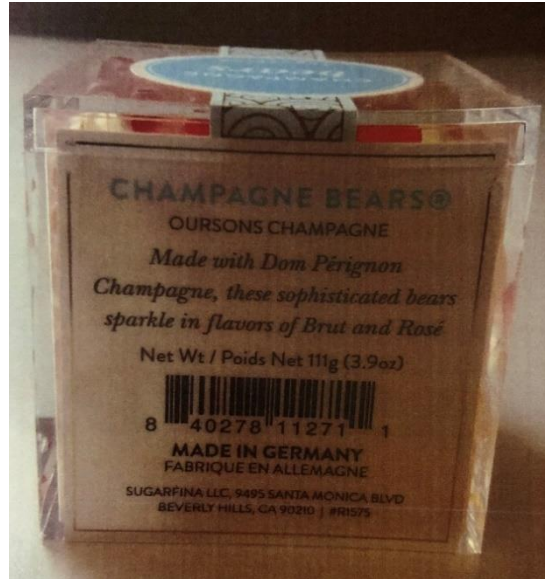
variants: *or less commonly* **Champagne**

1 : a white sparkling wine made in the old province of Champagne, France;

also a similar wine made elsewhere

2 : a pale orange yellow to light grayish-yellowish brown

- State of the register evidence in the form of searches she performed of the Canadian Trademarks Database for marks containing the word “champagne” aside from those covering goods classified under Nice class 33 (which includes mainly alcoholic beverages) [Exhibit D], marks containing the word “bear” and covering goods classified under Nice class 30 (which includes candy and gummy candies amongst many other foodstuffs) [Exhibit E] and marks containing the word “bear” and covering goods described as “candy” [Exhibit F]. I note a number of discrepancies in the search results adduced under these exhibits. For example, they include numerous irrelevant occurrences such as inactive (abandoned, cancelled or expunged) trademark applications or registrations or trademark applications that are either formalized, in default, searched/in examination or even opposed. Amongst the active trademark registrations, there are also irrelevant occurrences which do not contain the words “champagne” or “bear(s)” at all (such as PAIN DE CAMPAGNE... SUPER CROUSTILLANT!, Poulet portugais au Piri Piri ROTISSERIE CRISTÓVÃ O or LE CHOIX DE NOUNOURS Design).
- Photographs of a box of candy bearing the Mark (two of which are shown below), as well as label proofs displaying the Mark [Exhibit G].



- Excerpts from the website *nordstrom.ca* showing some of the Applicant's goods bearing the Mark [Exhibits I-J].
- The results of her Google searches using the following search terms: "champagne flavored", "champagne flavoured", "champagne colored", "champagne coloured", "'champagne flavored' snack" and "'champagne flavored' confectionery" [Exhibit K].
- The results of her searches on the website *amazon.ca* for the word "champagne", in particular in the product categories "Grocery & Gourmet Foods", "Clothing & Accessories", "Jewelry", "Electronics", and "Baby" [Exhibit L].
- The results of her searches on the website *sears.ca* for the word "champagne" [Exhibit M].
- The results of her searches on a number of third party websites displaying the word "champagne" in connection with products such as food, body wash, perfume and jewelry. Printouts showing the ingredients of a few of the products are also included where they were available. [Exhibit N]

PARTIES' BURDEN OR ONUS

[15] There is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [*John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD)]. If this burden is met, the Applicant then bears the legal onus of establishing, on a balance of probabilities, that no grounds of opposition prevent the registration of the Mark.

ANALYSIS

[16] As a preliminary matter, I note that the Applicant, rightly, takes issue with the wording of both grounds of opposition alleging that they are respectively either improperly or insufficiently pleaded.

[17] I agree that section 7(d) does not form a proper basis for a ground of opposition claiming non-registrability of the Mark. Non-registrability is captured by section 12 of the Act which does not include reference to a trademark being likely to mislead the public as to the character, quality or composition of the associated goods [*R v Anheuser-Busch, LLC*, 2014 TMOB 192 at para 9]. Ground of opposition a) is therefore rejected for being invalid. However, having assessed the sufficiency of the pleadings in association with the evidence, I am satisfied that the Applicant knew the case it had to meet with respect to ground of opposition b) which can be construed as raising an issue of non-registrability due to the Mark being clearly descriptive and/or deceptively misdescriptive of the character and/or quality of the applied-for goods or of their place of origin.

Section 12(1)(b)

[18] The material date to assess registrability here is the application filing date, namely, January 19, 2015 [*General House Wares Corp v Fiesta Barbeques Ltd*, 2003 FC 1021].

[19] The issue as to whether the Mark is clearly descriptive or deceptively misdescriptive must be considered from the point of view of the average purchaser of the associated goods. The Mark must not be carefully analyzed but must be considered in its entirety as a matter of immediate impression [*Wool Bureau of Canada Ltd v Registrar of Trade-marks* (1978), 40 CPR

(2d) 25 (FCTD); *Atlantic Promotions Inc v Registrar of Trade-marks* (1984), 2 CPR (3d) 183 (FCTD)]. In other words, the trademark must not be considered in isolation, but rather in its full context in conjunction with the goods [*Ontario Teachers' Pension Plan Board v Canada*, 2012 FCA 60]. Finally, in addition to considering the evidence submitted, the Registrar must apply common sense in making the determination about descriptiveness [*Neptune SA v Canada (Attorney General)* (2003), 29 CPR (4th) 497 (FCTD)].

[20] In order to be “clearly” descriptive, the meaning of the Mark has to be “easy to understand, self-evident or plain” [*Drackett Co of Canada Ltd v American Home Products Corp* (1968), 55 CPR 29 (Ex Ct) at 34]. In order to be “deceptively” misdescriptive, the Mark must mislead the public as to the character or quality of its associated goods [*Atlantic Promotions Inc, supra*]. In any case, the descriptive character of the Mark must go to the material composition of the goods or refer to an obvious intrinsic quality of the goods, such as a feature, trait or characteristic belonging to the product in itself [*ITV Technologies Inc v WIC Television Ltd*, 2003 FC 1056; *Provenzano v Registrar of Trade-marks* (1977), 37 CPR (2d) 189 (FCTD), aff’d (1978) 40 CPR (2d) 288 (FCA)].

[21] The Mark will be clearly descriptive of the place of origin of its associated goods if it is a geographic name and the goods originate from the location of the geographic name. It will be deceptively misdescriptive of the place of origin of its associated goods, if the Mark is a geographic name and the goods do not originate from the location of the geographic name, and the ordinary consumer would be misled into the belief that the associated goods had their origin in the location of the geographic name. [*MC Imports Inc v AFOD Ltd*, 2016 FCA 60]

Summary of the Opponent’s position

[22] The Opponent submits that the Mark is clearly descriptive, in English, of the character and/or quality of the applied-for goods because it clearly describes bear-shaped candies that contain Champagne wine. In this respect, the Opponent essentially argues that:

- Champagne wine has a considerable, if not legendary, reputation which extends to comestible products and so even when the word CHAMPAGNE is used in the context of such products including those covered by the application for the Mark, Canadian

consumers would be aware that it is indicative of a specific wine, with specific features, from a specific geographical area, produced according to specific standards;

- The word BEAR(S) is descriptive of a mammal with a specific silhouette and when it is used in association with candies (including gummy candies), the word BEARS is clearly descriptive of bear-shaped candies (such as “gummy bears”); and
- The Applicant’s goods used in association with the Mark are in fact bear-shaped candies (“gummy bears”) having Champagne wine as one of their ingredients.

[23] Pointing to the fact that the Applicant, on its candy packaging, translates CHAMPAGNE BEARS to *OURSONS CHAMPAGNE* the Opponent also contends that the descriptive character of the Mark is admitted to by the Applicant.

[24] Alternatively, the Opponent submits that the Mark is deceptively misdescriptive of the applied-for goods because:

- The statement of goods is devoid of any restriction (for example, as to the goods’ shape or composition) and thus the application also covers otherwise shaped candies made without any Champagne wine;
- The Applicant’s candies contain no alcohol, which is an essential component of Champagne wine;
- Consumers are well aware of the French CHAMPAGNE controlled designation of origin (*AOC CHAMPAGNE*) and of the characteristics of the wines with such designation of origin;
- Consumers seeing the word CHAMPAGNE used in association candies that contain Champagne wine, expect the candies in question to have some of the features or characteristics of said wine; and/or

- Based on the online review of the Applicant's "Dom Perignon-infused Champagne bears" [Dyal affidavit, Exhibit JHD-15], consumers would be surprised and deceived by the taste of the Applicant's candies and their lack of alcohol.

[25] At the hearing, the Opponent further submitted that the Mark is both clearly descriptive and deceptively misdescriptive of the place of origin of the applied-for goods because:

- The first, dominant and most striking element in the Mark is CHAMPAGNE which is a geographical indication (registered on the Canadian list of protected geographical indications) and refers to the Champagne region in France;
- The statement of goods is devoid of any geographical restriction (for example, as to the goods' provenance) and thus the application could also cover candies originating from the Champagne region in France; and/or
- Based on the references to "Dom Perignon Champagne" on the Applicant's candy packaging and the allegation that such candy is sold at a much higher price than other gummies, consumers expect such goods to be approved by or made in collaboration with the Dom Perignon brand, or at least originate from the Champagne region in France, which is currently not the case.

[26] With respect to its last point above, the Opponent also submitted at the hearing that the Registrar should take judicial notice of the fact that the price of gummy candies or gummies in stores is lower than the price at which the Applicant sells its goods. As I am not satisfied that this is a notorious or generally accepted fact or one capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy, I will do no such thing.

Summary of the Applicant's position

[27] The Applicant submits that while the Mark may be suggestive of a feature or trait of Champagne wine, the trademark CHAMPAGNE BEARS is a phrase that, when considered in its entirety, and in the context of the goods, is not clearly descriptive of the character or quality of the Applicant's goods. In this respect, the Applicant essentially argues that:

- The word “Champagne” is suggestive of a number of possibilities (none more dominant than the other) and does not clearly describe an intrinsic feature of the Applicant’s candy. More specifically, the word “Champagne” is commonly used by third parties on food products and other goods and it might therefore suggest quality or luxury to the average consumer, and could in some cases suggest colour or flavor; and
- There is a logical disconnect between the word “champagne” and the word “bears” when the Mark is considered as a whole and a Canadian consumer would not expect to see these words together, and being used in association with the goods “candy”.

[28] As the Mark is not clearly descriptive of the character or quality of its goods, the Applicant submits that it cannot be found to be deceptively misdescriptive.

[29] With respect to the Mark not being clearly descriptive of the place of origin of the goods, the Applicant essentially submits that:

- No element in the Mark is more dominant than another;
- There is no evidence that the Applicant’s candy is made in or originates from the Champagne region in France;
- Even if a significant number of Canadian consumers were aware of the significance of Champagne as a wine making region, this does not mean that they would conclude that the Applicant’s candy originates from the Champagne region in France;
- Given that the goods are candy, the average Canadian consumer would not immediately assume a connection between the Applicant’s candy and the Champagne wine region; and
- The mark is CHAMPAGNE BEARS and there is no evidence of a connection between bears and the Champagne wine region of France or candy and the Champagne wine region of France.

[30] The Applicant makes a parallel with the decision in *Institut National des Appellations d'Origine v Pepperidge Farm Inc* (1997), 84 CPR (3d) 540 (TMOB) where the trademark BORDEAUX was found to be registrable for the goods “cookies”, notwithstanding that Bordeaux was a geographical indication, and would be recognized by the Canadian public as signifying wine from that region of France.

Preliminary remarks on the evidence

[31] At the hearing, the Applicant also took issue with the Opponent’s evidence and argued that it should be given little to no weight mainly because it is provided by employees of the Opponent’s trademark agents and it either postdates the material date with respect to this ground of opposition or constitutes inadmissible hearsay. The Opponent in turn submitted that, interestingly, all of the Applicant’s evidence is also adduced by an employee of its trademark agents whose searches were conducted after the material date with respect to this ground of opposition.

[32] There are shortcomings in both parties’ evidence which must, of course, be weighed correspondingly. In this case, I do not believe that it is necessary to address the issue at length and will only make the following three comments. First, while the admissibility of contentious evidence is usually put into question when it is introduced by employees of parties’ agents, I note that in instances where both parties have filed such evidence, as is the case here, the Registrar has been reluctant to find it inadmissible [see for example *SpiritsInternational BV v Nemiroff Intellectual Property Establishment*, 2009 CanLII 90301 (TMOB) at para 20; and *Coca-Cola Ltd v Picnicface Productions Ltd*, 2014 TMOB 123 at para 10]. Second, I am not convinced that this could effectively disqualify the entirety of the evidence adduced in the instant case. For example, dictionary definitions such as the ones attached to Ms. Gulati’s affidavit or copies of legislative provisions such as the ones attached to Ms. Luong’s affidavit would not necessarily be more objective or reliable if they were instead provided by someone else. Third, I note that the Registrar can have regard to matters arising after a material date so long as they allow for inferences as to a situation existing as of said material date [*Speedo Knitting Mills Pty Ltd v Beaver Knitwear (1975) Ltd* (1985), CPR (3d) 176 (TMOB)]. Specifically with respect to the materials adduced by the Opponent which postdate the application filing date, to the extent that

they support and are consistent with the other evidence on record regarding the Champagne region and its wines, they have not been completely disregarded [*Institut national de l'origine et de la qualité v Établissements Rivoire-Jacquemin, Société Anonyme*, 2021 TMOB 162 at para 20].

Conclusion as to non-registrability

[33] The Opponent has filed evidence showing that Champagne is a controlled designation of origin (AOC) and a recently registered geographical indication covering “wine”. It has also provided some evidence of the fame of the alcoholic beverage Champagne. Hearsay and deficiencies aside, I am satisfied that a fair review of the whole of the Opponent’s evidence establishes that the average Canadian consumer would be familiar with the word “champagne” being used in respect of wine and would likely associate it to a sparkling wine from the wine-making region of Champagne in France.

[34] That said, I am far from convinced that whatever reputation the Opponent has established for Champagne wine in any way extends to food products. Similarly, I cannot subscribe to the Applicant’s contention that the evidence properly establishes the “commonness of the word ‘champagne’ on third party food products”. Besides, depending on the context, the word “champagne” nevertheless is and can be used descriptively in association with same. In fact, from the limited instances where the context of the third party uses of this term can be inferred from the evidence, I note that it mostly appears in a clearly descriptive sense to identify a food product’s component, rather than as some kind of color or laudatory reference. I will shortly come back to this point.

[35] In any case, it is important to remember that the Mark has to be viewed as a whole and in the specific context of the Applicant’s goods.

[36] As I can also refer to dictionaries, I have consulted the *Oxford Canadian Dictionary* (2nd ed., 2006) and note that the definition of the word “champagne” therein is generally consistent with those provided by the Applicant. A difference that I note is that the definition of the term set out in this source does not include a laudatory purport. As for the word “bear”, one of its definitions in the same dictionary refers to “a large mammal having thick fur and walking

on its soles” which is consistent with the meaning conferred to this term by the Opponent in its submissions. I also note that the word “gummi” is defined in this dictionary as “a rubbery, coloured and flavoured candy, often in the shape of animals, insects, etc.” and that *Dictionary.com* defines “gummy bears” as “a small, sweet, fruit-flavored candy made from gelatin and shaped like a bear”.

[37] Based on the dictionary definitions provided by the Applicant, I accept that the word “champagne”, on its own, may be capable of different meanings. However, when it is used in conjunction with the word “bears”, in association with candies or gummy candies (which I think is not a stretch here to understand as also encompassing “gummy bears”), it forms a rather logical and expected word combination and is in my view most likely to suggest that one of the candy’s ingredients is sparkling wine from the region of Champagne in France and/or that the candy has a flavour reminiscent of such wine. Although they may be indissociable, these two ideas which could be imparted on first impression are nevertheless respectively clearly descriptive of the goods’ composition and one of their characteristics. On this point, I note that the fact that a trademark has more than one meaning does not prevent a section 12(1)(b) ground of opposition from succeeding if both meanings are clearly descriptive, as is the case here [see for example *ABT, Inc v MULTY HOME LP*, 2020 TMOB 107 at para 12; *Canadian Tire Corp v Hunter Douglas Inc* (2010), 81 CPR (4th) 304 (TMOB) at 315; or *Holiday Juice Ltd v Sundor Brand Inc* (1990), 33 CPR (3d) 509 (TMOB)].

[38] In other words, I am not convinced that “champagne” when used in conjunction with the word “bears” in the present context will be primarily perceived as describing that the candy is of a champagne colour or that it will take on a laudatory connotation (such as suggesting that the Applicant’s candy is of a high quality or luxury candy). The Applicant’s candy is not all the same color and there is no evidence that the color champagne, as defined in the exhibited dictionaries, encompasses all colors of the Applicant’s candy. There is also no evidence prevalently showing a laudatory use of the word “champagne” in association with food products.

[39] Also of note is that the Applicant’s goods are admittedly “infused with Champagne”. The words “*Dom Pérignon Champagne*” appear in the list of ingredients for the Applicant’s goods, albeit admittedly in a small quantity. The evidence also includes a depiction of the packaging of

the Applicant's goods clearly displaying the words "*Made with Dom Pérignon Champagne, these sophisticated bears sparkle in flavors of Brut and Rosé*". [Applicant's written argument, para 42; Dyal affidavit, Exhibit JHD-15; Gulati affidavit, Exhibit G]

[40] In my view, descriptions such as the ones displayed on the Applicant's packaging not only emphasize Champagne wine as one of the candy's components but also as one which effects the candy's characteristics and further support a finding that the Mark, as a matter of immediate impression, will be perceived as describing the champagne-infused gummy candies in association with which it is used.

[41] Deficiencies aside, in light of the particular facts of this case, the state of the register evidence relied upon by the Applicant does not in my view deter from my conclusions above. In the end, it is also worth reminding that state of the register evidence regarding similar marks cannot render the Mark non-descriptive and therefore registrable [*Maple Leaf Foods Inc v Pinnacle Foods Group LLC*, 2015 TMOB 137 at paras 24-25; *Maple Leaf Foods Inc v Sofina Foods Inc*, 2016 TMOB 50 at paras 36-38].

[42] Accordingly, applying common sense, based on the plain meaning of the words composing the Mark taken in the context of the Applicant's goods, I agree with the Opponent that the Mark clearly describes the character of the applied-for goods. As the application is not limited as to the goods' shape or composition and thus also covers candies of all shapes (other than "gummy bears" for instance) made without sparkling wine from the region of Champagne in France, I further agree with the Opponent that the Mark may also be deceptively misdescriptive of the character of the applied-for goods [for an analogous finding see *Institut national de l'origine et de la qualité v Établissements Rivoire-Jacquemin, Société Anonyme*, *supra* at para 38]. The section 12(1)(b) ground of opposition therefore succeeds on these bases and its remaining prongs need not be considered.

DISPOSITION

[43] Having regard to the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application pursuant to section 38(12) of the Act.

Iana Alexova
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

Hearing date May 6, 2021

Appearances

Ekaterina Tsimberis and Olivier Jean-Lévesque	For the Opponents
Kathleen Lemieux	For the Applicant

Agents of record

Smart & Biggar LLP	For the Opponents
Borden Ladner Gervais LLP	For the Applicant