

Federal Court



Cour fédérale

**Date: 20220222**

**Docket: T-1195-21**

**Citation: 2022 FC 241**

**Ottawa, Ontario, February 22, 2022**

**PRESENT: The Honourable Madam Justice Aylen**

**BETWEEN:**

**NIA WINE GROUP CO., LTD**

**Applicant**

**and**

**NORTH 42 DEGREES ESTATE WINERY INC.**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] Nia Wine Group Co., Ltd. [Opponent] operates a winery in the Niagara region of Ontario and sells wine in Canada under various brand names, including NORTH 43°. North 42 Degrees Estate Winery Inc. [Applicant] sells wine produced from their farm and operates a winery, both located along the 42<sup>nd</sup> parallel or North 42 degrees latitude.

[2] The Applicant sought to register the trademark NORTH 42 DEGREES in association with the goods “wine” and the service “operation of a winery”. The Opponent unsuccessfully opposed the application before the Trademarks Opposition Board [TMOB] on the basis that the proposed trademark was clearly descriptive of the place of origin of the goods and services and was not distinctive.

[3] On the appeal presently before the Court, the central issue is whether “place of origin” within the meaning of section 12(1)(b) of the *Trademarks Act*, RSC 1985, c. T-13 [TMA] can include a specific line of latitude.

## **II. Background**

### **A. *The Application***

[4] The Applicant filed application number 1,785,974 on June 7, 2016 based on proposed use of the trademark NORTH 42 DEGREES in Canada in association with the goods “wine” and the services “operation of a winery” and “operation of a vineyard”. The Applicant subsequently abandoned that portion of the application related to the service “operation of a vineyard”. The application was advertised on February 8, 2017 in the *Trademarks Journal* for opposition purposes.

### **B. *Summary of Opposition Proceedings***

[5] On March 15, 2017, the Opponent filed a Statement of Opposition under sections 38(2)(a), (b) and (d) of the TMA. The grounds of opposition were based on sections 30(b), 30(i), 12(1)(b)

and 2 of the *TMA*. See Annex “A” below for relevant legislative provisions. Specifically, the Opponent raised the following grounds of opposition (with the exception of section 30(i) as it is no longer in dispute):

- A. NORTH 42 DEGREES is clearly descriptive of the place of origin of the goods and services as the Applicant’s winery is located at or near the 42<sup>nd</sup> line of constant latitude in the northern hemisphere or in the proximity of “north 42 degrees” and the wine originates from the same geographic region. As such, the trademark is not registrable under section 12(1)(b).
  
- B. NORTH 42 DEGREES is not distinctive, within the meaning of section 2, as the trademark is descriptive of the geographic origin of the goods or services and thus does not actually distinguish the goods and services from those of others which originate from the same geographic region (including those of the Opponent).
  
- C. NORTH 42 DEGREES has not been used in Canada as of the claimed dates of first use (2009 for the operation of a winery and 2013 for wine) and thus section 30(b) is contravened.

[6] The Applicant filed and served a counter statement on May 10, 2017, denying the grounds of opposition.

[7] The Opponent filed the affidavit of Pei (Violet) Chi Yeh sworn September 1, 2017 [First Yeh Affidavit]. Ms. Yeh was not cross-examined on her affidavit.

[8] The Applicant filed the affidavit of Suzanne Dajczak sworn December 20, 2017. Ms. Dajczak was cross-examined on her affidavit and the transcript was filed with the TMOB.

[9] As evidence in reply, the Opponent filed a second affidavit from Ms. Yeh, sworn October 12, 2018 [Second Yeh Affidavit].

[10] Both parties filed written representations. An oral hearing was held and both parties were represented. On May 31, 2021, the TMOB, on behalf of the Registrar of Trademarks, issued its decision rejecting the Opponent's opposition and allowing the trademark application of the Applicant.

**C. *TMOB Decision Under Appeal***

[11] Before considering the grounds of opposition, the TMOB made a number of findings in relation to the evidence of the Opponent. Exhibits B, G and H to the First Yeh Affidavit were found to be hearsay that could not be accepted for the truth of their contents and the TMOB disregarded Ms. Yeh's opinion on the descriptiveness of the trademark. The Second Yeh Affidavit was also disregarded as constituting improper reply evidence.

[12] The TMOB went on to consider the Opponent's opposition under section 12(1)(b). The TMOB stated that, even though the Applicant bore the legal onus of establishing, on a balance of

probabilities, that the application complied with the requirements of the *TMA*, there was an initial evidential burden upon the Opponent to adduce sufficient admissible evidence which, if believed, would support the truth of its allegations that the applied-for trademark is clearly descriptive or deceptively misdescriptive of the character or quality of the Applicant's good or their place of origin. The TMOB then considered the general applicable legal principles in considering whether a trademark is clearly descriptive or deceptively misdescriptive, as well as the purpose of the prohibition in section 12(1)(b) of the *TMA*.

[13] The TMOB found that, for the purpose of section 12(1)(b), a trademark will be descriptive of the place of origin if it is a geographic name and the goods and services originate from the location of the geographic name, citing *MC Imports Inc v AFOD Ltd*, 2016 FCA 60 at para 65.

[14] After summarizing the arguments of the Opponent and accepting that the evidence established that the Applicant's goods and services originate from a farm that is located along the 42<sup>nd</sup> parallel, the TMOB stated:

[45] However, I do not agree that the approach in *MC Imports* can be applied in this case since the Mark is neither a geographic name referring to a place of origin nor is it the name of a place. Rather, I find that in the absence of evidence to the contrary, the Mark would be seen by the average consumer, as a matter of immediate impression, as a geographical reference which alludes to a coordinate for a place or locality, but does not clearly describe a place or "geographic region" in way that is "easy to understand, self-evident, or plain". Accordingly, I find this case to be distinguishable from the *General Motors of Canada, supra* and *Jordan & Ste-Michelle Cellars Ltd, supra* cases cited by the Opponent, where the trademarks at issue were plainly recognizable as places, namely a road or boulevard in Montreal (DECARIE), and a place where wine is made (THE WINERY), respectively.

[15] After summarising the test set out in *MC Imports*, the TMOB went on to state:

[47] The Opponent submits that there is no ambiguity about whether the Mark actually refers to a place as the words “north 42 degrees” are merely “informative, descriptive, or generic” as applied to wine, and are not likely to serve any purpose other than to inform prospective purchasers of the place of origin. The Opponent submits that the alternative meanings for the Mark presented by the Applicant, namely that in the book *The Hitchhiker's Guide to the Galaxy*, 42 is the answer to the "ultimate" question, and that the 42nd degree is the angle (rounded to whole degrees) at which a rainbow appears, did not hold up at cross. In this regard, the Opponent notes Ms. Dajczak’s admissions that in *The Hitchhiker's Guide to the Galaxy*, for the references to 42 in that book, the word “degrees” or “north” is not significant (Q111), and that the word “north” has no significance when we are talking about the degrees of the angle of which a rainbow appears (Q114). The Opponent submits that as a result, there is no ambiguity about whether the Mark actually refers to a place, and that the only conclusion supported by the evidence is that the Mark is “clearly descriptive...in the English...language of the character or quality of the wares or services in association with which it is used or proposed to be used...or of their place of origin”.

[48] I agree that it is unlikely that the alternative meanings for the Mark put forward by the Applicant would be recognized by the ordinary consumer of the Goods and Services, particularly since both meanings only apply to the number 42 and not NORTH 42 DEGREES. However, I disagree that there is no ambiguity about whether the Mark actually refers to a place. On the contrary, I find that at best, the Mark alludes to a geographical coordinate for a place or locality. The Mark suggests a direction or geographical coordinate, but falls short of identifying or naming a place *per se*, which makes it ambiguous.

[16] The TMOB added that even if it was to find that the trademark clearly describes a line of latitude, it did not find the evidence sufficient to establish that the average consumer would, as a matter of immediate impression, easily and plainly understand this line of latitude to describe the geographic region asserted by Ms. Pei in her affidavit.

[17] The TMOB concluded that as the Opponent had not met its evidentiary burden, it was unnecessary to determine whether the Applicant had met its legal onus.

[18] With respect to the ground of opposition under section 2, the TMOB found that the Opponent had failed to meet its evidentiary burden of showing that the trademark was clearly descriptive of the applied for goods and services for the same reasons as those set out under the section 12(1)(b) analysis. The TMOB also found that the evidence fell short of showing that the trademark holds a commonly understood meaning relating to or identifying the geographic region of the goods and services.

[19] With respect to the ground of opposition under section 30(b), the TMOB found that the use of the degree symbol (°) rather than the word “degree” by the Applicant on signage displayed at the winery when it opened would not result in a loss of identity and that the trademark would remain recognizable, as the “DEGREE/S” element is simply the conventional symbol for the word. Regarding the Applicant’s admission that it had no sales prior to 2012, the TMOB noted that sales were not required in order for there to be use in association with services, and that Ms. Dajczak indicated in her affidavit that the Applicant had operated a winery “since 2009 in association with the trademark NORTH 42 DEGREES, the winery being regularly open to the public and customers for free or paid tours...”.

[20] The TMOB found that with very limited exceptions, the Dajczak affidavit consistently showed use on wine labels and promotional materials of NORTH 42 DEGREE ESTATE WINERY, but found that the words “ESTATE WINERY” were not so substantial that the

trademark NORTH 42 DEGREES would no longer be recognizable, as they held a suggestive or descriptive connotation of the type or kind of winery. It also noted that the much smaller sizing and placement of these additional words below NORTH 42 DEGREES further diminished any perceived significance, so that the dominant features of the trademark had been preserved such that the public would perceive the trademark *per se* as being used. As a result, the TMOB found that the Opponent had not discharged its burden under section 30(b) of the *TMA* and rejected this ground of opposition.

### **III. Issues, Parties' New Evidence and Standard of Review**

#### **A. *Issues***

[21] The Opponent appeals the TMOB's decision pursuant to section 56 of the *TMA*. The following issues arise on this appeal:

- A. What is the applicable standard of review?
  
- B. Did the TMOB err in finding that the Second Yeh Affidavit constituted improper reply and was therefore inadmissible?
  
- C. Did the TMOB err in determining that the trademark was not "clearly descriptive" of the place of origin for the associated goods and services within the meaning of section 12(1)(b) of the *TMA*?



- D. Did the TMOB err in determining that the trademark was inherently distinctive for the associated goods and services within the meaning of section 2 of the *TMA*?
- E. Did the TMOB err in determining that the Applicant had used NORTH 42 DEGREES as a trademark for wine since the claimed date of first use in compliance with section 30(b) of the *TMA*?

[22] In its Notice of Application, the Opponent raised an additional ground of appeal related to section 30(i) of the *TMA*. However, at the hearing of the application, the Opponent confirmed that it was abandoning this ground of appeal.

**B. *Parties' New Evidence on Appeal***

[23] Both parties filed new evidence on appeal pursuant to section 56(5) of the *TMA*.

[24] The Opponent filed the affidavit of Amy Proulx sworn July 26, 2021. Ms. Proulx is a professor and the Program Coordinator for Culinary Innovation and Food Science at Niagara College Canada in Niagara-on-the-Lake, Ontario. At the hearing, the Opponent advised that it was putting Ms. Proulx forward as an expert in manufacturing, production and marketing of food and wine in Canada, although no Form 52.2 certificate accompanied her affidavit. In her affidavit, Ms. Proulx states:

3. It is generally known that grapes grow best in temperate climates located in belts between approximately 30 and 50 degrees in both

the northern and southern hemispheres. In the northern hemisphere, 40 degrees north is the approximate centre of this temperate belt.

4. Ontario is Canada's most prolific wine producing region, with approximately 46.6% of total Canadian wine production. This wine is produced primarily in Niagara, with other production in regions known as Lake Erie North Shore and Prince Edward County.

a. The Niagara region is located at or near the 43<sup>rd</sup> line of constant latitude in the northern hemisphere or north 43 degrees;

b. Essex County is located in the region known as Lake Erie North Shore and is located at or near the 42<sup>nd</sup> line of constant latitude in the northern hemisphere or north 42 degrees; and

c. Prince Edward County is located at or near the 44<sup>th</sup> line of constant latitude in the northern hemisphere or north 44 degrees.

These latitudes are similar to that of other famous wine regions in the world, including Bordeaux, France and Tuscany, Italy. The statistics are from the Economic Impact of Wine and Grape Industry in Canada, 2015, published by the Wine Growers of Canada in 2017.

5. Most wine produced in Canada originates from regions located between the 42 and 50 degrees north.

6. The geographic location from which wine originates is an important factor in determining its taste. As a result, geographic terms are commonly used to brand a variety of wines, including terms that identify the line of latitude or parallel from which the wine originates.

7. Latitude, Longitude or Parallel is referenced in a number of wine labels, for example Latitude 50 Wine (Grey Monk Winery, Okanagan, BC), 50<sup>th</sup> Parallel Estate Winery (Okanagan, BC), 120 West Wines (Longitude Winery, Napa, California), and Stoneleigh (Pernod Ricard, New Zealand). A current marketing trend is for what is termed "New Latitude Wines" and this is a unique selling term for wines grown outside the 30 to 50 parallel zones.

[25] The Applicant filed the affidavit of Danika Dominique Desroches sworn August 16, 2021.

The affidavit evidence of Ms. Desroches, an administrative assistant with the solicitors for the

Applicant, is extremely limited. She exhibits certified copies of eight Canadian trademark registration certificates for various trademarks that contain the word “degrees” or the symbol for degrees (°).

[26] Neither Ms. Proulx nor Ms. Desroches were cross-examined.

### **C. *Standard of Review***

#### **(1) *General Principles***

[27] In considering the general principles applicable to the determination of the standard of review in this appeal, such principles can be stated no more clearly than they were set out by Justice Fuhrer in *Caterpillar Inc. v Puma SE*, 2021 FC 974:

[32] An appellate standard of review applies where, as in the case before me, there is a statutory right of appeal: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] paras 36-37, citing *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [Housen]. Vavilov does not displace the previous jurisprudence regarding new evidence filed with the Federal Court on appeal from a decision of the Registrar, but rather necessitates an adjustment: *The Clorox Company of Canada, Ltd. v Chloretec SEC*, 2020 FCA 76 [Clorox] at paras 19-23. The starting point is a consideration of whether any new evidence would have affected the TMOB’s decision materially: Clorox, above at para 19.

[33] To be considered “material,” the new evidence must be sufficiently substantial and significant, and of probative value: Clorox, above at para 21, citing respectively *Vivat Holdings Ltd v Levi Strauss & Co*, 2005 FC 707 at para 27 and *Tradition Fine Foods Ltd. v. Groupe Tradition’l Inc.*, 2006 FC 858 at para 58. “[E]vidence that merely supplements or repeats existing evidence will not surpass this threshold”: *Scott Paper Limited v Georgia-Pacific Consumer Products LP*, 2010 FC 478 [Scott Paper] at paras 48-49. The test is not whether the new evidence would have changed the Registrar’s mind, but rather whether it would have a material effect on the decision: Scott Paper, above, at para 49. In

that regard, quality, not quantity, is key: *Vivat Holdings Ltd v Levi Strauss & Co*, 2005 FC 707 at para 27.

[34] Further to the TMA s 56(5), a finding of materiality permits the Court to “exercise any discretion vested in the Registrar.” Justice de Montigny noted that this entails an appeal de novo calling for the application of the correctness standard: *Clorox*, above at para 21, referring to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] (and the situations where the presumptive reasonableness standard of review will be rebutted, as summarized at Vavilov para 17). In other words, the Court need not defer to the decision maker’s reasoning process; undertaking its own analysis, the Court may decide whether it agrees with the decision maker’s determinations or whether it will substitute its own views: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, [2008] 1 SCR 190.

[35] If the new evidence is not material (or if no new evidence is filed), then this is the point at which Vavilov requires an adjustment to the applicable standard: *Clorox*, above at para 22. Instead of the previous standard of reasonableness, the appellate standard of review applies, with reference to Housen. This means questions of fact or mixed fact and law (except extricable questions of law) will be assessed for “palpable and overriding error.” Palpable means an obvious error, while an overriding error is one that affects the decision-maker’s conclusion; it is a highly deferential standard of review: *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 61-64. Questions of law (including extricable questions of law), on the other hand, will be assessed for correctness according no deference to the conclusions of the underlying decision maker: *Clorox*, above at para 23; *Miller Thomson LLP v Hilton Worldwide Holding LLP*, 2020 FCA 134 at para 42.

[36] In sum, I must assess the nature, significance, probative value, and reliability of the parties’ new evidence, in the context of the record, and determine whether it adds “something of significance” and hence, whether it would have affected the TMOB’s decision materially: *Seara Alimentos Ltda v Amira Enterprises Inc.*, 2019 FCA 63 [Seara] at paras 23-26. In other words, would the evidence have enhanced or otherwise clarified the record in a way that might have influenced the Registrar’s conclusions on a finding of fact or exercise of discretion, had it been available at the time of the Decision? Further, even when new evidence is admitted on appeal, this does not necessarily displace the TMOB’s findings in respect of every issue but rather only those issues for which the evidence is provided and admitted: *Seara*, above at para 22.

**(2) Materiality of the Parties' New Evidence**

[28] I will begin with the affidavit of Ms. Desroches. It is entirely unclear to the Court why the Applicant filed this affidavit, as it was not once referred to in the Applicant's memorandum of fact and law (other than to say it was filed). Counsel for the Applicant was asked at the hearing to explain the materiality of Ms. Desroches' affidavit, which he failed to do. In fact, her evidence was never referred to by either party. As neither party has suggested that her evidence would have had a material affect on the TMOB's decision, I find the affidavit to be immaterial.

[29] Moreover, I fail to see the relevance of the trademark registrations included in her affidavit, given that there is no context to the use of the word or symbol "degrees", such that it is unclear to the Court whether it is intended to refer to a temperature or a place. If it is intended to refer to a place, it is also unclear to the Court whether such place was the place from which the goods or services associated with the trademark allegedly originated. Accordingly, in addition to being immaterial, I also find the affidavit of Ms. Duchesne to be irrelevant.

[30] I now turn to the affidavit of Ms. Proulx. The primary concern raised regarding Ms. Proulx's evidence was its admissibility, rather than its materiality. At the hearing of the appeal, I asked the Opponent whether they intended to put forward Ms. Proulx as an expert given that her affidavit contained opinion evidence; however, it was not accompanied by a certification in Form 52.2 signed by Ms. Proulx acknowledging that she had read the Code of Conduct for Expert Witnesses and agreeing to be bound by it. The Opponent confirmed that that was its intention and

advised that the absence of the certificate was an oversight. The Opponent offered to obtain such a certificate if the Court so requested.

[31] The absence of the certificate required by Rule 52.2(1) of the *Federal Courts Rules* is not, in and of itself, fatal to the Court's consideration of Ms. Proulx's evidence. Lack of compliance with the requirement to include a certificate must not be conflated with a failure to comply with the Code of Conduct itself, which is the general objective of Rule 52.2(2) [see *Saint Honore Cake Shop Ltd v Cheung's Bakery Products Ltd*, 2015 FCA 12 at para 24]. There was no evidence before the Court that Ms. Proulx had failed to comply with the Code of Conduct. However, there are other more significant problems with Ms. Proulx's evidence.

[32] Like all opinion evidence, expert opinion evidence is presumptively inadmissible and the burden lies on the party tendering the expert evidence to demonstrate its admissibility. The admissibility of expert opinion evidence is determined by the application of the two step test in *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23. First, the threshold stage requires the party putting the proposed expert forward to establish that the evidence satisfies the threshold requirements of admissibility. This requires that: (a) the evidence is logically relevant; (b) the evidence is necessary to assist the trier of fact; (c) there exists no other exclusionary rule; (d) the expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the duty to the court to provide evidence that is impartial, independent and unbiased; and (e) for opinions based on novel or contested science or science used for a novel purpose, that the underlying science must be reliable for that purpose. Evidence that does not meet the threshold requirement should be excluded. Second, as a discretionary matter,

the Court balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. These criteria apply in trademark cases as in other intellectual property cases.

[33] The Applicant objected to the admissibility of Ms. Proulx's affidavit as expert evidence on the basis that: (a) she has no demonstrated expertise in trademark branding, consumer awareness of product branding, where grapes grow best, the taste of wines or the branding of wine; (b) it is unknown what documents she reviewed or information she received to come to her opinions; (c) she does not state the reasons for her opinions; (d) she relied on a document that contained statistics but that document is not before the Court and we do not know who authored that document; (e) her affidavit contains double hearsay; (f) she refers to various brands of wine but it is entirely unclear if she looked at the labels (which are not in evidence) or if these wines are for sale in Canada; and (g) her affidavit plagiarizes the Second Yeh Affidavit, containing almost identical language to paragraph 6 of the Second Yeh Affidavit (which was determined by the TMOB to be inadmissible).

[34] The Opponent's memorandum of fact and law contains no submissions as to the admissibility of Ms. Proulx's affidavit as expert evidence (nor any submissions addressing the purported materiality of her evidence). When I asked the Opponent to address this issue at the hearing, the Opponent submitted that:

- A. The evidence was necessary as the Court would not otherwise know where grapes grow best.

- B. The evidence was relevant to the significance of the latitude north 42 degrees in Canada.
- C. Ms. Proulx is a properly qualified expert, as she is a professor of, and has a Masters degree and Ph.D. in, food science and nutrition. While the Applicant asserts that she lacks the necessary qualifications as she is not a sommelier or an expert in wine marketing and branding, there is no evidence before the Court that another expert, such as a sommelier, would be better positioned to give this evidence. Moreover, the Applicant failed to test her qualifications and expertise on cross-examination, nor did they file any expert evidence of their own or any evidence to demonstrate that she is not a qualified expert.
- D. There is no evidentiary rule that would prevent her evidence from being admitted.
- E. While the Applicant asserts that Ms. Proulx relied on documents not before the Court, the Opponent asserts that there is no evidence to support this assertion.

[35] I find that the Opponent has not demonstrated that Ms. Proulx is a properly qualified expert. While her affidavit appears to assert that her area of expertise is the manufacturing, production and marketing of food and wine in Canada, no effort has been made to demonstrate this asserted expertise. The only reference to wine in Ms. Proulx's curriculum vitae is that since March 2012, she has been the Founder of, and a consultant with, the Canadian Food and Wine Institute Innovation Centre. In that role, her experience is described as follows:

Developed the original business plan and funding for the National Science and Engineering Research Council – Community and



College Innovation Program – Canadian Food and Wine Institute Research Centre. Lead more than 100 industry projects, with emphasis on product development, food safety, regulatory affairs, and small business development. Current emphasis on course based research practice, industry-academic engagement and open innovation practice in the classroom.

[36] There is no specific reference to any projects or activities related to wine or the wine industry and more specifically to the production, marketing and branding of wine, nor does her curriculum vitae describe any research, publications, speaking engagements, professional or volunteer activities, employment or consulting related to the wine industry in Canada or abroad, as a whole, or more specifically as it relates to the growing of grapes and the branding and marketing of wines. In the circumstances, I find that Ms. Proulx has not been shown to have acquired special or peculiar knowledge through study or experience in respect of the manufacturing, production, branding or marketing of wine in Canada. Accordingly, her affidavit does not meet the threshold for admissibility.

[37] I agree with the Applicant that there are other problematic aspects of Ms. Proulx's evidence. However, in light of my finding regarding her qualifications, I need not address them.

[38] Having found that Ms. Proulx's affidavit is inadmissible, I also need not go on to make a determination as whether it would have materially affected the TMOB's findings of fact or the exercise of its discretion.

**(3) Applicable Standard of Review**

[39] Having found that the parties' new evidence on appeal is either immaterial or inadmissible, I find that the applicable standard of review is palpable and overriding error, with one exception. I find that the question of the proper interpretation of "place of origin" under section 12(1)(b) of the *TMA* is an extricable question of law reviewable on the standard of correctness [see *MC Imports, supra* at para 33].

**IV. Analysis**

**A. *Whether the TMOB erred in finding that the Second Yeh Affidavit constituted improper reply and was therefore inadmissible***

[40] The Opponent asserts that the TMOB erred when it determined that the Second Yeh Affidavit was inadmissible as it constituted improper reply.

[41] By way of context, in Ms. Yeh's first affidavit, she stated that it was her understanding that the entire Niagara Region is located at or near the 43<sup>rd</sup> line of constant latitude in the northern hemisphere and that this latitude is similar to other famous wine regions in the world, including those in Italy and France.

[42] On cross-examination, Ms. Dajczak refused to agree with an assertion that "most grapes grow best" in regions of the world that are located at lines of latitude in the range of 42 and 50 degrees north and as such, most wineries are located in these regions. She stated:

There are wineries located at different latitudes around the world, north and south, outside of that, that I would consider successful. All of California is south. There's wineries in Texas. There are wineries in New Zealand, Australia, that would not qualify as being north; South Africa. So to comment whether or not those are the most successful, I can't make that comment.

[43] Ms. Dajczak also refused to agree on cross-examination with Ms. Peh's evidence that the 43<sup>rd</sup> line of constant latitude in the northern hemisphere is similar to that of other famous wine regions of the world, including Italy and France. Ms. Dajczak stated:

Niagara is located in around the 43<sup>rd</sup> parallel, that's correct. Whether I would comment that it's equivalent to wine growing regions in Italy, I would say no, there's other regions in Italy that are not at the 43<sup>rd</sup> parallel. Southern -- in France, the same thing, it can go higher in terms of latitude. I mean it's, you know...

[44] In the Second Yeh Affidavit, Ms. Yeh responds to Ms. Dajczak's evidence given on cross-examination and expands upon an initial statement made in Ms. Yeh's first affidavit. She states:

6. In reply, I agree with Ms. Dajczak that there are successful wineries located at different latitudes, including southern latitudes. However, it is generally known that grapes grow best in temperate climates located in belts between approximately 30 and 50 degrees in both the northern and southern hemisphere. In the northern hemisphere, 43 degrees north is at approximate centre of this temperate belt and is similar to the latitude of Bordeaux, France and Tuscany, Italy.

7. As background, I have attached: (a) a screenshot from the web site <mapmania.org> entitled "Wine Regions of the World between 30-50 Degrees of Latitude" as Exhibit A; and (b) a screenshot from the web site <winesofcanada.org> entitled "Ontario" as Exhibit B, both of which confirm my understanding of the foregoing facts.

8. I therefore agree that there are also successful wineries located a few degrees north and south of the 43<sup>rd</sup> parallel in the northern

hemisphere. However, they are generally located in a temperate belt that surrounds the 43<sup>rd</sup> parallel in the northern hemisphere.

9. I also agree that there are successful wineries located in the corresponding southern grape growing belt located approximately between 30 and 50 degrees south. Again, 43 degrees south is the approximate centre of the southern temperate belt. The wineries located in New Zealand, Australia and South Africa are within the southern temperate belt.

10. My assertion that the 43<sup>rd</sup> line of constant latitude in the northern hemisphere is similar to that of other famous wine regions of the world was a reference to the fact that this latitude is located in the centre of the northern grape growing belt. It also reflected the fact that the first wines exported by the Opponent under the brand North 43° used juice from grapes grown in Italy at the 43<sup>rd</sup> line of constant latitude in the northern hemisphere.

[45] In its decision, the TMOB found that Ms. Dajczak's cross-examination transcript did not constitute evidence of the Applicant to which the Opponent was entitled to answer by way of reply, relying on the decision in *MCI Communications Corp v MCI Multinet Communications Inc* (1995), 61 C.P.R. (3d) 245 (TMBO). The TMOB also stated that section 54 of the *Trademarks Regulations*, SOR/2018-227 [*Regulations*] (previously Rule 43) contemplates the filing of evidence strictly confined to matters in reply to the Applicant's evidence filed pursuant to section 52 of the *Regulations* (previously Rule 42). The TMBO agreed with the Applicant's position that in filing the Second Yeh Affidavit, the Opponent was splitting its case by seeking to rely on section 54 of the *Regulations* to introduce evidence that should have been filed as part of its evidence in chief.

[46] The Opponent asserts that the TMOB misapplied the *MCI* decision and when properly considered, the cross-examination evidence of Ms. Dajczak constitutes the evidence of the Applicant to which the Opponent is entitled to reply. The Opponent asserts that the Second Yeh

Affidavit constitutes proper reply as it responds to the evidence given by Ms. Dajczak, which the Opponent asserts was misleading and thus required clarification.

[47] I find that the TMOB did not commit a palpable and overriding error in finding that the Second Yeh Affidavit constituted improper reply evidence. Regardless of whether the TMOB misapplied the *MCI* decision, I agree with the Applicant that the Second Yeh Affidavit simply expands upon her initial evidence on the basis that Ms. Dajczak did not agree with her. It was open to the Opponent to lead all of the evidence from the Second Yeh Affidavit when the Opponent addressed that same issue in her first affidavit. The case law is clear that evidence which is simply a rebuttal of evidence led as part of the other party's case and which could have been led in chief is not permitted in reply. Moreover, a party cannot adduce evidence on reply that is merely confirmatory of its case in chief – proper reply evidence must relate to issues raised in the other party's case that were not raised in that party's case in chief [see *Halford v Seed Hawk Inc*, 2003 FCT 141 at para 15; *Janssen Inc v Teva Canada Limited*, 2018 FC 1309 at para 13]. As such, the TMOB did not error in finding that the Opponent was improperly attempting to split its case.

**B. *Whether the TMOB erred in determining that the trademark was not “clearly descriptive” of the place of origin for the associated goods and services within the meaning of section 12(1)(b) of the TMA***

[48] The Opponent asserts that the TMOB made three errors in considering whether the trademark was “clearly descriptive”. First, the Opponent asserts that the TMOB erred in determining that the trademark was not “clearly descriptive” of the place of origin for the associated goods and services within the meaning of section 12(1)(b) of the *TMA* given the TMOB's findings that: (a) the goods and services originate from a winery located at NORTH 42

DEGREES; (b) the Applicant expected its customers to understand NORTH 42 DEGREES as a reference to the location from which the associated goods and services originate; (c) NORTH 42 DEGREES would be seen by the average consumer as a geographic coordinate for a place or locality; and (d) the alternative meanings for the words NORTH 42 DEGREES put forward by the Applicant were not likely to be recognized by the ordinary consumer.

[49] Second, the Opponent asserts that the TMOB erred by considering the point of view of the average purchaser in trying to determine whether the applied for trademark was clearly descriptive in the absence of a finding that the words NORTH 42 DEGREES have multiple meanings.

[50] Third, the Opponent asserts that the TMOB erred in law by stating that a trademark will only be considered clearly descriptive of the place of origin if it is a geographical “name” in the absence of any language in section 12(1)(b) of the *TMA* limiting the prohibition to words that are a “name” for the place of origin.

[51] It is the position of the Applicant that in order for a trademark to be clearly descriptive of the place of origin, the trademark must be a geographic name. The Applicant asserts that the TMOB therefore made no error in finding that NORTH 42 DEGREES was not a place of origin, as it is not the name of a geographic location.

[52] There is no dispute between the parties that the leading test on the application of section 12(1)(b) of the *TMA* is that set out by the Federal Court of Appeal in *MC Imports*. In that case, the Federal Court of Appeal sought to clarify the correct analytical approach to the issue of whether a

trademark is clearly descriptive or deceptively misdescriptive of the place of origin of the goods or services, given the inconsistency in the case law and in particular, what role, if any, the perspective of the ordinary consumer in Canada plays in the analysis. In that case, the trademark at issue, LINGAYEN, covered Filipino food products.

[53] The Federal Court of Appeal clarified that a three-part inquiry is required: first, by determining whether the trademark is a geographical name; second, by determining the place of origin of the wares and services; and third, by assessing the trademark owner's assertion of prior use under section 12(2) of the *TMA*, if any.

[54] In this case, section 12(2) of the *TMA* has not been asserted by the Applicant and thus the third part of the inquiry is not relevant. There is also no dispute in this case as to the origin of the goods and services. Accordingly, for the purpose of this appeal, the central issue is the first inquiry.

[55] In relation to the first inquiry, the Federal Court of Appeal stated:

(a) whether the impugned trade-mark is a geographic name

[57] This may require resort to consumer perceptions where, as in *Atlantic Promotions*, the name of a geographic place (name or location) also has other meanings. For example, "Sandwich" is the name of a number of towns in the United States and the United Kingdom, but it is also a word referring to a common food item. Cattanach J. considered this question in *Atlantic Promotions*, stating that the primary meaning of the word to a person of "ordinary education and intelligence" (at page 196) dictates its meaning.

[58] I agree with this approach, but would caution that this first step does not mean that names of places not widely known to Canadians fall somehow outside the ambit of paragraph 12(1)(b)'s prohibition of clearly descriptive trade-marks. This nature of inquiry is only

relevant when there are multiple meanings to the word in question, not all of which are geographic. It must then be determined which meaning predominates. If, going back to my example, proper evidence establishes that the primary meaning of "Sandwich" does not refer to a geographic place, then such a trade-mark cannot be clearly descriptive or deceptively misdescriptive of place of origin.

[59] Further, where such an inquiry is necessary, the relevant ordinary consumer from whose perspective this question ought to be considered is the ordinary consumer of the products or services with which the mark is associated.

[60] Despite the approach stated in *Parma* that the ordinary consumer is the general public in Canada, the weight of authorities support the Judge's approach when assessing the validity of the registration on a test where "clear description and deceptive misdescription pivot on the perceptions held by ordinary consumers are engaged" (Judge's reasons, at paragraph 29). The Judge relied on reference to "the average retailer, consumer or user of the type of wares or services the mark is associated with" (*Cliche v. Canada (Attorney General)*, 2012 FC 564, 103 C.P.R. (4th) 411, at paragraph 22) and to the endorsement in another case of a survey focussed not on the general public but on consumers who were aware of the relevant brand and likely to purchase the wares in question, for the purposes of determining distinctiveness in an expungement proceeding (*Cross-Canada Auto Body Supply (Windsor) Limited v. Hyundai Auto Canada*, 2007 FC 580, 60 C.P.R. (4th) 406, at paragraph 31).

[61] I note that even authorities citing *Parma* have tended not to adopt the view that the "general public" is the relevant consumer perspective, referring instead to the ordinary consumer of the wares or services with which the trade-mark is used (*Boston Pizza International Inc. v. Boston market Corp.*, 2003 FC 892, 27 C.P.R. (4th) 52, at paragraph 36; *ITV Technologies Inc. v. WIC Television Ltd.*, 2003 FC 1056, 29 C.P.R. (4th) 182, at paragraph 71).

[62] As I mentioned above, the appellants rely heavily on academic commentary endorsing *Parma* and rejecting *Leyda*. I find this commentary unpersuasive. In particular, the authors fail to engage in any distinction between clearly descriptive and deceptively misdescriptive cases, and simply assert that *Leyda* was wrongly decided. Once again, I disagree.

[63] In brief, in a clearly descriptive case, the resort I describe to the perspective of the ordinary consumer (as defined at paragraph 59,



above) is only meaningfully relevant when there is ambiguity whether the trade-mark actually refers to a place.

[64] Once it is concluded that the trade-mark refers to a geographic location, the focus of the analysis becomes the origin of the wares or services.

[emphasis added]

[56] The Applicant places a great deal of emphasis on the Federal Court of Appeal's repeated reference to "geographical name". However, a careful review of the decision reveals that while the Federal Court of Appeal undoubtedly uses the phrase "geographical name" in articulating the test, it also repeatedly uses the phrase "geographical location", as noted in the underlined portions of its reasons above and in the overview of the decision, where the Federal Court of Appeal stated that the appeal was "about the validity of a trade-mark when that mark is a geographical location".

[57] It also must be kept in mind that in *MC Imports*, the focus of the Federal Court of Appeal's analysis was not whether the trademark included a "place of origin", as there was no dispute between the parties that Lingayen is a municipality in the Philippines. The focus of the Court's inquiry was on whether it was necessary to consider whether the ordinary consumer in Canada would recognize the mark as relating to the place of origin and not whether LINGAYEN could be considered a place of origin.

[58] Other leading cases from the Federal Court of Appeal dealing with place of origin disputes have similarly not had to expressly determine whether the mark at issue involved a place of origin. For example, in *Lum v Dr Colby Cragg Inc*, 2015 FCA 293 (in which the disputed mark was

OCEAN PARK), Justice Gauthier stated at paragraph 18 that “it is not disputed that Ocean Park is a geographic location that has been known as such since the early 1900s”.

[59] In *Lum*, Justice Gauthier also refers to the Federal Court of Appeal’s decision in *General Motors of Canada v Décarie Motors Inc*, [2001] 1 FC 655, which involved the trademarks “Decarie” and “Decarie Logo Design” in association with the sale, lease and service of new and used motor vehicles. While that case involved an expungement proceeding on different grounds, the Federal Court of Appeal stated that “it is certainly reasonable to say, as contended by the appellants, that prima facie the mark “Décarie” was unregistrable under paragraph 12(1)(b) of the Act due to its geographic descriptiveness (place of origin).” Again, the focus on the decision was not whether Decarie (in reference to Decarie Blvd) in and of itself could be considered a place of origin.

[60] In considering both the *Lum* and *Décarie* decisions, it is important to note that, similar to *MC Imports*, the Federal Court of Appeal did not fixate on the requirement that the place of origin be a geographical name. As noted above, the Court used the language “geographical location” and “geographic descriptiveness”. Therefore, I am not satisfied that the Federal Court of Appeal has imported the requirement that a mark, to be unregistrable under section 12(1)(b), must use a geographical name.

[61] The parties have not pointed the Court to any decisions in which the question of what constitutes a “place of origin” for the purpose of section 12(1)(b) of the *TMA* has been expressly

considered. In order to answer that question, one must begin with a consideration of the statutory language. Section 12(1)(b) of the *TMA* states:

**When trademark registrable**

(1) Subject to subsection (2), a trademark is registrable if it is not

(b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the goods or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their **place of origin**.

[emphasis added]

**Marque de commerce enregistrable**

12 (1) Sous réserve du paragraphe (2), la marque de commerce est enregistrable sauf dans l'un ou l'autre des cas suivants :

b) qu'elle soit sous forme graphique, écrite ou sonore, elle donne une description claire ou donne une description fautive et trompeuse, en langue française ou anglaise, de la nature ou de la qualité des produits ou services en liaison avec lesquels elle est employée, ou en liaison avec lesquels on projette de l'employer, ou des conditions de leur production, ou des personnes qui les produisent, ou de leur **lieu d'origine**.

[soulignement ajouté]

[62] It is well-established that statutory interpretation requires consideration of the ordinary meaning of the words used and their statutory context. This was explained by the Supreme Court in *Canada Trustco Mortgage Co v Canada*, [2005] 2 SCR 601 at para 10 and reiterated in *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at para 21. In *Celgene*, the Supreme Court quoted from and commented on *Canada Trustco* as follows:

It has been long established as a matter of statutory interpretation that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: see 65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made

according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[63] The Supreme Court concluded that the words, if clear, will dominate. If not, they yield to an interpretation that best meets the overriding purpose of the statute.

[64] The Federal Court of Appeal has recognized the public interest purpose of section 12(1)(b) of the *TMA*, stating that maintaining a monopoly over the use of words to describe their origin is to unduly deprive potential competitors of the opportunity to so describe their own goods [see *MC Imports, supra* at para 44; *Lum, supra* at para 19].

[65] Keeping in mind this stated purpose of section 12(1)(b), I now turn to consider the ordinary meaning of the words “place” and « lieu ». In the Canadian Oxford Dictionary, the definition of “place” includes “a particular portion of space”, “a portion of space occupied by a person or thing” and “a city, town, village, etc.”. The Oxford English Dictionary defines the word “place” as including “a particular part or region of space; a physical locality, a locale; a spot, a location, and also a region or part of the earth’s surface” or “a particular area or spot in or on a larger body, structure or surface”. The word « lieu » is defined in *Le Petit Robert de la langue française* to include « portion déterminée de l’espace, considérée de façon générale et abstraite » and in *Le Robert Dictionnaire de la Langue Française* to include « portion déterminée de l’espace ». The

Larousse dictionary defines « lieu » as « situation spatiale de quelque chose, de quelqu'un permettant de la localiser, de déterminer une direction, une trajectoire » or « endroit, localité, édifice, local, etc., considérés du point de vue de leur affectation ou de ce qui s'y passe ».

[66] The words “place” and « lieu » clearly have broad definitions and include specific references to places on the earth’s surface, both general and abstract. Parallels of latitude and meridians of longitude refer to locations on the Earth’s surface, each with a specific directional and numerical designation (such as north and 42 degrees). They are geographical designations for specific lines that encircle the Earth.

[67] As is evident from a review of the case law, cities, provinces, regions and roads have all been recognized as places of origin for the purpose of section 12(1)(b). In the case of a road, a road is, simply put, a line on a map to which a designation has been given. By way of example, Yonge Street in Ontario is a very lengthy street, stretching from Toronto through numerous other cities in Ontario. Absent a specific address number, Yonge Street is no more of a specific geographical designation than a line of latitude covering multiple cities. Yet, it could not be seriously argued that Yonge Street, like Decarie Blvd., is not a “place” within the meaning of section 12(1)(b).

[68] By way of further example, the Equator (zero degrees latitude) and Greenwich (zero degrees longitude) are well-known lines of latitude and longitude respectively. One could imagine a scenario where an entity might seek to trademark “Equator” for use in relation to coffee made from beans grown in the tropical climate of the Equator. It would arguably be contrary to the

purpose of section 12(1)(b) to permit a monopoly over the use of the word “Equator”, thereby depriving potential coffee competitors of the opportunity to so describe their own coffee.

[69] I am satisfied that a proper interpretation of the terms “place of origin” and « lieu d’origine » should not be so restrictive as to exclude a designated line of latitude or longitude. Rather, in keeping with the purpose of section 12(1)(b), I find that the term “place of origin”/« lieu d’origine » should be interpreted to refer to any geographical designation.

[70] As for the assertion that section 12(1)(b) requires that the mark include the geographical name of the place of origin, I note that the statutory provision does not refer to the “name” of the place of origin, but only the place of origin. Moreover, even if it could be said that a place of origin must be designated by a name, I note that “name” is defined in the Merriam-Webster dictionary as including “a word or phrase that constitutes the distinctive designation of a person or thing” or “a word or symbol used in logic to designate an entity”. Each line of latitude and longitude has a distinctive designation (in this case, North 42 degrees) and thus does in fact have a name.

[71] As noted above, the proper interpretation to be given to the phrase “place of origin” in section 12(1)(b) of the *TMA* is an extricable question of law reviewable on the standard of correctness. I am satisfied that the TMOB erred by adopting an incorrect approach to the interpretation of section 12(1)(b) and thereafter in its determination that the trademark at issue fell short of identifying or naming a place.

[72] Further, I am satisfied that the TMOB erred by imposing an excessive burden on the Opponent. In an opposition proceeding, the Opponent bears an initial burden to adduce sufficient admissible evidence from which it could reasonably be conclude that the facts alleged to support the ground of opposition exists. When that evidentiary burden is met, the Applicant then bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the *TMA* [see *John Labatt Ltd v Molson Companies Ltd*, [1998] FCJ No 929 at para 49, rev'd on other grounds, [2000] FCJ No. 159]. In this case, the TMOB found that NORTH 42 DEGREES was not the name of a place of origin and concluded that the Opponent had not met its evidentiary burden. However, the question of whether a place of origin includes a designated line of latitude is a legal question, not an evidentiary one. The onus did not lie on the Opponent to convince the TMOB as to the proper interpretation of section 12(1)(b).

[73] In light of these errors and given that the evidence is exclusively in writing and no issue of credibility arises, I will render the decision that the TMOB should have rendered.

[74] Turning to the test prescribed in *MC Imports*, only the first and second prong of the three-party inquiry arises in this case as the Applicant has not asserted section 12(2) of the *TMA*. Both the evidence of the Opponent and the Applicant established that the Applicant's goods and services originate from a farm and winery located along the 42<sup>nd</sup> parallel or North 42 degrees latitude. Further, I am satisfied that, when properly interpreted, a "place" includes a specifically designated line of latitude, such as North 42 degrees latitude.

[75] Accordingly, I find that the trademark NORTH 42 DEGREES contravenes section 12(1)(b) of the *TMA* as it clearly describes the place of origin of the Applicant's goods and services.

[76] In light of my determination regarding the section 12(1)(b) ground of appeal, I need not go on to consider the remaining grounds of appeal.

**V. Conclusion**

[77] For the reasons set out above, I allow the Opponent's appeal. The TMOB's decision is set aside and the Applicant's trademark application for NORTH 42 DEGREES is refused in its entirety pursuant to section 38(12) of the *TMA*.

[78] It was agreed at the hearing that, in light of an offer to settle served prior to the hearing, the parties would attempt to reach an agreement on the issue of costs, failing which they would make written costs submissions in accordance with a schedule established by the Court.



**JUDGMENT in T-1195-21**

**THIS COURT'S JUDGMENT is that:**

1. Nia Wine Group Co., Ltd.'s application appealing the May 31, 2021 decision of the Trademarks Opposition Board, on behalf of the Registrar of Trademarks, and having citation 2021 TMOB 106, is allowed.
2. The May 31, 2021 decision (2021 TMOB 106) rejecting Nia Wine Group Co., Ltd.'s opposition against North 42 Degrees Estate Winery Inc.'s trademark application number 1,785,974 for NORTH 42 DEGREES is set aside.
3. Trademark application number 1,785,974 for NORTH 42 DEGREES filed by North 42 Degrees Estate Winery Inc. is refused pursuant to section 38(12) of the *Trademarks Act*.
4. The parties shall attempt to reach an agreement as to the costs of this application.  
In the event that they are unable to do so:
  - a. Nia Wine Group Co., Ltd. shall, within 14 days of the date of this Judgment, serve and file cost submissions in letter format not exceeding three pages;
  - b. North 42 Degrees Estate Winery Inc. shall, within seven days of service of the cost submissions in (a), serve and file cost submissions in letter format not exceeding three pages;

- c. Nia Wine Group Co., Ltd. may, within three days of service of the cost submissions in (b), serve and file reply cost submissions in letter format not exceeding two pages.

“Mandy Aylen”

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Judge

**Annex “A” – Relevant Provisions**

<p><i>Trademarks Act, RSC 1985, cT-13</i></p>	<p><i>Loi sur les marques de commerce, (L.R.C. (1985), ch. T-13)</i></p>
<p>Definitions</p> <p>2 In this Act,</p> <p>use, in relation to a trademark, means any use that by section 4 is deemed to be a use in association with goods or services.</p>	<p>Définitions</p> <p>2 Les définitions qui suivent s’appliquent à la présente loi.</p> <p><b>emploi ou usage</b> À l’égard d’une marque de commerce, tout emploi qui, selon l’article 4, est réputé un emploi en liaison avec des produits ou services.</p>
<p>When deemed to be used</p> <p>4 (1) A trademark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.</p> <p>(2) A trademark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.</p>	<p>Quand une marque de commerce est réputée employée</p> <p>4 (1) Une marque de commerce est réputée employée en liaison avec des produits si, lors du transfert de la propriété ou de la possession de ces produits, dans la pratique normale du commerce, elle est apposée sur les produits mêmes ou sur les emballages dans lesquels ces produits sont distribués, ou si elle est, de toute autre manière, liée aux produits à tel point qu’avis de liaison est alors donné à la personne à qui la propriété ou possession est transférée.</p> <p>Idem</p> <p>(2) Une marque de commerce est réputée employée en liaison avec des services si elle est employée ou montrée dans l’exécution ou l’annonce de ces services.</p>
<p>When trademark registrable</p> <p>12 (1) Subject to subsection (2), a trademark is registrable if it is not</p> <p>(b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French</p>	<p>Marque de commerce enregistrable</p> <p>12 (1) Sous réserve du paragraphe (2), la marque de commerce est enregistrable sauf dans l’un ou l’autre des cas suivants :</p> <p>b) qu’elle soit sous forme graphique, écrite ou sonore, elle donne une description claire</p>

<p>language of the character or quality of the goods or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;</p>	<p>ou donne une description fautive et trompeuse, en langue française ou anglaise, de la nature ou de la qualité des produits ou services en liaison avec lesquels elle est employée, ou en liaison avec lesquels on projette de l'employer, ou des conditions de leur production, ou des personnes qui les produisent, ou de leur lieu d'origine;</p>
<p>Contents of application</p> <p>30 An applicant for the registration of a trade-mark shall file with the Registrar an application containing</p> <p>(b) in the case of a trade-mark that has been used in Canada, the date from which the applicant or his named predecessors in title, if any, have so used the trade-mark in association with each of the general classes of goods or services described in the application;</p>	<p>Contenu d'une demande</p> <p>30 Quiconque sollicite l'enregistrement d'une marque de commerce produit au bureau du registraire une demande renfermant :</p> <p>b) dans le cas d'une marque de commerce qui a été employée au Canada, la date à compter de laquelle le requérant ou ses prédécesseurs en titre désignés, le cas échéant, ont ainsi employé la marque de commerce en liaison avec chacune des catégories générales de produits ou services décrites dans la demande;</p>
<p>Statement of opposition</p> <p>38 (1) Within two months after the advertisement of an application for the registration of a trade-mark, any person may, on payment of the prescribed fee, file a statement of opposition with the Registrar.</p> <p>Grounds</p> <p>(2) A statement of opposition may be based on any of the following grounds:</p> <p>(a) that the application does not conform to the requirements of section 30;</p> <p>(b) that the trade-mark is not registrable;</p>	<p>Déclaration d'opposition</p> <p>38 (1) Toute personne peut, dans le délai de deux mois à compter de l'annonce de la demande, et sur paiement du droit prescrit, produire au bureau du registraire une déclaration d'opposition.</p> <p>Motifs</p> <p>(2) Cette opposition peut être fondée sur l'un des motifs suivants :</p> <p>a) la demande ne satisfait pas aux exigences de l'article 30;</p> <p>b) la marque de commerce n'est pas enregistrable;</p>

<p>(c) that the applicant is not the person entitled to registration of the trade-mark; or</p> <p>(d) that the trade-mark is not distinctive.</p>	<p>c) le requérant n'est pas la personne ayant droit à l'enregistrement;</p> <p>d) la marque de commerce n'est pas distinctive.</p>
<p>Appeal</p> <p>56 (1) An appeal lies to the Federal Court from any decision of the Registrar under this Act within two months from the date on which notice of the decision was dispatched by the Registrar or within such further time as the Court may allow, either before or after the expiration of the two months.</p> <p>...</p> <p>Additional evidence</p> <p>(5) On an appeal under subsection (1), evidence in addition to that adduced before the Registrar may be adduced and the Federal Court may exercise any discretion vested in the Registrar.</p>	<p>Appel</p> <p>56 (1) Appel de toute décision rendue par le registraire, sous le régime de la présente loi, peut être interjeté à la Cour fédérale dans les deux mois qui suivent la date où le registraire a expédié l'avis de la décision ou dans tel délai supplémentaire accordé par le tribunal, soit avant, soit après l'expiration des deux mois.</p> <p>Preuve additionnelle</p> <p>(5) Lors de l'appel, il peut être apporté une preuve en plus de celle qui a été fournie devant le registraire, et le tribunal peut exercer toute discrétion dont le registraire est investi.</p>

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1195-21

**STYLE OF CAUSE:** NIA WINE GROUP CO., LTD v NORTH 42 DEGREES  
ESTATE WINERY INC.

**PLACE OF HEARING:** HEARD BY VIDEOCONFERENCE

**DATE OF HEARING:** JANUARY 11, 2022

**JUDGMENT AND REASONS:** AYLEN J.

**DATED:** FEBRUARY 22, 2022

**APPEARANCES:**

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Philip Kerr FOR THE RESPONDENT

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