



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2021 TMOB 221**

**Date of Decision: 2021-10-04**

**IN THE MATTER OF A SECTION 45 PROCEEDING**

**WITMART INC.**

**Requesting Party**

**and**

**SHANGHAI OLD-TOWN TEMPLE RESTAURANT GROUP CO., LTD.**

**Registered Owner**

**TMA932,376 for NANXIANG Design**

**Registration**

**INTRODUCTION**

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA932,376 for the trademark NANXIANG Design (the Mark), currently owned by Shanghai Old-Town Temple Restaurant (Group) Co., Ltd. (the Owner).

[2] The Mark is depicted below:



[3] All references are to the Act as amended June 17, 2019 (the Act), unless otherwise noted.

[4] The Mark is registered for use in association with the following:

Accommodation bureaus services, namely, providing hotel services and boarding house services; food and drink catering services; cafe services; cafeteria services; canteen services; boarding house services; hotelservices; restaurant services; boarding house bookings; self-service restaurants; snack-bar services; bar services; holiday camp lodging services; motel services; teahouse services (the Services).

[5] For the reasons that follow, I conclude that the registration ought to be maintained in part.

#### THE PROCEEDINGS

[6] At the request of Witmart Inc. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on April 8, 2019, to the Owner.

[7] The notice required the Owner to show whether the Mark had been used in Canada in association with each of the Services at any time within the three-year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of such use since that date. In this case, the relevant period for showing use is April 8, 2016 to April 8, 2019 (the Relevant Period).

[8] The relevant definition of use in the present case is set out in section 4(2) of the Act as follows:

4(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.

[9] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for removing “deadwood” from the register. As such, the evidentiary threshold that the registered owner must meet is quite low [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448 at para 68] and “evidentiary overkill” is not required [see *Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD) at para 3]. Nevertheless, sufficient facts must still be provided to allow the Registrar to conclude that the mark was used in association with each of the services.

[10] In the absence of use as defined above, pursuant to section 45(3) of the Act, a trademark is liable to be expunged, unless the absence of use is due to special circumstances.

[11] In response to the Registrar’s notice, the Owner furnished the affidavit of Mr. Wan Wei Hoow, sworn on November 5, 2019, to which was attached Exhibits “A” to “K”.

[12] Neither party filed written representations. No oral hearing was held.

#### THE EVIDENCE

[13] The Owner’s affiant, Mr. Wan Wei Hoow, is a Director of the Owner and has held that position since July, 2019. Mr. Hoow states that he either has personal knowledge of the matters set out in his affidavit or else has obtained such knowledge from the business records of the Owner.

[14] Mr. Hoow states that during the Relevant Period the Mark was used in Canada by the Owner’s licensee, Mennie Canada, who operated the Yu Garden restaurant in Richmond Hill,

Ontario, in accordance with standards set by the Owner [*Hoow Affidavit, paras. 6 & 7*].

According to Mr. Hoow, since September, 2015, the Yu Garden restaurant has offered food and drink catering services, café services, restaurant services and bar services in association with the Mark.

[15] Mr. Hoow states that the sales of these food and beverage services in Canada in 2016 exceeded \$50,000 (CAD), in 2017 exceeded \$25,000 (CAD) and in 2018 up to April 8, 2019 exceeded \$25,000 (CAD).

[16] To further support his allegations of use, Mr. Hoow attached to his affidavit the following exhibits:

- (a) Exhibit “A”: an English language translation of the agreement between the Owner and its licensee, Mennie Canada, pertaining to the operation of the Yu Garden restaurant in Richmond Hill, Ontario;
- (b) Exhibit “B”: photographs of the Yu Garden restaurant which prominently depict the Mark and which are stated to be representative depictions of the manner of use of the Mark in the normal course of trade during the Relevant Period; these photographs depict the exterior front of the restaurant as well as the interior seating areas of the restaurant;
- (c) Exhibit “C”: includes a Yu Garden menu which prominently depicts the Mark. According to para. 11 of the affidavit, “the restaurant’s decor and the use of the Mark”, which I infer includes the menu, has been consistent since the restaurant opened in 2015;
- (d) Exhibit “C” also includes an invoice dated October 27, 2019 which is not helpful as it is outside the Relevant Period and in any event does not depict the Mark; and
- (e) Exhibits “D” - “J”: extracts of third party websites containing reviews of the YU Garden restaurant which in turn contain pictures of the restaurant; the Mark

appears on some of the pictures.

## ANALYSIS AND REASONS FOR DECISION

### Interpretation of the registration

[17] It is a well-established principle that when interpreting a statement of goods or services in a section 45 proceeding, one is not to be “astutely meticulous when dealing with [the] language used” [see *Aird & Berlis LLP v Levi Strauss & Co*, 2006 FC 654 at para 17].

[18] Indeed, it has been held that a specification should be granted a reasonable interpretation [*ConAgra Foods, Inc v Fetherstonhaugh & Co* . 2002 FCT 1257] and reasonable inferences may be drawn from the evidence provided [*Eclipse International Fashions Canada Inc v Shapiro Cohen*, 2005 FCA 64].

[19] In the absence of written representations from the Requesting Party and applying a reasonable interpretation to both the registration and the evidence, I am prepared to conclude that the Mark was in use in Canada during the Relevant Period in association with restaurant services.

[20] However, there is no evidence from which I may conclude that the Mark was used in association with the remaining services covered by the registration. The Owner claims to have used the Mark in association with food and drink catering services, café services and bar services, but the evidence provided only shows use in association with restaurant services.

[21] Reference is made in the evidence to the delivery of Yu Garden’s food, but delivery is to be distinguished from catering services. Further, as the registration separately lists restaurant services, catering services, café services and bar services, the Owner must have considered these services to be unique and distinguishable from one another. I therefore find that use within the Relevant Period has been shown only with respect to restaurant services.

[22] As for the other services, there are no allegations of fact that could constitute special circumstances justifying non-use of the Mark within the meaning of s.45 of the Act..

DISPOSITION

[23] Pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be amended to delete all but restaurant services.

[24] The amended statement of services shall now read:

- restaurant services

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Jean Carrière  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

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

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**HEARING DATE** No Hearing Held

**AGENTS OF RECORD**

Perrier + Currier

For the Registered Owner

No agent appointed

For the Requesting Party