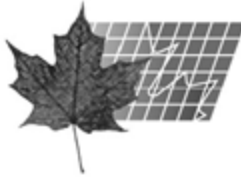


O P I C



C I P O

**LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS**

Citation: 2022 TMOB 077

Date of Decision: 2022-04-25

[UNREVISED ENGLISH]

CERTIFIED TRANSLATION]

IN THE MATTER OF A SECTION 45 PROCEEDING

FAST Fashion Brands GmbH

Requesting Party

and

B.G. BEAUTÉ INC

Registered Owner

TMA912660 for IZIA

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. TMA912,660 for the trademark IZIA (the Mark), registered in connection with the following goods:

[TRANSLATION]

False eyelashes, cosmetics for eyelashes, “the Goods.”

[2] For the reasons that follow, I conclude that the registration ought to be amended.

THE PROCEEDING

[3] At the request of FAST Fashion Brands GmbH (the Requesting Party), the Registrar of Trademarks gave the notice under section 45 of the Act on January 26, 2021, to B.G. BEAUTÉ INC. (the Owner), the registered owner of the Mark.

[4] The notice required the Owner to show whether the Mark was used in Canada in association with each of the goods specified in the registration at any time within the three-year period preceding the date of the notice and, if not, the date when the Mark was last in use and the reason for the absence of such use since that date. In this case, the relevant period for demonstrating use is between January 26, 2018 and January 26, 2021.

[5] The relevant definition of use in this case is set out in section 4(1) of the Act as follows:

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.

[6] 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.

[7] In response to the Registrar's notice, the Owner filed an affidavit of Jean-Jacques Benguigui, sworn on February 15, 2021, to which were attached Exhibits 1 to 3.

[8] Neither party submitted written representations, and no oral hearing was held.

THE EVIDENCE

[9] Mr. Benguigui identifies himself as the Owner's Founder, who has been performing his duties since 2003.

[10] Mr. Benguigui submits that the Owner works in the cosmetics field and owns the website called *www.misencil.com*, through which the Goods were sold during the relevant period

[paragraph 4]. He also submits that the Goods sold bore the Mark displayed on their packaging [paragraph 5].

[11] I note that Mr. Benguigui refers in his affidavit to four exhibits, but only three were attached. I find that the missing exhibit (Exhibit 4) has no bearing on this decision in that this exhibit apparently concerns sales invoices from abroad. Mr. Benguigui described it as invoices showing the sale of goods bearing the Mark in France [paragraph 7].

[12] The three exhibits filed in support of Mr. Benguigui's affidavit are as follows:

- Exhibit 1: excerpts from the Owner's website and the *archive.org* website. I note that a photograph of goods bearing the Mark, identified as "Izia Black Silk Lashes Tray," appears in the extract of the Owner's website and that this good is available through this website in different lengths and thicknesses. I also note that the excerpt from the *archive.org* website is dated during the relevant period and that several goods are listed there, including goods identified as "Izia Black Silk Lashes Tray" and "Izia Black Lashes in Bulk";
- Exhibit 2: three photos, the first and the third showing a good identified as "Silk Eyelashes" and the second showing the label of that good. I note that the Mark appears on the label displayed on the packaging of the good and within it;
- Exhibit 3: six invoices issued during the relevant period with addresses in Canada. I note that the only items identified in connection with the Mark appearing under the heading "Description" correspond to eyelashes of various length and thickness.

ANALYSIS AND REASONS FOR DECISION

[13] 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. In light of this, 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 38] and "evidentiary overkill" is not required [see *Union Electric Supply Co Ltd v Registrar of Trademarks* (1982), 63 CPR (2d) 56 (FCTD) at para 3]. However, sufficient facts must still be provided to allow the Registrar to find that the mark was used in association with the goods and/or services specified in the registration. In this case, I am of the opinion that the evidence shows that the Mark was used by the Owner during the relevant period in respect of only one of the Goods, namely "false eyelashes."

[14] Although Mr. Benguigui does not establish as such a precise correlation between the Goods described in the registration and those shown in Exhibits 1 to 3 described above, it is clear from these that the Mark was used during the relevant period in association with false eyelashes.

[15] This is not the case for “cosmetics for eyelashes” in that none of the general assertions of use of the Mark in association with the Goods made by Mr. Benguigui, are not supported by exhibits relating to this specific type of product. None of the photographs, nor any of the excerpts from the websites in Exhibits 1 and 2, show the use of the Mark in association with cosmetics for eyelashes. Similarly, none of the invoices in Exhibit 3 appear to relate to the sale of such a type of good in association with the Mark. It is trite law that bare statements that a trademark is in use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)].

[16] Given the absence of evidence of use of the Mark in association with cosmetics for eyelashes within the meaning of section 4 of the Act during the relevant period and that the evidence does not indicate any special circumstances justifying the non-use of the Mark in association with such goods, the registration will be amended to delete these goods.

DECISION

[17] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be amended to delete “Cosmetics for eyelashes” in compliance with the provisions of section 45 of the Act.

[18] The statement of goods will read as follows:

False eyelashes.

Maria Ledezma
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

Certified translation
Daniel Lepine

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

HEARING DATE: No hearing held

AGENTS OF RECORD

Therrien Couture Joli-Cœur LLP

For the Registered Owner

ROBIC

For the Requesting Party