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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2017 TMOB 165

Date of Decision: 2017-12-08

IN THE MATTER OF A SECTION 45 PROCEEDING

Johnston Law

Requesting Party

and

Ramón Cuevas

Registered Owner

**TMA799,509 for CUEVAS MEDEK
EXERCISES**

Registration

[1] At the request of Johnston Law, the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on October 7, 2015, to Ramón Cuevas (the Owner), the registered owner of registration No. TMA799,509 for the trade-mark CUEVAS MEDEK EXERCISES (the Mark).

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

Educational services, namely teaching courses and training of medical professionals; medical services, namely medical assistance, rehabilitation, evaluation and therapy in connection with neuromotor function performance of children.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the services specified in the registration 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.

[4] In this case, the relevant period for showing use is between October 7, 2012 and October 7, 2015.

[5] The definition of use with respect to services is set out in section 4(2) of the Act, as follows:

4(2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[6] 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 and, as such, the evidentiary threshold that the registered owner must meet is quite low [*Uvex Toko Canada Ltd v Performance Apparel Corp*, 2004 FC 448, 31 CPR (4th) 270].

[7] In response to the Registrar’s notice, Mr. Cuevas furnished his own affidavit, sworn on April 29, 2016 in Santiago, Chile. Both parties filed written representations; an oral hearing was not requested.

THE OWNER’S EVIDENCE

[8] In his affidavit, Mr. Cuevas identifies himself as a kinesiologist, with a particular focus on treating the motor functions of children with developmental delays.

[9] By way of background, Mr. Cuevas explains that, in the 1970s, he initially developed his therapy under the name “MEDEM,” referring to the Spanish acronym for “dynamic method of motor stimulation”. He attests that, in 1999, he renamed his therapy to “CUEVAS MEDEK EXERCISES”, or “CME” for short. He attests that, in 2003, he opened his clinic in Santiago, Chile under the name Cuevas Medek Exercises International Center to advertise and offer the registered services to physical therapists around the world. He attests that the registered services were offered by himself or other certified therapists whom he personally trained and certified to teach his therapy.

[10] Mr. Cuevas clarifies that Cuevas Medek Exercises International Center is not a separate or otherwise incorporated entity. He attests that he personally does business under the trade-name Cuevas Medek Exercises International Centre, referring to his clinical and professional installations in Santiago, Chile.

[11] With respect to the performance of the registered services during the relevant period, Mr. Cuevas attests that he advertised and offered his therapy worldwide via his website at *www.cuevasmedek.com*.

[12] In support, Mr. Cuevas attaches the following exhibits to his affidavit:

- Exhibit 1 consists of a printout from the Internet Archive, *www.archive.org*, showing the homepage for his website from June 2013. The homepage includes links to “CME Physical Therapy creator” and “Cuevas Medek Education Program”, with descriptions of the Owner’s background and the Cuevas Medek Exercises program. These descriptions are consistent with the registered “educational services” and “medical services”. I note that the Mark appears on the homepage’s banner.
- Exhibit 2 consists of a printout of the homepage of Mr. Cuevas’ website as it appeared in February 2015. The printout includes a photograph of what Mr. Cuevas attests is a depiction of him teaching Cuevas Medek Exercises in front of a classroom. Again, the Mark appears on the webpage’s banner. The Mark also appears as a watermark on the photograph.
- Exhibit 3 consists of a printout of the website’s biography page for Mr. Cuevas as it appeared in October 2013. The description states that “Ramón Cuevas teaches CME around the world and has participated in CME® presentations in Chile, Venezuela, Argentina, Brazil, the United States of America, Canada, France, England and Belgium.” The biography further indicates that “Ramón Cuevas established the Cuevas Medek Exercise Continuing Education Program® (CMECEP®) in order to heighten the quality of the CME therapy courses for professionals who work in pediatric rehabilitation.” The Mark appears on the webpage’s header.

- Exhibit 4 is a printout of Mr. Cuevas' Facebook Timeline page displaying his three most recent posts (as of the time his affidavit was furnished) regarding CME courses. I note that the Mark appears on multiple photos on the page.
- Exhibit 5 is also a printout from Mr. Cuevas' Facebook page, specifically a December 2014 post advertising his CME educational services. The post includes Toronto as a potential Canadian location for 2015. The Mark appears on this post.

[13] Mr. Cuevas states that “the latest performance of services in Canada” occurred in September 2015 in Toronto, Ontario. Mr. Cuevas attests that Simona DeMarchi, a licensee of the Mark, offered a CME course from her private practice located in Toronto. Mr. Cuevas further states that Ms. DeMarchi is the first practitioner to achieve CME certification under Mr. Cuevas' direct instruction. He attests that he is “quite certain” that his website was accessed from Canada regularly, “at least by the people who attended the Latest Performance of the Services.”

[14] In support, Mr. Cuevas attaches the following exhibits to his affidavit:

- Exhibit 6 is a brochure for the CME Course offered by Ms. DeMarchi. It includes a daily schedule of proposed exercises and presentations to be held in Toronto in September 2015. The brochure indicates that “Simona is the owner of Simona DeMarchi Paediatric Therapy, a private practice located in Toronto, ON where she focuses on delivering CME to her young clients from both near and far.” The description in the brochure regarding Ms. DeMarchi's delivery of CME to her clients is consistent with the registered “medical services”. The Mark appears on the front page of the brochure and on the accompanying schedule.
- Exhibit 7 is a letter dated December 2014, sent from Mr. Cuevas to Ms. DeMarchi. The letter indicates that Ms. DeMarchi “is authorized to produce according [to] standard specifications, and distribute the CME set of boxes in Canada and USA.” Mr. Cuevas attests that the letter authorizes Ms. DeMarchi to perform educational services and issue qualification certificates on his behalf to the attendees complying with the course requirements. The Mark appears as a logo on the bottom of the letter, in addition to a

variation of the Mark incorporated into the “Cuevas-Medek-Exercises International Centre” trade name appearing on the letterhead.

- Exhibit 8 is a June 30, 2015 email sent from Ms. DeMarchi to Mr. Cuevas. The email extends a thank you to Mr. Cuevas for visiting Ms. DeMarchi and her patients at her office in Toronto.
- Exhibit 9 is an August 30, 2015 email sent from Ms. DeMarchi to Ms. Cuevas confirming the names of the nine registered attendees for the CME Course held in Toronto.
- Exhibit 10 consists of a cover page and a table of contents for materials given to attendees of the CME course offered in Toronto. A variation of the Mark with hyphens, “Cuevas-Medek-Exercises”, appears prominently on the cover page. Under this, “Continuing Education Program” is displayed.
- Exhibit 11 is a copy of the CME Education Program certificate given to an attendee, certifying successful completion of the introductory CME course from September 2015 in Toronto. The certificate indicates that it was issued by Ms. DeMarchi, “CME Practitioner”, and Mr. Cuevas, “CME Therapy Creator”. The Mark appears on the certificate letterhead and in a seal affixed on the certificate.

Only one certificate appears at Exhibit 11, despite Mr. Cuevas indicating – at paragraph 28 of his affidavit – that three certificates are attached. A handwritten note next to paragraph 28 indicates that “the signed affidavit only came back with one copy of a certificate”.

ANALYSIS

[15] In its written representations, the Requesting Party questions several aspects of the Owner’s evidence. Generally, it alleges various contradictions and technical gaps in the evidence, arguing that Mr. Cuevas’ affidavit is, at best, vague and ambiguous.

[16] As a preliminary matter, the Requesting Party questions the validity of the affidavit, submitting it is insufficient to meet the burden on the Owner in this proceeding. Specifically, the Requesting Party points to two handwritten notes appearing in the margin on page six of the

affidavit. Further, the Requesting Party argues that the jurat is incomplete. In this respect, I note that although the jurat itself is left blank, each page of the affidavit and exhibits is signed and stamped on the right hand margin by a “notario publico.”

[17] In section 45 proceedings, the Registrar generally accepts affidavits sworn in foreign jurisdictions as long as they meet the requirements of that country [See *Dubuc v Montana* (1991), 38 CPR (3d) 88 (TMOB)]. In this case, there is no indication that the affidavit executed and solemnly affirmed in Santiago, Chile, does not meet the requirements of that country. Therefore, given the limited context of a section 45 proceeding, I agree with the Owner that the affidavit should be taken at face value.

[18] As for the two handwritten notes, the Requesting Party submits that, as they appear to have been added after the affidavit was sworn, they should result in the affidavit being disregarded in its entirety. However, in my view, neither handwritten note invalidates the contents of the affidavit. The first handwritten note purports to correct a minor typographical error in reference to Exhibit 10 of the affidavit. The second handwritten note explains why only one of the three certificates mentioned in the affidavit is actually attached as Exhibit 11. Including one copy of the certificate is sufficient to meet the evidence requirement. Thus, there is nothing problematic *per se* regarding these handwritten notes.

[19] Otherwise, the Requesting Party argues that, as the copyright notice on the website specifies “Cuevas Medek Exercise International Center”, it does not show use of the Mark by Mr. Cuevas. On this issue, however, I accept Mr. Cuevas’ statement that Cuevas Medek Exercises International Centre is essentially his trade name and not another legal entity.

[20] With respect to the alleged licensed use by Ms. DeMarchi, the Requesting Party submits that Mr. Cuevas has failed to demonstrate the requisite control over the services provided by Ms. DeMarchi and “other certified therapists”. The Requesting Party submits that Mr. Cuevas’ claims with respect to Ms. DeMarchi’s performance of the registered services to “high standards” do not demonstrate the requisite control.

[21] In response, the Owner directs attention to the authorization granted in the Exhibit 7 letter, which Mr. Cuevas attests refers to “standard specifications” for issuing CME qualification

certificates on his behalf. Further, the Owner submits that the Exhibit 11 certificate, with his signature, is another indicator of the requisite control.

[22] As stated by the Federal Court, there are three main methods by which a trade-mark owner can demonstrate the requisite control pursuant to section 50(1) of the Act: first, by clearly attesting to the fact that it exerts the requisite control; second, by providing evidence demonstrating that it exerts the requisite control; or third, by providing a copy of the license agreement that provides for the requisite control [see *Empresa Cubana Del Tabaco Trading v Shapiro Cohen*, 2011 FC 102, 91 CPR (4th) 248 at para 84].

[23] In the present case, at a minimum, two such methods are satisfied. That is, not only has Mr. Cuevas provided a clear statement attesting to such control, but he has provided specific examples of how such control is exercised, such as in the form of the exhibited letter and certificate. Consequently, I am satisfied that any use of the Mark by Ms. DeMarchi was licensed use, enuring to the benefit of Mr. Cuevas pursuant to section 50 of the Act.

[24] The remaining issue in this case is whether the evidence of use of the Mark correlates to the specified “educational” and “medical” registered services.

EDUCATIONAL SERVICES

[25] Although the Requesting Party suggests that it is not clear that the registered services were actually offered in Canada, the evidence demonstrates that Mr. Cuevas, through Ms. DeMarchi, conducted at least one CME course in Canada during the relevant period in association with the Mark. In view of the evidence, I am satisfied that the CME course in Toronto correlates to the educational services as registered. In this respect, I note that the Exhibit 10 course content is entitled “CUEVAS-MEDEK-EXERCISES Continuing Education Program.” Furthermore, the Exhibit 6 brochure and the Exhibit 11 certificate demonstrate that informative material was distributed to participants and that such sessions had educational elements for physical therapists, being “medical professionals”.

[26] The Requesting Party argues that the hyphenated version of “CUEVAS-MEDEK-EXERCISES” does not constitute display of the Mark as registered. In response, the Owner cites

JH Lock & Sons v Joseph Lewis Sciamanna (1989), 26 CPR (3d) 478 (TMOB), where similar hyphen placement was deemed acceptable. In this case, I agree with the Owner that the addition of hyphens constitutes a minor deviation, whereby the dominant feature of the Mark, namely the words “Cuevas Medek Exercises”, has been preserved. Accordingly, I am satisfied that the trademark as displayed on the course materials constitutes display of the Mark.

[27] In view of the foregoing, I accept that the Owner has demonstrated use of the Mark in association with the registered “educational” services in Canada during the relevant period within the meaning of sections 4 and 45 of the Act.

MEDICAL SERVICES

[28] With respect to the registered “medical services”, the evidence provides that Ms. DeMarchi is the first practitioner to achieve CME certification under Mr. Cuevas’ instruction. Based on the description of her practice in the Exhibit 6 brochure, I accept that Ms. DeMarchi delivered CME medical services to her clients from her office in Toronto. Although the evidence does not speak to her client base, in viewing the evidence as a whole, I accept that such medical services were, at a minimum, advertised in association with the Mark and available to be performed by Ms. DeMarchi.

[29] Otherwise, Mr. Cuevas states that he is “quite certain” that his website was accessed from Canada regularly during the relevant period. It is well established that the evidence in a section 45 proceeding need not be perfect; indeed, a registered owner need only establish a *prima facie* case of use within the meaning of sections 4 and 45 of the Act [see *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at paragraph 2]. This burden of proof is light; evidence need only supply facts from which a conclusion of use may follow as a logical inference [per *Diamant* at paragraph 9]. Accordingly, as Mr. Cuevas would have knowledge of his business, I accept his statement at face value.

[30] Furthermore, reasonable inferences can be made from the evidence provided [see *Eclipse International Fashions Canada Inc v Shapiro Cohen* (2005), 2005 FCA 64, 48 CPR (4th) 223]. In this case, Mr. Cuevas furnished printouts of his website displaying the Mark and showing that activities corresponding to both the registered educational services and the registered medical

services were advertised through that website. Given Mr. Cuevas' attestations and accompanying evidence as a whole, I consider it reasonable to infer that at least some Canadians would have accessed the Owner's website during the relevant period. As such, I am prepared to accept that the exhibited webpages advertised medical services in Canada, during the relevant period.

[31] In any event, I accept that Ms. DeMarchi's licensed use of the Mark in advertising her CME course and practice in Toronto constitutes use of the Mark in association with the medical services as registered.

[32] Accordingly, I accept that the Owner has demonstrated use of the Mark in association with the registered "medical" services within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[33] In view of all of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with the provisions of section 45 of the Act, the registration will be maintained.

Andrew Bene
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

No Hearing Held

AGENTS OF RECORD

BCF S.E.N.C.R.L./BCF LLP

For the Registered Owner

Johnston Law

For the Requesting Party