Lack of evidence of non-use and confusion result in POKEWORKS trademark remaining on the register

May 21, 2020

The Court has found that the applicant Beyond Restaurant Group LLC (Beyond Restaurant) did not meet its evidentiary burden to establish, on a balance of probabilities, that the word mark POKEWORKS was not used, was not distinctive of the owner, or that the owner made any material misstatements when declaring that the trademark had been used in Canada.

The application hearing was held *ex parte*, because Beyond Restaurant was unable to find a current address for the trademark owner Wang and previously had obtained an order for substitutional service. In support of its application to declare the word mark invalid pursuant to section 57 of the Trademarks Act, Beyond Restaurant filed affidavits of its client, a private investigator and a legal assistant.

The Court found that Beyond Restaurant operates a chain of POKEWORKS restaurants in the United States and one in Canada. Beyond Restaurant applied for the same trademark in Canada, after Wang had applied for it, but before Wang filed a declaration of use.

The Court first held that Beyond Restaurant was a person interested for the purpose of the application. The Court then reviewed the evidence to determine whether the trademark was distinctive. Beyond Restaurant hired a private investigator to determine whether Wang had made use of the trademark, but the investigator was unable to do so. The Court noted a lack of detail for the internet searches that were conducted, making it difficult to ascertain the breadth, scope and reasonableness of steps taken.

Furthermore, the private investigator's search was undertaken in April 2018, which was over a year prior to the material date of July 22, 2019, such that the trademark may have potentially been used in that time period. The Court was aware of the difficulty in having to prove a negative, but still held that the evidence of non-use fell short.

Beyond Restaurant's evidence to show confusion with its own use of the trademark included articles in publications and social media, but this was not found to be relevant to Canada because the evidence was from the United States and it lacked details of

spill-over circulation or whether Canadians were interacting with their U.S.-based social media online.

Finally, while Wang filed a declaration of use, the lack of evidence showing whether the trademark was used before filing, or even at all, meant that the Court was unable to find a material misstatement that would invalidate the registration of the trade mark.

Consequently, the Court dismissed the application to strike the trademark from the register.

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