

**IN THE MATTER OF AN OPPOSITION by Dentrix Inc. to  
application No. 736,555 for the trade-mark Teeth Design filed by  
Dr. Arthur Dunec**

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On September 9, 1993, the applicant, Dr. Arthur Dunec, filed an application to register the trade-mark Teeth Design, a representation of which appears below, based upon proposed use of the trade-mark in Canada in association with the “operation of a dentist’s office”.

The present application was advertised for opposition purposes in the *Trade-marks Journal* of May 4, 1994 and the opponent, Dentrix Inc., filed a statement of opposition on October 3, 1994, a copy of which was forwarded to the applicant on January 5, 1995. In its statement of opposition, the opponent alleged that the applicant’s trade-mark Teeth Design is not registrable and not distinctive, and that the applicant is not the person entitled to its registration, in that the applicant’s Teeth Design trade-mark is confusing with its registered Teeth Design trade-mark, registration No. 322,665, covering “dentist’s services” which had been used in Canada since May 1984. A representation of the opponent’s registered Teeth Design trade-mark is set out below.

Registration No. 322,665

The applicant served and filed a counter statement in which he effectively denied the allegations set forth in the statement of opposition. The opponent submitted as its evidence the affidavit of Douglas A. Baird while the applicant submitted as his evidence the affidavit of Dr. Arthur Dunec. The applicant alone submitted a written argument and neither party requested an oral hearing.

As the opponent has established its prior use and non-abandonment of its Teeth Design trade-mark in Canada in association with “dentist’s services”, the opponent has met the burden upon it under Subsections 16(5) and 17(1) of the *Trade-marks Act*. Consequently, this ground, as well as the Paragraph 12(1)(d) and non-distinctiveness grounds, remain to be decided on the issue of confusion between the design trade-marks at issue.

In determining whether there would be a reasonable likelihood of confusion between the applicant’s Teeth Design trade-mark and the opponent’s Teeth Design trade-mark within the scope of Subsection 6(2) of the *Trade-marks Act*, the Registrar must have regard to all the surrounding circumstances, including those which are specifically enumerated in Subsection 6(5) of the *Act*. Further, the Registrar must bear in mind that the legal burden is upon the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks of the parties as of the relevant material dates. In this regard, the material date in relation to the Paragraph 12(1)(d) ground is the date of my decision [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks*, 37 C.P.R. (3d) 413 (FCA)] while the material date for considering the non-entitlement and non-distinctiveness grounds are the applicant’s filing date [September 9, 1993] and the date of opposition [October 3, 1994], respectively.

With respect to the inherent distinctiveness of the trade-marks at issue, neither the applicant’s trade-mark Teeth Design nor the opponent’s Teeth Design mark possess much inherent distinctiveness as applied to the operation of a dentist’s office or dentist’s services in that both design marks are highly suggestive of such services. The Baird affidavit establishes that the opponent’s design trade-mark has become known in Canada in that it has been associated with the operation of twelve dentists’ offices in Western Canada commencing in June of 1984. In his

affidavit, Dr. Dunec states that he has used his design trade-mark in association with the operation of a store front dentist's office located on Yonge Street in Toronto since May of 1994. However, the extent to which the trade-marks have become known and the length of time the marks have been in use both clearly weigh in the opponent's favour.

The services of the parties are obviously related and consequently the channels of trade associated with the services of the parties would or could overlap.

As for the degree of resemblance between the trade-marks at issue, there is no similarity in sounding and, in my view, relatively little similarity in the appearance of the trade-marks at issue. To the extent that both marks suggest dental care, there is certainly a fair degree of similarity in the ideas suggested by the two design marks although I do not consider that either party would be entitled to a monopoly in respect of such an idea as applied to the respective services of the parties.

Dr. Dunec states in his affidavit that dental offices commonly use teeth designs/logos to advertise the provision of their services and has annexed to his affidavit photocopies of more than sixty-five pages from Yellow Pages directories from across Canada displaying various Teeth Design trade-marks in association with the advertisement of dental services. This evidence was not challenged by the opponent by way of cross-examination, nor did it seek to adduce evidence in reply to the applicant's evidence. Moreover, the opponent did not submit a written argument nor did it request an oral hearing to respond to the applicant's evidence. In any event, the applicant's evidence relating to the common adoption of the teeth design trade-marks by third parties confirms that the opponent's trade-mark ought to be accorded a narrow ambit of protection.

Having regard to the above and, in particular, to the limited degree of resemblance between the trade-marks at issue and the evidence of fairly extensive adoption by third parties of teeth design trade-marks in relation to dental services, I have concluded that there would be no reasonable likelihood of confusion between the applicant's Teeth Design trade-mark and the opponent's Teeth Design trade-mark. I have therefore rejected the opponent's grounds of opposition.

Having been delegated by the Registrar of Trade-marks by virtue of Subsection 63(3) of the *Trade-marks Act*, I reject the opponent's opposition in view of the provisions of Subsection 38(8) of the *Trade-marks Act*.

DATED AT HULL, QUEBEC, THIS 30<sup>th</sup> DAY OF JUNE, 1998.

G.W. Partington,  
Chairperson,  
Trade Marks Opposition Board.