

Council of Natural Medicine College of Canada (applicant) v. College of Traditional Chinese  
Medicine Practitioners and Acupuncturists of British Columbia (respondent)  
(T-427-09; 2013 FC 287)

**Indexed As: Council of Natural Medicine College of Canada v. College of Traditional  
Chinese Medicine Practitioners and Acupuncturists of British Columbia**

Federal Court  
Rennie, J.  
March 19, 2013.

**Summary:**

The Registrar of Trademarks gave public notice that the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia (College) had adopted and used 16 official marks (Trade-marks Act, s. 9(1)(n)(iii)). The Council of Natural Medicine College of Canada (Council), applied for judicial review, seeking to set aside the Registrar's decision.

The Federal Court dismissed the application. The court held that the Registrar committed no reviewable error. The Registrar correctly determined, consistent with the governing criteria, that the College was a public authority that had adopted and used the official marks. The court rejected an argument by the Council that s. 9(1)(n)(iii) constitutionally overreached federal jurisdiction (i.e., that s. 9(1)(n)(iii) was beyond the legislative competence of Parliament in its application to the medical arts and health professions, matters within provincial jurisdiction). The court also rejected arguments that s. 9(1)(n)(iii) constituted an unjustifiable restriction on freedom of expression (Charter, s. 2(b)).

**Civil Rights - Topic 1843.2**

Freedom of speech or expression - Limitations on - Intellectual property - The Registrar of Trademarks gave public notice that the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia had adopted and used 16 official marks (Trade-marks Act, s. 9(1)(n)(iii)) - The Council of Natural Medicine College of Canada applied for judicial review, arguing that s. 9(1)(n)(iii) infringed the freedom of expression (Charter, s. 2(b)) - The Federal Court agreed that the impugned provision infringed s. 2(b), but the infringement was justified as a reasonable limit prescribed by law under s. 1 of the Charter - See paragraphs 89 to 101.

**Civil Rights - Topic 8006**

Canadian or provincial bill of rights - Principles of operation and interpretation - Right to fair hearing in accordance with principles of fundamental justice - The Registrar of Trademarks gave public notice that the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia had adopted and used 16 official marks (Trade-marks Act, s. 9(1)(n)(iii)) - The Council of Natural Medicine College of Canada applied for judicial review, arguing that s. 2(e) of the Canadian Bill of Rights entitled the Council to a hearing prior to the issuance of public notice - The Federal Court held that s. 2(e) was inapplicable as that provision only applied in proceedings before a tribunal or body that determined individual rights and obligations - See paragraphs 102 to

**Civil Rights - Topic 8348**

Canadian Charter of Rights and Freedoms - Application - Exceptions - Reasonable limits prescribed by law (s. 1) - [See **Civil Rights - Topic 1843.2**].

**Constitutional Law - Topic 1701**

Extent of powers conferred - Ancillary doctrine - General - Section 9(1)(n)(iii) of the Trade-marks Act prohibited the adoption and use of official marks which had been adopted and used by any public authority - The Council of Natural Medicine College of Canada (Council) claimed that the official marks provisions could not be justified on the basis of the ancillary powers doctrine - The Federal Court rejected the Council's argument - The court stated that there was no need to resort to the ancillary powers doctrine as the official marks provision had not been contested on the basis that it was not a valid exercise of the federal trade and commerce power - Rather, the argument was that it overreached and had to be confined and read down so as to have no impact on provincial jurisdiction - See paragraphs 80 to 82.

**Constitutional Law - Topic 1761**

Extent of powers conferred - Necessarily incidental doctrine - General - The Registrar of Trademarks gave public notice that the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia had adopted and used 16 official marks (Trade-marks Act, s. 9(1)(n)(iii)) - The Council of Natural Medicine College of Canada (Council) applied for judicial review, seeking to set aside the Registrar's decision - The Council argued ss. 9(1)(n), 11 and 12(1)(e) of the Trade-marks Act should be read down to be inapplicable to all matters assigned to the provinces under the Constitution Act, 1867 - This would include any matter falling under s. 92(13), including the regulation of the medical arts and health care professions - Thus, the Council contended that the sections were a valid exercise of the federal power, but they simply did not apply to the provinces - The Federal Court rejected this argument, holding that the impugned provisions were valid regardless of any incidental effects on the provinces' powers - See paragraphs 51 to 65.

**Constitutional Law - Topic 1761**

Extent of powers conferred - Necessarily incidental doctrine - General - Section 9(1)(n)(iii) of the Trade-marks Act prohibited the adoption and use of official marks which had been adopted and used by any public authority - The Council of Natural Medicine College of Canada (Council) claimed that s. 9(1)(n)(iii) was constitutionally invalid - In considering the incidental effects doctrine, the Council argued that s. 9(1)(n) constituted a profound intrusion into provincial responsibility, resulting in a chaotic interface between the official marks provisions and the provinces' authority to regulate matters under its legislative responsibility under s. 92(13) (the regulation of the medical arts and health care professions) - The Council further argued that the impugned provision would impair other provinces' future ability to regulate traditional Chinese medicine practitioners and acupuncturists - The Federal Court rejected this argument, holding that there was simply no evidence of impairment of provincial competence to regulate, no evidence of conflict

or chaos or impermissible overlap; rather the constitutional conflict was premised on hypothetical scenarios - The constitutional challenge failed at the evidentiary threshold - See paragraphs 62 to 65.

### **Constitutional Law - Topic 2501**

Determination of validity of statutes or Acts - General principles - General - The Federal Court reviewed the basic framework for a division of powers constitutional analysis - The court noted that the "dominant tide" of constitutional analysis directed, as the Supreme Court of Canada noted in *Canadian Western Bank v. Alberta* (2007), that "[...] a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest." - See paragraphs 57 to 61.

### **Constitutional Law - Topic 2507**

Determination of validity of statutes or Acts - General principles - Reading down - [See first **Constitutional Law - Topic 1761** and **Constitutional Law - Topic 2511**].

### **Constitutional Law - Topic 2511**

Determination of validity of statutes or Acts - General principles - Interjurisdictional immunity - Section 9(1)(n)(iii) of the Trade-marks Act prohibited the adoption and use of official marks which had been adopted and used by any public authority - The Council of Natural Medicine College of Canada (Council) claimed that s. 9(1)(n)(iii) was constitutionally invalid, raising the inter-jurisdictional immunity doctrine (i.e., the official marks provision of the Trade-marks Act, a valid exercise of federal power, should be read down when it affected the provincial authority to regulate professions) - The Federal Court rejected the Council's argument - The court stated that the test was whether the basic, unassailable core of provincial responsibility had been impaired, which was not the case here - The court stated that the Council was attempting to resuscitate the otherwise clear legal position on interjurisdictional immunity by elevating "reading down" to a substantive constitutional principle, rather than applying it as a remedy consequent to a finding of impairment - See paragraph 70.

### **Trademarks, Names and Designs - Topic 988**

Trademarks - Registration - Appeals or judicial review - Scope of review of decision of registrar (incl. Opposition Board) - The Registrar of Trademarks gave public notice that the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia had adopted and used 16 official marks (Trade-marks Act, s. 9(1)(n)(iii)) - The Council of Natural Medicine College of Canada applied for judicial review - The Federal Court stated that decisions of the Registrar of Trademarks were to be reviewed on a standard of reasonableness unless new evidence was adduced which would have materially affected the decision - The court noted that in this case, there was fresh evidence and so the standard was correctness - See paragraph 3.

### **Trademarks, Names and Designs - Topic 4002**

Trademarks - Prohibited marks - Marks adopted or used by public authority - Section

9(1)(n)(iii) of the Trade-marks Act granted public authorities in Canada exclusive use of their "official marks" - The Federal Court stated that "This provision grants protection to a public authority that adopts and uses an official mark. The public authority gains exclusive use of a mark that, unlike a trade-mark, is not tied to specific wares or services. All others are prohibited from adopting a mark that so nearly resembles as likely to be mistaken for it in connection with a business. It is not necessary for the public authority to demonstrate the distinctiveness of a proposed official mark or any secondary meaning, and there is no requirement that public notice be given of a request to the Registrar ..." - See paragraph 32.

#### **Trademarks, Names and Designs - Topic 4002**

Trademarks - Prohibited marks - Marks adopted or used by public authority - The Registrar of Trademarks gave public notice that the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia (College) had adopted and used 16 official marks (Trade-marks Act, s. 9(1)(n)(iii)) - The Council of Natural Medicine College of Canada (Council) applied for judicial review, seeking to set aside the Registrar's decision - The Council argued that the College was not a public authority and had not adopted or used official marks - The Federal Court dismissed the application - The Registrar committed no reviewable error - The Registrar correctly determined, consistent with the governing criteria, that the College was a public authority that had adopted and used the official marks - See paragraphs 34 to 50.

#### **Trademarks, Names and Designs - Topic 4002**

Trademarks - Prohibited marks - Marks adopted or used by public authority - The Registrar of Trademarks gave public notice that the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia (College) had adopted and used 16 official marks (Trade-marks Act, s. 9(1)(n)(iii)) - The Council of Natural Medicine College of Canada (Council) applied for judicial review, seeking to set aside the Registrar's decision - The Council argued that the College had not adopted or used the official marks - The Council emphasized that the College did not publish the official marks in any of its printed materials - The Federal Court dismissed the application - The court held, inter alia, that there was no requirement that the mark be displayed in printed materials - Displaying the mark on a public website was sufficient - See paragraph 47.

#### **Trademarks, Names and Designs - Topic 4002**

Trademarks - Prohibited marks - Marks adopted or used by public authority - The Registrar of Trademarks gave public notice that the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia (College) had adopted and used 16 official marks (Trade-marks Act, s. 9(1)(n)(iii)) - The Council of Natural Medicine College of Canada (Council), applied for judicial review, raising a constitutional issue respecting s. 9(1)(n)(iii) - The Federal Court held that s. 9(1)(n)(iii) was a valid exercise of Parliament's authority to legislate in respect of trade and commerce, that the legislation was a justifiable infringement of freedom of expression (Charter, ss. 1 and 2(b)) and that s. 2(e) of the Canadian Bill of Rights had no application in the context of the Registrar's decision to grant an official mark - See paragraphs 25 and 51 to 106.

## **Trademarks, Names and Designs - Topic 4005**

Trademarks - Prohibited marks - Public authority - What constitutes - [See second **Trademarks, Names and Designs - Topic 4002**].

### **Cases Noticed:**

- See You In - Canadian Athletes Fund Corp. v. Canadian Olympic Committee (2007), 311 F.T.R. 245; 2007 FC 406, affd. (2008), 378 N.R. 261; 2008 FCA 124, refd to. [para. 3].
- Ontario Association of Architects v. Association of Architectural Technologists of Ontario, [2003] 1 F.C. 331; 291 N.R. 61; 19 C.P.R.(4th) 417; 2002 FCA 218, refd to. [para. 4].
- Canadian Jewish Congress v. Chosen People Ministries Inc. et al. (2002), 219 F.T.R. 122; 19 C.P.R.(4th) 186; 2002 FCT 613, refd to. [para. 32].
- FileNet Corp. v. Registrar of Trademarks et al. (2001), 209 F.T.R. 195; 2001 FCT 865 (T.D.), affd. (2002), 297 N.R. 178; 2002 FCA 418, refd to. [para. 47].
- TSA Stores Inc. v. Registrar of Trademarks et al. (2011), 385 F.T.R. 278; 2011 FC 173, refd to. [para. 47].
- Kirkbi AG et al. v. Ritvik Holdings Inc. et al., [2005] 3 S.C.R. 302; 341 N.R. 234; 2005 SCC 65, refd to. [para. 51].
- Canadian Western Bank et al. v. Alberta, [2007] 2 S.C.R. 3; 362 N.R. 111; 409 A.R. 207; 402 W.A.C. 207; 2007 SCC 22, refd to. [para. 57].
- PHS Community Services Society et al. v. Canada (Attorney General), [2011] 3 S.C.R. 134; 421 N.R. 1; 310 B.C.A.C. 1; 526 W.A.C. 1; 2011 SCC 44, refd to. [para. 66].
- Quebec (Attorney General) v. Lacombe et al., [2010] 2 S.C.R. 453; 407 N.R. 1; 2010 SCC 38, refd to. [para. 66].
- Canadian Council of Professional Engineers v. Lubrication Engineers Inc., [1985] 1 F.C. 530 (T.D.), refd to. [para. 84].
- Life Underwriters Association of Canada v. Provincial Association of Quebec Life Underwriters, [1992] 1 S.C.R. 449; 133 N.R. 223, refd to. [para. 86].
- Life Underwriters Association of Canada v. Provincial Association of Quebec Life Underwriters, [1990] 3 F.C. 500; 112 N.R. 34, refd to. [para. 86].
- Ontario Dental Assistants Association v. Canadian Dental Association, [2013] F.T.R. TBEEd. MR.052; 2013 FC 266, refd to. [para. 87].
- Life Underwriters Association of Canada v Provincial Association of Quebec Life Underwriters, [1988] F.C.J. 564, refd to. [para. 87].
- Irwin Toy Ltd. v. Québec (Procureur général), [1989] 1 S.C.R. 927; 94 N.R. 167, refd to. [para. 90].
- Techniquip Ltd. v. Canadian Olympic Association (1999), 250 N.R. 302 (F.C.A.), refd to. [para. 91].
- Hutterian Brethren of Wilson Colony et al. v. Alberta, [2009] 2 S.C.R. 567; 390 N.R. 202; 460 A.R. 1; 462 W.A.C. 1; 2009 SCC 37, refd to. [para. 97].
- Authorson v. Canada (Attorney General), [2003] 2 S.C.R. 40; 306 N.R. 335; 175 O.A.C. 363; 2003 SCC 39, refd to. [para. 104].
- Ocean Port Hotel Ltd. v. Liquor Control Licensing Branch (B.C.), [2001] 2 S.C.R. 781; 274 N.R. 116; 155 B.C.A.C. 193; 254 W.A.C. 193; 2001 SCC 52, refd to. [para.

**Statutes Noticed:**

Canadian Bill of Rights, S.C. 1960, c. 44, sect. 2(e) [para. 103].  
Canadian Charter of Rights and Freedoms, 1982, sect. 2(b) [para. 89].  
Constitution Act, 1867, sect. 91(2) [para. 51].  
Health Professions Act, R.S.B.C. 1996, c. 183, generally [para. 14, Annex D].  
Health Professions Act Regulations (B.C.), Traditional Chinese Medicine Practitioners and Acupuncturists Regulation, B.C. Reg. 290/2008, generally [para. 14, Annex E].  
Trade-marks Act, R.S.C. 1985, c. T-13, sect. 9(1)(n)(iii) [para. 31, Annex A]; sect. 11, sect. 12(1)(e) [para. 33].  
Traditional Chinese Medicine Practitioners and Acupuncturists Regulation - see Health Professions Act Regulations (B.C.).

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Johnathan Penner and Freya Zaltz, Victoria, British Columbia, for the Attorney General of British Columbia.

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Bull, Housser & Tupper LLP, Vancouver, British Columbia, for the respondent.  
Attorney General of British Columbia, Victoria, British Columbia, for the Attorney General of British Columbia.

This application was heard in Vancouver, B.C., on October 16-18, 2012, before Rennie, J., of the Federal Court, who delivered the following decision in Ottawa, Ontario, on March 19, 2013.

Application dismissed.

Editor: Elizabeth M.A. Turgeon

**Civil Rights - Topic 8348**

Canadian Charter of Rights and Freedoms - Application - Exceptions - Reasonable limits prescribed by law (s. 1) - The Registrar of Trademarks gave public notice that the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia had adopted and used 16 official marks (Trade-marks Act, s. 9(1)(n)(iii)) - The Council of Natural Medicine College of Canada applied for judicial review, arguing that s. 9(1)(n)(iii) infringed the freedom of expression (Charter, s. 2(b)) - The Federal Court agreed that the impugned provision infringed s. 2(b), but the infringement was justified as a reasonable limit prescribed by law under s. 1 of the Charter - See paragraphs 89 to 101.

### **Constitutional Law - Topic 2507**

Determination of validity of statutes or Acts - General principles - Reading down - Section 9(1)(n)(iii) of the Trade-marks Act prohibited the adoption and use of official marks which had been adopted and used by any public authority - The Council of Natural Medicine College of Canada (Council) claimed that s. 9(1)(n)(iii) was constitutionally invalid raising the inter-jurisdictional immunity doctrine (i.e., the official marks provision of the Trade-marks Act, a valid exercise of federal power, should be read down when it affected the provincial authority to regulate professions) - The Federal Court rejected the Council's argument - The court stated that the test was whether the basic, unassailable core of provincial responsibility been impaired, which was not the case here - The court stated that the Council was attempting to resuscitate the otherwise clear legal position on interjurisdictional immunity by elevating "reading down" to a substantive constitutional principle, rather than applying it as a remedy consequent to a finding of impairment - See paragraph 70.

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### **Trademarks, Names and Designs - Topic 4005**

Trademarks - Prohibited marks - Public authority - What constitutes - The Registrar of Trademarks gave public notice that the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia (College) had adopted and used 16 official marks (Trade-marks Act, s. 9(1)(n)(iii)) - The Council of Natural Medicine College of Canada (Council) applied for judicial review, seeking to set aside the Registrar's decision - The Council argued that the College was not a public authority and had not adopted or used official marks - The Federal Court dismissed the application - The Registrar committed no reviewable error - The Registrar correctly determined, consistent with the governing criteria, that the College was a public authority that had adopted and used the official marks - See paragraphs 34 to 50.