Federal Court Cour fédérale

Date: 20130319

Docket: T-427-09

Citation: 2013 FC 287

Ottawa, Ontario, March 19, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

COUNCIL OF NATURAL MEDICINE COLLEGE OF CANADA

Applicant

and

COLLEGE OF TRADITIONAL CHINESE MEDICINE PRACTITIONERS AND ACUPUNCTURISTS OF BRITISH COLUMBIA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

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Overview

[1] The Registrar of Trade-marks is required by legislation to give public notice of adoption and use of an official mark once an organization establishes that it is a public authority that has, prior to the time of application, adopted and used the proposed mark. In this case, the Registrar gave public notice that the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia had adopted and used 16 official marks, under subparagraph 9(1)(n)(iii) of the *Trade-marks Act*, RSC 1985, c T-13 (the *Trade-marks Act*) (Annex A).

[2] The applicant, the Council of Natural Medicine College of Canada, brings this application for judicial review to set aside the Registrar's decision.

[3] Decisions of the Registrar are reviewed on a standard of reasonableness unless new evidence is adduced which would have materially affected the decision: *See You In – Canadian Athletes Fund Corporation v Canadian Olympic Committee*, 2007 FC 406, aff'd 2008 FCA 124. In this case, there was fresh evidence and so the standard is correctness.

[4] I conclude that the Registrar committed no reviewable error. The Registrar correctly determined, consistent with the governing criteria, that the respondent College is a public authority that had adopted and used the official marks: *Ontario Association of Architects v Association of Architectural Technologists of Ontario*, 2002 FCA 218 at para 34.

[5] The applicant Council also challenges the *vires* of subparagraph 9(1)(n)(iii), both as beyond the legislative competence of Parliament in its application to the medical arts, and as an unjustifiable

restriction of freedom of expression under subsection 2(b) of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*) (*Charter*). Arguments with respect to constitutionality, whether under the *Constitution Act, 1867* (Annex B) or the *Charter* are also measured against a standard of correctness. These arguments also fail and the application is dismissed.

[6] The Attorney General of British Columbia (AGBC) appeared in response to a Notice of Constitutional Question served by the applicant.

Parties

The Council

[7] The applicant Council (as opposed to the respondent College) was incorporated by Dr. Sky Willow as a non-profit company under federal legislation on December 4, 2002. It is a private corporation, despite its name. The Council creates educational programs in traditional Chinese medicine (TCM) and acupuncture. Affiliated private schools teach these programs under license from the Council. At present, the Council has one affiliated school in Toronto, Ontario. The facts underlying this application relate to the Shanghai TCM College in Burnaby, British Columbia, now closed.

[8] The Council entered into a trade-mark licence agreement with graduates from its programs, licensing the use of various trade-marks previously held by, or for which registration had been filed, by the Council such as D.T.C.N. (Doctor of Traditional Chinese Medicine):

(1) D.T.C.M. (Doctor of Traditional Chinese Medicine) (registered 2005, expunged 2012)

(2) Registered D.T.C.M. (registered 2006, abandoned 2010

(3) Dr. TCM (filed for registration, abandoned

(4) D.P.C.M. (Doctorate of Philosophy in Chinese Medicine) (registered mark in 2005 and 2007, expunged 2012)

(5) Registered D.P.C.M. (filed 2006, abandoned 2012)

(6) R. TCM. P (Registered TCM Practitioner) (filed for registration, abandoned 2007)

[9] The promotional literature used by the Council to recruit students into its program described that it was offering, upon completion of the training, the right to use a trade-mark. An advertisement for a 2007 information session in Toronto read, in part:

> Information Session on Licence System for Doctor of Traditional Chinese Medicine and Alternative Medicine Therapist of federally registered CNMCC
>
> We invite you to attend the following information session on the trade mark-licenses of the Council of Natural Medicine College of Canada (CNMCC) of the Government of Canada Holistic Medicine Dispensary (H.M.D.), Natural Medicine Database Practitioners (N.M.D.P.) and Natural Health Doctor (N.H.D.)
>
> …
>
> Contents of Information Session:
> * Presentation on the licence system for the administration of medicine for the Alternative Medicine Therapist and Doctor of Traditional Chinese Medicine of the federally registered **Council of Natural Medicine College of Canada (CNMCC)**
>
> …
>
> * Information on how to join the federally registered **Council of Natural Medicine College of Canada (CNMCC)** and introduction on the roles of the members for the improvement of health care.

[10] A 2008 advertisement provided:

> Canada International College of T.C.M. authorized for educating programs to obtain the Council of Natural Medicine College of Canada (CNMCC) Trade Mark-Licence® approved by Government

> of Canada is now accepting candidates who wish to take lectures prepared for CNMCC Trade Mark-License® exams as follows. We invite many to participate and obtain a Trade Mark-License® for Alternative Medicine Therapist, Naturopathic Physician, Doctor of Traditional Chinese Medicine and Registered Acupuncturist.

[11] And, to same effect, the Council's website provided:

> The Council of Natural Medicine College of Canada (CNMCC) is the owner of all rights and titles in and to the trade-marks referred to on this website. Any unauthorized use of these trade-marks shall be subject to prosecution under the Trade-marks Act.

[12] In an August 2006 letter to the City of Vancouver business licensing department, the Council held out to the City that it was "responsible for reviewing and approving accreditation for educational programs through out Canada." At the same time, the CNMCC website included a "Scope of Practices" heading, which stated that CNMCC members were entitled to practice acupuncture and TCM.

[13] There is, of course, a vast legal distinction between the right to use a trade-mark and the right to practice a regulated trade or profession. The promotional literature, through the close juxtaposition and interlineation of the language "federally licensed", "federally registered" and "Government of Canada" between the name of the Council and its trade-marks, obfuscated otherwise legally discrete domains. As will be described, individuals enrolled in the Council's program and paid tuition only to find that, upon graduation, they had no right to practice acupuncture and TCM in British Columbia.

The College

[14] The respondent College was established in 1999 under the *Health Professions Act*, RSBC 1996, c 183 (*Health Professions Act*) (Annex D) and the *Traditional Chinese Medicine Practitioners and Acupuncturists Regulation*, BC Reg 290/2008 (Annex E) to regulate and govern the practice of TCM and acupuncture in British Columbia.

[15] As a professional self-governing body, the College grants registration to applicants who satisfy the criteria set out in its by-laws, including university pre-requisite courses, successful completion of an approved educational program involving clinical training, and registration exams. Registrants are then permitted to use certain reserved titles and abbreviations: R. Ac. (Registered Acupuncturist); R.TCM.H. (Herbalist); R.TCM.P. (Registered TCM Practitioner); and Dr. TCM (Doctor of Traditional Chinese Medicine). These titles are prescribed, designated and reserved under British Columbia law.

[16] In British Columbia only the College may authorize individuals to practice TCM and acupuncture. Despite this, the Council's promotional literature implied a right to practice, and certain graduates subsequently represented themselves as having a "federal licence" to practice TCM and acupuncture. The Council also represented itself to prospective students as a professional regulatory body whose members were entitled to practice TCM and acupuncture under a "federally registered license". There is, of course, no federal license to practice medicine, TCM or otherwise.

[17] In 2005, the Council demanded that the College cease and desist from using the phrase "Doctor of Traditional Chinese Medicine", alleging infringement of its registered trade-mark. This

demand, of course, ignored the College's powers and obligations, as mandated by statute and regulation, including the fact that the titles were reserved and prescribed under provincial law.

[18] In response to the Council's continued use of the trade-marks, the College decided to adopt official marks. It began to use the marks in April 2007, and on February 18, 2009, the Registrar published public notice of the College's adoption and use of the following official marks, which are the subject of this judicial review:

(1) D.T.C.M. (DOCTOR OF TRADITIONAL CHINESE MEDICINE) (official mark 918 354)

(2) REGISTERED D.T.C.M. (official mark 918 355)

(3) D.T.C.M.

(4) DR. TCM (official mark 918 357)

(5) D.P.C.M. (DOCTORATE OF PHILOSOPHY IN TRADITIONAL CHINESE MEDICINE)*

(6) TRADITIONAL CHINESE MEDICINE*

(7) DOCTOR OF TRADITIONAL CHINESE MEDICINE

(8) REGISTERED D.P.C.M.*

(9) ACUPUNCTURIST*

(10) REGISTERED ACUPUNCTURIST

(11) R. AC. (REGISTERED ACUPUNCTURIST) (official mark 918 364)

(12) R. TCM. P.

(13) R. TCM. P. (REGISTERED TCM PRACTITIONER) (official mark 918 366)

(14) R. TCM. H.

(15) R. TCM. H. (REGISTERED TCM HERBALIST)

(16) R. AC.

* Subsequently withdrawn.

Previous Litigation

[19] In September 2009, the College also obtained, in this Court, summary judgment and a permanent injunction restraining the Council from adopting, using or licensing the use of the protected titles and abbreviations in association with educational training, certification and registration, the operation of a TCM or acupuncture clinic, or the practice of TCM and acupuncture: *College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia v Council of Natural Medicine College of Canada*, 2009 FC 1110 [*CTCMPA of BC v CNMCC*].

[20] The Court enjoined the use of the titles and abbreviations that implied a professional designation or degree, or governmental approval. Justice O'Keefe found that the Council's marks were clearly descriptive or deceptively misdescriptive and therefore not registrable under paragraph 12(1)(b). Justice O'Keefe also found that the marks were not distinctive as required under paragraph 18(1)(b). A declaration was issued declaring the registrations invalid pursuant to paragraphs 18(1)(a), (b) and subsection 18(1) of the *Trade-marks Act*. An Order was issued expunging the registrations.

[21] Justice O'Keefe found that the Council's trade-marks had been historically used to describe doctors of TCM and acupuncturists and that these services and historical marks have had a commercial usage. Therefore, the above-mentioned marks were also prohibited under section 10 of the *Trade-marks Act*.

[22] Finally, Justice O'Keefe found that the Council had misled the public so that individuals would believe that it was a federal regulatory body, responsible for the practice of TCM, rather than

the mere owner of a trade-mark. Justice O'Keefe cited examples of individuals who used the trade-mark in advertising their professional services. Additionally, he found that the Council's advertisements suggested it was a federal regulatory body, which authorized the practice of TCM and not simply a holder of certain trade-marks.

[23] The Council's appeal from this judgment has been discontinued.

[24] The Council now seeks an order declaring the Registrar's public notice of the above-listed official marks invalid. To this end, it contends that:

(1) The College is not a public authority;

(2) The College did not adopt or use the official marks;

(3) Subparagraph 9(1)(n)(iii), paragraph 12(1)(e) and section 11 of the *Trade-marks Act* must be read down to ensure their constitutionality. Specifically, the Council contends that the provisions trench upon subsection 92(13) of the *Constitution Act, 1867* and are *ultra vires* as they offend the freedom of expression protection in section 2(b) of the *Charter*; and

(4) Subparagraph 9(1)(n)(iii) offends subsection 2(e) of the *Bill of Rights*.

[25] Insofar as the applicant Council seeks declarations of constitutional invalidity, I find subparagraph 9(1)(n)(iii) to be a valid exercise of Parliament's authority to legislate in respect of trade and commerce, that the legislation is a justifiable infringement of freedom of expression as protected by section 2(b) of the *Charter*, and that subsection 2(e) of the *Canadian Bill of Rights,* SC 1960, c 44 (*Bill of Rights*) (Annex C) has no application in the context of the Registrar's decision to grant an official mark.

Background

Provincial Legislation

[26] Under the *Health Professions Act* and associated regulations, British Columbia has established a comprehensive scheme for the regulation of all medical arts and health care providers in the province. Broadly read, it establishes self-governing colleges in defined areas of healthcare and grants to practitioners governance over their respective professions. The legislation requires the colleges to establish standards for all aspects of the practice of their profession including training, accreditation, ethics, public complaints, and discipline. The regulations also authorize the reservation of professional titles and govern their use and abbreviations as determined by the colleges and their respective by-laws. It is the Government of British Columbia, however, which enacts the regulations necessary to give the scheme legal effect.

[27] The legislature of British Columbia has therefore defined and controlled the use of professional titles in designated health care professions and restricted their use to members of colleges with the required accreditation. The *Traditional Chinese Medicine Practitioners and Acupuncturists Regulation* applies specifically in this case. By virtue of this Regulation, the titles "acupuncturist," "traditional Chinese medicine practitioner," "doctor of traditional Chinese medicine" and others are reserved for the exclusive use of members of the College.

[28] The *Health Professions Act* enables the Minister of Health to exercise on-going control and supervision over the policy and operational decisions of the colleges. For example, under section 17, the Minister must appoint board members; no less than one-third and no more than those elected by the College must be government appointed.

[29] Additionally, under section 18.1 the Minister may, if it is considered "necessary in the public interest," inquire into the colleges' activities and issue directives. This power is very broad; the inquiry may be into "any aspect" of the practice or governance of the profession. The Minister may also require the Board to perform its duties in a certain manner, to adopt any standard or restraint.

[30] The Minister also supervises the colleges' bylaw making authority. Under section 19, the Minister may disallow, amend, repeal and enact bylaws. The extent of the use of this authority will be discussed later in the review of the evidence.

Federal Legislation

[31] The *Trade-marks Act*, subparagraph 9(1)(n)(iii) grants public authorities in Canada exclusive use of their "official marks":

9 (1) No person shall adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for,	9. (1) Nul ne peut adopter à l'égard d'une entreprise, comme marque de commerce ou autrement, une marque composée de ce qui suit, ou dont la ressemblance est telle qu'on pourrait vraisemblablement la confondre avec ce qui suit :
[…]	[…]
(n) any badge, crest, emblem or mark	n) tout insigne, écusson, marque ou emblème :
[…]	[…]
(iii) adopted and used by any public authority, in Canada as an official mark	(iii) adopté et employé par une autorité publique au Canada comme marque

for wares or services, in respect of which the Registrar has, at the request of Her Majesty or of the university or public authority, as the case may be, given public notice of its adoption and use;	officielle pour des marchandises ou services, à l'égard duquel le registraire, sur la demande de Sa Majesté ou de l'université ou autorité publique, selon le cas, a donné un avis public d'adoption et emploi;

[32] 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: *Canadian Jewish Congress v Chosen People Ministries, Inc*, 2002 FCT 613 at paras 22-24.

[33] Section 11 and paragraph 12(1)(e) enforce the exclusivity of the official marks granted under section 9:

11. No person shall use in connection with a business, as a trade-mark or otherwise, any mark adopted contrary to section 9 or 10 of this Act or section 13 or 14 of the Unfair Competition Act, chapter 274 of the Revised Statutes of Canada, 1952.	11. Nul ne peut employer relativement à une entreprise, comme marque de commerce ou autrement, une marque adoptée contrairement à l'article 9 ou 10 de la présente loi ou contrairement à l'article 13 ou 14 de la Loi sur la concurrence déloyale, chapitre 274 des Statuts revisés du Canada de 1952.
12. (1) Subject to section 13, a trade-mark is registrable if it is not	12. (1) Sous réserve de l'article 13, une marque de commerce est enregistrable sauf dans l'un ou l'autre des cas suivants :
[…]	[…]
	e) elle est une marque dont l'article 9

(e) a mark of which the adoption is prohibited by section 9 or 10; | ou 10 interdit l'adoption;

Public Authority

[34] I find that the Registrar correctly determined that the College is a public authority for the purposes of the *Trade-marks Act*.

[35] To constitute a public authority, the organization must be under a significant degree of public control and must exist for the public benefit: *Ontario Association of Architects* at paras 51-52. The Council does not contest that the College exists for the public benefit, but, I find nonetheless that the College regulates the practices of TCM and acupuncture to promote public confidence in the provision of medical services and public health and safety. Through the College's registration system, the public is able to identify who is qualified to provide this type of healthcare service and is assured of a minimum level of training and expertise. This is clearly in the public interest. The first criterion of the test is satisfied.

[36] In *Ontario Association of Architects*, at paragraphs 60-62, the Federal Court of Appeal identified the indicia of ongoing government supervision of a self-regulatory professional body that would satisfy the public control test. The Court noted that the mere fact that a body is statutory or that the objects and powers may be amended unilaterally by the legislature does not constitute "government control". Rather, the following powers, exercisable by the relevant minister or Lieutenant Governor in Council, constituted a significant degree of governmental control:

(1) The power to review the activities of the body;

(2) The power to request that the body undertake necessary and desirable activities to implement the intent of its enabling legislation;

(3) The power to advise the body on the implementation of the statutory scheme;

(4) The power to approve the exercise of the body's regulation-marking; and

(5) The power to appoint members to the board and various committees.

[37] The Government of British Columbia, through the Minister of Health, exercises these powers over the College. Section 18.1 of the *Health Professions Act* enables the Minister to appoint a person to inquire into any aspect of the administration or operation of the College. Section 18.2 permits the Minister to issue directives, which may require the College to exercise certain powers or perform certain duties. Subsection 19(3.1) allows the Minister to disallow certain bylaws proposed by the College and subsection 19(6) allows the Minister to create, amend or repeal bylaws if certain pre-conditions are met. Finally, paragraphs 17(3)(b), 17(4)(a) and 17(4)(b) allow the Minister to appoint between one-third and one-half of the board members.

[38] The indicia identified by the Court of Appeal are not exhaustive, nor is the presence or absence of any one factor determinative. The analysis remains contextual and in this case there are additional indicia of government control. The College provides audited financial statements and an annual report to the Minister of Health. Additionally, the College is a designated public body under the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165. The College is listed under Schedule 3 with the consequence that the public has a right of access to records in its custody or under its control.

[39] There was evidence before this Court that through the vehicle of the by-laws, the government exercised *de facto*, as well as *de jure* control over the College. Mr. Arden Henley, a

government appointee to the Board from 2005 – 2011, explained that the government played an active role in the College's day-to-day operations. In his evidence he gave examples in support:

> [The College] inevitably ends up with operational, as well as policy, discussions with the legislative branch of government, who eventually must, by order of a council and other means, approve any changes that the college makes.
>
> […]
>
> ….those discussions do not take place in a limited and arcane way. Those discussions take place in a regular ongoing and operational way. That's how change is made, by agreement [about the by-laws] with the government and ultimately by approval with the government.

[40] Before leaving the issue of government control, the applicant Council points to the fact that the College, in seeking to protect the official marks under section 9, is acting inconsistently with the AGBC's legal position, as advanced in these proceedings on inter-jurisdictional immunity. The AGBC says subparagraph 9(1)(n)(iii) must be read down and does not apply to matters within the scope of subsection 92(13) of the *Constitution Act, 1867*, such as the regulation of health professions. This divergence of positions on the constitutional issue is said to be evidence that the province does not "control" the College.

[41] The case law does not require that to be a public authority the authority agree with all aspects of government policy, let alone in areas unrelated to their mandate. Presumably the College thought it in the best interests of the profession and the public to obtain the official marks in question, and, if it was of that view, it was mandated to act accordingly.

[42] Finally, *Ontario Association of Architects* does not assist the applicant in establishing that the control test was not met. In that case, the objects of the Ontario Association of Architects were not in issue; rather, it was the objects of the Association of Architectural Technologists of Ontario (the AATO) that were under consideration. The ATTO monopoly was narrow and nothing prevented non-members from being employed or practicing their trade. The government of Ontario did not exercise the power of approving by-laws, ordering inquiries or issuing directions to the ATTO, as in the case at bar. This case does not assist the applicant in establishing that the control test was not met.

Adoption and Use

[43] The Registrar correctly determined that the College had adopted and used the official marks.

[44] The public authority must have adopted and used the official mark before the Registrar gives public notice. The Registrar gave public notice on February 18, 2009. This is the date before which adoption and use must be established.

[45] Adoption and use are not defined terms. They are broad in scope and, for the purpose of section 9, a mark is adopted and used if it is displayed in association with services, even if the mark is not distinctive or is clearly descriptive.

[46] Two principle requirements govern adoption and use. First, there must be some degree of public display. Internal use alone is insufficient. Second, the marks must be distinguished from the

surrounding text. For example, it would be insufficient for the College to merely use the words "traditional Chinese medicine" within a phrase or sentence.

[47] The Council has emphasized that the College did not publish the official marks in any of its printed materials. However, there is no requirement that the mark be displayed in this particular way. This Court has previously found that displaying the mark on a public website is sufficient: *FileNet Corp v Canada (Registrar of Trade-marks)*, 2001 FCT 865 at para 65 (aff'd 2002 FCA 418). More recently, in *TSA Stores, Inc. v Registrar of Trade-marks*, 2011 FC 273, this Court reasoned that as the term "services" is not defined it should be given a liberal interpretation.

[48] The facts of this case are similar to those in *FileNet*. The College adopted and used the official marks by displaying them on its publicly accessible website before the date of public notice. The marks were preceded by an explanation that, "In addition to the titles listed above, the CTCMA has adopted and uses the following marks: [sixteen marks listed]". Each official mark was hyperlinked to detailed information about the related services and vocation. The marks were clearly identified and listed without any surrounding text. In this way, the College signalled to the public the significance of each official mark, while providing information and registration services to its members and the public on the website.

[49] As in *TSA Stores*, the website provided a significant amount of information relevant to the public, potential practitioners, and to practitioners. There was evidence before the Registrar that the website was accessible to, and used by, Canadians. The conclusion of the Registrar that the College

adopted, used and displayed its mark in association with its services is amply supported by the evidence.

[50] The applicant argues that this display was contrived in order to support the College's application. In my view it is irrelevant whether the College displayed the marks merely to support its application to the Registrar. The question is whether the marks were adopted and used, not whether they were adopted and used with a particular motive or in furtherance of a particular objective. Indeed, the evidence indicates the College sought to carefully ensure that it had complied with the statutory requirements of adoption and use before submitting an application. The criteria of public display in association with services satisfied.

Division of Powers

Overview

[51] The *Trade-marks Act* is, in pith and substance, an exercise of the trade and commerce power, under subsection 91(2) of the *Constitution Act*, *1867*: *Kirkbi AG v Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 SCR 302. The *Trade-marks Act* is directed to the regulation of trade, generally, and not to the regulation of a particular business. This distinction is fundamental to its constitutionality. It is also fundamental to understanding why the challenge to the official marks provision of the *Act* fails.

[52] The Council and the AGBC do not contest the *vires* of the provisions as being a valid exercise of the trade and commerce power; rather they contend that paragraph 9(1)(n), section 11 and paragraph 12(1)(e) 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 section 92(13) including the regulation of the medical arts and health care professions. Put otherwise, the applicants contend that the sections are a valid exercise of the federal power but they simply do not apply to the provinces.

[53] Legislation which is, in pith and substance, a valid exercise of a legislative or Parliament's authority is not "read down" simply because it may have an incidental effect on a head of provincial legislative authority. Reading down, as a remedy, is a device used by the courts where otherwise valid legislation impairs or trenches upon the legislative responsibilities of the other government.

[54] Reading down, if applied in the expansive manner as suggested by the applicant and the AGBC, would amount to a fundamental re-working of the constitution in general and the trade and commerce power, in particular. If given effect, the argument would deny the doctrine of incidental effects. All legislation would be read down or circumscribed so as to eliminate any effect on the provincial or federal government. It would confine each head of power, whether federal or provincial, to a hermetically sealed, watertight compartment with precisely prescribed boundaries de-marking the scope of the power.

[55] Reading down would also resuscitate, through an interpretive doctrine, the inter-jurisdictional immunity argument rejected by the Supreme Court of Canada (SCC). As will be considered, the constitutional arguments also fail as they have no evidentiary foundation. In sum, Sections 11, subparagraphs 9(1)(n)(iii) and paragraph 12(1)(e) are valid regardless of any incidental effects on the province's powers.

[56] As the arguments advanced seek to displace long-received principles guiding the division of powers, it is useful to revisit, briefly, the basic principles.

Basic Principles of Constitutional Analysis

[57] The analysis of any case involving the division of powers commences with a determination of the pith and substance of the legislation. By examining both the purpose of the impugned law and its effect, the courts characterize the principle object of the impugned legislation. In *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at paragraphs 27 – 37, the SCC provided a clear framework governing the analysis of division of powers:

> To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body and the legal effect of the law (*Reference re Firearms Act*, at para. 16). To assess the purpose, the courts may consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary debates. In so doing, they must nevertheless seek to ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose (*Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.), at p. 337). Equally, the courts may take into account the effects of the legislation. For example, in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 ("*Alberta Banks*"), the Privy Council held a provincial statute levying a tax on banks to be invalid on the basis that its effects on banks were so great that its true purpose could not be (as the province argued) the raising of money by levying a tax (in which case it would have been *intra vires*), but was rather the regulation of banking (which rendered it *ultra vires*, and thus invalid).
>
> The fundamental corollary to this approach to constitutional analysis is that legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. At this stage of the analysis of constitutionality, the "dominant purpose" of the legislation is still decisive. Its secondary objectives and effects have no impact on its

constitutionality: "merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law" (*Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21 (CanLII), [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 23). By "incidental" is meant effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature: see *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 (CanLII), [2005] 2 S.C.R. 473, 2005 SCC 49, at para. 28. Such incidental intrusions into matters subject to the other level of government's authority are proper and to be expected: *General Motors of Canada Ltd. v. City National Leasing*, 1989 CanLII 133 (SCC), [1989] 1 S.C.R. 641, at p. 670. In *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, by way of further example, and in contrast to the *Alberta Banks* case already mentioned, the Privy Council upheld the validity of legislation levying a tax on banks, holding that the pith and substance of the legislation was indeed to generate revenue for the province, and its essential purpose was therefore in relation to direct taxation, not banks or banking. See P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at para. 15.5(a).

[…]

Also, some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects. Thus the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence: *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at p. 130; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 81 (SCC), [1988] 1 S.C.R. 749 ("*Bell Canada (1988)*"), at p. 765. The double aspect doctrine, as it is known, which applies in the course of a pith and substance analysis, ensures that the policies of the elected legislators of both levels of government are respected. A classic example is that of dangerous driving: Parliament may make laws in relation to the "public order" aspect, and provincial legislatures in relation to its "Property and Civil Rights in the Province" aspect (*O'Grady v. Sparling*, 1960 CanLII 70 (SCC), [1960] S.C.R. 804). The double aspect doctrine recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various "aspects" of the "matter" in question.

[58] This framework is dispositive of the constitutional issue raised in this case. Six key principles that are particularly germane can be drawn from *Canadian Western Bank*:

(1) The pith and substance of legislation can be discerned from both its purpose and its effects.

(2) Legislation which in pith and substance falls within the jurisdiction of the legislature that enacted it may, to a certain extent, affect matters beyond the legislature's jurisdiction without being unconstitutional.

(3) The "pith and substance" doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government.

(4) The incidental effects will not disturb the constitutionality of an otherwise *intra vires* law.

(5) "Incidental" effects may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature.

(6) The "dominant purpose" of the legislation is still decisive. Its secondary objectives and effects have no impact on its constitutionality.

(7) Parliament and the legislatures may both adopt valid legislation on a single subject depending on the perspective from which the subject matter is viewed (the double aspect doctrine). It is not necessary to resort to the double aspect doctrine to determine the issue of constitutionality.

[59] The frame of analysis adopted by the applicant Council is also at odds with the now long received guidance as to how the overlay between "exclusive" heads of authority is to be considered.

[60] The "dominant tide" of constitutional analysis directs, as the SCC noted in *Canadian Western Bank*, at paragraph 37, 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.

[61] The applicant Council's arguments swim against this tide.

No Evidence to Support Impairment

[62] In considering the incidental effects doctrine, the applicant Council and the AGBC contend that paragraph 9(1)(n) constitutes 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 subsection 92(13). The Council further argues that the impugned provisions would impair other provinces' future ability to regulate TCM practitioners and acupuncturists.

[63] The facts on the record do not indicate that the College has interfered with the work of other provincial regulatory bodies. There is no evidence that subparagraph 9(1)(n)(iii) and section 11 would constrain another province from effectively regulating, as it saw fit, TCM. The argument is purely speculative, and has no empirical foundation such that this question is best left to another

day, should the conflict ever arise. If it does, the matter can, and should, be resolved with the appropriate factual context and litigants.

[64] As I will further explain below, the facts of this case indicate that the provincial and federal schemes exist in harmony. The College effectively utilized the *Trade-marks Act* to obtain an injunction restraining the Council from using its professional titles, showing that the *Act* can complement, rather than undermine, provincial legislation.

[65] In concluding, therefore, on this observation, the constitutional challenge fails at the evidentiary threshold. There is, apart from bare assertions, simply no evidence of impairment of provincial competence to regulate, no evidence of conflict or chaos or impermissible overlap; rather the constitutional conflict is premised on hypothetical scenarios. I will turn to this point in the discussion of the doctrine of incidental effects and inter-jurisdictional immunity.

Incidental Effects

[66] Assuming that there is an effect on provincial jurisdiction under subsection 92(13), this does not mean that the legislation is to be read down. Incidental effects on provincial jurisdiction or overlap have never been the indicia of constitutional over-reach, and, in a complex federation it is inevitable that there will be some incidental effects. The SCC has emphasized that "both governments should be permitted to legislate for their own valid purposes in these areas of overlap": *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 at para 62. The Chief Justice of Canada made the point clearly in *Quebec (Attorney General) v Lacombe*, 2010 SCC 38, [2010] 2 SCR 453 at paragraph 36:

> The incidental effects rule, by contrast, applies when a provision, in pith and substance, lies within the competence of the enacting body but touches on a subject assigned to the other level of government. It holds that such a provision will not be invalid merely because it has an incidental effect on a legislative competence that falls beyond the jurisdiction of its enacting body. Mere incidental effects will not warrant the invocation of ancillary powers.

[67] Particularly relevant in the context of the arguments advanced in this Court is the observation in *PHS* at paragraph 51 where the Court said:

> This argument appears to confuse the constitutional validity of a law with the applicability of a valid law. When determining whether a law is valid under the division of powers, the Court looks to the dominant purpose of the law. The fact that the law at issue in this case has the incidental effect of regulating provincial health institutions does not mean that it is constitutionally invalid. A valid federal law may have incidental impacts on provincial matters: *Canadian Western Bank v. Alberta*, 2007 SCC 22 (CanLII), 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 28; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21 (CanLII), 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 23. It is therefore untenable to argue, as I understand Quebec to do, that a valid federal law becomes invalid if it affects a provincial subject, in this case health.

[68] There is no evidence that supports the assertion that provincial capacity to regulate professions is affected by the granting of official marks in areas that are also regulated under provincial law. Indeed, to the extent that there is evidence on this issue, it does not support the confusion and chaos on which the applicant Council and the AGBC predicate their arguments. To the contrary, the evidence points in the opposite direction; both national or provincial self-governing authorities have obtained paragraph 9(1)(n) protection for various professions. Despite the fact that the Canadian Medical Association holds a mark on “Doctor”, the Royal College of Dental Surgeons of Ontario on “Doctor of Dentistry”, the Canadian Federation of Chiropractic Regulatory Boards on “Doctor of Chiropractic” and the Canadian Nurses Association on “Registered Nurse”, all

professions are fully regulated in British Columbia, and there is no evidence of official marks being an impediment to the scope or the effectiveness of that regulation. Indeed, the AGBC did not contend otherwise.

[69] For reasons that may relate to the historical development of self-governing bodies in various professions, national or provincial self-governing medical bodies have sought to protect titles or designations. There is no evidence that, in consequence of these grants of official marks under section 9, any province has been unable to properly regulate the professions. All Attorney Generals were served with a Notice of Constitutional Question, yet none appeared to advance evidence of regulatory paralysis.

Inter-jurisdictional Immunity

[70] The genesis of the inter-jurisdictional immunity doctrine lies in the principle that the powers reserved to Parliament under section 91 and to the legislatures under section 92 are reserved "exclusively". Again, drawing from *Canadian Western Bank* at paragraph 34:

> […] The notion of exclusivity and the reciprocal notion of non-encroachment by one level of legislature on the field of exclusive competence of the other gave rise to Lord Atkin's famous "watertight compartments" metaphor, where he wrote of Canadian federalism that "[w]hile the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure" (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.), at p. 354). Its modern application expresses a continuing concern about risk of erosion of provincial as well as federal competences (*Bell Canada (1988)*, at p. 766). At the same time, the doctrine of interjurisdictional immunity seeks to avoid, when possible, situations of concurrency of powers (Laskin C.J., in *Natural Parents v. Superintendent of Child Welfare*, 1975 CanLII 143 (SCC), [1976] 2 S.C.R. 751, at p. 764).

[71] Inter-jurisdictional immunity applies to protect the "basic, minimum and unassailable content" of each head of power that must be protected from impairment by the other level of government: *PHS* at para 58; *Bell Canada v Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 749 at p 839. Legislation may be read down on the basis of inter-jurisdictional immunity.

[72] If the doctrine of inter-jurisdictional immunity were to be triggered by mere incidental effect or overlap, the *Trade-marks Act* would be completely inapplicable to all provincially regulated professions and a vast array of other businesses that are unquestionably within provincially-regulated responsibility.

[73] The test is that set out in *PHS*, namely has the basic, unassailable core of provincial responsibility been impaired. The official marks provision of the *Trade-mark Act* and the provincial authority to regulate the professions have co-existed since the inception of the *Trade-marks Act*. The evidence before the Court was that self-governing professions, national or provincial, have moved to ensure that professional designations do not become articles of commerce. As noted, the Canadian Medical Association, the Royal College of Dental Surgeons of Ontario and the Canadian Nurses Association have obtained official mark designations for their professions, thereby protecting their titles from commercial exploitation. Thus, rather than being a source of confusion and chaos, the two heads of legislative power overlap and reinforce, rather than erode, respective legislative competence.

[74] The College, using both the official marks provision and the national jurisdiction of the Federal Court, moved to remove the College's professional designation and reserved titles from being articles of *commerce or trade*. Neither the injunction nor the official marks interfered in any way with the province's ability to regulate. At the level of the *practice* of traditional medicine, the province enjoined the unauthorized practices of those who were graduates of the Council's school. No one argues that as licensed users of a federal trade-mark they had a right to practice TCM and acupuncture or that the province's regulatory competence was displaced. The province investigated Shanghai TCM College and shut it down under the *Private Career Training Institutions Act* [SBC 2003] c 79, because it refused to comply with an order that it refund tuition fees.

[75] In sum, the evidence points in the opposite direction from that contended by the Council, away from regulatory chaos and towards the type of incidental effects and necessary overlap essential in a complex federation, precisely as contemplated by the SCC in *PHS*. In that decision, at paragraphs 62-64, the SCC instructs that overlap is not the test of constitutionality and that to draw prescribed lines around legislative authority runs the risk that activities will fall into a grey zone, a hiatus between federal and provincial jurisdictions:

> This caution reflects three related concerns. First, the doctrine of interjurisdictional immunity is in tension with the dominant approach that permits concurrent federal and provincial legislation with respect to a matter, provided the legislation is directed at a legitimate federal or provincial aspect, as the case may be. This model of federalism recognizes that in practice there is significant overlap between the federal and provincial areas of jurisdiction, and provides that both governments should be permitted to legislate for their own valid purposes in these areas of overlap.
>
> Second, the doctrine is in tension with the emergent practice of cooperative federalism, which increasingly features interlocking federal and provincial legislative schemes. In the spirit of cooperative federalism, courts "should avoid blocking the application

> of measures which are taken to be enacted in furtherance of the public interest": *Canadian Western Bank*, at para. 37. Where possible, courts should allow both levels of government to jointly regulate areas that fall within their jurisdiction: *Canadian Western Bank*, at para. 37.
>
> Third, the doctrine of interjurisdictional immunity may overshoot the federal or provincial power in which it is grounded and create legislative "no go" zones where neither level of government regulates. Since it is not necessary for the government benefiting from the immunity to actually regulate in the field in question, extension of the doctrine of interjurisdictional immunity risks creating "legal vacuums": *Canadian Western Bank*, at para. 44.

[76] The argument here is, in effect, a mirror or clone of the argument advanced in *PHS*. In *PHS*, the Court rejected the argument that the *Controlled Drugs and Substances Act*, SC 1996, c 19, an otherwise valid exercise of federal power, had to be read down when it affected provincial regulation over health. The Court affirmed that the "dominant approach" is to permit concurrent federal and provincial legislation provided both laws are valid: *Canadian Western Bank*.

[77] The inter-jurisdictional immunity argument advanced by the Council and the AGBC has been unequivocally rejected by the SCC. To quote the SCC's analysis in *PHS* at paragraph 68; "Overlapping federal jurisdiction and the sheer size and diversity of provincial health power render daunting the task of drawing a bright line around a protected provincial core of health where federal legislation may not tread."

[78] To conclude, the applicant seeks 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.

[79] The Court will not, on the basis of the evidence before it, draw a bright line. To do so would be contrary to the direction of the SCC in *PHS*, to deny the doctrine of incidental effects, and more fundamentally, significantly alter the scope of the trade and commerce power, precluding as it would the registration of any official mark in areas of the economy that are regulated under subsection 92(13).

Ancillary Powers

[80] The Council further contends that the official marks provisions cannot be justified on the basis of the ancillary powers doctrine. There is a distinction between the ancillary powers doctrine and the incidental effects doctrine. This distinction is substantive and has a long antecedence in the division of powers jurisprudence, but is blurred in the applicant's argument. In *Lacombe*, at paragraphs 35-36, the SCC explained:

> The ancillary powers doctrine permits one level of government to trench on the jurisdiction of the other in order to enact a comprehensive regulatory scheme. In pith and substance, provisions enacted pursuant to the ancillary powers doctrine fall outside the enumerated powers of their enacting body: *General Motors*, at pp. 667-70. Consequently, the invocation of ancillary powers runs contrary to the notion that Parliament and the legislatures have sole authority to legislate within the jurisdiction allocated to them by the *Constitution Act, 1867*. Because of this, the availability of ancillary powers is limited to situations in which the intrusion on the powers of the other level of government is justified by the important role that the extrajurisdictional provision plays in a valid legislative scheme. The relation cannot be insubstantial: *Nykorak v. Attorney General of Canada*, 1962 CanLII 38 (SCC), [1962] S.C.R. 331, at p. 335; *Gold Seal Ltd. v. Attorney-General for the Province of Alberta* 1921 CanLII 25 (SCC), (1921), 62 S.C.R. 424, at p. 460; *Global Securities*, at para. 23.
>
> The ancillary powers doctrine is not to be confused with the incidental effects rule. The ancillary powers doctrine applies where, as here, a provision is, in pith and substance, outside the competence of its enacting body. The potentially invalid provision will be saved

> where it is an important part of a broader legislative scheme that is within the competence of the enacting body.

[81] There is no need to resort to the ancillary powers doctrine, as the official marks provision, as a valid exercise of the federal trade and commerce power, is not contested. Neither the Council nor the College question its *vires*. They simply say it overreaches and must be confined and read down so as to have no impact on provincial jurisdiction.

[82] Therefore, the Council's reliance on the ancillary powers doctrine is misplaced. Whether an official marks regime is "sufficiently integrated" in the overall scheme of the *Trade-marks Act* is not in issue. As *Lacombe* instructs, that doctrine only applies when the impugned provision is, in pith and substance, outside the enumerated powers of their enacting body. The official marks provisions are directed to trade and commerce and are thus within federal jurisdiction. This is not challenged by either the Council or the AGBC.

Conclusion on Federalism

[83] The arguments advanced are reflective of a static view of federalism, with discrete, never overlapping heads of power. As the SCC described in *PHS*, the federation, as practical matter, does not work that way and neither does the Constitution. To immunize provincial jurisdiction from any effect of a valid exercise of the trade and commerce power would effectively nullify the constitutional doctrine of incidental effects. The argument advanced also has the potential to create legal vacuums, areas immune from any form of regulation absent new legislation.

[84] The applicant's argument also invites the Court to fall into the same error as made by the Court in *Canadian Council of Professional Engineers v Lubrication Engineers, Inc.* [1985] 1 FC 530. In that case, the Federal Court concluded that professional designations should not be registered as marks, the regulation of the professions being a matter of provincial legislative responsibility. The Court concluded that:

> … conflict is avoided by interpreting the Trade Marks Act so as simply to require the registrar to abstain from registering words, or expressions which include words, designating the popular or official name of professions whose members are exclusively entitled to the commercial or professional use of such names, designations or titles in conformity with provincial and territorial laws.

[85] The Court of Appeal upheld the decision on other grounds, but expressly disagreed with the constitutional analysis adopted by the Federal Court. Hugessen JA wrote:

> We are all of the view that much of what the learned trial judge said in his lengthy reasons for judgment cannot be supported. In particular we disagree with his view of the reach of paragraph 9(1)(d) of the Trade-marks Act; that text simply does not have the effect, as the judge seemed to think, of importing into federal law the various prohibitions against the use of certain professional designations which are contained in the provincial statutes regulating those professions. [*Canadian Council of Professional Engineers v Lubrication Engineers, Inc.* (CA) [1992] 2 FC 329]

[86] Similarly, and of equal resonance in the context of subparagraph 9(1)(n)(iii) is the decision of the SCC in *Life Underwriters Assn. of Canada v Provincial Assn. of Quebec Life Underwriters* [1992] 1 SCR 449. In that case, the SCC recognized the distinction between *the regulation and practice of a profession* and *the trade and commerce usages* of a title or designation. The SCC endorsed the reasoning of the Federal Court of Appeal per Marceau JA in *Life Underwriters Assn. of Canada v Provincial Assn. of Quebec Life Underwriters* (CA) [1990] 3 FC 500 at para 24:

> I do not see why the mere conferring of a title would, under the Constitution, be reserved exclusively to the legislative power having authority to regulate the profession to which the title could be somehow related. To be called professional, it seems to me, a title, like a certificate, must be directly linked to the exercise of the profession; it must have consequences as to the right and ability of its holder to practice the profession. The conferring and holding of a professional title in that sense may, of course, be part of the regulation of the profession, but otherwise the conferring and holding of a title is a neutral act, it seems to me, unconstrained by the division of powers.

[87] In sum, professional titles generally cannot be registered as trade-marks, not because regulation of the profession in question falls under subsection 92(13), but because they are either descriptive or non-distinctive. In *Ontario Dental Assistants Association v Canadian Dental Association*, 2013 FC 266, Justice Michael Mason considered whether a valid certification mark can be registered for a professional designation or acronym. I share his observations, at paragraph 23, concerning the effect of the *Life Underwriters Assn of Canada v Provincial Assn of Quebec Life Underwriters*, [1988] FCJ 564, decision:

> To the extent the case of *Life Underwriters Assn of Canada v Provincial Assn of Quebec Life Underwriters*, [1988] FCJ 564, and cases before the Opposition Board following that decision are relied upon to suggest that a professional designation can never serve to be a valid certification mark, I disagree. Nothing in the Act so limits the ability of a professional designation to validly act, in use, as a certification mark, provided such a designation meets the necessary criteria outlined above with respect to lack of clear descriptiveness, distinctiveness, absence of a likelihood of confusion, and proper use.

[88] There is nothing in the exercise of the power under subparagraph 9(1)(n)(iii) that is linked or otherwise tied to the right or ability to practice the profession. The province, under the *Health Professions Act*, has unimpeded jurisdiction to regulate the practice of TCM and acupuncture. Rather than conflicting with it, the *Trade-marks Act* complements and reinforces the College's

authority by allowing it, through paragraph 9(1)(n), to prevent professional designations from becoming articles of trade and commerce.

Freedom of Expression

[89] The impugned provisions infringe section 2(b) of the *Charter*, but are justified under section 1 as reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society.

[90] Commercial expression, such as using a professional title in association with a TCM and acupuncture practice, is protected expression within section 2(b). The use of a professional title is expressive and aimed at conveying meaning, namely a certain level of expertise and competence. The right to freedom of expression is content-neutral and therefore it is engaged in these circumstances: *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927.

[91] At the section 1 analysis, there is a pressing objective to the regimes' limitation on freedom of expression. The purpose of section 9 is to prevent confusion between government and private services. It prevents persons from capitalizing upon, and potentially misusing, public symbols and marks: *Techniquip Ltd v Canadian Olympic Assn*, [1999] FCJ No 1787 (FCA).

[92] As the College has argued, Canadians must have confidence that the marks of a public authority are used by that authority and no other. The facts of this case are illustrative. The licenses issued by the Council to a graduate read:

> The above certification(s) identify that the user of the certification(s) has fulfilled, both in theory and in clinical practice, the required number of hours and has successfully completed the competency

> exams. The certification indicates to the public that the user of this certification has the abilities to deliver competent and professional services in his/her area of expertise.

[93] The Council mislead some students into believing that it possessed regulatory authority over the practice of TCM and acupuncture. It improperly used trade-marks to imply a license to practice. There is effective recourse to prevent this from happening at the trade or marketing level, as reflected in the order of Justice O'Keefe.

[94] The College was entitled to respond by adopting various titles as official marks. In this way, it was able to brand its role and mandate and educate the public as to who was properly trained and authorized to practice TCM and acupuncture. The public marks scheme reinforces, at the trade and commerce level, the provincial regulatory objectives.

[95] There is, therefore, no serious debate on the question of whether subparagraph 9(1)(n)(iii) has a pressing and substantial objective. It is also apparent that the means chosen are rationally connected to that objective.

Minimal Impairment

[96] The Council argues that the provisions do not satisfy the requirement of minimal impairment. The Council argues that new practitioners and schools will be prohibited from using the terms registered by the College, without its consent. The Council also submits that there is no reason for the College to have this power across Canada.

[97] Chief Justice McLachlin, in *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at paragraph 53, recently explained the requirement of minimal impairment:

> The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.

[98] The applicant places considerable importance on the effect the official mark provision has on his economic interests. However, the frame of *Charter* analysis is much broader than the consequences on a single individual, or in this case, business. Chief Justice McLachlin has emphasized that courts are to consider the impact of the infringement from the perspective of society overall: "The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned": *Hutterian Brethren* at para 69.

[99] Subparagraph 9(1)(n)(iii), when situated in the context of the legislative scheme of the *Trade-marks Act* as a whole, has internal limitations which support the conclusion that, to the extent it impairs freedom of expression, it does so minimally. Those include:

(1) It is limited to a public authority.

(2) The public authority must "adopt and use" the mark, in contrast to the Canadian Forces which need only adopt "or" use. In consequence, official marks cannot simply be appropriated and sat on: *Techniquip Ltd. v Canadian Olympic Assn.*, [1999] FCJ No 1787 (FCA) at para 13.

(3) Official marks can be licensed with consent. A private owner of a mark cannot consent to use without risk of losing control over time. Public authorities can consent without fear of loss of right.

(4) The test is resemblance and confusion under subparagraph 9(1)(n)(iii) and section 6 of the *Trade Marks Act*: *Techniquip Ltd.* at para 5.

(5) There is no deeming provision. Use must be established.

(6) The regime is forward looking; the prohibition is against future adoption and use of the official marks. There is no retrospective effect: *Canadian Olympic Assn v Konica Canada Inc*., [1992] 1 FC 797 (FCA).

[100] The legislature has not limited the types of marks that can be adopted. This grants public authorities flexibility in conducting their work. The present case demonstrates the desirability of this approach.

[101] Finally, no other more nuanced official marks regime was identified which would meet the same objective. Moreover, according the government the "measure of deference" as required by the jurisprudence, I find that the impugned provisions are reasonably tailored to meet the pressing and substantial objective and that there is proportionality between the deleterious effects and salutary benefits. Therefore, the limitation on freedom of expression is justified.

Bill of Rights

[102] Finally, the Council argues that subsection 2(e) of the *Bill of Rights* entitles it to a hearing prior to the issuance of public notice. This argument fails.

[103] Subsection 2(e) provides that:

[…] no law of Canada shall be construed or applied so as to	[…] nulle loi du Canada ne doit s'interpréter ni s'appliquer comme
[…]	[…]
(e) deprive a person of the right to a fair	e) privant une personne du droit à une

hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;	audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

[104] In *Authorson v Canada (Attorney General)*, [2003] 2 SCR 40, 2003 SCC 39, the SCC held that subsection 2(e), when situated in its context, applies only in proceedings before a tribunal or body that determines individual rights and obligations. The French version of subsection 2(e) reinforces this conclusion, referring as it does to "une audition impartiale de sa cause". The common understanding of "une cause" is that of an "affaire, process qui se plaide".

[105] The registration process of a trade-mark includes examination, advertisement and opposition proceedings. Parliament has not provided a hearing for official marks, as it has in the case of other marks. There is no process for adjudication *inter partes* before the Registrar. The absence of a hearing is consistent with the characterization of the Registrar's function as non-adjudicative. The Court of Appeal held in *FileNet* at paragraphs 7-8:

> It is now well established that the Registrar has no discretion to refuse a request under section 9 to give public notice of the adoption and use of an official mark, once the party making the request establishes that the statutory criteria have been met: *Ontario Assn. of Architects* (*supra*), *Mihaljevic* v. *British Columbia*, (1988), 22 F.T.R. 59, 23 C.P.R. (3d) 80 (F.C.T.D.), affirmed, (1990), 116 N.R. 218, 34 C.P.R. (3d) 54 (F.C.A.). One of the statutory criteria is that the request for a public notice under section 9 must be made by Her Majesty, a university or a public authority, depending on the circumstances. Another is that the party making the request must adopt and use the official mark.
>
> In determining whether the statutory criteria are met, the Registrar is entitled but not bound to rely on the representations submitted with the request for publication. If the Registrar decides to gives the public notice as requested, a person who seeks judicial review of the Registrar's decision may adduce evidence that the official mark was

> not adopted or used. In that event, the party that requested the public notice has the burden of proving that the official mark was adopted and used by the date of the public notice.

[106] Parliament is free to prescribe the form of decision-making process to be followed, whether adjudicative, administrative, investigatory, quasi-judicial or judicial. It need not design a process that provides an obligation to inform the public at large of a request under subparagraph 9(1)(n)(iii) or to create a forum in which a neutral party invites submissions in response or to adjudicate between competing interests: *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 SCR 781, 2001 SCC 52.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. The parties may make submissions on costs, either in writing within 20 days of the date of this decision, or upon request, orally on a date to be fixed by the Judicial Administrator.

"Donald J. Rennie"
Judge

ANNEX A

Trade-marks Act, RSC 1985, c T-13

Section 2

"person" includes any lawful trade union and any lawful association engaged in trade or business or the promotion thereof, an the administrative authority of any country, state, province, municipality or other organized administrative area.

"use" in relation to a trade-mark, means any use that by section 4 is deemed to be a use in association with wares or services;

Section 3

3. A trade-mark is deemed to have been adopted by a person when that person or his predecessor in title commenced to use it in Canada or to make it known in Canada or, if that person or his predecessor had not previously so used it or make it known, when that person or his predecessor filed an application for its registration in Canada.

Section 4(1)

4(1) A trade-mark is deemed to be used in association with wares if, at the time of the transfer of the property in or possession of the wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is in any

Loi sur les marques de commerce (L.R.C. (1985), ch. T-13)

Article 2

« personne » Sont assimilés à une personne tout syndicat ouvrier légitime et toute association légitime se livrant à un commerce ou à une entreprise, ou au développement de ce commerce ou de cette entreprise, ainsi que l'autorité administrative de tout pays ou État, de toute province, municipalité ou autre région administrative organisée.

« emploi » ou « usage » À l'égard d'une marque de commerce, tout emploi qui, selon l'article 4, est réputé un emploi en liaison avec des marchandises ou services.

Article 3

3. Une marque de commerce est réputée avoir été adoptée par une personne, lorsque cette personne ou son prédécesseur en titre a commencé à l'employer au Canada ou à l'y faire connaître, ou, si la personne ou le prédécesseur en question ne l'avait pas antérieurement ainsi employée ou fait connaître, lorsque l'un d'eux a produit une demande d'enregistrement de cette marque au Canada.

Article 4(1)

4. (1) Une marque de commerce est réputée employée en liaison avec des marchandises si, lors du transfert de la propriété ou de la possession de ces marchandises, dans la pratique normale du commerce, elle est apposée sur les marchandises mêmes ou sur les colis

other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

(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.

dans lesquels ces marchandises sont distribuées, ou si elle est, de toute autre manière, liée aux marchandises à tel point qu'avis de liaison est alors donné à la personne à qui la propriété ou possession est transférée.

Section 9(1)

9(1) No person shall adopt in connection with a business, as a trademark or otherwise, a mark consisting of, or so nearly resembling as to be likely to be mistaken for

…

(n) any badge, crest, emblem or mark

…

(iii) adopted and used by any public authority, in Canada as an official mark for wares or services,

in respect of which the Registrar has, at the request of Her Majesty or of the university or public authority, as the case may be, given public notice of its adoption and use.

Article 9(1)

9. (1) Nul ne peut adopter à l'égard d'une entreprise, comme marque de commerce ou autrement, une marque composée de ce qui suit, ou dont la ressemblance est telle qu'on pourrait vraisemblablement la confondre avec ce qui suit :

…

n) tout insigne, écusson, marque ou emblème :

…

(iii) adopté et employé par une autorité publique au Canada comme marque officielle pour des marchandises ou services,

à l'égard duquel le registraire, sur la demande de Sa Majesté ou de l'université ou autorité publique, selon le cas, a donné un avis public d'adoption et emploi;

Section 11

11. No person shall use in connection with a business as a trade-mark or otherwise, any mark adopted contrary to section 9 or 10 of this Act.

Article 11

11. Nul ne peut employer relativement à une entreprise, comme marque de commerce ou autrement, une marque adoptée contrairement à l'article 9 ou 10 de la présente loi ou contrairement à l'article 13 ou 14 de la Loi sur la concurrence déloyale, chapitre 274 des Statuts revisés du Canada de 1952.

Section 12

12 (1) Subject to section 13, a trade-mark is registrable if it is not

…

(e) a mark of which the adoption is prohibited by section 9 or 10;

Article 12

12. (1) Sous réserve de l'article 13, une marque de commerce est enregistrable sauf dans l'un ou l'autre des cas suivants :

…

e) elle est une marque dont l'article 9 ou 10 interdit l'adoption;

ANNEX B

***The Constitution Act*, 1867 (U.K.), 30 & 31 Victoria, c 3**

Section 91(2)

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

…

2. The Regulation of Trade and Commerce.

Section 92(13)

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

…

13. Property and Civil Rights in the Province.

***Loi constitutionnelle* de 1867, 30 & 31 Victoria, c 3**

Article 91(2)

91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

…

2, La réglementation du trafic et du commerce

Article 92(13)

92. Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

…

13. La propriété et les droits civils dans la province;

ANNEX C

The Canadian Bill of Rights, SC 1960, c 44

Section 2

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

…

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

Déclaration canadienne des droits, SC 1960, c 44

Article 2

Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la Déclaration canadienne des droits, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

…

e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

ANNEX D

***Health Professions Act*, RSBC 1996, Ch 183**

Section 12

12 (1) The Lieutenant Governor in Council may, by regulation, designate a health profession for the purposes of this Act.

(2) In respect of a designated health profession, the minister may, by regulation, prescribe the following:

(a) the name of the college established under section 15(1) for the health profession;

(b) one or more titles to be used exclusively by registrants;

(b.1) limits or conditions respecting the use of titles prescribed under paragraph (b);

(c) services that may be provided by registrants;

(d) limits or conditions on the services that may be provided by registrants;

(e) services that may be provided only by registrants.

Section 12.1

12.1 (1) If a regulation under section 12 (2) (b) prescribes a title to be used exclusively by registrants of a college, a person other than a registrant of the college must not use the title, an abbreviation of the title or an equivalent of the title or abbreviation in another language

(a) to describe the person's work,

(b) in association with or as part of another title describing the person's work, or

(c) in association with a description of the person's work.

(2) If a regulation under section 12 (2) (b.1) prescribes a limit or condition respecting the use of a title, the title must not be used except in accordance with the regulation.

(3) A person other than a registrant of a college must not use a name, title, description or abbreviation of a name or title, or an equivalent of a name or title in another language, in any manner that expresses or implies that he or she is a registrant or associated with the college.

Section 15

15(1) A college is established for a health profession on designation of the health profession under section 12(1)

….

(3) for the purposes of exercising its powers and performing its duties under this Act, a college has the powers and capacity of a natural person of full capacity, including the power to acquire and dispose of property.

Section 16

16(1) It is the duty of a college at all times

- (a) to serve and protect the public; and
- (b) to exercise its powers and discharge its responsibilities under all enactments in the public interest.

(2) A college has the following objects:

- (a) to superintend the practice of the profession;
- (b) to govern its registrants according to this Act, the regulations, and the bylaws of the college;
- (c) to establish the conditions or requirements for registration of a person as a member of the college;
- (d) to establish, monitor and enforce standards of practice to enhance the quality of practice and reduce incompetent, impaired or unethical practice amongst registrants;

Section 17

17 (1) For each college established under section 15, there is a board.

(2) The minister must, by order,

- (a) appoint persons to the first board for a college, who hold office until the time at which the board members referred to in subsection (3) (a) and (a.1) are first elected, and
- (b) specify the date on or before which the first election referred to in paragraph (a) must be held.

(3) Following the first election referred to in subsection (2) respecting a college, the board for the college consists of the following:

…

- (b) not fewer than 2 persons appointed by order of the minister.

(4) The number of persons appointed under subsection (3) (b)

(a) must not be less than 1/3 of the total board membership, and

(b) must not be more than the total number of persons elected or appointed under subsection (3) (a) to (a.2).

…

Sections 18.1

18.1 (1) If the minister considers it necessary in the public interest, the minister may appoint a person to inquire into

(a) any aspect of the administration or operation of a college, or

(b) the state of practice of a health profession in

(i) British Columbia,

(ii) a locality, or

(iii) a facility.

(2) Subsection (1) includes inquiry into an exercise of a power or a performance of a duty, or the failure to exercise a power or perform a duty, under this Act.

(3) For the purposes of an inquiry under this section, a person appointed under subsection (1) has the powers, privileges and protection of a commission under sections 22 (1), 23 (a), (b) and (d) and 32 of the Public Inquiry Act.

(4) A person appointed under subsection (1) must comply with any term of reference the minister may establish concerning the conduct of the inquiry.

(5) The expenses incurred by the government under this section respecting a college are a debt due and owing by the college to the government.

Section 18.2

18.2 (1) On the completion of an inquiry under section 18.1, the minister may issue a directive to the board concerning which the inquiry was conducted.

(2) A directive under subsection (1)

(a) may require the board to exercise the powers or perform the duties of the board under this Act to address the issues that were the subject of the inquiry under section 18.1,

(b) despite paragraph (a), must not require the board to

(i) adopt a standard, limit or condition under section 19 (1) (k), (l) or (l.3) in a form specified by the directive, or

(ii) do anything under section 20 or Part 3 concerning a specific registrant as defined in section 26, and

(c) may include a requirement that a board submit a written report to the minister, within the time specified in the directive, detailing the measures the board has taken to implement that directive.

(3) A board must comply with a directive issued to it under this section.

Section 19

19 (1) A board may make bylaws, consistent with the duties and objects of a college under section 16, that it considers necessary or advisable, including bylaws to do the following:

…

(3) A bylaw under subsection (1) has no effect unless it is filed with the minister.

…

(3.2) If the minister considers it necessary or advisable to do so, the minister may, by order, within the period prescribed for the purposes of subsection (3.1),

(a) disallow the bylaw or a portion of the bylaw, except for a bylaw or a portion of a bylaw made under subsection (1) (k), (l) or (l.3), or

…

(4) The minister must disallow a bylaw made under subsection (1) if the minister is not satisfied that appropriate provision has been made respecting the following:

(a) the election of registrants to the board under section 17 (3) (a);

(b) each of the objects referred to in section 16.

(5) The minister may request a board to amend or repeal an existing bylaw for its college or to make a new bylaw for its college if the minister is satisfied that this is necessary or advisable.

(6) If a board does not comply with a request under subsection (5) within 60 days after the date of the request, the minister may, by order, amend or repeal the existing bylaw for the college or make the new bylaw for the college in accordance with the request.

…

Section 19

19(1) A board may make bylaws, consistent with the duties and objects of a college under section 16, that it considers necessary or advisable, including bylaws to do the following:

…

(y.8) subject to the regulations of the minister under section 12(2)(b.1), establish limits or conditions respecting the use by registrants of the following:

(i) titles describing the work of registrants, including titles prescribed under section 12(2)(b);

…

ANNEX E

Traditional Chinese Medicine Practitioners and Acupuncturists Regulations (BC Reg 29012008)

Section 1

1. In this regulation:

"Acupuncture" means an act of stimulation, by means of needles, or specific sites on the skin, mucous membranes or subcutaneous tissues of the human body to promote, maintain, restore or improve health, to prevent a disorder, imbalance or disease or to alleviate pain and includes

(a) the administration of manual, mechanical, thermal, and electrical stimulation of acupuncture needles;
(b) the use of laser acupuncture, magnetic therapy or acupressure; and
(c) moxibustion (Jiu) and suction cup (Ba Guan).

"Traditional Chinese Medicine" means the promotion, maintenance and restoration of health and prevention of a disorder, imbalance or disease based on traditional Chinese medicine theory by utilization of the primary therapies of

(a) Chinese acupuncture (Zhen), moxibustion (Jiu), and suction cup (Ba Guan),
(b) Chinese manipulative therapy (Tui Na),
(c) Chinese energy control therapy (Qi Gong),
(d) Chinese rehabilitation exercises such as Chinese shadow boxing (Tai Ji Quan), and
(e) prescribing, compounding, or dispensing Chinese herbal formulae (Zhone Yao Chu Fang) and Chinese food cure recipes (Shi Liao).

Section 2

2 The name "College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia" is the name of the college established under section 15 (1) of the Act for traditional Chinese medicine and acupuncture.

Section 3

3(1) The title "acupuncturist" is reserved for exclusive used by acupuncturists.

(2) The title "traditional Chinese medicine practitioner" is reserved for exclusive use by traditional Chinese medicine practitioners.

(3) The title "traditional Chinese medicine herbalist' is reserved for exclusive used by herbalists.

(4) The titles "doctor of traditional Chinese medicine" and "doctor" are reserved for exclusive use by doctors of traditional Chinese medicine.

(5) This section does not prevent a person from using

(a) the title “doctor’ in a manner authorized by another enactment that regulates a health profession, or

(b) an academic or educational designation that the person is entitled to use.

Section 5

5 No person other than a

(a) raditional Chinese medicine practitioner, acupuncturist or herbalist may make a traditional Chinese medicine diagnosis identifying a disease, disorder or condition as the cause of signs or symptoms;

(b) traditional Chinese medicine practitioner or a herbalist may prescribe those Chinese herbal formulae listed in a schedule to the bylaws of the College, and

(c) traditional Chinese medicine practitioner or an acupuncturist may insert acupuncture needles under the skin for the purposes of practising acupuncture.

FEDERAL COURT

SOLICITORS OF RECORD

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