

## Protect your Protected Titles

by Richard Steinecke  
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Almost all regulatory bodies are provincial. Almost all statutory regulatory bodies have protected titles that non-members cannot use. Can the protection of those titles be compromised by organizations obtaining federal trade mark protection for the same words?

In a Federal Court case released earlier this month, the answer is no. However, provincial regulators are well advised, in light of this decision, to obtain federal "official mark" protection for their protected titles.

The case involved a dispute between the regulatory body for traditional Chinese medicine practitioners in British Columbia and a body that accredited schools training students in acupuncture and traditional Chinese medicine. The accrediting body, which called itself the Council of Natural Medicine College of Canada, purported to trade mark a number of terms including D.T.C.N. (Doctor of Traditional Chinese Medicine).

The accrediting body also made statements implying that its federal trade mark status enabled graduates to practice the profession. The Court was critical of these assertions:

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.

In an earlier decision (found at 2009 FC 1110) the regulatory College had obtained an injunction preventing the accrediting Council from using the protected titles or from asserting federal trade mark / official mark status for those terms. The Court held that the terms were descriptive words and not distinctive commercial brands. In doing so the Court also said that the accrediting Council had acted in a misleading manner.

The current litigation was an attempt by the accrediting Council to challenge the validity of the regulatory Colleges official marks. If successful, the accrediting Council would have been in a position to argue that provincial regulatory bodies could be limited in their protection of professional designations in at least some circumstances. The Court rejected all of the arguments of the accrediting Council and held that the regulatory College was entitled to supplement its provincial protection of such titles and designations by obtaining federal official mark provisions.

Some of the arguments rejected were fairly technical. For example, the Court rejected the arguments that a provincial regulatory body is not a public authority entitled to register official marks. The Court also dismissed the submission that the regulatory body's prior use of the terms for the purpose of registering an official mark was improper.

More substantively, the Court rejected the argument that the federal trade mark/official mark authority should be interpreted narrowly so that it did not apply to titles protected by provincial legislation authorizing professional or industry regulation. The rejection of this argument means that regulators should consider registering their protected titles as official marks to prevent organizations, like this accrediting body, from asserting ownership of the designations. While the risk is not huge (because many professional designations are terms of common commercial usage which cannot be trademarked), it would be prudent to obtain this protection, particularly for relatively new or unique terms.

The Court also found that the freedom of expression provisions in the Canadian Charter of Rights and

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Freedoms did not prevent the regulatory College from obtaining official mark protections for its designations.

The Council of Natural Medicine College of Canada v. College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia, 2013 FC 287 case can be found at [www.canlii.org](http://www.canlii.org).

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