



## Canadian Intellectual Property Office

### THE REGISTRAR OF TRADEMARKS

**Citation:** 2025 TMOB 114

**Date of Decision:** 2025-05-26

### IN THE MATTER OF AN OPPOSITION

**Opponent:** Astra Capital Incorporated

**Applicant:** Astra Energy Services Corp.

**Application:** 2118513 for ASTRA GROUP CORP. & Design

### INTRODUCTION

[1] On July 2, 2021, Astra Energy Services Corp. (the Applicant) applied to register the trademark Astra Group Corp. & Design (the Mark), shown below.



[2] Colour is claimed as a feature of the Mark.

[3] The statement of services applied for in association with the Mark, together with associated Nice classes, is reproduced below:

37 (1) Advisory services relating to the construction of buildings; building construction services; building maintenance and repair; construction and repair of buildings; construction of buildings; electrical repair and installation of air conditioners; electrical repair and installation of heaters; electrical repair and installation of lighting; fire alarm installation and repair; floor buffing and polishing services; floor polishing; floor sanding; floor sanding services; furnace installation and repair; home renovation; house building and repair; house painting; installation and repair of plate glass; installation of air conditioners; installation of building insulation; installation of doors and windows; installation of electrical systems; installation of fire alarms; installation of home appliances; installation of venetian blinds; installation of windows; installing drywall panels; laying of carpet; maintenance and repair of buildings; masonry; paint stripping services; painting, interior and exterior; real estate development; refinishing of floors; refurbishment of buildings; renovation and restoration of buildings; renovation of buildings; repair of buildings; repair work on buildings; roofing repair services; roofing services; sanding; sealing and caulking services; tile laying; wallpapering; window installation services.

[4] Astra Capital Incorporated (the Opponent) has opposed the Mark on a number of grounds, most turning on the issue of confusion with at least one of its trademarks or trade names. For the reasons that follow, the application is refused.

#### **THE RECORD**

[5] The application was advertised in the *Trademarks Journal* for opposition purposes on October 5, 2022.

[6] On April 4, 2023, the Opponent opposed the application by filing a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T 13 (the Act).

[7] The statement of opposition raises the following grounds of opposition, as amended by an Interlocutory Ruling dated May 17, 2023:

i) the application does not comply with sections 38(2)(a) and 30(2)(a) of the Act in that the application does not contain a statement in

ordinary and commercial terms of each of the specific services in association with which the Mark is proposed to be used;

ii) the Mark is not registrable pursuant to sections 38(2)b) and 12(1)(d) of the Act as it is confusing with the Opponent's ASTRA PROPERTY GROUP (TMA1167255) and ASTRA PROPERTY GROUP & Design (TMA1167256) registered trademarks; and

iii) the Applicant is not entitled to registration of the Mark pursuant to sections 38(2)(c) and 16(1)(a) and/or 16(1)(c) of the Act in that, at the filing date of the application, it was confusing with the Opponent's previously used trademarks or trade names set out in the attached Schedules A and B.

[8] The Applicant filed and served its counter statement on June 5, 2023, denying each of the grounds of opposition.

[9] In support of its opposition, the Opponent filed affidavits of Ahmad (Ed) Rafih, and exhibits 1-24, Dick van Wyck, and exhibits 1-22 and Paulina Seo, and exhibits 1-9. Each of the Opponent's affiants were cross-examined and their cross-examination transcripts, as well as any replies to undertakings, are part of the record. Mr. Rafih was also re-examined on his answers to undertakings and that transcript is also part of the record.

[10] In support of its application, the Applicant filed an affidavit of Maxim Oshelvskyy. Mr. Oshelvskyy was cross-examined on his affidavit and his cross-examination transcript is also part of the record.

[11] The opponent did not file any evidence in reply.

## **EVIDENTIAL BURDEN**

[12] The legal onus is on the Applicant to show that its application complies with the provisions of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. Once this initial burden is met, the Applicant must satisfy the Registrar, on a balance of probabilities, that the grounds of opposition pleaded should not prevent the registration of the Mark [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) at 298; *Dion Neckwear Ltd v Christian Dior, SA* (2002), 20 CPR (4th) 155 (FCA)].

## **PRELIMINARY ISSUES**

### ***Evidentiary issues with Oshelvskyy affidavit***

[13] Mr. Oshelvskyy identifies himself as the Chief Executive Officer of the Applicant. In his affidavit, he discusses, *inter alia*, the business of the Applicant, the application history of the Applicant's Mark, searches of the trademarks register for trademarks in association with various classes that contain the component ASTRA, the Opponent's applications and prosecution histories, a review of the Opponent's website, and a corporate registry search for businesses with the word ASTRA in their names.

[14] The Opponent requests a preliminary ruling deleting and removing as purported evidence from the Olshevskyy Affidavit, paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 42, and Exhibits "B", "C", "D", "E", "F", "F-1", "G", "G-1", "H", "I", "J", "K", "L", "M", and "R". The paragraphs and exhibits objected to by the Opponent primarily concern searches conducted for the word ASTRA on the trademarks register and comments about them [Oshelvskyy affidavit, paragraphs 12-17], information about the Opponent's applications and

prosecution histories [Oshelvskyy affidavit, paragraphs 18-34] and the Applicant's opinion about the distinctiveness of the Opponent's trademark and confusion between the parties' trademarks [Oshelvsky affidavit, paragraph 42].

[15] The Opponent challenges these paragraphs on the basis that the affiant, Mr. Oshelvskyy, was unable to provide substantive answers during cross-examination regarding their content. In particular, he was unable to specify the dates of the searches referenced or the instructions and parameters under which those searches were conducted.

[16] It was further disclosed during cross-examination that the contested paragraphs were not authored by Mr. Oshelvskyy himself, but were instead prepared by his legal counsel.

[17] The Opponent also objects to other portions of Mr. Oshelvskyy's affidavit, arguing that he lacks the requisite expertise to offer meaningful or probative opinions on key legal matters.

[18] I agree with the Opponent that several paragraphs of Mr. Oshelvskyy's affidavit comprise hearsay since the affiant admits that it was his lawyer who conducted these searches. I do query how the Opponent could object to the evidence on this basis however, given that the Opponent also put forward evidence which each witness confirmed was tailored by counsel. In any event, the Opponent provides no reason to believe that the contents of the webpages do not accurately reflect the entries on the trademarks register at the time. Further, the file wrappers submitted are records of the history of the Opponent's own filings. I therefore have no reason to doubt the reliability of either of the searches conducted by Mr. Oshelvskyy.

[19] In view of the above, I find that it is appropriate to accord most of Mr. Oshelvskyy's evidence some weight, notwithstanding the fact that some of the exhibits and information contained in his affidavit were forwarded to him. I note that this is consistent with the approach taken in previous decisions of the Registrar and the Courts including *Cascades Canada Inc v Wausau Paper Towel & Tissue, LLC*, 2010 TMOB 176, and *Advance Magazine Publishers Inc v Miles Industries Ltd*, 2012 TMOB 260. However, as far as statements made by Mr. Oshelvskyy are conclusions in law on questions to be determined by the Registrar, those statements will not be given any weight.

***Opponent's corporate family***

[20] Mr. Rafih describes himself as the Chief Financial Officer of the Opponent and each of its wholly owned subsidiaries. In his affidavit he explains the organization of the Opponent's corporate family. As I find the Opponent's group of companies rather complex, I consider it important at this point to reproduce Mr. Rafih's statements at paragraphs 1 - 7 of his affidavit:

1. I am the Chief Financial Officer, and Kenneth Eugene Szekely ( Szekely ) is the Director, President and Chief Executive Officer, of each of:

(a) ASTRA CAPITAL INCORPORATED ( Astra Parentco ), the beneficial and legal owner of the trademarks relied upon by Opponent in the Statement of Opposition;

(b) Astra Parentco's wholly owned subsidiaries ASTRA CAPITAL PROPERTIES INCORPORATED ( Astra Properties ) and ASTRA REALTY MANAGEMENT INCORPORATED ( Astra Realty ); and

(c) Astra Parentco, Astra Properties and Astra Realty wholly owned or controlled project subsidiaries (collectively, the Astra Project Subsidiaries ):

(i) Astra Property Group GP Incorporated

- (ii) Astra Property Group 162 GP Incorporated
- (iii) Astra Property Group Port Credit Incorporated
- (iv) Astra Property Group 315 Incorporated
- (v) Astra Property Group 145 LP
- (vi) Astra Property Group 149 LP
- (vii) Astra Property Group 162 LP
- (viii) Astra Property Group 165-169 LP
- (ix) Astra Property Group 166 LP
- (x) Astra Property Group 260 LP

2. For the purposes of my Affidavit, and in the trade generally, Astra Parentco, Astra Properties, Astra Realty and the Astra Project Subsidiaries are collectively referred to as the Astra Group.

3. Astra Parentco was incorporated on July 19th, 1983 and then amalgamated on July 31st, 2012 with 2156029 Ontario Inc., and continued thereafter as before as Astra Parentco.

4. From incorporation in 1983, some 40 years ago, Astra Parentco has carried on business as ASTRA CAPITAL INCORPORATED and ASTRA CAPITAL.

5. On June 12th, 2013, Astra Parentco caused the incorporation of its wholly owned subsidiary Astra Properties.

6. On January 15th, 2019, Astra Parentco caused the incorporation of Astra Realty.

7. Since their respective dates of incorporation, the entities forming the Astra Group have carried on business, and continue to carry on business, under their respective corporate names and as the Astra Group and under the trademarks and tradenames identified and relied upon in the Statement of Opposition.

[21] With respect to the control exercised by the Opponent over these various entities, Mr. Rakih stated the following at paragraph 12 of his affidavit:

12. Each entity forming the Astra Group uses the ASTRA Family of Trademarks and Trade Names with the consent of and under the authority of the Opponent; the latter controlling the character and quality of the user and that use in association with the ASTRA Family of Trademarks and Trade Names. This control takes the form of Szekely, as the Director, President and Chief Executive Officer of the Opponent, determining to form each such member of the Astra Group and approving each such member use and display of the ASTRA Family of Trademarks and Trade Names in trade and in marketing and advertising materials.

[22] I will note here that use of a trademark by a licensee is deemed to be use by the owner if the requirements of section 50 of the Act are met. Mr. Rakih's statement that the Opponent approves each member's use and display of the Opponent's trademarks and trade names and that Mr. Szekely is the Director, President and CEO of the Opponent, is sufficient for me to infer that any services offered in association with the Opponent's trademarks or trade names would only be approved of if the character and quality of these services met the Opponent's standards.

***File wrapper estoppel***

[23] At pages 16-19 of its written representations, the Applicant has pointed to the file wrappers for the Opponent's registered trademarks ASTRA PROPERTY GROUP and ASTRA PROPERTY GROUP & Design for submissions made by the Opponent when it was defending its applications to register these trademarks. The Applicant submits that the Opponent narrowed its trademark applications by removing all of its class 37 services in the face of an office action which cited the Applicant's Mark as a barrier to registration. Having obtained registration by virtue of the amendments, the Applicant submits that the Opponent is no longer at liberty to rely on these trademarks for the purposes of its opposition. Relying on the decision in *S.C.*



*Johnson & Son, Ltd v Marketing Int'l Ltd*, 1979 CanLII 171 (SCC), the Applicant takes the position that the Opponent was estopped from alleging confusion in this case as a consequence of statements made in obtaining its registrations.

[24] The Opponent, on the other hand, submits, that the reason it deleted certain services from its applications was to traverse the Examiner's objections. The Opponent maintains that to "traverse" means to respond without admitting the validity of any citation raised by the trademark examiner. The Opponent further adds that the trademark examiner's citations in the office actions against the Opponent's applications were not a finding of law that the Opponent's applied for trademarks were confusing with the Applicant's Mark.

[25] I begin by noting that estoppel is generally considered an equitable remedy, whereas the Registrar, as a creature of statute, does not possess equitable jurisdiction [*Molson Canada 2005 v Anheuser-Busch, Incorporated*, 2010 FC 283]. In this context, section 38 of the *Trademarks Act* outlines the Registrar's powers in opposition proceedings, and these do not include any reference to equitable principles. This limitation has been affirmed through jurisprudence which has repeatedly held that equitable doctrines, such as estoppel, have no place in opposition proceedings before the Registrar. For example, in *Molson Breweries v Labatt Brewing Co*, 1996 CanLII 21804 (FC), 68 CPR (3d) 202 (FCTD), the Court addressed a situation in which one party relied on a prior inconsistent position taken by the other as a surrounding circumstance relevant to the confusion analysis. The Court held:

"In my view, this circumstance is not relevant in determining whether the two trade-marks at issue are confusing. Regardless of the previous positions taken by Labatt, I must come to a determination as to confusion that is in accordance with the law and relevant jurisprudence."

[26] In view of the above, I do not find that the Opponent is estopped from alleging confusion in this case as a consequence of statements made at examination in obtaining its registrations.

## **GROUND OF OPPOSITION**

### ***Section 16(1)(a) – Non-entitlement***

[27] The Opponent pleads that the Applicant is not entitled to registration of the Mark because at the Applicant's filing date or date of first use (if applicable), the Mark was confusing with the Opponent's trademarks identified in the attached Schedule A which had been previously used in Canada by the Opponent.

[28] To meet its initial evidential burden under section 16(1)(a), the Opponent must demonstrate that it had used at least one of its trademarks set out in the attached Schedule A prior the filing date of the application, namely July 2, 2021, and not abandoned this trademark as of the date of advertisement of the Applicant's application (i.e., October 5, 2022).

[29] Since there is no evidence of use of the Mark in Canada, the material date to assess entitlement to registration in this case is the Applicant's filing date, namely July 2, 2021.

[30] Section 16 of the Act does not require an opponent to demonstrate any particular level of use or reputation. The Federal Court confirmed in *JC Penney Co v Gaberdine Clothing Co*, 2001 FCT 1333, that section 16 of the Act does not impose any requirements concerning an opponent's length of use; so long as the trademark relied upon functions as a trademark, a single instance of its use within the meaning of section 4 of the Act may suffice for an opponent to meet its burden.

[31] The evidence before me regarding the Opponent's use of its trademarks and tradenames in Canada consists primarily of the affidavit, cross-examination and replies to undertakings of Mr. Rafih, with some supporting evidence provided by Ms. Seo and Mr. VanWyck. I have structured my analysis to address the impact of the Opponent's evidence, as well as the evidentiary deficiencies in this evidence identified by the Applicant.

Astra Group's property management and leasing services

[32] As previously mentioned, the Opponent was incorporated in 1983; a copy of the document is attached as Exhibit 2 to the Seo affidavit. The Opponent's wholly owned subsidiaries Astra Properties and Astra Realty were incorporated in 2013 and 2019 respectively [Seo Affidavit, Exhibits 5 and 7].

[33] In his affidavit at paragraph 13, Mr. Rafih attests as follows to the Opponent's business in Canada since 1983:

"Over the past 40 years since 1983, the Astra Group (defined as (the Opponent), Astra Properties, Astra Realty and the Astra Project Subsidiaries) has been a leader in the sustainable development of mixed-use, retail, office residential/condominium and industrial properties; offering our clients unique market opportunities unavailable through a traditional developer role."

[34] Astra Group's services are partially described by Mr. Rafih in his affidavit at paragraph 18 as follows:

The Astra Group suite of property management and leasing services serve the effective management of third-party real estate assets and afford Astra Group clients an improved value proposition through expense control, tenant retention and return on investment, thus improving the bottom line of our clients.

Opponent's use of its trademarks and trade names

[35] Mr. Rafih maintains that in the five year period prior to the date of his affidavit, the Astra Group had generated revenues in excess of

\$1,500,000.00 per year and has expended in excess of \$50,000.00 per year on marketing and promotion of the ASTRA family of trademarks and trade names.

[36] Mr. Rafih also provides examples of use of some of its trademarks (including its ASTRA PROPERTY GROUP & Design trademark) and trade names displayed on, *inter alia*, its website *www.astracapitalinc.com*, representative invoices, property signage, emails, business cards and letterhead (all displaying the address 2213 North Sheridan Way). The business cards and emails were representative of the forms of business cards and emails used by the Astra Group in connection with business and trade matters “during times material to the opposition” [Rafih affidavit, Exhibits 9, 10, 11 and 12].

[37] The Applicant points out that the Opponent’s evidence of use, particularly at any point prior to the filing date of the Applicant’s application, is lacking. In this regard, the Applicant submits that there is no breakdown of which services were provided or in association with which trademark or trade name. The one invoice for “rent services” issued by Astra Properties located at 2213 North Sheridan Way, Mississauga, ON, was dated September 1, 2023 (subsequent to the material date) and the business cards and letterhead filed were not dated. Further, it was revealed on cross-examination that the photo of the ASTRA CAPITAL & Design sign which appeared on the building at 2213 North Sheridan Way in Mississauga, Ontario, was taken from the Opponent’s website sometime around August, 2021, which is also subsequent to the filing date of the application.

[38] One of the undertakings provided by Mr. Rafih at his cross-examination was to advise when the earliest invoices referencing use of the trademarks ASTRA PROPERTY GROUP or ASTRA PROPERTY GROUP & Design,

reflected in the Opponent's registrations attached as Exhibits 21 and 22 to Mr. Rafih's affidavit were issued, and to provide a few redacted samples if they existed. The response provided by Mr. Rafih at No. 2(b) of his response to undertakings was as follows:

These trademarks have been used by [Astra Realty] since its incorporation on January 15th, 2019. Prior to that time they were used and continue to be used by the Opponent since at least as early as 2012. The Opponent only maintains invoices and related materials for six years in accordance with standard guidance published by Canada Revenue Agency. The Exhibits 1, 2 and 3 attached are examples of invoices bearing these marks issued during that six-year period.

[39] In the invoices attached as Exhibits 1-3 to Mr. Rafih's response to undertakings, client information, invoiced amounts and services rendered have been redacted for confidentiality purposes, but the invoice number and the ASTRA PROPERTY GROUP & Design trademark is clearly visible. The invoices were issued from Astra Realty Management, located at 2213 North Sheridan Way in Mississauga, Ontario. The dates on the invoices are January 1, 2021, January 2, 2021 and January 4, 2021.

[40] The Applicant offered the Opponent a confidentiality agreement if it could provide unredacted copies of these invoices. The Opponent did not. In view that redactions have generally been accepted by the Registrar to preserve confidentiality [see *McCarthy Tetrault LLP v Star Television Productions Limited*, 2020 TMOB 49], I will not make a negative inference from Mr. Rafih's refusal to provide an unredacted copy of these invoices as requested by the Applicant.

Has the Opponent met its burden?

[41] At the oral hearing, the Applicant's agent submitted that the Opponent's evidence was deficient for it to meet its burden under this ground. While I agree that the evidence of use of any of the Opponent's

trademarks or trade names prior to the material date for this ground is not voluminous, I am satisfied that the Opponent has met its burden under this ground for the following reasons.

[42] As noted above, a single instance of use within the meaning of section 4 may suffice for an opponent to meet its burden under this ground. Further, even when evidence post dates the material date for a ground of opposition, the Registrar may take into account such evidence insofar as it may indicate a situation existing at the material date [see, for example, *George Weston Ltd v Corporate Foods Ltd*, 1988 CanLII 10187 (CA TMOB)]. In this case, the evidence establishes that the Opponent is essentially a web of corporations affiliated with the Astra Capital trade name [see Rafih cross-examination, Q. 36] that has operated a successful business for some time, with revenues in excess of \$1,500,000.00 per year in the five year period prior to the date of Mr. Rafih's affidavit. The Opponent has also expended in excess of \$50,000.00 per year on marketing and promotion in the same period.

[43] Further, I note that each of the invoices submitted (both prior to and after the material date) issued from 2213 North Sheridan Way, and the later invoice dated September 1, 2023, was for rent services. The representative business cards submitted also displayed both this address and the ASTRA PROPERTY GROUP & Design trademark. On the representative pages from the Astra Group's website at <https://astraproperty.com> attached as Exhibit 2 to Mr. Rafih's affidavit, the ASTRA PROPERTY GROUP & Design trademark appears above an image of the Opponent's location at 2213 North Sheridan Way.

[44] When all of the Opponent's evidence is considered together, I find it is reasonable to infer that at least one of the invoices submitted as evidence

was issued by the Opponent or one of its licensees/subsidiaries for rent services prior the filing date of the application. I am therefore satisfied that the Opponent has at least shown use of the trade name ASTRA REALTY MANAGEMENT and the trademark ASTRA PROPERTY GROUP & Design in association with leasing or property management services prior to filing date of the application, as well as continued use after that date.

Likelihood of confusion

[45] In view that the Opponent has met its burden with respect to the ASTRA PROPERTY GROUP & Design trademark (shown below), I must now assess whether this trademark was confusing with the Mark as of the filing date of the application.



[46] If so, the Applicant would not be entitled to registration of the Mark.

[47] The test for confusion is set out in section 6(2) of the Act which provides that the use of a trademark causes confusion with another trademark if the use of both trademarks or trade names in the same area would likely lead to the inference that the goods associated with those trademarks are manufactured or sold by the same person, whether or not the goods are of the same general class or appear in the same class of the Nice Classification. Therefore, section 6(2) of the Act does not deal with

confusion between trademarks themselves, but with the likelihood that goods from one source will be perceived as being from another source.

[48] The test for confusion is assessed as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees an applicant's mark, at a time when they have no more than an imperfect recollection of an opponent's trademark or trade name, and do not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at para 20].

[49] In making such an assessment, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5) of the Act: (a) the inherent distinctiveness of the trademarks or trade names and the extent to which they have become known; (b) the length of time the trademarks or trade names have been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trademarks or trade names, including in appearance or sound or in the ideas suggested by them. These criteria are not exhaustive and different weight will be given to each one in a context specific assessment [*Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 54].

*Inherent distinctiveness of the trademarks and extent to which they have become known*

[50] The inherent distinctiveness of a trademark refers to its originality. Trademarks consisting of or including words or designs that are descriptive of their associated goods or services have a low degree of inherent distinctiveness, and attract a more limited range of protection relative to an invented, unique, or non-descriptive word, or an original design [see *General*



*Motors Corp v Bellows*, [1949] SCR 678, 1949 CanLII 47; see also *Fairmont Resort Properties Ltd v Fairmont Hotel Management LP*, 2008 FC 876].

[51] The Applicant submits that the word ASTRA is a non-distinctive component of both parties' trademarks. I respectfully disagree. In this regard, I do not find that this component suggests anything about either parties' associated services. As both parties' trademarks also include distinctive design elements I find that they each have a fair degree of inherent distinctiveness. The Opponent's trademark is slightly less inherently distinctive than the Mark however because the component PROPERTY is somewhat descriptive of the Opponent's associated services.

[52] The distinctiveness of a trademark may be increased by means of it becoming known in Canada through promotion or use in the marketplace [see *Mondo Foods Co Ltd v TorreMondo Industries Inc*, 2022 FC 926, at para 24].

[53] In his affidavit, Mr. Oshelvskyy states that since the Applicant's incorporation, it has completed over 700 projects (commercial, industrial, multifamily, renovations and general construction, hazmat) across Alberta, BC and Saskatchewan for government agencies and housing corporations including the military. He also states that he has promoted the company in social media extensively, including on the Applicant's website and Instagram social media channel, and has used the Mark in association with his company's services. Mr. Oshelvskyy does not, however, provide any supporting evidence to corroborate any of these statements. The Applicant has therefore not provided any evidence of use of the Mark or the extent to which it has become known in Canada.

[54] As for the Opponent's trademark, as previously noted, its evidence of use or making known of its ASTRA PROPERTY GROUP & Design trademark at

any point prior to the filing of the Applicant's application is lacking. For example, the appearance of this trademark on the Opponent's website is not evidence that Canadians were aware of this trademark to any significant extent [*Symantec Corporation and Veritas Technologies LLC v Det Norske Veritas AS*, 2021 TMOB 143 at para 24]. I therefore only find that the Opponent's trademark has become known to a limited extent in Canada.

[55] Overall, this factor favours the Opponent.

*Length of time in use*

[56] As indicated above, there is no evidence that the Applicant has used the Mark in Canada.

[57] As for the Opponent's ASTRA PROPERTY GROUP & Design trademark, as per my above review of the Rafih evidence, I find that this trademark has been used since at least as early as the filing date of the application. This factor therefore favours the Opponent.

*Nature of the goods, services or business; the nature of the trade*

[58] When considering the goods, services and trades of the parties, it is the statement of goods or services in the Applicant's trademark application and the services for which use has been shown by the Opponent that govern in respect of the issue of confusion arising under section 16.

[59] The Applicant's construction and renovation services are not the same as the Opponent's rent services. However, in view that the applied for services are not restricted in any way, I find that the parties' services could be related. For example, the Applicant could install air conditioning in a unit rented out by the Opponent.

[60] With respect to the parties channels of trade, in the absence of evidence to the contrary, I find it reasonable to infer that the parties' channels of trade could also overlap.

*Degree of resemblance*

[61] While the degree of resemblance is the last factor cited in section 6(5) of the Act, it is the statutory factor that is often likely to have the greatest effect in deciding the issue of confusion [*Masterpiece, supra* at para 49].

[62] When considering the degree of resemblance, the trademarks must be considered in their totality. The appropriate test is not a side by side comparison but a matter of first impression of a consumer with an imperfect recollection of an opponent's trademark [*Veuve Cliquot Ponsardin v Boutiques Cliquot Ltee*, 2006 SCC 23 (CanLII)].

[63] In *Masterpiece*, the Supreme Court of Canada observed that while the first word of a trademark may, for purposes of distinctiveness, be the most important in some cases [*Conde Nast Publications Inc v Union des editions modernes*, 1979 CanLII 4571 (FC)] a preferable approach is to first consider whether there is an aspect of the trademark that is particularly striking or unique [*Masterpiece, supra*, at para 64].

[64] In the present case, I consider the most striking feature of each trademark to be the word ASTRA. Given that this word appears in the dominant first position of the parties' trademarks, and both parties trademarks also include the word GROUP, I find that there is a high degree of resemblance between the marks in appearance and sound. Both marks also suggest a similar idea, namely that the services are being offered by a group associated with the ASTRA name. This factor therefore favours the Opponent.

*Surrounding circumstances - State of the register and state of the marketplace evidence*

[65] Attached as Exhibit B to Mr. Oshelvskyy's affidavit is what he describes as a recent search of the trademark register which he states shows that there are roughly 50 existing registered trademarks with the word ASTRA. He admits, however, that when a similar search was conducted for the word ASTRA for services similar to those of the parties (i.e., those restricted to Nice class 37), the only trademarks which appear are the two registered trademarks of the Opponent and the Mark [Oshelvskyy affidavit, Exhibit C]. A search of the register for "Astra" and use of the words "property", "development", "construction" and "real estate" in the services also only showed the same two registered trademarks of the Opponent and the Mark [Oshelvskyy affidavit, Exhibit D].

[66] State of the register evidence favours an applicant when it can be shown that the presence of a common element in marks would cause consumers to pay more attention to the other features of the marks, and to distinguish between them by those other features [*McDowell v Laverana GmbH & Co KG*, 2017 FC 327 at para 42]. Inferences regarding the state of the marketplace may be drawn from such evidence in two situations: where a large number of relevant registrations are located; and/or where there is evidence of common use in the marketplace of relevant third party marks [*Kellogg Salada Canada Inc v Maximum Nutrition Ltd*, 1992 CanLII 14792 (FCA) ; *McDowell v Laverana GmbH & Co KG*, *supra*, at paras 41-46].

[67] The Opponent pointed out a number of deficiencies with the Applicant's state of the register evidence which I do not consider necessary to go through in detail. Suffice it to say that having identified no relevant third party trademarks including ASTRA in the same or related field, the state of the register evidence does not assist the Applicant.

### *Conclusion*

[68] The legal onus is on the Applicant to show that, on a balance of probabilities, there is no reasonable likelihood of confusion between the marks. Having considered all of the surrounding circumstances, including in particular the high degree of resemblance between the marks, and the fact that the parties' marks would be used with related services, and not withstanding the lack of evidence regarding the extent known of the Opponent's trademark as of the material date, I conclude that the probabilities as to a likelihood of confusion are equal. When the probabilities are equal, the Applicant has not met its burden. In other words, the Applicant has not satisfied me that, on a balance of probabilities, a Canadian who has an imperfect recollection of the Opponent's ASTRA PROPERTY GROUP & Design trademark associated with rent services would not, as a matter of first impression, assume that the Applicant's services related to construction and renovation originate from the same source or are otherwise related or associated with the Opponent's services.

[69] The section 16(1)(a) ground is therefore successful.

### ***Section 30(2)(a) – Ordinary commercial terms***

[70] The Opponent pleads that the application does not comply with section 30(2)(a) of the Act in that it does not contain a statement in ordinary commercial terms of each of the specific services in association with which the alleged trademark is proposed to be used. The Opponent submits that the services are defined in an overly broad way and are not what the Applicant intends to use the Mark for.

[71] Section 30(2)(a) of the Act requires an application to contain "a statement in ordinary commercial terms of the goods or services in association with which the trademark is used or proposed to be used".

[72] The Opponent relies on the Applicant's own evidence and admissions on cross-examination to meet its burden. In this regard, the Opponent submits that Mr. Oshelvskyy was not able to answer questions concerning the litany of services asserted in the Applicant's application. For example, the affiant could not answer the question about what the differences were between the services described as maintenance versus those described as repair [Oshelvskyy cross-examination, Qs. 113-131].

[73] I dismiss the Opponent's submissions regarding Mr. Oshelvskyy's answers on cross-examination, as I find that those questions and answers were more directed to the similarities and differences between repair and maintenance services as opposed to whether the Applicant's services were described in ordinary commercial terms. The absence of a statement that the Applicant has used the Mark with specific services is not relevant. Further, as pointed out by the Applicant, each of these services are listed as acceptable services in the Trademarks Office *Goods and Services Manual*. Therefore, as the Opponent has not otherwise shown how the application does not conform to the requirements of section 30(2) of the Act, the Opponent fails to meet its burden under this ground and it is therefore rejected.

***Section 12(1)(d) - Registrability***

[74] The Opponent pleads that the Mark is not registrable having regard to section 12(1)(d) of the Act in that it is confusing with its registered trademarks ASTRA PROPERTY GROUP (TMA1167255) or ASTRA PROPERTY GROUP & Design (TMA1167256) both registered in association with the following services:

Evaluation of real property; property evaluation; property management; property management consulting services; residential property investment; commercial property investment; rental of commercial property; building management; building leasing; land leasing; leasing of apartments; leasing

of office space; acquisition of real estate for others; appraisal of real estate; assessment and management of real estate; real estate appraisal and valuation; real estate brokerage; real estate consultation; real estate investment services

[75] As noted above, I disagree with the Applicant that any confusion between these trademarks and the Mark was disclaimed by the Opponent when it deleted the single Nice class of services which were found by the Trademark Examiner to overlap with the Mark in order to obtain its registrations.

[76] The only difference between this ground and the section 16(1)(a) ground therefore is the material date (which is the date of decision for the section 12(1)(d) ground) and the services associated with the Opponent's registered trademark versus those services for which the Opponent has shown use.

[77] I will begin by noting that I consider the evidence of use of the design mark ASTRA PROPERTY GROUP & Design (TMA1167256) to also constitute use of the word mark ASTRA PROPERTY GROUP (TMA1167255) [see *Nightingale Interloc v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB)].

[78] The difference in material dates only strengthens my analysis of the issue of confusion, as the Opponent's ASTRA PROPERTY GROUP & Design trademark has acquired greater distinctiveness by the later date.

[79] Regarding the differences between the parties' services, the Applicant acknowledged in its written submissions that its construction and renovation services are related to the Opponent's property management and rental services. The Applicant also conceded that it would be reasonable to conclude there may be some overlap in the parties' respective channels of trade.

[80] In view of the above, I reach the same conclusion as I did under the section 16(1)(a) ground. The section 12(1)(d) ground is therefore also successful.

**REMAINING GROUND OF OPPOSITION**

[81] In view that the Opponent was successful with respect to at least two grounds of opposition, it is not necessary for me to address the remaining ground.

**DISPOSITION**

[82] In view of the above, and pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application pursuant to section 38(12) of the Act.

Cindy R. Folz  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office



## **SCHEDULE A**

### ***Opponent's trademark registrations and applications***

<b>Trademark</b>	<b>Application or Registration No.</b>	<b>Goods/Services</b>
ASTRA PROPERTY GROUP	TMA1167255	(1) Evaluation of real property; property evaluation; property management; property management consulting services; residential property investment; commercial property investment; rental of commercial property; building management; building leasing; land leasing; leasing of apartments; leasing of office space; acquisition of real estate for others; appraisal of real estate; assessment and management of real estate; real estate appraisal and valuation; real estate brokerage; real estate consultation; real estate investment services
ASTRA PROPERTY GROUP & DESIGN	TMA1167256	(1) Evaluation of real property; property evaluation; property management; property management consulting services; residential property investment; commercial property investment; rental of commercial property; building management; building leasing; land leasing; leasing of apartments; leasing of office space; acquisition of real estate for others; appraisal of real estate; assessment and management of real estate; real estate appraisal and valuation; real estate brokerage; real estate consultation; real estate investment services

ASTRA REALTY	Application No. 2199673	<p>(1) Evaluation of real property; property evaluation; property management; property management consulting services; residential property investment; commercial property investment; rental of commercial property; building management; building leasing; land leasing; leasing of apartments; leasing of office space; acquisition of real estate for others; appraisal of real estate; assessment and management of real estate; real estate appraisal and valuation; real estate brokerage; real estate consultation; real estate investment services</p> <p>(2) Land development; advisory services relating to the construction of buildings; building construction services; building construction supervision; maintenance and repair of buildings; restoration of buildings; supervisor of building construction; real estate development</p>
ASTRA REALTY MANAGEMENT	Application No. 2199674	<p>(1) Evaluation of real property; property evaluation; property management; property management consulting services; residential property investment; commercial property investment; rental of commercial property; building management; building leasing; land leasing; leasing of apartments; leasing of office space; acquisition of real estate for others; appraisal of real estate; assessment and management of real estate; real estate appraisal and valuation; real estate brokerage;</p>

		<p>real estate consultation; real estate investment services</p> <p>(2) Land development; advisory services relating to the construction of buildings; building construction services; building construction supervision; maintenance and repair of buildings; restoration of buildings; supervisor of building construction; real estate development</p>
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**SCHEDULE B****OPPONENT'S TRADE NAMES**

<b>TRADE NAME</b>	<b>BUSINESS</b>
ASTRA CAPITAL INCORPORATED	(1) Evaluation of real property; property evaluation; property management; property management consulting services; residential property investment; commercial property investment; rental of commercial property; building management; building leasing; land leasing; leasing of apartments; leasing of office space; acquisition of real estate for others; appraisal of real estate; assessment and management of real estate; real estate appraisal and valuation; real estate brokerage; real estate consultation; real estate investment services (2) Land development; advisory services relating to the construction of buildings; building construction services; building construction supervision; maintenance and repair of buildings; restoration of buildings; supervisor of building construction; real estate development
ASTRA CAPITAL PROPERTIES INCORPORATED	
ASTRA CAPITAL PROPERTIES	
ASTRA PROPERTIES	
ASTRA CAPITAL	
ASTRA PROPERTY GROUP	
ASTRA REALTY	
ASTRA REALTY MANAGEMENT	

# Appearances and Agents of Record

**HEARING DATE:** 2025-03-18

## **APPEARANCES**

**For the Opponent:** Stephen Selznick

**For the Applicant:** Shaun B. Cody

## **AGENTS OF RECORD**

**For the Opponent:** Cassels, Brock & Blackwell

**For the Applicant:** New Horizon Law