



absence of such use since that date. In this case, the relevant period for showing use is November 6, 2015, to November 6, 2018.

[3] In response to the notice, the Owner furnished the affidavit of Jeanne Lottie, sworn January 28, 2019. Both parties submitted written representations. No oral hearing was held.

[4] The relevant definition of use is set out in section 4(1) of the Act as follows:

4(1) A trademark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

[5] As a preliminary matter, I note that in its written representations, the Owner includes and refers to a number of facts not in evidence. Pursuant to sections 45(1) and (2) of the Act, I can only consider evidence submitted in the form of an affidavit or statutory declaration filed within three months of the date of the Registrar's notice, plus any extensions granted under section 47. The alleged facts referred to in the Owner's written representations are not in the form of an affidavit or statutory declaration and were filed outside of the prescribed time; accordingly, I cannot consider them [*Ridout & Maybee LLP v Encore Marketing International Inc* (2009), 72 CPR (4th) 204 (TMOB)].

[6] The Lottie Affidavit consists of a single sentence: "Jeanne lottie has used the registered trade mark of Diamond Rose, TMA703,377 during the last three year period." No exhibits were attached to the affidavit.

[7] In its written representations, the Requesting Party raises a number of issues with respect to the Lottie Affidavit, noting that it contains only a bare assertion of use; that it refers to an individual, rather than the Owner, using a trademark identified as "Diamond Rose"; and that it makes no reference to the registered goods or the relevant period.

[8] I concur with the Requesting Party that the Owner's affidavit is insufficient to establish use of the Mark in association with any of the registered goods. As was the case in *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA), the affidavit consists only of a bare assertion that the Mark has been in use, with no factual evidence to corroborate the

affiant's assertion. Such statements are not sufficient to demonstrate use in the context of section 45 proceedings. As a result, even if I were to accept that the "Jeanne lottie" referenced in the affidavit refers to the Owner, that "Diamond Rose" refers to the Mark, and that the use of the Mark referenced in the affidavit refers to use in association with the registered goods during the relevant period, I cannot conclude that the Owner has used the Mark within the meaning of the Act in the absence of evidence demonstrating such use.

[9] As such, I am not satisfied that the Owner has demonstrated use of the Mark in association with the registered goods within the meaning of sections 4 and 45 of the Act. Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be expunged in compliance with the provisions of section 45 of the Act.

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G.M. Melchin  
Hearing Officer  
Trademarks Opposition Board  
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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**HEARING DATE:** No Hearing Held

**AGENTS OF RECORD**

No Agent Appointed

For the Registered Owner

Sander R. Gelsing

For the Requesting Party