IN THE MATTER OF AN OPPOSITION by CORANCO CORPORATION LIMITED to application No.796,371 for the trade-mark EURO-CUISINE filed by SWISSMAR IMPORTS LTD.

On November 2, 1995, the applicant, SWISSMAR IMPORTS LTD., filed an application to register the trade-mark EURO-CUISINE based on proposed use of the trade-mark in Canada in association with "Cookware, namely saucepans, sauté pans, pots, frying pans, stockpots and metal cooking pans".

The present application was advertised for opposition purposes in the ***Trade-marks Journal*** of April 3, 1996 and the opponent, CORANCO CORPORATION LIMITED, filed a statement of opposition on May 30, 1996 which was amended on July 5, 1996 in response to objections raised by the Opposition Board to the original statement of opposition. A copy of the amended statement of opposition was forwarded to the applicant on July 18, 1996 and the applicant served and filed a counter statement in response to the amended statement of opposition on November 13, 1996. The opponent subsequently requested and was granted leave on August 6, 1997 to file a re-amended statement of opposition pursuant to Rule 40 of the ***Trade-marks Regulations***. Likewise, the applicant requested and was granted leave pursuant to Rule 40 of the ***Regulations*** to amend its counter statement on September 28, 1998. The opponent submitted as its evidence the affidavits of Nathalie Lemire, John P. Colfer and Anne-Marie Dubé, together with certified copies of the following registered trade-marks: EUROCHEF, registration No. 415,530; EUROCOLLECTION, registration No. 469,325; MAPLE LEAF EUROPEAN CUISINE, registration No. 187,597; and MAPLE LEAF EUROPEAN CUISINE & Design, registration No. 192,164. The applicant filed as its evidence the affidavits of Daniel Oehy and William Barlow, together with a certified copy of the registered trade-mark EUROPRO, registration No. 458,163. The opponent alone filed a written argument and an oral hearing was not requested by either party.

The following are the grounds of opposition relied upon by the opponent in its re-amended statement of opposition:

a) The present application does not comply with Subsection 30(i) of the ***Trade-marks Act*** in that the applicant could not state in its application that it was satisfied

that it was entitled to use the trade-mark EURO-CUISINE;

b) The trade-mark EURO-CUISINE is not registrable in view of Paragraph 12(1)(b) of the ***Trade-marks Act*** since the word CUISINE, for which no disclaimer of the right to the exclusive use thereof has been entered, falls squarely within the prohibition set forth in Paragraph 12(1)(b);

c) The trade-mark EURO-CUISINE is not registrable in view of Paragraph 12(1)(d) of the ***Trade-marks Act*** since it is confusing with the opponent's following registered trade-marks:

Trade-mark	*Registration No.*	*Wares/Services*
EUROCHEF	415,530	Cookware and kitchen accessories, namely saucepans, sauté pans, frying pans, pots, metal cooking pans, colanders and steamers.
EUROCOLLECTION	460,325	Cookware and kitchen accessories, namely kettles, saucepans, sauté pans, frying pans, pots, metal cooking pans, colanders and steamers.

As well, the applicant's trade-mark is confusing with the following registered trade-marks standing in the name of Maple Leaf Foods Inc.:

Trade-mark	*Registration No.*	*Wares/Services*
MAPLE LEAF EUROPEAN CUISINE & Design	192,164	Meats and meat products, namely, smoked, cooked, cured and fresh meats, or otherwise processed.
MAPLE LEAF EUROPEAN CUISINE & Design	187,597	Meats and meat products, namely, smoked, cooked, cured and fresh meats, or otherwise processed.
EUROPEAN CUISINE	187,586	Preserved meats and meat products; namely, cooked, smoked and dried sausage; canned meats, meat spreads, meat stews; snack foods, namely cheese.

d) The applicant is not the person entitled to registration of the trade-mark EURO-CUISINE in view of Subsection 16(3) of the ***Trade-marks Act*** since, at the filing date of the present application, the applicant's trade-mark was confusing with:

i) the opponent's registered trade-marks identified above which were extensively used or made known in Canada and for which applications were filed prior to the applicant's filing date;

ii) the trade-mark EUROPA which the opponent has extensively used or made known in Canada since at least as early as May 1992 in association with the following wares: "Cookware and kitchen accessories, namely saucepans, sauté pans, frying pans, pots, metal cooking pans, colanders and steamers";

e) The applicant's trade-mark EURO-CUISINE is not distinctive in that it does not distinguish nor is it adapted to distinguish the wares of the applicant from the wares and services of others, and more particularly those of the opponent.

With respect to the first ground of opposition, the legal burden is on the applicant to show that its application complies with Subsection 30(I) of the ***Act***. This includes both the question as to

whether or not the present application formally complies with the requirements of Section 30 and the question as to whether or not the statements contained in the application are correct. However, to the extent that the opponent relies on allegations of fact in support of its Section 30 grounds, there is an initial evidential burden on the opponent to prove those allegations [see ***Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.***, 3 C.P.R. (3d) 325, at pp. 329-330]. To meet the evidential burden upon it in relation of a particular issue, the opponent must adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support that issue exist [see ***John Labatt Limited v. The Molson Companies Limited***, 30 C.P.R. (3d) 293, at p. 298]. Also, the material time for considering the circumstances respecting the issue of non-compliance with Section 30 of the ***Act*** is the filing date of the present application [see ***Georgia-Pacific Corp. v. Scott Paper Ltd.***, 3 C.P.R.(3d) 469, at p. 475].

The opponent has not alleged any facts in support of its allegation that the applicant could not state in its application that it was satisfied that it was entitled to use the trade-mark EURO-CUISINE. As a result, the first ground is contrary to Paragraph 38(3)(a) of the ***Trade-marks Act***. Moreover, even were the Subsection 30(i) issue to be arguably founded upon allegations set forth in the remaining grounds of opposition, the success of the Subsection 30(i) ground would have been contingent upon a finding that the applicant's trade-mark EURO-CUISINE is not registrable or not distinctive, or that the applicant is not the person entitled to its registration, as alleged in those grounds [see ***Consumer Distributing Co. Ltd. v. Toy World Ltd.***, 30 C.P.R. (3d) 191, at p.195; and ***Sapodilla Co. Ltd. v. Bristol-Myers Co.***, 15 C.P.R. (2d) 152, at p.155]. I have therefore dismissed the Subsection 30(i) ground.

As its second ground, the opponent has asserted that the word CUISINE in the applicant's mark is objectionable under Paragraph 12(1)(b) of the ***Act*** and, since the applicant has not disclaimed the word CUISINE apart from its trade-mark, the applicant's trade-mark is not registrable in view of Paragraph 12(1)(b) of the ***Trade-marks Act***. As the opponent's allegation does not relate to the applicant's trade-mark EURO-CUISINE in its entirety being contrary to the provisions of Paragraph 12(1)(b), the opponent's allegation does not support a Paragraph 12(1)(b) ground. In this regard, in the case of ***Canadian Schenley Distilleries Ltd. v. Registrar of Trade Marks and Bodegas Rioja***

Santiago, S.A., 15 C.P.R. (2d) 1, at p. 10, Mr. Justice Heald dismissed a similar allegation for the reason that it is not a proper ground of opposition, stating:

> "His submission was that the Registrar should have required a disclaimer of the word "Sant'Gria" and that his failure to do so is a ground for refusal of registration. The short answer to this proposition is that there is no provision in s. 37(2) for such a ground to be a basis for opposition to registration. It may well be that the Registrar should, in accepting subject application, have required such a disclaimer, or it may be that he should still do so at the time registration is granted (if he has that power under s. 34, as to which question, it is unnecessary for me to express an opinion). The fact remains that as I read s. 37(2), a failure to disclaim is not a ground of opposition. It seems to me that the proper time for the appellant to raise his argument on disclaimer (since its counsel conceded at trial that this was, in reality, their only objection to registration) would be after registration. At that time, an appeal would be open to the appellant either under s. 56 or s. 57 of the Act."

Even were the opponent's ground to be interpreted as alleging that the applicant's trade-mark EURO-CUISINE in its entirety is clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's wares, no evidence has been furnished by the opponent which might arguably support such an allegation. Consequently the opponent has failed to meet its initial evidential burden of adducing sufficient evidence which, if believed, would support the allegation that the trade-mark EURO-CUISINE is either clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's wares. I have therefore dismissed the second ground of opposition.

The third ground is based on Paragraph 12(1)(d) of the ***Act***, the opponent alleging that the trade-mark EURO-CUISINE is confusing with its registered trade-marks EUROCHEF and EUROCOLLECTION, registration Nos. 415,530 and 460,325, as well as being confusing with the registered trade-marks EUROPEAN CUISINE, registration No. 187,597, MAPLE LEAF EUROPEAN CUISINE & Design, registration No. 192,164 and MAPLE LEAF EUROPEAN CUISINE & Design, registration No. 187,597. In determining whether there would be a reasonable likelihood of confusion between the trade-marks at issue, the Registrar must have regard to all of the surrounding circumstances including those specifically set forth in Subsection 6(5) of the ***Trade-mark Act***. Further, the Registrar must bear in mind that the onus or legal burden is on the applicant to show that there would be no reasonable likelihood of confusion between the trade-marks at issue as of the date of my decision, the material date with respect to the Paragraph 12(1)(d) ground of opposition [see ***Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The***

Registrar of Trade Marks, 37 C.P.R. (3d) 413 (F.C.A.)].

With respect to the issue of confusion between the applicant's trade-mark and the opponent's registered trade-marks, and considering initially the inherent distinctiveness of these marks [Para. 6(5)(a)], the applicant's trade-mark EURO-CUISINE possesses some minor degree of inherent distinctiveness when considered in its entirety as applied to saucepans, sauté pans, pots, frying pans, stockpots and metal cooking pans, the mark suggesting that the applicant's wares are used for European-style cooking. The opponent's registered trade-marks both possess a limited degree of inherent distinctiveness, the mark EUROCOLLECTION suggesting that the wares covered in registration No. 460,325 are a collection of cookware and kitchen accessories emanating from Europe while the opponent's mark EUROCHEF as applied to the wares covered in registration No. 415,530 suggests that these wares are used by European chefs or, as in the case of the applicant's mark, may suggest to some consumers that the wares associated with the trade-mark are used for European-style cooking.

As for the extent to which the trade-marks at issue have become known [Para. 6(5)(a)] and the length of time the marks have been in use [Para. 6(5)(b)], John P. Colfer, President of the opponent, attests to sales of the opponent's EUROCHEF wares in Canada since 1993 and its EUROCOLLECTION wares since 1995, the total sales of its cookware and kitchen accessories associated with these marks since 1993 and 1995 being, respectively, in excess of $1,894,000 and $2,858,000. In his affidavit, Daniel Oehy, President of the applicant, states that his company has sold EURO-CUISINE wares in Canada since October of 1995, the total sales for 1995 and 1996 being somewhat in excess of $325,000. Mr. Oehy also noted that the applicant has sold cookware and kitchen gadgets in Canada since October 1993 under the trade-mark EUROPRO, the total sales up to 1997 being $351,600. Thus, the extent to which the trade-marks at issue have become known in Canada favours the opponent, as does the length of time the marks have been in use in relation to its trade-mark EUROCHEF.

With respect to the nature of the wares of the parties [Para. 6(5)(c)] and the nature of the trade [Para. 6(5)(d)] associated with their respective wares, it is the applicant's statement of wares

and the statements of wares covered in registration Nos. 415,530 and 460,325 which must be considered in assessing the likelihood of confusion in relation to the Paragraph 12(1)(d) ground [see ***Mr. Submarine Ltd. v. Amandista Investments Ltd.***, 19 C.P.R.(3d) 3, at pp. 10-11 (F.C.A.); ***Henkel Kommanditgesellschaft v. Super Dragon***, 12 C.P.R.(3d) 110, at p. 112 (F.C.A.); and ***Miss Universe, Inc. v. Dale Bohna***, 58 C.P.R.(3d) 38,1 at pp. 390-392 (F.C.A.)]. In the present opposition, the applicant's "saucepans, sauté pans, pots, frying pans, stockpots and metal cooking pans" are identical to the opponent's "saucepans, sauté pans, frying pans, pots and metal cooking pans" covered in its registrations. Consequently, the channels of trade associated with the wares of the parties either could or would overlap.

As for the degree of resemblance [Para. 6(5)(e)] between the trade-marks at issue, there is a fair degree of similarity between the trade-marks EURO-CUISINE and EUROCHEF in appearance and in the ideas suggested and some minor degree of similarity in their sounding. Further, there is some similarity in appearance between the applicant's mark EURO-CUISINE and the registered trade-mark EUROCOLLECTION although these marks differ in their sounding and in the ideas which they suggest.

As a further surrounding circumstance in assessing the likelihood of confusion between the trade-marks at issue, the applicant submitted state of the register evidence by way of the affidavit of William Barlow. Mr. Barlow conducted a manual search of the records and indices of the Canadian Trade-marks Office to locate registrations and pending applications for or involving the words EURO, EUROPA, EUROPEAN and CUISINE for cookware; meat and meat products; and cheese. However, I consider the registrations and pending applications covering meat and meat products, and/or cheese to be of little, if any, relevance to the determination of the issue of confusion between the applicant's mark and the opponent's registered trade-marks. Indeed, the search results revealed the existence of only one relevant registration, that being for the trade-mark EUROPA covering soup plates, dessert plates, dinner plates, tea cups and saucers. However, the trade-mark EUROPA bears relatively little similarity to the trade-marks at issue and therefore is of limited relevance to the determination of the issue of confusion between the applicant's mark and the opponent's registered trade-marks. Furthermore, state of the register evidence is only relevant insofar as one can make

inferences from it about the state of the marketplace [see ***Ports International Ltd. v. Dunlop Ltd.***, 41 C.P.R.(3d) 432 and ***Del Monte Corporation v. Welch Foods Inc.***, 44 C.P.R.(3d) 205 (F.C.T.D.)]. Also, the decision of the Federal Court of Appeal in ***Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd.***, 43 C.P.R.(3d) 349 (F.C.A.) is support for the proposition that inferences about the state of the marketplace can only be drawn from state of the register evidence where large numbers of relevant registrations are located. In the present case, no meaningful inferences can be drawn concerning the state of the marketplace from the existence of only one relevant trade-mark registration. I am therefore not prepared to accord any weight to the applicant's state of the register evidence.

As yet a further surrounding circumstance in assessing the likelihood of confusion between the trade-marks at issue, the applicant has relied on its registration and use of its trade-mark EUROPRO in Canada in association with cookware and kitchen gadgets since October 1993, the applicant's total sales of such wares from 1993 to 1997 inclusive being $351,600. This evidence is of at least some relevance to the determination of the issue of confusion between the applicant's trade-mark and the opponent's trade-marks EUROCHEF and EUROCOLLECTION. However, the applicant's registration and use of the trade-mark EUROPRO does not *per se* entitle it to obtain registration for its trade-mark EURO-CUISINE, nor does it establish any measure of common adoption of trade-marks having the EURO prefix in the cookware area.

Having regard to the foregoing and, in particular, to the degree of resemblance between the applicant's trade-mark EURO-CUISINE and the opponent's registered trade-mark EUROCHEF in appearance and in the ideas suggested, and bearing in mind that the wares of the parties are identical and could travel through the same channels of trade, and even considering the applicant's evidence of limited use of its EUROPRO trade-mark, I find that the applicant has failed to meet the legal burden upon it of satisfying the Registrar that there would be no reasonable likelihood of confusion between the trade-marks at issue. As a result, the applicant's trade-mark EURO-CUISINE is not registrable in view of Paragraph 12(1)(d) of the ***Trade-marks Act***.

The opponent has also relied on three third party registrations standing in the name of Maple

Leaf Foods Inc. under the Paragraph 12(1)(d) ground of opposition. However, the three Maple Leaf registrations cover meats and meat products which are unrelated to the applicant's cookware and would travel through different channels of trade from the wares of the applicant. Moreover, the state of the register evidence points to the existence of several other third party registrations for trade-marks having the prefix EURO as applied to food products. I have concluded therefore that there would be no reasonable likelihood of confusion between the applicant's trade-mark EURO-CUISINE and any of the third party registrations relied upon by the opponent. Thus, this aspect of the third ground is unsuccessful.

The fourth ground relates to the applicant's entitlement to registration of the trade-mark EURO-CUISINE, the opponent relying on its use and making known of its registered trade-marks and its trade-mark EUROPA since May 1992 in association with "Cookware and kitchen accessories, namely saucepans, sauté pans, frying pans, pots, metal cooking pans, colanders and steamers" prior to the applicant's filing date [November 2, 1995], as well as its previously filed application for the trade-marks EUROCHEF and EUROCOLLECTION. As the opponent's evidence fails to establish its prior making known of any of its trade-marks within the scope of Section 5 of the ***Trade-marks Act***, I have dismissed this aspect of the fourth ground. Further, while the Colfer affidavit establishes the opponent's prior use and non-abandonment of its trade-marks EUROCHEF and EUROPA in Canada, the opponent's evidence does not clearly establish that it used its trade-mark EUROCOLLECTION in Canada prior to November 2, 1995 although the Colfer affidavit points to the opponent having commenced use of its mark EUROCOLLECTION some time in 1995. In any event, and having regard to my previous comments concerning the surrounding circumstances in assessing the likelihood of confusion between the trade-marks EURO-CUISINE and EUROCHEF in relation to the Paragraph 12(1)(d) ground, I find that there would be a reasonable likelihood of confusion between these trade-marks as of the filing date of the present application. Thus, the fourth ground is also successful in relation to the opponent's trade-mark EUROCHEF.

With respect to the opponent's reliance on its previously filed applications, the opponent's application for the trade-mark EUROCHEF had already matured to registration as of the date of advertisement of the present application and therefore was not pending as of the material date, as

required by Subsection 16(4) of the ***Trade-marks Act***. On the other hand, the opponent's application for registration of the trade-mark EUROCOLLECTION was filed prior to the filing date of the present application and was still pending as of April 3, 1996. It therefore qualifies as a previously filed application which can support a ground of opposition under Paragraph 16(3)(b) of the ***Trade-marks Act***. Again, in assessing whether there would be a reasonable likelihood of confusion between the applicant's trade-mark EURO-CUISINE and the opponent's trade-mark EUROCOLLECTION as of the filing date of the present application, the Registrar must have regard to all of the surrounding circumstances including those specifically set forth in Subsection 6(5) of the ***Trade-mark Act***. Further, the Registrar must bear in mind that the onus or legal burden is on the applicant to show that there would be no reasonable likelihood of confusion between the trade-marks at issue as of the applicant's filing date.

With respect to the inherent distinctiveness of these marks, both the applicant's trade-mark EURO-CUISINE and the opponent's trade-mark EUROCOLLECTION possess little inherent distinctiveness and, as of the applicant's filing date, neither trade-mark had become known to any extent in Canada. Likewise, the length of time the marks had been in use as of November 2, 1995 does not favour either party. However, the wares and channels of trade associated with these marks overlap and, as noted previously, there is some similarity in appearance between the applicant's mark EURO-CUISINE and the trade-mark EUROCOLLECTION although these marks differ in their sounding and in the ideas which they suggest.

Given the overlap in the wares and channels of trade of the parties and the fact that there is some visual similarity between the trade-marks EURO-CUISINE and EUROCOLLECTION, and even bearing in mind that the applicant had commenced use of its EUROPRO trade-mark in Canada as of the filing date of its present application, I remain in doubt in relation to the determination of the issue of confusion between these marks. I have therefore resolved that doubt against the applicant who has the burden of satisfying the Registrar that there would have been no reasonable likelihood of confusion between the applicant's mark and the trade-mark EUROCOLLECTION as of the filing date of the present application. Thus, this aspect of the non-entitlement ground is also successful.

Having regard to the foregoing, I do not propose to consider the remaining grounds of opposition relied on by the opponent. I would note, however, that the final ground would likely have been found to have been successful in view of my conclusions relating to the Paragraphs 12(1)(d) and 16(3)(a) grounds.

Having been delegated by the Registrar of Trade-marks by virtue of Subsection 63(3) of the ***Trade-marks Act***, I refuse the applicant's application pursuant to Subsection 38(8) of the ***Trade-marks Act.***

DATED AT HULL, QUEBEC THIS 28th DAY OF APRIL, 2000.

G.W.Partington,
Chairperson,
Trade-marks Opposition Board.