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**MAPLE LEAF FOODS INC.**  
**DIRECTOR “INDEPENDENCE” AND DISCLOSURE**

**Introduction**

The annual meeting of shareholders of Maple Leaf Foods Inc. (MFI : TSX) on April 28, 2011, publicly displayed the successful defence and maintenance of a controlling influence over the Company by the family of the late Wallace McCain, the control of which company came under challenge in the prior year. In the absence of the Chairman of the Board, Wallace McCain, due to illness<sup>1</sup>, Purdy Crawford chaired the meeting in his capacity as the Lead Director and Vice Chair of Maple Leaf Foods.<sup>2</sup> In his address, Michael McCain, the President and CEO, told the shareholders, with the confidence and conviction of a leader firmly in control, that “we will deliver on the promise” that the Company’s value creation plan would increase EBITDA margins from 7.3% in 2010 to 12.5% in 2015.

From June 30, 2010 into early 2011, Maple Leaf Foods and its shareholders experienced another period of turbulence. As a result of the termination of the Shareholders Agreement between McCain Capital Corporation (“McCain Capital”) and Ontario Teachers’ Pension Plan (“OTPP”) on June 30, 2010, the Wallace McCain family’s controlling influence over Maple Leaf Foods was placed in a perilous position of potential vulnerability. Through their Shareholders Agreement (which had been replaced and revised in November, 2001), McCain Capital and OTPP had together exercised control since their joint acquisition of the Company from Hillside Holdings plc in April 1995. As a result of OTPP’s decision to exit its relationship with McCain Capital and the subsequent disposition of OTPP’s entire 36% MFI share interest in the second half of 2010, McCain Capital was left as the largest single shareholder with 31.34% of the voting shares. When the Company was threatened with a public proxy contest for control

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<sup>1</sup> Wallace McCain died on May 13, 2011, after a 14 month battle with pancreatic cancer at the age of 81. See, [www.wallacemccaintribute.ca](http://www.wallacemccaintribute.ca), for a tribute to this great Canadian businessman and leader of the Canadian food industry.

<sup>2</sup> Following the passing of Wallace McCain, Purdy Crawford was appointed Chairman of the Board of Maple Leaf Foods effective June 22, 2011.

of its Board, Maple Leaf Foods was pressured to reach an accord and enter into a formal Settlement Agreement with a new activist shareholder, West Face Capital Inc. (“West Face Capital”) which had challenged the McCain incumbency. This settlement was reached only after the Company had entered into key consultations with other large shareholders. “They had heard from other shareholders”, it was reported, which convinced the Board to reach a settlement. The West Face Capital hedge fund, which privately acquired a 11.35% MFI voting share interest from OTPP in August 2010, had filed a requisition calling for a special shareholders’ meeting to approve non-binding advisory votes to implement changes to the membership of MFI’s Board, introduce stricter corporate governance standards for director independence, and adopt a ‘Say on Pay’ policy for shareholders. As part of the settlement, West Face Capital withdrew its requisition and proxy challenge and obtained one seat on the 14 member Board, with future Board changes to come in 2012.

One of the main governance issues that was hotly debated during this test to the McCain family’s supremacy was the questioning of the independence of MFI’s Lead Director, an important and pivotal governance role in a controlled public company where the Chairman of the Board is not independent. The position of a Lead Director, in such circumstances, is a critical forum from which to provide leadership to the independent directors of the Board in fulfilling their stewardship and fiduciary duties independently of management and in the best interests of the Company.

### **Summary of the Principal Events**

The series of unfolding events that ensued following OTPP’s decision to terminate the Shareholders Agreement are highlighted below. OTPP apparently exited MFI because of its reported ‘profound dissatisfaction’ with Maple Leaf Foods’ disappointing financial results and poor share performance and its ‘stressful series of boardroom disagreements’ with MFI’s CEO and Board over the Company’s future strategy including large capital expenditures of \$1.3 billion to modernize its operations.

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| April 24, 2008:    | Claude Lamoureux was elected as an independent director of MFI following his retirement in December 2007 as CEO of OTPP, an executive officer position with OTPP held since 1990. OTPP then held 33% of the MFI shares.   |
| December 16, 2008: | OTPP increased its investment by private placement in MFI treasury common shares and warrants for \$52.1 million out of a total \$70 million offering. OTPP then owned 36.39% of the MFI shares, assuming exercise and conversion of its holdings into common shares. |
| February 24, 2009: | Two executive officers of OTPP were appointed to the MFI Board as independent directors.  |
| July 29, 2009:     | OTPP confirmed that it delivered notice to McCain Capital to terminate their Shareholders Agreement with effective June 30, 2010, stating that it no longer needed the formal legal agreement   |

that was entered into when OTPP and McCain Capital purchased their combined stake in MFI.

June 29, 2010: MFI announced that its Board adopted a 'poison pill', with immediate effect, based on the recommendation of a Special Committee formed to consider matters arising out of OTPP's termination of the Shareholders Agreement with McCain Capital. The 'poison pill' was triggered on the acquisition or potential acquisition of 20% of MFI's voting common shares.

This defensive manoeuvre effectively blocked OTPP from selling its share block as an entirety to a single purchaser or related group of purchasers.

June 30, 2010: The Shareholders Agreement between OTPP and McCain Capital terminated. OTPP announced its rejection of MFI's adoption of a 'poison pill'.

August 10, 2010: OTPP announced that it sold common shares (at a price representing \$8.25 per common share) and warrants of MFI to West Face Capital, reducing its interest from approximately 36% to 25.23%.

August 11, 2010: MFI stated that the mandate of its previously announced Special Committee was exclusively to monitor the process the Company may take in connection with the potential sale of OTPP's stake in MFI and other matters that may arise from the termination of the Shareholders Agreement.

(The Special Committee held 19 meetings in 2010.)

October 28, 2010: MFI announced that the two directors representing OTPP resigned from the Board after their unsuccessful request to amend the minutes of a previous Board meeting approving the Company's value creation plan to reflect that their approval was conditional on completion of analysis by management, satisfactory to OTPP. The Chair of the MFI Corporate Governance Committee said that the resignations were accepted, but the reasons given were inconsistent with their repeated support for the Company's strategy.

November 5, 2010: MFI formed a Shareholder Relations Committee to support renewal of the Board.

November 23, 2010: OTPP and MFI announced a 'bought deal' whereby OTPP would sell its entire remaining 25% stake in Maple Leaf by way of a secondary distribution through underwriters.

November 29, 2010: MFI filed a preliminary short form prospectus to qualify OTPP's secondary offering for sale to the public.

November 29, 2010: News reports disclosed that MFI's Lead Director, Mr. Purdy Crawford who was judged independent by the Corporate Governance Committee and the Board, was and had been for several years a director of McCain Capital, relationships not previously disclosed.

A press report stated that OTPP became aware of the Lead Director's dual roles in the summer of 2010.

The Chair of MFI's Corporate Governance Committee and Mr. Purdy Crawford commented that Mr. Crawford was not a member of the Special Committee that considered the Company's relationships with OTPP and West Face Capital.

December 3, 2010: After unsuccessful discussions with the MFI Board, West Face Capital filed a requisition with MFI to call a special shareholders' meeting to vote on the following five non-binding advisory resolutions;

1. to reduce the MFI Board from 14 to nine members;
2. to require that no less than two-thirds of the directors be independent (in accordance with stricter standards proposed by West Face Capital);
3. to require Board committees be composed solely of independent directors;
4. to retain a search firm to identify candidates that meet the stricter independence standards for nomination for election in 2011;
5. to adopt a policy for an annual non-binding advisory vote on 'Say on Pay'.

West Face Capital stated that there are "deficiencies ... in critical areas such as board independence and corporate governance". It also said that, after having been "rebuffed on several occasions when we have raised these concerns with management and the board of directors, we have concluded that the board needs to hear a strong message from shareholders that the independence and governance practices of Maple Leaf do not satisfy their expectations or today's standards of good corporate governance."

- December 3, 2010: The Chair of the Maple Leaf Foods Corporate Governance Committee announced that West Face Capital's requisition for a shareholders' meeting was "a costly, and unnecessary process" and "unproductive and contrary to the best interest of Maple Leaf Foods and its shareholders."
- December 7, 2010: MFI filed its (final) short form prospectus to qualify the sale of OTPP's interest in MFI, which contained substantial new disclosure under the heading "Independence of Purdy Crawford, C.C." relating to the Lead Director's relationships with McCain Capital and with the principal external law firm, Osler, Hoskin & Harcourt LLP, which advised both McCain Capital and MFI.
- December 8, 2010: Press reports indicated that these amendments to the (final) short form prospectus followed letters of concern from West Face Capital to regulatory authorities concerning the disclosure of the Lead Director's relationships with MFI and the McCain family.
- December 16, 2010: OTPP completed the secondary offering of the sale of the balance of its share interest in MFI.
- December 20, 2010: MFI announced that its Shareholder Relations Committee would meet with large shareholders to seek their views on governance and manage matters relating to the West Face Capital requisition for a shareholders' meeting.
- December 23, 2010: MFI announced that it called an Annual and Special General Meeting of Shareholders for April 28, 2011, which would vote on West Face Capital's proposals, but would not call an earlier special meeting to do so. MFI said its Shareholder Relations Committee "is actively seeking input on the Board renewal process from Maple Leaf shareholders".
- A West Face Capital spokesperson responded that: "Once again, the board is showing its disrespect for shareholders other than McCain Capital by delaying the special meeting so that advisory resolutions on the constitution of the board cannot be considered before the board asks for a vote on its own election."
- December 2010 –  
January 2011: Two members of the MFI Shareholder Relations Committee consulted with the Company's largest shareholders to solicit views on a number of matters relating to Maple Leaf Foods and its governance including board renewal.

February 2, 2011: Following consultations with certain of its large shareholders, other than McCain Capital, MFI entered into a Settlement Agreement with West Face Capital that provided:

- the CEO of West Face Capital would be appointed to the MFI Board and re-elected at the 2011 AGM;
- All the current incumbent 12 members of the Board would be re-elected at the 2011 AGM;
- One new independent and unaffiliated director would be elected to the Board at the 2011 AGM;
- At the 2012 AGM, MFI, in its sole discretion, would either nominate not more than 10 directors (reduced from 14), or nominate not more than 12 directors and four of the current incumbents would be replaced with two new independent and unaffiliated directors;
- West Face Capital would withdraw its requisition for shareholder advisory votes;
- West Face Capital would agree to a “standstill” not to engage in certain prohibited activities including proxy contests, requisitioning shareholder meetings or proposing other candidates for election to the Board.

February 23, 2011: The CEO of West Face Capital is appointed to the Board of MFI.

March 30, 2011: Maple Leaf Foods filed its Management Proxy Circular dated March 28, 2011 for its AGM held on April 28, 2011.

### **OTPP and McCain Capital Shareholders Agreements**

The terms of the Shareholders Agreements between OTPP and McCain Capital relating to the governance of MFI do not appear to have publicly disclosed entirely. The MFI Management Proxy Circular for its May 8, 1997 annual meeting of shareholders disclosed the following with respect to the original 1995 Shareholders Agreement:

**“The size and composition of the Board** - A shareholders' agreement amongst MCC [McCain Capital], Mr. G. Wallace F. McCain and OTPPB provides, among other things, that the Corporation is to have a Board of Directors consisting of 13 members, with three nominees of OTPPB and its permitted successors, five nominees of MCC and five directors to be recommended by MCC in consultation with OTPPB. Pursuant to

its terms of reference, the Corporate Governance Committee has the responsibility to review the status of each of the directors annually with a view to determining whether any of them has become or ceased to be a "related director" within the meaning of the Guidelines.

“The Board is of the view that at least eight of its 13 members are independent in that they do not have interests in or relationships with either the Corporation, MCC or OTPPB. The Board has also concluded that nine directors are "unrelated" as the term is used in the Guidelines. These nine directors, none of whom are officers or employees of the Corporation or any of its subsidiaries, are also otherwise free of any interest or other business relationship with the Corporation. As at December 31, 1996, 25.1% of all outstanding common shares and 33.0% of the voting common shares were held by persons other than MCC or OTPPB. Therefore, the Board is of the view that its composition fairly reflects the investment in the Corporation by shareholders other than the significant shareholders. However, in that the Guidelines recommend nominations for directors be a responsibility of a nominating committee composed of unrelated directors, this Guideline is not met.”

In its (final) short form prospectus dated December 6, 2001, MFI disclosed the following information with respect to a new Shareholders Agreement that had been entered into between OTPP and McCain Capital:

**“McCain Capital Corporation/Ontario Teachers’ Pension Plan Board Shareholders’ Agreement**

On November 8, 2001, Maple Leaf announced that it had been advised by McCain Capital Corporation (“MCC”) and the Ontario Teachers’ Pension Plan Board (“OTPPB”) that MCC and OTPPB had entered into a shareholders’ agreement. This agreement replaced a prior shareholders’ agreement between MCC and OTPPB which had expired earlier.

Under the terms of the new shareholders’ agreement, Maple Leaf will continue to have a board of directors consisting of up to thirteen members. Unless MCC and OTPPB otherwise agree, Maple Leaf’s board of directors will consist of three nominees of MCC, two nominees of OTPPB, the Chief Executive Officer of Maple Leaf and seven independent directors to be mutually agreed to by MCC and OTPPB. No changes to the present board of directors of Maple Leaf are contemplated. The new shareholders’ agreement will continue indefinitely but may be terminated by

either party upon one year's prior notice, which may be given at any time after the agreement has been in effect for two years."

The disclosure concerning the Shareholders Agreement in the MFI Management Proxy Circulars for subsequent annual shareholder meetings did not provide any further information.

The MFI Management Proxy Circulars did not identify which of the nominees proposed for election as directors each year were put forward by McCain Capital and which were put forward by OTPP.

### **Independence of Maple Leaf Foods' Lead Director**

One of the principal issues that arose following West Face Capital's acquisition of its interest in Maple Leaf was the public debate initiated by West Face Capital over the "independence" of directors of MFI, and, in particular, whether the Lead Director of the Board was "independent", as had been determined by the MFI Corporate Governance Committee and disclosed in its public filings.

The determination of whether an outside director is "independent" or "not independent", assuming an objective "reasonable person" test and not a subjective or discretionary standard is applied, requires a more complex and intricate assessment of the relevant relationships that may exist than initially may be thought to be required. Where relationships do exist between an outside director in question and the company, including possible relationships with a controlling shareholder or other stakeholders in the company, a judgment as to that director's independence will depend on the particular circumstances of the situation. It is a fact specific analysis, and, for the purposes of an objective assessment, the standard of independence should be one based on the applicable legal and regulatory requirements, and not subjective criteria or 'best practice' policy aspirations.

The disclosure obligations of reporting issuers whether their directors are independent or not independent may be considered against the background of the disclosures made by Maple Leaf Foods in its public filings with respect to its statements of the independence of its Lead Director, Purdy Crawford, and his various relationships with Maple Leaf Foods and its controlling shareholder, the Wallace McCain family.

### **Maple Leaf's 2010 AIF and Management Proxy Circular**

Maple Leaf's Annual Information Form dated March 18, 2010, there was no disclosure of any non-director relationships between Purdy Crawford and Maple Leaf Foods or McCain Capital. The AIF disclosed that Mr. Crawford had the Principal Occupation as Counsel, Osler Hoskin & Harcourt LLP (Law Firm), that he had been a director of MFI since 1995 and was a member of the Board's Corporate Governance Committee and Human Resources and Compensation Committee. There was also disclosure that he was Chairman of AT&T Canada when it filed for creditor protection in September 2002.

In MFI's Management Proxy Circular dated March 18, 2010, for its Annual Meeting of Shareholders held April 29, 2010, as required by regulation, additional disclosure was provided for each individual nominated for election as a director at that annual meeting. With respect to



Mr. Crawford, his picture and biography were added, as well as past directorships held with other public companies within the past five years, his attendance at MFI Board and committee meetings during the last year and his ownership of securities in the Company. It was disclosed that he had been a director since June, 1995, that he was the Lead Director and that he was independent. There was no disclosure of any relationship with McCain Capital.

The 2010 MFI Management Proxy Circular also disclosed under “Board Organization and Membership” the following with respect to ‘independence of directors’ (at p. 13):

“4. Independence of Directors.

“The Board has adopted a policy requiring a majority of the directors to be independent, by which the Board means a director who is not a member of management and is free from any interest and any business, family or other relationship which could, or could reasonably be perceived to, materially interfere with the directors ability to act with a view to the best interests of the Corporation. The Board has concluded that a director who is otherwise not related to the Corporation or its management will be considered to be independent notwithstanding the presence of a relationship with either of its controlling shareholders.

“A director shall not be considered to be independent if the director would not be considered independent under the definition of director independence for purposes of Audit Committee membership under applicable securities laws. The Board annually reviews the Corporate Governance Committee’s report on director independence.

“Under the rules of one or more organizations that measure the quality of corporate governance, the Corporation loses points because the five nominees of MCC [McCain Capital] and OTPP of the 14-person board exceed the maximum number allowable for a 100% score. In the opinion of the Board, to suggest that having five nominees of MCC and OTPP, with their level of share ownership in the Corporation, detracts from the quality of good corporate governance, strains the bounds of credibility.”

[Underline added]

That MFI Management Proxy Circular then contained a chart (on page 14) which identified which of the directors was “Independent of MCC and OTPP” and whether there was a “Relationship Affecting Independence with MCC and OTPP.” With respect to the two directors who were senior officers of OTPP, neither was designated as being “Independent of MCC and OTPP” and they were each identified as senior officers of OTPP under “Relationship Affecting Independence with MCC and OTPP.” Both such senior officers of OTPP were designated as being “Independent of Corporation”.

With respect to Purdy Crawford, he was designated as being independent under both “Independent of Corporation” and “Independent of MCC and OTPP”. There was no disclosure of any relationship that Mr. Crawford had with either MCC [McCain Capital] or OTPP under “Relationship Affecting Independence with MCC and OTPP”. The fact of his McCain Capital directorship was not considered relevant or appropriate disclosure, and was not disclosed, under “Relationship Affecting Independence with MCC and OTPP”. It is difficult to follow the logic

that Mr. Crawford's directorship with McCain Capital was not a "Relationship Affecting Independence with MCC and OTPP", even if one concluded that that relationship did not change the conclusion that he was independent of McCain Capital and independent of Maple Leaf Foods.

In March, 2010, the principal shareholders of Maple Leaf Foods were McCain Capital, which owned 37.7% of the voting shares and 31.6% of all shares, and OTPP, which owned 22.8% of the voting shares and additional non-voting common shares. All together, OTPP held 35.3% of all shares of MFI. The Shareholders Agreement between McCain Capital and OTPP provided that the Maple Leaf Foods Board would be composed of a majority of independent directors and would include the CEO, up to two nominees of OTPP and up to three nominees of McCain Capital. The Management Proxy Circular did not disclose who were the nominees of McCain Capital, nor whether the CEO, Michael McCain, was one of the nominees of McCain Capital or was elected to the Board by the controlling shareholders by virtue of his office as CEO.

At the Company's April 29, 2010 AGM, two representatives of OTPP were elected directors of MFI. It was disclosed in the Management Proxy Circular that these two OTPP representatives, who were senior officers and employees of OTPP and not members of management of MFI, were independent. The former CEO of OTPP, who retired from that position in December 2007, and who was first elected a MFI director in April 2008, was also re-elected to the Board and determined to be independent. It is generally accepted that shareholding alone may not interfere with the exercise of a director's independent judgment. [Companion Policy 52-110CP--To National Instrument 52-110 *Audit Committees*, Part 3-Independence.]

As noted above, Maple Leaf Foods adopted the definition of independence for a director that is contained in National Instrument 52-110 *Audit Committees*. Section 1.4(1) of NI 52-110 provides that an audit committee member is independent if he or she has no direct or indirect material relationship with the issuer. Section 1.4(2) provides that for the purposes of subsection (1) a 'material relationship' is a relationship which could, in the view of the issuer's board of directors, be reasonably expected to interfere with the exercise of a member's independent judgment. This regulatory definition is consistent with the definition of independence adopted by MFI above.

MFI went beyond the required definition of "independence" for all its directors who are not members of its Audit Committee by stating that: "A director shall not be considered to be independent if the director would not be considered independent under the definition of director independence for purposes of Audit Committee membership under applicable securities laws." All audit committee members are required by regulation to be independent, and the test for independence for a member of an audit committee is more stringent than the independence standards applicable to board members who are not members of the audit committee. Section 1.5 of NI 52-110 adds additional requirements or conditions to satisfy the test of independence for the purpose of being a member of a public corporation's audit committee. MFI did not have to, but did, adopt the more stringent test of independence for all the directors of Maple Leaf which was required only for those members of the Board of Maple Leaf who are members of its Audit Committee.

Maple Leaf's adoption of a policy to extend to all members of the Board the more stringent regulatory definition of independence that applies to audit committee members requires that, in addition to satisfying the independence requirements of Section 1.4, a director had to satisfy the additional independence requirements of Section 1.5 of NI 52-110. One of the disqualifying factors that make an individual not independent is where the individual is "an affiliated entity of the issuer". [Section 1.5(1)(b) of NI 52-110] The definition of an individual who is "an affiliated entity of the issuer" is an individual who is "both a director and an employee of an affiliated entity" [Section 1.3(1)(b)(i)]. An affiliated entity is a party who controls the public corporation in question.

It was subsequently disclosed that the Lead Director of the Maple Leaf Board, Mr. Crawford, was, and had been for several years a director of McCain Capital. However, it is reported that he is not an employee of McCain Capital (assuming McCain Capital is an affiliated entity of Maple Leaf). Accordingly, assuming that McCain Capital is an affiliated entity of Maple Leaf, the fact that Mr. Crawford is a director but not an employee of McCain Capital would mean that he would technically not fall within the disqualifying condition that he was "an affiliated entity of the issuer".

For the purposes of NI 52-110, control means the direct or indirect power to direct or cause the direction of management and policies of a person or company whether through ownership of voting securities or otherwise. [Section 1.3(3)] It would appear a reasonable conclusion, considering all the factors, that McCain Capital would be considered to "control" Maple Leaf .

It is relevant to note that the definition of independence adopted by the Maple Leaf Board includes the express provision that a director who is otherwise not related to MFI or its management will be considered to be independent notwithstanding the presence of a relationship with either of its controlling shareholders. The two controlling shareholders of MFI are McCain Capital and, at the date of the 2010 Management Proxy Circular, OTTP.

### **Public Discussions of the Independence of the Lead Director**

In late November 2010, reports appeared in the business press concerning questions that had been raised whether the Lead Director of MFI was independent. The principal relationship factors involved in this discussion were the recent knowledge of the previously undisclosed fact that Mr. Crawford was a director, though not an employee, of McCain Capital and had been "for several years"; his and his family's personal friendships over many decades with Wallace McCain and other members of the McCain family; the relationship of Osler, Hoskin & Harcourt LLP., of which Mr. Crawford was a former senior partner and currently Counsel, as lawyers for many years for Maple Leaf and McCain Capital; and that his daughter was employed by Maple Leaf since 2002. West Face Capital publicly expressed its view that the Lead Director was, by their standards, not independent. The Board of MFI, the Chairman of its Governance Committee and Mr. Crawford all vigorously and resolutely defended the independence of Mr. Crawford. Purdy Crawford and Maple Leaf Foods both noted that Mr. Crawford recused himself from Maple Leaf Board deliberations on matters when his dual roles represent a conflict or potential conflict of interest.

As noted, the subsequently disclosed fact that Purdy Crawford was a director, but not an employee, of McCain Capital meant that the Lead Director did have a relationship with that controlling shareholder. However, as the Board of Maple Leaf Foods had determined that a relationship with McCain Capital did not, by itself, constitute a disqualifying relationship for the purposes of director independence, Mr. Crawford could still be properly considered to be an independent director, based on that relationship factor, notwithstanding that such relationship was not disclosed (at least publicly).

The same analysis applies to the two directors of Maple Leaf Foods who were senior officers of OTPP. Those two directors, Wayne Kozun, a Senior Vice-President, Public Equities, of OTPP and William Royan, Vice-President, Relationship Investing, of OTPP, were both categorized and reported as “Independent” directors in the March 2010 Management Proxy Circular. The three members of the McCain family, Wallace McCain, Chairman of the Board of Maple Leaf Foods, Michael McCain, President and CEO of Maple Leaf Foods and Scott McCain, President and COO, Agribusiness Group, were all identified and designated as “Not Independent”. The determination of being “Not Independent” for these three McCain family members would arise, not because of their relationship with McCain Capital, but rather because of their positions as senior officers and management of Maple Leaf Foods.

#### **Amendment to Maple Leaf’s Public Disclosure File – December 7, 2010**

On November 29, 2010, Maple Leaf filed a preliminary short form prospectus to commence the qualification for sale of OTPP’s remaining holdings in MFI. That preliminary prospectus did not amend or expand the previously filed public disclosures concerning director independence and relationships nor comment on the independence of the Lead Director. However, the controversy in the public press concerning changes to the Board sought by West Face Capital, and the debate following its allegations that the Lead Director was “not independent”, together with disclosure of Mr. Crawford’s relationship with McCain Capital and reported requests to the OSC to review the matter, resulted in significant changes in the disclosure concerning the Lead Director in Maple Leaf’s (final) short form prospectus dated December 7, 2010. The new and expanded disclosure concerning the independence of the Lead Director was the following:

##### **“Independence of Purdy Crawford, C.C.**

The Company has become aware of allegations questioning the independence of Purdy Crawford, the Company’s lead director. Specifically, the allegations concern his relationship with MCC [McCain Capital], the Company’s largest shareholder, his personal relationship with the McCain family, the family that controls MCC and his relationship with the Company’s counsel, Osler, Hoskin & Harcourt LLP. In making the determination of Mr. Crawford’s independence under applicable securities laws, the Corporate Governance Committee of the board of directors, the committee of the board of directors to whom independence determinations have been delegated, was aware that Mr. Crawford was an independent director of MCC, was aware of his relationship with the McCain

family and was aware of his relationship with Osler, Hoskin & Harcourt LLP. With respect to his relationship with MCC, the Company has been advised that Mr. Crawford is not, and has never been, an employee, officer or shareholder of MCC and that he does not receive any compensation from MCC other than customary directors' fees and expense reimbursement in connection with his role as a director of MCC. With respect to his relationship with Osler, Hoskin & Harcourt LLP, Mr. Crawford is a retired former partner of the firm and holds the honorary title of "counsel" to the firm. The Company understands Mr. Crawford is not a partner, member or officer of the firm, does not share in the profits of the firm or receive any salary or bonus from the firm. In addition, the Company understands he receives no financial benefit in respect of the work that the firm does for the Company. The Company understands that Mr. Crawford retired as partner of the firm in 1985 and returned to his current honorary position of "counsel" in 2000. The Company has considered Mr. Crawford's role as an independent director of MCC, his personal relationship with the McCain family and his role with the Company's counsel, Osler, Hoskin & Harcourt LLP, and is of the view that Mr. Crawford is independent under applicable securities laws and has no direct or indirect material relationship with the Company which could, in the view of the Company's board of directors, be reasonably expected to interfere with the exercise of Mr. Crawford's independent judgment, notwithstanding the presence of these relationships. The determination of independence was approved by the full board in 2006, following the introduction of the current independence tests under applicable securities laws." (MFI (final) short form prospectus dated December 7, 2010, pp. 5-6.)

### **Maple Leaf's Public Disclosure – March 28, 2011**

As a result of the Settlement Agreement entered into between Maple Leaf and West Face Capital on February 2, 2011, discussion of issues concerning Maple Leaf, its Board and directors ceased to be discussed in the public press and returned to the private and confidential sanctum of the Company's boardroom. However, on March 30, 2011, Maple Leaf filed its Management Proxy Circular dated March 28, 2011, for its AGM to be held April 28, 2011. In connection with the governance and disclosure issues that are the subject of this note, substantial and updated revisions were made to the related disclosures in the prior year's Management Proxy Circular with respect to Board directors. First, with respect to each of Purdy Crawford, Wallace McCain, Scott McCain and Michael McCain, it was now disclosed that each of them is a director of McCain Capital. Second, the following amended disclosure was included concerning the Board's policy of director independence:

“Independence of Directors

The Board has adopted a policy requiring a majority of the directors to be independent, by which the Board means a director who is not a member of management and is free from any interest and any business, family or other relationship which could, or could reasonably be perceived to, materially interfere with the director’s ability to act with a view to the best interests of the Corporation. The Board has concluded that a director who is otherwise not related to the Corporation or its management will be considered to be independent notwithstanding the presence of a relationship with any of its shareholders. The Corporation no longer has a controlling shareholder.

A director shall not be considered to be independent if the director would not be considered independent under the definition of director independence for purposes of Audit Committee membership under applicable securities laws. The Board receives annually the Corporate Governance Committee’s report on director independence.

The Board considers the presence of nominees of significant shareholders on the Board to be constructive and to contribute to effective governance. Accordingly, it encourages the presence of nominees of MCC to the Board. Correspondingly, as part of the West Face Agreement, it agreed to appoint Mr. Boland, the CEO of WFC, to the Board.” (MFI Management Proxy Circular dated March 28, 2011, p. 21.)

Thirdly and most significantly, the 2011 Management proxy Circular contained new disclosure regarding the independence of MFI’s Lead Director which is revised and expanded from that set out in the December 7, 2010 prospectus. That most recent disclosure was as follows:

“Independence of Purdy Crawford, C.C.

In 2010, the Corporation became aware of questions regarding the independence of Purdy Crawford, the Corporation’s Lead Director. The Corporate Governance Committee is responsible for assessing independence of directors. In making its assessment, the Committee collects relevant information for consideration. The Corporate Governance Committee has considered the relevant factors and relationships of Mr. Crawford and is of the view that Mr. Crawford is independent under applicable securities laws and has no direct or indirect material relationship with the Corporation which could, in the view of the Board, be reasonably expected to

interfere with the exercise of Mr. Crawford's independent judgment.

Specifically, the questions regarding Mr. Crawford's independence with the Corporation concerned his relationship with MCC [McCain Capital], the Corporation's largest shareholder, his personal relationship with the McCain family, the family that controls MCC, his relationship with the Corporation's counsel, Osler, Hoskin & Harcourt LLP and the fact that his daughter is an employee of the Corporation.

With respect to his relationship with MCC, the Corporation has been advised that Mr. Crawford is not, and has never been, an employee, officer or shareholder of MCC and that he does not receive any compensation from MCC other than customary directors' fees and expense reimbursement in connection with his role as a director of MCC. The Corporation understands he acts as an independent director of MCC.

With respect to his relationship with Osler, Hoskin & Harcourt LLP, Mr. Crawford is a retired former partner of the firm and holds the honorary title of "counsel" to the firm. The Corporation understands Mr. Crawford is not a partner, member or officer of the firm, does not share in the profits of the firm or receive any salary or bonus from the firm. In addition, the Corporation understands he receives no financial benefit in respect of the work that the firm does for the Corporation. The Corporation understands that Mr. Crawford retired as partner of the firm in 1985 and returned to his current honorary position of "counsel" in 2000. With respect to Mr. Crawford's daughter, she is employed by the Corporation. However, she is neither an officer nor an executive officer of the Corporation, nor does she occupy a similar or equivalent position." (MFI Management Proxy Circular dated March 28, 2011, p. 21.)

### **Summary Observations**

On a reasoned and careful analysis of the facts that have been publicly disclosed, it is a fair observation that the determination by the Maple Leaf Corporate Governance Committee and Board that the Lead Director is "independent", based on the currently applicable securities laws and regulations, is within the range of reasonableness.

If there was an area for improvement in Maple Leaf's past disclosure practices, it might be suggested that it should have provided more transparent and

fulsome disclosure concerning relationships that a director, or nominee for election as director, may have with the Company and its stakeholders, particularly a controlling shareholder. It would have been benign disclosure to have provided information that the Lead Director, who occupies an important leadership governance role, was also a director, and not an officer or employee, of McCain Capital, and that he has only the honorary position of Counsel to his former law firm, which is the principal legal advisor to both McCain Capital and to Maple Leaf Foods. It is suggested that it was not material disclosure that the Lead Director has a long and personal friendship with the controlling shareholder family or that his daughter was in the employ of the Company and not as an officer or executive.

The argument was made by Maple Leaf that it is not customary to disclose directorships with private companies. It may be difficult for many to agree with that submission in the circumstances where the issue is the assessment of the significant relationships of the independent Lead Director, a critical governance leadership position in a controlled public company, and the private company in question with which the Lead Director has an insider relationship as a director is the controlling shareholder of that same public company.

### **Comment on Recommended Disclosure Changes**

In December 2008, the Canadian Securities Administrators (“CSA”) issued a Request for Comment concerning the potential repeal and replacement of National Policy 58-210 *Corporate Governance Guidelines*, National Instrument 58-101 *Disclosure of Corporate Governance Practices* and National Instrument 52-110 *Audit Committees* and Companion Policy 52-110CP *Audit Committees*: (2008) 31 OSCB 12158. In November 2009, the CSA determined not to proceed with these proposals after comments had been received: CSA Staff Notice 58-305 – Status Report on the Proposed Changes to the Corporate Governance Regime, (2009) 32 OSCB 9347.

These proposals contained, however, some important enhancements to the disclosure obligations of issuers with respect to relationships that independent directors may have with the issuer, its executive officers and other directors on the board. With respect to independent directors, the proposals were aimed at requiring disclosure of a description of any relationship that an independent director may have that the board considered in determining the director’s independence and a discussion of why the board considered the director to be independent. For directors determined to be not independent, disclosure was required of the basis for that determination.

Currently, Form 58-101F1 – Corporate Governance Disclosure, requires disclosure only of the identity of the independent directors, without more; with respect to directors who are not independent, there must also be a description of the basis for that determination. (section 1(a) and (b).



**Recommendation**

It is recommended that the CSA proceed to amend the current disclosure requirements with respect to those directors that are determined to be independent to provide transparency of any relationship that the independent director may have with the issuer, any of its executive officers, another director on the issuer's board and with any affiliated entity of the issuer that the board considered in determining the director's independence and, if there is such a relationship, a discussion of why the board considered the director to be independent.