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BlackBerry Minority Shareholder Forces Changes to Related Party Transactions with Fairfax

Author: [Brett Seifred](#)

BlackBerry Ltd. completed an amended debt refinancing transaction with its significant shareholder Fairfax Financial Holdings Limited (Fairfax), on September 1, 2020, after having made changes to the transaction terms on two separate occasions. These included downsizing the financing from US\$535 million to US\$365 million as a result of minority shareholder complaints to the staff of the Ontario Securities Commission (OSC) and the Toronto Stock Exchange (TSX). Davies acted for the minority shareholder who brought forward these complaints to the regulators.

BlackBerry's situation serves as an important reminder to issuers engaged in related party transactions to ensure they comply with TSX rules concerning the issuance of listed securities to insiders, as well as with *Multilateral Instrument 61-101 – Protection of Minority Security Holders in Special Transactions* (MI 61-101), which provides the regulatory framework for potential conflict of interest transactions, including related party transactions.

Background

BlackBerry originally announced a debt refinancing transaction in a press release dated July 22, 2020, whereby, with the support of Fairfax via a "consent agreement," BlackBerry would amend its 3.75% unsecured convertible debentures (3.75% Debentures) to permit the "optional redemption" of the 3.75% Debentures before maturity on November 13, 2020. BlackBerry would then exercise this newly created optional redemption feature to redeem the entire outstanding US\$605 million principal amount of the 3.75% Debentures on September 1, 2020. Fairfax (for US\$500 million) and another unnamed institutional investor (for US\$35 million) would then subscribe to new 1.75% unsecured convertible debentures of BlackBerry (1.75% Debentures) on a private placement basis for an aggregate subscription price of US\$535 million.

Apart from the reduced interest rate, the terms of the 1.75% Debentures were described as "substantially identical" to those of the 3.75% Debentures, except that the conversion price would be reduced from the 3.75% Debenture conversion price of US\$10 per share to US\$6 per share, and the 1.75% Debentures would not be redeemable by BlackBerry before maturity, virtually ensuring that Fairfax would have the opportunity to convert its investment to equity.

Prior to completion of the proposed debt refinancing, Fairfax and its affiliates owned 8.4% of BlackBerry's shares and \$500 million principal amount of BlackBerry's 3.75% Debentures. Assuming conversion of its 3.75% Debentures, Fairfax would own 17.4% of BlackBerry's outstanding shares. Accordingly, Fairfax was a related party of BlackBerry due to its beneficial ownership of over 10% of BlackBerry's voting shares, but not necessarily a "control person" (generally, deemed to be such when holding 20% or more of the voting rights attached to all outstanding voting securities of an issuer). Further, Prem Watsa, the founder and control person of Fairfax, is a director of BlackBerry and therefore a BlackBerry insider.

Importantly, the minority shareholder determined that following completion of the transactions, Fairfax would hold slightly over 20% of BlackBerry's voting shares (including for this purpose the voting shares underlying the US\$500 million 1.75% Debentures to be purchased by Fairfax in the transaction), necessarily making Fairfax a control person and "materially affecting control" of the issuer within the meaning of the TSX rules. This was not disclosed in the July 22 press release. In addition, although the July 22 press release acknowledged that the transactions were "related party transactions" under MI 61-101, it did not disclose the specifics of the formal valuation and minority approval exemptions from MI 61-101; nor did it discuss the review and approval process adopted by the board of

directors of BlackBerry as mandated by MI 61-101. The minority shareholder brought these deficiencies to the attention of OSC and TSX staff.

In addition, the minority shareholder argued that the related party transactions appeared to require “disinterested shareholder approval” under TSX rules. Approval of the TSX was required because the private placement of the 1.75% Debentures involved “the issuance or potential issuance” of listed securities (the BlackBerry shares issuable on conversion of the new 1.75% Debentures). Under TSX rules, on the basis of the participation of insiders (Fairfax/Watsa) in the transaction and the material affect on control of the listed issuer, the minority shareholder argued that the TSX should require shareholder approval for the transaction. In any event, the minority shareholder argued that disinterested shareholder approval must be obtained under TSX rules because the private placement of the 1.75% Debentures involved the issuance to insiders of “entitlements to listed securities” greater than 10% of the outstanding shares, putting the transaction offside the “insider participation limit” under TSX rules.

BlackBerry and Fairfax Amendments to the Related Party Transactions

After the close of business on Friday, August 21, 2020, BlackBerry issued a press release titled “BlackBerry Provides Additional Details Regarding Proposed Debt Refinancing.” In addition to providing disclosure of the particulars of the BlackBerry board’s deliberations regarding the related party transactions with Fairfax, BlackBerry disclosed the specifics of the formal valuation and minority approval exemptions on which it was relying. Most significantly, BlackBerry and Fairfax appeared to have amended the transactions to introduce a new “blocker” provision in respect of the new 1.75% Debentures, so that on their conversion Fairfax’s ownership would remain below 19.99% of the voting shares (i.e., below the deemed threshold for a control person).

On August 28, 2020, just a few days before the scheduled closing date of September 1, 2020, BlackBerry and Fairfax amended the transaction terms for a *second time*, reducing Fairfax’s subscription from US\$535 million, as previously announced on July 22, 2020, to US\$365 million. The August 28, 2020 press release disclosed that the TSX had reversed its prior conditional approval of the proposed private placement of 1.75% Debentures on the basis that the transaction was subject to the “insider participation limit” under TSX rules, requiring BlackBerry to obtain disinterested shareholder approval if it were to proceed with the transaction on its original terms. Rather than submitting the transaction to a shareholder vote, BlackBerry reduced the size of the financing to just below the insider participation limit.

Conclusion and Commentary

BlackBerry’s experience in having to provide enhanced disclosure and introduce significant and late-breaking amendments to an already announced transaction as a result of complaints made to the regulators illustrates the need for issuers to be attentive to both the securities law rules of MI 61-101 governing related party transactions and, for TSX-listed issuers, the TSX rules concerning disinterested shareholder approval when there is significant insider participation in an issuance of listed securities or when the transaction could otherwise materially affect control of a listed issuer. Failure to do so risks regulatory intervention as well as justifiable criticism and possible litigation from minority shareholders.

Key Contact: [Brett Seifred](#)

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