

# 2007 BCSECCOM 244

April 11, 2007

## Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act ss. 48, 76 Employees and Consultants - A US issuer is seeking prospectus and registration relief for securities that it will issue to Canadian residents - The filer would have an exemption for the trade of securities to former employees upon the exercise of options but for the fact that the options were originally granted by a company that merged with the filer; therefore, it is only for technical reasons that an exemption is unavailable - A US issuer is seeking first trade relief for securities that it will issue or has issued to Canadian residents - The filer meets all of the conditions in section 2.14 of NI 45-102 *Resale of Securities* and section 2.28 of NI 45-106 *Prospectus and Registration Exemptions*, except that the issuer is a reporting issuer in Québec as a result of an arrangement

## Applicable British Columbia Provisions

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 34(1)(a), 48, 61 and 76

In the Matter of  
the Securities Legislation of  
British Columbia, Alberta, Ontario and Quebec  
(the Jurisdictions)

and

In the Matter of  
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of  
Hewlett-Packard Company  
(the Filer)

## MRRS Decision Document

## Background

The local securities regulatory authority or regulator (the Decision Maker) in the Jurisdictions has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) that:

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- (a) the dealer registration requirement and the prospectus requirement do not apply to a trade by the Filer in common shares of the Filer (Common Shares) to Mercury Option Holders (as defined below), or their legal representatives or permitted transferees, in accordance with the terms and conditions of the Assumed Options (as defined below) (the Exercise Requested Relief); and
- (b) the dealer registration requirement does not apply to the first trade in the Common Shares issued upon the exercise of the Assumed Options (the First Trade Registration Relief and together with the Exercise Requested Relief, the Requested Relief).

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

Defined terms contained in National Instrument 14-101 Definitions have the same meaning in this decision unless they are defined in this decision.

### **Representations**

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation incorporated under the laws of Delaware and is not a reporting issuer in any jurisdiction in Canada except Quebec. The Filer is subject to the reporting requirements of the 1934 Act.
2. The authorized share capital of the Filer consists of 9,600,000,000 Common Shares with a par value of US\$0.01 each and 300,000,000 shares of preferred stock with a par value of US\$0.01 each. As at November 30, 2006 there were 2,720,808,149 Common Shares and no shares of preferred stock of the Filer issued and outstanding.
3. The Common Shares are listed on the New York Stock Exchange, Inc.
4. As at November 30, 2006, residents of Canada did not own, directly or indirectly, more than 10 percent of the outstanding Common Shares and did not represent in number more than 10 percent of the total number of owners, directly or indirectly, of Common Shares.

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5. Hewlett Packard (Canada) Ltd. (HP Canada), a wholly-owned subsidiary of the Filer is a corporation incorporated under the federal laws of Canada. HP Canada is not a reporting issuer in any jurisdiction in Canada and does not have any present intention of becoming a reporting issuer or its equivalent in any jurisdiction in Canada.
6. In Canada, the equity compensation plans that the Filer operates for the benefit of the employees of HP Canada are, among others, the HP 2004 Stock Incentive Plan, the HP 2000 Employee Stock Purchase Plan and the HP 2000 Stock Plan (all such existing plans collectively, the Existing HP Plans).
7. Mercury Interactive Corporation (Mercury) was a corporation incorporated under the laws of the state of Delaware and was not a reporting issuer in any jurisdiction in Canada.
8. Immediately prior to the effective time of the Merger (as defined below), the authorized share capital of Mercury consisted of 560,000,000 shares of common stock with a par value of US\$0.002 per share and 5,000,000 shares of preferred stock with a par value of US\$0.002 per share. As at September 19, 2006, there were 89,197,029 shares of common stock and no preferred stock of Mercury issued and outstanding.
9. Mercury Interactive Canada, Inc. (Mercury Canada) was a corporation incorporated under the laws of Ontario and was not a reporting issuer in any jurisdiction in Canada.
10. Mercury Canada was a wholly-owned subsidiary of Mercury.
11. The Filer and Mercury, together with Mars Landing Corporation (Mars), a Delaware corporation and wholly-owned subsidiary of the Filer, entered into an agreement and plan of merger dated as of July 25, 2006 (the Merger Agreement), pursuant to which, subject to certain conditions, Mars offered to purchase all outstanding shares of common stock of Mercury at a purchase price of U.S.\$52.00 per share (as may be amended) (the Tender Offer).
12. Upon the fulfilment of the terms and conditions in the Merger Agreement, including the completion of the Tender Offer, on November 7, 2006 Mars and Mercury merged to form a wholly-owned subsidiary of the Filer (the Merger).
13. At the effective time of the Merger, without issuing any new options to Mercury Canada employees under any Mercury option plans, the Filer assumed the outstanding vested and unvested options (the Mercury Options)

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previously awarded by Mercury to Mercury Canada employees resident in the Jurisdictions (the Mercury Option Holders) under the Mercury Amended and Restated 1999 Stock Option Plan and Amended and Restated 2000 Supplemental Stock Option Plan (collectively, the Mercury Plans) and, pursuant to such assumption, the Mercury Options became options to purchase Common Shares (the Assumed Options).

14. The number of Common Shares issuable upon the exercise of each Assumed Option and the exercise price per share under each Assumed Option were calculated according to a predetermined formula as set forth in the Merger Agreement. The duration and other material terms of each Assumed Option are the same as they existed immediately prior to the effective time of the Merger.
15. As of January 31, 2007, there are approximately 12 Mercury Option Holders in Canada holding Mercury Options exercisable for 43,325 shares of Mercury common stock.
16. Following the Merger, no further Mercury Options have been or will be issued under the Mercury Plans.
17. Upon completion of a corporate reorganization following the Merger, the Mercury Option Holders will be employed by HP Canada.
18. The current agents for the HP 2004 Stock Incentive Plan are StockCross Financial Services Inc., Morgan Stanley, Smith Barney and Computershare Investor Services (collectively, the Agents) and effective February 15, 2007, the Filer commenced using the services of the Agents in connection with the Mercury Plans. The Agents are, and if replaced will be, corporations registered under applicable U.S. securities legislation to trade in securities and have been authorized to provide services under the HP 2004 Stock Incentive Plan and the Mercury Plans.
19. Subject to the discretion of the applicable plan administrator to permit transfers to permitted transferees in accordance with the terms of the Mercury Plans and to applicable securities laws, the Assumed Options are not transferable otherwise than by will or the laws of descent and distribution.
20. All of the disclosure documentation made available to the Filer's employees resident in the United States who receive options under the Existing HP Plans will be made available to Mercury Option Holders.

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21. Participation in the Mercury Plans is voluntary and the Mercury Option Holders will not be induced to continue to participate in the Mercury Plans or acquire Common Shares under the Mercury Plans by expectation of employment or continued employment.
22. Because there is no market for the Common Shares in Canada and none is expected to develop, any trades of the Common Shares by the Mercury Option Holders, their legal representatives or permitted transferees or the Agents will be effected through the facilities of and in accordance with the rules of an exchange or market outside of Canada on which the Common Shares are traded.

### **Decision**

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the Decision has been met.

The decision of the Decision Makers under the Legislation is that the Exercise Requested Relief is granted, provided that the first trade in the Common Shares issued upon the exercise of each Assumed Option is deemed to be a distribution unless the following conditions are satisfied:

- (a) at the time of the issuance of the Common Shares upon the exercise of the Assumed Option (the Exercise Time), the Filer is not a reporting issuer in any jurisdiction of Canada except Quebec;
- (b) at the Exercise Time, after giving effect to the issuance of the Common Shares and any other Common Shares that were issued at the same time as or as part of the same distribution, residents of Canada
  - (i) did not own directly or indirectly more than 10 percent of the outstanding Common Shares, and
  - (ii) did not represent in number more than 10 percent of the total number of owners directly or indirectly of Common Shares; and
- (c) the trade is made
  - (i) through an exchange, or a market, outside of Canada, or
  - (ii) to a person or company outside of Canada.

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It is further the decision of the Decision Makers under the Legislation that the First Trade Registration Relief is granted provided that the conditions set out in paragraphs (a), (b) and (c) under the decision granting the Exercise Requested Relief are satisfied.

Wendell S. Wigle  
Ontario Securities Commission

David L. Knight  
Ontario Securities Commission