

# 2004 BCSECCOM 133

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications – first trade relief for securities of a U.S. company to be distributed to shareholders of a private company in connection with an arrangement – after the distribution, residents of Canada will hold more than 10% but less than 16% of the outstanding securities of the U.S. company

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, s. 76

## **IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH COLUMBIA AND ONTARIO**

**AND**

## **IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM FOR EXEMPTIVE RELIEF APPLICATIONS**

**AND**

## **IN THE MATTER OF CRAY INC.**

## **MRRS DECISION DOCUMENT**

- ¶ 1 WHEREAS the local securities authority or regulator (the “Decision Maker”) in each of British Columbia and Ontario (the “Jurisdictions”) has received an application from Cray Inc. (“Cray”) for a decision under the securities legislation of the Jurisdictions (the “Legislation”) that the prospectus requirement under the Legislation shall not apply to the first trade of shares (“Cray Common Shares”) of common stock of Cray issued or to be issued in connection with an agreement for a subsidiary (“Exchangeco”) of Cray to acquire all of the issued and outstanding shares of Octigabay Systems Corporation (“Target”) in exchange for exchangeable shares (“Exchangeable Shares”) of Exchangeco or Cray Common Shares under a plan of arrangement (the “Plan of Arrangement”) under section 192 of the *Canada Business Corporations Act* (the “CBCA”) involving Target and its securityholders (the “Transaction”);

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- ¶ 2 AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the “System”), the British Columbia Securities Commission is the principal regulator for this application;
- ¶ 3 AND WHEREAS, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 *Definitions*;
- ¶ 4 AND WHEREAS Cray has represented to the Decision Makers that:
1. Cray is a corporation incorporated under the laws of the State of Washington; Cray’s principal offices are located in Seattle, Washington and its principal management, assets and operations are located in the United States;
  2. Cray designs, develops, markets and services high performance super computers;
  3. Cray is not a reporting issuer in any province of Canada and will not become a reporting issuer as a result of the Transaction;
  4. Cray is currently subject to the reporting requirements of the United States *Securities Exchange Act of 1934*, as amended, (the “1934 Act”) and is in compliance with all reporting and disclosure requirements to which it is subject under the 1934 Act;
  5. as of the close of business on February 12, 2004, 73,058,352 Cray Common Shares were issued and outstanding of which, as of December 31, 2003, 225,600 Cray Common Shares, representing approximately 0.3% of the total outstanding Cray Common Shares, were held by an aggregate of 7 shareholders resident in Canada;
  6. An aggregate of 19,963,362 Cray Common Shares are issuable upon the exercise of various convertible securities of Cray;
  7. the Cray Common Shares are quoted on the NASDAQ National Market (the “NNM”), are not listed or quoted on any other exchange or market in Canada or elsewhere and Cray has no plans to apply for a listing in Canada;
  8. there is no market in Canada for Cray Common Shares and none is expected to develop as a result of the Transaction;
  9. Target is a closely-held company continued under the CBCA;

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10. the authorized capital of Target consists of an unlimited number of Common shares (“Target Common Shares”), an unlimited number of Class A Preferred shares (“Target Preferred Shares” and, together with the Target Common Shares, “Target Shares”) and an unlimited number of Class B Preferred shares; as of February 11, 2004, there were 16,706,596 Target Common Shares issued and outstanding and held by an aggregate of 13 persons; 36,402,438 Target Preferred Shares issued and outstanding and held by an aggregate of six persons and no Class B Preferred shares issued and outstanding; each of the Target Preferred Shares is convertible into one Target Common Share; the largest single holder of Target Preferred Shares holds 12,195,122 Target Preferred Shares; the largest single holder of Target Common Shares holds 10,866,350 Target Common Shares;
11. as of February 11, 2004, 3,965,150 Target Common Shares were reserved, in the aggregate, for issuance upon the exercise of options (“Target Options”) and warrants (“Target Warrants”) to acquire Target Common Shares; there are an aggregate of 59 holders of Target Options, each of whom is an employee, director, advisor or consultant of Target; each holder of Target Warrants is also a holder of Target Common Shares; it is expected that all Target Warrants will be exercised before the effective date (the “Effective Date”) of the Plan of Arrangement;
12. none of the Target Shares are listed on a stock exchange or quotation system and Target is not a reporting issuer under the securities legislation of any province of Canada; shareholders of Target are currently resident in British Columbia (16), Ontario (1), and the United States (2); holders of Target Options are currently resident in British Columbia (56) and the United States (3);
13. Cray is at arm’s length to Target and each of Target’s Shareholders;
14. the Transaction is proposed to be effected under the Plan of Arrangement under which each holder of Target Shares (except those held by shareholders who exercise rights of dissent) will be entitled to elect to receive, at his or her option, a fraction of an Exchangeable Share or a fraction of a Cray Common Share for each Target Share equal to the “Exchange Ratio”, as determined under the Plan of Arrangement; on the completion of the Transaction, Exchangeco will own all of the issued and outstanding Target Shares;
15. Target Options will be exchanged under the Plan of Arrangement for options to purchase Cray Common Shares (“Replacement Options”);

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16. an aggregate of 13,142,039 Cray Common Shares and Exchangeable Shares will be issued in connection with the Transaction (inclusive of Cray Common Shares to be issued on exercise of Replacement Options) of which approximately 12,900,000 will be issued to residents of Canada; the Cray Common Shares issued in connection with the Transaction or issuable from time to time in exchange for Exchangeable Shares or on exercise of Replacement Options will be listed on the NNM; the Cray Common Shares issued on the Effective Date will be exempt from registration under the United States *Securities Act of 1933*, as amended, and the Cray Common Shares issuable from time to time in exchange for Exchangeable Shares or on exercise of Replacement Options will be registered in the United States under filings with the United States Securities Exchange Commission;
17. the Exchangeable Shares will be exchangeable by the holder thereof for Cray Common Shares, initially on a one-for-one basis, at any time at the option of the holder and will be required to be exchanged on the occurrence of certain events; the Exchangeable Shares will not be listed or posted for trading on any stock exchange;
18. the Plan of Arrangement will provide that 10% of the Exchangeable Shares and Cray Common Shares issued as a result of the Transaction will be held in escrow by an escrow agent until February 28, 2005 and will be available to indemnify Cray for certain losses;
19. Cray Common Shares issued under the Plan of Arrangement in exchange for Target Shares or issuable from time to time in exchange for Exchangeable Shares and that are not subject to the escrow will be subject to a “lock-up” on completion of the Arrangement and may not be traded following completion of the Transaction; Cray Common Shares that are subject to the lock-up will be released from the lock-up over a five-month period;
20. on completion of the Transaction it is estimated that an aggregate of 13,125,600 Cray Common Shares or securities exchangeable or exercisable for Cray Common Shares, representing approximately 15.2% of the issued and outstanding Cray Common Shares (after giving effect to the Transaction and assuming on a pro-forma basis the exchange of all Exchangeable Shares and Replacement Options), will be held by 83 shareholders resident in Canada;
21. Cray will comply with Rule 14a-13 under the 1934 Act with respect to Canadian intermediaries, so that beneficial owners of Cray Common Shares resident in Canada will receive copies of all disclosure materials provided to holders of Cray Common Shares resident in the United States;

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22. shareholders of Target resident in Canada will not be able to rely on the prospectus exemption set out in section 2.14 of Multilateral Instrument 45-102 Resale of Securities for first trades of Cray Common Shares because, following the Transaction, residents of Canada will own more than 10% of the Cray Common Shares;

- ¶ 5 AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each Decision Maker (collectively, the “Decision”);
- ¶ 6 AND WHEREAS 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;
- ¶ 7 THE DECISION of the Decision Makers under the Legislation is that the prospectus requirement will not apply to the first trade of Cray Common Shares acquired in connection with the Arrangement or on the exchange, redemption or retraction of the Exchangeable Shares or on exercise of Replacement Options provided that the trade is made through the facilities of the NNM or any other market or exchange outside of Canada on which the Cray Common Shares may be quoted or listed for trading at the time that the trade occurs.
- ¶ 8 March 2, 2004

Brent W. Aitken  
Vice Chair