

# 2011 BCSECCOM 77

February 1, 2011

## Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – National Instrument 55-104 *Insider Reporting Requirements and Exemptions*, s. 10.1– insider reporting obligations -An issuer wants relief from the requirement to file insider reports for its insiders - The insider does not make a discrete investment decision for the disposition; participating insiders do not control or influence the timing of the dispositions of the underlying shares under the automatic plan; dispositions of the underlying shares occur automatically at pre-determined regular intervals; the disposition is not a specified disposition of securities

## Applicable British Columbia Provisions

National Instrument 55-104 *Insider Reporting Requirements and Exemptions*, s. 10.1

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

and

In the Matter of  
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of  
Fortress Paper Ltd.  
(the Filer)

Decision

## Background

- ¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (Decision Maker) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) pursuant to section

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91 of the *Securities Act* (British Columbia) (the BC Act), section 121(2) of the *Securities Act* (Ontario) (the Ontario Act) and section 10.1 of National Instrument 55-104 *Insider Reporting Requirements and Exemptions* (NI 55-104) that certain directors and senior executive officers of the Filer and its subsidiaries (the Insiders) be exempt from the requirement to file an insider report within five days following the disposition of securities under an automatic securities disposition plan (the Exemption Sought), subject to certain conditions.

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

- (a) the British Columbia Securities Commission is the principal regulator for this application,
- (b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon Territories, Northwest Territories and Nunavut, and
- (c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

### **Interpretation**

- ¶ 2 Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

### **Representations**

- ¶ 3 This decision is based on the following facts represented by the Filer:
- 1. the Filer is a corporation incorporated under the *Business Corporations Act* (British Columbia), is a reporting issuer in each of the provinces and territories of Canada and is not in default of the securities legislation in any of the jurisdictions in which it is reporting;
  - 2. the Filer's head office is located at 2nd Floor, 157 Chadwick Court, North Vancouver, British Columbia;
  - 3. the authorized share capital of the Filer consists of an unlimited number of Class A voting common shares without par value (Common Shares) and an unlimited number of Class B preferred shares with a par value of \$1,000; as of the date hereof, the Filer had 12,665,080 Common Shares outstanding; the

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Common Shares are listed and posted for trading on the Toronto Stock Exchange under the symbol “FTP”;

4. restricted share units, deferred share units and performance share units may be granted to an Insider pursuant to the Filer's long term incentive plan (the LTIP) and vest according to a fixed schedule and/or the achievement of certain performance targets; on vesting of LTIP units held by a participant, one Common Share is issued by the Filer for each vested unit without payment of additional consideration; in addition, the Filer grants stock options to Insiders from time to time in accordance with its amended and restated stock option plan (the Option Plan); each option is exercisable into one Common Share and is generally exercisable over a five year period;
5. on December 10, 2010, the Filer announced that it had adopted an automatic share disposition plan (the ASDP); under the ASDP, eligible Insiders can elect to: (i) deposit currently held Common Shares into the ASDP to be automatically sold; (ii) have Common Shares issued upon the vesting of units granted to the Insider under the LTIP automatically deposited into the ASDP and subsequently sold; and (iii) have options granted under the Option Plan deposited into the ASDP, automatically exercised and the Common Shares issuable upon exercise automatically sold; Insiders who are officers of the Filer are subject to ongoing minimum ownership restrictions with respect to the Filer's securities as a condition of their participation in the ASDP;
6. the ASDP is designed to facilitate sales of Common Shares for the Insiders; absent such an automatic disposition process, the Insiders have a limited number of opportunities to dispose of their Common Share holdings due to insider trading restrictions under applicable securities laws and the Filer's insider trading policies;
7. the parameters of the ASDP and other instructions are set out in a written plan document which outlines the restrictions on sales of Common Shares; the plan document also outlines the mechanics of transfer and sale of the Common Shares by an independent third-party administrator (the Administrator); the Administrator is a securities broker which is arms length to the Filer and the Insiders; neither the Filer nor any of its or its subsidiaries' directors, officers or employees may disclose any material undisclosed information to the Administrator; further, no Insider participating in the ASDP may disclose to the Administrator any information that is intended to or could influence the timing of the exercise of options or the sale of Common Shares;
8. the ASDP is an automatic plan and the Insiders cannot make investment decisions through the ASDP; the ASDP has been structured to comply with

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applicable securities legislation and guidance, including, *inter alia*, section 57.4(3) of the BC Act, section 175(2)(b) of *Regulation 1015* under the Ontario Act, Ontario Commission Staff Notice 55-701 *Automatic Securities Disposition Plans and Automatic Securities Purchase Plans* (OSC Notice 55-701) and similar rules and regulations in other applicable Canadian securities laws, and accordingly, with the intent that sales under the ASDP shall be exempt from subsection 76(1) of the Ontario Act and from liability under section 134 of the Ontario Act, from subsection 57.2 of the BC Act and from liability under section 136 of the BC Act, and from the corresponding provisions in other applicable Canadian securities laws; any material change in the terms of any securities of the Filer deposited into the ASDP shall be disclosed or reported in accordance with applicable securities laws;

9. Insiders are required to complete an election form to participate in and become subject to the terms of the ASDP including making certain representations to both the Filer and the Administrator;
10. Insiders who elect to participate in the ASDP (Participating Insiders) will be permitted to sell, in any given year, subject to minimum Common Share ownership requirements: (i) currently held Common Shares; (ii) Common Shares issuable to them upon vesting, in such year, of units granted under the LTIP; and (iii) Common Shares issuable upon the exercise of their stock options; sales of Common Shares subject to the Plan will be effected by the Administrator in accordance with a fixed trading schedule;
11. as part of the ASDP enrolment form required to be provided by an Insider to participate, the Insider is required to elect the number of Common Shares, including the Common Shares issuable upon vesting of units granted under the LTIP and the Common Shares issuable upon exercise of the stock options, that will be subject to the ASDP; in addition, the Insider is permitted to set a minimum price for their Common Shares, below which the Common Shares will not be sold by the Administrator; once the enrolment form is received and accepted by the Filer and the Administrator and 90 days have elapsed, the Administrator will commence making dispositions of Common Shares;
12. in respect of the automatic exercise of stock options, the underlying Common Shares will be sold and in-the-money options will be automatically exercised during the trading period established under the ASDP; out-of-the-money options will not be exercised and will be held for exercise until the next trading period; in no case will options be exercised after the expiry date of the options;

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13. the ASDP contains meaningful restrictions on the ability of the Insiders to enrol, terminate or modify their participation in the ASDP as recommended by OSC Notice 55-701;
14. at the time of enrolment, an Insider must be able to represent that they are not in possession of material undisclosed information about the Filer and that they are not entering the ASDP as part of a plan to evade the prohibitions against trading with material undisclosed information contained in applicable Canadian securities law;
15. if an Insider elects to enrol in the ASDP, once such enrolment is accepted by the Filer, the Administrator will attempt to exercise in-the-money options and sell the Participating Insider's Common Shares over four consecutive calendar quarters at any time during a period commencing on the first trading day and ending on the last trading day in a calendar quarter, beginning after 90 days have elapsed from the date that the Participating Insider's enrolment form together with all documentation required by the Filer and the Administrator to execute sales under the ASDP are received and accepted; a Participating Insider's trading instructions remain in effect until such Participating Insider amends or terminates his or her participation in the ASDP;
16. a Participating Insider may amend their trading instructions to modify the minimum price in a given year by submitting a revised enrolment form or terminate their participation in the ASDP by submitting a withdrawal and termination form to the Filer; in order to submit a revised enrolment form or a withdrawal and termination form in respect of an amendment to or termination of a Participating Insider's participation in the ASDP, there must be no Filer-imposed "black out" period in effect and the Participating Insider must represent that they are not in possession of material undisclosed information relating to the Filer; any amendment will only become effective after 90 days have elapsed from the date that the Filer receives the enrolment form; any termination will become effective after 30 days have elapsed from the date that the Filer receives the withdrawal and termination form; if the Participating Insider voluntarily terminates their participation in the ASDP, such Participating Insider may not re-enrol in the ASDP until at least six months have elapsed following such termination;
17. for any enrolment, amendment or termination by a Participating Insider in the ASDP, the Filer will be required to certify that, to the best of the Filer's knowledge, the Participating Insider is not in possession of material undisclosed information concerning the Filer and is in compliance with the Filer's insider trading policy; and

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18. subject to the limits described above, a Participating Insider's (i) currently held Common Shares; (ii) Common Shares issuable upon vesting of LTIP units; and (iii) Common Shares issuable upon the exercise of stock options made subject to the ASDP will be deposited into a sole purpose brokerage account by the Administrator; the Administrator will sell the Common Shares underlying the options and exercise the stock options held in the Participating Insider's plan account during four trading periods in a given year on a quarterly basis, such that a maximum of 25% of the Common Shares available for sale under the ASDP will be sold in each quarter, with any Common Shares not sold in such quarter available for sale in each subsequent quarter, in order for the Common Shares to be fully sold by the completion of the fourth applicable quarter.

### **Decision**

- ¶ 4 Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted provided that each Participating Insider shall file a report, in the form prescribed for insider trading reports under the Legislation, disclosing on a transaction-by-transaction basis or in “acceptable summary form” (as such term is defined in NI 55-104) all dispositions of Common Shares under the ASDP that have not been previously disclosed by or on behalf of the Participating Insider during a calendar year, on or before March 31 of the next calendar year.

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British Columbia Securities Commission