



Canadian Foundation *for*  
Advancement *of* Investor Rights  
Fondation canadienne *pour* l'avancement  
*des* droits *des* investisseurs

May 6, 2019

**Mr. Louis Morisset**

Chair, Canadian Securities Administrators  
President and Chief Executive Officer, Autorité des marchés financiers  
800, square Victoria, Suite 2510  
C.P. 400, tour de la Bourse  
Montréal, QB H4Z 1J2

**RE: Exemptive relief granted by Canadian securities regulators in connection with automatic stock disposition plans (“ASDP”)**

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FAIR Canada is writing to express concerns about exemptive relief granted by Canadian securities regulators for automatic stock disposition plans, such as the one granted Bombardier Inc. and its executives, on September 14 2018.<sup>1</sup>

FAIR Canada is a national, charitable organization dedicated to putting investors first. As a voice for Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit [www.faircanada.ca](http://www.faircanada.ca) for more information.

**Summary**

- 1. Bombardier: The exemptive relief order should be revoked, the insiders should be required to report the details of the trades made pursuant to the ASDP that would ordinarily be reported in insider trading reports, and a formal investigation should be conducted into the trades.**
- 2. General application: Any existing exemptive relief order in respect of an ASDP should be revoked, if it does not require insider reporting with the normal 5 day period, and a new application be required. The requirements for granting any exemptive relief orders in respect of an ASDP should be changed as proposed herein.**

**General Comments**

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<sup>1</sup> In the Matter of Exemptive Relief Applications and Pierre Beaudoin and others and Bombardier Inc., September 14, 2018: [https://www.osc.gov.on.ca/en/SecuritiesLaw\\_ord\\_20180927\\_219\\_pierre.htm](https://www.osc.gov.on.ca/en/SecuritiesLaw_ord_20180927_219_pierre.htm)

## **Definition**

In Canada, insider trading is illegal when insiders (or other persons or corporations having privileged access to information about a reporting issuer) acquire or dispose of a security knowing material non-public information about the reporting issuer (“insider information”). Illegal insider trading does not require the insiders to use insider information, or to exercise discretion at the time of trading. Trading while in possession of insider information is sufficient to trigger liability.

The definition of illegal insider trading is broad and requires exemptions to enable some insiders to trade in some specific circumstances, including in the case of automatic purchase and sales plans, as further described in this submission.

## **Reporting Requirements**

To ensure transparency and foster investor confidence in the fairness and integrity of the securities markets and also to enable securities regulators to detect and deter fraud, all insider trades must be reported within 5 calendar days.

In the OSC Staff Notice 51-726 dated February 18, 2016, the OSC has stated that:

“The insider reporting requirements serve a number of functions, including deterring improper insider trading based on material undisclosed information and increasing market efficiency by providing investors with information concerning the trading activities of insiders of an issuer, and, by inference, each insider's views of the issuer's prospects.

Insider reporting also helps prevent illegal or otherwise improper activities involving stock options and similar equity-based instruments, including stock option backdating, option repricing, and the opportunistic timing of option grants (spring-loading or bullet-dodging), since the requirement for timely disclosure of option grants and public scrutiny of such disclosure will generally limit opportunities for insiders to engage in improper dating practices.”<sup>2</sup>

An exemption has been established in NI 55-104. It allows reporting issuers and their directors or officers to enter into automatic purchase plans (which may include incidental dispositions that does not involve a discrete investment decision or disposition made to satisfy tax withholding obligations). This statutory exemption is often extended to ASDPs by way of exemptive relief orders. Exemptions have been granted in many instances across Canada<sup>3</sup>.

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<sup>2</sup> “Report on Staff’s Review of Insider Reporting and User Guides for Insiders and Issuers”:  
[https://www.osc.gov.on.ca/documents/en/Securities-Category5/sn\\_20160218\\_51-726\\_review-insider-reporting.pdf](https://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20160218_51-726_review-insider-reporting.pdf)

<sup>3</sup> In the matters of Fortress Paper Ltd ([https://www.osc.gov.on.ca/en/SecuritiesLaw\\_ord\\_20110211\\_219\\_fortress-paper.htm](https://www.osc.gov.on.ca/en/SecuritiesLaw_ord_20110211_219_fortress-paper.htm)), Kinross Gold

The purpose of insider reporting obligations is to publicly disclose the trades of those who have privileged access to information about reporting issuers in order to detect and deter insider trading, increase investors' confidence, transparency of the market place and to offer equal investment opportunities to all.

FAIR Canada recognizes that the automated and non-discretionary nature of the trading pursuant to automatic purchase plans may protect the integrity of the market (if instituted and administered properly) and generally does not oppose these plans, subject to the caveats described herein.

### **Automatic Stock Purchase Plans**

The statutory exemptions of NI 55-104 enable directors or officers ("reporting insiders") not to report stock purchases and specified dispositions or transfers incidental to the operation of the automatic securities purchase plan which does not involve a discrete investment decision by the reporting insider within 5 calendar days, provided that the reporting issuer itself files an "issuer grant report", within that same timeline. Issuer grant reports are disclosures of the trades by the reporting issuer, rather than by the reporting insiders. It provides similar transparency as insider trading reports. An annual report must also be filed, by reporting insiders, to enable securities regulators to reconcile the acquisitions under the plan with any other acquisitions or dispositions. The Notice and Request for Comments NI 55-104, dated December 18, 2008, explains that issuer grant reports have been implemented because insiders "experienced difficulties reporting on time transactions that originate at the issuer level, such as a grant of stock options by the issuer to insiders, because of delays in the issuer providing the necessary information".<sup>4</sup>

### **Automatic Stock Disposition Plans**

Automatic stock disposition plans are private arrangements established between the insiders and a broker. Therefore, even though the principles of exemptive relief for automatic stock disposition plans may appear to be similar to automatic share purchase plans, the regulatory issues are quite different. For instance, issuer grant reports cannot be filed by reporting issuers.

Several exemptive relief orders, granted by various provincial securities regulators, have exempted reporting insiders from filing insider trading reports for trades made pursuant to automatic share disposition plans. These exemptive relief orders are granted on a case-by-case basis, taking into account the specific risks of each request and assuming good faith of the reporting insiders.

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Corporation ([https://www.osc.gov.on.ca/en/SecuritiesLaw\\_20090918\\_218\\_kinross.htm](https://www.osc.gov.on.ca/en/SecuritiesLaw_20090918_218_kinross.htm)) and Royal Bank of Canada (<https://www.osc.gov.on.ca/en/9026.htm>)

<sup>4</sup> [https://www.osc.gov.on.ca/documents/en/Securities-Category5/csa\\_20081218\\_55-104\\_roc-insider-rpt.pdf](https://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20081218_55-104_roc-insider-rpt.pdf)

The exemptive order not only exempts the insiders of Bombardier from insider reporting, it allows them the option of reporting inadequate information up to three months after a calendar year end.

For instance, the exemptive relief order granted on September 14, 2018, to Bombardier Inc. and its executives, establishes that: "...by March 31 of each calendar year, the Insider files a report through SEDI of all acquisitions and dispositions under the ASDP during the prior calendar year not previously disclosed in a SEDI filing, disclosing either of the following: a) each acquisition and disposition on a transaction-by-transaction basis; b) all acquisitions as a single transaction using the average unit price of the securities, and all dispositions as a single transaction using the average unit price of the securities."<sup>5</sup>

### **Reporting**

**In the absence of issuer reports filed within 5 days, we do not understand why securities regulators agreed to exempt insiders from reporting their trades within the standard 5 calendar days, and instead agreed to rely solely on an annual report filed within 3 months after year end and with inadequate information on dispositions.**

It appears that, in the early days of the automatic stock purchase plan exemption, securities regulators may have taken into account the burden of insider reporting requirements for directors and senior officers. The Notice of proposed National Instrument 55-101 Exemption From Certain Insider Reporting Requirements and Companion Policy 55-101 published by the OSC, on August 20, 1999, states that: "The Canadian securities regulatory authorities have recognized the extent to which compliance with the insider reporting requirements can be unnecessarily burdensome and have, in recent years, provided exemptive relief on a case-by-case basis in response to applications made on behalf of directors and senior officers of subsidiaries and affiliates of corporate insiders of reporting issuers and in respect of purchases made under automatic securities purchase plans."<sup>6</sup>

It is our submission that the "regulatory burden" argument simply does not apply in the case of these dispositions, otherwise it would apply to insider reporting in general.

### **Risks**

We assume that the risk of improper trading under an automatic share disposition plan was considered low, because of the absence of discretionary trading by the insider. However, as further described herein, we submit that this may not be true in the case of some sales and, in any event, we see no valid reason why regulators should base an exemption on such an assumption.

There have been instances of fraud in connection with automatic trading plans. Reporting issuers and insiders have created so-called automatic trading plans as a scheme to trade based

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<sup>5</sup> In the Matter of Exemptive Relief Applications and Pierre Beaudoin and others, and Bombardier Inc., supra note 1

<sup>6</sup> [https://www.osc.gov.on.ca/en/SecuritiesLaw\\_rule\\_19990820\\_55-101not.jsp](https://www.osc.gov.on.ca/en/SecuritiesLaw_rule_19990820_55-101not.jsp)

on insider information without being subject to the prescriptions of the insider trading laws. For instance, by implementing plans while in possession of insider information, or by terminating and restructuring plans when aware of insider information, insiders are able to lock-in trade profits or avoid losses. See:

*SEC v. Mozilo*: In June 2009, the SEC filed a civil complaint alleging that Mr. Angelo Mozilo, the CEO of Countrywide Financial, was in possession of insider information when the automatic trading plan was created. In this case, it was demonstrated that the plan was amended, shortly after its adoption, in order for Mr. Mozilo to benefit from higher stock prices.

*Backe v. Novatel Wireless, Inc.*: In April of the same year, another case was brought in California against executives who amended their automatic trading plans to sell stock right before adverse insider information about the reporting issuer became public. In this case, it was also demonstrated that the sales were taking place at varying dates, rather than at fixed dates, such as on the first of each month.

On March 28, 2019, the Globe and Mail reported that “Bombardier’s disposition program allowed 12 senior executives to dispose of securities through an arm’s-length broker who makes the trading decisions. While the program was expected to run for two years, it appears several executives sold a majority of their securities within the first two months, which means their sales were not required to be spaced evenly over 24 months.”<sup>7</sup>

These dispositions are material enough to be considered price sensitive information that would have impacted the share price if they had been disclosed. However, these trades were not reported until March 2019. Therefore, for example, they do not appear on the Bombardier INK insider report for December 31, 2018 (attached to this letter). Any investors that researched insider trading of Bombardier in the context of making an investment decision to buy or sell Bombardier shares, would have been misled by the absence of timely insider trading reports. In addition, if investors had been aware of the extent of insider trading this may have been reflected in lower prices for Bombardier shares.

Disclosing all dispositions which took place during the 2018 as a single transaction by March 31, 2019, using the average unit price of the securities (as permitted in the exemptive relief order), does not enable the public to know when securities were sold and at what prices.

However, exceptionally, in the case of Bombardier, because the plan started trading on September 17 and trading was suspended on November 15, we are able to assess, as did the Globe and Mail, that **Alain Bellemare, President and CEO of Bombardier, sold 52% of the securities he put into the 24-month automatic disposition plan during the first 2 months of**

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<sup>7</sup> McFarland, Janet. “Key Bombardier Executives Reap Tens of Millions From Cashing In Share Units, Options.” The Globe and Mail, 28 March, 2019

**trading.** If the trades had been evenly spaced over time, closer to 8% of the securities should have sold during that same period. **Considering that he sold his shares at an average price of \$4.55, when Bombardier’s share price traded as low as \$1.67, after material non-public information was publicly disclosed, there is an appearance of prejudice to the balance of the shareholders and we believe that it undermines investors’ confidence in the Canadian markets, Bombardier and its insiders, and the regulators.**

We understand that the Autorité des marchés financiers (“AMF”) has conducted a review of these transactions and that Bombardier Inc. voluntarily suspended all sales of securities under the ASDP at the beginning of the review. We also understand, as further communicated in a press release issued by the AMF on April 26, 2019 (the “press release”), that no “offence or failure under securities legislation by participating senior executives or Bombardier Inc. during the implementation of the ASDP” was identified.<sup>8</sup> As a result, Bombardier and its senior executives were not required to end their use of the ASDP. Instead, the AMF “strongly recommended that Bombardier Inc. reconsider the merits of maintaining its ASDP”<sup>9</sup>. Bombardier indicated, on its website, that it will “follow the recommendation of the AMF and will ask its board of directors to pass a resolution to terminate the ASDP at its next meeting on May 1st 2019.”<sup>10</sup>

**Given the appearance of improper trading having occurred and significant profits being earned by the Bombardier senior executives, we submit that this is not enough.**

We believe that the case of Bombardier shed a harsh light on the ASDP exemptions regime adopted by the members of the CSA. If Bombardier “voluntarily” suspended the ASDP less than two months after it started, the board of directors presumably were aware of the regulatory concerns. Why did the board not require immediate insider reporting of the trading? Why did the board instead choose to delay insider reporting until March 2019 and even then, the reporting disclosed minimal information? Why did the AMF not require immediate and full insider trading reporting?

To convey insider preferences requires nothing more than a “wink and a nod”. It has always been naïve to assume that insiders will not disclose information, or preferences, to the brokers running their so-called “automatic” share sales plan. With the benefit of the hindsight, it would now be irresponsible to continue to undermine the purpose of insider trading and insider reporting rules by granting exemptive relief based on representations from insiders that they

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<sup>8</sup> <https://lautorite.qc.ca/en/general-public/media-centre/news/fiche-dactualites/lautorite-annonce-la-fin-de-son-examen-des-operations-entourant-la-mise-en-place-du-regime-daliena/>

<sup>9</sup> See note 8 supra

<sup>10</sup> <https://www.bombardier.com/en/media/newsList/details.binc-20190426-bombardier-acknowledges-the-press-release-issued-b.bombardiercom.html>

will act in good faith and will not use the plans as schemes to evade insider trading prohibitions and reporting requirements.

**As reported by The Globe and Mail, shortly after the issue of the AMF press release, Michel Magnan, a specialist in corporate compensation management at Montreal's Concordia's University commented that: "The optics of ASDPs, even if legally set up, are not consistent with modern governance, especially if companies obtain regulatory exemptions allowing them to defer the disclosure of transactions, as was the case with Bombardier" and that "fair and level-playing-field capital markets rely on transparency and ASDPs detract us from such an objective. If executives, as insiders, need or want to sell shares, then usual rules and regulations should apply."**<sup>11</sup>

**FAIR Canada shares this point of view and strongly advocates against the status quo. We submit that greater caution should be exercised and that regulators should not assume that these plans are implemented and administered in a genuinely automatic and non-discretionary fashion.**

**As a result, we recommend that securities regulators revoke all existing exemptions regarding ASDPs and require new applications to be made if the parties wish to continue with an exemption. Any new exemptions should require the application of consistent objective criteria and controls on any automatic trading plan, such as (i) timely reporting of insider trades, (ii) using fixed automatic trading formula or algorithm and (iii) imposing waiting and cooling off periods applicable to the implementation, amendment, suspension or termination of such plans.**

### **Proposed Changes**

#### **(i) Reporting Period:**

Regulation of manipulative and deceptive trading practices, including illegal insider trading, vary from one jurisdiction to another. Intention to defraud, or the actual knowledge of non-public material information, may or may not be required for a transaction to be viewed as illegal insider trading. However, insider trading, must always be reported on a timely basis. For instance, insider trading reports must generally be filed within 2 days in the U.S, 3 days in the UK and EU and 5 days in Canada. In the U.S. insider trade reporting has been extended to 5 days in the case of automatic trading plans. Therefore Canada has the most lenient insider trade reporting rule of these major financial jurisdictions. The exemptions granted in the Bombardier case undermine even this lenient insider reporting standard to an unacceptable level.

**We submit that annual reporting is insufficient and that all insider trades should be reported by the insiders or the broker (on behalf of the insiders) within 5 days.** Fairness is the ultimate

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<sup>11</sup> Nicolas Van Praet, "Regulator recommends Bombardier scrap executive stock-sale program", The Globe and Mail, 26 April, 2019



objective and it can only be achieved through transparency and ongoing market integrity, which strongly relies on proper reporting.

**(ii) Fixed Automatic Formula or Algorithm:**

To be effective automatic plans should also apply a mandatory fixed formula or algorithm, which would evenly space the trades during the course of the life of the plan. For instance, it appears that Bombardier Inc.'s insiders sold a majority of their securities within the first 2 months of the 2 year plan while a fixed formula or algorithm would have resulted in evenly spaced trades over the course of the plan.

**(iii) Waiting and Cooling Off Periods:**

To ensure automatic trading plans are not used to evade insider trading prohibitions under the applicable Canadian regulatory framework, we believe that trading should always be based on an automatic trading plan that is agreed to and implemented while insiders do not know of insider information. To enforce this requirement, a sufficient time period should elapse between the date of the creation of the plan and the starting dates of the automatic trading. We submit that in the corporate world, where decisions are often made on quarterly basis, the 1-month period currently required is too short and propose a mandatory waiting period of 3 months.

Finally, it should not be possible to terminate or suspend a plan and either implement a new one or resume the existing one, at the convenience of the director of officers. This presents a high risk of fraud and it should be prohibited in all cases.

**Summary**

In summary, investors' confidence in the integrity of the Canadian markets and regulatory system is undermined by the current automated sales plan exemptions. The obvious risk of self-serving implementation or administration of automated stock sale plan calls for stricter boundaries. One should not rely on the good faith of the reporting issuers, insiders and brokers, but rather establish parameters not only to deter fraud, but also to prevent it. Those parameters should include:

**Reporting:** Dispositions under automatic sales plans should not be exempted from timely reporting and should be disclosed within 5 calendar days.

**Fixed Automatic Trading Formula or Algorithm:** Automatic plans should also apply a mandatory fixed formula or algorithm, which would evenly space the trades during the course of the life of the plan.

**Waiting Period:** A mandatory 3 months waiting period, between the implementation of the plan and the commencement of the trading; and




**Cooling Off Period:** A mandatory cooling off period of 6 months to 1 year, between the termination of a plan and the creation of a new plan or for a suspended plan to resume trading.

We look forward to your response and would be pleased to discuss this letter with you at your convenience. Please feel free to contact Ermanno Pascutto, Executive Director, FAIR Canada at 647-256-6693 or [ermanno.pascutto@faircanada.ca](mailto:ermanno.pascutto@faircanada.ca).

We copy this letter to Maureen Jensen, Chair, Ontario Securities Commission as the OSC is the other securities regulator that granted the Bombardier exemptive relief. Please note that we plan to publish this letter in our May Newsletter. We would be pleased to publish your response.

Sincerely,



Ermanno Pascutto, Executive Director  
FAIR Canada  
c.c. Maureen Jensen, Chair, Ontario Securities Commission  
Attachments: Bombardier INK Insider Report for December 31, 2018