

**IN THE MATTER OF AN APPEAL TO THE APPEAL COMMITTEE  
OF THE CANADIAN INVESTOR PROTECTION FUND**

**RE:** [REDACTED]

**Written Appeal Scheduled: January 13, 2016**

**APPEAL CONSIDERED BY:**

BRIGITTE GEISLER

Appeal Committee Member

**DECISION AND REASONS**

**Introduction and Overview**

1. [REDACTED] (the “Appellant”) was a client of First Leaside Securities Inc. (“FLSI”), an investment dealer through which over 1,200 customers made investments in various affiliated companies, trusts and limited partnerships (collectively the “First Leaside Group”). FLSI was registered with the Ontario Securities Commission (“OSC”) and was a member of the Investment Industry Regulatory Organization of Canada (“IIROC”). It was also a member of the Canadian Investor Protection Fund (“CIPF” or the “Fund”) until its suspension by IIROC on February 24, 2012, being the same date that FLSI was declared to be insolvent and the day after FLSI sought protection under the *Companies’ Creditors Arrangement Act*. The relevant history leading up to these events and the role of CIPF with respect to claims to the Fund are set out in detail in the Appeal Committee’s decision in relation to an appeal heard on October 27, 2014.<sup>1</sup>

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<sup>1</sup> This decision is available on the CIPF website and will be referenced throughout as the “October 27, 2014 decision”.

2. The Appellant sought recovery from CIPF on the basis that FLSI was a Member of CIPF and as such the Appellant was entitled to protection through the Fund which was established to provide coverage in the event of insolvency. CIPF Staff made a decision denying compensation to the Appellant on the basis that the Appellant's losses did not arise as a result of the insolvency of FLSI and thus were not covered under the CIPF Coverage Policy dated September 30, 2010.

3. The Appellant requested that his appeal be considered on the basis of written materials which he provided.

### **Chronology of Events Relevant to the Appellant's Claim**

#### *(i) The Appellant's Investments and Claim*

4. The claim arises from the Appellant's investments in various First Leaside Group products for a total net value of \$1,787,680<sup>2</sup> ("Claimed Funds"). Of this amount, \$1,031,385.68<sup>3</sup> relates to undocumented claims, but which claims have been acknowledged by the insolvency trustee. It appears that these undocumented amounts reflect purchases of securities made by the Appellant prior to March 1, 2004, the date when FLSI became a member of the Investment Dealers Association (the predecessor of IIROC). I reach this conclusion as the records that are available indicate that the Appellant was an investor with the First Leaside Group of companies from as early as October, 2004.

5. For the claims that CIPF Staff were able to document, certificates representing the Appellant's purchases were transferred to accounts in the name of the Appellant at Fidelity Clearing Canada ULC or were delivered to the possession of the Appellant.

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<sup>2</sup> The Appellant originally claimed \$1,804,001, however, CIPF Staff adjusted this claim to \$1,787,680 based on duplicate amounts being claimed. See Appeal Record Volume 1, Tab 34, pp. 74-75 at paragraph 3.2

<sup>3</sup> The Appellant purchased 833 units of First Leaside Fund on October 14, 2005 for \$997.85, see Appeal Record, Vol 1, p.9. Therefore the undocumented amounts total submitted in Appendix A of CIPF Staff's submissions is reduced to include this amount.

(ii) *The Appellant's Application for Compensation*

6. The Appellant applied to CIPF for compensation for his losses in investments made through FLSI. By letter dated August 7, 2014, the Appellant was advised that CIPF Staff were unable to recommend payment of his claim. The relevant part of the letter reads as follows:

...losses caused by dealer misconduct, compliance failures or breaches of securities regulatory requirements in respect of the distribution of securities are not covered by CIPF. The securities that you purchased were subject to the disclosure of an offering memorandum or other offering documentation which, among other things, disclosed the risks relevant to the purchase and the investment. These investments, like any securities, were subject to market forces and, unfortunately, your loss appears to have been a loss caused by a change in the market value of your investments and not a loss resulting from the insolvency of FLSI.

**Analysis**

7. In his written submission, the Appellant raised arguments similar to those advanced at the October 27, 2014 appeal hearing. This included interpretation of the phrase “including property unlawfully converted” in the Coverage Policy, with particular application to investments made after the OSC began investigating the First Leaside Group in 2009. The Appellant submitted that he intended the funds he invested be applied to proprietary First Leaside products for the primary purpose of funding the acquisition and/or development of various real estate projects; instead, these funds were unlawfully converted by FLSI for its own use.

8. As mentioned above, the Appellant has been an investor with the First Leaside Group of companies since at least 2004 and possibly earlier. Of the investment amounts that can be documented, more than half of the investments were made prior to 2009.<sup>4</sup> Consequently, a vast majority of the claim relates to investments made prior to the start of the OSC investigation in the fall of 2009.

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<sup>4</sup> See Submissions of CIPF Staff, Appendix A for a summary of the investments made and the dates they were made. Of the claims that could be documented through FLSI records in the total amount of \$756,294.32, \$439,973.32 was invested prior to 2009.

9. These written arguments are focused on investments made during the time period following the commencement of the OSC investigation into the First Leaside Group, however, the Appellant has included all of his investments within this argument.

10. As stated in other Appeal Committee decisions, these arguments suggest that the Appellant's claim is really of fraud, material non-disclosure and/or misrepresentations. However, as was fully discussed in the October 27, 2014 decision, these arguments do not lead to the conclusion that what happened in this case falls within the meaning of the phrase "including property unlawfully converted" as set out in the Coverage Policy. That phrase is intended to address the situation where there is a failure to return property to the customer because it has been improperly confiscated by the broker. To apply the interpretation suggested by these written submissions would, in effect, create a new head of coverage. The October 27, 2014 decision deals extensively with the written arguments which were raised. This Appeal Committee adopts the reasoning in the October 27, 2014 decision.

11. The Appellant has included in his submissions, a claim for share certificates which he suggests have not been issued.<sup>5</sup> The Appellant has provided no evidence to suggest that this is the case. In any event, the investments in the Appellant's claim have been acknowledged by the insolvency trustee. CIPF's obligation is to ensure that property, which is recorded on the books and records of the Member, are returned to the customer. If they are not so recorded, there is no eligible claim, unless the customer can establish that the property was "unlawfully converted". Since the Appellant has made the claims and the insolvency trustee has acknowledged the investments from records of the First Leaside Group of companies, it would appear that the Appellant's instructions as to his investments were followed and this is not an issue of missing property. The lost of value of an investment is not missing property.

12. The Appellant has stated that the insolvency of FLSI rendered the company unable to return the Claimed Funds. It must be remembered that many of the First Leaside Group entities became

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<sup>5</sup> Although he has claimed that certificates are missing, the Appellant has not detailed to which certificates he is referring. See Appeal Record, Volume 1, page 116.

insolvent at approximately the same time, but that some of the entities did not, in fact, become insolvent. The Appellant had investments with various First Leaside Group entities. CIPF's involvement with these insolvencies is restricted to its Member, FLSI (which documented the records of his investments), and not the other First Leaside Group entities. CIPF's obligations are to ensure that the customer's property, as documented on the Member's records, is returned. While CIPF's mandate is to contribute to the security and confidence of customers of Canadian investment dealers, (as stated by the Appellant), this does not include the restoration of the customer's assets which have been negatively impacted by poor business decisions, market forces, fraud or other factors.

13. It is important to understand the origins of CIPF and the restrictive nature of CIPF coverage. CIPF's mandate is to provide coverage that is custodial in nature; in other words, to ensure that the customers of an insolvent Member have received their property. The Appellant has received his property (or had it acknowledged by the insolvency trustee); accordingly the issue of CIPF coverage is not applicable. It is most unfortunate that the value of the property is uncertain; however, the Coverage Policy clearly states that CIPF does not cover "changing market values of securities, unsuitable investments, or the default of an issuer of securities".

14. As stated above, CIPF coverage is to ensure that property is returned to Members' customers. It does not extend beyond that to include a "guarantee" of the principal of the investment. It is not an insurance scheme to cover fraud, like the one that can be found in Quebec. In fact, the existence of the Quebec fund confirms the narrowness of CIPF coverage in that the Quebec government realized that there was a gap in coverage for investor losses as a result of fraud and has provided limited coverage.

15. The Appellant has submitted that his claim should be paid on the basis that the insolvency of FLSI was due to the interference of the regulatory bodies, namely IIROC and the OSC. That assertion has been raised by other Appellants as well, but no evidence in substantiation of this claim has been presented. A lawsuit against the OSC by a group of investors addresses conduct by the OSC Staff, but relates to issues arising out of the same time period in question in the actions by the

OSC against Messrs. Phillips and Wilson, former principals of the First Leaside Group of companies. In any event, even if such an allegation were to be proven, it would not assist the Appellant in his claim as a claim to CIPF must be for losses arising out of the insolvency of a Member; possible regulatory misconduct would not be a relevant consideration.

16. I have sympathy for the losses suffered by the Appellant; however, I conclude that the Appellant's submissions in this appeal are not persuasive and do not give rise to a successful claim for compensation from CIPF.

**Disposition**

17. The appeal is dismissed. The decision of CIPF Staff is upheld.

Dated at Toronto, this 18<sup>th</sup> day of February, 2016.

*Brigitte Geisler*