

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

**RE:** [REDACTED]

**March 25, 2015**

**WRITTEN 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 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 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 dated October 27, 2014.<sup>1</sup>

2. The Appellant alleges that he invested \$509,039.29 in First Leaside Funds and Partnerships. CIPF Staff was only able to confirm the purchase of investments for a value of \$338,014.15, but noted that a further 38,571 units of Wimberly Apartments Limited Partnership and 10,000 units of

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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”.

First Leaside Spring Valley Limited Partnership were also claimed, but without information as to the dates or purchase price.

3. 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.

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

### **Chronology of Events Relevant to the Appellants' Claim**

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

5. The claim arises from the Appellant's purchase of various First Leaside Funds and Partnerships, as follows:

- a. Purchase of 19,491 units of First Leaside Fund Series A on November 21, 2005;
- b. Purchase of 74,645 units of Wimberly Apartments Limited Partnership for \$50,012 on November 28, 2005. A further 38,571 units are claimed, however, no purchase price or date is available;
- c. Purchase of 30,000 units of First Leaside Expansion Limited Partnership on December 13, 2005;
- d. Purchase of 50,000 units of First Leaside Fund Series B on November 14, 2008;
- e. Purchase of 41,511 units of Flex Fund on August 9, 2011;
- f. Purchase of 52,500 units of First Leaside Venture Limited Partnership on October 17, 2011;
- g. Purchase of 50,000 Special Notes Limited Partnership on October 18, 2011; and
- h. 10,000 units of First Leaside Spring Valley Limited Partnership for which no purchase price or date is available.

6. The Appellant alleges he invested a total of \$509,039.29 in various funds and partnerships. He advises that he has received \$175,579.05 in distributions from the funds or partnerships. He has not received any distribution from the insolvency trustee.

7. Certificates representing these investments were delivered to the Appellant with the exception of the units of First Leaside Fund Series A and Flex Fund which were transferred to accounts in the Appellant's name at Fidelity Clearing Canada ULC ("Fidelity") following FLSI's insolvency.

*(ii) The Appellants' Application for Compensation*

8. The Appellant applied to CIPF on October 3, 2013 for compensation for his losses in investments made through FLSI. By letter dated July 10, 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:

Regarding your claim for unlawful conversion, it does not appear to us that any property held by FLSI for you was converted or otherwise misappropriated. 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 or the conversion of your property.

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.

With respect to the securities that you purchased and which are described in the Table 1 below<sup>2</sup>, they were properly recorded in the books and records of FLSI at the date of insolvency. Those securities were transferred to accounts in your name at another IIROC Dealer Member subsequent to February 24, 2012. In addition, at the date of insolvency, the securities described in Table 2<sup>3</sup> below were not held by, or in the control of, FLSI. Therefore, the loss is not one that is eligible for CIPF coverage, as indicated above.

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<sup>2</sup> See paragraph 5 (a) and (e) for details of the securities.

<sup>3</sup> See paragraphs 5 (b) to (d) and (f) to (h) for details of the securities.

## Analysis

9. The Appellant relied upon arguments similar to those raised by Representative Counsel for the investors of FLSI. These arguments were dealt with in detail in the October 27, 2014 decision, in particular, in paragraphs 27 through 49.

10. One of the main arguments focused on the interpretation of the phrase “including property unlawfully converted” in the Coverage Policy. The Appellant argues that the funds he invested were to have been invested in proprietary First Leaside products on the understanding that such funds would be invested in those products for the primary purpose of funding the acquisition and/or development of various real estate products. The Appeal Committee is of the view that the adoption of these arguments suggests that the Appellant’s claim is really one of fraud, material non-disclosure and/or misrepresentation which does not fall within the meaning of the phrase "including property unlawfully converted". Such an interpretation would in effect create a new head of coverage.

11. The other main argument raised in the Representative Counsel submissions related to the exercise of discretion by the Appeal Committee under the Coverage Policy. As was indicated in the October 27, 2014 decision, the Appeal Committee is bound to exercise its discretion within the limits of the CIPF mandate which is to provide custodial coverage to customers in the event of the insolvency of a Member. While the Coverage Policy provides a residual discretion, it is limited to cases where the application of the Policy might result in an outcome that frustrates or defeats the purpose of the compensation scheme. It is not intended to use discretion to create a new head of compensation such as misrepresentation or the default of an issuer. The Appeal Committee’s discretion is limited to the Coverage Policy which, in general terms, provides for the return of the Appellant's property. In this case, the Appellants’ investments were either held by FLSI at the date of insolvency and subsequently transferred to Fidelity or were delivered to him.

12. The Appellant submitted that his investments were made while the principals of FLSI were aware of the Grant Thornton Report and that to have done so was fraudulent conduct. In review of the dates of the investments, it appears that approximately two-thirds of his investments pre-dated the Grant Thornton Report. For those investments, arguments relating to fraudulent conduct on the basis of the Grant Thornton Report would appear to be inapplicable.

13. As stated above, the purpose of CIPF coverage is limited to custodial coverage. As was indicated in the October 27, 2014 decision, the CIPF brochure outlines limitations on coverage. Furthermore, had any misrepresentations in relation to CIPF been made, they were made by FLSI. Oversight of members is primarily the jurisdiction of IIROC, with additional oversight by the Ontario Securities Commission.

14. As in the October 27, 2014 decision, while the Appeal Committee has considerable sympathy for the Appellant's position, I conclude that his submissions in this appeal are not persuasive and do not give rise to a successful claim for compensation from CIPF.

### **Disposition**

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

Dated at Toronto, this 25<sup>th</sup> day of March, 2015

Brigitte Geisler

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