

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

**RE:** [REDACTED] and [REDACTED]

**Heard: July 17, 2015**

**HEARD BEFORE:**

BRIGITTE GEISLER

Appeal Committee Member

**APPEARANCES:**

James Gibson

)  
)

Counsel for Canadian Investor  
Protection Fund Staff

[REDACTED]

)  
)

On his behalf and on behalf of [REDACTED]

[REDACTED]

**DECISION AND REASONS**

**Introduction and Overview**

1. [REDACTED] and [REDACTED] (the “Appellants”) were clients 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 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>

2. The Appellants sought recovery from CIPF on the basis that FLSI was a Member of CIPF and as such the Appellants were 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 Appellants on the basis that the Appellants' 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. On July 17, 2015, an Appeal Committee Member of CIPF's Board heard an appeal to determine whether to depart from the decision of CIPF Staff. The appeal hearing was held at Neeson Arbitration Chambers in Toronto, Ontario. The Appellant [REDACTED] was in attendance and made submissions on behalf of both Appellants.<sup>2</sup>

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

#### *(i) The Appellants' Investments and Claim*

4. The claim arises from the Appellants' purchases of various First Leaside Group products, namely: units of First Leaside Fund (Series C), First Leaside Mortgage Fund (Series A), and First Leaside Wealth Management Fund. The Appellants have made a net claim of \$176,411.32.<sup>3</sup>

5. Certificates representing the Appellants' purchases were transferred to accounts in the names of the Appellants at Fidelity Clearing Canada ULC ("Fidelity").

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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".

<sup>2</sup> Consequently, although this decision is in relation to the appeals brought by both Appellants, [REDACTED] is referred to below as the "Appellant".

<sup>3</sup> This claim amount is calculated by starting with the purchase cost of the investments, adding a claim for stock dividends received and reducing the claim by amounts deducted by the Appellants.

(ii) *The Appellants' Application for Compensation*

6. The Appellants applied to CIPF on October 10, 2013 for compensation for their losses in investments made through FLSI. By letter dated December 29, 2014, the Appellants were advised that CIPF Staff were unable to recommend payment of their claims. The relevant parts of the letter read 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.

In addition, with respect to the securities that you purchased, 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. Therefore, the loss is not one that is eligible for CIPF coverage, as indicated above.

**Analysis**

7. The Appellant submitted that because the relationship between FLSI and the First Leaside Group was not arm's length, that this was a conflict of interest. While his submission has merit, this type of issue relates to the conduct of the sales representatives at FLSI, a matter which is under the purview of IIROC. CIPF is not a regulatory body; as discussed below, its mandate is restricted to custodial insurance.

8. The Appellant referred to the CIPF Coverage Policy, in particular to a part of the third paragraph under the heading "Determination of Customer Losses",<sup>4</sup> which states:

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<sup>4</sup> Appeal Record, Vol 1, p.73.

“Where the securities are not available to be delivered, cash in an amount equal to their value as at the date for determining financial loss may be paid to the customer even though the amount of such cash may not be equal to the value of such securities as at the date of payment.”

He submitted that this sentence means that if the certificates for his securities were not available, that CIPF should satisfy his claim through payment of the last value shown on his monthly statements, which would have been the full amount of his claim.

9. The Appeal Committee disagrees with this interpretation. Securities traded on a public exchange have available a value at which willing buyers and sellers will transact. CIPF would look to this valuation as of the date of the insolvency, not to the values which may be shown on account statements. The same kind of process would apply to private securities; however, unlike for exchange traded securities, no third party independent information is available. CIPF would be obligated to return the value of securities as at the date of insolvency, with the value being determined by the Board of CIPF. To simply accept the value as stated on the monthly statements would not be the process for publicly traded securities and would not be appropriate for private securities, as this value was determined by the First Leaside Group themselves.

10. Counsel for CIPF Staff submitted that this approach would create a regime where different and unfair results would arise for investments made on a public market and on a private basis. He noted that over many years the values of the various First Leaside Group entities were almost always shown at the original purchase price of \$1.00/unit even, which tends to undermine the validity of the values.

11. The Appellant also addressed the matter of 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 Appellants' property. In this case, the Appellants' investments were held by FLSI at the date of insolvency and were subsequently transferred to Fidelity.

12. CIPF's mandate and its coverage is custodial in nature; in other words, to ensure that the clients of an insolvent member have received their property. This custodial coverage is set out in CIPF's mandate, which is approved by the OSC and other provincial securities regulators. The mandate is restricted to this coverage, and does not extend to coverage for fraud, material non-disclosure and/or misrepresentation. The nature and extent of the coverage is discussed in full in the October 27, 2014 decision.

13. The Appellant noted that some of his investments were made during the period when the First Leaside Group was under investigation by the OSC and Grant Thornton. He stated that he was advised that the investments were extremely safe and that CIPF insurance would protect the investments. He stated that he had complaints against everyone, but that there was no recourse available, a result which was unfair. While I have considerable sympathy for the Appellants, I conclude that the Appellants' submissions in this appeal are not persuasive and do not give rise to a successful claim for compensation from CIPF.

### **Disposition**

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

Dated at Toronto, this 22nd day of July, 2015.

*Brigitte Geisler*