"BUT EVERYBODY DOES IT": APPELLATE GUIDANCE ON "INNOCUOUS" CONDUCT INVOLVING IIROC

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In the case of *Eley v. Ontario Securities Commission*,[1] a former registered representative appealed to Ontario's Divisional Court the Ontario Securities Commission's decision to uphold the findings and sanctions imposed by IIROC. The representative raised several issues in his appeal, alleging errors in the decision-making process. The court ultimately dismissed the appeal. Of particular interest is the representative's argument that he only made "innocuous alterations" to documents – a defence that did not win the day.

Facts

A former registered representative was accused by IIROC of making unauthorized trades, forging client signatures, and altering client account documents. IIROC found that the representative violated various Dealer Member Rules, fined him $375,000 and ordered him to pay costs of $30,000. The OSC upheld these findings and sanctions, leading to the representative's appeal to the court.

"Innocuous Errors"

After dealing with issues related to the standard of review and standard of assessment of conduct, the court focused the representative's allegations that IIROC was deficient in how it had defined its case – failing to provide details about the sorts of client documents that he was alleged to have altered. This ground of appeal was unsuccessful.

The representative then argued that part of the foundation of IIROC's decision concerned document alterations that were "innocuous" and "acceptable industry practice". The unauthorized alterations included the modification of account documents such as trade tickets, order tickets, and new account forms. Some of the innocuous conduct addressed by the IIROC Panel was the representative adding account numbers, his own signature and date after client signatures. According to the Evidence Chart used by the IIROC Panel, *a portion* of the alterations made by the representative were purportedly "innocuous" and "acceptable," which the representative claimed undermined the Panel's conclusion that there was a pattern of misconduct.

The representative argued that these alterations were harmless and commonplace in the industry, and

therefore should not have been used to ground liability against him.

The court rejected this argument, stating that the IIROC Panel had considered all the evidence related to the unauthorized alterations and concluded that there was a pattern of misconduct based on the instances that grounded liability. Further, there were some issues that were innocuous and others that were not.[2]

The court emphasized that the IIROC Panel's use of the term "innocuous" and "acceptable" for some of the allegations did not mean that the conduct was permissible or excusable but rather that they were instances that did not warrant the imposition of the most severe sanctions. Ultimately, the court found that the evidence showed a pattern of misconduct that was not undermined by the instances of "innocuous" and "acceptable" alterations.

Ultimately, the court held that the sanctions imposed were reasonable and within permissible boundaries, considering the seriousness of the representative's misconduct and his prior disciplinary record.

Conclusion

The decision in *Eley v. Ontario Securities Commission* holds that parties may be penalized for conduct notwithstanding that some of it may be consistent with industry practice. This was upheld as reasonable on appeal.

At least in some circumstances, conduct that may be viewed as commonplace or innocuous may, at a minimum, aggravate how other conduct is viewed before the New Self-Regulatory Organization of Canada (which is an amalgamation of IIROC and the MFDA).

This decision also highlights why parties subject to complaints at the New Self-Regulatory Organization of Canada must place adequate importance on obtaining success at first instance. Appellate courts will not perform an “at first instance” analysis of the degree to which innocuous conduct is balanced in the overall disposition of a matter. Showing that a conclusion is erroneous on appeal can be challenging – particularly when they involve a weighing of evidence before the initial administrative decision-maker.

[1] 2023 ONSC 2168, aff’g 2021 ONSEC, aff’g 2019 IIROC 35 and 2020 IIROC 35.
[2] In fact, the original decision of the IIROC Panel states that “The Panel finds that the Respondent, between May 2015 and November 2015, executed not only the innocuous alterations which he acknowledges, but also that he either executed, or directed someone to make improper alterations, and then knowingly allowed the improperly amended documents to remain in his client’s files.” 2019 IIROC 35 at para 79.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.