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## Facing the Music: The Pitfalls of Obstruction Under Canada's *Competition Act*

### *Competition Compliance Essentials*

Conventional wisdom (at least since Watergate) tells us that "it's not the crime, it's the cover-up." In other words, it's possible to violate the law by trying to conceal an alleged crime – even if it turns out that the allegation of criminal conduct is never substantiated.

In the same way, a basic principle of competition law compliance – both in Canada and elsewhere – is that parties must never obstruct an ongoing investigation, whether by hiding or destroying documents, deleting emails, wiping out texts and voicemails from cellphones, falsifying information, or otherwise hindering the course of an enforcement action.

The recent penalty imposed by the United Kingdom's Competition and Market Authority (CMA) on guitar manufacturer Fender Musical Instruments (Fender) for obstructing a cartel investigation underscores the harsh consequences of violating this principle and illustrates the need for companies to take preparatory measures to ensure compliance at all stages of an investigation.

#### **The Case of Fender Musical Instruments**

According to the CMA, Fender's objectionable conduct occurred during an unannounced search of its U.K. offices by the CMA (often referred to as a "dawn raid"). During the raid, the CMA asked Fender to produce all relevant hard copy documents, including employees' personal notebooks.

One senior employee of the company dutifully handed his recent notebooks over to the CMA, but explained that notebooks from prior years were not relevant and, in any event, had been discarded. Unbeknown to the company, however, the employee's story about his older notebooks was a complete fabrication. In reality, he had given the notebooks to a junior colleague who was instructed to conceal them at home. When Fender became aware of the employee's deceptive actions, it promptly alerted the CMA and produced the notebooks for examination.

Even though Fender had been unaware of its employee's conduct and had made full disclosure once it discovered what he had done, the CMA concluded that the notebooks were indeed relevant to its investigation and fined Fender £25,000 for obstruction. The CMA said that it could not allow Fender to simply "absolve" itself of liability, particularly when the misconduct was carried out by a senior employee who had taken "active steps" to obstruct the dawn raid in a "flagrant and intentional" manner.

#### **The Cost of Non-Compliance**

In Canada too, obstruction is a serious matter with significant consequences. For example, it's a criminal offence to impede or prevent any inquiry or examination carried out by the Competition Bureau, including by destroying or altering records. Penalties can range from a fine in the discretion of the court to imprisonment for a maximum term of 10 years, or both.

The biggest risk of obstruction in Canada typically arises in the context of the Competition Bureau's search and seizures, as was the case for Fender. Targets of a search and seizure must be meticulous in ensuring that no member of the company (from the executive suite down) engages in conduct that could be construed as obstruction.

But care also must be taken in any other circumstance in which the Competition Bureau requires that information be provided, such as in response to a compulsory court order for the production of records. In particular, it's critical that the responses and information provided are complete and accurate in all material respects and that no attempt is made to deliberately mislead or conceal relevant items.

So don't "face the music" for obstruction as Fender did. If you find yourself the target of a Bureau investigation and are subjected to compulsory process, make sure that you use the utmost vigilance in avoiding any conduct that could be construed as impeding the Bureau in the lawful exercise of its authority.

## How You Can Prepare

Here are five basic steps that you can take to help avoid allegations of obstruction if you are the subject of a Competition Bureau search and seizure or other compulsory process:

1. Immediately advise relevant employees of the nature of the event (search and seizure, subpoena for records, compulsory demand for responses to written interrogatories, etc.) and inform them that any attempt to obstruct the Bureau's process (including by hiding, altering or destroying documents, deleting electronic records, or falsifying responses) is a criminal offence punishable by fine and/or imprisonment.
2. Suspend the company's record retention and destruction procedures until the scope of the information sought by the Bureau can be assessed. Voicemails, text messages and all other forms of company communications should also be preserved until further notice.
3. Clarify any questions regarding the information sought by the Bureau (e.g., in a subpoena) and ensure that responses provided are complete and accurate in all material respects.
4. In the case of a search and seizure, Bureau officers will seal offices or storage spaces that remain to be searched as well as any room where they are temporarily storing seized materials. Advise all employees, including building maintenance staff, that these seals must not be tampered with or broken under any circumstances.
5. Document your compliance procedures, including instances of discussions with Bureau officers or counsel regarding any issues or questions that arise.

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For additional guidance, please refer to our publication on [Suggested Procedures for Responding to a Competition Bureau Investigation](#).

*Competition Compliance Essentials is a new series by Davies' Competition practice that shines the spotlight on common compliance issues and offers practical guidance on how to avoid potential violations of Canadian law.*

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