

## **COURT TOSSES OUT LAWSUIT AFTER LITIGANT HACKS INTO OPPONENT'S COMPUTER SERVER FOR "SELF-HELP" REMEDY**

**Duty to Disclose, Employment, Ethics, Intellectual Property, Misappropriation, Privacy, Security, Solicitor-Client Privilege**

**Frequently when relationships between a business and a partner or employee end, the business may be concerned the departing individual has possession of its electronic information, including proprietary or confidential intellectual property.**

**A business may wish to take steps to recover this electronic information from the former partner or employee. In such a case, it is critical that the business consult its legal counsel before taking any "self-help" remedies.**

The recent decision of *Autosurvey v. Prevost et al.*<sup>[1]</sup> should be required reading for any business considering exercising a self-help remedy to recover intellectual property believed to be in the possession or control of a departing partner/employee.

In *Autosurvey*, the plaintiff business accessed a former partner's computer server without authorization and made a complete copy of the server's contents. Because of the plaintiff's conduct, the Ontario Superior Court of Justice permanently stayed the plaintiff's action at its

outset without any judicial examination of the original allegations that the defendants had misappropriated the plaintiff's intellectual property. The Gardiner Roberts LLP team of David Fine and James Cook successfully represented the interests of the defendants, who strenuously denied the plaintiff's unproven allegations during the hearing.

### **Facts of the Case**

The plaintiff, *Autosurvey Inc.*, was engaged in the business of providing computerized online customer survey and polling systems for retail automotive dealerships obtaining customer feedback. In April 2005, *Autosurvey* and its Vice-President of Research and Development, Joseph (Andy) Prevost, terminated their business relationship. On May 5, 2005, *Autosurvey* served Prevost and other defendants with a statement of claim alleging breaches of fiduciary and contractual duties, and appropriation of intellectual property and business opportunities. *Autosurvey* also served the defendants with notice of a motion seeking an injunction and other interim relief, scheduled for May 13, 2005.

[1] 2005 CanLII 36255, [2005] O.J. No. 4291 (Ont. S.C.J.)

The case then took a dramatic turn of events. Over the course of May 10-11, 2005, the plaintiff Autosurvey accessed Prevost's computer server without authorization and made a complete copy of the server's contents. Although Autosurvey's principal swore an affidavit on May 11, 2005 disclosing his access to the server, the affidavit did not disclose the fact a complete copy of the server's contents had been made. Prevost's counsel did not discover a complete copy had been made until 20 days later, when the plaintiff delivered another affidavit and DVD with a complete copy of the server's contents as of May 11, 2005.

Prevost's server was used for both Prevost's personal electronic communication and for other business ventures that bore no relationship to Autosurvey's action. Consequently, the unauthorized access to Prevost's server potentially gave Autosurvey passwords, credit card information, highly confidential source codes for other software products Prevost was developing, personal business and financial records for the past 15 years, and copyrighted software products on the Web sites of third parties. Further, Prevost's server contained 29 e-mail communications between Prevost and his legal counsel in connection with the Autosurvey litigation, which were protected by solicitor/client privilege.

Upon discovering the unauthorized copying of Prevost's server, the defendants sought to remove the plaintiff's lawyers from the record and to stay the entire action. Mr. Justice Quigley then granted an extraordinary order permanently staying the action. In the court's view, this remedy was the only one that could properly recompense the defendants in any meaningful way for Autosurvey's conduct.

The court emphasized the fundamental entitlement of privacy in Canada, not only in the context of public law matters, but also in relationships between

people in a private law context. The fundamental principle is the right of everyone to be free and secure from encroachment upon their reasonable expectations of confidentiality and privacy in a free and democratic society — whether by government, non-governmental parties or a litigation adversary, such as Autosurvey.

Justice Quigley scathed Autosurvey for its unauthorized resort to "an invasive self-help remedy" that permitted it, secretly and surreptitiously, to access and download the entire contents of Prevost's computer server. Justice Quigley made it clear Autosurvey had no right to take such an intrusive action on its own initiative, even if it believed Prevost had misappropriated property. In the court's view, Autosurvey's intrusive conduct went far beyond what the court would have been prepared to grant even if Autosurvey had the patience or "good sense" to allow the court to adjudicate, rather than taking matters into its own hands.

#### Decision's Impact on Your Business

It is important to note there are court-sanctioned remedies available that a business can take to recover electronic information and intellectual property from a departing partner or employee.

Orders can be sought on an urgent basis and, in certain appropriate circumstances, without notice to the former partner or employee. Any order granted by the court must provide for safeguards for the fundamental rights of privacy and protection of privileged information.

Failing to give due weight to these rights could result in a stay of an action without any judicial examination of the merits of the allegations against the former partner or employee.

---

Gardiner Roberts LLP  
Lawyers  
Suite 3100, 40 King Street West  
Toronto, ON M5H 3Y2  
Tel 416 865 6600  
Fax 416 865 6636  
web [www.gardiner-roberts.com](http://www.gardiner-roberts.com)



Gardiner Roberts LLP is a medium-sized law firm with a full-service practice at Scotia Plaza. Gardiner Roberts LLP is a member of MSI, a worldwide network of professional firms

#### Contacts:

Editor: Lou Milrad – 416 865 6650  
Arlene O'Neill – 416 865 6640  
John Collins – 416 865 6699

Please call us. We'd enjoy your comments.

The Innovator is a publication of Gardiner Roberts LLP, Lawyers. These materials are intended for education purposes only and not as legal advice.