

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *SaNOtize Research and Development Corp. v. Smith*,
2025 BCSC 895

Date: 20250410
Docket: S252480
Registry: Vancouver

Between:

**SaNOtize Research and Development Corp.,
Christopher Miller, and Gilly Regev**

Plaintiffs

And:

Trent Leroy Smith and Element Ventures (Canada) LP

Defendants

Before: The Honourable Justice J. Hughes

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

N.T. Hooge
M.K. Shergill

No other appearances at this hearing

Place and Date of Hearing:

Vancouver, B.C.
April 10, 2025

Place and Date of Judgment:

Vancouver, B.C.
April 10, 2025

Overview

[1] This is an application for interlocutory relief by the plaintiffs against the defendants, in which the plaintiffs seek to restrain the defendants from acting on a threat of publishing certain confidential information, and prohibit the defendants from making or continuing to make representations that they have an ownership interest in the plaintiff, SaNOtize Research and Development Corp. ("SaNOtize"), its intellectual property, or its pharmaceutical products.

[2] Specifically, the plaintiffs seek the following orders:

1. An interlocutory injunction, pending the trial of this action:
 - (a) Restraining and enjoining the defendants, Trent Leroy Smith ("Mr. Smith") and Element Ventures Canada (LP) ("Element Ventures") from:
 - (i) publishing, distributing, or otherwise making available any information, data, documents, or other material in [their] possession or control, in data room format or otherwise, that is related to or derived from the negotiation and due diligence in respect of a License, Development and Commercialization Agreement between Bovivor Pharmatech Inc. ("Bovivor") and Eli Lilly and Co. (Elanco) in or about 2015; and
 - (ii) publishing, distributing, or otherwise making available any other "Confidential and Proprietary Information" that Mr. Smith has in his possession or control, as defined and described in the Mutual Release of All Claims and Settlement Agreement, made effective November 2, 2017, entered into by, among others, Mr. Smith and Bovivor.
 - (b) Requiring the defendants, Mr. Smith and Element Ventures, within two (2) days of the order, to remove from the website, located at <https://elementventureslp.com/> (the "Element Website"), the statement:

"Leveraging legal and beneficial ownership in SaNOtize Research & Development Corp, patented technologies (US 10905712 B2), and regulatory approved (Cambodia, Germany, India, Thailand, Singapore, South Africa) drug products."

(the "SaNOtize Ownership Representation").
 - (c) Restraining and enjoining the defendants, Mr. Smith and Element Ventures from publicly disseminating or otherwise publishing the SaNOtize Ownership Representation on the Element Website, any other website(s) the defendants or either them operate or control, or in any other public forum or manner.

- (d) Restraining and enjoining the defendants, Mr. Smith and Element Ventures from making any other representations to the public, including in direct communications to third parties, that the defendants or either them own or have any ownership rights or interest of any kind in SaNOtize Research and Development Corp. ("SaNOtize") or any of its products, including the "VirX" nasal spray.

[3] The matter came on for hearing before Madam Justice Tucker on April 1 on an *ex parte* basis. Justice Tucker granted an interim injunction prohibiting the disclosure of confidential information as set out at para. 1(a) of the notice of application and granted short leave for the hearing of the balance of the application for injunctive relief regarding the defendants' conduct in respect of SaNOtize.

[4] The injunction application was served on the defendants in accordance with Justice Tucker's short leave order. No response has been filed by the defendants. Shortly before the matter came on for hearing, at 8:46 a.m. this morning, Mr. Smith contacted counsel for the plaintiffs and advised that:

...I have not published, distributed or otherwise made available any documents or other materials in my possession or control, in data room form or otherwise...

[5] He also confirmed that the statement contained on the website of the defendant Element Ventures (Canada) LP ("Element Ventures"), which is in issue in para. 1(b) of the notice of application, has been removed as of April 7, 2025. In light of that, the plaintiffs are not proceeding with the injunction as it relates to the relief sought in para. 1(b) of the notice of application. In his email, Mr. Smith also indicated "I agree to comply with the items 1(a), (c), and (d)," which is in reference to the notice of application set to be heard today.

[6] Further, in follow-up correspondence sent at 9:40 a.m. this morning, Mr. Smith indicated:

I consent to items 1, 2, and 4 of the attached, without prejudice to my outstanding claims in copyright infringement.

[7] Mr. Smith also indicated his position that costs of this application should be awarded in the cause pending a final trial in this matter.

[8] In light of Mr. Smith's communications to counsel for the plaintiffs this morning, the application is effectively proceeding by consent. However, as Mr. Smith did not attend at court, and due to the lateness of his response, a consent order was not able to be prepared in advance of the matter coming on for hearing.

[9] Accordingly, counsel for the plaintiffs, at the Court's invitation, proceeded to take the Court through the substance of the materials on the application, which was, in my view, beneficial given that obtaining injunctive relief is one of the key aims of the litigation, and it is questionable whether the action will proceed on the merits if the injunction is granted.

Facts

[10] SaNOtize is a British Columbia company that is involved in global clinical-stage pharmaceuticals and based in Vancouver. SaNOtize was founded by the individual plaintiffs Drs. Miller and Regev in 2017. The defendant Mr. Smith is a former business associate of Drs. Miller and Regev in a now-defunct business venture called Bovicor Pharmatech Inc. (“Bovicor”). Bovicor was a British Columbia company that has since been dissolved for failure to file in March of 2020.

[11] Mr. Smith is not and has never been a shareholder, director, or employee of SaNOtize. Nor is he affiliated with SaNOtize in any other manner according to the plaintiffs' evidence. The defendant Element Ventures represents itself to be a limited partnership in which Mr. Smith is the founder and managing partner.

[12] The individual parties to this proceeding have an extensive litigation history, which dates back to their common involvement in Bovicor. Mr. Smith was an original director of Bovicor with Dr. Miller. Mr. Smith was employed in the position of a business developer by Bovicor until his employment was terminated for cause in March of 2016.

[13] During his employment with Bovicor, Mr. Smith was primarily responsible for many of the administrative, financial and other office functions of Bovicor's business, but did not have a scientific background and was not involved in Bovicor's research and development work.

[14] In the course of business employment with Bovicor, Dr. Miller deposes that Mr. Smith did have access to Bovicor's intellectual property and other work product, including details of its business dealings and research. One of such business dealings with a licensing, research, development and commercialization agreement that Bovicor entered into with Eli Lilly & Co. It is through this agreement that Mr. Smith is alleged to have had access to certain confidential information contained in a data room, which is now the subject of the present injunction, as it relates to the orders seeking to restrain Mr. Smith from disclosing confidential information.

[15] In May of 2016, Bovicor commenced an action against Mr. Smith. That action was subsequently settled in November of 2017. In the course of settling that proceeding, Mr. Smith and his holding company, DaoRui Enterprises Ltd., entered into a mutual release of all claims and settlement agreement with Bovicor. The terms of the settlement agreement included, in material part:

- 1) an obligation on Mr. Smith to keep information obtained during his employment with Bovicor confidential and not disclose such information, which obligation appears to include keeping confidential the information obtained from the 2015 "data room" created for a transaction with Eli Lilly & Co.;
- 2) the release of all claims in favour of Bovicor's officers, directors and shareholders, which included the individual plaintiffs in this action; and
- 3) an indemnity provision in favour of Bovicor and its officers, directors, employees, and others against any and all liabilities, including costs based on, arising out of, or resulting from any breach of the settlement agreement.

[16] In September of 2023, Mr. Smith commenced an action in this Court against SaNOtize, Dr. Miller, and Dr. Regev, among others, alleging many of the same causes of action that were settled in the Bovivor action. That action was dismissed on limitations grounds under Rule 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, and with the remainder being struck as an abuse of process under Rule 9-5(1)(d) in March of 2024, with reasons for judgment indexed at *Smith v. SaNOtize Research and Development Corp.*, 2024 BCSC 386.

[17] In January of 2024, Mr. Smith filed proceedings in this Court in the name of SaNOtize against Drs. Miller and Regev, among others. On April 11, 2024, that action was struck under Rule 9-5(1) as disclosing no reasonable cause of action, and as an abuse of process. Mr. Smith was also ordered to pay lump-sum costs in the amount of \$4,500, which costs have not yet been paid.

[18] In January of 2025, Mr. Smith commenced another proceeding in the Federal Court claiming copyright infringement. That action was struck without leave to amend on April 1, 2025, and Mr. Smith was ordered to pay costs of \$2,000.

[19] More recently, in March of 2025, Mr. Smith has threatened to disclose the plaintiffs' confidential information. In particular, in an email dated March 28, 2025, Mr. Smith sent a demand to Drs. Miller and Regev, which stated, in part, the following:

We hold legal and beneficial ownership in the Intellectual Property and related rights used by Sanotize Research and Development Corp., and in the Nitric Oxide Releasing Solution related commercial products (e.g. VirX Nasal Spray).

[20] Mr. Smith also asserted that certain conduct amounted to a breach of the settlement and release agreement, namely:

Further, take notice that we maintain possession, ownership, and control of data and information stored on digital media and databases that includes: legal, chain of title, licensing agreements and freedom to operate; safety and efficacy; API formulation; CMC and supply chain; clinical trials; regulatory; investment; commercial and marketing information. This data is maintained in data room format used for due diligence and that resulted in our origination,

structuring, negotiation, and execution of the Eli Lilly & Co. (Elanco) licensing, research, development, and commercialization agreement in 2015.

...

Take notice that if arrangements are not made for our receipt of **\$150,000 by close of business April 2, 2025**, we will proceed with publishing, distributing, and making available the relevant data, media, and databases. This may include online publication of some or all of the data for free and open-source use.

[Emphasis in original.]

[21] Dr. Miller indicates that the plaintiffs do not know the full extent or content of the information that Mr. Smith has threatened to publish or make use of, as he cannot be certain of the nature and scope of that data. Dr. Miller's best understanding is that Mr. Smith is referring to documents from the digital data room that was set up for the due diligence process in the course of Bovicor's 2015 negotiations with Eli Lilly & Co.

[22] Furthermore, on February 9, 2025, Mr. Smith wrote to one of SaNOtize's approved distributors, Glenmark Pharmaceuticals Limited ("Glenmark"), who is a distributor of SaNOtize's nasal spray product VirX, claiming copyright ownership in the VirX nasal spray, alleging copyright infringement, and threatening legal action against Glenmark:

We are owners of Copyright in VirX Nasal Spray (the "Infringing Work"), and are writing to you regarding a matter of great concern.

The Infringing Work is subject matter in the Canada Federal Court legal proceedings *Smith v. Nitric Solutions Inc. et al* (T-186-25). A copy of the Statement of Claim is enclosed.

...

It is our position of that your activities and constitute an infringement of our copyright contrary to sections 3, 27 and 28 of the *Canada Copyright Act*, R.S.C. 1985, c. C-42, as amended, and pursuant relevant international law where Canada, India and Singapore are parties.

Accordingly, we must insist, without prejudice to all of our rights and remedies, that you:

1. cease and desist any publication, advertising and/or distribution of the Infringing Work;
2. immediately withdraw from the marketplace, including recalling from retailers, whether in physical or online channels any Infringing Work;

3. provide written confirmation that you have done the foregoing by no later than February 17, 2025; and
4. provide by no later than February 17, 2025 details relating to the number of Infringing Work sold or distributed through virxnasalspray.com including for each sale, the quantity, price, purchaser and date, along with the supporting documentation (e.g., invoices and purchase orders). Following receipt of this, we are willing to discuss appropriate compensation to be paid by you.

...

As you will appreciate, this matter is of the utmost importance. If this matter is not satisfactorily addressed by February 17, 2025, we will have no alternative but to consider initiating legal proceedings in court, including seeking damages and an injunction against you. I look forward to hearing from you or, if you have counsel, your counsel.

Analysis

[23] The test for interlocutory injunctive relief is well settled. The plaintiff must show: (a) a serious question to be tried; (b) that they would suffer irreparable harm in the event that injunctive relief is not granted; and (c) the balance of convenience favours granting the injunction: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117.

(a) Serious question to be tried

[24] With respect to the serious question to be tried, where, as here, an applicant seeks prohibitive relief, the first stage is a low threshold. The claim must be neither frivolous nor vexatious. The ultimate focus is on whether granting the injunction is just and equitable in the circumstances: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, at paras. 39-40 [*Charbonneau*].

[25] Considering the record before me, I am satisfied that the plaintiffs have established a serious question to be tried in respect of both grounds of injunctive relief sought.

[26] First, with respect to the disclosure of confidential information, injunctions are regularly granted where breach of the negative covenant is involved: see e.g. *Li v. Rao*, 2019 BCCA 264. This is the case here with respect to Mr. Smith's alleged breaches of the confidentiality obligations imposed on him by the settlement

agreement in the Bovicor action. Mr. Smith's email of March 28 makes it apparent that he asserts to have confidential information covered by that agreement in his possession and that he is threatening to disclose it publicly. I am also satisfied there is a serious question to be tried that such material and information falls within the definition of "confidential and proprietary information" in the settlement agreement, and that there is a serious question to be tried as to whether Mr. Smith is therefore in breach of the settlement agreement by virtue of having retained and then potentially threatening to disclose that confidential information.

[27] Moreover, while Drs. Miller and Regev are not parties to the settlement agreement, they are third party beneficiaries thereunder as directors of Bovicor, including in respect of the release and indemnity provisions of the settlement agreement. I am satisfied that the serious question to be tried threshold has been met with respect to their ability to enforce the settlement agreement, given recent decisions of the Ontario Court in *Gilani v. BMO Investments Inc.*, 2021 ONSC 3589, and given this Court's decision in *Ladysmith Maritime Society v. Ladysmith (Town)*, 2023 BCSC 2285 [*Ladysmith*].

[28] Indeed, in *Ladysmith*, this Court held that the ability of third parties to enforce breaches of contract is "a developing area of the law", and that there has been "a trend in the case law over the years to relax the strict application of the privity rule". In *Ladysmith*, that was found to be sufficient to satisfy the serious question to be tried threshold for the purposes of granting an interlocutory injunction.

[29] Likewise here, I find that the plaintiffs have established a serious question to be tried as to their ability to enforce the terms of the settlement agreement, including not only the terms in which they are express beneficiaries, namely the release and indemnity, but also the provisions of that settlement agreement more generally, given the nature of the substance of the agreement, the confidential information it purports to protect, and the circumstances in which it was reached.

[30] Second, with respect to the representations that Mr. Smith and the corporate defendant Element Ventures are alleged to have made regarding their asserted

ownership interest in SaNOtize's intellectual property and products, I find the plaintiffs have likewise established a serious question to be tried, both in respect of their claim in passing off and under the *Competition Act*, R.S.C., 1985, c. C-34.

[31] I am satisfied the plaintiffs have established a serious question to be tried, that SaNOtize has built up a recognized trade name and reputation globally, has been active in the field, and developed good will amongst a wide array of clientele and business partners, including by way of but one example Glenmark, one of its distributors.

[32] I am also satisfied that the evidence before me establishes a serious question to be tried that the defendants have engaged in misrepresentations to the public by way of their website and the February 9, 2025 letter to Glenmark that I referred to earlier.

[33] Based on the record before me, I am satisfied that the plaintiffs' claim for passing off is neither frivolous nor vexatious, and indeed, as I indicated, raises a serious question to be tried. I come to the same conclusion with respect to the plaintiffs' claim under the *Competition Act*. It appears that the defendants are actively marketing or promoting their own business by way of making false claims of a relationship with, an ownership interest in, or otherwise connection to SaNOtize and its business, work product, and trademarks, including by way of the public representations that were contained on the website and by way of the letter sent directly to the plaintiffs' distributor, Glenmark.

(b) Irreparable harm

[34] Where an injunction involves breach of a negative covenant, as is the case here in respect of the alleged breaches of the settlement agreement, the Court of Appeal has held in *Charbonneau* that where a *prima facie* breach is found, a negative covenant may be enforced by the court without great consideration of irreparable harm: at para. 88.

[35] I am satisfied, based on the record before me, that in the present case, the nature of the harm in question cannot be quantified in monetary terms. This is particularly the case given that the harm allegedly arising from Mr. Smith's conduct involves publication and distribution of confidential information, the magnitude of which is presently unknown to the plaintiffs in light of the fact that they do not know what information Mr. Smith may have apparently wrongfully retained in breach of the settlement agreement, or what information he may be purporting to disclose publicly.

[36] I accept that once such information is made available to the public, irreparable harm may well follow, given the difficulty in restoring the confidentiality of information once disclosed into the public domain. Indeed, the settlement agreement itself contains Mr. Smith's agreement and acknowledgment that his public disclosure of such information may cause "irreparable damage which could not be adequately compensated for by damages".

[37] I am also satisfied based on the affidavit evidence of Dr. Miller that the plaintiffs will suffer irreparable harm from the defendants' ongoing attempts to misrepresent their relationship with the plaintiffs and the defendants' assertions of ownership interests in SaNOTize, its intellectual property and products, and that this has likely caused and may, in the future, cause reputational harm to SaNOTize in terms of harm to good will, including by way of interference with its relationship with customers and distributors.

[38] There is also some question on the materials before me as to whether Mr. Smith is impecunious. He has not paid at least one costs order of this Court and indicated in correspondence that he would be making an impecuniosity application. It is unclear whether that application was, in fact, brought or granted, but the inference to be drawn from this assertion is that Mr. Smith clearly considers himself to be impecunious. Mr. Smith's potential inability to pay damages also constitutes further evidence of irreparable harm.

(c) Balance of convenience

[39] Finally, addressing the balance of convenience. Considering the record as a whole, I agree with the plaintiffs that the balance of convenience weighs in favour of granting the injunction. In particular, Mr. Smith is the party who has upset the status quo by threatening to release confidential information, contrary to his obligations under the settlement agreement, and who is making repeated unsubstantiated assertions of an ownership interest in SaNOTize, its intellectual property and products, and in doing so, attempting to interfere with SaNOTize's relationships with its business partners and distributors.

Conclusion

[40] In the result, the plaintiffs' application for an interlocutory injunction pending trial is granted on the terms set out in paragraphs 1(a), (c), and (d) of the notice of application.

[SUBMISSIONS ON COSTS]

[41] THE COURT: All right, sir. I am inclined to grant you your costs of this application on the term that you seek, namely payable in any event of the cause and forthwith.

[SUBMISSIONS ON ASSESSMENT OF COSTS]

[42] THE COURT: In the circumstances, I agree that awarding and assessing costs on a lump sum basis is an imminently reasonable way of approaching the issue. The bill of costs is reasonable, and the disbursements were, in my view, necessarily incurred in order to deal with this application. I therefore award lump-sum costs and assess them in the amount of \$1,150, payable forthwith and in any event of the cause.

“Hughes J.”