

# John Van Dongen - apply for an order to vacate the Sealing Order

## IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Van Dongen et al. v. The Society For  
The Prevention Of Cruelty To Animals,*  
2004 BCSC 1353

Date: 20041021  
Docket: L033701  
Registry: Vancouver

Between:

JOHN VAN DONGEN, RICHMOND RODEO RIDING LTD.  
AND BEACH GROVE STABLES LTD.

Petitioners

And

THE SOCIETY FOR THE PREVENTION OF  
CRUELTY TO ANIMALS

Respondent

Before: The Honourable Madam Justice Ross

### Reasons for Judgment

Counsel for the Petitioners  
Counsel for the Respondent

S.D. Sutherland Q.C.  
K.A. Robertson and  
G. Butt A.S.

Date and Place of Hearing

September 2, 2004  
Vancouver, B.C.

[1] The Petitioners, John Van Dongen, Richmond Rodeo Riding Ltd. and Beach Grove Stables Ltd., apply for an order to vacate the Sealing Order for records pertaining to a search warrant made by a Judicial Justice of the Peace at Burnaby on December 1, 2003.

[2] Mr. Van Dongen and Beach Grove Stables Ltd. are horse breeders and traders who carry on business at 9230 Ladner Trunk Road in Delta, British Columbia, a property owned by Richmond Rodeo Riding Ltd. Mr. Nick Henze is a Special Provincial Constable appointed under the **Police**

**Act**, R.S.B.C. 1996, c. 367 and an authorized agent of the respondent, the Society for the Prevention of Cruelty to Animals (the "SPCA").

[3] On December 1, 2003, on the basis of Mr. Henze's "oath/affirmation" that there were reasonable grounds to believe that an animal was in distress at the 9230 Ladner Trunk Road property, a Judicial Justice of the Peace at Burnaby issued a warrant pursuant to the **Prevention of Cruelty to Animals Act**, R.S.B.C. 1996, c. 372 (the "**Act**") to search and to take any action authorized by the **Act** to relieve the animal's distress (the "Warrant"). On that same date, Mr. Henze made an *ex parte* application to prohibit access to and disclosure of all records relating to the Warrant. Consequently, a Judicial Justice of the Peace at Burnaby issued a Sealing Order pursuant to s. 487.3 of the **Criminal Code**, R.S. 1985 c. C-46 (the "Sealing Order").

[4] The initial complainant told Mr. Henze that she wished to remain anonymous and specified her concerns. The complainant more recently advised Mr. Henze that the same concerns still exist and that she still wishes to remain anonymous.

[5] On December 2, 2003, Mr. Henze, with others acting on behalf of the SPCA, exercised the Warrant against the petitioner's property at Ladner Trunk Road. Three young horses were seized and removed from the property. Because of the Sealing Order, Mr. VanDongen was denied access to the information relating to the Warrant.

[6] Section 13 (2) of the **Act** provides:

(2) A justice who is satisfied by information on oath in the prescribed form that there are reasonable grounds

(a) under paragraph (1)(a), may issue a warrant in the prescribed form authorizing an authorized agent to enter the premises, vehicle, aircraft or vessel for the purpose of taking any action authorized by this Act to relieve the animal's distress, and

(b) under paragraph (1)(b), may issue a warrant in the prescribed form authorizing an authorized agent to enter the premises, vehicle, aircraft or vessel for the purpose of searching for the thing that will afford evidence of an offence under section 24.

[7] The court form used to obtain the Sealing Order, is a prescribed form that sets out, incorrectly in the case at bar, that the application was made pursuant to s. 487.3 of the **Criminal Code**.

[8] The petition was filed December 23, 2003 seeking, *inter alia*, an order vacating the Sealing Order.

[9] By order dated February 2, 2004, Madam Justice Martinson ordered that:

5. The solicitor for the Petitioners and the solicitor for the Respondent he [sic] granted access, subject to a publication ban, to all of the records filed with this Court pursuant to Order 4 above, except that the name and address, if any of the complainant to the Respondent be edited from such copies of the records provided to the solicitor for the Petitioner and the solicitors for the Respondent.

[10] The **Act** does not provide for Sealing Orders. Hence an application for a Sealing Order with respect to a Warrant issued under the **Act** would have to be under the common law. The position of the petitioners is that the Sealing Order is a nullity because it was purported to have been made pursuant to the **Criminal Code** and not at common law. This is not, in the petitioners' submission, a technical irregularity. Rather, the power as invoked did not exist. Counsel notes that the **Act** does not provide for Sealing Orders. Moreover, counsel submits that there are protections under the **Code** when a sealing order is issued. The Justice of the Peace mistakenly assumed those protections were available in the present circumstances. Had he known that they were not available, he would have turned his mind to other protections necessary in the circumstances. Counsel submits that the concerns expressed by the confidential informant are not sufficient to justify a Sealing Order.

[11] The position of the respondent is that that Justice had authority under common law principles to order the sealing of the warrant. There is no evidence that the Justice failed to consider the proper considerations. Counsel submits that there are sound policy reasons to protect the anonymity of a confidential informant. In the circumstances, the reference to the **Criminal Code** in the printed form is an irregularity. Section 9 of the **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241 provides that the court may refuse relief in such circumstances.

[12] The controlling common law principles with respect to the circumstances under which a Sealing Order may be obtained are identical to the principles in s. 487.3 of the **Criminal Code**, see **R. v. Toronto Star Newspapers et al**, (2003) 232 D.L.R. (4th) 217, 178 C.C.C. (3d) 349 (Ont. CA), at para. 18.

[13] In **R. v. Mentuck**, [2001] 3 S.C.R. 442, 2001 SCC 76, Iacobucci J. described a two step analytical approach to cases involving publication bans or the limitation of public access to court proceedings at para. 32 as follows:

A publication ban should only be ordered when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk, and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[14] Mr. Henze's affidavit in support of the Sealing Order justifies the order on the basis that disclosure of the information would subvert the end of justice by compromising the identity of a confidential informant. Details with respect to this concern are then specified.

[15] The protection of the identity of a confidential informant is one of the circumstances enumerated in s. 487.3(2) of the **Code** in which the "circumstances of justice would be subverted by disclosure".

[16] As a consequence of the Order of Martinson J. of February 2, 2004, the identity of the confidential informant is the only information that has not been disclosed to the petitioners. In the result, there has been, as much disclosure to the petitioners as possible, "without sacrificing the prevention of the risk" per Iacobucci J., *supra*, at para. 36.

[17] It follows, in my view, that the reference to the **Criminal Code** in the application for a Sealing Order constitutes a technical defect or irregularity. Accordingly, in all of the circumstances, I conclude that this is an appropriate case in which to refuse relief on the basis of s. 9 of the **Judicial Review Procedure Act** in that the sole ground for relief is a defect in form or a technical irregularity and no substantial wrong or miscarriage of justice has occurred.

[18] In the result, the application of the petitioners with respect to the Sealing Order is dismissed. The balance of the relief sought in the petition remains to be addressed. The issue of costs is deferred until those remaining matters have been adjudicated.

"C. Ross, J."  
The Honourable Madam Justice C. Ross