

## **As The Supreme Court of British Columbia Saw it**

Selected excerpts from the Judgment of Lutz v. Faith Lutheran Church of Kelowna (2009 BCSC 59) rendered on January 23, 2009 by the Honourable Mr. Justice Meiklem with respect to the trial/hearing in the Supreme Court of British Columbia held on August 21, 2008 in Kelowna, B.C. concerning the excommunication of seven members from Faith Lutheran Church.

The full transcript (49 pages) of the "Reasons for Judgment" can be downloaded from: <http://www.courts.gov.bc.ca/Jdb-txt/SC/09/00/2009BCSC0059.htm>. The bracketed numbers below coincide with numbered sections of the Judgment.

### **The Parties and the Nature of the Application**

[1] The petitioners and three other people were expelled from membership in the respondent in September 2007. The petitioners apply for a declaration that there has been an omission, defect, error or irregularity in the conduct of the affairs of the respondent, by which there was default in compliance with the respondent's bylaws in connection with the expulsion. They apply for an order quashing the revocation of their membership and restoring them as members of the respondent.

### **Events Leading up to the Exclusion of the Petitioners**

[6] ...and the respondent's Pastor, Anita Desjardins, is the primary affiant setting out the factual allegations (and, inappropriately, some opinion and argument) on behalf of the respondent.

[7] However, it is very obvious on the whole of the evidence, including her own affidavit, that Pastor Desjardins played a major role as an individual protagonist in the events that I will summarize ...

[36] At this point I will simply comment that the only evidence from any other member of the Council present at the meetings on September 6, 2007 is from Chairperson Magel...

[38] There is no evidence other than that set out in paragraph 33 above as to how an additional four members of the Congregational Council who were not part of the "Discipline Committee" that met on September 6 joined those in that group in signing a form of resolution dated September 6 to issue letters of exclusion to the petitioners and three others.

[45] ...it appears that Pastor Desjardins means to convey that the Special Congregational Meeting was intended to be the hearing of the appeal requested by the excluded members. This was not the case, however, because, as she states in paragraph 30 of her affidavit, this Special Congregational Meeting was organized and announced on September 10, 2007. This was three days prior to the delivery of the request for an appeal which was dated September 11, 2007.

[48] On or about September 22, 2007, the petitioners delivered a request signed by the seven excluded members and 24 additional members for a Special Congregational Meeting to be held “as soon as possible and prior to October 2, 2007” to discuss and vote on the exclusions from membership. This request was intended to be an appeal and was not granted.

[49] Pastor Desjardins appends to her affidavit a copy of a 13-page typed document which she describes as her “report” to the congregation for the October 2, 2007 meeting. It is actually more of an impassioned submission as to why it was necessary to rid the church of the destructive conflict caused by the expelled members. It is not clear from her affidavit whether the document was actually provided in its written form to members in advance, as her description of it would imply, or simply constitutes her speaking notes for her oral presentation at the meeting.

[50] Another point she expanded upon while speaking was her perception that the call for the Special Congregational Meeting, which she labels a petition, was a negative personal attack on herself. She had written that she felt powerless, defensive, deeply hurt, angry, frightened, confused and betrayed. I must say that I am unable to rationalize her perception of the call for a meeting as a negative personal attack with the actual substance of the call for a meeting and even more with the comment in her report that perhaps it was “the misrepresentation that the Pastor was behind this petition” that played a role in why the congregation, including some members of Council, signed it without reporting its existence to herself or the Council.

[51] Pastor Desjardins’ written report to the October 2 meeting summarized her view of the “petition” for the convening of a Special Congregational Meeting to implement the resolution of the February 2007 Annual Congregational Meeting in very strong terms. I quote from page 6-7:

In Summary, this petition was clearly

- A campaign smear against the Blessing Same Gender Unions, and the B.C. Synod
- A display of taking matters of the National Church’s Convention into their own hands
- A display of the lack of faith in God
- A display of lack of trust in the ELCIC Convention process
- An invasion into the privacy of Faith Lutheran Church’s membership
- Misrepresentation of authority and leadership (Ted Schoepp was a Lay assistant minister, Bill Logan was Finance Chairperson)
- Coercion
- Slander
- Covert
- Fear mongering, intimidation
- Deliberate, pre-planned, organized, and executed
- Disruptive
- Secretive

Furthermore, this petition was a display of the, destructive power that [the expelled members] have in this congregation. It sends a clear message to the Pastor and Church Council and anyone in a leadership position that these people hold the power to build up or to destroy this congregation and its Pastor and leaders. And that they will do it whenever they want, and with whatever issue they want to use.

[52] It is fair to say that this was a rather extreme and subjective characterization of the “petition” and the motives of the petitioners, who, in fairness, were concerned that the resolution of the February 2007 meeting, vague though it was, was being ignored by the Church Council, and sought a forum for discussion, pursuant to the Constitution and Bylaws. The last sentence in the quoted passage is pure rhetoric that does not suggest how such a message was or could have been gleaned from the circumstances.

[53] My point in making these observations is not to review the merits of Pastor Desjardins’ opinions in respect of the call for a Special Congregational Meeting, but to illustrate the emotionally charged nature of her submissions to the congregation at the October 2, 2007 Special Congregational Meeting which she and Council called, not to hear and consider the appeal of the expelled members - none of whom were present - but to explain the decision to expel in the hope that the congregation would be persuaded to ratify the decision on the following night, October 3, 2007, which had been designated as voting night.

[54] Some speakers at the October 2 meeting were concerned about the correctness of the disciplinary process undertaken to that point, and attempted to raise some of the same points that the expelled members had raised in their letter delivered to the ad hoc discipline committee on September 6. The presider (the Bishop) deflected these concerns and repeatedly informed the meeting that the purpose of the meeting was not to judge the actions of the Pastor or Council, whom he stated had followed the proper procedure. It appears that the rationale for the decree about judging the actions of the Pastor or Council was that the Bishop (and the several other Pastors) should not be present at a meeting where the propriety of the actions of Council or the Pastor was on the agenda, since they would be compromised if matters had to be taken higher. I infer that it was this same rationale that in some part caused the expelled members to request a separate appeal hearing, prior to the October 2 and 3 meetings called by counsel.

[55] Unfortunately, the presider’s statement that such matters could be discussed at the October 3 meeting was not prophetic, because Pastor Desjardins announced at that meeting that there would be no further discussion and that the registration and voting would proceed forthwith.

## **Analysis and Findings**

### **Was there default in compliance with the Bylaws of the respondent?**

[69] The petitioners' allegations of non-compliance are all supported on the evidence and I find the respondent's arguments on this issue wholly untenable.

[71] While it is correct that the Bylaws require the Congregational Council to appoint certain committees and provide authority to appoint "such other committees as may from time to time be necessary or advisable", which could enable the appointment of a discipline committee, it does not follow that the Council can delegate its duties and powers under Part II Section 9 to any such committee, and I agree with the petitioners' argument that such a delegation would be beyond the powers of the Council.

[73] The respondent's argument that the discipline committee did not make the decision to exclude is tenuous on the evidence. As can be seen from the quoted letters (at ¶40 and ¶41 above), the "Letter of Exclusion from Membership" was signed on behalf of the "disciplinary Committee" and conveys the judgment of that committee of conduct grossly unbecoming of a member of the body of Christ.

[75] I agree with the petitioners' submission that the petitioners were never provided a hearing before the Congregational Council prior to the imposition of disciplinary exclusion, as required by Section 9 of Part II of the respondent's Bylaws. The meeting of the committee could not be a Section 9 hearing. The Council certainly had the power to appoint a committee, ad hoc or otherwise, to implement step 2 of the 3-step process incorporated in the Bylaws and Mathew 18:15-18, but if that is what they intended to do, they did not execute that step properly in that the members being disciplined were not informed that that was happening. Council could not delegate to that committee any decision-making on the discipline issue. That delegation is not authorized by the Bylaws, Section 9, which sets out a procedural code that prescribes a finding of guilt by a two-thirds vote of the Council.

[76] The subsequent full Council meeting on September 6, if it occurred at all as a physical gathering, was clearly held without notice or invitation to the petitioners, who had been requested to attend the scheduled meetings at hourly intervals earlier in the evening. When the members did not attend the committee meetings, Council treated the non-attendances as adding to the unbecoming disrespectful behaviour of the members, even though the written submissions of the seven members suggest that Council may have played a role in their non-attendance by misinforming them of the nature of the meeting they had been requested to attend, and they had a reasonable objection to attending what they perceived as a discipline hearing before the Council that was procedurally flawed.

[77] There is no evidence that the Council itself considered the proper question, namely whether each of the members were guilty of the conduct described in Section 7 of Part

II of the Bylaws, rather than simply voting to adopt the “recommendation” of the committee, which looks very much like a ready-made ultimate decision.

[78] On any view of the proceedings of September 6, 2007, the notice to the petitioners did not come close to adequately describing the extent of the multiple allegations which ultimately formed the basis of the decision to exclude them from membership. That is not merely a technical breach of the respondent’s Bylaws Part II, Section 9, but a breach of one of the very basic principles of natural justice that the Bylaw codifies.

[79] I agree also with the petitioners’ argument that the participation of two pastors from outside the congregation on the discipline committee would render the hearing defective under the Bylaws if it was a hearing. If this committee could, after the fact, be considered one form of step 2 under Mathew, I see no objection to their participation in that step. There is a different issue that arises in connection with whether, as BC Synod members, they were thereby prejudicing their impartiality on a possible appeal from future processes, but that problem could be solved by them recusing themselves from hearing any appeal.

[80] As for the participation of Pastor Desjardins in the attempted hearing process, I agree with the petitioners’ characterization of her as the accuser. Her own version of events does not bring that characterization into doubt. She became the accuser at the May 13, 2007 church service. Her affidavit is silent about that event, although it was sworn after the affidavits from others dealing with that service were filed. I agree that her full participation in the setting up of the meetings and in the decision of Council on September 6, 2007 is a breach of one of the basic principles of natural justice - that the accuser should not be the judge. It is no answer to say that one has to expect and acquiesce in a measure of bias in small voluntary associations, because the issue here, as it turned out, was very much centered on her very strong and persistent personal reaction to the actions of the petitioners, and it would have been a very simple matter for her to absent herself from the decision-making processes.

[82] Pastor Desjardins’ continued participation in arranging the Special Congregational meetings argued to constitute an appeal is also very problematic. The impassioned content of her “report” to the congregation for the October 2 meeting belies any notion that she had an open mind at any point in the proceedings on the issue of the guilt of the accused.

[83] I will not dwell in any length on my reasons for agreeing with the petitioners that the Special Congregational Meetings of October 2 and 3, 2007 and the vote on the latter date did not constitute an appeal. It should be abundantly clear from my detailed recitation of the facts that the petitioners’ submissions are correct and that there was no appeal to the congregation granted the petitioners. Pastor Desjardins and the Council called these meetings to inform the congregation of the reasoning for issuing the letters of exclusion, and to try to obtain a vote in favour of supporting Council. Constitutionally, no other business, such as an appeal on the merits of the accusations, could have been conducted. The issue was not whether or not the petitioners and others were guilty of

conduct grossly unbecoming of a member of the body of Christ, as it would have been on an appeal, but whether or not to “support council” in excluding them as members. The Bishop foreclosed discussion on “judging” the actions of the Pastor or Council which obviously was crucial even to the limited question the congregation was going to vote on the next night, and he stated that he supported the propriety of the processes undertaken by Council.

Notwithstanding her participation in the decision of Council, Pastor Desjardins provided an emotionally charged presentation in favour of supporting Council and emphasizing the hurt and betrayal she felt. Even in that context, the 46-32 vote was not overwhelmingly in favour of supporting Council.

[84] In conclusion, I find multiple non-compliances with the Bylaws of the respondent society in the particular ways set out above.

### **What Principles of Natural Justice are Applicable and were any Breached?**

[87] The respondent argues that the only principles of natural justice applicable here are those codified in the Bylaws. I disagree. The Bylaws are quite specific in codifying the notice and opportunity requirements, and I think compliance with them would satisfy the requirements of natural justice, (and non-compliance would constitute a breach of natural justice as well as a breach of the Bylaws) but the Bylaws say nothing on the subject of bias. It is a basic principle of natural justice that to avoid bias, “no one should be judge in their own cause”.

[88] As foreshadowed above, on the evidence in this case I can only come to the conclusion that the discipline of the petitioners and the three other members was, from its inception in May 2007 and its resumption upon her return from stress leave in August 2007, primarily the Pastor’s cause.

[89] ...I infer that to be judged guilty of conduct grossly unbecoming a member of the body of Christ is much more significant to a Christian churchgoer than to be judged insufficiently collegial or in breach of club rules by a golf club or other social club formed to promote common social interests.

[90] Obviously other members of the Congregational Council also had knowledge of the case and were not indifferent to the outcome, but they are entitled, in the absence of evidence to the contrary, to be presumed to have open minds and to be able put their bias aside on the issue of the petitioners’ guilt. An accuser, by definition, cannot be presumed to have an open mind, but rather is asserting the guilt of the accused, which clearly raises an apprehension of bias if the accuser then sits in judgment of the issue. In the circumstances of this case, there can be no doubt of the apprehension of bias on the part of the Pastor which exceeds the applicable standard of procedural fairness.

## **The Remedy**

[94] ...The vote came on the evening following a meeting where the Bishop had informed the congregation that the Council had observed all the proper procedures, in direct response to members who questioned the nature of the proceedings. It is impossible to know to what extent that assurance may have influenced the votes of the undecided, but I think it is reasonable to infer that some members were influenced to support the results of what they were assured was due process who might not have done so if they understood how flawed the process leading to the exclusion had actually been, according to my reasons. It is impossible to know what the will of the majority really was, given the form of the questions and all the circumstances, but it is clear the meeting did not have the same facts and arguments before it that the court now does.

[99] Clearly the case before me is different in that I am not called upon to decide what standard of degree of procedural fairness to apply by reference to whether this is an appropriate case for intervention. I have applied the standard of procedural fairness that is largely codified in the Bylaws, save only the matter of fairness in respect of bias. I have concluded that the Bylaws were not complied with, and also that the participation of the accuser breached the appropriate standard of fairness in respect of potential bias or the apprehension of bias.

[100] In my view it is not appropriate to make an order upholding either the letters of exclusion issued by the Council or the motion of the congregation supporting the actions of the Council. There may well be some loss of morale or resumption of strife or tension within the congregation or between the Pastor and the reinstated members in the short term, but that is not sufficient reason to condone or validate what I find were serious non-compliances with the Bylaws and the applicable principles of natural justice. In my view, that would set a dangerous precedent which has the potential to cause long-lasting strife and a loss of morale which could permanently affect the success of the respondent's purpose and mission.

## **Order**

[103] For the reasons stated, I order that the exclusion of the petitioners from membership is quashed and that the petitioners be restored as members of the respondent.

[104] The petitioners are awarded costs.