

Federal Court



Cour fédérale

**Date: 20110110**

**Docket: T-1064-10**

**Citation: 2011 FC 17**

**Ottawa, Ontario, January 10, 2011**

**PRESENT: The Honourable Mr. Justice Barnes**

**BETWEEN:**

**YVETTE METANSININE**

**Applicant**

**and**

**ANIMBIIGOO ZAAGI'IGAN ANISHINAABEK  
FIRST NATION AND  
CHIEF THERESA NELSON AND  
COUNCILLORS PRISCILLA GRAHAM,  
MORRIS THOMPSON AND  
DOROTHY RODY, AS REPRESENTATIVES  
OF THE BAND COUNCIL OF ANIMBIIGOO  
ZAAGI'IGAN ANISHINAABEK FIRST  
NATION**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application by Yvette Metansinine challenging a decision to remove her as the Chief of the Animbiigoo Zaagi'igan Anishinaabek First Nation (AZA) and the concomitant election of the Respondent, Theresa Nelson, to fill the vacated position. The other personal Respondents are

the members of the AZA Band Council who made the decision to remove Chief Metansinine from office.

### Background

[2] AZA is a First Nation with a reserve situated north-east of Thunder Bay, Ontario. Interestingly, for historical reasons none of the approximately 380 members of AZA live on the reserve lands, but rather live in or near Thunder Bay. Thunder Bay is also where most Band elections and meetings take place.

[3] AZA is presently governed under the terms of its Master Policy, which sets out the terms and conditions of membership, band elections and financial management. Band governance is provided by an elected Chief and three councillors who hold office for a term of three years. Article 8.1 of the Master Policy provides that a position on Council becomes vacant “when [t]he official is absent from three (3) consecutive Council meetings without authorization from a quorum of Council”. When the position of Chief is vacated, Article 8.2 requires the Band Administrator to convene an emergency community meeting to fill the position. Article 7.1(i) stipulates that the Band Administrator shall give notice of the required emergency meeting where nominations will be accepted and a by-election held.

[4] Chief Metansinine was first elected as Chief of AZA in 1997 and has continuously held office since then. She was most recently re-elected in a March 6, 2010 general Band election where she defeated her opponent, Theresa Nelson, by a margin of 100 votes to 83 votes.

[5] On April 24, 2010 the Band met to discuss possible amendments to the Master Policy and to discuss matters arising out of the March 6<sup>th</sup> election. According to the Minutes of that meeting, Theresa Nelson made a number of accusations about the conduct of Chief Metansinine including misuse of a Band credit card and vehicle, as well as election irregularities. This was followed by a lengthy discussion among the membership focussed largely on the conduct of the Chief and which included some calls for her resignation. At about the same time, a petition was circulated within the AZA membership calling for revisions to the Master Policy and the calling of a new election.

[6] As a result of the allegations made at the April 24<sup>th</sup> Band meeting, Chief Metansinine sought medical attention for the onset of anxiety. On April 26, 2010 she was examined at the Nipigon Hospital and diagnosed with depression and anxiety. She was also advised to take a medical leave of absence from Band duties and was referred to counselling. On May 5, 2010 Chief Metansinine provided a medical note from her physician to the Finance Officer for AZA which stated that she would be off work indefinitely because of severe, acute anxiety and depression.

[7] Band Council continued to function in the absence of Chief Metansinine and meetings were convened on May 5<sup>th</sup>, 19<sup>th</sup> and June 1<sup>st</sup>, 2010. The Minutes of the May 5<sup>th</sup> meeting note the unauthorized absence of Chief Metansinine along with information about her health status. Those Minutes also indicate Council's agreement to keep her updated by email and reflect a detailed discussion about the validity of the March 6<sup>th</sup> election. At this meeting, Council also agreed to convene a Band meeting on June 6<sup>th</sup> with a view to discussing possible changes to the AZA Master Policy. The proposed Band meeting is described as "a workshop style format with round tables" where election code issues would be discussed.

[8] The Minutes of the May 19<sup>th</sup>, 2010 Band Council meeting note Chief Metansinine's continued unauthorized absence as well as the pending Band meeting in Thunder Bay scheduled for June 5<sup>th</sup>.

[9] The Minutes of the June 1<sup>st</sup>, 2010 Band Council meeting indicate that Chief Metansinine was again "absent without authorization" and include a further update on the upcoming Band meeting in Thunder Bay.

[10] The Minutes of the Band meeting on June 5<sup>th</sup> confirm the adoption of an agenda and a discussion about the appropriate membership of a proposed Policy Committee, the mandate of which was to recommend changes to band policies. During roundtable discussions many proposals for electoral reform were advanced and duly noted. This was followed by an open forum discussion where the medical absence of Chief Metansinine was raised. One member called for criminal action against the Chief and another called for a new election. Theresa Nelson is reported as saying that another election would lead to a delay of four months but that, with the approval of Band Council, an election for Chief could be held that day.

[11] As a result of the comments of some band members during the open forum discussion, the Band meeting was recessed in order for the Band Council to deliberate. When the open forum resumed, the Band Council announced that they had decided to vacate the position of Chief due to Chief Metansinine's unauthorized absences from its three previous meetings. It also authorized an

immediate emergency community meeting for the purpose of holding a by-election. This decision was later ratified in the following June 7, 2010 Band Council Resolution:

**WHEREAS** The Animbiigoo Zaagi'igan Anishinaabek select their leadership under a custom Election Code, dated October 28, 2006; and

**WHEREAS** the custom Election Code also provides for determination of vacating a position on Council under Section 8.1; and

**WHEREAS** Section 8.1 states that a position on Council becomes vacant when:

- I. The official resigns their position; or
- II. Becomes deceased; or
- III. The official has been convicted of a criminal offence; or
- IV. The official is absent from three (3) consecutive Council meetings without authorization from a quorum of Council; or
- V. The official is convicted of election fraud, or corrupt practices and

**WHEREAS** Yvette Marie Metansinine has been absent from three (3) consecutive Council Meetings on May 5, 2010, May 19, 2010 and June 1, 2010; and

**WHEREAS** a quorum of Council has confirmed on June 5, 2010 that the absences from the Council Meetings have been without authorization;

**THEREFORE BE IT RESOLVED** that Yvette Marie Metansinine has vacated the position of Chief with the Animbiigoo Zaagi'igan Anishinaabek effective June 5, 2010.

**THEREFORE BE IT FURTHER RESOLVED** that the Council of Animbiigoo Zaagi'igan Anishinaabek authorized the Band Administrator to immediately convene an emergency meeting as per Band Custom to fill the position on June 5, 2010.

[12] The Band meeting was then concluded with a motion to adjourn to be followed by the immediate convening of an “emergency meeting for the purposes of filling our leadership position here today”. An emergency meeting of the Band was convened and nominations to fill the vacated position of Chief were called. Theresa Nelson and another candidate were nominated and in the ensuing vote Ms. Nelson was elected by a margin of 49 to 41.

[13] It is not a point of dispute that Chief Metansinine was never notified that her position as Chief was in jeopardy during any of the meetings noted above. In particular, it is clear on the record that she was never told that Band Council contemplated her removal from office because of three consecutive absences from its meetings. Indeed, Chief Metansinine has deposed that she was never notified of the meeting of Band Council held on May 5<sup>th</sup>, that being one of the three supposedly unauthorized absences that were relied upon by Band Council to remove her from office. This evidence is not contradicted by the Respondents and, in fact, Theresa Nelson deposes that the May 5<sup>th</sup> meeting “was scheduled verbally at the office, as is the common practice of Council”. Unlike the two subsequent meetings of Band Council where written notice to Chief Metansinine was provided, the record contains no evidence of any kind of notice being sent to her about the May 5<sup>th</sup> meeting. It is also common ground that Chief Metansinine did not seek formal authorization from her political colleagues for the absences from Council meetings that were subsequently relied upon to remove her as Chief.

### Issues

[14] Was the Band Council decision to remove Chief Metansinine from elected office and to conduct a Band by-election carried out in conformity with the principles of procedural fairness and

in keeping with the election provisions of the AZA Master Policy or its prevailing customary practices, if any?

### Analysis

[15] The parties agree that the Court has jurisdiction over this matter and I agree that it falls within the well-accepted parameters for judicial review of a band council decision of the sort made here: see *Sparvier v Cowessess Indian Band*, [1993] 3 FC 142, 63 FTR 242.

[16] The fundamental issue raised on this application is one involving procedural fairness which is reviewable on the standard of correctness: see *Giroux v Swan River First Nation*, 2006 FC 285, 288 FTR 55 at para 31. Effectively, the same argument has been advanced as to the proper construction of the AZA Master Policy. Because the factual underpinnings of that argument are not in dispute and can be isolated from the legal issues of interpretation advanced by the Applicant, it too must be assessed on a standard of correctness.

[17] There is no doubt on the record before me that Chief Metansinine was given no notice that Band Council was contemplating her removal from office before it took that decision on June 5<sup>th</sup>, 2010. That was not an issue that was raised in any of the previous meetings of the Band Council nor was it the subject of any proposed item for decision at the scheduled Band meeting of June 5<sup>th</sup>. According to the Minutes of the June 5<sup>th</sup> Band meeting, the possibility of Chief Metansinine's removal first arose during an open forum discussion and proceeded from there.

[18] Chief Metansinine says that, as a matter of fairness, she was entitled to express notice of any meeting where her continued tenure as Chief was at risk. She argues that notice of such a meeting is required both under the common law and in accordance with the spirit and language of the AZA Master Policy.

[19] The Respondents say that the election provisions of the Master Policy do not explicitly require that notice be given to a member of Band Council whose position is vacated under Article 8.1. This provision, they say, is automatically invoked upon proof that the member is absent from three consecutive Council meetings. In the case of Chief Metansinine, it was pointed out that she was well aware of Article 8.1 and had participated in its similar application in other situations where a position on Band Council had been vacated. This prior history is said to have established a band custom supporting the summary disposition of such matters followed immediately by the convening of an emergency community meeting to fill the vacancy. The Respondents further contend that, in the case of the position of Chief being vacated, the necessary by-election can proceed without notice to members of the Band who are not present for the emergency meeting. In other words the Respondents argue that a regular Band meeting called for some other declared purpose can be converted on the spot to an emergency community meeting in support of an unannounced by-election and that only those present are entitled to nominate candidates and to vote.

[20] All of the above is, of course, precisely what happened in the case of Chief Metansinine. Notwithstanding the fact that she had won election as Chief over Theresa Nelson by a margin of 100 to 83, she was put out of office three months later in an by-election for which she and many others members of the Band had no notice and no opportunity to run or to vote. In that election



Theresa Nelson won the position of Chief over George Nayanookesic by a margin of 49 to 41 with the total of votes cast representing less than half of the votes cast in the preceding Band election.

[21] I do not accept the Respondents' arguments that the approach taken for the removal of Chief Metansinine and the election of Theresa Nelson as her successor was procedurally fair or in keeping with the AZA Master Policy.

[22] The requirement for explicit notice to a person whose rights are in jeopardy is a fundamental component of the duty of fairness: see *Sparvier*, above. The requirement to give notice of an election to all eligible voters is equally fundamental to the proper exercise of the rights of the electorate in any democratic institution. What took place in this instance was a profound breach both of Chief Metansinine's right to argue against her removal by the Band Council and of the rights of those members of the Band who were effectively disenfranchised by the failure to give them notice of the resulting by-election. This process allowed Theresa Nelson to run again for election as Chief without the need to face Chief Metansinine as an opponent and presumably in the absence of many voters who had supported Chief Metansinine in the previous election. Such a process invites the potential corruption of the political process by permitting a minority of the electorate to undercut the will of the majority by stealth and has no place in any democratic process.

[23] I reject entirely the Respondents' contention that Chief Metansinine was not entitled to notice that the Band Council intended to consider the invocation of Article 8.1 to remove her from office. What took place was not in keeping with how the Band Council had dealt with absences of members from meetings in the past, including Chief Metansinine. Band Council was well aware of

the reason for Chief Metansinine's absences and, by the indications given to her, those absences did not represent a problem. In fact, in the Minutes of the meeting of Band Council for May 5, 2010 it was reported that Chief Metansinine would be off work indefinitely and "[c]ouncil agreed that they would continue to send emails to her so that she could continue to be updated...".

[24] It is also of considerable significance to the decision to later remove Chief Metansinine that, according to her affidavit, she did not receive advance notice of the May 5<sup>th</sup> meeting. That meeting was nevertheless counted as one of the three meetings she had missed as a prerequisite to her removal. There is no evidence presented on behalf of the Respondents to contradict Chief Metansinine's account on this critical point and Theresa Nelson's affidavit provides some corroboration by stating that the "May 5, 2010 meeting was scheduled verbally at the office, as is the common practice of Council". Having regard to the presence in the Record of two email notices sent to Chief Metansinine concerning the other two pending Council meetings of May 19<sup>th</sup> and June 1<sup>st</sup>, I can only conclude that Chief Metansinine was never notified of the May 5<sup>th</sup> Band Council meeting and, in the result, did not miss three meetings without authorization.

[25] The argument that Article 8.1 of the Election Code could still be invoked against Chief Metansinine because she later became aware that Band Council considered her absence on May 5<sup>th</sup> to be unauthorized is wholly without merit. A person cannot be penalized for failing to attend a meeting for which no notice was provided. But, in any event, this is precisely why Chief Metansinine was entitled to be informed that her position as Chief was in issue at the Band Council and community meetings later held on June 5<sup>th</sup>. Had she been given notice, she could have

made the case that the prerequisite for invoking Article 8.1 had not been met and that any attempt to declare her position vacant was unlawful.

[26] I also do not accept that Article 8.1 provides for an automatic removal from office upon proof of three unauthorized absences from Council meetings. By its very terms Article 8.1 permits Band Council to excuse absences of this kind. By failing to give notice to Chief Metansinine that her position was at risk, she was deprived of an opportunity to make that case as well.

[27] Nothing turns on Chief Metansinine's failure to seek prior authorization for her medical absences. She was still entitled to express notice that her status of Chief would be under review by Band Council before any decision was taken to remove her.

[28] The Respondents' argument that Band custom allowed for this type of process is equally unmeritorious. What they have put forward as evidence of band custom is nothing more than anecdotal accounts of largely dissimilar events which are, in themselves, troubling from a fairness perspective. Customs of a band are historical practices which are generally acceptable to its members and for which there is a broad consensus: see *Prince v Sucker Creek First Nation*, [2008] FCJ No 1613, 2008 FC 1268 at para 28. The evidence that was presented falls well short of what is required to prove a customary practice.

[29] It is noteworthy that the Master Policy governing the events relevant to this case was adopted by the Band in 2006 and after the events relied upon by the Respondents in proof of band custom. Article 1.5 of the Master Policy states that it is based upon and incorporates band customs

and traditions. There is nothing whatsoever in the Master Policy which would support an argument that Band Council can invoke Article 8.1 without notice to the person affected. Indeed, the Master Policy contains numerous provisions which require notice in a variety of situations and, in particular, with respect to by-elections.

[30] The suggestion that what occurred on June 5<sup>th</sup> was consistent with the broad consensus of the Band is also belied by evidence in the record that some of those present opposed the process. While the approach taken here might have been acceptable to individuals with a vested interest in its outcome, I do not agree that any objective and fair-minded member of the Band would find it acceptable.

[31] Even if the Respondents are correct that the Master Policy is not exhaustive of the election customs of AZA, I do not accept that any procedural gaps can be filled by the fundamentally unfair practices that were followed on June 5<sup>th</sup>, 2010: see *Sparvier*, above.

[32] There is no doubt that the by-election undertaken by the Band on June 5<sup>th</sup> was in clear violation of the notice requirements for replacing the Chief. I do not agree that Article 8.2 permits a by-election for the Chief without notice to all of the members of the Band. Article 8.2 is subject to the general requirement in Article 7.1 that notice of an emergency community meeting to fill any vacancy be sent to all members of the Band. Anything short of this effectively disenfranchises those electors who would have wanted to vote and it precludes the nomination of members who would have sought the vacated office had they been aware of the election.

[33] This is also not a situation where, because of extraordinary intervening events, prerogative relief in the form requested ought to be refused. Chief Metansinine is entitled to reinstatement.

### Conclusion

[34] For the foregoing reasons the Band Council Resolution purporting to remove Chief Metansinine from office dated June 5<sup>th</sup>, 2010 and the resulting election of Theresa Nelson as Chief of AZA are set aside. Chief Metansinine is entitled to a declaration that she continues to be the lawfully elected Chief of AZA.

[35] The parties have requested that I reserve my decision on costs. If they cannot agree on costs, I will accept written submissions from them not to exceed 10 pages in length with the Applicant's submission to be filed within 30 days of this decision. The Respondents' submission may be filed within 14 days and the Applicant will have 3 days to reply with the further submission not to exceed 3 pages in length.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. the June 5, 2010 decision of the AZA Band Council, ratified by the June 7, 2010 Band Council Resolution purporting to remove the Applicant from office, and the subsequent election of Theresa Nelson as Chief of AZA are hereby set aside;
2. the Court declares that the Applicant continues to be the lawfully elected Chief of AZA; and
3. the issue of costs is reserved pending further submissions from the parties.

“ R. L. Barnes ”

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1064-10

**STYLE OF CAUSE:** METANSININE  
v  
ANIMBIIGOO ZAAGI'IGAN ANISHINAABEK  
FIRST NATION ET AL.

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** December 7, 2010

**REASONS FOR JUDGMENT:** BARNES J.

**DATED:** January 10, 2011

**APPEARANCES:**

Bradley A. Smith

FOR THE APPLICANT

Martin G. Masse  
Corinne E. Brulé

FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

Weiler, Maloney, Nelson  
Thunder Bay, ON

FOR THE APPLICANT

Lang Michener  
Ottawa, ON

FOR THE RESPONDENTS