

Students' Society of McGill University
Judicial Board

BETWEEN:

Mr. Jonathan Glustein (Petitioner)

v.

Ms. Maya Koparkar in her personal capacity and in her capacity as Vice-President (Internal Affairs) of the Students' Society of McGill University (Respondent) and

Mr. Jad El Tal in his capacity as Speaker of the Students' Society of McGill University (Respondent)

EX PARTE INTERIM ORDER

The following decision was delivered on October 28, 2017 by

THE SSMU JUDICIAL BOARD, UNANIMOUS –

Present: Justices Jonah Batist, Georgina Hartono, Benjamin Herrera, Natasha Petrof, and Samuil Rosenov Stoychev.

FACTS

1. During the Fall 2017 General Assembly (“GA”) held on October 23, 2017, a motion to ratify the SSMU Board of Directors was presented. As a new term for the Board of Directors begins each November, such motions are regularly presented at the Fall GA.

2. The Vice-President (Internal Affairs) of the Students' Society of McGill University (“SSMU”), Ms. Maya Koparkar, motioned to divide the question, proposing

to vote individually on each Director, rather than a single block. In previous GAs, the Board of Directors had been voted upon as a whole.

3. After the motion was presented, Mr. Jonathan Glustein alleged the motion to be unconstitutional. Subsequently, the SSMU Speaker, Mr. Jad El Tal, allowed the vote to occur.

4. The motion to divide the vote on the ratifications of Board of Directors nominees passed with 106 in favour and 64 opposed. Subsequently, the ratification of three Board of Director nominees were voted down, each individually.

5. Following the results of the GA, Mr. Jonathan Glustein filed a petition with the Judicial Board against Ms. Maya Koparkar both in her personal capacity and in her capacity as Vice-President (Internal Affairs) of the SSMU, along with Mr. Jad El Tal in his capacity as Speaker of the SSMU.

6. The Petitioner is seeking an interim order to be made by October 28, 2017 that all 12 Directors' names, as they are listed in the motion to ratify the SSMU Board of Directors attached in the Petitioner's declaration, be submitted for ratification by means of an online referendum during the Fall 2017 Referenda period. The proposed deadline coincides with the start of campaigning period. Online voting opens on November 8, 2017.

7. The Petitioner claims that the motion to divide the vote on the ratifications of Board of Director nominees violates the *Students' Society of McGill University Constitution*¹ ("*SSMU Constitution*"). In turn, it is sought that the Judicial Board overturn the General Assembly resolution to split the vote on the ratification of Board of Directors nominees.

ISSUES

8. The Petitioner seeks an interim order to be granted by October 28, 2017 that all 12 Directors' names, as they are listed in the motion to ratify the SSMU Board of Directors attached in the Petitioner's declaration, be submitted for ratification via an online referendum during the Fall 2017 Referenda period. This Board must determine whether such an order could be granted.

¹ *Students' Society of McGill University Constitution*, (2017) [*SSMU Constitution*], online: <ssmu.ca/wp-content/uploads/2017/09/SSMU-Consitution-2017-03-16.pdf?x26516>.

9. If not, can the Judicial Board grant an interim order that suspends the General Assembly's decision until the Judicial Board issues a ruling on the constitutionality of the motion to split the vote?

ANALYSIS

A - Jurisdiction of the Judicial Board

10. Despite being polysemic, the term jurisdiction can loosely refer to persons, moral and physical, and constitutional documents over which an adjudicative body exerts authority.

11. Applied to this Board, its jurisdiction is established by Section 10 of the *SSMU Judicial Board Procedures* (“*Procedures*”).² Furthermore, this Board's jurisdiction also draws from Part 1 of the *Internal Regulations of Governance-03: Judicial Board* (“*Internal Regulations of Governance*”).³ Finally, Section 15.1 of the *SSMU Constitution* outlines the jurisdiction of this Board.⁴ In considering these three sources, we found no contradiction within their meaning and the intention they carry individually. Therefore, we decided that they should be interpreted as a whole.

12. Assessing whether the Judicial Board has jurisdiction over the present Petition requires effectively asking whether the matter falls within our mandate. The aforementioned provisions strongly establish that the Judicial Board has authority “to render opinions on matters which the Constitution or Internal Regulations specify”⁵, which section is followed by a list of such matters. For the ensuing reasons, this Board concludes that the Petition at hand, and the accompanying order, doubtlessly fall within our jurisdiction.

13. Two sections in the *Internal Regulations of Governance* support this conclusion. First, Section 1.1(c) specifies that the jurisdiction includes “the interpretation of all procedures, questions and results of all Elections and Referenda.”⁶ Additionally, Section

² *Students' Society of McGill University Judicial Board Procedures*, (2012), s 10 [*Procedures*], online: <ssmu.ca/wp-content/uploads/2012/01/SSMU-Judicial-Board-Procedures-adopted-12-Apr-2012.pdf?x26516>.

³ *Students' Society of McGill University Internal Regulations of Governance*, (2017), at 03 *Judicial Board* [*Internal Regulations Governance*], online: <ssmu.ca/wp-content/uploads/2017/05/Internal-Regulations-of-Governance-2017-03-09.pdf?x26516>.

⁴ *SSMU Constitution*, *supra* note 1, s 15.

⁵ *Internal Regulations Governance*, *supra* note 3 at 03 *Judicial Board*, part 1, s 1.1.

⁶ *Ibid*, s 1.1(c).

1.1(a) mentions the “interpretation of the Constitution, Internal Regulations, Policies and Plans of the Society”, which confers a broad scope to this Board jurisdiction.⁷

14. The two questions submitted by the Petitioner to this Board each touch upon these aspects of the jurisdiction. The first issue pertains specifically to the Judicial Board’s authority over questions related broadly to Referenda. The second issue relates to the constitutional interpretation of a motion at a General Assembly. Given that General Assemblies are provided for by Section 13 of the *SSMU Constitution* and the *Internal Rules of Governance-07*, we conclude that the second issue falls within our jurisdiction as per Section 1.1(a) pertaining to interpretation of the *SSMU Constitution* and *Internal Regulations of Governance*.⁸

15. The Board concludes that the matters submitted by the Petitioner are within its jurisdiction in respect of SSMU constitutional documents. Consequently, we must now turn to considering the implications and constitutional basis for the Petitioner’s request of an interim order.

B - Can the Judicial Board issue an *ex parte* interim order?

16. Section 34 of the SSMU Judicial Board’s *Procedures* states that “[i]nterim orders shall be binding on all parties, and on all persons advised of the order who are subject to the authority of the Judicial Board”.⁹ This section serves as the basis for the Petitioner’s request for interim orders.

17. Pursuant to Section 3.1 Part 3 of the *Internal Regulations of Governance*, “the Judicial Board may rule on matters related to the central issue in the form of a preliminary decision”, and parties “may request a preliminary decision prior to the hearing.”¹⁰ Although interim orders are not specifically mentioned in the *Internal Regulations of Governance*, Section 3.1 empowers this Board to render a temporary decision on certain aspects of the issues presented by the parties prior to a hearing on all aspects of the dispute.

18. In our view, the purpose of an interim order is to preserve all directly affected Members’ rights until this Board reaches a final decision. Given that hearing procedures can take months, there might be risk that the Petitioner’s ability to regain his rights becomes extinct by the time the final decision is rendered. Thus, this Board must

⁷ *Ibid*, s 1.1(a).

⁸ *Internal Regulations Governance, supra* note 3 at 07 *General Assembly*.

⁹ *Procedures, supra* note 2, s 34.

¹⁰ *Internal Regulations Governance, supra* note 3 at 03 *Judicial Board*, part 3, s 3.1 [emphasis added].

determine whether there is a risk that the Petitioner's rights would be irreparably infringed if the status quo is preserved.

19. Section 35 of the *Procedures* entitles this Board to issue an interim order "based solely on the written submission".¹¹ This *ex parte* interim order falls squarely within the scope of this section. The singular "submission" clearly indicates that this Board is entitled to rely on the Petitioner's submission only.

20. In the case before us, the Petitioner has one interim order. The Petitioner has also raised the time-sensitive nature of this request. This Board believes that the Petitioner's submission serves as a sufficient basis to consider an *ex parte* interim order.

C - Can the Judicial Board issue an interim order that introduces a student-initiated Referendum question after the deadline for the nomination period?

21. The Petitioner seeks an interim order by October 28, 2017 that submits all 12 Directors' names, as they are listed in the motion to ratify the SSMU Board of Directors attached in the Petitioner's declaration, for ratification via an online referendum during the Fall 2017 Referenda period. This Board cannot issue such an order. Doing so would be unconstitutional.

22. According to Section 14.1 of the *SSMU Constitution*, Referenda "may be initiated by the Legislative Council or Members, in accordance with the Internal Regulations."¹²

23. Section 1.3 of the *Internal Regulations of Elections and Referenda-04: Referenda* outlines the procedure for student-initiated Referendum questions. Any Member may initiate a Referendum question by presenting a question to the Chief Electoral Officer, who will assess whether the proposed question respects the requirements of the *Internal Regulations of Elections and Referenda*. The Member must then collect the signatures of 100 Members with not more than 30% from any one faculty or school on a petition at least 14 days before the beginning of the Polling Period.¹³

¹¹ *Procedures*, *supra* note 2, s 35.

¹² *SSMU Constitution*, *supra* note 1, s 14.2.

¹³ *Students' Society of McGill University Internal Regulations of Elections and Referenda*, (2017), at 04 *Referenda*, s 1.3 [*Internal Regulations Elections & Referenda*], online: <ssmu.ca/wp-content/uploads/2017/05/Internal-Regulations-of-Elections-and-Referenda-2017-03-23.pdf?x26516>.

24. According to the Elections SSMU, which is “the body of the Society that is solely responsible for the administration of the Society’s Elections and Referenda”¹⁴, the nomination period for student-initiated Referenda ended on October 25, 2017 at 5:00 PM, which is 14 days before the start of the polling period, November 8, 2017 at 9:00 AM.¹⁵

25. Based on the facts before us, the Petitioner did not follow the procedure for student-initiated Referendum questions as outlined by Section 1.3 of the *Internal Regulations of Elections and Referenda-04: Referenda*. The October 25, 2017 deadline has passed.

26. Section 1.4 of the *Internal Regulations of Elections and Referenda-04: Referenda* presents the procedure for the extension of the 14-day deadline for approval of student-initiated Referendum questions. The 14-day deadline can be extended “by a motion passed by a two-thirds (2/3) majority of the Legislative Council and approval by the Chief Electoral Officer.”¹⁶

27. This Board is not mentioned at all in Section 1.4 of the *Internal Regulations of Elections and Referenda-04: Referenda*. The Petitioner asks this Board to unilaterally include a student-initiated Referendum question in the Fall 2017 Referenda period. The bodies mentioned in this provision—the Legislative Council and the Chief Electoral Officer—can only extend the 14-day deadline. Therefore, it does not follow that a body that is not even mentioned in this provision could unilaterally include a Referendum question in the coming Referenda period.

28. Section 1.5 *Internal Regulations of Elections and Referenda-04: Referenda* presents an exception to the 14-day deadline.¹⁷ However, as it only applies to Legislative Council-initiated Referendum questions, it is not applicable to the present Petition.

29. Therefore, the Judicial Board cannot grant the interim order that the Petitioner is seeking in full. However, this does not preclude this Board from suspending the results of the General Assembly ratification vote thus allowing the unratified Directors to sit on the Board of Directors until the Judicial Board renders the final opinion.

¹⁴ See *Internal Regulations Governance*, *supra* note 3 at 01 Structure, Function, Interpretation and Amendments of the Internal Regulations, part 3, art (bb).

¹⁵ See Elections SSMU, “Fall 2017 Referendum Period Tentative Timeline” (2017), online: <ssmu.mcgill.ca/elections/>; Elections SSMU, “SSMU Referendum Kit: Fall 2017” (2017), online: <ssmu.mcgill.ca/elections/wp-content/uploads/2012/04/Ref.-Nomination-Kit-2017-2018.pdf>.

¹⁶ *Internal Regulations Elections & Referenda*, *supra* note 13 at 04 Referenda, s 1.4.

¹⁷ *Ibid*, s 1.5.

D - Can this Board grant an interim order that suspends the General Assembly ratification vote until it issues a ruling on the constitutionality of the motion to split the General Assembly ratification vote?

(i) Applicable Test for Interim Orders

30. This Board established the test for interim orders in *Chen v Gould*.¹⁸ Although the present decision only considers the merits of an application for an interim order while *Chen v Gould* was a final decision, the test in *Chen v Gould* applies to the present decision.

31. The test in *Chen v Gould* is based on the general three-branch test in Canada for interlocutory injunctions established by the Supreme Court of Canada in *RJR—MacDonald Inc v Canada (Attorney General)*.¹⁹ The test consists of the following questions:

- I. Is there a serious issue to be heard?
- II. Will the applicant suffer irreparable harm if the interim order is not granted?
- III. Balance of inconvenience: Which party will suffer the greater harm from granting or refusing the interim order pending a final decision on the merits?²⁰

Is there a serious issue to be heard?

32. The first branch of the test considers whether there is a serious question to be heard. According to the Supreme Court in *RJR—MacDonald*, applications that are “neither vexatious nor frivolous” meet this branch of the test and move on the second branch.²¹

Will the applicant suffer irreparable harm if the interim order is not granted?

¹⁸ *Chen v Gould* (19 February 2008), SSMU, (Judicial Board of the SSMU) at para 13. In *Chen v Gould*, the Judicial Board wrote in para 13 that the test is for injunctions, which are synonymous to interim orders. Since the term “interim order” is mentioned in ss 33–36 of the SSMU Judicial Board Procedures and in the Petitioner’s declaration, we will be referring to “interim orders” instead of “injunctions” in this decision.

¹⁹ *RJR—MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR—MacDonald*]. We have changed the wording of the test to be consistent with the *SSMU Constitution*, *SSMU Internal Regulations Governance*, and *SSMU Judicial Board Procedures*.

²⁰ *Ibid* at 347–49.

²¹ *Ibid* at 337.

33. In the second stage of the test, this Board must assess whether the refusal to grant an interim order would inflict a harm of such importance to the applicant that it could not be remedied even if the eventual final decision is rendered in the applicant's favour.²²

34. If the applicant suffers from irreparable harm in the event that the interim order is not granted, then the second branch of the test is met and the application moves on to the third branch.

35. According to the Supreme Court in *RJR—MacDonald*,

“Irreparable” refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.²³

Balance of inconvenience: Which party will suffer the greater harm from granting or refusing the interim order pending a final decision on the merits?

36. Often called the “balance of inconvenience” step, the third branch consists of an assessment of which of the two parties will suffer greater harm from the refusal or granting of an interim order pending a final decision.²⁴

37. In addition to the damage that each party alleges it will suffer from the refusal or granting of an interim order, this Board must also consider the interest of the public. In other words, this Board must determine whether the public will suffer any harm from the refusal or granting of an interim order. According to the Supreme Court, “[p]ublic interest’ includes both the concerns of society generally and the particular interests of identifiable groups.”²⁵

(ii) Application of the test to the present situation

Is there a serious issue to be heard?

38. The application meets the first branch of the test as it raises a serious issue to be heard. This application concerns the composition of the Board of Directors, which

²² *Ibid* at 341.

²³ *Ibid*.

²⁴ *Ibid* at 342.

²⁵ *Ibid* at 344.

according to Section 6.1 of the *SSMU Constitution*, supervises the management and administers the business and affairs of the SSMU.²⁶

39. Considering the powers of the Board of Directors, this application is neither vexatious, nor frivolous.

Will the applicant suffer irreparable harm if the interim order is not granted?

40. The Petitioner would not suffer irreparable harm from the refusal to grant an interim order to suspend the results of the General Assembly as the harm does not meet the “irreparable” standard established in *RJR—MacDonald*.

41. The Petitioner, as a member of the Board of Directors, would suffer from the consequences arising from an incomplete Board of Directors composed of less than 12 members. However, these consequences do not constitute an “irreparable” harm as the *SSMU Constitution* provides a framework to select replacement Board members.²⁷

42. However, due to the time-sensitive nature of his request for an interim order, this Board must consider extraneous factors which have affected the submission of this demand. Notably, the lack of time and the impossibility to seek guidance on the constitutional merits of the Petition must be included in this Board’s reasoning. Such considerations can be linked to guiding principles of the *SSMU Constitution*, evoked in the Preamble of the document, notably the duty to duly represent students of the Society as well as considerations of equality, equity, and fairness.²⁸ Hence, the Board must assess the present demand in light of these principles.

43. Considerations of equity and fairness allow us to take into account the harm that might be suffered by the parties directly targeted by the motion to split the vote. This Board must consider whether the refusal of an interim order would be so harmful to the parties directly targeted by the motion that even an eventual final decision in their favour would not remedy this harm.

44. By refusing to grant the interim order suspending the results of the General Assembly, the unratified Directors would not be able to sit on the Board of the Directors

²⁶ *SSMU Constitution*, *supra* note 1, s 6.1.

²⁷ See *ibid*, s 6.4.

²⁸ See *SSMU Constitution*, *supra* note 1 at Preamble. As mentioned in the Preamble of the *SSMU Constitution*, there exists a duty of Representation for the Society, and it shall act in the best interests of its members. The principles of fairness and equity are rooted in the fact that an individual Member’s best interests are not superior to that of any other Member. Accordingly, decisions must be made in consideration of these various interests, the deciding factors being the pursuit of fairness.

pending the final decision on the merits of the action. Even if this Board renders a final decision in favour of the unratified Directors, they could not make up the time they would have sat on the Board had the Board of Directors been ratified as a block. Therefore, the harm that they would suffer from a refusal of an interim order would constitute an irreparable harm as defined by the Supreme Court in *RJR—MacDonald*.²⁹

45. We are of the view that the contextual component of this Petition and the time limitations to which the Petitioner has been subjected must be considered. Furthermore, this Board should consider guiding principles to compensate for these extraneous factors, which could derail the application. It is our opinion that this Society's duty to act in the best interests of its members justifies that this second criterion be met.

46. Furthermore, this Board recognizes that it is not the Supreme Court and that the standard established by the Supreme Court may be too burdensome for parties in hearings before this Board to reach without the services of legal professionals.

47. Therefore, although the Petitioner himself does not suffer from irreparable harm, this Board considers that the second branch of the test is met since other parties which could have been included in the Petition if time and practical considerations had not prevented their inclusion, would suffer irreparable harm from the refusal of the interim order.

Balance of convenience: Which party will suffer the greater harm from granting or refusing the remedy pending a final opinion on the merits?

48. Since the Petitioner's application for an interim order is time sensitive, this present decision is *ex parte*. Ideally, we would have also considered submissions from the Respondents and convene a hearing with both Petitioner and Respondents before rendering a decision on the interim order.

49. However, although the Respondents were notified of the Petitioner's application for an interim order, this Board did not receive any submissions from the Respondents. Furthermore, this Board must decide on the merits of an interim order as soon as reasonably possible.³⁰ Therefore, due to these limitations, this Board cannot infer the harm that would be suffered by the Respondents if the interim order were granted without failing its duty towards the Petitioner to act in reasonable time.

²⁹ See *RJR—MacDonald*, *supra* note 19 at 341.

³⁰ See *Procedures*, *supra* note 2, s 33.

50. This Board must also consider whether it is in the public's interest to grant or to refuse to grant an interim order to suspend the results of the General Assembly regarding the splitting of the votes for the ratification of Directors.

51. It is in the public's interest that the unratified Directors remain seated on the Board of Directors pending the final decision. If their seats are vacated, the Society shall appoint new members in the interim as Section 6.2 of the *SSMU Constitution* states that the Board of Directors shall consist of 12 members.³¹ If this Board, in its final opinion, decides that the General Assembly vote is unconstitutional, the three unratified Directors would be up for ratification once again. In this event, there will be uncertainty regarding the composition of the Board of Directors as the vacancies may have already been filled, and there could be more than 12 Directors on the Board of Directors.

52. To resolve this uncertainty, further petitions would need to be filed and further hearings would need to be held before this Board. Considering the lengthy process of hearings before this Board, as outlined by the *Internal Regulations of Governance* and the *Procedures*, the issue regarding the composition of the Board of Directors would only be resolved, at the earliest, in the Winter 2018 semester.

53. The Board of Directors is responsible for supervising the management and administers the business and affairs of the SSMU according to the *SSMU Constitution*.³² These tasks are crucial to the well-functioning of the Society. Therefore, uncertainty regarding the composition of the Board of Directors will hinder Directors from fulfilling their obligations and further damage Members' trust in the SSMU.

54. If this Board grants an interim order that suspends the results of the General Assembly and thus allows the unratified Directors to remain seated on the Board of Directors, some Members of the SSMU may feel that this Board is undermining the vote of 106 Members who elected to split the vote on the ratification of the Directors during the General Assembly. These concerns are valid.

55. However, we emphasize the temporary nature of an interim order. By granting an interim order to suspend the results of the General Assembly and thus allowing the unratified Directors to remain seated on the Board of Directors, this Board does not declare its positions regarding the constitutionality of the splitting of the ratification vote. This Board is only ensuring the stability of the composition of the Board of Directors

³¹ *SSMU Constitution*, *supra* note 1, s 6.2.

³² See *ibid*, s 6.1.

pending the final opinion of this Board regarding the constitutionality of the General Assembly ratification vote.

DECISION

56. After due consideration of the matters addressed through the application of the test for interim orders, the Judicial Board establishes that the General Assembly's motion to split the vote is suspended until further evaluation, through an official hearing procedure, of the constitutionality of this motion.

57. More specifically, this entails that the Directors that have not been ratified by the General Assembly on October 23, 2017 will not be demoted of their functions as Directors until the Judicial Board issues a ruling regarding the constitutionality of the motion to split the vote. If they were to be demoted of their functions until the ruling regarding constitutionality, these Directors would suffer irreparable harm in the case where the motion would be judged unconstitutional.

58. The Judicial Board cannot order an interim order as per the first request of the Petitioner. Every General Assembly motion is subject to ratification in an online referendum vote, including the ratification of the Board of Directors. Section 13.9 of the *SSMU Constitution* states that "Resolutions adopted by the General Assembly that do not pass online ratification shall be null. The quorum for all General Assembly ratification shall be ten percent (10%) of the Members."³³ This suggests that once SSMU Directors are ratified at the General Assembly, they are subject to an online referendum vote. Therefore, the Directors that were not ratified at the General Assembly cannot be part of the online ballot.

59. However, subsequent hearings will be held in order to determine the constitutionality of the General Assembly's motion to split the vote. Ultimately, the decision that will be established after the hearings will determine whether the motion to split the vote can be enforced or not. Until a final decision is issued, this interim order preserves the status quo prior to the General Assembly and maintains the 12 Directors' status, notwithstanding other constitutional requirements with regards to ratification.

60. Finally, this Board believes this decision to be guided by the best interests of the Society's Members, and a principle of fairness in the proceedings.

³³ *SSMU Constitution*, *supra* note 1, s 13.9.