

# Students' Society of McGill University

## Judicial Board

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### **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)*

### FINAL JUDGEMENT

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### **EXECUTIVE SUMMARY<sup>1</sup>**

- The Vice-President (Internal Affairs), Maya Koparkar, and the former Speaker, Jad El-Tal are absolved of all blame with regards to the motion to divide (and related motions) at the Fall 2017 General Assembly.
- Although the Speaker is not included in the positions that are subject to the standard of care (under Section 16.1 of the *SSMU Constitution*), the Judicial Board concludes that there are reasonable expectations that the Speaker upholds the standard of care in performing their duties. In effect, the standard of care applies to the Speaker in performing their duties.
- In the future, Justices of the Judicial Board should not be consulted during General Assemblies for questions regarding the constitutionality of motions. For the reasons that led us to take this stance, see paragraphs 67–73.
- The motion to divide filed by a Member from the Faculty of Arts is unconstitutional as it violates several Sections of the *SSMU Constitution*.

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<sup>1</sup> The Executive Summary serves to increase the accessibility of Judicial Board decisions to the Members of the SSMU. However, the Executive Summary is not part of the final judgement and is thus not binding following the ratification of the final judgement by the Board of Directors. The Executive Summary does not replace the final judgement. Therefore, Members of the SSMU are highly encouraged to read the final judgement in addition to the Executive Summary.

- Ratifying Directors individually vitiates the purpose of the Nominating Committee. This transformation is not supported by provisions of the *SSMU Constitution*.
- In a situation where the General Assembly elects a partial Board of Directors (i.e., that some Directors were not ratified), there are no replacement mechanisms to fill the missing seats. The *SSMU Constitution* includes replacement mechanisms under the following circumstances: resignation, removal from office, death, Director ceasing to be qualified. In effect, such a situation gives rise to an unconstitutional Board of Directors.
- A procedural motion leading to the ratification of a Board of Directors composed of less than the 12 voting Directors is, in itself, unconstitutional.

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The following judgement was delivered on December 31, 2017 by

THE JUDICIAL BOARD, UNANIMOUS –

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

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## FACTS

1. To determine the facts surrounding the present matter, the Judicial Board weighed the parties' allegations of facts against the standard of the balance of probabilities. In other words, for this Board to accept a party's allegations as fact, they must convince this Board that what they allege is at least 51% likely to have happened.

2. During a meeting of the Board of Directors held on September 24, 2017, the Vice-President (Finance), Arisha Khan,<sup>2</sup> questioned the legitimacy of the appointment of Members to the Board of Directors. In a discussion with another Director of the Board, Jonathan Glustein (*Petitioner*), the Vice-President (Finance) asked who elected him. Mr. Jonathan Glustein explained that he was elected by way of General Assembly and then again by electronic ballot. The Vice-President (Finance) responded that the way in which Mr. Jonathan Glustein was elected had been illegitimate.<sup>3</sup>

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<sup>2</sup> Ms. Arisha Khan has since resigned from her position as the Vice-President (Finance) effective November 16, 2017.

<sup>3</sup> SSMU, Board of Directors, *Board of Directors Minutes*, (24 September 2017) at 2–6, made public on 16 October 2017 [BoD Minutes], online: <<https://ssmu.ca/wp-content/uploads/2016/06/Minutes-Board-of-Directors-Approved-2017-09-24.pdf>>, cited in Ms. Maya Koparkar's Declaration at n 1.

3. During the same meeting, the General Manager of the SSMU, Ryan Hughes, suggested that each Director could be ratified through a ballot individually. The President, Munavvar “Muna” Tojiboeva, agreed with making this a discussion in the near future.<sup>4</sup>

4. On October 23, 2017, an hour before the Fall 2017 General Assembly, the President emailed the Speaker of the SSMU, Jad El-Tal (*Respondent*),<sup>5</sup> and the Parliamentarian, Christelle Tessono, notifying Mr. Jad El-Tal and the Parliamentarian of the possibility that a motion to divide the Motion Regarding the Nomination of Directors for the Board of Directors (“Main Motion”) may be filed. In the same email, the President offered her interpretation of Section 6.5 of the *Students’ Society of McGill University Constitution* (“SSMU Constitution”).<sup>6</sup> Pursuant to her interpretation of the provision, if there was a motion to divide the Main Motion presented at the Fall 2017 General Assembly, it would be unconstitutional.

5. After receiving this email, Mr. Jad El-Tal and the Parliamentarian spoke with the President. The President advised Mr. Jad El-Tal and the Parliamentarian to consult with Chief Justice James Trougakos of the Judicial Board<sup>7</sup> on the constitutionality of such a motion.

6. Before the Fall 2017 General Assembly, Mr. Jad El-Tal met with the Parliamentarian and Chief Justice Trougakos for 30 minutes. Mr. Jad El-Tal and the Parliamentarian received verbal confirmation from Chief Justice Trougakos that his interpretation of “the whole” in Section 6.5 was in accordance with their views, where “the whole” does not necessarily mean that the Directors need to be ratified as a block, but rather that all of them need to be ratified either through a General Assembly vote or Online Referendum.<sup>8</sup>

7. During the Fall 2017 General Assembly, the Vice-President (Internal Affairs), Maya Koparkar (*Respondent*), motioned to divide the Main Motion.<sup>9</sup>

8. After Mr. Jonathan Glustein alleged that Ms. Maya Koparkar’s motion was

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<sup>4</sup> *BoD Minutes*, *supra* note 3 at 5.

<sup>5</sup> Mr. Jad El-Tal has since resigned from his position as Speaker effective October 27, 2017.

<sup>6</sup> *Students’ Society of McGill University Constitution*, (2017), s 6.5 [*SSMU Constitution*], online: <<https://ssmu.ca/wp-content/uploads/2017/09/SSMU-Consitution-2017-03-16.pdf>>.

<sup>7</sup> Chief Justice James Trougakos has since retired from the Judicial Board. His term expired on December 22, 2017.

<sup>8</sup> *SSMU Constitution*, *supra* note 6, s 6.5.

<sup>9</sup> TVMTelevision, “SSMU General Assembly – Fall 2017” (23 October 2017) at 02h:03m:10s [TVMTelevision], online: <[https://www.youtube.com/watch?v=Vl6\\_Z0M0OG0](https://www.youtube.com/watch?v=Vl6_Z0M0OG0)>.

unconstitutional, Mr. Jad El-Tal and the Parliamentarian recessed with Chief Justice Trougakos and other Executives in order to interpret the constitutional provisions relevant to the Board of Directors' ratification process.

9. During consultations, Mr. Jad El-Tal was made aware that the Main Motion was unconstitutional as it included the names of Muna Tojiboeva and Arisha Khan. By virtue of their positions as President and Vice-President (Finance) respectively, they are automatically ratified to the Board of Directors. As such, Ms. Maya Koparkar's motion was nullified.

10. The names of Muna Tojiboeva and Arisha Khan were subsequently removed from the list of Directors to be ratified. This amendment was done by way of a second motion filed by a Member from the Faculty of Arts & Science.<sup>10</sup>

11. At this point, the constitutionality of the motion to divide the Main Motion was unclear to Ms. Maya Koparkar, who then refrained from pursuing the matter. This will be important to the following analysis regarding her responsibility.

12. Once the amendment was passed, an unidentified Member asked whether the motion could still be divided.

13. Mr. Jad El-Tal and the Parliamentarian consulted with Chief Justice Trougakos once again. Consistent with his opinion prior to the Fall 2017 General Assembly, Chief Justice Trougakos reiterated that his interpretation of "the whole" in Section 6.5 was in accordance with their views, where "the whole" does not necessarily mean that the Directors need to be ratified as a block, but rather all of them need to be ratified either through a General Assembly vote or an Online Referendum.

14. Chief Justice Trougakos only provided his interpretation of the constitutionality of the motion to divide pursuant to Section 6.5 of the *SSMU Constitution*.<sup>11</sup> He did not comment on the overall constitutionality of the motion. Chief Justice Trougakos informed Mr. Jad El-Tal that he was only providing his opinion and that the decision was ultimately the Speaker's to make pursuant to Section 5.4 of the *Internal Regulations of Governance-07: General Assembly*.<sup>12</sup>

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<sup>10</sup> *Ibid* at 02h:16m:23s.

<sup>11</sup> *SSMU Constitution*, *supra* note 6, s 6.5.

<sup>12</sup> *Students' Society of McGill University Internal Regulations of Governance*, (2017), at 07 General Assembly, part 2, s 5.4 [*Internal Regulations Governance*], online: <<https://ssmu.ca/wp-content/uploads/2017/05/Internal-Regulations-of-Governance-2017-03-09.pdf>>.

15. After some discussion on other matters, a Member from the Faculty of Arts motioned to divide the Main Motion.<sup>13</sup> The motion filed by this Member was passed with 106 in favour and 64 opposed.

16. Following the results of the Fall 2017 General Assembly, 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.

17. The Petitioner sought an interim order to be filed by the Judicial Board by October 28, 2017 that all 12 Directors' names, as they are listed in the Main Motion attached to the Petitioner's declaration, be submitted for ratification by means of an online referendum during the Fall 2017 Referenda period.

18. The Petitioner claims that the motion to divide the Main Motion violates the *SSMU Constitution*. In turn, it is sought that the Judicial Board overturn the Fall 2017 General Assembly resolution to divide the Main Motion.

19. On October 28, 2017, the Judicial Board granted an interim order suspending the Fall 2017 General Assembly's motion to divide the Main Motion until further evaluation, through an official hearing procedure of the constitutionality of this motion.

## ISSUES

20. In the present final judgement, the Judicial Board is tasked with addressing the following issues:

- A) Did Ms. Maya Koparkar, in her capacity as Vice-President (Internal Affairs) of the SSMU and in her personal capacity, act with the requisite standard of care outlined in Section 16.1 of the *SSMU Constitution*?
- B) Did Mr. Jad El-Tal, in his capacity as Speaker of the SSMU during the Fall 2017 General Assembly, act with the requisite standard of care outlined in Section 16.1 of the *SSMU Constitution*?
- C) Does the motion to divide the Main Motion presented at the Fall 2017 General Assembly violate the *SSMU Constitution*?

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<sup>13</sup> TVMTelevision, *supra* note 9 at 02h:35m:56s.

(i) Is the motion to divide the Main Motion constitutional pursuant to Section 6.5 of the *SSMU Constitution*?

(ii) Is the motion to divide the Main Motion constitutional pursuant to Section 6.4 of the *SSMU Constitution*?

(iii) Is the motion to divide the Main Motion constitutional pursuant to Section 6.2 of the *SSMU Constitution*?

(iv) Is the motion to divide the Main Motion vote consistent with the constitutional principles and underlying values of the *SSMU Constitution*?

## JURISDICTION

21. As outlined in the *ex parte* interim order of *Glustein v Koparkar*, the Judicial Board concludes that the matters submitted by the Petitioner are within its jurisdiction in respect of SSMU constitutional documents.<sup>14</sup> Accordingly, this Board retains jurisdiction over the matter and now undertakes to consider the constitutional implications raised by the motion to divide the Main Motion.

## ANALYSIS

### **A. Did Ms. Maya Koparkar act with the requisite standard of care outlined in Section 16.1 of the *SSMU Constitution*?**

22. The standard of care in Section 16.1 is defined as follows:

Every Director, Councillor, Officer, and member of any committee of the Board of Directors or Legislative Council of the Society (for the purposes of this Section 16, the “Representative”) in exercising their powers and discharging their duties shall act honestly and in good faith with a view to the best interests of the Society and shall exercise the care, diligence, and skill that a reasonably

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<sup>14</sup> *Glustein v Koparkar* (28 October 2017), SSMU, (Judicial Board of the SSMU), (interim order) at paras 10–15 [Glustein Interim Order], online: <[https://ssmu.ca/wp-content/uploads/2012/01/20171028\\_Interim\\_Order\\_GlusteinvKoparkar.pdf](https://ssmu.ca/wp-content/uploads/2012/01/20171028_Interim_Order_GlusteinvKoparkar.pdf)>.

prudent person would exercise in comparable circumstances. Every Representative shall comply with the Act, the regulations, the Constitution, the Internal Regulations, and any Policy.<sup>15</sup>

(i) Does Section 16.1 of the *SSMU Constitution* apply to Ms. Maya Koparkar?

23. Pursuant to Section 16.1, the standard of care applies to “[e]very Director, Councillor, Officer, and member of any committee of the Board of Directors or Legislative Council of the Society”.<sup>16</sup> The Vice-President (Internal Affairs) is defined as an Officer of the Society under Section 10.1.<sup>17</sup> Section 10.13 outlines the powers and duties of the Vice-President (Internal Affairs),<sup>18</sup> an office currently held by Ms. Maya Koparkar. She is also a Director of the Society.

24. Given that Ms. Maya Koparkar is an Officer and a Director of the Society, she is bound by the standard of care outlined in Section 16.1.

(ii) Did Ms. Maya Koparkar breach the standard outlined in Section 16.1 of the *SSMU Constitution*?

25. In determining whether Ms. Maya Koparkar breached the requisite standard of care, the following elements must be established: (i) a fault, (ii) a prejudice, (iii) a causal link between the fault and the prejudice.

26. In this matter, it is unnecessary to discuss whether Ms. Maya Koparkar committed a fault or whether the prejudice occurred given that there is a clear lack of causality between the alleged fault and the alleged prejudice.

27. The alleged fault is that Ms. Maya Koparkar presented an unconstitutional motion, or failed to make adequate inquiries as to the constitutionality of the motion she presented. The alleged prejudice is the harm caused by the unconstitutional motion. However, the motion that was ultimately passed at the Fall 2017 General Assembly was not presented by Ms. Maya Koparkar, but by a Member from the Faculty of Arts. As a result, there is no causal link between the alleged fault and the alleged prejudice.

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<sup>15</sup> *SSMU Constitution*, *supra* note 6, s 16.1.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid*, s 10.1.

<sup>18</sup> *Ibid*, s 10.13.

28. For further clarity, this Board refuses the idea that Ms. Maya Koparkar is responsible for “inspiring” the Member who made the motion which ultimately passed. As Ms. Maya Koparkar stated during the hearing, she stopped pursuing the motion once it had failed. The Member who made the ultimate motion acted on their own behalf.

29. Even though the Member could have been inspired by Ms. Maya Koparkar’s initial motion, the Member’s actions constitute a *novus actus interveniens* (“new act intervening”), breaking the chain of causality between Ms. Maya Koparkar’s motion and the motion that was ultimately approved at the Fall 2017 General Assembly. Ms. Maya Koparkar cannot be held responsible for the consequences of a motion presented by another Member of the Society, even though the other Member’s motion could have been inspired by Ms. Maya Koparkar’s motion.

30. In summary, Ms. Maya Koparkar is absolved of all blame: she did not breach the standard of care outlined in Section 16.1 given that the motion which ultimately passed was presented by a Member from the Faculty of Arts.

**B. Did Mr. Jad El-Tal, in his capacity as Speaker of the SSMU during the Fall 2017 General Assembly, act with the requisite standard of care outlined in Section 16.1 of the *SSMU Constitution*?**

31. To address this issue, this Board must determine whether Mr. Jad El-Tal, in his capacity as Speaker of the SSMU, was bound by the standard of care entrenched in Section 16.1 of the *SSMU Constitution* at the time of the Fall 2017 General Assembly.<sup>19</sup>

(i) Does Section 16.1 of the *SSMU Constitution* apply to Mr. Jad El-Tal as the Speaker at the time of the Fall 2017 General Assembly?

32. This Board believes that Section 16.1 applied to Mr. Jad El-Tal during his mandate as the Speaker of the SSMU at the time of the Fall 2017 General Assembly.

33. The *SSMU Constitution* does not explicitly state whether the Speaker is bound by Section 16.1. Section 16.1 of the *SSMU Constitution* only indicates that it applies to “[e]very Director, Councillor, Officer, and member of any committee of the Board of Directors or Legislative Council of the Society.”<sup>20</sup>

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<sup>19</sup> *Ibid*, s 16.1.

<sup>20</sup> *Ibid*.



34. Due to this omission, we must determine whether the Speaker falls in the categories of Director, Councillor, Officer, or member of any Board of Directors or Legislative Council committees as defined by the *SSMU Constitution*.

35. We conclude that the Speaker is not a Director, a Councillor, or an Officer. The Speaker is a member of a Board of Directors committee and of a Legislative Council committee; however, these memberships are not the source of the duty to uphold the standard of care entrenched in Section 16.1 of the *SSMU Constitution* during the Fall 2017 General Assembly.

36. For reasons explained below, we nonetheless believe that Mr. Jad El-Tal is bound by Section 16.1 of the *SSMU Constitution*.

*Is the Speaker an Officer?*

37. The Speaker is not included in the exhaustive definition of the term “Officer” in Section 10.1 of the *SSMU Constitution*.<sup>21</sup> Therefore, we conclude that the Speaker is not an Officer.

*Is the Speaker a Councillor?*

38. The Speaker is not a Councillor. According to Section 2(e) of the *SSMU Constitution*, the term “Councillor” shall mean “the members of the Legislative Council who are not Officers.”<sup>22</sup>

39. Section 8.2 of the *SSMU Constitution* outlines the composition of the Legislative Council. Even though the Speaker presides over Legislative Council meetings per Section 11.6 of the *SSMU Constitution*,<sup>23</sup> the Speaker is excluded from the composition of the Legislative Council provided in Section 8.2 of the *SSMU Constitution*.<sup>24</sup>

40. Therefore, this Board concludes that the Speaker is not a Councillor as defined by Section 2(e) of the *SSMU Constitution*.<sup>25</sup>

*Is the Speaker a Director?*

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<sup>21</sup> *Ibid*, s 10.1.

<sup>22</sup> *Ibid*, s 2(e).

<sup>23</sup> *Ibid*, s 11.6.

<sup>24</sup> *Ibid*, s 8.2.

<sup>25</sup> *Ibid*, s 2(e).

41. The Speaker is not a Director. The nomination process of a Director, who is neither a Councillor nor an Officer, is outlined in Section 6.4 of the *SSMU Constitution*: “The Nominating Committee shall solicit, through an application process, and nominate four Members who are not members of the Legislative Council to the Board of Directors.”<sup>26</sup>

42. The Speaker is not appointed by a Nominating Committee. Instead, according to Section 11.6 of the *SSMU Constitution*, the Speaker is appointed by the Executive Committee from among the Members.<sup>27</sup>

43. Therefore, as the selection process for a Speaker differs from that of a Director, this Board concludes that the Speaker is not a Director.

*Is the Speaker a Member of a Committee of the Board of Directors or of the Legislative Council?*

44. The Speaker is a member of a committee of the Board of Directors and Legislative Council. According to Section 1.6(a) of the *Committee Terms of Reference*, the Speaker is the non-voting Committee Co-Chair of the Accountability Committee, a committee of the Board of Directors.<sup>28</sup> Furthermore, according to Section 11.4(a) of the *Committee Terms of Reference*, the Speaker is the non-voting Committee Chair of the Steering Committee, a committee of the Legislative Council.<sup>29</sup>

45. As a member of a Board of Directors committee and a Legislative Council committee, the Speaker must act with the requisite standard of care outlined in Section 16.1 of the *SSMU Constitution* in exercising his powers and discharging his duties relevant to his position within those committees.

46. However, the standard of care that emerges by virtue of the Speaker’s membership in those committees does not extend to his duties at the General Assembly. Presiding over the General Assembly is not one of the Speaker’s duties as a member of the Accountability Committee or the Steering Committee.

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<sup>26</sup> *Ibid*, s 6.4.

<sup>27</sup> *Ibid*, s 11.6.

<sup>28</sup> *Students’ Society of McGill University Committee Terms of Reference*, (2016), s 1.6(a), online: <<https://ssmu.ca/wp-content/uploads/2008/10/Committee-Terms-of-Reference-Book-2016-09-15.pdf>>.

<sup>29</sup> *Ibid*, s 11.4(a).

47. Therefore, this Board concludes that the Speaker's duty to act with the standard of care outlined in Section 16.1 of the *SSMU Constitution* at the General Assembly is not established by the Speaker's membership of a Board of Director or Legislative Council committee.

48. The Speaker is not an Officer, Councillor, or Director as defined by the *SSMU Constitution*. Furthermore, although the Speaker is a member of a Board of Directors committee and a Legislative Council committee, the Speaker's position in these committees does not bind the Speaker to act with the standard of care outlined in Section 16.1 during the General Assembly.

*Reasonable Expectations of Upholding Standard of Care in Section 16.1 during the General Assembly*

49. However, this Board believes that the Speaker must nevertheless act with the requisite standard of care provided in Section 16.1 as it is reasonable to expect the Speaker to act in accordance with the standard of care outlined in Section 16.1.

50. Section 11.6 outlines the responsibilities of the Speaker:

The Speaker shall receive notice of and preside over the General Assembly, meetings of the Legislative Council, meetings of the Board of Directors and, where applicable, meetings of the Executive Committee.<sup>30</sup>

51. If the officials who are voting members at these meetings are bound by Section 16.1, then it is reasonable to expect the Speaker, who presides over these meetings, to also be bound by Section 16.1.

52. As Section 16.1 of the *SSMU Constitution* applies to the Speaker, Mr. Jad El-Tal, in his capacity of Speaker, is bound by Section 16.1 at the time of the Fall 2017 General Assembly. In exercising his powers and discharging his duties during the Fall 2017 General Assembly, Mr. Jad El-Tal had the obligation to "act honestly and in good faith with a view to the best interests of the Society" and to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."<sup>31</sup>

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<sup>30</sup> *SSMU Constitution*, *supra* note 6, s 11.6.

<sup>31</sup> *Ibid*, s 16.1.

53. Once it has been established that Mr. Jad El-Tal must act with the standard of care provided in Section 16.1 of the *SSMU Constitution*, this Board must determine whether he breached that standard during the Fall 2017 General Assembly.

(ii) Did Mr. Jad El-Tal breach the standard outlined in Section 16.1 of the *SSMU Constitution* during the Fall 2017 General Assembly?

54. This Board believes that Mr. Jad El-Tal did not breach the standard of care outlined in Section 16.1 of the *SSMU Constitution* during the Fall 2017 General Assembly.

55. When determining whether Mr. Jad El-Tal breached the standard of care outlined in Section 16.1, the following elements must be established: (i) a fault, (ii) a prejudice, (iii) a causal link between the fault and the prejudice. For this assessment, this Board does not consider the accuracy of his interpretation of the constitutionality of the motions to divide the Main Motion.

56. This Board concludes that Mr. Jad El-Tal did not commit a fault. He sufficiently discharged his duties under Section 16.1 of the *SSMU Constitution* by consulting a “relevant person” when ruling on the two motions to divide the Main Motion.

#### Adherence to Robert’s Rules of Order

57. According to Section 4.1 of the *Internal Regulations of Governance-05: Legislative Council*, the Speaker must “enforce the rules under which ... the General Assemblies meet, including Robert’s Rules of Order and the Standing Rules.”<sup>32</sup>

58. Mr. Jad El-Tal alleges that he acted in accordance to the Robert’s Rules of Order during the Fall 2017 General Assembly.

59. The interpretation falls outside of the Judicial Board’s jurisdiction outlined in Section 1.1 of the *Internal Regulations of Governance-03: Judicial Board*.<sup>33</sup> Therefore, this Board will not consider Mr. Jad El-Tal adherence to Robert’s Rules of Order when determining whether he breached the standard of care outlined in Section 16.1 of the *SSMU Constitution*.

#### Consultation with Chief Justice James Trougakos of the Judicial Board

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<sup>32</sup> *Internal Regulations of Governance*, *supra* note 12 at 05 *Legislative Council*, part 1, s 4.1.

<sup>33</sup> *Ibid* at 03 *Judicial Board*, part 1, s 1.1.

60. Mr. Jad El-Tal based his ruling on the constitutionality of the two motions to divide the Main Motion filed by Ms. Maya Koparkar and the Member from the Faculty of Arts on discussions with “relevant persons” pursuant to Section 5.4 of the *Internal Regulations of Governance-07*. According to Section 5.4, the Speaker may “request assistance from the General Manager, Officers, or other relevant persons” when reviewing a motion from the floor.<sup>34</sup>

61. Mr. Jad El-Tal and the Parliamentarian consulted with Chief Justice Trougakos multiple times prior to and during the Fall 2017 General Assembly. Chief Justice Trougakos informed Mr. Jad El-Tal and the Parliamentarian that a motion to divide the Main Motion would not violate Section 6.5 of the *SSMU Constitution*.

62. Although Chief Justice Trougakos emphasized during his discussions with Mr. Jad El-Tal that the ruling on the constitutionality of late motions was ultimately the Speaker’s to make pursuant to Section 5.4 of the *Internal Regulations of Governance-07: General Assembly*, Mr. Jad El-Tal cites his discussions with Chief Justice Trougakos as one of his reasons for allowing the motion to divide the Main Motion filed by the Member of the Faculty of Arts.

63. At the time of the Fall 2017 General Assembly, Chief Justice Trougakos was the most senior Justice of the Judicial Board, a body which has the authority to render opinions on the interpretation of the *SSMU Constitution* and Internal Regulations.<sup>35</sup> Therefore, considering the nature of Chief Justice Trougakos’ position within the Judicial Board, it was reasonable for Mr. Jad El-Tal to base his decision on Chief Justice Trougakos’ opinion the constitutionality of the motions.

64. It should be noted that Chief Justice Trougakos only commented on the constitutionality of the motions to divide the Main Motion pursuant to Section 6.5 of the *SSMU Constitution* as it was the only provision that Mr. Jad El-Tal invoked during their discussions. Chief Justice Trougakos did not comment on the overall constitutionality of the motions to divide.

65. The Speaker only invoked Section 6.5 during his discussions with the Chief Justice because it was the only provision discussed by the President of the SSMU in her email to Mr. Jad El-Tal preceding the Fall 2017 General Assembly. Mr. Jad El-Tal could not have reasonably known of all of the grounds on which the constitutionality of the

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<sup>34</sup> *Ibid* at 07 General Assembly, part 2, s 5.4.

<sup>35</sup> *Ibid* at 03 Judicial Board, part 1, s 1.1(a).

motion to divide the Main Motion could have been contested. He could not have asked Chief Justice Trougakos whether the motion to divide the Main Motion violated other provisions.

66. In summary, Mr. Jad El-Tal acted with the requisite standard of care pursuant to Section 16.1 of the *SSMU Constitution* by basing his ruling on the constitutionality of the motions to divide the Main Motion on consultations with a relevant person pursuant to Section 5.4 of the *Internal Regulations of Governance-07: General Assembly*. Therefore, by discharging his duties under Section 16.1 of the *SSMU Constitution*, he is absolved of all blame.

#### *Involvement of the Judicial Board in the Fall 2017 General Assembly*

67. Following the assessment of Ms. Maya Koparkar and Mr. Jad El-Tal's respective actions, this Board addresses its involvement as advisors in General Assemblies.

68. Although the expertise of the Justices can qualify them as "relevant persons" for the purposes of Section 5.4 of the *Internal Regulations of Governance-07: General Assembly*,<sup>36</sup> this Board firmly believes that the consultation of Justices during General Assemblies is problematic. Such consultation is inconsistent with the nature of the Judicial Board. Furthermore, it creates logistical issues for the Judicial Board.

69. The Judicial Board is a reactive body, rather than a proactive body. According to Section 14 of the *SSMU Judicial Board Procedures*, an action can only be initiated following an event that is the cause of the petition.<sup>37</sup>

70. Furthermore, constitutional matters require rich discussion within the Judicial Board. It is unlikely that the Justices will reach a consensus regarding the constitutionality of a motion within a short recess period during a General Assembly.

71. As for logistical issues, the consultation of the Judicial Board during General Assemblies can create conflicts of interests. During the Fall 2017 General Assembly, Chief Justice Trougakos rendered his opinion on the constitutionality of the motion to divide pursuant to Section 6.5 of the *SSMU Constitution*. Due to his involvement in the matter, he was precluded from participating in the formulation of the present opinion and

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<sup>36</sup> *Internal Regulations of Governance*, *supra* note 12 at 07 *General Assembly*, part 2, s 5.4.

<sup>37</sup> *Students' Society of McGill University Judicial Board Procedures*, (2012), s 14, online: <<https://ssmu.ca/wp-content/uploads/2012/01/SSMU-Judicial-Board-Procedures-adopted-12-Apr-2012.pdf>>.

all related matters (i.e., the *ex parte* interim order and the memorandum regarding said interim order).

72. If Justices are precluded from participating in the decision-making process regarding a contested matter, this Board will have difficulty meeting quorum outlined in Section 8 of the *SSMU Judicial Board Procedures*.<sup>38</sup>

73. Therefore, this Board concludes that the Justices of the Judicial Board should no longer be consulted during General Assemblies for questions regarding the constitutionality of motions.

### **C. Is the motion to divide the Main Motion presented during the Fall 2017 General Assembly constitutional?**

74. In examining the constitutionality of the motion to divide the Main Motion, this Board turned to the *SSMU Constitution* as a guide in this interpretative journey. For the reasons below, this Board concluded that a motion to divide the Main Motion breaches multiple provisions of the *SSMU Constitution*, the spirit of the *SSMU Constitution*, and the underlying values and principles of the *SSMU Constitution*.

(i) Is the motion to divide the Main Motion constitutional pursuant to Section 6.5 of the *SSMU Constitution*?

75. Section 6.5 of the *SSMU Constitution* states that “the nomination of Directors in accordance with Section 6.4 shall be submitted for ratification by the Members of the Society by way of Referendum or approved by the General Assembly.”<sup>39</sup> The formulation in Section 6.5 does not specify whether the ratification of Directors should be done as a block or on an individual basis.

76. In light of this omission, the Judicial Board shall consider the legislative intent of the legislator of the *SSMU Constitution*. Legislative intent is a tool used by judicial bodies in order to uncover the true meaning of ambiguous provisions. The initial intention of the legislator behind the words in Section 6.5, specifically the sentence cited above, can be inferred through the analysis of other provisions in Section 6 of the *SSMU Constitution*.

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<sup>38</sup> *Ibid*, s 8.

<sup>39</sup> *SSMU Constitution*, *supra* note 6, s 6.5.

77. Section 6.9 enumerates the circumstances that lead to the termination of the term of office of a Board Member.<sup>40</sup> Additionally, Section 6.10 provides a replacement mechanism in cases where the term of office of a Board Member is terminated under the circumstances enumerated in Section 6.9.<sup>41</sup> Therefore, Sections 6.9 and 6.10 should be considered jointly. Together, they determine the situations leading to and the procedure following the end of a Director's term of office.

78. Contrary to Sections 6.9 and 6.10, there is no provision in the *SSMU Constitution* that is complementary to Section 6.5 with regards to replacement mechanisms in the event that a Board Member fails to be ratified by the General Assembly.

79. The lack of any provision within the *SSMU Constitution* that can be used and interpreted in unison with 6.5 allows this Board to infer, and thus conclude, that the legislator's original intent was for the ratification of the Board Members to be executed as a whole rather than on an individual basis.

(ii) Is the motion to divide the Main Motion constitutional pursuant to Section 6.4 of the *SSMU Constitution*?

80. Furthermore, Section 6.4 of the *SSMU Constitution* states that the selection of Directors shall proceed partly through the Nominating Committee.<sup>42</sup> The Nominating Committee is responsible for nominating Members of the Society to the Board that are neither Councillors nor Officers. This Committee shall solicit and nominate four members through an application process. This provision of the *SSMU Constitution* affirms that four Directors of the Board shall be appointed rather than being determined through a general election open to all SSMU members.

81. Moreover, formal electoral procedures exist within the *Internal Regulations of Elections and Referenda* for Members of the Society that present themselves as candidates for an SSMU election.<sup>43</sup> No such rules exist for the Members of the Board that are chosen through the Nominating Committee. Therefore, this Board concludes that these Members are truly meant to be chosen by the Nominating Committee rather than by the Members of the Society at a General Assembly.

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<sup>40</sup> *Ibid*, s 6.9.

<sup>41</sup> *Ibid*, s 6.10.

<sup>42</sup> *Ibid*, s 6.4.

<sup>43</sup> See *Students' Society of McGill University Internal Regulations of Elections and Referenda*, (2017), online: <<https://ssmu.ca/wp-content/uploads/2017/05/Internal-Regulations-of-Elections-and-Referenda-2017-03-23.pdf>>



82. Therefore, the motion to divide the Main Motion fundamentally alters the purpose and the essence of Section 6.4. By allowing the ratification to proceed on an individual basis, the Nominating Committee's power to choose Members of the Board is vitiated. Through an individual ratification, the responsibility conferred upon the Nominating Committee of appointing Members to the Board is put at risk of being undermined in the eventuality where a Member would fail to be ratified at the General Assembly.

83. If the motion to divide the Main Motion were considered constitutional, the entire essence and structure of the *SSMU Constitution* and the Board of Directors would be altered. Indeed, through Section 6.4, the *SSMU Constitution* provides for the presence of non-elected Members within the Board of Directors. By allowing the ratification to be executed on an individual basis, the entire structure of the Board of Directors would thus be transformed. An individual ratification process would allow members of the Society to prevent unelected nominees from sitting on the Board of Directors; and, in doing so, transform the Board of Directors into an entirely elected body. This transformation has not been provided for through the words of the *SSMU Constitution*.

84. To function efficiently and to uphold the rule of law, the SSMU must act in accordance with its enabling documents and ensure that the provisions that it enacts are internally consistent with one another. By allowing the motion to divide the Main Motion, the Society would be acting in contradiction to its own internal and guiding provisions, such as Section 6.4.

85. Therefore, the motion to divide the Main Motion violates Sections 6.4 and 6.5 of the *SSMU Constitution*, thus rendering the motion unconstitutional.

(iii) Is the motion to divide the Main Motion constitutional pursuant to Section 6.2 of the *SSMU Constitution*?

86. Pursuant to Section 6.2 of the *SSMU Constitution*, the Board of Directors is generally composed of 12 voting Directors.<sup>44</sup> However, the *SSMU Constitution* provides some exceptions to Section 6.2. It is, therefore, constitutional for a Board of Directors to be composed of less than 12 Directors in exceptional circumstances.<sup>45</sup>

87. Section 6.9 exhaustively encompasses all of the exceptions to Section 6.2. In other words, Section 6.9 explicitly outlines all of the circumstances under which a Board

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<sup>44</sup> *SSMU Constitution*, *supra* note 6, s 6.2.

<sup>45</sup> *Ibid.*

of Directors can be composed of less than 12 voting Directors.<sup>46</sup> Four exceptions to Section 6.2 are presented in the *SSMU Constitution*.<sup>47</sup>

1. Resignation: In accordance with Sections 6.7, and as reiterated in Section 6.9, a Director can resign on their own volition.<sup>48</sup>
2. Removal from office: Per Section 6.8 and as reiterated in Section 6.9, a Director may be removed from office, with respect to the conditions and procedures laid out in Section 6.8.<sup>49</sup>
3. Death: The death of the Director is yet another exception to Section 6.2.<sup>50</sup>
4. Director no longer qualified: Finally, the fourth exception to the requirement for the Board of Directors to be composed of twelve individuals is to be found in Section 6.9, and occurs when a Director ceases to be qualified to be a Director, as per the qualifications specified in Section 6.3 of the *SSMU Constitution*.<sup>51</sup>

88. These four exceptions (i.e., resignation, removal, death, and a Director ceasing to be qualified) all result in the end of the term of office of a Director. This Board resolutely concludes that this list is exhaustive, in accordance with an analysis of the legislator's intent, as mentioned above. Henceforth, any procedure leading to the ratification of a Board of Directors composed of less than the 12 voting Directors constitutionally required per Section 6.2 must surely be deemed unconstitutional itself, as its direct corollary is the unconstitutionality of the Board of Directors.<sup>52</sup> This is the fate this Board reserves for the motion under our examination.

89. Further, reading in exceptions to Section 6.2 that are not provided by the *SSMU Constitution* would constitute an unwarranted incursion by this Board. Such incursions could provoke dire and unpredictable consequences.

90. In addition, Section 6.10 of the *SSMU Constitution* only explicitly provides for the replacement mechanisms in cases of vacancies outlined in Section 6.9. The formulation of Section 6.10 notably precludes the replacement mechanisms from

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<sup>46</sup> *Ibid*, ss 6.2, 6.9.

<sup>47</sup> *Ibid*, s 6.2.

<sup>48</sup> *Ibid*, ss 6.7, 6.9.

<sup>49</sup> *Ibid*, ss 6.8–6.9.

<sup>50</sup> *Ibid*, s 6.2.

<sup>51</sup> *Ibid*, ss 6.3, 6.9.

<sup>52</sup> *Ibid*, s 6.2.

applying to other cases of vacancies within the Board of Directors not mentioned in Section 6.9.<sup>53</sup>

91. In this light, this Board concludes that a motion to divide the Main Motion is unconstitutional as it violates Sections 6.2, 6.9, and 6.10 of the *SSMU Constitution*.<sup>54</sup> By allowing for the creation of a Board of Directors initially composed of less than the 12 Directors, the motion allows for the creation of an unconstitutional Board, and is thus unconstitutional itself.

(iv) Is the motion to divide the Main Motion vote consistent with the constitutional principles and underlying values of the *SSMU Constitution*?

92. At the hearing, it was submitted by the Petitioner that the motion to divide the Main Motion should be deemed unconstitutional as it was in violation of unwritten principles and values enshrined in the *SSMU Constitution*. This Board is receptive to the substance of the argument and recognizes the great importance of unwritten constitutional principles and values to the interpretation of the *SSMU Constitution*'s provisions. However, this Board is also of the opinion that unwritten constitutional principles and values cannot, on their own, invalidate the motion.

93. Principles can nevertheless reinforce claims of unconstitutionality of a motion if these are also fuelled by written provisions and more “concrete” considerations, without solely relying on principles. This is the predicament this Board is confronted with in the present case.

94. Principles and values are aspirational moral concepts that guide the actions of Members of the SSMU, and are inherent to the *SSMU Constitution*. This Board, in the *ex parte* order pertaining to the matter at hand, invoked guiding principles rooted in the Preamble of the *SSMU Constitution*.<sup>55</sup> Stemming from the duty of representation with regards to the Member's best interests, this Board mentioned equity, equality, and fairness in its decision, while specifying that these principles were interpretative tools, and were not determinative on their own.<sup>56</sup>

95. The same rationale needs to be applied to conventions. It was argued by the Petitioner that the motion was unconstitutional because it was inconsistent with the

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<sup>53</sup> *Ibid*, ss 6.9–6.10.

<sup>54</sup> *Ibid*, ss 6.2, 6.9–6.10.

<sup>55</sup> *Ibid*, Preamble.

<sup>56</sup> *Glustein* Interim Order, *supra* note 14 at para 42.

convention that the ratification had always been done as a block in previous years. While constitutional conventions can support other arguments, they are not determinative on their own.

96. To be very clear, if this Board finds that the motion under examination is unconstitutional, it is not because it violates constitutional principles and conventions. It is because it breaches provisions of the *SSMU Constitution*, notably Sections 6.2, 6.4, 6.5, 6.9, and 6.10.<sup>57</sup> Nonetheless, the fact that the motion also infringes on constitutional principles set out in the Preamble of the *SSMU Constitution* reinforces the argument of unconstitutionality.<sup>58</sup>

97. The Petitioner also submitted that the motion breached the principle of democracy because it was a “vote by ambush”. They allege that, had more Members been aware that this motion was likely to be submitted to a vote at the Fall 2017 General Assembly, more Members would have come to said General Assembly. This is purely speculative, and this Board cannot seriously consider this aspect of their overall submission because it would not be basing its opinion on objective facts.

98. Nevertheless, this Board strongly wishes to highlight that an overriding duty of transparency is applicable to all Officers, Councillors, Directors and employees of the SSMU, and is constitutionally enshrined within the Preamble of the *SSMU Constitution* as per the duty of representation of the SSMU towards its Members.<sup>59</sup> Conflicting evidence submitted by the parties and their witnesses at the hearing does not allow this Board to corroborate the “vote by ambush” theory, but irregularities in the process do justify the present reminder that Members are entitled to total transparency from their elected and nominated officials.

## **DECISION**

99. This Board holds the following:

- (i) That Ms. Maya Koparkar be absolved of blame as the motion to divide the Main Motion that was ultimately voted on by the Fall 2017 General Assembly was filed by a Member from the Faculty of Arts.

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<sup>57</sup> *SSMU Constitution*, *supra* note 6, ss 6.2, 6.4–6.5, 6.9–6.10.

<sup>58</sup> *Ibid*, Preamble.

<sup>59</sup> *Ibid*.

(ii) That Mr. Jad El-Tal, in his capacity of Speaker at the time of the Fall 2017 General Assembly, be absolved of blame as he acted with the requisite standard of care outlined in Section 16.1 of the *SSMU Constitution* by adhering to the Internal Regulations, RROR, and Standing Rules, and by consulting Chief Justice Trougakos to rule on the constitutionality of the motion to divide.

(iii) That the motion to divide the Main Motion, filed by a Member from the Faculty of Arts is unconstitutional as it violates Sections 6.2, 6.4, 6.5, 6.9, and 6.10 of the *SSMU Constitution*.

100. Therefore, upon ratification of the present judgement by the Board of Directors, the Judicial Board believes that the Motion Regarding the Nomination of Directors for the Board of Directors should be voted on again at another General Assembly or as a Referendum question—this time, as a whole.