

Students' Society of McGill University

Judicial Board

Reference re Legality of the BDS Motion and Similar Motions

The following reference was delivered on May 31, 2016 by
THE JUDICIAL BOARD, UNANIMOUS –

Present: Interim Chief Justice Robin Morgan, Justices Lillian Fradin, Aly Háji, and Munavvar Tojiboeva.

1. Few questions are as important as who may belong in a community, and on what terms. This question is not easy, and it took nothing less dramatic than the events surrounding McGill's Boycott, Divestment, and Sanctions Action Network [BDSAN]'s proposed Boycott, Divestment, and Sanctions [BDS] Motion, which failed to be ratified through online referendum, for it to be asked at McGill.

2. Both opposing sides of the BDSAN have brought forward complaints. First, pursuant to alleged voting irregularities, the McGill BDSAN (through two of its representatives) originally brought forward a petition to deal with these irregularities. This is the subject of the second Reference question, "Reference Re SSMU Mediation Agreements."

3. Conversely, another petitioner argued that the BDS movement, and all similar motions, are in violation of the SSMU Constitution and the *Equity Policy*. This petitioner therefore asked that the JBoard rule on the following reference questions which are dealt with here: does the BDS motion, and similar motions, conform to the SSMU Constitution and *Equity Policy*? In this reference we answer this in the negative – any motion that specifically targets one nation and compels SSMU to actively campaign against that country, such as the BDS Motion, is unconstitutional. Note that any reference herein to the “Constitution” relates to the SSMU Constitution, and not to Canada’s Constitution.

1. Facts

4. On Monday, February 22 2016 McGill University’s SSMU General Assembly voted in favour of a motion supporting the BDS movement [“the Motion”]. The Motion called for “SSMU [to] support campaigns associated with the BDS movement through the office of the VP External” and for the President of SSMU to “lobby the McGill Board of Governors in support of BDS Campaigns.”¹ Following the initial vote, the Motion was sent to online ratification by SSMU’s Membership. There, online ratification failed by a margin of 57-43%. This was the third vote in relation to the BDS movement in 18 months.

5. Following this referendum, the petitioner brought forward a reference question which seeks to declare the BDS Motion, and similar motions, incompatible with SSMU’s by-laws, internal regulations, and legal structure more generally. While we will delve somewhat into detail as to what the BDSAN movement comprises, for present purposes it is sufficient to note that BDSAN is a group of McGill students who campaign on behalf of the BDS movement. As for the BDS movement itself, it can best be summarized by the BDS movement’s official webpage:

*The global movement for a campaign of Boycott, Divestment and Sanctions (BDS) against Israel until it complies with international law and Palestinian rights was initiated by Palestinian civil society in 2005, and is coordinated by the Palestinian BDS National Committee (BNC), established in 2007. BDS is a strategy that allows people of conscience to play an effective role in the Palestinian struggle for justice.*²

6. During the period that led to the GA vote and the general Referendum there was a sharp increase in harassment, defined pursuant to the *Equity Policy*, around campus.³ McGill students who campaigned for BDSAN and those who campaigned against were subject to a barrage of hostilities. Indeed, the BDS vote garnered national attention, with the CBC as well as the Montreal Gazette running several stories on the matter.⁴ For present purposes it suffices to reproduce the

¹ *Motion Regarding Support for the Boycott, Divestment and Sanctions Movement*, SSMU General Assembly Resolution Book, Updated as of 03/07, p 51. Online: <http://ssmu.mcgill.ca/wp-content/uploads/2009/10/General-Assembly-Resolution-Book-Updated-2016-03-07.pdf>.

² BDS, *Introducing the BDS Movement*, online (accessed last 31-05-2016): <https://bdsmovement.net>.

³ *Equity Policy*, SSMU Policy and Plan Book, p76. Available online at: <http://ssmu.mcgill.ca/wp-content/uploads/2008/10/SSMU-Policy-and-Plan-Book-2016-04-07.pdf>.

⁴ Elias Abboud, “McGill University BDS movement vows to continue”, *CBC News* (29 February 2016) online: <http://www.cbc.ca/news/canada/montreal/mcgill-university-bds-movement-vows-to-continue-1.3469713>; see also

headline of a Montreal Gazette story published February 25: “BDS Vote Stirs Up Hostilities on McGill Campus.”⁵ BDSAN’s official position has been that they support their Jewish peers while standing up for Palestine, and have strongly condemned anti-Semitic behaviour on Campus.

7. This is the context in which this reference was made. Procedurally this reference has been unique. First, due to significant internal events related to JBoard structure and SSMU, it was impossible to render this reference during the semester in which it was submitted. This should not be a recurring trend, and complaints and references should continue to be dealt with in the semester in which they are brought. Moreover, while SSMU was designated as the respondent in this case, the President ultimately declined to represent the opposing side of the petition. This was, in our view, wise to allow SSMU to remain neutral in the dispute. Instead, we have invited representatives of the BDSAN to submit their position on the matter to ensure that we get both sides of the dispute, though it must be stressed that this invitation was not necessary. They have brought a preliminary, structural argument that the Judicial Board lacks jurisdiction, for several reasons, to render a decision pursuant to this Reference. We shall now go into these preliminary arguments.

2. Preliminary arguments on JBoard Jurisdiction: the JBoard does have Jurisdiction to Answer the Reference

8. The representatives of BDSAN submit two arguments. First, they submit that the Judicial Board cannot answer this question since there is no legal question as to interpretation, but rather one which requires adjudication. As a related argument they submit that the JBoard does not have jurisdiction to decide whether the BDSAN or the BDS movement more generally are anti-Semitic since, they argue, this is a political rather than legal question. Their second argument is that the JBoard should exercise its discretion to refuse to answer the reference. With the exception of the argument that we not opine on whether the BDSAN or the BDS movement is anti-Semitic, which we accept, we reject the preliminary arguments for the reasons that follow. We would also take the time to clarify JBoard rules of procedure since there currently exists an unfortunate lack of clarity.

The Judicial Board has Jurisdiction to Hear the Complaint: The Question is not too Vague and Relates to the Interpretation of SSMU’s Legal Order.

9. The main point of contention for this argument is that the Judicial Board lacks jurisdiction since it would base the reference on unsubstantiated “facts” submitted by the petitioner which, the BDSAN claims, are more opinion than fact. While we make no comment as to whether this statement is accurate, we would like to clarify the nature of a reference. To be sure, when a

Marian Scott, “McGill students reject controversial BDS motion”, *Montreal Gazette* (27 February 2016) online: <http://montrealgazette.com/news/local-news/mcgill-bds-motion-fails-to-rally-student-support>.

⁵ Karen Seidman, “BDS vote stirs up hostilities on McGill Campus”, *Montreal Gazette* (25 February 2016) online: <http://montrealgazette.com/news/local-news/bds-vote-stirs-up-hostilities-on-mcgill-campus>.

petitioner submits a Reference there will be alleged facts. It is up to the JBoard to decide what is accepted as fact. In this case, we limit the reference question to whether the BDS motion conforms to SSMU's Constitution and *Equity Policy*, thus do not rule on the nature of the BDSAN.

10. Likewise, there has been confusion as to what “similar” motions mean – the petition questions whether the BDS Motion and “similar motions” are Constitutional. The representatives of the BDSAN are right to submit that “similar” is a nebulous concept which is often difficult to define. However, we find that in this case we can readily define “similar” motions to mean motions which compel SSMU to campaign against specific nations. In this case, that specific nation is Israel. To be sure, the February 2016 Motion was much more of a call to action against certain businesses in which McGill has invested.⁶ We will deal with the question of whether the BDS motion actually targets Israel later – but, for present purposes, it is sufficient to say that “similar” motions here mean those that target specific nations. We thus find the reference question to be sufficiently specific to be answered.

11. Moreover the question here is one of legal interpretation. The petitioner questions the compatibility of the BDS Motion and similar motions with SSMU's Constitution and Policies, which is a question of interpretation of the by-laws and not, as the representatives of the BDSAN suggest, one which is totally political in nature. This is likewise not an issue that requires adjudication – it is a broad reference question concerning interpretation of the Constitution, internal regulations, and SSMU policies. The petitioner is questioning the validity of the Motion and a group of Similar Motions: it is not targeting the BDSAN itself.

12. BDSAN's next argument, that the Judicial Board should not answer the reference since doing so would be contrary to the principles of natural justice, is also rejected. Here we must discuss the two types of rulings which the Judicial Board may come to: references, and judgments. A judicial board judgment follows all of the rules set out in the *SSMU Judicial Board Procedures*.⁷ This is perhaps what most would think of when they hear of a judgment: there will be a preliminary conference, a trial, and a judgment. Conversely, a reference is different. It unfortunately exists in a grey-space since it has been developed since the advent of the Constitution in 1999. A reference, unlike a judgment, involves a petitioner submitting a question on the interpretation of the SSMU Constitution, by-laws, or internal regulations. Similarly to References at the Appellate or Supreme Court level, a reference in the SSMU context will involve the Judicial Board giving an advisory opinion on a certain issue. This will typically involve the Constitutionality or clarification of the legal contours of a practice, policy, or regulation. While it is an authoritative pronouncement, it must not be confused with a judgment, which seeks to redress an ongoing dispute.

13. There are significant procedural differences between a JBoard judgment and a reference. Unlike a judgment, there is no mediation, preliminary conference, or hearing – thus in fact very little of the *Judicial Board Procedures* will apply. The issue of intervenors, respondents, and petitioners was raised by the representatives of the BDSAN, and this is likewise another area which is different from a typically judgment. Under s 21 of the *Judicial Board Procedures* the JBoard

⁶ See the BDS Motion *supra*, note 1.

⁷ *Judicial Board Procedures*, last updated April 12, 2012. Online at: <http://ssmu.mcgill.ca/wp-content/uploads/2012/01/SSMU-Judicial-Board-Procedures-adopted-12-Apr-2012.pdf>.

“shall” extend an invitation through campus media to anyone wishing to intervene in a “dispute.” Under s. 22, the JBoard may recognize intervenors only where their intervention is necessary for the resolution of the dispute. In our opinion, while the spirit of these rules do apply to references, they do not apply as written in the *Judicial Board Procedures*. Unlike in a dispute, there is no injustice which is being righted in a reference, there is only a question of interpretation. There is thus no “dispute” per se, which renders ss 21-23 of the *Procedures* inapplicable. Importantly, this reading is supported by s. 23, which focusses entirely on hearings. Thus, since ss 21-23 refer to “disputes” and “hearings,” there is no requirement that the JBoard call for intervenors for a reference.

14. However, the spirit of ss. 21-23 exist in references regardless of the inapplicability per se of those subsections. This means that where necessary, and where practicable, the JBoard will invite members of SSMU to intervene in order to have their opinions heard. Nevertheless, this does not mean that this will always be necessary or practicable. In some instances the question can be dealt with without intervention and solely based on the original petition – thus, the criterion of “necessity” in s 22 may act in References to preclude any notice of intervention, despite this not being the case for judgments.

15. When will submissions be necessary to answer a reference? The answer rests in the subject matter of the reference. It will be very unusual for references to require input from the broader SSMU Membership. However, in some instances submissions by third parties will in fact be necessary. Let us use this case as an example. Had the reference questioned the validity of the BDSAN, then submissions by the BDSAN would have been necessary since the JBoard would have been required to come to findings of fact with respect to the BDSAN network, and not just the BDS Motion and similar motions. Thus we find that only references which specifically target a group of people or an individual will necessitate their participation in the Reference process. For example, if the BDSAN’s existence were contested then they would have been required to participate, or if the President’s jurisdiction were contested then he would have been required to intervene as well. However, contesting a motion which is sponsored by a group or individual, such as the BDS motion in this case, will not meet the requirements for necessity.

16. Based on the above, we find that there is no breach of natural justice here. BDSAN’s submission is not necessary for this reference. Since we are dealing with the validity of the motion itself and similar motions, we have enough to work with without having to make any statements of fact about the BDSAN at all. However, we would like to make a few general statements about freedom of expression within SSMU. The freedom to criticize and explore unpopular ideas, even those that make us uncomfortable, are central to the academic freedom which animates McGill’s vibrant intellectual community. This means that while SSMU policy and motions may not pass Constitutional muster, individual students and groups are afforded much higher protection when it comes to stating controversial opinions, though this protection is not absolute. At any rate, we leave just how far academic freedom extends in SSMU to a later decision.

17. In conclusion, we accept the BDSAN representatives’ argument that we cannot rule on the Constitutional validity of BDSAN in this Reference without having heard from the BDSAN on the

matter. However, we reject all of their other arguments, and find that we do have jurisdiction to deal with this reference.

The JBoard will not exercise its discretion to refuse the Reference

18. The representatives of the BDSAN also argue that we should exercise our discretion to refuse to answer this reference. Citing the Supreme Court, they argue that there are three indicia which will suggest refusal: (i) where the question is not justifiable, (ii) where the question is too imprecise or ambiguous to permit a complete or accurate answer and, (iii) where the parties have not provided sufficient information to allow the Court to provide a complete or accurate answer.⁸

19. This argument is not very persuasive, and we reject it. First, the question is certainly justifiable. Tensions ran high on campus following the BDS Motions, and the petitioner's point that the Motion contravenes SSMU's legal framework is arguable. Second, as we have already seen, "similar motions" does not suffer from ambiguity in this context, certainly not enough to preclude an accurate or complete answer. Finally, we have access to the Constitution, By-laws, Internal Regulations and Policies required to determine whether the Motion (which has also been submitted) is Constitutional. Thus, none of the criteria for exercising discretion to refuse a reference are met.

3. The BDS Motion, and Similar Motions, Are Unconstitutional

Background and Framework:

20. Before delving into why the BDS Motion and Similar Motions are unconstitutional it is best to examine the applicable framework. The first step in the framework is the Constitution itself. Nothing, not even SSMU's Board of Directors, is above the Constitution, which serves as the foundation for the Society. Despite the Constitution focussing on technical matters, the preamble is necessary for our purposes and dictates the broad goals of the Society. It also serves as a tremendously valuable tool for interpreting the validity of motions, IRs, or action, by infusing SSMU with principles that SSMU must respect. The Preamble reads:

PREAMBLE

SERVICE. The Society shall serve as an umbrella organization to coordinate and support the student groups that make up civic life in the McGill community, while providing services to strengthen the educational, cultural, environmental, political, and social conditions of our Members. Made up of undergraduate and professional students of McGill University, the Society shall endeavour to facilitate communication and interaction between all students from all McGill communities. The Society is a central focal point for McGill students and shall provide a wide variety of services to its different constituencies. The Society shall strive to provide excellence and quality of service at all times, and shall continue to enhance the quality and scope of these services.

⁸ *Reference re Secession of Quebec*, [1998] 2 SCR 217.

REPRESENTATION. The Society shall act as the official voice of its Members and as a liaison between them and the University. The Society shall act in the best interests of its Members as a whole.

LEADERSHIP. All of the Society's endeavours shall be undertaken with full respect for human dignity and bodily sovereignty and without discrimination on the basis of irrelevant personal characteristics that include but are not limited to race, national or ethnic origin, colour, religion, sex, gender identification, age, mental or physical disability, language, sexual orientation or social class. The Society commits to demonstrating leadership in matters of human rights, social justice and environmental protection. The Society shall be mindful of the direct and indirect effects that Society businesses and organizations have on their social, political, economic, and environmental surroundings. The Society commits itself to groups, programs, and activities that are devoted to the well-being of a group disadvantaged because of irrelevant personal characteristics as outlined above.⁹

21. Next come the internal regulations, which are subordinate to the Constitution but above policies. IRs are not involved in this dispute. Policies, however, are. According to SSMU, "Policies and SSMU Plans provide long-term guidance for the affairs of the Society," and "Policies lay out the SSMU's values and positions, both internal and external."¹⁰ The *Equity Policy* is central to this current Reference. In its opening remarks, the *Equity Policy* recognizes SSMU's long-standing commitment to leadership on issues of equity and social justice. Importantly, SSMU dedicates itself to creating an "anti-oppressive" atmosphere where all of its membership feels included. These following sections of the Policy Statement are particularly relevant for this reference:

2.1. The SSMU has a responsibility, as a leader, representative, and service provider to a diverse membership, to conduct itself by the highest standards of respect, fairness, integrity, safety, and equitable treatment for all persons.

2.2. The SSMU strives to create a community that exceeds social standards of equitable treatment and create a safer space for all of our members where discourse and diverse ideas can flourish within a respectful atmosphere.

2.4. The SSMU understands that groups that have been historically and culturally disadvantaged are subject to systematic marginalization and oppression, based on but not limited to: gender identity, gender expression, age, race, ethnic or national origin, religion, sexuality, sexual orientation, ability, language, size, or social class.

2.5. The SSMU condemns harassment or discrimination based on, but not limited to: gender identity, gender expression, age, race, ethnic or national origin, religion, sexuality, sexual orientation, ability, health, language, size, or social class.

⁹ SSMU Constitution, last amended April 28, 2016. Available online at: <http://ssmu.mcgill.ca/about-us/who-we-are/constitution-internal-regulations-policies/>.

¹⁰ *Policy Book supra*, note 3 at p 7.

2.5.1. The SSMU regards harassment and/or discrimination on these bases as serious offences that undermine its constitutional commitment to respect.

2.5.2. Condemnation of harassment and/or discrimination does not prevent any program or activity whose purpose is to improve the conditions or provide safer spaces for groups that have been historically and culturally disadvantaged.

2.6. The SSMU will actively support projects and policies that aim to end oppression or to promote accessibility and inclusiveness in the McGill community.

3.2. This Policy is not to be applied in such a way as to detract from the right of members to engage in open discussion of potentially controversial matters. No individual student or student group should have the effect of limiting dialogue provided that such discussion does not perpetuate the oppressions outlined in Article 2.4 and is conducted in a manner that conforms to the SSMU's stance on discrimination and harassment set out in Article 2.5.¹¹

22. Particular attention should be given to s. 2.5.1, where discrimination on the bases outlined in 2.5 is considered unconstitutional.

23. Several important lessons can be learned from reading the Equity Policy and the Constitution together. First, the Equity Policy should be understood as being an interpretive tool for the Preamble, and will set the bounds of Constitutionality. S. 2.5.1 is clear when it states that discrimination or harassment will be considered a violation of the Constitution, and the Constitution itself precludes SSMU from acting in ways which discriminate on the basis of the enumerated grounds outlined therein. SSMU does this in order to promote a "safer space" for all SSMU members to be able to participate in discourse within a respectful atmosphere. The Background to the *Equity Policy* highlights that the areas where "Safer spaces" played the largest part were women's rights, francophone rights, queer rights, and combatting racism.¹² Background aside, any official SSMU policy or motion which promotes or basis itself on harassment or discrimination will therefore be unconstitutional pursuant to s 2.5.1 of the *Equity Policy*.

The Constitutionality of the BDS Motion and Similar Motions

24. As a starting point we emphasize that we will not rule on the validity of the BDSAN movement. Moreover, we propose to deal with this issue solely on the basis of Motions that compel SSMU to campaign against specific nations, and will leave questions of religion aside. Thus our focus will be on nations, in this case, Israel.

25. It is clear that the BDSAN and the BDS movement, as one of their primary platforms, oppose Israel. When examining the BDS Movement's website, it may be seen that the movement targets all Israeli products and Israel on the whole, not simply organizations or businesses that do business in occupied territory. It even targets Israeli companies by virtue of their ties to Israel,

¹¹ *Equity Policy supra* note 3 at 76-77.

¹² *Ibid* at "Background."

regardless of whether their goods are actually manufactured in Israel. The following has been reproduced directly from the official BDS website:

“For decades, Israel has denied Palestinians their fundamental rights of freedom, equality, and self-determination through ethnic cleansing, colonization, racial discrimination, and military occupation. Despite abundant condemnation of Israeli policies by the UN, other international bodies, and preeminent human rights organisations, the world community has failed to hold Israel accountable and enforce compliance with basic principles of law. Israel’s crimes have continued with impunity.

In view of this continued failure, Palestinian civil society called for a global citizens’ response. [...]

Anyone can boycott Israeli goods, simply by making sure that they don’t buy produce made in Israel or by Israeli companies. Campaigners and groups call on consumers not to buy Israeli goods and on businesses not to buy or sell them.”¹³

26. Conversely, the BDS motion which went before the GA in February was more specific. The motion targeted three businesses in which McGill holds investments.¹⁴ However, the BDS motion supplanted itself within the greater aims of the BDS movement by resolving that “SSMU support campaigns associated with the BDS movement” and that “the SSMU President lobby the McGill Board of Governors in support of BDS campaigns.”¹⁵ By incorporating and aligning the Motion’s goals to the BDS movement itself, this means that the BDS Motion is incorporated via reference into the Motion which, in turn, calls on SSMU to take an authoritative, direct, and unambiguous stance against Israel.

27. The question then becomes whether or not SSMU can adopt an official position against a nation. The BDS Motion would have compelled SSMU to do so against Israel, and “Similar Motions” would compel SSMU to adopt official platforms against specific nations. When assessing the validity of such motions, it is important to outline the Constitutional principles which stand for and against. We will look at these factors now, both in general and applied to the BDS Motion. Importantly, we will interpret these Constitutional principles in line with the *Equity Policy* where appropriate and possible.

28. There are several factors which would support SSMU’s ability to adopt official platforms against specific nations. First, and most importantly, SSMU is the manifestation of the McGill undergraduate society’s democratic will. Democracy is a value unto itself, and while it is not found in the preamble, it can be seen through the emphasis on voting, elections, and referenda in the Constitution. Likewise, SSMU’s emphasis on demonstrating “Leadership” with respect to human rights, social justice, and environmental protection, also supports an unfettered ability to take up positions against nations. Sometimes this would call on SSMU to actively support action against certain nations, such as against South African apartheid (although it is interesting to note that apartheid was formally dismantled before the advent of the Constitution and the *Equity Policy*).

¹³ *BDS Website supra*, note 2.

¹⁴ *BDS Motion supra*, note 1.

¹⁵ *Ibid.*

The representatives of the BDSAN have argued that academic freedom likewise support such motions, but we believe that the “academic freedom” concern is more properly encompassed by the principle of democracy. We reason this to be true since nothing in this reference involves the dismantling of the BDSAN within McGill, or the stifling of debate concerning the ongoing Israeli-Palestinian conflict.

29. Conversely, other Constitutional principles militate against allowing SSMU to adopt motions like the BDS motion. First, SSMU is dedicated to providing a unique “Service” in its preamble: “facilitating communication and interaction between all students from all McGill communities.” By adopting positions against individual nations SSMU takes an indirect position against students from those nations. While in theory this is problematic, in practice the BDS Motion has revealed this to be a very real concern with disastrous consequences. McGill is an international University, and one of the best in the world. As such, it attracts students from almost every country. Unfortunately, not all nations get along, and the ongoing Palestinian-Israeli conflict is but one example. By picking a side in such conflicts SSMU does not promote interactions between the various factions of students, but rather champions one’s cause over another. In some cases, this will contrast with SSMU’s emphasis on human rights, as the BDSAN movement claims is the case here, and will require balancing to determine whether it is appropriate. However, while SSMU should do its utmost to promote debate on issues relating to BDS and the ongoing Palestinian-Israeli conflict, a motion like the BDS Motion will invoke the Constitutional principle of “service” since it inhibits SSMU’s ability to create an open, inviting atmosphere for students of Israeli origins, and undermines SSMU’s ability to serve them without bias.

30. Second, SSMU remains dedicated to acting as the official voice of all Members, and acting in the best interests of the Members as a whole under the “Representation” pillar. By formally advocating against a nation, as the BDS Motion aims to do, SSMU compromises its ability to represent Members from that nation. For example, it would be absurd for SSMU to claim that it is representing Israeli members as favourably as other nationals despite it supporting boycotts, divestment, and sanctions against Israel. Doing so would allow the ebb and flow of global politics to taint SSMU’s capacity to represent all students equally, placing significant strain on the “Representation” pillar which is central to the SSMU Constitution.

31. The third and most important principle which militates against SSMU adopting a motion which compels it to adopt a formal platform against specific nations falls under the third and final “Leadership” pillar. This is because “All of the Society’s endeavors shall be undertaken [...] without discrimination on the basis of irrelevant personal characteristics that include but are not limited to race, **national** and ethnic origin [emphasis added].”¹⁶ It is in this vein that SSMU enacted the Equity Policy, which aims to create a “safer space” and preclude discrimination based on, among other things, discrimination based on nationality.

32. SSMU’s commitment to creating “safer spaces” around campus aims to create an “anti-oppressive” atmosphere. In short, SSMU is firmly committed to ensuring that the tyranny of the majority shall never compromise the rights of the minority to participate in McGill’s vibrant

¹⁶ SSMU Constitution, *supra* note 9 preamble.

community. McGill is first and foremost a university, a place of knowledge and intellectual growth – a fact that is often forgotten. This is why SSMU remains adamant on promoting the rights of those who are placed at a structural disadvantage vis-à-vis others within McGill, for the litany of reasons laid out in the background to the Equity Policy. Everyone should feel free to participate, debate ideas, and have their voices heard by SSMU, and everyone should feel like they find themselves within a “safer space.” But “safer spaces” do not equate to comfortable spaces – and often times, a safe space may well be one where debate makes us uncomfortable. Instead, the core principle that the “safer spaces” doctrine and the Equity Policy in general seek to promote is for each individual student to feel like they belong at McGill, and that while not everyone thinks as they do, they should always feel that SSMU is there to represent them.

33. This brings us to the main issue. Leadership in human rights will occasionally require that positions be taken against nations. However, for SSMU, this can only be the case in extreme circumstances, and on very particular terms. Special attention must be paid to ensure that SSMU remains a “safer space.” By adopting official positions against certain nations, as the BDS Motion aims to do with Israel, SSMU would be placing Members from those nations at a structural disadvantage within McGill’s community. This is the exact reason why SSMU remains committed to preventing discrimination among, other things, national origin. But by promoting – rather than alleviating – structural disadvantage within McGill itself, SSMU indirectly discriminates against its Members that come from that nation. In essence, SSMU signals to those Members from the very beginning that it is hostile towards their country thus, indirectly, them. Motions which compel SSMU to do so threaten the fragile bonds which hold McGill’s international community together.

34. When all of these considerations are read together, the inescapable conclusion is that motions similar to the BDS Motion, which target one specific nation, breach values inherent in our Constitution and the *Equity Policy*. While SSMU’s leadership on human rights issues may at times invite SSMU to adopt formal positions against nations, the simple fact is that in doing so SSMU would place its global leadership role above its obligations to its own members. In extreme cases this may be justified, but even then motions must be carefully tailored to deal with the human rights issue in question and cannot specifically target the nation in question. Let us take Apartheid as an example. In our opinion, SSMU could well have adopted a formal position against Apartheid. But it could not have adopted a formal position against the nation of South Africa: instead, it could well have called for a more inclusive South African society. The nuance is important, and a properly drafted Motion would still allow for SSMU to have promoted the end of Apartheid. “Leadership in human rights” must take a backseat to ensuring stability and inclusiveness within McGill itself, but the two need not always conflict each other. Else, SSMU would place its desire to act as a global leader above those of its own membership.

35. Furthermore, democratic will cannot outweigh SSMU’s commitment to protecting minority rights and fostering “safer spaces.” As said above, the tyranny of the majority cannot be invoked to compromise the rights of the minority – this is the exact reason why SSMU has a Constitution, internal regulations, and policies, which aim to protect against discrimination and harassment. SSMU is a body of laws, not a machine of the majority. In many cases this rule will be straightforward or simply inapplicable, but in some cases, the majority will try to place the

minority at a disadvantage. It is here that SSMU taking positions against certain countries can be especially problematic. As an international university, McGill has students from all over the globe. Not all nations tolerate each other – or even, for that matter, accept each other’s existence. Whichever nation has more students at McGill may be able to command debate and push its own agenda far better than the other’s, and this is exactly what SSMU’s laws seek to avoid. SSMU cannot be the venue for a proxy war. However, it must be stressed that this does not preclude debates on the subject.

36. We therefore conclude that SSMU’s commitment against discrimination in favour of creating “safer spaces” renders motions similar to the BDS Motion, which specifically compel SSMU to adopt a platform against a particular nation, unconstitutional.

Application to the BDS Motion

37. As we have already seen, the BDS Motion specifically targets Israel. The petitioner is correct in stating that the Motion was partisan and one-sided. Had the BDS Motion been adopted, then SSMU would have, as official policy, a stance which advocated for boycotts against all Israeli businesses and products, regardless of their relation with Palestine, sanctions against Israel, and divestment from investments of all companies that do business with Israel. Moreover, SSMU would have had to actively support the BDS campaign.

38. Doing so would have breached the Constitution for the reasons outlined above. BDS may be a movement for Palestinian justice, but it is also a particularly divisive movement that calls for sustained and significant action against Israel. Its divisiveness was reflected in the fact that the BDS Motion resulted in palpable tension throughout campus. Students – on both sides – were left yearning for the “safer spaces” that SSMU is designed to provide. Instead, what they got was harassment and open discrimination, particularly through social media outlets.

39. The reality remains that if SSMU were to adopt the BDS Motion, it would adopt an anti-Israel platform. Israeli students would be placed at a disadvantage – SSMU, despite being their representative, would be openly hostile towards their country. This places them at a structural disadvantage vis-à-vis others and denies them access to the “safer spaces” that SSMU holds so dear. This breaches the fundamental Constitutional values which permeate SSMU, as well as the *Equity Policy*. We therefore conclude that the BDS Motion, much like similar motions to the BDS Motion which compel SSMU to take positions against specific countries, is unconstitutional.

4. Conclusion and Moving Forward

40. In conclusion, all motions which compel SSMU to actively campaign against specific countries are unconstitutional. Doing so would place one group (nationals of that country) at a structural disadvantage vis-à-vis the majority and is thus discriminatory.

41. Moving forward, two things are important to keep in mind. First, this reference is specific to the BDS Motion and to similar motions that compel SSMU to actively campaign against specific countries. We have not ruled on the Constitutionality of the BDSAN, thus this Reference should not be interpreted as finding the BDSAN in violation of the *Equity Policy* or the Constitution.

42. Second, SSMU is not precluded from issuing statements related to the ongoing Israeli-Palestinian conflict. It simply cannot adopt a platform which advocates against one of those nations. This means that just as SSMU cannot campaign against Israel, it also cannot campaign against Palestine.

43. *The reference question is answered accordingly:*

44. *The BDS Motion submitted to the General Assembly in February of 2016 is unconstitutional and breaches the Equity Policy;*

45. *Similar motions to the BDS Motion that compel SSMU to adopt a platform against specific nations are unconstitutional and further breach the Equity Policy.*