



Judicial Board | Conseil judiciaire

jboard@ssmu.ca

3600 McTavish St., Suite 1200, Montréal, QC, H3A 0G3

Located on Haudenosaunee and Anishinaabe, traditional territories

STUDENTS' SOCIETY OF MCGILL UNIVERSITY
JUDICIAL BOARD
2020-08-17

BETWEEN

Daniel Benjamin Miller

Petitioner

and

**Jemarke Earle in his official capacity as President of the Students' Society of
McGill University (SSMU)**

Respondent

TYPE

Final Judgment

JURISDICTION

Students' Society of McGill University

CORAM

Chief Justice Patrick O'Donnell and Justices Catherine Laperrière (presiding), Charles Choi,
David How and Nikita Tafazoli

REASONS FOR JUDGMENT

THE SSMU JUDICIAL BOARD, UNANIMOUS—



Executive Summary¹

1. In the 2020 SSMU Winter Referendum, a new Constitution was adopted by the SSMU electorate, which made the French version of the Constitution the only authoritative version. However, a French version was not made available to voters at the time of the Referendum. Both parties presented arguments during the hearing. The Respondent repeatedly expressed concern about the potential serious consequences that the invalidation of the 2020 Constitution could have on the SSMU's relationship with the McGill administration. This was due to the fact that the SSMU and McGill will soon conclude a Memorandum of Agreement (MoA) regarding the composition of the SSMU Board of Directors, in line with its new Constitution.
2. In the present decision, both parties agree to the facts of the case, but diverge on the remedy sought. The Board sides with the Petitioner and maintains that the 2017 Constitution should apply until the 2020 Constitution is approved by referendum in a procedurally correct manner. To do otherwise would be to maintain the status quo and not offer voters a meaningful choice. The Board also reached this decision based on the SSMU's constitutional and regulatory documents, which contain language-rights protections that were violated.
3. The Judicial Board's preliminary order, issued previously, demanded that the SSMU ask McGill University to suspend its approval of a new MoA between the SSMU and McGill, in order to avoid violating this MoA if the 2020 Constitution were declared invalid. Full reasons for the decision, including its time-sensitive nature and importance, can be found within its respective document. Seeing the present decision, this order is maintained, since it ensures that the composition of the current Board of Directors complies with the relevant constitutional requirements.
4. The Judicial Board offers some recommendations, based on functions that are already available, as to how the SSMU can adapt to the changes brought by this judgment in order to mitigate adverse effects. However, the course of action taken in response to the present decision ultimately lies with the political bodies of the SSMU.

¹ 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 judgment and is thus not binding following the ratification of the final judgment by the Board of Directors. The Executive Summary does not replace the final judgment. Therefore, Members of the SSMU are highly encouraged to read the final judgment in addition to the Executive Summary.



Decision

The Judicial Board of the SSMU declares the following:

- a. The 2020 Constitution was not adopted appropriately pursuant to the SSMU's governing documents and is thus invalid;
- b. The Constitution in effect before the Winter 2020 Referendum is maintained as the supreme governing document of the SSMU until further amendments are adopted appropriately.

Reasons

Facts

[1] During the 2020 winter term, the Students' Society of McGill University (SSMU) held a referendum that included a question regarding the adoption of a new Constitution (hereafter "2020 Constitution") to replace the Constitution that was then in force, last updated in 2017 (hereafter "2017 Constitution").

[2] The referendum asked students to pass the 2020 Constitution and attached the proposed 2020 Constitution with changes from the 2017 Constitution highlighted for easy reference. This attached document was only provided in English.

[3] Section 1.5 of the 2020 Constitution reads: "The Constitution and Internal Regulations shall be made available in both the English and French languages. In the case of conflict, the version in the French language shall be authoritative."

[4] A French version of the 2020 Constitution was never provided in time for the referendum and its translation has only recently been completed by the SSMU. It was thus not voted upon in the 2020 Winter Referendum.

[5] However, the referendum question passed and the 2020 Constitution was adopted by the SSMU and ratified by its Board of Directors without a French version.



Issues

[6] In the present judgment, the Board is tasked with determining whether the 2020 Constitution should remain in effect until a procedurally correct referendum, where both French and English versions of the 2020 Constitution are presented to voters, is held.

Jurisdiction

[7] The jurisdiction of the Board of the SSMU is outlined in section 15.1 of the SSMU Constitution,² section 1.1 of the Internal Regulations of Governance-03: Judicial Board,³ and section 7 of the Judicial Board Procedures.⁴ The Board considered all three regulating documents to confirm its jurisdiction over this matter.

[8] Section 1.1(c) of the SSMU Internal Regulations of Governance-03 specifically grants the Judicial Board jurisdiction to render opinions on “the interpretation of all procedures, questions and results of [...] Referenda, including the authority to declare invalid any Referenda [...] that violates the Constitution or Internal Regulations”.⁵ This provision undoubtedly applies to the present case.

[9] Thus, the Judicial Board is of the opinion that it has jurisdiction to render an opinion on this matter as it concerns the constitutionality of the SSMU referendum which adopted the 2020 Constitution.

[10] Two other provisions must be considered to establish the Board’s jurisdiction in a case challenging a referendum. The Internal Regulations of Elections and Referenda—07: Investigation and Sanctions prescribe that the deadline for appeals to the Judicial Board is five days (excluding holidays) after the official transmission of results to the General Manager.⁶ In the present case, this deadline was five days from the moment the Petitioner received email confirmation that there was no French version of the Constitution, on March 24. He sent his petition for hearing to the Board

² Students’ Society of McGill University Constitution (10 November 2017), s 15.1 (Judicial Board, General) [“SSMU Constitution”].

³ Students’ Society of McGill University Internal Regulations of Governance-03: Judicial Board (28 March 2019), s 1.1 (General Jurisdiction) [“Internal Regulations Governance-03”].

⁴ Students’ Society of McGill University Judicial Board Procedures (14 October 2018), s 7 (Proposed Procedures).

⁵ Internal Regulations of Governance-03, s 1.1(c) (General Jurisdiction).

⁶ Internal Regulations of Elections and Referenda—07: Investigation and Sanctions (24 October 2019), s 4.2 (Deadline).



on April 5, outside of the prescribed timeline. However, the Judicial Board itself sought (and received) permission to delay hearing this petition by several weeks because it was filed just as the COVID-19 pandemic began affecting decisions by both McGill and the SSMU regarding in-person operations. The Petitioner, having faced the same situation as members of the Judicial Board, is entitled to lenience in this regard. Moreover, even if the Petitioner had submitted his documents on time, the present case would not have been adjudicated any sooner given the Judicial Board's own need to postpone hearing the matter. While election and referendum results are generally very time-sensitive matters, the present case would not have been heard faster even if the deadline had been respected. We would note that our policy throughout the present pandemic has been to err on the side of accommodating parties to the greatest extent practicable, and that both parties in the present case asked for and received extensions to various deadlines. Given this, allowing the Petitioner some leniency with regard to filing deadlines would seem, to us, to be the most consistent and reasonable approach.

[11] The Internal Regulations of Elections and Referenda also state “all appeals arising from Elections and Referenda shall be heard in the semester that they are launched”.⁷ The Board recognizes its opinion is rendered after the winter semester and regrets this unfortunate delay, but considers, as mentioned above, that the exceptional circumstances arising out of the pandemic justify that it heard the present case.

Analysis

[12] Both parties agree on the facts and characterize the presentation of a solely English Constitution in the referendum as wrongful. However, they diverge in opinion as to the remedy sought. For the reasons that follow, the Board agrees with the Petitioner that the 2017 Constitution should apply until the 2020 Constitution is approved by referendum in a procedurally correct manner. It reaches this decision (A) based on the values expressed by governing documents and considering the sociolinguistic context in which the SSMU operates; (B) in order to respect the SSMU's own requirements for adopting the 2020 Constitution; and (C) to ensure a fair and equal democratic choice is proposed when voting on the Constitution.

⁷ *Ibid*, s 4.3 (Adjudication).



A. Respecting the values and broader context of the governing documents

[13] In both the written declaration as well as during oral arguments, the Respondent repeatedly emphasized that a decision to strike down the adoption of the 2020 Constitution and order a return to the previous 2017 Constitution would cause significant logistical, bureaucratic, and operational disruptions to the Society—a concern shared by the Board and which the Petitioner has indicated he is sympathetic toward as well. During oral arguments, both parties agreed that it would be acceptable for the Judicial Board to issue a suspended judgment declaring the amendments adopted in Winter 2020 as being invalid, but allowing the Society to continue operating thereunder pending the results of a new referendum. They justified continuing to apply the 2020 Constitution by noting that voters are much more likely to again approve the proposed amendments than they are to reject them and force a return to the 2017 Constitution.

[14] With this likelihood in mind, the Respondent does not dispute that the referendum in question must be held anew but argues that the Society should be allowed to continue operating under the 2020 Constitution until the results of a second referendum are finalized. He notes that the 2020 Constitution contains provisions modifying the composition of various bodies of the Society including Legislative Council, executive staff portfolios, and even the Board of Directors itself. Given that similar referendum questions⁸ have only rarely (if ever) been rejected in the past, the Respondent points out that striking down the 2020 amendments only to have them re-approved by voters would force the Society to fill vacancies for positions that are unlikely to exist for more than a few weeks and to let go those staff who have been appointed or elected to any position that did not exist prior to the 2020 amendments.

[15] It is worth recalling the broader principles at play. It would be helpful, in doing so, to examine both the letter of the constitution as well as its recent history of amendments.

[16] The preamble to the 2017 Constitution declares that one of the central mandates of the SSMU is to “facilitate communication and interaction between all students from all McGill communities”.⁹ Language is obviously an important factor

⁸ That is to say, routine updates to governing documents that attracted little to no substantive criticism from the student body.

⁹ 2017 and 2020 SSMU Constitutions, under Preamble: Service.



when considering issues related to communication and student interaction, and it should be noted that less than half of McGill’s student body lists English as a mother tongue (though it remains a strong plurality).¹⁰ Of the 54.6% of students for whom English is not a first language, more than one-third list French instead.¹¹ Put differently, even if we ignore the many students who are fluent in French but do not consider it a mother tongue, nearly one out of every five students on campus speaks French as their first language.

[17] That the proportion of students speaking French as a first language is so high would most likely already be enough, on its own, to attract the attention of any student organization concerned with facilitating “communication and interaction” among its members. But it should also be considered in context: while McGill University is an operationally English institution, it is also located in the only province of Canada in which French is the sole official language. In fact, the proportion of students at McGill claiming Québec as their place of origin is higher than the proportion claiming English as their mother tongue. None of this means that the SSMU has any sort of *inherent* constitutional duty to accommodate its French-speaking members, but it does (and should) colour our interpretation of the spirit and purpose of the relevant operative clauses found in the Constitution and other governing documents.

[18] The treatment of Francophones on campus is also of legitimate interest to many people who have never had a formal affiliation with McGill whatsoever—an interest, in fact, that the SSMU itself has both recognized and formalized. The preamble to both the SSMU’s 2017 and 2020 Constitutions affirms, under “Leadership”, the Society’s commitment to being “mindful of the direct and indirect effects that Society businesses and organizations have on their social, political, economic, and environmental surroundings”.¹² Issues like the one presented by the case at hand must be considered with an eye to their respective local, municipal, and provincial political contexts.

B. Respecting the requirements of the governing documents

[19] Moving past the preamble, we observe that the proposed constitutional amendments not only retain the French-language protections found in the 2017

¹⁰ McGill University, “2019 Factbook”, online: <https://www.mcgill.ca/about/quickfacts>.

¹¹ *Ibid.*

¹² 2017 Constitution, Preamble: Leadership (also included in 2020 amendments).



Constitution, but in fact strengthen them. One of the amendments proposed by the 2020 Constitution concerns section 1.5, on languages. While it previously mentioned that “Both versions shall have equal authority”, it now reads as such: “In the case of conflict, the version in the French language shall be authoritative.” However, the 2020 Constitution was translated in French in July and, consequently, the authoritative version did not exist at the time the amendment passed. For anyone using the Constitution between March and July, there was no way to determine if a conflict existed between both versions. This shows the intention of the change was not respected, since no other amendment expresses that the authoritativeness of the French Constitution should be delayed.

[20] In both the 2017 and 2020 Constitutions, section 1.5 also provides that “The Constitution and Internal Regulations shall be made available in both the English and French languages.” Considering it took over three months to translate the Constitution in French,¹³ this requirement was clearly not met.

[21] Relevant requirements concerning the French language can be found not just in the Constitution but also in the Society’s core governing documents known as its Internal Regulations. The initial concern raised by the Petitioner was that a document whose French version is to be considered authoritative could not serve as a Constitution until said French version is made publicly available (which, by time of this decision’s publication, is the case). But the Internal Regulations outline *procedural* requirements in addition to end-states, and section 1.9 of the Internal Regulations of Elections and Referenda-04 requires that “all amendments to the Constitution [. . .] be *adopted* in both official languages”.¹⁴ The document that would otherwise have become the 2020 Constitution has not been *adopted* in both official languages by voters, regardless what languages it is now *available* in.

[22] While some requirements found in the Constitution and/or Internal Regulations provide room for flexibility or are subject to the discretion of a designated decision-maker (such as the Chief Electoral Officer), the issues in this case—even if adopting the most “deferential standard of reasonableness”¹⁵ possible—simply cannot be reconciled with the stated requirements. Referendum campaign

¹³ Even if the Board accepts that some of this delay may be due to the COVID-19 pandemic, it is evident, seeing the aforementioned internal regulations, that the Constitution should have been translated *before* being presented to voters.

¹⁴ Internal Regulations of Elections and Referenda-04: Referenda, s 1.9 (Constitutional Amendment). Emphasis added.

¹⁵ As prescribed by the Internal Regulations of Elections and Referenda—07: Investigation and Sanctions, s 4.1 (General).



committees “*shall* act in accordance with all SSMU Governance Documents”.¹⁶ The Chief Electoral Officer “*shall* ensure that Referendum questions are clear, concise, and do not violate the Governance Documents”.¹⁷ Campaigns “shall act in accordance with all SSMU Governance Documents”,¹⁸ and shall “be ultimately responsible for activity engaged in, or material disseminated, on their behalf that contravenes the Governance Documents or the spirit of a fair campaign”.¹⁹

[23] The Chief Electoral Officer (CEO) is entitled to a certain degree of deference during any review of their decisions, whether by the Judicial Board or any other appellate body. But the relevant governing documents regarding referenda make clear that the CEO has a responsibility to not only issue sanctions in response to violations of electoral or campaign bylaws, but in fact to disqualify or overturn the results of referenda or elections found to have been impacted by “grave violations”.²⁰ The nature of the violation in this case—whether voters had an opportunity to review in a language in which a sizable part of the student body is most comfortable, the very document they were asked to approve or reject—can only be considered, by its nature, as falling into this category. The likelihood of this violation adversely affecting the outcome of the referendum is non-negligible, considering the voter turnout of 15.3%, a number which certainly included numerous Francophone students, but which, for comparison, is lower than the proportion of native French-speakers among the student body. The CEO accordingly had a duty to ensure the violation was either remedied prior to the vote, or otherwise to suspend the referendum question pending availability of the French version of the documents in question.

[24] We emphasize again, however, that the SSMU’s obligation in this respect arises out of provisions within the Constitution and Governing Documents, including Internal Regulations, all of which were voluntarily imposed by the Society’s membership. Should the SSMU view its self-imposed obligations toward its French-speaking members as overly burdensome, the appropriate course of action would be to put forward an amendment relieving it of these obligations (rather than strengthening them, as has been the recent trend). Given the fundamental importance of language rights and election procedure (both on campus and within the surrounding

¹⁶ Internal Regulations of Elections and Referenda—05: Campaigning, s 1.11 (Respecting Governance Documents). Emphasis added.

¹⁷ Internal Regulations of Elections and Referenda—04: Referenda, s 1.6 (Approval of Referendum Questions). Emphasis added.

¹⁸ Internal Regulations of Elections and Referenda—05: Campaigning, s 1.11 (Respecting Governance Documents).

¹⁹ *Ibid*, s 6.5 (Restriction on Campaigning).

²⁰ Internal Regulations of Elections and Referenda—07: Investigation and Sanctions, s 2 (Sanctions).



community), the Society’s executives, electoral officials, and directors have a binding obligation to ensure that bylaws and regulations pertaining to the French language are carefully respected. Moreover, in our view, the Judicial Board’s mandate is such that we could not, in good conscience, decline to enforce these fundamental requirements upon receiving a petition.

C. Ensuring a fair and equal democratic choice

[25] Turning now to the question of why the SSMU cannot be allowed to continue operating under the amended constitution it has proposed in the short interim between now and a second referendum, the answer boils down to the need to ensure that every voter—but, particularly, those who are members of explicitly protected groups of students—has an *equal* opportunity to express their preferences through their vote.

[26] It is in the interests of the Society’s members, broadly speaking, that SSMU operate as efficiently and effectively as possible and, as such, the logistical and operational concerns asserted by the Respondent must be factored into this decision. However, if the Society is allowed to continue operating under the not-yet-ratified amendments it proposes, then an equally problematic situation arises in the event that voters ultimately reject said amendments. While it is probably true that the latter scenario is less likely to materialize than the former, attention should be given to the basic democratic principle that students should be free to vote according to their preference.

[27] The SSMU is entitled to shift resources and attention from one issue to another as priorities change over time—for example, from a committee that it intends to disband to another that is meant to be newly created. But any such shifts must be justifiable under the Constitution and governing documents as they stand *at the time of the referendum*.

[28] Francophone students have received repeated and emphatic assurance, in the SSMU’s most fundamental governing documents, that their language will be treated as equally as possible with English in numerous circumstances. Now, given that a second referendum has been promised regardless of our decision in the interim, it is true that French-speaking members of the SSMU will be guaranteed the chance to vote on the constitutional amendments at hand. The important question, however, is whether they will have an *equal* opportunity to vote.



[29] The Respondent submits that returning to the 2017 Constitution would pose serious logistical difficulties for the SSMU. Specifically, the Respondent has suggested that the Society could be forced to undo the hiring of some of its student staff as well as let go several newly-appointed members of the Legislative Council whose seats did not exist prior to the Winter 2020 referendum, and rehire representatives for seats that were scheduled to be removed. We agree entirely that these logistical problems constitute an important reason to consider when deciding on striking down the Winter 2020 amendments, but—perhaps counterintuitively—it is exactly because of our agreement that they *must* be struck down.

[30] If our decision is affected by the Respondent’s revelation that a return to the 2017 Constitution would cause the Society significant logistical difficulties, it follows that a hypothetical French-speaking voter may be similarly affected. Although we cannot, and do not want to, assume how students weigh various considerations when voting, we must remove any substantial risk that their decision will be changed based on the expected adverse impacts of the SSMU of returning to the 2017 Constitution.

[31] While practical concerns will factor into any similar referendum, they are acceptable only when resulting from decisions that comply with the requirements at the time of the vote. Where an unconstitutional decision negatively affects only one option in a referendum, it must be remedied—and all the more so when the only group of voters forced to account for these consequences is a group that has been explicitly identified as the intended beneficiary of relevant equity provisions, as French-speaking members of the SSMU have been. This is especially the case if these worrisome consequences arise solely due to the SSMU’s decisions. The SSMU cannot move forward with a second referendum unless its French-speaking members are provided the *same opportunity* to express their opinion of the constitutional amendments as their English-speaking peers. Francophone students cannot be responsible for weighing practical and logistical concerns that are the product of an unconstitutional decision, and that English-speaking students—who voted before the SSMU had already begun implementing the unconstitutional amendments in question—did not have to take account for when casting their own votes.

[32] Consequently, the Board was not convinced internal impacts should prevent it from invalidating the 2020 Constitution. Furthermore, some of this new Constitution’s changes have not yet been implemented, but will be soon, creating more difficulties in reverting to the 2017 Constitution; the burden potentially limiting students’ free vote will only increase if the Board allows the SSMU to maintain the application of the 2020



Constitution. As such, the Board, recognizing the importance of having the Constitution approved by the student body in a truly democratic manner, emphasizes that another referendum should be held if the SSMU wants to be governed by the 2020 Constitution. .

[33] In short, the Board finds the 2020 Constitution invalid as its adoption violates internal regulations, the 2017 Constitution and the 2020 Constitution—its own terms—with respect to the language rights that these documents contain. This interpretation is strengthened by consideration for the principle of democracy and the context in which the SSMU operates.

D. Recommended Next Steps

[34] Our consideration of this case has led us to hear of a few adaptations to the SSMU's operations which can be made to mitigate such impacts and which we offer as guidelines in the next section. These should be read in the spirit of a recommendation, rather than as an order to implement the following suggestions.

Councillors

[35] The 2020 Constitution established new positions for four councillors from the SSMU Indigenous Affairs Committee, the SSMU Equity Committee, the SSMU Francophone Affairs committee, and a councillor representing the Macdonald Campus Students' Society (MCSS). All councillors except the MCSS Councillor do not have voting powers. The Judicial Board recognizes that the creation of these positions aims to better advocate and represent minority constituents, and acknowledges the importance of this objective.

[36] The Respondent stated during the hearing that an individual is nominated from the respective committees to hold the councillor position and have voting powers at Legislative Council, excluding the councillor representing the MCSS. He added that a separate position of a commissioner still exists and that commissioner chairs the committee. When asked whether the committees had already selected the councillors, the Respondent replied that he was unaware of the hiring status.

[37] Although reverting to the 2017 Constitution will deprive the ability of councillors to represent their communities with a vote, the Board recommends that the Legislative Council use its ability to call upon witnesses and other individuals who



can speak to focus matters where the Legislative Council may not have the proper expertise to do so, in order to ensure proper student representation and stakeholder consultations before passing policy. The Respondent mentioned that previously, for the Indigenous Solidarity Policy, the Legislative Council asked the Indigenous Affairs Commissioner to speak on the matter to gain their expertise. The Board recommends that the Legislative Council use the same functions to do so. In addition, the positions of commissioners still exist; therefore, the Board recommends that the commissioners take active steps to represent their communities.

[38] When looking at how it will affect the ability of the councillors to receive training for their roles, the Respondent mentioned during the hearing that the training for these councillors would take place the weekend before the first week of school. Thus, this Board finds that since the training has not taken place yet, neither the SSMU nor the councillors will face undue hardship in that regard.

Elected Officials

[39] As the Respondent mentioned, reverting to the 2017 Constitution will recall individuals whose positions were removed by the 2020 Constitution. The Board recognizes that this may cause extreme difficulties not only to the SSMU but to the relevant organizations and individuals that previously held a position on the Legislative Council. Although the Board does not decide upon political actions taken by the executive or other political bodies of the SSMU, the Board acknowledges other recourses available, including the use of proxies as a relevant function to ensure accountability and proper representation in following the spirit of the 2017 Constitution. If a proxy is required, the Board recommends that the represented organization, faculty, or group decide on the proxy, rather than the SSMU if it is outside its purview.

Board of Directors

[40] The Respondent notified the Judicial Board that the 2020 Constitution changed the composition of the SSMU's Board of Directors to include the Alumni Director and Professional Director. However, during the hearing, the Respondent told the Judicial Board that the student society did not start recruitment for these two positions.

[41] In addition, the Respondent raised the discrepancy between the 2020 Constitution and the Memorandum of Agreement between the student society and



McGill University. Therefore, this Board, through its preliminary decision, ordered the SSMU to notify McGill to continue its review but suspend taking steps to pass the decision itself. Based on these measures, the Judicial Board finds that reverting to the 2017 Constitution will have no consequences on the Board of Directors.

Paid Employees

[42] A concern that the Respondent made clear to the Board was the concern of job loss and paycheck for student employees of the SSMU in positions created under the 2020 Constitution. As the Board recognizes the unique situation brought by the onset of the COVID-19 pandemic and the financial difficulties it poses for students, the Board took exceptional caution when evaluating this case at every step.

[43] However, as per the Respondent's response in the amended declaration and hearing, the SSMU did not commence hiring for paid employees for positions created under the 2020 Constitution. Thus, the Judicial Board does not believe there are any consequences to paid employees from this decision.

Training Executives

[44] The Respondent stated during the hearing that the SSMU executives will face difficulty as they were trained to prepare for the Legislative Council with the 2020 Constitution. However, he also stated that in the case that this Board upholds the 2017 Constitution, the SSMU is capable of reverting to complying with the 2017 Constitution within a month. Therefore, the Board finds that the SSMU will not face grave consequences to revert to the 2017 Constitution and that the reasons presented above favour this decision.