



STUDENTS' SOCIETY OF MCGILL UNIVERSITY JUDICIAL BOARD

2021-04-14¹

Reference re Applicability to the Society's Services of the 2016 Reference re Legality of the BDS Motion and Similar Motions

PARTICIPANTS

Jemark Earle, Students' Society of McGill University's President²

Petitioner

and

(1) Students in Solidarity for Palestinian Human Rights McGill

(2) Union for Gender Empowerment

Intervenors

TYPE

Final Judgment

JURISDICTION

Students' Society of McGill University

REASONS FOR JUDGMENT

THE SSMU JUDICIAL BOARD [2020-2021] - UNANIMOUS—

¹ The Judicial Board submitted the initial judgment to the Students' Society of McGill University's Board of Directors on March 8, 2021. Upon an informal request for clarification, the Judicial Board submitted a revised copy to the Board of Directors on April 14, 2021.

² Represented by Advocate Brooklyn Fizzle, Students' Society of McGill University's Vice President University Affairs.



Executive Summary³

1. On 31 May 2016, the Judicial Board rendered its decision on the case of *Reference re Legality of the BDS Motion and Similar Motions* [“2016 Reference”]. In January 2019, then-President of the Students’ Society of McGill University (SSMU), Tre Mansdoerfer, sought clarification on whether Queer McGill or any other SSMU Service could have a position on the Boycott, Divestment, and Sanctions (BDS) movement.
2. The Petitioner argued that Queer McGill as an institution had, in its own right, the ability to have a position on the BDS movement, noting that the best way that Queer McGill can support its constituents is through activism. Further, it was suggested that as a Service of the Society with its own applicable constitution that mandates activism, Queer McGill should have the ability to have a position on political matters such as the BDS movement.
3. Students in Solidarity for Palestinian Human Rights (SPHR) McGill, an Intervenor, argued that the Society could not force a Service to have a position aligning with the Society’s interests, and suggested that Services were not bound by the *2016 Reference*. SPHR also stated that limiting Services’ ability to adopt political positions would prevent Services with an activism mandate from advocating for their respective constituents.
4. The Union for Gender Empowerment (UGE), an Intervenor, remarked on its mandate to provide an anti-oppressive environment and peaceful means of advocacy. It was further mentioned that the actions of the Israeli government negatively affect students at McGill; thus, making it necessary for Services like the UGE to engage in such advocacy.
5. Upon reviewing the Petitioner and Intervenors’ written declarations and arguments presented at the hearing, the Judicial Board agrees that Queer McGill and other SSMU services may adopt a position on the BDS movement subject to the constraints set out in the Society’s governing documents: including but not limited to the *Constitution* and *Equity Policy*, as interpreted in

³ 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.



the 2016 Reference and the 2021 Reference re Interpretation and Scope of the Reference re Legality of the BDS Motion and Similar Motions.

Decision

The Judicial Board of the SSMU declares the following:

- a. SSMU Services are subject to the governing documents of the SSMU, including but not limited to the *Constitution* and the *Equity Policy*, to the same extent as the Society itself;
- b. SSMU Services are permitted to adopt political positions insofar as doing so does not contravene the Society's governing documents:
 - i. As this Board clarified in its January 2021 *Reference re Interpretation and Scope of the Reference re Legality of the BDS Motion and Similar Motions*, adopting a position toward the BDS movement is not categorically prohibited by the *Constitution* or the *Equity Policy*.

Reasons

Facts⁴

[1] On 22 February 2016, the Students' Society of McGill University (SSMU) General Assembly (GA) voted in favour of a motion supporting the Boycott, Divestment, and Sanctions (BDS) movement ["the Motion"]. The Motion called for the "SSMU [to] support campaigns associated with the BDS movement through the office of the VP External" and for the President of the SSMU to "lobby the McGill Board of Governors in support of BDS Campaigns."⁵ Following the initial vote, the Motion was sent to online ratification by the SSMU Membership. There, ratification failed by a margin of 57-43%. This was the third vote in relation to the BDS movement in 18 months.

⁴ As the facts of the original case remain the same, parts of this section have been copied from the *Reference Re Legality of BDS and Similar Motions*, 2016 SSMU ["2016 Reference"].

⁵ *Motion Regarding Support for the Boycott, Divestment and Sanctions Movement*, SSMU General Assembly Resolution Book, updated as of 03/07/2016, p 51, online: <http://ssmu.mcgill.ca/wp-content/uploads/2009/10/General-Assembly-Resolution-Book-Updated-2016-03-07.pdf>.



[2] Following this referendum, the question was brought forth to inquire whether the BDS Motion and similar motions are incompatible with the SSMU's by-laws, internal regulations, and legal structure, in a general sense.

[3] The Boycott, Divestment, and Sanctions Action Network (BDSAN), in the context of McGill University, 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.⁶

[4] During the period that led to the GA vote and the Referendum, there was a sharp increase in harassment, defined pursuant to the *Equity Policy*, around campus.⁷ 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.⁸ For present purposes it suffices to reproduce the headline of a *Montreal Gazette* story published 25 February 2016: "BDS Vote Stirs Up Hostilities on McGill Campus."⁹ 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. This is the context in which the *Reference re Legality of the BDS Motion and Similar Motions* ["2016 Reference"] was made.¹⁰ In short, this decision prohibited SSMU from

⁶ BDS, *Introducing the BDS Movement*, online (accessed last 31-05-2016): <https://bdsmovement.net>.

⁷ Students' Society of McGill University *Equity Policy*, (5 April 2018), s 3.10 (Definitions) ["*Equity Policy*"].

⁸ 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 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>.

⁹ 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>.

¹⁰ *2016 Reference*.



adopting “motions which compel SSMU to actively campaign against specific countries”.¹¹

[5] In January 2019, the then-President of the SSMU, Tre Mansdoerfer, filed a petition to the Judicial Board seeking clarification on whether Queer McGill or any other SSMU Service could adopt a stance on the BDS movement.

[6] Another petition related to the *2016 Reference* was filed in August 2020. The Board decided it should logically be heard before the present reference, since it asked the Board to reconsider the soundness of the *2016 Reference*, while the present reference solely challenges the entity to which it applies. The pandemic and an insufficient number of justices on the Board also delayed the hearing.

[7] The Board issued calls for intervenors in February 2020 and in February 2021, as well as a hearing notice in February 2021.

[8] On 19 January 2021, the Board rendered a decision concerning the other petition, *Reference re Interpretation and Scope of the Reference re Legality of the BDS Motion and Similar Motions*¹² [*Reference re Interpretation*], which clarified and, where there were conflicts, superseded the *2016 Reference*.

[9] At the Hearing of the present reference, the Petitioner argued that Queer McGill as an institution had, in its own right, the ability to have a position on the BDS movement, noting that the best way that Queer McGill can support its constituents is through activism. Further, it was suggested that as a Service of the Society with its own applicable constitution that mandates activism, Queer McGill should have the ability to have a position on political matters such as the BDS movement.

[10] Students in Solidarity for Palestinian Human Rights (SPHR) McGill, an Intervenor, argued that the Society could not force a Service to have a position aligning with the Society’s interests, and suggested that Services were not bound by the *2016 Reference*. SPHR also stated that limiting Services’ ability to adopt in political positions would prevent Services with an activism mandate from advocating for their respective constituents.

¹¹ Ibid, at para 40.

¹² *Reference re Interpretation and Scope of the Reference re Legality of the BDS Motion and Similar Motions*, 2021 SSMU [*Reference re Interpretation*].



[11] The Union for Gender Empowerment (UGE), an Intervenor, remarked on its mandate to provide an anti-oppressive environment and peaceful means of advocacy. It was further mentioned that the actions of the Israeli government negatively affect students at McGill; thus, it is necessary for Services like the UGE to engage in such advocacy.

Issues

[12] The Board considered the following questions:

[a] Can a SSMU Service have a position on the BDS movement?

[b] Can the SSMU compel Services to take a specific position, or vice versa?

Jurisdiction

[13] In its decision to establish its jurisdiction, the Judicial Board consulted section 1.1 of the *Internal Regulations of Governance*, section 15.1 of the *Society's Constitution*, and sections 7 and 20 of the *Judicial Board Procedures*.

[14] Specifically, section 1.1(a) of the *Internal Regulations of Governance* grants the Board jurisdiction over the “the Constitution, Internal Regulations, Policies, and Plan of the Society”; section 1.1(d) recognizes this Board’s jurisdiction to render decisions on the “the interpretation of the constitutions of Clubs and Services of the Society, including the authority to declare invalid any act of a Club or Service which violates the Constitution or Internal Regulations or its own constitution”; and section 1.1(e) acknowledges the Board’s authority to render decisions on “the interpretation of any other Governance Documents of Clubs and Services of the Society as requested.”¹³

[15] Section 7 of the *Judicial Board Procedures* lays out the general jurisdiction of the Board while section 20.1 specifically deals with the jurisdiction of the Board to

¹³ Students' Society of McGill University Internal Regulations of Governance-03: Judicial Board (2 April 2020), s 1.1 (General Jurisdiction) [“Internal Regulations Governance-03”].



decide on reference questions submitted by, *inter alia*, the President of the SSMU.¹⁴ The Board views this *Reference* as falling within its jurisdiction.

[16] As per section 11.1 of the *Judicial Board Procedures*, the Board extended an invitation for intervenors and accepted two Intervenor, the UGE and SPHR, pursuant to its authority to recognize them as such under sections 11.2 and 11.3 of the *Judicial Board Procedures*.

[17] The Board heard from the Intervenor UGE that the Service had been verbally informed by someone at the SSMU during the 2018-2019 academic year that they could not have a pro-BDS position and that this decision could not be appealed to the Judicial Board.¹⁵ The Board would like to reiterate its declaration in *Khediguian and Sciortino v EdUS* that it “finds inappropriate [any] attempts to dissuade students from seeking redress by appealing to the Board”.¹⁶

[18] The Board, while recognizing that the exact facts are uncertain, is resolute that students always have recourse via a petition to the Judicial Board, which will determine whether the conditions are met to establish its jurisdiction.

Analysis

A. Can a SSMU Service have a position on the BDS movement?

[19] The Board reiterates the difficulty of issuing a decision on specific policies within the umbrella of the BDS movement.¹⁷ It is further inappropriate for this Board to deny or permit a SSMU Service to have a position on the BDS movement where

¹⁴ Students' Society of McGill University Judicial Board Procedures (14 October 2018).

¹⁵ Although the Intervenor UGE included within their Declaration that the SSMU Services Coordinator notified them that they could not have a pro-BDS position and that this decision could not be appealed to this Board, this Intervenor also mentioned during the hearing that they were unsure of who or which specific body of the SSMU had informed the UGE of this, as this was before their involvement with the UGE. The Board attempted to gain clarification from the Office of the VP Student Life and from the UGE's institutional memory, to no avail.

¹⁶ *Khediguian and Sciortino v Office of the Chief Returning Officer of the Education Undergraduate Society (EdUS)*, 2020 SSMU at para 1.

¹⁷ *Reference re Interpretation* at paras 20, 23.



challenges exist to fully understand the historical and cultural context around the BDS movement and the variations of implementing and adhering to the BDS movement.

[20] The Board stresses the importance of its duties to issue opinions on cases and references that strictly fall within the jurisdiction of this Board, as recognized in the *Reference re Interpretation*:

[23] Given the limits of its jurisdiction, the Judicial Board exists to rule on specific instances and cases regarding issues that fall within its ambit. Where the Board cannot answer an issue clearly and unambiguously, as it cannot regarding a broad umbrella of policies that may or may not be supported by BDS movements, that decision is not within the scope of the Board. Such issues must be left to SSMU's other decision-making bodies.¹⁸

[21] Recognizing the above, the Board acknowledges broadly that it is within the rights of a SSMU Service to have a position on political issues, for the following reasons.

Services and the Society

[22] The Petitioner and Intervenor from the UGE made compelling arguments that the mandate of Services such as the Union for Gender Empowerment and Queer McGill is to provide a safe space for students of the Society. These Services operate with advocacy mandated within their Service constitution or within their objectives as a Service.

[23] The SSMU's relationship with its Services is to bear the legal, financial, and governing responsibility of the Services. The SSMU recognizes this and has developed different mechanisms within the SSMU to ensure oversight while maintaining some level of autonomy for Service operations, including the Services Committee, the Services Administrative Coordinator, and the Service Representative to Legislative Council. Further, the *Internal Regulations of Student Groups* explicitly recognize "the legal oversight of the Society."¹⁹ These mechanisms provide oversight to the legal, financial, and governing responsibilities.

¹⁸ *Reference re Interpretation* at para 23.

¹⁹ Students' Society of McGill University Internal Regulations of Student Groups-03 Part II: s 6.2 (Services) ["Internal Regulations of Student Groups-03"].



[24] Another mechanism, the Services Review Committee, reviews each Service’s constitution every academic year. This process evaluates each Service’s adherence to the Society’s governing documents and performs progress reviews. The latter ensure the proper use of the Society’s finances dedicated to Services and the day-to-day operations of Services through receiving public feedback on the Service’s operations and performance throughout the school year.²⁰ As such, it is the Board’s view that the Society, in its mechanisms, grants Services the right to have a position on political issues, if recognized within their mandate and constitution, by *de facto* allowing such positions.

Application of the SSMU’s governing documents to Services

[25] SSMU Services must operate within the governing documents of the Society, including but not limited to its *Constitution*, *Internal Regulations*, and *Policies*.²¹ Failure to do so may result in a revocation of Service accreditation.²²

[26] Services are subject to such governing documents to the same extent and on the same basis as the SSMU itself. The *Equity Policy* is no exception:

2.1 This Policy shall apply to:

[...]

2.1.2. All activities and events hosted, funded, and promoted by the Society and SSMU-affiliated Clubs and Services.²³

[27] Additionally, SSMU Services must adhere to previous decisions of the Judicial Board regarding the scope and application of governing documents, including the Board’s *2016 Reference* and *Reference re Interpretation*, which discusses the Society’s abilities to have a position on political matters.²⁴ This is due to the Services’ status as creatures of the SSMU, subject to its “legal oversight”, rather than as independent governing actors.²⁵

²⁰ Internal Regulations of Student Groups-03, s 7.3 (Review).

²¹ Ibid, ss 6.5 (Restriction), 7.3 (Review), 7.4 (Revocation).

²² Ibid, s 7.4 (Revocation).

²³ *Equity Policy*, s 2.1.2 (Scope).

²⁴ See *2016 Reference*; *Reference re Interpretation*.

²⁵ Internal Regulations of Student Groups-03, s 6.2 (Oversight).



Positions on Political Issues

[28] The Board recognizes that having a position on political issues is integral to the operation of some Services of the Society, Services have the autonomy to do so.

[29] The SSMU, and by extension, its Services, may not establish a position on political issues that leads to “discrimination on the basis of [...] national or ethnic origin”,²⁶ among other prohibited grounds of discrimination. As decided in the *2016 Reference* and reaffirmed by the *Reference re Interpretation*, to do so would contravene the Society’s *Constitution* and the *Equity Policy*.²⁷

[30] However, the Board highlights the importance of the *Equity Policy* for any consideration of SSMU Services having a position on political issues. The *Equity Policy* explicitly states the following:

1.2.2. Programs or activities whose purpose it is to improve the conditions of, or provide safer spaces for groups that have been historically and culturally disadvantaged are not deemed discriminatory or oppressive by advocating for specific resources, conditions and spaces to address the social and systemic barriers they face.²⁸

[31] Since the same is said specifically regarding Services,²⁹ their anti-oppressive stances can respect the principles above.

[32] Specific to the issue at hand, the Board refers to the *Reference re Interpretation* and the *2016 Reference* as guidelines for SSMU Services having a position on political issues. It is the opinion of this Board that these decisions apply to the SSMU Services, as subordinates of the SSMU whose purpose is to “extend the Society’s provision of services to Members of the Society.”³⁰ This description of their objective highlights the complementary nature between the SSMU’s central organs and its Services: no relevant distinction between the two can be found in governing documents with regards to the applicability of the Board’s judgements. Therefore, SSMU Services may

²⁶ Students’ Society of McGill University Constitution (10 November 2017), Leadership (Preamble).

²⁷ *2016 Reference* at paras 40–41; *Reference re Interpretation* at paras 21–22.

²⁸ *Equity Policy*, s 1.2.2 (Interpretation).

²⁹ Internal Regulations of Student Groups-03, s 6.3.1 (Service Provision — Exception).

³⁰ *Ibid*, s 6.1 (Purpose).



adopt positions on political issues on “the actions of any government” so long as they “do not amount to the adoption of a position against the entire country writ large.”³¹

[33] In short, SSMU Services may adopt positions on political issues, subject to the constraints of the governing documents of the SSMU and Judicial Board rulings.

[34] As decided in the *Reference re Interpretation*, it would be inappropriate for this Board to categorically and broadly disallow political stances on certain topics.³²

Decisions to adopt political stances fall squarely within the authority of the executive and political branches of the SSMU. Given its narrow interpretive mandate, the Judicial Board is not the appropriate venue to conduct such political debates.

[35] As such, the Board’s mandate is to determine the conformity of political stances with the provisions of the Society’s governing documents. Determinations of whether specific political stances violate the *Constitution* and the *Equity Policy* are best made on a contextual, case-by-case basis.³³

B. Can the SSMU compel Services to take a specific position, or vice versa?

[36] The Board acknowledges that it is legitimate for and well within the mandate of Services to have a political position.

[37] Services must provide support and access to different resources to members and, to serve their members, Services might need to have a specific position that differs from the Society’s position.

The following criteria shall be required of any organization seeking accreditation as a Service.

- a. The organization’s mandate must not include the provision of services otherwise provided by the Society;
- b. The organization’s mandate must be to provide resources and/or support to Members. Services may also provide referral, awareness, education, or advocacy services in addition to their provision of resources and/or support. [...] ³⁴

³¹ *Reference re Interpretation* at para 17.

³² *Ibid* at paras 20–21.

³³ *Reference re Interpretation* at paras 23–24, 41.

³⁴ Internal Regulations of Student Groups-03, s 7.1 (Eligibility).



As such, Services may have a position that is different from the Society itself and may take actions beyond the Society's actions, leading to a quasi-independence of the Services offered by the Society.

[38] Moreover, as the Board discussed above,³⁵ the SSMU itself provides mechanisms that allow Services to operate in a separate and protected jurisdiction. If the political positions of a Service are within what is permitted in the governing documents and Judicial Board decisions, the SSMU cannot disallow or prevent Services from taking these positions.

[39] Conversely, the Board also finds that Services cannot compel other bodies of the Society to have a political position as the Society is well within its purview to take its own political positions free from the Services.

[40] However, the Board recognizes that bodies of this Society include the political branch. Thus, it is of the opinion of this Board that Services cannot compel the Society to have a political position beyond the allowed mechanisms in the political bodies of the Society.³⁶

[41] The Board recognizes the need of SSMU Service organizations to provide a service to their members and, in doing so, that Services may need to have a specific position that differs from the Society's position. Consequently, one entity cannot compel the other to have a position beyond the allowed mechanisms in the political bodies of the Society.

³⁵ *Supra* at paras 22-24.

³⁶ Such as submitting a motion to the Legislative Council or General Assembly compelling the Society to have a position on matters.