



**Judicial Board | Conseil judiciaire**

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*Located on Haudenosaunee and Anishinaabe, traditional territories*

# STUDENTS' SOCIETY OF MCGILL UNIVERSITY JUDICIAL BOARD

2021-04-23

## Reference re Motion on Divest for Human Rights Policy

### PARTICIPANTS

**Jemark Earle, representing the Students' Society of McGill University's Board of**

**Directors**

Petitioner

and

**(1) Divest for Human Rights Coalition**

**(2) Hillel McGill**

Intervenors

### TYPE

Final Judgment

### JURISDICTION

Students' Society of McGill University

### REASONS FOR JUDGMENT

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



## Executive Summary<sup>1</sup>

1. On 19 January 2021, the Judicial Board rendered its decision on the *Reference re Interpretation and Scope of the Reference re Legality of the BDS Motion and Similar Motions*.<sup>2</sup> On 15 March 2021, a petition was submitted to the Judicial Board to seek constitutional clarification on their *Motion Regarding the Adoption of the Divest for Human Rights Policy 2021-02-16* (“the Motion”).<sup>3</sup> The Petitioner sought to obtain clarification on the legality of the *Motion* and its desired outcomes, specifically whether they violated the *Constitution* or other governing documents.<sup>4</sup> The Divest for Human Rights Coalition and Hillel McGill applied for intervenor status in this reference.
2. During the hearing procedures, the Petitioner expressed the difficulties faced at the SSMU Winter 2021 General Assembly, which ultimately lost quorum and turned into a consultative forum. The Motion was passed at the consultative forum and sent to the Legislative Council, where it was again passed. At the final stage of ratification, the Board of Directors had concerns about the constitutionality of the *Motion*’s proposed actions and decided to refer the question to this Board.
3. In line with this Board’s decision in the *Reference Re Interpretation*, it finds that the *Motion* is constitutional insofar as it advocates against specific private corporations that violate norms of social justice. As a political body, SSMU is empowered to take political stances. Insofar as the proposed actions of the *Motion* are directed at private corporations that do not represent nations, the *Motion* is constitutional.

## Decision

The Judicial Board of the SSMU declares the following:

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<sup>1</sup> The Executive Summary serves to increase the accessibility of Judicial Board decisions to the Members of the SSMU. However, the Executive Summary is not part of the final 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.

<sup>2</sup> *Reference re Interpretation and Scope of the Reference re Legality of the BDS Motion and Similar Motions*, 2021 SSMU [*Reference re Interpretation*].

<sup>3</sup> *Motion Regarding the Adoption of the Divest for Human Rights Policy 2021-02-16*, Legislative Council of the SSMU, LEG-PUB-MOT-2021-02-25-001 (16 February 2021).

<sup>4</sup> Students’ Society of McGill University Constitution (10 November 2017), Leadership (Preamble).



- a. The *Motion Regarding the Adoption of the Divest for Human Rights Policy* is constitutional based on the information provided by the Parties.

## Reasons

### Facts

[1] On 19 January 2021, the Board rendered a decision concerning *Reference re Interpretation and Scope of the Reference re Legality of the BDS Motion and Similar Motions* [“*Reference re Interpretation*”], which clarified and, where there were conflicts, superseded the *Reference Re Legality of BDS and Similar Motions* [“*2016 Reference*”].<sup>5</sup>

[2] In February 2021, this Board also heard *Reference re Applicability to the Society’s Services of the 2016 Reference re Legality of the BDS Motion and Similar Motions* [“*Reference re Applicability to Services*”]. The Judicial Board agreed 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 the *Constitution* and *Equity Policy*, as interpreted in the *2016 Reference* and the *Reference re Interpretation*.

[3] On 16 February 2021, the *Motion Regarding the Adoption of the Divest for Human Rights Policy* (“the *Motion*”) was presented at the Winter 2021 General Assembly for debate.

[4] The *Motion* attained the requisite quorum of 350 Members, but immediately prior to the voting period to approve the *Motion*, about 80 Members left the meeting. It was therefore declared that the General Assembly was a Consultative Forum, with quorum having been lost. The *Motion* was approved by the Consultative Forum and then sent to the Legislative Council for approval.

[5] The Legislative Council then approved the *Motion*, with 21 Councillors in favour, 5 Councillors opposed, and 4 Councillors abstaining. The *Motion* was then sent to the Board of Directors for ratification.

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<sup>5</sup> *Reference re Interpretation and Scope of the Reference re Legality of the BDS Motion and Similar Motions*, 2021 SSMU.



[6] On March 4, 2021, the Council *Motion* was presented at the Board of Directors. As there was much debate at the General Assembly and following the *Motion*, the Board of Directors hoped to present the *Motion* to the Judicial Board for the Board's review.

[7] The Petitioner, having considered arguments in favour and opposed to the *Motion*, sought advice on the *Motion's proposed actions*, more specifically as to whether they contravened the Society's governing documents, including the *Constitution*.

[8] The Judicial Board issued Calls for Intervenors as well as a Notice of Hearing for the present reference in March 2021. Both the Divest for Human Rights Coalition and Hillel McGill applied for intervenor status.

[9] At the Hearing, Hillel McGill argued that this *Motion* will contribute to anti-Semitism on campus, while the Divest for Human Rights Coalition argued that the *Motion* states that it "will not be used as a basis or justification for racism or xenophobia of any kind, including but not limited to anti-Asian racism, Sinophobia or anti-Semitism," therefore, attempting to limit the promotion of anti-Semitism through this *Motion*.<sup>6</sup>

## Issues

[10] The Board is presented with the following question:

- A. Is the *Motion Regarding the Adoption of the Divest for Human Rights Policy* constitutional?

## Jurisdiction

[11] In its decision to establish its jurisdiction, the Judicial Board consulted section 15.1 of the Society's *Constitution*,<sup>7</sup> section 1.1 of the *Internal Regulations of Governance*,<sup>8</sup> and section 20 of the *Judicial Board Procedures*.<sup>9</sup>

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<sup>6</sup> *Motion* at 2.

<sup>7</sup> *Students' Society of McGill University Constitution* (10 November 2017) [*Constitution*].

<sup>8</sup> *Students' Society of McGill University Internal Regulations of Governance-03: Judicial Board* (2 April 2020) [*Internal Regulations of Governance-03*].

<sup>9</sup> *Students' Society of McGill University Judicial Board Procedures* (14 October 2018) [*Judicial Board Procedures*].



[12] Specifically, section 15.1 of the *Constitution* states that the Board “shall have authority to adjudicate on matters within its jurisdiction, as set out in the Internal Regulations.”<sup>10</sup>

[13] Section 1.1(b) of the *Internal Regulations of Governance-03: Judicial Board* grants the Board jurisdiction over “the interpretation of all motions and resolutions passed by the Legislative Council, including the authority to declare invalid any act of the Legislative Council or the Executive Committee which violates the Constitution or Internal Regulations.”<sup>11</sup> This reference question concerns the constitutionality of the Legislative Council’s Motion as passed on 16 February 2021. This reference question, therefore, falls under the Board’s jurisdiction, as specified in the *Internal Regulations*, to review the constitutionality of Legislative Council motions.

[14] Section 20.1 of the *Judicial Board Procedures* confirm the jurisdiction of the Board to decide on reference questions submitted by, *inter alia*, the SSMU Board of Directors and the President of the SSMU.<sup>12</sup> The Board of Directors’ decision to refer this question to the Judicial Board, therefore, falls appropriately within the Judicial Board’s jurisdiction over reference questions.

[15] As such, the Board views that this Reference falls within its jurisdiction.

## Analysis

[16] The Judicial Board, in its analysis, reiterates that this Board is not a body to distinguish the political merits of the Society’s actions and their implications. Rather the Board’s role is to analyze whether the Motion before the Board is constitutional, according to the SSMU governing documents.

[17] In its analysis, the Board also highlights that it has no expert understanding of the human rights violations listed in the Motion before the Board and that its analysis is based on the information provided through the Declarations and Statements presented during the Hearing.

### **A. Is the Motion constitutional?**

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<sup>10</sup> *Constitution*, s 15.1

<sup>11</sup> *Internal Regulations of Governance-03*, s 1.1 (General Jurisdiction).

<sup>12</sup> *Judicial Board Procedures*, s 20.1.



[18] The Judicial Board views the Motion as constitutional since the SSMU is a political body that is empowered to take political stances, including campaigning against corporations. In its review, the Board notes that there are no provisions within the governing documents that explicitly restrict the ability of the Society to campaign against corporations.

### Implications to Marginalized Communities

[19] During the Hearing, the Divest for Human Rights Coalition stated that the Motion before the Board rejects racism and does not target any ethnic groups. The Coalition said that the Motion explicitly states, “This Policy shall not be interpreted as justification for racism or xenophobia of any kind, including but not limited to anti-Asian racism, Sinophobia, or anti-Semitism.”<sup>13</sup>

[20] However, this Board notes the possible gap between written policy and the actual implications of implementing the policy. The language of the Motion does not necessarily provide accountability mechanisms to prevent actions that could marginalize members of the Society.

[21] Further, the Coalition stated at the Hearing that the Coalition works to actively minimize the impact of racism and xenophobia without providing many details and noted that those found to be violating racism or xenophobia shall be dealt with separately. Such words without specifics do not provide protection or reassurance to communities that have or continue to be marginalized.

[22] The Board notes that the question of accountability provided by the Motion was not raised before the Board. As such, the matter should be examined separately, should it become necessary.

### Relations to Boycott, Divestment and Sanction (BDS) Movement

[23] As there was widespread confusion during the General Assembly and the Hearing, the Board wishes to make a clear distinction between the implications of the *2016 Reference* and the Motion before the Board. In the *2016 Reference*, this Board ruled that “similar motions to the BDS Motion that compel SSMU to adopt a platform against specific nations are unconstitutional and further breach the *Equity Policy*.”<sup>14</sup> Specifically, the *2016 Reference*

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<sup>13</sup> *Motion* at 2.

<sup>14</sup> *2016 Reference*, para 45.



defines “‘similar’ motions to mean motions which compel SSMU to campaign against specific nations.”<sup>15</sup>

[24] Further, the *2016 Reference* never declared the BDS Movement unconstitutional or in violation of the Equity Policy. Explicitly, it noted that “this Reference should not be interpreted as finding the BDSAN [McGill’s BDS Action Network] in violation of the Equity Policy or the Constitution.”<sup>16</sup> Instead, it was specific to the BDS Motion and similar motions that compel the SSMU to actively campaign against other nations.

[25] The current *Motion* before the Board does not compel the SSMU to campaign against a nation. Rather, it is specific to corporations. Thus, the *2016 Reference* does not apply to this case.

### Implications to the Citizenry

[26] The Board does not accept Hillel McGill’s argument that only the *Motion’s* provisions that implicate Israel must be found unconstitutional and struck from the *Motion*. Although there may be meaningful distinctions between the implications of the *Motion* on Israel specifically, relative to other actions included in the Motion, none were presented.

[27] To be sure, this Board ruled previously on the ability of the SSMU to campaign against government action in its *Reference re Interpretation*. However, the Board notes that the *Motion* currently before the Board implicates action against corporations, which are not held directly accountable to the general public or citizenry of a defined border or area. Contrastingly, the role of the government could be understood as one to look after the best interests of the citizenry; however, the Board finds a distinction in that corporations are not obliged to this. Therefore, the *Reference re Interpretation* is not directly applicable to this case.

[28] Moreover, the Divest for Human Rights Coalition stated during the Hearing that its selection process of the targeted corporations in the *Motion* reflected the coalition members’ focus, reviewing corporations’ support or current cooperation with specific government policies and human rights violations, rather than their association with the nations

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<sup>15</sup> *2016 Reference*, para 10.

<sup>16</sup> *2016 Reference*, para 41.



themselves. As such, the Board finds that the causes selected by the Coalition are not in violation of the governing documents.

[29] Indeed, in the case before the Board, targeting corporations' actions cannot be deemed discriminatory under the *Equity Policy's* prohibited grounds for discrimination, which include among others race, national or ethnic origin, colour and religion.

### Moving Forward

[30] Both the Coalition and Hillel McGill argued that ruling against their position would further marginalize certain members of the Society. The Judicial Board does not have the expertise or legitimacy to determine whether one side should prevail based on the arguments provided during the reference. As explained in the *Reference re Interpretation*, these decisions belong to political bodies of SSMU, which may take positions affecting SSMU members, but must do so diligently.<sup>17</sup>

[31] Nonetheless, the Board understands the sensitivity of Motions brought before this Board that involve groups of opposing political views.

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<sup>17</sup> *Reference re Interpretation*, para 35.