



**MEMORANDUM**  
**Montréal**

**PRIVILEGED AND CONFIDENTIAL**

**To:** Darshan Daryanani, President  
Michal Chernov, Governance  
Manager

**From:** Troy D. McEachren

**Date:** March 31, 2022

**Subject:** SSMU: Legal Nature of Members Referenda

**File:** 0219049.00025

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Dear Mr Daryanani,

The purpose of the present memorandum is to review the legal nature of referenda approved by the members of the Students' Society of McGill University's ("**SSMU**").

**I. FACTS**

The SSMU, in its present form, resulted from a merger as of June 1, 2007. The SSMU is governed by Part III of the *Companies Act* (Quebec) (the "**Companies Act**").

We have been provided with SSMU's general by-laws known as "The Constitution of the Students' Society of McGill University" (the "**Constitution**").

We have also been provided with a document entitled "Internal Regulations of Elections and Referenda" (the "**Elections and Referenda Regulation**").

For the purpose of the present memorandum, we assume that the Constitution and the Elections and Referenda Regulation were duly adopted by SSMU's board of directors and ratified by its members.

SSMU is an accredited students' association pursuant to the *Act respecting the accreditation and financing of students' associations*, CQLR c. A-3.01 (the "**Students' Association Act**").

**II. GOVERNING PRINCIPLES**

The SSMU is a non-share capital corporation governed by Part III of the *Companies Act* whose members are the student body of McGill University (+25,000 students) and whose

activities are to support and provide services to its members. This has two general and important consequences:

1. The members are, to a certain degree, like shareholders of a corporation in that they elect directors, supervise the management of the directors by reviewing the financial statements, and approve fundamental changes to the SSMU. Unlike shareholders, the members have no economic interest in the SSMU.
2. The relationship between the members and the SSMU is contractual. This means that the governing documents of SSMU form the contractual relationship between the SSMU and the members.

### III. ORGANS OF GOVERNANCE

The *Companies Act* and corporate law principles set out specific rules of governance from which derogation cannot be made except by way of express legislative authority. This should not be seen as limiting the functioning of the SSMU but rather it is the architecture in which the SSMU, like all non-profit corporations (a “**NPO**”), operates. The following is the structure of corporate governance of a NPO under the *Companies Act*.

1. **Members:** Members have the following rights – (A) elect and remove directors; (B) review financial statements; (C) approve fundamental changes such as a changes to Letters Patent and by-laws.
2. **Directors:** The board of directors is mandated by the *Companies Act* to manage the affairs of the SSMU and pursuant to the rule of *delegata potestas non potest delegari* (no delegated powers can be further delegated) the board of directors cannot delegate its authority. The *Companies Act* however, expressly derogates from this maxim in two instances: 1) by allowing directors to appoint officers whose duties they determine<sup>1</sup>, and 2) by allowing them to appoint an executive committee, which exercises certain powers of the board of directors.<sup>2</sup>
3. **Officers:** The *Companies Act* provides that the directors shall elect from among themselves a president and, if they deem it advisable, a chair of meetings and one or more vice-presidents of the corporation. They may also appoint any other officers of the corporation. The *Companies Act* also gives the directors the power to make by-laws regulating the appointment, functions, duties and removal of all officers, officers, agents and employees of the corporation, and their remuneration.

It is also possible for the by-laws to provide that the members may elect the officers.

4. **Committees:** The board of directors may establish committees other than the executive committee, but there is nothing in the *Companies Act* that allows it to delegate powers to them. The role of these committees must therefore be limited to informing or assisting the board of directors in its work, and in all circumstances to

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<sup>1</sup> Subsections 89(4) & 91(2)(d) of the *Companies Act*.

<sup>2</sup> Section 92 of the *Companies Act*.



carrying out its instructions. They are, in reality, "working groups" with specific mandates.

The SSMU is also subject to the *Students Association Act*, which modifies the above but only with respect to the following:

1. **Accreditation:** The members have the right to vote on the accreditation of the students' association under the *Student Association Act*; and
2. **Fees:** Student association fees paid by students to the students' association must be approved by by-law supported by a majority of the students voting at a special meeting or referendum for that purpose.

#### **IV. RELEVANT PROVISION OF THE CONSTITUTION AND THE ELECTIONS AND REFERENDA REGULATIONS**

The relevant provisions of the Constitution with respect to the holding of referenda are the following:

##### 14. Referenda

###### 14.1. General

The Society may hold Referenda, on which Members may directly vote on resolutions, in accordance with its Internal Regulations.

###### 14.2. Initiation

Referenda may be initiated by the Legislative Council or Members, in accordance with the Internal Regulations.

###### 14.3. Voting

All Members shall be eligible to vote in a Referendum. Unless otherwise provided for in the Act, this Constitution, or the Internal Regulations, all Referendum questions submitted to the Members shall be decided by a Simple Majority.

###### 14.4. Quorum

The quorum for all Referenda shall be fifteen percent (15%) of the Members.

The relevant provisions of the Elections and Referenda Regulation is found in Annex 1.



## V. ANALYSIS

### 1. General Rules of Corporate Law

The board of directors of a Part III corporation is charged with the exclusive right and obligation to manage the affairs of the corporation.<sup>3</sup> The Quebec Court of Appeal<sup>4</sup> cited the following passage from Martel<sup>5</sup> as to the nature of the board of directors authority over the management of a Part III corporation:

The power to administer the affairs of the corporation is in principle vested in the board of directors, and is not vested in the members. The members cannot exercise any direct control over the administration of the corporation, nor do they participate in day-to-day management decisions. Moreover, they generally cannot prevent the directors from acting, nor can they give them instructions, nor can they have their actions annulled, even in flagrant cases of abuse of power on their part: at most, they have certain recourses for damages against directors who act beyond their mandate.

[Our translation]

As to the ability of the members to be involved in the administration of a Part III corporation, Martel provides the following additional comments:

#### iv) Right to Manage

The only real right of the members in the administration of the corporation is to elect, and where permitted, to remove directors. Indeed, the power to administer the affairs of the corporation rests in principle with the board of directors, and is totally outside the control of the members. Members have no direct control over the administration of the corporation, nor do they participate in any day-to-day management decisions. Moreover, they cannot generally prevent directors from acting, give them instructions, or have their acts annulled, even in flagrant cases of abuse of power on their part: at most, they have certain remedies for damages against directors who act beyond their mandate.

In *Association patronale des entreprises en construction au Québec v. Association de la construction du Québec*, the court declared null and void the clause in the affiliation contract of a legal person to a federation which subjected, in order to be valid, the decision of the legal person to disaffiliate to a two-thirds vote of the members, declaring:

[60] The board of directors has exclusive authority to terminate a contract for the exchange or supply of services without a vote of the members, which is

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<sup>3</sup> Subsection 91(1) of the *Companies Act*.

<sup>4</sup> *Matossian v. Canadian Heritage of Quebec*, 2007 QCCA 1155 (CanLII).

<sup>5</sup> Paul Martel & Luc Martel, La corporation sans but lucratif au Québec (Montreal: Wilson Lafleur et Martel Itée, 2014) ("**Martel**") at 8-17.



one of the purposes of the federal act. Section 91(1) [Companies Act] does not distinguish the type of contract that the directors of the association may enter into on its behalf, since this enabling provision refers to 'any kind of contract'. The members may be consulted and vote on any matter not subject to ratification, including disaffiliation, but they do not have decision-making powers, including ratification, authorization or lack of ratification or authorization. The Board of Directors is not legally bound by such consultation. This power belongs exclusively to the Board of Directors and cannot be delegated to the members. Any dissatisfaction with a decision of the board of directors, not subject to ratification under the Companies Act, will be a political matter, for example, when the members of the association meet at the annual general meeting to elect the board of directors.

[61] The directors are the agents of the association, not the members. Article 321 C.C.Q. states: " A director is considered to be the mandatary of the legal person. He shall, in the performance of his duties, conform to the obligations imposed on him by law, the constituting act or the by-laws and he shall act within the limits of the powers conferred on him." The Supreme Court of Canada has already recognised the applicability of the rules of mandate to the responsibilities entrusted to directors by the legislator:

"But the position of directors is quite different from that of shareholders. The director is appointed by the shareholders, but he is not, strictly speaking, their agent; he is a director charged by law with managing a patrimony which is neither his own, nor that of his co-directors, nor that of the shareholders, but that of the company, a legal person absolutely distinct from both those who manage it and those who own its share capital. In this capacity, the director must act in good conscience, in the sole interest of the assets entrusted to management. This implies that he has the freedom to choose, at the time of a decision to be taken, the one which seems to him to be the most in conformity with the interests over which the law imposes his duty of care."

[62] The directors must respect the obligations imposed on them by the Companies Act and the general by-laws, without excess of power or mandate, in a loyal manner towards the association. Article 322 C.C.Q. states: "A director must act with prudence and diligence. He shall also act with honesty and loyalty in the interest of the legal person." Article 2138 C.C.Q. sets out a similar rule with respect to mandates: "A mandatary is bound to fulfill the mandate he has accepted and, he shall act with prudence and diligence. He shall also act honestly and faithfully in the best interests of the mandator and shall avoid placing himself in a position where his personal interest is in conflict with that of the mandator."

[63] Directors have the exclusive responsibility to enter into and terminate all kinds of contracts permitted by law. They cannot discharge this responsibility by entrusting it to the vote of the members at a general meeting, at the risk of acting disloyally towards the legal person whose destiny they direct. They may not exceed their power to entrust its exercise to third parties who are not



subject to the same legal duty of loyalty and thus renounce their duty. As a mandatary, a director is required to personally carry out the mandate conferred on him by the legislator in articles 83 and 91 [Companies Act] and article 321 C.C.Q. Article 2140 C.C.Q. states in the first paragraph: "The mandatary is bound to fulfill the mandate himself unless he is authorized by the mandatory to appoint another person to perform all or part in his place." The mandator, i.e. the legal person, who derives its powers from the legislator, the letters patent and the regulations, does not authorize the director to substitute another person to execute part of the mandate and to delegate this execution to a meeting of third party members of the association. The mandatary as delegatee may not delegate to a sub-mandatary. Directors may not give a mandate to members at a general meeting or to any other person to take a decision in their place or to participate in it, as they would otherwise abdicate the exercise of their power by such illegal delegation. They may not undertake to act on the instructions or decisions of third parties, such as members of the association, or even those of their colleagues on the board. Each director retains full independence, within the framework of his discretion, which he must exercise prudently and loyally in the interest of the legal person (art. 322 C.C.Q.). He may not be in the pay of anyone.

Both the doctrine and the case law is extremely clear that the board of directors of a Part III corporation have the absolute and exclusive authority to manage the affairs of the corporation. The members have absolutely no authority to interfere with these exclusive rights of the board of directors and may in no way bind either the company or the board of directors absent express legislative authority.

The concept of member democracy under a Part III corporation is limited to electing directors and approving fundamental changes. To this added the rights to approve fees and accreditation under the *Students' Association Act*. When members elect directors, they know that the directors can enter into many transactions, even fundamental transactions, without consulting the members. The members do not have a veto right over those transactions, and they cannot come to court to ask the court to review or veto transactions on their behalf.

The board of directors may not defer to or abdicate their duty to manage the company. Even if the company were to adopt a clear by-law giving such rights to the members, such a by-law would be invalid and without effect. Indeed, this is the exact conclusion reached by the Superior Court of Quebec in *Ruel v. 9128-8647 Québec inc. (Gestion Chrstian Couture)*<sup>6</sup>, which decision was affirmed by the Quebec Court of Appeal.<sup>7</sup>

Finally, the board of directors is both permitted and expected to make an independent decision on all matters that come before the board even if the matter is have been approved or rejected by the members. The board of directors must base itself on the governing principle of acting in the best interest of the corporation and all of its members.

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<sup>6</sup> 2010 QCCS 3651 (CanLII) at paras. 130-131.

<sup>7</sup> 2010 QCCA 2332 (CanLII).



## 2. Application of the Foregoing to the SSMU

We have carefully reviewed the *Companies Act*, the Constitution, the Election and Referenda Regulation, and the *Students' Accreditation Act* and we are of the following opinions:

- No referendum adopted by SSMU's members, other than with respect to accreditation under the *Students' Accreditation Act* or with respect to members fees, is binding on the SSMU.
- We have found no provision in the Constitution or the Election and Referenda Regulation that expressly or implicitly makes the result of a referendum binding on the SSMU.
- Even if the Constitution or the Election and Referenda Regulation, or any other by-law contained a provision that made a referendum vote is binding<sup>8</sup> on the SSMU or the SSMU's board of directors, such provision would be invalid and without effect.
- The SSMU's board of directors is under no legal, moral, or ethical duty to adopt as official policy of the SSMU, the results of any referendum regardless of the nature of the referendum or the percentage by which the referendum is approved by SSMU's members.
- Member democracy is limited to electing directors, approving fundamental changes, the charging of fees, and accreditation under the *Students' Association Act*.
- Each director of SSMU's board of doctors must make a decision to adopt, reject, postpone, modify, etc. the results of a referendum based on his/her/their own decision that weighs all of the circumstances and impact of the decision on the SSMU and on all of the SSMU's members. The decision must be one that is in the best interest of the SSMU and all of its members.

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<sup>8</sup> Other than a vote on accreditation or fees.



## ANNEX 1

### INTERNAL REGULATIONS OF ELECTIONS AND REFERENDA-04: REFERENDA

#### 1. Referendum Questions

##### 1.1. General

Referenda may be initiated by the Legislative Council or by Members.

##### 1.2. Legislative Council-Initiated Referendum Questions

The Legislative Council may initiate a Referendum question by way of a resolution. Any motion to place a question before the Society by the Legislative Council must be presented as a written motion signed by the number of Councillors stipulated in the Standing Rules, or where none exist, at least three (3) Councillors and distributed to all Councillors prior to the meeting of the Legislative Council. If passed, it will be put to Members during the following Referendum period.

The wording of a Referendum question must be approved by the Legislative Council fourteen (14) days prior to the opening of polls.

##### 1.3. Student-Initiated Referendum Questions

Any Member may initiate a Referendum question by presenting a question to the Chief Electoral Officer who shall indicate to the Member as soon as possible whether the proposed question respects the requirements of the Internal Regulations. The Member must then collect on a petition, clearly stating the Referendum question at the top of each page, the signatures of one hundred (100) Members with not more than thirty percent (30%) from any one faculty or school. All signatures must be collected in the academic year in which the Referendum is to be held. A signature shall only be valid if it is accompanied by a corresponding name, student identification number, faculty, and program year. A Member may sign multiple petitions for Referendum questions. The Member shall submit the complete petition of signatures to the Chief Electoral Officer at least fourteen (14) days prior to the beginning of the Polling Period.

Student-initiated Referenda may not alter the composition of the Society's staff or the Society's base fee. The Chief Electoral Officer shall either approve or reject each Referendum petition within three (3) days of its receipt. All student-initiated Referendum questions shall be transmitted to the Society's Speaker and President to be circulated to the Legislative Council within twenty-four (24) hours after the petition is approved.

##### 1.4. Waiver of Deadline

The fourteen (14) day deadline for approval of Legislative Council-initiated and student-initiated referendum questions may be extended for a question by a motion passed by a two-thirds (2/3) majority of the Legislative Council and approval by the Chief Electoral Officer.





If this deadline has been waived or postponed by the Legislative Council, there shall be a Public Notice indicating so, posted on the Society's website and distributed via the Society's listserv.

Each question shall be considered separately, and a motion to waive or postpone this deadline shall only apply to one (1) question at a time.

#### 1.5. Exception

The fourteen (14) day deadline for approval of Legislative Council-initiated Referendum questions shall not apply to the Referendum Respecting the Election of Councillors to the Board of Directors.

#### 1.6. Approval of Referendum Questions

All Referendum questions must be approved by the Chief Electoral Officer. The Chief Electoral Officer shall ensure that Referendum questions are clear, concise, and do not violate the Governance Documents. The Chief Electoral Officer may reject any Referendum question they deem in violation of the Constitution or Internal Regulations. Student-Initiated Referenda that seek to alter the SSMU Constitution will require approval by the Board of Directors, which shall be rendered at the Board's earliest convenience and upon consultation of relevant Governance Documents, as well as appropriate provisions of Canadian Law where necessary. Where the Board of Directors deems a legal issue may exist with the referendum question, it can vote to present the question to outside counsel for legal consultation. If the question is approved outside of the appropriate electoral timeline, it may be considered pre-approved for the following semester.

Moreover, any significant changes to the question from its original form may require the collection of a new set of signatures, at the discretion of the CEO. Any dispute or uncertainty arising from the Chief Electoral Officer's interpretation of a Referendum question shall be referred to the Judicial Board for an opinion.

#### 1.7. Fee Questions

Referendum questions proposing Society fees shall follow the requirements outlined in the Internal Regulations of Finances.

#### 1.8. Quorum

Quorum for all Referenda shall be fifteen percent (15%) of Members.

#### 1.9. Constitutional Amendment

The Constitution may only be amended by Referendum, except for instances otherwise provided by law. All amendments to the Constitution shall be adopted in both official languages. Furthermore, the existing wording as well as the proposed amendment to the Constitution shall be provided at every Polling Station and shall be readily accessible on the online ballot. Any Referendum question proposing an amendment to the Constitution must be approved by a majority vote of the Board of Directors.



#### 1.10. Notice of Questions

Notice of the Referendum and detailed instructions regarding the formation of “Yes” and “No” Campaigns shall be distributed by a Public Notice to Members.

#### 1.11. Withdrawals

“Yes” or “No” Campaigns may withdraw up to twenty-four (24) hours before the beginning of the Polling Period by a submission of a petition of two-thirds (2/3) of the Referendum committee for student-initiated committees or by a resolution of the Legislative Council for Legislative Council-initiated committees.

