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Montréal, February 11, 2025

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Ms. Maya Marcus-Sells
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Students' Society of McGill University
3600, McTavish Street
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Montréal, Québec H3A 0G3

Re: Legal opinion on the *Motion regarding the approval of a referendum question amending section 1.3 of the SSMU Constitution*

Our file : 5656-000

Ms. Marcus-Sells,

You have asked us to provide our opinion on the *Motion regarding the approval of a referendum question amending section 1.3 of the SSMU Constitution*, which has been submitted to the SSMU Board of Directors on February 4, 2025 (hereinafter, “the *Motion*”).

We will first describe the context in which this *Motion* was proposed and the relevant provisions of the SSMU Constitution, after which we will provide our analysis of the *Motion*.

1. Context and relevant provisions

The current incarnation of SSMU was constituted under part III of the *Companies Act*¹ (which governs non-profit corporations) as a result of a merger between the Students' Society of McGill University and the Student Center of McGill University. Letters patent were delivered on June 1, 2007 to constitute the new entity. The letters patent enunciate the following objects of the legal person:

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1717, boul. René-Lévesque Est
Bureau 300
H2L 4T3
T 514 525-3414
F 514 525-2803

Québec
871, Grande Allée Ouest
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T 418 640-1773
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¹ CQLR, c. C-38.

2. OBJETS

2.1 Les objets de la Nouvelle personne morale seront les suivants :

2.1.1 Grouper en association les étudiants de premier cycle de l'Université McGill;

2.1.2 Organiser tout genre de services pour étudier, encourager, promouvoir et servir les intérêts des membres dans les secteurs de la science, des arts, de la culture, de la récréation, des sports, des questions sociales, de l'économie, des exercices et passe- temps;

2.1.3 Acquérir, organiser et administrer des centres récréatifs et sportifs, des clubs privées et sociaux;

2.1.4 Acquérir, louer, organiser et administrer des terrains et édifices aux fins de les utiliser pour le bénéfice des étudiants de premier cycle de l'Université McGill, et d'une façon plus générale pour l'un quelconque des objets ci-mentionnés;

2.1.5 Encourager, promouvoir et organiser des rencontres et communications entre les membres et les représentants de l'administration et les enseignants de même qu'avec les autres étudiants de l'Université McGill et des autres institutions d'éducation de même qu'avec la société en général.

SSMU is also governed by its Constitution and run in accordance with a number of internal regulations.

The Constitution² opens with a preamble setting out broad objectives and guiding principles of the Society:

PREAMBLE

Service

The Society shall serve as an umbrella organization to coordinate and support the student groups that make up civic life in the McGill community, while providing services to strengthen the educational, cultural, environmental, political, and social

² As last amended on November 15, 2021.

conditions of our Members. Made up of undergraduate and professional students of McGill University, the Society shall endeavour to facilitate communication and interaction between all students from all McGill communities. The Society is a central focal point for McGill students and shall provide a wide variety of services to its different constituencies. The Society shall strive to provide excellence and quality of service at all times, and shall continue to enhance the quality and scope of these services.

Representation

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

Leadership

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

Section 1 of the Constitution sets out the following with respect to the interpretation of the Preamble:

1.3. Preamble

The preamble shall form an integral part of the Constitution.

We also note in passing the way in which headings are to be interpreted:

1.4. Headings

The headings used in the Constitution are for reference purposes only and they shall not be considered in the interpretation of the terms or provisions in the Constitution.

The Constitution goes on to describe the powers, duties, composition, and modalities of office of members of the governance bodies and individuals involved in the administration of SSMU, including the Board of Directors, the officers (which together form the Executive Committee), the Legislative Council, the General Manager, the General Assembly, and the Judicial Board.

The amendment of the Constitution must be done by way of a referendum (section 20). Section 14 establishes the basic rules for referenda (initiation; voting; quorum).

The *Motion* proposes to submit to a referendum an amendment to section 1.3 of the Constitution. The proposed amendment would strike the existing text of s. 1.3 and replace it with a new paragraph, as follows:

1.3. Preamble

~~The preamble shall form an integral part of the Constitution.~~

The Preamble shall serve solely as a mission statement of this Constitution and an articulation of principles and values for the Students' Society of McGill University. As such, the Preamble shall not be interpreted as imposing specific obligations on the Society, nor shall it be used as a basis for legal, contractual, or procedural claims.

The *Motion* contains explanatory notes to describe and support the proposed amendment, from which we quote the following excerpts:

Issue	Section 1.3 of the Constitution must be changed through a referendum question to preserve the autonomy, agency, and integrity of the Society by preventing the wrongful or deliberate misinterpretation of the Constitution's Preamble.
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Background and Rationale	[...] Although it may appear banal, it must be emphasized that the many important values listed in the Preamble of the SSMU's Constitution (hereafter "Preamble") have been consistently weaponized against the Society to hold it to an impossible standard.
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This has manifested both in the forms of litigation and in Notices of Default (hereafter "NoDs") with respect to our Memorandum of Agreement (hereafter "MoA") with McGill. As

such, this single phrase has served to function as a built-in vulnerability in the sense that any party may claim the SSMU has violated its own Constitution but in doing so only cite the Preamble—alleging, for example, that by taking a political stance some students may object to, that the SSMU has failed to “*facilitate communication and interaction between all students from all McGill communities.*”

It is furthermore not trivial to mention that literally facilitating communication between 25,000+ individuals in a given moment is not only impossible; rather, it is absurd by any standard to genuinely believe that a team of 6-7 SSMU Executives and a handful of part-time and full-time staff possess the capability to meet an unreachable standard which itself is not precise—namely and precisely because such standards were never met [sic] to be interpreted in a literal fashion.

Because of these conclusions, the constitution must be amended so that section 1.3 reads as follows:

[...]

This issue affects all students, given the way section 1.3 has been exploited to subvert popular movements and the clear ambitions of student movements. It could potentially save the SSMU thousands of dollars in legal troubles by saving time on unnecessary deliberation or litigations.

Alignment with Mission The changing of this clause would make it easier to implement virtually every Policy in the case that frivolous or vexatious conduct or litigation arose which would combat such Policy’s ratification or implementation.

[...]

Risk Factors And Resource This question, if approved by the membership, would possibly save the SSMU thousands on

Implications legal fees and make it more difficult for the McGill Administration to instrumentalize and weaponize the MoA.

[...]

Motion or Resolution for Approval The purpose of this amendment is to prevent the Preamble of the Constitution from being misused to impose unrealistic expectations on the SSMU, leading to costly procedural challenges. Clarifying that the Preamble is a mission statement, not a binding rule to be literally interpreted, will protect the Society's autonomy and ability to enact student-driven policies without concerns over legal challenges. This change ensures a fair interpretation of the Constitution while safeguarding SSMU's governance and financial and organisational stability.

[...]

Examples of the weaponization of the preamble mentioned in those notes are the notices of default sent by McGill University in 2022 and 2024 as well as the litigation in the *Fried v. SSMU* and *X v. SSMU* cases.

The notices of default were sent pursuant to s. 12 of the Memorandum of Agreement between McGill and SSMU³ (hereinafter, "the MoA"). We note in passing that the MoA, which began on June 1, 2016 and was set to end on May 31, 2024, is still in force as of this writing; s. 18 of the MoA provides for its extension "for a maximum of nine months" if "the parties are unable to agree on the terms of renewal". We understand that negotiations are still ongoing to renew the agreement.

The MoA structures important aspects of the relationship between SSMU and McGill. Among other things, it sets up a mechanism by which McGill collects fees from students and remits them to SSMU.

Section 12 of the MoA enunciates "event[s] of default" which can lead to termination of the agreement. One of these "event[s] of default" is phrased as follows:

12.1.2 when the Association violates its constitution, the Quebec Act Respecting the Accreditation and Financing of Students' Associations, the Quebec Companies Act, or any duly approved regulations, rules or policies of the University, some of which

³ Students Society of McGill University MOA 2016-2024.

appear at www.mcgill.ca and in particular those in the University Administrative Handbook located at <http://www.mcgill.ca/adminhandbook/>;

[Emphasis added.]

The defaulting party is entitled to written notice of default and has 30 working days (or 60 days in the summer) to remedy the default. An arbitration procedure is provided for if the parties are in dispute as to the existence of a default.

In the March 2022 notice of default, the University alleged that the *Palestine Solidarity Policy* submitted to a referendum (in which members approved the policy) could “[i]n no way [...] be considered to “facilitate communication and interaction between all students from all McGill communities” or to “act in the best interests of [SSMU’s] Members as a whole⁴” The University invoked this alleged violation of the Constitution – excerpts of its preamble – as well as alleged irregularities in the referendum process to ground its notice of default under the MoA.

In November 2023, the University invoked the same excerpts from the preamble in its notice to SSMU that the potential adoption of the *Policy Against Genocide in Palestine* would in its view violate the SSMU Constitution and trigger a default under the MoA⁵.

In July 2024, the University sent an actual notice of default alleging among other things that SSMU’s connection to SPHR gave rise to a violation of the SSMU Constitution given the conduct of SPHR:

Moreover, SSMU’s **Constitution** includes a preamble that affirms SSMU’s chief mandate as serving and acting in the best interests of all of McGill students. This preamble is expressly integrated within the Constitution (1.3). SSMU has been repeatedly put on notice that its continued connection to and support for SPHR, because of the latter’s conduct that inflicts profound and ongoing adverse effects on a significant number of McGill students, puts SSMU in default of this core mandate and thus, its own Constitution. Violation by the SSMU of its own constitution constitutes a further event of default, as per art. 12.1.2 of the MoA⁶.

[Bold and underlined characters in the original.]

⁴ Letter from Fabrice Labeau, Deputy Provost (Student Life and Learning), March 22, 2022, to Darshan Daryanani, then-President of SSMU.

⁵ Letter from Fabrice Labeau, Deputy Provost (Student Life and Learning), November 8, 2023, to Alexandre Ashkir, then-President of SSMU.

⁶ Letter from Angela Campbell, Interim Deputy Provost (Student Life and Learning), July 10, 2024, to Dymetri Taylor, President of SSMU.

As for litigation examples, we note, as mentioned above, the *Fried* and *X* cases.

In *Fried*, the plaintiff alleged that the 2022 *Palestine Solidarity Policy*, among other things, “violates the SSMU Constitution⁷”. The Superior Court dismissed the application, finding that the issues were moot because SSMU had decided not to adopt the Policy, and deciding it was not an appropriate case for the court to exercise its discretion to hear the application even though it is moot⁸.

In *X*, the plaintiff alleged among other things that the 2023 *Policy Against Genocide in Palestine* violates the SSMU Constitution⁹. The passages of the Constitution relied upon in the application are all from the preamble¹⁰. The Superior Court granted an interlocutory injunction. The Court decided that there was an appearance of right to ground the application for injunction:

It is at least arguable the Policy violates certain guiding principles contained in the Constitution, notably those requiring the SSMU “to facilitate communication and interaction between all students from all McGill communities” and fully to respect human dignity regardless of national or ethnic origin or religion¹¹.

As you know, the Court of Appeal has granted leave to appeal of this decision¹²; the appeal will be heard on February 25, 2025.

2. Analysis

Our firm has already expressed in a previous opinion our view that there is in fact no violation of the SSMU Constitution susceptible of giving rise to a default under the MoA¹³.

In the *X* appeal, we argue, among other things, that the intervention of courts in the internal affairs of legal persons, by virtue of their supervisory power, is circumscribed to a narrow set of circumstances – abuse of authority, fraud, injustice amounting to fraud – and that the mere derogation of an act from the by-laws of a legal person does not suffice to render said act void, especially

⁷ *Fried v. SSMU* originating application, July 22, 2022, para. 72; *Fried v. SSMU* modified originating application, August 11, 2023, para. 73; *Fried v. Students' Society of McGill University*, 2024 QCCS 1381, paras. 1, 14, 31.

⁸ *Fried v. Students' Society of McGill University*, 2024 QCCS 1381.

⁹ *X v. Students' Society of McGill University* originating application, para. 16; *X v. Students' Society of McGill University* injunction application, para. 18; *X v. Students' Society of McGill University*, 2024 QCCS 1879, paras. 1, 69, 70, 81, 91.

¹⁰ Originating application, paras. 7-10; injunction application, paras. 9-12.

¹¹ *Students' Society of McGill University*, 2024 QCCS 1879, para. 92.

¹² *Association étudiante de l'Université McGill c. X*, 2024 QCCA 841.

¹³ Legal opinion re: notice of default, August 29, 2024.

if has been ratified by members¹⁴. We further argue that there is absolutely no ground to support the argument that the *Policy Against Genocide in Palestine* violates the very broad statement of principles found in the preamble of the SSMU Constitution¹⁵.

We will refer below to some principles of statutory interpretation that the courts and authors have embraced, as the law is more developed in that area. Although statutory interpretation and interpretation of the by-laws of a legal persons are two different things, courts have nevertheless stated that “[t]he applicable principles for the interpretation of corporate articles and by-laws are similar to the principles that govern statutory interpretation¹⁶.”

In our view, the preamble of the SSMU Constitution, as it currently stands, should not be read as giving rise to binding, enforceable obligations against SSMU.

As a general proposition, preambles of statutes can be read to gain insight into “the social or economic evils the Act was meant to combat, the aspirations that motivated the legislature, the concerns that it was attempting to meet, the principles that guided it in preparing the legislation, and the ultimate goals that it hoped to achieve¹⁷” (emphasis added). It is “not a binding part of the statute¹⁸”.

The same can be said of the preambles of the by-laws of legal persons – a *fortiori*, given the principle of narrow intervention of courts in the affairs of corporations.

Furthermore, the language of the preamble of the SSMU Constitution already indicates that it is of the nature of a mission statement, of a broad statement of principles. Given the principles that apply to such statements, as we will see shortly, the preamble should not be read, even as it currently stands, as giving rise to binding, enforceable obligations against SSMU.

In this sense, it should be emphasized that the proposed amendment to s. 1.3 of the Constitution is really a *clarification* of the original intent. For this reason, the amendment to s. 1.3 should in no way be read as an admission that in the prior version of the Constitution, the preamble could be read as enunciating binding, enforceable obligations against SSMU.

That the intent of the amendment is to *clarify* what is already in the text of the Constitution is already apparent from the text of the *Motion*. Perhaps some

¹⁴ Appellant’s factum in *X v. SSMU*, paras. 30-33.

¹⁵ *Id.*, para. 43.

¹⁶ *Polar Multi-Strategy Master Fund v. The Stars Group Inc.*, 2018 ONSC 4397, para. 18.

¹⁷ Sullivan, *Statutory Interpretation*, 3rd edition, 2016, Irwin Law, chapter 9, p. 162.

¹⁸ *Geherman v. Geherman*, 2004 ABQB 785, para. 5.

additional mentions could be made to the *Motion* – if possible – so that there is absolutely no ambiguity on that matter. Here is a proposal in that spirit:

While the preamble of the Constitution as it stands already is in the nature of a broad mission statement that does not give rise to binding, enforceable obligations against SSMU, the amendment seeks to make this even clearer and explicit.

The aim here is to make it clear in documents in support of the amendment that the prior text of the Constitution should *already* be interpreted in the manner indicated – with even greater clarity – in the amended text of s. 1.3. This could help to avoid arguments in ongoing litigation (in the *X* case, for instance) which would state that the amendment *retrospectively “validates”* that the preamble of the prior version contains binding, enforceable obligations which can give rise to actions before the courts or default under the MoA.

We believe the proposed amendment could be helpful in making it clear (or clearer) that the preamble is not binding and does not give rise to enforceable obligations against SSMU.

The case law has stated that mission statements, statement of principles or other similar statements found in legislation or elsewhere should not be read as giving rise to binding, enforceable obligations.

In *Guimond v. Vancouver (City)*¹⁹, the Court said that the City’s Mission Statement, albeit “an important philosophical document in that it sets forth certain objectives and values and emphasizes a commitment to responsible and ethical government [...] was never intended to be more than a statement of general principle and intent²⁰”.

Courts will normally defer to language in documents that indicates clearly that the text “is not intended to create legal obligations²¹”.

In *Greater Vancouver Regional District v. British Columbia (Attorney General)*²², the Court of Appeal of British Columbia affirmed that provisions in a statute setting out “aspirational goals²³” create “no legally enforceable obligation²⁴”. On a cautionary note to legislatures, the Court wrote that “statements of this kind should return to preambles where they are clearly differentiated from substantive and enforceable statutory obligations²⁵”.

¹⁹ 1999 CanLII 5207 (BC SC).

²⁰ *Id.*, paras. 115 & 120.

²¹ *Nusink v. Wyeth-Ayerst Canada Inc.*, 2005 CanLII 19848 (ON SC), paras. 29, 31-32.

²² 2011 BCCA 345.

²³ *Id.*, para. 47.

²⁴ *Id.*, para. 45.

²⁵ *Id.*, para. 47.

In a widely referred-to text on statutory interpretation, authors have described the decision of the Court of Appeal in that last case as establishing that “statements of purpose and principle do not create legally binding rights or obligations, nor do they purport to do so²⁶.”

In *Kett (Re) (No. 2)*, 2017 ONMIC 14, an integrity commissioner, applying *Greater Vancouver Regional District v. British Columbia (Attorney General)*, wrote:

152. As a general matter, a statement of principle in legislation does not create an obligation. It merely states the principle(s) that may be used to interpret obligations created elsewhere in the law: see *Greater Vancouver Regional District v. British Columbia (Attorney General)* (2011).

[...]

154. I find that the “Policy Statement” section and the “Purpose” section of the Code provide interpretive direction only, and they do not create rules or obligations on Council Members that can be the subject of a complaint. They contain statements of principle only. These principles are not enforceable rules.

[Emphasis added.]

In *R. v. Shum*²⁷, the Court interpreted the following provision of a statute:

Commitment

40.1 The Government of Canada is committed to taking appropriate measures to promote fairness, openness and transparency in the bidding process for contracts with Her Majesty for the performance of work, the supply of goods or the rendering of services.²⁸

The Court made the following observations about this provision:

[255] Although the 2006 amendments to the *FAA* introduced references to bidding on government contracts, those references were not substantive in nature. Section 40.1 is a statement of intention and commitment. It does not create any obligations on the part of public servants involved in the collection, management, or disbursement of public money.

²⁶ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th edition, para. 14.04.

²⁷ 2018 ONSC 2981.

²⁸ *Id.*, para. 251.

[Emphasis added.]

In *West Nipissing Police Services Board v. Municipality of West Nipissing*²⁹, the Court made the following comments about a municipal by-law:

[58] The Board also relies on By-law 2002/33 to submit that there was a legitimate expectation that the proceedings would be fully bilingual, even though that had not been done in the prior consultations. [...]

[59] The Municipality had in place By-law 2002/33, which set out aspirational goals and objectives of the Municipality regarding bilingualism, during the 2016/2017 process. That by-law had no mandatory provisions and in turn did not require that all Municipal written material, or activities, be in both official languages. Although it expresses a positive objective, it falls short of being a clear, unambiguous and unqualified representation giving rise to more procedural rights in the consultation process than those that were provided in this case.

[Emphasis added.]

In sum, mission statements or statements of principles or aspirational goals have been consistently interpreted as not giving rise to binding obligations.

The proposed amendment to s. 1.3 of the SSMU Constitution characterizes the preamble as serving “solely as a mission statement” and explicitly states that it “shall not be interpreted as imposing specific obligations on the Society, nor shall it be used as a basis for legal, contractual, or procedural claims”.

Such language should dissipate any ambiguity as to the juridical nature of the preamble. It could certainly help to discourage attempts to use the preamble as a basis for actions in courts against SSMU and provide explicit guidance to the courts in case such an attempt is nevertheless made. Of course, there is no absolute magic wand against misguided claims, for instance, but SSMU would be better situated to discourage good-faith actors and to respond to bad-faith ones.

Finally, we wish to note that we find no obstacle in the MoA that would bar the proposed amendment to the SSMU Constitution.

Obviously, SSMU is an autonomous entity that can, as any part-III non-profit corporation³⁰ – or legal person – can, amend its by-laws and regulations,

²⁹ 2018 ONSC 6454.

³⁰ *Companies Act*, CLQR, c. C-38, s. 91, para. 3.

including its Constitution. Amendment of the Constitution is explicitly provided for under s. 20 of the Constitution.

We leave aside the question of whether it would be legal for a corporation to submit its power to amend its own by-laws to the will of another entity, as the question does not even arise here.

Section 11.1 of the MoA sets out the following:

The Association represents, warrants and covenants that:

11.1 the charter documents, constitution and by-laws of the Association consist entirely of the documents remitted to the University concurrently with the execution of the present Agreement and which appear as Appendix C. The Constitution and By-laws of the Corporation are provided for reference purposes. The Parties agree that no clause in the Constitution or By-laws shall modify or supersede this Agreement.

We also reproduce excerpts from section 11.8:

11.8 The Association shall provide the Deputy Provost (Student Life and Learning) by December 1 each year with a copy of:

[...]

v. **any changes to the documents** remitted to the University concurrently with the execution of the present Agreement at least once per semester.

[Bold characters in the original.]

Section 11.1 does not impede in any way SSMU's capacity to modify its Constitution and by-laws. In fact, paragraph v. of s. 11.8 clearly indicates the contrary, as it expressly contemplates changes to the documents mentioned in s. 11.1 during the life of the MoA.

The only undertaking by SSMU with respect to its Constitution and by-laws is what appears in the last sentence of section 11.1: SSMU agrees "that no clause in the Constitution or By-laws shall modify or supersede" the MoA. There is obviously no provision in the MoA establishing any requirement with respect to the nature or interpretation to be given to the preamble of the SSMU Constitution.

The proposed amendment to s. 1.3 of the Constitution does not "modify or supersede" in any way the MoA.

For these reasons, we find that there is no obstacle in the MoA to the adoption of the proposed amendment.

We add in closing that the adoption of the proposed amendment could possibly have an impact on the negotiations for the renewal of the MoA or other agreements with the University. However, as this is not a legal consideration, but rather a political one, we leave it to your assessment.

We remain available to answer any further questions you may have on these issues.

Yours very truly,

MELANÇON MARCEAU GRENIER COHEN s.e.n.c.



Guillaume Grenier