SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-17-127703-232

DATE : May 22, 2024

PRESIDED BY THE HONOURABLE SHAUN E. FINN, J.S.C.

X
Plaintiff
v.

STUDENTS' SOCIETY OF MCGILL UNIVERSITY
Defendant

and

MCGILL UNIVERSITY
Impleaded Party

JUDGMENT

TABLE OF CONTENTS

INTRODUCTION

[1] The Plaintiff, a McGill University student, seeks a confidentiality order and an interlocutory injunction against the Students' Society of McGill University (the "**SSMU**"). Among other things, the Plaintiff alleges the Policy Against Genocide in Palestine (the "**Policy**") – already submitted to a student referendum vote – is "a gross violation of the Defendant's constitution, Equity Policy, and Antisemitism Policy."[1] The purpose of the interlocutory injunction is to prevent the SSMU from ratifying and implementing the Policy until a judgment on the permanent injunction has been rendered. The SSMU contests

[1] Injunction Application, para. 18.

both the Plaintiff's application for confidentiality and the interlocutory injunction. McGill University ("**McGill**"), impleaded in this proceeding, supports the application for confidentiality but takes no position on the interlocutory injunction.[2]

ISSUES

[2] This case gives rise to two key issues:

1. Should the Plaintiff be allowed to litigate anonymously?
2. Should an interlocutory injunction be ordered?

[3] For the following reasons, the Court concludes that:

1. The Plaintiff should be allowed to litigate anonymously; and
2. An interlocutory injunction should be ordered as the Plaintiff has established an appearance of right, serious or irreparable harm, and a balance of probabilities that favours her position.

ANALYSIS

1. THE PLAINITIFF SHOULD BE ALLOWED TO LITIGATE ANONYMOUSLY

1.1 Facts

[4] Dates for the 2023 SSMU fall referendum were set on August 17, 2023.[3]

[5] The nomination period for proposed referendum questions ran from October 9, 2023 to October 31, 2023.[4] Among the student-initiated questions submitted to voters was the following: (Question 9) "Do you agree to the SSMU's adoption of the Policy Against Genocide in Palestine?"[5]

[6] Before the referendum, "Yes" and "No" campaigns were organized by proponents of each side. The Plaintiff, identified as "X" in the proceedings, was the chair of the "No" campaign.[6]

[7] The campaign and polling periods ran from November 14, 2023 to November 20, 2023.[7] Of the 31.5% of SSMU members who voted in the referendum, 78.7% voted in

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[2] Plan of Argument of the Mise En Cause, McGill University, para. 2.
[3] Affidavit of Alexandre Ashkir dated January 18, 2024, par. 26.
[4] Affidavit of Alexandre Ashkir dated January 18, 2024, par. 27.
[5] Affidavit of Alexandre Ashkir dated January 18, 2024, par. 30.
[6] Affidavit of Alexandre Ashkir dated January 18, 2024, par. 34.
[7] Affidavit of Alexandre Ashkir dated January 18, 2024, par. 37.

favour of adopting of the Policy and 21.3% voted against. In other words, roughly 25% of SSMU members voted "Yes."

[8] On November 17, 2023, the Plaintiff brought a Modified Application for Interlocutory and Provisional Injunction (the "**Injunction Application**"). The relevant conclusion of the Injunction Application, as amended orally, reads as follows: "**ISSUE** an interlocutory injunction ordering the defendant Student Society of McGill University, its officers, directors, agents, and employees […] to refrain from […] implementing the Policy […] until the trial on the merits."

[9] The Plaintiff also filed an Application Originating a Judicial Proceeding, later amended, seeking the issuance of a permanent injunction, as well as $100,000 in moral damages and $25,000 in punitive damages from the SSMU.

[10] On November 21, 2023, the parties executed an agreement entitled *Consentement à l'émission d'une ordonnance de sauvegarde* (the "**Consent Agreement**"). This Consent Agreement recognizes that the casting and counting of votes has already taken place and that the interlocutory portion of the Injunction Application thus only relates to the ratification and implementation of the Policy. The Consent Agreement also provides that the Plaintiff will serve a confidentiality application and that the Policy will not be ratified or implemented until the interlocutory injunction has been heard.

[11] That same day, the Court homologated the Consent Agreement, ordered the parties to comply with its terms, and set a date for the hearing on the interlocutory injunction.

[12] On November 28, 2023, the Plaintiff filed an Application for Confidentiality.

[13] A hearing on the Application for Confidentiality and Injunction Application took place on March 25, 2024.

[14] On March 28, 2024, the Court rendered a judgment in which it found that the safeguard order issued on November 21, 2023 would remain in effect until the interlocutory portion of the Injunction Application was decided.

1.2 Position of the Parties

[15] The Plaintiff submits a climate of fear exists on the McGill campus. More specifically, as chair of the "No" campaign, both she and other members of the campaign were the targets of online intimidation. The Plaintiff's fears involve personal safety and integrity rather than reputational harm. As the "No" campaign was virtual and the Plaintiff attempted to maintain her anonymity, there was never a renunciation of confidentiality on her part. Newspaper articles further show this climate of fear is situated in a broader context of intolerance and violence towards Montreal's Jewish community. The Plaintiff

submits failure to grant the Application for Confidentiality will have a chilling effect on similarly situated litigants who face real and present danger.

[16] McGill submits the Application for Confidentiality meets the three-part test for granting such an application. Although this test establishes a high bar of demonstration, the Plaintiff's fears are serious and substantiated. Furthermore, the proposed order is the only way of protecting the Plaintiff in the circumstances and disclosing the Plaintiff's name would not provide any meaningful benefit to the SSMU or the public at large.

[17] The SSMU submits the Confidentiality Application contravenes the *Canadian Charter of Rights and Freedoms* (the "***Charter***").[8] To obtain a confidentiality order of the kind sought, an applicant must meet a burden of proof and cannot base itself on hearsay or assertions. For this reason, the newspaper articles cited by the Plaintiff are inadmissible. The sworn statements contained in the affidavit of Fabrice Labeau, Deputy Provost (Student of Life and Learning) of McGill, should also be dismissed as they constitute mere speculation.

[18] According to the SSMU, the exhibits filed in support of the Application for Confidentiality do not establish a serious threat to the Plaintiff's security. The referendum campaign took place in a fraught, highly politicized context. The Plaintiff's subjective fears, however sincere, should not be allowed to trump the open-court principle. In addition, the Plaintiff renounced anonymity by filing the Injunction Application and producing an exhibit that mentions the Plaintiff's name.

[19] Subsidiarily, the SSMU submits the proposed confidentiality order is too broad as it would prevent authorized and instructing members of the SSMU and their counsel from knowing the Plaintiff's identity.

1.3 Discussion

[20] The open-court principle, whereby legal proceedings take place in public, is constitutionally enshrined. According to Section 2(b) of the *Charter*, everyone has the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[9] Similarly, Section 3 of the *Charter of Human Rights and Freedoms* provides that every person is the possessor of fundamental freedoms, including freedom of expression.[10] As stated by the Supreme Court of Canada in *Sherman Estate* v. *Donovan*, the open-court principle is protected by freedom of expression and "as such, it represents a central feature of a liberal democracy."[11] Simply put, it is fundamental to a liberal democracy – and indeed to the rule of law – that citizens and members of the press witness the administration of justice.[12] The independence and

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[8] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[9] *Ibid.*
[10] CQLR c C-12.
[11] *Sherman Estate* v. *Donovan*, [2021] 2 SCR 75, para. 1 [*Sherman*].
[12] *Ibid*, para. 30.

impartiality of courts, and public confidence in the justice system, require judicial and procedural transparency.[13]

[21] In Quebec, the open-court principle is consecrated by article 11 of the *Code of Civil Procedure* ("**C.C.P.**"):

> **11.** Civil justice administered by the courts is public. Anyone may attend court hearings wherever they are held, and have access to court records and entries in the registers of the courts.
>
> An exception to this principle applies if the law provides for in camera proceedings or restricts access to the court records or to certain documents filed in a court record.
>
> Exceptions to the principle of open proceedings set out in this chapter apply despite section 23 of the Charter of human rights and freedoms (chapter C-12).
>
> [Underlining added]

[22] As article 11 C.C.P. specifies, however, the open-court principle is not absolute. In addition to the exceptions mentioned by article 11 C.C.P., article 12 C.C.P. provides that courts can take exceptional measures to safeguard the dignity of persons, including by ordering that their anonymity be protected:

> **12.** The court may make an exception to the principle of open proceedings if, in its opinion, public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests, requires that the hearing be held in camera, that access to a document or the disclosure or circulation of information or documents specified by the court be prohibited or restricted, or that the anonymity of the persons involved be protected.
>
> [Underlining added]

[23] Article 12 C.C.P. codifies the Supreme Court's reasoning in *Sierra Club of Canada* v. *Canada (Minister of Finance)*,[14] where it was determined that a confidentiality order should only be granted when:[15]

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

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[13] *Ibid*, para. 39.

[14] *Commentaires de la ministre de la Justice – Code de procédure civile – Chapitre C-25.01* (Montreal : Société québécoise d'information juridique/Wilson & Lafleur Ltée., 2015), p. 30, 31; *Sherman*, *supra* note 11, para. 66.

[15] *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 2 SCR 522, par. 53.

> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> [Underlining added]

[24] The test for granting confidentiality orders has since been revisited by the Supreme Court of Canada in *Sherman*. While recognizing the "strong presumption in favour of open courts,"[16] the Supreme Court acknowledges that "exceptional circumstances do arise where competing interests justify a restriction on the open-court principle."[17] Accordingly, to succeed in obtaining an order that limits the open-court principle, the applicant must establish that:[18]

> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[25] These three "prerequisites" are cumulative.[19]

1.3.1 Court Openness Poses a Serious Threat to an Important Public Interest

1.3.1.1 Physical Safety is an Important Public Interest

[26] To obtain a confidentiality order, it is necessary for the applicant to cross the initial threshold of the *Sherman* test – namely, establishing that court openness poses a serious threat to an important public interest. An important public interest generally requires more than subjective disadvantage, embarrassment, or distress.[20] Rather, the applicant must assert that his or her integrity or dignity is at risk. For example, a person's physical safety has been found to constitute an important public interest worthy of protection. As the Supreme Court of Canada observes, "[t]he administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects."[21]

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[16] *Sherman*, *supra* note 11, par. 2.
[17] *Ibid*, para. 3.
[18] *Ibid*, para. 38.
[19] *Ibid*, para. 39.
[20] *Ibid*, para. 63.
[21] *Ibid*, para. 72.

1.3.1.2 The Plaintiff Must Meet a Burden of Demonstration

[27] But as the Supreme Court of Canada makes clear, it is not enough to plead the applicant's physical safety – or some other important public interest – is at serious risk. While not held to the civil standard of proof, the applicant must nevertheless meet a burden of demonstration:[22]

> [97] At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation.
>
> [98] As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.
>
> [Underlining added; references omitted]

[28] As a result, in their assessment of an application for confidentiality, courts:

- can make logical inferences based on objective circumstantial facts (as opposed to impermissible speculation); and
- where the feared harm is particularly serious, need not determine that this harm is likely to materialize, provided its materialization is not negligeable, fanciful, or speculative.

[29] In *J.C.* c. *Douville*, the Court of Appeal noted that the demonstration made by the applicant must be "convincing."[23] He or she must:[24]

> [39] […] démontrer l'existence d'un « risque sérieux d'atteinte à la dignité de la personne », soit un risque de « préjudice objectivement discernable » en termes d'intérêt public à la protection de la dignité humaine, lequel pouvait être établi par de simples inférences logiques plutôt qu'une preuve directe.

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[22] *Ibid*, para. 76, 79, 97, and 98.
[23] *J.C.* c. *Douville*, 2022 QCCA 958, para. 37 [*Douville*].
[24] *Ibid*, para. 39.

1.3.1.3 The Plaintiff has Met Her Burden of Demonstration

[30] The foregoing framework will guide the Court's analysis of the Application for Confidentiality, whose allegations include the following:

> 9. As head of the No Campaign, Plaintiff has been advised by McGill students that McGill students speaking out against voting in favour of the Policy Against Genocide in Palestine were subject to intimidation and someone even being spat at.
>
> 10. Plaintiff wishes to remain anonymous for fear of her safety due to threats she received on social media as head of the No Campaign.
>
> 11. [Plaintiff] made an Instagram account to promote the "No Campaign". Even though her name doesn't appear on the said account, it is very easy to trace the person behind an account considering the following.
>
> 12. Instagram users have already tried to get Plaintiff to disclose her identity for example, one user wrote: "Why [hide] behind anonymity, we can see who owns this account," **exhibit P-2**.
>
> 13. Plaintiff has been the subject of threats on social media on the said account, for example, an Instagram user wrote, "Really enjoyed look at the comprehensive list of followers! It's almost like I can find a list of pro genociders at McGill – really appreciate you bringing this data..." Another user in response wrote, "facts. Made it much easier for us to find genocide supporters."
>
> 14. It is now public information that the student leading the injunction is the student who led the "No Campaign". Disclosing her identity will materialize the public's doubts about her identity.
>
> 15 Moreover, since initiating the No Campaign, Plaintiff is afraid to go on McGill campus. She only goes to campus when it is mandatory for her classes. Even when she arrives early before class, Plaintiff feels unsafe to go on McGill's campus and would rather avoid being seen on campus due to attempts of people trying to disclose her identity.
>
> 16. Plaintiff states that anonymity is crucial to protect her from potential retaliation or harm. The stress and fear associated with being publicly identified in such contentious situation can be significant. Anonymity can help in safeguarding her mental and emotional health. Plaintiff says she is "being the face of something a lot of people disagree with".
>
> [Underlining added]

[31] The Application for Confidentiality further alleges:

> 19. Plaintiff is entitled to the protection of her integrity, safety and privacy. In the circumstances where this lawsuit significantly raises Plaintiff's risk of being physically assaulted, Plaintiff's right to safety and security must take precedence over that of the publicizing the judicial debate and proceedings in the case at bar.
>
> 20. The increased risk on Plaintiff's person is due to the nature of the claims made by Plaintiff, the threats she received even before the start of this lawsuit, and the increased violence on the Jewish community since October 7th, 2023.
>
> 21. As head of the No Campaign, Plaintiff's claim for damages will certainly shed light on her having a direct and important impact on her physical and psychological dignity. Having Plaintiff's name published would cause her more than "Shame, discomfort, embarrassment or fear of inconvenience". The salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public[.]
>
> 22. The publication of Plaintiff's name will also have the effect of increasing the fear she experiences as being a student who believes in [...] Israel's right to exist, insofar as she will have to defend herself not only to the McGill community, but above all to the public.
>
> 23. Therefore, the proposed ban is necessary to prevent a serious risk to the proper administration of justice, because reasonable alternative measures will not prevent the risk and effective alternative measure. [*sic*]
>
> [Underlining added]

[32] As these allegations illustrate, the Plaintiff is primarily concerned about her physical safety in connection with the referendum and its aftermath. She claims to have been threatened online, both directly and indirectly. She also alleges privacy concerns and emotional and psychological harm.

[33] In support of these allegations, the Plaintiff has sworn an affidavit[25] and communicated various exhibits. Among these exhibits are a series of social media messages reproduced below:

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[25] Although the Affidavit sworn in support of the Application for Confidentiality is dated October 28, 2023 as opposed to November 28, 2023 (the date of the application), counsel for the Plaintiff informed the Court that this was due to a clerical error. A new affidavit was sworn by the Plaintiff on the morning of the hearing to address this error.

- **Exhibit P-2**

  peepeepoopooman32789: [@X] why hide behind anonymity, we can see who owns this account

- **Exhibit P-3**

  cbcryptoclub: Really enjoyed look at the comprehensive list of followers! It's almost like I can find a list of pro genociders at McGill – really appreciate you bringing this data…

  ***

  clown1129872: Made it much easier for us to find genocide supporters.

- **Exhibit P-11**

  peepeepoopooman32789: No way your back up, thought I scared you into privating

  ***

  peepeepoopooman32789: Why don't you call out [X] for not attaching her name to this account and hiding behind anonymity?

  ***

  peepeepoopooman32789: So did you go private because I called you out or was it just the tipping point

  [Underlining added]

- **Exhibit P-12**

  peepeepoopooman32789: I straight be p*ssing and sh*tting on some evil gang sh*t

  ***

  peepeepoopooman32789: Straight up evilmaxxing. In my evil guy mode era. My f*cked up state of mind. Straight devious and malicious kinda guy. Just a little fellow doing evil gang stuff. Just a little goblin kind of guy. I'm just a funky evil guy. I just straight silly with my evil gang. I'm on god so silly rn. Evil gang [emoji]

  [Underlining added; expletives sanitized]

[34] Before proceeding further, the Court considers these social media messages sufficient to ground the serious safety risk raised by the Plaintiff. They are thinly veiled threats directed at the Plaintiff and members of the "No" campaign.

[35] To be characterized as a "pro genocider" and a "genocide supporter" is not simply par for the course when it comes to charged political language. Anyone would feel threatened by such demonization. To be so condemned is to have a target placed on one's back. Furthermore, having one's anonymity attacked by (an equally anonymous) person claiming to belong to an "evil gang" and to be a "devious and malicious kinda guy" would also give rise to substantiated fears on the part of anyone. These messages are designed to harass, intimidate, and silence. It is not fanciful or speculative to infer that their authors, or likeminded people, would act to further threaten or physically harm the Plaintiff were her name to be widely circulated. In the Court's view, the administration of justice would suffer were it to dismiss the Application for Confidentiality despite serious threats to the Plaintiff's physical safety.

[36] We are well beyond the realm of subjective discomfort or hypothetical fear.[26]

[37] In addition to these social media messages, the Plaintiff has also communicated as exhibits different newspaper articles. The SSMU objects to their admissibility on the grounds they consist of hearsay evidence. While it is true quotations, opinion, and analysis contained in newspaper articles is hearsay and can only be used sparingly (typically to cross-examine a witness),[27] newspaper articles are nevertheless admissible – at this preliminary procedural stage[28] – to establish that on date (a) journalist (b) of media outlet (c) wrote story (d) under the headline (e). Given the Plaintiff's allegations, this broader context is relevant to the issue of confidentiality.[29]

[38] Therefore, without admitting the veracity of the contents of these exhibits, the Court notes that:

- On November 7, 2023, René Bruemmer of *The Gazette* published a story titled "Quebec leaders want hate speech investigation into Adil Charkaoui;"[30]

- On November 8, 2023, Rachel Lau of CTVNewsMontreal.ca published a story titled "Jewish community 'outraged' after suspected arsons at Montreal-area synagogue, institution;"[31]

- On November 9, 2023, Andy Riga of *The Gazette* published a story titled "Jewish community pleads for help after shots fired at two Montreal schools;"[32]

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[26] *A.B.* c. *Robillard*, 2022 QCCA 959, para. 29-32.
[27] *Ndiaye c. Adiélou Investissement International Canada inc.*, 2019 QCCS 2726, para. 126.
[28] *Douville*, *supra* note 23, para. 48, 49 : "[I]l convient d'éviter qu'à ce stade des procédures, l'audience sur une demande d'anonymat devienne un procès avant le procès [...]. À cette étape des procédures, la demande d'anonymat de J.C. ne pouvait être analysée qu'à la lumière d'une preuve partielle et forcément incomplète."
[29] *Droit de la famille — 22937*, 2022 QCCS 2113, para. 123.
[30] Application for Confidentiality, Exhibit P-9.
[31] Application for Confidentiality, Exhibit P-7.
[32] Application for Confidentiality, Exhibit P-8.

- On November 13, 2023, Aaron Derfel of *The Gazette* published a story titled "Jewish-owned businesses in Montreal targeted with antisemitic profanity;"[33] and

- On November 16, 2023, Joe Lofaro of CTV NewsMontreal.ca published a story titled "Concordia University bans two people from campus after investigating into violent clashes"[34]

[39] On its own, the publication of these newspaper articles is insufficient to substantiate the Plaintiff's physical safety fears. Nevertheless, it does show a broader climate of disquiet that corroborates her allegations and lends some support to her fears.

[40] The Plaintiff also refers to statements made by and on behalf of McGill. The best evidence for McGill's position is the affidavit of Mr. Labeau, who states:[35]

> 18. […] McGill considers that the Policy would be highly divisive of the student population during a period that is already extremely difficult for members of McGill's Jewish and Muslim students alike; it would risk creating an unsafe environment for all students; […]
>
> 21. In this letter [of November 8, 2023], I advised the SSMU that McGill considers that adoption of the Policy would result in a violation of the SSMU's constitution. I further informed the SSMU of McGill's concern that adoption of the Policy would exacerbate tensions on campus as well as the feelings of alienation that some Jewish, Muslim, and Arab students are already experiencing, and that it would "invariably compel some students to silence their own identities and opinion." […]
>
> [Underlining added]

[41] On their own, these sworn statements are likewise insufficient to substantiate the Plaintiff's physical safety fears. The Court accepts, in part, the SSMU's submission that Mr. Labeau's concerns are somewhat speculative, although his speculations are not disconnected from his informed understanding of the student body as Deputy Provost (Student of Life and Learning) of McGill. Indeed, according to Mr. Labeau's affidavit, his "responsibilities include the oversight of most non-academic University Student Services, and the management of relations with accredited student associations on our campuses."[36] Mr. Labeau's sworn statements show McGill's Jewish, Muslim, and Arab students were already struggling and experiencing alienation in November 2023. This further corroborates the Plaintiff's allegations and lends some support to her fears.

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[33] Application for Confidentiality, Exhibit P-10.
[34] Application for Confidentiality, Exhibit P-6.
[35] Affidavit of Fabrice Labeau dated November 20, 2023.
[36] Affidavit of Fabrice Labeau dated November 20, 2023, para. 2.

[42] As for the antisemitic posts allegedly made by Solidarity for Palestinian Human Rights (or SPHR),[37] since no evidence was adduced and few representations were made about this group, the Court will not take the posts into account.

[43] In short, the Court is satisfied the Plaintiff has established that court openness poses a serious threat to an important public interest – her physical safety. Unlike in *Sherman*, where the fears of the applicants were hypothetical (i.e., the prospect of violence being visited upon trustees by the very criminal(s) who murdered the deceased couple, *assuming the deceased couple were, in fact, murdered*), those of the Plaintiff stem mainly from social media statements directed towards her and members of the "No" campaign, of which she was the chair. These statements are thinly veiled threats designed to harass, intimidate, and silence the Plaintiff. Compelling the Plaintiff to reveal her name could result in her being further threatened or physically harmed. Based on the evidence presented to the Court, the probability that this harm will materialize is more than negligible, fanciful, or speculative.

[44] Given its conclusion with respect to the Plaintiff's physical safety, it is unnecessary for the Court to determine whether she has met her burden of demonstration with respect to privacy or psychological and emotional harm. At the very least, the Court can reasonably infer that receiving threats of the kind quoted above would produce anxiety and distress in the average person.

1.3.1.4 The Plaintiff Did Not Renounce Her Anonymity

[45] The Court does not accept that the Plaintiff explicitly or tacitly renounced anonymity by bringing the Injunction Application or communicating an exhibit that reveals her name. The record shows the Plaintiff chaired the "No" campaign on a virtual and anonymous basis. The record also shows that – at least as of the Consent Agreement – the Plaintiff intended to assert and maintain her anonymity throughout this proceeding. The fact her name was disclosed in an exhibit communicated *in support of the Application for Confidentiality* can hardly be cited as evidence of a renunciation of the very confidentiality the Plaintiff seeks to have protected. To avoid further compromising the Plaintiff's identity, the Court will order that Exhibit P-2 be filed under seal.

[46] In any event, even in instances where an applicant's name has already been made public, he or she can still apply for a confidentiality order. In *Sherman*, the Supreme Court of Canada stated that "just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk [...]."[38] Similarly, in *Douville* the Court of Appeal concluded that "bien que certains articles de journaux identifient la partie appelante, l'aggravation du préjudice serait inévitable si l'ordonnance de banalisation n'était pas prononcée."[39] Even more to

[37] Application for Confidentiality, Exhibits P-4, P-5, P-13, P-14, P-15, P-16, and P-17.
[38] *Sherman*, *supra* note 11, para. 81.
[39] *Douville*, *supra* note 23, para. 55

the point, "la publication de quelques articles de journaux ne peut constituer une fin de non-recevoir à l'ordonnance recherchée."[40]

[47] In this case, there is no evidence the Applicant intended for her identity to be made known. That some third parties were nevertheless able to obtain it or that it is known to some members of the SSMU and/or its counsel cannot be invoked to dismiss the Application for Confidentiality. As noted by the Supreme Court of Canada, "[i]f the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal."[41] The same can be said here.

[48] The initial threshold of the *Sherman* test has thus been met.

1.3.2 The Order Sought is Necessary to Prevent this Serious Risk to the Identified Interest Because Reasonably Alternative Measures Will Not Prevent this Risk

[49] As the Supreme Court of Canada observes in *Sherman*, "[t]he condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as reasonably possible to prevent the serious risk."[42]

[50] Here, the Court concludes preserving the Plaintiff's anonymity is preferable to the reasonable alternatives: namely, sealing orders or private, *in camera* proceedings. According to *Douville*, these alternatives "sont plus attentatoires au principe de la publicité des droits que l'anonymat, comme le souligne la Cour suprême dans [l'arrêt *A.B.* c. *Bragg Communications Inc.*]."[43] In effect, the hearing on the applications in issue prove it is possible to have an open, informed, and vigorous legal debate without the need for the Plaintiff to be identified by name.

[51] That said, the Court agrees with the SSMU that the conclusion proposed by the Application for Confidentiality is too broad: "**ORDER** the confidentiality of proceedings, documents and testimony, with regard to [...] any element that can be used to identify Plaintiff."[44] As crafted, this conclusion would prevent authorized and instructing members of the SSMU and their counsel from knowing the Plaintiff's identity. Accordingly, should every aspect of the *Sherman* test be met by the Plaintiff, the Court will render the same confidentiality orders as those issued by the Court of Appeal in *Douville*:[45]

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[40] *Ibid.*
[41] *Sherman*, *supra* note 11, para. 80.
[42] *Ibid*, para. 105.
[43] *Douville*, *supra* note 23, para. 59.
[44] Application for Confidentiality, p. 6.
[45] *Douville*, *supra* note 23, para. 4, 5.

> **ORDONNE** la non-publication et la non-diffusion de tout renseignement permettant d'identifier J.C.;
>
> **ORDONNE** la banalisation de son nom advenant la publication ou la diffusion de toute décision dans ce dossier;

[52] The Court will also declare that the Plaintiff's full name be communicated to authorized and instructing members of the SSMU through their counsel of record, subject to the foregoing non-publication and non-dissemination orders. This approach is more consistent with the open-court principle than that proposed by the Plaintiff.

1.3.3 As a Matter of Proportionality, the Benefits of the Order Outweigh its Negative Effects

[53] The reasoning with respect to the second step of the *Sherman* test applies to the third step as well. The Court concludes dismissing the Application for Confidentiality would produce more negative effects than granting it. The remarks of the Court of Appeal in *Douville* are apposite:[46]

> [65] Quant aux intervenants – soit les médias et le public en général – puisque l'atteinte à la publicité est minime, ils pourront tout de même assister aux audiences, consulter les pièces, entendre les témoignages et en rapporter le contenu. Conséquemment, les avantages de l'ordonnance l'emportent nettement sur ses effets négatifs.

[54] While the open-court principle must be protected, so too must important public interests that involve the dignity and physical safety of those who compose our liberal democracy. Where, as here, proportionate measures can be taken to reconcile fundamental values, courts should do so. Absolutism is not synonymous with civil justice.

2. THE INJUNCTION APPLICATION SHOULD BE GRANTED

2.1 Facts

[55] The SSMU "is a non-share capital corporation constituted and continued under Part III of the Quebec *Companies Act*, CQLR c. C-38. It is governed by its constitution. The members of the SSMU are students enrolled in undergraduate programmes at McGill."[47]

[56] The Preamble to The Constitution of the Students' Society of McGill University (the "**Constitution**") enunciates principles focused on the themes of service, representation, and leadership.[48] Section 14 of the Constitution enunciates rules for referenda:

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[46] *Ibid*, para. 65.
[47] Affidavit of Fabrice Labeau dated November 20, 2023, para. 4.
[48] Injunction Application, Exhibit P-1.

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.

[57] On May 29, 2019, McGill and the SSMU executed a Memorandum of Agreement ("**MoA**") "respecting various matters including the assessment and collection of fees from students and the operation of University accounts for such fees [...]."[49] According to section 12.1 of the MoA, the violation by the SSMU of its Constitution is considered an "event of default:"

12.1 Each of the following shall be considered an event of default: [...]

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 [...];

[58] The Policy submitted to SSMU members in the context of the 2023 referendum reads as follows:[50]

Policy Against Genocide in Palestine

Why is this policy so urgent?

- Since October 7th 2023, Israeli forces have waged a relentless, indiscriminate, genocidal bombing campaign in the Gaza Strip, murdering over 7,500 Palestinians, including over 3,000 children and 47 entire extended families at the time of writing. Backed by the Canadian, U.S. and

[49] Affidavit of Fabrice Labeau dated November 20, 2023, Exhibit FL-2.
[50] Injunction Application, Exhibit P-4.

other Western governments, Israeli and government officials have repeatedly declared their intent to destroy the population of Gaza.

- Since October 7th, food, water, medicine, fuel, electricity and any other essentials of life have been completely cut off from the Gaza Strip by Israeli forces. This constitutes a murderous escalation of the pre-existing, illegal, suffocating siege which has subjected Gaza's population to inhumane living conditions over the past 17 years.

- As of October 28th, healthcare facilities throughout Gaza have completely collapsed as a result of the bombing and the siege. Internet and phone communications have been completely blocked. The people of Gaza are facing the threat of imminent annihilation, under the shadow of a media blackout.

- Instead of condemning this escalading genocide, the McGill administration has publicly threatened students who voice their solidarity with the Palestinian people. The administration's persistent refusal to even acknowledge the mass murder of Palestinians has demonstrated a shocking, blatant, racist disregard for Palestinian and Arab lives.

- McGill University continues to invest, or engage in close collaboration with organizations, institutions, and donors complicit in the ongoing democide against Palestinians in Gaza, in addition to settler-colonial apartheid and ethnic cleansing throughout occupied Palestine.

- Following concerted student activism, McGill University cut its ties with institutions and corporations complicit in South African apartheid in the 1980s.

- The SSMU Constitution states that "the SSMU commits to demonstrating leadership in matters of human rights [and] social justice."

- In 2021, the SSMU Judicial Board reaffirmed the SSMU's right to support Palestinian liberation, to criticize oppressive governments, and to engage in boycott or divestment campaigns.

- During the SSMU's Winter Referendum, 71% of student voters endorsed the Palestine Solidarity Policy, indicating overwhelming support for our student union's urgent obligation to support Palestinian human rights.

[Underlining added]

[59] Under the heading "Call to Action," the Policy formulates the following resolution:[51]

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[51] Injunction Application, Exhibit P-4.

Call to Action

Be it resolved, that the students of McGill University and their student union:

1. Demand that our university's administration immediately and publicly condemn the genocidal bombing campaigns and siege against the people of Gaza, retract its abhorrent threats against Palestinian students and student groups, and provide concrete support to Palestinian and Arab students.

2. Demand that our University immediately cut ties with any corporations, institutions or individuals complicit in genocide, settler-colonialism, apartheid, or ethnic cleansing against Palestinians;

3. Demand that our University immediately divest from all corporations and institutions complicit in genocide, settler-colonialism, apartheid, or ethnic cleansing against Palestinians;

4. Demand that our student union, the SSMU, make an immediate public statement condemning the ongoing genocide against the Palestinian people in Gaza, and reaffirming its solidarity with Palestinian and Arab students;

5. Demand that our student union commit to strong, consistent position in solidarity with Palestinian students, and with the Palestinian struggle against genocide and settler-colonial apartheid.

This Policy shall remain in force for a period of 5 years until May 1st, 2028.

[Underlining added]

[60] Prior to the referendum, on November 8, 2023, Mr. Labeau addressed a letter to the President of the SSMU in which he warned that the Policy – if passed and adopted – would breach the Constitution, and give rise to an event of default within the meaning of the MoA:[52]

> I am writing as I have been made aware of a question that will be asked in the SSMU Fall 2023 referendum aimed at enacting a *Policy Against genocide in Palestine*.
>
> All students at McGill and SSMU itself enjoy the right to free expression and freedom of opinion.
>
> The proposed policy, however, runs counter the SSMU Constitution in that it can in no way be considered to "facilitate communication and interaction between all

[52] Affidavit of Fabrice Labeau dated November 20, 2023, Exhibit FL-4.

> students from all McGill communities" or to "act in the best interests of [SSMU's] Members as a whole", as that constitution requires.
>
> Should this referendum question pass and become a SSMU policy, the University will consider that SSMU is in breach of its own constitution, and hence also in default of the [MoA] between SSMU and McGill University, as per Section 12.1.2 of this MoA. [...]
>
> Under the guise of a political statement, this policy invokes antisemitic tropes to motivate its calls to action. What is equally disturbing is that, in the current context of the war in Israel and Gaza, adopting such a policy will undoubtedly lead to harm to the very student population it purports to defend. As discussed at length in the context of last year's Initiative against Islamophobia and Antisemitism, divisive debates around the Middle East conflict on our campus always lead to increases in both Antisemitic and Islamophobic events. [...]
>
> [...] I reiterate the importance of freedom of expression and opinion. That freedom should not be exercised in a way that will invariably compel some students to silence their own identities and opinion, which is the precise consequence that your proposed policy would have. [...]
>
> [Underlining added]

[61] Despite this letter (and an earlier letter sent by Mr. Labeau on March 22, 2022 in similar circumstances),[53] the SSMU proceeded to hold a referendum vote on the Policy and tally the results.

2.2 Position of the Parties

[62] The Plaintiff submits the criteria for the issuance of an interlocutory injunction are met. More specifically, the Injunction Application provides sufficient allegations of fact to make out a serious case that the Plaintiff, and McGill's Jewish students more broadly, would be harmed were the Policy to be ratified and implemented. This harm could not be compensated or remedied by any monetary award. Moreover, when weighing the balance of inconvenience, the Court should consider the public interest, which weighs in favour of the Plaintiff.

[63] The SSMU submits the criteria for the issuance of an interlocutory injunction are not met because:

- The Injunction Application is premature as the Policy has not yet been ratified or adopted by the SSMU's Board of Directors (the "**Board**").
- The Plaintiff has not established an appearance of right as student democracy and freedom of expression are fundamental values that are part and parcel of the

[53] Affidavit of Fabrice Labeau dated November 20, 2023, Exhibit FL-3.

university campus. It is inappropriate for the Court to interfere in what is an internal corporate matter. Moreover, the Policy is not antisemitic: it criticizes the Israeli government and military, as well as those governments, institutions, and donors who lend them support. It does not criticize Israelis or members of the Jewish community. As a result, the Policy is entirely consistent with the Constitution.

- By being prevented from ratifying and implementing a policy approved of by way of a lawful referendum, the SSMU and its members will suffer irreparable harm.

- The irreparable harm suffered by the SSMU outweighs the subjective discomfort and hypothetical fears of the Plaintiff.

2.3 Discussion

2.3.1 The Applicable Legal Framework

[64] According to article 511 C.C.P.:

> **511.** An interlocutory injunction may be granted if the applicant appears to have a right to it and it is judged necessary to prevent serious or irreparable prejudice to the applicant or to avoid creating a factual or legal situation that would render the judgment on the merits ineffective.
>
> The court may grant an interlocutory injunction subject to a suretyship being provided to cover the costs and any resulting prejudice.
>
> It may suspend or renew an interlocutory injunction for the time and subject to the conditions it determines.
>
> [Underlining added]

[65] As the Court of Appeal states in *Groupe CRH Canada inc.* c. *Beauregard*, to obtain an interlocutory injunction, the applicant must establish: (1) an appearance of right; (2) serious or irreparable harm if the order is not granted; and (3) a balance of probabilities that militates in favour of granting the order.[54]

[66] It is through the lens of these three cumulative criteria that the Injunction Application must be holistically analysed.[55]

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[54] *Groupe CRH Canada inc.* c. *Beauregard*, 2018 QCCA 1063 [*Beauregard*].
[55] *Favre* c. *Hôpital Notre-Dame*, 1984 CanLII 2824 (QC CA) [*Favre*].

2.3.2 The Injunction Application is Not Premature

[67] Before doing so, however, the Court must first determine whether the Injunction Application is premature, as the SSMU submits. If so, that would be reason enough to dismiss the interlocutory injunction.

[68] The SSMU's position is that the Plaintiff does not have a "sufficient interest" pursuant to article 85 C.C.P. As the Policy has not yet been ratified or implemented by the Board – or even submitted to the Board for consideration – the Plaintiff does not have an actual, existing legal interest enabling her to obtain an injunctive order. In support of this submission, the SSMU points to the affidavit of its President, Mr. Alexandre Ashkir, who states:[56]

> 42. In order for the Policy Against Genocide in Palestine to be adopted, it must be ratified by a simple majority of the SSMU Board of Directors;
>
> 43. To date, the Policy has not been submitted to the Board of Directors for ratification;

[69] While the SMMU's argument may appear attractive at first blush, it is important to bear in mind that the objective of the Injunction Application is to prevent the SSMU from ratifying and implementing the Policy to begin with, because, according to the Plaintiff, it grossly violates the SSMU's Constitution and policies. In this context, the crystallization of the Plaintiff's sufficient interest is not moored to the ratification and implementation of the Policy, *but rather to the referendum process and the Policy itself*. This is underscored by the Consent Agreement:

> **ATTENDU QUE** la Demanderesse prétend que le Référendum et la Politique seraient illégaux, qu'ils iraient à l'encontre de la constitution de la Défenderesse et constitueraient une politique haineuse, ce qui est vigoureusement contesté par la Défenderesse.

[70] In other words, the gravamen of the Injunction Application is the unconstitutionality of the Policy and not simply the harmful effects it would have on the Plaintiff – and on McGill's Jewish community, more broadly – if ratified and implemented.

[71] Furthermore, there is no basis for the suggestion that the Policy might not be submitted to the Board or that the Board might reject it.[57] If anything, the Consent Agreement indicates the Policy will indeed be submitted to the Board for ratification as a matter of course:

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[56] Affidavit of Alexandre Ashkir dated January 18, 2024.

[57] Unlike in *McLauchlan* c. *Association étudiante sectorielle des programmes et modules en science politique et droit de l'UQAM*, 2015 QCCS 684, para. 16, and *Association générale des étudiants de la Faculté des lettres et sciences humaines de l'Université de Sherbrooke* c. *Roy Grenier*, 2016 QCCA 86, para. 43 [*Grenier*].

> **ATTENDU QUE** les conclusions recherchées par la Demanderesse quant à la tenue du vote et le décompte des voix exprimées sont devenus théoriques;
>
> **ATTENDU QUE** la Demanderesse souhaite toutefois présenter sa demande en ce qui concerne ses conclusions visant à interdire à la Défenderesse de ratifier la Politique, par vote de son conseil d'administration; [...]
>
> **ATTENDU** que la Défenderesse, sans aucune admission et sous réserve de ses droits dont celui de contester la demande à l'effet de l'empêcher de ratifier la Politique à quelque stade ultérieur que ce soit des procédures, est prête à s'engager à ne pas ratifier les résultats du vote sur la Politique tant et aussi longtemps que la Cour n'aura pas entendu la demande en injonction interlocutoire de la Demanderesse [...];
>
> [Underlining added]

[72] It is notable the SSMU undertakes not to *ratify* the results of the vote on the Policy rather than undertaking that its Board will not *receive and consider* the Policy in deciding whether to proceed with its ratification.

[73] This distinguishes the present case from *Fried* c. *Students' Society of McGill University*, where the Board released a statement confirming it would not ratify a comparable referendum result that, it admitted, offended the Constitution, the Equity Policy, and the 2016 SSMU Judicial Board ruling.[58] No such statement has been made here, even though more than six months have passed since the referendum took place.

[74] The Court concludes the Injunction Application is neither premature nor moot.

2.3.3 There is an Appearance of Right

[75] As regards the first criterion for granting an interlocutory injunction, *Beauregard* states the applicant must establish a serious question to be tried based on a preliminary analysis of the merits of the litigation. It is sufficient that the proposed interlocutory injunction be neither frivolous nor vexatious:[59]

> [28] Premièrement, une étude préliminaire du fond du litige doit établir qu'il y a une question sérieuse à juger. Ce critère est généralement peu exigeant. Il suffit que la demande ne soit ni frivole ni vexatoire. Par conséquent, un long examen du bien-fondé de la demande n'est souvent ni nécessaire ni souhaitable, sauf circonstances exceptionnelles – comme lorsque l'injonction interlocutoire équivaut pratiquement à une disposition définitive du litige. L'article 511 C.p.c. prévoit en effet que l'injonction interlocutoire ne peut être accordée que si celui qui la demande « paraît y avoir droit ». [...] Il est désormais établi que le critère de la

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[58] *Fried* c. *Students' Society of McGill University*, 2024 QCCS 1381, para. 12.
[59] *Beauregard*, *supra* note 54, para. 28.

> « question sérieuse à juger » s'applique également dans les litiges à caractère privé.
>
> [Underlining added; references omitted]

[76] Although the threshold for establishing an appearance of right falls below that of the civil burden of proof, the Court is mindful that injunctions (including interlocutory injunctions) are exceptional remedies.[60] As noted by the Court of Appeal, an interlocuroty injunction "ne peut être prononcée en l'absence d'une atteinte actuelle ou imminente à un droit apparent, atteinte dont la survenance causerait un préjudice irréparable qu'on cherche donc à limiter ou prévenir."[61]

[77] The Court is also mindful that this case involves student democracy and freedom of expression. In *R.W.D.S.U., Local 558* v. *Pepsi-Cola Canada Beverages (West) Ltd.*, the Supreme Court of Canada observes that freedom of expression promotes core values that underpin a democratic society:

> [...] The Court [...] has repeatedly reaffirmed the importance of freedom of expression. It is the foundation of a democratic society. The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.
>
> [Underlining added]

[78] These comments, made with respect to a labour dispute, also apply to the academic sphere. In effect, places of higher learning exist to allow for the exploration, questioning, and confrontation of often controversial ideas. Education implies a liberation of the mind that is uncomfortable, even jarring, at times. The university campus is intended to be a marketplace of ideas and a forum for vigorous debate. Courts are therefore loath to interfere in the internal affairs of corporate bodies such as student associations.[62]

[79] The Court agrees with the SSMU that, in addressing the Injunction Application, it should consider and give weight to student democracy and freedom of expression.[63] The Court also agrees the Constitution[64] and the Internal Regulations of Elections and

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[60] *Grenier*, *supra* note 57, para. 51.
[61] *Ibid.*
[62] *Garcha* v. *Khalsa Diwan Society - New Westminster*, 2006 BCCA 140, para. 9.
[63] *L.M.* c. *CBC Radio-Canada*, 2011 QCCS 6275, para. 7.
[64] Section 14 of the Constitution.

Referenda[65] give the SSMU considerable latitude when it comes to submitting questions to a referendum vote and holding referenda.

[80] But important as they are, student democracy and freedom of expression are not absolute, nor do they exist in a vacuum. Rather, they are exercised pursuant to a constitution that governs the activities of the SSMU. The question before the Court is not whether democracy and freedom of expression are fundamental values. They are. The question is whether the Policy approved of by a referendum vote *appears* to violate the SSMU's Constitution and any other applicable policies.

[81] According to the Plaintiff:

> 18. The [...] Policy [...] is a gross violation of the SSMU Constitution, Equity Policy and Antisemitism Policy;
>
> 19. The Policy [...] is a gross violation of the duty of SSMU of fair representation of its Members including Jewish students like the Plaintiff;
>
> 20. The Policy [...] constitutes hate literature;
>
> 21. The Policy [...] encourages, promotes and endorses antisemitism;
>
> 22. The Policy [...] contains false, misleading facts and facts taken out of context; [...]
>
> 25. The atmosphere on McGill campus has become tense and frightening for Jewish students at McGill University;
>
> 26. As a Jewish student, Plaintiff is frightened for her personal safety and security at McGill University; [...]
>
> 32. The gross violations of the SSMU of its Constitution, Equity Policy and Antisemitism Policy in promoting and permitting the referendum on the Policy [...], is an antisemitic act which has a direct negative impact on Jewish students at McGill [...] and Plaintiff in particular; [...]
>
> 38. Since initiating the No Campaign, Plaintiff is afraid to go on [the] McGill campus. In addition to the current antisemitic atmosphere at McGill, Plaintiff has also received threatening messages on social media related to the No Campaign, targeting Plaintiff and Jewish students who support the State of Israel; [...]
>
> 42. Without an injunction to stop the referendum process including [...] implementation, Plaintiff will suffer irreparable damage which cannot be fully compensated for monetarily; [...]

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[65] Injunction Application, Exhibit P-5.

[Underlining added]

[82] These allegations are buttressed by the Plaintiff's affidavits[66] and other exhibits, including the Constitution,[67] the SSMU Equity Policy,[68] and the Motion Regarding the Joint Board of Directors and Legislative Council Special Committee on Anti-Semitism (the "**Antisemitism Motion**").[69]

2.3.3.1 The Policy Appears to Violate the Constitution

[83] In deciding whether the Plaintiff's allegations and exhibits are sufficient to establish an appearance of right, it is necessary to determine whether the Policy plausibly violates the Constitution. The passages of the Constitution invoked by the Injunction Application[70] read as follows:

> [Under Services] [...] 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. [...]
>
> ***
>
> [Under 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.
>
> ***
>
> [Under 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 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.
>
> [Underlining added]

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[66] The Affidavit dated November 17, 2023 and the Supplementary Affidavit dated November 20, 2023.
[67] Injunction Application, Exhibit P-1.
[68] Injunction Application, Exhibit P-2.
[69] Injunction Application, Exhibit P-3.
[70] Injunction Application, para. 7-10.

[84] On the one hand, the Plaintiff submits the Policy is laced with "antisemitic tropes" that clearly target Jews, Israelis, and those who believe in Israel's right to exist. It paints a distorted picture of violent Israelis intent on dispossessing and killing Palestinians. While the Policy does not explicitly use the terms "Jew(s)," "Jewish," or "Israeli(s)," they are obviously its intended targets. In addition to being misleading and discriminatory, the Plaintiff submits the Policy has the effect of alienating and compromising the safety of the Plaintiff, participants in the "No" campaign, and other members of McGill's Jewish community. This frustrates, rather than facilitates, the interaction between all students from all McGill communities by creating a hostile campus environment. It also marginalizes and silences a group of students along national, ethnic, and religious lines.

[85] On the other hand, the SSMU submits the Policy is not antisemitic at all. The Policy nowhere mentions Jews or Israelis. Instead, it takes aim at the Israeli government and military, just as it takes aim at the governments of Canada, the United States, and other Western nations. The Policy is thus in harmony with past concerted student activism against apartheid in South Africa. While the SSMU acknowledges that not everyone agrees with the Policy and that it has given rise to strong differences of opinion, this is consistent with robust student democracy and freedom of expression. Furthermore, by speaking up on behalf of Palestinians, the Policy advocates for a group of disadvantaged people, to whom the SSMU is constitutionally committed.

[86] The Court thus finds itself faced with two troubling possibilities:

- Granting the interlocutory injunction, thereby possibly interfering inappropriately in the internal affairs of a corporate body (i.e., by stifling student democracy and freedom of expression); or

- Dismissing the interlocutory injunction, thereby allowing a possibly antisemitic and unconstitutional policy from being ratified and implemented.

[87] A similar case was heard by the Supreme Court of British Columbia (the "**B.C. Court**") in 2017. In *Presch* v. *Alma Mater Society of the University of British Columbia*, the petitioner sought to prevent the Alma Mater Society ("**AMS**") of the University of British Columbia from submitting to a referendum vote the question: "Do you support your student union (AMS) in boycotting products and divesting from companies that support Israeli war crimes, illegal occupation, and the oppression of Palestinians?"[71] There, as here, the proposed question was "obviously highly political in nature" and the petitioner argued that it "violated the constitution and bylaws of the AMS [...]."[72] The B.C. Court refused to grant an injunction, stating that a "loaded" and "highly controversial" referendum question could be put to a referendum vote:[73]

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[71] *Presch* v *Alma Mater Society of the University of British Columbia*, 2017 BCSC 963, para. 2 [*Presch*].
[72] *Ibid*, para. 6.
[73] *Ibid*, para. 55-59.

> [55] I recognize that the Proposed Question is a loaded one, as Mr. Presch contends. In fact, during the Council discussions in 2015 the AMS ombudsperson recognized that the question is seemingly intended to lead to a "yes" answer. In effect the question states that there are, in fact, Israeli war crimes, illegal occupation, and oppression of Palestinians, and also that there are companies that support these things in some way. In consequence it may be that any person of good conscience would tend to feel that they ought to vote "yes." It may also be that the form of the question makes it difficult for those who wish to oppose the referendum to vote "no," because they might be thought of as supporting war crimes, illegal occupation, and oppression.
>
> [56] Clearly the content of the question is highly controversial. I accept that the debate could lead to strife of some sort on the campus. It is of course the responsibility of the AMS and the university to ensure the safety and security of students and to ensure respectful debate by all means necessary.
>
> [57] It is true as well that the intention of a member of the AMS in voting "yes" or "no" may be unclear. For example, whether the voter agrees with one or more of the premises of the question would not be clear.
>
> [58] However, the AMS bylaws and Code do not require that the referendum question be fair, and I have rejected the argument that the question must lead to a clear and unambiguous interpretation or result.
>
> [59] In other words, the AMS bylaws and Code do no prohibit a loaded question as I have described it. Nor, in my view, do the bylaws require that the intent of the voter or the consequences of implementing the bylaw be clear. The bylaws and Code simply do not so state. Moreover, the context of referenda such as this one does not support such an interpretation. I conclude, then, that the conduct of the AMS Council and the president did not violate the bylaws or Code as contended.
>
> [Underlining added]

[88] The B.C. Court sounds the following note of caution in the final paragraph of its reasons:[74]

> [The comment that the court is always reluctant to interfere in the internal affairs of any corporate body] is nowhere more apt than in the circumstances of this case, where an order of the Court could be seen as interfering in the free and democratic processes of the AMS, and could be seen as intruding into or even taking sides on political issues. A great deal of caution is therefore required on the part of the Court in these circumstances.
>
> [Underlining added]

[89] Although the B.C. Court's decision is not binding, it is none the less deserving of deference and careful consideration. Indeed, the Court agrees it must proceed cautiously

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[74] *Ibid*, para. 69.

to avoid interfering inappropriately in the internal affairs of the SSMU. However, there are meaningful distinctions between *Presch* and the present case that should not be overlooked.

[90] First, the constitutional issues in *Presch* turn on procedural and contractual points. The petitioner alleged that the proposed referendum question could not be answered by a simple "yes" or "no," contrary to the AMS bylaws, and could result in the AMS breaking a contract with one or more of its service providers, contrary to the AMS Code of Procedure.[75] In its analysis, the B.C. Court found that the AMS bylaws were able to accommodate loaded questions and that difficulty of implementation was an issue for the AMS, rather than the courts, to resolve.

[91] In this case, the issue raised by the Plaintiff is neither procedural nor contractual. She alleges the Policy grossly violates guiding principles contained in the Constitution in that it is antisemitic, divisive, and poses a safety risk for McGill's Jewish students. In other words, the Plaintiff attacks the underlying validity of the Policy itself.

[92] Second, *Presch* involved a loaded *question*. Here we have more than just a loaded question, but a loaded *policy*, one that outlines in detail a series of alleged crimes, grievances, and resolutions. Both quantitatively and qualitatively, the Policy is more controversial than the question proposed by the AMS. The Policy is an unmitigated condemnation of the Israeli government, Israeli forces, and Israeli action. The Policy also makes no mention of the events that took place on October 7, 2023, an obvious and apparently intentional omission. As such, the Plaintiff's claim that the Policy truly condemns Israel, as well as its (predominantly Jewish) people and supporters, is not unserious. 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 religion.

[93] Third, the Policy is situated in the context of a more acute and controversial conflict than the referendum question in *Presch*. The historic acuteness of the current situation is affirmed by the Policy itself.

[94] Fourth, the prospect of strife on campus mentioned in *Presch* was merely hypothetical. Yet, as noted above, in this case the Plaintiff and other members of the "No" campaign were the targets of thinly veiled threats designed to harass, intimate, and silence them. Furthermore, Mr. Labeau discouraged the referendum from being held because, according to him, the Policy was unconstitutional, an event of default under the MoA, and contained antisemitic tropes likely to harm the very people it was intended to defend.[76] While these opinions are not facts, the letter sent by Mr. Labeau on November

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[75] *Ibid*, para. 7.
[76] Affidavit of Patrice Labeau dated November 20, 2023, Exhibit FL-4.

8, 2023 shows the McGill administration contested the constitutionality of the Policy and was concerned about the safety of its students.

[95] Finally, unlike in *Presch*, further evidence could be adduced on the merits to provide the Court with a better understanding of the debate, including:

- Evidence on what the Policy means when it uses terms such as "genocide," "settler-colonialism," "apartheid," and "ethnic cleansing." The SSMU argues these terms have the definitions given to them by various international authorities. Perhaps – but this is an assertion that could be confirmed and explained by the person or persons who drafted the Policy;

- Testimony by McGill students, including the Plaintiff, who have allegedly been harmed as a result of their involvement in the "No" campaign and/or as Jewish students or supporters of Israel;

- Testimony on how, why, and when members of the McGill administration took steps to discourage the referendum;

- Evidence about the harassment and violence allegedly suffered by Montreal's Jewish community and institutions since October 2023;

- Expert evidence on antisemitic tropes; and

- Expert evidence on the international authorities cited by the SSMU[77] and their relevance in contextualizing the Policy.

[96] Given these meaningful distinctions, the Court is led back to the first criterion it must consider in deciding whether to grant an interlocutory injunction. Insofar as the Plaintiff's constitutional claim is concerned, does the Injunction Application have an appearance of right? The Court concludes it does. While the SSMU's defences are serious – rooted, as they are, in student democracy and freedom of expression – the Court cannot dismiss the allegations and evidence of the Plaintiff as frivolous or vexatious. A preliminary examination of the merits indicates they are neither "lacking a legal basis" nor "without reasonable or probable cause or excuse."[78] In other words, the Plaintiff has established a serious question to be tried. In so finding, the Court does not take position on the conflict involving Israel and Gaza. Nor does it prejudge the outcome of the

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[77] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, Order of January 26, 2024; Michael Lynk, Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires occupés depuis 1967, Conseil des droits de l'homme, Quarante-neuvième session, A/HRC/49/87; Francesca Albanese, Privation arbitraire de liberté dans le territoire palestinien occupé : l'expérience des Palestiniens derrière les barreaux et au-dehors – Rapport de la Rapporteuse spéciale sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Conseil des droit de l'homme, Cinquante-troisième session, A/HRC/53/59.

[78] Bryan A. Gardner, ed., *Black's Law Dictionary*, 7th ed. (St. Paul, Minn.: West Group, 1999), p. 677 and 1559.

permanent injunction. It simply concludes there is an appearance of right that warrants a trial on the merits.

2.3.3.2 The Policy Does Not Appear to Violate the Equity Policy

[97] In addition to alleging the Policy grossly violates the Constitution, the Plaintiff alleges it violates the SSMU Equity Policy as well,[79] which states:[80]

> [Part I – Background] [...] [T]he SSMU has a responsibility as a leader, representative, and service provider to a diverse membership to conduct itself with integrity, respect, and inclusivity. The safety and equitable treatment for all persons is paramount to SSMU's mandate, as it continues to support students, student-led initiatives and their communities as they further address systemic oppression.
>
> ***
>
> [Part I – Definitions] [...] **Oppression:** experiences of domination and exploitation resulting from historically and systemic institutions of superiority and inferiority. These relations of power result in individuals or groups being systematically subjected to political, economic, or social injustices. [...]
>
> ***
>
> 4.1 Principles for Advocacy
>
> 4.1.1. The SSMU recognizes that groups that have been historically and culturally disadvantaged are subject to systematic marginalization and oppression, and condemns harassment or discrimination based on but not limited to: gender identity, gender expression, age, race, ethnic or national origin, religion, sexuality, sexual orientation, ability, language, size, or social class.
>
> a. The SSMU regards harassment and/or discrimination on these bases as serious offences that undermine is constitutional commitment to respect, as outlined in the preamble of the SSMU Constitution. [...]
>
> [Underlining added]

[98] While the reasoning developed in subsection 2.3.3.1 of this judgment ostensibly also applies to the Equity Policy, its Appendix A, titled "Equity Complaints Procedures," provides procedural rights and remedies for members of the SSMU who wish to lodge an equity complaint:

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[79] Injunction Application, para. 11-13.
[80] Injunction Application, Exhibit P-2.

1. Submission of an Equity Complaint

1.1 Any individual who was a SSMU member or was employed by the SSMU at the time of the incident alleged in the Complaint may submit an Equity Complaint under the Equity policy.

1.2 It is encouraged that complaints be submitted within six months following the incident alleged in the Complaint.

a. This timeline respects both the impediments to filing a Complaint, and increasing difficulty with time of investigating Complaints.

1.3 All Complaints must be submitted or referred to the Equity Commissioners [...]

2. Accommodations

2.1 Following the receipt of a Complaint, the Equity Complaints Committee may recommend that accommodations be implemented, in extraordinary circumstances, to protect the safety and wellbeing of the Claimant(s). [...]

3. Confidentiality

3.1 Every aspect of an Equity Complaint and its resolution will be strictly confidential between the Equity Complaints Committee; the Claimant(s), Respondent(s) and their Support Person(s); the Witness(es); and the Board of Directors. [...]

[Underlining added]

[99] Despite these procedural rights and remedies, there is no evidence the Plaintiff attempted to avail herself of them in a timely manner. On the contrary, the affidavit of Mr. Ashkir states she failed to do so:[81]

45. Pursuant to the Equity Policy, any activity or behaviour not in alignment with the commitments or operational requirements outlined in the Policy are grounds for an Equity Complaint;

46. The Equity Policy provides for the creation of an Equity Complaints Committee responsible for responding to and resolving complaints of violation of that policy, in accordance with the Equity Complaints Procedures set out in Appendix A of the same policy;

47. Final decisions of the Equity Complaints Committee may be appealable to the SSMU Judicial Board;

[81] Affidavit of Alexandre Ashkir dated January 18, 2024.

> 48. At no time did the plaintiff X submit an Equity Complaint in relation to the Policy Against Genocide in Palestine; [...]

[100] The Court concludes an interlocutory injunction should not be granted in circumstances like these where an applicant, through her own inaction, has neglected to exercise a viable procedural right or remedy. As a result, the Plaintiff has not established an appearance of right with respect to the alleged violation of the Equity Policy.

2.3.3.3 The Antisemitism Motion is Not a Policy

[101] On or about March 15, 2018, the SSMU's Legislative Council approved the Antisemitism Motion. According to this motion:[82]

> ***Whereas,*** SSMU is an organization committee to empowering groups "disadvantaged due to irrelevant personal characteristics such as race, national or ethnic origin, colour, religion sex, gender identification, age, mental or physical disability, language, sexual orientation or social class," as stated in the preamble of the SSMU constitution;
>
> ***Whereas,*** in the Fall of 2017 the Board of Directors created a committee to examine the presence and history of anti-Semitism at McGill University; [...]
>
> ***Whereas,*** "anti-Semitism is antithetical to collective liberation; it hurts Jews and it also undermines, weakens, and derails all of our movements for social justice and collective liberation";
>
> ***Whereas,*** addressing anti-Semitism is a vital component of the fight against all forms of oppression and discrimination and should not be neglected by broader social justice movements;
>
> **Be it Resolved, that** the Special Committee be renewed for the academic year of 2018-2019;
>
> **Be it further Resolved, that** the mandate of the Special Committee is to serve as a reference to SSMU, the Board of Directors, and Legislative Council in the implementation of these recommendations, or in the case of allegations of anti-Semitism. [...]
>
> [Underlining added]

[102] Once again, while the reasoning developed in subsection 2.3.3.1 of this judgment ostensibly applies to the Antisemitism Motion, the Court notes that no policy was adopted by way of the motion and that the mandate of the Special Committee on Anti-Semitism has not been renewed:[83]

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[82] Injunction Application, Exhibit P-3.
[83] Affidavit of Alexandre Ashkir dated January 18, 2024.

> 49. […] [I]t should be clarified that the document produced as Exhibit P-3 to the plaintiff's originating application is not a policy, contrary to what is alleged in paragraph 14 of the Modified Application […] and paragraph 16 of the [Injunction Application];
>
> 50. Rather, as appears from the tile and text of Exhibits P-3, the document is a motion adopted by the SSMU Legislative Council renewing the mandate of a Special Committee on Anti-Semitism, first created in fall 2017, for the 2018-2019 academic year;
>
> 51. No policy was adopted by way of this motion; […]

[103] As the sworn statements to this effect have not been contested by the Plaintiff, the Court concludes the Antisemitism Motion is not relevant to its analysis and cannot assist the Plaintiff in establishing an appearance of right.

2.3.3.4 Conclusion

[104] In summary, the Court concludes the Plaintiff has established an appearance of right regarding the Policy's alleged violation of the Constitution. However, the Court concludes the Plaintiff has failed to establish an appearance of right regarding the Policy's alleged violation of the Ethics Policy and the Antisemitism Motion.

2.3.4 There is Serious or Irreparable Harm

[105] As regards the second criterion for granting an interlocutory injunction, *Beauregard* observes:[84]

> Deuxièmement, il faut rechercher si la partie qui requiert l'injonction interlocutoire subirait un préjudice irréparable si sa demande était rejetée. Le C.p.c. ajoute ici la notion de « préjudice sérieux ». Un préjudice irréparable est un préjudice qui n'est pas susceptible d'être remédié par des dommages-intérêts ou qui peut difficilement l'être. Comme l'expliquent les juges Sopinka et Cory dans l'arrêt *RJR — MacDonald* : « Le terme « irréparable » a trait à la nature du préjudice subi plutôt qu'à son étendue. C'est un préjudice qui ne peut être quantifié du point de vue monétaire ou un préjudice auquel il ne peut être remédié, en général parce qu'une partie ne peut être dédommagée par l'autre ».
>
> [Underlining added; references omitted]

[106] In support of its submission that the Injunction Application satisfies this criterion, the Plaintiff cites the climate of fear created by the referendum, as well as the emotional harm she and other members of McGill's Jewish community have suffered and would continue to suffer if the Policy were adopted. Without minimizing these allegations, the Court notes that no expert evidence has been adduced to substantiate them. While the

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[84] *Beauregard*, *supra* note 54.

Court can infer that the threats received by the Plaintiff would produce anxiety and distress in an average person, it is not prepared to conclude this constitutes serious or irreparable harm sufficient to justify an injunctive order. As mentioned above, injunctions remain exceptional remedies.

[107] The Plaintiff further submits the ratification and implementation of an unconstitutional policy is seriously or irreparably harmful. Yet an obvious reply to this submission is that the efficient cause of student division and alienation at McGill is not the impugned Policy, but rather the underlying conflict involving Israel and Gaza. So long as this conflict persists, McGill students will remain divided and alienated, regardless of whether the Policy is ratified and implemented by the Board.

[108] Although compelling, this rebuttal of the Plaintiff's position is not dispositive. Indeed, the Policy is not simply a statement – it includes a call to action whereby various demands will be made to the McGill administration or the SSMU to:[85]

- "Immediately and publicly condemn the genocidal bombing campaigns and siege in Gaza;"
- Cut ties with "complicit" corporations, institutions, and individuals;
- Divest from these corporations and institutions;
- Condemn "the ongoing genocide against Palestinian people in Gaza;" and
- "Commit to a strong, consistent position in solidarity with Palestinian students, and with the Palestinian struggle against genocide and settler-colonial apartheid."

[109] While the Court recognizes there will continue to be student division and alienation no matter the Policy's fate, these problems will be exacerbated by the call to action that the Policy's ratification and implementation would trigger, one that involves a cascading series of controversial demands.

[110] Moreover, ratifying and implementing a Policy that is unconstitutional because it is antisemitic would necessarily violate the human dignity of the Plaintiff and members of McGill's Jewish community. This would strike at the heart of student life by degrading certain students based on their national, ethnic, or religious background. Furthermore, as the Policy states, it "shall remain in force [...] until May 1st, 2028."[86] Consequently, once ratified and implemented, there appears to be no internal mechanism to rescind the Policy for roughly four years, making it impossible to end an ongoing violation to human dignity throughout the intervening period.

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[85] Injunction Application, Exhibit P-4.
[86] Injunction Application, Exhibit P-4.

[111] In the Court's view, this harm is serious.

2.3.5 The Balance of Inconvenience Favours the Plaintiff's Position

[112] Finally, as regards the third criterion for granting an interlocutory injunction, *Beauregard* notes:[87]

> Troisièmement, il faut rechercher laquelle des deux parties subira le plus grand préjudice selon que l'injonction interlocutoire sera accordée ou refusée dans l'attente d'une décision sur le bien-fondé du dossier au mérite. Il s'agit d'un critère jurisprudentiel qui n'a pas été formellement repris au C.p.c. Les facteurs qui peuvent être considérés lors de l'examen de ce critère de la « prépondérance des inconvénients » sont nombreux, et ils varient d'un cas à l'autre. Dans les cas qui s'y prêtent, l'intérêt public peut d'ailleurs être pris en compte dans le cadre de cette pondération.
>
> [Underlining added; references omitted]

[113] The Court is mindful of the SSMU's submission that an unjustified infringement of student democracy and freedom of expression produces serious or irreparable harm. But so too does the ratification and implementation of an unconstitutional policy that violates human dignity. In considering the balance of inconvenience, the Court is of the view that it weighs in favour of the Plaintiff's position.

[114] If, on the one hand, the Injunction Application is granted, the SSMU will be prevented from ratifying and implementing the Policy until the permanent injunction has been decided. Should the SSMU win on the merits, however, the Policy can come into force. If, on the other hand, the Injunction Application is dismissed, the Policy will be ratified and implemented forthwith and remain in force for roughly four years, without the possibility of rescission. Of these two prospects, the Court concludes the second is more prejudicial and therefore more inconvenient.

2.3.6 The Interlocutory Injunction Should Not be Declared Executory Notwithstanding Appeal

[115] As the interlocutory injunction ordered by this Court will remain in place – unless an appeal is brought and decided or unless the Court of Appeal orders a stay – it is unnecessary to declare that it be executory notwithstanding appeal.[88]

[116] **FOR THESE REASONS, THE COURT:**

[117] **GRANTS** the Application for Confidentiality, in part;

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[87] *Beauregard*, *supra* note 54.
[88] *Favre*, *supra* note 55.

[118] **ORDERS** the non-publication and non-dissemination of any information enabling the identification of the Plaintiff / **ORDONNE** la non-publication et la non-diffusion de tout renseignement permettant d'identifier la partie demanderesse;

[119] **ORDERS** that the Plaintiff's name remain anonymous in the event of the publication or dissemination of any decision rendered in this file / **ORDONNE** la banalisation du nom de la partie demanderesse advenant la publication ou la diffusion de toute décision dans ce dossier;

[120] **DECLARES** that counsel for the Plaintiff will communicate her full name to authorized and instructing members of the SSMU through their counsel *ad litem*;

[121] **ORDERS** that Exhibit P-2, communicated in support of the Application for Confidentiality, be filed under seal to protect the identity of the Plaintiff;

[122] **GRANTS** the Modified Application for Interlocutory and Provisional Injunction, in part;

[123] **ISSUES** an interlocutory injunction ordering the Defendant, its officers, directors, agents, and employees to refrain from ratifying or implementing the Policy Against Genocide in Palestine until the trial on the merits has been decided;

[124] **DISPENSES** the Plaintiff from putting up security;

[125] **DECLARES** that this judgment be notified to the Defendant at its principal office, located at 3610 McTavish Street, Montreal, Quebec, Canada, H3A 1Y2, leaving a copy of this judgment with any reasonable person in charge thereof;

[126] **ALL OF WHICH**, with legal costs to follow.

SHAUN E. FINN, J.S.C.

Mtre Michael N. Bergman
Counsel for the Plaintiff

Mtre Marie-Claude St-Amant
Mtre Sibel Ataogul
Melançon Marceau Grenier Cohen s.e.n.c.
Counsel for the Defendant

Mtre Olga Redko
Mtre Marie-Hélène Lyonnais
IMK s.e.n.c.r.l./LLP
Counsel for the Impleaded Party

Hearing date: March 25, 2023
Taken under advisement: March 28, 2023