

**QUÉBEC'S SOLE SHAREHOLDER REGIME  
AND THE RISE OF SIMPLIFIED  
CORPORATIONS : INNOVATION,  
IMPLEMENTATION AND THE  
CHALLENGES AHEAD**

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Small and medium sized enterprises (SMEs) are the lifeblood of dynamic capitalist economies.<sup>1</sup> Ensuring the breadth and depth of an economy's pool of SMEs, together with constant regeneration, is critical to long-term prosperity. Québec is living proof of this proposition: it has succeeded in building a diversified economy on foundations that comprise a vibrant, multifaceted and constantly evolving mix of SMEs. Whether it is in more traditional industry sectors such as manufacturing or retail, or in new and rapidly changing sectors such as information technology, multimedia or artificial intelligence, Québec's SMEs play a central role in providing meaningful and widespread employment. It is little wonder, then, that facilitating the creation and growth of SMEs was a critical lens through which those entrusted with reforming Québec's principal corporate law statute a decade ago viewed their mission. Finding ways to enhance the ease with which SMEs would be able to navigate this statute was, in turn, a central theme in the consultative process that would come to shape reform.

One of the most intriguing consequences of Québec's thirst for a modernized business law, one well suited to the needs of SMEs, was the birth of a new regime for companies that have only one shareholder—typically the company's founder. Ten years on, Québec's sole shareholder regime continues to distinguish itself. It is highly innovative, whether viewed from a purely Canadian perspective or seen through the lens of international developments. But it is important to take stock of the impact that Québec's leadership in this area has had in practice. It is one thing to innovate, but another altogether for innovation to be embraced.

The importance of evaluating both the potential and the impact of Québec's sole shareholder regime is that much more obvious when one considers the significance of the "S" in "SME." In 2018, small businesses employed 8.4 million Canadians, whereas medium sized business employed 2.4 million individuals and large sized business employed 1.3 million.<sup>2</sup> Particularly striking is data concerning the number of small business employers: for example, in 2018 there were 243,029 small business employers in Québec, representing approximately 98% of the total number of employer businesses in Québec. In contrast, there were 4,695 medium and 634 large-sized business employers in Québec.<sup>3</sup>

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1. For a recent study on the global economic importance of SMEs, see OECD, *Enhancing the Contributions of SMEs in a Global and Digitalised Economy* (2017): <https://www.oecd.org/industry/C-MIN-2017-8-EN.pdf>.

2. GOVERNMENT OF CANADA, *Key Small Business Statistics*, November 2019: [https://www.ic.gc.ca/eic/site/061.nsf/eng/h\\_03114.html#a01](https://www.ic.gc.ca/eic/site/061.nsf/eng/h_03114.html#a01). The statistics in this Government of Canada report are as of December 2018 and reveal that small businesses constituted at least 97% of employer businesses in each province in Canada, as well as in Canada's northern territories.

3. Statistics Canada defines small businesses as those with 1 to 99 employees, medium businesses as those with 100 to 499 employees, and large businesses as those with 500 or more employees. In all three categories (i.e. small, medium and large), Québec was second in number of business employers only to Ontario, further confirming the critical

It is no secret that many small business founders have more pressing issues to worry about than whether to set up their business as a corporation. Sole proprietorship may initially seem the path of least resistance, especially if incorporating entails layers of administration and expense that serve only to take time and money away from more immediate business imperatives. But as a business grows, so too does the attraction of the corporate form. Ease of access to a legal vehicle that offers limited liability to a sole shareholder, that has a distinct legal personality, and that facilitates borrowing as well as the ability to attract equity capital is fundamental to long-term success.<sup>4</sup> It is therefore especially important that the many small businesses that start out with a single shareholder be able to incorporate easily and thereafter manage their affairs with as few administrative burdens as possible.

This article explores the genesis, adoption and early history of provisions enacted in Québec as part of reforms to its corporate law that were intended to assist sole shareholder corporations in dealing with these very challenges. The article identifies lessons that this early history has to offer about the difficulties involved in implementing change that is not only innovative, but that in turn results in meaningful adoption of a simplified corporate form—notably one that does not require the appointment of one or more directors, let alone a full-blown board of directors. In the face of a growing global movement to simplify how small business can set about incorporating and then maintaining its corporate status, it is particularly important to consider how Québec's regime stacks up relative to other countries that have also recently enacted reforms in this area.

The article is divided into four parts. First, it examines the history underlying Québec's development of a distinctive regime applicable to sole shareholder corporations. Second, the article considers the model that was ultimately adopted and the extent to which companies have taken advantage of what it has to offer. The article notes that the sole shareholder provisions' rate of adoption has so far been uninspiring when compared to the impact that the 2011 reforms as a whole have had on the number companies choosing to incorporate in Québec. Third, the article compares these developments with those seen in a number of countries forming part of the Organization of American States (of which Canada is a member), countries that have embraced provisions of the kind found in Québec's sole shareholder

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importance of Québec's SMEs to its economy and to Canada's as a whole. The 243,029 small business employers in Québec represent approximately 21% of the 1.18 million small business employers in Canada. Interestingly, the numbers cited above for medium- and large-sized employers in Québec also represent 21% of the overall Canadian numbers (i.e. 22,666 medium and 3,010 large sized employers). Finally, it is also worth noting that micro-enterprises (1–4 employees) made up 54.3% of Canadian businesses and that if one adds businesses with 5–9 employees, the number moves up to 73.5%. Many of these businesses will be sole proprietorships or sole shareholder companies.

4. For a discussion of why incorporation facilitates borrowing, see M. KHIMJI & C. NICHOLLS, "Corporate Veil Piercing and Allocation of Liability – Diagnosis and Prognosis", (2015) 30 *BFLR* 211.

regime, notably those dispensing with the need to have a board of directors. The article observes that in important instances reform in these countries has had a dramatic and positive impact on rates of incorporation for small business. Finally, the article considers what might account for the difference between the rate of adoption of the sole shareholder regime in Québec and analogous regimes in other jurisdictions, as well as what lessons Québec and Canada might learn from these different outcomes. The paradox that this article seeks to unpack is why it is that while Québec's sole shareholder regime is, even ten years on, highly innovative when it comes to what it offers to sole shareholders, it is by no means at the head of the class when it comes to small business actually making use of its provisions.

Before digging deeper into this paradox, it is worth noting that very little has so far been written concerning the development and impact of Québec's sole shareholder regime. Shortly after its enactment, some articles did appear noting that the regime was novel. But the commentary typically formed a small part of larger studies concerning the wide-ranging changes to Québec's business corporation laws. For example, as part of an article on the reforms published in 2011, Stéphane Rousseau provided a brief but favourable reference to the sole shareholder provisions, noting that they were highly innovative.<sup>5</sup> For his part, Wayne Gray, also writing in 2011, was similarly well-disposed to the sole shareholder provisions.<sup>6</sup> He noted that when choosing an incorporation jurisdiction, decision makers in SMEs seek advantages such as maximum corporate design flexibility, which the ability to dispense with a board of directors would further.<sup>7</sup> Gray suggested that introducing the new sole shareholder regime in order to appeal to SMEs was one of many ways in which Québec had made Québec's *Business Corporations Act* (QBCA)<sup>8</sup> competitive relative to corporate statutes in other Canadian jurisdictions. Indeed, he asserted that "[t]he favourable treatment of the SME is a notable achievement under the QBCA—particularly in light of the scant attention given the SME in other Canadian corporate legislation and the preponderance of SMEs that will use this new Act."<sup>9</sup>

But since Rousseau and Gray offered up these observations a decade ago, the regime has received scant attention from Canada's corporate law community.<sup>10</sup> It is therefore worth looking more closely at the history and purpose

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5. Stéphane ROUSSEAU, "La réforme du droit des sociétés au Québec: tradition, harmonisation et innovation" (2011) 50 *Can Bus L J* 51 at p. 70.

6. Wayne D. GRAY, "M. Dickerson Arrive au Québec: A Comparative Law Perspective on the New Business Corporations Act (Québec)" (2011) 50 *Can Bus L J* 83.

7. *Id.* at 85.

8. *Business Corporations Act*, CQLR, c. S-31-1.

9. Wayne D. GRAY, "M. Dickerson Arrive au Québec: A Comparative Law Perspective on the New Business Corporations Act (Québec)" (2011) 50 *Can Bus L J* 83 at 84.

10. For other brief references to the regime found in leading texts on Québec's corporate law, see Raymonde CRÉTE & Stéphane ROUSSEAU, *Droits des sociétés par actions*, 4th ed., Montréal, Les Éditions Thémis (2018), par. 1257; and Paul MARTEL, *La société par actions au Québec. Volume I, Les aspects juridiques*, Montréal, Ottawa, Wilson & Lafleur Martel Itée (2020), paras 27-57 to 27-62.

of the regime in order to see what the government of the day set out to achieve, to assess whether it was ultimately successful in realizing its objectives, and to assess what lessons this exercise teaches us about the challenges that must be met if simplified corporations in general, and a sole shareholder regime in particular, are to gain meaningful traction in Québec and in Canada as a whole.

## I. The Impetus for Québec's Sole Shareholder Regime

Faced with a business corporations statute that had not seen meaningful reform in 30 years, one that it was evident to legal practitioners in Québec was unattractive when compared to its federal counterpart, Québec's Ministry of Finance had for some time been concerned about the number of Québec businesses that were choosing to incorporate under the *Canada Business Corporations Act* (CBCA) rather than Québec's increasingly archaic corporate statute.<sup>11</sup> The Ministry was also well aware that the vast majority of businesses in Québec were SMEs.<sup>12</sup> The challenge that the Ministry therefore faced was how to : (i) encourage newly formed Québec-based SMEs to incorporate under the QBCA; (ii) remove incentives for companies incorporated in Québec to consider reincorporation under another jurisdiction's corporate statute (notably the CBCA); and (iii) create incentives for Québec-based SMEs already incorporated under the CBCA to consider moving over to the new QBCA.<sup>13</sup>

### A. Working Paper

In December 2007, Québec's Ministry of Finance released a *Working Paper*<sup>14</sup> that discussed ways in which one might overhaul Québec's *Companies Act*<sup>15</sup> and that invited interested individuals and organizations to provide the Ministry with their perspective on the *Working Paper*'s proposals. Twenty-five

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11. Hansard, 21 October 2009: [http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/39-1/journal-debats/20091021/11117.html#\\_Toc243984392](http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/39-1/journal-debats/20091021/11117.html#_Toc243984392).

12. See e.g. GOUVERNEMENT DU QUÉBEC, *Reform of the Companies Act Working Paper*, 2007 ("Working Paper"), p. 3.

13. During the course of consultations discussing Bill 63, Mr. Paul Martel (who helped draft the legislation) stated that it was essential to create good reasons for businesses to prefer Québec's corporate law statute over those of other jurisdictions, because the new Act would now open the doors to cross-jurisdictional continuation (something that had not previously been possible and that was a notable weakness in Québec's corporate law). (Hansard, 3 November 2009: <http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/cfp-39-1/journal-debats/CFP-091103.html>).

14. *Working Paper*, at [http://www.finances.gouv.qc.ca/documents/Autres/en/AUTEN\\_ReformCompaniesAct.pdf](http://www.finances.gouv.qc.ca/documents/Autres/en/AUTEN_ReformCompaniesAct.pdf).

15. *Companies Act*, CQLR, c.C-38.

submissions were received.<sup>16</sup> A committee consisting of practitioners and academics was then formed to draft a bill in light of this feedback.<sup>17</sup>

Bill 63 was the outcome of this process and it was ultimately presented to the National Assembly on 7 October 2009.<sup>18</sup> More organizations were heard from in consultations forming part of the legislative process. But no changes were made to the Bill's sole shareholder provisions. Together with the rest of the QBCA, these were enacted on 3 November 2009, coming into force on 14 February 2011.

From the outset, the idea of having special rules for SMEs was one that clearly appealed to the Ministry of Finance.<sup>19</sup> Its *Working Paper* noted that “companies having less than 100 employees—the maximum limit most often used to define an SME—represent more than 90% of all companies incorporated under the Act (under Parts I and IA).”<sup>20</sup> This is very much of a piece with the observations about the importance of small business made at the beginning of this article. Indeed, the Ministry noted that: “[i]n 2005, SMEs supplied 54.3% of total employment in Québec. From 2000 to 2005 they created 48% of all jobs ... This is why the government intends to use this reform to analyze the effect the Act may have on the incorporation and operation of SMEs and to assess the possibility of better adapting the Act to this clientele.”<sup>21</sup>

The *Working Paper* posed general questions asking whether the rules applicable to SMEs were too complex or too expensive to comply with, and whether they hindered incorporation or a company's subsequent development.<sup>22</sup> The *Working Paper* also suggested that consideration be given to: (i) the possibility of SME-specific legislation, (ii) a specific chapter in the new Act for SMEs, or (iii) specific provisions in the *Civil Code of Québec* for SMEs. Rules applicable to SMEs might, for example, feature “[a] loosening of the rules of operation in the case of a ‘one-person company,’” or involve

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16. *Document de référence, Explications et commentaires aux parlementaires sur le projet de loi sur les sociétés par actions*, Volume 1, 2009, Québec Ministry of Finance: [http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR\\_docreference\\_2009-12-01\\_vol-1.pdf](http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR_docreference_2009-12-01_vol-1.pdf), p. 3.

17. *Ibid.*

18. *Ibid.*

19. *Id.*, at p. 24–26.

20. The *Working Paper*, states at p. 3: “Presently, the main clientele of the Act is made up of small and medium enterprises (SME). In fact, companies having less than 100 employees—the maximum limit most often used to define an SME—represent more than 90% of all companies incorporated under the Act (under Parts I and IA).” It also notes that: “[i]n 2005, SMEs supplied 54.3% of total employment in Québec. From 2000 to 2005 they created 48% of all jobs. Therefore, there is no denying the importance of SMEs in the economy of Québec. This is why the government intends to use this reform to analyze the effect the Act may have on the incorporation and operation of SMEs and to assess the possibility of better adapting the Act to this clientele.”

21. *Working Paper*, p. 24.

22. *Ibid.*

“[s]implifying decision-making procedures, especially when directors are the only shareholders in the company.”<sup>23</sup> The Ministry of Finance made reference to measures in place in Delaware applicable to “close corporations,”<sup>24</sup> and went on to note that the United Kingdom had recently enacted reforms as part of the *Companies Act 2006* “simplifying the regulations which apply to” SMEs.<sup>25</sup>

### B. *Responses to the Working Paper*

Of the 25 briefs received in response to the *Working Paper*, 14 commented on the possibility of having SME-specific rules. Most were of the view that SME-specific legislation or SME-specific provisions were not necessary or were in fact a bad idea. However, many of these same briefs supported introducing measures designed to reduce the administrative burdens that sole shareholder companies faced.

Reasons cited for not wanting SME-specific rules in the new company law included :

- uncertainty regarding how best to define what constitutes an SME and when it would cease to be an SME;<sup>26</sup>
- disapproval of the criteria proposed to determine whether a business is an SME;<sup>27</sup>
- concern that having SME-specific rules would only serve to increase the overall complexity of the statute;<sup>28</sup>

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23. *Ibid.*

24. In Delaware, close corporations can have no more than 30 shareholders and are subject to restrictions on the sale or transfer of shares. They are governed by the *Delaware Code*, Title 8, Chapter 1 – General Corporation Law, Subchapter XIV: Close Corporations; Special Provisions § 342(a)(1): <https://delcode.delaware.gov/title8/c001/sc14/index.shtml>.

25. *Working Paper*, p. 25–26. Some of the measures adopted in the United Kingdom that the *Working Paper* highlighted included the simplification of incorporation procedures and a reduction in the amount of information to be supplied to the Registrar.

26. See Davies Ward Phillips & Vineberg’s Brief: [http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR\\_LCQ-9-Davies.pdf](http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR_LCQ-9-Davies.pdf).

27. The *Working Paper*, at p. 3, suggests that 100 employees is “the maximum limit most often used to define an SME,” but some suggested that it was not clear why “employees” should be the criterion on which this distinction turns. Some of the responses—for example, the responses from M<sup>e</sup> Geneviève Dufour (Assistant Professor at the University of Montréal) and the Center for Economic Law Studies (CEDE)—took issue with this criterion. See: [http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR\\_LCQ-24-ULaval.pdf](http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR_LCQ-24-ULaval.pdf) and [http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR\\_LCQ-23-UdeM.pdf](http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR_LCQ-23-UdeM.pdf).

28. See Federation of Chambers of Commerce of Québec’s Brief: [http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR\\_LCQ-10-FCCQ.pdf](http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR_LCQ-10-FCCQ.pdf).

- favouring a public vs. private company dichotomy instead of an SME vs. non-SME dichotomy;<sup>29</sup> and
- given that other Canadian provinces did not have SME-specific rules, the absence of any need for such rules in Québec.<sup>30</sup>

The Ministry's initial openness to the idea of SME-specific legislation or SME-specific provisions rapidly receded in the face of this critical commentary. As a result, the Ministry narrowed the scope of its proposed changes. Rather than carving out a separate regime for SMEs, the QBCA largely adhered to the approach taken in most Canadian corporate law statutes : providing a single set of largely facilitative rules that different sized companies can then adapt to their needs as they see fit.

At the same time, the consensus that emerged from the consultations about the need to simplify matters for sole shareholder companies did not go unnoticed. As a result, the Ministry decided to proceed with provisions intended to do just that. A press release that the Ministry issued after the bill was drafted stressed that the sole shareholder provisions were part of a set of initiatives that would assist with "administrative streamlining,"<sup>31</sup> provisions that the Minister believed would "do more to satisfy the needs of Québec businesses, which should encourage them to incorporate under Québec law rather than under federal law, which is less suitable for SMEs."<sup>32</sup>

When Bill 63 was submitted to Québec's National Assembly, there was minimal discussion about its sole shareholder provisions, suggesting that those who had provided initial input were largely satisfied with the approach taken in Bill 63. In his remarks introducing the proposed legislation to the National Assembly, the Minister of Finance, Raymond Bachand, stated that the proposed reforms were intended to achieve three main goals : protect shareholders ; lighten the administrative burden that companies were subject to ; and foster modernization that would allow companies to operate more efficiently.<sup>33</sup> Regarding efforts to keep administrative requirements to a minimum, the Minister stated that the government believed that the competitiveness of Québec's companies, most of which were SMEs, was in part due to the existence of an environment in which administrative

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29. See Center for Economic Law Studies (CEDE)'s Brief: [http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR\\_LCQ-24-Ulaval.pdf](http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR_LCQ-24-Ulaval.pdf); Federation of Chambers of Commerce of Québec's Brief: [http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR\\_LCQ-10-FCCQ.pdf](http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR_LCQ-10-FCCQ.pdf); and Ogilvy Renault's Brief: [http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR\\_LCQ-17-OgilvyRenault.pdf](http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR_LCQ-17-OgilvyRenault.pdf).

30. See e.g. Canadian Bar Association/Québec Division's Brief: [http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR\\_LCQ-1-AssBarreucanadien.pdf](http://www.finances.gouv.qc.ca/documents/Autres/fr/AUTFR_LCQ-1-AssBarreucanadien.pdf).

31. Press Release, "Major Reform of the *Companies Act*," Québec Ministry of Finance, 7 October 2009, at 2: [http://www.finances.gouv.qc.ca/documents/communiqués/en/COMEN\\_20091007.pdf](http://www.finances.gouv.qc.ca/documents/communiqués/en/COMEN_20091007.pdf).

32. *Id.*, p. 2.

33. On 21 October 2009: [http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/39-1/journal-debats/20091021/11117.html#\\_Toc243984392](http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/39-1/journal-debats/20091021/11117.html#_Toc243984392).

requirements had been reduced to what was strictly necessary.<sup>34</sup> He stated that the Bill was intended to help a company's internal governance by, for example, clarifying provisions concerning the use of a unanimous shareholder agreement.

For his part, Paul Martel—one of Québec's leading corporate law experts who served on the committee that helped draft the bill—stated that those who crafted the legislation took into account the fact that the clientele for Québec's company law was largely SMEs, even though this reality had been ignored in other jurisdictions.<sup>35</sup> Another member of this experts committee, Jacques Authier (who had previously worked with private companies for over two decades while a partner with the accounting firm Ernst & Young), mentioned that it was a real nuisance for sole shareholder businesses to maintain their minute books, which were in event never in order, and that the new law would allow them to dispense with maintaining minutes of board meetings.<sup>36</sup> Martel in turn stressed that given the need to manage relationships between shareholders, maintaining various formalities (such as having an annual shareholder meeting, or keeping a record of a board of directors' proceedings) might be justified when there was more than one shareholder, but that these were completely unnecessary when there was just one shareholder.<sup>37</sup>

## **II. Québec's Simplified Regime: Adoption, Impact and Influence**

### *A. Adoption*

The regime that Québec's National Assembly adopted in November 2009 and that came into force in February 2011 was inserted into a part of the QBCA that provides shareholders with the ability to withdraw power from a board of directors by entering into a unanimous shareholder agreement.<sup>38</sup> This is a concept that has long been found in business corporations legislation in the rest of Canada. And as with statutes like the CBCA,<sup>39</sup> s. 213 of the QBCA provides that a sole shareholder may make a written declaration that restricts a board's powers—or withdraws them altogether, with the declaration then deemed to be equivalent to a unanimous shareholder

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34. *Ibid.*

35. On 3 November 2009: <http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/cfp-39-1/journal-debats/CFP-091103.html>.

36. *Ibid.*

37. *Ibid.*

38. Chapter VII of the QBCA deals with shareholders and Division III of this Chapter, entitled "Unanimous Shareholder Agreement," is where one finds ss. 213–217, which deal with both unanimous shareholder agreements and the sole shareholder regime.

39. See s. 146(2) of the CBCA.

agreement.<sup>40</sup> This was done to ensure that s. 214 of the QBCA would subject the sole shareholder to the liabilities that directors would otherwise have, just as shareholders who enter into a unanimous shareholder agreement take on directors' liabilities.

However, unlike the CBCA, the QBCA contains unique provisions that go on to provide that :

- once a unanimous shareholder agreement is entered into, no board of directors need be established,<sup>41</sup> and
- in the case of a sole shareholder corporation, not only is there no need to establish a board of directors, but the corporation need not appoint an auditor and is also exempted from any requirement to comply with requirements relating to the adoption of by-laws or the holding of shareholders meetings and meetings of the board of directors.<sup>42</sup>

For any legal practitioner who has had to deal not only with the process of crafting by-laws, but then also with the more painful task of ensuring that a small business holds regular director and shareholder meetings—let alone that these proceedings are in turn properly minuted and recorded in the company's books and records, the advantages of doing away with administrative requirements of this kind are readily apparent. There is therefore much to be said for the decision to work through the logical consequences of having only one shareholder and providing that that shareholder can dispense with a board of directors, as well with the rather pointless formality in these circumstances of holding an annual meeting of shareholders—an irritating administrative burden that remains part of the CBCA even when a corporation has a sole shareholder who has prepared a written declaration removing all powers from the board. Instead of corporate action having to be authorized at director or shareholder meetings, the QBCA simply states that decisions of a sole shareholder may now be made by written resolution. Furthermore, s. 217 of the QBCA ensures that regardless of whether a written

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40. The second paragraph of s. 213 states:

A sole shareholder may make a written declaration that restricts the powers of the board of directors or withdraws all powers from the board. The declaration is equivalent to a unanimous shareholder agreement.

41. See s. 216 of the QBCA.

42. S. 217 states:

Decisions of a sole shareholder on whom all of the powers of the board of directors have been conferred may be made by written resolution.

Any act by such a sole shareholder on behalf of the corporation is deemed to be authorized.

Such a sole shareholder may choose not to establish a board of directors and not to appoint an auditor, and is not required to comply with the requirements of this Act relating to the by-laws, shareholders meetings and meetings of the board of directors.

resolution is in fact adopted, third parties are protected since the QBCA provides that any act that a sole shareholder engages in on behalf of the corporation is deemed to be authorized.

*B. Impact : 2016 Report on the Application of the Business Corporations Act*<sup>43</sup>

As part of a statutorily mandated review of the QBCA that has to be conducted every five years, Québec's Ministry of Finance released a report in 2016 that considered a wide range of issues, including the adoption rate for the simplified system for sole shareholders. The Ministry of Finance is due to release another report in 2021 (after this article was completed) which it is to be hoped will shed further light on how the regime has fared to date.<sup>44</sup>

The 2016 report begins by acknowledging that the 2011 legislative changes were designed to increase the competitiveness of Québec's business corporations legislation relative to statutes found in other jurisdictions.<sup>45</sup> The report concludes that the measures taken to make the Québec's statute more appealing have had a positive impact.<sup>46</sup> Indeed, the report points to meaningful change in the number of corporations governed by the QBCA from 2011 to 2016.<sup>47</sup> The report notes that the number of corporations with 10 or fewer employees making use of the Québec's corporate law rose steadily after the QBCA came into force.<sup>48</sup> The report also considers changes in corporations' choice of jurisdiction, revealing that prior to the passage of the QBCA, Québec was the province in which the CBCA was used the most (with 22% of new corporations constituted under the CBCA in 2011 located in Québec), but that after the QBCA came into force Québec-based businesses as a percentage of corporations constituted under the CBCA had steadily declined such that by 2015 they represented 18.19%.<sup>49</sup>

Importantly, the report goes on to note that in the first five years after adoption of the regime, 685 sole shareholder corporations had notified the Québec Enterprise Register that they had withdrawn all powers from their

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43. GOUVERNEMENT DU QUÉBEC, *Report on the Application of the Business Corporations Act*, February 2016.

44. S. 496 of the QBCA provides that "[n]ot later than 14 February 2016 and subsequently every five years, the Minister of Finance must report to the Government on the carrying out of this Act and, if applicable, on the advisability of amending it...." In the final paragraph of the report's "Conclusion and Recommendations" section, the report also refers to "the next five-year report." The report was published in 2016, so the next five-year report is due in 2021.

45. GOUVERNEMENT DU QUÉBEC, *Report on the Application of the Business Corporations Act*, February 2016, p. 3.

46. *Id.*, p. 23.

47. *Id.*, p. 4, with the number moving from 338,673 companies in 2011 to 406,485 in 2015.

48. *Ibid.*, with the number moving from 315,531 companies in 2011 to 381,951 in 2015.

49. *Id.*, p. 7.

boards of directors by means of a written declaration, allowing them to take advantage of the simplified regime.<sup>50</sup> The report observes that the withdrawal of all powers from the board of directors occurred more frequently in sole shareholder corporations (64% of all withdrawals of all powers from the board) than in corporations with multiple shareholders that entered into a unanimous shareholder agreement (36% of all withdrawals of all powers from the board of directors).<sup>51</sup>

The report is, however, silent when it comes to the question what conclusion one should draw from these numbers. Although it is not possible to pinpoint with certainty how many sole shareholder corporations there are in Québec, it is fair to assume that they represent a very significant portion of Québec's roughly 300,000 SMEs.<sup>52</sup> With only 685 of these having taken advantage of the QBCA's sole shareholder regime in the first 5 years of its existence—a rate of adoption that is surprisingly low—it is reasonable to conclude that at the time of incorporation few businesses in Québec are in fact aware that they have the option to set up a company that does not need to have a board of directors or to comply with several other provisions that require redundant procedures to be followed. The question, of course, is why the sole shareholder regime is not better understood and what steps need to be taken to enhance its visibility. We will return to this question in Part IV of the article.

### C. Influence

Even though the initial adoption rate was low, Québec's innovative sole shareholder provisions have not gone unnoticed. Indeed, soon after their adoption they were to inspire reform in the Yukon—a territory that has made a particular effort to offer up a corporate law model whose flexibility has made it attractive to many Canadian businesses (notably British Columbia-based mining companies). Eager to remain competitive in the face of substantial reforms to British Columbia's corporate law statute enacted in 2002,<sup>53</sup> the Yukon adopted a series of management-friendly amendments to the Yukon *Business Corporations Act* (YBCA) on 1 May 2015,<sup>54</sup> including a

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50. *Id.*, p. 14.

51. *Ibid.*

52. The Minister of Finance referred to there being 300,000 SMEs in Québec when he introduced Bill 63 to the National Assembly. See: [http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/39-1/journal-debats/20091021/11117.html#\\_Toc243984392](http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/39-1/journal-debats/20091021/11117.html#_Toc243984392).

53. For a discussion on the British Columbia reforms (which were adopted in 2002), see L. PARSONS & K. BAKE-PATERSON, "Six Months of the B.C. *Business Corporations Act*: Changes and Challenges", 43 *Can. Bus. L.J.* 455 (2006).

54. S. 148(7.1) of the *Business Corporations Act*, RSY 2002, c. 20 as amended by SY 2010, c.8; SY 2010, c. 16; SY 2012, c. 14; SY 2016, c. 5; SY 2016, c. 8; SY 2017, c. 12, available at: [http://www.gov.yk.ca/legislation/acts/buco\\_c.pdf](http://www.gov.yk.ca/legislation/acts/buco_c.pdf). For a review of the various measures that the Yukon adopted, see "Yukon Makes a Pitch to Become Delaware of the North" (7 July 2015),

provision allowing for corporations with no directors (s. 148(7.1)).<sup>55</sup> It is worth noting, however, that this provision is conditioned on first entering into a unanimous shareholder agreement removing all powers from directors before one can in turn dispense with having one or more directors.<sup>56</sup> Moreover, no attempt is made to distinguish sole shareholder corporations. As a result, to take advantage of these provisions a sole shareholder corporation first has to enter into a unanimous shareholder agreement. It is also worth noting that none of the provisions seen in s. 217 of the QBCA that are intended to lighten administrative burdens were incorporated in the YBCA.

Other Canadian provinces and territories typically have a provision in their corporations legislation that is similar to the unanimous shareholder agreement provisions seen in s. 214 of the QBCA and s. 148(7) of the YBCA.<sup>57</sup> Some of the statutes also have provisions that provide both that a sole shareholder may make a written declaration that restricts the powers of directors, and that the declaration is deemed to be a unanimous shareholder agreement.<sup>58</sup> These provisions are therefore similar to the latter part of s. 213 of the QBCA. However, no Canadian jurisdiction other than Québec and Yukon has so far adopted provisions enabling shareholders to dispense with

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available at: [https://ca.practicallaw.thomsonreuters.com/9-617-0925?transitionType=Default&contextData=\(sc.Default\)#co\\_anchor\\_a645246](https://ca.practicallaw.thomsonreuters.com/9-617-0925?transitionType=Default&contextData=(sc.Default)#co_anchor_a645246).

55. S. 148(7.1) states:

If a unanimous shareholder agreement abrogates all the rights, power and duties of the directors of a corporation, the corporation is not required to have a director for as long as the unanimous shareholder agreement remains in effect and continues to abrogate all the rights, power and duties of the directors.

56. S. 148(7.2) requires that a copy of the agreement be filed within 15 days after ceasing to have directors:

If a corporation does not have a director as permitted by subsection (7.1) the corporation shall

- (a) send to the registrar within 15 days after ceasing to have a director
  - (i) a signed copy of the unanimous shareholder agreement by which all the rights, power and duties of the directors of the corporation are abrogated, and
  - (ii) a notice of change of directors under section 114;
- (b) send to the registrar any amendments made to the unanimous shareholder agreement from time to time within 30 days of an amendment taking effect; and
- (c) comply with any requirements prescribed by the regulations.

57. See, for example, s. 146(5) of the CBCA, which states:

To the extent that a unanimous shareholder agreement restricts the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation, parties to the unanimous shareholder agreement who are given that power to manage or supervise the management of the business and affairs of the corporation have all the rights, powers, duties and liabilities of a director of the corporation, whether they arise under this Act or otherwise, including any defences available to the directors, and the directors are relieved of their rights, powers, duties and liabilities, including their liabilities under section 119, to the same extent.

58. See, for example, CBCA, s. 146(2); Prince Edward Island's *Business Corporations Act*, s. 116(2); Manitoba's *Corporations Act*, s. 140(3); New Brunswick's *Business Corporations Act*, s. 99(3); Saskatchewan's *Business Corporations Act*, s. 140(2.1); Newfoundland and Labrador's *Corporations Act*, s. 245(2). But, as noted, oddly enough this provision is not to be found in the YBCA.

a board of directors, and no jurisdiction other than Québec has adopted a provision allowing a sole shareholder corporation to dispense with having to adopt by-laws, appoint an auditor, and hold shareholder and director meetings. This is somewhat surprising given global developments with respect to sole shareholder corporations, some of which are canvassed in the next section of this article. Policy makers outside of Québec who are responsible for ensuring that Canadian corporate law is responsive to the needs of SMEs would therefore do well to consider the growing body of experience with sole shareholder regimes not only in Québec but also in other jurisdictions around the world.

### **III. Québec's Initiatives in Perspective : Latin America and Simplified Corporations**

In assessing strategies for the development of simplified corporations and the strengths and weaknesses of Québec's sole shareholder regime, there is much to be said for looking at reform at a global level. Indeed, Québec is hardly alone in trying to find ways not only to facilitate small business's access to incorporation, but also to reduce the administrative load that has to be dealt with after having incorporated. Reference was made earlier in this article to developments in Delaware and the United Kingdom that Québec's Ministry of Finance mentioned in its 2007 *Working Paper* on potential reforms to Québec's corporate law. But it is worth adding to this list of jurisdictions and noting that several states in the United States have enacted legislation designed to simplify matters for close corporations, including through the adoption of provisions that provide the option to dispense with by-laws, annual shareholder meetings and boards of directors.<sup>59</sup> This is a model that a number of countries have looked to as they have considered how to modernize their corporate law.<sup>60</sup> Moreover, the European Union has for some time been engaged in dialogue about how to foster a unified approach to streamlining provisions governing "single member private limited liability corporations," with a number of European countries adopting measures designed to lighten the administrative burden applicable to sole shareholder corporations.<sup>61</sup>

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59. Sixteen states (including Delaware) and the District of Columbia allow for statutory close corporations. For further details, see, for example: <https://www.bizfilings.com/toolkit/research-topics/running-your-business/asset-strategies/statutory-close-corporations-permitted-in-some-states>.

60. The countries include France, Japan, Singapore, China, and India. See *Report of the Inter-American Juridical Committee: Recommendations on the Proposed Model Act on the Simplified Corporation*, Mexico, 5–10 March 2012, p. 1: [http://www.oas.org/en/sla/dil/docs/CJI-doc\\_380-11\\_corr2.pdf](http://www.oas.org/en/sla/dil/docs/CJI-doc_380-11_corr2.pdf) (*IAJC Report*).

61. For details on some of the European Union's initiatives, see, for example, Robert Jay DILGER, "The European Union's Small Business Act: A Different Approach", Congressional Research Service, 1 September 2016: <https://fas.org/sgp/crs/row/R44084.pdf>.

Particularly instructive are developments in countries that have engaged in recent reform that has in turn had a dramatic impact on rates of small business incorporation. Indeed, at the same time that Québec embarked on its reforms, change to corporate law applicable to small business was also starting to be implemented in Latin America. A wave of change has since unfolded that has led more than 10 countries that are members of the Organization of American States (OAS) to adopt simplified corporate models: Chile (2007), Colombia (2008), the Dominican Republic (2008), Mexico (2016), Argentina (2017), Brazil (2017), Peru (2018), Guatemala (2018), Uruguay (2019), Paraguay (2020), and Ecuador (2020).

Although Chile was first out of the gate in the push to adopt a simplified corporate regime, creating the Chilean SpA in 2007, there were difficulties in implementing its regime.<sup>62</sup> As a result, Colombia, which moved forward with its own highly successful reforms a year later, rapidly became the model for other OAS countries seeking to adopt a simplified regime.

Colombia's success in promoting awareness of the positive consequences flowing from adoption of a simplified corporate law model, notably one based on Colombia's Law 1258 allowing for the creation of a form of simplified corporation known as a Sociedad por Acciones Simplificada (SAS), is in no small part due to tenacious efforts on the part of Dr. Francisco Reyes Villamizar.<sup>63</sup> Dr. Reyes would come to write a number of influential publications in which he called for a Model Law based on Law 1258 that other Latin American countries might look to for inspiration, arguing that there were significant benefits to be had from providing for simplified corporations.<sup>64</sup> Based on experience in Colombia, Dr. Reyes emphasized that a model designed in light of experience with the Colombian SAS would "be particularly useful in developing and emerging economies where there is an increasing need for flexible and user-friendly corporate vehicles."<sup>65</sup> But he noted that introducing the SAS to many Latin American countries would require

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62. *IAJC Report*, p. 1.

63. See e.g.: <https://www.law.miami.edu/faculty/francisco-reyes-villamizar> and [http://www.oas.org/en/sla/dil/newsletter/DDI\\_Virtual\\_Meeting\\_Model\\_Law\\_Simplified\\_Corporation\\_September-2019.html](http://www.oas.org/en/sla/dil/newsletter/DDI_Virtual_Meeting_Model_Law_Simplified_Corporation_September-2019.html).

64. In addition to numerous articles, Dr. Reyes has published a book which explores the subject in considerable detail: FRANCISCO REYES, *Latin American Company Law. Volume II, A New Policy Agenda: Reshaping the Closely-Held Entity Landscape*, Carolina Academic Press, Durham, N.C., 2013. For examples of articles that he has written, see FRANCISCO REYES, "Modernizing Latin American Company Law: Creating an All-Purpose Vehicle for Closely Held Business Entities—The New Simplified Stock Corporation" 29 *Penn. St. Int'l L. Rev.* (2011) 523; "The Colombian Simplified Corporation: Corporate Law Disintermediation in a Developing Jurisdiction" 50 *Wake Forest L. Rev.* 743 (2015); "The Colombian Simplified Corporation: A Proposed Model for Developing Jurisdictions" 33 *Ariz. J. Int'l & Comp. L.* 113 (2016).

65. FRANCISCO REYES, "The Colombian Simplified Corporation: An Empirical Analysis of a Success Story in Corporate Law Reform" (20 November 2013), p. 18. Available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2357578](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2357578). The article was also published in 4 *Penn. St. J.L. & Int'l Aff.* 392 (2015): <https://elibrary.law.psu.edu/jlia/vol4/iss1/18/>.

“breaking up path dependence and overcoming certain pressure groups and backward looking legal traditions.”<sup>66</sup> This is why he believed it important to prepare and promote a Model Act on simplified corporations, one which would serve as a starting point in building the consensus needed for significant corporate law reform and the introduction of simplified corporations.

The OAS's Inter-American Juridical Committee embraced Dr. Reyes's work and endorsed a Model Law, making a concerted effort to assist OAS members in developing and then implementing legislation based on the Model Law.<sup>67</sup> The Committee concluded that there was compelling evidence supporting the proposition that adoption of simplified business associations would contribute meaningfully to economic progress.<sup>68</sup> Indeed, economic development in many OAS countries had for too long been dependent on informally created micro-enterprises and SMEs.<sup>69</sup> The Committee noted that existing business models in many Latin American countries were often unhelpful in moving business out of this informal economy, frequently requiring business people to follow elaborate and costly notarial and administrative processes which simply served as a disincentive to taking the steps needed in order to incorporate.<sup>70</sup> The Committee was of the view that Colombia's SAS was especially well placed to serve as a model for OAS members seeking to streamline and simplify incorporation for smaller businesses.<sup>71</sup>

The OAS held a series of meetings to discuss the proposed Model Law,<sup>72</sup> and on 20 June 2017 the OAS's General Assembly adopted a resolution in which it requested that the Inter-American Juridical Committee and its Technical Secretariat give the broadest possible publicity to the OAS Model Law on Simplified Corporations.<sup>73</sup> The General Assembly also requested that the OAS's General Secretariat provides OAS member states with all necessary cooperation and support in the event that they decided to adopt some or all of the Model Law.<sup>74</sup> The OAS's endorsement of the Model Law

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66. *Ibid.*

67. *IAJC Report*.

68. *Ibid.*

69. The *IAJC Report* referenced the following study: Boris KOZOLCHYK & Cristina CASTANEDA, “Invigorating Micro and Small Businesses Through Secured Commercial Credit in Latin America: The Need for Legal and Institutional Reform” 28 *Ariz. J. Int'l & Comp. L.* 43 (2011).

70. *IAJC Report*, p. 2.

71. *Ibid.*

72. For a review of the process leading to Model Law, see Jeannette TRAMHEL, “The Simplified Corporation: A New Structure for Doing Business in the Americas?”, *Agenda Internacional*, Año XXIV N° 35, 2017, p. 137–170: <http://revistas.pucp.edu.pe/index.php/agendainternacional/article/view/19368/19486>.

73. General Assembly Resolution 2906 (XLVII-0/17). See: <https://www.law.ox.ac.uk/business-law-blog/blog/2017/09/organization-american-states-model-law-simplified-corporations> and [http://www.oas.org/en/sla/dil/newsletter\\_Model\\_Law\\_Simplified\\_Corporation\\_Report\\_Jul-2017.html](http://www.oas.org/en/sla/dil/newsletter_Model_Law_Simplified_Corporation_Report_Jul-2017.html).

74. *Ibid.*

was an important factor that led those Latin American countries listed above to adopt legislation introducing a variety of simplified corporate forms.

It is beyond the scope of this article to engage in a detailed analysis of the similarities and differences between the different Latin American regimes inspired by the OAS Model Law. However, there is value in looking briefly at the main elements of the regime that inspired this wave of reform : Colombia's Law 1258.

### A. *Features of Colombian SAS*

Colombia enacted Law 1258 on 5 December 2008.<sup>75</sup> Unlike Québec, the decision was made to create a distinct kind of corporation that would be available to small business, one that was a meaningfully different legal vehicle than what was provided for under traditional Colombian corporate law.

Law 1258 allows one or more natural or legal persons to create an SAS.<sup>76</sup> Shares and other securities issued by the SAS cannot be traded on a stock exchange.<sup>77</sup> The SAS can be created by a contract or other unilateral act that is recorded in a private document registered with the Mercantile Registry of the Chamber of Commerce of the region in which the company establishes its main domicile.<sup>78</sup> Model incorporation documents, including model by laws, are available on Colombia's Chamber of Commerce website to assist with the formation of an SAS.<sup>79</sup> A Colombian SAS is then governed by its by laws, Law 1258 and the general provisions included in Colombia's Commercial Code (to the extent that they are not inconsistent with Law 1258).<sup>80</sup>

Importantly, the Colombian SAS is not required to have a board of directors.<sup>81</sup> If an SAS does not have a board of directors, administrative and legal representation falls to a legal representative appointed by shareholders. This person is a manager or an "authorized officer"<sup>82</sup> who conducts the day-to-day affairs of the SAS.<sup>83</sup> Financial statements and management reports must be submitted by the legal representative for consideration at shareholders'

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75. Law 1258: [http://www.secretariassenado.gov.co/senado/basedoc/ley\\_1258\\_2008.html](http://www.secretariassenado.gov.co/senado/basedoc/ley_1258_2008.html).

76. Law 1258, Chapter I, Article 1.

77. Law 1258, Chapter II, Article 4.

78. Law 1258, Article 5.

79. Available at <https://www.ccc.org.co/tramites-de-registros/registros-publicos/registro-mercantil/modelo-de-actas-y-documentos/>. See also [http://recursos.ccb.org.co/ccb/faq\\_actas/index.htm#](http://recursos.ccb.org.co/ccb/faq_actas/index.htm#).

80. <https://www.alcaldiabogota.gov.co/sisjur/listados/tematica2.jsp?subtema=24626&cadena=S>.

81. Law 1258, Article 25.

82. Clare MONTGOMERY & Adriana COMBATT, "Establishing a business in Colombia", Thomson Reuters Practical Law, point 11: [https://uk.practicalaw.thomsonreuters.com/w-013-2585?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicalaw.thomsonreuters.com/w-013-2585?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

83. Francisco REYES, "The Colombian Simplified Corporation: an Empirical Analysis of a Success Story in Corporate Law Reform" (20 November 2013), p. 15.

meetings for approval.<sup>84</sup> In an SAS with a sole shareholder, however, the sole shareholder will simply approve all company accounts and record such approval in minutes forming part of the company's records.<sup>85</sup>

### B. *Impact of SAS Legislation*

As previously noted the SAS is subject to a distinct statute and so marks a departure from the unified approach to corporate law typically favoured in Canada and reflected in Québec's 2011 reforms. Dr. Reyes notes that the decision to proceed in this way has its advantages in that : "the SAS law contains general housekeeping rules that operate as default provisions, and are particularly useful for those parties who lack the expertise, time or resources needed to negotiate tailor made corporate contracts and shareholder agreements."<sup>86</sup> This is in part why it was decided to have the Colombian Mercantile Registry provide model by-laws that are extensively used by Colombia SAS's. Dr. Reyes notes that : "[i]n this manner entrepreneurs can significantly reduce transaction costs and proceed to the incorporation without the aid of costly advisors."<sup>87</sup>

Some of the benefits flowing from the adoption of Law 1258 have included : reduced incorporation formalities, such that all that is now needed is a simple filing with the Mercantile Registry ; streamlined costs and requirements associated with the formation and operation of boards of directors and auditors ; the elimination of purpose clauses, among other anachronistic requirements ; and the introduction of innovative enforcement reform that has led arbitration and administrative adjudication to supersede inefficient judicial procedures.<sup>88</sup> Law 1258 therefore involved a comprehensive rethinking of many aspects of Colombia's corporate law regime, one that was arguably even more archaic than the one that Québec set out to reform 10 years ago. In dealing with this challenge, Colombia drew inspiration from some of the same sources that would also influence Québec, notably hybrid business entities seen in the United States and the United Kingdom.<sup>89</sup> But it is clear that Colombia and other Latin American countries have adapted these models and introduced innovations. As a result, rather than limiting

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84. Law 1258, Article 37.

85. See the commentary that follows Article 37 at: [http://www.secretariasenado.gov.co/senado/basedoc/ley\\_1258\\_2008.html](http://www.secretariasenado.gov.co/senado/basedoc/ley_1258_2008.html).

86. Francisco REYES, "The Colombian Simplified Corporation: An Empirical Analysis of a Success Story in Corporate Law Reform" (20 November 2013), p. 3.

87. *Ibid.*

88. *Id.*, p. 1.

89. See footnote 3 of a summary of a longer article with the same name as the one cited above that was submitted by Dr. Reyes Villamizar to the United Nations Commission on International Trade Law Working Group I, Twenty-second session, New York, 10–14 February 2014, "The Colombian Simplified Corporation: An Empirical Analysis of a Success Story in Corporate Law Reform", available at <https://undocs.org/pdf?symbol=en/A/CN.9/wg.I/wp.83>.

oneself to looking at the United States and the United Kingdom, Canadians interested in how we might advance our thinking on how best to adapt our law to better suit small business would do well to look farther afield and consider developments in regions like Latin America.

The impact that reform has had in Latin America is striking. Indeed, Dr. Reyes notes that the positive effects flowing from the introduction of the Colombian SAS were significant and include :

- Colombia achieving a much higher level of economic formalization,<sup>90</sup> because the SAS has contributed to the regularization of thousands of businesses that, in its absence, would have remained informal businesses;<sup>91</sup>
- the creation of significant employment;<sup>92</sup>
- increased access for small businesses to credit and investment;<sup>93</sup>
- increased collection of taxes by local and national governments;<sup>94</sup> and
- an increase in social security contributions and other payments to governmental agencies.<sup>95</sup>

Dr. Reyes has also noted that in Colombia alone “[t]he incorporation of more than 200,000 Simplified Stock Corporations during the first 5 years following the enactment of this law eloquently shows the usefulness of new corporate vehicles endowed with flexibility and simplified incorporation features.”<sup>96</sup> The rate of adoption has continued apace with almost all companies in Colombia choosing to incorporate under the SAS regime.<sup>97</sup>

#### IV. The Challenges Ahead

While this article does not seek to provide a comprehensive overview of developments with respect to simplified corporations in Latin America, it should nevertheless be clear that there is considerable innovation and

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90. FRANCISCO REYES, “The Colombian Simplified Corporation: An Empirical Analysis of a Success Story in Corporate Law Reform” (20 November 2013), p. 18.

91. *Id.*, p. 1.

92. *Id.*, p. 18.

93. *Ibid.*

94. *Id.*, p. 1 and 18.

95. *Ibid.*

96. *Id.*, p. 18. Dr. Reyes notes that the number had risen to 300,000 by the end of the 6th year following adoption of the law (“The Colombian Simplified Corporation: Corporate Law Disintermediation in a Developing Jurisdiction” 50 *Wake Forest L. Rev.* 743 (2015), p. 743); and to 330,000 by August 2015 (“The Colombian Simplified Corporation: A Proposed Model for Developing Jurisdictions”, 33 *Ariz. J. Int’l & Comp. L.* 113 (2016), p. 114).

97. Jeannette TRAMHEL, “The Simplified Corporation: A New Structure for Doing Business in the Americas?”, *Agenda Internacional*, Año XXIV N° 35, 2017, footnote 20 at p. 144, notes that in figures for the SAS as a percentage of all types are 96.56% (2014), 97.24% (2015), and 97.92% (as of April 2016).

reform unfolding in a number of OAS member states. Part of the reason for this is that the OAS itself has been actively involved in encouraging countries to embrace reform that will increase rates of small business incorporation. Québec and Canada can only benefit from learning more about this wave of reform, just as Canada and other OAS member states would benefit from learning more about the innovative aspects of Québec's sole shareholder regime.

Given the importance of small business to Québec's economy, renewed attention therefore needs to be paid to ways to encourage these businesses to take advantage of what Québec's sole shareholder regime has to offer. But matters should not stop there. In addition to finding ways to foster a higher rate of adoption, it is important to keep asking oneself if the regime can be improved.

To be sure, the addition of the sole shareholder provisions found in ss. 213 to 217 of the QBCA was a significant and positive development. This article has already stressed that there is much to be said for the decision to work through the logical consequences of having only one shareholder, and then providing for the option to dispense with drafting by-laws, appointing a board of directors and an auditor, and preparing director and shareholder resolutions. The reduction in the administrative burden that being able to side-step these requirements entails is meaningful and many a small business would benefit from getting out from under corporate law rules that are essentially redundant when one is dealing with sole shareholder corporations. Québec's initiative therefore deserves to receive more attention both in Canada and abroad. Many of the Latin American countries that have adopted simplified corporations legislation would benefit from considering whether to fold into their legislation some of the distinctive provisions that Québec has enacted. For example, doing away with by-laws and superfluous resolutions would go some way to furthering the process of simplification that so many of these countries have embraced.

At the same time, the low rate of adoption seen in Québec with respect to a number of the features found in its sole shareholder regime does force one to ask what more can be done to encourage use of the regime at home before being too quick to promote its merits abroad. In this respect, the experience in Colombia and other OAS countries suggests that if governments and inter-governmental organizations decide to put their shoulder to the wheel and to encourage businesses to take advantage of simplified corporate structures, it is possible to generate transformative change. The question is whether what has been missing in Québec is a similar degree of sustained commitment to ensuring that small business takes advantage of what was made available in 2011.

In considering how best to answer that question, it is worth noting that there are at least two dimensions to the challenges that face any jurisdiction that seeks to adopt a sole shareholder regime that will resonate with small

business. The first relates to providing a compelling model and then engaging in a process of continuous improvement. But the second is no less significant, and it involves finding ways to enhance awareness that the regime is available and to encourage businesses to opt into that regime.

When it comes to providing a compelling model, Québec clearly scores well. Its sole shareholder regime is highly innovative yet carefully considered. Other jurisdictions in Canada would therefore benefit enormously if they too followed in the Yukon's footsteps and considered how best to integrate a simplified corporation model of this kind into their corporate law.

At the same time, there are aspects of the way in which Québec came at developing its sole shareholder regime that are worth re-examining. To begin with, thought should be given to the wisdom of the decision to integrate a sole shareholder regime into sections of a business corporations statute that deal with unanimous shareholder agreements. Rather than weave provisions designed for sole shareholder corporations in and out of sections dealing with situations that typically involve several shareholders, it would be a good deal more straightforward if the sole shareholder sections were set out in a stand-alone division of Chapter VII of the QBCA. This would have the virtue of highlighting the distinctiveness of the regime and of ensuring that one does not have to interpret aspects of the sole shareholder regime through the prism of clauses designed to deal with unanimous shareholder agreements.

While one could, of course, have gone down the more complex path of creating a separate statute for sole shareholder companies, on balance this author favours the approach taken in most Canadian jurisdictions, which involves minimizing the number of corporate statutes on offer. There is much to be said for having a single statute that allows a company to evolve and grow without having to move from one statute to another. Moreover, as Québec's efforts regarding the sole shareholder provisions confirm, it is entirely possible to provide for a simplified regime in part of a business corporations statute that focuses exclusively on that exercise.

In addition to the location of sole shareholder provisions in a business corporations statute, there are other changes that should be considered. For example, one might well ask why rather than require a shareholder to prepare a written declaration removing the powers of the Board after the corporation has been created, the QBCA does not simply provide for a streamlined system that allows the sole shareholder to decide at the time of incorporation that it wishes to establish a company with no directors. One suspects that the current approach requiring the preparation of a declaration was in part a product of weaving the regime into that part of the QBCA that deals with unanimous shareholder agreements, with the result that it may have seemed natural enough to have a sole shareholder prepare a document analogous to a unanimous shareholder's agreement. But there is absolutely no reason to impose this requirement on a shareholder that

knows from the very outset that it has no need for directors. It would be quite simple instead to provide the incorporator the option at the time of incorporating to tick a box confirming that the corporation will not have directors for the time being.

This may seem like a minor detail, but as it stands the QBCA requires that at some point after incorporation a sole shareholder must take the step of preparing a written declaration in order to dispense with directors. This administrative step is unnecessarily burdensome, especially since in practice most entrepreneurs have little familiarity with how to draft legal documents. In practice it will be far from obvious to many an entrepreneur what the declaration that they need to prepare is supposed to look like. Doing away with this requirement and simply providing for the ability to create a corporation without directors from the very outset would greatly simplify matters and could be expected to enhance ease of access to the sole shareholder regime.

S. 215 of the QBCA is another example of the overly burdensome nature of the declaration process. It requires that a shareholder notify the registrar responsible for corporations that such a declaration has been adopted, thereby adding another administrative step to the process.<sup>98</sup> This too would not be necessary if the shareholder could simply opt into the regime when incorporating the company through a very simple step forming part of the incorporation process itself, such as ticking off a box confirming that there will initially be no directors. While it is no doubt the case that some sole shareholder companies would wish to start off with one or more directors only to dispense later with the director(s) in question, it would be easy enough to reserve the declaration mechanism or some simpler version of this mechanism for those situations (e.g. one that would not entail having to produce a legal document like a declaration but that could be effected through filling out a simple online form). And while a declaration mechanism (or a simpler approach of the kind just described) is no doubt needed to enable what are likely thousands of existing sole shareholder corporations in Québec that have directors to opt into the no-director model that s. 217 of the QBCA permits, a forward-looking regime should nevertheless seek to streamline the exercise as much as possible for new companies as they are incorporated, rather than allow the system to be driven entirely by a mechanism created to enable existing corporations to transition to the new regime.

There are other aspects of the existing regime that warrant reconsideration. The QBCA states that a sole shareholder that has dispensed with a

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98. S. 215 of the QBCA applies to sole shareholder declarations since they are deemed pursuant to s. 213 to be equivalent to a unanimous shareholder agreement. S. 215 states:

The corporation must, in accordance with the Act respecting the legal publicity of enterprises declare to the enterprise registrar, for entry in the enterprise register, the existence or the termination, including on the corporation becoming a reporting issuer, of a unanimous shareholder agreement that restricts, in whole or in part, the powers of the directors.

board may make decisions by way of written resolution. But it is not altogether clear whether this provision is suggesting that the sole shareholder should keep a written record of any corporate decision that would ordinarily form the subject matter of directors' resolutions. For example, if the sole shareholder wishes to amend the company's articles of incorporation, is the provision suggesting that it is necessary for the sole shareholder to prepare a written resolution to that effect before filing the relevant form? If so, what is the point of such a requirement? To some extent, the decision to include language in s. 217 that states that any act taken on behalf of the corporation is "deemed to be authorized" resolves the matter in the event that no written resolution is prepared, but one might still ask whether it might not be possible to be clearer about what kinds of decisions one thinks it is really necessary to have documented in the form of a written resolution.

The point of these observations is not to take away from the accomplishments of those who prepared the QBCA's sole shareholder regime. It is instead simply to suggest that there are ways in which one can make the regime even more user-friendly for those creating or running small business enterprises who have little, if any, familiarity with legal procedures that were in any event designed for situations where there are multiple shareholders involved, and that serve little purpose when there is only one shareholder.

This brings us then to the second dimension of the challenge: raising awareness that the sole shareholder regime is available. There are at least two distinct constituencies of relevance and the challenges related to each one are somewhat different. The easier of the two is the category of businesses that are incorporating for the first time. As best this author can determine, there is nothing in the forms that one must complete when incorporating a QBCA company, or on the website through which one can complete and then file these forms, that makes clear that one can in fact set up a company without any directors.<sup>99</sup> Nor is there readily available information making clear that a sole shareholder corporation need not have by-laws or an auditor, and that it can dispense with director and shareholder meetings. As the OAS's experience in Latin America makes clear, for innovative measures to be adopted people first need to know they exist and what advantages their adoption entails. Rather than rely on a plan dependent on word of mouth or on lawyers in private practice to get the word out, Colombia developed a government-driven strategy designed to ensure that small businesses were made well aware of the advantages of the SAS. In this respect, it is striking that data compiled by Dr. Reyes concerning the percentage of Colombian SAS's that opt not to have boards of directors reveals that 86% of Medellin-based companies and 94% of Bogota-based companies chose to

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99. See the following Government of Québec website which is designed to allow the creation of a QBCA corporation: <http://www.registreentreprises.gouv.qc.ca/en/demarrer/constituer-cie.aspx>.

forego having a board of directors, preferring to opt for direct management.<sup>100</sup> The challenge for Québec, and for any other jurisdiction in Canada seeking to go down this road in a way that will have a meaningful impact, is therefore to develop a sustained communications strategy that will alert small businesses to the advantages that the sole shareholder regime has to offer and encourage them to consider going down this path.

The other constituency that one needs to consider is the set of sole shareholder corporations that have already been incorporated. One suspects that most of these have little idea that the sole shareholder regime is available to them, what it entails, and how to transition to the regime. Once again, the problem calls for a well-thought through communications strategy. It is certainly possible to design such a strategy so as to ensure that in conjunction with, for example, reminding a company of annual filing obligations (or confirming receipt of these filings) the *Registraire des Entreprises Québec* would also remind companies that the sole shareholder regime is available should they wish to take advantage of what it has to offer.

The problem just described is not an unfamiliar one in Canada. Several Canadian provinces have in the past proven quite creative in providing for new corporate vehicles that are innovative only to see them get little traction. One need only think of Nova Scotia's efforts to promote social enterprise through the creation of the Community Interest Company,<sup>101</sup> or British Columbia's adoption of legislation allowing for the creation of the Community Contribution Company,<sup>102</sup> which was also designed to foster social enterprises. Neither has met with significant adoption rates.<sup>103</sup> This is in part because the legal community is unfamiliar with the models in question and is therefore concerned about the risks associated with trying untested statutes that have seen little jurisprudence built up around the interpretation of their provisions. But it is in this author's view more fundamentally because having created the vehicle and got some positive press as a result, governments are all too often inclined to move onto new challenges and do not develop long-term strategies that will foster ongoing adoption of the legal vehicles in question.

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100. Francisco REYES, *Latin American Company Law. Volume II, A New Policy Agenda: Reshaping the Closely-Held Entity Landscape*, Carolina Academic Press, Durham, N.C., 2013, p. 154.

101. *An Act Respecting Community Interest Companies*, SNS 2012, c 38.

102. *Community Contribution Company Regulation*, BC Reg 62/2013, provides for a distinct regime further to provisions in Part 2.2. of the British Columbia's *Business Corporations Act*, SBC 2002, c 57.

103. See the discussion of these entities, and their limited adoption, at p. 573 to 578 of Robert M. YALDEN *et al.*, *Business Organizations: Practice, Theory and Emerging Challenges*, 2nd ed., Toronto, Emond, 2018. For a more detailed analysis of reasons why Community Contribution Companies have not met with a higher adoption rate, see Bridget HOREL & Kevin MCKAGUE, "Community Contribution Companies and Access to Social Finance", *Journal of Sustainable Development* Vol. 11, No. 5, 2018: <https://doi.org/10.5539/jsd.v11n5p126>.

## CONCLUSION

The introduction of a distinctive and highly innovative sole shareholder regime into the QBCA a decade ago marked an important step forward in advancing the potential inherent in simplified corporations. But for this potential to be fully realized more is needed than creative thinking. Equally important is execution, and in this regard there is still work to be done in Québec.

Recent developments in a number of Latin American countries that have introduced simplified corporations legislation reveal the importance of making a concerted effort to have small businesses embrace new and simpler ways of creating and managing companies. Without question, having the OAS active in encouraging its member states to adopt new legislation has made a big difference, but so too have the efforts of a number of the countries in question to promote the new regime on a sustained basis. Some countries may at first have struggled with implementation, but Colombia's long-term success is instructive. It shows the importance of building into the processes associated with incorporation, as well as dealing with government through the life of the corporation, a well-thought through communications strategy, one that will help small businesses to see the very real advantages to be had in embracing a simplified corporate model.

Canada as a whole would do well to follow more closely the international movement to assist micro- and small business in particular, and SMEs in general, through the introduction of simplified corporations. Fortunately, Québec has done much over the last decade to advance our appreciation for ways in which to integrate concepts central to simplified corporations into our existing business corporations acts. The challenge going forward is to encourage other jurisdictions in Canada to follow Québec's lead, to reflect on ways in which the sole shareholder corporation regime can be improved, and to develop communications strategies that will ensure that businesses are made aware of the advantages that a well-crafted sole shareholder regime has to offer.