

September 2015

Summary of the brief issued by the OACIQ in response to

The report on the application of the Real Estate Brokerage Act

OACIQ

Published and produced by the Organisme d'autoréglementation du courtage immobilier du Québec
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BACKGROUND

On June 12, 2015, in accordance with the requirements of the *Real Estate Brokerage Act* (c. C-73.2) (hereinafter “the REBA”), the Minister of Finance tabled his *Report on the application of the Real Estate Brokerage Act* (hereinafter the “Minister’s report”) in the National Assembly.

This report poses a number of questions that essentially raise two issues:

- Whether the notion of “brokerage transaction” needs to be defined and, if so, whether it should cover advisory and assistance services provided to the parties to a real estate or mortgage transaction;
- The mission and governance of the Organisme d’autoréglementation du courtage immobilier du Québec (OACIQ).

The OACIQ salutes the Minister’s initiative to reflect on the future of real estate and mortgage brokerage and to encourage brokerage stakeholders and the general public to comment, before September 30, 2015, on the issues raised by the Minister’s Report. In response to the Finance Minister’s invitation, the OACIQ is submitting its brief.

In its brief, the OACIQ presents an overview of the status and evolution of the real estate and mortgage brokerage industry and of the evolution of services designed to assist the parties to a transaction, and proposes a definition to clarify the professional activities governed by the REBA. In the OACIQ’s opinion, the purpose is not to broaden the field of application of the REBA, but rather to clarify its scope with a view to ensuring proper oversight of all professional activities required by the public when carrying out a real estate transaction or seeking a mortgage loan.

It should be stressed that the OACIQ is surprised at some of the findings and comments contained in the Minister’s Report on the evolution of real estate and mortgage brokerage and the governance of the Organization. The OACIQ is also concerned by some of the directions that could be taken regarding the questions raised in the report.

Moreover, following a thorough review of the situation since the coming into force of the REBA on May 1, 2010, the OACIQ arrives at findings that are different from those contained in the Minister’s Report, including when it comes to the fulfilment of its public protection mission.

Consequently, the brief outlines the OACIQ’s achievements, how it has discharged its mission and how well it is managed, and ultimately concludes to the success of the current self-regulation model, which is essentially based on:

- public information and assistance;
- prevention work to empower, train and inform brokers; and
- more coercive actions with brokers where circumstances require.

Finally, the brief suggests a number of other topics requiring discussion which are not addressed in the Minister’s Report, including the importance of overseeing the activities of building inspectors and co-ownership property managers.

REAL ESTATE AND MORTGAGE BROKERAGE: ECONOMIC FACTORS AND PROTECTION OF THE PARTIES' ASSETS

The purchase or sale of a property remains one of the biggest investments a person or family will ever make in their lives, and real estate property represents an important part of their assets. If we exclude retirement funds and investments in a self-owned business, close to 60% of a family's assets consists in real estate holdings. On average since 2010, more than 140,000 residential and commercial real estate transactions have been carried out each year in Québec, representing a volume of several billions of dollars. The value of mortgage loans extended each year also amounts to billions of dollars. Real estate and mortgage transactions therefore have a significant impact on the assets of Québec families and enterprises.

The presence of brokers in real estate and mortgage transactions

Under the REBA, only brokers who hold a licence issued by the OACIQ can engage in real estate or mortgage “brokerage transactions”, and the OACIQ is the body that oversees these activities.

Real estate brokers are involved in the majority of transactions mentioned above (in about 70% of cases on the residential side), and nothing indicates that this involvement is decreasing, quite the opposite. On the mortgage side, the volume of loans obtained through the services of a mortgage broker is on the rise and currently stands at almost 30% (more for first-time buyers).

Real estate and mortgage brokers guide the parties to a transaction through the process of purchasing, selling or leasing an immovable or of obtaining a loan secured by immovable hypothec. This means that they help Québec families and enterprises build their real estate portfolios and, because their activities are overseen and they have certain obligations, their involvement contributes to the protection of these assets. Examples that come to mind in this regard include a broker's obligation to provide information on the immovable or the mortgage loan, to verify the accuracy of any information provided, and to advise all the parties to a transaction.

Real estate and mortgage brokers, whose numbers remain at an historic high, despite a drop which is likely due to a slump in the real estate market, provide a broad range of services as part of the process leading to a real estate or mortgage transaction. These services evolve constantly based on the needs of the public, technological changes and the growing complexity of transactions, and cover both residential and commercial transactions. They are provided to sellers and buyers, borrowers and lenders, lessors and lessees. Thus one cannot consider brokerage only from the angle of the services provided to the seller of a residential immovable who relies entirely on the broker to carry out his transaction, as suggested in the Minister's Report.

The service offer by for-sale-by-owner companies

Parallel to the services provided by real estate and mortgage brokers, other services pursuing the same goals are emerging and proliferating (including what the Minister's Report refers to as "for-sale-by-owner companies", citing DuProprio as an example). Although in the past these companies may have been considered as simple advertising services, this is no longer the case for some of them. These companies now offer complete services to put a property on the market or search for a mortgage loan, and market these services via sophisticated and specialized websites, as well as guidance, advisory or assistance services. This gives the public a false sense that their transactions are very safe, a feeling reinforced by advertising campaigns that stress that a seller who uses these services is supported and not working alone. In other words, several of these companies are engaging in brokerage activities within the meaning of the REBA, and it is imperative that this be specified.

Yet the OACIQ is concerned by the fact that these companies do not consider their activities to fall within the reach of the REBA and therefore operate outside of the Act's framework, thereby depriving the public from the protections it should rightfully expect when using real estate or mortgage services.

Whereas the similarity of the services provided by "for-sale-by-owner companies" and those provided by real estate brokers seems obvious, doing business with the former gives limited recourse to a user who would be dissatisfied with their services, other than turning to the courts in accordance with the provisions of the Civil Code, with the delays and expense that this entails. The same goes for certain Internet companies that offer to put borrowers in contact with lenders. These companies are acting without being duly licensed, outside of the REBA and of any measures put in place to protect the public.

THE OACIQ AND PUBLIC PROTECTION

Under the REBA, the OACIQ's mission is to:

"[...] protect the public in real estate and mortgage brokerage dealings by enforcing rules of professional conduct and by inspecting the affairs of brokers and agencies. It is to ensure, among other things, that the transactions engaged in by brokers and agencies are compliant with the law."

In the last five years, the OACIQ has fulfilled this mission effectively, including by informing the public, empowering brokers, and creating efficient bodies to achieve this.

Informing the public

The public must be able to rely on an oversight organization that provides relevant information in order to clearly understand the services offered and the tools used by brokers, and the protections deriving therefrom.

The OACIQ is of the opinion that public protection means wide-scale dissemination of information on the advantages for consumers of doing business with a broker whose activities are governed by the Organization. To this end, the OACIQ website offers a wealth of information on the rights and obligations of consumers and brokers. In addition the OACIQ has become a content partner of the Protégez-Vous.ca website and a collaborator in the new website lacropriété.info, on which it broadcasts its own information capsules. The public can also contact the **OACIQ Info Center** for more information, including on the duties of brokers and the brokerage forms they use. Some 60,000 requests for information are processed each year, one quarter of which emanate from the public.

Empowering brokers

Consumers who use the services of a broker to carry out a real estate or mortgage transaction are protected, because they are guaranteed to be dealing with professionals:

- with certified, up-to-date skills;
- who have access to tools to help protect the public; and
- whose activities are overseen.

The following initiatives attest to the OACIQ's leadership in this area:

a) Basic training

The OACIQ has implemented effective regulations to verify the skills of those aspiring to the broker profession:

- Implementation of mandatory basic training, certified via an examination administered by the OACIQ;
- Development, following a rigorous process, of competency frameworks that serve as a basis for training program recognition and exam development;
- Implementation of a training program recognition process for educational institutions that offer them.

b) Continuing education

In addition, in order to ensure that brokers maintain their skills, the OACIQ has developed a mandatory continuing education program requiring brokers to obtain, over a 24-month period, the equivalent of 18 hours of training recognized using a very rigorous process that is also tied to the competency frameworks. Moreover, in the last few years the OACIQ has made certain education activities mandatory for all brokers, or for certain groups, on topics deemed crucial such as new forms, collaboration between brokers, and the obligations of a real estate or mortgage agency executive officer.

c) Brokerage forms and other tools available to brokers

In order to improve public protection, the OACIQ has provided brokers with forms that reflect regulatory requirements, to be used when entering into brokerage contracts and preparing transaction proposals, making some of these forms mandatory for residential transactions (including the form Declarations by the seller of the immovable, which reduces the risks for the seller and allows the buyer to make his purchase with full knowledge of the facts). The OACIQ also provides many other tools such as FAQs, annotated forms and standard clauses, in addition to the OACIQ Info Center, which they can contact with any question, notably regarding their obligations, the compliance of their practices with regulatory requirements, and brokerage forms.

d) Oversight of professional practices

Finally, the OACIQ has developed a complete set of regulations covering brokerage practices, rules of professional conduct for brokers and rules regarding advertising and representations made to the public. At the heart of a broker's obligations are those aimed at informing the public as transparently, comprehensively and accurately as possible about all the ins and outs of a transaction, and at acting objectively when advising the parties on the facts relevant to a transaction. These obligations help ensure that the parties are acting with full knowledge of the facts as to the value and condition of the immovable being sold, purchased or leased, or the features of the mortgage loan being sought.

Fulfilling its mission: The OACIQ's different bodies

Any talk about the OACIQ's mission and how it is discharged would not be complete without talking about the various bodies created to do so. The public must be able to rely on an organization that provides effective intervention mechanisms when it wants to obtain information or communicate a grievance regarding a broker's services or behaviour.

In addition to the OACIQ Info Center, the public can count on the Assistance Department, which can be asked to intervene in cases concerning a broker's behaviour, and on the Office of the Syndic, which investigates alleged offences and file complaints with the Discipline Committee where appropriate. Together these departments process some 2,000 requests each year. This results in about 150 complaints being referred to the Discipline Committee, and a hundred or so leading to legal action for illegal practice. In addition to this is the prevention work performed by the Inspection Committee and Department which, through on-site inspections and self-inspections, review the activities of some 2,500 brokers and agencies annually.

The public can also rely on the Real Estate Brokerage Indemnity Fund (FICI) for compensation in case of fraud or misappropriation of funds by a broker, and on the Fonds d'assurance responsabilité du courtage immobilier du Québec (FARCIQ) in case of damages sustained through fault, error, negligence or omission by a broker. Thanks to sound management practices, both funds are in excellent financial health and can carry out their obligations effectively, benefitting both consumers and brokers.

A proactive public protection role

Finally, over the years the OACIQ has been called upon to play a leadership role in certain areas in order to ensure better public protection. Some of the best examples of this include the development of tools to ensure quality building inspections (development of standards of practice, of a service agreement and of the mandatory declarations by the seller form, and inclusion of an inspection clause in the promise to purchase forms), as well as information and training initiatives on phenomena that have been major sources of concern in the last several years (real estate fraud, use of residential buildings for cannabis cultivation, flood zones properties, sale of co-ownership properties, radon infiltration and pyrrhotite).

CLARIFYING THE PROFESSIONAL ACTIVITIES GOVERNED BY THE REBA: A WAY TO ENSURE PUBLIC PROTECTION

The OACIQ believes that, regardless of the scope of services which consumers wish to have access to in order to help them purchase, sell or lease an immovable or secure a mortgage loan, it is important for them to benefit from all the protections offered under the REBA and put in place by the OACIQ. It is also important, as much for the public as for the enterprises and individuals concerned, to know the activities for which the Act provides protection.

In addition, the security of operations leading to the acquisition or leasing of immovable property or the granting of a mortgage loan as well as the protection of the assets of Québecers cannot be ignored. It is important therefore to ensure proper oversight of all the individuals who play a role in real estate or mortgage transactions, regardless of the scope of their intervention. To this effect, there cannot be a “double standard”, one for brokers and one for companies that operate outside of the REBA and the protections it should provide (unlike, for example, the seller who truly chooses to sell on his own).

Yet, although the role of the REBA is to ensure the protection of consumers who use real estate or mortgage brokerage services, the Act does not clearly define the activities this encompasses, merely referring to the notion of “brokerage transaction” without specifying further. Public protection demands a clear definition of these activities.

The idea is not to broaden the REBA's field of application, but rather to specify its scope given the meaning that can be ascribed to the notion of “brokerage transaction” and the evolution of practices.

Bringing a real estate or mortgage transaction to fruition involves diverse and multiple services, and the REBA should provide a definition that takes this into account. Therefore any definition should as a minimum cover the entire range of services involved in the completion, for the benefit of others, of the purchase, sale or lease of an immovable (or enterprise) or the granting of a mortgage loan.

Proposed definition

The OACIQ therefore proposes that the professional activities covered by the REBA be clearly defined. This definition, based on what is done in the professional realm, could read as follows:

“The professional activities referred to in this Act are aimed at contributing to public protection through participation in the completion of a real estate or mortgage transaction and the development of consumer assets.

The practice of the professional activity of broker consists, with regards to the economic activities and assets of a person, enterprise or organization, in the area of real estate or mortgage brokerage, in:

- 1) Gathering, organizing, analyzing, evaluating, verifying, communicating or advising on financial and non-financial information;*
- 2) Developing and evaluating marketing, acquisition, borrowing, advertising and negotiation strategies and proposing, implementing or advising on related processes;*
- 3) Taking any action or providing any service toward the completion of a real estate or mortgage transaction;*
- 4) Performing, offering, attempting to perform or soliciting in order to perform one of the activities listed above.*

Without restricting the generality of the foregoing, this activity consists in providing services to:

- 1) Assess the market value of an immovable or enterprise;*
- 2) Engage in prospecting activities;*
- 3) Solicit, represent, put in contact, act as intermediary, negotiate, assist;*
- 4) Present an immovable, an enterprise or any mortgage product;*
- 5) Provide, prepare, complete or provide advice on any contract, transaction proposal or form regarding a real estate or mortgage transaction;*
- 6) Inform all parties to a transaction of any factors that can adversely affect the parties to a transaction or the very object thereof;*

7) *Protect and promote the interests of the parties represented while providing fair treatment to all parties to a transaction; or*

8) *Act as trustee.*

Nothing in the foregoing may adversely affect the rights of a member of a professional order or a self-regulated organization or any person authorized to carry out an activity under a law applicable in Québec.

For the purpose of the above, the following constitutes a real estate or mortgage transaction, whether or not carried out for investment purposes, as the case may be:

1) *the purchase or sale of, or the promise to purchase or sell, an immovable, a mobile home or shares for exclusive use of a dwelling, or the purchase or sale of such a promise;*

2) *the leasing of an immovable;*

3) *the exchange of an immovable or of shares for exclusive use of a dwelling;*

4) *the loan secured by immovable hypothec;*

5) *the purchase or sale of, or the promise to purchase or sell, an enterprise, and the purchase or sale or such a promise, including any transaction concerning a company's share capital.*

Benefits of a definition

Defining the professional activities of brokers will allow the OACIQ to continue to fully discharge its public protection mission, and even to be more efficient in its actions. The first benefit is that it will clarify its field of action for the public, for brokers, and for the Organization itself. A definition will also help resolve the issues surrounding the evolution of the offer of real estate and mortgage brokerage services, and the emergence of players who operate illegally outside of the regime put in place by the REBA to protect the public.

In the end, a comprehensive, clear and flexible definition will provide increased public protection and will prevent inappropriate interpretations of the REBA that would unduly confine its scope to a few limited acts of intermediation (e.g. presenting promises to purchase and negotiations between parties). This definition will also prevent the proliferation of an ever-increasing range of services that are similar to those offered by brokers but that attempt to operate outside of the REBA's framework.

MAINTENANCE OF THE OACIQ AS A SELF-REGULATING BODY

The Minister's Report states that self-regulation has its limits and is the subject of criticism. The report then goes on to ask which regulation and governance model should be chosen, suggesting that three options are possible, i.e. substantially reducing the presence of industry professionals on the OACIQ Board of Directors, completely eliminating such presence and having the Organization run by a President and CEO appointed by the government, or restricting the OACIQ's activities solely to the oversight of brokers and agencies.

Considering the advantages of self-regulation and the success with which the OACIQ has discharged its mission, it is difficult to understand the reasons for replacing the governance model with the options put forward in the Minister's Report.

Advantages of self-regulation

While agreeing that no system is perfect, the OACIQ still feels that self-regulation offers several advantages (drawing on the knowledge and know-how of the professionals concerned, better understanding of the issues of the regulated field and their impact on public protection, adherence to regulations by professionals, cost of self-regulation borne by the professionals concerned rather than the government, etc.). As demonstrated by the report on its activities since the coming into force of the REBA, it is important to note that the OACIQ has adequately discharged its mission "to protect the public in real estate and mortgage brokerage dealings". In addition, the OACIQ has demonstrated sound management of its assets and made sure it could fulfill its mission by committing the necessary human, material and financial resources. This sound management extends to the administration of the OACIQ's general operating fund and the funds dedicated to FICI, as well as that of the FARCIQ, which is managed in cooperation with its own board of directors.

A proven track record

The success of self-regulation can therefore not be summarily called into question as it is in the Minister's Report. In fact this success was recognized in the OACIQ's compliance verification report prepared in 2013 by the firm Raymond Chabot Grant Thornton, at the request of the Finance Department. The report indicates that the OACIQ has implemented a complete service offer and sound management practices, enabling it to adequately fulfill its mission, although some improvements could be made. Since the tabling of this report, the OACIQ has in fact pursued its efforts to maintain and even improve the quality of its services as it discharges its mission, including by adopting a single file concept (which promotes collaboration within its departments and coherent public interventions, and facilitates file follow-up), by re-evaluating its structure and methods of operation to maximize its resources, and by creating an ombudsman function. Incidentally, these actions were favourably received by the Finance Department.

In short, the current governance structure appears adequate and has shown its effectiveness in protecting the public. The system is now well-established and efficient, and does not require the injection of any government funds. The OACIQ has trouble identifying what can justify the three options put forth in the Minister's Report and is of the opinion that none of these options would ensure better public protection. Consequently we feel that self-regulation should be maintained in the field of real estate and mortgage brokerage.

A reformulated mission statement and the means to achieve it

Despite this success, the OACIQ is aware that improvements constantly have to be made to adapt to evolving management and governance practices.

Nevertheless, although the current make-up of its Board of Directors has enabled it to fulfill its mission well, the OACIQ is not opposed to the addition of one or two directors appointed by the Finance Minister to take into account the addition in 2014 of two elected directors representing the fields of commercial and mortgage brokerage. Incidentally, the OACIQ also proposes to consider the relevance of including criteria in the REBA to ensure the ability of appointed directors to contribute to the Board's work.

As for the concern raised in the Minister's Report regarding the perception brokers may have of the OACIQ as an organization that defends their business interests, without stating an opinion on its merits, the OACIQ encourages better communication between the various stakeholders in the fields of real estate and mortgage brokerage, so that consumers and brokers can be aware of each other's roles and responsibilities. The OACIQ also feels that there is no call to limit its ability to offer brokers services that contribute to its public protection mission, such as publishing forms or offering continuing education activities.

In addition, while maintaining its current functions and powers, it is suggested that the OACIQ's mission be reworded as follows to better reflect its scope:

"The OACIQ ensures public protection through appropriate oversight of the profession by ensuring quality real estate and mortgage brokerage in Québec, and helps promote broker professionalism and competence."

Finally, in order to enable it to continue to fulfil its mission appropriately and effectively, the OACIQ must be completely empowered to do so. In this regard, the following avenues are proposed:

- Modulation of the fines assessed to brokers found guilty of a disciplinary offence based on the benefits derived from the transaction and the cost of the investigation;
- Alternatives to the disciplinary complaint where circumstances warrant, such as a broker's voluntary commitment to restrict his right to practice or to pay a fine and administrative monetary penalties;
- Additional powers in the area of illegal brokerage in order to make it easier to gather information during investigations and to introduce an offence for encouraging illegal brokerage;
- Possibility of restricting a broker's right to practice for reasons of health or integrity;
- Recognition of the OACIQ's ombudsman function.

IMPORTANT TOPICS NOT ADDRESSED IN THE MINISTER'S REPORT

The OACIQ further thinks it useful to formulate a number of comments on topics of importance that are not discussed in the Minister's Report.

Need to oversee building inspections and co-ownership management

First, the OACIQ feels that the protection of the parties involved in a real estate transaction requires that certain activities which are determining factors in many transactions, such as building inspections and co-ownership property management, be made subject to oversight.

Indeed many real estate transactions are dependent upon the intervention of building inspectors (adequate identification of problems that may affect a property, determining impact on a buyer's decision to acquire the property or regarding the offering price, etc.) and of managers of co-ownership properties (sound management of contingency fund, availability of documentation on the financial health and the maintenance of the property).

Considering the importance of such interventions to the success of a transaction, the absence of oversight of these activities through standards of practice or conduct, and the absence of standardized methods (including regarding the content of service agreements or inspection reports, and the documentation available to the buyer or the seller from the manager of a co-ownership property) are a source of concern for the OACIQ and for many observers of Québec's real estate industry. This situation should no longer be tolerated.

These two areas would benefit from oversight that would:

- guarantee competence and the standardization of practices;
- make professional civil liability insurance mandatory;
- allow the public to turn to an oversight body in case of grievances regarding the services received (in this regard, the OACIQ will leave it to the government to determine the best authority to act as the oversight body).

Other topics to consider

Finally, comments and recommendations are formulated in the brief regarding the following topics:

- Flexibility as to the funding of the Organization's activities;
- Clarification of the situation concerning activities governed by both the REBA and by the *Securities Act* (SA), in order to avoid having real estate and mortgage brokers come under the jurisdiction of both the Autorité des marchés financiers (AMF) and the OACIQ for activities that should come under the REBA;
- Revision of certain exceptions or limitations to the application of the REBA in order to limit their scope (application of the REBA to transactions also referred to in the SA, brokerage involving the leasing of immovables and the purchase or sale of enterprises, brokerage activities by financial institutions, client referrals to mortgage lenders by professionals, brokerage activity by an enterprise that is a division of the owner) and new potential exceptions (tourist establishments, activities that should be exempt from the Act based on the professional activities defined therein);
- Oversight of other activities that have an impact on real estate and mortgage transactions, such as private lenders and loan underwriters and administrators;
- Simplification of the brokerage form approval process;
- Subjecting the OACIQ to the *Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information* which could be better adapted to its realities;
- Revision of the regulatory framework concerning the additional training activities that brokers must attend to take into account the implementation of the mandatory continuing education program;
- Facilitating the use of technological document transmission methods between the OACIQ and brokers, and between brokers and their clients.

CONCLUSION

This summary articulates the OACIQ's main comments on the issues and questions raised in the Minister's Report tabled in the National Assembly on June 12, 2015.

The OACIQ hopes its comments and recommendations will make a positive contribution to the Finance Minister's reflection on the relevance of maintaining or amending the REBA. For its part, the OACIQ is convinced that if followed, its recommendations will improve the REBA and the OACIQ, and that both will be better positioned to protect the public in the fields of real estate brokerage and mortgage brokerage.

For more details on the analysis, reflections, comments and recommendations of the OACIQ, we encourage you to review the full brief entitled *Brief by the Organisme d'autoréglementation du courtage immobilier on the Report on the application of the Real Estate Brokerage Act*, available on its website at **oaciq.com**.

