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Brief by the Organisme d'autoréglementation du courtage immobilier du Québec on the

# ***Report on the application of the Real Estate Brokerage Act***

tabled in the National Assembly by the Québec Minister of Finance  
on June 12, 2015

**OACIQ**



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# INTRODUCTION

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The *Real Estate Brokerage Act*<sup>1</sup> (hereinafter the “REBA”), which came into force on May 1, 2010, states that “Not later than 1 May 2015 and every five years after that, the Minister must report to the Government on the carrying out of this Act and on the advisability of maintaining it in force or amending it.”<sup>2</sup>

On June 12, 2015, the Minister of Finance tabled his *Report on the application of Real Estate Brokerage Act* in the National Assembly (hereinafter the “Minister’s Report”).

The Organisme d’autoréglementation du courtage immobilier du Québec (hereinafter 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 on the questions raised in the Minister’s Report.

This report takes a look at the oversight and evolution of brokerage since 2008 and 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 body entrusted with the oversight of real estate and mortgage brokerage in Quebec.

In response to the Finance Minister’s invitation, this document presents the OACIQ’s comments on these issues and the responses which the Organization proposes to make to the questions posed in the Minister’s Report.

The OACIQ will first provide an overview of the situation of real estate brokerage and the way in which the OACIQ has discharged its public protection mission since the coming into force of the REBA on May 1, 2010 (pursuing, as such, the activities of the Association des courtiers et agents immobiliers du Québec – hereinafter the “ACAIQ” – which had been fulfilling this role since 1994). Our comments will also concern the importance of clearly defining the activities referred to in the Act in order to improve public protection. Lastly, this brief addresses the issue of the maintenance of the OACIQ as a self-regulated body, whose mission should be restated to better reflect its scope, as well as the means which it has at its disposal to fulfill this mission and how these could be improved.

From the outset, the OACIQ would like to express its surprise 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. These points would have gained from being further developed. The OACIQ is also concerned by some of the directions that could be taken regarding the questions raised in the report. Following a thorough review of the situation since the coming into force of the REBA, the OACIQ arrives at findings that are quite different from those contained in the Minister’s Report, including when it comes to the way in which the OACIQ has fulfilled its public protection mission and to the success of self-regulation.

The OACIQ is also voicing a number of comments on important topics that are not addressed in the Minister’s Report. These concern certain activities that have a direct impact on real estate transactions, especially building inspections and co-ownership property management, as well as certain improvements, more technical in nature, which could be made to the REBA.

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1 CQLR c. C-73.2.

2 S. 160 of the *Real Estate Brokerage Act*.

# PART I: OVERVIEW OF THE SITUATION AND OACIQ'S POSITION ON THE QUESTIONS RAISED IN THE MINISTER'S REPORT

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The Minister's Report offers an overview of real estate brokerage, the activities of brokers, and those of businesses offering services that are similar to those of brokers without being governed by the REBA, as well as the status of the OACIQ. With due regard, in the OACIQ's opinion this overview seems succinct, to say the least, and even incomplete, and it leads to a number of assertions that seem hard to justify given the OACIQ's analysis of the situation. The OACIQ would have liked to have a better understanding of the evidence on which the Report is based. We propose hereafter an overview of the situation which the OACIQ hopes is more comprehensive and takes a different perspective on how we should be looking at real estate and mortgage brokerage oversight for the future.

## 1. The real estate assets of Québec families and enterprises and real estate and mortgage brokerage: overview of the current situation

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### 1.1 Real estate assets and their importance in Québec's economy

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Real estate has become a major component of Québec's economy, whether in the area of residential or commercial real estate, or of loans secured by immovable hypothec.

For most Québec families, the purchase or sale of their principal residence remains the most important transaction of their lives. According to Statistics Canada's latest *Survey of Financial Security*<sup>3</sup> published in February 2014:

*"The total value of assets held by Canadian family units in 2012 was 9.4 trillion, composed of financial assets (pension and non-pension), non-financial assets and equity in business. As in 1999 and 2005, the principal residence was the largest asset in 2012, representing one-third of the total value of assets. For those who owned their principal residence, the median reported value of their residence was \$300,000 in 2012, up 83.2% from 1999 and 46.6% more than in 2005.*

(...)

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3 <http://www.statcan.gc.ca/daily-quotidien/140225/dq140225b-eng.htm>



*Other real estate such as cottages, timeshares, rental properties and other commercial properties represented 9.9% of total assets held in 2012. About one in five Canadian family units owned these properties, with a median value of \$180,000. The median value has more than doubled since 1999.*"

This means that 43% of the value of a family's assets consists in real estate. In fact, if you subtract these assets from those relating to retirement funds and investments in a self-owned business, close to 60% of a family's assets are made up of real estate holdings.

In Québec, the portion of families that own their own dwelling is 61% and, of those, 60% have a mortgage.<sup>4</sup> The real estate value of Québec's housing stock per capita is close to \$120,000,<sup>5</sup> and the average price of detached homes across Québec was over \$267,000 in Q1 2015,<sup>6</sup> with the median price expected to reach \$230,000 by the end of this year.<sup>7</sup>

As for commercial real estate in Québec, 2014 is being touted as a record year, with a transaction volume expected to top \$5 billion.<sup>8</sup>

**TABLE I: RESIDENTIAL AND COMMERCIAL REAL ESTATE TRANSACTIONS IN QUÉBEC, WITH OR WITHOUT A BROKER**

YEAR	NUMBER OF RESIDENTIAL TRANSACTIONS (Source : JLR solutions foncières)	NUMBER OF COMMERCIAL TRANSACTIONS (Source: GDL credit resource inc.)
2009	118,047	16,638
2010	128,139	19,645
2011	120,831	24,063
2012	124,548	25,426
2013	110,517	24,837
2014	106,584	25,559

On the mortgage side, the total number of mortgage loans approved for new or existing dwellings in Québec numbered more than 295,000 in 2010, for a value of almost \$36 billion<sup>9</sup> (the total residential mortgage portfolio held by financial institutions was worth about \$160 billion at the time, and today totals close to \$250 billion – see Table 11).

In Canada, it is estimated that over 80% of residential property buyers must finance at least part of their purchase with a mortgage loan, and that the financing obtained represents 67% of the purchase price on average (80% for first-time buyers).<sup>10</sup>

4 *Coup d'œil sociodémographique n° 14, ISQ, 2009.*

5 *Québec Handy Numbers, 2014, [http://www.stat.gouv.qc.ca/quebec-chiffre-main/qcm\\_an.htm](http://www.stat.gouv.qc.ca/quebec-chiffre-main/qcm_an.htm).*

6 Source: Canadian Mortgage and Housing Corporation, *Housing Market Outlook, Quebec Region Highlights*, release date Second Quarter 2015.

7 Source: Quebec Federation of Real Estate Boards, *A word from the economist*, June 2015.

8 <http://www.informateurimmobilier.com/2014/12/perspectives-du-marche-canadien-2015-selon-cbre>.

9 <http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/manuf03b-eng.htm>.

10 Canadian Association of Accredited Mortgage Professionals: *A Profile of Home Buying in Canada*, June 2015.

**TABLE II: MORTGAGE LOANS IN QUÉBEC (RESIDENTIAL PROPERTIES)**

ANNÉE	NUMBER OF LOANS EXTENDED (Source: GDL credit resource inc.)	TOTAL VALUE OF LOANS HELD BY BANKS <sup>11</sup> (Source: Statistics Canada)	TOTAL ESTIMATED VALUE OF LOANS HELD BY CAISSES POPULAIRES <sup>12</sup> (Source: Statistics Canada)
2010	N/D	\$66,006,000,000	\$94,168,500,000
2011	177,743	\$103,666,000,000	\$101,773,500,000
2012	177,542	\$113,242,000,000	\$108,456,000,000
2013	160,441	\$119,810,000,000	\$116,669,250,000
2014	151,369	\$124,933,000,000	\$124,839,000,000

Source: GDL crédit ressource inc.

**TABLE III: MORTGAGE LOANS IN QUÉBEC (COMMERCIAL PROPERTIES)**

YEAR	NUMBER OF LOANS EXTENDED	TOTAL VALUE OF LOANS EXTENDED
2010	26,439	\$50,385,639,168
2011	30,604	\$59,032,558,216
2012	33,141	\$75,693,550,047
2013	33,177	\$66,108,273,439
2014	32,723	\$96,950,388,600

Source: GDL crédit ressource inc.

*The above data clearly show the importance of real estate holdings and of the loans needed for their acquisition in the balance sheet of Québec families and enterprises. The security of the transactions for the acquisition or leasing of immovable property and the granting of mortgage loans, as well as the protection of Québécois' assets 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 or timing of their intervention.*

11 Figures representing the total value, as of Q4 of each year, of the mortgage portfolio held by banks concerning residential properties located in Québec; see Statistics Canada, Table 176-0074, *Chartered banks, regional distribution of selected assets and liabilities, Québec*.

12 Figures representing the total estimated value, as of Q4 of each year, of the mortgage portfolio held by Québec caisses populaires (estimate based on an evaluation of the loans extended by Québec credit unions at 7% of all mortgage loans extended by caisses populaires or credit unions in Canada); see Statistics Canada, Table 176-0026, *Local credit unions and caisses populaires: quarterly statement of assets and liabilities*.

## 1.2 Real estate and mortgage brokerage

### 1.2.1 The presence of brokers in numbers

We have seen the role that real estate holdings play in Québecers' assets and indeed in the Québec economy as a whole. However, what of the role played by real estate and mortgage brokers in building these assets? Here are some rather revealing data:

As of July 22, 2015, there were 14,994 brokers and 1,244 agencies, for a total of 16,238 holders of licenses issued by the OACIQ.

Of the 14,994 brokers, about 350 work mainly in commercial brokerage, and a little over 1,000 work primarily in mortgage brokerage.<sup>13</sup>

As indicated in the Minister's Report, it is true that real estate and mortgage brokerage is influenced by the situation of the real estate market.<sup>14</sup> In this, brokerage is no different from other economic sectors. It is not surprising therefore to see fluctuations in the number of licence holders that follow an arc similar to that of the number of transactions carried out each year. Thus, while the number of residential transactions has decreased by almost 17% since 2011, the number of licence holders likewise went down by almost 14%. A correlation between an increase in "commissions" and the number of brokers, as suggested by the Report,<sup>15</sup> seems to be based on nothing more than assumptions, and it would have been interesting to know what analysis led to this conclusion.

**TABLE IV: EVOLUTION IN NUMBER OF LICENCE HOLDERS SINCE 2010 (AS AT JANUARY 1)**

YEAR	BROKERS	AGENCIES	TOTAL
2010	15,847	1,774	17,621
2011	17,960	1,678	19,638
2012	17,292	1,536	18,828
2013	16,521	1,477	17,998
2014	15,994	1,377	17,371
2015	15,496	1,306	16,802

Finally, although the number of new brokers is decreasing, it is interesting to note that the licence maintenance rate of brokers has been increasing constantly since 2011, reaching a historic height of 90% in 2015.

13 Estimate based on the number of real estate or mortgage brokerage licence holders who carry out their activities with mortgage agencies.

14 Minister's Report, p 8.

15 *Id.*

As for real estate brokers' participation in real estate transactions, a study by the Québec Federal of Real Estate Boards estimates that in 2014 the market share of real estate brokers who are members of a real estate board (residential real estate transactions recorded on the MLS-Centris system) was more than 70% (excluding sales handled by real estate brokers without going through Centris and the sale of new properties.<sup>16</sup> According to a survey by the Canadian Real Estate Association, this market share could be as high as 72%.<sup>17</sup> In addition, according to the CMHC, between May and August 2014 in the Census Metropolitan Area (CMA) of Montreal, 20% of new properties on the resale market were listed by sellers selling their own homes,<sup>18</sup> suggesting that almost 80% were listed by brokers.

Although it is true that the number of residential transactions involving real estate brokers has decreased since 2010, this drop only reflects the total decrease in real estate sales carried out in Québec during the same period. Nothing justifies ascribing this decrease to any other factor, and the OACIQ was surprised at the suggestion made in the Minister's Report that this was due to the amount of "commissions" collected by brokers, without any corroboration for this assertion.<sup>19</sup> In fact, although it is difficult to determine the actual market share of brokers due to the dearth of sources to establish with accuracy all the transactions carried out by brokers,<sup>20</sup> the table below suggests that the decrease in the number of transactions conducted with the help of a broker is simply following a parallel curb to the decrease in the total number of transactions.

**TABLE V: RESIDENTIAL SALES CARRIED OUT BY A BROKER AS PER CENTRIS SYSTEM DATA<sup>21</sup>**

YEAR	NUMBER OF SALES CARRIED OUT BY A BROKER (Source: Centris)	TOTAL NUMBER OF RESIDENTIAL SALES (Source: JLR) <sup>22</sup>
2010	80,126	128,139
2011	77,258	120,831
2012	77,463	124,548
2013	71,265	110,517
2014	70,686	106,584
2015	75,000 <sup>23</sup>	-

16 Excerpt from the presentation made by the Greater Montreal Real Estate Board at its Annual General Meeting on April 15, 2015.

17 Canadian Real Estate Association, *Great Expectations, Tracking Study*, March 2014.

18 Based on ads for dwellings being sold their owners the Les Pac, Kijiji and DuProprio sites, data emanating from the CMHC, "Montréal: fundamentals for 2015 and 2016", November 26, 2014. [http://www.cmhc-schl.gc.ca/en/hoficlincl/homain/upload/montreal\\_outlook.pdf](http://www.cmhc-schl.gc.ca/en/hoficlincl/homain/upload/montreal_outlook.pdf).

19 Minister's Report, p. 9.

20 The only data available comes from the CENTRIS system, which reflects only the transactions carried out by brokers who are members of real estate boards and actually list their sales on this system. Therefore it does not include sales by brokers who do not belong to a board or, if they do, do not list the properties they have for sale or sold on this system.

21 This table should not be interpreted as a way to determine the number of transactions carried out with the assistance of "for-sale-by-owner" companies. No reliable data is available to distinguish between these transactions and those truly carried out by the owners themselves (FSBOs). It is true that when the sale of the DuProprio assistance company to the Yellow Pages group was announced in June 2015, the company indicated that it held 17% of residential listings in Québec (Canadian Press report published on the <http://www.lapresse.ca/> website on June 16, 2015). The OACIQ for its part has no data to evaluate the proportion of sales actually carried out via for-sale-by-owner companies where there is no broker involved in the transaction (e.g. representing the buyer).

22 Includes all sales (new and resale) of residential immovables containing five dwellings or less (including co-ownership units) listed in the land register for the year mentioned.

23 Projection by the Québec Federation of Real Estate Boards: *A word from the economist*, FCIQ, supra note 7.

Again according to data collected by the Québec Federation of Real Estate Boards,<sup>24</sup> sales by residential real estate brokers in Québec in 2014 totalled close to \$19 billion. The sale and purchase of properties made with the help of Québec real estate brokers who use the MLS-Centris system created or maintained about 30,000 direct and indirect jobs each year between 2010 and 2012.<sup>25</sup>

On the mortgage brokerage side, the Canadian Association of Accredited Mortgage Professionals (CAAMP) estimates that, of all loans outstanding in Canada in 2014, 30% were contracted via the services of a mortgage broker (27% in Québec). This share has been on a constant increase since 2009, when it was 23%.<sup>26</sup> For loans obtained during 2013 and 2014, the share of mortgage brokers went up to 34% (39% for loans to first-time buyers).<sup>27</sup> In addition, the “client experience” satisfaction rate is higher for clients of mortgage brokers than for those who transacted directly with the financial institution (56% declared themselves very satisfied versus 46% for banks)<sup>28</sup>. Finally, it is interesting to note that in addition to the benefit of finding credit at the best cost, clients of mortgage brokers identified the opportunity of being offered a vast array of products and options and of benefitting from information and advice as elements motivating them to do business with a broker.<sup>29</sup>

## 1.2.2 The activities related to the practice of brokerage

Thus real estate and mortgage brokers play a role in building the real estate assets of Québec families and enterprises, and their presence contributes to the protection of these assets. This is part of the reason why their activities are regulated and why they are exclusively authorized to perform the acts referred to in the REBA.<sup>30</sup>

The OACIQ was surprised to note that the Minister’s Report, although it only gives a very brief description of the role of mortgage broker, seems to view the oversight of real estate brokers from the sole perspective of the seller who relies “solely” on the broker, opposing this complete “function of intermediary” to the seller’s ability to sell his property himself and thereby obscuring many aspects of today’s real estate brokerage and mortgage brokerage and the protections they provide to the public.

Before going into a more detailed description of the activities of brokers, it is important to note that real estate brokerage<sup>31</sup> is different from the brokerage of financial products in that the real estate broker is not an intermediary between a member of the public and a distributor of financial products, who is overseen by the AMF, but rather between two or more members of the public who are not overseen and have equal need for protection.

24 [http://www.fciq.ca/pdf/Communiqués\\_presse/stats/stats\\_q4\\_2014\\_a.pdf](http://www.fciq.ca/pdf/Communiqués_presse/stats/stats_q4_2014_a.pdf)

25 *Economic impact of MLS sales 2013*, Altus Group, Canadian Real Estate Association. It should be noted that mortgage brokers and many commercial real estate brokers do not use MLS-Centris for their transactions, so the figure pertains mainly to residential real estate brokerage.

26 Canadian Association of Accredited Mortgage Professionals (CAAMP), *Mortgage Insights 2014*, January 2015.

27 Canadian Association of Accredited Mortgage Professionals (CAAMP), *A Profile of Home Buying in Canada*, June 2015.

28 *Id.*

29 *Mortgage Insights 2014*, January 2015, *supra* note 26.

30 Ss. 4, 13 and 124 of the *Real Estate Brokerage Act*.

31 Residential and commercial real estate brokerage excluding mortgage brokerage.

It is also important to note that even though in everyday language one talks about the “mandate” given to a broker (to sell, lease or find a property, a lessee, financing, etc.), the broker is usually not the client’s mandatary and does not have the power to bind his client to a third party by contract. Rather, he acts under a service contract, express or tacit, called the brokerage contract.<sup>32</sup>

Real estate and mortgage brokers support the parties to a transaction for the purchase, sale or lease of an immovable or the obtaining of a loan secured by immovable hypothec. Such support may be required for all the steps involved in the transaction (assessing the market value of the property, drafting a description sheet of the immovable, advertising, presence during visits, drafting of transaction proposals, identifying the types of loans available, preparing the loan application file, advising, etc.) or, in certain situations, only some of these steps. The purpose of the support is not only to facilitate the purchase, sale or lease of real estate property or to obtain a mortgage loan, but also to make the parties feel secure by providing accurate information on the condition and the value of the property or the mortgage products available, thus contributing to the preservation of the client’s assets.

The role of broker cannot be restricted to that of bearer and receiver of offers to purchase. Criticizing this view, one author says:

*“[Tr.] ...this is certainly not a broker’s only role, and in this regard it is important to consider the advisory duty to which the broker is bound.”<sup>33</sup>*

Similarly, another author comments as follows regarding mortgage brokers:

*“[Tr.] ...the broker’s services are not limited to presenting offers of financing, but also cover the information and assistance services involved in obtaining financing.”<sup>34</sup>*

Brokers have a diverse clientele and, contrary to what the Minister’s Report suggests, this clientele does not include only sellers, but also buyers, lessees, lessors, borrowers and lenders. The transactions in which they participate can involve many types of properties (single-family or multi-dwelling residential properties, divided or undivided co-ownership properties, commercial, industrial and agricultural properties, etc.), as well as various mortgage products to suit the needs of clients.

Through the years, the practice of real estate brokerage has evolved. For example, in the past the information available to brokers was centralized. Properties available for sale were grouped in a “catalog” that was accessible exclusively to the members of a real estate board. Therefore to have access to all the properties on the market, a client had to go through a real estate broker.

32 Jacques DESLAURIERS, *Vente, louage, contrat d’entreprise ou de service*, 2e éd., Wilson et Lafleur, 2013, nos 1983 and 1990; see also Claude G. LEDUC, *Le courtage immobilier: aspects civils et déontologiques*, 4e éd., Cowansville, Éditions Yvon Blais, 2015, p. 19 and fol.; Audrey LÉTOURNEAU and Mario NACCARATO, *Courtage immobilier*, Brossard, Publications CCH Itée, 2011 p. 65; Claude BARSALOU, *Le contrat de courtage immobilier, vente d’un immeuble résidentiel de moins de cinq logements*, Wilson Lafleur Ltée, 1996, page 93 and fol. In addition, the characterization of the real estate brokerage contract as a service contract is well established in the jurisprudence: *Association des courtiers et agents immobiliers du Québec c. Proprio Direct inc.*, [2008] 2 RCS 195, par. 50; *Immeuble Toron Canada inc. c. Capreit Apartments Inc.*, 2010 QCCA 803, par. 4; *Matte c. Charron*, 2010 QCCA 1496, par. 84; *Immeubles Le Proprio courtier immobilier agréé inc. c. Duguay*, REJB 2002-33189 (C.A.); *Côté c. Richer Supermarché (1979) inc.*, J.E. 97-1822 (C.A.).

33 Claude G. LEDUC, *Le courtage immobilier: aspects civils et déontologiques*, supra note 32, p. 15.

34 Mario NACCARATO, “Le courtage immobilier”, in *Droit immobilier québécois*, loose leaf edition, Brossard, Publications CCH Itée, No 10-250.

Starting in the mid-1990's, everything changed. "[Tr.] The explosion of the media offer, coupled with the advent of new communication technologies, beginning with the Internet",<sup>35</sup> enabled consumers to do part of the work that had traditionally been done by real estate brokers, and the latter's role started to change. This is when the field of residential real estate brokerage started making accessible to the public, usually via websites, the latest version being the provincial site CENTRIS.ca, a lot of information concerning properties for sale to which brokers used to have exclusive access.

Real estate and mortgage transactions themselves are becoming more complex: changes in the law and the jurisprudence, the proliferation of legislation and regulations impacting transactions, the aging of the real estate stock, the increase in the number of phenomena affecting lots and buildings (pyrite, pyrrhotite, ochre deposits, blue algae, subsidence, floods, etc.).<sup>36</sup>

Thus the role of broker has changed through the years, notably because of obvious changes in the needs and expectations of the public.

This evolution of client expectations is of course due in great part to the arrival of new reference and information sources available in real time on the web, on a multitude of platforms (smartphones, tablets, etc.). Thus:

- The household high-speed Internet connection rate was 94.7% in 2011) according to *Québec Handy Numbers, 2014*);
- Internet is the buyers' main source of information (62%), according to a survey conducted for the OACIQ by *Multi Réso* at the end of 2011;
- Future buyers (12-24 years) have greater expectations when buying goods (see study by CEFRIO: *Génération C: Les 12-24 ans - Moteurs de transformation des organisations*).

The public is much better informed than it used to be. For example, a buyer may already have visited several properties online before even contacting a broker. What this client is looking for from a broker is not only assistance in selecting or visiting properties, but also a professional who will guide and advise him, and provide him with all the information he needs to be able to carry out a transaction with all necessary and relevant elements in hand.<sup>37</sup>

Because of this, we are seeing an evolution of the concept of intermediation or of the understanding we used to have of this concept. Today's real estate and mortgage agencies and brokers offer a much more diversified range of services.

In this context, it is not surprising to note that for several years now, some brokers and agencies have been offering their services according to models that didn't use to exist, proposing various remuneration methods or allowing owners to sell their properties themselves.<sup>38</sup> The OACIQ is aware of this reality and respects it.

35 Online: <http://www.e-marketing.fr/Definitions-Glossaire-Marketing/Bouche-a-oreille-5992.htm>,

36 See Annex 2 for an additional discussion on the complexity of real estate or mortgage transactions.

37 This advisory role was recognized in the previous *Report on the Application of the Real Estate Brokerage Act*, tabled in June 2004 in the Québec National Assembly; see p. 9 of this report.

38 Appendix 3 includes business models used by some of these brokers or agencies.

Thus the services rendered by brokers vary and are adapted to the requirements of their clientele. These can be limited simply to the referral of a buyer to a seller or of a borrower to a lender, all the way to taking full responsibility for selling a property or obtaining mortgage financing for the purpose of carrying out a real estate or mortgage transaction.

As part of his service offer, a broker may, for example:

- look for properties that meet the needs and means of a buyer, plan visits and accompany his client;
- represent the seller with any buyer;
- act as negotiator and facilitate communications between the parties;
- act as advisor to help a client identify his needs;
- bring a real estate transactions to its successful completion;
- advise a seller on the price at which to list his property;
- organize an effective marketing strategy;
- receive all calls and coordinate visits;
- prepare and present transaction proposals, lead negotiations and coordinate the transaction;
- send all the documentation required by the parties;
- advise, inform and guide the parties on the various aspects of the transaction;
- receive and analyze all documents related to the transaction in order to help the client make an informed choice;
- assess the market value of properties;
- advise the parties on the best price to offer or ask for;
- evaluate the real estate market.

For his part, a mortgage broker may:

- determine the borrower's needs;
- approach various financial institutions to find a loan that meets the borrower's needs and ability to pay;
- research the best mortgage loan, at the best available rate, according to the client's requirements;
- suggest the various options available according to the client's needs, such as fixed or variable rate, 5- or 10-year term, etc.;
- prepare the loan application and send the necessary documentation to the lending institution;
- qualify borrowers for lenders;



- advise the client and provide all the information required at each step of the search for a mortgage loan;
- evaluate the mortgage products available.

These various elements being at the very heart of a broker's activity, this leads to certain obligations toward the public and the profession; these are enshrined in various regulations governing the brokerage practice (see item 1.3.2).

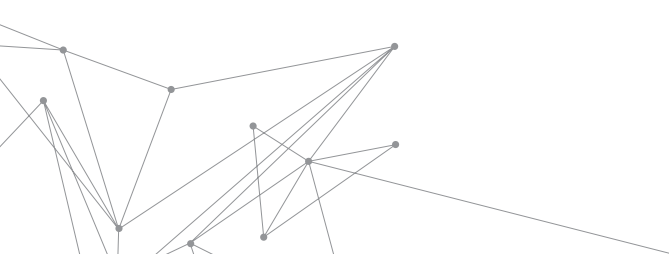
In short, the public wants to be able to choose the services it uses while requiring more transparency, professionalism and skill on the part of the professionals with whom they do business. Consumers' needs have changed. As in any other field, they expect to have an array of services to choose from, and they want to have access to advice and expertise that they do not possess themselves.

### **1.2.3 Alternative services such "for-sale-by-owner companies"**

The increasing emergence of various services to help sell or lease properties or find mortgage products, which deem themselves entitled to operate outside the REBA framework, including what the Minister's Report calls "for-sale-by-owners companies", are, in light of the above, a source of concern for the Organization, as it should for the legislator.

Although in the past these companies may have been considered as simple advertising services, although highly sophisticated ones, this is no longer necessarily the case today for some of them. These companies now offer complete services to sell property or search for a mortgage loan, and market these services via sophisticated and specialized websites as well as guidance, advisory or assistance services.

The Minister's Report states that brokers "provide several of the services delivered by FSBO companies". Actually, what happened is the reverse. It is those companies that, with the help of evolving technologies among other things, have come to offer a great many of the services provided by brokers. The table below compares the services offered to owners wishing to sell their property on advertising company websites that simply offer "classified ad" type listing services, those offered by "FSBO companies", and those offered by real estate brokers:



**Table VI**

	MERE POSTING SITE <sup>39</sup>	FSBO COMPANIES <sup>40</sup>	REAL ESTATE BROKERS
Web posting	✓	✓	✓
Marketing		✓	✓
Photo		✓	✓
Advisor meeting with the seller		✓	✓
Market evaluation		✓	✓
Property evaluation		✓	✓
Advice to prepare the detailed description sheet		✓	✓
Advice on listing price		✓	✓
Advertising (web, newspapers)		✓	✓
Sign (For Sale, Open House)		✓	✓
Web advertising effectiveness report	✓	✓	✓
Targeted mailings to potential buyers		✓	✓
Advice and follow-up on selling process		✓	✓
Negotiating advice for sellers		✓	✓
Legal documents		✓	✓
Presence during visits		✓	✓
Preparation and amendment of a counter-offer for the seller		✓ / ■	✓
Negotiating, receiving and presenting PPs			✓
Accompaniment to the notary's			✓
Negotiating advice for sellers and buyers		✓	✓

<sup>39</sup> The information used to complete the table comes from the montreal.kijiji.ca and lespac.com websites, as viewed on September 18, 2015.

<sup>40</sup> The information used to complete the table comes from the propriosolo.com, duproprio.com and estrietoit.com websites, as viewed on September 18, 2015. These companies may offer all or some of the services indicated.

Job offers recently published by an FSBO company indicated that the services provided by the successful candidates (notary<sup>41</sup> or representative<sup>42</sup>) to the company's clients looking to sell their property include:

[Tr:]

- "Providing verbal legal advice or opinions to clients using the company's services;"
- "Answering questions from clients who use the company's services for the sale of their property;"
- "Explaining and interpreting offer to purchase forms and other legal documents;"
- "Marketing properties;"
- "Explaining to clients how to use the tools in their possession for the sale of their property."

These companies also offer buyers "real estate alerts" when properties with a client's desired features come on the market.

FSBO companies make available to their clients transaction forms that are very similar to those developed by the OACIQ, which tends to reassure the public. However, these forms include liability exclusion clauses. Here is one example:

*"(...) Duproprio disclaims any and all liability with respect to the accuracy, sufficiency and relevance of the said models. (...)"<sup>43</sup>*

The possibility of such liability exclusions should, in the context of public protection, be cause for concern. By comparison the regulations governing real estate and mortgage brokerage prohibit this practice:

*"6. A licence holder engaging in brokerage activities may not elude or attempt to elude professional civil liability, either his or her own or, if applicable, that of the business corporation within which the licence holder carries on activities in accordance with Division IV of Chapter II of the Real Estate Brokerage Act (RSQ, c. C-73.2) including by inserting in a contract of professional services a clause that directly or indirectly, fully or partially, excludes that liability."<sup>44</sup>*

Websites that offer assistance to sellers (and by the same token to buyers), with their accompanying array of information and services, are well on their way to constitute intermediation.

41 Job posting on [juricarriere.com](http://juricarriere.com) site, June 1, 2015.

42 Job posting on [www.jobillico.com](http://www.jobillico.com) site, May 20, 2015.

43 Such as indicated in the available forms viewed on the Duproprio website in July 2015 at <http://duproprio.com/buy-house/finalise-sale>.

44 Regulation respecting brokerage requirements, professional conduct of brokers and advertising, CQLR, C-73.2, r. 1.

All these elements set up by “FSBO companies” create a false sense of security in the public, which of course is of concern to the OACIQ. In fact the promotion of some of these services stresses the fact that the client is not left to his own devices and will receive all the support he needs to bring his transaction (i.e. the sale of his property) to its successful completion, which only increases this sense of security.<sup>45</sup>

A recent story illustrates the risks of inadequate support received by a seller in the use and completion of such forms. The parties having omitted to fill out the declarations by the seller form which should have accompanied the promise to purchase, both made available by the FSBO company, the seller was actually sued for failing to declare a suicide which had occurred in the property.<sup>46</sup>

There are also examples of “alternative” services in the field of mortgage brokerage. For instance, some companies, via the web, offer to put borrowers in contact with lenders using a lending rate comparison formula.<sup>47</sup> This type of company is similar to those in the insurance business that operate “premium comparison sites”, a service which the AMF likens to advice, making them companies that should be registered with the AMF and made subject to the applicable regulations.<sup>48</sup> The same reasoning should apply to “rate comparison sites”, which should be considered as constituting mortgage brokerage.

The similarity of the services provided by “for-sale-by-owner companies”, which consider themselves beyond the reach of the REBA, with those provided by real estate brokers seems obvious. Yet these enterprises are only subject to minimum oversight, so that doing business with these gives limited recourses, other than to turn 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.

The Minister’s Report suggests that adequate protection would be provided via the application of certain provisions of the Civil Code of Québec and the Consumer Protection Act (the “CPA”).<sup>49</sup> But however useful these provisions might be, they often create an obligation for the injured client or third party to go before the courts to assert their rights. The CPA seems to be ill conceived to oversee assistance and advisory functions, as it mainly concerns contract clauses, prohibited provisions and false or misleading representations.

45 See for example DuProprio’s promotional video uploaded on its website on August 25, 2015: <http://blog.duproprio.com/2015/08/25/un-sondage-caa-revele-a-quel-point-les-quebecois-aiment-duproprio/#.VfnIXs445fQ>.

46 *Girard c. Dufour*, 2015 QCCS 340.

47 For example, the following websites offer this type of comparison: ratesupermarket.ca, kanetix.ca, lowestrates.ca, ratehub.ca, comparasave.com, zoocasa.com, ratespy.com.

48 See *L’offre d’assurance par Internet, présentation des résultats de la consultation et des orientations retenues*, pp. 19 and 20, published in the Bulletin de l’Autorité des marchés financiers, Vol. 12, n° 13, April 2, 2015.

49 See p. 12 of the Minister’s Report.

The Minister's Report also mentions the fact that "FSBO companies" use the services of professionals who are members of an order to provide their services (e.g. lawyers or notaries), suggesting that the client would therefore benefit from the protections provided under the *Professional Code*.<sup>50</sup> On the one hand the OACIQ wonders about the legality of the protection offered by a business model in which a professional works for an enterprise, but does not render professional services directly to this enterprise, but rather to this enterprise's clientele. In this context, who is the professional's real client? To whom does the lawyer or the notary, for example, have a duty of loyalty? How can he guarantee professional independence to a person using his services? Does this context of practising the profession not in fact circumvent the guidelines established under the *Professional Code* and the regulations governing the practice of the profession within a joint-stock company (such as the effective control of the company by the members of a professional order)?<sup>51</sup>

On the other hand, these companies' services are not all provided by members of professional orders (in fact some of them are former brokers), so that some service providers have no oversight whatsoever. This results in two-tiered services, i.e. some in which protection would be offered by the professional order concerned where the services are provided by its members (to the extent where the order agrees to do this), and some for which the client would have to turn to the CPA or the Civil Code; yet, in the Organization's opinion, all these individuals are engaging in real estate brokerage.

*The public must be protected, and this protection requires a modernization of the Act in order to make it clear that it encompasses the entire range of services relating to real estate and mortgage transactions that are not otherwise regulated, while allowing broker services to evolve, this due to the economic and legal impacts of real estate transactions on each of the parties involved.*

### 1.3 The OACIQ and public protection: positive results

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."<sup>52</sup> In the fulfilment of its mission, the Organization "may also dispense training courses for brokers and agency executive officers, with the exception of basic training courses...".<sup>53</sup>

<sup>50</sup> See p. 14 of Minister's Report.

<sup>51</sup> See for example the *Regulation respecting the practice of the profession of advocate within a limited liability partnership or joint-stock company and in multidisciplinaryity*, CQLR c. B-1, r.9, and the *Regulation respecting the practice of the notarial profession within a partnership or joint-stock company*, CQLR c. N-3, r. 7, CQLR c. N-3, r. 7.

<sup>52</sup> Note that the REBA does not state that this is the OACIQ's only mission, contrary to what is mentioned on pages 2, 7, 15 and 17 of the Minister's Report.

<sup>53</sup> S. 32 of the *Real Estate Brokerage Act*.

The OACIQ is administered by a Board of Directors consisting of 13 directors, 10 of whom are elected by licence holders and three are appointed by the Finance Minister.<sup>54</sup> Eight of the directors are elected to ensure geographical representativity and traditionally come from the field of resident real estate brokerage, and the other two represent the fields of commercial brokerage and mortgage brokerage.<sup>55</sup> To reduce the risk of conflict of interest, the REBA stipulates that a person who acts as director or officer of an association or enterprise whose aim is to defend the interests of real estate brokers, agencies or franchisers cannot be an OACIQ director.<sup>56</sup> In addition, the REBA still calls for a general meeting of licence holders, which means that the OACIQ retains an associative nature.<sup>57</sup> Can this last element be contributing to the confusion in the minds of brokers as to the role of the Organization? This is further discussed in 3.4.

To properly guide its actions, the OACIQ has adopted a mission statement and related vision:

## MISSION STATEMENT

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“The OACIQ ensures **public protection** by **overseeing** the profession adequately and providing **quality real estate and mortgage brokerage** in Québec.”

## VISION

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“As an **essential reference** in the real estate and mortgage brokerage field, the OACIQ helps promote brokers’ **professionalism** and **competence**. The OACIQ is characterized by its organizational **effectiveness**, its interventions and its **leadership** in regards to brokerage development.”

As the OACIQ sees it, public protection starts first and foremost by providing a guarantee that consumers can do business with professionals whose skills are regularly validated and updated, and whose activities are monitored. Indeed public protection begins with prevention, long before the suppression of undesirable behaviours. However, when these occur, for example if a broker behaves in a doubtful manner, consumers must also have the assurance that they can turn to a regulatory body that provides effective intervention mechanisms.

The REBA and the mechanisms set up by the OACIQ provide such guarantees and assurances.

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54 Ss. 57 and 58 of the *Real Estate Brokerage Act*.

55 S. 58 of the *Real Estate Brokerage Act*; ss. 86 to 93.2 of the *Internal By-Laws of the Organisme d'autorégulation du courtage immobilier du Québec*.

56 S. 58 of the *Real Estate Brokerage Act*.

57 S. 56 of the *Real Estate Brokerage Act*.

In addition, over the last few years the Organization has engaged in a strategic planning exercise. This plan illustrates the importance for the organization of fulfilling its mission, this via a number of initiatives revolving around public protection, including by improving broker skills.

In short, the OACIQ is the only organization whose mission is specifically aimed at protecting the public in the course of their real estate or mortgage transactions, and in the last five years, the OACIQ has fulfilled this mission effectively, including by informing the public, empowering brokers, and creating efficient mechanisms to achieve this.

### 1.3.1 Informing the public

The OACIQ believes that public protection means, among other things, 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 public can access the OACIQ website (oaciq.com) for a wealth of information on the rights and obligations of consumers and brokers. Consumers may also contact the OACIQ Info Center for information, including on the duties of brokers and the brokerage forms they use. The Centre processes some 60,000 requests for information each year:

**TABLE VII: NUMBER OF REQUESTS PROCESSED BY THE OACIQ INFO CENTER**

YEAR	NUMBER OF REQUESTS
2010	60,853
2011	61,523
2012	68,517
2013	59,424
2014	58,884

In total since 2010, 309,201 requests, over one quarter of which emanate from the public, have been processed by the Organization's Information Centre.

In 2013 the OACIQ put together a communication plan for the years 2014 to 2016, whose main purpose is to position the Organization as a public protector in the fields of real estate and mortgage brokerage through oversight of the profession.

Several initiatives have been carried out under this plan. Thus the OACIQ has become a content partner of the Protégez-Vous.ca website and a collaborator in the new website lacopropriété.info (a joint initiative by the Department of Justice and the Chambre des notaires du Québec) on which it broadcasts its own information capsules.

The OACIQ has also dedicated efforts to promote the protections deriving from the oversight of brokers by the REBA. The Organization's approach is similar to that adopted by several professional orders or by the AMF on advertising, which is that public protection means, among other things, getting quality services from a qualified professional. The OACIQ must express its surprise here regarding the comments in the Minister's Report to the effect that by its advertising efforts, the OACIQ is supporting a "media battle" by the brokerage industry against FSBO companies. Promoting the protections provided by licence holders who are governed by the Act is part of the OACIQ's public protection mission. The message in the last campaign (using a broker's services provides notable benefits and avoids many problems), was in fact understood by 91% of respondents in a survey conducted following this campaign.<sup>58</sup>

The OACIQ's latest advertising initiative, which is mostly web-based,<sup>59</sup> was aimed at making the OACIQ's role and services better known to the public, showcasing the functions of information and protection. There again, the campaign bore fruit since the overall results show the effectiveness of the initiative. During June 2015, the online campaign drew close to 9,200 visitors to the OACIQ.com website, including 83% of first-time visitors.

### 1.3.2 Ensuring broker competence and overseeing their practices

As part of the adoption and coming into force of the REBA, the OACIQ also adopted a set of regulations enabling it to verify the skills of those wishing to enter the broker profession and to ensure these skills are maintained.<sup>60</sup> In addition, the Organization made sure that brokers had access to public protection tools. Finally, it developed a complete set of regulations on the practice of brokerage, the rules of professional conduct for brokers, and those governing advertising and representations to the public.<sup>61</sup>

#### 1.3.2.1 Access to the profession

##### 1.3.2.1.1 Basic training and competency frameworks

Considering the economic and legal impacts of a real estate or mortgage transaction and the complexity to which it can give rise, whether regarding the immovable itself or the various documents pertaining to the transaction, the conclusion is obvious:

*Any person intervening in a real estate or a mortgage transaction must have specific and proven technical skills in order to offer quality services and protect the various parties to the transaction.*

58 Léger survey, Évaluation post-campagne, December 2014

59 The following tools were used in this web campaign:

- Animated clickable banners redirecting the user to the oaciq.com website information page from many sites such as Canoe, Le Devoir, Les Affaires and Publimaison;
- Purchase of key words and implementation of sponsored links in search engine results.

60 Regulation respecting the issue of broker's and agency licences, CQLR, c. C-73.2, r.3.

61 Regulation respecting brokerage requirements, professional conduct of brokers and advertising.



Thus, with the support of Université de Sherbrooke and following consultations with brokerage professionals, the OACIQ developed competency frameworks<sup>62</sup> for each field of practice, and qualifications that basically represent the basis to access the profession.

These frameworks outline all professional acts involved in each skill that a broker entering the profession must master. They are the main tools used by educational institutions to create the various basic training programs that prepare students to enter the profession.

They are also the tools used by the Organization to develop the examinations which candidates must pass to obtain the desired licence and which assess each of the skills, required.

This type of examinations based on each competency framework have been administered by the Organization since the coming into force of the REBA in 2010. In addition, following a regulatory amendment requested by the OACIQ,<sup>63</sup> anyone wishing to take a certification examination in order to be issued a real estate or mortgage brokerage licence must, since September 2, 2013, have completed a basic training program recognized by the Organization. A person who wishes to apply for a full-service licence (to be able to work in residential, commercial or mortgage brokerage and manage an agency) must now have completed a college-level program equivalent to some 870 hours of training, which compares favourably with the number of hours required for the majority of college studies. The current basic training in fact represents major progress compared to all previous training requirements in the areas of real estate and mortgage brokerage in Québec. It is one of the most comprehensive trainings in the field in Canada and across North America.

#### **1.3.2.1.2 Educational institutions**

To have its program recognized, an education institution must apply to the OACIQ. Among other things, it must demonstrate that the training provided is related to real estate or mortgage brokerage best practices, that it is based on the above-mentioned competency frameworks, and that it adequately prepares students for the practice.

To get recognition, the institution must also indicate the level of support which the student will receive and the evaluation criteria that will be used to determine success.<sup>64</sup> Where needed, it must make any amendments required by the Organization prior to recognition. In addition, the OACIQ regularly monitors the educational institutions it has accredited<sup>65</sup> and collaborates with them to make sure that basic training programs continue to meet standards and evolve with the practice.

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62 Competency frameworks can be viewed on the OACIQ website at <http://www.oaciq.com/en/pages/to-prepare-for-the-oaciq-certification-examinations>.

63 Order in Council 1058-2012, November 14, 2012.

64 The application for recognition form is available upon request to [formationdebase@oaciq.com](mailto:formationdebase@oaciq.com).

65 The list of establishments recognized can be viewed on the OACIQ website at <http://www.oaciq.com/en/pages/educational-institutions-and-training-programs-recognized-by-the-oaciq>; the recognition criteria are also available by written request to [formationdebase@oaciq.com](mailto:formationdebase@oaciq.com).

### 1.3.2.1.3 Examinations

The development of the examinations used as entry to the profession, designed and administered by the OACIQ, is based on each competency framework. The examinations present candidates with realistic scenarios in which they must take appropriate action and formulate recommendations on the situation presented. This allows the OACIQ to evaluate both the knowledge gained and the skills developed by the candidate, while making sure that he will be able to offer quality services, to protect the public as he carries out a transaction,<sup>66</sup> and to complete all the necessary steps to bring it to fruition. Note that in order to get a passing grade on the examination, the candidate must be successful in all competencies.

In short, through these measures the Organization ensures that the issuance of a real estate or brokerage broker's licence comes only as a result of serious and relevant training and a successful examination based on the demonstration of competencies related to the responsibilities which the candidate will need to discharge toward the various parties to the transaction while respecting his various obligations.

The development and continuing improvement of the competency frameworks, the accreditation of educational institutions and their programs, the monitoring, the administration of examinations based on realistic scenarios, all these elements represent major progress compared to what used to exist. They are one of the successes of self-regulation in the field of real estate and mortgage brokerage.

### 1.3.2.2 Maintaining and updating skills: continuing education

Not only must brokers complete a basic training program and successfully complete an examination to demonstrate their knowledge and skills, but they also have an obligation to further develop and update their skills by attending supplementary education activities.<sup>67</sup>

*Mandatory continuing education is a crucial preventive tool to ensure quality services and public protection in the mid-and long term. It benefits brokers as much as it does the public, and the OACIQ must continue to play a leadership role in this regard.*

It's a true culture of continuing education that has developed within the OACIQ for several years and even more with the coming into force of the current REBA.

#### ***Between 2010 and 2014: continuing education activities (mandatory or on a volunteer basis)***

Between 2010 and 2014, 50 distinct continuing education activities have been offered. For the same period, 1,045 education sessions have been held, attended by 75,558 participants.

<sup>66</sup> S. 35 of the *Regulation respecting the issue of broker's and agency licences*; a sample examination can be viewed on the OACIQ website at <http://www.oaciq.com/en/pages/to-prepare-for-the-oaciq-certification-examinations>.

<sup>67</sup> S. 46(2) of the *Real Estate Brokerage Act* and ss. 48 and 50 of the *Regulation respecting the issue of broker's and agency licences*.

Since the coming into force of the REBA in 2010, three education activities have been made mandatory for all brokers (New Act, New Forms and Collaboration); one was mandatory for agency executive officers, and another, dealing with problems related to the presence of pyrrhotite in building foundations in the Trois-Rivières area, was mandatory for real estate brokers practicing in that region.

**TABLE VIII: CONTINUING EDUCATION ACTIVITIES**

YEAR	PARTICIPANTS IN CONTINUING EDUCATION ACTIVITIES
2010	22,639**
2011	6,378
2012	25,382**
2013	9,391
2014	16,828**

\*\* years in which specific continuing education activities were made mandatory for all or certain groups of brokers.

***Since May 1, 2015: implementation of a mandatory continuing education program***

In order to increase the training culture and thereby maintain and develop credibility for the profession, the OACIQ instituted, following consultations with various stakeholders from the real estate and mortgage fields and with the public, a Mandatory continuing education program. The program officially began on May 1, 2015 for an initial two-year cycle. One of the elements that arose from the consultations was the importance of creating and providing continuing education activities on the regulations, compliance and ethics.

Brokers will have two years to accumulate the 18 continuing education units (CEU) required under this new program. A minimum of 6 UFC will have to come from training activities on core content,<sup>68</sup> while the rest may be obtained from any eligible training activity covering either core or specialized content.<sup>69</sup> These training activities will allow brokers to acquire, update, and perfect the professional skills they need to carry out their profession, while adapting their practice to the evolution of the real estate and mortgage markets and public expectations.

68 A training activity on core content is one whose aim is to protect the public and which allows brokers and agency executive officers to acquire, maintain, update, improve and perfect the skills required in a real estate or mortgage brokerage transaction, and related to at least one of the following topics or a related topic:

- General or special legal rules set out in the *Real Estate Brokerage Act* and its regulations;
- Content, use and drafting of contracts and forms relating to brokerage transactions referred to in section 1 of the *Real Estate Brokerage Act*;
- Professional conduct of brokers and agency executive officers.

69 A training activity on specialized content is one whose aim is to develop knowledge, skills or abilities required in a real estate or mortgage transaction that do not constitute core content, and related to at least one of the following topics:

- General or special legal rules applicable to a real estate transaction referred to in section 1 of the *Real Estate Brokerage Act*;
- Legislative reform, other than the *Real Estate Brokerage Act*, that may affect the activities of brokers and agencies;
- Material, physical or environmental consideration that may affect a brokerage transaction referred to in section 1 of the *Real Estate Brokerage Act*;
- Ethics of brokers and agency executive officers;
- Management of professional activities or brokers and agencies;
- Assessment of the value of an immovable or an enterprise;
- Assessment of the quality and construction features of an immovable;
- Financial implications of brokerage transactions referred to in section 1 of the *Real Estate Brokerage Act*;
- Financing of transactions referred to in section 1 of the *Real Estate Brokerage Act*.

Trainings can be provided by the OACIQ or by accredited providers. As for basic training programs, accreditation of continuing education activities is done with the utmost care, and all projects submitted are analyzed, including against the competency frameworks, in order to ensure consistency and respect for best practices. To date, in addition to the activities offered by the OACIQ, more than 150 activities provided by individual trainers or organizations (e.g. CEGEPS, private colleges, real estate boards, real estate agencies, various training institutes) have been accredited.<sup>70</sup> As of September 1, 2015, close to 35% of brokers with a valid licence had already completed training activities as part of the continuing education program. The OACIQ is the main provider of core content training activities and has presented more than a third of all activities already completed under the program.

The 18 CEUs constitute a minimum for the program's initial cycle. The OACIQ will assess whether this number will need to be increased in future.

### 1.3.2.3 Forms and other tools available to brokers

Public protection in the fields of real estate and mortgage brokerage also means adhering to certain basic standards in terms of content and use of the brokerage contracts entered into by brokers and their clients and the transaction proposals drafted by brokers. The OACIQ has therefore developed regulations that are both flexible and comprehensive regarding these documents, which can have a determining impact on the rights and obligations of the public in a real estate or mortgage transactions.<sup>71</sup>

The OACIQ has also empowered brokers by providing them with forms that comply with regulatory requirements and must be used to enter into brokerage contracts or to complete transaction proposals. Some of these forms are mandatory for residential transactions. Thus the OACIQ has developed 21 mandatory forms (Including the form *Declarations by the seller of the immovable*, which reduces the risks for the seller and allows the buyer to purchase with full knowledge of the facts), and 22 recommended forms.<sup>72</sup>

*Mandatory or recommended forms represent another key building block to enable the Organization to fulfill its mission. The content of some of these forms governs relations between brokers/agencies and the public, while other forms represent the pre-contract that establishes the rules between the parties to the transaction.*

In developing these forms, the OACIQ made sure to maintain a balance between the various parties and to protect their rights and obligations. The creation of the forms gave rise to numerous discussions, analyses and consultations with stakeholders from the field and with experts. These are basic tools for agencies, brokers and the parties, and they reflect the experience and strength of the profession as a whole, the result of many years of development and continuous improvement work.

<sup>70</sup> The list of education activities accredited as of September 18, 2015 can be found in Appendix 4, *Tools made available to brokers by the OACIQ*.

<sup>71</sup> *Regulation respecting contracts and forms*, CQLR, c. C-73.2, r.2.1.

<sup>72</sup> These forms are listed in Appendix 4, *Tools made available to brokers by the OACIQ* and may be viewed on the OACIQ website at <http://www.oaciq.com/en/pages/real-estate-brokerage-forms>.

Brokers are trained and have the skills required to understand the meaning and impacts of these forms and to complete them properly. It would be risky to let consumers use these forms on their own, as one has to have experience in order to understand all the subtleties that have legal impacts. Unfortunately, FSBO companies give out forms that are very similar to those published by the OACIQ, which include many clauses that are technical or legal in nature. Sellers normally do not have the necessary training or experience to complete these forms properly and without risk. Such risk in fact is illustrated in the case mentioned above where, because the parties omitted to complete the seller's declarations form which should have accompanied the promise to purchase (both made available via the FSBO company), the seller was sued for failing to declare a suicide which occurred in the property.<sup>73</sup>

This situation is especially alarming since RSBO companies limit or exclude their liability regarding the forms they make available to the public. In addition, because the advice provided by their companies receives no oversight, the public has no other recourse than to go before the civil courts to claim damages should this advice turn out to be inappropriate or incomplete. It is also reasonable to wonder about the extent to which these unregulated service companies are insured for their liability resulting from damages suffered by members of the public.

Finally, the OACIQ provides brokers with many other tools, such as FAQs, annotated forms and standard clauses, not to mention the OACIQ Info Center for any questions regarding, among other things, brokerage forms, broker obligations and compliance with regulatory requirements.<sup>74</sup> Since May 2014, a hotline has been available to agency executive officers in order to help them oversee and supervise their real estate and mortgage brokers. As of August 31, 2015, some 6,080 calls had been processed via this hotline.

#### 1.3.2.4 Oversight of brokers' professional practices

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.

Thus brokers and agencies must comply with rules arising from oversight by the REBA, and they have certain obligations towards the parties they represent and the other parties to the transaction. In other words, agencies and brokers help protect the public in each real estate or mortgage transaction in which they intervene.

Brokers must respect these rules and obligations, including:<sup>75</sup>

- When identifying the parties, to make sure the transaction takes place between the proper parties;
- By making appropriate recommendations, for example by recommending that a prospective buyer have a complete building inspection done;

<sup>73</sup> *Girard c. Dufour*, supra note 46.

<sup>74</sup> A list of these tools is included in Appendix 4.

<sup>75</sup> See the *Regulation respecting brokerage requirements, professional conduct of brokers and advertising*.

- By taking steps to uncover any factors that may adversely affect the parties or the object of the transaction;
- By explaining the rights and obligations to the parties;
- Where the situation requires, by directing the parties to a qualified professional;
- By putting the rights and obligations of the parties down in writing on the appropriate recommended or mandatory forms, as required;
- By ensuring complete disclosure to allow the parties to enter into the contract with full knowledge of the facts;
- By disclosing any conflict of interest;
- When informing and advising the parties to the transaction.

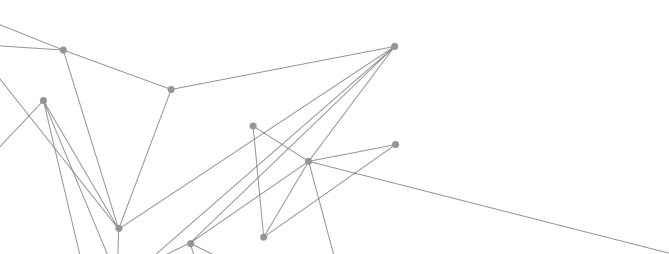
In short, the broker plays a key role in the completion of the transaction and the protection of the parties. He must act proactively in his search for elements concerning the immovable and in the disclosure of information to the parties concerned, so that everyone knows what they are getting into.

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. As mentioned previously, advice in fact represents an important part of what the public is seeking, and can touch on any of the following aspects:

- the value of the property, the best way to showcase it, the content of promises to purchase and counter-proposals, the transaction process, the buyer's financial ability to pay, the suitability of the property, the asking or offering price or the mortgage product versus the client's needs and means, the physical features of the property, which he can assess because he actually goes on site, the mortgage and other products and services available, etc.

*Nowadays, advice is at the heart of the transaction. It is crucial therefore that anyone playing an advisory role in a real estate or mortgage transaction be subject to oversight.*

Regardless of the scope of services required, the person who does business with a broker expects that this oversight will contribute not only to quality services that meet the highest standards, but also to the protection of their assets through proper information and advice regarding the value of the property being bought or sold, or the details of the mortgage loan being sought.



### 1.3.3 Fulfilling its mission

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#### 1.3.3.1 The AOCIQ's different bodies

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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. Considering the importance of a broker's intervention for the success of a transaction and any subsequent outcomes, and consequently, for the protection of the assets of those using his services, the public must be able to rely on an organization that provides effective intervention mechanisms when it wishes to obtain information or to communicate a grievance regarding a broker's services or behaviour.

In addition to the **OACIQ Info Center** mentioned above, the public can turn to the following services and bodies.

The **Assistance Department** is responsible for guiding those who solicit the Organization's help, report violations or register complaints. In some cases, the Assistance Department can act as mediator or conciliator. If necessary, the request for assistance can also be referred to another OACIQ department for more appropriate processing, including the Office of the Syndic.<sup>76</sup>

Between 2010 and 2014, this department processed over 10,000 requests, more than half of which emanated from the public.

**TABLE IX: NUMBER OF REQUESTS RECEIVED/PROCESSED BY THE ASSISTANCE DEPARTMENT**

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YEAR	REQUESTS RECEIVED	REQUESTS PROCESSED
2010	1,805	1,715
2011	2,302	2,355
2012	1,956	1,939
2013	1,868	1,905
2014	1,921	2,136

The role of **Office of the Syndic** is to investigate any alleged violation of the REBA and the regulations thereunder by brokers or agencies, including their administrators and officers. Once its investigation is complete, it decides whether to file a complaint with the Discipline Committee.<sup>77</sup> Where the complaint is deemed to be justified, the Discipline Committee can impose penalties on the broker concerned, which can go as far as a permanent suspension of the right to practice in the most serious cases.

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<sup>76</sup> Ss. 70 and 71 of the *Real Estate Brokerage Act*.

<sup>77</sup> S. 84 of the *Real Estate Brokerage Act*.

**TABLE X: NUMBER OF FILES OPENED/PROCESSED BY THE OFFICE OF THE SYNDIC**

YEAR	INVESTIGATIONS OPENED	FILES PROCESSED	COMPLAINTS FILED WITH THE DISCIPLINE COMMITTEE
2010	322	243	83
2011	743	957	90
2012	781	680	93
2013	412	1096	118
2014	496	527	104

The **Inspection Committee and Department** are responsible for overseeing the activities of the members of the OACIQ, specifically by verifying their records, books and registers.<sup>78</sup> The Committee can make any recommendation deemed appropriate to a broker and require that he attend a course or training session.

**TABLE XI: NUMBER OF INSPECTIONS CONDUCTED**

YEAR	NUMBER OF AGENCIES INSPECTED *	AGENCY START-UPS **	ONLINE SELF-INSPECTIONS ** (LONG VERSION)	TOTAL NUMBER OF AGENCY INSPECTIONS	NUMBER OF BROKERS WHO RECEIVED A REPORT FOLLOWING AN AGENCY INSPECTION
2010	371	143	226	740	995
2011	366	136	333	835	1684
2012	365	118	286	769	1594
2013	431	78	282	791	1942
2014	402	69	251	722	2 032

\* includes brokers acting on their own account (not for an agency)

\*\* an agency start-up session and a long version online self-inspection are equivalent to inspections

In addition to these services, public protection is ensured via the following two funds, which are complementary.

The **Real Estate Indemnity Fund** (FICI) was instituted under the REBA and is made up, among other things, of fees paid by Québec real estate agencies and brokers.<sup>79</sup> The FICI indemnifies victims of fraud, fraudulent tactics or misappropriation of funds for which a broker or agency is responsible. Claims are filed via a request for assistance. The maximum indemnity is \$35,000 per claim (it was \$15,000 prior to 2010).<sup>80</sup>

78 Ss. 74 and 75 of the *Real Estate Brokerage Act*

79 Ss. 108 and 109 of the *Real Estate Brokerage Act*.

80 S. 14 of the *Regulation respecting the Real Estate Indemnity Fund and determination of the professional liability insurance premium*, CQLR, c. C-73.2, r. 5.



The **Fonds d'assurance professionnelle du courtage immobilier du Québec** (FARCIQ) insures the professional liability of Québec's real estate and mortgage agencies and brokers. It protects the public in case of unintentional fault, error, negligence or omission on the part of a real estate or mortgage broker in the execution of their professional duties. All brokers and all agencies must pay a professional liability insurance premium to the FARCIQ.<sup>81</sup> It is surprising that the Minister's Report mentions that the Fonds "aims primarily to protect the assets of brokers and agencies in the event of fault" and "protects the public subsidiarily".<sup>82</sup> With respect, the OACIQ feels that the obligation for brokers to be insured and the coverage provided by the Fonds are part of the essential measures put in place by the REBA to protect the public. Thus the role of insurer entrusted to the OACIQ under the REBA<sup>83</sup> is one of the mechanisms provided under the Act allowing the Organization to fulfill its public protection mission.

Finally, it is important to mention that an **ombudsman's** position was recently created within the OACIQ. The ombudsman ensures that the processing of requests which the OACIQ receives from the public is managed in an optimal and coherent manner (in particular by ensuring that cases involving the Organization are processed efficiently and in a way that is consistent with what the public has a right to expect). In broader terms, the ombudsman makes sure that OACIQ fulfils its mission and functions.

### 1.3.3.2 A proactive public protection role

Finally, the OACIQ (and the ACAIQ before it) is called upon to play a leadership role in certain areas in order to ensure better public protection.

Some of the best examples of this are the measures taken concerning building inspections as well as information and training initiatives on phenomena that have been major sources of concern in the last several years.

Thus to counter the lack of oversight for services provided by building inspectors (we will come back to this in point 1 of Part II of this brief), the OACIQ (previously the ACAIQ) has developed since 2003 a number of tools, now widely used, to improve and standardize practices (development, in cooperation with associations representing the building inspection field, of standards of practice, service agreements and forms to record the seller's declarations on the condition of his property). More recent initiatives by the OACIQ in this area include a requirement for brokers to recommend to a buyer to have the property under consideration inspected by an inspector that meets basic requirements (have insurance coverage, use a service agreement, comply with practice standards and provide a written report).<sup>84</sup> This also led the Organization to recognize certain associations of inspectors that require their members to follow these guidelines. The OACIQ has also included a pre-purchase inspection clause in the promise to purchase forms it publishes.

81 Ss. 8 and 17 of the *Real Estate Brokerage Act*.

82 Minister's Report, p. 4.

83 S. 52 of the *Real Estate Brokerage Act*.

84 S. 81 of the *Regulation respecting brokerage requirements, professional conduct of brokers and advertising*.

The OACIQ has acted proactively by organizing seminars on topics that can have a major impact on the value of real estate properties, including real estate fraud, the use of residential buildings for cannabis cultivation, the consequences of major flooding on properties bordering the Richelieu river in 2011, and the specificities of transactions concerning co-ownership properties.

Likewise, the OACIQ, in cooperation with the most credible experts on these matters (lawyers, engineers, Health Canada), organized training sessions for broker on the radon phenomenon (cancer-causing radioactive gas) and on the pyrrhotite phenomenon in the Mauricie region (affecting concrete slabs and foundation walls and causing hundreds of thousands of dollars in damages to properties). The objective was to provide brokers with all the information and tools they need to ensure secure transactions and protect the assets and health of those involved.

## 2. Clarifying the professional activities governed by the REBA: a way to ensure public protection

### 2.1 Questions raised in the *Minister's Report*

#### QUESTIONS REGARDING THE NOTION OF BROKERAGE

- *Should brokerage be defined and, thus, certain actions made exclusive to brokers?*
- *If yes, which ones?*

#### QUESTIONS REGARDING THE ADVISORY FUNCTION

- *Should the activity consisting in providing real estate advice be exclusive to certain persons, such as real estate brokers?*
- *Should this activity be regulated by the Real Estate Brokerage Act or another statute, regardless of who carries out the activity?*

#### QUESTION REGARDING BROKER SERVICES

- *Should brokers be prohibited from offering their services otherwise than under a brokerage contract?*

#### QUESTIONS REGARDING FOR-SALE-BY-OWNER COMPANIES

- *Should the scope of the Act be broadened to include for-sale-by-owner (FSBO) companies?*
- *If yes, which services, in particular, offered by such companies should be regulated in order to protect the public?*

## 2.2 The absence of definition in the REBA

The REBA states that it applies to anyone who engages in a “brokerage transaction” regarding the purchase, sale, exchange or lease (under certain conditions) of an immovable, the purchase or sale of an enterprise whose assets consist mainly or immovable property<sup>85</sup> and in a brokerage transaction regarding a loan secured by immovable hypothec.<sup>86</sup>

By stipulating that no one may engage in “brokerage transactions” or use a title or act in a way that leads others to believe that he is a real estate or mortgage broker unless he is the holder of a licence issued by the OACIQ,<sup>87</sup> the OACIQ confirms that this activity is reserved exclusively for licence holders.

The jurisprudence has identified certain activities as real estate brokerage activities requiring a licence issued by the REBA. However, the jurisprudence leaves many grey areas and uncertainty that does not favour public protection.

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 which this encompasses, merely referring to the notion of “brokerage transaction” without specifying further. Public protection demands a clear definition of these activities.

The OACIQ is of the opinion 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 be clear on the activities for which the Act provides protection.

The OACIQ’s response to the questions raised in the Minister’s Report therefore consists in proposing a comprehensive, clear and flexible definition of the activities covered by the Act, in order to reflect the reality of the various services available on the market, to encompass them all, and to guarantee public protection.

85 We will return to the matter of the application of the REBA to the leasing of an immovable and the sale of an enterprise in Part II of this brief: “Important topics not addressed in the Minister’s Report.”

86 S. 1 of the *Real Estate Brokerage Act*.

87 Ss. 4, 13 and 124 of the *Real Estate Brokerage Act*.

## 2.3 The benefits of a definition

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The Minister's report seems to oppose two business models: one that would be offered by "FSBO companies" and one that would or should be offered by brokers. Now, regardless of the business model chosen, there is a way to protect the public (by overseeing activities) and one way not to do it (by not overseeing activities).

The OACIQ respects the choice made by a portion of the public to transact without a broker's support. This means the OACIQ is not opposed to allowing sellers to sell their properties on their own. However, it is important to ensure that anyone who retains professional services to help them with the purchase, sale or lease of an immovable or to provide or obtain a mortgage loan, does benefit from the full protection offered under the Act, regardless of the scope of services retained and the type or company that offers them. This protection means, among other things:

- The obligation for all professionals involved to abide by the same rules;
- The assurance that one is doing business with professionals who are trained, qualified, responsible and monitored, and whose knowledge and skills are regularly updated;
- The protection by the Fonds d'assurance responsabilité professionnelle du courtage immobilier du Québec (FARCIQ);
- The presence of a monitoring organization, the OACIQ, to which the public can turn in case of grievances regarding the services received or a broker's behaviour.

All companies and professionals providing support services of the same nature as those offered by brokers should be subject to the same rules and offer the public the same guarantees and protections, regardless of the timing or scope of their intervention in the transaction process. For consumers who require services for the sale or purchase of an immovable or to obtain a mortgage loan and who essentially "purchase" the peace of mind that comes with the services provided, there should not be a "double standard."

In addition, the presence of a definition will have the advantage of allowing all the parties involved in real estate or mortgage transactions to have a clearer understanding of the scope and limits of an agency or a broker's obligations.

Finally, defining what constitutes a "brokerage transaction" would help resolve the issues around 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.

A clear and flexible definition would allow the oversight structure to evolve with brokerage services, while taking client needs into account.

The Minister's Report also asks the question as to whether brokers should be prohibited from offering their services other than under a brokerage contract. This question appears surprising in that it seems to suggest that brokers should be limited to a single type of service offer.

A positive reply to this question would risk having an anti-competitive effect and would not be to the public's advantage:

- Brokers could be placed in direct competition with players who are not governed by the regulations and would be prevented from adapting their service offer to meet the needs of the public; in other words, we would be protecting unregulated "players" from potential competition by brokers rather than providing public protection in the course of real estate or mortgage transactions;
- We would be limiting the choice of consumers who would prefer to do business with a broker.

In fact no jurisdiction in North America prohibits brokers from adapting their service offer to meet the needs of clients, although some do require a minimum level of service in certain circumstances.<sup>88</sup> Thus in the United States it is estimated that in 20% of cases, the client (buyer or seller) who uses the services of a real estate broker uses a limited – even very limited – range of services offered by this broker.<sup>89</sup>

The definition, even if sufficiently specific, must not be so bullet-proof that new practices escape monitoring by the regulatory body.

The OACIQ is concerned by what could be a reductive vision of the brokerage transaction referred to in the REBA. Such a vision does not correspond to its mission.

It is important to remember that the protections provided under the Act, including the professional liability insurance fund and the indemnity fund, apply only if the person who performed the acts is the holder of a licence. It is why the Act states that the OACIQ governs real estate and mortgage brokerage, which includes not only licence holders, but also non-holders who illegally engage in brokerage activities, the latter being targeted by the penal provisions of the Act.

In short, increased public protection necessarily requires quality oversight of real estate brokerage activities, and the ability to adapt it based on the evolution of services.

*The REBA must remain flexible and not impose nor prohibit a particular business model in order to allow consumers to choose the services which they feel they need. Regardless of the scope of services sought or of financial means, consumers must be able to benefit from the protections offered under the REBA.*

88 See Katherine A. PANCAK, *Critical Examination of Broker Minimum Service Law*, Center for Real Estate and Urban Economic Studies, University of Connecticut, 2009.

89 National Association of Realtors, *Home Buyer and Seller Generational Trends*, March 2014.

Thus oversight must not hinder competition, but still adequately protect the public.

In its final analysis, the OACIQ considers that adopting a comprehensive, clear and flexible definition of the notion of “brokerage transaction” will allow the structure and the tools developed to benefit those who offer a range of services or products related to the real estate or mortgage transaction. It will also reinforce public protection in the course of a transaction that can have a major impact on the financial health of all parties concerned.

## 2.4 Difficulties caused by the absence of definition

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The absence of definition in the REBA obscures many aspects of the role and duties of brokerage professionals, creating a grey zone around many activities in which real estate and mortgage brokers engage and which are actually often at the heart of the practice. Examples of these activities include assessing the market value of an immovable, putting an immovable on the market, sending information about the immovable to prospective buyers, assisting and advising the parties to the transaction, soliciting potential buyers on behalf of a seller, soliciting lenders or borrowers, evaluating a borrower’s borrowing capacity and qualifying a borrower for a lending institution.

This absence of definition is also liable to cause many difficulties inherent to the meaning traditionally assigned to the word “brokerage”. A review of the jurisprudence shows some hesitation by the courts when it comes to applying this notion to certain situations, making it difficult to establish clear guidelines when attempting to narrow down what constitutes a “brokerage transaction”. The absence of definition in the REBA, combined with conflicting jurisprudence on what constitutes a brokerage act, present obstacles for the OACIQ in the fulfilment of its public protection mission by making it difficult to determine the exact scope of application of the Act.

One of the risks of not having a clear-cut definition of the expression “brokerage transaction” and of the fact that traditionally this concept has been restricted to the intermediary role played by brokers, is that it leaves without protection those members of the public who use the services that have emerged in recent years, which revolve around web-based tools and an online assistance offer. Trusting that they can avoid the application of the REBA, these companies in fact avoid offering services that would place them too directly in the role of intermediary (e.g. accompanying a buyer on visits or helping with negotiations).<sup>90</sup> Considering the liability exclusion statements found on these companies’ websites, this situation is of concern.

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<sup>90</sup> Although one could argue that these companies often indirectly take part in negotiations via the advice and support they provide to their clients in the course of the transaction.

Concretely, one can observe certain difficulties caused by the absence of definition of what constitutes a “brokerage transaction”, the evolution of real estate and mortgage services, and the emergence of players who operate outside of the framework put in place by the REBA to protect the public. Examples include:

- Difficulty for the public to differentiate between the services offered by brokers and non-brokers;<sup>91</sup>
  - False sense of security for consumers, who may think they are protected the same way as if they do business with a broker (possibility of referring to the OACIQ for questions regarding the forms used and the services rendered, insurance in case of fault or fraud on the part of the service provider, disciplinary process to penalize a serious offence by the service provider), whereas the services offered by non-brokers, for lack of clarification, could fall outside of the oversight realm of the only body dedicated to public protection in the real estate industry;
- Confusion on the part of the public as to whether or not an activity constitutes a brokerage activity;
- Difficulty to apply the REBA with the emergence of activities similar to brokerage or of new business models for brokers;
- Risk of long and costly legal debates, whether civil, penal or disciplinary, to determine whether this or that act constitutes a “brokerage transaction”;
- Risk that certain activities will not be governed by the REBA and that public protection cannot be assured;
- Absence of oversight of representations made by alternative service providers as to:<sup>92</sup>
  - the effectiveness of the services provided;
  - the accuracy of the information provided regarding immovables offered for sale and the results and savings promised for using their services;
  - potential conflicts of interest (client referrals to various service providers without the client being informed of the benefit received);

91 To illustrate this fact, it is common for owners to say that they used the services of a broker or company to sell their homes, citing the names of businesses (e.g. DuProprio, Propriosolo, Stopsansagent, Immocom, Propriomax, Goproprio, Estrietoit, Liaisonmaison, etc.) that offer complete assistance services to sellers of residential immovables without being licenced. These owners do not feel that they bought or sold “on their own”. The same confusion is found in the media. An article published in *Les Affaires* on December 17, 2014 stated: “[Tr.] Selling without an intermediary doesn’t mean selling your property by yourself. Like brokers, companies such as DuProprio provide visibility and support to their clients throughout the process, as the sale of a property requires a minimum of real estate knowledge.” Likewise, when the sale of DuProprio to the Yellow Pages Group was announced in June 2015, several media sources called the company a real estate agency (Canadian Press report published on the <http://www.lapresse.ca/> website on June 16, 2015; *Journal Metro*, June 17, 2015, p. 12; *Le Soleil*, June 17, 2015, p. 31). This confusion can also be found in several legal decisions by civil or family courts. Thus a quick search of decisions rendered by the Court of Québec or the Superior Court shows that in several cases, reference is made to this type of company as an “agency”, a “broker” or a “brokerage firm” (see Appendix 5 for a list of decisions).

92 Without speculating on the outcome of the proceedings initiated, the criticism leveled at DuProprio in the class action case of *Fédération des chambres immobilières du Québec et Patrick Juaneda c. DuProprio inc.*, File No. 500-06-00721-148, illustrates the risks posed by the absence of oversight over advertising and representations made by a provider of services which, in the eyes of the public, are similar to those of a real estate broker’s (among other things, the grievances relate to the use of arbitrary commission rates to highlight potential savings for clients, the performance guarantee being based on too many variables to actually apply, failure to mention certain ancillary costs, the quoting of selling prices obtained by sellers above actual prices).

- performance guarantees;
- their training and qualifications;
- their civil liability (liability exclusion clause);
- the tools available to the public to carry out a transaction (price setting tools, forms).

Given that, more often than not, a real estate transaction is the most important transaction a person will ever enter into in their life, this situation is not very reassuring and deprives the public of the protections it should rightfully expect when using professional services. The need to improve consumer protection in real estate and mortgage matters in fact comes from initiatives such as the symposium entitled “Le consommateur immobilier en quête de protection,” organized by Fondation Claude Masse in Montreal in November 2013.<sup>93</sup>

## 2.5 Absence of definition: an exception to the rule

Finally, by failing to define what exactly is meant by a “brokerage transaction”, the REBA differs from legislation in force elsewhere in Canada, both in real estate<sup>94</sup> and mortgage<sup>95</sup> industries. Indeed, everywhere else the activities restricted to licence holders are listed and explicitly defined (the term “licence” here being used generically to designate any form of authorization to practice an activity, trade or profession).

Here in Québec, real estate and mortgage brokerage is also an exception. Québec laws governing activities that are regulated and restricted to certain categories of individuals who hold a licence to practice usually include very specific definitions of the activities in question. This is true of the activities of contractor or worker in the construction industry,<sup>96</sup> those relating to the practice of a profession (except architects)<sup>97</sup>, and activities in the field of financial services<sup>98</sup> and securities.<sup>99</sup>

93 The symposium's proceedings are published under the title *Le consommateur immobilier en quête de protection* (sous la direction de Pierre Claude LAFOND et Brigitte LEFEBVRE, Éditions Yvon Blais, 2014, 378 pages).

94 All Canadian jurisdictions oversee the practice of real estate brokerage, restricting the practice of this activity to the holders of licences, save for a few exceptions – see Appendix 6 for references to Canadian real estate brokerage legislation and Appendix 7 for a brief analysis of the activities covered by the various laws governing real estate brokerage in Canada.

95 Eight Canadian provinces (Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Québec, Saskatchewan and Newfoundland) currently regulate the activities of mortgage brokers by requiring that they hold a licence, and restrict the practice of this activity to licence holders; a ninth province, New Brunswick, will soon be regulating this activity – see Appendix 8 for references to Canadian legislation in the mortgage brokerage industry.

96 See: *Building Act*, CQLR c. B1.1, and *Regulation respecting the professional qualification of building contractors and owner-builders*, CQLR c. B1.1, r. 9; *Regulation respecting the application of the Act respecting labour relations, vocational training and workforce management in the construction industry*, CQLR c. R-20, *Regulation Respecting the Issuance of Competency Certificates*, CQLR c. R-20, r.5, *Act Respecting Labour Relations, Vocational Training and Workforce Management in the Construction Industry*, CQLR c. R-20, r.8.

97 See *Professional Code*, CQLR c. C-26; *Act respecting Acupuncture*, CQLR c. A-5.1, *Agrologists Act*, CQLR c. A-12, *Land Surveyors Act*, CQLR c. A-23, *Hearing-Aid Acousticians Act*, CQLR c. A-33, *Act respecting the Barreau du Québec*, CQLR c. B-1, *Professional Chemists Act*, CQLR c. C-15, *Chiropractic Act*, CQLR c. C-16, *Chartered Professional Accountants Act*, CQLR c. C-48.1, *Dental Act*, CQLR c. D-3, *Denturologists Act*, CQLR c. D-4, *Geologists Act*, CQLR c. G-1.01, *Bailiffs Act*, CQLR c. H-4.1, *Nurses Act*, CQLR c. I-8, *Engineers Act*, CQLR c. I-9, *Forest Engineers Act*, CQLR c. I-10, *Veterinary Surgeons Act*, CQLR c. M-8, *Medical Act*, CQLR c. M-9, *Notarial Act*, CQLR c. N-3, *Dispensing Opticians Act*, CQLR c. O-6, *Optometry Act*, CQLR c. O-7, *Pharmacy Act*, CQLR c. P-10, *Podiatry Act*, CQLR c. P-12, *Midwives Act*, CQLR c. S-0.1, *Act Respecting Medical Imaging Technologists, Radiation Oncology Technologists and Medical Electrophysiology Technologists*, CQLR c. T-5.

98 *Act respecting the Distribution of Financial Products and Services*.

99 *Derivatives Act* and *Securities Act*.



## 2.6 Proposed definition

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Considering the importance of real estate and mortgage transactions, in order allow the REBA to fully attain its public protection objective in the area of real estate or mortgage services and to spell out for the public the circumstances under which it will benefit from the protections afforded by the Act, it is important to determine what does and does not fall within the REBA's scope. 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.

The OACIQ's purpose in having the brokerage act defined is not to preserve a business model, but rather to clarify what constitutes the activity of broker.

Bringing a real estate or mortgage transaction to fruition requires diverse and multiple services, and the REBA should provide a definition that takes this into account. Thus any definition should cover, among other things, all of the services involved in carrying out, for the benefit of others, the purchase, sale or lease of an immovable (or enterprise) or the granting of a mortgage loan. The need for public protection can be found at any step of the process leading to the purchase or sale of an immovable or the obtaining of a mortgage loan and, considering the impact of these transactions on the assets of the individuals concerned, the government must avoid adopting a definition of the professional activities referred to in the REBA that would reduce it to a few overly restrictive actions. This would amount to a detrimental disengagement on the part of the government, whereas the OACIQ believes that the government, on the contrary, should intervene.

The OACIQ therefore proposes that the professional activities covered by the REBA be clearly defined, based among other things on what is done in the professional realm, in three points: first, a definition of what constitutes the professional activity; second, the exclusive nature of the profession; and third, adjustments concerning the unauthorized use of certain titles or practices (penal provisions).

# RECOMMENDATIONS:

## **A) CONCERNING A DEFINITION, THE FOLLOWING IS PROPOSED:<sup>100</sup>**

*"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;<sup>101</sup>*
- 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."*

<sup>100</sup> If necessary, new exception to the application of the REBA could be considered to exempt activities that should clearly not come under the Act – see point 4.4 of the Part II of this brief: *Important topics not addressed in the Minister's Report*.

<sup>101</sup> The notion of advice in fact is covered in the *Act respecting the Distribution of Financial Products and Services*, CQLR c. D-9.2, by including in the definition of "representative in insurance of persons", "group insurance representative", "damage insurance agent" and "damage insurance broker" (s. 3, 4, 5 and 6 of the Act) the fact that they "act as advisor" in their respective field; it is also covered by the *Securities Act*, CQLR c. V-1.1 (see definition of "adviser" and "dealer" in section 5) and the *Derivatives Act*, CQLR c. I-14.01 (see definition of "adviser" and "dealer" in section 3).

*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 of such a promise, including any transaction concerning a company's share capital.*

**B) REGARDING THE EXCLUSIVE NATURE OF THE ACTIVITIES:**

*Subject to the exceptions provided under this Act, no person except the holder of a licence issued by the Organisme d'autorégulation du courtage immobilier du Québec may act as or purport to be a real estate or mortgage broker.*

*A real estate broker is a natural person who engages in the practice of the professional activity described in section 1.*

*A mortgage broker is a natural person who engages in the practice of the professional activity described in section 1 relating to loans secured by immovable hypothec.*

*Subject to Division IV of Chapter II, a person who contravenes this section may not claim or receive remuneration for the practice of the professional activity described in section 1. Likewise, a broker who engages in the practice of the professional activity described in section 1 through the intermediary of a person who is not a licence holder is also precluded from claiming or receiving remuneration for this activity.*

**C) REGARDING THE PENAL PROVISIONS:**

*Any person who does not hold the licence required under this Act, unless authorized under the Act, and in any manner claims to be a real estate broker or a mortgage broker, uses one of these titles or a title or abbreviation or initials that may lead others to believe that the person is such, engages in the professional activity described in section 1, claims to have the right to engage in this activity, or acts in a way that leads others to believe that he is authorized to do so, is guilty of an offence.*

*Without restricting the generality of the above, the titles that may lead others to believe that a person is a broker are:*

- 1° "real estate agent";*
- 2° "mortgage loan agent";*
- 3° "real estate or mortgage agent or coach or specialist or consultant or advisor or coordinator or analyst";*
- 4° "agent or coach or specialist or consultant or advisor or coordinator or analyst in the sale or purchase of enterprises";*
- 5° "leasing agent or coach or specialist or consultant or advisor or coordinator or analyst";*
- 6° "marketing agent or coach or specialist or consultant or advisor or coordinator or analyst".*

By making the proposed adjustments to the legislation, we believe that the legislator would address a good number of concerns created by the absence of definition in the REBA.

## 3. The regulatory body and governance

### 3.1 Questions raised in the Minister's report

#### QUESTIONS REGARDING THE ORGANIZATION AND ITS GOVERNANCE

- *Which regulation model should be chosen?*
- *Should other models be studied?*

Regarding this, the Minister's puts forth three options:<sup>102</sup>

- Substantially reduce or even terminate industry professionals' control over the regulatory body;
- Have the OACIQ run by a president and chief executive officer appointed by the government, according to the model of the Autorité des marchés financiers;
- Without transforming the OACIQ's governance model, strictly limit in in the Act the OACIQ's activities to the functions involved in regulating brokers and agencies: regulations, licence issuance, public assistance, oversight, mediation and arbitration, discipline and indemnities.

### 3.2 The OACIQ: a success

#### 3.2.1 Advantages of self-regulation

The Minister's Report recognizes that self-regulation has certain advantages, but in order to arrive at the options put forward, it seems to retain essentially that self-regulation has its limits and has drawn criticism.<sup>103</sup> The OACIQ would have liked for the report to explain this position in more detail since, in its opinion, self-regulation on the contrary offers numerous advantages:

- draws on the profession's know-how on complex and rapidly-evolving policy issues;
- the OACIQ's specific knowledge of the regulated field enables it to find solutions more quickly than a government body which, even with general knowledge and collective skills, can only intermittently devote itself to such technical and specific problems;
- the members of a self-regulated organization are generally informed more quickly of innovations and trends in their activity sector;
- allows more flexibility and speed in adopting and adapting self-regulatory standards;

<sup>102</sup> Minister's Report, p. 15 and 16.

<sup>103</sup> Minister's Report, p. 4 and 15.

- allows greater proximity to the actual constraints and practices in the regulated field;
- increases the motivation of regulated individuals to comply with the rules since these take their practice into account;
- allows for better understanding by regulated individuals of the objectives and the motives justifying the adoption of certain rules and, consequently, encourages them to submit voluntarily to the regulations, thus increasing compliance;
- the cost of overseeing regulated activities is borne by the individuals concerned rather than by all taxpayers;
- lightening of the load for public authorities;
- lower implementation costs for those concerned;
- adoption of more stringent ethical rules than would come from a public agency performing the same functions, considering the interest of the individuals concerned in preserving public trust and ensuring healthy markets.<sup>104</sup>

In this context, the OACIQ cannot help but be surprised by the options put forward by the Minister's Report, especially that of having the OACIQ run by a president and chief executive officer appointed by the government. Does this mean the government is considering repatriating the Organization, its structures, assets and financial commitments, as well as its 150 employees within the government apparatus? If that is the case, it is difficult to see what advantage this would represent for the government, given the success with which the OACIQ has fulfilled its mission and managed its activities until now.

### 3.2.2 Recognized success and efforts to maintain it

Self-regulation in itself presents many advantages, but there is more.

As mentioned above (see point 1.3), since its inception in 2010 the OACIQ (and the ACAIQ before it) has successfully discharged its mission under the REBA. 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 indicated:

*"[Tr.] Our inspection has led us to conclude that the OACIQ has implemented a comprehensive service offer and sound management practices that enable it to fulfill its mission of ensuring public protection in the areas of real estate brokerage and of loans secured by immovable hypothec, and to ensure that brokerage activities by brokers and agencies are performed in accordance with the Act.*

*All the processes and procedures reviewed are rigorously documented, respected and updated in a timely fashion. In addition, solid mechanisms are in place and followed to ensure the independence of OACIQ employees, of the members of the various committees, and of the directors."*

<sup>104</sup> See Julie BIRON, "Le double mandat des organismes d'autorégulation et la protection des investisseurs, le cas de l'OCRCVM," in *Revue générale de droit*, vol. 42, n°1, 2012, pp.173-180; see also Luc THÉVENOZ, "Pas d'autorégulation sans consultation" in *De lege ferenda: réflexions sur le droit désirable en l'honneur du professeur Alain Hirsh*, Genève, Éditions Slatkine, p. 298.

In addition, according to the information provided to the OACIQ by Finance Department officials, through the years the Department has received very few complaints from the public regarding the OACIQ, and those were resolved to the Department's satisfaction.

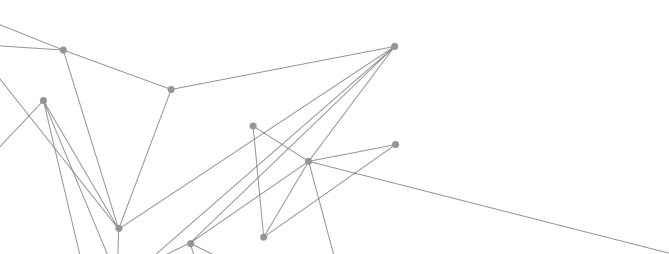
Since the issuance of the audit report, the OACIQ has pursued its actions to maintain quality services in the fulfilment of its mission and to improve these services. The OACIQ followed up on all the recommendations contained in the audit report, including concerning follow-up processes and processing times for assistance files and disciplinary files, to the Finance Department's satisfaction. Consequently, in a letter dated April 22, 2015, the *Assistant Deputy Minister, Policy Pertaining to Financial Institutions and Corporate Law*, congratulated the OACIQ on the work undertaken since the audit report.

Thus effective tools for real-time file follow-up and processing time management were implemented, resulting in a 12% increase in the number of files processed by the Assistance Department, and a 40% reduction in the number of files awaiting processing, a drop of more than 30% in the average processing time of this department's files. At the Office of the Syndic, the number of current or pending files has been reduced by almost 75% since the beginning of 2013, and processing times have been reduced by half.

Again in an effort to improve operational efficiency and improve public protection, the OACIQ adopted the concept of single file.

Finally, the OACIQ re-examined its structure and reviewed its operating methods to maximize its resources. This notably led to a grouping of the Organization's investigative functions within the Office of the Syndic (disciplinary and penal investigations) and to the creation of an ombudsman position mentioned in point 1.3.3.1.

The following tables provide an idea of the OACIQ's achievements by comparing its activities to those of similar organizations.



**TABLE XII: COMPARISON BETWEEN THE OACIQ'S ACTIVITIES AND THOSE OF OTHER PROFESSIONAL ORDERS AND SELF-REGULATED ORGANIZATIONS<sup>105</sup>**

	OACIQ	ORDRE DES INGÉNIEURS	ORDRE DES COMPTABLES PROFESSIONNELS AGRÉÉS	CHAMBRE DE LA SÉCURITÉ FINANCIÈRE	BARREAU DU QUÉBEC	CHAD	CHAMBRE DES NOTAIRES	ORDRE ADMINISTRATEURS AGRÉÉS	
<b>Number of members or licence holders</b>	<b>16,802</b>	<b>60,826</b>	<b>36,038</b>	<b>31,917</b>	<b>25,095</b>	<b>14,669</b>	<b>3,837</b>	<b>1,370</b>	
<b>Number of requests for intervention or investigation</b>	<b>1,921<sup>106</sup></b>	<b>450<sup>107</sup></b>	<b>940<sup>108</sup></b>	<b>529</b>	<b>1,684</b>	<b>184</b>	<b>539</b>	<b>N/D</b>	
<b>Office of the Syndic</b>	Number of files or investigations opened	<b>496<sup>109</sup></b>	<b>349</b>	<b>940</b>	<b>375</b>	<b>1,684</b>	<b>226</b>	<b>539</b>	<b>14</b>
	Number of files processed or investigations completed	<b>527</b>	<b>N/D</b>	<b>793</b>	<b>416</b>	<b>490</b>	<b>110</b>	<b>759</b>	<b>10</b>
<b>Discipline council or committee</b>	Number of disciplinary complaints received	<b>104</b>	<b>20<sup>110</sup></b>	<b>51</b>	<b>63</b>	<b>73<sup>111</sup></b>	<b>18<sup>112</sup></b>	<b>24</b>	<b>1</b>
	Number of decisions rendered <sup>113</sup>	<b>83</b>	<b>15</b>	<b>44</b>	<b>73</b>	<b>83</b>	<b>40</b>	<b>40</b>	<b>3</b>
<b>Illegal practice<sup>114</sup></b>	Number of investigations opened	<b>93</b>	<b>141</b>	<b>157</b>	<b>N/D<sup>115</sup></b>	<b>N/D</b>	<b>N/D<sup>116</sup></b>	<b>N/D</b>	<b>N/D</b>
	Number of files or investigations processed	<b>246</b>	<b>103</b>	<b>190</b>	<b>N/D</b>	<b>N/D</b>	<b>N/D</b>	<b>N/D</b>	<b>20</b>
	Number of lawsuits	<b>37<sup>117</sup></b>	<b>83<sup>118</sup></b>	<b>48</b>	<b>N/D</b>	<b>6</b>	<b>N/D</b>	<b>N/D</b>	<b>11</b>
	Number of convictions	<b>55</b>	<b>50<sup>119</sup></b>	<b>30</b>	<b>N/D</b>	<b>10</b>	<b>N/D</b>	<b>N/D</b>	<b>10</b>
<b>Inspection</b>	Number of inspections	<b>722</b>	<b>1,522</b>	<b>828<sup>120</sup></b>	<b>N/D</b>	<b>1,013</b>	<b>92</b>	<b>936</b>	<b>28</b>
	Inspection reports issued	<b>2,032</b>	<b>1,483<sup>121</sup></b>	<b>N/D</b>	<b>N/D</b>	<b>N/D</b>	<b>N/D</b>	<b>1,163</b>	<b>127</b>

105 The data in this table comes from annual reports for 2014. For the OACIQ, the information comes from the 2014 Annual Report covering the year ended December 31, 2014. For professional orders, the data comes from annual reports for the year 2013-2014 whose year ended March 31, 2014.

106 The OACIQ makes available to the public and to licence holders the services of the Info Center, which handles many requests for information. Some of these requests may lead to requests for intervention by the Assistance Department. As of December 31, 2014, the Info Center had processed 58,884 requests for information. For the same period, the Assistance Department processed 1,921 requests.

107 The OIQ has set up a hotline to respond to questions concerning ethics. For the year ended on March 31, 2014, this hotline has responded to 1,310 calls.

108 The order has also responded to 1,800 calls concerning ethics.

109 Of this number, 337 are part of the 1,921 requests to the Assistance Department.

110 Including 18 from the office of the syndic.

111 Of this number, 41 complaints come from the syndic and 32 are private complaints.

112 4 of these complains come from the syndic, 10 from an ad hoc syndic and 4 are private complaints.

113 The number of decisions can also include decisions other than those on guilt or penalties (e.g. withdrawal of complaint, interlocutory decision, temporary suspension, etc.)

114 This number includes, if applicable, any data pertaining to the exercise of a penal recourse, including the illegal use of a reserved title.

115 The Autorité des marchés financiers is responsible for the exercise of penal recourses. Consequently, this information is more likely to come under the AMF.

116 *Id.*

117 This figure represents the number of notices issued.

118 This figure represents the number of violation counts concerned in a lawsuit.

119 This figure represents the number of violation counts concerned by a decision.

120 This figure corresponds to the number of units of practice inspected. This led to the inspection of 2,800 members.

121 In addition, 10 members were inspected for competence, giving rise to 8 inspection reports. A total of 1,483 inspection reports were issued.

**TABLE XIII: COMPARISON BETWEEN THE ACTIVITIES OF THE OACIQ INDEMNITY FUND AND THOSE OF PROFESSIONAL ORDER FUNDS AND FINANCIAL SERVICES FUND**

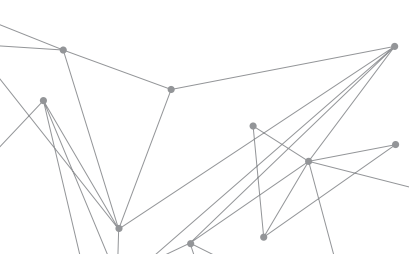
		OACIQ	BARREAU DU QUÉBEC	CHAMBRE DES NOTAIRES	ORDRE DES COMPTABLES PROFESSIONNELS AGRÉÉS	ORDRE DES ADMINISTRATEURS AGRÉÉS	AMF	ORDRE DES GÉOLOGUES
<b>Indemnity Fund</b>	Number of claims received	90	82	11	0	0	41	0
	Number of files processed	79	78	7	1	N/D	71	N/D
	Indemnities paid or to be paid	\$114,242.78	\$300,532.32	\$11,025	\$6,300.06	N/A	\$91,000	N/A



**TABLE XIV: COMPARISON BETWEEN THE ACTIVITIES OF THE REAL ESTATE BROKERAGE PROFESSIONAL LIABILITY INSURANCE FUND (FARCIQ) AND THOSE OF PROFESSIONAL ORDER FUNDS\***

	FARCIQ	FONDS D'ASSURANCE RESPONSABILITÉ DU BARREAU DU QUÉBEC	FARPCNQ (NOTARIES)	FARPODQ (DENTISTS)	FONDS DES ARCHITECTES	FONDS ASSURANCE RESPONSABILITÉ PROFESSIONNELLE DE L'OEAOQ (CHARTERED APPRAISERS) (YEAR 2013)	FARPOQ (PHARMACISTS)
Number of insured	16,845	14,647	6 613	4,453	1,489 employers 1,002 employees	524	8,889 pharmacists 1,091 companies
Number of claims received	583	662	473	294	291	6	537
Number of claims processed	625	N/D	476	231	N/D	N/D	N/D
Funds allocated to claims and claim expenses	\$3,580,703	\$11,403,428	\$17,435,289 (including reinsurance ceded and reinsurers' shares in claims)	\$5,126,493	\$13,199,065	\$767,177	\$954,826
Earnings / (loss) from insurance activities	\$2,979,708	\$7,785,038	(\$2,408,965)	(\$755,385)	(\$3,144,885)	\$136,744	\$1,494,307
Accumulated surplus	\$37,888,982	\$63,356,254	\$34,430,899	\$8,316,820	\$13,393,825	\$2,676,729	\$14,446,494

\*The information contained in the above table comes from the annual reports of the organization or order and/or the fund's management report for the year 2014.



### 3.2.3 Sound management

The successes outlined here would not be possible without sound financial management of the OACIQ's activities.

In the OACIQ's opinion, public protection means making an optimum use of its human, physical and financial resources. To this effect, the OACIQ, taking up responsible management where the ACAIQ left off, has managed its assets responsibly to face its obligations, including by maintaining a budgetary surplus since its inception in 2010. Such responsible administration can be observed in the management of the OACIQ's General Operating Fund and that of the FICI or the FARCIQ, in cooperation with its board of directors.

**TABLE XV: GENERAL OPERATING FUND – STATEMENT OF OPERATIONS AND CHANGES IN NET ASSETS**

YEAR	INCOME	EXPENSES	NET ASSETS
2010	\$17,554,893	\$16,221,385	\$6,543,203
2011	\$20,450,423	\$19,372,084	\$7,621,542
2012	\$22,680,245	\$24,135,005	\$6,166,782
2013	\$21,063,070	\$22,604,116	\$4,625,736
2014	\$21,961,229	\$21,299,416	\$5,287,549

**TABLE XVI: INDEMNITY FUND - STATEMENT OF OPERATIONS AND CHANGES IN NET ASSETS**

YEAR	INCOME	EXPENSES	NET ASSETS
2010	\$787,669	\$381,017	\$2,503,898
2011	\$1,256,981	\$575,753	\$3,185,126
2012	\$1,202,899	\$668,831	\$3,719,194
2013	\$1,033,393	\$654,631	\$4,097,956
2014	\$1,307,684	\$714,834	\$4,690,806

**TABLE XVII: FARCIQ – STATEMENT OF COMPREHENSIVE INCOME, FINANCIAL POSITION AND SURPLUS VARIATIONS**

YEAR	CLAIMS AND FEES	CLAIM LIABILITIES	SURPLUS
2010	\$5,592,222	\$21,349,133	\$18,958,960
2011	\$5,901,550	\$20,550,339	\$24,276,798
2012	\$4,201,542	\$17,721,504	\$29,954,448
2013	\$3,826,161	\$15,874,238	\$33,807,312
2014	\$4,918,757	\$14,645,262	\$37,888,982

With the same view to sound management, in 2012 the OACIQ exercised the options contained in its lease to purchase 50% of the partnership that owns the building where the OACIQ has its offices, according to a cost formula determined at the signing of the lease. Given the current valuation of the property, this transaction is generating a yield of close to 8%, this after amortization and without increasing its occupancy costs.<sup>122</sup>

### 3.2.4 Maintenance of self-regulation

As shown by a review of its activities since the coming into force of the REBA, the OACIQ has successfully discharged its mission “to protect the public in real estate and mortgage brokerage dealings”, and the success of self-regulation is undeniable, although some improvements could be considered.

Like other professional orders with which it has many similarities (mission, structures, etc.), the fact that the OACIQ board of directors is made up of a majority of professionals whose activities are regulated by the Act allows it to clearly understand the issues pertaining to the practice of brokerage and their impact on the protection of those who use the services of real estate brokers and agents. It also allows the Organization to develop the necessary measures and to propose additional solutions to government authorities where necessary, including through legislative or regulatory amendments.

As for the possibility of making the OACIQ into a professional order, although this is not an option examined in the Minister’s Report or championed by the OACIQ, the Organization would still like to stress that although the Office des professions may in the past have considered that the broker profession did not meet the criteria set out in the *Professional Code* to constitute an order,<sup>123</sup> the changes which have occurred in the profession in the last decade, especially the requirements regarding training and skill validation since the coming into force of the current REBA, are positioning real estate and mortgage brokers as true professionals.

*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 forward in the Minister’s Report and believes that none of these options would ensure better public protection.*

122 A government source has indicated to the OACIQ that the inclusion, on page 4 of the Minister’s report, of a reference to an alleged conflict of interest emanated from a single complaint received from a broker regarding the purchase of half of the shares of the partnership that owned the immovable where the OACIQ has its offices, to the effect that brokerage fees were paid to commercial brokers for this acquisition. It is important to note that in 2007 the ACAIQ issued an invitation to all commercial brokers in order to find a broker to help it analyze any offers of office spaces that it might receive. A broker was then retained. Following this, a call for tenders was issued to commercial brokers and office building owners. Not having received any interesting offer, the ACAIQ launched another call for tenders to find a commercial broker who could find a space to fulfill its needs. The services of a commercial broker were retained and a brokerage contract was signed. This contract called for the payment of fees to represent it in its negotiation of a lease with an option to purchase a portion of the immovable.

123 Opinion issued by the Office des professions in November 2004 at the request of the Finance Department and mentioned in the Minister’s Report, p. 7. However the Office’s opinion stated that it was not an official notice of constitution of a professional order, which would have required more in-depth study.

The OACIQ is meant to be a modern self-regulated organization, in tune with major regulatory trends, and it should be maintained.

## RECOMMENDATION

- **MAINTAIN THE OACIQ AS A SELF-REGULATED BODY.**

### 3.3 Public presence within OACIQ bodies

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The predominance of real estate and mortgage brokers within OACIQ bodies makes a vital contribution to the fulfilment of its public protection mission. This protection means, among other things, adequate training for those who propose to enter the broker profession, oversight of their activities once they become brokers, and intervention processes (inspection, discipline) that are completely in step with real estate and mortgage brokerage practices. The OACIQ is of the opinion that brokers remain best placed to direct its actions in this area.

This being said, the presence of representatives from the public within certain OACIQ bodies also makes an important contribution, allowing to the Organization to broaden the scope of its actions. Thus three representatives from the public appointed by the Minister of Finance sit as directors on the OACIQ board. In addition, individuals who are not brokers sit on the Indemnity Committee formed within the OACIQ to rule on requests for compensation from the FICI, as well as on the FARCIQ board of directors.

The number of directors on the OACIQ board was actually increased from 11 to 13 on January 1, 2014, with the addition of two elected directors to represent the fields of commercial and mortgage brokerage. The OACIQ has successfully discharged its mission and nothing justifies abandoning the self-regulation formula, quite the contrary. If the Minister wishes to adjust the proportion of directors who are not brokers on the board, the OACIQ would not object to the addition of one or two appointed directors.

To allow the board to work efficiently, the OACIQ proposes that appointed directors be chosen based on their ability to contribute to the resolution of problems in the field of real estate brokerage, or on their professional status making them able to contribute to the work of a board of directors (accountants, chartered administrators, jurists, etc.).

# RECOMMENDATIONS

- **INCREASE THE NUMBER OF DIRECTORS APPOINTED BY THE MINISTER OF FINANCE FROM 3 TO 4 OR 5;**
- **ENSURE THAT APPOINTED DIRECTORS ARE ABLE TO CONTRIBUTE TO RESOLVING PROBLEMS IN THE FIELD OF REAL ESTATE AND MORTGAGE BROKERAGE OR ARE PROFESSIONALS ABLE TO CONTRIBUTE TO THE WORK OF A BOARD OF DIRECTORS.**

## 3.4 Confusion regarding the role of the OACIQ

The Minister's Report suggests that the OACIQ is perceived by the brokers themselves as a body that exists to defend their business interests.<sup>124</sup> Echoing the concerns contained in the Minister's Report, the OACIQ would first like to stress that the understanding that some brokers may have of the role of the OACIQ is not different from that of members of professional orders.

But regardless of the validity of this claim, we wonder whether this confusion regarding the role of the OACIQ might result from the maintenance, within the REBA, of the annual general meeting of licence holders (see point 1.3). In this regard, the OACIQ deems it important to maintain an annual forum, regardless of the name or form it might be given, where brokers have an opportunity to express their opinions on the governance of the Organization and to ask questions of directors and officers. This also gives the latter an additional opportunity to keep abreast of the reality and concerns of brokers whose activities are governed by the OACIQ.

In any case, the understanding that certain brokers may have of the OACIQ's role could be improved, and the OACIQ intends to pursue its efforts in this area. Regarding this issue, the OACIQ thinks that the way to dispelling any confusion that might exist begins with better communication between the various stakeholders in the field of real estate and mortgage brokerage, so that consumers and brokers are better informed about their respective roles and responsibilities, and the Organization encourages such communication.

The OACIQ likewise agrees that the "partner programs" it has implemented, through which commercial services such as cellular phones and group insurance are made available to brokers, could be associated with an associative function. Although this offer of services is not necessarily incompatible with its mission, the OACIQ is considering abolishing it.

<sup>124</sup> Minister's Report, p. 15.

Lastly, the OACIQ is concerned by the option suggested in the Minister's Report of restricting the OACIQ's activities to the oversight of brokers and agencies, which could mean withdrawing from the development, distribution and even accreditation of continuing education activities or other tools essential to the fulfilment of its mission, such as forms. The OACIQ believes that in order to ensure that brokers provide quality services and that the public is protected, these activities must be maintained.

As mentioned, the OACIQ believes that public protection begins with the application of preventive measures. The tools developed by the OACIQ, including the forms it publishes and the continuing education activities it imposes and provides in part, form an important part of the preventive measures which have been implemented and have proven effective. The OACIQ is especially well positioned to play a key role in the development and distribution of these tools. Thanks to the close relationships which its various bodies (OACIQ Info Center, Assistance Department, Inspection Department, Office of the Syndic) maintain daily with consumers and brokers, the OACIQ is able to identify practices that are liable to cause problems and to propose corrective measures. This can take the form, for example, of improving existing forms, introducing new forms, or developing training activities.

Regarding the OACIQ's training role, it would be very unusual for the regulatory body responsible for public protection not to be able to offer training to those governed by the regulations that it is responsible for enforcing. Far from claiming to be the only organization that can offer training (the majority of training activities offered under the mandatory continuing education program developed by the OACIQ are in fact supplied by third-party providers), it remains that the OACIQ is sometimes best positioned to develop and provide certain types of trainings, especially on topics that are directly related to the REBA or the regulations thereunder, on forms, on best practices or, more generally, on what we have called "core content training" (see point 1.3.2.2). In fact many brokers regularly express an interest in getting training on topics such as rules of practice or conduct, or on forms directly from the organization that has created them and knows them best, i.e. the OACIQ.

The same is true when it comes to ensuring that all brokers, including those who do not place as much importance on the training offer, have access to quality training on topics that are relevant to their practice (for example for brokers who practice outside major urban centers, English-speaking brokers, or commercial or mortgage brokers, or even residential brokers who do not belong to a real estate board). In short, the diversity of trainings and providers helps reach out to all those who need it and to ensure a rich and diversified training offer, and the OACIQ in many ways is especially well positioned to contribute to this, being responsible for the enforcement of the regulations and the instigator of several of the practices it oversees.

## RECOMMENDATIONS

- **MAINTAIN THE OACIQ'S CURRENT FUNCTIONS AND POWERS;**
- **NOT LIMIT THE OACIQ'S ABILITY TO PROVIDE SERVICES TO BROKERS THAT CONTRIBUTE TO ITS PUBLIC PROTECTION MISSION, SUCH AS PUBLISHING FORMS AND OFFERING CONTINUING EDUCATION ACTIVITIES.**

### 3.5 Redefining the Organization's mission

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The OACIQ's mission is well established: to protect the public. The mechanisms contained in the REBA to enable the Organization to fulfill this mission have proven effective and must be maintained (licence issue, public assistance, disciplinary management of brokers, broker inspections, oversight of basic training and continuing education, ability to provide continuing education activities, form development and publication).

In addition, in order to properly discharge its mission, the OACIQ cannot limit itself to a policing role, and it must demonstrate to brokers that the oversight provided in the Act is not only beneficial for the public, but also for real estate and mortgage brokerage professionals. In fact this is how one of the benefits of self-regulation (the buy-in by people governed by the regulations) can be achieved.

To better reflect the scope of the OACIQ's mission and the vision which the Organization would like to pursue, it is suggested that the OACIQ's mission be rephrased.

## RECOMMENDATIONS:

- **REPHRASE THE OACIQ'S MISSION STATEMENT UNDER SECTION 32 OF THE REBA:**  
*"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."*

### 3.6 Making sure the Organization is empowered to fulfill its mission

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Although the OACIQ feels that it has successfully discharged its public protection mission with the tools provided under the REBA and those adopted over time, the Organization would like to have more tools at his disposal and for certain changes to be made to the Act to further empower it to fulfill its mission.

### 3.6.1 Disciplinary sanctions: gains made and investigation costs

Under the REBA, a broker who is found guilty of or pleads guilty to an offence before the OACIQ Discipline Committee can be fined between \$1,000 and \$12,500 per count and double these amounts for subsequent offences.<sup>125</sup>

The OACIQ notes that the fines imposed don't always have the desired deterrent effect and seem insufficient in the eyes of the public, especially when the fine represents only a fraction of the remuneration earned from the transaction that is the subject of a disciplinary complaint. To correct this situation, the REBA could provide expressly, similarly to what exists for a criminal conviction for illegal brokerage<sup>126</sup> or what is provided in the *Criminal Code* regarding the factors to take into account in setting sentencing factors,<sup>127</sup> that the Discipline Committee take into account "the injury suffered as a result of and the benefits derived from the offence."

The REBA also states that if the Discipline Committee orders the publication in the newspapers of a notice regarding the suspension or revocation of a broker's licence or the imposition of restrictions or conditions on the licence, the Committee may decide to make the publication cost of the notice payable by the broker.<sup>128</sup> In addition, the regulations stipulate that a broker can be ordered to pay the costs related to the processing of the complaint, which are restrictively defined.<sup>129</sup>

Now publication and processing costs are not the only costs involved in the disciplinary process. Investigations also entail sizeable costs, and consideration should be given to the idea that these costs should, in whole or in part, be borne by the broker who is found guilty of or pleads guilty to an offence. Such costs could be set out in a tariff.

## RECOMMENDATIONS

- **PROVIDE FOR THE DISCIPLINE COMMITTEE TO TAKE THE INJURY SUFFERED AND THE BENEFITS DERIVED FROM THE OFFENCE INTO ACCOUNT IN THE DETERMINATION OF A FINE;**
- **ALLOW THE DISCIPLINE COMMITTEE TO CHARGE, IN WHOLE OR IN PART, IN ACCORDANCE WITH A SET TARIFF, THE COST OF INVESTIGATING A BROKER FOUND GUILTY OF AN OFFENCE.**

125 S. 98(3) of the *Real Estate Brokerage Act*.

126 S. 125 of the *Real Estate Brokerage Act*.

127 S. 728.21 a) of the *Criminal Code*, R.S.C. (1985), c. C-46; an example of the application of this principle was recently provided in the case of *R. c. Pétroles Global inc.*, 2015 QCCS 1618, in which a company found guilty of fixing the price of gas was ordered to pay a \$1,000,000 fine, taking into consideration the profit derived from the operation.

128 S. 98.1 of the *Real Estate Brokerage Act*.

129 S. 55 of the *Regulation respecting disciplinary proceedings of the OACIQ*, CQLR c. G-73.2, r.6.



### 3.6.2 Alternative measures to the disciplinary complaint

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The absence of disciplinary alternatives to the handling of certain cases results in a heavier volume of cases requiring processing and in longer processing times, including by the Syndic and the OACIQ Discipline Committee. In order to prevent cases that do not involve major ethical breaches or in which common ground can be found from resulting in a disciplinary complaint for lack of other means of intervention, alternative solutions could be provided in the REBA. These would be an addition or supplement to those already in place and would allow for more flexible and efficient handling of certain minor breaches or of cases where an agreement can be reached with the broker at fault on the appropriate corrective measure, without using the disciplinary process.

Such measures would have the benefit of accelerating the processing of cases, reducing costs, avoid overloading the Discipline Committee and exposing potential witnesses (often the victims) to the unpleasantness of the disciplinary process (travel, lost time, anxiety generated by the obligation to testify, etc.).

#### 3.6.2.1 Voluntary commitments

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The Syndic and other OACIQ authorities already use voluntary commitments on the part of offenders to attend a course or complete any other type of training to remedy certain deficiencies. Failure to comply with such a commitment can result, in accordance with the regulations, in a licence suspension for the broker at fault.<sup>130</sup>

This type of measure would benefit from being supplemented with the ability for the Syndic and the Inspection Committee to enter into an agreement with a broker to have his right to practice made subject to restrictions or conditions, to have his licence suspended, or to pay a voluntary “fine”. Regarding the last option, a regulatory power could allow the setting of scales to determine the amount of the “fine”, based, for example, on the benefit gained by the broker in the transaction being investigated and on the costs of such investigation.

In fact, the ability to enter into an agreement with a broker regarding the imposition of restrictions or conditions on his right to practice or the suspension of his licence is consistent with one of the recommendations made by the Conseil interprofessionnel du Québec, in January 2014, as part of the possible reform of the *Professional Code* regarding the type of agreement that the syndic of a professional order could make with a member.<sup>131</sup>

The Syndic already uses warning letters, although this measure is not included in the REBA. It would be a good idea to include this to avoid any ambiguity regarding the ability to issue such letters.

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<sup>130</sup> S. 15 of the *Regulation respecting the issue of broker's and agency licences*.

<sup>131</sup> *Recommandations en vue d'une réforme globale du Code des professions*, Conseil Interprofessionnel du Québec, January 2014, pp. 30 and 31.

## RECOMMENDATIONS

- **RECOGNIZE THE ABILITY FOR THE SYNDIC TO ISSUE WARNING LETTERS;**
- **ALLOW THE SYNDIC AND THE INSPECTION COMMITTEE (OR THE OACIQ) TO ENTER INTO AN AGREEMENT WITH A BROKER TO IMPOSE RESTRICTIONS OR CONDITIONS ON HIS RIGHT TO PRACTICE, SUSPEND HIS LICENCE OR HAVE HIM PAY A VOLUNTARY “FINE”.**

### 3.6.2.2 Administrative monetary penalties

Another measure is worth discussing as it offers an effective alternative to penalize offences that are technical in nature: administrative monetary penalties (AMP). The OACIQ believes that AMPs are effective tools to sanction minor or technical violations which, because they are less serious, do not justify a suspension or revocation of a broker's licence or the filing of a disciplinary complaint, but do require a sufficient incentive for the offender to correct the situation, which is not always accomplished by a simple warning of the requirement to attend a training activity.

The use of such penalties is not unusual. For example, this ability is included in the laws administered by the Autorité des marchés financiers.<sup>132</sup> Also, some Canadian provinces provide the ability for the appropriate regulatory body to impose AMPs in the fields of real estate<sup>133</sup> or mortgage<sup>134</sup> brokerage. This type of penalty can also be found in federal legislation, notably in the fight against money laundering and terrorist financing activities.<sup>135</sup>

## RECOMMENDATION

- **ALLOW THE USE OF ADMINISTRATIVE MONETARY PENALTIES (AMP).**

<sup>132</sup> S. 205.1 of the *Insurance Act*, CQLR c. A-32; ss. 115, 115.2, 146.2 and 419 of the *Act respecting the Distribution of Financial Products and Services*; ss. 273.1, 274.1, 271.13, 271.14, 331(11) of the *Securities Act*.

<sup>133</sup> Examples: s. 83 of the *Real Estate Act*, RSA 2000, c. R-5 (Alberta); s. 56 and 57 of the *Real Estate Services Act* (British Columbia); in addition, the Ministry of Government and Consumer Services of Ontario tabled, on October 4, 2013, a proposal to allow various regulatory authorities, including in the field of real estate brokerage, to impose administrative monetary (see: <http://www.reco.on.ca/tc-334/sc-440.html>).

<sup>134</sup> Example: ss. 38 and 39 of the *Mortgage Brokerages, Lenders and Administrators Act*, 2006, SO 2006, c. 29 (Ontario); s. 83.1 of the *Real Estate Act*, RSA 2000, c. R-5. (Alberta); s. 76(1) of the *Mortgage Brokers Act*, SNB 2014, c. 41, (New Brunswick – coming into force in 2015); ss. 72, 73 and 74 of the *Mortgage Regulation Act*, SNS 2012, c. 11, (Nova Scotia – not yet in force); s. 75 of the *Mortgage Brokerages and Mortgage Administrators Act*, SS 2007, c. M-20.1 (Saskatchewan).

<sup>135</sup> Ss. 73.1, 73.11 and 73.13 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c. 17.

### 3.6.3 Additional powers to better fight against the illegal practice of the broker activity

The absence of specific powers, other than the power to conduct a search,<sup>136</sup> in order to obtain information held by third parties (e.g. telephone or internet service providers) sometimes makes investigating illegal brokerage cases difficult and even impossible. Using a search is a heavy mechanism which in most cases feels excessive. More flexible and effective ways to obtain information could be considered. For example, the powers of commissioners under the *Act respecting Public Inquiry Commissions*, CQLR c. C-37, which the Syndic and Assistant Syndics already have,<sup>137</sup> could be extended to investigators. Such powers in fact exist for persons conducting investigations for the Régie du bâtiment,<sup>138</sup> the Corporation des maîtres électriciens du Québec,<sup>139</sup> the Corporation des maîtres mécaniciens en tuyauterie du Québec<sup>140</sup> and the Autorité des marchés financiers.<sup>141</sup> A power to compel someone to provide certain documents or information also exists in Québec and Canadian federal legislation<sup>142</sup> and could serve as a model to include in the REBA.

There is also a question regarding the adequacy of current REBA provisions regarding penal offences under certain circumstances. There is no provision for penalties against an individual who facilitates illegal brokerage, as opposed to taking part directly. Yet, this type of offence is found in several industries, including with professionals,<sup>143</sup> as well as in the fields of financial services<sup>144</sup> and securities,<sup>145</sup> and in construction companies,<sup>146</sup> and could be included in the REBA.

## RECOMMENDATIONS

- **MAKE IT EASIER TO OBTAIN INFORMATION FROM THIRD PARTIES IN THE COURSE OF A PENAL INVESTIGATION BY GRANTING COMMISSIONER POWERS OR OTHER TYPES OF INVESTIGATIVE POWERS, SUCH AS THE "FORMAL DEMAND";**
- **INCLUDE AN OFFENCE FOR ENCOURAGING ILLEGAL BROKERAGE.**

136 S. 36 of the *Real Estate Brokerage Act*.

137 S. 89 of the *Real Estate Brokerage Act*.

138 S. 129 of the *Building Act*.

139 S. 11 of the *Master Electricians Act*, CQLR c. M-3.

140 S. 9.1 of the *Master Pipe-mechanics Act*, CQLR c. M-4.

141 S. 14 of the *Act respecting the Autorité des marchés financiers*, CQLR c. A-33.2, s. 240 of the *Securities Act*.

142 See for example: ss. 239 and 242 of the *Securities Act*, s. 79 of the *Mining Tax Act*, CQLR c. I-0.4, s. 39 of the *Tax Administration Act*, RSQ c. A-6.002, s. 35 of the *Unclaimed Property Act*, CQLR c. B-5.1, s. 231.2 of the *Income Tax Act*, RSC (1985), c. 1 (5<sup>th</sup> supp.), s. 289 of the *Excise Tax Act*, RSC (1985), c. E-15.

143 S. 188.1 of the *Professional Code*.

144 S. 491 of the *Act respecting the Distribution of Financial Products and Services*.

145 S. 208 of the *Securities Act*.

146 Ss. 200 and 201 of the *Building Act*.

### 3.6.4 New power to restrict, suspend, revoke or refuse to issue a licence for reasons of health or integrity

There are extremely serious situations which occur and for which the disciplinary process is ill-suited or does not allow for rapid and effective intervention to adequately protect the public. This is notably the case where a person, for reasons of physical or mental health, is no longer able to carry on the activity of broker. It is also the case where the integrity of a broker or a person wishing to enter the profession is called into question (e.g. an applicant who was fired from a financial institution following an internal investigation that uncovered the existence of fraud or who is subject to criminal charges for fraud without a guilty verdict having yet been pronounced).

The OACIQ feels that it should be able to intervene in each of these cases, in advance and proactively, to ensure public protection without having to wait for a fault to be committed, an injury suffered by the public or a disciplinary process to be triggered before being able to impose penalties.

Mechanisms aimed at restricting the right to practice in case of physical or mental incapacity do exist for professionals governed by the *Professional Code*<sup>147</sup> and, regarding integrity, in the financial services industry.<sup>148</sup> These could serve as a model.

## RECOMMENDATIONS

- **PROVIDE THE ABILITY TO:**
- **RESTRICT THE RIGHT TO PRACTICE FOR MEDICAL REASONS;**
- **RESTRICT, SUSPEND, REVOKE OR REFUSE TO ISSUE A LICENCE IF THE PERSON CONCERNED DOES NOT HAVE THE NECESSARY INTEGRITY TO CARRY ON THE ACTIVITY OF BROKER.**

<sup>147</sup> See s. 48 and fol. of the *Professional Code* on the ability to require a medical examination to ensure a professional's physical or mental capacity to carry out a profession. It should be noted here that the mechanism provided in the *Professional Code* was the subject of recommendations from the Conseil interprofessionnel du Québec to improve its effectiveness (pp. 28 to 30 of *Recommandations en vue d'une réforme globale du Code des professions*, supra note 131).

<sup>148</sup> S. 220 of the *Act respecting the Distribution of Financial Products and Services*.

### 3.6.5 Recognition of the ombudsman function

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As noted above, in order to ensure optimum and coherent management of requests from the public regarding how it processes files, the OACIQ has implemented an ombudsman function. This function, which can contribute to public protection and enhance public trust in the Organization, would benefit from being enshrined in the REBA.

## RECOMMENDATIONS

- **RECOGNIZE THE OMBUDSMAN FUNCTION IN THE REBA;**
- **DEFINE THE ROLE, POWERS AND DUTIES OF THE OMBUDSMAN;**
- **PROVIDE FOR THE OMBUDSMAN TO REPORT TO THE OACIQ BOARD OF DIRECTORS.**

# PART II: IMPORTANT TOPICS NOT ADDRESSED IN THE MINISTER'S REPORT

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The Minister's report focuses only on two elements: the scope of the notion of real estate brokerage, seen from the sole angle of the representation of a residential seller, and the governance of the oversight body. In order to ensure better public protection and in the event of a revision of the Real Estate Brokerage Act, several other topics warrant comments and recommendations.

## 1. Oversight of building inspectors and co-ownership property managers

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When it comes to real estate and mortgage transactions, public protection can only be properly ensured if all parties involved in the transaction are subject to adequate oversight, with features and benefits similar to those described above, i.e. 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.

Yet, some of the activities that are essential and closely related to the proper completion of real estate or mortgage transactions are not regulated in any way. This causes problems both for the parties to the transaction and for the brokers whose services they have retained. There are two such areas that have been the subjects of extensive discussions in recent years: building inspections and co-ownership property management, whether it is about the various investigations and studies on building inspections<sup>149</sup> or all the work done leading up to the current efforts to revise the rules of the Civil Code of Québec regarding co-ownership.<sup>150</sup>

For reasons which are explained below, the OACIQ feels that it is imperative and urgent to examine the issue of oversight regarding these activities.

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149 For examples, see the report submitted to Industry Canada's Office of Consumer Affairs by the Association des consommateurs pour la qualité dans la construction (ACQC): *L'inspection préachat dans le domaine immobilier – Pour une meilleure protection des acheteurs et des vendeurs*, June 27, 2012; see also the following articles: *Inspection préachat: toujours le Far West*, by Stephan Dussault, posted on the *protegezvous.ca* website in January 2010, and *Inspecteurs en bâtiment: un métier sans encadrement au dépens de l'acheteur*, based on a story by Nancy Desjardins, posted on the *radio-canada.ca* website on November 10, 2013.

150 See *Rapport du groupe de travail sur la copropriété*, submitted to the Québec Justice Minister in March 2011; see also *Rapport du comité consultatif sur la copropriété*, submitted to the Québec Justice Minister and to the board of directors of the *Chambre des notaires du Québec* in November 2012 (amended in January 2013).

## 1.1 Building inspections

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The Minister's Report mentions the involvement of several professionals in a real estate transaction, including the building inspector. Yet, building inspections is completely unregulated in Québec. In other words, anyone may call themselves a building inspector, and an inspection takes place in the majority of real estate transactions, at least those handled by a broker.<sup>151</sup> This situation is of great concern, given the importance of having an inspection performed by a qualified person who follows practice standards that enable them to provide an accurate assessment to the parties regarding the condition of a property. Without oversight, there is a risk that a buyer could end up with a property that contains major defects which the inspector has failed to identify. Also important is the fact that the inspector's conclusions have a determining impact on the buyer's decision to go ahead with his purchase and on the seller's ability to obtain the desired price.

It is true that many inspectors belong to voluntary associations and follow standards of practice. It is also true that, in collaboration with certain building inspector associations, the OACIQ (or ACAIQ) has developed and made available, as early as 2003, tools such as standards of practice and a service agreement for the inspection of residential buildings, as well as a form allowing the seller to properly declare what he knows about his property; these tools have helped improve and standardize practices in this field. Still, the disparity of practices, the absence of standards and qualifications that apply consistently to anyone carrying out building inspections, the absence of a body responsible for ensuring inspector competence and for receiving complaints from consumers represent as many risks for the public.

The problem relating to the absence of adequate oversight of building inspections was recently raised by one of the authors of the book *La responsabilité de l'inspecteur préachat*,<sup>152</sup> at a symposium on real estate consumers. The author concluded her presentation with the following opinion:

*"[Tr.] ...It appears from the general principles applicable to pre-purchase inspections from the perspective of consumer rights, that this institution is the forgotten one in the real estate industry. While consumer protection mechanisms do exist, they are general and somewhat random in nature and do not correspond to the reality that consumers are looking for... [...] A reform is therefore needed in this area so that the very nature of this service can be better defined and regulated to ensure consumer protection... [...] It would therefore seem desirable to shed new light on the obligations of pre-purchase inspectors so that consumers may be better informed and protected when retaining the services of an inspector..."*<sup>153</sup>

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151 A note that in an effort to provide some control over building inspections, since 2010 real estate brokerage regulations require that the broker recommend to any buyer to have an inspection performed by a person who meets certain conditions; to this effect, the OACIQ has recognized, via agreements with certain associations of inspectors, that their members did meet these conditions; since 2012, promise to purchase forms which brokers must use for the sale of residential immovables include a building inspection clause.

152 Published in 2012 by Éditions Yvon Blais.

153 Isabelle VIENS, "L'inspection préachat" in *Le consommateur immobilier en quête de protection*, supra note 93, p. 245-246.

For years now, the OACIQ (formerly the ACAIQ) and many stakeholders have been asking for oversight of building inspections.<sup>154</sup> Such oversight would guarantee to the public that they are dealing with an inspector who has received adequate basic training, whose skills have been verified and are kept current, who has adequate insurance coverage and is governed by a regulatory body to which the public can turn in case of problem. This would result, among other things, in a standardization of practices, for example by the adoption of practice standards common to all and a standardization of the rules concerning the content of service agreements and inspection reports. This would inevitably result in improving the quality of the services received by the public and the security of transactions, and in reducing the risk of dispute and the resulting case load before the courts.

It should be noted that a majority of American states<sup>155</sup> and two Canadian provinces<sup>156</sup> regulate building inspections.

## RECOMMENDATION

- **PROVIDE FOR THE OVERSIGHT OF BUILDING INSPECTIONS BY AN APPROPRIATE AUTHORITY.**

### 1.2 Co-ownership property management

Another area that would greatly benefit from appropriate oversight, for reasons similar to those mentioned regarding building inspections, is co-ownership property management. This would help ensure that those who offer services in that field are adequately trained, are subject to basic requirements in co-ownership management, including concerning the adequacy of contingency funds, building maintenance and the availability of information for co-owners and prospective buyers, that they are covered by professional civil liability insurance and, lastly, that a regulatory body exists to enforce standards of practice and to which the public can submit grievances.

Without casting doubt on the good faith and willingness of co-ownership managers, a role often fulfilled by volunteer co-owners, we are forced to recognize that the management of immovables held in divided co-ownership in Quebec is inadequate.<sup>157</sup> The situation has become especially worrisome as more and more co-ownership syndicates entrust their management to “professional” managers.<sup>158</sup> Yet, as in the case of building inspections, there is no oversight of these managers, except for certain provisions of the Civil Code, and no body exists to enforce standards of competence and integrity in that field.<sup>159</sup>

154 See among other the report by the ACQC *L'Inspection préachat dans le domaine immobilier – Pour une meilleure protection des acheteurs et des vendeurs*, supra note 149.

155 See Appendix 9 for a list of American States that oversee building inspections.

156 Alberta and British Columbia; in addition, a report commissioned by the Ontario government and tabled in December 2013 recommended that building inspections be regulated in Ontario (*A Closer Look: Qualifying Ontario's Home Inspectors - Home Inspector Panel Report and Recommendations to the Minister of Consumer Services*).

157 To this effect see comments in the *Rapport du groupe de travail sur la copropriété*, supra note 150, p. 56.

158 *Id.*

159 *Id.*, p. 57.



Without claiming that this is the only culprit, this situation is contributing to major shortcomings that have been noted in the area of co-ownership, which take the form of insufficient contingency funds, inadequate maintenance of immovables held in co-ownership,<sup>160</sup> and deficiencies in the keeping and availability of up-to-date information on the physical and financial health of these properties. Each of these elements can have a direct impact on the value of a unit put on the market, on a buyer's decision to buy a property, or on the price he will offer. In the context of a real estate transaction, it is easy to see the difficulty of purchasing a property where maintenance is potentially lacking and where the funds set aside to remedy the situation are potentially insufficient, while the information that would shed light on the situation is unavailable.

Both the *Rapport du groupe de travail sur la copropriété* and the *Rapport du comité consultatif sur la copropriété*<sup>161</sup> recommend that professional co-ownership managers, excluding the members of the board of directors and volunteer managers, be required to belong to a professional order. The OACIQ would be prepared to oversee this activity.

In fact the oversight of co-ownership property managers is on the agenda in Ontario<sup>162</sup> and is already in place in British Columbia as well as in seven American states, and it will soon be in Alberta and Colorado.<sup>163</sup>

## RECOMMENDATION

- **PROVIDE FOR THE OVERSIGHT OF THE ACTIVITIES OF CO-OWNERSHIP PROPERTY MANAGERS BY A COMPETENT AUTHORITY.**

## 2. Continuation and autonomy of the Organization

The OACIQ must have the financial resources it needs to be able to fully discharge its mission.

<sup>160</sup> This inadequate maintenance, due to negligent managers, is in fact identified as one of the main causes of substantial increases in insurance premiums and deductibles in co-ownership insurance, and the difficulty experienced by certain syndicates of co-owners to insure their property; see comments by M<sup>e</sup> Yves Joli-Cœur, general secretary of the Regroupement des gestionnaires et copropriétaires du Québec (RGQC), in an interview with journalist Alexandra Perron ("Un sondage pour mieux comprendre") published in *Le Soleil* on January 31, 2015, p. M14; see also the comments made at the unveiling, on February 5, 2015, of a study commissioned by the RGQC on the problems related to insuring co-ownership properties, as reported by journalist André Dubuc: "S'assurer coûte une fortune", *La Presse Affaires*, February 6, 2015, p. 4); a deficient management culture, inadequate regulatory supervision, insufficient contingency funds and inadequate maintenance of properties were also the reasons recently invoked by the Aviva Canada insurance company for their withdrawal from the co-ownership insurance market (see "Aviva tire un trait sur la copropriété", an article published on the *condolegal.com* website on February 24, 2015 and "Aviva Canada se retire du segment commercial des condos au Québec", published on the *journal-assurance.ca* website on February 24, 2014).

<sup>161</sup> *Supra* note 150.

<sup>162</sup> Bill 106, *Protecting Condominium Owners Act, 2015* ([http://www.ontla.on.ca/bills/bills-files/41\\_Parliament/Session1/b106.pdf](http://www.ontla.on.ca/bills/bills-files/41_Parliament/Session1/b106.pdf)), still under review by the Ontario Legislature as of September 17, 2015.

<sup>163</sup> In these two provinces as well as in five American states, the oversight of co-ownership property managers comes under the real estate brokerage regulatory authority; see Appendix 10 for a list of Canadian and American jurisdictions that oversee co-ownership property management.

The REBA currently states that the OACIQ's activities "are financed out of the licence fees paid by licence holders and the other amounts payable to the Organization under the [REBA]."<sup>164</sup>

Actually, the only "other amounts payable" to the OACIQ under the REBA are the contribution to the Indemnity Fund<sup>165</sup> and the premium paid to the FARCIQ,<sup>166</sup> as well as the interest generated by brokers' trust accounts, which are paid into the financing fund<sup>167</sup> (Note: historically this interest has been practically non-existent). All these "other amounts" are therefore assigned to specific purposes and cannot be used to finance other activities.

To ensure the continuation of the OACIQ and make sure the Organization has sufficient and adapted resources to discharge its public protection mission, the REBA must not limit the OACIQ's capacity to diversify its funding sources.

In addition, along the same idea, the OACIQ must be able to enjoy a certain level of autonomy as well as more flexibility in establishing payable fees and contributions to the Real Estate Indemnity Fund. Both should be fixed by resolution of the board of directors, as is the case for the FARCIQ premium. On this front, the OACIQ, in collaboration with the Fund's board of directors, has demonstrated serious and responsible management that enabled it to maintain optimum capitalization for the FARCIQ,<sup>168</sup> to reduce the premiums payable by brokers,<sup>169</sup> and to adapt premiums based on the particular risks associated with real estate brokerage on the one hand, and with mortgage brokerage on the other hand, while increasing the coverage provided.

The setting of payable fees and of the contribution to the Indemnity Fund by regulation deprives the OACIQ of the flexibility it would need to make the necessary adjustments in order to adequately discharge its mission while preventing brokers and agencies from overpaying.

## RECOMMENDATIONS

- **ENSURE THAT THE REBA DOES NOT UNDULY RESTRICT THE ABILITY TO IMPROVE VARIOUS ADMINISTRATIVE FEES (USER PAYER PRINCIPLE) OR TO DIVERSIFY THE OACIQ'S FUNDING SOURCES;**
- **ALLOW FOR THE AMOUNT OF PAYABLE FEES AND THE CONTRIBUTION TO THE REAL ESTATE INDEMNITY FUND TO BE SET BY RESOLUTION (ON THE BASIS OF ACTUARIAL STUDIES IN THE CASE OF THE FUND CONTRIBUTION) RATHER THAN BY REGULATION.**

<sup>164</sup> S. 62 of the *Real Estate Brokerage Act*.

<sup>165</sup> Ss. 46(17) and 109 of the *Real Estate Brokerage Act*.

<sup>166</sup> Ss. 8, 17 and 52 of the *Real Estate Brokerage Act*.

<sup>167</sup> Ss. 10 and 47 of the *Real Estate Brokerage Act*.

<sup>168</sup> As of December 2014, the accumulated surplus in the FARCIQ totalled \$37 million.

<sup>169</sup> The premium was reduced four times since the inception of FARCIQ in 2006, i.e. from \$550 to \$345 for real estate brokerage, and to \$245 for mortgage brokers.

### 3. Clarify the situation regarding the activities covered by both the *Real Estate Brokerage Act (REBA)* and the *Securities Act (SA)*

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Considering the very broad field of application of the SA, several activities are likely to be regulated by this Act and by the REBA. For example:

- brokerage transactions concerning the purchase or sale of a unit in a “co-ownership by shares” structure, which in practice results in the sale or purchase of shares in a private company whose only assets is an immovable with the granting of the right to reside in one of the property’s apartments (supported by the existence of a lease between the company and the buyer); the day-to-day life of occupants of such “co-ownership by shares” properties then being similar to those of co-owners of an immovable held in divided co-ownership;
- brokerage transactions concerning the sale of a unit in an immovable held in co-ownership presented as an investment rather than a residence (a manager generally occupying the unit during the periods where it is not occupied by the buyer, i.e. most of the time), therefore liable to constitute an “investment contract” within the meaning of the SA (e.g. “condotel”);
- solicitation, by a broker, of clients or private mortgage lenders (who would be considered as investors within the meaning of the SA);
- brokerage transactions concerning the sale of an immovable or an enterprise, considered as such but which, for tax or financial reasons, takes the form of a sale of shares.

These are activities that come under a real estate or mortgage broker’s field of expertise and for which clients want to use the services of a broker. What people are looking to purchase or sell is a real estate or mortgage product, not securities, even within the broad meaning provided under the SA.

The idea here is not to question the fact that a person registered under the SA with the Autorité des marchés financiers (AMF) in the appropriate registration category, may engage, at least in part, in one of the transactions mentioned above. However, these transactions are more directly related to the expertise of a real estate or mortgage broker, as the case may be, and do not require the protections available in the field of securities. The framework established by the REBA and the protective measures that can be adopted<sup>170</sup> thereunder already adequately ensure public protection when consumers use the services of brokers governed by the REBA. The protections specific to the SA, in case of a public offering for example, are generally not at stake or, if so, only marginally.

<sup>170</sup> The OACIQ is open to considering the strengthening of the obligations to inform towards, for example, private lenders, “investor” buyers, or buyers of “co-ownership by shares structure”, if it is deemed relevant to do so.

In short, there is a risk of double regulation or of lawsuits by the AMF against real estate or mortgage brokers who engage in such activities, which does not serve public protection or promote regulatory relief.

This topic has been the subject of several exchanges, both formal and informal, for at least 15 years between the OACIQ (and the ACAIQ before 2010) and the AMF, without the two organizations being able to come to mutually satisfactory solutions. At this stage, only a legislative amendment to remove real estate and mortgage brokers from the scope of the SA seems to be the solution to the issue. On this front, the Québec legislator could draw inspiration from the solution adopted by Manitoba on real estate brokerage<sup>171</sup>, or by Ontario on mortgage brokerage, for example.<sup>172</sup>

## RECOMMENDATIONS

- **LIKE THE ACTIVITIES GOVERNED BY THE *DERIVATIVES ACT*, MAKE IT SO THE SA DOES NOT APPLY TO THE ACTIVITIES REFERRED TO IN THE REBA;**
- **ALTERNATIVELY, PROVIDE IN THE SA THAT REAL ESTATE AND MORTGAGE BROKERS ARE NOT SUBJECT TO IT WHEN ENGAGING IN AN ACTIVITY GOVERNED BY THE REBA.**

## 4. Re-examine certain exceptions or limitations to the application of the REBA

### 4.1 General exception for transactions covered by the SA or the Derivatives Act

The second paragraph of section 1 of the REBA provides for a general application exception that can pose a problem:

*“However, this Act does not apply to a transaction involving a derivative within the meaning of the Derivatives Act or to a transaction of securities within the meaning of the Securities Act.”*

<sup>171</sup> See s. 41 of the *Real Estate Brokers Act*, CCSM, c. R-20 and s. 21 of the *Securities Act*, C.P.L.M., c. S-50.

<sup>172</sup> See s. 12 of *Ontario Regulation 407/07 – Exemptions from the Requirements to be Licensed* (adopted under the *Mortgage Brokerages, Lenders and Administrators Act*) and s. 35(4) of the *Securities Act*, RSO 1990, c. S-5.

Therefore, for example, for each of the situations mentioned in point 3 above, a person could claim not to be subject to the REBA because the transaction concerns securities, even if this person is not registered with the AMF as a dealer or adviser within the meaning of the SA.

In addition, clarifying the REBA's scope of application by defining the activities referred to in the Act could make it so the general application exclusion mentioned above would lose some of its relevance and could become superfluous.

## RECOMMENDATIONS

- **ASSUMING THE ACTIVITIES THAT COME UNDER THE REBA ARE DEFINED, REMOVE THE EXCLUSION CONCERNING BROKERAGE TRANSACTIONS INVOLVING A DERIVATIVE OR A SECURITY;**
- **OTHERWISE, BETTER DEFINE THE APPLICATION EXCEPTION CONCERNING TRANSACTIONS INVOLVING SECURITIES AND DERIVATIVES IN ORDER TO EXCLUDE FROM THE APPLICATION OF THE REBA PERSONS OR COMPANIES REGISTERED WITH THE AMF THAT ENGAGE IN A BROKERAGE TRANSACTION INVOLVING SUCH A DERIVATIVE OR SECURITY.**

### 4.2 Exceptions or limitations to the application of the REBA requiring clarification or reorganization

Apart from the application exception mentioned above, the REBA includes, taking into account the limitations outlined in its section 1, more than 20 exceptions or limitations to its application in favour of various individuals. Some of these exclusions cause application issues or have a scope that should be more clearly defined in order to achieve the goal without opening the door to the broker activity by individuals or businesses that engage in activities which, from a public protection perspective, should not be excluded.

The following exceptions or limitations to the application of the REBA cause difficulties or have a scope that would benefit from being more clearly defined:

- S. 1(2°): This provision limits the application of the REBA regarding brokerage transactions relating to the leasing of immovable property to a person or partnership that “carries on” a brokerage enterprise. This is a limitation to the scope. It means that in order to establish that such a brokerage transaction is governed by the REBA, not only does one have to establish that the brokerage transaction exists, but also that a leasing brokerage enterprise is carried on. On the penal side, this increases the OACIQ’s burden, which makes it difficult to prove beyond any reasonable doubt that the activity of broker is being illegally practiced in the leasing business.

## RECOMMENDATIONS

- **NOT LIMIT THE SCOPE OF REBA WHEN IT COMES TO LEASING BROKERAGE;**
- **PROVIDE AN APPLICATION EXCEPTION IN FAVOUR OF PERSONS OR ENTERPRISES WHO ENGAGE IN THIS TYPE OF TRANSACTION ONLY OCCASIONALLY.**

- S. 1(5°): This provision limits the application of the REBA regarding brokerage transactions relating to the sale of an enterprise by requiring that the property of the enterprise being sold consists, according to its market value, mainly of immovable property.

In penal matters, again the OACIQ's burden is increased as it must provide proof of the value of the enterprise's property which, in cases where it is not obvious that this value consists mainly of immovable property, can entail sizeable costs for the OACIQ (e.g. cost of the expert report to establish the value of the enterprise's various assets) and opens the door to an expert debate before the court.

Concerning the oversight of broker and agency activities, this limitation to the scope of the REBA poses difficulties for the OACIQ and uncertainty for brokers and agencies when it is necessary to determine, for a given brokerage act, whether or not it falls within the scope of the REBA and whether the various obligations of brokers and agencies under the regulations apply.

## RECOMMENDATIONS

- **NOT LIMIT THE SCOPE OF THE REBA WHEN IT COMES TO ENTERPRISE BROKERAGE;**
- **PROVIDE AN APPLICATION EXCEPTION IN FAVOUR OF PERSONS OR ENTERPRISES WHO ENGAGE IN THIS TYPE OF TRANSACTION ONLY FOR AN ENTERPRISE THAT DOES NOT INCLUDE PROPERTY ASSETS OR RIGHTS.**

- S. 3(1°): This provision provides an application exception in favour of financial institutions, their employees and "exclusive representatives when acting on behalf of their financial institution, in the context of a brokerage transaction relating to a loan secured by immovable hypothec."

The OACIQ is concerned by the fact that financial institutions, along with their employees and exclusive representatives, can act as actual mortgage brokers with a borrowers whose applications are refused by the institution by directing them to an alternative lender. This client referral is done by employees or even representatives who are not employees, and a limited choice of alternatives – sometimes even just one – is then offered to the borrower. This concern is not unique to Québec. For example in 2013 the

Real Estate Council of Alberta tabled a report recommending that financial institutions be made subject to that province's (Real Estate Act, RSA 2000, c. R-5) when they transact for their clients to get a loan from another institution.<sup>173</sup>

It is suggested that the legislator be able to intervene to promote a wider variety of options for a mortgage borrower whose loan application is refused by the financial institution approached.

## RECOMMENDATIONS

- **LIMIT THE APPLICATION EXCEPTION IN FAVOUR OF FINANCIAL INSTITUTIONS TO LOANS ISSUED BY THE INSTITUTION;**
- **OTHERWISE, EXAMINE THE BEST WAYS TO PROMOTE A WIDER VARIETY OF OPTIONS FOR THE MORTGAGE BORROWER WHERE THE INSTITUTION REFUSES TO GRANT THE LOAN BUT REFERS HIM TO AN ALTERNATIVE LENDER.**

- S. 3(2°): This exception allows any professional or any person registered with the Autorité des marchés financiers to refer a client to a mortgage lender as long as this is done "as an ancillary activity". This last notion is difficult to circumscribe and opens the door to a distinction, whose outcome is uncertain, with the notion provided in section 2 of the REBA regarding certain professionals "in the course of their functions". In addition, the questions as to whether the practice of each of the 45 professions listed in the *Professional Code* actually lends itself to the referral of clients to a mortgage lender could lead to difficulties of interpretation. It would have been preferable to limit the exception to certain professionals whose functions actually lend themselves to this practice.

## RECOMMENDATIONS

- **LIMIT THE EXCEPTION, IN ADDITION TO PERSONS REGISTERED WITH THE AMF, TO ONLY THOSE PROFESSIONALS WHOSE PROFESSION LENDS ITSELF TO THE REFERRAL OF CLIENTS TO A MORTGAGE LENDER;**
- **REPLACE THE TERM "AS AN ANCILLARY ACTIVITY" WITH "IN THE COURSE OF HIS FUNCTIONS."**

173 Real Estate Council of Alberta, Consultation Report, *Real Estate Act* Amendments, Issue 2: RECOMMENDATION: The *Real Estate Act* should apply to banks, treasury branches, credit unions, loan corporations, trust corporations or insurance companies when they are dealing in mortgages from other financial institutions.

- S. 3(11°): This exception concerns the employee or property manager who works for a subsidiary of the owner and engages in a brokerage transaction relating to the leasing of an immovable owned by the owner. As worded, this exception has only few applications since in practice, it is head office employees who engage in leasing brokerage activities for the benefit of the subsidiary that owns the immovable.

## RECOMMENDATION

- **REVIEW THE EXCEPTION SO THAT IT CAN APPLY TO AN EMPLOYEE OF AN ENTERPRISE REGARDING THE LEASING OF THE IMMOVABLE OF THE SUBSIDIARY OF THE ENTERPRISE CONCERNED.**

### 4.3 New exception in favour of tourist establishments

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An operator of an establishment that leases dwellings units to tourists (room, suite, apartment, house, cottage, etc.) for a maximum of 31 days comes under the *Act respecting Tourist Accommodation Establishments*, CQLR, c. E-14.2 which regulates this activity. Considering that the REBA applies to leasing brokerage regardless of duration, there is a risk, depending on to the nature of the activities in which he engages, that the operator in question is also governed by it. This dual coverage serves neither public protection nor the interests of stakeholders in the area of tourist leasing.

## RECOMMENDATION

- **PROVIDE AN APPLICATION EXCEPTION IN THE REBA IN FAVOUR OF HOLDERS OF A CLASSIFICATION CERTIFICATE WITHIN THE MEANING OF THE *ACT RESPECTING TOURIST ACCOMMODATION ESTABLISHMENTS*.**



#### 4.4 New exceptions arising from the proposed definition of the notion of brokerage transaction

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The OACIQ proposes a flexible and comprehensive definition of the scope of the REBA and the notion of brokerage transaction. In this context, new exceptions to the application of the REBA could be considered to remove activities which clearly should not be subject to it.

### RECOMMENDATION

- **PROVIDE APPLICATION EXCEPTIONS IN THE REBA IN FAVOUR OF ENTERPRISE OR PERSONS:**
  - **OFFERING AN ADVERTISING SERVICE TO SELLERS FOR THE SALE OF THEIR PROPERTIES;**
  - **ONLY REFERRING THE PARTIES TO A TRANSACTION TO VARIOUS EXPERTS OR PROFESSIONALS IN THE COURSE OF A TRANSACTION (E.G. NOTARY, CERTIFIED EVALUATOR, BUILDING INSPECTOR, LAND SURVEYOR).**

## 5. Regulate other activities that have an impact on real estate and mortgage transactions

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The OACIQ notes an absence of oversight of certain service providers closely linked to the obtaining of mortgage loans, which can be harmful to public protection and cause discrepancies between the expectations of some major stakeholders in the mortgage field and the regulatory reality.

For example:

- Difficulty to adapt the REBA to mortgage loan administration and underwriting activities that can be similar in some respects to mortgage brokerage and for which the CMHC requires, to certify this type of enterprise which is not otherwise regulated, that they be licenced by the OACIQ;
- Difficulty for mortgage brokers and borrowers to evaluate the “quality” of a private mortgage broker in the absence of oversight (integrity of the lender, source of funds, financial strength); in fact recently the Bank of Canada underlined certain risks for the public relating to the presence of unregulated lenders.<sup>174</sup>

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174 *Financial System Review*, Bank of Canada, December 2014, p. 15.

Yet, the activities of private mortgage lenders, underwriters and administrators are subject to oversight in one way or another in several Canadian jurisdictions<sup>175</sup> and, with a view to protecting the public, the OACIQ is of the opinion that similar oversight should be considered in Québec.

## RECOMMENDATION

- **CONSIDER HAVING THE FOLLOWING ACTIVITIES OVERSEEN BY THE APPROPRIATE AUTHORITY:**
  - **PRIVATE MORTGAGE LENDERS;**
  - **UNDERWRITERS AND ADMINISTRATORS OF MORTGAGE LOANS.**

## 6. Review the forms adoption process

The OACIQ must submit to the Chambre des notaires du Québec, for consultation purposes, any real estate brokerage form which it proposes to adopt.<sup>176</sup> For many of the forms adopted by the Organization, this obligation lengthens the adoption process and whose usefulness seems limited. Although consultation is appropriate and very useful for certain forms, especially those which the notary will have to review and take into account as part of his involvement in the transaction, is it neither practical nor useful to require consultation for all forms. As well, the form which such consultation should take could use revision.

## RECOMMENDATION

- **REPEAL SECTION 51 OF THE REBA AND CONSIDER THE OBLIGATION FOR THE OACIQ TO FORM AN ADVISORY COMMITTEE ON FORMS AND OTHER TRANSACTION DOCUMENTS USED BY BROKERS, ON WHICH A REPRESENTATIVE FROM THE CHAMBRE DES NOTAIRES DU QUÉBEC WOULD SIT.**

<sup>175</sup> See: *Mortgage Brokers Act*, RSBC 1996, c 313 (British Columbia); *Mortgage Brokers Act*, CCSM c. M210 (Manitoba); *Mortgage Brokerages, Lenders and Administrators Act*, SO 2006, c. 29 (Ontario); *Mortgage Brokers Act*, SNB 2014, c. 41 (New Brunswick – not in force); *Mortgage Regulation Act*, SNS 2012, c. 11, (Nova Scotia – not yet in force); *Mortgage Brokerages and Mortgage Administrators Act*, SS 2007, c. M-20.1 (Saskatchewan); *Mortgage Brokers Act*, RSNL 1990, c. M-18 (Newfoundland and Labrador).

<sup>176</sup> S. 51 of the *Real Estate Brokerage Act*.

## 7. Review the conditions for subjecting the OACIQ to the *Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*

The OACIQ does not question the fact that it should be subject to the *Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, CQLR c. A-2.1 (the Access Act). However the nature, mission and operation of the OACIQ are not quite suited to the application of the Act without some adaptation. Difficulties refer to the confidentiality of investigations and of certain processes specific to the OACIQ,<sup>177</sup> the public nature of the information contained in the register of licence holders (current and past information) and of some of the information concerning disciplinary complaints, the ability to forward information to police forces or other public protection agencies.<sup>178</sup>

### RECOMMENDATION

- **MODIFY THE APPLICATION OF CERTAIN PROVISIONS OF THE ACCESS ACT TO BETTER ADAPT IT TO THE REALITY AND FUNCTIONS OF THE OACIQ.**

## 8. Facilitate the implementation of the mandatory continuing education program

The regulations state that the additional training activities which brokers must attend are to allow them to develop, maintain, update, improve and broaden the professional skills associated with their activities.<sup>179</sup> The regulations list several subject matters which training activities can cover and indicates that for each training activity, the OACIQ must approve the content, set the duration and time within which it must be taken, and specify the training personnel, bodies or educational institutions qualified to offer it.<sup>180</sup>

177 On this topic, it is important to specify that the Syndic, the Assistance Department and the Indemnity Committee share documents and information necessary to public protection (s. 49.1 REBA), more so since the recent implementation of a “single file” investigation process by the Syndic. In this context, and since these bodies are basically interconnected, the problems of investigation confidentiality do not only concern the documents and information obtained or issued by the Syndic, but also those handled by each of these bodies.

178 It is important to note that the Conseil interprofessionnel du Québec also recommends adjustments to the access to information and protection of personal information regimes applicable to professional orders, in order to promote the sharing of useful information or documents between professional order syndics and allow multidisciplinary investigations (pp. 43 to 45 of *Recommandations en vue d'une réforme globale du Code des professions*, supra note 131).

179 S. 48 of the *Regulation respecting the issue of broker's and agency licences*.

180 Ss. 49 and 50 of the *Regulation respecting the issue of broker's and agency licences*.

This regulation was initially designed in a context where specific additional training activities would be imposed, as decided from time to time by the OACIQ board of directors, to meet a specific need.

As mentioned above, in May 2015 the OACIQ launched a new mandatory continuing education program based on the principle of a minimum number of training hours to be completed (expressed in terms of continuing education units, or CEUs) and allowing brokers to choose from an evolving bank of training activities related to the knowledge and skills to be maintained, as relevant to their practice. The implementation of this program gave the OACIQ an opportunity to note the limits of the current regulatory framework. Requiring the board of directors to approve the content of all training activities in the program (which can number in the hundreds), set the duration and time in which to complete them and specify the training personnel, bodies or educational institutions qualified to offer them, does not serve either public protection or organisational efficiency. This regulatory framework must therefore be reviewed to allow more flexibility. The role of the board of directors should be to focus on establishing the broad principles of the program, and the “accreditation” of the training activities should come under the OACIQ’s daily operations and be performed by OACIQ staff.

## RECOMMENDATION

- **REVIEW THE REGULATORY FRAMEWORK RELATING TO MANDATORY CONTINUING EDUCATION TO TAKE INTO ACCOUNT THE FACT THAT CONTINUING EDUCATION IS NOW REQUIRED AS PART OF A TRAINING PROGRAM AND TO ALLOW FOR THE ACCREDITATION OF TRAINING ACTIVITIES VIA AN ADMINISTRATIVE PROCESS THAT DOES NOT REQUIRE BOARD APPROVAL FOR EACH ACTIVITY (CONTENT, TRAINERS, DURATION AND TIME IN WHICH TO COMPLETE IT).**

# 9. Incorporate the use of information technologies in the REBA

The majority of the OACIQ's administrative processes are computerized. Yet, because of the provisions of the *Act to Establish a Legal Framework for Information Technology*, CQLR c. C-1.1, the REBA currently provides very few ways in which the OACIQ can require brokers and agencies to use technological methods to perform some of their obligations (e.g. licence maintenance). Thus it is currently uncertain whether the OACIQ will be able to require licence maintenance to be done solely online. It would therefore be advisable to clarify the situation in order to allow an optimal use of the OACIQ's computerized resources (e.g. the OACIQ extranet for brokers) and to move closer to a paperless environment.

In addition, the OACIQ currently uses a contractual accreditation process to certify technological solutions used by brokers and agencies in terms of electronic document management (EDM) and electronic signatures, in addition to issuing general guidelines concerning the technical standards to follow for any non-accredited solution. This potentially opens the door to a multitude of solutions, which creates a problem with standardization of practices and can cause uncertainty for the various stakeholders (clients, brokers, notaries, financial institutions), especially since the OACIQ intends to continue to promote the use of the electronic version of the forms it publishes.

## RECOMMENDATIONS

- **ALLOW THE ORGANIZATION TO REQUIRE THAT CERTAIN DOCUMENTS OR INFORMATION BE PROVIDED VIA A GIVEN MEDIA OR TECHNOLOGY;<sup>181</sup>**
- **ALLOW THE ORGANIZATION TO IDENTIFY AND IMPOSE, IN SPECIFIED AREAS, THE SOLUTION THAT WOULD BE RECOGNIZED AS CONSISTENT WITH THE TECHNICAL STANDARDS REQUIRED.**

<sup>181</sup> This could notably be done by granting a regulatory power allowing the OACIQ to require that documents or information be sent via a given media, such as digital, or using a given technology – see ss. 10.6, 10.7 and 331.1 (4.1) of the *Securities Act*.

# CONCLUSION

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Real estate property represents an important part of the assets of Québec individuals, families and enterprises. The security of transactions leading to the purchase, sale or lease of such property and the securing of loans to finance their acquisition is of the utmost importance, and the oversight of practices aimed at supporting sellers, buyers, lessors, lessees, borrowers and even lenders should remain at the heart of the government's concerns.

The Minister's Report poses a number of questions that essentially raise two issues: the governance of the OACIQ and the relevance of defining what constitutes a "brokerage transaction" within the meaning of the REBA.

The analysis on which the Minister's Report appears to be based to address these two issues seems at best incomplete, making it difficult to follow the reasoning behind some of its comments on the evolution of real estate and mortgage brokerage, including when it comes to services provided by brokers and those offered by "for-sale-by-owner" companies". The same goes for the conclusions drawn regarding self-regulation and the way in which the OACIQ has discharged its public protection mission since the coming into force of the REBA in 2010. Following a more in-depth study and analysis of the situation we arrive, in the context of public protection, at findings and directions that are quite different from those put forth in the Report.

Thus when it comes to overseeing the activities of real estate and mortgage brokers, it is clear that the OACIQ has successfully fulfilled its mission under the REBA. This is amply demonstrated by the OACIQ's achievements outlined in this brief and by an analysis of the results attained, and it is disconcerting that the Minister's Report should cast doubt in this regard. The success of self-regulation in the field of real estate and mortgage brokerage is a strong argument in favour of maintaining the current model, although this brief does propose some improvements which could be made to enable the organization to discharge its mission even more efficiently.

In addition to these improvements, if there is one way in which public protection could be enhanced, it would be by the inclusion of a clear, flexible and comprehensive definition of what constitutes the professional activities governed by the REBA. This brief contains a detailed proposal of what such a definition could look like. The OACIQ is concerned with the emergence in recent years of services that are similar to those of brokers but are offered by enterprises that believe themselves beyond the oversight provided by the REBA, thus depriving the public of the protections which it has a right to expect. The purpose of the proposed definition therefore is to ensure that members of the public who enlist services for the sale, purchase or lease of an immovable, or in order to obtain a loan secured by immovable hypothec, will always deal with competent professionals who are properly trained and monitored, and will have a regulatory body to turn to should they be dissatisfied with the services received.

Finally, with a view to broadening the debate on public protection when it comes to real estate and mortgage transactions, the OACIQ has included a number of recommendations on topics that are not addressed in the Minister's Report, including the importance of overseeing building inspections and co-ownership management.

With this brief, the OACIQ hopes to contribute to a clearer understanding of what real estate and mortgage brokerage represents in 2015, and of the issues that must be faced in the future to ensure better public protection. The OACIQ hopes that this analysis and the resulting recommendations will help inform the Minister's reflections on potential revisions to the REBA, and would like an opportunity to discuss this in more detail with the Minister in the near future.

# APPENDIX 1

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## List of recommendations

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### Main recommendations

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#### Defining what constitutes a brokerage activity: recommendations

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- A) Concerning a definition, the following is proposed:

*“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 of such a promise, including any transaction concerning a company's share capital.*

- B) Regarding the exclusive nature of the activities:

*Subject to the exceptions provided under this Act, no person except the holder of a licence issued by the Organisme d'autoréglementation du courtage immobilier du Québec may act as or purport to be a real estate or mortgage broker.*

*A real estate broker is a natural person who engages in the practice of the professional activity described in section 1.*

*A mortgage broker is a natural person who engages in the practice of the professional activity described in section 1 relating to loans secured by immovable hypothec.*

*Subject to Division IV of Chapter II, a person who contravenes this section may not claim or receive remuneration for the practice of the professional activity described in section 1. Likewise, a broker who engages in the practice of the professional activity described in section 1 through the intermediary of a person who is not a licence holder is also precluded from claiming or receiving remuneration for this activity.*



- C) Regarding the penal provisions:

*Any person who does not hold the licence required under this Act, unless authorized under the Act, and in any manner claims to be a real estate broker or a mortgage broker, uses one of these titles or a title or abbreviation or initials that may lead others to believe that the person is such, engages in the professional activity described in section 1, claims to have the right to engage in this activity, or acts in a way that leads others to believe that he is authorized to do so, is guilty of an offence.*

*Without restricting the generality of the above, the titles that may lead others to believe that a person is a broker are:*

*1° "real estate agent";*

*2° "mortgage loan agent";*

*3° "real estate or mortgage agent or coach or specialist or consultant or advisor or coordinator or analyst";*

*4° "agent or coach or specialist or consultant or advisor or coordinator or analyst in the sale or purchase of enterprises";*

*5° "leasing agent or coach or specialist or consultant or advisor or coordinator or analyst";*

*6° "marketing agent or coach or specialist or consultant or advisor or coordinator or analyst".*

### **Regulatory body and governance: recommendation**

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- Maintain the OACIQ as a self-regulated body.

### **Public presence within OACIQ bodies: recommendations**

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- Increase the number of directors appointed by the Minister of Finance from 3 to 4 or 5;
- Ensure that appointed directors are able to contribute to resolving problems in the field of real estate and mortgage brokerage or are professionals able to contribute to the work of a board of directors.

### **Role of the OACIQ: recommendations**

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- Maintain the OACIQ's current functions and powers;
- Not limit the OACIQ's ability to provide services to brokers that contribute to its public protection mission, such as publishing forms and offering continuing education activities.

## **OACIQ mission: recommendation**

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- Rephrase the OACIQ's mission statement under section 32 of the REBA:

"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."

## **Disciplinary sanctions: recommendations**

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- Provide for the Discipline Committee to take the injury suffered and the benefits derived from the offence into account in the determination of a fine;
- Allow the Discipline Committee to charge, in whole or in part, in accordance with a set tariff, the cost of investigating a broker found guilty of an offence.

## **Alternative measures to the disciplinary complaint: recommendations**

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- Recognize the ability for the Syndic to issue warning letters;
- Allow the Syndic and the Inspection Committee (or the OACIQ) to enter into an agreement with a broker to impose restrictions or conditions on his right to practice, suspend his licence or have him pay a voluntary "fine".

## **Administrative monetary penalties (AMP): recommendation**

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- Allow the use of administrative monetary penalties (AMP).

## **Additional powers to better fight against the illegal practice of the broker activity: recommendations**

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- Make it easier to obtain information from third parties in the course of a penal investigation by granting commissioner powers or other types of investigative powers, such as the "formal demand";
- Include an offence for encouraging illegal brokerage.

## **New power to restrict, suspend, revoke or refuse to issue a licence for reasons of health or integrity: recommendations**

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Provide the ability to:

- restrict the right to practice for medical reasons;
- restrict, suspend, revoke or refuse to issue a licence if the person concerned does not have the necessary integrity to carry on the activity of broker.

## **Recognition of the ombudsman function: recommendations**

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- Recognize the ombudsman function in the REBA;
- Define the role, powers and duties of the ombudsman;
- Provide for the ombudsman to report to the OACIQ board of directors.

## **Other recommendations**

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### **Building inspections: recommendation**

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- Provide for the oversight of building inspections by an appropriate authority.

### **Co-ownership management: recommendation**

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- Provide for the oversight of the activities of co-ownership property managers by a competent authority.

### **Continuation and autonomy of the OACIQ: recommendations**

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- Ensure that the REBA does not unduly restrict the ability to improve various administrative fees (user payer principle) or to diversify the OACIQ's funding sources;
- Allow for the amount of payable fees and the contribution to the Real Estate Indemnity Fund to be set by resolution (on the basis of actuarial studies in the case of the Fund contribution) rather than by regulation.

### **Securities Act: recommendations**

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- Like the activities governed by the Derivatives Act, make it so the SA does not apply to the activities referred to in the REBA;
- Alternatively, provide in the SA that real estate and mortgage brokers are not subject to it when engaging in an activity governed by the REBA.

### **Exceptions or limitations to the application of the REBA: recommendations**

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- Assuming the activities that come under the REBA are defined, remove the exclusion concerning brokerage transactions involving a derivative or a security;
- Otherwise, better define the application exception concerning transactions involving securities and derivatives in order to exclude from the application of the REBA persons or companies registered with the AMF that engage in a brokerage transaction involving such a derivative or security.

## Exceptions or limitations to the application of the REBA requiring clarification or reorganization: recommendations

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### Art. 1(2°)

- Not limit the scope of REBA when it comes to leasing brokerage;
- Provide an application exception in favour of persons or enterprises who engage in this type of transaction only occasionally.

### Art. 1(5°)

- Not limit the scope of the REBA when it comes to enterprise brokerage;
- Provide an application exception in favour of persons or enterprises who engage in this type of transaction only for an enterprise that does not include property assets or rights.

### Art. 3(1°)

- Limit the application exception in favour of financial institutions to loans issued by the institution;
- Otherwise, examine the best ways to promote a wider variety of options for the mortgage borrower where the institution refuses to grant the loan but refers him to an alternative lender.

### Art. 3(2°)

- Limit the exception, in addition to persons registered with the AMF, to only those professionals whose profession lends itself to the referral of clients to a mortgage lender;
- Replace the term “as an ancillary activity” with “in the course of his functions.”

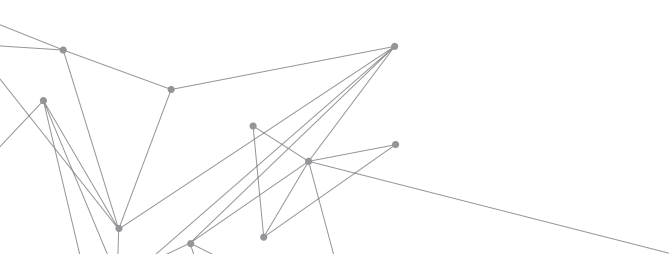
### Art. 3(11°)

- Review the exception so that it can apply to an employee of an enterprise regarding the leasing of the immovable of the subsidiary of the enterprise concerned.

## New exception in favour of tourist establishments: recommendation

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- Provide an application exception in the REBA in favour of holders of a classification certificate within the meaning of the *Act respecting Tourist Accommodation Establishments*.



## **New exceptions arising from the proposed definition of the notion of brokerage transaction: recommendation**

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- Provide application exceptions in the REBA in favour of enterprise or persons:
  - offering an advertising service to sellers for the sale of their properties;
  - only referring the parties to a transaction to various experts or professionals in the course of a transaction (e.g. notary, certified evaluator, building inspector, land surveyor).

## **Regulate other activities that have an impact on real estate and mortgage transactions: recommendation**

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- Consider having the following activities overseen by the appropriate authority:
  - Private mortgage lenders;
  - Underwriters and administrators of mortgage loans.

## **Review the forms adoption process: recommendation**

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- Repeal section 51 of the REBA and consider the obligation for the OACIQ to form an advisory committee on forms and other transaction documents used by brokers, on which a representative from the Chambre des notaires du Québec would sit.

## **Review the conditions for subjecting the OACIQ to the *Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*: recommendation**

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- Modify the application of certain provisions of the Access Act to better adapt it to the reality and functions of the OACIQ.

## **Facilitate the implementation of the mandatory continuing education program: recommendation**

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- Review the regulatory framework relating to mandatory continuing education to take into account the fact that continuing education is now required as part of a training program and to allow for the accreditation of training activities via an administrative process that does not require board approval for each activity (content, trainers, duration and time in which to complete it).

## **Incorporate the use of information technologies in the REBA: recommendations**

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- Allow the Organization to require that certain documents or information be provided via a given media or technology;
- Allow the Organization to identify and impose, in specified areas, the solution that would be recognized as consistent with the technical standards required.

# APPENDIX 2

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## Features of a real estate or mortgage transaction

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A real estate transaction has specific aspects, some of the complex, which sometimes pertain to the building, sometimes to the land, and often to both.

For example, several laws and regulations have a direct impact on the rights of the parties to a transaction. Here are a few:

- *Civil Code of Québec, CQLR c. C-1991 (among other things concerning co-ownership rules, servitudes, dwellings, guarantees against hidden defects, etc.).*
- *Building Act, CQLR c. B-1.1.*
- *Cultural Heritage Act, CQLR c. P-9.002 (concerning a heritage property that has archaeological, architectural, artistic, emblematic, ethnological, historical, landscape, scientific or technological value, in particular a building, a structure, vestiges or land).*
- *Cultural Property Act, CQLR c. B-4 (concerning the prohibited moving, use, use as backing, construction, repair, renovation, modification, demolition, arrangement, destination, utilization and ground plan, and alienation of a historic monument, site or district, natural district or protected area).*
- *Public Curator Act, CQLR c. C-81 (concerning the administration of an immovable owned by a tutorship or curatorship to persons of full age or to minors).*
- *Act respecting the Régie du logement, CQLR c. R-8.1 (concerning the rules governing the alienation and leasing of residential properties).*
- *Environment Quality Act, CQLR c. Q-2. (concerning soil characterization, among other things).*
- *Act Respecting Land use Planning and Development, CQLR c. A-19.1 and the various municipal by-laws (concerning uses of soil, constructions or authorized/prohibited work according to: land topography, proximity of waterway or lake, flood risks, rockslides, landslides and other cataclysms, reasons of public security or environment protection of shorelines, littoral and flood plains).*
- *Act Respecting Duties on Transfers of Immovables, CQLR c. D-15.1.*
- *Act Respecting Compensation Measures for the Carrying out of Projects Affecting Wetlands or Bodies of Water, CQLR c. M11-4 (concerning the requirements and authorizations relating to construction projects).*
- *Act Respecting the Acquisition of Farm Land by Non-residents, CQLR c. A-4.1.*
- *Various tax laws.*

The components of the building themselves can also require specific knowledge, including heating systems (oil, gas, electric dual energy, geothermal energy, masonry heaters, etc.), various wastewater disposal systems, water supply systems, insulation and related issues, water towers, rules concerning the maintenance of certain immovables, home automation systems, and many others.

The transactions involving co-ownership properties have an additional layer of complexity, due to multiple types of properties, the existence of several syndicates for the same property, contingency funds, building maintenance, minutes, by-laws, financial statements, certificates of location, etc.<sup>182</sup>

Other considerations can also have an impact on a transaction, including the presence of pyrite, pyrrhotite, radon or asbestos, zoning, and various environmental rules, to name only a few.

In commercial real estate brokerage, in addition to the above are the different measurement standards (BOMA<sup>183</sup> and IPMS<sup>184</sup>) and the complexity of the documents used in the transaction.

As for the mortgage market, it also evolves constantly: from the term of the loan to the repayment methods available, including fund availability or sources and interest rates, practically every aspect of this industry has changed over the last decades.

With the requirements for borrowers and lenders increasingly complex and varied, practices, processes and methods in the field of mortgage lending have gone from the simple repayment schedule to a multitude of complex payment formulas offered by a vast array of public and private institutions.

The wide variety and complexity of mortgage types can be confusing for consumers and make choosing difficult. This diversification offers the mortgage broker all sorts of opportunities to meet the needs of his clientele.<sup>185</sup>

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182 Co-ownership and related issues have already been the subject of two major reports in the last few years: the *Rapport du groupe de travail sur la copropriété*, submitted to the Québec Justice Minister in March 2011, and the *Rapport du comité consultatif sur la copropriété*, submitted to the Québec Justice Minister and the board of directors of the *Chambre des notaires du Québec* in November 2012 (amended in January 2013). The OACIQ is collaborating with the *Chambre des notaires du Québec* in this area by providing content for the website it is developing on co-ownership, at the Justice Department's request.

183 ANSI/BOMA Z65.1-2010: Office Buildings: Standard methods of measurement, this standard introduces a unified and coherent approach to the measurement of office space.

184 International Property Measurement Standards.

185 For more details regarding the economic or legal history of mortgage brokerage, see the *Guide des pratiques professionnelles hypothécaires* published in 2014 by the OACIQ, developed jointly by the OACIQ and CAAMP.

# APPENDIX 3

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## Some of the business models overseen by the OACIQ

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The OACIQ Assistance Department frequently analyzes new business models used by licence holders. Below are a few examples:

### Auction sale process

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A sale by tender, or call for tenders, is an invitation for buyers to submit promises to purchase by a certain date and time. The promises to purchase are then opened and reviewed simultaneously. The description sheet indicates that this is a requirement of the seller.

### Model operating exclusively with a brokerage contract to purchase

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Some brokers only represent buyers and necessarily enter into a brokerage contract with them. An agreement is made to allow the buyer's broker to place a sign on the property, once the deed of sale is notarized, with the mention "Purchased with team ...".

### Marketing plan with various guarantees/commitments by the broker or agency

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In some business models, brokers and agencies "guarantee" the sale of the property. For example they may promise to the seller that if they fail to find a buyer, they will buy the property themselves at the expiration of the brokerage contract, the terms of which purchase may or may not be pre-set. In other cases, brokers offer rebates or remuneration reductions if the property is not sold within a given period.

### Ability for the seller to sell his property himself

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Several business models allow the seller to market his property himself and offer a remuneration reduction if the seller finds a buyer. This method has been adopted by unlicensed assistance services.

### Remuneration reduction if the buyer is not represented

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Some business models offer a remuneration reduction if the buyer is not represented by a broker.



## Various broker remuneration methods by agencies

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Some brokers receive a fixed salary instead of being remunerated for each transaction. In other models, the overall remuneration is shared between all members of the agency according to a percentage set out in their service contract.

## Grouping and promoting of several projects (mainly co-ownership properties) to simplify the search for the public

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Real estate brokers rent a space and present several new condo projects in a given area. Virtual tours and 3D images.

Access to all services under the same roof: developer, broker, consultant and designer.

High-end, comfortable environment with an interactive showroom.

## Different websites operated by brokers regarding specific fields of practices

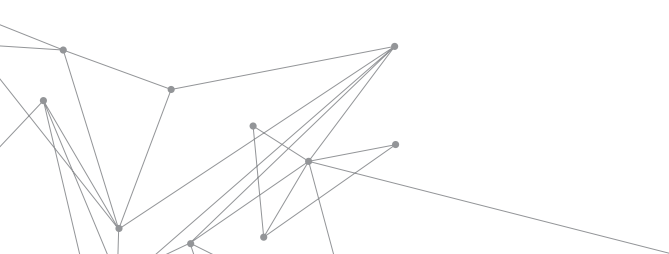
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**Examples:** Classified ad website for income properties or co-ownership properties, or for commercial properties only, where the service offers of various professionals are grouped, such as brokers, notaries, evaluators, etc.

## Other websites:

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For example, a site not operated by real estate brokers, but grouping different services related to the field, such as real estate and mortgage brokers, insurance companies, moving companies, various suppliers, notaries, lawyers, etc.



# APPENDIX 4

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## Tools made available to brokers by the OACIQ

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### List of mandatory forms

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- Annex RC – Remuneration and Costs
- Annex F – Financing
- Annex R – Residential Immovable
- Annex sale – Residential immovable outside Québec
- Enhancements prior to acceptance
- Exclusive brokerage contract – Purchase Chiefly residential immovable containing less than 5 dwellings
- Exclusive brokerage contract – Divided co-ownership – Fraction of a chiefly residential immovable held in divided co-ownership
- Exclusive brokerage contract – Undivided co-ownership – Share of a chiefly residential immovable held in undivided co-ownership
- Exclusive brokerage contract – Residential lease
- Exclusive brokerage contract – Sale – Chiefly residential immovable containing less than 5 dwellings excluding co-ownership
- Exclusive brokerage contract – Sale – Mobile home situated on leased land
- Counter-proposal – Residential lease
- Counter-proposal to a promise to purchase
- Declarations by the seller of the immovable (land and buildings, appurtenances and dependencies)
- Amendments
- Amendments – Residential lease
- Promise to purchase – Chiefly residential immovable containing less than five dwellings excluding co-ownership
- Promise to purchase – Divided co-ownership – Fraction of a chiefly residential immovable held in divided co-ownership
- Promise to purchase - Undivided co-ownership - Share of a chiefly residential immovable held in undivided co-ownership.
- Promise to purchase – Mobile home situated on leased land
- Promise to lease – Residential

## List of recommended forms

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- Annex – Drinking water and septic system – Immovable
- Annex – Expert report
- Annex RCOM - Reduced compensation
- Annex G – General
- Annex L – Income property
- Notice and follow-up on fulfilment of conditions – Immovable
- Consent to release information by a municipality concerning an immovable
- Consent to check payment habits
- Exclusive brokerage contract – Commercial lease
- Exclusive brokerage contract – Loan secured by immovable hypothec
- Exclusive brokerage contract – Residential sublease
- Exclusive brokerage contract – Sale of an immovable
- Counter-Proposal – Commercial Lease
- Request for information to the syndicate of co-owners
- Request for information relating to a hypothecary loan
- Income property – Detailed description
- Residential property – Detailed description
- Premises and leases – Detailed listing
- Promise to purchase – Immovable
- Promise to lease – Commercial
- Promise to sublease – Residential immovable
- Identity verification

## Interactive tool on forms (annotated mandatory and recommended forms)

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### FAQs

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- [\*13 topics of interest to AEOs\*](#)
- [\*Frequently Asked Questions – Certification Department\*](#)
- [\*Mandatory continuing education session for agency executive officers\*](#)
- [\*Mandatory continuing education session on collaboration\*](#)
- [\*Mandatory continuing education on the new elements and amendments to forms\*](#)
- [\*Real estate brokerage forms\*](#)
- [\*Implementing an electronic document management system\*](#)
- [\*Real Estate Brokerage Act\*](#)
- [\*Mandatory continuing education program\*](#)

## Continuing education sessions for brokers

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### *OACIQ education sessions*

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- Annex R – Residential immovable
- Certificate of location
- Collaboration
- Brokerage contract to purchase
- Divided co-ownership: use of forms
- Undivided co-ownership: forms and features
- Brokerage contract to sell
- The broker who buys or sells
- Declarations by the seller
- Timelines on forms
- Agency executive officer, more than a director
- Record documentation
- Mandatory continuing education session on additions and changes to forms
- Residential lease form
- Managing trust accounts
- Electronic document management: For a successful EDM

- Building inspections: duties and obligations of the broker
- Identification and identity verification: knowing who you're dealing with
- Recent jurisprudence
- Advertising
- Simultaneous presentation of several promises to purchase
- Presence of pyrrhotite and real estate transactions
- Promise to purchase
- Most frequently asked questions at OACIQ Info Center
- Mortgage financing basic rules
- The keeping of records and registers
- How to use the online land register
- Magnetic fields
- Drinking water and wastewater: unserved buildings
- Building inspections: problems, expert evaluations and solutions
- Indoor production of drugs
- Radon: To better advise your clients
- Home Buyer's Plan (HBP)
- Electronic signatures
- Successions
- Hidden defects
- Synbad, my site: I click, I find!
- Professional conduct, the cornerstone of your daily practice
- Brokerage contracts: choosing the right supplementary forms

### ***Training activities accredited by the OACIQ***

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- Formation en copropriété pour les courtiers
- Mixed-used
- L'assurance titres résidentielle - Plus qu'une option : une solution !
- Conformité en matière de lutte au blanchiment et au financement du terrorisme
- Le bail
- L'arpentage pour les courtiers immobiliers
- Les installations septiques pour les courtiers immobiliers
- Construction & Development A linear Process

- L'alimentation en eau potable pour les courtiers immobiliers
- Un courtier qui se démarque - Au-delà du home staging
- La gestion de votre entreprise
- Sachez éviter les pièges de la transaction
- Sachez éviter les pièges de l'inscription
- La protection de l'environnement en milieu riverain
- La différence entre la copropriété divise et la copropriété indivise
- Identification et vérification d'identité : savoir à qui on a affaire
- La société, personne morale : son fonctionnement et ses avantages
- Le téléphone : Là où la vente commence
- Fenêtre sur le marché
- Le radon : Comment savoir s'il y a du radon chez soi ?
- Moisissure, ocre ferreuse, amiante et vermiculite
- Historique des méthodes de construction des bâtiments résidentiels
- Les puits et installations septiques - Que doit savoir un courtier immobilier et comment y faire face
- Tout sur le condo - Copropriété divise et indivise
- Ayez les bons chiffres
- Bilan 2014 du marché de la revente et Perspective du marché immobilier pour 2015
- Programme intensif et complet sur l'inscription (techniques et méthodes de vente)
- Horizon immobilier - Laurentides
- Atelier pratique : Apprenez à utiliser efficacement le Registre foncier du Québec en ligne
- Maîtriser la négociation à son avantage
- Contrat de courtage
- Crédit Hypothécaire
- Normes de mesurage BOMA
- L'inspection en bâtiment et la déclaration du vendeur
- Négociation de baux commerciaux
- Commission de protection du territoire agricole du Québec
- Photographie immobilière HDR
- Les vices affectant l'immeuble
- Démystifier les copropriétés divisées et par indivision lors d'une transaction
- L'assurance titres : comment bien protéger vos transactions immobilières

- Constructeurs, Courtiers : Comment collaborer pour mieux vendre du neuf à Montréal
- Conformité des courtiers, lutte au blanchiment
- Gérer efficacement son temps en tant que courtier immobilier
- Bien construire pour mieux habiter
- Les garanties légales du vendeur en immobilier résidentiel à toutes les étapes d'une vente
- Marketing
- Coaching
- Ventes
- The Regulatory and Compliance Environment
- Introduction à la protection des renseignements personnels
- Residential Mortgage Underwriting from a Lender's Perspective
- Understanding Specialized Mortgages
- Real Estate and Mortgage Economics and Investments
- Formation en décontamination de moisissure et d'amiante
- Comment convaincre les «AVPP» et répondre efficacement aux objections
- Comment bien gérer vos relations de presse et vos médias sociaux en gestion d'urgence (MSGU) et de crise
- La cohabitation des générations au travail
- Panel - La loi 122 et l'entretien des façades
- Atelier médias et réseaux sociaux au sein de l'industrie immobilière
- Camp d'entraînement pour les STARS de l'immobilier (Boot camp)
- 10 éléments essentiels de l'électricité résidentielle
- Formation Écocourtier
- Maximiser ses revenus d'entreprise
- Code d'honneur pour acheteurs
- Inscrire avec plaisir !
- Marketing ciblé - Mon secteur ferme
- Prospection et développement des affaires
- Modèle d'affaires pour se vendre !
- 10 éléments essentiels de la plomberie résidentielle
- 10 éléments essentiels de la structure du bâtiment
- La prospection dynamique
- 27 stratégies pour se démarquer et se distinguer des autres courtiers
- Le téléphone, un allié indispensable !

- La gestion électronique des documents : Pour une GED réussie
- Spécial AVPP et autres agences publicitaires du même type !
- Les 17 meilleures techniques de «closing» pour courtier immobilier
- Passifs \$\$ environnementaux prévoir ce qui peut bloquer ou retarder les ventes
- Programme intensif et complet sur les acheteurs
- Home Energy Efficiency for Real estate professionnels
- Impact des arbres dans une transaction immobilière en milieu urbain
- Symposium de l'ACCHA 2015
- Synbad, my site: I click, I find!
- Aspects environnementaux liés à une transaction immobilière et hypothécaire
- Commercial Mortgage Financing level I
- Commercial Mortgage Financing level II
- Entrepreneuriat
- L'embauche, la gestion et le licenciement
- Le Lean Management pour redéfinir la gestion d'immeubles
- 10 points essentiels de l'extérieur du bâtiment résidentiel
- Démystifier la vente sous contrôle de justice et la prise en paiement par le créancier
- Assemblée générale annuelle 2015
- Comment identifier et adapter votre communication aux huit types de personnalité de vos clients
- Prospection, objections AVPP et expirés ?
- Quoi faire et ne pas faire avec des acheteurs
- From Shanghai to your shelf : Logistics and supply chain industrial real estate decisions of the 21st Century : connecting the dots back to the consumer
- Calculer la rentabilité d'un immeuble à revenus
- Le radon, la vermiculite et la pyrite
- Les systèmes de chauffage et de climatisation résidentiels
- Les fondations, les drains de fondation et l'ocre ferreuse
- L'efficacité énergétique et la ventilation résidentielle
- La communication proactive et la gestion du temps des courtiers performants
- Contrat de courtage hypothécaire
- L'art de négocier
- Financement d'un multi-logements (2 à 4 unités)
- Générez de nouveaux clients grâce au Web et Facebook



- Bâtir une communauté sur les médias sociaux
- La gestion du temps
- Types de fondations et leurs particularités
- L'art d'influencer
- Faire son autopromotion et fidéliser ses clients
- Gestion des clients difficiles
- L'art de négocier efficacement
- Stratégies efficaces de sollicitation de clients
- L'approche-conseil pour réussir vos ventes
- Le succès par l'inscription
- Démystifiez la GED et optimisez son utilisation dans votre quotidien
- Utilisation de la signature électronique en courtage immobilier
- La gestion de temps
- La qualification acheteur
- La qualification d'un client vendeur
- La structure d'affaires et le plan d'action
- Problématiques affectant les bâtiments
- Secrets de la négociation immobilière
- Les représentants légaux et les transactions immobilières
- Les impacts du certificat de localisation lors d'une transaction immobilière
- Les cas particuliers en droit immobilier
- Les servitudes et le droit d'accès riverains
- Le processus de location (Cours REIC 2360)
- Éthique et conduite professionnelle (Cours REIC 2600)
- Comportement du consommateur et négociation (Cours REIC 2270)
- La franchise
- Certificat de localisation de A à Z.... Problèmes et solutions
- L'inspection en bâtiment
- Développement d'affaires numériques et «Social selling» stratégique
- Ce qui peut hanter vos transactions : vices cachés et litiges
- Issue and Challenges for Real Estate Brokers
- Changing agencies ? Watch out!
- École de prospection Ose Coaching

- L'essentiel en 60 minutes - L'appel entrant
- L'essentiel en 60 minutes - Méthodes pour répondre aux objections
- Médias sociaux : comment les lois influencent vos contenus
- Professional conduct, the cornerstone of your daily practice
- Évitez les litiges en préparant bien vos clients et leurs documents en vue de la rencontre avec le notaire
- Location immobilière résidentielle
- La copropriété indivise organisée
- La jurisprudence récente
- Colloque de la Chambre immobilière de l'Outaouais 2015
- Marketing Web : Développer une stratégie ciblée et rentable
- Mieux connaître son marché
- Fournir aux consommateurs un meilleur service en leur offrant de l'information, des outils et des moyens d'améliorer leurs connaissances
- Aidez vos clients à prendre des décisions éclairées en matière de financement de l'habitation
- Les chemins de la réussite
- Tout ce que vous devez savoir avant, pendant et après la conclusion d'un bail commercial
- Diminuer vos coûts d'achat et de rénovations
- Montreal Real Estate Strategy & Leasing conference
- La créativité, ça s'apprend!
- Les principaux tests reliés à l'immobilier : connaître et comprendre
- Create 21
- Votre droit à la rétribution
- Comment identifier des contaminants dans une bâtisse
- Réunion annuelle Hypothéca 2015
- APHMM Forum Hypothécaire 2015

## Publications

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- Leaflet “The Buyer’s Broker and You”
- Leaflet “The Seller’s Broker and You”
- Booklet “Discipline Committee”
- Leaflet “The Inspection Department”
- Professional Standards of Practice for the Visual Inspection of Chiefly Residential
- Buyer’s Guide
- Seller’s Guide
- Advertising Guide for real estate and mortgage agencies and brokers
- Professional Practices Guides:
  - Courtage immobilier: Gérer vos activités professionnelles
  - Opérations de courtage: recourir aux règles de droit
  - Immeuble: évaluer les éléments de construction
  - Immeuble: effectuer les opérations
  - Courtage hypothécaire: distinguer les principes de base
- Un guide sur les contrats et formulaires est en développement
- Numerous issues of *Profession BROKER*, the e-magazine for real estate and mortgage brokerage professionals
- Numerous online articles on various topics

## Quick Reference Guides

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- [Quick Reference Guide – Commercial Brokerage – Brokerage Contract/Listing Record – Missing documents](#)
- [Quick Reference Guide – Commercial Brokerage – Transaction Record – Missing documents](#)
- [Quick Reference Guide – Mortgage Brokerage – Exclusive Brokerage Contract/Transaction \(Loan\) Record – Missing documents](#)
- [Quick Reference Guide – Residential Brokerage – Brokerage Contract/Listing Record – Missing documents](#)
- [Quick Reference Guide – Residential Brokerage – Transaction Record – Missing documents](#)
- [Quick Reference Guide – Residential Brokerage – Brokerage Contract/Listing/Lease and Sublease Record – Missing documents](#)
- [Quick Reference Guide – Residential Brokerage – Transaction/Lease and Sublease Record – Missing documents](#)
- [Quick Reference Guide – Managing trust accounts](#)
- [Quick Reference Guide – How to leave the profession properly – Residential and commercial real estate brokerage](#)

## Forms relating to the management of trust accounts

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- *Notice of delegation of obligations related to the opening and maintaining of a trust account*
- *Notice of closing of a general trust account*
- *Client's Ledger*
- *Declaration of inactivity – Trust Transaction Report*
- *Declaration related to the opening of a general trust account*
- *Declaration related to the opening of a special trust account*
- *List of the financial institutions with which the OACIQ has negotiated an agreement for the trust accounts*
- *Trust transaction report – Summary of deposits and withdrawals*

## Disclosure forms

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- *Notice of disclosure – Purchase-sale-exchange*
- *Notice of disclosure – Licence holder proposing to act as mortgage lender*
- *Disclosure of remuneration agreement*
- *Disclosure of remuneration sharing*
- *Disclosure pertaining to a loan secured by immovable hypothec*
- *Declaration of inactivity – Register of disclosure notices*

## Sample registers

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- *Instructions to agencies and brokers acting on their own account for maintaining records and registers*
- *Register of disclosure notices*
- *Register of brokerage contracts*
- *Register of brokers*
- *Register of general trust account transactions*
- *Register of transactions*
- *Brokerage Contracts and Mortgage Transactions Register*

## Forms relating to business closings & ceasing of activities

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- *Notice of closing of a general trust account*
- *Mandatory declaration – Ceasing of activities by a real estate or mortgage agency or by a real estate or mortgage broker acting on his own account*
- *Trust transaction report*

## Other forms

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- *Identity verification mandate and mandatory's declaration*
- *Standard notices informing clients about changes in agencies or in broker status (12 models available)*

## Standard clauses:

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### ***Brokerage contract***

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- Reduced remuneration
- Exclusion of warranty for fireplaces, stoves, combustion appliances and chimneys
- Exclusion of legal warranty of quality
- Conforming promise to purchase – Additions to the detailed description sheet
- Reduced remuneration in case of promise to purchase by a designated person
- Designated persons excluded from the brokerage contract for a determined period
- Standard clauses to make the Brokerage contract non-exclusive
- Place where a possible recourse shall be exercised
- Off the market
- Standard clauses to be added to the new form Exclusive brokerage contract – Sale – Immovable published by the OACIQ for the sale of an enterprise including an immovable
- Standard clauses to be added to the form Exclusive brokerage contract – Sale of an enterprise excluding any immovable published by the ACAIQ for the sale of an enterprise excluding any immovable

### ***Promise to purchase***

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- Earnest money agreement
- Insurance commitment
- Lease cancellation agreement
- Exclusion of warranty for fireplaces, stoves, combustion appliances and chimneys
- Exclusion of legal warranty of quality

- Chimney inspection
- Swimming pool inspection
- Tank and heating systems inspection
- Zoning change or permit
- Buyer's participation in the enterprise's operations
- Work to be performed by the seller
- Verification of zoning
- Visit by the buyer
- Pool opening by seller
- General clause by which a sum is withheld by the notary to guarantee an obligation by the seller
- Inspection to the buyer's satisfaction
- DB-certified stone
- Acceptance including notification clause
- Property search by the seller
- Obtainment of the certificate of location within the specified time frame
- Radon measurement test
- Sending of a notice
- Further inspection
- Price reduction
- Standard clauses to be added to the new form Promise to purchase – Immovable published by the OACIQ for the sale of an enterprise with an immovable

### ***Mortgage brokerage contract (clause to be inserted)***

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- Identification of the parties to the contract
- Object and term of the contract
- Features and details of the loan sought
- Remuneration of the agency or broker
- Terms regarding the obtaining and use of borrower's personal information
- Conciliation, mediation and account arbitration

### ***Miscellaneous clauses***

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- Security deposit – Lease of a property as a vacation resort only
- Release and discharge

# APPENDIX 5

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## References to for-sale-by-owner companies in some Québec court decisions

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### Decisions rendered since 2010 that refer to DuProprio<sup>186</sup> as an “agence” (agency) or a “courtier” (broker)

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- *Droit de la famille – 14355*, 2014 QCCS 708 (“courtier”)
- *Droit de la famille – 133184*, 2013 QCCS 5668 (“courtier”)
- *Droit de la famille – 123750*, 2012 QCCS 6752 (“maison de courtage”)
- *Droit de la famille – 12186*, 2012 QCCS 344 (“courtier”)
- *Droit de la famille – 123028*, 2012 QCCS 5376 (“agence”)
- *Fortin c. Mercier*, 2013 QCCQ 5890 (“bannière”)
- *Re/Max Alliance AM inc. c. Lafond*, 2014 QCCQ 1127 (“bannière”)
- *Re/Max Performance c. Dupont*, 2014 QCCQ 9917 (confusion between DuProprio and an existing real estate agency)

### Decisions rendered since 2010 indicating that the client sold “par l’entremise” (through) or “par l’intermédiaire” (through the intermediary) of for-sale-by-owner companies

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- *Cardinal c. Héту*, 2015 QCCQ 89
- *Groupe Sutton Immobilia c. Philippe*, 2014 QCCQ 12597
- *Rey-Lescure c. Fowler*, 2013 QCCQ 15567
- *Poirier c. Bussière*, 2014 QCCQ 4898
- *Pelletier c. Auger*, 2014 QCCQ 5033
- *Lévesque c. Terry*, 2015 QCCQ 207
- *Droit de la famille – 121941*, 2012 QCCS 3660
- *Riendeau c. Fortin*, 2013 QCCS 3011
- *Labbé c. Boyer*, 2014 QCCQ 6896
- *Gatien c. Ross*, 2014 QCCQ 12609
- *Langlois c. Forget*, 2012 QCCQ 6168
- *Thériault c. Langlois*, 2013 QCCQ 6346

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<sup>186</sup> This company, whose website is purported to be the most visited real estate selling site in Québec, was chosen to facilitate the search because of its large presence on the market.

# APPENDIX 6

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## Legislation on real estate brokerage in Canada

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### **Alberta**

- *Real Estate Act*, RSA 2000, c. R-5

### **British Columbia**

- *Real Estate Services Act*, SBC 2004, c. 42

### **Prince Edward Island**

- *Real Estate Trading Act*, RSPEI 1988, c. R-2

### **Manitoba**

- *Mortgage Brokers Act*, CCSM c. R-20

### **New Brunswick**

- *Mortgage Brokers Act*, RSNB 2011, c. 215

### **Nova Scotia**

- *Real Estate Trading Act*, SNS 1996, c. 28

### **Québec**

- *Real Estate Brokerage Act*, CQLR c. C-73.2

### **Ontario**

- *Ontario Real Estate and Business Brokers Act*, 2002, SO 2002, c. 30, Sch. C

### **Saskatchewan**

- *Real Estate Act*, SS 1995, c. R-1.3

### **Newfoundland / Labrador**

- *Real Estate Trading Act*, RSNL 1990, c. R-2

### **Nunavut**

- *Real Estate Agents' Licensing Act*, RSNWT 1988, c. 48 (Supp.)

### **Northwest Territories**

- *Real Estate Agents' Licensing Act*, RSNWT 1988, c. 48

### **Yukon**

- *Real Estate Agents Act*, RSY 2002, c. 188



# APPENDIX 7

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## Analysis of the notion of brokerage transaction in Canadian comparative law

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In Canada, generally speaking, the scope of laws governing real estate brokerage is established based on the notion of “trading in real estate”, for others and for compensation. It is this notion of “real estate transaction” that the legislation and other Canadian jurisdiction have endeavoured to clearly define.

The following provinces use basically the same wording to define a real estate transaction:

- Ontario;
- Nova Scotia;
- New Brunswick;
- Newfoundland;
- Prince Edward Island.

which is:

**“trade”** includes a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for purchase and sale, exchange, option, lease, rental or otherwise and any offer or attempt to list real estate for the purpose of such a disposition, acquisition or transaction, and any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of any disposition, acquisition, transaction, offer or attempt, and the verb “trade” has a corresponding meaning; (“opération”, “mener des opérations”).<sup>187</sup>

or

**“trade”** or **“trading”** includes a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for sale, exchange, option, commercial lease or rental or otherwise and any offer or attempt to list real estate for the purpose of such a disposition or transaction, and any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of any disposition, acquisition, transaction, offer or attempt.<sup>188</sup>

Interestingly, the province of New Brunswick excludes from the definition the information dissemination services offered by a real estate board.<sup>189</sup>

Saskatchewan adds to this definition “property management,” “offer to purchase,” and “holding oneself out as trading in real estate.”<sup>190</sup>

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187 For Ontario, see section 1 of the Ontario *Real Estate and Business Brokers Act*, 2002, SO 2002, c 30, sch. C.

188 For Nova Scotia, see section 2 of Nova Scotia's *Real Estate Trading Act*, SNS 1996, c 28.

189 *Real Estate Agents Act*, RSNB 2011, c 215, s. 1.

190 *Real Estate Act*, SS 1995, c R-1.3 s. 2 (bb).

Alberta has a similar definition, but adds, in addition to property management, collecting certain sums of money.<sup>191</sup>

“(x) **“trade”** includes any of the following:

(vii) collecting, or offering or attempting to collect, on behalf of the owner or other person in charge of real estate, money payable as:

(A) rent for the use of the real estate, or

(B) contributions for the control, management or administration of the real estate;”

The Alberta act also lists acts that do not constitute advertisements for the purpose of the act:

“(2) None of the following constitute an offering, advertisement, listing or showing of real estate for the purposes of subsection (1) (x) (iii):

- the provision of information, forms and signs;
- the creation of a web page to market properties;
- the publication of a list of properties for disposition or acquisition.”  
(our underline)

British Columbia’s definition adds to these definitions a series of concrete actions taken towards such trades:<sup>192</sup>

**“trade in real estate”** means

- a transaction for the purchase or sale of real estate, for the leasing of real estate or for any other form of acquisition or disposition of real estate, or
- a prospective trade in real estate within the meaning of paragraph (a);

**“trading services”** means any of the following services provided to or on behalf of a party to a trade in real estate:

- (a) advising on the appropriate price for the real estate;
- (b) making representations about the real estate;
- (c) finding the real estate for a party to acquire;
- (d) finding a party to acquire the real estate;
- (e) showing the real estate;
- (f) negotiating the price of the real estate or the terms of the trade in real estate;
- (g) presenting offers to dispose of or acquire the real estate;
- (h) receiving deposit money paid in respect of the real estate, but does not include an activity excluded by regulation.”

191 Real Estate Act, RSA 2000, c R-5, s. 1(1) (x).

192 Real Estate Services Act, SBC 2004, c 42, s. 1.

In this, British Columbia's definition is similar to that of Manitoba:<sup>193</sup>

**“transaction”, “transaction in real estate” or “real estate transaction”** means:

- (a) the negotiation for another or others of any trade in real estate wherever situated, or
  - (b) any advertising by a broker, authorized official or salesman, whether of real estate for sale or lease or for real estate to purchase or take on lease, or
  - (c) the showing of real estate for sale or lease to potential purchasers or tenants, or
  - (d) the collection by a broker, authorized official or salesman of rent, mortgage payments or instalments of purchase money payable under a lease, mortgage or agreement for sale of real estate, except real estate of which he is himself the owner, mortgagee or vendor, as the case may be, or
  - (e) the solicitation or obtaining of a listing agreement,
- and includes any conduct, act or negotiation, directly or indirectly, in the furtherance or attempted furtherance of any one or more of the things mentioned in this clause; (« transaction », « transaction de biens immeubles » et « transaction immobilière »)

As for Yukon and Northwest Territories, they use wording very similar to the above:<sup>194</sup>

**“Trade”** means a transaction by sale, purchase, agreement for sale, exchange, option, lease, rental, or otherwise and includes any offer or attempt to list real estate for the purpose of that transaction and any act, advertisement, conduct, or negotiation directly or indirectly in furtherance of such a transaction, offer, or attempt.”

It follows from the above that the definition of real estate transaction in all provinces covers:

- a) sale;
- b) purchase;
- c) lease.

However, the following nuances are observed as to what is specifically included, such as the fact of trading in real estate in the other provinces:

- Negotiation is included in the definition of real estate trade in all jurisdictions (11 provinces and territories);

<sup>193</sup> *Real Estate Brokers Act*, CCSM, c R20, art.1.

<sup>194</sup> *Real Estate Agents Act*, RSY 2002, c 188, s. 1(1) and *Real Estate Agents' Licensing Act*, RSNWT 1988, c 48 s. 1.

- Advertising and advertisements or representations regarding an immovable are included in all jurisdictions examined (11 provinces and territories);<sup>195</sup>
- The offer or listing of real estate property for the purpose of a real estate trade is included in nine provinces and territories (except British Columbia and Manitoba);
- The showing of real estate is specifically included in four provinces (Alberta, British Columbia, Manitoba and Saskatchewan);
- Property management is included in only three provinces (Alberta, Saskatchewan and British Columbia);
- Collecting of certain sums is included in two provinces (Manitoba and Alberta);
- Soliciting or obtaining a real estate agreement is specifically included in two provinces (Alberta and Manitoba);
- Holding oneself out as trading in real estate is specified to be part of a real estate trade in two provinces (Alberta and Saskatchewan);
- Providing advice on the asking price is included in only one province (British Columbia);
- Receiving deposit money paid in respect of the real estate is included in only one province (British Columbia).

Consequently, most provinces define a real estate trade as including:

- Negotiating (11 provinces);
- Advertising and advertisements (10 provinces);
- Offering or attempting to list real estate property for the purpose of a real estate trade (nine provinces).

<sup>195</sup> On this point, it is important to note that in Alberta, the Act states specifically that communicating information, forms or posters, as well as the creation of a website or the publication of a list of properties for sale does not constitute advertising.

# APPENDIX 8

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## Legislation on mortgage brokerage in Canada

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### *Alberta*

- *Real Estate Act*, RSA 2000, c. R-5

### *British Columbia*

- *Mortgage Brokers Act*, RSBC 1996, c 313

### *Manitoba*

- *Mortgage Brokers Act*, CCSM c. M210

### *New Brunswick*

- *Mortgage Brokers Act*, LNB 2014, c. 41 (Will come into force in 2015)

### *Nova Scotia*

- *Mortgage Brokers and Lenders Registration Act*, RS, c. 291

### *Ontario*

- *Mortgage Brokerages, Lenders and Administrators Act, 2006*, SO 2006, c. 29

### *Saskatchewan*

- *Mortgage Brokerages and Mortgage Administrators Act*, SS 2007, c. M-20.1

### *Newfoundland / Labrador*

- *Mortgage Brokers Act*, RSNL 1990, c. M-18

# APPENDIX 9

## List of American states that oversee building inspections

Alabama	Alaska	Arkansas
Arizona	California *no licence required but prohibition of unethical practices	North Carolina
South Carolina	Connecticut	North Dakota
South Dakota	Delaware	Florida
Georgia **no licence required, but presence of some oversight	Illinois	Indiana
Kentucky	Louisiana	Maryland
Massachusetts	Mississippi	New Hampshire
New Jersey	New York	Nevada
Oklahoma	Oregon	Pennsylvania
Rhode Island	Tennessee	Texas
Vermont	Virginia (reserved title)	West Virginia
Washington	Wisconsin	

**NO OVERSIGHT:** Michigan, Minnesota, Missouri, Montana, Nebraska, Colorado, New Mexico, Ohio, Hawaii, Idaho, Iowa, Kansas, Utah, Maine, Wyoming

Source: <http://www.theashschool.com/Home-Inspection-Classes/Requirements-by-State>

# APPENDIX 10

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## List of Canadian provinces and American states that oversee co-ownership management

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### CANADA

#### - ALBERTA

**Legislation:** *Condominium Property Amendment Act, 2014*, Third Session, 28th Legislature, 63 Elizabeth II, 2014 Bill 9, assented to on December 17, 2014, not yet in force

**Organization:** Real Estate Council of Alberta (oversees real estate brokerage)

#### - BRITISH COLUMBIA

**Legislation:** *Real Estate Services Act*, [SBC 2004], c. 42

**Organization:** Real Estate Council of British Columbia (oversees real estate brokerage)

### UNITED STATES

#### - ALASKA

**Legislation:** *Real Estate Commission Statutes and Regulations AS 08.88 and 12 AAC 64*, Section 08.88.171 (f)

**Organization:** Alaska Real Estate Commission (oversees real estate brokerage)

#### - COLORADO

**Legislation:** *Colorado Common Interest Ownership Act* (C.R.S. §38-33.3-101, and seq.) and *Colorado Community Association Manager Licensing Act* (HB13-1277)

**Organization:** Department of Regulatory Agencies - Division of Real Estate (oversees real estate brokerage)

#### - CONNECTICUT

**Legislation:** *Connecticut Statute*, Chapter 400b

**Organization:** Department of Consumer protection (oversees real estate brokerage)

#### - FLORIDA

**Legislation:** *Community Association Management Act* (2014 Florida Statutes, Title XXXII, Chap. 468, Part VIII, (ss. 468.431-468.438))

**Organization:** The Regulatory Council of Community Association Managers

- **GEORGIA**

**Legislation:** *2010 Georgia Code*, Title 43, Chapter 40

**Organization:** The Georgia Real Estate Commission & Appraisers Board (oversees real estate brokerage)

- **ILLINOIS**

**Legislation:** *Illinois Condominium Property Act* (765 ILCS 605, section 18.7) and *Community Association Manager Licensing and Disciplinary Act* (225 ILCS 427)

**Organization:** Illinois Department of Financial and Professional Regulation (oversees real estate brokerage)

- **NEVADA**

**Legislation:** *Common-Interest Ownership Uniform Act* (NRS 116) and *Common-Interest*

**Communities:** *Regulation of Community Managers and Other Personnel* (NRS 116A)

**Organization:** Nevada Commission for Common-Interest Communities

- **VIRGINIA**

**Legislation:** *Code of Virginia*, Title 54.1, Chapter 23.3

**Organization:** The Common Interest Community Board







