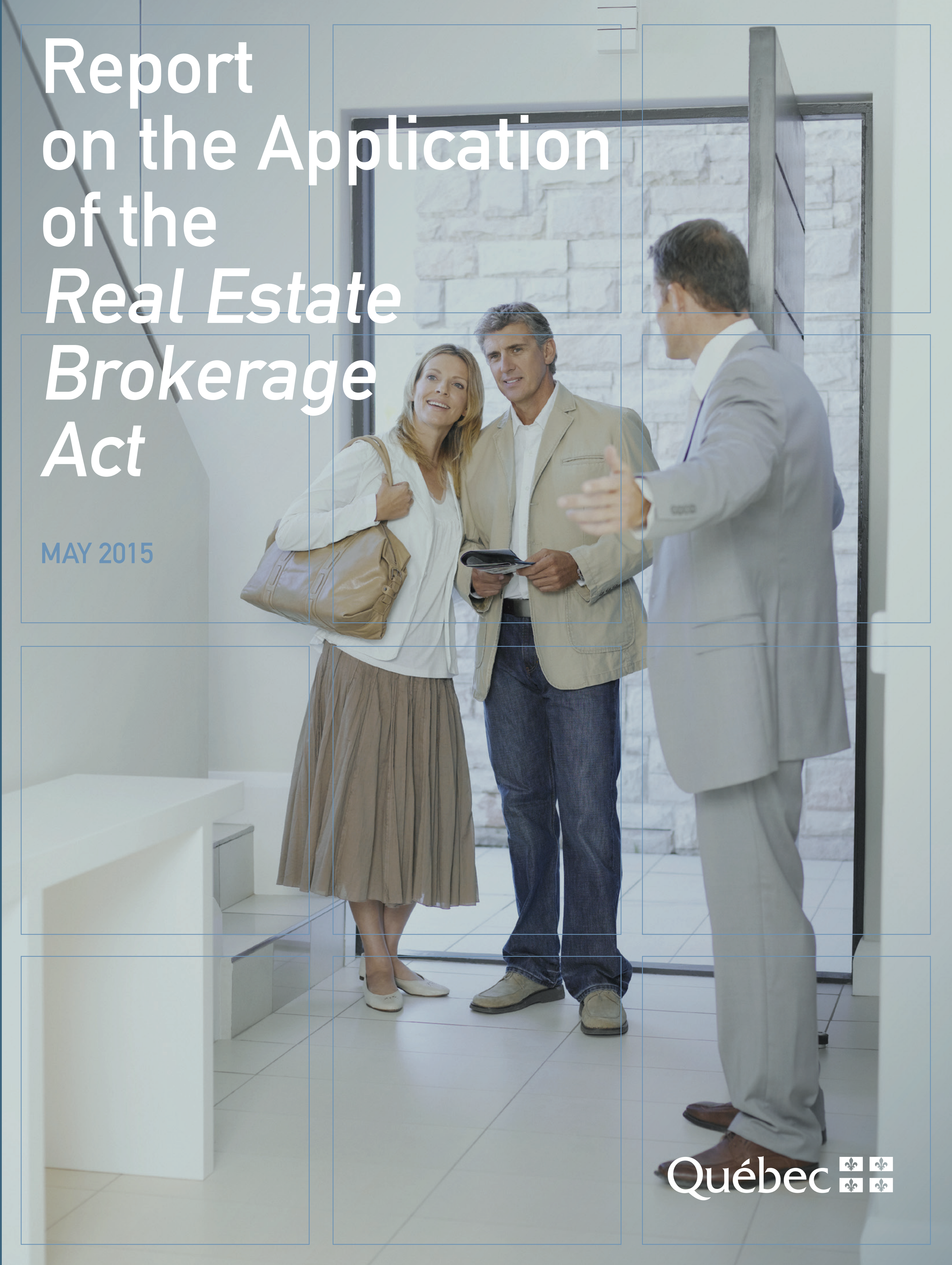
Report on the Application of the *Real Estate Brokerage Act*

MAY 2015



Québec

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MAY 2015

Finances Québec

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Mr. Jacques Chagnon
President of the National Assembly
Parliament Building
Québec (Québec) G1A 1A4

Dear Mr. Chagnon:

In accordance with section 160 of the *Real Estate Brokerage Act* (CQLR, chapter C-73.2), I am pleased to send you the *Report on the Application of the Real Estate Brokerage Act*, for tabling in the National Assembly.

Sincerely,

Carlos Leitão
Minister of Finance
May 2015

MESSAGE FROM THE MINISTER

For most people, the sale and purchase of a property is the most important transaction of their life. People who hire a broker to look after all of the details of the transaction need to be sure the broker is competent and honest. That is the objective of the Real Estate Brokerage Act*. The current act was passed in 2008 and came into force on May 1, 2010. It grew out of a major reform of real estate brokerage and mortgage brokerage law undertaken to better protect the public and ease the regulatory burden.*

This report is intended as a tool for reflection with a view to examining the current legal framework governing real estate and mortgage brokerage, in order to continue to protect the Québec public and maintain its trust in brokerage industry players. I therefore invite industry professionals and any other interested persons to comment on the issues presented in this report and share with me their opinions, as well as any proposals they may have.

Carlos Leitão
Minister of Finance

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INTRODUCTION

Real estate transactions, whether residential or commercial, are a big part of the economy. A house represents approximately one-third of the total value of a family's assets.[1] In comparison, pension plans represent a little under one-third of total assets.

In most cases, the sale or purchase of an immovable property, generally a home, requires several brokers to work together. In addition, buyers are increasingly using the services of a mortgage broker to obtain, from a financial institution, a loan secured by immovable hypothec.

The vast majority of real estate brokers are members of a real estate board. Membership gives them access to the Centris real estate database, the largest such database in Québec. On May 27, 2015, 111 765 properties were listed (compared to 104 875 in May 2014). In 2014, 70 686 residences listed on Centris were sold or bought in Québec.[2]

Every real estate transaction generally requires the participation of several other professionals, including a building inspector and a notary. It is therefore paramount that this important industry be appropriately regulated in order to protect the public and maintain its trust. The *Real Estate Brokerage Act* (CQLR, chapter C-73.2) (the Act) is a key element of that regulation. The purpose of the Act is to protect the public by regulating and overseeing persons and businesses carrying out real estate or mortgage brokerage transactions. This entails providing for, among other things, career entry standards, additional training standards, a code of ethics and disciplinary measures for fault. The Act established the Organisme d'autoréglementation du courtage immobilier du Québec (OACIQ), which is charged with regulating and overseeing licence holders.

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1 STATISTICS CANADA, *Survey of Financial Security, 2012*.

2 FÉDÉRATION DES CHAMBRES IMMOBILIÈRES DU QUÉBEC, *Québec's Residential Real Estate Market: Return to Growth in 2015*, [press release], January 15, 2015.

Purpose of this report

The *Report on the Application of the Real Estate Brokerage Act* seeks to ascertain to what extent the Act continues to satisfy the needs of the public and the brokerage industry and, if necessary, to propose improvements.

The report is divided into three chapters. Chapter 1 gives an overview of the real estate and mortgage brokerage industry and its regulation. Chapter 2 discusses the 2008 reform and changes in the industry since then. Chapter 3 deals with the future of regulation.

CHAPTER 1

OVERVIEW OF THE REGULATION OF THE INDUSTRY

The Organisme d’autoréglementation du courtage immobilier du Québec

The Organisme d’autoréglementation du courtage immobilier du Québec (OACIQ) exercises powers delegated legislatively to it by the state. It is a legal person of public law whose sole mission is to protect the public in real estate and mortgage brokerage dealings. The OACIQ must therefore ensure the quality of brokerage services offered by licence holders. Its functions include adopting regulations, inspecting brokers and agencies, addressing the public’s assistance needs and ensuring discipline among licence holders.

Thus, the OACIQ makes certain that the public receives good service in its dealings with real estate brokers, mortgage brokers, real estate agencies and mortgage agencies. The OACIQ is responsible for receiving and examining complaints from consumers, assisting consumers, guiding them through the system when they take steps against a broker, and directing them, sometimes forwarding their file, to the proper services, such as mediation, arbitration, compensation and the syndic.

Brokers and agencies have an obligation to, among other things, act honestly and competently. If a serious allegation of non-performance of their obligations is levelled against them, the sydic investigates and, where applicable, lodges a complaint with the discipline committee.

As indicated by its name, the OACIQ is a self-regulating body. Self-regulation is based on the principle that the professionals of a particular industry are willing to comply with standards of practice and conduct that will protect the public with whom they do business, so as to maintain the public’s confidence in their industry. Often, the industry even goes so far as to set up a compensation fund for victims of fraud committed by professionals. Québec’s real estate brokerage industry set up such a fund, with the OACIQ. This, too, helps to preserve the public’s trust.

One of the advantages of self-regulation is that it puts the specialized skills of industry professionals to work for the public. Another advantage is that it is funded by the industry itself. However, criticism is regularly levelled at self-regulation, in part because of an appearance of conflict of interest.

The OACIQ is administered by a board of 13 directors. Ten of the directors are brokers elected by licence holders, while the other three are appointed by the Minister of Finance. All of these persons, whether brokers or not, must ensure that the OACIQ's mission—to protect the public in real estate and mortgage brokerage dealings—is carried out.

The OACIQ is funded essentially out of the fees paid by licence holders, namely, brokers and agencies. The OACIQ's funds are not private funds. They are public in nature, like those of the state. Accordingly, the funds must be used solely to carry out the OACIQ's mission.

Managed by the OACIQ, the Real Estate Indemnity Fund is dedicated to the payment of indemnities to victims of fraud committed by a broker or agency. An indemnity committee rules on the eligibility of claims before indemnities are paid.

Established by the OACIQ, the Fonds d'assurance responsabilité professionnelle du courtage immobilier du Québec (FARCIQ) aims primarily to protect the assets of brokers and agencies in the event of fault. Thus, where a court or an arbitrator finds that a broker or agency committed a fault causing damage, the victim will be compensated through the FARCIQ, not by means of property belonging to the broker or agency. The FARCIQ protects the public subsidiarily, the public being compensated even if the broker or agency becomes insolvent or cannot be found. The FARCIQ is administered by a board of directors separate from that of the OACIQ.

Brokers and agencies

To obtain a broker's licence, a person must successfully complete a training program recognized by the OACIQ and pass the OACIQ exam.

Licence holders are real estate brokers, mortgage brokers, real estate agencies and mortgage agencies. Agencies engage in brokerage transactions through the intermediary of one or more brokers. The vast majority of brokers carry out their activities in an agency.

As intermediaries, real estate brokers and agencies offer a type of partnership to people who do not want to look after selling their house themselves. The broker provides all of the services subsidiary to the sale and advises the seller on the asking-price strategy to be adopted, acts on behalf of the seller in dealing with prospective buyers and advises the seller on the offers to purchase received. Most sellers go through a broker. Generally, the seller pays the broker a commission calculated as a percentage of the value of the sale.

Mortgage brokers and agencies determine which financial institution will give consumers and businesses a loan in line with their needs. Consumers do not have to pay for this service, because the broker's or agency's remuneration is generally covered by the lending institution.

TABLE 1

NUMBER OF BROKERS AND AGENCIES
As at December 31, 2014

Real estate brokers	14 887
Mortgage brokers	609
Real estate agencies	1262
Mortgage agencies	44

Source: Organisme d'autoréglementation du courtage immobilier du Québec and Fonds d'assurance responsabilité professionnelle du courtage immobilier du Québec, *Annual Reports 2014 – For a Dynamic and Forward-looking Profession Focused on Public Protection*, 2015.

The number of real estate brokers and agencies fell slightly in 2014, while that of mortgage brokers rose. The number of mortgage agencies remained stable.

TABLE 2
FRANCHISE
As at December 31, 2014

Franchised agencies	427
Non-franchised agencies	879
Brokers using a franchise	9463
Brokers not using a franchise	6033

Source: Organisme d'autoréglementation du courtage immobilier du Québec and Fonds d'assurance responsabilité professionnelle du courtage immobilier du Québec, *Annual Reports 2014 – For a Dynamic and Forward-looking Profession Focused on Public Protection*, 2015.

The real estate boards and their federation

While the OACIQ's mission consists in protecting the public in real estate and mortgage brokerage dealings, that of the real estate boards and their federation—the Fédération des chambres immobilières du Québec (FCIQ)—focuses instead on defending and promoting the socioeconomic interests of real estate brokers.

The FCIQ administers the largest real estate listings website, called Centris.

The real estate boards and their federation offer various services to their members, such as training and arbitration activities. They also promote brokerage services through advertising.

CHAPTER 2

THE 2008 REFORM AND SUBSEQUENT CHANGES IN THE BROKERAGE INDUSTRY

The 2008 reform

The existing *Real Estate Brokerage Act*, which came into force on May 1, 2010, was the result of a thorough review of real estate brokerage law, both the statute and the regulations. It was preceded by three major documents:

- a document of the Association des courtiers et agents immobiliers du Québec (ACAIQ), which became the OACIQ under the new statute, entitled *Fully Responsible Real Estate Brokers: For Greater Protection of the Public – Review of the Real Estate Brokerage Act* (November 2000);

- *Report on the Application of the Real Estate Brokerage Act* (June 2004);

- *Rapport du Comité de députés constitué par le ministre des Finances relativement au droit du courtage immobilier* (November 2006).

During the review, the Office des professions du Québec examined the possibility of the ACAIQ's forming a professional order. The Office found that the profession of broker did not meet the criteria in the *Professional Code*.

The reform brought in many changes. One of them was the conversion of the OACIQ's principal mission—to protect the public in real estate and mortgage brokerage dealings—to an exclusive mission as of May 2010. That change was made further to a recommandation of the MNA committee, with a view to putting more emphasis on protecting the public by clarifying the OACIQ's role in relation to that of the real estate chambers and their federation. The OACIQ was now charged exclusively with protecting the public, thus leaving the roles of defence and promotion of the brokers' socioeconomic interests to the real estate boards and their federation. All regulatory powers were entrusted to the OACIQ, whereas they had previously been held in part by the ACAIQ and the government.

Agencies and brokers ceased to be members of the ACAIQ and became holders of licences issued by the OACIQ.

The term “real estate agent” was dropped, with “real estate broker” becoming the sole term used for natural persons. Brokerage enterprises became agencies.

The Real Estate Indemnity Fund, which was established as a separate legal person, was incorporated into the OACIQ.

In short, the ACAIQ was replaced by the OACIQ, which acquired several new powers.

Changes in the brokerage industry since 2008

The 2004 *Report on the Application of the Real Estate Act* emphasized that new technologies, including the Internet, were already transforming certain aspects of the practice of real estate and mortgage brokerage, primarily the listing of properties for sale.

In that regard, the real estate brokerage industry had a leg up on the real estate market, because of the real estate listing system, which now goes by the name of Centris. At the time, the system could be used solely by members. Thus, it gave brokers a considerable competitive edge, since they were the only ones who could access its mass of information on property listings. The Internet enabled the public to share real estate information directly.

The brokerage industry is greatly influenced by the situation of the real estate market. For example, real estate prices rose much more rapidly than the cost of living in general over the past 15 years.[3] This increase in prices is reflected in a nearly proportionate rise in brokers’ commissions, which probably fostered a substantial increase in the number of brokers. The number of brokers doubled between 1997 and 2012.

[3] Brian Peterson and Yi Zheng, “Medium-Term Fluctuations in Canadian House Prices,” *Bank of Canada Review*, Winter 2011-2012, pp. 30-42.

TABLE 3

NUMBER OF BROKERS

Year (as at January 1)	Number of brokers (natural persons)
1997	8309
1998	8743
2005	13 659
2006	13 735
2012	16 928
2013	16 100
2014	15 461
2015	14 887

Source: Organisme d'autoréglementation du courtage immobilier du Québec and Fonds d'assurance responsabilité professionnelle du courtage immobilier du Québec, *Annual Reports 2014 – For a Dynamic and Forward-looking Profession Focused on Public Protection*, 2015.

In recent years, the rise in commissions has likely contributed to a slight decrease in the number of residential sales through a broker.

TABLE 4

RESIDENTIAL SALES THROUGH A BROKER

Year	Number of residential sales (Centris)
2009	79 185
2010	80 126
2011	77 258
2012	77 463
2013	71 265
2014	70 686

Source: Fédération des chambres immobilières du Québec, annual press releases on the previous year's sales.

New needs in real estate services have also fostered the development of companies that help owners sell their properties, the best-known being DuProprio.

Direct sales by owners have always competed with sales by brokers. However, companies that help owners sell on their own—for-sale-by-owner (FSBO) companies—have certainly fostered that competition by facilitating the owner-seller's job. In fact, such companies are increasingly present in real estate transactions, even though real estate brokers and agencies still hold the lion's share of the market.

The brokerage industry, with the support of the OACIQ, is waging an intense media battle against FSBO companies to preserve its market share.

Legislative changes since 2008

The *Real Estate Brokerage Act* has been amended a few times since it was passed in 2008. It was first amended in 2009 (S.Q. 2009, chapter 58), just before it took force, so that a few adjustments could be made.

It was amended again, in 2010 (S.Q. 2010, chapter 40), to allow real estate brokers to be constituted as legal persons for tax planning purposes, if they so desire. Lastly, it was amended in 2013 (S.Q. 2013, chapter 18) to clarify certain provisions about remuneration claimed or received for a brokerage transaction, allow the OACIQ to serve as arbitrator in the event of a dispute between a consumer and a broker, and set forth the appeal procedure with respect to decisions by the OACIQ.

CHAPTER 3

THE FUTURE OF REGULATION

The notion of brokerage

The purpose of the Act is to regulate real estate brokerage, that is, the function of intermediary played by brokers. Why regulate this function in particular and allow only brokers to perform it? Because, by dealing with a broker, sellers rely solely on another person to "succeed" in selling their property. Sellers trust that, by dealing with a broker, they will obtain a fair price for their property and the transaction will be carried out without them having to worry about administrative and legal considerations. Thus, the broker bears the burden of the sale and, in exchange, normally receives a commission paid out of the selling price. Conversely, people who decide to sell their property on their own understand that the price they obtain will be one they manage to negotiate and that they are fully responsible for complying with legal requirements.

The difference between the two ways of selling property is fundamental and relatively easy to recognize: In one case, the sale is made through a broker; in the other, the sale is made by the owner. On the one hand, a commission is generally paid to the broker; on the other, no commission is paid. So, just as important to protecting the public is making sure that there is no ambiguity as to the broker's responsibilities: The broker's job is to advise the client on the asking price, make sure legal obligations are met and lead negotiations with the prospective buyers. The broker also looks after listing the property.

The scope of the Act is therefore defined by the very nature of the relationship between the seller and the broker who is given the mandate to sell the property. By allowing only brokers to engage in the act of brokerage, the Act ensures that the seller enters into such a relationship only with a broker. In a sense, the broker becomes the seller's partner. Their interests are intertwined, as the broker's only remuneration is generally paid out of the proceeds of the sale. The scope of the Act cannot easily be delimited by the services performed by brokers, which can vary depending on the circumstances.

The Act does not precisely define what brokerage is, and the question comes up regularly. However, the brokerage industry, through the

OACIQ, defined brokerage practices, that is, all of the obligations brokers must meet in selling a client's property. Today, the industry notes that a number of the acts performed by brokers under their mandate are now carried out, in the form of FSBO services, by persons who are not brokers. The industry sees this state of affairs as an encroachment on the exclusive scope of practice of brokers.

It is true that, under a brokerage mandate, brokers provide several of the services delivered by FSBO companies. They take photographs, advertise offers of sale in various ways, provide forms, and so forth. FSBO companies are covered by legal provisions that protect people with whom they enter into a contract. Such provisions include those dealing with contracts for services in the *Civil Code of Québec* (ss. 2098 *et seq.*) and the general provisions governing all contracts. Lastly, to the extent that these companies are not real estate agencies, and depending on the nature of the services offered, a number of provisions, such as the general provisions governing contracts regarding goods and services (ss. 8 to 22.1) and the business practices provisions (ss. 215 to 253) of the *Consumer Protection Act*, may apply. These provisions protect consumers from, for example, misleading advertising.

QUESTIONS

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

The function of adviser

Advice has become a highly important aspect of business. Providing advice is one of the most common ways of attracting clients and building client loyalty. Advisers help clients ascertain their needs in keeping with their means. As advisers, brokers must help their clients make the best choices. Advice in and of itself is not a brokerage act, but it is part of the actions taken by brokers in carrying out their mandate.

QUESTIONS

- 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?

Ad hoc services

There has been much discussion around the issue of whether real estate brokers should be allowed to offer ad hoc services. In other words, should brokers be allowed to offer advisory or assistance services for only part of the process of selling or buying an immovable property? For example, brokers could be remunerated to assist a buyer in drafting an offer to buy.

To dispel any confusion, it is paramount for the public to be able to distinguish clearly between the level of services and protection it will obtain from FSBO services, in the case of sellers who wish to sell their property on their own, and from brokerage services, in the case of sellers who want someone else to look after selling their property.

QUESTION

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

For-sale-by-owner (FSBO) companies

FSBO companies offer services that, given their growing popularity, appeal to owners who feel comfortable enough about selling their property themselves, with some assistance, while people who want to be involved as little as possible in the sale of their property can use the services of a broker.

Consumers who partner with an FSBO company can bring an action against the company if they suffer prejudice as a result of a fault by an employee of the company. The services that may be delivered by professionals (e.g. legal advice) in an FSBO company are covered by the *Professional Code*.

Should the scope of the Act be broadened to cover not only brokerage, but also other services relating to real estate transactions?

Should clients of FSBO companies, like clients of brokers and agencies, have access to an indemnity fund (in cases of fraud), a liability insurance fund, a syndic and a discipline committee? Should people working for FSBO companies have basic training, take an exam and hold a licence?

Would broadening the Act in this way require the OACIQ to become a regulatory body?

QUESTIONS

- 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?

The regulatory body and governance

Self-regulation has its advantages, but it also has its limits. This is especially true when the industry that is self-regulating is in competition with other industries. It then becomes important for the industry to defend its market shares. The self-regulating industry then faces a lot of pressure to defend the interests of industry professionals against their competitors.

Thus, despite its mission, which is restricted to protecting the public, the OACIQ is perceived, especially by brokers themselves, as a body mandated to defend the business interests of brokers and agencies, with the result that its role in this respect melds with that of the real estate boards and their federation.

Several factors explain this perception, including:

- the control exercised over the OACIQ by industry professionals;
- the ads paid for by the OACIQ to discourage owners from selling their property themselves, which take indirect aim at FSBO companies competing with them on the real estate services market;
- the offer of services to brokers;
- the resources allocated to activities other than the regulation of brokers.

To ensure that the public continues to trust in real estate brokerage's regulatory framework, these perceptions must be changed. The OACIQ is unlikely to succeed in effecting such change on its own, since brokers will probably face even stronger competition in the years to come.

One option would be to substantially reduce, or even terminate, industry professionals' control over the regulatory body. Brokers could perhaps represent only a minority on the board of directors.

Another option: The OACIQ could henceforward be run solely by a president and chief executive officer appointed by the government, according to the model of the Autorité des marchés financiers. In this case, committees comprised primarily of brokers could provide the regulatory body with the expertise it needs to adopt regulations and maintain the principle of peer discipline.

Short of transforming the OACIQ's governance model, another option would be to limit, in the Act, the OACIQ's activities strictly to the functions involved in regulating brokers and agencies: regulations, the issuance of licences, public assistance, oversight, mediation and arbitration, discipline and compensation. The OACIQ would be prohibited from carrying out all other activities, such as providing services to brokers and engaging in promotional advertising.

The industry would have to create another body or entrust these functions to the real estate boards and their federation.

QUESTIONS

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

CONCLUSION

The application of the *Real Estate Brokerage Act* was examined with one main concern in mind: How can the public interest be better served while meeting the challenges of the real estate brokerage industry?

This report deals particularly with the main issues of the day, it being understood that certain, more technical, aspects of the Act will also be considered in conjunction with a legislative review. Discussions will only be more relevant.

These issues must be dealt with openly. It is essential for the legislation to be adapted in light of the new realities. Ignoring them will not make the consequences go away.

The real estate brokerage industry is at a crossroads. There will always be owners who do not want to sell their house themselves. There will always be others who want to. Brokerage services will always be needed, and it is important to ensure that they will always be available. Does the future of the brokerage industry lie with brokers who offer a turnkey service or with licence holders who offer a variety of services, from the installation of a sign to a turnkey service?

Is the industry ready to support legislative amendments, in particular respecting the nature of the regulatory body, that would refocus it on its exclusive mission of protecting the public? Is it ready to rely only on the real estate boards and their federaltion to defend and promote their socioeconomic interests? Would not amendments in this regard increase the public’s trust in the regulatory body?

The time has come to discuss these questions.

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