

# **BRIEF**

## **BILL NO. 24**

October 2011

### **AN ACT MAINLY TO COMBAT CONSUMER DEBT OVERLOAD AND MODERNIZE CONSUMER CREDIT RULES**

Presented to the Committee on Citizen Relations by



**Brief of the OACIQ**

**Bill No. 24**

Act mainly to combat consumer debt overload and modernize consumer credit rules

October 2011

**MEMBERS OF THE BOARD OF DIRECTORS**

Elected Chairman of the Board

Serge Brousseau

Elected Directors

Louis Cayer

Richard Dion

Hélène Lavoie

Daniel Pelchat

Johanne Roy

Bernard Savard

Carole Strasbourg

Directors appointed

by Minister of Finance

Pierre Carrier

Nathalie Ebnoether

Claude Rousseau

President and Chief Executive Officer

Robert Nadeau

Secretary appointed by the Board

Claude Barsalou

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## **THE OACIQ, AN ORGANIZATION WITH THE MISSION OF PROTECTING THE PUBLIC**

The *Organisme d'autoréglementation du courtage immobilier du Québec* (hereinafter called OACIQ) was created by the Real Estate Brokerage Act (R.S.Q., c. C-73.2) that came into force on May 1, 2010 and oversee the administration of this Act. The OACIQ succeeds the *Association des courtiers et agents immobiliers du Québec* (ACAIQ) which was responsible for administering the old Real Estate Brokerage Act (R.S.Q., c. C-73.1). The OACIQ reports to the Minister of Finance of Quebec and is run by a Board of Directors composed of eleven directors.<sup>1</sup>

In Quebec, every person or partnership that engages in real estate brokerage transactions or in brokerage relating to a loan secured by immovable hypothec (hereinafter referred to as "mortgage brokerage" must, with few exceptions, be holder of a licence issued by the OACIQ. The latter oversees more than 18,500 licence holders – agencies, real estate and mortgage brokers.

The OACIQ's main mission is to protect the public in the mortgage brokerage field by applying the rules of ethics and conducting broker's and agency inspection, making sure that their activities are carried out in accordance with the Real Estate Brokerage Act.<sup>2</sup> In Quebec, the supervision of the real estate and mortgage brokerage is modeled on that of professional orders. In fact, the Real Estate Brokerage Act originates at the same time from the professional Law and consumer Law.

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<sup>1</sup> Eight directors are elected among licence holders and three, who are not brokers nor directors or agency executive officers, are appointed by the Minister of Finance of Quebec (section 58 of the Real Estate Brokerage Act).

<sup>2</sup> Section 32 of the Real Estate Brokerage Act.

## THE REAL ESTATE AND MORTGAGE BROKERAGE SUPERVISION

For many years, the real estate and mortgage brokerage has been supervised by three successive real estate brokerage Acts.<sup>3</sup> In 2008, with the adoption of the current Real Estate Brokerage Act and, in 2010, with its coming into force along with the regulations relating thereto, the legislator has chosen to recognize specifically the supervision of persons and partnerships engaged in mortgage brokerage activities.<sup>4</sup>

The Real Estate Brokerage Act defines its scope as follows:

- “1. This Act applies to any person or partnership that, for others and in return for remuneration, engages in a brokerage transaction relating to*
- (1) the purchase or sale of immovable property, a promise to purchase or sell immovable property, or the purchase or sale of such a promise;*
  - (2) the lease of immovable property, when the person or partnership acting as an intermediary carries on an enterprise in that field;*
  - (3) the exchange of immovable property;*
  - (4) a loan secured by immovable hypothec; or*
  - (5) the purchase or sale of an enterprise, a promise to purchase or sell an enterprise, or the purchase or sale of such a promise, under a single contract, if the enterprise’s property, according to its market value, consists mainly of immovable property.*
- (...)”*

It also provides for a specific licence for persons or partnerships that engage only in mortgage brokerage activities:

- “4. Subject to sections 2 and 3 and special authorizations from the real estate self-regulatory organization known as the Organisme d’auto-réglementation du courtage immobilier du Québec (the “Organization”), no person except the holder of a broker’s licence issued by the Organization may act as or purport to be a real estate or mortgage broker.*

*A real estate broker is a natural person who engages in a brokerage transaction described in section 1.*

*A mortgage broker is a natural person who engages exclusively in brokerage transactions relating to loans secured by immovable hypothec.*

*A person who contravenes this section may not claim or receive remuneration for services rendered.”*

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<sup>3</sup> Chapter C-73 of Revised Statutes of Québec, adopted in 1962, chapter C-73.1, adopted in 1991 and entered into force essentially in 1994, and chapter C-73.2.

<sup>4</sup> Also see sections 47 to 60 of the Regulation respecting brokerage requirements, professional conduct of brokers and advertising R.R.Q., c. C-73.2, r.1.

***“13. Subject to sections 2 and 3 and special authorizations from the Organization, no person or partnership except the holder of an agency licence issued by the Organization may act as or purport to be a real estate or mortgage broker agency.***

*A real estate agency is a person or partnership that engages in brokerage transactions described in section 1 through the intermediary of one or more brokers licensed by the Organization.*

*A mortgage broker agency is a person or partnership that, through the intermediary of one or more mortgage brokers, engages exclusively in brokerage transactions relating to loans secured by immovable hypothec.”*

Furthermore, many provisions of the Real Estate Brokerage Act and its regulations are directly inspired by the Consumer Protection Act (R.S.Q., c. P-40.1) and have as objective to rebalance the contractual relationships between licence holders and the persons who retain their services.

The other provisions of the Act, without getting directly involved in the relationships between licence holders and consumers, contribute to the protection of consumers by imposing obligations and standards to improve the quality of services rendered by licence holders. The provisions related to the control of illegal practice of broker's or agency activities also aim at ensuring a better protection of public.

In addition to its role concerning the application of the Real Estate Brokerage Act, the OACIQ is given broad regulatory powers allowing it to adopt, both in terms of real estate and mortgage brokerage, rules which, by their nature, participate in protecting consumers. Among these provisions, we find:

- The existence of profession entry requirements and licence maintenance requirements (criteria for issuing and maintaining a licence, initial or additional examination and training) aiming at ensuring a consistency of skills and knowledge among licence holders as well as the integrity of these latter.<sup>5</sup>
- The obligation for all licence holders to pay the liability insurance premium determined by the OACIQ and the existence of the *Fonds d'assurance responsabilité du courtage immobilier du Québec* (FARCIQ);<sup>6</sup>
- The obligation for all licence holders to pay the contribution to the Real Estate Indemnity Fund, which is responsible for payment of indemnities to victims of fraud, fraudulent tactics or misappropriation of funds caused by a licence holder;<sup>7</sup>

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<sup>5</sup> Sections 5 and 14 of the Real Estate Brokerage Act and Regulation respecting the issue of brokers and agency licences, R.R.Q., c. C-73.2, r.3. The related regulatory powers are provided in sections 7, 9, 42, 44.1, 46 par. 1° à 3° of the Act.

<sup>6</sup> Sections 8 and 17 of the Real Estate Brokerage Act and section 17 of the Regulation respecting the Real Estate Indemnity Fund and determination of the professional liability insurance premium, R.R.Q., c. C-73.2, r.5. The related regulatory powers are provided in sections 8, 17 and 52 of the Act.

<sup>7</sup> Sections 108 and followings of the Real Estate Brokerage Act and sections 1 to 16 of the Regulation respecting the Real Estate Indemnity Fund and determination of the professional liability insurance premium. The related regulatory powers are provided in sections 46 par. 15° to 17°, 106, 107 and 109 of the Act.

- The obligation for a broker to deposit in a trust account any amount of money that he or she receives in the course of his or her functions.<sup>8</sup>
- The existence of rules concerning representation and advertising made by licence holders;<sup>9</sup>
- The existence of rules relating to the form and to the terms and conditions of use of contracts and forms used by licence holders, and the mandatory, prohibited and intention supplement particulars or stipulations contained in such contracts and forms;<sup>10</sup>
- The existence of rules relating to the requirements to be met in order to engage in a real estate or mortgage brokerage transaction, particularly in terms of disclosure and conflict of interest.<sup>11</sup>
- The existence of professional conduct rules applicable to licence holders, notably regarding the duty to provide information to the parties engaged in a transaction;<sup>12</sup>
- Overseeing the activities of brokers and agencies by various bodies, including the syndic, discipline committee and the inspection committee of the OACIQ, which have been given the powers of an investigation commissioner;<sup>13</sup>
- The existence of penal provisions allowing the OACIQ to prosecute any person who practices broker's or agency activities illegally.<sup>14</sup>

In addition to the above, it is also important to note that the OACIQ may, for the purpose of any regulation it adopts, establish special or additional rules for real estate and mortgage brokers and agencies.<sup>15</sup>

The legislative and regulatory corpus relating to real estate and mortgage brokerage shows that Quebec benefits in these fields from a specific, specialized and integrated supervision, of which the cornerstone is the protection of public by overseeing the activities of real estate and mortgage brokers and agencies.

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<sup>8</sup> Section 10 of the Real Estate Brokerage Act and section 24 and followings of the Regulation respecting records, books and registers, trust accounting and inspection of brokers and agencies, R.R.Q., c. C-73.2, r.4. The related regulatory powers are provided in sections 10, 46 par. 10° and 10.1° and 47 of the Act.

<sup>9</sup> Sections 21 and 22 of the Real Estate Brokerage Act and section 110 and followings of the Regulation respecting brokerage requirements, professional conduct of brokers and advertising. The related regulatory powers are provided in sections 21 and 22 of the Act.

<sup>10</sup> Regulation respecting contracts and forms, R.R.Q., c. C-73.2, r.2. The related regulatory powers are provided in sections 26 and 46 par. 13° of the Act.

<sup>11</sup> Regulation respecting brokerage requirements, professional conduct of brokers and advertising. The related regulatory powers are provided in sections 7 and 46 par. 8° of the Act.

<sup>12</sup> Id. The related regulatory powers are provided in sections 46 par. 5° of the Act.

<sup>13</sup> Section 45 and followings of the Regulation respecting records, books and registers, trust accounting and inspection of brokers and agencies, and the Regulation respecting disciplinary proceedings of the *Organisme d'autorégulation du courtage immobilier du Québec*, R.R.Q., c. C-73.2, r.6. The related regulatory powers are provided in sections 76, 82, 90 and 95 of the Act.

<sup>14</sup> Section 124 and followings of the Real Estate Brokerage Act.

<sup>15</sup> Section 49 of the Real Estate Brokerage Act.

## RECOMMENDATIONS

Subjecting mortgage brokers and agencies to Consumer Protection Act is the recommendation that the OACIQ would like to make.

### Rules relating to loan brokers

The Act mainly to combat consumer debt overload and modernize consumer credit rules (Bill No. 24) introduces special rules concerning loan brokers. The Loan broker is defined as follows:

*“(e.2) “loan broker” means a person other than a member of a professional order governed by the Professional Code (chapter C-26) who, for the purposes of a credit contract, acts as an intermediary between a consumer and a person willing to advance money;”<sup>16</sup>*

However, acting as an intermediary between a borrower and a lender regarding a loan secured by immovable hypothec constitutes a brokerage transaction governed by the Real Estate Brokerage Act.

Considering the specific system of supervision described above to which persons and partnerships engaged in mortgage brokerage activities are subject (whether they are brokers or real estate agencies or brokers or mortgage agencies), the OACIQ submits a proposal to the members of the Committee on Citizen Relations stating that it would be appropriate to provide, like members of professional orders, that the definition “loan broker” should not be applicable to them. Thus, the OACIQ recommends an amendment of section 1 of the Bill No. 24 in order to be read as follows:

*“ 1. Section 1 of the Consumer Protection Act (R.S.Q., chapter P-40.1) is amended by inserting, after paragraph e.1, the following:*

*“(e.2) “loan broker” means a person other than a member of a professional order governed by the Professional Code (chapter C-26) or a holder of a licence issued by the Organisme d’autoréglementation du courtage immobilier du Québec under the Real Estate Brokerage Act (chapter C-73.2) who, for the purposes of a credit contract, acts as an intermediary between a consumer and a person willing to advance money;”*

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<sup>16</sup> Article 1 du projet de loi n°24.

### **Removal of transactions governed by the Real Estate Brokerage Act**

More broadly, and for the same reasons, the OACIQ also submits a proposal stating that it would be appropriate to remove the transactions governed by the Real Estate Brokerage Act concerning mortgage brokerage from the application of the Consumer Protection Act. Insofar as real estate brokers or agencies already benefit from an exception under sections 6 and 6.1 of the Consumer Protection Act, the proposed amendment would have the effect of preserving the principle of supervision of activities of real estate and mortgage brokers and agencies by one Organization, the OACIQ.

The development and tightening of supervision of mortgage brokerage sector support such amendment. With respect to the expertise of Consumer Protection Office, we believe that the specific system of supervision from which this sector already benefits and the OACIQ's specialization in this field justify that the activities of mortgage brokers and agencies should only be governed by the Real Estate Brokerage Act. This Act provides a supervision which is more comprehensive and better suited to mortgage brokerage reality. By its proximity to industry, mortgage brokerage is more likely to follow the development adequately and respond in a timely fashion to practices susceptible to compromise consumers' protection. These advantages are inherent in the self-regulatory model adopted by Quebec legislator and in which the participation of licence holders within various bodies of the OACIQ is provided, notably in various committees in charge of overseeing the activities of brokers and agencies.

Furthermore, by centralizing the supervision of this sector within one organization, consumers would be offered a single window where they can address their questions relating to mortgage brokerage or with which they can file a complaint against a mortgage broker or agency.

This centralization would also benefit brokers and agencies since it would avoid duplication of rules to which their activities are subject. This simplification would ensure a better legislative and regulatory compliance from brokers and agencies. This would ultimately contribute to a better consumer protection. The financial burden, resulting from double supervision and which brokers and agencies may have to bear, would also be reduced.

To implement this recommendation, the OACIQ proposes:

- To amend section 6 of the Consumer Protection Act to insert a paragraph which would read as follows :

*"a brokerage transaction by a broker or an agency governed by the Real Estate Brokerage Act (chapter C-73.2)";*

and

- To delete from section 6.1 of the Consumer Protection Act the following words :

*"to the acts of a broker or his agent governed by the Real Estate Brokerage Act (chapter 73.1) or"*



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