



BILL NO. 63

Government Bill

*2nd Session, 61st General Assembly
Nova Scotia
59 Elizabeth II, 2010*

An Act to Amend Chapter 28 of the Acts of 2004, the Legal Profession Act

CHAPTER 56
ACTS OF 2010

**AS ASSENTED TO BY THE LIEUTENANT GOVERNOR
DECEMBER 10, 2010**

The Honourable Ross Landry
Minister of Justice

*Halifax, Nova Scotia
Printed by Authority of the Speaker of the House of Assembly*

This page is intentionally blank.

**An Act to Amend Chapter 28
of the Acts of 2004,
the Legal Profession Act**

Be it enacted by the Governor and Assembly as follows:

1 Section 2 of Chapter 28 of the Acts of 2004, the *Legal Profession Act*, is amended
by

(a) adding immediately after clause (g) the following clause:

(ga) “capacity” means a member’s ability to practise law with reasonable skill and judgement that is not substantially impaired by a physical, mental or emotional condition, disorder or addiction;

(b) adding immediately after clause (aa) the following clause:

(aaa) “medical assessment” means a physical, mental health or addictions assessment or examination by a qualified health professional approved by the Society;

and

(c) adding “has” immediately after “who” in the second line of clause (ad).

2 Subsection 4(2) of Chapter 28 is amended by

(a) striking out “and” at the end of clause (b);

(b) striking out the period at the end of clause (c) and substituting “; and”; and

(c) adding immediately after clause (c) the following clause:

(d) seek to improve the administration of justice in the Province by

(i) regularly consulting with organizations and communities in the Province having an interest in the Society’s purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province, and

(ii) engaging in such other relevant activities as approved by the Council.

3 Subsection 5(8) of Chapter 28 is amended by adding immediately after clause (h)
the following clauses:

(ha) authorizing members of the Hearing Committee to sit as a credentials appeal panel and to hold hearings and make orders, including orders as to costs, concerning the admission or re-instatement of persons as members of the Society in each of the categories of membership;

(hb) establishing the powers of a credentials appeal panel including some or all of the powers, privileges and immunities enumerated in Sections 42 and 44;

4 Subsection 7(1) of Chapter 28 is repealed and the following subsection substituted:

- (1) The Council consists of
 - (a) such number of members of the Society elected or appointed as prescribed by the regulations;
 - (b) the Attorney General of the Province for the time being or a representative appointed by the Attorney General;
 - (c) the President, First Vice-president and Second Vice-president of the Society;
 - (d) the Dean of the Faculty of Law of Dalhousie University; and
 - (e) at least three persons who are not members of the Society and who are appointed in the manner prescribed by the regulations.

5 Section 9 of Chapter 28 is amended by adding immediately after subsection (3) the following subsection:

- (4) The Executive Director shall report to Council and the Society's annual meeting on the results of the consultations carried out pursuant to clause 4(2)(d).

6 Clause 11(b) of Chapter 28 is amended by striking out "(h)" in the second line and substituting "(e)".

7 (1) Clause 28(1)(a) of Chapter 28 is amended by adding ", capacity" immediately after "conduct" in the first line.

(2) Clause 28(2)(a) of Chapter 28 is repealed and the following clause substituted:

- (a) establishing or adopting ethical standards for members of the Society;

8 Clause 33(b) of Chapter 28 is repealed and the following clause substituted:

- (b) resolving complaints of professional misconduct, conduct unbecoming a lawyer, professional incompetence and incapacity;

9 Clauses 34(1)(a) and (b) of Chapter 28 are repealed and the following clauses substituted:

- (a) establishing processes for receiving and responding to complaints or other information concerning the conduct, practice, professional competence or capacity of members of the Society;
- (b) establishing processes for investigating the conduct, practice, professional competence or capacity of a member of the Society;

10 Chapter 28 is further amended by adding immediately after Section 34 the following Section:

34A (1) The Council shall establish a Fitness to Practise Committee composed of members of the Society and persons who are not members of the Society as prescribed by the regulations.

(2) The Council may make regulations

(a) prescribing the make-up of the Fitness to Practise Committee and determining the criteria for being the Chair or Vice-chair;

(b) establishing the processes and procedures to be utilized by the Fitness to Practise Committee;

(c) prescribing the circumstances in which a member of the Fitness to Practise Committee whose term has expired may remain a part of the Committee until matters in which that member of the Committee has been involved have concluded;

(d) establishing the processes and procedures by which the Executive Director may refer a matter to the Fitness to Practise Committee pursuant to subsection 35B(1);

(e) establishing the circumstances in which, and the processes and procedures by which, a matter may be referred

(i) by the Fitness to Practise Committee to the Complaints Investigation Committee pursuant to subsection 35B(3),

(ii) by the Complaints Investigation Committee to the Fitness to Practise Committee pursuant to subsection 35B(4).

11 Section 35 of Chapter 28 is repealed and the following Sections substituted:

35 The conduct, capacity, practice or professional competence of a member of the Society may be the subject of an investigation pursuant to this Part.

35A For the purpose of conducting an investigation of a member pursuant to this Part, the Executive Director, the Complaints Investigation Committee or any person designated by either of them may request, and is entitled to obtain, any file or record regarding a client or former client of the member that is reasonably required to further the investigation, whether or not the file or record or any part of it is

(a) subject to solicitor-client privilege; or

(b) the subject of a charge or complaint.

35B (1) Notwithstanding anything contained in this Act or the regulations, where a complaint concerns a member's capacity, or where a person, in the absence of a complaint, raises concerns about a member's capacity to the Society, or a member self reports incapacity to the Society, the Executive Director may, where it is in the public interest to do so, refer the matter to the Fitness to Practise Committee in accordance with the regulations.

(2) Where a matter is referred to the Fitness to Practise Committee, the matter must be addressed in accordance with this Act and the regulations.

(3) The Fitness to Practise Committee may refer a matter to the Complaints Investigation Committee in the circumstances set out in, and in accordance with, the regulations.

(4) The Complaints Investigation Committee may refer a matter to the Fitness to Practise Committee in the circumstances set out in, and in accordance with, the regulations.

(5) Where a matter is referred by the Fitness to Practise Committee to the Complaints Investigation Committee pursuant to subsection (3) or subsection 36(2B), the matter must be considered a complaint and be processed in accordance with this Act and the regulations.

12 (1) Subsection 36(1) of Chapter 28 is repealed and the following subsection substituted:

(1) The Complaints Investigation Committee and the Fitness to Practise Committee have all the powers conferred by this Act and the regulations in the discharge of their functions as well as the powers, privileges and immunities of a commissioner under the *Public Inquiries Act*.

(2) Subsection 36(2) of Chapter 28 is amended by

(a) adding immediately after clause (i) the following clause:

(ia) require a member of the Society to submit to a medical assessment;

and

(b) striking out “or (i)” in the second line of clause (j) and substituting “, (i) or (ia)”.

(3) Section 36 is further amended by adding immediately after subsection (2) the following subsections:

(2A) Upon referral of a matter by the Executive Director or the Complaints Investigation Committee, the Fitness to Practise Committee may, where it is in the public interest to do so and with the member’s consent, enter into an agreement which may include some or all of the following provisions:

(a) that the member submits to a medical assessment to determine a member’s capacity;

(b) that the member undertakes and completes any applicable course of treatment designed to address any issues concerning the member’s capacity;

(c) that the member authorizes the Fitness to Practise Committee to receive reports from the medical assessments or treatment referred to in clauses (a) and (b);

(d) that the member agrees to accept practice restrictions or conditions on the member’s practising certificate or a withdrawal from practice pending completion of the terms and conditions in an agreement

reached between the Fitness to Practise Committee and the member in accordance with this Act and the regulations;

(e) that the member consents to such other provisions of an agreement as agreed upon by the member and the Fitness to Practise Committee.

(2B) For greater certainty and subject to subsection 35B(3), the process in subsection (2A) is voluntary and requires the consent of the member after the member has been advised of the authority of the Executive Director under Section 40.

(2C) Where a member of the Society fails to comply with the agreement or requirements under subsection (2A), the Fitness to Practise Committee may refer the matter to the Complaints Investigation Committee.

(2D) The Fitness to Practise Committee in existence at any time retains jurisdiction over a member who is subject to ongoing terms and conditions of an agreement to monitor the member's compliance and may, at any time and with the member's consent, amend the terms and conditions of the agreement, if the Fitness to Practise Committee determines that it is in the public interest to do so.

(4) Subsection 36(4) of Chapter 28 is repealed and the following subsections substituted:

(4) The Complaints Investigation Committee may, by resolution, order that a member pay to the Society all or a portion of the reasonable costs of the audit, review, examination, medical or other assessment ordered or allowed under this Section, and may set and extend the date for payment.

(4A) A member who is ordered by the Complaints Investigation Committee under this Section to pay costs shall pay those costs in full by the date set or extended by the Committee.

(4B) A member who has not paid the amount owing under this Section by the date set or extended by the Complaints Investigation Committee is in breach of this Section and, where any part of the amount owing remains unpaid by the date set or extended, shall have his or her practising certificate suspended unless the Committee otherwise orders.

(5) Subsection 36(6) of Chapter 28 is repealed and the following subsection substituted:

(6) A member who is subject to an order under subsection (4) may, within thirty days, appeal the order on any grounds to the Hearing Committee, which shall refer the appeal to a hearing panel.

13 Clause 37(5)(b) of Chapter 28 is amended by striking out "may" in the first line.

14 (1) Subsection 40(2) of Chapter 28 is amended by

(a) adding immediately after clause (a) the following clause:

(aa) subject to any order of a hearing panel, a complaint or information with respect to a complaint may be disclosed to the public if such complaint or information is disclosed in the course of a hearing;

(b) striking out clause (c) and substituting the following clause:

(c) the President or the Executive Director, or a person designated by either of them, may disclose

(i) that a complaint about the conduct, capacity or competence of a member of the Society has been received,

(ii) that the complaint is or will be under investigation,

(iii) information that is otherwise available to the public, or

(iv) where Section 37 applies, that conditions or restrictions have been imposed on a practising certificate, or that a lawyer's practising certificate has been suspended, pending completion of the investigation and any disciplinary proceeding that may follow;

and

(c) adding "subject to Section 77A," immediately before "the" in the first line of clause (e).

(2) Section 40 is further amended by adding immediately after subsection (2) the following subsections:

(2A) All information received by and all proceedings of the Fitness to Practise Committee shall be kept confidential by the Society.

(2B) Notwithstanding subsection (2A) and subject to any order of a hearing panel, where a matter referred to the Fitness to Practise Committee is referred to a hearing panel, information disclosed to the Fitness to Practise Committee may be disclosed to the public if such information is disclosed in the course of a hearing.

(2C) Notwithstanding subsection (2A), the Fitness to Practise Committee may authorize the Executive Director to disclose

(a) to the Minister of Justice and the Attorney General of the Province and the Minister of Justice and Attorney General of Canada, or to persons designated by either or both of them, information that the Executive Director considers necessary for the purpose of considering judicial appointments and appointments as Her Majesty's Counsel learned in the law;

(b) subject to Section 77A, specific information to a specific person or persons if it is determined by the Fitness to Practise Committee that it is in the public interest to do so;

(c) information with respect to a matter before the Fitness to Practise Committee to a regulatory body in a foreign jurisdiction when it is relevant and concerns the fitness of a member of the Society for membership in the foreign jurisdiction;

(d) information with respect to a matter before the Fitness to Practise Committee for the administration of this Act or to comply with the purpose of this Act.

15 Clause 42(2)(k) of Chapter 28 is repealed and the following clause substituted:

(k) reject or by order approve a settlement agreement.

16 Subsection 44(2) of Chapter 28 is repealed and the following subsections substituted:

(2) A hearing panel may order that the public, in whole or in part, be excluded from a hearing or any part of it if the hearing panel is satisfied that

(a) financial, personal or other matters may be disclosed at the hearing of such a nature that the desirability of avoiding public disclosure of those matters in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings may be open to the public; or

(b) the safety of a person may be jeopardized.

(2A) A hearing panel

(a) shall order that the public, in whole or in part, be excluded from a hearing or any part of it if satisfied that matters involving solicitor-client privilege that have not otherwise been waived may be disclosed; and

(b) may order that the public, in whole or in part, be excluded from a hearing or any part of it if satisfied that the public interest in disclosure of other information is outweighed by the interest of the public or any person in preventing the information from being disclosed.

17 (1) Subsection 45(1) of Chapter 28 is amended by

(a) adding “or makes a finding of incapacity” immediately after “clerk” in the third line; and

(b) striking out clause (d) and substituting the following clauses:

(d) order a member to submit to a medical assessment to determine whether the member has the capacity to practise law, and to provide any medical assessment report to the hearing panel;

(e) receive any reports from the medical assessments;

(f) resolve to bring an application pursuant to Section 50.

(2) Subsection 45(4) of Chapter 28 is amended by

(a) adding “or makes a finding of incapacity” immediately after “clerk” in the third line;

(b) striking out “subsection 36(5) or Sections 37 and 38” in the last line of clause (h) and substituting “Sections 36 to 38”; and

(c) adding immediately after clause (i) the following clause:

- (ia) order the member to submit to a medical assessment;

18 Section 62 of Chapter 28 is amended by adding immediately after subsection (2) the following subsection:

(3) The Association has all the powers necessary to conduct and maintain the programs established by the Council pursuant to clause 63(da) and, without limiting the generality of the foregoing, the Association may enter into contracts with service providers to provide or support the programs of assistance.

19 Section 63 of Chapter 28 is amended by

(a) striking out clause (a) and substituting the following clause:

(a) authorizing the Council to make a policy giving broad policy directions with respect to the mandatory professional liability program of the Association;

and

(b) adding immediately after clause (d) the following clauses:

(da) establishing

(i) programs to assist lawyers and other persons designated in the policy direction of the Council in handling or avoiding personal, emotional, medical or substance abuse problems,

(ii) programs to assist lawyers with issues arising in the practice of law as part of the mandatory professional liability program of the Association;

(db) authorizing the Council to make a policy giving broad policy directions with respect to programs established under clause (da);

20 (1) Subsection 77(1) of Chapter 28 is repealed and the following subsection substituted:

(1) Any person, committee, panel or agent of the Society carrying out duties under this Act may, for the purpose of the Act only, receive and use information or documents that are confidential or subject to solicitor-client privilege, but has the same obligation respecting disclosure of that information or document as the member of the Society or other person from whom the information or document is received.

(2) Subsection 77(4) of Chapter 28 is repealed and the following subsections substituted:

(4) A committee, panel or court considering a complaint, charge, review or appeal under this Act or the regulations

(a) shall order that the public, in whole or in part, be excluded from a proceeding or any part of it if satisfied that the matters involving

solicitor-client privilege that have not otherwise been waived may be disclosed; and

(b) may order that the public, in whole or in part, be excluded from a proceeding or any part of it if satisfied that the public interest in disclosure of other information is outweighed by the interest of the public or any person in preventing the information from being disclosed.

(4A) The committee, panel or court may make the order on its own motion or on the application of any person having an interest in the information to be disclosed.

(4B) The order or application referred to in subsections (4) and (4A) may be made before the proceeding begins or at any time during the proceeding.

21 Chapter 28 is further amended by adding immediately after Section 77 the following Section:

77A (1) In this Section,

(a) “legal proceeding” means any civil proceeding, discovery, inquiry, proceeding before a tribunal, court, board of commission or arbitration, in which evidence may be sought or given, and includes an action or proceeding for the imposition of a fine, penalty or imprisonment for the violation of a Provincial enactment, but does not include any proceeding, review, hearing or appeal conducted pursuant to this Act or the regulations;

(b) “relevant committee” means the committee of the Society for whose purpose a report was created or received, and includes the Complaints Investigation Committee, the Fitness to Practise Committee, a panel of the Hearing Committee or the Credentials Committee;

(c) “report” includes any document, statement, electronic record, minute, note, correspondence or memorandum created or received by a person, committee, panel or agent of the Society for the purpose of any process under Section 5 or Part III and regulations under those provisions, but does not include an original document that belongs to a complainant or a member or to a person other than an employee or agent of the Society.

(2) The Society, its employees or agents or persons who are members of committees or panels established or authorized under this Act, are not compelled to

(a) testify in a legal proceeding;

(b) disclose reports in a legal proceeding; or

(c) disclose in a legal proceeding any other information they may have acquired for the purpose of processes under Section 5 or Part III and the regulations under those provisions.

(3) Reports are not admissible in a legal proceeding except where the relevant committee determines that it is in the public interest to make the report avail-

able and authorizes the Executive Director to make the report available in the legal proceeding.

(4) Notwithstanding subsections (2) and (3), where a person has made a complaint to the Society respecting a member, the complaint is admissible with the consent of the complainant, but not otherwise.

(5) Notwithstanding subsections (2) and (3), where a member responds to the Society in respect of a complaint or investigation, the member's response is admissible with the consent of the member, but not otherwise, even though the Executive Director may have delivered a copy or a summary to the complainant.

22 Section 81 of Chapter 28 is amended by adding immediately after subsection (2) the following subsection:

(2A) No action for damages lies against any person for making a complaint to the Society in good faith about a member of the Society.

23 (1) For greater certainty, a complaint made before the coming into force of this Act must continue to be processed in accordance with the *Legal Profession Act* as nearly as circumstances permit.

(2) Upon the coming into force of this Act, any matter pending before the Complaints Investigation Committee that would properly form the subject of a matter to be heard by the Fitness to Practise Committee may be transferred to that Committee for determination and processing in accordance with this Act.

(3) Upon the coming into force of this Act, where a hearing has not commenced pursuant to the *Legal Profession Act*, any matter pending before the Hearing Committee that the Fitness to Practise Committee believes may be dealt with by it pursuant to this Act may, by agreement of the Fitness to Practise Committee and the member, be transferred to the Fitness to Practise Committee.
