



**ALBERTA
OMBUDSMAN**

**An investigation into the levy of a fee to
request a review by the Complaint Review
Committee of the Alberta Dental
Association and College**

OWN MOTION INVESTIGATION REPORT
OCTOBER 2016

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Mandate

Every Albertan has the right to be treated fairly when accessing or using public services. The Ombudsman protects this right by promoting standards of fairness and has the authority to conduct investigations and make recommendations if an investigation reveals unfairness.

The Ombudsman reports directly to the Legislative Assembly and operates independently from the Alberta government, political parties and individual elected officials. The Ombudsman has jurisdiction over Alberta government departments, agencies, boards, commissions, designated professional organizations and the Patient Concerns Resolution Process of Alberta Health Services. The Ombudsman is not an advocate for complainants nor a representative for government departments or professional organizations.

Through impartial and independent investigations, recommendations and education, the Ombudsman ensures administrative fairness. Individuals who have been affected by an administrative decision, action or recommendation made by a jurisdictional authority may bring forward their concerns to the Ombudsman who may conduct an investigation. As an office of last resort, all other avenues of resolving the complaint must have been exhausted prior to the Ombudsman undertaking an investigation. These investigations may result in recommendations to resolve issues of unfairness and improve administrative processes.

The Ombudsman may initiate an investigation on his own motion, as is the case in this investigation, when questions arise about the administrative fairness of a program. Recommendations arising from these types of investigations are generally aimed at improving systemic issues.

Executive Summary

On December 8, 2015, the Alberta Ombudsman launched an own motion investigation, pursuant to section 12(2) of the *Ombudsman Act*, to examine the administrative fairness of the practice of the Alberta Dental Association and College (ADA+C) in levying a \$500 fee to request a review of its decisions by the Complaint Review Committee (CRC).

This investigation was prompted by a complaint we received from an individual. This person initially laid a complaint of unprofessional conduct with the ADA+C against a dentist. The complaints director for the ADA+C dismissed this complaint on the grounds there was insufficient evidence of unprofessional conduct. When the complainant learned he was required to pay a non-refundable \$500 fee to request a review by the CRC, he wrote our office to complain about the fee assessment. In doing so, he pointed out the fee effectively denies low income individuals their right of access to the CRC review process. We heard from two other individuals

also unable to afford the \$500 fee when notified their complaints of unprofessional conduct had been dismissed.

All regulatory colleges within the jurisdiction of the Ombudsman have legislative authority to assess fees for a variety of activities, including reviews or appeals of decisions. The *Health Professions Act* (the Act) requires regulatory colleges within its scope to establish these fees in bylaws.

These bylaws are developed by the executive level (or council) within the colleges. Through this investigation, we learned the ADA+C is one of only six regulatory colleges assessing fees to take a dismissal decision through the review process. Fees of the other five colleges range from \$100 to \$260.

The only available documentary information about the reason for the ADA+C fee is found in the council motions approving the fees. Even then, there is limited rationale for the fee. It appears the primary reason is to offset some of the costs of CRC reviews. A CRC review is an extensive process, and the ADA+C has independent legal counsel assisting with the decision-writing, which can raise the costs of a CRC review.

There is significant evidence the fee increase to \$500 from \$100 resulted in a reduction in the number of reviews conducted by the CRC from a high of 27 in the two-year period prior to the fee increase, to seven in the two-year period following the fee increase. The ADA+C does provide public information on its website about the complaint process, but there is no information about the fee to request a CRC review.

The primary responsibility of the regulatory colleges is protection of the public. Section 3(1)(a) of the Act states the role of a college is to “*carry out its activities and govern its regulated members in a manner that protects and serves the public interest.*” Fees assessed by colleges to request review processes do not serve the public interest when they become a barrier to the review processes enshrined in legislation. The Ombudsman’s recommendations will provide guidance to all the regulatory colleges that currently assess a fee or are contemplating assessing a fee.

Background

The ADA+C has a history of assessing a fee to take a matter to the CRC, and the Ombudsman has conducted investigations where we confirmed the ADA+C has the legal authority to assess a fee. At one time the fee was \$100 and we learned, as a result of a previous complaint in 2015, the fee has risen to \$500. The ADA+C has taken the position in previous investigations we have done the fee is “*very modest*” and does not represent a “*barrier*” to those seeking a CRC review.

Both the 2013 and the 2014 annual reports on the ADA+C website make no reference to the \$500 fee.

There are 29 health professions scheduled to be covered by the Act, and 26 of them have been proclaimed under the Act. While many of the health professions have little to no contact with the public and are not likely to receive complaints from the public, in our experience there are a number of health professions with significant public contact. At the outset of this investigation, we had limited information on what fees were being assessed by other professional colleges.

If a complainant is dissatisfied with a decision of the complaints director to dismiss a complaint, the complainant may apply for a review to the CRC. The CRC is a four member committee, one of whom is a public member. It is estimated each CRC member spends six to eight hours reviewing the package of material which includes correspondence, clinical notes, x-rays, plus other relevant information. The CRC meets face-to-face to discuss and decide a matter. Legal counsel is present during the hearing to provide legal advice.

The scope of this own motion investigation is on the fees assessed to the public. Fees assessed to regulated members of the profession for various hearings or reviews are part of the cost of being a member of the profession, and are not at issue.

Our process

We provided a written list of questions to Dr. Gordon Thompson, Executive Director and Registrar of the ADA+C, on December 8, 2015. The response to these questions were provided through James Casey of Field Law, the firm providing legal counsel to the ADA+C, on February 2, 2016. Further information was obtained from Dr. Thompson and Mr. Casey during subsequent email discussions, and a meeting on March 9, 2016. Survey letters were sent on December 17, 2015 to all the professions, health and non-health, within jurisdiction of the Ombudsman.¹ These survey letters asked whether the public was charged a fee to take matters through the review process. All respondents provided responses via email or letter. Every Canadian Ombudsman office was also surveyed to determine whether investigations had been conducted into this issue. A review was conducted of Alberta Hansard from April 27, 1998 (when the Act was first introduced in the Alberta Legislature) to November 29, 2001 (when the legislation received Royal Assent by the Lieutenant Governor).

Legislative authority

The first section of Part 4 of the Act establishes the process for managing complaints about a regulated member. In section 55 of the Act the complaints director, upon receipt of a complaint, has a number of options for acting on a complaint. These include informal resolution, referral to alternative complaint resolution, investigation, dismissal on trivial or vexatious grounds, dismissal on the grounds of a lack of

¹ There are 31 regulatory health and non-health colleges under the Ombudsman's jurisdiction, including the ADA+C.

evidence of unprofessional conduct, or making an assessment of incapacity. In addition, the complaints director can do one of two things under section 66 once an investigation has been completed:

- Refer the matter to the hearings director for a hearing; or
- Dismiss the complaint, either because the complaint is trivial or vexatious, or there is insufficient or no evidence of unprofessional conduct.

If the complaint is dismissed under section 55 or section 66, section 67 of the Act requires the complaints director to give the complainant notice of the dismissal and notice of the right to apply for a review by the CRC within 30 days of the dismissal. Section 68(1) states the complainant must submit a written request for a CRC review to the hearings director. Under section 68(5) of the Act, the CRC has three options when making its decision:

- Refer the matter to the hearings director for a hearing;
- Order a further investigation; or
- Confirm the dismissal of the complaint if it finds that the complaint is trivial or vexatious or there was insufficient evidence of unprofessional conduct.

The ADA+C relies on section 132(1)(p) of the Act, which gives councils of health professions the authority to enact bylaws regarding fees:

A council may make bylaws ... respecting costs, fees, levies and assessments to be paid by regulated members and applicants with respect to registration, practice permits, professional corporations, annual permits, permits of physical therapy corporations and late payment fees under this Act or the bylaws and costs, fees, levies and assessments for any accreditation, review, appeal, thing or service provided by the college under this Act or the bylaws.

Section 22(1)(j) of the ADA+C bylaws states its council has the authority to establish a fee for review or appeals of any decision under the Act:

Council may establish fees, costs, levies or assessments for the following ... fees for reviews or appeals of any decisions under the Health Professions Act ...

Investigative Findings

ADA+C council motions

A council resolution on May 25-26, 2004 followed a discussion of the appeal process for dismissed complaints, and recommended a nominal fee for reviews by the CRC be established as a deterrent to frivolous complaints. The council approved a \$100 fee to request a review by the CRC.

A council resolution on May 21-22, 2013 followed a discussion of the CRC process and a recommendation the fee be increased to help cover the costs. The council approved a fee increase to \$500.

The complaint

An individual wrote to the ADA+C on November 20, 2014 to register a complaint against a dentist. The complainant claimed he had contracted a severe bacterial infection as a result of the antibiotic medication the dentist prescribed following dental surgery on October 9, 2014. He also claimed the dentist failed to caution him of the potential for infection. The bacterial infection was significant enough to hospitalize the complainant. Had the complainant been made aware of the potential severity of infection following surgery, he stated he would have sought medical attention sooner.

The matter was investigated by the complaints director for the ADA+C pursuant to section 55(2)(d) of the Act. The complainant participated in the investigation by providing additional information and the complaints director obtained an expert medical opinion from a dental advisor. On April 22, 2015, the complaints director issued her decision to dismiss the complaint on the grounds there was insufficient evidence of unprofessional conduct by the dentist, in accordance with section 66(3)(b)(iii) of the Act.

In her decision, the complaints director relied on the likelihood the complainant would have been advised by his pharmacist when he filled the prescription of side effects and the necessity for contacting his family doctor if he experienced those side effects. She noted the complainant did not contact the dentist when he experienced side effects, and was thus unable to advise him to stop taking the antibiotics. She also noted a medicinal herb the complainant was using may have contributed to his condition. She found the particular dental surgery the complainant received was appropriate, and concluded that while there were conflicting “narratives” regarding the issue of informed consent, she was satisfied with the dentist’s explanation that he typically cautions patients verbally about the dental procedure and the use of antibiotics. The only recommendation she made was that the dentist consider revising his post-operative written instructions document, which is provided to patients to include information on antibiotics and its side effects. Her decision letter contains no information about the expert medical opinion received by the ADA+C.

The complaints director advised the complainant of his right to request a review by the CRC pursuant to section 68(1) of the Act. The letter advised the complainant of the requirement to pay a non-refundable application fee of \$500 to request a review by the CRC and that he has 30 days from receipt of the decision letter to submit a request.

The complainant did not file a request for review by the CRC. In his letter of complaint to the Ombudsman, he stated he was unable to afford the \$500 fee and noted that *“the College’s policy of charging complainants a \$500 appeal application fee denies (for all intents and purposes) the opportunity of appeal to low income individuals and the working poor.”*

He concluded the ADA+C has “failed to meet its obligation under the Act to (a) protect the public and serve the public interest, and (b) ensure its registrants meet its standards of practice.”

An October 21, 2015 letter of response from the ADA+C points out the college is governed by the Act and its bylaws. The Act and bylaws authorize the ADA+C council to set fees, including a fee to request a CRC review. Council set the fee at \$500. The ADA+C also noted it conducts investigations without charging any fee, and only when a matter is advanced to the CRC level is a fee assessed. Overall, according to the ADA+C, the purpose of the fee is:

... primarily to assist the ADA+C in defraying some of the costs of conducting a CRC review, which is an involved process that consumes extensive staff as well as volunteer resources from the CRC’s professional and public members. Also, the amount of the fee provides an avenue of appeal for serious complaints while reducing the number of nuisance complaints that must be considered by the CRC.

The ADA+C also pointed to the efforts of the CRC to provide more comprehensive reasons for decisions as a result of previous Ombudsman recommendations. These recommendations have resulted in the CRC retaining independent legal counsel to assist in decision-writing at a significant cost to the ADA+C membership.

The complainant has been advised the ongoing investigation of his complaint has been put on hold pending the results of this own motion investigation.

Other cases

Another individual wrote to us on November 14, 2015 and again on November 20, 2015 to advise she has submitted a complaint to the ADA+C with similar concerns about a dentist. The matter was investigated by the ADA+C, and this individual received a decision from the complaints director indicating there was no unprofessional conduct on the part of the dentist. The individual was advised of her right to request a review to the CRC and of the \$500 non-refundable fee. She wrote the ADA+C to request a waiver of the fee indicating that as a low income senior, she was unable to afford the fee. The ADA+C hearings director responded by referencing the applicable legislation and bylaws as the rationale for denying the individual’s fee waiver request.

A third individual called our office on November 17, 2015, then wrote to us on December 28, 2015 to advise she had submitted a complaint to the ADA+C. Again, this individual had similar concerns about a dentist. The matter was investigated by the ADA+C, and this individual received a decision from the complaints director finding no unprofessional conduct on the part of the dentist. The individual was advised of her right to request a review and of the \$500 non-refundable fee. She wrote the ADA+C to request a waiver of the fee for financial reasons. The ADA+C hearings director responded by referencing the applicable legislation and bylaws as the

rationale for denying this individual's fee waiver request. The hearings director also noted the 30 day appeal period has expired.

Neither matter has been opened for investigation by the Ombudsman. Our office has advised both complainants any investigation has been put on hold pending the results of this own motion investigation.

Survey results

A survey was conducted of the 25 regulated health professions under the Act (not including the ADA+C), and five other regulated professions within the jurisdiction of the Alberta Ombudsman (two professions under the *Regulated Forestry Profession Act*, one profession under the *Chartered Professional Accountants Act*, one profession under the *Veterinary Profession Act*, and one profession under the *Agrology Profession Act*). Each of the professions were asked whether it assessed fees to members of the public to access the complaint review process.

Of the 30 professions surveyed, and including the ADA+C, six of the professions assess a fee to request a review at the CRC level or its equivalent. Two of the six assess a fee of \$250; the fee assessed by three others range from \$150 to \$230. A seventh profession is considering a \$300 fee to request a CRC review, but at the time the survey was conducted, the proposal had not been approved by its governing body. One college refunds the fee if the CRC reverses the dismissal decision.

Our survey of Canadian Ombudsman offices revealed only British Columbia and the Yukon have jurisdiction similar to the Alberta Ombudsman to investigate complaints about regulated professions. Neither has conducted investigations into the issue of fees assessed by the professions to take a matter through a review process.

Alberta Hansard

The *Health Professions Act* was introduced in the Legislative Assembly of Alberta on April 27, 1998 and represented the culmination of four years of public and stakeholder consultation. Further consultations resulted in the *Health Professions Amendment Act, 2001*, which ultimately received Royal Assent on November 29, 2001 and was proclaimed into force December 31, 2001. The clear intent of the legislation was to provide “for enhanced accountability and responsiveness”² and “a more responsive and less costly avenue to address concerns about regulatory colleges.”³

² Alberta Hansard, April 28, 1998, p. 1779

³ Alberta Hansard, April 13, 1999, p. 969

Rationale for fee

At its meetings of May 25-26, 2004, the council for the ADA+C established a \$100 fee for reviews by the CRC. Our office commenced at least three separate investigations of the \$100 fee being assessed by the ADA+C. The ADA+C's responses to our investigations noted in part, "*the fee of \$100 is very modest and in no way represents a barrier to applicants seeking a review by the Complaint Review Committee.*" Further, the ADA+C stated, "*The fee represents only a very small part of the cost of a review by the Complaint Review Committee and does not present a significant financial barrier to the complainants.*"

At the council meetings of May 21-22, 2013, the council increased the fee for reviews by the CRC to \$500. The minutes of these council meetings note the purpose of requesting the fee increase is to help cover the costs of CRC hearings. Dr. Thompson indicated the CRC, through its chair, spoke to him about the need for the fee to be increased because of changes in costs to hold a CRC review; the complexity of the issues coming to the CRC; plus there had been no increase since the inception of the fee. There is no other documentary substantiation for the fee increase.

In the investigation that was the catalyst for opening this own motion investigation, we were advised the \$500 fee was "*reasonable and fair*" considering the resources required to conduct a CRC review. As well, the ADA+C claims the fee reduces the number of nuisance complaints, allowing the CRC to provide more timely reviews.

In response to this own motion investigation, the ADA+C reported the average cost for a CRC review, including legal costs, is \$2,745.09. The ADA+C also noted the costs of CRC reviews had increased dramatically, particularly since independent legal counsel began attending all CRC discussions and was asked to review draft CRC decisions. There are hourly fees paid to the CRC chair and members for time spent reviewing files, meetings, and working on decisions as well as ancillary costs. The ADA+C acknowledges the \$500 does not cover costs. Rather, these fees are considered a "*contribution*" towards the costs.

The ADA+C has interpreted the wording of the council motion to approve the \$500 fee to mean there is no discretion to waive the fee or to consider exceptions to assessing the fee.

The regulated professions provided various rationale for their fees. One profession established a fee following a particularly vexatious case. Another views fee payment as a demonstration of commitment to the process, while still another considers it part of the cost of managing a robust process. One profession that does not assess a fee indicated a person's inability to pay a fee should not be a barrier to accessing the complaint and review process.

ADA+C experience before and after the fee increase

Patients are advised by the ADA+C of their right to request a review by the CRC when their cases are dismissed by the complaints director. They are also informed of the requirement to pay a non-refundable fee.

In the two years prior to the fee increase, the ADA+C dismissed 357 complaints under either section 55 or 66 of the Act. Thirty patients requested a review of the dismissal by the CRC, and 27 pursued the matter by paying the then \$100 fee. In the two years following the fee increase, dismissals decreased to 292, and 14 patients requested a review of the dismissal; however, only 50% of those requesting the review paid the \$500 fee.

There were patients who had concerns about more than one dentist. It is not unusual for a person with a complicated dental history to see a number of dental specialists during a course of treatment. The ADA+C conducts individual investigations into the actions of each dentist named in the complaint, with the result being a patient receives a decision for each dentist who had been the subject of an investigation. The fee to request a review is assessed on each investigation decision. During our investigation we saw instances where a complainant was assessed fees that totaled \$1000 and another instance where a complainant was assessed fees that totaled \$2000.

There were complainants who contacted the ADA+C objecting to the payment of the fee to request a CRC review. Some felt the fee assessment was unfair as they had already paid, in some cases, a significant amount of money for the dental service. Others called the fee assessment unfair, unreasonable or insulting. Many noted their financial situation prevented them from paying or the requirement for a fee represented a barrier to exercising their right to request a review. In all cases, they were advised the fee had been set by council, was mandatory, and their request for a CRC review would not proceed without payment of the fee.

ADA+C's position

The ADA+C has pointed out there are no fees charged to conduct an investigation if a patient files a complaint of unprofessional conduct against a dentist. There are time requirements in the legislation at various stages of the investigative process and significant internal resources are expended in the investigative process. With changes in dentistry the complaints are becoming more complex, often involving more than one dentist. The CRC has made significant improvements in its decision-writing to the extent of having independent legal counsel assist in ensuring its decisions are administratively fair. There were also concerns raised about building in discretion to waive the fee would require the ADA+C to develop some form of income testing process which would be difficult and costly to administer.

Ombudsman's position

The individuals who approached the Ombudsman are concerned they cannot afford the fees to request reviews of matters they feel should be pursued through the regulatory colleges' complaint processes. The Act contemplates complaint processes should be completed before the Ombudsman becomes involved. If individuals are unable to complete the complaint process of the regulatory college due to financial or other barriers imposed by the regulatory college, nothing prevents the Ombudsman from becoming involved at an earlier stage than contemplated in the Act.

Indeed, the Ombudsman interprets section 13(1)(a) of the *Ombudsman Act* to mean decisions of complaints directors that have not been taken to a CRC within the legislated 30 days are within the jurisdiction of the Ombudsman to investigate on the grounds that, as the *Ombudsman Act* notes, "*the time prescribed for the exercise of that right [of appeal] has expired.*" The Ombudsman will decide whether to investigate in these circumstances on a case-by-case basis.

Conclusions

There is no public information available regarding the fee, which means there is incomplete information about the ADA+C complaint process. The ADA+C does not have a process to balance the needs of the ADA+C and at the same time ensure there are no barriers for Albertans in exercising their rights to request CRC reviews. For Albertans who simply do not have the financial ability to pay the fee, there is no discretion built into the fee structure to consider a fee waiver.

The Ombudsman recognizes the value of internal explanations of the fee, particularly for members of regulated colleges. These individuals are also entitled to sound explanations concerning the decisions and activities of their elected councils.

Of the 31 regulatory professional colleges within the jurisdiction of the Ombudsman, six assess a fee to request a review at the CRC level or its equivalent. A fee of anywhere from \$100 to \$500 offsets quite a limited portion of the total costs of a CRC review which averages almost \$2,800.

By implementing non-refundable fees, the regulatory colleges run the risk of missing an opportunity to uncover concerns or problems within the profession it is charged with managing in the public interest.

The most common reason for implementing a fee was to manage the numbers of invalid complaints. However, there is provision in the legislation to dismiss complaints on frivolous and vexatious grounds. If a complaint is dismissed on those grounds, the complainant has the right to apply for a review by the CRC.

Recommendations

While our investigation focused on one of the regulatory colleges within the Ombudsman’s jurisdiction, the following recommendations should be considered by any regulatory college which has either set a fee or is considering a fee:

- All regulatory colleges should ensure the fee structure is established in bylaws as required by the legislation.
- The rationale for implementing a fee should be well documented and address the issues the regulatory college has determined are grounds for imposing a fee.
- When implementing a fee, a regulatory college should take into consideration not everyone can pay and the higher the fee, the more onerous it is for some.
- A regular review of the fee structure should occur to ensure the fee is accomplishing what was intended.
- The fee should be communicated to the public wherever the college is explaining the complaint process.
- Discretion to waive a fee should be built into the fee structure; a fee should not preclude someone who has a case from being able to take it to the next level as allowed for in the legislation.

Specific to the ADA+C, the following is recommended:

Recommendation #1

The ADA+C develop a guidance framework for consideration when waiving the assessment of the fee on a discretionary basis.

Recommendation #2

The ADA+C provide public information on its website regarding the fee structure.

Recommendation #3

The ADA+C implement a process to periodically review the fee structure and fully document the rationale for the fee.

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