

Legislative
Assembly
of Ontario



Assemblée
législative
de l'Ontario

STANDING COMMITTEE ON PUBLIC ACCOUNTS

OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE
(Section 3.01, 2004 Annual Report of the Provincial Auditor)

2nd Session, 38th Parliament
54 Elizabeth II

Legislative
Assembly
of Ontario



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de l'Ontario

The Honourable Michael A. Brown, MPP,
Speaker of the Legislative Assembly.

Sir,

Your Standing Committee on Public Accounts has the honour to present its Report and commends it to the House.

Norman Sterling, MPP,
Chair.

Queen's Park
December 2005

STANDING COMMITTEE ON PUBLIC ACCOUNTS

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PREAMBLE

The Standing Committee on Public Accounts held hearings on the Auditor General's¹ report on the Office of the Public Guardian and Trustee (Section 3.01 of the *2004 Annual Report*) on May 12, 2005. The Committee endorsed the Auditor General's findings and recommendations.

The Standing Committee on Public Accounts would like to thank the Deputy Attorney General, Ministry for the Attorney General and his staff for their attendance at these hearings. The Committee acknowledges the assistance provided by the Office of the Auditor General (the Auditor), the Clerk of the Committee, and the Research Officer from the Ontario Legislative Library's Research and Information Services Branch at the hearings and during subsequent deliberations.

The format of this Committee report includes introductory information in each section based *directly* on the Auditor's report, an overview of the hearings, and recommendations. A list of the Committee's recommendations is reproduced in the final section of this report.

Response to Committee Report

The Committee requests that the Office of the Public Guardian and Trustee provide the Committee Clerk with a comprehensive response to this report within *120 days* of the date of tabling with the Speaker of the Legislative Assembly of Ontario. In this report, the Committee has concluded that for certain recommendations a *30 day* timeframe is necessary.

1. BACKGROUND

The Office of the Public Guardian and Trustee (OPGT/Office), which operates under the *Public Guardian and Trustee Act* and other provincial statutes, has various responsibilities which include acting as the guardian of property and/or personal care for mentally incompetent individuals, and administering the estates of persons without a will and without known relatives. The Accountant of the Superior Court of Justice, which is part of this Office, is the depository for all monies, mortgages, and securities, and administers monies to the credit of minors until they reach the age of majority.

The Office charges fees for its services to incapable clients and for administering estates. Total service fees in the year ended March 31, 2004 were approximately \$16.5 million. The Office was responsible for the investment and management of approximately \$1 billion of client assets.

¹ Auditor General - formerly the Provincial Auditor.

2. AUDIT OBJECTIVES AND CONCLUSIONS

The Auditor's objectives were to assess whether the Office had adequate systems and procedures in place to:

- fulfil its key mandates, including: protecting the rights and interests of mentally incapable clients, administering the estates of deceased persons without a will or known next of kin in Ontario, and protecting the public's interest in charities; and
- ensure its services and programs were delivered economically and efficiently.

The audit was substantially completed in March 2004.

2.1. Overall Audit Conclusions

The Office made several key operational improvements in response to the last audit in 1999; however, the 2004 current audit did identify additional areas in need of attention, specifically:

- Administration of Estates - a significant backlog remains in locating heirs.
- Locating Minors Entitled to Assets - a lack of continued follow-up action in locating minors reaching the age of majority for the transfer of assets held for them pursuant to court orders and judgments.
- Management of Assets – several issues were identified in relation to the management of assets entrusted to the Office for investment:
 - the selection of a fund manager that had consistently underperformed in comparison to most of the other candidates and market benchmarks for ten years prior to its selection;
 - payment of management fees in excess of the fees quoted in its successful proposal;
 - inadequate assessment of the suitability of incapable clients with respect to their health and age before investing their funds in higher risk stock markets; and
 - a lack of attention to ensuring appropriate diversity of client investment portfolios resulting in some clients incurring significant losses.

There are adequate procedures for reviewing applications for incorporating charities and for handling complaints. However, the Office did not adequately follow-up on charities deregistered by the Canada Revenue Agency, to ensure the charities' assets were properly distributed to beneficiaries or transferred to successor charities to prevent misuse or misappropriation.

Committee Conclusion

In consideration of the findings in the Auditor's report in 2004 and the hearings in 2005, the Committee's overall conclusion is that the level of accountability

demonstrated by the OPGT must be enhanced, for example, through regular reporting and timely follow-up.

The Committee acknowledges that progress has been made since the Auditor's 1999 report; however, operational and service delivery problems reported on in 2004 must be addressed to resolve long-standing concerns through, for example, aggressive follow-ups of dated files, an established reporting protocol on clients' accounts, and compliance with Management Board directives pertaining to procurement. Clear lines of accountability must be established.

DETAILED AUDIT OBSERVATIONS

3. SERVICES TO INCAPABLE PERSONS

With few exceptions, almost all of the Office's 9,000 cases of incapable clients entail property guardianship. The Office has responsibility for ensuring that clients receive the income and/or benefits to which they are entitled, and assisting with their financial affairs. In the case of clients with real estate or other substantial assets, the Office provides property management services, which includes for example, identifying and accounting for all assets, and arranging for routine property maintenance, and disposal of assets when appropriate.

The Auditor concluded that in guardianship cases, except for the investment of the assets, the Office had improved its services. For example, authority to provide guardianship services was properly obtained on a timely basis, the Office established and generally met performance targets (e.g., field investigation of property, and securing and disposing of assets), and closing-out procedures upon a death were conducted in an appropriate and timely manner.

Committee Hearings

Staff Complement and Caseload

The OPGT has approximately 330 staff providing services in six locations, delivering 14 programs with a budget of \$30.4 million.¹ Client representatives with guardianship responsibilities have an average caseload of approximately 140 clients, and are organized in multidisciplinary teams in the fields of health care, social work and financial planning. In addition, professional support includes lawyers, accountants and investigators.

The guardianship program serves approximately 9,000 clients with assets of approximately \$380 million. A majority of these clients receive social assistance or are institutionalized, and in the order of 44% live in the community.² The OPGT's broad responsibilities include financial management, asset management, substitute decisions on medical treatment, long-term-care admission, litigation, and personal affairs.³ Current workload statistics are as follows:⁴

- 7,000 applications for income and benefits;
- payment of one million bills;

- locating, securing or managing assets and overseeing 10,000 tax filings;
- instituting 2,000 legal actions on behalf of clients' legal interests; and
- an increasing number of home visits (approximately 4,500 in 1999 to around 6,900 in 2004).

The Office attempts to find relatives or parties willing to become private guardians.⁵ Often it is the most complex and difficult cases to manage that become OPGT's responsibility.⁶ The reality, according to the Ministry, is that the Office is handling more cases and serving clients with increasingly complex issues, all of which is placing additional pressure on the Office.⁷

The OPGT is investing additional resources in the improvement of the efficiency, management and monitoring of program areas. In addition to staff increases, a new tracking system has the capability to readily establish the status of a given file, providing follow-ups on accounts. The tracking system is computerized providing annual logging for each file, processing 12,000 applications for benefits and income redirections.

Business Applications Transfer Project

The Business Applications Transfer Project is a large-scale information technology replacement program which will provide a more efficient and user-friendly system, with improved client service.⁸ The OPGT provided the following supplementary information on the implementation of this project following the hearings:⁹

The OPGT's Business Applications Transfer Project (BAT) is underway and has been implemented in some areas of the office already, notably the investigations area and the Accountant of the Superior Court of Justice. The largest component of the project is the property guardianship client management function, which is at the point where all the basic background work has been done and now the detailed business requirements must be articulated. As a forerunner to this step, the current business processes must be mapped and redesigned, to ensure maximum efficiency in the final result. The OPGT has retained a consulting firm with expertise in this area to assist with this process, which is now well underway. This stage should be complete by the end of this year, at which point the new I.T. design for that component can begin, and user testing can then take place.

Committee Recommendation

The Committee is encouraged that the Ministry has taken steps to provide a more efficient and user-friendly system, with improved client service to address the property guardianship client management function.

The Committee therefore recommends that:

1. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on its progress in implementing the Business Applications Transfer Project.

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 120 days of the date of tabling this report in the Legislature.

4. ESTATE ADMINISTRATION

The Office administers the estates of individuals (\$5,000 minimum value) who die in Ontario without a will or known next of kin, and it is compensated based on a percentage of the assets. Under the *Escheats Act*, if heirs cannot be located, assets become payable to the province 10 years following the death. As of December 2003, the Office was administering 1,785 outstanding estate files, valued at approximately \$87 million.

4.1. Locating Heirs

The 1999 audit of estate administration identified a lack of timely searches for the heirs of estates; therefore, the Office subsequently took steps to review 547 files with assets valued at more than \$10,000. The Auditor noted that the Office was now more effective in locating heirs on a more timely basis. However, in a number of cases where heirs had been located more than two years ago follow-up letters advising heirs of their entitlements still had not been sent out. The Office attributed this in part to staff turnover.

When heirs are confirmed, an estate file is classified as under interim closure. When assets are distributed the file is closed. The Auditor's review noted that there had been an increase in the number of files closed and the amount distributed since the 1999 audit. However, it will take many years to clear the majority of outstanding files at the current rate of processing. The Office noted that certain external restrictions beyond its control limited the rate of processing.

The Auditor recommended that for the Office to properly discharge its duty as estate trustees, it should increase its efforts to locate heirs and distribute assets on a more timely basis.

Committee Hearings

The current number of outstanding files is 1,700 which includes about 400 pre-1996 files. The asset value attached to these 1,700 claims is about \$70 million. On average each year since 1999, 240 new files were set up and 300 closed. Although the Office has made a special effort to clear the old files, the Committee has concluded that this process needs to be more aggressive.¹⁰

Another approach to assist with the resolution of outstanding files would be to publish the names of deceased OPGT clients on the Office's web site and in newspapers with the objective of having family and other potential beneficiaries contact the Office

Committee Recommendation

The Committee noted that the number of outstanding claims are still significant, and concluded that they require immediate attention.

The Committee therefore recommends that:

2. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on its success in locating heirs, particularly relating to the approximately 400 pre-1996 files. The Office should undertake to resolve all pre-1996 files by December 31, 2006. The OPGT's report should address when this initiative will be undertaken, include a status report on all outstanding files, and provide the expected date at which OPGT will be current on all other files.

The publication of the names of deceased OPGT clients on the website or in the local community newspaper be implemented as a means for advising family members and other potential beneficiaries.

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 30 days of the date of tabling this report in the Legislature.

5. ACCOUNTANT OF THE SUPERIOR COURT OF JUSTICE

The Accountant of the Superior Court of Justice is the depository, for all monies, mortgages and securities paid into, or lodged with the court; and acts as a custodian and invests funds for clients. Funds are received and released pursuant to judgments and orders of the court, and the Office administers the funds of minors until they reach the age of majority (18) or as specified by the court. As of November 2003, the Accountant had approximately \$501 million in assets under its administration, representing 25,500 minor accounts and 12,500 litigant accounts.

In 2000 the Office undertook to clear its backlog, paying out approximately 85% of the assets identified as being overdue in the 1999 audit. As of March 2004, more than 600 of the former minors, with about \$4.6 million in assets, had not been paid. Since 2000, the initial notifications to minors about entitlements have been sent out on a timely basis; however, there has been a lack of follow-up to search for minors where the current address was unknown.

The Auditor recommended that to ensure beneficiaries receive funds when they are legally entitled to them, the Office should initiate more rigorous and timely follow-up action to locate and distribute funds to intended beneficiaries.

Committee Hearings

Information Sources

Several factors contributed to the backlog, for example, there had not been requirements to place a great deal of information on file at the time of the original payment.¹¹ This lack of information and the age of some files compounded the problems encountered in locating certain individuals. Also, when the office took over the function of the Accountant it was not the practice to search for minors who have reached the age of majority and who would have been entitled to their assets.¹² The OPGT turns to other government sources such as the Ministry of Transportation, and as the last resort, the Ministry of Health to fill information gaps in its files.¹³

Committee Recommendation

The Committee acknowledged that the OPGT has taken action to follow-up on all files, particularly with the notification of individuals having reached the age of majority. However, the sharing of information between the Ministry of Health and the OPGT was not formalized at the time of the hearings pending the Ministry of Health obtaining the necessary regulatory power to do so.¹⁴

The Committee therefore recommends that:

3. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on the status of the Public Guardian and Trustee's arrangement with the Ministry of Health to share Ministry information for the purposes of locating individuals.

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 30 days of the date of tabling this report in the Legislature.

6. INVESTMENT OF TRUST ASSETS

The Office acts as a trustee, managing and investing trust assets of approximately \$1 billion. Its objective is to earn a reasonable rate of return, while maintaining the principal and investments.

The Office invests trust assets in accordance with the *Financial Administration Act* and the *Trustee Act*, primarily within fixed income securities. Amendments to the *Trustee Act* require the use of a “prudent investor standard” and stipulate requirements with respect to investing trust property in any form of property (including stocks), and ensuring investments are diversified. The Office uses investment management firms to administer its investments in a diversified fund and fixed income fund.

6.1. Engagement of Investment Advisory Firm

The Office has used the same investment advisory firm since 1992 to provide continuous general advice relating to the investment of funds, including recommendations on asset mix, investment policies and strategies. The firm also provides advice on and assists in the evaluation and selection of investment managers. The Management Board of Cabinet directive on consulting services stipulates practices to be followed in selecting vendors to ensure contract competition in an open and fair bidding process, and that vendors not be permitted to gain a monopoly for a particular kind of work.

The most recent contract was awarded through a request for proposals (RFP) posted on MERX, which is an electronic tendering system. The Office received only two bids in addition to the incumbent firm, and the combined scores awarded to these competitors were lower than the score of the incumbent firm. The Auditor expressed several concerns with the process followed:

- limited timeframe to develop a proposal and submit a bid, as the incumbent firm had the advantage due to its long-term familiarity with the Office; and
- the incumbent investment advisory firm was registered with the Ontario Securities Commission as an investment counsel prior to 1998, but its registration lapsed in 1998.

The Auditor expressed concern that firms providing investment advisory services are usually registered as investment counsel with the provincial securities commissions in the provinces where they are operating, and secondly that a situation of continuous reliance could arise, based on a long standing relationship with a given firm.

The Auditor recommended that to obtain better value and to avoid continuous reliance on a particular vendor, the Office should establish appropriate mechanisms for attracting more potential vendors for the provision of investment advisory services.

The Office acknowledged that the posting on MERX was for 14 days as opposed to the 15 days required by Management Board. The OPGT committed to comply with policy in future RFPs and will consider ways to attract additional potential vendors.

Committee Hearings

Investment Advisory Consultant/Selection Process

The investment consultant has responsibility for reviewing reports received by the OPGT on a quarterly basis from its investment fund managers. In turn a report is prepared analyzing their performance based on established benchmarks, taking into account other factors such as the economy's overall performance.¹⁵

The investment advisory firm operates under a contract with a termination date. It has a three-year term with the possibility of two extensions of up to a year each, and is therefore not open-ended.¹⁶ The current contract was coming due and at the time of the hearings, and therefore would be operating under an extension.¹⁷ An RFP was posted on MERX and responses were being considered.¹⁸

A second point of interest was registration with the OSC. It was explained that this is not required unless the firm is providing specific advice on individual buy and sell decisions of a given stock. This was not the case with the OPGT.¹⁹ To the contrary, general advice is provided on the stock market and overall performance, given established benchmarks.²⁰

Committee Recommendation

The Committee concluded that an evaluation would be beneficial to clarify the roles of external investment consultants.²¹

The Committee therefore recommends that:

4. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on the results of its recent tender for its investment consultant.

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 30 days of the date of tabling this report in the Legislature.

6.2. Selection/Post-selection Performance of Diversified Fund Managers

The Office posted an RFP in 2000 for investment management firms to manage the diversified equity fund. A total-performance benchmark was used to evaluate the candidates, using numerical scores for ranking and selection. Based on the 15 proposals received, five firms were short-listed and interviewed. Two investment

managers were selected to manage the diversified fund and each was given over \$50 million to invest.

6.2.1. Selection Process

The Auditor noted that while the candidate with the second highest scores met the performance benchmark criteria established by the Office, the candidate with the highest scores did not. The Office's top-choice candidate consistently had the lowest annualized investment performance of all the short-listed candidates. Management indicated that investment performance was important, but that other factors had to be considered. According to management, a screening of all 15 candidates had already been done to eliminate consistent underperformers. Consequently, performance was no longer an important factor in ranking short-listed candidates.

The Auditor noted that the top-choice candidate was short-listed despite the fact that its performance in terms of annualized returns over the years was the lowest of all short-listed candidates and was 13th out of all 15 candidates. Overall it had not met the total-performance benchmark on an annualized return basis in the eight years prior to selection.

The Auditor's review of the relative performance of the two selected managers showed that the second-choice manager provided better returns than the top-choice manager. The Auditor concluded that the screening process was questionable, although the Office had identified past performance as a key selection criteria, it did not clearly identify that this candidate had consistently underperformed.

6.2.2. Post-selection Performance

The two managers selected met the Office's benchmark performance for investments; however, over the 3.5 year period, the return of the manager who had underperformed in prior years was \$10 million lower than that of the other manager.

The Auditor recommended that the Office should critically evaluate the performance of potential investment managers based on investment returns and ensure that its process for selection of investment managers eliminates candidates that consistently underperform.

The OPGT's 2004 response explained that the two managers have different investment styles and therefore each is expected to perform better than the other under contrasting market conditions. Selecting contrasting management styles was intentional to provide a balanced approach in unpredictable markets. Finally, the Office committed to place a greater emphasis on the past performance of consultants for investment management.

Committee Hearings

Fund Manager Selection Strategy

The Committee addressed the extent to which the selection of managers accounts for past performance.²² The OPGT indicated that a firm's history is only one indicator in its evaluation and that other criteria are important in the selection of a fund manager. These include, for example, investment philosophy and management style, succession planning at the firm, client services, the firm's reputation, and risk controls.²³ The OPGT noted that the firms selected have different investment styles to respond to varying market conditions.²⁴

OPGT Oversight Function

The Committee followed-up with several questions related to the Auditor's observations that the top-choice candidate had the lowest annualized investment performance of all short-listed candidates, and had consistently underperformed in relation to benchmarks for global equity market. The OPGT explained that each fund has benchmarks for monitoring performance and therefore management.²⁵ There are quarterly reports from management firms which are subject to a OPGT consultant assessment, and finally a OPGT review.²⁶ The consultant's responsibility is to analyze the returns for comparison with the established benchmarks. In the event of underperformance against benchmarks, the OPGT may reconsider current management.²⁷

The OPGT noted that the firms considered were all good performers, with some having done better than others. Their record demonstrates as follows:

- the firm selected as the first choice ranked well on a number of criteria and it performed well relative to other industry firms (an independent evaluation of fund managers ranked it in the top list of leading fund managers);²⁸ and
- the OPGT acknowledged that on an annualized basis, over the 10 year period, the first choice ranked fund manager did not do as well as some other firms.²⁹

The OPGT noted that since 2000 the market has not performed well and the second-choice manager with its more conservative style has done better.³⁰ The Office has committed that in the future it will take a critical look at past performance in selecting investment managers.³¹ It will continue to be assisted by members of its investment advisory committee in the selection and ongoing evaluation of its investment managers.

Committee Recommendation

The Committee is encouraged that the OPGT has committed to more critically evaluate past performance in selecting investment managers.³² In addition, it noted that the Office will conduct regular reviews with updates of benchmarks and consider other benchmarks for what it describes as the unique nature of its application.³³

The Committee therefore recommends that:

5. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on its quarterly evaluation of investment performance and report publicly on its investment returns compared to industry benchmarks.

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 120 days of the date of tabling this report in the Legislature.

6.3. Selection of Fixed Income (Money Market) Funds' Managers

The fixed income funds are comprised primarily of two money market funds and a bond fund. The money market funds, which include government treasury bills and corporate paper, are designed to preserve original capital and generate income; and the objective of the bond fund is to generate a high, stable income yield, while preserving the original capital.

6.3.1. Tendering Process (Tendering Procedures)

The Management Board of Cabinet directive for the procurement of goods and services has specific competition requirements. For example, services with an estimated total contract value of over \$100,000 must be acquired through an open tendering process. The reasons for any exceptions to open tendering must be justifiable and properly documented, with prior approval of the deputy head or designate.

The Office followed the proper open tender process for the smaller diversified fund of just over \$100 million, but did not follow an open competitive process in the case of the management of the \$800 million fixed income funds that had expected total contract values of over \$500,000 for three years. There were several issues identified with the process followed:

- a closed process was conducted where tenders were only invited from the four investment managers administering the diversified fund and the fixed income funds; and
- there was no evidence of prior approval from the Deputy Attorney General, and no documentation on the decision not to follow an open tendering process as required by Management Board of Cabinet.

The Office explained that it decided not to consider other candidates as the current managers had previously been retained through a formal tendering process. In addition, they were performing adequately, and understood the Office's mandate and investment objectives.

6.3.2. *Selection of Money Market Funds' Manager*

Using an RFP process, the Office selected the same candidate who managed the diversified fund to also manage the money market fund. The Office's rationale for selecting the same manager was as follows:

- the three potential managers exhibited the same performance on an annualized five-year basis; and
- the selection was mainly based on management fees as differences in performance were not significant.

The Auditor noted that on an annualized basis the selected candidate's performance was the lowest of all candidates in seven of the prior 10 years. While the selected candidate offered a more attractive fee quote than the incumbent manager's fee, the incumbent had a better performance record. The Auditor noted that subtracting the higher fee difference from the extra returns, the net return from the incumbent manager would have been significantly greater.

The Office considered the lower fee quote to be the primary criterion for awarding the contract; however, subsequent to the awarding of the contract the selected candidate was granted a higher fee because the firm indicated that it had made an error in its quotation. The Auditor questioned this decision, given that the Office had invited both firms to resubmit their fee quotes before the selection. Neither firm changed their quote and the lower fee quoted was the main reason the firm was selected.

6.3.3. *Post-selection Performance (Fixed Income Funds)*

Unlike the smaller diversified fund, the fixed income funds were not designed to have two managers for comparison and monitoring purposes. The newly selected investment management firm for the money market fund had been evaluated using a performance benchmark that was inappropriate, given that it applied to relatively risk-free treasury bills. In fact, approximately half the fund was invested in higher-risk corporate paper. Despite this fact, performance was only marginally above risk-free investment, prior to management fees. Finally, the Office had not established performance benchmarks for the bond fund as the bonds were to be held to maturity. The Auditor recommended that more appropriate investment benchmarks needed to be taken into account in comparing the actual performance of this fund against accepted industry benchmarks.

The Auditor recommended that to enhance returns for its clients, when selecting money market investment managers, the Office should:

- use an open, competitive tender process, such as posting requests for proposals for all significant contracts on the public electronic tendering system; and
- evaluate candidates based on a combination of performance and fees.

Furthermore, the Auditor indicated that the Office should not pay fees higher than those agreed to when the contract was awarded, and that the Office should establish appropriate indicators to measure the performance of its fund managers against appropriate investment benchmarks.

The Office has agreed to follow an open, competitive tender process in the future, and it accepts that the contract fee adjustment should have been refused. Also, the Office explained that the benchmark used for the money market fund is standard in the industry.

The office indicated that the bond fund does not have a benchmark based on its unique structure (investments are held to maturity). The manager is monitored and returns on the OPGT bond fund have consistently exceeded returns on other types of fixed income instruments. Finally, the Office agrees with having benchmarks and metrics in place, with regular updating.

Committee Hearings

The Committee focused on certain aspects of the issues identified in the management of the fixed income funds; namely, the nature of the tendering process, and the OPGT's decision to permit a firm to amend an error in a tender document. The Ministry has committed to closely monitor the current bond fund manager to ensure compliance with fund policies.³⁴

Tendering Process

The Auditor concluded that in looking at past performance, perhaps the OPGT should have considered the higher performing manager. According to the OPGT the difference in performance over the past 10 years has been very small. Furthermore, the investment consultant that assisted in the selection process indicated that the Office should focus on other criteria in making a decision, for example, fees, which after the contract adjustment, were still better than the competition.

Contract Fee Adjustment

The Auditor concluded that the OPGT should not have accepted a fee adjustment by the firm selected to manage certain investment accounts.³⁵ The rationale for the OPGT accepting the amended fee was as follows:

We accepted the change at the time because, although the bidder had made a mistake in its fee quotation, the new, adjusted fee was still below those of other competitors who had presented bids. In addition, since the original fee quoted was in error, it was also possible that it could not have been legally enforced. The adjusted fee was considered to be a reasonable resolution of the issue at the time it was accepted.³⁶

The Office went back to the candidate to confirm the proposed fee structure, and the firm was selected with the very competitive fee proposed. The Committee noted that the error in the tendering document was not corrected even though the firm was given the opportunity to resubmit a fee quote.

The Ministry accepted the responsibility for these events, and explained things could have been done better.³⁷ The OPGT maintained that this bid was still the lowest, and ultimately would have been selected.³⁸ Furthermore, the Ministry concluded that legally it may have been difficult to compel performance.

The Auditor's issue was that performance should be taken into consideration, in addition to fees.³⁹ It was pointed out by the Auditor during the hearings that the track record of the number two candidate was better, earning more on the money market investments, and that the OPGT's criterion for fee structure should be addressed.⁴⁰

Fund Managers' Performance Evaluation

Current practices require that the following steps be followed:

- review of performance by the managers on a regular basis;
- quarterly meetings with the investment advisory committee;
- meetings with the managers and with the consultant to obtain advice; and
- review performance and decide on the need to go to tender for a new manager.⁴¹

A decision will be made this year on whether to tender the contract again.⁴²

Committee Recommendation

The Committee acknowledged that initiatives have been taken to address the Auditor's concerns. However, it concluded that supplementary information is required on several issues to ensure that permanent solutions have been achieved with respect to these issues, such as open/competitive tendering practices and accounting for past professional performance in assessing a tender.

The Committee expressed concerns over the appropriateness of the OPGT's action in requesting bidders to resubmit their quotes after the tender was already finished. The Committee also concurs with the Auditor that the Office should not pay fees higher than those contractually agreed to. As noted, the OPGT acknowledged that the fee adjustment should not have been made.

Also, given that a low fee structure was quoted, accepted and then amended by the firm selected raises the matter of fairness to other competitors at the time.

The Committee therefore recommends that:

6. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on its adherence to established criteria in the tendering process. The plan should address:

- **assurance that past net investment performance (over an extended period) will be carefully evaluated at the tendering stage for all bidders;**
- **attention to project fees;**
- **adherence to an open and competitive tender process, consistent with Management Board directives and guidelines; and**
- **establishment of a process for corrective action, including retendering of open contracts, where net performance has been consistently below benchmark levels over an extended period of time.**

The Office of the Public Guardian and Trustee should re-tender its investment fund manager's contracts for the money market fund, and for the diversified fund that had consistently underperformed.

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 30 days of the date of tabling this report in the Legislature.

6.4. Investing in the Diversified Fund for Individual Clients

Most clients have limited funds which are invested in the Office's fixed income fund to generate steady interest income, rather than in the diversified equity fund. The latter fund is used for clients with significant assets that are not required for daily living for at least five years. The diversified fund is a higher-risk fund requiring a financial review by a financial planner, with input from the client's caseworker and the caseworker's team leader, prior to making an investment recommendation.

6.4.1. Review and Approval Process to Select Clients for Investment

The Auditor assessed whether only eligible clients were selected for participation in the diversified fund. The financial planning process was reviewed, and the Auditor concluded that in the majority of cases, financial plans of incapable clients were not provided to caseworkers for review.

According to management, the staff was unclear on the Office's financial planning requirements. The procedures requiring formal documented approval, for example, were not implemented until November 2000, and most of the investments addressed were made in August 2000. Formal documentation of

consultations was incomplete, and as of March 2004 no follow-up documentation had been completed. At the centre of this discussion is the suitability of investment plans.

The Auditor recommended that to ensure major investment decisions made for individual clients are appropriate and prudent, a proper process of consultation, review, and approval should be followed.

A review was completed, and the OPGT now ensures that files are properly documented following consultation with caseworkers.

6.4.2. Suitability of Investing in the Diversified Fund

Incapable Clients

An assessment of a client, with respect to their health and age, must be conducted prior to investing in the diversified fund. At issue is whether the client may require funds over the five-year period as in this case, investment in equity funds needs careful evaluation. The Auditor questioned the Office's practice of making general assumptions about life expectancy, rather than assessing each individual's state of health. The Auditor noted that of the 50 clients identified, approximately 50% died within three years of their funds being invested.

For Minor Clients of the Accountant of the Superior Court

Clients are generally entitled to their funds once they reach 18 years of age. Therefore, financial guidelines for five year investments stipulate that a minor's assets may be invested in the diversified fund provided that the child is 12 years of age or younger. The Auditor noted that these investment guidelines were not consistently followed, with respect to consideration of health assessments, age criteria, and consultations with parents or guardians regarding the child's personal circumstances.

The Office of the Children's Lawyer was contacted with respect to information pertaining to investments. However, the Office of the Children's Lawyer questioned whether it would add any value to the investment process as its role was minimal and its information on their clients limited.

The Auditor recommended that to minimize the risk of financial losses to clients because of short-term market fluctuations, the Office should improve its review, oversight, and approval processes and ensure that its current investment guidelines are being adhered to.

The OPGT reviews a client's health status prior to preparing a financial plan for investments, assessing risk factors. It is taking steps to improve the process for assessing and documenting health status, and since 2003 the Office has communicated with parents/guardians on behalf of minors when making investment decisions. In the case of investments in the diversified fund, the Office advises parents/guardians and requests relevant information on health and financial requirements.

6.4.3. Asset Allocation

The *Trustee Act* requires that a trustee must diversify the investment of trust property. The Investment Fund Institute of Canada (IFIC) advises that prudent investment strategies should include a mix of fixed income investments, and stocks. As investors grow older, it is recommended that the asset mix should be adjusted to decrease the percentage of stocks in favour of fixed income instruments, based on the client's risk tolerance. The Office did not comply with its policy requiring staff to periodically review clients' assets to ensure appropriate diversification. For example, for the 22 clients the Auditor reported on who died within three years of their funds being invested in the diversified equity funds, the Auditor found that half of their holdings were in stocks instead of only 20%, as suggested by the IFIC guidelines at the time of the investment.

As well, the Auditor's examination of files revealed that there had been no disposal of stocks in order to reduce the risk of over concentration. Consequently, some clients who died incurred financial losses because their significant stockholdings were not diversified. For example, an elderly client had one stockholding that was worth over \$3 million, representing more than 80% of the client's asset mix in early 2000. The Auditor noted that the recommendation of the Office's financial planner to sell at least 75% of this stockholding was never implemented. Instead, in August 2000 the Office invested an additional \$400,000 of the client's remaining cash in the equity fund. By the time this client died three and a half years after the recommendation to sell, the total stockholdings' market value had fallen from its August 2000 value by over 80%.

The Auditor recommended that to ensure clients' assets are not exposed to undue risk, the Office should regularly review client portfolios and act on a timely basis on recommendations from financial planners for these portfolios.

The OPGT has increased its complement of financial planners and their advice is being responded to in a timely manner. In addition, the Office was developing a plan for the regular review of client portfolios, with priority being given to higher risk files.

Committee Hearings

Investment Strategies and Case Management

An investment strategy is dependent on a number of factors.⁴³ According to the Office, developing a client's profile presents challenges as it may be impossible under certain circumstances to enquire about a client's tolerance for investment risk or health matters. Therefore, the Office works with parents or guardians to assemble information on a client's health and financial needs for the purposes of financial planning.⁴⁴ In certain situations it may be a judgment call on which course of action to adopt.

Portfolio Losses

The Committee addressed instances of substantial losses in certain portfolios.⁴⁵ The Ministry explained that the volatility in the markets in recent years meant that clients with private stock portfolios experienced major swings with gains and losses. The Ministry explained the events and consequences for certain portfolios, as follows:

Because of their strong cash positions, all of these 22 clients were considered to be good candidates for long-term investments with a substantial weighting in equities, the idea being that satisfactory growth would be achieved, with the effect of market volatility being smoothed out over time. Unfortunately, each of the clients passed away unexpectedly and was unable to benefit personally from this longer-term strategy.⁴⁶

The Office is aware of market volatility and the need to check the asset mix to provide for the maximum steady return, matching the needs, the profile, the age and the health of the client.⁴⁷ According to the Ministry, criteria were followed in making investment decisions, for example, cash-on-hand and cash requirements in the short term, and the level of financial security required over the longer term.⁴⁸ Several investment portfolios were over weighted in equities contrary to investment guidelines.⁴⁹ The Auditor's stressed the need to diversify assets, and to monitor equity-fixed income mix, which has not been the case.⁵⁰

Service Delivery Enhancements

Action has been taken to address management procedures and fund management methodology. The management review is more thorough at the front end, entailing the following:

- identification of all assets;
- transfer of each file to a financial planner for the preparation of a financial plan;
- an immediate review of file's with investments of \$10,000 or more with a financial planner;
- presentation of recommendations to the client services representative responsible for making decisions on behalf of the client;
- implementation of recommendations by the client services representative; and
- the financial planner forwards the plan to the Office, thereby effecting the transaction.⁵¹

The Office has revised its policy for managing individual clients' funds to include the following:

- Financial Review – a very thorough review, with attention to timeliness built in;
- Management Oversight – the planner and client representative, and management follow-up on the implementation of recommendations; and
- Investment for the Elderly – the policy has now been changed to not invest in equities if clients are over 75 years old. For those clients who are already in stock when they come to the OPGT, an exit strategy is established with portfolio monitoring.⁵²

The major difference following the audit is that the monitoring has been improved, specifically through oversight at more senior levels.⁵³ Also, procedures have been tightened up and staff is aware of the administrative requirements.⁵⁴

Financial Planning

Recommendations made by financial planners are carefully considered by a client representative, with follow-up.⁵⁵ The Ministry explained the procedures and policies pertaining to financial planners' recommendations:

- the financial planner fills out a financial plan, which is offered to the client services representative (substitute decision-maker on file); and
- in the event that the recommendation is not going to be followed, the team leader for the client services representative takes it up with the financial planner's manager.

The Office has defined policies and procedures to ensure that recommendations are dealt with appropriately.⁵⁶

The Office is mindful of the need to ensure timely decisions, particularly on more complex portfolios.⁵⁷ The OPGT has hired additional staff for asset management, strengthened procedures and educated staff in this regard.⁵⁸ However, the entire process can take up to six months from inception to the completion of the financial plan and the implementation of decisions.⁵⁹ The Committee expressed concern that this timeframe may be too lengthy for certain investment portfolios.⁶⁰

Committee Recommendation

The Auditor's concerns centred on subjecting major investment decisions to the proper consultation/review/approval processes; minimizing the risk of financial losses through review/oversight/approvals steps; and ensuring regular portfolios reviews with attention to the advice of financial planners. The Committee acknowledges that the OPGT has taken action in critical areas to address these concerns.

For example, the Ministry concurs that investment decisions for individual clients should be fully documented and has followed up on this matter.⁶¹ There are to be regular reviews of files, with attention to the client's health, and the

interrelationship with other investment factors. At the time of the hearings, planning was ongoing to address the portfolio reviews, with a commitment to act promptly on recommendations from financial planners.⁶² Also, plans are underway to improve the process for assessing a client's health.⁶³ The Committee is encouraged by the response, but stressed that the timeframe on all activities must be timely and therefore responsive to market circumstances.⁶⁴

The Committee therefore recommends that:

7. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on its initiatives to address the concerns identified with the diversified fund related to the management of client portfolios.

The Office's report should address, but not be limited to addressing, the following:

- completion of client documentation for investment decisions (e.g., assessment of risk factors such as a client's health status and financial requirements prior to preparing a financial plan), and the results of initiatives to improve the procedures for assessing and documenting health status;
- the frequency and results of internal portfolio reviews;
- the lengthy timeframe for the completion of a financial plan and the implementation of decisions (approximately 6 months);
- the Office's record on advising parents/guardians prior to investing in the diversified fund;
- the timeliness of responses to financial planners' recommendations; and
- oversight by senior management to ensure compliance with all OPGT investment guidelines.

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 120 days of the date of tabling this report in the Legislature.

7. CHARITABLE PROPERTIES PROGRAM

The Office's Charitable Properties Program protects the public's interests in charitable properties in Ontario, for example, by reviewing applications of organizations wanting to incorporate as charitable corporations. The Auditor noted as follows:

- adequate procedures were in place to review applications for the incorporation of charitable organizations and to handle complaints in a timely manner; and

- there were weaknesses in following up on the status of charities deregistered by the Canada Revenue Agency (CRA). Specifically, the Office did not ensure that prior donations to deregistered charities were distributed to intended beneficiaries or transferred to successor charities.

In 2003, the Office contacted approximately 350 Ontario charitable organizations out of 1,100 that had been deregistered by the CRA between July 2002 and July 2003. More than 300 of these organizations did not respond to the request for information on the reasons for the revocation of their charitable status, the winding up of operations, and the proposed plan to distribute their charitable property. Furthermore, the Office did not have plans to follow-up with these deregistered charities to ensure the proper distribution of assets, and it did not request information with regard to the deregistered Ontario charities.

The Auditor recommended that to ensure charitable assets are distributed to intended beneficiaries or successor charities, the Office should review the CRA's reasons for deregistering charities on a timely basis and immediately follow-up on any organizations that may represent a higher risk of misusing or misappropriating their charitable donations.

The Office responded in 2004 that it was consulting with the CRA to obtain information on charities indicating the cause for deregistration and the potential risk to a charitable property. This information was necessary to implement the Auditor's recommendation.

Committee Hearings

Revocation of Charitable Organizations

The OPGT's concern is with the fate of a charitable property when charities wind up.⁶⁵ If there are concerns with the disposal of property, the OPGT has the option of following-up with the directors, and it has the authority to take legal action to compel the charity to produce its accounts for the purposes of determining whether it is being managed appropriately.⁶⁶

The Office confirmed that in September 2003, 350 letters were sent to former Ontario charities deregistered by the CRA, enquiring about the reasons for the revocation and action taken to close the operations. The Office did not follow-up on these letters, in spite of having received fewer than 50 replies.⁶⁷ In the past, CRA had published a monthly list of charities that had been deregistered. It became an annual list in 2003.⁶⁸

The Committee focused on the tools available to OPGT to address deregistered charities, specifically the management of assets in the winding down of these entities.⁶⁹ The OPGT has been working with CRA on developing a protocol to obtain the necessary information, and agreements for the sharing of information have been developed.⁷⁰

Committee Recommendation

Follow-up on charitable assets is required to establish the level of risk at deregistration. Under a new federal-provincial protocol, the federal government will inform the province when a charity has been deregistered, and will share relevant information. The Ministry received the initial information in early 2005 and a review was underway at the time of the hearings.

The OPGT will be targeting charities requiring follow-up, but the challenge will be to determine which entities fall into this category.⁷¹

The Committee therefore recommends that:

8. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on the following matters related to the deregistration of charities:

- **the effectiveness of the new federal-provincial protocol for the sharing of information on these charities between the Canada Revenue Agency and the Office of the Provincial Guardian and Trustee;**
- **the findings from the initial information provided in 2005, specifically the status of assets with an indication of potential risk to charitable properties; and**
- **the action taken by the Office based on the information provided in 2005, with the results.**

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 120 days of the date of tabling this report in the Legislature.

8. LIST OF COMMITTEE'S RECOMMENDATIONS

The Committee requests that reports on the following recommendations be provided to the Committee Clerk.

1. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on its progress in implementing the Business Applications Transfer Project.

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 120 days of the date of tabling this report in the Legislature.

2. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on its success in locating

heirs, particularly relating to the approximately 400 pre-1996 files. The Office should undertake to resolve all pre-1996 files by December 31, 2006. The OPGT's report should address when this initiative will be undertaken, include a status report on all outstanding files, and provide the expected date at which OPGT will be current on all other files.

The publication of the names of deceased OPGT clients on the website or in the local community newspaper be implemented as a means for advising family members and other potential beneficiaries.

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 30 days of the date of tabling this report in the Legislature.

3. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on the status of the Public Guardian and Trustee's arrangement with the Ministry of Health to share Ministry information for the purposes of locating individuals.

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 30 days of the date of tabling this report in the Legislature.

4. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on the results of its recent tender for its investment consultant.

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 30 days of the date of tabling this report in the Legislature.

5. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on its quarterly evaluation of investment performance and report publicly on its investment returns compared to industry benchmarks.

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 120 days of the date of tabling this report in the Legislature.

6. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on its adherence to established criteria in the tendering process. The plan should address:

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- assurance that past net investment performance (over an extended period) will be carefully evaluated at the tendering stage for all bidders;
 - attention to project fees;
 - adherence to an open and competitive tender process, consistent with Management Board directives and guidelines; and
 - establishment of a process for corrective action, including retendering of open contracts, where net performance has been consistently below benchmark levels over an extended period of time.

The Office of the Public Guardian and Trustee should re-tender its investment fund manager's contracts for the money market fund, and for the diversified fund that had consistently underperformed.

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 30 days of the date of tabling this report in the Legislature.

7. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on its initiatives to address the concerns identified with the diversified fund related to the management of client portfolios.

The Office's report should address, but not be limited to addressing, the following:

- completion of client documentation for investment decisions (e.g., assessment of risk factors such as a client's health status and financial requirements prior to preparing a financial plan), and the results of initiatives to improve the procedures for assessing and documenting health status;
- the frequency and results of internal portfolio reviews;
- the lengthy timeframe for the completion of a financial plan and the implementation of decisions (approximately 6 months);
- the Office's record on advising parents/guardians prior to investing in the diversified fund;
- the timeliness of responses to financial planners' recommendations; and
- oversight by senior management to ensure compliance with all OPGT investment guidelines.

8. The Office of the Public Guardian and Trustee report to the Standing Committee on Public Accounts on the following matters related to the deregistration of charities:

- **the effectiveness of the new federal-provincial protocol for the sharing of information on these charities between the Canada Revenue Agency and the Office of the Provincial Guardian and Trustee;**
- **the findings from the initial information provided in 2005, specifically the status of assets with an indication of potential risk to charitable properties; and**
- **the action taken by the Office based on the information provided in 2005, with the results.**

The Committee requests that a written response to this recommendation be provided to the Committee Clerk within 120 days of the date of tabling this report in the Legislature.

NOTES

- ¹ Ontario, Legislative Assembly of Ontario, Standing Committee on Public Accounts, Official Report of Debates (*Hansard*), First Session, 38th Parliament (12 May 2005): P-393.
- ² *Ibid.*, P-393.
- ³ *Ibid.*
- ⁴ *Ibid.*, P-393 and P-394.
- ⁵ *Ibid.*, P-394.
- ⁶ *Ibid.*
- ⁷ *Ibid.*
- ⁸ *Ibid.*
- ⁹ The Office of the Public Guardian and Trustee provided this information to the Committee in an e-mail dated October 28, 2005 via Legislative Research and Information Services.
- ¹⁰ Ontario, Legislative Assembly of Ontario, Standing Committee on Public Accounts, Official Report of Debates (*Hansard*), First Session, 38th Parliament (12 May 2005): P-406 and P-407.
- ¹¹ *Ibid.*, P-406.
- ¹² *Ibid.*
- ¹³ *Ibid.*
- ¹⁴ *Ibid.*
- ¹⁵ *Ibid.*
- ¹⁶ *Ibid.*, P-404.
- ¹⁷ *Ibid.*
- ¹⁸ *Ibid.*
- ¹⁹ *Ibid.*
- ²⁰ *Ibid.*
- ²¹ *Ibid.*, P-400.
- ²² *Ibid.*, P-402.
- ²³ *Ibid.*, P-402 and P-394.
- ²⁴ *Ibid.*, P-402.
- ²⁵ *Ibid.*, P-401 and P-402.
- ²⁶ *Ibid.*, P-402.
- ²⁷ *Ibid.*
- ²⁸ *Ibid.*
- ²⁹ *Ibid.*
- ³⁰ *Ibid.*
- ³¹ *Ibid.*, P-394.
- ³² *Ibid.*
- ³³ *Ibid.*
- ³⁴ *Ibid.*, P-395.
- ³⁵ *Ibid.*, P-394.
- ³⁶ *Ibid.*
- ³⁷ *Ibid.*, P-398.
- ³⁸ *Ibid.*, P-397.
- ³⁹ *Ibid.*
- ⁴⁰ *Ibid.*
- ⁴¹ *Ibid.*, P-398.
- ⁴² *Ibid.*
- ⁴³ *Ibid.*, P-405.
- ⁴⁴ *Ibid.*, P-395.
- ⁴⁵ *Ibid.*, P-398.
- ⁴⁶ *Ibid.*, P-395.
- ⁴⁷ *Ibid.*, P-399.
- ⁴⁸ *Ibid.*, P-395.
- ⁴⁹ *Ibid.*
- ⁵⁰ *Ibid.*, P-396.
- ⁵¹ *Ibid.*, P-399.

⁵² Ibid., P-400.

⁵³ Ibid., P-397.

⁵⁴ Ibid.

⁵⁵ Ibid., P-396.

⁵⁶ Ibid., P-397.

⁵⁷ Ibid., P-398.

⁵⁸ Ibid., P-399 and P-395.

⁵⁹ Ibid., P-399.

⁶⁰ Ibid.

⁶¹ Ibid., P-395.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid., P-399.

⁶⁵ Ibid., P-407.

⁶⁶ Ibid.

⁶⁷ Ibid., P-395.

⁶⁸ Ibid., P-407.

⁶⁹ Ibid., P-406.

⁷⁰ Ibid., P-406 and P-407.

⁷¹ Ibid., P-407.