

GATCC Program Overview: Part One

Matters Considered by GATCC between April 2011 to July 2013

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Introduction

Overview

Test cases play a significant role in our judicial system in terms of promoting justice for low-income and other disadvantaged communities, in a cost-effective and efficient manner. Legal Aid Ontario (LAO) contributes to test case litigation through the Group Applications and Test Case Committee (GATCC) as well as through other funding streams, such as clinic envelope funding and the big case management program. This paper focuses on test cases supported through GATCC certificates.

On average, LAO spends \$367,000 per year on GATCC certificates. It is therefore important that we understand how this money is being spent and develop success measures. This paper is the first step in developing a model for outcome measurement.

Scope

Using data recorded since April 2011, this paper provides an overview of the types of applications considered by GATCC, dispositions, types of matters approved for funding, costs and results¹.

Methodology

The raw data used for this analysis was extracted from both an Excel based record of GATCC applications and finance and case data in PeopleSoft. It should be noted that efforts should be made to explore eliminating the need for manual record keeping of GATCC .

Limitations and Cautions

Given the limited sample size and purpose of this analysis, LAO and the Committee should avoid making decisions based upon the observations made and trends identified in this paper. The purpose of this paper is to provide a jumping off point for the development of a way forward, including how LAO might begin to develop a more rigorous program for considering how our limited resources could be effectively used to support public interest cases and to assess the value or outcomes of that support.

¹ Please note that the results analysis conducted to date is very rudimentary. Further analysis is proposed below.

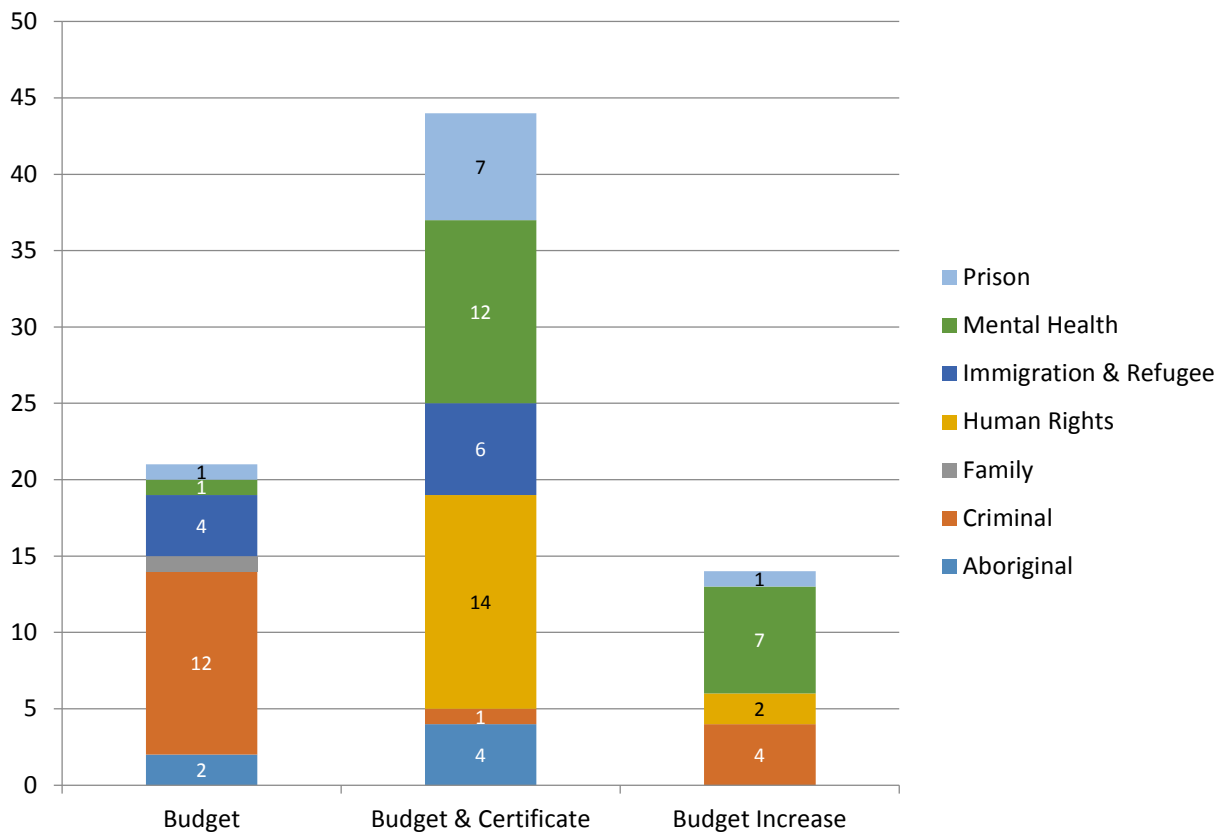
Part I: Types of applications and applicants

Request Types

Between April 2011 and July 2013 (27 months) the Committee has considered a total of 79 applications, for an average of 3 applications per month. The applications generally fit into three categories:

Type	Count	%
GATCC certificate and budget	44	56%
GATCC budget where client already has standard LAO certificate	21	27%
Increase to a previously approved GATCC budget	14	18%

Chart 1: Request Types by Issue



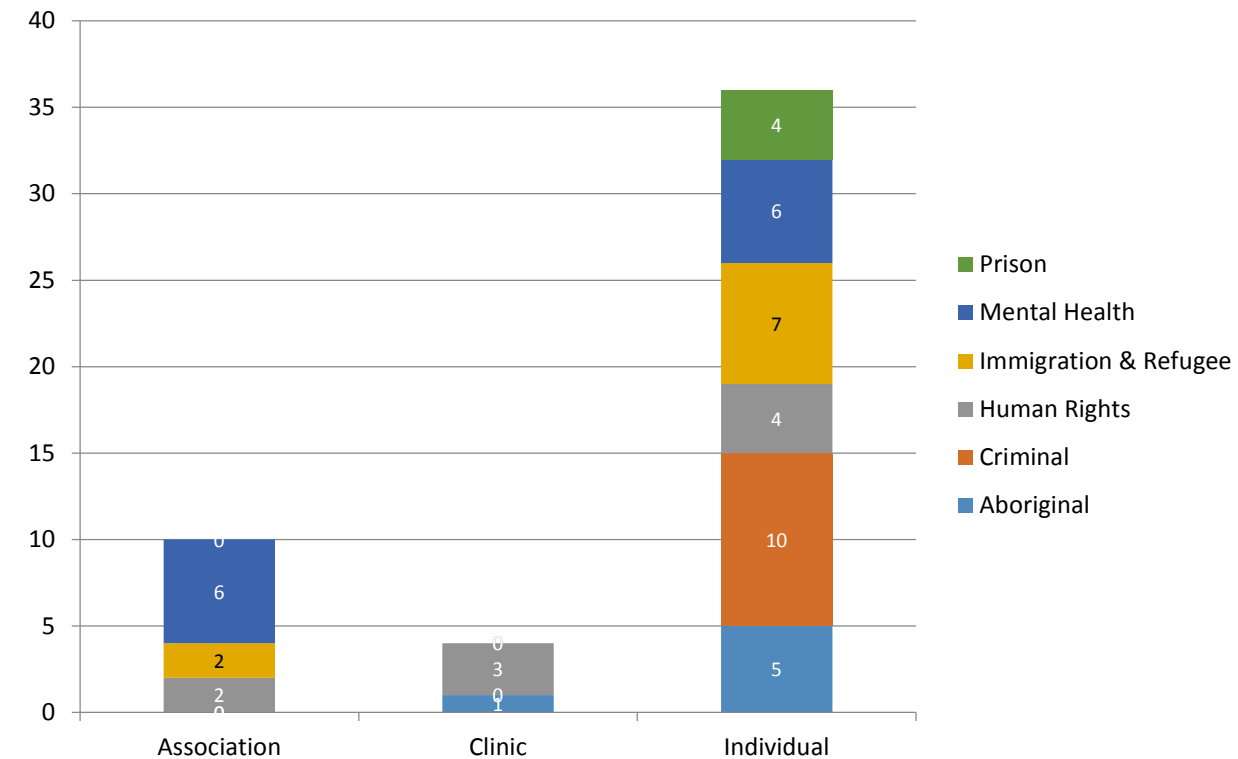
DataTable 1 of chart 1: Request Types by Issue

	Budget	Budget & certificate	Budget increase
Prison	1	7	1
Mental Health	1	12	7
Immigration & Refugee	4	6	0
Human Rights	0	14	2
Family	1	0	0
Criminal	12	1	4
Aboriginal	2	4	0

Types of Applicants/Types of Matters

Excluding applications for increases to budgets previously approved for funding by GATCC and two applications which were abandoned, during this period GATCC considered a total of 63 applications. Some of these applications were for the same case, as it progressed from trial or initial application, to first level appeal and second level appeal. In order to obtain a more accurate picture of when and the extent to which GATCC funds multiple levels of the same case, the scope of this analysis will need to be expanded.

Chart 2: Requests by Type of Applicant and Issue



Datatable 2 of chart 2: Requests by Type of Applicant and Issue

	Association	Clinic	Individual
Prison	0	0	4
Mental Health	6	0	6
Immigration & Refugee	2	0	7
Human Rights	2	3	4
Criminal	0	0	10
Aboriginal	0	1	5

Part II: Overview of matters approved for funding

During this period GATCC recommended and LAO approved a total of 50 of 63 applications for funding through the GATCC program² for a general approval rate of 79% of matters referred to GATCC for consideration.³

Approval Rates by Type of Issue

Type of Matter	Applications	% of applications considered	Approved	Approval Rate
Aboriginal	6	10%	6	100%
Criminal	13	21%	10	77%
Family	1	2%	0	0%
Human Rights	12	19%	9	75%
Immigration & Refugee	10	16%	9	90%
Mental Health	13	21%	12	92%
Prison	8	13%	4	50%
Total	63		50	79%

Given the strategic priority that LAO has assigned to issues of mental health and aboriginal issues, it is worth considering whether more effort should be made to proactively develop public interest litigation in this area. In order to assess the need for and value of doing so, additional work will need to be done to understand the extent to which LAO is supporting work in these areas through means other than GATCC. For example, the recent decision of the Ontario Court of Appeal in *Kokopenance*⁴ was supported through a higher than average budget granted through the Big Case Management Program and the recently instituted discretion guidelines provide for considerations of issues of mental health. A better understanding of

² One of these matters was referred to the BCM program to set a budget with an endorsement of the merits by GATCC.

³ One area of comparison which should be explored is the success rate of applications to Area Committees for appeals of criminal and refugee matters, among other types of appeals which require an Area Committee decision.

⁴ In *Kokopenance* the Ontario Court of Appeal concluded that the Government of Ontario had failed in its constitutional obligation to propote a jury which was reflective of the local population is as much as Aboriginal people were underrepresented on jury-rolls.

how, and the extent to which, LAO supports public interest litigation through various programs, not only the GATCC program, is one of the core goals of this test case transformation project.

In total, over this 27 month period, the types of “litigation partners” approved⁵ for funding were:

- Individuals - \$521,284 (67.8%)
- Associations - \$135,523 (17.6%)
- Clinics - \$112,254 (14.6%)

We have used the term “litigation partner”, rather than “funding recipient” in order to emphasize that the individual to whom payment or funding is being flowed should not be understood as being necessarily the “beneficiary” of that funding. Most GATCC funding flows primarily to certificate lawyers as representatives of individuals. Certificate lawyers are not the beneficiaries of that funding. Their individual clients are, as are the groups or communities whose interests they represent. The same is true for our clinic and association clinic partners. For example, Aboriginal Legal Services of Toronto (“ALST”) was approved for approximately \$82,000 in GATCC funding. This funding is for travel expenses for ALST staff to travel to remote communities outside of Toronto, to retain a local counsel to represent families. In another matter, we funded the fees of an experienced criminal lawyer to act on behalf of the African Canadian Legal Clinic (“ACLC”) to intervener in criminal appeal which raised issues about the disproportionate effect mandatory minimum sentences would have on African Canadians.

Approvals by Litigation Partner

	Number	% of Cases Approved for Funding	% of Total Approved Funding
Associations	10	20%	16%
Clinic	3	6%	14%
Individual	37	74%	70%

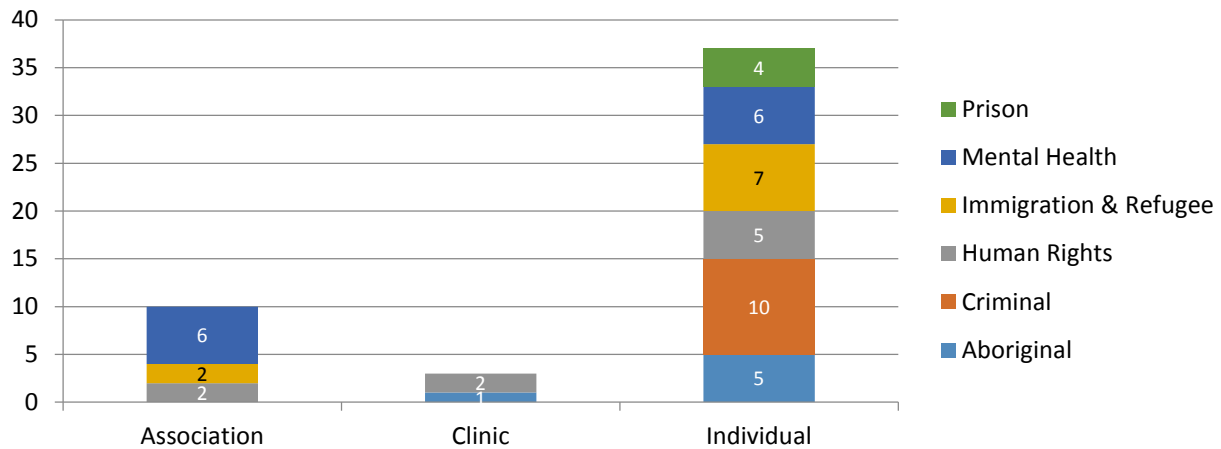
From the above, it appears that matters in which our litigation partner was a clinic are disproportionately expensive. However, it is to be noted that the sample has been skewed by one case. In the *Bushie* matter, GATCC approved funding in the amount \$82,000 for the Aboriginal Legal Services of Toronto (in partnership with the Nishnawbi-Aski Nation) to intervene on behalf of several families into a joint inquest into the deaths of several Aboriginal

⁵ N.B.As discussed in more detail below, historically what has been “approved” for funding has not generally been fully expensed.

men and women in remote northern communities in circumstances in which access to better health care and other social services may have prevented their deaths.⁶

Many if not all GATCC funded cases defy simple categories. Issues such as access to justice and equality require a complex intersectional approach to permit understanding. Many GATCC matters which we have categorized as “criminal” also raised issues of equality or other aspects of “human rights”. One case which we categorized as “criminal” was a challenge to the requirement for doctors to act as gatekeepers to access to marijuana. The challenge raised issues of equality for people with disabilities, the right to essential medical care etc. But, it was raised in the context of a criminal prosecution with criminal liabilities. There are many such examples. As such, what we did in our analysis was to create “cascading” categories. In this way we are able to provide a slightly more nuanced, although still blunt understanding of the types of cases funded by GATCC (see “Part III: Types of Issues Funded”).

Chart 3: Types of Matters Approved for Funding (Litigation Partner and Issues)



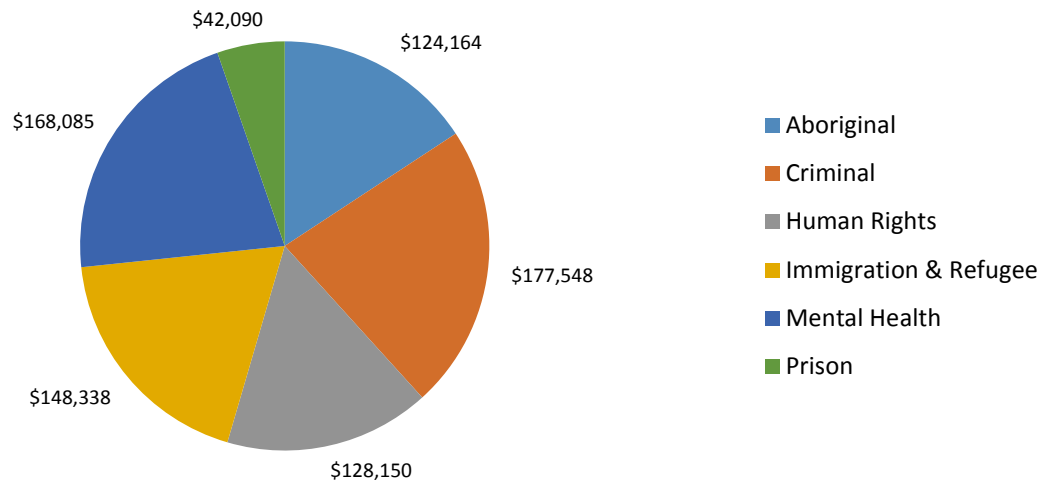
Datatable 3 of chart 3: Types of Matters Approved for Funding (Litigation Partner and Issues)

	Association	Clinic	Individual
Prison	0	0	4
Mental Health	6	0	6
Immigration & Refugee	2	0	7
Human Rights	2	2	5
Criminal	0	0	10
Aboriginal	0	1	5

⁶ The funding includes 300 hrs for local (certificate) counsel to meet with families and assist in preparing for and attend the inquest, as well as over \$30,000 in travel expenses for the certificate lawyer and staff of ALST to travel to meet with families and attend the inquest and \$13,000 to support ALST retaining expert witnesses.

The number of different types of issues approved for funded is consistent with the level of funding approved for these cases i.e. there is no “type” of issue which appears to be more costly than another.

Chart 4: Types of Matters Approved: Issues by Funding Level



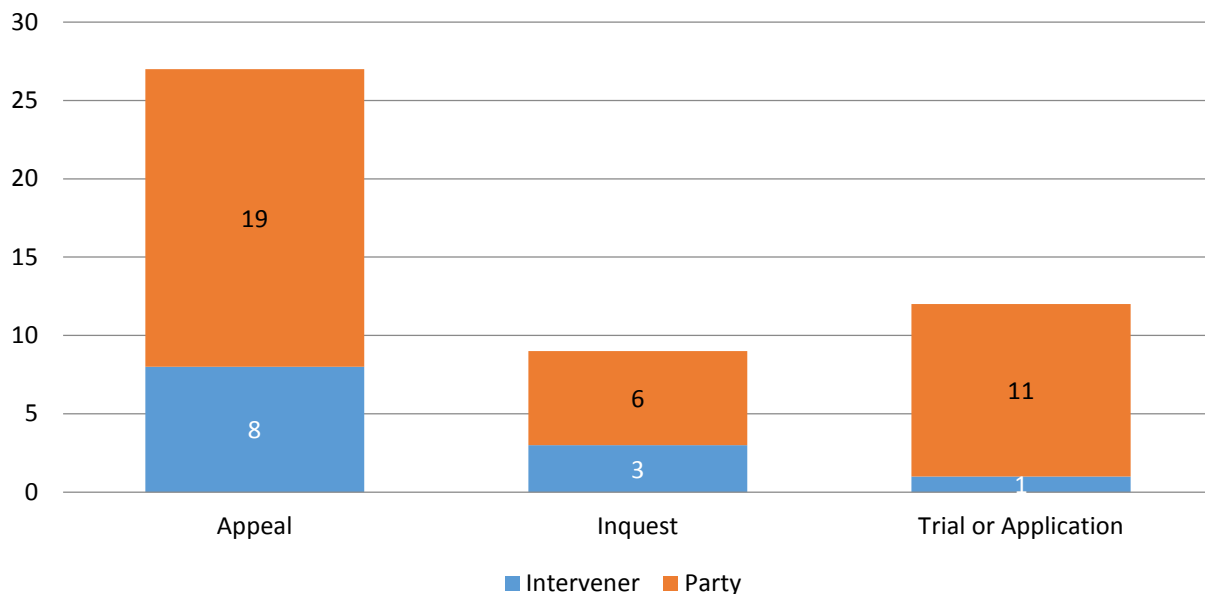
It is interesting to note that there seems to have been an assumption by many that criminal matters which raised public interest issues were generally funded through discretion and the big case management program, rather than through GATCC. This has clearly not been the case in recent years. One area of reform for consideration is whether criminal matters which raise public interest issues should continue to be routed to GATCC or to a committee with more expertise in the area of criminal law, such as the Big Case Management Exceptions Committee and/or Area Committees.

Types of Litigation Funded

The GATCC program is funding cases at all levels, although appeals and inquests represent the most significant type of litigation funded. It is also interesting to note, that it is not uncommon for LAO to fund both interveners and parties in the same case. The funding of both litigants and interveners recognizes that both have important but unique issues of public importance to raise in the proceedings. LAO provides this funding for both sets of parties for same reason that the court or inquest has granted standing to an intervener as well as to litigants. That said additional analysis is warranted to further explore the merits of the hypothesis that there is value in funding interveners and parties to litigation.

In two recent cases challenging changes to the refugee system⁷ LAO received applications from and agreed to fund both the Canadian Association of Refugee Lawyers as a public interest litigant, and an individual refugee litigant as a member of the larger group of refugees. It is also not uncommon in the context of a Coroner’s Inquest to fund one or more family members as well as an association to represent the interests of a larger community, such as the Mental Health Legal Committee. It should however be noted, once again, then even when an individual family member is being funded, they are being funded because the GATCC has determined that they can and will raise interests of larger public importance. For example, in one pending application to be considered, the Mental Health Legal Committee has been funded to raise systemic issues with respect to the interaction of police with individuals with mental health issues. In that same proceeding a member of the family has recently applied for funding to retain a lawyer who has expertise on the issue of the use of tasers. A lawyer with a background in these issues was required since it was anticipated that the use of tasers would be proposed at the inquest (?) as a “panacea” to avoid deaths of people with mental health illnesses at police hands.

Chart 5: Types of Matters Approved: By Type of Litigant and Level of Court



Although additional analysis will be provided below on the costs of GATCC matters, it is interesting to note at the outset that the average amount approved for GATCC funded matters is relatively the same with the striking exception of interventions by associations at inquests.

⁷A challenge to the Designated Country of Origin provisions and also to cutbacks to the Interim Federal Health Benefits.

Average Approved Cost by Type of Matter

Appeal (Party and Intervener)	Appeal (Party)	Appeal (Intervener)	Trial (Party)	Inquest (Intervener)
\$14,116	\$15,618	\$10,549	\$13,351	\$48,343

The much higher average cost for inquest interveners is based on the following three interventions:

- An inquest into the death of an individual in custody (mental health) by the “Oak Ridge Client Group” as represented by [REDACTED]
- An inquest into the death of a man with mental health issues at the hands of the police (mental health) by the “Empowerment Council” as represented by [REDACTED]
- An inquest into multiple deaths of Aboriginal people into the adequacy of medical and other government services (Aboriginal) by ALST as represented by clinic staff and one or more counsel locally retained to work with the families of the deceased. All three inquests were high profile, highly adversarial and extended proceedings, in which fundamental issues about how particularly vulnerable Legal Aid clients are treated by state authorities were addressed. Their high cost can be justified on that basis.

Interestingly, it appears that the cost of GATCC funded appeals have not proven to be relatively expensive. On average, a serious criminal appeal, managed through the BCM program, to the ONCA will cost LAO about \$35,445, and an appeal to the SCC will cost LAO roughly \$24,884. Therefore, appeals funded through GATCC appear to be generally lower cost than standard criminal appeals.

Individuals are most often funded as parties to litigation. In a recent case, however, a client was provided funding to intervene in a Supreme Court of Canada case about the immigration inadmissibility of alleged “terrorists” to Canada. It was felt that the client was ideally suited to intervene at the SCC as very similar issues had arisen in an earlier case for which he had been party litigant and for which he had also received GATCC funding. LAO’s decision to fund the intervention clearly had merit, since the SCC did grant the party intervener status.

By contrast, associations are most often and clinics were only funded as interveners.

Chart 6: Funding Approved: By Type of Litigant and Level of Court

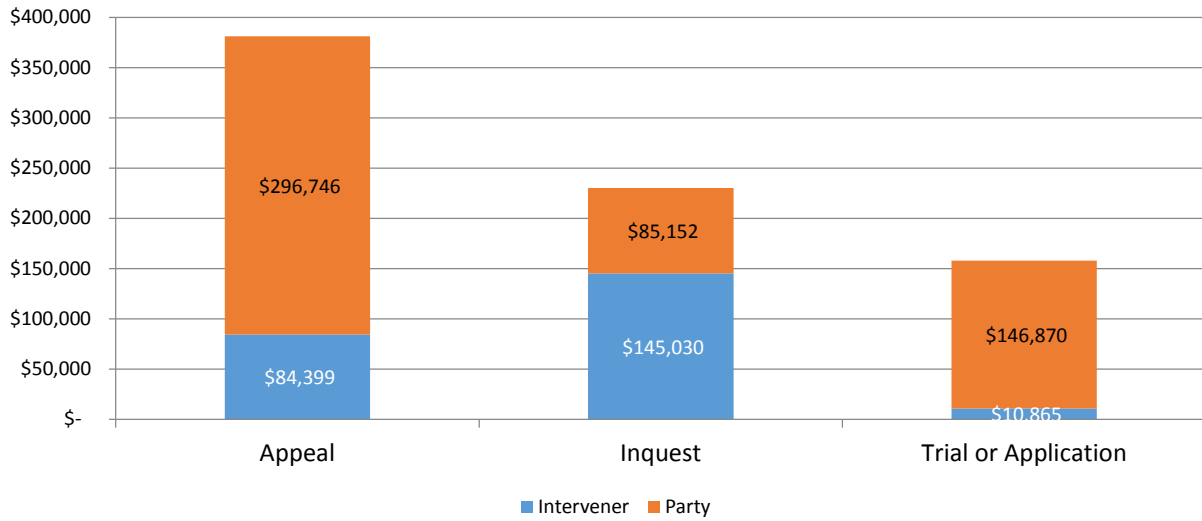
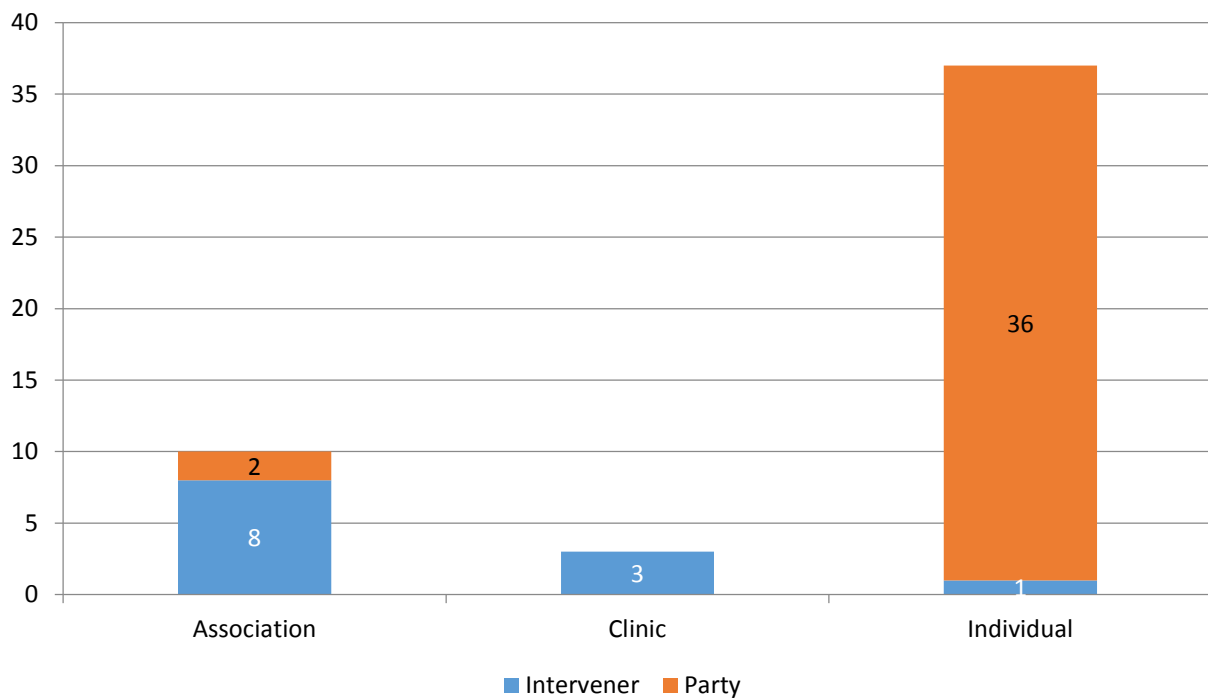
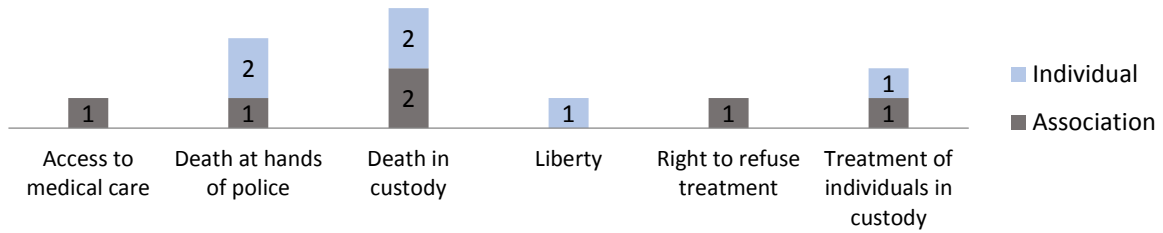


Chart 7: Funding Approved: By Type of Litigant and Level of Court



Part III: Types of issues funded

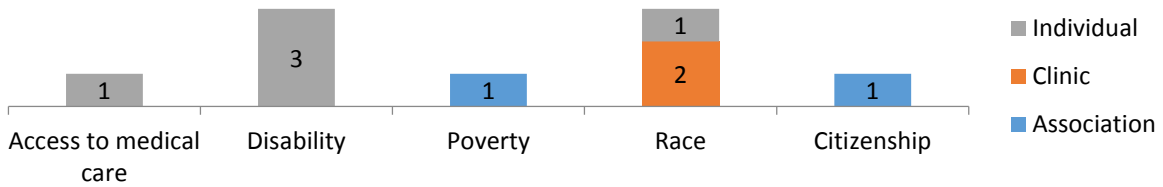
Mental Health



Datatable 4 Mental health

	Access to medical care	Death at hands of police	Death in custody	Liberty	Right to refuse treatment	Treatment of individuals in custody
Individual	0	2	2	1	0	1
Association	1	1	2	0	1	1

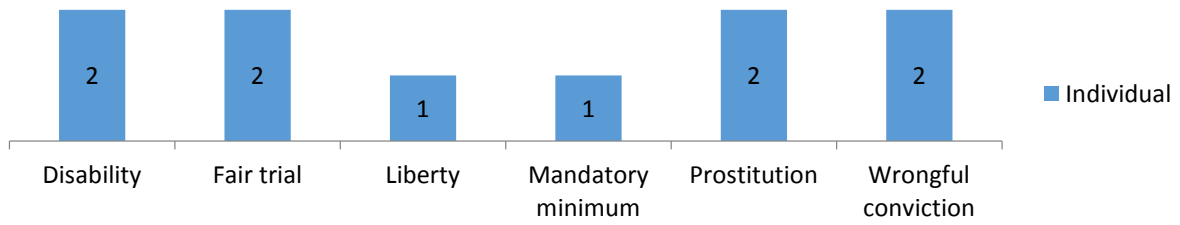
Human Rights



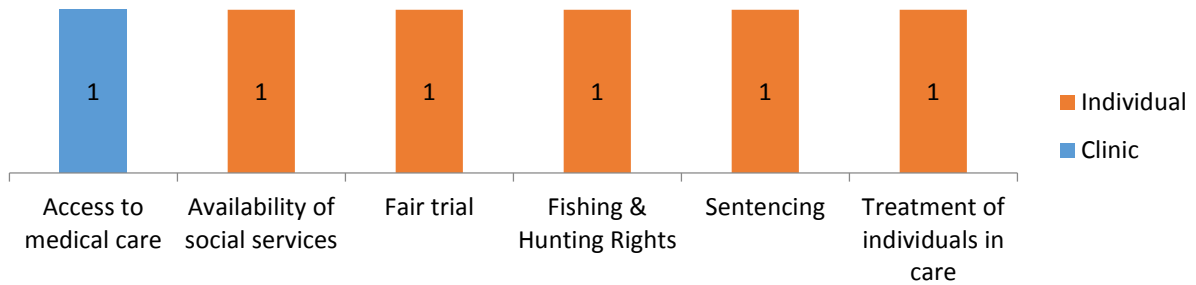
Datatable 5 Human rights

	Access to medical care	Disability	Poverty	Race	Citizenship
Individual	1	3	0	1	0
Clinic	0	0	0	2	0
Association	0	0	1	0	1

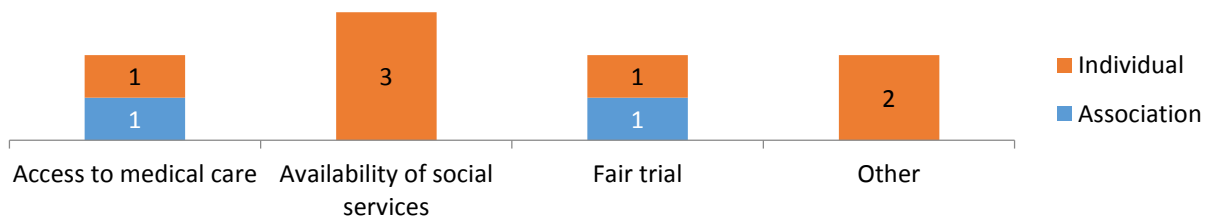
Criminal



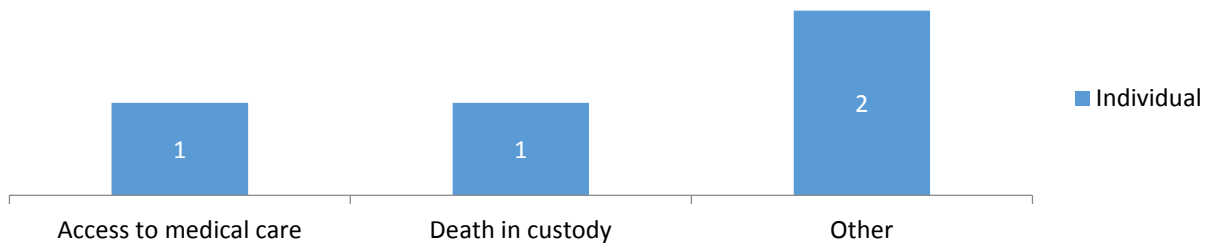
Aboriginal



Immigration and Refugee



Prison



Constitutional Challenges

There are a large number of constitutional challenges. Out of the 50 approved matters, 26 raised constitutional challenges in various contexts ranging from criminal to immigration and refugee. The majority of the applications raising constitutional challenges indicated that s. 7 (right to life liberty and security of person) was at issue.

Part IV: Financial management

As discussed in the papers prepared to support a “Realignment of Accountability” for the GATCC program – to manage it more consistently as a provincial program – there are challenges with respect to the intergity of the data related to this program. These However, the data is in my opinion of sufficient quality to understand overall trends and with few exceptions, demonstrates that cases were managed according to budget.

Coverage and Expenditure Trends by Region

GATCC Certificates Issued					
	2008-09	2009-10	2010-11	2011-12	Average
GTA Region	12	18	14	15	14.8
South West Region	4	1	1	1	1.8
Northern Region	5	0	0	2	1.8
Central East Region	4	9	6	2	5.3
Unknown	0	0	0	1	0.3
Total	25	28	21	21	23.8

GATCC Certificate Payments									
	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13 (YTD)	2004-05 to 2012-13 (YTD)	Average
Central East	\$106,852	\$77,118	\$26,845	\$61,952	\$6,297	\$44,998	\$110,345	\$481,039	\$ 54,010
GTA	\$224,735	\$185,666	\$377,007	\$117,919	\$248,765	\$465,891	\$142,808	\$1,920,499	\$269,997
Northern	\$0	\$8,963	\$3,238	\$7,658	\$22,475	\$0	\$0	\$53,428	\$ 7,056
South West Region	\$185	\$111,402	\$1,533	\$57,088	\$7,379	\$36,239	\$35,341	\$281,164	\$ 35,638
Grand Total	\$331,772	\$383,148	\$408,623	\$244,617	\$284,916	\$547,745	\$288,494	\$2,747,300	\$366,804

Program Budget Management

In recent years, the GATCC Program has had a notional budget of \$600,000 per year. Prior to this recent increase, the notional budget was \$500,000 per year. As indicated above, the program has never fully expended that budget, even when one considers the multi-year life cycle of certificate expenditures.

When GATCC funding was approved, and a budget set, program staff created an estimate of total costs of the case to its conclusion. This estimate was then reported to the Committee as a running “total approved in that fiscal year” so that they could assess future applications against the available notional budget for the program.

Funding Approved	
2010-11	\$ 492,689
2011-12	\$ 278,129
2012-13	\$ 596,591

Accuracy of Budgeting & Financial Controls

Because expenditures were tracked as approved (rather than on an expenditure modelling exercise) we cannot easily assess the accuracy of the cost forecasting on an annual basis. Nevertheless, my analysis reveals that overall, cost estimation was quite accurate. Of the total 22 matters approved for funding during this period which have been final billed, total case budgets of \$349,164 was approved. As final billed, a total of \$328,811 was paid, for a negligible variance of \$20,353 paid below approval.

This accuracy was in part due, in my opinion, to the manner in which GATCC set budgets. Specifically, unlike in other LAO programs, budgets were often set with a fixed cap on cost, regardless of things like the number of days/hours of actual attendance and often with no provision for preparation *per diem*. To the extent that these budgeting methods may change, it will be important to incorporate into the cost estimation process expenditure modelling such as that which is done for the BCM and certificate programs more generally.

Part V: Outcomes

During this 27 month period, only 18 matters have concluded. Of those 18 matters, five (28%) can be considered a definitive success. It should be noted that overall the success rate of appeals to the ONCA is 30%, so a success rate of 28% for GATCC funded matters should not be considered negative. Perhaps more importantly, given the very limited sample currently available, caution should be exercised to drawing any conclusions. The outcome analysis presented below is very rudimentary. A much more rigorous model for outcome assessment of test case litigation is required. These measures will inevitably need to include qualitative factors such as:

- Was public awareness of an issue increased?
- Were communities empowered in other ways?
- Was confidence in the justice system engendered?
- Was our relationships with our stakeholders improved?
- Did one or more individual clients benefit?
- Did the funding of this issue as a “test case” clarify the law to the benefit of our clients and improve the efficiency of the justice system, thereby reducing the demand for publically funded legal services?

The questions are relevant not only to those matters understood as “unsuccessful”, but also to those matters considered successful. For example, in the context of positive jury recommendations, have changes actually been implemented by the government. Or have police techniques changed following a ruling by a court on the constitutionality of a particular investigative technique by the police. These will be challenging questions to explore. It suggested that in order to understand the benefit of this program, efforts should be made to invest in a comprehensive evaluation, perhaps in partnership with academic institutions.

Proceeding Type	Type of Matter	Type of Matter Sub-Category	Goal	Result	Successful
Appeal	Mental Health	Treatment of individuals in custody	Reduce wait time for assessment of mental health issues among people in criminal custody	Leave to intervene denied	No

Proceeding Type	Type of Matter	Type of Matter Sub-Category	Goal	Result	Successful
Inquest	Mental Health	Death at hands of police	Prevent individuals with mental health being killed by police	Recomm.: increased access to alcohol and substance abuse treatment in Branford and increased training for the police on mental health and more use of Tasers.	Yes
Appeal	Immigration & Refugee	Availability of social services	Eliminate fee to apply for permanent residency based on Humanitarian and Compassionate grounds.	Application for leave to appeal dismissed	No
Trial or Application	Criminal	Wrongful conviction	To overturn the conviction on the basis that the medical evidence of the coroner was flawed	Conviction was overturned	Yes
Appeal	Immigration & Refugee	Availability of social services	Extend health care benefits to immigrants without status	Finding that there was no constitutional right to this benefit.	No
2nd level Appeal	Immigration & Refugee	Availability of social services	Extend health care benefits to immigrants without status	Finding that there was no constitutional right to this benefit.	No
Appeal	Human Rights	Equality / Race	Uphold the criminalization of hate speech as justified in certain circumstances	A blanket prohibition on hate speech does violate freedom of expression and religion, but can be justified based on s. 1	Yes

Proceeding Type	Type of Matter	Type of Matter Sub-Category	Goal	Result	Successful
Trial or Application	Criminal	Liberty	Limit use of law to criminalize protests	Not successful.	No
Trial or Application	Prison	Other	Prevent Canadians from being detained outside of Canada.	Prisoner transferred to Canada.	No
Appeal	Criminal	Disability	Improve access to medical marijuana	Doctors are the appropriate gate-keepers.	No
Appeal	Criminal	Disability	Improve access to medical marijuana	Leave to appeal denied	No
Inquest	Prison	Access to medical care	Improved medical treatment of individuals in criminal custody.	Coroner concluded that the death was not the result of bad medical treatment	No
Appeal	Human Rights	Disability	Equal access of adult disabled children to parental financial support regardless of whether they are the child or married or unmarried parents.	Equality argument not considered. No right to support found for children of unmarried parents.	No

Proceeding Type	Type of Matter	Type of Matter Sub-Category	Goal	Result	Successful
Appeal	Human Rights	Disability	Equal access of adult disabled children to parental financial support regardless of whether they are the child or married or unmarried parents.	Equality argument not considered. No right to support found for children of unmarried parents.	No
Trial or Application	Aboriginal	Sentencing	Availability of curative discharge for individuals found guilty of drinking and driving who have addictions	Crown's application to dismiss was denied	Yes
Trial or Application	Human rights	Poverty	Establish <i>Charter</i> right to the creation of a strategy to eliminate homelessness	Leave to appeal denied	No
Appeal	Criminal	Fair trial	Limit use of appellate courts use of the curative proviso	Leave to appeal denied	No
Trial or Application	Criminal	Race	Prevent racial profiling	Matter was resolved by Crown in order to prevent precedent	No

Part VI: Next Steps

As noted above, the best use of this paper is to provide a jumping off point to begin to develop a more comprehensive model for assessing what public interest test cases we should support and how. As a first step, we have secured the assistance of a student for one month in January 2014 to expand both the scope of this study in two ways:

- First, to look at a larger sample of cases funded through GATCC, extending the study to include cases considered prior to April 2011. In this way, not only will the sample size be increased, but also will our ability to study cases which have concluded.
- Secondly, and perhaps most importantly, to increase the depth of analysis to include a more nuanced assessment of success, including factors such as:
 - Was public awareness of an issue increased?
 - Were communities empowered in other ways?
 - Was confidence in the justice system engendered?
 - Was our relationships with our stakeholders improved?
 - Did one or more individual clients benefit?
 - Did the funding of this issue as a “test case” clarify the law to the benefit of our clients and improve the efficiency of the justice system, thereby reducing the demand for publically funded legal services?

It is hoped that the Working Group will be able to identify other areas for further study.