

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*,
2026 BCCA 267

Date: 20260616
Docket: CA50482

Between:

Cambie Surgeries Corporation and Specialist Referral Clinic (Vancouver) Inc.

Appellants
(Plaintiffs)

And

Attorney General of British Columbia

Respondent
(Defendant)

Before: The Honourable Mr. Justice Butler
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated
January 27, 2025 (*Cambie Surgeries Corporation v. British Columbia*
(*Attorney General*), 2025 BCSC 123, Vancouver Docket S090663).

Counsel for the Appellants: J.K. McEwan, K.C.
A.I.M. Dhawan

Counsel for the Respondent: J.G. Penner
T.C. Boyar
C.M. Clemente

Place and Date of Hearing: Vancouver, British Columbia
February 11, 2026

Place and Date of Judgment: Vancouver, British Columbia
June 16, 2026

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Mayer

Summary:

The appellants appeal an order granting trial costs to the Attorney General of British Columbia (“AGBC”). The costs hearing followed litigation challenging the constitutionality of certain provisions of the Medicare Protection Act, R.S.B.C. 1996, c. 286. The appellants say the judge erred in principle in determining the normal costs rule applied despite the public interest at stake in the litigation. They argue the judge misapprehended facts related to their profits and revenue; relied on this misapprehension of the appellants’ capacity to bear costs which affected the analysis of factors determining the suitability of the normal rule; and considered an irrelevant factor—the efficiency of the litigation.

Held: Appeal dismissed. The appellants challenge a highly discretionary costs decision and are unable to demonstrate any error in law or principle. The judge did not misapprehend facts related to the appellants’ financial position. The factors guiding the exercise of discretion to depart from the usual costs rule are not to be considered in isolation. Absent any error, this Court cannot reweigh the factors to arrive at a different result. The awarding of costs in public interest litigation is an exercise of principled discretion. It would unduly constrain that discretion if the trial court could not consider the conduct of the parties when deciding on the appropriate costs order.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] Cambie Surgeries Corporation (“Cambie”) and Specialist Referral Clinic (Vancouver) Inc. (“SRC”), collectively referred to as “the appellants”, appeal the order of Justice Whately granting trial costs to the Attorney General of British Columbia (“AGBC”). The hearing on costs followed litigation that challenged the constitutionality of certain provisions of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 [MPA].

[2] Justice Whately aptly described the trial as “prodigiously lengthy and complex”. The trial was heard by Justice Steeves over 194 days and across three and one-half years. He dismissed the appellants’ claim—that the *MPA* prevented the individual plaintiffs, or other similarly situated patients, from accessing medically necessary health care thus depriving them of their s. 7 and 15 *Charter* rights: 2020 BCSC 1310 (the “Trial Reasons”). That decision was upheld on appeal to this Court: 2022 BCCA 245 (the “Appeal Reasons”). In the Appeal Reasons, the Court made no award of costs of the appeal to either party or any intervener, “in light of the

public interest at stake in this appeal”: at paras. 370, 422. Leave to appeal to the Supreme Court of Canada was denied: [2022] S.C.C.A. No. 354.

[3] The parties were given leave to make further submissions on costs of the trial, which occurred after the appeals were exhausted. The costs applications were heard by Justice Whately in chambers because they were brought after the trial judge had retired. She concluded the normal costs rule should apply and the AGBC was entitled to costs of the trial as the successful party: 2025 BCSC 123 (the “Costs Reasons”).

[4] On appeal, the appellants argue the judge erred in law or principle in three ways. First, they submit the judge adopted unproven statements made by respondent’s counsel about the revenues and profits allegedly earned by the appellants in contravening the *MPA*. Second, the judge allowed her misapprehension of facts regarding the appellants’ capacity to bear costs to affect her analysis of the factors relevant to the exercise of discretion when ordering costs in a matter that was clearly public interest litigation. Third, the judge erred by considering an irrelevant factor—the “overall efficiency of the litigation”—when determining whether the normal costs rule should apply.

[5] The issue on appeal is whether the judge erred in concluding that the normal costs rule was suitable on the facts of the case. The standard of review carries significant weight here as the appellants are challenging a highly discretionary costs order subject to limited appellate review. In my view, the appellants are unable to demonstrate that the judge erred in law or principle, and I would dismiss the appeal.

Reasons of the Chambers Judge

[6] The costs application was heard by Justice Whately over two days in July 2024. On January 27, 2025, she issued the Cost Reasons. While the proceedings involved individually named plaintiffs, the AGBC only sought costs against the appellants, Cambie and SRC, who are the corporate plaintiffs. The judge ordered that it recover costs only against the appellants.

[7] As the chambers judge noted early on, an understanding of the complexity of the trial proceeding was relevant to the costs application. The trial judge set out a detailed chronology of those proceedings at paras. 66–159, and in Schedule III of the Trial Reasons. The chambers judge helpfully summarized that history in her reasons:

[10] On December 4, 2008, a group of citizens filed a petition against the Medical Services Commission of British Columbia (the “Commission”). The petitioners sought a declaration that several private medical centers, including Cambie, were participating in billing practices which violated the *MPA*. The petition sought, among other things, to compel the Commission to enforce the *MPA* provisions.

[11] On January 28, 2009, Cambie and a number of other plaintiffs filed a Statement of Claim, which is separate from the petition described above. In the Statement of Claim, the plaintiffs alleged that sections of the *MPA* violated their rights under the *Charter* and should therefore be declared to be no force and effect.

[12] The 2009 Statement of Claim listed the Commission, the AGBC, and the Minister of Health Services of British Columbia as defendants. The Attorney General of Canada was later added to the action pursuant to the constitutional question.

[13] On February 20, 2009, the original three defendants filed a statement of defence and a counterclaim. The counterclaim named the SRC as a defendant by counterclaim.

[14] On November 20, 2009, Justice Lynn Smith determined, among other things, that the constitutional questions were best addressed via the statement of claim proceeding, instead of the petition. The issue of costs for this ruling was deferred until the conclusion of the trial: *Schooff v. Medical Services Commission*, 2009 BCSC 1596.

[15] On June 30, 2010, all the original plaintiffs, with the exception of Cambie, filed a notice of discontinuance. For a period of time, Cambie was the sole remaining plaintiff.

[16] On September 6, 2012, the Commission applied for an interim injunction against Cambie and SRC. The Commission alleged that Cambie and SRC were engaging in billing practices that contravened the *MPA*. The Commission requested that the court enjoin the Corporate Plaintiffs from continuing these allegedly contravening practices. The Commission later deferred this application to allow the trial to proceed.

[17] Between September 2012 and the commencement of the trial in September 2016 the plaintiffs amended their notice of civil claim on multiple occasions. On September 13, 2012, the plaintiffs filed an amended notice of civil claim which added individual named parties as plaintiffs. On January 10, 2013, the plaintiffs filed an additional amended notice of civil claim which added an additional named party and SRC as plaintiffs.

[18] During this time, the court also made multiple pre-trial decisions related to intervenors, the disclosure and admissibility of evidence, and the Commission's ongoing enforcement of the *MPA* in light of the *Charter* challenge.

[19] On November 25, 2015, Associate Chief Justice Cullen ordered a temporary interim stay to stop the Commission from enforcing the *MPA* provisions which the plaintiffs claimed to be unconstitutional: *Cambie Surgeries Corporation v. British Columbia (Medical Services Commission)*, 2015 BCSC 2169, at para. 146.

[20] The trial was originally set to begin on September 2, 2014, but was delayed several times. The causes of the delay were varied and numerous. It is notable that there were at least two adjournments with new trial dates granted that were peremptory on the plaintiffs. It is also notable that on March 2, 2015, the trial was adjourned by consent due to the Minister of Health discovering that it had inadvertently failed to disclose thousands of potentially relevant documents.

[21] The original expected time estimate for the trial was 24 weeks.

[22] The trial began on September 6, 2016, and concluded on February 28, 2020. The trial lasted a total of 194 days.

[23] Throughout the trial, there were numerous procedural and evidentiary disputes which caused substantial delay. In addition to the 194 trial days, the parties also appeared in chambers on several occasions and participated in over 30 judicial management conferences.

[24] The plaintiffs' case used 134 days of trial time, the AGBC used 30 days, and the various intervenors took the remaining 9 days. The record included 590 exhibits totalling thousands of pages, oral testimony and affidavits from 75 lay witnesses, and 40 expert reports, with most of those experts being cross-examined during the trial.

[25] Justice Steeves made over 50 substantive evidentiary rulings over the course of the trial, which he summarized at paras. 113–145 of the Trial Decision. A complete table of the evidentiary rulings and judgments appear at Schedule III.

[26] Closing submissions concluded on February 28, 2020. On September 10, 2020, Justice Steeves released Reasons for Judgment which dismissed the plaintiffs' ss. 7 and 15 claims. Justice Steeves concluded his reasons with the following remarks:

...

[2943] To the extent the parties and intervenors cannot agree on the matter of costs they may make further submissions.

[27] Justice Steeves retired before the parties were able to make submissions related to costs.

[28] On April 11, 2024, the AGBC filed a notice of application seeking costs against the Corporate Plaintiffs. On May 22, 2024, the Corporate Plaintiffs filed an application response requesting that this Court order each party to bear their own costs.

[8] After describing the procedural background, the chambers judge set out the applicable legal principles. She noted that the normal costs rule—that costs are awarded to the successful party unless otherwise ordered—is stated in Rule 14-1(9) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. She also recognized that the court retains a discretion to depart from the normal rule. The party requesting a deviation from the rule has the burden of proving the rule is unsuitable to the facts of the case.

[9] The chambers judge referred to *British Columbia (Attorney General) v. Trial Lawyers Association of British Columbia*, 2022 BCCA 354 as addressing the current state of the law concerning the special considerations applicable to public interest litigation. Where a public interest litigant is unsuccessful, they are not automatically insulated from adverse costs. Instead, the court must apply the five factors outlined in *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, 2005 BCCA 368 to determine the suitability of the normal rule based on the facts of the case. She observed that the court's remaining discretion is not unfettered and must be exercised on a principled basis.

[10] The chambers judge laid out the factors from *Guide Outfitters*:

[41] ...

- a. The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
- b. The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
- c. The issues have not been previously determined by a court in a proceeding against the same defendant.
- d. The defendant has a clearly superior capacity to bear the costs of the proceeding.
- e. The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

[11] She next examined decisions involving unsuccessful litigants who raised questions of public interest but did so, at least in part, to further personal pecuniary interests: *Guide Outfitters*; *MacDonald v. University of British Columbia*, 2004 BCSC 412; *Odhavji Estate v. Woodhouse*, 2003 SCC 69; *OPEIU v. B.C. Hydro et al*, 2005 BCSC 8. She noted that some courts have focused on the characteristics of the litigants (*MacDonald*), or their individual interests (*OPEIU*), while the reasoning in *Guide Outfitters* “rested primarily on the nature of the proceedings rather than on the nature of the litigant”. She concluded with the following statement in *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 94 B.C.L.R. (2d) 331 at para. 49, 1994 CanLII 6510 (B.C.S.C.), cited with approval in *Guide Outfitters*, that focuses on the motives of the litigant (at para. 52):

I do not think that it would be wise to establish a principle that any person bringing a proceeding out of a *bona fide* concern to vindicate his or her perception of the public interest should be insulated from an award of costs in all cases. Such a motive will always be a relevant and important factor, but it should not be considered to the exclusion of all other relevant and important factors. The Court must retain the flexibility to do justice in each case...

[12] The chambers judge then considered and commented on the five factors as they applied to the circumstances of the case: Costs Reasons at paras. 53–102.

Does the proceeding involve issues of public interest?

[13] The chambers judge noted that the proceeding “clearly involved issues extending beyond the immediate interests of the parties”: Costs Reasons at para. 53. While she found that public interest was at stake in the litigation, the chambers judge did not consider this Court’s ruling on costs in the Appeal Reasons to be binding or persuasive.

[14] The chambers judge went on to consider whether the appellants were public interest litigants. She noted the trial judge’s observation that had the appellants sought public interest standing at trial, he would not have granted it. She agreed with the appellants that the judge’s view of their standing was not determinative of the issues she had to consider. The chambers judge nevertheless found his comments were relevant to her exercise of discretion in assessing costs. She concluded that

“the corporate plaintiffs’ pecuniary interests likely preclude them from being considered true public interest litigants”: Costs Reasons at para. 64, emphasis in original.

Do the plaintiffs’ pecuniary interests justify the proceeding?

[15] The chambers judge referred to the AGBC’s submission that the appellants had been contravening the provisions of the *MPA* for many years, and its statement that “this ‘likely’ means millions in profit for each entity...”: Costs Reasons at para. 66. She also set out the appellants’ response: that the evidence relied on by the AGBC was limited and speculative; and that the remedy the appellants sought in the litigation was “limited to patients to whom British Columbia failed to provide timely care in the public system”: at para. 71. The chambers judge determined that the appellants “had a direct, and not insignificant pecuniary interest in the outcome of the proceeding” and that they stood “in stark contrast to the many previous examples ... of true public interest litigants, or to those who have some limited financial interest”: at para. 73. She concluded:

[74] On the materials before me, I am not in a position to precisely weigh the financial benefits and costs of pursuing the litigation. However, I cannot find that the Corporate Plaintiffs’ interest in the outcome was so “trivial and inconsequential” that it did not justify the proceedings economically.

Has the issue been previously determined?

[16] The chambers judge accepted that the main issue at trial had not been previously determined and acknowledged Cambie’s argument that the question of the government’s constitutional obligation to provide health care within a reasonable time was novel.

Does the defendant have a clearly superior capacity to bear costs?

[17] The chambers judge summarized the parties’ arguments on this factor. The AGBC stressed: the capacity of the appellants to bear costs in part because they had generated income while operating in contravention of the *MPA*; the failure of the appellants to present evidence to show they could not finance the litigation; and the fact that the appellants received third-party funding from the Canadian Constitutional

Foundation. The appellants' arguments focused on the parties' relative financial capacity and the fact that the AGBC is the best resourced litigant in the province. The chambers judge concluded that while the AGBC had a greater ability to bear costs, the appellants fell "on the very narrow end of the broad spectrum of litigants that face the AGBC": Costs Reasons at para. 86. She found that they were not at a "severe disadvantage" to the province in terms of the ability to bear costs.

Was the plaintiffs' conduct vexatious, frivolous or abusive?

[18] The chambers judge again set out both positions on this issue. The AGBC argued that the appellants conducted the litigation in an inefficient, frivolous or vexatious manner. The appellants meanwhile denied that they had engaged in such conduct and asserted that the AGBC's "massive" shortcomings in document disclosure and production had derailed the litigation process: Costs Reasons at para. 91. She found that neither party's conduct could be characterized as frivolous, vexatious or abusive as those terms are understood in applications for special costs or for declaring a party to be a vexatious litigant. She concluded:

[101] That said, I certainly consider the overall efficiency of this litigation as an important factor in terms of my exercise of discretion. In considering the submissions of the parties, and in particular considering the comments of Justice Steeves, I find that the scales are tipped against the Corporate Plaintiffs with respect to this factor.

[102] I do so keeping in mind the late disclosure by the Ministry of Health which resulted in a lengthy delay to the trial start date, the absence of which I likely would have found this factor substantially in favour of the AGBC.

[19] The chambers judge reiterated the complexity of the litigation and its significance to British Columbians but emphasized that the "overarching question" was whether the normal costs rule was unsuitable: Costs Reasons at para. 104. She balanced the *Guide Outfitters* factors and found:

[105] In considering the factors above, with a particular focus on the characteristics, motivations, and resources of these specific Corporate Plaintiffs, as well as a careful review of the findings in the Trial Decision, I do not find that the normal rule is unsuitable on the facts of this case.

Issues On Appeal

[20] The appellants allege the chambers judge erred in principle in:

- a) adopting a statement by counsel for the AGBC that the appellants had taken in revenues “in the millions of dollars” and “likely” had “millions in profit” in each year in which they had allegedly contravened the impugned legislation;
- b) allowing this misapprehension of fact to affect her analysis of certain factors in *Guide Outfitters*, including: (i) finding that the appellants’ interest was not so “trivial and inconsequential” that it did not justify the proceedings economically, misstating factor 2; and (ii) failing to find that the AGBC had a markedly superior capacity to bear the costs of the litigation, under factor 4; and
- c) applying the incorrect test for determining when deviation from the normal costs rule is appropriate by considering the “overall efficiency of the litigation” as an additional factor.

[21] The AGBC submits that the chambers judge did not misapprehend the evidence or err in principle. She properly considered and applied the *Guide Outfitters* factors.

Standard of Review

[22] It is well established that “costs are awarded on a discretionary basis” and are subject to limited appellate review: *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 at para. 52, citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27. Where discretion is exercised, an appellate court must show great deference and be cautious in intervening: *Jodoin* at para. 52.

[23] Costs awards should be set aside only if the judge made an error in principle or the award is plainly wrong: *MacFarlane v. Gustafson*, 2024 BCCA 400 at para. 13, citing *Hamilton* at para. 27. Accordingly, this Court will interfere only if “the

judge misdirected themselves, or the decision is so clearly wrong it amounts to an injustice”: *Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd.*, 2021 BCCA 129 at para. 149, citing *Agar v. Morgan*, 2005 BCCA 579 at para. 26; *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at paras. 72–75.

[24] Misdirection may include “making an error as to the facts, taking into consideration irrelevant factors, or failing to take into account relevant factors, all of which would amount to an error in principle”: *Giles* at para. 72; *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27 at para. 24; *Yung v. Jade Flower Investments Ltd.*, 2013 BCCA 170 at para. 17. Other reviewable errors may include overemphasizing irrelevant considerations, making assumptions without any basis in the evidence, or misunderstanding the court’s power to make an order sought: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 44; *Majewska v. Partyka*, 2010 BCCA 236 at para. 13.

[25] The discretion with respect to costs is “not wholly unencumbered”, and the purpose for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted: *Giles* at paras. 73–74. It must also be remembered that “the person who seeks to displace the usual rule [as to costs] has the burden of persuading the judge that the rule should be displaced”: *Giles* at para. 75, citing *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at para. 24.

[26] Courts hold the discretion to depart from the general rule where the circumstances justify a different approach: *Giles* at para. 72, citing *Victoria (City) v. Adams*, 2009 BCCA 563 at para. 180; *Okanagan Indian Band* at para. 22. One such potential derogation is to relieve an unsuccessful public interest litigant from an adverse cost award: *Adams* at paras. 181–182.

Discussion

[27] I will consider the three errors alleged by the appellants with reference to the relevant *Guide Outfitters* factors. As noted in *Trial Lawyers*, this Court has affirmed the use of the *Guide Outfitters* factors as part of a distinct analysis for seeking costs

against an unsuccessful public litigant: at para. 14. The parties accept that the appeal is to be determined through the principles set out in *Trial Lawyers*.

Did the chambers judge misapprehend facts by adopting statements made by AGBC’s counsel about the appellants’ revenues and profits?

Position

[28] The appellants describe the first alleged error as the chambers judge’s misapprehension of a key fact taken from statements made by counsel for the AGBC that:

- a) the “annual revenue of the [appellants] in the period of the time they were contravening the provisions of the MPA was in the tens of millions”; and
- b) this “‘likely’ means millions in profit for each entity each year they operated, including through the course of the litigation”.

[29] The appellants assert that the judge accepted counsel’s statements “at face value” when they were not supported by the evidence. The financial statements of the appellants show that their combined annual revenue totaled just over \$20 million as opposed to “tens of millions of dollars”. They submit the chambers judge’s misconception led her to make a costs order “on the basis of a clearly wrong finding of fact” which amounts to an error in principle.

Analysis

[30] This alleged error is central to the appellants’ position on appeal because they say the chambers judge’s misapprehension had a significant impact on her consideration of the *Guide Outfitters* factors. However, the reasons show that the chambers judge did not accept counsel’s assertions about the appellants’ revenues and profit and did not misapprehend the facts as alleged. The chambers judge accurately attributed the statement about the extent of their profits and revenue to counsel:

[66] The AGBC submits that the annual revenue of the Corporate Plaintiffs in the period of time they were contravening the provisions of the *MPA* was in the tens of millions, and states that this “likely” means millions in profit for each entity each year they operated, including through the course of the litigation.

[Emphasis added.]

[31] Contrary to the appellants’ assertions, the chambers judge did not adopt that statement but specifically found she was “not in a position to precisely weigh the financial benefits and costs of pursuing the litigation”: Costs Reasons at para. 74. Her finding that their interest in the outcome of the proceeding was not “trivial and inconsequential” was clearly available based on the evidence before her. This evidence included the limited financial statements produced which showed that Cambie’s revenues for 2015 to 2017, inclusive, ranged from approximately \$9.8 and \$11.6 million, with profits of between \$251,089 and \$442,286. SRC’s revenues for 2016 were approximately \$10.3 million with net income of \$449,717. In 2017, it had revenue of \$10.8 million with net income of \$440,622. Further, the appellants did not deny that as providers of private health care services they stood to benefit financially if the challenge to the *MPA* was successful.

[32] The appellants bore the onus on the application to establish that the normal costs rule was not suitable on the facts. Although not mentioned in the Costs Reasons, the chambers judge was entitled to consider evidence from the proceedings when assessing the appellants’ financial situation, including: their lack of transparency at trial concerning their finances; and their insufficient efforts to comply with disclosure obligations: Trial Reasons at paras. 744–745. I see no error in the chambers judge’s conclusions on the evidence before her, including the limited disclosure of financial information throughout the proceedings. The appellants had a “direct, and not insignificant pecuniary interest” and stood in contrast to “many previous examples ... of true public interest litigants, or to those who have some limited financial interest” in the outcome: Costs Reasons at para. 73.

[33] In summary, I find no substance to the first alleged error. This conclusion also undercuts the appellants' other allegations of error, which rely on their written assertion that the judge's "ultimate conclusion was rooted in a misapprehension of fact that was allowed to overpower the appellants' public interest arguments".

Did the chambers judge's misapprehension of fact affect her analysis of the *Guide Outfitters* factors?

Position

[34] The appellants argue the alleged misapprehension of fact caused her to skew or misapply the first, second, and fourth *Guide Outfitters* factors.

[35] They first submit the chambers judge failed to give weight to, or "muted", the first factor—whether the importance of the issues extended beyond the immediate interests of the parties involved—even though she acknowledged the issues at trial were of "great importance to all British Columbians". She inappropriately adopted the view that their interests did not align with those of "at least some of the patients" and so they could not be considered an appropriate representative to bring claims on behalf of British Columbians. The appellants say this is a conflation of the first and second factors, and the chambers judge erred by considering pecuniary interest as part of the first factor, rather than the importance of the issues raised in the proceeding.

[36] The appellants argue that the chambers judge's conflation of the first and second factors also led her to mistakenly conclude that they could not be considered a "true" public interest litigant for costs purposes. The chambers judge seemed to proceed on the erroneous assumption that any financial interest precluded the appellants from succeeding on their position on costs. The appellants argue the chambers judge's view that "the Corporate Plaintiffs stand in stark contrast to many previous examples in the case law of true public interest litigants" mistakenly endorses the position that only organizations formed for the purpose of litigating in the public interest can qualify. They note that this position was rejected in *Odhavji Estate* and *Guide Outfitters*.

[37] They further assert the chambers judge approached the second factor incorrectly by failing to heed the observation in *Trial Lawyers* that “some pecuniary interest does not automatically bar a public interest plaintiff from costs consideration”: at para. 30. This led the chambers judge to place too high a burden on the appellants. Instead of asking whether their interest could “justify the proceeding economically”, she merely found that the appellants’ interest was not “trivial and inconsequential”. She also failed to draw the proper inference from the fact of third-party funding from the Canadian Constitutional Foundation. Instead of finding that the appellants could not have pursued the litigation absent such funding, she mistakenly inferred that the appellants could afford the litigation and were willing to pursue it to further their own interests.

[38] Regarding the fourth factor, the appellants submit the chambers judge improperly failed to consider the relative capacity of both parties to bear costs. Instead, she focused on the fact that they were commercial enterprises and were not “at a severe disadvantage in terms of the ability to bear costs.” In addition, without any basis in the evidence, the chambers judge found that they fell “on the very narrow end of the broad spectrum of litigants that face the AGBC”.

Analysis

[39] The appellants fairly note that the chambers judge accurately set out the relevant principles. Ultimately, however, the appellants’ arguments challenge the application of these principles and the conclusions reached by the chambers judge. This is a difficult argument for the appellants to advance given the highly discretionary nature of the decision and the applicable standard of review. They are effectively asking this Court to examine the *Guide Outfitters* factors to arrive at a different result. This is not something we can do absent an error in principle, a clear misdirection or a decision that is plainly wrong. As I will explain, the appellants’ challenges to the chambers judge’s consideration of the first, second and fourth factors do not demonstrate any such errors.

[40] I do not see any error in the judge’s approach to the first factor. The chambers judge did not mute her analysis of this factor by considering the appellants’ finances and finding that they were not true public interest litigants.

[41] First, the appellants’ submission essentially asserts that the judge failed to sufficiently weigh the fact that the litigation involved issues of public interest extending beyond the interests of the parties. As mentioned, they are merely inviting this Court to reweigh the *Guide Outfitters* factors to arrive at a different decision. That is not this Court’s role. The judge clearly gave weight to that factor having found that the proceeding “concerned issues of critical importance to all British Columbians, including access to healthcare, the constitutional rights of patients, and public policy about wait times...”: Costs Reasons at para. 53.

[42] Second, the exercise of discretion required the chambers judge to examine the appellants’ motives and interest in the proceedings as well as the public interest. Notably, the Court in *Trial Lawyers* adopted a similar approach to that taken by the chambers judge. The Court framed its consideration by first stating that “the heart of the question before the Court is how to characterize the public importance of the proceedings, and relatedly, the respondent TLABC’s interest in them”: at para. 9. The interests of the Trial Lawyers Association of British Columbia (“TLABC”) were characterized in very different ways by the parties. The Court had to assess whether it was “a public interest litigant bringing a matter of constitutional importance before the Court” or “a large group of lawyers pooling resources” in the face of a threat to their business: at para. 9. The Court found that even though the TLABC was a non-profit entity, it was “proper to consider the pecuniary interest that members of a non-profit society may have, directly or indirectly, in their organization bringing litigation – to do otherwise would ignore the reality of the interests at stake...”: at para. 30. The Court’s overarching position on the exercise of discretion in a costs analysis further supports the approach taken:

[20] This is not to say that every unsuccessful public interest litigant will be insulated from adverse costs. The court must still assess each situation using the factors approved in *Guide Outfitters*. These do not constitute “a test fettering what is inherently an exercise of principled discretion”: *Adams* at

para. 186. The overarching question remains whether the normal rule is unsuitable on the facts of the case (quoting Hall J.A. in *Guide Outfitters*).

[Emphasis added.]

[43] The appellants' submission that the chambers judge erred by conflating the first and second *Guide Outfitters* factors suggests those factors should be considered in silos. That is not the proper approach to the exercise of discretion. The factors must be considered together in the "exercise of principled discretion". Contrary to their assertion, the chambers judge was entitled to consider the trial judge's observation that he would not have granted public interest standing to the appellants: Costs Reasons at para. 63. She was also entitled to consider any misalignment of interests between the appellants and the broader public interest: Costs Reasons at paras. 69–70. The chambers judge's approach was consistent with the observation in *Sierra Club* that the fact a litigant has a "bona fide concern to vindicate his or her perception of the public interest" does not mean that the litigant should be insulated from an award of costs in all cases: at para. 49.

[44] I also find the appellants have failed to demonstrate that the chambers judge erred in principle or misdirected herself about the second factor. Contrary to the appellants' submission, the chambers judge did not proceed on the basis that the existence of any financial interest would preclude them from succeeding with their application. She recognized that one can still have a basis for pursuing public interest litigation despite a pecuniary interest in the result: Costs Reasons at para. 72. The appellants do not suggest they had no pecuniary interest in the outcome of the proceeding. Accordingly, the question before the chambers judge was whether that interest "clearly does not justify the proceeding economically". The economic justification of the appellants' decision to challenge the *MPA* is not a question that has a readily apparent answer. As the chambers judge noted in her final summary, the assessment of the *Guide Outfitters* factors involved consideration of the "characteristics, motivation, and resources" of the appellants as corporate plaintiffs: at para. 105.

[45] Accordingly, the chambers judge appropriately examined and weighed the relevant facts of the case to arrive at her conclusion. Those included: the appellants' financial situation; their failure to be transparent about their general financial situation; their failure to be transparent about their specific arrangements with physicians; and the pre-trial proceedings in which the Medical Services Commission sought an injunction to prevent them from engaging in billing practices that contravened the *MPA*. I see no error in her conclusion that their interest in the outcome was not so "trivial and inconsequential" that it did not justify the proceedings economically, particularly as the appellants bore the onus of showing the usual costs rule should not apply.

[46] I also fail to find any error in principle in the chambers judge's approach to the fourth factor—the capacity to bear costs—for similar reasons.

[47] It is worth restating in regard to this question that the *Guide Outfitters* factors are not to be considered in isolation. The assessment of capacity to bear costs must be considered as part of the larger exercise of discretion. In all cases except those involving large corporations, the substantial resources of the province would mean it would always have a clearly superior capacity to bear costs. As I emphasized earlier, if the appellants wished to tender further evidence concerning their ability to bear the costs of the proceeding, it was incumbent on them as the party seeking a variation from the usual order. That is particularly the case here, where the evidence showed that the appellants received over \$7 million from the Canadian Constitutional Federation to cover a significant portion of their own legal fees and disbursements.

[48] The chambers judge was thus open to conclude as she did on the fourth factor. It was justifiable to find the appellants fell within a small segment of litigants who are not severely disadvantaged regarding capacity to bear the costs of proceedings given they provided little or no evidence to the contrary.

Did the chambers judge err in principle by considering the overall efficiency of the litigation as a relevant factor?

Position

[49] The appellants submit the chambers judge erred by introducing an irrelevant consideration to the analysis—the overall efficiency of the litigation. They argue that in the *Guide Outfitters* context, a party’s contribution to the efficiency of the litigation is only relevant if their behaviour was vexatious, abusive, or frivolous. Having concluded that neither party engaged in vexatious, frivolous or abusive conduct, they submit the judge should not have gone on to consider the overall efficiency of the litigation.

[50] The appellants point to the origins of the *Guide Outfitters* factors in *MacDonald* at para. 13, which draws on the Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989): *Trial Lawyers* at para. 12. The Ontario Law Reform Commission (“OLRC”) report suggests that the vexatious, frivolous, abusive threshold was meant as a “guardrail” to uphold access to justice and avoid discouraging public interest litigation. The appellants further submit there is no case law supporting the view that efficiency should be a consideration when deciding whether to depart from the normal costs rule in public interest litigation. They say that while the *Guide Outfitters* factors are not closed, the discretion surrounding these factors are bound by principles tracing back to the OLRC report. These principles, they argue, have been applied consistently and are meant to offer guidance as to whether unsuccessful public interest litigants should be insulated from adverse costs awards.

Analysis

[51] I agree that the fifth *Guide Outfitters* factor functions as a guardrail to promote access to justice and draws a sharp line where parties have abused the litigation process. However, I do not agree with the appellants’ contention that the trial court is unable to consider the parties’ litigation conduct as a relevant consideration when deciding whether the normal costs rule should apply in public interest litigation.

[52] Costs awards in public interest litigation require consideration of additional factors, but that does not mean that the general principles underlying costs awards are to be ignored. As explained in *Okanagan Indian Band*, orders made under modern costs rules accomplish various purposes aside from indemnification, including “to sanction behaviour that increases the duration and expense of litigation”: at para. 25. The approach to costs is further “animated by the broad concern to ensure that the justice system works fairly and efficiently”: at para. 26. The awarding of costs in public interest litigation remains one of “principled discretion”: *Trial Lawyers* at para. 20. It would unduly constrain that discretion if the trial court could not consider the conduct of the parties when deciding on the appropriate costs order. That is particularly relevant here, where the appellants seek to displace the usual rule and where the conduct of the litigation featured so prominently in the reasons of the trial judge.

[53] Before the chambers judge, the appellants took the position that the AGBC’s “massive” shortcomings in document disclosure and production derailed the litigation process. The AGBC took the position that the appellants’ conduct of the litigation was frivolous, vexatious or abusive. The chambers judge found neither parties’ conduct rose to that level and went on to consider the parties’ conduct in the litigation. In my view, it was entirely within her discretion to examine the parties’ conduct as it contributed to the length and expense of the litigation.

[54] The proper characterization of the parties’ conduct was a central focus of the parties’ submissions on the costs application. The chambers judge’s focus on their behaviour was understandable given the procedural history and the voluminous decisions authored by the trial judge on pre-trial and evidentiary issues, and his comments on the parties’ conduct in the trial decision. As the chambers judge noted, the length of trial and the number of pre-trial applications “do not accurately reflect the gruelling marathon that this litigation became for all the parties”: Costs Reasons at para. 87.

[55] The chambers judge fairly outlined the parties' positions without delving into the specifics of their complaints in the Costs Reasons: at paras. 89–98. She then explained how she approached the question of the extent to which the parties' conduct impacted the trial length and the evident inefficiencies:

[99] Without reproducing the lengthy and myriad complaints in their entirety, I tried to capture the parties' positions with respect to this factor. I considered carefully whether, under the circumstances of this difficult trial, either side were substantially more at fault for the length, scope or any avoidable inefficiencies.

[56] With this context laid out, the chambers judge concluded that the overall efficiency of the litigation was “an important factor” in her exercise of discretion and that the “scales are tipped against the Corporate Plaintiffs”: Costs Reasons at para. 101. In addition, but for the late disclosure of documents by the Ministry of Health, she would have found “substantially in favour of the AGBC”: at para. 102.

[57] Having reviewed the Trial Reasons and the numerous procedural and evidentiary rulings, I see no error in her conclusion that the appellants were largely responsible for the inefficiencies which contributed to the excessive length of the trial.

[58] More importantly, it is my view that the chambers judge did not err in principle in considering the appellants' litigation conduct as a factor in her decision. The chambers judge properly examined the *Guide Outfitters* factors with a particular focus on the motivations and resources of the appellants, their conduct in the litigation, and the facts of the case as found by the trial judge. Her conclusion that the normal costs rule was suitable on the facts of the case was a principled exercise of discretion.

Disposition

[59] As stated, costs awards are reviewed by this Court applying a highly deferential standard. The appellants have not established an error in principle that

would allow for appellate intervention on a principled basis. Accordingly, I would dismiss the appeal.

“The Honourable Mr. Justice Butler”

I AGREE:

“The Honourable Madam Justice DeWitt-Van Oosten”

I AGREE:

“The Honourable Justice Mayer”