SCC File Nos. 38374 and 38376

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

MAIA BENT

APPELLANT
(Respondent)

-AND-

HOWARD PLATNICK

RESPONDENT
(Appellant)

AND BETWEEN

LERNERS LLP

APPELLANT
(Respondent)

-AND-

HOWARD PLATNICK

RESPONDENT
(Appellant)

AND BETWEEN

1704604 ONTARIO LIMITED

APPELLANT
(Respondent)

-AND-

POINTES PROTECTION ASSOCIATION, PETER GAGNON, LOU SIMIONETTI, PATRICIA GRATTON, GAY GATSHORE, RICK GARTSHORE, and GLEN STORTINI

RESPONDENTS
(Appellants)

FACTUM OF THE INTERVENERS, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, CANADIAN JOURNALISTS FOR FREE EXPRESSION, CTV, A DIVISION OF BELL MEDIA INC., GLOBAL NEWS, A DIVISION OF CORUS TELEVISION LIMITED PARTNERSHIP, ABORIGINAL PEOPLES TELEVISION NETWORK, and POSTMEDIA NETWORK INC.
(COLLECTIVELY THE "MEDIA COALITION")

(Pursuant to Rules 42 of the *Rules of the Supreme Court of Canada*)

LINDEN & ASSOCIATES PROFESSIONAL CORPORATION
200 Bay St., Suite 2010
RBC Plaza, North Tower
Toronto ON M4J 2J1

Iain A.C. MacKinnon
Tel: (416) 861-9338 x231
Fax: (416) 861-9778
Email: imackinnon@lindenlex.com

Counsel for the Intervener Media Coalition

CONWAY BAXTER LLP
400 - 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

David Taylor
Tel: (613) 288-0149
Fax: (613) 688-0271
E-mail: dtaylor@conway.pro

Ottawa agent to Counsel for the Intervener Media Coalition

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

Winkler Dispute Resolution
39 Glenayr Road
Toronto, ON M5P 3B9

Howard Winkler
Eryn Pond
Tel: (416) 519-2344
FAX: (416) 915-6325
E-mail: hwinkler@winklerlawllp.com

Counsel for the Appellant, Maia Bent

Danson Recht LLP
700 Bay Street, Suite 2000
Toronto, ON M5G 1Z6

Timothy S.B. Danson
Marjan Delavar
Tel: (416) 929-2200
FAX: (416) 929-2192
E-mail: danson@drlitigators.com

Borden Ladner Gervais LLP
1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel: (613) 787-3562
FAX: (613) 230-8842
E-mail: kperron@blg.com

Ottawa Agent for the Appellant, Maia Bent

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel: (613) 695-8855 Ext: 101
FAX: (613) 695-8580
E-mail: emeehan@supremeadvocacy.ca

Counsel for the Respondent, Howard Platnick

Lax O'Sullivan Lisus Gottlieb LLP
2750 - 145 King St. West
Toronto, ON M5H 1J8

Terrence J. O'Sullivan
Andrew Winton
Tel: (416) 644-5359
FAX: (416) 598-3730
E-mail: tosullivan@counsel-toronto.com

Ottawa Agent for the Respondent, Howard Platnick

Borden Ladner Gervais LLP
1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel: (613) 787-3562
FAX: (613) 230-8842
E-mail: kperron@blg.com

Counsel for the Appellant, Lerners LLP

Attorney General of Ontario
4th Floor, 720 Bay Street
Toronto, ON M7A 2S9

Hart Schwartz
Sara Weinrib
Tel: (416) 326-3867
FAX: (416) 326-4015
E-mail: hart.schwartz@ontario.ca

Ottawa Agent for the Appellant, Lerners LLP

Borden Ladner Gervais LLP
1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel: (613) 787-3562
FAX: (613) 230-8842
E-mail: kperron@blg.com

Counsel for the Attorney General of Ontario

Wishart Law Firm LLP
390 Bay Street
5th Floor
Sault Ste. Marie, ON P6A 1X2

Orlando M. Rosa
Tim J. Harmar
Tel: (705) 949-6700
FAX: (705) 949-2465
E-mail: orosa@wishartlaw.com

Ottawa Agent for the Attorney General of Ontario

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel: (613) 695-8855 Ext: 101
FAX: (613) 695-8580
E-mail: emeehan@supremeadvocacy.ca

Counsel for the Appellant, 1704604 Ontario Limited

Wiffen Litigation
181 University Avenue
Suite 2200
Toronto, ON M5H 3M7

Ottawa Agent for the Appellant, 1704604 Ontario Limited

Champ and Associates
43 Florence Street
Ottawa, ON K2P 0W6

Mark Wiffen
Tel: (416) 792-3494
FAX: (647) 317-1515
E-mail: mark.wiffen@wiffenlaw.ca

Counsel for the Respondents, Pointes Protection Association, Peter Gagnon, Lou Simionetti, Patricia Grattan, Gay Gartshore, Rick Gartshore and Glen Stortini

Bijon Roy
Tel: (613) 237-4740
FAX: (613) 232-2680
E-mail: broy@champlaw.ca

Ottawa Agent for the Respondent, Pointes Protection Association, Peter Gagnon, Lou Simionetti, Patricia Grattan, Gay Gartshore, Rick Gartshore and Glen Stortini

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PART I – OVERVIEW

1. Ontario's *Protection of Public Participation Act*, 2015, S.O. 2015, c. 23 (the *PPPA"*) was enacted to help prevent the misuse of the court system by strategic lawsuits against public participation ("SLAPP"), without depriving anyone of appropriate remedies arising from publication of expressions that actually cause significant harm. Its purpose is to encourage public discussion and expressions on matters of public interest and reduce the risk that such discussions and expressions will be hampered by fear of legal action.

2. The *PPPA* sets out a threshold test to determine whether a legal action should be dismissed for being a SLAPP suit. As part of that test, the legislation attempts to balance the competing interests of protecting an individual's reputation and encouraging public discussion, debate, and expressions on matters of public interest. However, the relevant provisions of the *PPPA* leave much to interpretation when courts are required to apply the test under the Act.

3. Freedom of expression, including freedom of the press, is a cornerstone of any democracy and is constitutionally protected under s. 2(b) of the *Charter*. The members of the Media Coalition have a fundamental interest in ensuring the correct balance is struck between the competing interests of protecting reputation and encouraging public discussion on matters of public interest.

4. Journalism contributes to debate on matters of public interest, informs the public and encourages expression by others. Much of the discussion in Canada on matters of public interest occurs or is reflected in our press and other media of communication. They provide information, facts and opinions that inform debate and decision-making on such matters before our courts, tribunals, legislative and other governmental bodies. As this Court has recognized on previous occasions, the media provide an important means to inform the public about current debates about matters of public interest, as they occur in public institutions and private organizations.

5. Fear of being dragged into protracted, expensive litigation can create a "chill" on expression that is detrimental to public debate. As newsrooms shrink, the media themselves may become more susceptible to this chilling effect of real or potential lawsuits, even if those lawsuits

have little to no chance of success.

6. Therefore, as outlined below, the Media Coalition supports an interpretation and application of the *PPPA* that provides robust protection of public interest expression.

PART II – QUESTIONS IN ISSUE ON APPEAL

7. The issue in these appeals of interest to the Media Coalition concerns the proper way to interpret and apply the provisions of the *PPPA*, having regard to the vital role the media play in contributing to debates on important matters of public interest, informing the public, and encouraging expression by others.

8. The Media Coalition makes the following submissions with respect to the proper interpretation of the *PPPA*:

   i. The *PPPA* should be interpreted in a manner that is consistent with the express purposes set out in the legislation;

   ii. The standard for a plaintiff to clear the "merits-based hurdle" in section 137.1(4)(a) of the *PPPA* must be meaningful and should be higher than the standard established by the Ontario Court of Appeal in the appeals before this Court and other cases decided by the Court of Appeal;

   iii. Extraneous considerations such as the motives or purposes of a plaintiff's lawsuit or defendants' expressions should not be introduced under the balancing test in section 137.1(4)(b) of the *PPPA*;

   iv. Motion judges should conduct a causal analysis of the harm or damages alleged to have been suffered by the plaintiff when balancing the competing interests under s. 137.1(4)(b) of the *PPPA.*

PART III – ARGUMENT

A. The *PPPA* Should Be Interpreted Purposively

9. As set out in the *PPPA* and section 137.1(1) of the *Courts of Justice Act,* R.S.O., c. 43, the purposes of the *PPPA* are:[1]

(a) to encourage individuals to express themselves on matters of public interest;
(b) to promote broad participation in debates on matters of public interest;
(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

2. Prior to the enactment of the *PPPA* and section 137.1 of the *Courts of Justice Act* (the "*CJA*"), the Attorney General of Ontario created an Advisory Panel to advise the government on how best to deter SLAPP suits. The Advisory Panel prepared a report, dated October 28, 2010, which led to the *PPPA* and amendments to the *CJA* (the "Advisory Panel Report").[2]

3. As the Report notes, a SLAPP suit has been defined as a lawsuit initiated against one or more individuals or groups that speak out or take a position on an issue of public interest. The Report makes the following comments about the importance of protecting expression on matters of public interest:

> Participation by members of the community in matters of public interest is fundamental for democratic society. The very fabric of democracy is woven daily from the acts of citizens who engage in public discussion and contribute in countless ways to creating a civil society alive to the interests and rights of its members. It will always be important to recognize and protect these activities, but more than ever it seems crucial to encourage public participation as voter turnouts decline, society's needs become ever more complex and individuals feel increasingly powerless to effect meaningful change. If anything, public activities by individuals and groups within the community are even more essential in the face of such realities, and yet undertaking them has never been more challenging.
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> The issues the Panel was asked to consider raise important concerns about the impact of law and procedure on those engaged in public participation. Free expression on matters of public interest is key to such participation, as repeatedly recognized by the Supreme Court of Canada. The principal goal must be to

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[1] Bill 52 - An Act to amend the *Courts of Justice Act*, the *Libel and Slander Act* and the *Statutory Powers Procedure Act* in order to protect expression on matters of public interest

[2] Anti-SLAPP Advisory Panel, *Report to the Attorney General* (Ontario: Ministry of the Attorney General, 2010)

> encourage such activities and expression as far as possible within the appropriate confines of our laws and legal system.[3]

4. There is no doubt that right of Canadians to express themselves freely is a fundamental and critical right. The Supreme Court of Canada made the following comments on the importance of freedom of expression rights under section 2(b) of the *Charter*:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.[4]

5. This Court has also made the following comments about the rights of individuals to debate matters of public interest and that public controversy can be a rough trade:

> An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. Of course "chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of legitimate public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements.[5]

This Court has repeatedly recognized the important role the media play in informing the public about matters of public interest: "Productive debate is dependent on the free flow of information. The vital role of the communications media in providing a vehicle for such debate is explicitly recognized in the text of s. 2(*b*) itself: "freedom of thought, belief, opinion and

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[3] Advisory Panel Report, pp 1-2, BOA, Tab 2
[4] Edmonton Journal v. Alberta (Attorney General), 1990 CanLII 63 (SCC), [1989] 2 S.C.R. 1326, at p. 1336 per Cory J.
[5] WIC Radio Ltd. v. Simpson, [2008] 2 SCR 420, 2008 SCC 40 (CanLII) at para. 2

expression, including freedom of the press and other media of communication".[6] (emphasis in original)

6. Freedom of expression is fundamental to the flourishing of ideas, and comments that are offensive or off-colour should not compromise this central tenet of Canadian society. The *PPPA* should protect free expression rights on a principled and purposive basis.

B. The Merits-Based Hurdle Must Be Higher Than the Standard Set by the Court of Appeal

7. Section 137.1(4)(a) of the *PPPA* states that a judge shall dismiss an action if there are grounds to believe that, (i) the proceeding has substantial merit, and (ii) the moving party has no valid defence in the proceeding . In *Pointes*, the Court of Appeal held that the inclusion of the word "substantial" in reference to "merit" only means that the claim has some chance of success and that is it "legally tenable and supported by evidence, which could lead a trier of fact to conclude that the claim has a real chance of success."[7] Such a low standard is inconsistent with the plain meaning of the words "substantial merit" and express purposes of the *PPPA.*

10. The standard of reasonable "grounds to believe" should be higher than simply requiring a plaintiff to establish that a defence "could go either way," as the Court of Appeal held in *Bondfield*[8], or that a finding of "no valid defence" is "in the range of conclusions reasonably available on the motion record," as the Court of Appeal found in *Pointes*[9]. Such a standard lowers the merits-based hurdle to the point where it merely becomes a speed bump and not a hurdle.

11. The watered-down standard set by the Court of Appeal does not achieve purposes of the

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[6] Grant v. Torstar Corp., [2009] 3 SCR 640 at para. 52
[7] *1704604 Ontario Ltd. v. Pointes Protection Association,* 2018 ONCA 685 at para. 80
[8] *Bondfield Construction Company Limited v. The Globe and Mail Inc*., 2019 ONCA 166 at paras. 10-12
[9] *Pointes, supra* at para. 75

PPPA. The more appropriate standard is set out by the motions judge in *Able*[10] and *Platnick*[11], which relied on this Court's decision in *Mugesara* to define the standard of "reasonable grounds to believe" – an objective basis for the belief which is based on "compelling and credible information."

12. The Media Coalition submits that the standard applied by the motions judge in *Able* to determine "substantial merit" is the appropriate standard – "credible and compelling evidence supporting the claim as being a serious one with a reasonable likelihood of success."[12]

13. The same standard used to determine whether a plaintiff's claim has substantial merit should also be used to determine whether there is "no valid defence." No valid defence" is the corollary to the "substantial merit" requirement (two sides of the same coin), and therefore the standard should be the same, given the importance of defences in defamation actions. Just as it should not be enough for a plaintiff to show his or her claim "could" succeed, it should not be enough to show that a defence "could" fail or that such finding is "reasonably available." That would effectively require a defendant to show that at least one defence has no chance of failing.

14. As the motions judge noted in *Able*, "It cannot reasonably be supposed that a *higher* standard was intended to be applied to the examination of the affirmative defences of the moving party under s. 137.1(4)(a)(ii) than applies to the assessment of the claim itself under s. 137.1(4)(a)(i) when the same 'grounds to believe' language is applied to both."[13]

15. A plaintiff should have the onus of establishing that there are reasonable grounds to believe that none of the defences put in play are likely to succeed or have a good chance of success. If too many claims are allowed to proceed even where there are valid defences, plaintiffs will not be

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[10] *Able Translations Ltd. v Express International Translations Inc*., 2016 ONSC 6785 at paras. 46-47
[11] *Platnick v. Bent*, 2018 ONCA 687 at paras. 84-86
[12] *Able*, *supra* at para. 49
[13] *Able*, *supra* at para. 96

sufficiently discouraged from commencing litigation with doubtful merit. Similarly, defendants will be more reluctant to invoke the legislation and risk simply adding another step to the litigation.

16. The Court of Appeal also stated in *Pointes* that a motions judge should only conduct "a limited weighing of evidence, and in some cases, credibility evaluations."[14]

17. Motions brought under the *PPPA*, and particularly those brought by media outlets, typically involve defamation claims. The success of such defamation claims usually turn on the strength of the defences of truth, fair comment, or responsible communication, which are fact based. The fact-based nature of these defences requires a court to engage with the evidence to properly assess their validity, such as determining whether an expression is fact or opinion. The Court of Appeal did that in *Armstrong v. Corus* by closely examining the defences pleaded by the media defendant.[15]

18. Therefore, the Media Coalition submits that a motion judge hearing a motion under the *PPPA* should be permitted to weigh evidence and assess credibility in the same manner as courts are permitted to do in summary judgment motions, and take a "deeper dive" into the merits of the claims and defences than the Court of Appeal has indicated is necessary in most if its *PPPA* decisions. Failing to assess the merits of claims and defences in a meaningful way will result in a low threshold for plaintiffs to clear and a failure to achieve the legislative goal of weeding out claims that target expressions on matters of public interest and do not have substantial merit.[16]

C. Extraneous Considerations Should Not Be Introduced Under the Balancing Test

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[14] *Pointes, supra* at para. 82
[15] *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689 at paras. 30-52
[16] Shantona Chaudhury and Andrew W. MacDonald, "Balancing the Public Interest in Expression and the Right to Sue: How Much Protection Should Anti-SLAPP Laws Provide?" in Todd L. Archibald, ed., *Annual Review of Civil Litigation, 2019* (Toronto: Thomson Reuters, 2019).

19. In *Pointes* and *Platnick*, and at least one other appellate decision[17], the Court of Appeal has noted that the motives of both the plaintiff in commencing the action and the defendant in making the impugned statements are relevant considerations when assessing the competing public interests under the balancing test in s. 137.1(4)(b) of the *PPPA*. The Court of Appeal suggested that a motion judge's analysis could start by asking, "Does this claim have the hallmarks of a classic SLAPP?" and then evaluate whether any of the recognized indicia of a SLAPP are present, including the following:

- a history of the plaintiff using litigation or the threat of litigation to silence critics;
- a financial or power imbalance that strongly favours the plaintiff;
- a punitive or retributory purpose animating the plaintiff's bringing of the claim; and
- minimal or nominal damages suffered by the plaintiff.

20. The Advisory Panel Report[18] and the legislature expressly rejected this approach and set out a test that targets actions that have the *effect* of discouraging participation in discussions on matters of public interest, regardless of the plaintiff's motives in suing the defendant. As one paper on this topic has noted,

> The *PPPA* was specifically designed to allow courts to dismiss actions arising from expression relating to matters of public interest *without considering the plaintiff's motive*. The "abuse of process" model of legislation adopted in other jurisdictions was rejected in favour of a test that could be used to screen out cases that have *the effect* of stifling expression in the public interest even though they do not constitute an improper use of court procedure.[19]

21. The Court of Appeal in *Pointes* correctly noted that, "the emphasis on the litigation's effect over its purpose is said to provide a more streamlined and accurate assessment of the legitimacy of the claims: Anti-SLAPP Advisory Panel, at paras. 32-35." However, the Court then contradicted itself and noted that, "the purpose of the lawsuit can be an important consideration on a s. 137.1 motion."[20]

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[17] *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163 at para. 31
[18] Advisory Panel Report, *supra* at paras. 32-35
[19] Chaudhury and MacDonald,, at pg. 85
[20] *Pointes, supra* at para. 47

22. The Media Coalition submits that a consideration of the purpose of a lawsuit has no role in the balancing test under s 137.1(4)(b) of the *PPPA*. On the plain wording of the statute, a motions judge should only take into account the effects of the defamatory words and harm they may cause to the plaintiff and the public interest in protecting the expression in question. The wording of the section should not invite extraneous considerations such as the purpose of a lawsuit of the plaintiff's motivation.

23. Factors that a motions judge should consider when assessing how heavily to balance the protection of the expression in question should include the degree of public interest in the publication, the type of expression involved, the seriousness of the allegations or statements in question, and the source of the information.

24. Mainstream media outlets, such as those who comprise the Media Coalition, must adhere to certain standards and practices before publishing or broadcasting news stories. Stories are often double or triple sourced and reviewed by one or more editors or producers before they are published or broadcast. Reporters at mainstream media outlets are required to act responsibly and fairly when preparing stories that may include defamatory allegations. Those are relevant factors that courts should consider and weigh in favour of protecting expressions on matters of public interest, particularly involving investigative journalism or situations when the Responsible Communication defence is pleaded and evidence is led on a *PPPA* motion to support such a defence.

D. There Should be a Causal Analysis of the Alleged Harm Under the Balancing Test in S. 137.1(4)(b)

25. In *Pointes* the Court of Appeal noted that, "The preservation of one's good reputation or one's personal privacy have inherent value beyond the monetary value of a claim. Both are tied to an individual's liberty and security interests and can, in the appropriate circumstances, be taken into account in assessing the harm caused to the plaintiff by the defendant's expression."[21]

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[21] *Pointes, supra at para. 88*

26. However, media outlets often report on matters of public interest that may affect a plaintiff's reputation in situations when there are other causes of the plaintiff's alleged damages. Therefore, under the balancing test, a plaintiff should be required to lead evidence to establish that the harm suffered by the plaintiff was caused by the statements published or broadcast by the defendant.

27. This causal analysis is important for media defendants, particularly in the context of investigative journalism where a plaintiff may suffer harm as a result of his or her conduct, or due to accurate reporting of that conduct. Court should not simply presume that harm automatically follows as a result of the impugned statements being published in the media, or that evidence of harm without a causal link is sufficient.

28. In *Bondfield,,* the Court of Appeal noted that the media defendants had "a good argument" that there was no connection between the harm suffered by the plaintiff and the articles in question, but that a motion under s. 137.1 "was not the place to resolve the causal connection issue as it related to the alleged damages."[22] The Media Coalition submits that courts should conduct those type of causal analyses when assessing the harm to a plaintiff.

PART IV – COSTS

29. The Media Coalition does not seek any costs and asks that no costs be awarded against it, apart from payment of any added disbursements pursuant to Rule 59(1)(a) of the Rules of the Supreme Court of Canada.

PART V – ORDER SOUGHT

30. The Media Coalition is intervening in the public interest and does not take a position on the orders as against the parties.

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[22] *Bondfield, supra* at para. 25

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED AT Toronto, Ontario, this 22nd day of October, 2019

Iain A.C. MacKinnon
Counsel for the Interveners Media Coalition

PART VI - LIST OF AUTHORITIES

AUTHORITY	PARAGRAPHS
Bill 52, *Protection of Public Participation Act*, 2015	1, 9
Anti-SLAPP Advisory Panel, *Report to the Attorney General* (Ontario: Ministry of the Attorney General, 2010),	2, 3
Edmonton Journal v. Alberta (Attorney General), 1990 CanLII 63 (SCC), [1989] 2 S.C.R. 1326	4
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Shantona Chaudhury and Andrew W. MacDonald, "Balancing the Public Interest in Expression and the Right to Sue: How Much Protection Should Anti-SLAPP Laws Provide?" in Todd L. Archibald, ed., *Annual Review of Civil Litigation, 2019* (Toronto: Thomson Reuters, 2019).	18, 20