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## A 'tough case': Ghomeshi, the CBC and the law

By SIMON HOUPPT AND JEFF GRAY

*Lawyers are divided on whether the CBC Radio host has a realistic chance of success in his defamation lawsuit*

The scandal enveloping the Canadian Broadcasting Corporation over its handling of the dismissal of radio host Jian Ghomeshi is already making Canadian media history.

Now, it may make Canadian legal history too.

On Sunday, the CBC dismissed Mr. Ghomeshi over what it said it was information it had recently received that precluded it from continuing his employment. But after the host fired back with a \$55-million lawsuit, lawyers were divided on whether he has a realistic chance of success.

On Monday afternoon, Mr. Ghomeshi filed a statement of claim against the CBC, claiming \$25-million in damages for breach of confidence, \$25-million in damages for defamation, and \$5-million in punitive, aggravated and exemplary damages."

But employment lawyers say the host's move to also file a grievance through his union appeared at odds with his lawsuit. Normally, employees cannot do both, and the issues in a wrongful dismissal case involving a union employee would be resolved through arbitration – not a lawsuit, lawyers say.

"It's a tough case," said Natalie MacDonald, a partner with Rudner MacDonald LLP and the author of *Extraordinary Damages in Canadian Employment Law*. "There's no easy answer."

Lawyers say that while many people may think they cannot be fired for bad behaviour that they commit on their own time, legally in Canada employers can fire anyone, with cause, if they can demonstrate the bad behaviour – even if it does not result in criminal charges – damages their reputation.

"The issue really comes down to whether or not the employer is going to have sufficient evidence to prove that it had a reason to terminate. The issue will become whether or not CBC is going to be able to prove that it affected their reputation to such an extent that they needed to take this action," Ms. MacDonald said.

"Any time the court can point to behaviour that is inappropriate and that is going to somehow be linked to the company, and can harm the company, the courts are going to be more sympathetic to the employer," she said.

In the case of Mr. Ghomeshi, however, they may have acted prior to any damage being done, Ms. MacDonald noted, and thus precipitated both the revelations and the resulting alleged damage to Mr. Ghomeshi's reputation. She pointed out that, when high-profile executives are dismissed, the company usually takes steps to minimize the potential damage to their reputation by suggesting, for example, that they want to spend more time with their families.

Mr. Ghomeshi's case may intersect as well with developments in new media. While the law has not changed, the issue of social media and the reputational damage that can be done there is now a bigger issue for employers, said Erin Kuzz, a senior partner with Toronto law firm Sherrard Kuzz LLP who advises companies on employment law.

"What happening is we are seeing it and hearing it more and more because of social media," Ms. Kuzz said. "Things that used to be kept private before an employee and an employer ... can now be made public more quickly."