OPINION
‘Ghomeshi' amendments are worth keeping

By ELIZABETH SHEEHY

Professor emerita at the University of Ottawa Women can breathe a sigh of relief after a Supreme Court of Canada decision last week upheld the constitutionality of the so-called Ghomeshi amendments to the Criminal Code for sexual assault trials.

The case, R. v J.J., focused on these amendments, which were designed to give women a greater opportunity to challenge the use of private records and evidence of their sexual history in court.

The amendments subject private records in the possession of the accused to the same processes already in place for judicial screening of a woman’s prior sexual activity when the accused seeks to introduce this evidence at trial to discredit her account.

These records can include emails, videos, Facebook or Instagram posts and text messages. In addition, the amendments give complainants the ability to hire their own lawyers to contest the admissibility of the proposed evidence.

Prior to the amendments, a hearing was required only when the records were in the possession of a third party, such as a rape crisis centre or a doctor. If the accused had already come into possession of the records, no pretrial screening was required, no matter how sensitive and personal the information they contained.

Parliament's 2018 amendments in part responded to the defence tactics in the sexual assault trial of Jian Ghomeshi, whereby complainants were confronted in cross-examination with their own sexualized text messages sent to the accused. But more importantly, the amendments responded to the current social and legal context in which sexual assault prosecutions take place.

For one thing, social-media messages are now a predominant form of communication for most adolescents and adults. Online posts are regularly drawn upon as evidence in sexual assault trials, whether by prosecutors or the defence.

The new law also responds to the fact that sexual violence remains a crime that is almost riskfree to commit. Only one in 20 victims report to police because sexual violence is a crime of subjugation, leaving many women terrorized or wondering whether they are somehow to blame or will even be believed. "Unfounding" - sometimes at a rate of 40 per cent - makes matters worse; that's when police refuse to lay charges because they discount the woman's accusations, fail to properly investigate the allegations, misunderstand the law or prefer statements made by the suspect.

Prosecutors also screen out sexual assault charges if there is no reasonable prospect of conviction. Where cases do proceed to trial, sexual assault has a very low conviction rate. Women who testify can be cross-examined with "gratuitous humiliation and denigration," said Dalhousie University law professor Elaine Craig, often through reliance on discriminatory sex myths.

This is why the Supreme Court ruled that requiring pretrial screening of personal records by the judge, regardless of who possesses them, does not undermine the Charter rights of the accused to defend himself and is consistent with the right to a fair trial. A fair trial, the majority held, must recognize the interests of victims of sexual assault, who have been subjected to a criminal trial process that discourages reporting through unfair and discriminatory treatment of complainants.
The court said it is not “unfair” to deprive the defence of the ability to spring personal records on the complainant in cross-examination because the right to a fair trial does not include the right to “ambush” the complainant. In fact, "providing advance notice to complainants that they may be confronted with highly private information is likely to enhance their ability to participate honestly in cross-examination."

The court recognized that judicial screening of such records is needed to weed out myths that distort the truth-seeking function of the trial. Not only the myth that a sexually active woman is more likely to have consented or to lie, but myths about the credibility and reliability of women with mental-health challenges or who have consumed alcohol and drugs; about the failure to report a sexual assault immediately; or that "a 'real victim' will avoid all contact with the perpetrator after the fact," last week's ruling said.

This ruling does not increase the risk of wrongful convictions.

Defence lawyers can challenge whether a record falls within the screening process because it does not contain "information of an intimate and highly personal nature." More importantly, records may still be admitted postscreening. And, although the accused must normally apply for this screening before trial, the court left the door open for an accused to surprise the complainant by introducing this evidence mid-trial, after she has given her evidence and before cross-examination, if doing otherwise would "negate the efficacy of cross-examination."

Parliament and the Supreme Court have taken a vital step to protect complainants. It is now up to Canada's trial judges to apply the amendments, respecting the spirit of the Supreme Court's endorsement of principles of fairness and non-discrimination in sexual assault trials.