Bill C-51 not revenge for Ghomeshi acquittals

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“Catastrophic attack” on the defence’s right to make full answer and defence,” “a barrier to justice,” “scandalous” attack on our criminal law.

Some hysterical defence lawyers have had the ear of Postmedia columnists Christie Blatchford and Barbara Kay who have been channeling their supposed worst nightmares about Bill C-51, which finished second reading in Parliament and is now headed to the Standing Committee on Justice and Human Rights.

And it’s all the fault of these “radical feminists” who are on a mission to convict the innocent. Blatchford even writes that the Bill has "had scant attention, probably because it touches upon the accepted and sacred wisdom that women just can’t get a break in the criminal courts."

I beg to differ. It’s received scant attention because it’s merely the case of legislation being updated with the times, particularly technology to modernize the already validated but dated rape shield law.

That law deals with the twin myths. First, past sexual experience can’t be used to show it made complainants more likely to consent to sex. Second, that their past sexual activity makes them more or less worthy of belief.

When the rape shield law was introduced, defence lawyers were also howling about how shocked they were at this new law. Heresy!

The Supreme Court of Canada upheld the constitutionality of that law in a case called Darrach in 2000. I was the assistant Crown attorney who prosecuted the case in the early 1990s, which took over a year to conduct due to a slew of schmaltzy and baseless defence motions.

The law then was that if the accused wanted to adduce evidence of past sexual experience to show the complainant was more likely to consent, or that their past sexual activity made her less worthy of belief, the accused had to enter into a process where the judge would rule weighing the evidence to determine, among a variety of criteria, whether it had a significant probative value “not substantially outweighed by the danger of prejudice to the administration of justice.”

Darrach got convicted. He lost his first appeal. Then he headed to the SCC where the defence continued to scream bloody murder. The integrity of the criminal justice system is at stake! The accused’s right to make full answer and defence, his right to a fair trial and the presumption of innocence have been tossed out the door, not to mention that he’s forced to incriminate himself!

The SCC would have none of it. The court rightfully found the “twin myths” are “simply not relevant at trial” and can “distort the trial process.” The process for screening the evidence “enhances the fairness of the hearing by excluding misleading evidence.”

Text messages, emails and video recordings were in their infancy, if they even existed, in 1992-1993, so they weren’t included in the language of the Criminal Code. Now they would be. Everything else stays the same.

Blatchford and Kay both claim Bill C-51 is revenge for the Jian Ghomeshi acquittals. Of course, that makes it sexier to write about.

But no. It’s actually simply a bit of spring cleaning and making sure the Criminal Code is with the times. If the Bill becomes law, expect the same legal challenges as in Darrach. Also expect the SCC to uphold it.