Marin trivialized rights of accused

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Why Bill C-51 will likely lead to wrongful convictions for sexual assault

In his Toronto Sun column of July 9, ("Just some legal spring cleaning") André Marin took strong exception to recent columns written in opposition to Bill C-51 by me and my National Post colleague Christie Blatchford.

He accused us of shilling for the views of "hysterical defence lawyers" in crafting our negative judgments, a charge I cannot allow to pass on my own behalf.

Bill C-51 was pitched as a "housecleaning" of a slew of old laws that are no longer constitutionally viable.

Tucked into the middle of the list is an "update" to the 1992 rape- shield provision, which forbids complainant- baiting, with what are known as the "twin myths": that past sexual experience — promiscuity or prostitution, say — may be a contributing factor in assessing present consent, and that past sexual behaviour impinges on the complainant's credibility.

The C-51 "housecleaning" supposedly brings those provisions into alignment with current Supreme Court of Canada decisions, as well as with modern technology, such as emails, texts and video recordings, which weren't in general usage then, and so were not included in the Criminal Code's rape- shield law (section 276).

Marin claims that apart from their inclusion, "everything else stays the same."

This is quite inaccurate.

Housecleaning implies getting rid of unwanted stuff, not bringing in new stuff.

But clause 25 of C-51 does add something new to the Criminal Code, Section 278.92.

This amendment has nothing to do with the rape shield law.

It does not have technology at its heart.

It requires the disclosure, in a closed hearing in advance of the trial, to the complainant, her lawyer (if she chooses to have one) and the prosecutor, of material that doesn't relate only to the complainant, but to witnesses.

Essentially such disclosure will reveal what "goods" the defence has on the complainant and her witnesses, providing them the opportunity to craft a narrative around the defence evidence.

Such forced disclosure abrogates the defendant's fundamental right to remain silent.

Marin claims the amendment has nothing to do with the Jian Ghomeshi trial.

Really? That trial hinged on the Crown's witnesses' credibility, decimated by defence evidence that C-51 would render toothless.

Coincidence? It strains an intelligent observer's credulity to believe that.

One of the defence's key pieces of evidence, for example, introduced to challenge Lucy DeCoutere's credibility, was her long, handwritten love letter to Ghomeshi, which refuted much of her narrative at trial.

Under the existing law, Ghomeshi had no obligation to disclose that letter, which was his property, the use of it subject only to the judge's ruling at trial on its relevance.

Under the new law, he would have had to disclose it in advance of the trial.

The letter wasn't "digital"; it wasn't "social media." It had nothing to do with the "twin myths."

Under C-51's strictures, Ghomeshi's defence might have proved worthless.

This shows the new law goes far beyond what the existing rape shield laws require.

One can easily see why prosecutors (and former prosecutors like Marin) might approve of this amendment, since it makes the Crown's job easier.

But if C-51 is adopted as is, we will likely see a rise in wrongful convictions of defendants (near- invariably male in sexual assault cases).

Marin has trivialized the important issues at stake here.

His seeming contempt for thoughtful, evidence- based responses to an ill- conceived attack on an accused's fundamental right to "make full answer and defence" does him no credit as a polemicist.

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