Feature

All Together Now: Government Bill Bundling in the 42nd Parliament

Bill bundling – the reintroduction of all the substantive provisions of a bill without any modification in another bill – has been used on several occasions by the government during the 42nd Parliament, 1st Session. In this article, the author notes that this method of packaging a legislative agenda is somewhat unusual and warrants further consideration from a legislative planning perspective. He explains that while combining or consolidating related matters into one bill maximizes efficiency, the introduction of government legislation carries with it a myriad of legal and practical consequences beyond the Senate and House of Commons, some of which are heightened when bills are bundled. The author suggests that the recent trend of bill bundling is linked to recognition of the limited time in the legislative calendar before the next scheduled election. However, if bill bundling becomes a more common practice in future parliaments, some questions about predictability and consistency of a legislative agenda should be considered.

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Introduction

Avid readers of legislation likely feel a strong sense of déjà vu when perusing government bills introduced in the 42nd Parliament, 1st Session. For example, Bill C-75 is perhaps best likened to a legislative Russian doll: it contains the *Criminal Code* amendments proposed in C-28, C-38 and C-39, the latter of which itself contains the legislative amendments proposed in C-32. Yet, C-75 is not alone: C-71 in relation to firearms contains the provisions of C-52; C-62 respecting public sector employment includes the proposals of both C-5 and C-34; C-44 implementing the budget includes C-43; and C-76 on elections contains the measures from C-33.

While governments often bundle previously-introduced legislative initiatives when bringing items forward in a new session or new Parliament,[1] governments do not commonly repackage legislative proposals within a single session of Parliament without any modifications.[2] Although the government of the day is free to package its legislative agenda as it sees fit for presentation to Parliament, the practice of copying provisions holus-bolus from one government bill into others during the same parliamentary session warrants further consideration from a legislative planning perspective.

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The focus of this work is the reintroduction of all the substantive provisions of a bill without any modification in another bill.[3] This is a unique case that must be distinguished from situations where portions of a bill are re-introduced over the course of the same session in another bill. An example of this latter phenomenon is seen in the 41st Parliament: Bill C-31, *Protecting Canada's Immigration System Act*, included portions of Bill C-4, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*. Notably, only some provisions from C-4 were reintroduced in C-31 without modification whereas others were changed.[4] It may be that as a government's policy evolves, the need for new legislation emerges that includes some previously-introduced provisions.[5]

Legislative Planning: An Overview

It perhaps goes without saying, but no government bill is introduced in Parliament without careful planning.[6] To begin with the basics, a government must decide, from among its policies that require legislation, which legislative initiatives to introduce, when, in which Chamber, and in what form (i.e., stand-alone measure, included in a budget implementation act, etc.). It must plan how it will seek to advance that legislation through Parliament, giving thought, *inter alia,* to which committees it might task with the study of a bill, whether the bill should be referred before or after Second Reading in the House, and whether to seek pre-study in the Senate. It must consider potential parliamentary consequences, such as the

application of new Standing Order 69.1 in the House that allows the Speaker to divide omnibus bills for the purposes of voting.

This task, difficult as it is, is further complicated by the sheer unpredictability of Parliament and the nature of governance. A government that has identified its legislative priorities might find itself having to put aside those priorities to legislate quickly in response to an unexpected Court ruling or because back-to-work legislation is required on an urgent basis. At the same time, a government caucus might lose hours or days for debate owing to procedural maneuvers of which it has little notice,[7] or owing to completely unforeseeable circumstances.[8]

Without careful planning, parliamentary time may be squandered and a government's legislation may go undebated or fail to complete the legislative process prior to dissolution. Indeed, a government may decide in some cases that while its agenda could be pursued through legislation, there is a better way to use Parliament's time on an issue.[9]

The potential impact of failed government legislation extends far beyond questions of political or parliamentary embarrassment. Failure to pass a confidence matter may lead to the fall of a government and trigger an election. Failed appropriations may need to be remedied with a Governor General's Special Warrant to ensure continued funding for essential services and payments such as Old Age Security.[10] Practically, failed legislation may represent the breaking of an electoral promise that later becomes a campaign issue and thorn in the side of the governing party. That said, not every government bill is introduced with the objective of passage.[11] However, each represents an investment in time and resources at taxpayer expense, from legislative drafters and jurilinguists to policy advisers and press release-writers who must trumpet every bill as the apotheosis of legislative excellence.

Of course, legislative planning does not happen in a policy vacuum. There are numerous considerations that might influence the substance of the legislation and its associated timing, such as the time it will take for regulations to be developed – perhaps in consultation with the provinces – in order for a legislative scheme to be fully operational. As well, legislation might need to meet an international commitment before a particular date or to respond to certain international events that may also be highly unpredictable.[12] Further, there may be a deliberate choice made to include provisions within certain bills that would otherwise seem to make for strange bedfellows.[13]

Moreover, legislative planning intersects with politics, and sometimes in quite uncomfortable ways. Minority governments often struggle with whether the inclusion of certain measures in their legislation may risk their government's defeat.[14] However, even majority governments must consider whether and when the governing caucus should be forced to vote on a potentially divisive issue that could have electoral consequences for certain Members.[15] This is where parliamentary and political strategy is often on full display – such as in cases where a government appears to orchestrate the absence of some of its Members from a vote.[16]

As the foregoing alludes, execution of the government's legislative plan requires careful parliamentary coordination. This can be difficult in a new Parliament in which many government MPs are also new. For example, the 42nd Parliament has already seen the accidental defeat of a clause of a government bill at committee, seemingly caused by confusion at the committee.[17] As well, the government had a tie vote on one of its measures, which its Whip conceded was "a very close call. Too close, actually."[18]

Current Context

Given the foregoing, the bundling of government bills seen in the 42nd Parliament reflects curious legislative planning. To a pure process pragmatist, combining or consolidating related matters into one bill maximizes efficiency – a paramount consideration given the limited time and resources of the legislature. However, the inquiry quickly turns to why the introduced measures were tabled at all if they would not subsequently be advanced. As it has played out, almost all government bills that are later repackaged in other initiatives are not brought up for debate at Second Reading and simply remain on the Order Paper with an uncertain fate.[19]

If there is no change to the provisions in subsequent iterations, it is difficult to understand why the measures were not proceeded with in their initial legislative vehicle. That is, if the measures were first introduced as trial balloons to gauge public reaction, perhaps instead of a tabled bill there could be public consultation on a draft, as occurs in other legislative contexts.[20]

In its press release on C-75 the government indicated that, in relation to the other bills it incorporated, "Including these amendments in one bill will enable Parliament to consider all of these reforms in a timely fashion".[21] This phrasing perhaps provides a clue to the government's motivation.

The first bill contained in C-75, introduced in March 2018, is C-32, which was introduced in November 2016. Arguably, there has been time for Parliament to consider C-32, a bill that has only five pages of legislative text. Given that the bills contained within C-75 could have been advanced at any time, the phrase "timely fashion" might be read to suggest that the government is now keenly aware of the ticking legislative clock. With an election nominally fixed for the fall of 2019, there is only so much time remaining for the House to move matters into the Senate with the hope of completing the legislative process before the next election. Complicating matters for the government is its lack of Senate influence occasioned by the appointment of independent Senators, thereby reducing the government's ability to facilitate the passage of its agenda through the Upper House on its preferred timetable.[22]

However, upon closer inspection, a slightly more puzzling state of affairs emerges. For example, the provision proposed in C-32 contained in C-39 and repackaged in C-75 concerns the repeal of the *Criminal Code* prohibition against anal intercourse, which has been found unconstitutional by several courts of appeal. Yet, this provision was not included in C-51, which, per its summary, "amends the *Criminal Code* to amend, remove or repeal passages and provisions that have been ruled unconstitutional or that raise risks with regard to the *Canadian Charter of Rights and Freedoms*". It's unclear why the repeal of this provision was not included in C-51, for which it would seem to be a logical fit. For perspective on why the legislative vehicle matters timing-wise, consider the state of both bills as of the summer 2018 recess: C-51 was under consideration by the Standing Senate Committee on Legal and Constitutional Affairs having already passed the House, whereas C-75 was before the House's Standing Committee on Justice and Human Rights.

Also in the realm of criminal law, C-74 implementing the budget amends the *Criminal Code* to establish a "remediation agreement regime", commonly known as deferred prosecution agreements. When introducing C-75, the government announced that it aimed "to improve the efficiency of the criminal justice system and reduce court delays".[23] Seemingly, the *Criminal Code* amendment made in the budget would have been a natural fit for C-75. Its inclusion in the budget makes it a confidence matter. Why should some criminal justice-related matters speed through the budget process as matters of confidence while others move separately? The public record is silent on this point, though surely analysis within government yielded the bundling advice that gave rise to the decisions reflected in C-51, C-74 and C-75.[24]

Introduction Implications

The mere introduction of any government legislation carries with it a myriad of legal and practical consequences beyond the Senate and House of Commons. Some of these consequences are heightened in the case of bundled bills.

First, litigation may be impacted by the presentation of new legislation.[25] In a recent case, for example, the government wrote to the court to advise of the introduction of legislation after a hearing was concluded but before the judgment was rendered.[26] In another, a Prothonotary (a judicial officer of the Federal Court) was put in the precarious position of having to decide whether to stay proceedings pending the proposed repeal of a provision, given the "balance to be struck between avoiding needless expenditure of public funds and resources in the very likely event that matter may become moot […] and ensuring, if the repealed legislation is delayed or fails, that the matter can proceed without undue delay".[27]

The impact of proposed legislation on litigation should not be considered lightly – indeed, lives can be put on hold pending Parliament's disposal of a matter. For example, a divorce case was stayed after the introduction of government legislation that would determine the outcome of the legal controversy.[28] The bill sat on the Order Paper from February 2012 until its unanimous consent passage by the House with amendment at all stages in June 2013 and its subsequent adoption by the Senate.[29] While the legislation remained stagnant, the couple was neither sure of the validity of their marriage in Canadian law nor able to complete their divorce.

As might be imagined, bundling may present a particular challenge in the litigation context. That is, if the government asks a Court to hold off until a piece of legislation is advanced through Parliament, it may quickly erode any good will when it appears that the legislation is being abandoned. Indeed, once the bundled bill is introduced, the government will need to notify those involved in the litigation and possibly prepare new submissions that could perhaps be viewed as less credible given any previous assertions in relation to the prior bill.[30]

Second, bundling has unique consequences for parliamentary actors. For their part, parliamentarians may have acquainted themselves with the previous bills and perhaps planned amendments. In addition, parliamentarians – including those in the governing caucus – need to be aware of the government's legislative initiatives when preparing non-government bills as their hard work could be overtaken or require subsequent amendment.

As an example, a recent private member's bill (PMB)[31] to reduce the voting age coordinated, at introduction, with the "register of future electors" proposed in C-33. This makes sense because the age of those to be included on a register of 'future' electors would certainly be impacted by the lowering of the voting age. However, as the PMB was on Notice, the government introduced C-76 which included the "register of future electors" provisions of C-33. As such, if the PMB advances, it will need to have a new coordinating amendment to address the amendments made by C-76.

Other parliamentary actors are also impacted by the introduction of legislation. For example, the Library of Parliament prepares a legislative summary for government bills, and officers of Parliament may review and comment on bills.[32] Their work will need to be updated and changed to reflect the government's new legislative slate.

Finally, the public and public service are impacted by the introduction of legislation. While much federal public service work contributes to the introduction of legislation, the public sector responds to events in Parliament by considering the impact of proposed legislation on its work and preparing to implement bills that are passed into law. This can include, for example, provinces preparing to address any impacts that federal legislation may have on them. By extension, members of the public may respond to legislation by planning their affairs in accordance with what the law proposes.[33]

In short, when bundling bills a government should consider not only its needs vis-à-vis Parliament and the advancement of its agenda, but the potential consequences on judges, litigants, advocacy groups, parliamentarians – including in its own caucus – and everyday Canadians. Expectations form when a government introduces legislation, particularly when that government has a majority.

Analysis

It may be that the current spate of legislative bundling represents not only recognition of the limited time to legislate before an election, but also of the difficulties with moving many legislative items through at once. Indeed, tasking one committee with one bill is simpler and creates less room for error at clause-by-clause. It also reduces the burden on government officials who might otherwise need to make multiple committee appearances on otherwise related measures.

That said, legislative bundling is a curious legislative planning choice that raises more questions than answers: Is it appropriate for a government to introduce legislation it does not intend to advance? At what point after a new government forms should its legislative plan be in place? Should a government signal in some direct way that it is abandoning a bill,[34] or that more is yet to come?

The nature of legislation before Parliament was once wisely summarized by a former Speaker of the House in his later capacity as Associate Chief Justice of the Federal Court: "I cannot imagine anything less predictable than the course of legislation through Parliament. Indeed, the only thing that is certain about life in Parliament that nothing is certain".[35]

Complete parliamentary predictability would be undesirable – that is, there is no suggestion that the Senate or House should speed government matters through as a rubber stamp. However, it is possible for a government to be predictable and consistent with its approach to legislative planning in Parliament. Predictability is arguably maximized when a government measure is contained in only one introduced bill, and the government advances that item through the legislative process. As well, if provisions are repackaged, there should be discernable logic as to their associated legislative vehicles.

In the 42nd Parliament, the government's curious legislative combinations have proven to be anything but predictable. Perhaps this is an outgrowth from growing pains – a new government needs time to adjust to the realities of Parliament.[36] However, with an election looming and the government having more experience, might this bundling continue? Or, might this be a mere blip on the parliamentary radar after which predictability is restored? The answer, of course, is anything but predictable.

Notes

1 For example, Bill C-10 of the 41st Parliament, 1st Session grouped together nine bills from the 40th Parliament, 3rd Session. See: Library of Parliament, Legislative Summary of Bill C-10: *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts.* Similarly, C-2 of the 39th Parliament, 2nd Session, combined items from government bills introduced in the 39th Parliament, 1st Session and included elements from a government bill introduced in the 38th Parliament, which had a different government from that of the 39th Parliament.

2 It does happen – for example, C-59 of the 41st Parliament, 2nd Session was budget implementation legislation that contained provisions from C-58, the *Support for Veterans and Their Families Act* of the same session.

3 That is, everything other than titles, coordinating amendments and coming into force provisions that may differ in a bill that subsumes other bills.

4 See Library of Parliament, Legislative Summary of Bill C-31: *An Act to amend the Immigration and Refugee Protection Act,* the *Balanced Refugee Reform Act,* the *Marine Transportation Security Act* and *the Department of Citizenship and Immigration Act*.

5 This may be occasioned by procedural realities as well. For example, C-31 contained additional immigration measures that were not contemplated in C-4, including an amendment to the *Department of Citizenship and Immigration Act*. As this statute was not modified by C-4, it would have been procedurally inadmissible to amend C-4 in respect of it at committee in the House given the Parent Act rule.

6 See Privy Council Office, *Guide to Making Federal Acts and Regulations.*

7 Rachel Aielllo, CTV News, "Conservatives preparing to force 'about 40 hours' of votes in the House," 21 March 2018 online: https://www.ctvnews.ca/politics/conservatives-preparing-to-force-about-40-hours-of-votes-in-the-house-1.3853412.

8 Time this session in the House has been lost to a fire alarm (28 September 2017) and the unexpected death of a Member after which the House adjourned for the day (2 March 2016 and 2 May 2018).

9 Though perhaps a unique example, in 1966 the Cabinet of the day supported abolishing the death penalty and commuted all death sentences. Rather than spend time in the Commons on death penalty legislation, the government instead chose to pursue an abolition resolution. As explained by the *Globe and Mail*, "The advantage of a resolution over one of the private bills is that it will keep the issues clearer and prevent the Commons from tieing [*sic*] itself in a knot, procedural and otherwise, over the many detailed clauses in each of the abolition bills". Normal Webster, "A Life and Death Debate in the Commons" *Globe and Mail,* 21 March 1966, p. 7.

10 For information on Governor General's Special Warrants, see: https://www.canada.ca/en/treasury-board-secretariat/services/planned-government-spending/governor-general-special-warrants.html.

11 Consider bills introduced in the dying days of a Parliament for use purely as election fodder.

12 Note for example that Bill C-74 of the 42nd Parliament, 1st Session contains a provision that "comes into force on a day to be fixed by order of the Governor in Council, which may not be earlier than the day — if ever — on which the United Kingdom ceases to be a member state of the European Union."

13 Consider the issue in Reference re *Supreme Court Act*, ss. 5 and 6, 2014 SCC 21, [2014] 1 S.C.R. 433. The government asked for confirmation of the validity of the *Supreme Court Act* as proposed to be amended by *Economic Action Plan 2013 Act, No. 2*. Presumably, the inclusion of a *Supreme Court Act* amendment in a budget bill was to advance the measure quickly and as a confidence matter. However, at the same time as it introduced the amending legislation, the government submitted the reference to confirm its constitutional validity rather than wait for related litigation (then underway) to proceed through the courts. This legislative planning choice was part of a broader policy response to an issue not solely motivated by parliamentary considerations. In theory the government could have introduced the legislation and waited for litigation, waited for the existing litigation to proceed (without the legislation) or submitted a reference on the issue without any ties to pending legislation.

14 Gloria Galloway, "Cabinet split on gambling with content of legislation," *The Globe and Mail*, 23 March 2005 at A8.

15 A notable example is in relations to firearms legislation. As one author explains, "much of the original opposition to Bill C-68 from rural backbenchers was attributed to the fact that they heard from many angry gun owners during the Christmas recess of 1994. To prevent this from happening again, the government pushed C-68 though the House before Parliament recessed for the summer so backbenchers would not [have] another wave of confrontations with angry gun owners." See Samuel A. Bottomley, "Parliament, Politics and Policy: Gun Control in Canada, 1867-2003" Ph.D. Thesis, Carleton University, 2004 at 40, FN 38.

16 See, for example: "'We don't have enough Liberals tied down': Missing members could decide noose issue," *The Globe and Mail,* 29 May 1978, p. 10.

17 See Evidence, Standing Committee on Public Safety and National Security, 29 November 2016 on Bill C-22.

18 "Near-miss on Air Canada vote scares federal Liberal whip", Times-Colonist (Victoria, BC), 17 May 2016, A-12.

19 Only Bill C-5 was debated - for one sitting at Second Reading. See *Journals,* 21 September 2016.

20 See Department of Finance Canada, "Department of Finance Canada Consulting Canadians on Draft Tax Legislative Proposals" 8 September 2017 https://www.fin.gc.ca/n17/17-079-eng.asp.

21 Canada, "Canada tables legislation to modernize the criminal justice system and reduce court delays" https://www.canada.ca/en/department-justice/news/2018/03/modernizing-the-criminal-justice-system-and-reduce-court-delays.html

22 See Gloria Galloway, "Increasingly independent Senate injecting uncertainty into parliamentary process," *Globe and Mail,* 3 February 2018, page A-22.

23 *Supra* note 21.

24 It is worth considering that certain policies may not be developed in time to support a particular legislative package. For example, as this article goes to press, Bill C-84 has been introduced to amend the *Criminal Code* in relation to bestiality and animal fighting. The bill is quite short and its provisions might have been appropriate for inclusion in larger *Criminal Code* amendment packages such as Bill C-51 or C-75. Considering, however, that the bestiality provision responds to the June 2016 Supreme Court case *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, it is possible that the policy response implemented in C-84 was simply not ready in time for inclusion in the June 2017 tabling of C-51 or the March 2018 tabling of C-75. Similarly, in relation to animal fighting, it is worth noting that these provisions required consultation in their development, something highlighted in the government's press release on the bill (https://www.canada.ca/en/department-justice/news/2018/10/government-of-canada-announces-measures-to-strengthen-legal-protections-for-children-vulnerable-individuals-and-animals.html).

25 For example, see Miriam Katawazi, "Ottawa fails in bid to delay Ontario solitary confinement lawsuit" *Globe and Mail* 6 July 2017, which notes federal government efforts to postpone proceedings in relation to administrative segregation (solitary confinement) in both British Columbia and Ontario owing to the introduction of Bill C-56.

26 See Federal Court of Appeal Proceeding Query A-105-16 – "Letter from the respondent dated 18-JUL-2017 writing to advise the Court of the tabling of Bill C-51, enclosing a copy of the bill and requesting that it and the letter be forwarded to the panel, received on 18-JUL-2017".

27 *Bernard v. Canada* (National Revenue), 2017 FC 536 at 20.

28 Tobi Cohen, "Ottawa in no rush to pass gay divorce bill," *Leader Post* (Regina, Sask.), 1 June 2013, page C 9.

29 LegisINFO, 41st Parliament, 1st Session, C-23, *Civil Marriage of Non-residents Act*.

30 As noted in footnote 25, supra, the government unsuccessfully sought to postpone certain proceedings in relation to administrative segregation (solitary confinement) on the basis of Bill C-56's introduction. Bill C-56, introduced in June 2017, sought to limit the use of administrative segregation to a certain number of days; it was never debated. As this article goes to press, Bill C-83 has been introduced and would, per its summary, "eliminate the use of administrative segregation and disciplinary segregation". One can imagine that if a Court and other parties were waiting on C-56 to advance, they would be in for quite a surprise at C-83's tabling.

31 Bill C-401, *An Act to amend the Canada Elections Act (voting age),* 42nd Parliament, 1st Session.

32 As an interesting example, consider the Elections Canada *Briefing Book for the Minister of Democratic Intuitions* (January 2017) which contains analysis in respect of "Should Bill C-33 become law". Bill C-33 was overtaken by Bill C-76 several months later.

33 In particular, businesses impacted by a new law will likely plan their affairs as soon as possible.

34 In the previous Parliament, for example, the Minister of Justice announced "We will not be proceeding with Bill C-30 and any attempts that we will continue to have to modernize the Criminal Code will not contain the measures in C-30" Tobi Cohen, "Government kills online-snooping bill over privacy issues," *The Vancouver Sun,* 12 February 2013, page B2.

35 *Iscar Ltd. v. Karl Hertel GmbH*, 18 F.T.R. 264, 19 C.P.R. (3d) 385, 8 A.C.W.S. (3d) 207.

36 Rachel Aiello, "Chagger says time allocation to be used 'more often' by Liberals to pass legislative agenda," *The Hill Times*, 2 May 2017.