“Trojan Horse”: Opposition’s Procedural Odyssey with Omnibus Bill C-38

As the spring 2012 House of Commons session drew to a close, a bi-annual budget implementation bill was the subject of an atypical spectacle. With the NDP serving as the Official Opposition in a majority Parliament situation, opposition MPs unfurled a long string of Parliamentary tactics aimed at slowing the Bill’s passage. What began with negotiations included finagling over committee procedure and little-used points of order and ended in a sleepover in the legislative chamber. Ultimately, Bill C-38, the “omnibus budget implementation Bill,” passed with no amendments.[1]

Newspapers captured each step of the process, made remarkable as the “first time since the last election, the opposition a serious fight.”[2] So, was this an example of proper use or abuse of the parliamentary system? Viewed one way,[3] opposition parties fulfilled their role, raising public awareness and providing a counterweight for the Government’s incentive to pass large omnibus bills. Viewed another way,[4] opposition MPs unfairly obstructed the Government in passing important new laws, interfering with their majority mandate.

This article will outline the role that the opposition MPs can play in the Canadian Parliamentary system, using Bill C-38 as an example. Bill C-38 was unique in that it was an “omnibus” bill.

HOW IT’S MADE: THE PROCESS OF PASSING BILL C-38

First, some context: each year, the Government of Canada passes its budget. Once the budget is passed, the priorities outlined in it must be executed through “budget implementation bills.” Bill C-38 – which became *The Jobs, Growth and Long Term Prosperity Act*[5] – was the first such implementation bill in 2012.

Introduction and First Reading

Any MP can introduce a bill into the House of Commons, but the budget implementation bill is a government bill, sponsored by the Minister of Finance. Before a bill can be introduced into the House of Commons, the MP sponsoring the bill must give notice at least 48 hours in advance of the bill’s introduction. The bill’s title then goes on the Notice Paper where it remains until the Member or Minister makes a motion to introduce it.

Assuming the bill is on the notice paper, the motion to introduce a bill is automatically accepted. The Speaker then proposes that the bill move onto the first reading stage. This motion is automatically adopted as well. The purpose of the first reading is to ensure that

the bill can be printed and distributed to all MPs.[6] As another formality, the Speaker then asks when the bill should be read a second time and House Members respond: "At the next sitting of the House!"

Second Reading and Referral to Committee

When the House of Commons sits again, the bill is on the Order Papers (the daily agenda). An MP will, at some point, motion to bring the bill to its Second Reading and to, simultaneously, refer the bill to committee. The Debate on the Second Reading is restricted to the bill's general principle, rather than the details of specific provisions. After the House has finished debating general aspects of the bill, the Speaker will put a question to the House: "That the bill be now read a second time and referred to the committee." If a majority of the House votes in favour, the bill continues. If not, the bill is withdrawn. "Public bills" – those introduced by government Members – cannot be amended before they have gone through a second reading.

If the House votes in favour of the bill at Second Reading, it will proceed to be reviewed by an existing "standing committee." Generally, standing committees are made up of 12 MPs, with representation from all political parties in proportion to the number of seats that they hold in the House.[7] It is notable that independent MPs do not serve on committees. Usually, a bill is referred to the committee whose mandate is most relevant to the bill. Because Bill C-38 was a budget implementation bill, it went to the Finance Committee. Typically, a committee holds public hearings. These hearings start with a speech from the bill's sponsor – in this case, Minister of Finance Jim Flaherty – but other relevant individuals are invited to speak as well. This can include experts, representatives of relevant organizations, or other individuals who would be affected. After the public hearings, a committee considers the bill, clause-by-clause. At this point, all committee members – and only committee members – can propose amendments to the bill. Committee members ask questions, propose amendments, and debate on each clause of the bill.

Reporting Stage and Third Reading

The committee reports its recommendations to the House. It can either recommend a bill as it is or with amendments, but it cannot write comments otherwise. After the report has been presented, MPs are allowed to propose additional amendments. However, the Speaker will normally rule amendments out of order if they have already been considered and rejected in committee. This is part of the "consistency" principle that the House takes toward amendments. In the case of Bill C-38, this meant that the three opposition parties were not able to submit substantive amendments at the reporting stage because the amendments had been considered and rejected in committee.

During the report stage, amendments are debated and voted on. The Speaker of the House can choose to rule amendments out of order or group them together for debate and voting, to prevent the report stage from becoming a re-hash of the committee process. When all amendments are voted on, the bill immediately moves on to the third reading, where it is debated and voted on for a final time within the House of Commons.

And onto the Senate!

The bill then moves onto the Senate and, if it passes there, goes to the Governor General, who gives it royal assent. For more information on the process of passing a bill into law, Parliament's Compendium of Procedure is available here.

THE ROLE OF OPPOSITION: TOOLS TO OPPOSE A BILL IN A MAJORITY PARLIAMENT

Though the lengthy nature of what was essentially a "floor fight" distinguishes it from others in recent memory, the passing of Bill C-38[8] is an archetype for the way that opposition party behaviour differs between majority and minority government situations. Unable to command the power of numbers to vote down a bill, opposition MPs in a majority government situation have a limited set of options for reacting to legislation that they take issue with.

Opposition MPs in a majority government have less power, to be sure. But there are nevertheless a number of points in the process where they can attempt to influence policy. They can do so directly, within the bill-passing process and/or indirectly, by influencing public opinion. So, what specifically can opposition MPs do when they are faced with an omnibus bill that they have concerns about?

Rallying Public Opinion

Opposition MPs can use speeches during floor debates in the House of Commons, interviews with journalists, personal and party websites and protests to inform the public and to rally support for their position. In doing so, opposition parties hope to spur negative reaction towards the governing party, forcing it to modify its actions or to accept less public support with regard to the proposed legislation.

Slowing Down the House

Opposition MPs use time allocation to slow a bill's passage. The most commonly used tactic is a "filibuster," where an individual MP (or a series of MPs) talks for a very long time in order to stall the parliamentary process. The House of Commons meets for a finite period, so opposition MPs may filibuster in the hopes of preventing, or at least delaying, a vote. Opposition MPs can use their time in debate on the bill, though the Government will often react by placing a time limit on the debate.

The Committee Process

When a proposed bill progresses to its relevant policy committee, opposition representatives can propose amendments there. Opposition parties can also negotiate with the governing party outside the official legislative process, perhaps asking it to split parts of a bill up or change a provision.

Points of Order and Amendments

In the House, opposition MPs can offer points of order where they ask the Speaker to rule a bill out of order because it does not meet the requirements of House of Commons Standing Orders.

Opposition parties can submit amendments through their committee members and in the House, subject to the restrictions described above (aimed at avoiding redundancy). Independent MPs can submit substantive amendments only in the House, because they are not on committees. Amendments can be used to slow the passage of a bill or to lure government MPs to vote on small changes to the bill.

Reality: What Took Place in Spring 2012

In early May, the New Democratic Party (NDP) Official Opposition requested that the parts of Bill C-38 related to the environment should be split into a separate bill.[9] After two days of hesitation, Government said no.[10] As a sort of makeshift filibuster, the NDP responded by instigating an extended debate on the snow crab industry in Atlantic Canada.

In June, Green Party MP, Elizabeth May, raised a point of order asking that Bill C-38 be ruled out of order[11] in accordance with Parliamentary Standing Order 68(3), which disallows bills that are "improper in form."[12] Ultimately, Speaker Scheer ruled against May's point of order.[13] For further elaboration on the ruling, and on omnibus bills generally, see, "The Omnibus Budget Implementation Bill: Balancing Democratic Accountability with Legislative Efficiency."

When the Bill progressed to the Finance Committee, the NDP raised more than 50 amendments.[14]None of these amendments passed; Bill C-38 continued, unaltered. Conservative MPs comprise a majority of the Finance Committee. In the House, the Liberals tabled 503 clause deletions while the NDP simultaneously tabled 506. Because the Green Party does not meet the threshold to be considered a political party within the House, Elizabeth May, the lone Green Party MP, cannot sit on a committee. So, unlike her colleagues, she was allowed to submit substantive amendments (not just clause deletions) and she tabled over 300.

In the end, 871 amendments were presented to the Speaker. Though he ruled some out of order, he bundled most of them together into between 67 and 159 items for the House to vote upon. The Government responded by limiting the amount of time that was allocated for debate on the Bill, the twenty-sixth time it has done so since the current Government came to power in 2011. The NDP charged that this was part of a record-breaking pattern of stifling debate, while Government argued that Bill C-38 had received plenty of debate.[15] Voting on Bill C-38 began on June 13, passing (un-amended) 22 hours later on June 14 – after 157 votes on the bundled amendments, all of which were unsuccessful.

Sometimes Losing isn't Really Losing: Were Opposition's Manoeuvres Against Bill C-38 Successful?

In a majority government situation, the likelihood of success by opposition parties to stop or

to amend a bill, especially a large and important bill like an omnibus, is limited. By this metric, the opposition parties were unsuccessful in their efforts against Bill C-38. None of their amendments passed, Government did not offer any conciliatory amendments of their own, the Bill was not split, and it has become law. However, in the long term, the tools used by opposition MPs to contest the omnibus Bill may prove to have an impact.

Caucus Troubles

Opposition parties rallied enough public opinion against the Bill to pressure one backbencher, Conservative MP David Wilks, into telling his constituents that he and a handful of other backbenchers wished to see some measures separated from the omnibus Bill.[16] Although the Government quickly pressured him to retract his statements,[17] there is some evidence that backbenchers in the Conservative caucus are dissatisfied. The Globe and Mail reported that several backbenchers in the Tory caucus are uncomfortable with omnibus bills and unhappy with the process that was followed in passing Bill C-38.[18]

Because opposition MPs put forward a large number of amendments, many of which would have been popular for Conservative MPs to support (as Conservative MP David Wilks explained to his constituents), the Government was forced to exert iron-fisted party discipline in order to ensure that Bill C-38 passed without amendment. In other words, some or many Conservative MPs had to sacrifice their own political views in support of the party. Conservative Party leadership may need to assuage tensions by agreeing to the demands of their (dissatisfied) backbenchers, perhaps by avoiding use of an omnibus format for autumn's budget implementation bill. If it doesn't, the Government may risk having some of its members cross the floor or upending the current Conservative leadership from within the party.

In this sense, opposition parties may see the fruit of their springtime manoeuvres in the fall, if the Government refrains from using an omnibus format for the second 2012 budget implementation bill.

Public Opinion

Opposition parties may also have set themselves up for electoral gains in the future through this fight. A poll conducted just after Bill C-38 passed put nationwide public support for the NDP ahead of the governing Conservatives for the first time.[19] Although the next federal election will likely not take place for four years, this is bound to be good news for a party heading the Official Opposition for the first time in the House of Commons.

A Call to Regulate

Finally, the omnibus budget Bill controversy has led to renewed calls for limits to be placed on omnibus bills. Liberal MP Marc Garneau tabled a motion in the Standing Committee on Procedure and House Affairs. If it passes, the Committee will study the prospect of placing limits on omnibus bills, possibly leading to new House regulations.[20] Given the

dissatisfaction among Conservative MPs about the omnibus Bill, if new rules are drafted they may be passed by the House.

CONCLUSION

Oppositions are undoubtedly weaker when the Government has a majority of seats in the House of Commons. But that does not make them powerless. As Bill C-38 went through the process of becoming law, opposition MPs demonstrated that they had a wide variety of tools in their possession to advance their positions. Although the Bill did become law, the Government faces the possibility of notable long-term losses because opposition parties were able to successfully harness public opinion against the policy and process of passing Bill C-38. It seems, then, that a clever opposition MP need not despair in a majority government situation.

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[1] *Jobs, Growth, and Long-term Prosperity Act*, RSC 2012, c C-38.

[2] Andrew Coyne, "The C-38 debate is a last-ditch effort to save democracy's soul**",** *Vancouver Sun* (13 June 2012).

[3] John Ibbitson, "Budget filibuster could sideswipe other bills on Tory agenda", *Globe & Mail* (7 June 2012).

[4] *Ibid.*

[5] *Supra* note 1.

[6] "Compendium of Procedures" *Parliament of Canada* (nd), online: Parliament of Canada.

[7] "Committees: Practical Guide" *House of Commons*, online: Parliament of Canada.

[8] *Jobs, Growth, and Long-term Prosperity Act*, *supra* note 1.

[9] Aaron Wherry, "Can This Baby be Split?" *Macleans* (7 May 2012).

[10] Aaron Wherry, "No Deal" *Macleans* (9 May 2012).

[11] Elizabeth May, "Points of Order – Bill C-38" *Elizabeth May MP* (4 June 2012).

[12] House of Commons, *Standing Orders of the House of Commons*, s 68(3).

[13] House of Commons Debates, 41st Parl, 1st Sess, No 138 (11 June 2012) at 1205 (Hon Andrew Scheer), online: Parliament of Canada.

[14] Aaron Wherry, "A Rough Guide to Bill C-38" *Macleans* (6 June 2012).

[15] Jason Fekete, "Conservatives Breaking Record for Stifling Commons Debate: NDP" *Canada.com* (12 June 2012).

[16] Matt Gurney, "Matt Gurney: Semi-Rogue Tory MP Shouldn't Underestimate Caucus Unrest" *National Post Full Comment* (24 May 2012).

[17] Tabatha Southey, "A Tory MP Takes a Brave Stand Against… His Previous Brave Stand" *The Globe and Mail* (26 May 2012), online: Globe and Mail.

[18] Stephanie Levitz, "Tories Fear Budget-Bill Showdown Burnt Substantial Political Capital" *The Globe and Mail* (15 June 2012).

[19] Eric Grenier, "NDP Beats Tories in First Round of 4-Year Battle, Polls Show" *The Huffington Post* (22 June 2012).

[20] Beth Hong, "Opposition MPs Prepare for Battle Against New Omnibus Legislation in the Fall"*Vancouver Observer* (21 June 2012).