Overcoming Policy Blockages at Drafting Stage: A Client Perspective and the ECCC Model

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1) Context: Legislative Policy Steps

- **Step 1**: Identify the problem
- **Step 2**: Develop the legislative options to solve the problem
- **Step 3**: Cabinet Approval of Policy
- **Step 4**: Drafting of Bill
- **Step 5**: Preparation and Cabinet Approval of Bill (Bill Review)
- **Step 6**: Parliamentary Process
- **Step 7**: Coming into Force
- **Step 8**: Post Enactment
1) Context: Approving Legislative Policy (theory)
1) Context: Approving Legislative Policy (reality)
2) Potential Sources of Policy Blockages

- Lack of clarity around policy objectives
- Divergent policy views
  - intra-departmental divergences
  - Inter-governmental divergences (e.g.: culture clashes)
- Unresolved issues: more analysis or expertise needed
- Changes in policy directions as a result of:
  - New political direction
  - Co-development of legislative policy with Indigenous partners
  - Input received from consultation with stakeholders
3) Policy Blockages at Drafting Stage?
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New policy blockages created as a result of drafting:

- “Words fly away, writings remain” : official Bill text generates reactions
- Drafters’ and drafting experts’ involvement bring new perspective/interpretation
- Drafting guidelines or conventions may create new obstacles
4) Key Factors to Prevent or Minimize Impact of Policy Blockages at Drafting Stage

- Preparation
- Expertise & experience in legislative policy
- Broad view of the legislation under Minister’s responsibility and ability to make linkages
- Relationships with key programs in the department (who’s who)
- Implementing the “Fearless Advice, Loyal Implementation” moto
- Structure that provides rapid access to Senior Management for key decisions
- Corporate memory and review (lessons learned)
5) The ECCC Model: Legislative Governance Division

• Created in 2007 – with mandate for:
  ▪ Focal point for environmental law reform (ECCC statutes, Private Members’ Bills, Parliamentary Reviews)
  ▪ Operational work (CEPA and SARA Registries, CEPA-NAC Secretariat, Five Statutory Annual Reports)

• Part of the Environmental Protection Branch of ECCC (« ECCC’s Regulator »)

• Multidisciplinary team: professionnals with legal training background + science and environmental policy expertise
5) The ECCC Model: Legislative Governance Division

• Delivery of broad legislative and policy requirements
• Guardians of legislative framework for conservation & environmental protection
  • Oversees legislative reform agenda for Minister
  • Think tank for getting ahead of the issues that may require a legislative tool (forward-looking research)
• Intermediary function between programs, legal services, drafters, other departments
6) Example: GGPPA

- Greenhouse Gas Pollution Pricing Act (GGPPA)
  - Part of Bill C-74, the Budget Implementation Act, 2018, no.1 which received Royal Assent on June 21, 2018
  - Establishes the legal framework for the federal carbon pricing system – the “backstop”
  - Purpose is to help reduce Canada’s greenhouse gas emissions by ensuring that a carbon price applies broadly throughout Canada and increases over time
  - Two complementary components:
    - a charge on fossil fuels (Part 1 / Minister of Finance)
    - a performance-based pricing system for industrial facilities also known as the output-based pricing system (Part 2 / Minister of ECC)
  - ECCC also responsible for Part 3 (Provincial GHG Pricing Regimes in the Federal House) and Part 4 (Annual Report)
6) Example: Drafting of GGPPA

• Preparation & Corporate memory
  ▪ Carbon pricing & forward-looking research started prior to 2015
  ▪ Fall 2015: participated in discussion / analysis of party platform / early constitutional analysis / able to assemble information quickly relying on documented corporate memory
  ▪ Drafting instructions

• Expertise & experience in legislative policy
  ▪ Advice on instrument choice: existing statute, new statute, regulations
  ▪ Unresolved policy issue vs time pressure: kept drafting moving to generate reactions/decisions
  ▪ Regularly debriefed Programs, Enforcement Branch
  ▪ Tracked drafting decisions/ DIs-Bill correspondence / held weekly working level meetings and Senior management briefings
6) Example: Drafting of GGPPA

- **Broad view of legislation and ability to make linkages**
  - Enforcement schemes in environmental legislation
  - Consistency with CEPA legislative policy
  - Procedural environmental rights: transparency and annual reporting

- **Access to senior management**
  - Regular briefing & kept track of decisions

- **Relationship**
  - Finance Canada, Natural Resources Canada

- **Review & Lessons learned**
6) Other examples

- **Environmental Enforcement Act, 2009**
  - Government Agenda in 2006: « Tough on Crime »
  - Opportunity to modernize enforcement schemes of nine federal environmental statutes
  - Research and analysis on environmental enforcement legislative policy (administrative monetary penalties, creative sentencing, etc) ready on time

- Private Member’s Bills
  - « Support with amendments » scenarios requires quick action

- Tracking Other Government Departments Bills Initiatives

- Tracking and forward-looking for each of ECCC’s statutes
Conclusion