

## Forestry Manuals: Legally Enforceable or Not?

**N**UMEROUS MANUALS ARE USED TO ADMINISTER PUBLIC FOREST TENURES IN British Columbia. The most commonly referenced of these are probably the coast and interior appraisal manuals used to determine stumpage rates in BC. That said, many others are also used in the day-to-day administration of BC's forestry resources. These include the *Ministry of Forests and Range Policy Manual*, the *Provincial Logging Residue & Waste Measurement Procedures Manual* (the Waste Manual), the *Cruise Compilation Manual*, and the *Scaling Manual* just to name a few. These manuals are voluminous, technical and require a high degree of professional expertise to understand. A little Zen-like knowledge of the universe also helps. Those who are experts with these manuals often receive the designation of 'guru' as in, "Larry's our appraisals guru."

Given the ubiquitous use of manuals in the BC forest industry, free-thinking individuals might reasonably ask, "Are these things legally enforceable?" Of course, my lawyerly answer is that it depends.

In terms of regulatory law, legally enforceable rules within provincial constitutional jurisdiction (such as forestry) must flow from the Legislature in the form of statutes or validly enacted 'subordinate legislation.' (That is legislation that the Legislature has statutorily authorized another body to enact.) The important thing to note is that while the Legislature is free to enact any legislation it wants within constitutional constraints (former Minister of Forests Dave Zirnhelt was absolutely right in this regard), a subordinate legislative body is only authorized to enact regulations that fall strictly within the grant of authority that the Legislature bestowed upon it. A subordinate legislative body is, in effect, a proxy that exercises a narrowly defined slice of the Legislature's jurisdiction on behalf of the Legislature.

While subordinate legislation most often takes the form of regulations enacted by the provincial cabinet, authority to enact subordinate legislation is commonly granted to other bodies as well. For example, the Legislature has granted municipalities the authority to enact municipal bylaws, a form of subordinate legislation. Closer to home, the Legislature has authorized the council of the ABCFP to enact bylaws under the *Foresters Act* with respect to the practice of professional forestry, also subordinate legislation.

Some of BC's forestry manuals, in whole or in part, contain subordinate legislation that our courts will enforce. Section 105(1) of the *Forest Act* requires the Ministry to determine stumpage rates "in accordance with the policies and procedures approved ... by the minister", and the Minister approves these policies and procedures in the appraisal manuals. The BC Court of Appeal held in *MacMillan Bloedel Ltd. v. Appeal Board* (1984) that the power to approve policies and procedures under

section 105(1) is akin to regulation-making. The courts and administrative tribunals of BC have consistently enforced the appraisal manuals as subordinate legislation ever since.

Manuals can also obtain legal enforceability as a matter of contract law (as opposed to regulatory law). For example, a forest tenure is a contract and most forest tenures will expressly provide for the assessment of waste under the tenure in accordance with the *Waste Manual*. Through referential incorporation into the forest tenure document, the requirements of the *Waste Manual* with respect to the assessment of waste become part of the contract between the licensee and the government. This allows the parties to enforce the *Waste Manual* in the courts as a matter of contract law. The same is true for the requirements of any other manual to the extent that those requirements are referentially incorporated into a contract.

Nevertheless, those who make their livelihood in the forest industry are right to cast a suspicious eye towards the legal significance of any manual. The Ministry has no inherent authority to create legally enforceable rules: "ministry policy" is not synonymous with "legal requirement." As the Forest Appeals Commission has noted on several occasions, Ministry policy, on its own, does not have the force of law. Unless ministry policy is created as subordinate legislation validly authorized under a statute of the Legislature, or is referentially incorporated into a forest tenure or other contract, ministry policy is simply guidance with respect to the Ministry's approach towards a given matter. ☺

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