



**Affaires autochtones et
Développement du Nord Canada**

**Aboriginal Affairs and
Northern Development Canada**



Relationship of Laws

Federal Presentation at
Dehcho Main Table Session
November 15 to 17, 2011

For Discussion Purposes Only

Without Prejudice



Determination Validity of Laws

- **Constitutional Context**
- **Conflicts between federal and provincial laws**

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Validity

When conflicts are alleged to have occurred

- 1. First determine if laws are validly enacted**
- 2. Look to the dominant matter of challenged law**
- 3. Determine if law is within one of the heads of power set out in division of power provisions of the Constitution s.s. 91 and 92**
- 4. Incidental impact**
- 5. Double aspect**

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Conflict

Constitutionally conflicts between federal and provincial laws are always resolved in favour of the federal law

- **Limited in application to the part of the law that has given rise to the conflict, i.e. rest of the law remain intact**

- **Temporal Effect:** if federal law is amended so no conflict or repealed the provincial provision would once again be applicable

- **Courts have developed tests that promote co-existence of laws:**
 - ✓ Impossibility of dual compliance
 - ✓ Frustration of legislative intent

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Canada's Approach to Negotiating First Nation Jurisdiction

Concurrent Law Model

- **Federal/territorial /First Nation laws would normally co-exist**
 - i.e. The enactment of a First Nation law would not result in the ousting of a federal or territorial law in the same field

Exception: identified federal laws that would cease to apply for the First Nation – e.g. *Indian Act* provisions

- **In many areas the First Nation government is likely to be the only government enacting laws**

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Concurrent Law-Making Model

- **Means there will be some degree of overlap of First Nation/federal/territorial laws**
- **Means conflicts may arise from this concurrency**
- **Expect Canadian courts if faced with a conflict situation between First Nation and federal/territorial laws would apply the same rules to sort out these conflicts as they do currently for sorting out conflicts between federal and provincial laws**

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Priority

- **Unlike federal/provincial context, federal mandate permits us to negotiate First Nation priority for certain subject matters**
- **For each jurisdictional subject matter there will be a rule set out to determine which government's law will prevail in the event of a conflict**

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Judicial Sorting Process

- **Determine whether First Nation law is validly enacted**
- **Determine if First Nation law is in conflict with a federal/territorial law**
- **If there is a conflict, determine which law prevails**
- **Conflict rules - subject matter to subject matter**
 - **- incidental impact**
 - **- double aspect**
 - **- overriding national importance**