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Constitutional Implications of Expanded Railway Access

Opinion prepared for the Canada Transportation Act Review

Opinion prepared by
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Mr. Ian S. MacKay,
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Dear Mr. MacKay:

Re: Constitutional Implications of Expanded Railway Access

Further to your letter of November 14, 2000, you have requested my opinion on the constitutional implications arising from granting provincially-regulated railways or persons the right to use rail lines or facilities that are subject to exclusive federal jurisdiction. Such expanded running rights would be achieved by amending section 138 of the *Canada Transportation Act*, S.C. 1996, c.10 (the “Act”), to allow “any person” to apply for running rights or access to another railway company’s lines rather than limit such application to a “railway company”, which the Act defines as a railway company subject to the jurisdiction of Parliament.

You have asked for my opinion on the following two constitutional issues arising from such an amendment to section 138 of the Act:

- (i) is it within the legislative authority of Parliament to make laws which would grant to railways or other persons subject to exclusive provincial jurisdiction the right to use lines and facilities of a railway company within the exclusive jurisdiction of Parliament? If so, would Parliament have sufficient jurisdiction to ensure that the provincial railway would meet applicable insurance, licensing, safety and other statutory requirements that apply to federal railways, at least in so far as their operations over the federally-regulated lines and facilities are concerned? and
- (ii) if Parliament does have sufficient authority to accomplish the above, does a provincial railway which operates by way of running rights over a federally-regulated rail line thereby lose its status as a provincial railway and become subject to the exclusive jurisdiction of Parliament?

Opinion

My opinion on the above-noted issues is as follows:

- Parliament has authority to amend section 138 of the Act so as to permit the grant of running rights over federally-regulated lines and facilities to any person, regardless of whether that person is a “railway company” as defined in the Act;
- Parliament can ensure that any person that is granted such running rights must meet applicable insurance, licensing, safety and other statutory requirements that apply to federal railways, at least in so far as the person’s operations over federally-regulated lines and facilities are concerned; and
- a provincially-regulated railway that is granted running rights over federally-regulated lines or facilities would not become subject to exclusive federal jurisdiction merely by virtue of having been granted such running rights. Rather, jurisdiction over the provincially-regulated railway will depend upon the established tests and criteria that have been developed by the courts in determining constitutional jurisdiction over works and undertakings. These tests consider whether the provincial undertaking is operated in common with a federal undertaking, or whether the federal undertaking is dependent for its operation upon the provincial undertaking. Mere physical connection between a provincial and federal undertaking (including, in this context, the use of federal lines or facilities by a provincial undertaking) is not sufficient to establish exclusive federal jurisdiction over the provincial undertaking.

1. Analysis

The analysis set out below assumes that the reader is familiar with sections 92(10) and 91(29) of the *Constitution Act, 1867*, the provisions allocating jurisdiction over works and undertakings as between Parliament and the provincial Legislatures. It also assumes a familiarity with the manner in which these constitutional provisions have been interpreted and applied by the courts.¹

(a) **The Grant of Running Rights over Federally-Regulated Lines**

The first issue identified above relates to the extent of Parliament’s ability to grant running rights over federally-regulated rail lines and facilities. This raises two related sub-questions: (i) whether Parliament has the legislative authority to grant to railways and other persons within exclusive provincial jurisdiction the right to use rail lines or facilities subject to exclusive federal jurisdiction; and

¹ See generally, Hogg, *Constitutional Law of Canada* (looseleaf ed., 2000), chapter 22; Monahan, *Constitutional Law* (1997), chapter 12.

- (ii) whether Parliament has the authority to require that a provincial railway granted such rights must meet applicable insurance, licensing, safety and other statutory requirements that apply to federal railways, at least in so far as their operations over the federally-regulated lines and facilities are concerned.

- (i) *Federal Power to Grant Running Rights*

The first of these sub-questions arose in the case of *Kootenay & Elk Railway Company v. CPR*, [1974] S.C.R. 955 (“*Kootenay and Elk*”). In this case, the Kootenay and Elk Railway Company (“K & E”), a company incorporated under the *Railway Act* of British Columbia, proposed to construct a rail line in British Columbia to within 1/4 inch of the United States border, where it would connect with a line constructed by Burlington Northern Inc. (“Burlington”), an American railway company. (The Burlington line was likewise to be constructed to within 1/4 inch of the Canadian border.) The purpose of the construction of these two lines of railway was to enable the transportation of coal from mines in B.C. through to the United States.

An application was made to the Canadian Transport Commission, a statutory body established under the *National Transportation Act*, R.S.C. 1970, c. N-17 and exercising jurisdiction under the *Railway Act* (Canada), for permission to join the proposed lines (the “Main Application”). K & E also applied, *inter alia*, for running rights over a portion of the C.P.R. main line in B.C. (the “Running Rights Application”), pursuant to a provision in the *Crows Nest Pass Act*, S.C. 1897, c.5. The Commission refused the Main Application on grounds that, in its view, a provision in the *Railway Act* prohibited the agreement between K & E and Burlington for the exchange of rail traffic. However, the Commission was of the view that the *Crows Nest Pass Act* authorized the Running Rights Application and would have granted K & E the running rights it requested had it granted the Main Application.

K & E appealed the Commission’s denial of the Main Application to the Supreme Court of Canada, with the C.P.R. cross-appealing the Commission’s decision that it had jurisdiction to grant the Running Rights Application. A variety of issues were considered in the Supreme Court of Canada. The main holding in case was that the mere fact of physical connection between the K & E line and the Burlington line did not render K & E an interprovincial work and undertaking subject to exclusive federal jurisdiction.² However, of particular importance in the present context is the Court’s analysis of issues relating to the Running Rights Application. The C.P.R. had argued that the *Crows Nest Pass Act* only permitted the grant of running rights over a federal rail line to a federally-regulated railway. The Supreme Court of Canada unanimously rejected this argument, holding that the statute permitted to grant of running rights to a provincially-incorporated railway such as K & E.³

² See, in particular, the judgment of Martland J., with whom Abbott and Ritchie JJ. concurred, at 978-982.

³ See judgment of Fauteux C.J., with whom Judson and Pigeon JJ. concurred, at 958; the judgment of Martland J., with whom Abbott and Ritchie JJ. concurred, at 974; the judgment of Hall J. at 996; and the judgment of Laskin J. (as he then was) at 1021.

Therefore, the *Kootenay and Elk* case authoritatively confirms that Parliament has the jurisdiction to enact legislation granting a provincially-regulated railway company the right to use lines or facilities of a federally-regulated railway company.⁴

(ii) *Federal Power to Regulate a Provincial Railway
Exercising Running Rights over a Federal Line*

The second sub-question identified above asks whether Parliament can require a provincially-regulated railway that is granted running rights over a federally-regulated line to comply with insurance, licensing, safety and other statutory requirements in respect of its operations over the federal line. This issue has also been considered and authoritatively determined in earlier caselaw. In particular, in *Montreal v. Montreal Street Railway*, [1912] A.C. 33 (“*Montreal Street Railway*”), two railway companies operating in the City of Montreal ran rail cars over the other company’s rail lines. One of the railway companies (the “Park Railway”) was subject to exclusive federal jurisdiction (having been declared to be a work for the general advantage of Canada pursuant to section 92(10)(c) of the *Constitution Act, 1867*) while the other railway (the “Montreal Street Railway”) was a local work and undertaking subject to exclusive provincial jurisdiction. The specific issue in the case was whether Parliament had authority to regulate the traffic of the federally-regulated Park Railway when running over the lines of the provincially-regulated Montreal Street Railway.

The Privy Council, in a judgment written by Lord Atkinson, held that federal authority did not extend to the Park Railway traffic running over the provincially-regulated Montreal Street Railway. Therefore, a provision in the federal *Railway Act* stating that a provincially-regulated railway company would be subject to federal jurisdiction whenever its traffic connected with that of a federally-regulated railway,⁵ was limited in application to through

⁴ I refer to this proposition as having been “confirmed” by *Kootenay and Elk* since this same conclusion had been reached in earlier cases. For example, in *Montreal v. Montreal Street Railway*, [1912] A.C. 33, a locally-regulated railway had been granted running rights over a federally-regulated railway, in accordance with a provision in the federal *Railway Act*. There was no objection taken to the grant of running rights in favour of the local railway company over the federal rail line: the main issue in the case was whether the fact of interconnection between the two lines meant that “through traffic” on the provincial line was subject to federal regulation. See discussion of this aspect of the case below. See also *A.G. Alta. v. A.G. Canada*, [1915] A.C. 363 (P.C.) (affirming exclusive federal authority to determine the extent of rights to be granted to provincial railways seeking to cross a federal rail line).

⁵ The provision in question was section 8 of the *Railway Act*, R.S.C. 1906, c.37, which read as follows:

8. Every railway, steam or electric street railway or tramway, the construction or operation of which is authorized by Special Act of the legislature of any province, and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to, -
- (a) the connection or crossing of one railway or tramway with or by another, so far as concerns the aforesaid connection or crossing;
 - (b) the through traffic upon a railway or tramway and all matters appertaining thereto;

traffic moving across the federally-regulated rail line. An order made by the Board of Railway Commissioners for Canada purporting to require the provincially-regulated Montreal Street Railway to enter into an agreement with the federally-regulated Park Railway respecting the movement of traffic of the latter company on the rail lines of the former was quashed as being beyond the jurisdiction of the Board.

Therefore, the first proposition established by this case is that where a provincially-regulated railway is granted permission to run traffic over a federally-regulated line, that in itself does not authorize Parliament to regulate traffic running on the provincial line.

The *Montreal Street Railway* case also considered the specific sub-question identified above, namely, to what extent can Parliament regulate rail traffic of a provincially-regulated railway that is running over a federally-regulated rail line. Lord Atkinson found that such regulatory authority was vested in Parliament rather than the provincial legislature (at 346):

One of the arguments urged on behalf of the appellants was this: the through traffic must, it is said, be controlled by some legislative body. It cannot be controlled by the provincial Legislature since that Legislature has no jurisdiction over a federal line, therefore it must be controlled by the Legislature of Canada. The answer to that contention is this, that so far as the “through” traffic is carried on over the federal line, it can be controlled by the Parliament of Canada. And that so far as it is carried over a non-federal provincial line it can be controlled by the provincial Legislature, and the two companies who own these lines can be respectively compelled by these two Legislatures to enter into such agreement with each other as will secure that this “through” traffic shall be properly conducted. (emphasis added)

Thus the *Montreal Street Railway* case establishes Parliament’s jurisdiction over all rail traffic moving on a federally-regulated rail line, whether it be traffic of a provincial or a federal rail company.⁶

A more recent case confirming this conclusion is *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 328 (“*Ontario Hydro*”). This case raised the issue of the extent of Parliament’s regulatory authority over “works” that have been declared to be for the general advantage of Canada pursuant to section 92(10)(c) of the *Constitution Act, 1867*. The Supreme Court, by a 4-3 majority, held that Parliament’s authority extended to exclusive

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- (c) criminal matters, including offences and penalties; and
 - (d) navigable waters.

⁶ It might be noted that in the *Kootenay and Elk* case, the Supreme Court held that the federal regulator in that case was limited to considering issues of safety when considering whether to grant a provincially-regulated rail company the right to run traffic on a federally-regulated line. However, that conclusion was based on an interpretation of the relevant statutory language, which referred to issues of safety only, and not on the basis of any constitutional limitation on Parliament’s jurisdiction over traffic running on a federally-regulated rail line. See the judgment of Martland J. at 974-977.

jurisdiction over the labour relations of the undertaking operating the work in question. La Forest J., with whom L'Heureux-Dubé and Gonthier JJ. concurred, reasoned that when a work has been made subject to the exclusive jurisdiction of Parliament, whether by way of a federal declaration under section 92(10)(c) or by virtue of having been enumerated in section 92(10)(a), provincial jurisdiction over the work *qua work* is ousted.⁷ Therefore, Parliament's exclusive authority extends to the regulation of the management and operation of the work, including labour relations of the undertaking operating the work.⁸ Chief Justice Lamer, who concurred in the result, took a slightly less expansive view of federal authority, holding that Parliament had jurisdiction only over those matters that were "essential and integral" to federal interests in the work. However, he agreed with La Forest J. that labour relations was an essential and integral part of Parliament's interest in relation to nuclear energy.⁹

Regardless of whether one adopts the view of La Forest J. or Lamer C.J., it is clear that federal regulation of provincial railway operators seeking permission to run on federal rail lines is an integral part of federal jurisdiction over the federal work. Thus Parliament's authority would extend to matters such as insurance, licensing, safety and other statutory requirements applicable to all railway companies, including provincially-regulated companies, operating over a federally-regulated rail line.

(b) Constitutional Status of Railway Exercising Running Rights

The remaining question is whether the grant of running rights over a federally-regulated rail line to a provincially-regulated railway company results in that company being subjected in its entirety to the exclusive jurisdiction of Parliament (rather than merely in respect of its operations over the federal line).

As noted, this issue was specifically considered by the Privy Council in the *Montreal Street Railway* case. The passage from Lord Atkinson's judgment quoted above found that Parliament did not have authority to regulate rail traffic running over a provincially-regulated rail line, even when the company in question was running traffic over a federal rail line. It was on this basis that the Privy Council had quashed an order of the Railway Commissioners purporting to require the provincially-regulated railway in the case to enter into an agreement with the federally-regulated railway respecting the through traffic on the former company's rail line. Therefore, *Montreal Street Railway* stands for the proposition that a provincially-regulated railway does not become subject to the exclusive jurisdiction of Parliament by virtue of being granted running rights over a federally-regulated rail line.

⁷ See judgment of La Forest J. at 362-63.

⁸ Ibid, at 363, 367.

⁹ Ibid, at 351.

The same issue arose indirectly in the *Kootenay and Elk* case. As described earlier, K & E applied for running rights over the main line of the C.P.R. The Supreme Court of Canada upheld the jurisdiction of the Canadian Transport Commission to grant these running rights. The Supreme Court also held that K & E remained a provincially-regulated railway company. Therefore, *Kootenay and Elk* confirms that a provincially-regulated railway does not become subject to exclusive federal jurisdiction merely by virtue of being granted running rights over a federal rail line.¹⁰

Another case reaching the same result is *In Re Cannet Freight Cartage Ltd.*, [1976] 1 F.C. 174 (C.A.) (“*Cannet Freight*”). In this case Cannet Freight Cartage Ltd. (the “Freight Company”) was involved in the freight forwarding business. The Freight Company would solicit freight from customers in the Toronto area for forwarding to Western Canada and make the necessary arrangements to have the freight picked up and delivered to rail cars owned and operated by Canadian National Railway. The Freight Company would load the freight onto the Canadian National cars and unload it when it had been transported by Canadian National to its intended destination.

It was argued that the employees of the freight company were subject to exclusive federal jurisdiction by virtue of the fact that they were employed in connection with Canadian National’s railway business. The Federal Court of Appeal rejected this argument. Chief Justice Jaccett held that the key issue was whether the employees in question were functionally integrated into Canadian National’s operations. He illustrated his point by the following examples (at 177):

Clearly a person employed by the railway company to carry out a part of the transportation services provided to its customers falls within [federal jurisdiction] even though he does not physically come in touch with the right-of-way or rolling stock. Just as clearly, a person working for a local business man in a province does not fall within [federal jurisdiction] even though his work, in connection with that man’s purely local operation, requires that he perform a large part or all of his services physically on the railway’s right-of-way or rolling stock. (emphasis added)

Jaccett C.J.’s point is that the physical location of activities cannot be determinative of constitutional jurisdiction over those activities. What is of central importance is the manner in which the activities are carried out and, in particular, whether the activities in question are functionally integrated into or form part of the federal undertaking. If this functional

¹⁰ It should be noted that no-one appears to have argued that the grant of running rights to K & E resulted in it being subjected to federal jurisdiction: the argument that was made in favour of federal jurisdiction was based on the physical connection between the K & E line and the Burlington line. Thus the Supreme Court did not specifically affirm the conclusion that K & E remained subject to exclusive provincial jurisdiction despite it being granted running rights over the federally-regulated line. Nevertheless, this conclusion is a necessary step in the reasoning that produced the result, and can be said to be part of the *ratio decidendi* of the case.

integration is absent, the undertaking does not come with exclusive federal jurisdiction, notwithstanding the fact that certain of its activities might physically occur on a federally-regulated rail line or facility.

The analysis of Jockett C.J. in *Cannet Freight* was specifically approved by the Supreme Court of Canada in *U.T.U. v. Central Western Railway*, [1990] 3 S.C.R. 1112 (“*Central Western*”). After quoting the paragraph set out above from Jockett C.J.’s judgment, Chief Justice Dickson (who wrote the majority judgment of the Supreme Court), commented as follows (at 1146-47):

I agree [with Jockett C.J.]. To hold otherwise would be to undermine completely the division of powers for, absent a requirement of physical integration, virtually any activity could be said to “touch” a federally regulated interprovincial undertaking. In my view, moreover, this Court’s dicta consistently suggests that something more than physical connection and a mutually beneficial commercial relationship with a federal work or undertaking is required for a company to fall under federal jurisdiction.

Dickson C.J. also reviewed the jurisprudence on section 92(10) of the *Constitution Act, 1867* and noted that this test of functional integration (as opposed to mere physical connection) has predominated in the earlier case law. One of the cases he referred to with approval was *Luscar Collieries Ltd. v. McDonald*, [1927] A.C. 925 (“*Luscar Collieries*”), in which the Privy Council had held that a short branch line railway situated in Alberta was subject to exclusive federal jurisdiction. Dickson C.J. pointed out that the basis of the Privy Council’s decision was the fact that the operation of the branch line was functionally integrated into the overall operations of Canadian National Railways. Dickson C.J. also relied on his own judgment in *Alberta Government Telephones v. Canada (C.R.T.C.)*, [1989] 2 S.C.R. 225 in which he had commented as follows (at 262):

...mere interconnection of physical facilities in one province with those in a neighbouring province, territory or state may not be sufficient to attract the characterization of the undertaking involved as interprovincial in nature.

These authorities all suggest that the grant of running rights to a provincially-regulated railway over the lines or facilities of a federally-regulated railway would not, in itself, result in the former becoming subject to exclusive federal jurisdiction. The key question would be the degree of functional integration between the provincial undertaking and the federal undertaking. To the degree that the provincial undertaking remained a separate undertaking distinct in its management and operation from the federal undertaking, the mere fact that it was utilizing the physical facilities of a federally-regulated railway would not result in its being brought under exclusive federal jurisdiction.

The only case which might be regarded as inconsistent with this analysis is *Ontario v. Board of Transport Commissioners*, [1968] S.C.R. 118 (“*Go Train*”). The province of Ontario had established a commuter train service utilizing track owned by the Canadian National Railway. The Supreme Court of Canada held that the use of the interprovincial rail line made the

commuter rail service part of the interprovincial undertaking and subject to federal jurisdiction. Certain statements made by the Court in its judgment might be interpreted as proceeding on the basis that mere physical use of a federal rail line results in an undertaking that would otherwise fall under provincial jurisdiction being treated as a federal undertaking.¹¹ There are, however, two additional factors which suggest that the holding in this case is not inconsistent with the functional approach outlined above. First, the commuter train service in question was being operated entirely on the federal rail line. We have already noted that Parliament has authority to regulate all rail activity taking place on a federal rail line. Thus one way of understanding the *Go Train* case is that it merely affirms that Parliament has regulatory authority over all rail traffic on federally-regulated rail lines.¹² Second, the Supreme Court in the *Go Train* case cited and relied upon *Luscar Collieries* which, as we have seen, proceeded on the basis of a functional analysis. Thus the *Go Train* case can be read as having proceeded on the basis of the same functional analysis accepted in other cases, in which the degree of integration with a federal undertaking becomes the key factor in assessing whether a provincially-regulated railway becomes subject to federal jurisdiction.

I conclude that the granting of running rights to a provincially-regulated railway over the lines and facilities of a federally-regulated railway will not, in itself, result in the entire operations of the provincial railway becoming subject to federal jurisdiction. Rather, jurisdiction over the provincial railway¹³ will continue to depend upon the traditional tests that have been applied in determining whether provincially-regulated undertakings become subject to federal jurisdiction. This jurisprudence establishes that there are two ways that a provincially-regulated rail undertaking can be made subject to federal jurisdiction.¹⁴ The first is where the provincial undertaking is operated in common with a federal undertaking, such that there is in reality a single, indivisible undertaking. The second is where the operations of a federal undertaking are dependent upon those of the provincial undertaking. However, where the provincial undertaking is operated as a separate and distinct undertaking, and its operations are not integral to those of a federal undertaking, it remains subject to provincial jurisdiction. In my view, these same tests would be applied to any provincially-regulated railway that was granted running rights over the lines or facilities of a federally-regulated railway.

I have had occasion to review certain of the submissions that have been made to the CTA Review in connection with the proposal to amend section 138 of the *Canada Transportation Act* so as to permit the grant of running rights to provincially-regulated entities.¹⁵

¹¹ See, for example, the statement at p. 127 that “...the constitutional jurisdiction depends on the character of the railway line not on the character of the particular service provided on that railway line.”

¹² This point is made by the Supreme Court at p.126.

¹³ Note that the discussion here refers to the operations of the provincial railway other than those utilizing the federal lines or facilities. As noted above, all traffic over a federal rail line or facility is subject to federal jurisdiction.

¹⁴ See the *Central Western* case at 1124-25.

¹⁵ See, in particular, the submission by OmniTRAX, Inc., “Submission to the Canadian Transportation Act

Based on this review, it is my understanding that the provincial entities that would be granted expanded running rights would be competitors with the federal undertakings that own the rail lines and facilities in question. In this context, it would appear that the provincial undertakings would remain separate and distinct from the federal undertakings. On this assumption, while all the traffic running over the federal line or facility would be subject to federal regulation (for the reasons described above in relation to the first question), the other activities and operations of the provincial undertakings would remain subject to provincial jurisdiction.

2. Supplementary Questions

In further discussions, you have raised two supplementary questions for my consideration. First, you have asked whether federal jurisdiction over the operations of provincially-regulated railways running over federal rail lines would extend to labour relations of those railways. Second, you have asked whether the conclusions outlined above with respect to the scope of federal jurisdiction would be altered in a case where a provincially-regulated railway's only operations were over a federally-regulated rail line.

With respect to the first supplementary question, while the matter is not entirely free of doubt, the better view would appear to be that the mere fact that a provincially-regulated railway utilizes a federal rail line would not mean, in and of itself, that the labour relations of that railway fall under exclusive federal jurisdiction. This follows from the functional analysis endorsed by the Supreme Court of Canada in cases such as *Central Western*. As discussed above, this analysis states that mere physical interconnection or common use of facilities is not sufficient to extend federal jurisdiction over undertakings that are otherwise functionally separate and distinct from federal undertakings. Therefore, jurisdiction over labour relations of provincially-regulated railways would turn on these functional considerations and not on the mere fact of a physical connection or common use of facilities.

With respect to the second supplementary question, I do not believe that the conclusions I have earlier outlined would be altered in a case where a provincially-regulated railway operated exclusively over federal rail lines. As I have explained, I am of the view that constitutional jurisdiction in such cases will depend upon functional considerations, rather than mere physical interconnection. Therefore, even in a case where the only operations of a provincially-regulated railway were over federal lines, such an undertaking would not, on account only of the use of the federal lines, become subject to exclusive federal jurisdiction.¹⁶

Review Panel: A Proposal to Enhance Competition in the Canadian Railway Marketplace”, October 3, 2000; and the submission by Luscar Ltd., “Brief to the Review Panel Canada Transportation Act, 1996 Re: Competitive Rail Access Provisions of the Canada Transportation Act 1996”, October 2000..

¹⁶ In my earlier discussion of the *Go Train* I had suggested that there may have been some significance attached to the fact that the rail operations in that case were conducted exclusively on a federal line. However, the better view is that the case can be regarded as turning on the same functional considerations that have been emphasized in more recent Supreme Court cases. See Hogg, note 1 above, at section 22.7(b).

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I trust that this responds to the questions you have raised. I would be pleased to elaborate on any of these matters at your convenience.

Yours very truly,

Patrick J. Monahan
Professor of Law