ONTARIO COURT OF JUSTICE

HIS MAJESTY THE QUEEN

v.

JASON MONRAD

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A P P L I C A T I O N

O F

A P P E A L

Before the Honourable Mr. Justice J. Nadel
On January 9, 2012 at ST. CATHARINES, Ontario

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APPEARANCES:

S. McCarten — Counsel for the Crown
F. Alfano — Agent for Mr. Monrad

ONTARIO COURT OF JUSTICE

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MONDAY, JANUARY 9, 2011

MS. MCCARTEN: Having had an opportunity, Your Honour…

THE COURT: Yes.

MS. MCCARTEN: …to look at the Jason Monrad matter…

THE COURT: Yes.

MS. MCCARTEN: …I understand that there's an agent here on that pair of motions, I believe.

MR. ALFANO: I'm a paralegal.

THE COURT: Yes, good morning.

MR. ALFANO: Good morning, Your Honour. It's Frank Alfano, for the record, sir, appearing….

THE COURT: Mr. Alfano?

MR. ALFANO: Yes.

THE COURT: You testified in front of me in Cayuga recently?

MR. ALFANO: Brampton.

THE COURT: Brampton, is that where it was?

MR. ALFANO: Yes, it was.

THE COURT: All right. I knew you looked familiar but I couldn't place it, and I can't remember the exact matter.

MR. ALFANO: It was an over 80 and a Charter application.

THE COURT: It had to do with whether or not you were entitled to appear. You realized finally you weren't, and there were some other matters as well. Anyway….

MR. ALFANO: It was Charter application

where the accused was not permitted to call his counsel of choice. Mr. Stillman was counsel and….

THE COURT: I allowed the motion.

MR. ALFANO: Yes.

THE COURT: I excluded the evidence.

MR. ALFANO: You did.

THE COURT: I remember that now. Only vaguely but I knew you looked familiar. All right, so now this apparently is an application to extend the time to appeal, and an application to file without paying the fine.

MR. ALFANO: That's correct.

THE COURT: And it's opposed by you, Ms. McCarten, right?

MS. MCCARTEN: Yes.

THE COURT: All right. So before you go on, let me show the appearances. Have a seat, Mr. Alfano, I'm just going to write something. All right. A-L-F-A-N-O?

MR. ALFANO: Yes, sir.

THE COURT: All right. So it's a contested motion. Is this with respect to both the driving under suspension and also the use the hand-held device, or merely the drive suspended?

MR. ALFANO: Just the drive suspended, Your Honour.

THE COURT: All right. So insofar as it goes, that conviction remains in effect, and that's the end of that.

MR. ALFANO: Yes.
THE COURT: Now I have the affidavit that you filed, but that speaks to your client learning about the fact that he had a right of appeal. It doesn't speak to any merits. Don't you have to demonstrate that the appeal is not frivolous?
MR. ALFANO: Yes, there's four criteria we have to demonstrate. One, why was the application filed late. Two, what would be the grounds of appeal and would they have any merit. Three, what defences, if any, would be available - or what would the defendant be able to advance.
THE COURT: Right.
MR. ALFANO: And then I guess the fourth component is, is there a triable issue, which you sort of combine with the third...
THE COURT: That's - sure, sure.
MR. ALFANO: ...third hurdle. So basically the defendant was unaware as per the affidavit that there was even an appeal process.
THE COURT: No, but hang on a second. Wait, wait, wait, wait. He doesn't deny he gets served with tickets.
MR. ALFANO: Yes.
THE COURT: What he says is, I misplaced them, and that's the last thing he did, right? Is that due diligence?
MR. ALFANO: No. Well, I, I was anticipating the question in terms of that.

Your Honour, when we look at, and I think you have this part of the court record, the driving record of the defendant.

THE COURT: Right.

MR. ALFANO: But for the driving suspend, he's always had, what I would term to be minor regulatory offences.

THE COURT: I'm sorry, Ms. McCarten is standing up. Is it an objection?

MS. MCCARTEN: No, it's not. I actually don't have a copy of it so I was wondering if I could look at either Mr….

MR. ALFANO: I can show….

THE COURT: One moment. One moment. As it turns out, there's an extra copy in my file.

MS. MCCARTEN: That's the only page I'm missing so perhaps you got my copy. Thank you, Your Honour.

THE COURT: It appears to have, from the 15 September '09 to 23 November '10, right?

MR. ALFANO: Yes.

THE COURT: I think that's all there is. Right? Good, okay. So you're saying?

MR. ALFANO: Just based on the record, the defendant's never really been served a summons. He's always had what'd best be described as minor Part 1 regulatory offences, which from the guilty of the offence date to the conviction date, he'd just typically simply paid them. He's never….

THE COURT: Or ignored them and got

suspended for non-payment of fines.

MR. ALFANO: Well, his record doesn't reflect a history of not paying fines actually. This - it would appear he was suspended for one offence, a ten over speeding ticket, which the fine would have totalled, I think, a $30-35. That was an oversight on his part. He doesn't dispute that he was suspended on the date and time in question. His defence would have been that he didn't know he was suspended for that particular fine. So….

THE COURT: Well, hang on.

MR. ALFANO: Okay. It, it, it….

THE COURT: I understand this is not the appeal, but wait a second. The documents filed in his conviction…

MR. ALFANO: Yes.

THE COURT: …demonstrate that a notice of his suspension was forwarded by mail on August 16, 2010 to him at 2482 Snowhill Court in Burlington, Ontario, which the records of the Ministry indicate was the last known address of him. And that that suspension remained outstanding on the 19th of November, 2010, which is the date of this alleged drive under suspension.

MR. ALFANO: Yes, sir.

THE COURT: So on what basis would he be saying that - what, the letter never came to him or what?

MR. ALFANO: Yes, he says he did not know he

was suspended. Did not receive a notice. The prosecution can rely on what's typically referred to as a deeming provision…

THE COURT: Yes.

MR. ALFANO: …which says that it's deemed served. It's sent out by regular mail. It used to be sent out by registered mail and it was a lot easier for the Crown to prove that someone got it…

THE COURT: Sure.

MR. ALFANO: …but when they passed - it was about ten years of the deeming provision when they passed….

THE COURT: No, I understand that, but, but again - I appreciate, Mr. Alfano, that this is not the appeal per se. I understand that, but remember that looking at whether or not the appeal is frivolous or not, I have to apply - beware of the law. Give me a second. I want to find a case that I think you need to speak to.

MR. ALFANO: I think *Montgomery* might be the case…

THE COURT: That is exactly the case.

MR. ALFANO: …that you're looking at.

THE COURT: Thank you very much. There you go. Mr. Justice….

MR. ALFANO: Hundal.

THE COURT: There we are. So, he talks about due diligence. He says,

> "The trial judge recognized that driving under suspension is a strict liability

offence, and that once the appellant was shown to have driven while under suspension the burden was on him to establish due diligence."

And so, if your man's already sworn that he lost the tickets and did nothing, however is he going to demonstrate that he exercised due diligence. I mean, that's the crux of this whole thing, isn't it?

MR. ALFANO: I believe that just the summons he lost, the not paying the fine was an oversight. Are you looking at the affidavit that was sworn on September 29, 2011?

THE COURT: I am. Let me just turn to it because - let me just turn to it. September 20th, 2011. "I am the applicant. I have knowledge. I'm 34. I've got kids. I was convicted on a date. I misplaced my summons and did not know when my court date was."

MR. ALFANO: Yes, that was for this offence. It wasn't for the offence which triggered the suspension.

THE COURT: Yes, it was for this offence.

MR. ALFANO: Yes.

THE COURT: Well….

MR. ALFANO: *Montgomery* speaks to, if a defendant can advance a due diligence defence or whether it's due diligence…

THE COURT: Yes.

MR. ALFANO: …if he simply ignores a ticket.

THE COURT: Well, that's - but that's what he did here. He ignored the ticket. He

misplaced it and did squat, right? He says, I have the - he wants the chance to appeal. Or sorry, he wants to have a trial on the merit to demonstrate due diligence. But in the course of doing so, he exhibits a lack of due diligence by doing nothing when he loses the summons.

MR. ALFANO: Right, but that's why I was - in my submissions earlier, I was saying that the defendant has only ever received, what can best be described as minor regulatory offences. He's simply - ultimately just simply paid his fines. He's never had a summons before. I would agree with Your Honour that it's certainly, if you have to measure or weigh the amount of diligence he's exhibited, I would agree that he hasn't really exhibited much. But from the perspective of the defendant, this is someone who simply pays fines. He doesn't really - doesn't - seems to not litigate many, so his perception of what he was facing is very different from what he was actually facing.

THE COURT: Let me ask this; even if I - and I'm not saying I will, in any sense…

MR. ALFANO: Yes.

THE COURT: …even if I granted him the opportunity to appeal, that doesn't necessarily stay the prohibition, does it? The filing of a notice of appeal does not stay the conviction unless a judge so

orders.

MR. ALFANO: There's a regulation under the *Highway Traffic Act*. I believe it's 394/94, that a conviction is not automatically stayed. But if he serves the Ministry of Transportation with a notice of appeal that's been properly served and filed...

THE COURT: They will....

MR. ALFANO: ...along with the recognizance and a transcript order, they would....

THE COURT: All right, so....

MR. ALFANO: It would be retroactive however. So, like, his license is due to be reinstated February 17th, so we'll say it takes the Ministry a week. Whatever time would be remaining - if he's unsuccessful in his appeal, they will re-suspend him for the remainder of the six months imposed.

THE COURT: Right.

MR. ALFANO: If he's successful, he actually runs the risk of serving another six months, because they will retroactively cancel the previous suspension, and if convicted, will be suspended again, which sort of makes matters worse. It's a difficult thing to decide whether he's going to appeal or not so....

THE COURT: Right.

MR. ALFANO: ...he's decided to take the step. I mean, I agree that he hasn't demonstrated some of the best decisions, but I would urge

Your Honour to consider it in context. If you look at his particular circumstances in context, one could - the argument could be made, yes, he got a summons, he should have listened to the summons, but this is also someone who's simply always paid fines. He's never faced an offence that carries, you know, a disposition that could involve jail or probation or any of these things. When we look at his record, we can tell that any offence he's ever picked up were extremely minor, absolute liability offences, most of which a defence couldn't be advanced. And so I would urge Your Honour to, at a minimum, extend the time and permit him to enter into a recognizance, and then at which point we could draft materials and prepare an appeal.

THE COURT: All right, thank you. Ms. McCarten, what would you say and why?

MS. MCCARTEN: I'm opposed to this, for basically the reasons you already set out. There's no merit to this appeal, based on what Mr. Alfano set out. In addition to *Montgomery*, which you cited before the Court, there was also a decision from your brother Justice Harris just two weeks ago, Amir Nikbakht, N-I-K-B….

THE COURT: Do you have a copy?

MS. MCCARTEN: No, I don't, but I can provide it if you want to stand down the court. I have it upstairs.

THE COURT: How long will it take you to get it?

MS. MCCARTEN: Ten minutes.

THE COURT: All right. I'll stand down, but I may just adjourn this. Is this Mr. Shan?

MR. SHAN: Yes.

THE COURT: What we're going to do is, I'm going to hold this one down. I'm going to deal with Mr. Shan, okay? And you'll get a copy of that to Mr. Alfano first and then get a copy to me.

MR. ALFANO: Thank you, Your Honour.

THE COURT: Be patient, all right? Good.

...COURT ATTENDS TO OTHER MATTERS...

...UPON RESUMING...

MS. MCCARTEN: I can provide the case that I referred to earlier which is *Nikbakht*, and I can give that to Mr. - I apologize, Your Honour.

THE COURT: That's all right. That's fine. I can listen and write at the same time.

MS. MCCARTEN: I'll just provide - it's for the Jason....

...COURT ATTENDS TO OTHER MATTERS....

...UPON RESUMING...

THE COURT: Good. There we go. All right. Now do you want a chance, Mr. Alfano, to have a read of this?

MR. ALFANO: I'm actually familiar with this matter. I wasn't here for the decision but....

THE COURT: It's already made the rounds?

MS. MCCARTEN: He was somewhat involved in it earlier.

THE COURT: All right. So let me read it myself, okay.

MS. MCCARTEN: I have sidebarred it for you, Your Honour.

THE COURT: That's fine, but it's only a few pages. And so I've read that, thank you very much. You gave me *Miller* as well.

MS. MCCARTEN: I did simply because His Honour referred to it in the - and that's also been marked.

THE COURT: I see. Yes, all right. So, Mr. Alfano, if you want to make some further submissions in light of what you can anticipate will be Ms. McCarten's position, by all means.

MR. ALFANO: Ah, yes, just briefly, one way I would distinguish this case is that this is a case where the statutory presumption was not applicable, and then they looked at the actual….

THE COURT: You're talking about *Nikbakht*?

MR. ALFANO: Yes.

THE COURT: Yes.

MR. ALFANO: This is service is deemed on the seventh day. This gentleman was talking about sixth day. It's clear when you look at that case coupled with *Montgomery*, that the actions of a defendant are going to be crucial in a trial of a drive suspended. So you have to look at each case contextually,

not simply - because there was no action taken, that means that the - automatically means he should be convicted. But it….

THE COURT: Because no action was taken because his experience was all very modest minor things and so….

MR. ALFANO: And he typically paid it. This particular one was an oversight. So when we have to look at - from the perspective of a trial justice - it's important to note that. This was also an ex partie trial so the defendant was not able to put his defence forward, through his own fault, I would concur but….

THE COURT: Let me ask you this. Let me ask you this. Best case scenario, the best case scenario at the new trial, if there is one, is this: The Crown calls its case in more or less the same fashion.

MR. ALFANO: Yes.

THE COURT: No issue that Mr. Monrad was driving on the occasion in question. There's really no issue…

MR. ALFANO: He was suspended on the day.

THE COURT: …that he had an unpaid fine which resulted in a suspension, which was sent to an address he once lived at. And the Crown gets to prove its case and then the onus shifts to you for Mr. Monrad to show due diligence. So…

MR. ALFANO: Yes.

THE COURT: …at its highest, he will say,

"I've got three children. I go to work. I support my family. On occasion I commit moving violations of modest proportion and I pay the fines when they are assessed."

MR. ALFANO: Yes.

THE COURT: "Apparently, I missed this one. I would have paid it because why would I risk my livelihood in supporting my family, for 35, 40 bucks. I could afford that."

MR. ALFANO: Why would he put himself at risk for a $1,000 fine, a possible jail sentence, probation, a six month suspension…

THE COURT: For 40 bucks.

MR. ALFANO: …which prevents him from working for $40?

THE COURT: Right, and "my history shows that I don't do that." That's his case at the highest, right? And that, you say, is due diligence. Right? More or less? You can make it sweeter if you want.

MR. ALFANO: I think you can draw a distinction, if I could give you two examples?

THE COURT: Sure.

MR. ALFANO: *Montgomery* was a, "I got a ticket. I didn't care about it. I basically threw it away.

THE COURT: Yes, yes.

MR. ALFANO: But I didn't know I was suspended." You can distinguish a person who doesn't care from someone who actively takes steps, pays fines, you know. The one

thing about getting offences is he's demonstrated…

THE COURT: Yes.

MR. ALFANO: …that he would pay.

THE COURT: Yes, yes.

MR. ALFANO: This was a completely - it was an oversight. Completely out of character for this accused, and I think if a justice were to accept that evidence, he would be entitled to the benefit. When we look at *Sault St. Marie*, and the three defences available….

THE COURT: You're saying that, you're saying that you could demonstrate, on the balance of probabilities, due diligence.

MR. ALFANO: I….

THE COURT: Because….

MR. ALFANO: No, no, no.

THE COURT: No?

MR. ALFANO: There's three defences.

THE COURT: Yes?

MR. ALFANO: Due diligence and officially induced error are the two big ones that everyone refers to but…

THE COURT: Yes.

MR. ALFANO: …reasonable mistaken fact, which is sort of a by-product of the due diligence defence, or a form thereof.

THE COURT: Yes.

MR. ALFANO: If the defendant believed, in a mistaken set of facts, and the belief is reasonable but those facts are untrue, would

render the act or omission innocent.
THE COURT: Well, the - but the - wait.
MR. ALFANO: And that is the defence that he would be….
THE COURT: Wait. You've got to make sure that what you characterize as fact is a mistake of fact as opposed to a mistake of law, which would not be a defence.
MR. ALFANO: Correct, but in this particular case, his mistake of fact was that his license was valid at the time. That was a - he believed that….
THE COURT: I think that that's a mistake of law, not fact. I mean, his belief that you have a legal right is - anyway, you'll argue the point maybe in due course. I have your point. Sit down, let me hear from Ms. McCarten, okay? Ms. McCarten?
MS. MCCARTEN: Again, I don't see any merit to this appeal whatsoever. I cannot see how a person, as Justice Harris put it in his decision, to - a person taking all reasonable care or taken all reasonable steps to avoid his license being suspended, would be somebody who received a ticket admittedly, didn't do anything about those tickets, apparently received a Part 3 summons later one, saying that he was to attend court. Did not read that summons indicating what he was supposed to do with that summons, and then didn't attend court. Never called the court to find out when his

trial date was. Simply assumed that the provisions under Part 1 of the Provincial Offences Act applied to all offences under the Provincial Offences Act. To me, that's a mistake of law. I don't see any mistake of fact there. I don't see any reasonably induced error. The officer apparently did everything that he was required to do. The Ministry of Transportation did everything that they were required to do. He was served with his notice of suspension. It was deemed served, but that's not an element of the offence, Your Honour. It's not - to me, it's not relevant. So in this case, I think that granting the motions would simply be a waste of the Court's time. I don't see any reasonable chance of success for Mr. Monrad, and basically it was an oversight, as Mr. Alfano said, with regard to the fine. It's an oversight, it's not due diligence. I appreciate that sometimes, given the much lower standard of mens rea in provincial offences, that that can sometimes mean that people who don't intend to commit offences do commit provincial offences. But this isn't a criminal court. This is a regulatory appeals court, and he more than meets the standard for a conviction under Section 53(1).

THE COURT: Anything further?

MR. ALFANO: I think, you know, we typically focus on *Montgomery*, but *Bellomo* from

Justice Fairgrieve was….

MS. MCCARTEN: I must object to that. That was the decision based on a previous version of the *Highway Traffic Act*. That wording is not longer in effect.

MR. ALFANO: I don't believe that to be the case.

THE COURT: I don't have it before me.

MR. ALFANO: The offence section remains the same. The only difference from *Bellomo* is *Bellomo* was decided back when it was registered mail, and now it's regular mail. But the offence - the section that creates the offence is exactly the same. But - and even that aside, the proposition is that this, this defendant faces a six-month suspension of his license, a $1,000 fine, the possibility of jail and probation, for the oversight of paying a $40 fine. The bulk of defendants, typically their only interaction with the justice system is typically these types of offences. His impression, you know, that is the impression. The only contact they have is this. I can't imagine that the law is so black and white, that it completely lacks the compassion of someone who made an honest mistake, to be penalized as such….

R E A S O N S F O R J U D G M E N T

NADEL, J. (Orally):

Sit, sit, sit. I think, generally speaking, Ms. McCarten is right and liable to be found right, and that your man is going to suffer the same penalty in due course. I've enjoyed hearing you, Mr. Alfano. You are at least as articulate as most of the lawyers who appear in front of me, clearly as prepared, probably better so. And I'm impressed by the fact that your man has a very modest prior record, and has three kids he's trying to support. I probably am stretching the test. Mr. Justice Watt in chambers in a case called *Price*, not terribly long ago in 2010 ONCA 541. It's not the Quicklaw citation, but you could find it. *R. v. Donald Price*. Mr. Breen was for the applicant. Ms. Joyal was for the respondent. In that particular case, Justice Watt went through the principles governing the extension of time. And he said at paragraph 19, halfway through that paragraph,

> "In the final analysis, the principal consideration is whether the applicant has demonstrated that justice requires that the time be extended."

That's the principle, and there are factors that inform that principle, or they inform that decision and they include whether he's demonstrated a bona fide intention to pay within the prescribed time. He hasn't here. Whether the applicant has accounted for the

delay. He really hasn't. Whether the proposed appeal has merit. I think it's slight. But he goes on to say at paragraph 20,

> "In some circumstances, other factors may exert an influence on the decision about an extension of time; whether the consequences of the conviction are all out of proportion to the penalty imposed."

Some of that applies here. Given that the precipitating fact was, as Mr. Alfano has said, a very modest $40 fine or something in that range. Whether the Crown would be prejudiced. The Crown won't be because you concede the Crown's case, do you not?

MR. ALFANO: I would, yes.

THE COURT: So the Crown doesn't have to call a witness. The Crown could rely upon the transcript for all that matters. Whether the applicant has taken the benefit of the judgment. He clearly hasn't done that. I think, Ms. McCarten, that if I was more hard hearted, I wouldn't grant leave, but someone should be entitled to hear Mr. Alfano weave his magic. I think that it's arguable. I can't say it's frivolous. I don't think it will succeed. I mean, I can see a tremendously enjoyable cross-examination by a Crown Attorney of Mr. Alfano's client. And for a man who never gets tickets or gets small tickets, having

got stopped by a police officer and given tickets that have a court date, I just think that the fact that he's not contesting the other count, I think he can get beaten up pretty well, but I am sympathetic to the client receiving this tremendously drastic punishment for a relatively modest debit; that is to say, paying a very small fine. I don't Mr. Alfano will be successful, but I will give him that shot. And you're more than welcome, Ms. McCarten, to appeal my decision and demonstrate to me that I ought to be tougher and less generous. It strikes me, though, that I shelter under the comment made by Mr. Justice Watt that justice requires it to be extended. What Mr. Alfano has convinced me of is this; payment of a very modest fine shouldn't result, it seems to me, in this potential domino of horrible consequences, where he says I have an arguable, not completely laughable, defence, in my view. So I'm going to let him have the shot. And you don't have to do anything, other than show up on the trial list and say, "On consent, the case against the accused is admitted. It is one of the basis upon which the extension of time was granted." Let him argue the appeal and see if he gets his appeal. If he does get his appeal, there will be no further costs to the community in terms of running a trial. So that's what I'm going to do, having

exacted that undertaking. And all this means is you have got to argue it on the merits…

MR. ALFANO: I understand.

THE COURT: …and demonstrate that the appeal should be granted. So sit down. I'll do an endorsement and….

MR. ALFANO: If I might, he's also asking to waive payment of the fine for recognizance.

THE COURT: I understand that. I'll let him do all of that, and you'll have to send the documents to the Ministry to get the prohibition - all right. So let me just - this will take me a moment. We don't have much left, do we?

MS. MCCARTEN: Just a short amount of people who aren't here.

THE COURT: Good, good, all right. So I'm going to do an endorsement, so be patient with me, please. What's the amount of the fine, and costs, and surcharge? Do you know all in?

MR. ALFANO: The fine is $1,000, and it's 25%, the surcharge.

MS. MCCARTEN: $1,160.

THE COURT: All right, and presumably the appeal is ready to be filed, more or less, forthwith. Do you need 30 days? How long do you need?

MR. ALFANO: Ten days will be fine, Your Honour.

THE COURT: You're entitled to more. It's

30 days now, isn't that what they say now?
MR. ALFANO: It's, by statute, 30 days following conviction.
THE COURT: Yes, that's fine, that's fine, right. All right. "January the 9th, 2012. Mr. Alfano for the proposed appellant. Ms. McCarten for the Province. Over objections of Ms. McCarten, I find that the defendant should be given opportunity to argue his appeal on the drive suspended only, for reasons given in a meandering stream on the record. Therefore, time extended. Recognizance $1,160 without surety or deposit. Thirty days to file appeal and sign recog. All right. And there's no guarantee, Mr. Alfano, that you'll succeed, but as I say - and it won't be in front of me, that's for certain. All right. So just make sure that on the day that you are to argue your appeal, I want you to make sure you ask, to make sure - it shouldn't be me, all right?
MR. ALFANO: Yes, sir.
THE COURT: I'll fill out the forms - your man is not here now, is he?
MR. ALFANO: He's not.
THE COURT: So I'll fill out the forms, leave them in the file, he can come in within the 30 days and launch the appeal and sign the various documents.
MR. ALFANO: Thank you, Your Honour. Thank you, my friend.

THE COURT: Yes, it was a pleasure. I enjoyed it. And, Ms. McCarten, it's only because you have broad shoulders, that I might do this to you apparently time and again. It is not personal. Actually, I quite enjoy your appearances in front of me. All right.

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Certificate of Transcript

Evidence Act, subsection 5(2)

I, Jane Buick, certify that this document is a true and accurate transcript of the recording of R. v. Jason Monrad, in the Ontario Court of Justice, held at 59 Church St., St. Catharines, Ontario and taken from recording no. 2111-6-4-2012, which has been certified in Form 1.

January 20, 2012

J Buick
Signature of Authorized person