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## Foreclosure tale is coyote ugly

Ronald and Ann Bonnar owned a house in Cape Breton, N.S. The house had two mortgages registered against it a first to Royal Bank of Canada, and a second in favour of Canada Trust Company as trustees for the owners of various registered retirement savings plans.

The Bonnars fell into arrears on their mortgages, and the Royal Bank sued them for foreclosure and possession of the property. Last October, the Supreme Court of Nova Scotia calculated the mortgage debt at just under \$125,000 and ordered the local sheriff to conduct an auction sale of the house on Oct. 31 at 11 a.m.

Counsel for the Royal Bank in Dartmouth hired Elliott Fraser, a local lawyer in Baddeck, to attend at the sheriff's sale and buy the house back for the bank, so it could resell it and recover its debt.

Fraser was instructed to be at the sheriff's sale and bid up to \$135,000 on the house.

On the morning of the auction sale, no one showed up representing the Royal Bank. The sheriff tried to reach the Royal Bank's lawyer in Dartmouth to say that the bank would be unrepresented at the sale, but ended up with the lawyer's voice mail.

The reason no one showed up to bid on behalf of the Royal Bank became clear in a later court hearing. It turned out that Fraser saw a coyote inside his backyard shortly after 11 a.m. on the morning of the sale. He was quite concerned because he has small children and pets and the coyote was inside the fenced-off area.

Fraser contacted the Department of Natural Resources and waited for two of their representatives to arrive and investigate how the coyote got into that restricted area. Shortly before noon, Fraser returned to the office portion of his residence and received a phone call from the sheriff advising him that the house had been sold without anyone being present to represent the Royal Bank.

At the sale, a representative of the Canada Trust RRSP holders bought the house for what appears to have been a bargain price of \$70,000.

Not to be muzzled, the Royal Bank was back in court three weeks later asking to have the foreclosure sale set aside. The bank set the fur flying when it argued that the court should not put the bite on the bank just because its lawyer was held up by a coyote.

It said the sale price was too low, the sheriff knew the bank had hired a lawyer to be at the sale and Fraser's failure to attend was reasonable and understandable. The bank also argued that the successful bidder would make an unconscionable profit at the expense of the bank and the borrowers.

In December, Nova Scotia Chief Justice Joseph Kennedy decided that Royal Bank's arguments were toothless. He could find no fault with the actions of the sheriff. It was not unreasonable, he reasoned, for the sheriff to proceed with the sale.

In his ruling, the judge hinted that the former owners would probably not be required to pay for the bank's losses on the mortgage. The implication is that because of his failure to attend the auction, Fraser's insurers might make good the shortfall on the Royal Bank's mortgage.

In Ontario, foreclosures and judicial sales are rarely used. They can be cumbersome, expensive and time-consuming.

The preferred method for handling mortgage defaults here is a power of sale, where the lender sends out notices of sale by registered mail, evicts the occupants and sells the property through a regular real estate listing. Without coyotes.

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## Royal Bank of Canada v. Bonnar, 2007 NSSC 377 (CanLII)

Date: 2007-12-11  
Docket: S.H. 280285  
Parallel citations: (2007), 262 N.S.R. (2d) 60  
URL: <http://www.canlii.org/en/ns/nssc/doc/2007/2007nssc377/2007nssc377.html>

### IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** Royal Bank of Canada v. Bonnar, 2007 NSSC 377

**Date:** 20071211

**Docket:** S.H. 280285

**Registry:** Halifax

**Between:**

Royal Bank of Canada

v.

Ronald Bonnar and Ann Bonnar

Respondents

and

Canada Trust

Respondent (This Application)

**Judge:** The Honourable Chief Justice Joseph P. Kennedy

**Heard:** November 22, 2007, in Halifax, Nova Scotia in Chambers.

**Oral Decision:** **December 11, 2007**

**Counsel:** Stephen Kingston for applicant  
K. Michael Tweel representing Canada Trust in this application  
Mark Ricksts (on behalf of Edward Gores) for the Attorney General

**By the Court:**

[1] This is a decision in the Royal Bank and Bonnar arising out of chambers on November 22, 2007. This is an application by the bank to set aside a foreclosure sale. I am doing the matter by way of an oral decision. It turns out it doesn't lend itself particularly well to this process, however this is in my experience the quickest way to respond to these matters and I think that expedition is important.

[2] The background of this matter: the respondents, the Bonnars, own property in Victoria County, Nova Scotia, the bank holds a mortgage against that property. The mortgage account has fallen into arrears and the bank retained Mr. John Fitzpatrick of the Boyne Clarke firm to enforce its remedies under that mortgage. Mr. Fitzpatrick commenced this foreclosure action on behalf of the bank and as a result an order for foreclosure sale and possession was issued by Justice Hood of this court on October 21<sup>st</sup>, 2007. That order settled the mortgage debt as of October 1<sup>st</sup> at \$124,753.40, together with interest thereafter and other charges and protective disbursements that might be approved by the court. The foreclosure sale was scheduled to proceed in Baddeck, Victoria County, Cape Breton on October 31<sup>st</sup>, 2007 at 11:00 in the morning. So, that is when the sheriff's sale was to take place.

[3] On October 1<sup>st</sup>, 2007, Mr. Fitzpatrick, counsel for the bank, wrote the sheriff, specifically Sheriff Hutchinson, forwarding copies of the foreclosure order, notice of public auction and other documents. The notice of public auction identifies Mr. Fitzpatrick as the bank's solicitor. Clearly the sheriff knew Mr. Fitzpatrick was involved on behalf of the bank. Mr. Fitzpatrick then retained Elliott Fraser, who is a lawyer practising in Baddeck, to act on the bank's behalf to attend that sale and bid at the foreclosure sale. Mr. Fitzpatrick advised Mr. Fraser as to the time and date of the sale and instructed him to open bidding at the minimum amount of \$2,677.01 and to bid incrementally up to, but not exceeding, \$135,500.00 as might be required. He then confirmed these instructions by letter. Mr. Fitzpatrick of Boyne Clarke confirmed his instructions to Mr. Fraser by letter. That proposed bid of \$135,500.00 represented Mr. Fitzpatrick's best estimate as to the total amount of the

mortgage debt, the accrued interest, taxable cost and protective disbursements. That s the figure that he believed the bank had to bid in on the property at the sheriff s sale.

[4] Canada Trust Company, as trustees for retirement savings plan holders, held a second mortgage against that property which secured a principle debt of \$72,000. Canada Trust as trustee is the respondent in this application. So, we have the sale scheduled for October 31<sup>st</sup>, 2007, we have Mr. Fraser retained by Mr. Fitzpatrick, we have Canada Trust as second mortgagee on behalf of the retirement savings plan holders. What happens?

[5] Mr. Fitzpatrick receives a telephone call from the sheriff s office in Sydney, some time after 11:00 on October 31<sup>st</sup>, 2007 and by that call the sheriff s office expresses surprise that no one attended the sale on behalf of the bank. Nobody represented the Royal Bank at that sale, on the morning of October 31<sup>st</sup>. Mr. Fitzpatrick on receiving this information not surprisingly was alarmed, contacts Mr. Fraser in Baddeck. Mr. Fraser confirms that he did not attend the sale. He said that he was distracted by an incident at his home earlier in the day and forgot to attend.

[6] That incident is described in the affidavit evidence, particularly Mr. Fraser s affidavit; he writes that while working in his office, which happens to be in his home property, shortly after 11:00 on the morning of October 31<sup>st</sup>, the morning of the sale, he saw a coyote in his back yard. This caused him considerable concern because the yard was fenced and the coyote was inside the fence. Mr. Fraser in his affidavit points out that he has small children and pets and was concerned about the coyote being in that fenced off area, as I expect he would have been. He contacted the Department of Natural Resources and two representatives of that department arrived. He says, in his affidavit, that about 30 minutes later he went out into the yard to assist these officers in attempting to discover how the coyote got into that restricted area. He said that took approximately an additional 20 - 30 minutes. Mr. Fraser then returns to the office portion of his residence and he receives a telephone call from the sheriff s office advising him that the foreclosure sale had gone ahead, the property had been sold.

[7] Mr. John Fitzpatrick speaks to sheriff Hutchinson after having been informed that the sale had been accomplished in the absence of the bank. The sheriff tells Mr. Fitzpatrick that he attempted to contact him by telephone shortly before the sale and that he ended up with Mr. Fitzpatrick s voice mail. He then attempted to contact Mr. Fitzpatrick s assistant, but again ended up with voice mail. The sheriff told Mr. Fitzpatrick that he left a message on the assistant s voice mail and awaited a call in response. He did not receive that call and so proceeded with the sale in the absence of anybody representing the bank.

[8] It is manifest that the sheriff understood that Mr. Fitzpatrick was acting for the bank and obviously expected somebody to be there on behalf of the bank. The mortgage property was knocked down to a Mr. Michael Dudka for \$70,000.00. Mr. Dudka was the agent for the Retirement Savings Plan Holders, involved in the Canada Trust second mortgage. After having obtained the property for \$70,000.00 he eventually paid the full purchase price and that money is being held by the sheriff in trust, pending the determination of this matter.

[9] Mr. Fraser has by affidavit sworn that it was always his intention to attend at that foreclosure sale and to bid as instructed by the bank. He repeats that it was only by reason of, what he describes as, an unforeseen incident involving the coyote and his concern for his family s safety, that caused him not to attend the sale.

[10] Mr. Fitzpatrick of Boyne Clarke has, by affidavit, provided evidence that he intended to have a representative at that foreclosure sale and to thereby protect the bank s interest. He said in his affidavit that had he been advised by the sheriff, or any other person, that Mr. Fraser was not in attendance at the sale that he would have immediately requested the sheriff to postpone the sale so that he could ensure the bank s agent would be in attendance.

[11] The bank as a result of all of this, now applies asking that this court set aside that foreclosure sale of October 31<sup>st</sup>, 2007, and grant leave for the sale to be rescheduled at a subsequent date.

[12] Two questions; firstly, does this court have discretionary power to set aside a foreclosure sale and if it does, should it do

so in this specific?

[13] Let me address the question of the discretionary power. All parties agree that this court has that kind of power. Yes it does. I do possess the discretionary power to set aside foreclosure sales in special circumstances. What are special circumstances? What are the circumstances under which that discretion, quite dramatic discretion actually, should be exercised? Justice Hallett said some things in a couple of cases that were cited to me, that are pertinent, Justice Hallett, when he was on the trial court before he became Justice of the Court of Appeal.

[14] In *Atlantic Trust Co. v. H. & E. General Stores Ltd.*, [1997] 25 N.S.R. (2d) 526, Justice Hallett was dealing with a situation where the lawyer representing a foreclosing creditor was on his way to attend the foreclosure sale and his car broke down. Justice Hallett found as fact, that that had happened. As a result, the lawyer does not arrive at the sale until the bidding is concluded, he eventually shows up after the bidding is concluded. Keeping in mind that in 1977 no cell phones, no car phones, not the easy access to communication that we enjoy today. Lawyer doesn't show up, the property was purchased by the second mortgagee for \$1,000.00, whereas the evidence indicated that its actual value was up to \$19,000.00. The foreclosing creditor, represented by the counsel whose car broke down, applied to have the sale set aside. Justice Hallett grants that application. He speaks of those special circumstances, meriting the exercise of his discretion, makes reference to what I gather to be a leading case from Supreme Court of Canada *Pew v. Zinck*, [1953], 2 D.L.R. 337, para. 6. This is Justice Hallett making reference to *Pew v. Zinck*:

It is to be noted that Rand, J., did not try to enumerate all of the grounds upon which sales may be set aside. As a general rule, inadequacy of price is not a ground to set aside a judicial sale, nor should anything turn on the fact that the purchaser was a second mortgagee.

[15] So he is saying, as a general rule inadequacy of price is not a ground. Justice Hallett subsequently goes on to say at para. 7:

In my opinion, there were, in the case before me, special circumstances which must be looked at in considering this application to set aside the sale. Specifically, the special circumstances were as follows:

[16] This is Justice Hallett talking about finding of special circumstances in the *Atlantic Trust* case:

1. The property was purchased by the second mortgagee for \$1,000.00 which is obviously a ludicrous price considering that the property had a value of at least \$13,000.00 and possibly \$19,000.00.

[17] So, after having said that inadequacy of price as a general rule is not a ground for overturning a sale, Justice Hallett in that case finds the inadequacy of price to have been a ludicrous price. Makes an exception to the general rule in that specific. He goes on to say, he is now speaking of the special circumstances that he finds:

2. The second mortgagee knew that the first mortgagee intended to attend and bid the property up to \$12,500.00.

3. The first mortgagee's failure to attend was due to circumstances beyond the control of the first mortgagee's solicitor.

[18] I consider this latter consideration significant, circumstances beyond the control of the first mortgagee's solicitor. Justice Hallett found as fact that that car broke down. He goes on to say:

To allow the sale to stand would be unconscionable as it would have the effect of:

1. Giving the second mortgagee a property for \$1,000.00 which it can realize on and make an unconscionable profit at the expense of the first mortgagee and the mortgagors;

[19] Another reason why it was unconscionable:

2. It deprives the first mortgagee of the benefit of its security under circumstances which are unfair;

3. It leaves the mortgagors open to a claim by the first mortgagee for a deficiency judgment of something in the order of \$12,000.00; the mortgagors having lost their property, could also be burdened by a very large judgment for the deficiency.

[20] and Justice Hallett concluded, paragraph 14:

On the facts before me, I find that the sale price as stated was shockingly inadequate .

[21] He referred to it previously as ludicrous , now he calls it

... shockingly inadequate and should likely be set aside on that ground alone. However, coupled with the other circumstances I have referred to, there are adequate grounds to exercise my discretion to set the sale aside.

[22] And he did that.

[23] Once again, Justice Hallett, another case, this time it is 1981 and the case is *Nova Scotia Savings & Loan Company v. Hill and Hill*, [1981] 45 N.S.R. (2d) 689. The facts in that case are the representative of the subsequent encumbrancer had attended the foreclosure sale and had been authorized to bid up to \$36,000.00. Interesting facts. The representative is actually there at the sale, present. Sheriff conducting the sale moved quickly to knock the property down in response to a bid for \$26,000.00. The subsequent encumbrancer was taken by surprise by the sudden termination of the sale and asked the sheriff to reopen the bidding. The sheriff refused. So the guy was actually in the room. The sheriff refused. Justice Hallett granted the subsequent encumbrancer's application, not surprising I would say, to set aside the sale on the basis that the sheriff failed to conduct the sale in a manner so as to get the best price obtainable. Justice Hallett makes reference again to *Pew v. Zinck et al. supra*, for another purpose, this is paragraph 24 of Justice Hallett's decision, he's making reference to *Pew & Zinck* again:

As stated in *Pew v. Zinck et al.*, an error in the proceedings is a recognized ground for setting aside a judicial sale. ...

There are competing interests in this situation. On the one hand, the desirability of obtaining the best price for the property foreclosed which was not achieved in this sale as the Bank was prepared to bid \$10,000.00 over and above the price at which the property was in fact sold to Mr. Baker. On the other hand there is the importance of a Sheriff's sale being final as it would be a very unsatisfactory situation if sales were constantly being opened up.

[24] Justice Hallett goes on to say at para. 26:

In trying to determine if this was an error in the proceedings that would justify the court in setting aside the sale, I have asked myself if this court could approve of this sale on the facts as set forth and the affidavits. I have concluded that I could not approve of this sale. There was at least one bidder present ready, willing and able to bid \$36,000.00. In my opinion the Sheriff did not indicate in an acceptable manner to the bidders that she was about to knock the property down to Mr. Baker for \$26,000.00 and, as a consequence, the best price was not obtained. The court has an interest in seeing the property is sold for the best price obtainable; ...

[25] At para. 34 subsequently says and this is significant:

That it is not to say that simply because of a sale of a mortgaged property pursuant to a foreclosure order brings less than the market value, it will be set aside. Indeed, inadequacy of price is not a ground to set aside a sale,

[26] So he repeats that general rule,

but when the inadequate sale price is brought about by the unreasonable manner in which the property being sold was knocked down by the person authorized by the court order to conduct the sale, it cannot be approved and must be set aside.

[27] Not surprisingly on those facts, Justice Hallett set aside that sale. The question becomes, should this foreclosure sale be set aside? The bank, the applicant says yes. The bank speaks to the conduct of this sale by the sheriff makes reference to

Justice Hallett's decision in that *Nova Scotia Savings & Loan v. Hill and Hill, supra*, and then talks about how the sheriff handled this sale. The bank submits that the sheriff in this instance failed to conduct the foreclosure sale in the manner calculated to get the best price obtainable. Same language used by Justice Hallett. And that the sale should be set aside as a result.

[28] Affidavit evidence demonstrates, says the bank, that the sheriff knew that Mr. Fitzpatrick represented the bank in connection with this foreclosure. The sheriff tried to contact the bank's solicitor prior to proceeding with the sale when it became clear that the bank was not going to be represented. The bank also says that the evidence demonstrates that the sheriff expected Mr. Fitzpatrick, or his agent, to attend on behalf of the bank. Well, that is demonstrative, why else is he making those phone calls? What other explanation? The sheriff obviously expected somebody to be there on behalf of the bank. The sheriff telephones, as pointed out, Mr. Fitzpatrick's office before the sale; somebody from the sheriff's office telephones Mr. Fitzpatrick's office after the sale to express surprise that the bank wasn't represented. The bank says that this sheriff should have postponed this sale, that it was improper for the sheriff to proceed in the circumstances.

[29] The sheriff does have power to postpone sales. The bank makes reference to *Civil Procedure Rule* and Practice Memorandum No. 13. Makes reference to paragraph 1(b) of the standard procedure and instructions to sheriffs which states:

The plaintiff, the solicitor, the sheriff, the deputy sheriff or person authorized by court order, makes a public announcement at the time and place of the sale, postponing the sale to a date certain, (only one postponement may take place without further court order) ...

[30] Clearly contemplates the possibility of the sheriff postponing a sale in circumstances when it is justified. The bank submits that the sheriff erred in proceeding with this sale in the absence of the bank's agent, the bank's solicitor, in the absence of any confirmation that the bank did not intend to appear, should have postponed the sale until he could have got in direct contact with the bank's solicitor until he had spoken to Mr. Fitzpatrick, or someone in Mr. Fitzpatrick's office, and would have determined thereby that the bank intended to have someone at the sale and should therefore in order to obtain the best price, have postponed the sale. That's what the sheriff should have done according to the bank. The sheriff should have known that proceeding, with the sale in the absence of the bank, in that instance, would mean that the sale would not generate the best possible price and indeed that is what happened, says the bank.

[31] Goes back to, reference to *Nova Scotia Savings & Loan Company v. Hill & Hill, supra*, where it makes reference to the sheriff's interest in conducting the sale in the fashion so as to obtain the best possible price. So the bank claims that one of the reasons that this court should set aside this sheriff's sale, is that the sheriff defaulted. The sheriff did not conduct the sale in the manner that, or more accurately, the sheriff proceeded with the sale in circumstances when the sheriff should not have done so, should have exercised his ability to postpone that sale and that that justifies this court in exercising its discretion to set aside the sale. That's not the only reason says the bank, not the only special circumstances.

[32] The bank restates that John Fitzpatrick of Boyne Clarke, representing the bank, had made arrangements for an agent to attend and to bid at that sale to protect the bank's interest. Mr. Fitzpatrick had done what he could do in order to accomplish that. The agent, Mr. Fraser, through his affidavit, points out why that didn't happen. He had received instructions and he had intended to bid as instructed and it was only because of the unforeseen incident with the coyote that it didn't happen. The bank submits that Mr. Fraser's concern for family safety was reasonable and understandable and as a result his failure to attend was both accidental and unintentional.

[33] The bank uses, again, the terminology unconscionable that the sale price of \$70,000.00 would be allowed to stand. Says it was clearly inadequate relative to the true value of the property. A property for which the bank was prepared to bid up, to \$135,500.00 at the sale. The bank says that if the sale were allowed to stand, then Canada Trust through their agent, Mr. Dudka would make an unconscionable and unfair profit at the expense of the bank, the mortgagors and Canada Trust as second mortgagee.

[34] Failure of the bank's agent, Mr. Fraser to attend the sale was due to entirely unforeseen circumstances beyond his control. Reference to Justice Hallett's finding with respect to the lawyer's car breaking down the *Atlantic Trust Co. v. H. & E. General Stores Ltd., supra*. The bank says the sheriff in the circumstances, therefore acted unreasonably in proceeding with the sale in the absence of the bank's solicitor, in the absence of any confirmation by the bank that it did not intend to be represented. If the sale stands the bank will have been deprived of much of the benefit of its security, and those circumstances will be unfair. Another word Justice Hallett used to justify the use of discretion.

[35] The bank submits that circumstances of the present case recommend the exercise of the court's discretion to set aside the foreclosure sale and reschedule it to another date, justify the court's discretion.

[36] And finally, as a result they asked that the foreclosure sale held on October 31<sup>st</sup>, 2007, be set aside and the court grant leave for such sale to be rescheduled to a later date in accordance with the terms of the original foreclosure order, simply reschedule that sale, allow the bank to be present so that everything can be accomplished for the best interest of the bank and presumably the mortgagors.

[37] Canada Trust, argues otherwise. It stresses, the integrity of the process.

[38] Canada Trust also mentions *Atlantic Trust Co. v. H. & E. General Stores Ltd., supra*. The aspect of that case that Canada Trust asks this court to consider is at paragraph 19 where Justice Hallett says:

It is desirable that purchasers at judicial sales should be able to assume that if the sale is conducted in accordance with the Court order, they will have acquired title to the property and should not have to concern themselves that the sale may be set aside.

It is only special circumstances that the Court's discretion should be exercised...

[39] The integrity of the sales process is what Canada Trust is asking the court to consider to be paramount in the specific. Canada Trust also cites, make reference to *Nova Scotia Savings & Loan v. Hill and Hill, supra*. Again Justice Hallett, the portion of the case which they say supports their position in relation to the integrity of the process where he says:

On the other hand, there is the importance of the sheriff's sale being final as it would be very A unsatisfactory situation if sales were constantly being opened up.

[40] Well that's true. Canada Trust then goes on to argue that there are no such special circumstances existing in this matter that justify, that compromise of the finality that is desirable in relation to sheriff sales. Canada Trust says, contrary to the bank's position, that the sheriff's actions herein were reasonable and proper. No issues raised concerning the sheriff's actions once the sale got underway. This is not the same situation that Justice Hallett faced in *Nova Scotia Savings & Loan v. Hill and Hill, supra*, where the sheriff misconducted the sale. In this instance the sale itself was conducted properly. The bank's position is that it should have been postponed.

[41] Canada Trust says there is no evidence, notwithstanding the fact that the sheriff knew that Mr. Fitzpatrick was acting on behalf of the bank and clearly anticipated that the bank would be present, that it knew that the bank actually was going to attend the sale. Certainly the sheriff anticipated.

[42] The bank has submitted that the sheriff should have known that in proceeding with the sale in the absence of the bank, it was likely that the sale would not generate the best possible price for the mortgaged property. Canada Trust says that's not so. It points out that there were several bidders present at that sheriff's sale that morning. It submits that a sheriff should not be required to seek expressions of interest, or require a bidder to advise in advance the amount the bidder is prepared to bid. It submits that there is no reasonable way that a sheriff could determine in advance what the bids will be. All it takes is two people wanting the property to create an auction. So, Canada Trust says, put yourself in the position of that sheriff, here he is, anticipates that the bank would want to be there, but the bank isn't there, can't contact the bank, has tried to do so but can't do that, he's got more than one bidder present at the sheriff's sale, duly authorized and advertised and the bank is suggesting that he should have gone back in there and postponed that sale, tell those bidders to go away because the bank may have had an interest in participating in this sale. Canada Trust says no, it's got bidders there in response to the advertisement of that sale, properly to be conducted on that date at that time and what does the sheriff do, he conducts the sale as directed. It says the sheriff is not making any errors in doing so. It submits that the sheriff, with several registered bidders present, properly commenced the bidding process.

[43] Let me speak about the situation in relation to the sheriff. I agree with the Canada Trust's position. I find no fault with the sheriff's actions herein. Clearly the sheriff thought that the bank would be present to bid on that property. But when the bank was not represented I find that it was not unreasonable or improper that that sheriff proceeded with that sale, especially when he had more than one interested bidder present. As a matter of fact, had he not proceeded with the sale, in those circumstances, I think he would have called the process into question. I think he did have an interest in the integrity of the process at that time.

[44] I see nothing that the sheriff did on that day that comes close to the actions of the sheriff in *Nova Scotia Savings & Loan Company v. Hill & Hill*, *supra*, that justified the exercise of the court's discretion in that case. This sheriff herein, conducted himself properly in the specific and I so find. Everything that the sheriff did on that day seems to me, including proceeding with the sale under the circumstances, was reasonable and proper.

[45] Canada Trust has addressed the other suggestion of special circumstances raised by the bank that might be described as Mr. Fraser's dilemma. This is what Canada Trust says. It says that Mr. Fraser, in his affidavit, does not indicate that the events involving the coyote sighting resulted in him being late for the sale. There is nothing in his affidavit to suggest that the coyote sighting caused him to miss the sale. Rather, they make reference to Mr. Fitzpatrick's affidavit, paragraph 13 and they quote, this is Mr. Fitzpatrick speaking, That I contacted Mr. Fraser by telephone, he confirmed that he had not attended at the foreclosure sale. He said that he had been distracted by the incident at his home earlier in the day and he had forgotten the foreclosure sale. So it is the position of Canada Trust that for whatever reason, maybe for good reason, he simply forgot. Lawyers have a lot on their mind. Showing up at foreclosure sales is an important obligation. Canada Trust points out that Mr. Fraser did not call the sheriff to indicate that he had a coyote problem at his house and that he was required to stay home to deal with that situation, did not ask that the sale be delayed or postponed. That's true.

[46] Canada Trust makes reference to *Atlantic Trust Co. v. H. & E. General Stores Ltd.*, *supra*, where Justice Hallett found a mechanical breakdown on the part of the plaintiff's solicitor's motor vehicle. These were circumstances beyond the control of that solicitor. And they say circumstances in this situation, as unfortunate as they were, did not create a situation beyond the control of Mr. Fraser. He could have attended had he remembered, at a minimum could have contacted the sheriff asking that the sale be delayed for a short time to allow for Mr. Fraser to attend. Didn't do that, Canada Trust says that, on the totality of the evidence, I should conclude that as a result of the distraction, counsel simply forgot.

[47] As for the inadequacy in price, the bank has submitted that the price of \$70,000.00 was clearly inadequate in relation to the value of the property.

[48] I make reference again to *Atlantic Trust Co. v. H. & E. General Stores Ltd.*, *supra*, in which Justice Hallett found that a \$1,000.00 price for a property that was worth in the area of \$13,000.00 and up to \$19,000.00, was a ludicrous price. Canada Trust says it is not the case here. It asks this court to accept that \$70,000.00 in this instance reminding the court that there is no evidence of the market value of this property, would be something in the area of 56% of the foreclosure figure, at least of \$124,743.40. Whether that foreclosure figure is definitive in relation to value of this property is not answered, but suffice to say that what Canada Trust is asking this court to accept is that the price in this matter was not either ludicrous or shockingly inadequate as was the situation before Justice Hallett in the *Atlantic Trust* matter.

[49] Bottom line, I do not find special circumstances that justify the setting aside of this foreclosure sale. I share Justice Hallett's interest in the integrity of the sheriff sale process. The interest we have in people knowing, expecting, that at sales conducted according to court order, when they are in attendance and successfully bid, will allow them to acquire title to that property. I agree that in special circumstances a sale can and indeed in some instances, should be set aside, but these circumstances in my mind will be exceptional.

[50] I've already made my finding in relation to the sheriff's actions in this matter being proper and reasonable. I determine that what happened in this matter based on the affidavit evidence before me, is that a lawyer who was required to be at that sale became distracted, perhaps for a good reason, and forgot to attend the sale. These were not circumstances beyond his control. This is not the same as was the situation in 1977 of the lawyer's car breaking down on the way to the sale. As a result the property sold for significantly less than would have been the case.



[51] However, I agree with Canada Trust that, unlike the situation in *Atlantic Trust Co. v. H. & E. General Stores, supra*, the price paid herein was not either ludicrous or shockingly inadequate. I am mindful that otherwise, as a general rule, inadequacy of price is not a ground to set aside a judicial sale.

[52] In totality, I find that the applicant bank has not shown the special circumstances herein that would justify the exercise of this court's power to set aside this properly conducted sale.

[53] I anticipate that the defendants, the Bonnars will not be required to suffer as a result of the bank's failure to be represented at this sale.

[54] Canada Trust has asked for interest from October 31<sup>st</sup>, 2007, the date of the sale in question, to the date of the eventual issuing of the sheriff's deed. I find that I do not have sufficient information before me to justify that order.

[55] Canada Trust will have costs in the amount of \$1,000.00.

[56] I direct that the sheriff will complete the process arising from the foreclosure sale of October 31<sup>st</sup>, 2007. Thank you counsel.

Chief Justice Joseph P. Kennedy