

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
MONTREAL SEAT

No: 500-09-031802-259
(500-11-066133-253)

DATE: July 10, 2026

CORAM: THE HONOURABLE MARK SCHRAGER, J.A.
PATRICK HEALY, J.A.
CHRISTIAN IMMER, J.A.

DEMATIC LIMITED
APPELLANT – Respondent
v.

17667884 CANADA INC. in continuance of proceedings for ATALLAH GROUP INC.
RESPONDENT – Debtor/Applicant

and

ATALLAH INTERNATIONAL INC.
9416-7145 QUÉBEC INC.
ATALLAH GROUP US INC.
ATALLAH GROUP LIMITED
ATALLAH GROUP EU SRL
IMPLEADED PARTIES – Debtors

and

ERNST & YOUNG INC.
IMPLEADED PARTY – Monitor

JUDGMENT

[1] This is an appeal from a judgment rendered on November 18, 2025, by the Superior Court, District of Montreal (the Honourable Andres C. Garin) which grants in part the Respondent's amended application for homologation and execution of a transaction.

[2] For the reasons of Schrager, J.A., with which Healy and Immer, JJ.A., concur, **THE COURT:**

[3] **DISMISSES** the appeal with legal costs.

MARK SCHRAGER, J.A.

PATRICK HEALY, J.A.

CHRISTIAN IMMER, J.A.

Mtre Laurent Nahmiash
Mtre Lydia Amazouz
INF
For Dematic Limited

Mtre Charles Ouimet
Mtre Danny Duy Vu
Mtre Anna Maria Arapovic
STIKEMAN ELLIOTT
For 17667884 Canada Inc. in continuance of proceedings for Atallah Group Inc., Atallah International Inc., 9416-7145 Québec Inc., Atallah Group US Inc., Atallah Group Limited and Atallah Group EU SRL

Mtre Alain Riendeau
Mtre Brandon Farber
FASKEN MARTINEAU DUMOULIN
For Ernst & Young Inc.

Date of hearing: May 14, 2026

REASONS OF SCHRAGER, J.A.

[4] This is an appeal from a judgment rendered on November 18, 2025, by the Superior Court, District of Montreal (the Honourable Andres C. Garin) which grants in part the Respondent's amended application for homologation and execution of a transaction.¹

[5] The Appellant allegedly failed to deliver services promised pursuant to an agreement between the parties related to the upgrade of the Respondent's order fulfilment centre. After months of negotiations, the Respondent accepted an offer of settlement contained in the Appellant's email. At that time, the Respondent was in a precarious financial situation that culminated in proceedings under the *Companies' Creditors Arrangement Act* ("**CCAA**").² The Appellant argues that the trial judge erred in finding that a transaction was concluded and that its consent was not vitiated by the Respondent's concealment of its insolvency.

[6] The Respondent, ("**Respondent**" or "**SSENSE**") conducting business under the trade name "**SSENSE**", runs an online retail platform based in Montreal.

[7] The Appellant is an engineering company specialising in supply chain automation with headquarters in the United States.

[8] In 2020, SSENSE sought to upgrade its fulfilment centre in the hopes of increasing its daily capacity to fulfill orders. On November 4, 2020, the parties entered into an agreement whereby, for the total price of 40M\$, the Appellant would install the machinery, software and systems needed to meet SSENSE's fulfilment target ("**the Master Agreement**").

[9] In 2022, the parties entered into a Resident Maintenance Agreement ("**the RMA**") and later, in 2025, a Remote Support and Managed Services Agreement ("**the MSA**"). The former pertains to the Appellant's maintenance of the systems it installed in SSENSE's fulfilment centre, while the latter provides SSENSE with remote support and assistance.

[10] The Appellant never managed to implement the system as planned, nor set up the centre to meet the promised target. After attempts to make the system work, settlement discussions began in February 2025.

¹ *Arrangement relatif à Atallah Group Inc.*, 2025 QCCS 4430 [judgment under appeal].

² *Companies' Creditors Arrangement Act*, R.S.C. 1985, Ch. C-36.

[11] Between August 26 and 27, 2025, the parties exchanged emails regarding a settlement offer (“**the Email Exchange**”).

[12] On August 26, 2025, the Appellant’s president, Michael Larsson (“**Larsson**”), sent the following email to Bassel Atallah (“**Atallah**”), chief operating officer of SSENSE:

Bassel,

As a follow up to our last discussion on July 24th and in the interest of finding a path, I am prepared to make the following offer.

- 10M CAD CashTransfer ownership of Consignment Parts on site to SSENSE (less the parts SSENSE has identified as DMS or related - valued at 845K CAD which will be returned to Dematic warehouse)
- Waiver of all open unpaid Dematic invoices including all parts and services. This does not include Resident Maintenance for June 2025 and forward (June 2025 – Oct 2026 current RM contract period). Resident Maintenance will be paid separately going forward
- Waiver of final 2M CAD Payment for Project
- Waiver of fees for services through July 31, 2026 to include Matflo and other remote support, managed services, Insight and Sprocket per the drafted agreement between our teams. This does not include Resident Maintenance which will continue to be paid per that separate agreement on a monthly basis.

It is my hope that this offer will bring us to a closure.

Our offer to settle this matter includes the amount of liquidated damages which could be applicable pursuant to the terms of our contract. Also, I thought it important to confirm with you in writing that our settlement offer and discussions with you are for settlement purposes only and are undertaken without prejudice as to any future proceedings or positions we may take. I trust that this is your expectation as well. If in agreement, we would be happy to draft a formal settlement agreement and release.

[13] Atallah responded on August 27, 2025:

Michael,

Thank you for your email.

We accept the terms of the offer below.

Please forward the draft agreement at your earliest convenience.

[14] On August 27, 2025, the Bank of Montreal, one of SSENSE's lenders, notified to SSENSE an *Application for the Issuance of an Initial Order, an Amended and Restated Initial Order and a Sale and Investment Solicitation Process Approval Order* under the CCAA. SSENSE eventually brought its own CCAA application that was unopposed by its senior secured creditors and an initial order under the CCAA was issued on September 12, 2025.

[15] In the following weeks, SSENSE followed up with the Appellant, seeking in Atallah's words, to "paper" the settlement. The Appellant, taken aback by the news of SSENSE's financial difficulties, never responded.

[16] On September 25, 2025, SSENSE sent a demand letter to the Appellant. It sought to finalize the agreement reached in the Email Exchange by September 29, 2025, and included a draft settlement agreement for the Appellant to sign. It requested that the Appellant pay the settlement amount of 10M\$ no later than October 3, 2025.

[17] The Appellant responded in writing to the demand letter on September 29, 2025. It refused to sign the settlement agreement, arguing that no agreement was reached and that SSENSE negotiated in bad faith by failing to disclose its precarious financial situation.

I. JUDGMENT UNDER APPEAL

[18] After forty-one pages of detailed analysis, the trial judge homologated the transaction.

[19] The judge concludes that although the parties contemplated it, executing a formal written settlement agreement was not an essential element of the transaction. Crucial to this conclusion is Larsson's email on August 26, 2025: he does not explicitly mention that the conclusion of the agreement is contingent upon signing a formal written memorandum of the agreement.³

[20] Atallah and Larsson's respective testimonies confirmed this intention; their business experience would encourage them to put any agreement in writing out of prudence, but not necessity. However, any further assertions made by either witness to the effect that a written agreement was either necessary or unnecessary to a meeting of the minds was discounted by the judge as self-serving evidence.⁴

[21] As for SSENSE's preparation of a draft agreement, the trial judge concludes that it was only "a prudent step aimed at bringing Dematic to implement the settlement that SSENSE believed had been reached" rather than an admission that a written agreement

³ Judgment under appeal, *supra*, note 1, paras. 63-68.

⁴ *Id.*, paras. 75-76.

was essential. Indeed, the judge comments that completing a paper agreement would have obviated the need to undertake the present litigation.⁵

[22] The trial judge then found that the following elements were secondary terms that did not need to be included in the Email Exchange in order that a settlement agreement be reached:

- The timing of the parties' respective payments;⁶
- The transfer of ownership of spare parts to SSENSE;⁷
- The logistics and associated costs of returning the DMS spare parts to Dematic.⁸

[23] The trial judge held that at the heart of the settlement is SSENSE's release of Dematic from claims regarding the contractual dispute that spurred the negotiations. In exchange, SSENSE receives payment from Dematic in the form of cash, services, and spare parts.⁹ This release is integral in the Email Exchange.

[24] He found that a release with respect to Dematic's promise of future free services would be illogical as SSENSE would have no way to enforce the very settlement it agreed to.¹⁰ He rejected the argument that such a release was an essential element of the settlement.

[25] He also found that no evidence suggests that the parties were contemplating a limited liability clause.¹¹ In any event, he added that such a clause would not be an essential element.¹²

[26] The trial judge acknowledged that as of June 2025, SSENSE was in a precarious financial situation. It was insolvent at the time of the Email Exchange in August. This information was never disclosed to Dematic during the settlement discussions or otherwise.¹³

[27] After a review of the applicable law, he concluded that in the absence of a contractual or statutory provision requiring disclosure of financial circumstances, an

⁵ Judgment under appeal, *supra*, note 1, paras. 92-94.

⁶ *Id.*, para. 104.

⁷ *Id.*, para. 111.

⁸ *Id.*, para. 119.

⁹ *Id.*, para. 120-121.

¹⁰ *Id.*, para. 127.

¹¹ *Id.*, para. 128.

¹² *Ibid.*

¹³ Judgment under appeal, *supra*, note 1, para. 150.

obligation to make such disclosure must be based on good faith in contractual dealings and the Supreme Court's decision in *Bail*.¹⁴

[28] SSENSE knew of its precarious financial situation and Dematic had no way of acquiring this information on its own.¹⁵ The trial judge concludes that this information was not however decisive.¹⁶ Both parties entered into the settlement agreement with the expectation that their business relationship would last until at least October 2026. It was never SSENSE's intent to halt its operations; it reasonably expected to continue its operations into 2026. It was seeking a suitable arrangement with its lenders and failing that it was prepared to continue the CCAA proceedings and secure interim financing from its shareholders. Ultimately, it never ceased operations.¹⁷

[29] The trial judge rejected the argument that the information would have had an impact on the bargain Dematic was willing to strike with SSENSE, as no evidence supports this assertion. Finally, he observed that the evidence also indicated no intent by SSENSE to mislead Dematic.¹⁸

* * *

II. ISSUES

[30] The parties' expression of the issues on appeal differs somewhat. I would frame them as follows:

1. Did the trial judge err in concluding that there was a meeting of the minds on all essential elements of the transaction?
2. Did the trial judge err in law by failing to address whether the Respondent had an implied contractual duty to disclose to the Appellant its insolvency prior to the Email Exchange?
3. Did the trial judge err in concluding that the Respondent had not breached its duty of good faith?

III. ANALYSIS

[31] For the reasons which follow, none of the arguments raised by the Appellant justify appellate intervention.

¹⁴ Judgment under appeal, *supra*, note 1, para. 165.

¹⁵ *Id.*, para. 166.

¹⁶ *Id.*, para. 172.

¹⁷ *Id.*, paras. 170-171.

¹⁸ *Id.*, para. 180.

1. Did the trial judge err in concluding that there was a meeting of the minds on all essential elements of the transaction?

Appellant's submissions

[32] The Appellant argues that the trial judge committed two errors of law. First, he overlooked that:

- the parties' relationship is governed by a Master Agreement and the related RMA and MSA contracts, all of which provide for changes, modifications or additions to be made in writing and signed by both parties; a settlement of an earlier dispute in December 2023 reflected this same intention;
- Atallah testified that he considered negotiations to be ongoing and expected the execution of a settlement agreement, and particularly a release document, such that the Email Exchange between the parties could not be considered final; and
- the Respondent's application for injunctive relief sought to force the signature of a first draft settlement agreement, suggesting that the Email Exchange was not final.

[33] Second, the judge erred in finding that the execution of reciprocal releases was not essential to the conclusion of a transaction. The settlement sought to resolve issues relating to the provision of future services so that a release of the Appellant regarding future services was essential. The Appellant adds that by wrongfully limiting the scope of the release to the existing contractual dispute, the trial judge erred and exceeded his jurisdiction under article 528 C.C.P.

Discussion

[34] To grant an application for homologation of a transaction, a judge must determine, in the light of the evidence presented, whether there had been a meeting of minds on the essential terms of the transaction. Three conditions must be met for a transaction to have been concluded, as per article 2631 C.C.Q.: (1) a litigious dispute, (2) an agreement not to undertake legal recourse, and (3) mutual concessions or reservations.¹⁹

[35] The Appellant argues that the trial judge erred in his evaluation of the intention of the parties and adds that the failure to discuss certain existing agreements between the parties constitutes an error of law²⁰. In essence, the errors alleged are factual in nature. A trial judge is not bound to mention every element of the evidence as long as the

¹⁹ *A.B. c. Miller*, 2025 QCCA 850, para. 21; *Groupe Drumco Construction inc. c. 7321228 Canada inc.*, 2017 QCCA 145, para. 32.

²⁰ The Appellant misreads *Syndic de Distribution Pri inc.*, 2020 QCCA 487, para. 43, where the undersigned stated that the distinction between subrogation and assignment (which the judge did not discuss) is a question of law.

judgment is coherent.²¹ Thus, the applicable standard of review is that of palpable and overriding error.²²

[36] The trial judge undertook a thorough review of the evidence in concluding that all essential elements of a transaction were agreed upon by the parties. The Appellant does not demonstrate any reason for the Court to interfere with this conclusion.

[37] The transaction settles a dispute arising in the execution of the Appellant's obligations under the Master Agreement. It does not modify that agreement. The "entire agreement" clause specifying that any changes be made in writing is not applicable nor of any assistance to the Appellant's arguments.

[38] With regard to the execution of a release, the judge concluded that:

[120] Unlike the other elements invoked as essential by Dematic, there can be no doubt that the release to be given by SSENSE in exchange for Dematic's payment in the form of cash, services, and spare parts is an essential element of the contract of transaction. Obtaining a release is the very reason why Dematic was willing to make such payments.

[121] It is evident that by accepting Mr. Larsson's offer of August 26, SSENSE agreed to grant Dematic a release in respect of any claims in relation to the contractual dispute at issue in the parties' settlement discussions. Manifestly, there was a meeting of the minds on this point.

[39] Though not mentioned by the judge nor the parties, Article 2633 C.C.Q. provides in part as follows:

2633. A transaction has, between the parties, the authority of *res judicata*.

2633. La transaction a, entre les parties, l'autorité de la chose jugée.

A transaction is not subject to forced execution until it is homologated.

La transaction n'est susceptible d'exécution forcée qu'après avoir été homologuée.

[40] Thus, as would a judgment, the transaction binds the parties as to its subject matter. Consequently, the Respondent would have no further recourse against the Appellant with regard to the matter in dispute, which was settled by means of the transaction. As such, a release or a renunciation of the cause of action necessarily

²¹ *Tiger-Vac International inc. c. Mambro*, 2021 QCCA 53, para. 19.

²² *Martel c. Martel*, 2022 QCCA 385, para. 9; *Sacchetti c. Nuccio*, 2021 QCCA 1230, paras. 57-58; *Groupe Drumco Construction inc. c. 7321228 Canada inc.*, 2017 QCCA 145, para. 33; *Graham Boulevard Apartments Ltd. c. Cheng*, 2014 QCCA 1739, para. 5, citing *Supreme Precision Castings (1963) Ltd. c. Parker industries Ltd.*, [1985] J.Q. n° 650, para. 11 (C.A.).

underlies the dispute and resulting transaction.²³ Otherwise stated, a release is integral to the transaction. That proof might be required in a subsequent dispute as to that which was settled does not change this.

[41] As to the Appellant's argument that a release for future services and limitation of liability were essential to the settlement, the judge concluded that Larsson's testimony did not indicate that such a clause was essential. Nothing in Atallah's testimony nor in the draft agreement submitted by the Respondent supports the Appellant's contention in this regard. The judge's findings of fact are free from any manifest error.

[42] Nor is there merit in the Appellant's assertion that the judge did not consider the parties' testimony as to the requirement of a formal written agreement. Most significantly, the execution of a formal agreement is not specified by the Appellant in its email as a condition precedent of the transaction. The expectation by both parties that such a formal memorandum of agreement would be signed is reasonable, particularly for experienced business people, but does not change the fact that, as the judge concluded, there was a meeting of the minds on the essential elements of the transaction.

[43] The Appellant has not established a reviewable error under this ground of appeal.

2. Did the trial judge err in law by failing to address whether the Respondent had an implied contractual duty to disclose to the Appellant its insolvency prior to the Email Exchange?

The Appellant's submissions

[44] According to the Appellant, the trial judge failed to consider that the Master Agreement created an implied obligation for the Respondent to disclose its financial situation to the Appellant in light of the Supreme Court's decision in *Ponce*.²⁴ The Master Agreement allows either party to terminate the Agreement in the event of the other party's insolvency and thus created a duty to inform in the course of the settlement negotiations.

Discussion

[45] The duty of good faith can feature both prohibitive and proactive dimensions. Its prohibitive dimension requires that parties not act dishonestly in performing the contract, and that they not "jeopardize the existence or equilibrium of the contractual relationship."²⁵

²³ Martine Lachance, *Le contrat de transaction*, 3rd ed., Montréal, Wilson & Lafleur, 2018, paras. 23, 26 and 30.

²⁴ *Ponce v. Société d'investissements Rhéaume Itée*, 2023 SCC 25, [*Ponce*].

²⁵ *Id.*, paras. 75-76.

[46] It is not expected that a party subordinate its interests to those of the other party in order to respect the prohibitive contours of the duty of good faith. They should however “look out for the interests” of their contractual partners. The Supreme Court in *Ponce* notably finds that parties may have a legitimate expectation that their contractual partners will refrain from “scheming in any way to enrich themselves at [the other party’s] expense.”²⁶

[47] The proactive dimension requires that each contracting party assist their contracting partner, without acting in a manner contrary to their own interests. According to the circumstances, they must provide the other party with the information that is relevant to the performance of their obligations “in order to facilitate it or avoid making it more onerous than originally intended”.²⁷

[48] Specific circumstances are required to bring about such an obligation. *Ponce* makes it clear that mere “exchange contracts” do not bring about the same intensity of obligations as “cooperation contracts”, wherein parties set out to pursue a common objective in the long-term.²⁸ In *Ponce*, the shareholders sued two directors of their companies who had purposefully failed to disclose to the shareholders the interest expressed by a prospective purchaser in acquiring the companies. The directors then bought the companies so as to themselves profit from the sale to the prospective purchaser, to the detriment of the shareholders.²⁹ The Supreme Court concluded that the relationship between the parties involved a long-term business relationship and had a common business goal – i.e., a cooperation contract.³⁰

[49] The trial judge does not explicitly discuss *Ponce* (other than a footnote), but mentions article 1434 C.C.Q. upon which it is predicated:

[163] [...] While the point was not addressed by the parties in their submissions, there may well be instances where a duty to provide financial information constitutes an implicit obligation arising from the nature of the contract, usage or equity pursuant to article 1434 CCQ.

[Reference omitted]

[50] The instant parties are not pursuing a common enterprise or objective. The Appellant is a supplier of goods and services to SSENSE, for which SSENSE pays in kind. The RMA expires in 2026, and nothing would in theory prevent SSENSE from replacing the Appellant with another provider in the same industry. Indeed, the Master Agreement even features a “Termination for Convenience” clause allowing SSENSE to

²⁶ *Ponce*, *supra*, note 24, para. 77.

²⁷ *Id.*, para. 80.

²⁸ *Id.*, para. 81.

²⁹ *Id.*, para. 2.

³⁰ *Id.*, para. 81.

“in its sole discretion [...] terminate this Agreement at any time on 10 business days’ written notice to Dematic.” The relationship between the parties is clearly an “exchange contract” that does not bring about a proactive duty of good faith that would extend to the disclosure by the parties of their financial statements.

[51] The Appellant contends that the following clause in the Master Agreement gives rise to an obligation for the Respondent to have informed the Appellant of its insolvency:

f) **Bankruptcy. Either Party may terminate the Agreement in the event of the other Party becoming insolvent**, filing for or being petitioned into bankruptcy or its equivalent, having a receiving order made against it, compounding with its creditors, commencing to be wound up (other than a members’ voluntary winding up for the purposes of restructuring or amalgamation), carrying on its business under an administrator, receiver, manager or liquidator for the benefit of its creditors, or any other acts, omissions or measures taken by a Party having an equivalent effect (“Insolvency Action”) and, provided such Insolvency Action is capable of remedy, such Insolvency Action is not set aside within thirty (30) days of the date of such Insolvency Action. Termination under this Section shall be deemed a termination for cause.

The mere inclusion of a clause regarding termination in the event of bankruptcy in the Master Agreement does not create an obligation to disclose insolvency in the present context, that is, in the course of settlement negotiations arising from a contractual dispute. The settlement is necessarily retrospective and seeks to compensate SSENSE for the Appellant’s failure to perform its obligations. The context differs greatly from the implicit obligation created in *Ponce*, which required that information be shared that would affect the parties for the future. The Appellant does not demonstrate that knowledge of SSENSE’s insolvency crisis would have facilitated its own obligations under the Master Agreement or protected its own financial interests going forward. The disclosure might well have weakened the Respondent’s bargaining position (and thus strengthened that of the Appellant), but that does not compel the disclosure when the insolvency did not affect the Appellant’s alleged contractual default that it wished to settle.

[52] Moreover, SSENSE was not the party paying under the transaction. Its ability to pay was not germane to SSENSE’s performance of any obligation under the transaction. Periodic payments to be made by the Appellant under the RMA would be current and coincide with the provision of ongoing maintenance by the Respondent. If payments ceased so would the service so that again any future monetary obligation of the Respondent was not relevant to the settlement.

[53] This ground of appeal does not succeed.

3. Did the trial judge err in concluding that the Respondent had not breached its duty of good faith according to *Bail*?

The Appellant's submissions

[54] The Appellant submits that the trial judge overlooked the longstanding and future relationship between the parties, who intended to settle their dispute on the condition of an ongoing business relationship. The Respondent sought to continue the relationship into at least 2026, which would represent over 10M\$ in earnings.

[55] He also overlooked Larsson's testimony that he would have never made the offer to settle had he known of SSENSE's financial issues and Atallah's admission that SSENSE concealed the information for fear it would be used as leverage in negotiations. Both parties clearly considered the information to be crucial to the outcome of the possible settlement according to the Appellant.

[56] SSENSE's failure to disclose deprived the Appellant of the opportunity to properly negotiate the settlement. The trial judge incorrectly relied on the fact that SSENSE managed to solve its insolvency crisis and thus failed to consider the effect on the Appellant had the outcome been more dire. This *post facto* analysis is inappropriate when considering whether the Appellant's consent was vitiated, argues the Appellant.

Discussion

[57] In *Bank of Montreal v. Bail Ltd.*³¹, the Supreme Court set out three main elements of the obligation to inform:

1. knowledge of the information, whether actual or presumed, by the party which owes the obligation to inform;
2. the fact that the information in question is of decisive importance;
3. the fact that it is impossible for the party to whom the duty to inform is owed to inform itself, or that the creditor is legitimately relying on the debtor of the obligation.

[58] Whether the information was of decisive importance to a contracting party is a question of fact so that the trial judge's findings here again are subject to the standard of palpable and overriding error.³²

³¹ *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554.

³² *Construction BSL inc. c. Procureur général du Québec (Ministère des Transports du Québec)*, 2025 QCCA 1438, para. 34.

[59] The trial judge correctly concluded that information regarding SSENSE's financial status was not of decisive importance to the Appellant at the time of the settlement. This conclusion flows from the absence of any mention of the subject in the Email Exchange.

[60] As mentioned above, the judge noted that SSENSE intended to and had the reasonable ability to continue its operations either by securing new banking arrangements or shareholder loans.³³ The judge found that both parties contemplated an ongoing relationship until October 2026.³⁴

[61] Again, good faith does not require a party to reveal information that is objectively irrelevant to the decision of the other party to transact and is detrimental to the bargaining position of the party not divulging the information. This was underlined by the Supreme Court in *Ponce*.³⁵

[62] The Appellant's reasoning implies that when negotiating a settlement for a damage claim arising from the faulty execution of a contract, the injured party receiving compensation should voluntarily disclose its balance sheet and financial statements. If SSENSE's balance sheet had been essential, Larsson, an experienced businessman, would surely have asked for it. He did not. There is no such mention in the Email Exchange. Indeed, and at the risk of repetition, since SSENSE would not be paying under the transaction (other than periodic payments in consideration of the receipt of ongoing maintenance services) the information was not, on any objective level, relevant or decisive.

[63] The Appellant does not establish any manifest error in the judgment under appeal under this ground, nor otherwise so that I would recommend that the appeal be dismissed with legal costs.

MARK SCHRAGER, J.A.

³³ Judgment under appeal, *supra*, note 1, para. 176.

³⁴ *Id.*, para. 172.

³⁵ *Ponce*, *supra*, note 24, para. 80.