COURT OF APPEAL FOR ONTARIO

CITATION: Next Pathway Inc. v. Informatica Inc., 2026 ONCA 657
DATE: 20260922
DOCKET: COA-25-CV-0954

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van Rensburg, Miller and Coroza JJ.A.

BETWEEN

Next Pathway Inc.

Plaintiff (Respondent)

and

Informatica Inc.

Defendant (Appellant)

Patrick Flaherty and Brendan Brammall, for the appellant

Dorothy Charach and Solomon McKenzie, for the respondent

Heard: March 4, 2026

On appeal from the order of Justice Jennifer Penman of the Superior Court of Justice, dated July 14, 2025, with reasons reported at 2025 ONSC 7343.

REASONS FOR DECISION

Overview

[1] Informatica LLC[1] is a software development company headquartered in California. Next Pathway is a software services company headquartered in Toronto. This litigation arises from Informatica terminating two contracts it had

[1] The appellant Informatica LLC is incorrectly named as Informatica Inc. in the title of proceedings.

made with Next Pathway: the Software Licence and Services Agreement, dated May 21, 2021 (the “Service Agreement”); and the Migration Program Participation Agreement, dated August 22, 2023 (the "Migration Agreement”). Next Pathway brought an action in tort and contract arising from Informatica’s termination of both contracts. Informatica brought an unsuccessful motion to have the action stayed on jurisdictional grounds. This appeal from the order dismissing that motion addresses a narrow question of jurisdiction: specifically, the effect of the forum selection clauses in each of the two agreements.

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Background

[2] In early 2024, Informatica terminated the Service Agreement without paying the termination fee of USD $666,852. Next Pathway alleges that at a meeting to discuss potential resolution, Informatica threatened to harm its business. Shortly after this meeting, Informatica also terminated the Migration Agreement.

[3] Next Pathway brought the underlying action seeking damages for breach of contract with respect to both agreements, and for tortious conduct including intentional interference with economic interests and inducing breach of contract between Next Pathway and its clients.

[4] Informatica sought to stay the proceedings in part, or dismiss the allegations related to the Migration Agreement, on the basis that the claims related to the Migration Agreement are governed by the Migration Agreement’s forum selection

clause. This clause provides that "any dispute must be brought in the Superior Court for San Mateo County, California." The motion judge dismissed the motion.

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The forum selection clauses

[5] The Service Agreement contained the following forum selection clause:

> **Governing Law; Forum**. This Agreement is governed by and construed in accordance with the Laws of the province of Ontario and the federal laws of Canada applicable therein, without regard to conflicts of laws provisions thereof, and without regard to the United Nations Convention on International Sale of Goods. Any Action arising out of this Agreement or the licenses granted hereunder will be instituted exclusively in the state and federal courts of the province of Ontario, and each Party irrevocably submits to the exclusive jurisdiction of such courts in any such Action.

[6] The forum selection clause in the Migration Agreement reads as follows:

> **Governing Law**. This Agreement will be governed by the laws of the State of California, without regard to conflict of law provisions, and any dispute must be brought in the Superior Court for San Mateo County, California. If either party brings an action or proceeding to enforce the provisions of this Agreement, the prevailing party shall be entitled to collect all reasonable attorneys' fees and expenses incurred in connection therewith. The Uniform Commercial Code is not applicable to this Agreement.

The reasons below

[7] The motion judge summarized Next Pathway's claims as:

(a) breach of the Service Agreement by non-payment of the termination fee;

(b) breach of contractual duties of honest contractual performance and good faith under the Service Agreement by terminating the Migration Agreement in retaliation for Next Pathway requiring payment of the termination fee;

(c) breach of the duty of honest contractual performance and good faith in exercising contractual discretion under the Migration Agreement by terminating the Migration Agreement in retaliation for Next Pathway requiring payment of the termination fee;

(d) inducement of Next Pathway to breach its contracts with third parties by terminating the Migration Agreement.

[8] In determining whether the action should be stayed, the motion judge applied the "strong cause" test from *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450. On this test, the party seeking to rely on a forum selection clause must first establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court": *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 28. Thereafter, "the court must grant the stay unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause." *Pompey*, at para. 39.

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[9] The parties agreed, and the motion judge found, that based on the forum selection clause in the Service Agreement, the Superior Court of Justice in Ontario had jurisdiction over any dispute arising from the Service Agreement.

[10] The motion judge did not, however, interpret the forum selection clause of the Migration Agreement as conferring exclusive jurisdiction on California over any dispute arising from that agreement. She could not conclude that that was the parties' intention. She noted the absence of the word "exclusive" from the clause and characterized the clause as "ambiguous" between conferring exclusive and non-exclusive jurisdiction. The motion judge also found that because the Migration Agreement was a contract of adhesion, the interpretive principle of *contra proferentem* applied and the ambiguity should be resolved in favour of non-exclusive jurisdiction.

[11] Accordingly, the motion judge concluded that the "Migration Agreement does not clearly oust Ontario's jurisdiction, and applying a commercially reasonable interpretation, the forum selection clause must be read as non-exclusive." The motion judge held that, as pleaded, the two Agreements and their respective terminations are "inextricably linked"; the claims related to the termination of the Migration Agreement are "rooted" in the circumstances surrounding the breach of the Service Agreement. Thus, she found the entire action proper to Ontario.

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[12] In the alternative, the motion judge found that, even if she was incorrect about the validity issue in the first step, she would nevertheless find that Next Pathway satisfied the "strong cause" prong of the test articulated in *Pompey*. She noted that the majority of the evidence regarding both agreements is located in Ontario, that Informatica has offices in Toronto, and that its affiant travels to Toronto frequently. Moreover, if the stay were granted and an action commenced in California, it would result in multiple proceedings and risk inconsistent findings. Considering these circumstances, the motion judge found that it would be unreasonable to disregard a forum selection clause negotiated by the parties (in the Service Agreement) in favour of a forum selection clause imposed on Next Pathway by Informatica.

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Analysis

[13] Informatica argues that the motion judge made a number of errors in coming to the conclusion that the forum selection clause in the Migration Agreement did not necessitate a stay or dismissal of the allegations relating to the Migration Agreement.

[14] First, Informatica submits that the motion judge erred in characterizing the Migration Agreement as a contract of adhesion and then applying the doctrine of *contra proferentem* to resolve the ambiguity she found in that contract's forum selection clause.

[15] Informatica asserts that the conclusion that this was a contract of adhesion reflects a palpable and overriding error of fact because the evidence before the motion judge was all to the contrary: the parties were both sophisticated commercial entities; Next Pathway's representative in this transaction, Clara Angotti, was experienced in negotiating commercial contracts; and there was no evidence that Next Pathway could not have discussed or negotiated any of the terms of the Migration Agreement.

[16] We disagree. The motion judge concluded that based on the wording of the contract, in conjunction with the evidence of Informatica's representative, Ansa Sekharan, signing the Migration Agreement was a pre-requisite for Informatica's partners to access the "Migration Tool" (certain proprietary software) that was not specific to Next Pathway. She stated that this conclusion was supported by the evidence of Ms. Angotti, who stated in her affidavit that the Migration Agreement was provided to Next Pathway on a "take it or leave it" basis, that she understood it was a standard form contract Informatica used for any company seeking to use its software, and that Next Pathway had no ability to negotiate or amend its terms. Informatica did not contradict these statements in its own affidavit evidence. Indeed, Mr. Sekharan conceded under cross-examination that the Migration Agreement was a standard form contract.

[17] Informatica points to an email following up on the request that Next Pathway sign the Migration Agreement by Docusign, which stated, "if you have any

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questions please direct to Mike Clark." We do not agree that this is a clear indication on the part of Informatica that any part of the Migration Agreement, including the forum selection clause, could have been negotiated by Next Pathway. Nor does the fact that Next Pathway's counsel did not question Mr. Sekharan about whether the Migration Agreement was negotiable assist Informatica. Next Pathway was entitled to rely on Informatica's silence in response to the specific assertion in Ms. Angotti's affidavit that the Migration Agreement was non-negotiable.

[18] Second, and in the alternative, Informatica argues that the motion judge erred in law in failing to follow *Pompey* when she held that little weight ought to be placed on the forum selection clause because it was part of a contract of adhesion and did not reflect the bargain reached between the parties.

[19] In *Pompey* the Supreme Court rejected the submission that little weight should be accorded to a forum selection clause in the subject contract which was asserted to be a contract of adhesion. The court refused to invalidate the forum selection clause on this basis, also finding that, on the facts of that case, the forum selection clause could well have been negotiated. As we have already noted, there is no reversible error in the motion judge's conclusion that the Migration Agreement was a contract of adhesion, which is supported by the evidence. And we do not read the motion judge as having concluded that the forum selection clause should be given little weight because it was part of a contract of adhesion. Rather, having concluded that the Migration Agreement was a contract of adhesion, it was open

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to the motion judge to apply the principle of *contra proferentem* to resolve ambiguity in its interpretation.

[20] Third, Informatica argues that the motion judge erred in her interpretation of the forum selection clause in concluding that it did not establish that the parties intended to confer exclusive jurisdiction on the California courts.

[21] We disagree. The motion judge found it significant that, in contrast to the language used in the Service Agreement, the clause in the Migration Agreement did not state it was conferring "exclusive" jurisdiction, and there was no assertion of attornment. Further, although the clause stated that it applied to "any dispute", there was no definition of "dispute". This was particularly important because of the claims asserted by Next Pathway in the action and the motion judge's finding that "as pleaded the two Agreements and the terminations of both are 'inextricably linked'" (a finding that in our view is unassailable).

[22] While Informatica points to cases where forum selection clauses have been upheld in the absence of a reference to "exclusive" jurisdiction, the motion judge properly applied the test. As noted earlier, at the first stage of the *Pompey* test, the party seeking a stay based on a forum selection clause must establish that "the clause is valid, clear and enforceable and that it applies to the cause of action before the court.": *Facebook Inc.*, at para. 28. The motion judge concluded that, giving the words of the provision their ordinary meaning, she was unable to find

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that the parties intended that any dispute arising from the Migration Agreement could only be brought in California. She concluded that the Migration Agreement did not clearly oust Ontario's jurisdiction and, applying a commercially reasonable interpretation, that the forum selection clause must be read as non-exclusive. The motion judge made no error in coming to this interpretation, which is entitled to deference.

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[23] Fourth, Informatica argues that the motion judge erred by failing to recognize that Next Pathway engaged in "artful pleading" in order to get around the forum selection clause. There is no merit to this submission. The motion judge characterized the claim regarding the termination of the Migration Agreement as a reprisal for requiring payment of the termination fee under the Service Agreement, a finding that was open to the motion judge on a plain reading of the Amended Statement of Claim.

[24] Fifth, Informatica argues that, in her alternative analysis, the motion judge erred in failing to apply the "strong cause" prong of the *Pompey* test, and that she applied a conventional *forum non conveniens* analysis instead. Given that the motion judge found that the Migration Agreement did not confer exclusive jurisdiction, the "strong cause" test did not apply in any event: *Forbes Energy Group Inc. v. Parsian Energy Rad Gas*, 2019 ONCA 372, 93 B.L.R. (5th) 169, at paras. 6-7. While it is unnecessary for the purpose of this appeal to determine

whether there was any reversible error in the motion judge's alternative analysis, we are not persuaded that the motion judge made the error Informatica alleges.

[25] *Pompey* requires the court to take into account all of the circumstances of the particular case when assessing whether the plaintiff has met the burden of establishing that the factual matrix presents the type of exceptional circumstances that justify a departure from the general principles that forum selection clauses will be enforced: *Pompey*, at para. 39. While some of the factors identified by the motion judge would also be considered in a *forum non conveniens* analysis, they were relevant to the motion judge's conclusion that "[b]ecause the case involves two agreements with interwoven factual circumstances, it makes commercial sense to have the matter litigated in one jurisdiction", and that it would be unreasonable to disregard the negotiated forum selection clause in favour of one that was imposed by Informatica on Next Pathway. This was the substance of her "strong cause" analysis, which reveals no error.

Disposition

[26] For these reasons the appeal is dismissed. As the successful party on the appeal, the respondent is entitled to its costs, fixed in the all-inclusive amount of $25,000, as agreed between the parties.

"K. van Rensburg J.A."
"B.W. Miller J.A."
"S. Coroza J.A."

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