

EIS must undertake the complex task of restoring the outstanding data to TD Waterhouse for no consideration. Neither result is commercially reasonable.

[2] Following the initial appearance, I asked the parties for written submissions regarding whether the transition provisions of the agreement applied. The Agreement contemplates the \$2.50 “document restore” fee for day-to-day requests. However, on termination, the Transition provisions of the Agreement apply to the migration of data from EIS to TD Waterhouse.

[3] For the reasons set out below, EIS shall return TD Waterhouse’s data and be compensated on a *quantum meruit* basis.

Background

[4] TD Waterhouse provides wealth management services. It is a wholly owned subsidiary of The Toronto-Dominion Bank.

[5] EIS designs, develops, maintains, and hosts customized workflow software and systems services for clients, including banks, insurance companies, and investment firms.

[6] TD Waterhouse and EIS have had a commercial relationship since 1999, when EIS first provided TD Waterhouse with certain services, including microfilming and cheque fraud detection services.

[7] From 2007 onward, the relationship between TD Waterhouse and EIS has been governed by the agreement that was executed on June 19, 2007, which has been amended ten times (the “Agreement”).

[8] During the course of the Agreement, TD Waterhouse sent a large volume of documentary records containing information about its customers to EIS to manage (including information such as requests to open an account, or requests that an account be transferred to another financial institution) (each record, an “Image”, and collectively, the “TD Data”). When the TD Data was sent to EIS, EIS scanned, indexed, and stored the records and uploaded them to a platform that was readily accessible to TD Waterhouse. After six months, the records were moved to an “offline” state, stored on servers operated by EIS. Once the records were moved to this archive, they were no longer readily accessible by TD Waterhouse.

[9] The TD Data now consists of more than 180 million records.

[10] There is no dispute that TD Waterhouse owns the TD Data. TD Waterhouse needs the data to conduct its business and for certain regulatory requirements. Under section 5(b) of the Agreement, the TD Data is the property of TD Waterhouse:

5. Intellectual Property Rights

(b) The parties agree that any images, information or data processed by EIS and any data, reports and output generated as a result of the use of the Software or

Services by or on behalf of [TD Waterhouse] or its Affiliates is and will be the exclusive property of [TD Waterhouse] or its Affiliates, as the case may be.

[11] The Agreement expired on May 15, 2025.

[12] TD Waterhouse asked EIS for the return of the TD Data.

[13] EIS responded that TD Waterhouse is not entitled to the return of the TD Data unless it pays a fee of \$2.50 per Image.

[14] The \$2.50 per Image fee requested by EIS is from the current fee schedule, which provides for a fee of \$2.50 per image for “[d]ocument restore.”

[15] To be able to access and use the TD Data, TD Waterhouse requires:

- a) The Images; and
- b) The metadata associated with the Images, which includes:
 - i. “Main Table Records”: the primary index records associated with the Images;
 - ii. “Image Table Records”: the records that associate Main Table Records and other metadata with individual Image files;
 - iii. “Notes Tables Records”: the records that associate workflow notes made by TD Waterhouse with Main Table Records and other metadata; and
 - iv. “History Table Records”: the records of edits and actions made by users of the Main Table Records, including the addition of workflow notes;

Together with any additional data needed to link the Images with the foregoing metadata and the records in the above with one another (collectively, the “Associated Metadata”).

Analysis

Is TD Waterhouse required to pay EIS \$2.50 per Image for the return of the TD Data?

[16] As I indicated above, the issue before the court is one of contractual interpretation.

[17] I have determined that TD Waterhouse is not required to pay EIS \$2.50 per Image for the return of the TD Data.

[18] The Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, 2 SCR 633, at para. 47 stated that a contract must be read “as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.” The Supreme Court of Canada further stated

that “the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine ‘the intent of the parties and the scope of their understanding’” (para. 47, citing *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] S.C.R. 744, at para. 27).

[19] A contract must also be interpreted in accordance with sound commercial principles and good business sense: *Scanlon v. Castlepoint Development Corp.*, 1992 CanLII 7745 (ON CA), 11 O.R. (3d) 744 (C.A.). As noted by the Court of Appeal for Ontario in *Kentucky Fried Chicken v. Scott’s Food Services*, 1998 CanLII 4427, 114 O.A.C. 357, at para. 27, when interpreting a contract “in accordance with sound commercial principles and good business sense,” “[c]are must be taken [...] to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.” The Court of Appeal also noted that where the document is a “negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity.”

[20] As noted above, there is no dispute that TD Waterhouse owns the TD Data, which is reflected in the Agreement. There is also no dispute that TD Waterhouse needs the data for its business. EIS is required to return the TD Data but is refusing to do so unless TD Waterhouse pays \$2.50 per Image.

[21] The parties disagree on whether the Agreement provides that TD Waterhouse is required to pay EIS more than \$460 million for the return of the TD Data. The problem is that both outcomes are commercially unreasonable. On the one hand, TD Waterhouse would have to pay more than \$460 million for the return of the TD Data currently archived with EIS. On the other hand, EIS would not be compensated for the significant costs associated with repatriating the TD Data to TD Waterhouse.

[22] The contractual provisions in dispute relate to fees payable by TD Waterhouse.

[23] Section 7(a) of the Agreement (per amendment number five to the Agreement, effective as of March 23, 2017) provides that TD Waterhouse is only responsible for paying EIS the fees set out in the Agreement:

Except as expressly stated in this Agreement, TD will not be responsible to pay EIS: (i) any additional fees or expenses not specifically enumerated or expressly stated in this Agreement, including any schedule, statement of work or change order without having given its prior written approval to any such fee or expense; or (ii) any invoices issued to TD that are later than ninety (90) days following the month in which the Services were provided by EIS.

[24] The current Fees Schedule is set out in Schedule B to the eighth amendment to the Agreement. There is no fee for the archiving/storage of the TD Data. There is a fee for a service called “Document restore” of \$2.50/image. The first iteration of this provision described the fee as follows: “Image reload charge as requested @\$2.50/image”. The use of the language “as requested” suggests that this charge was to be applied to day-to-day requests for documents made by TD Waterhouse.

[25] Schedule A to the Agreement sets out EIS's services and service levels. It was amended in 2010. It states that the "Vendor will provide the following services at the rates agreed upon, and set out in Schedule B:"

Document Restore – Moving Nearline images to online for purposes of further processing or investigation.

[26] TD Waterhouse's position is that the Agreement does not set out a fee payable to EIS for the return of the TD Data, which is TD Waterhouse's property. TD Waterhouse submits that the Agreement does not contemplate the mass repatriation of TD Waterhouse's data because that is to be determined by the parties as part of the transition plan. TD Waterhouse argues that the ordinary grammatical meaning of the Agreement read as a whole supports the view that the document restore fee does not apply to the repatriation of data on termination of the Agreement. Instead, it submits that it applies only to an "image reload charge as requested" and "document restore," is meant to cover one-off requests for documents from TD Waterhouse. In TD Waterhouse's supplemental submissions, it argues that the Agreement is structured such that upon the expiry of the Agreement, the Transition Provisions (discussed below) come into play.

[27] The \$2.50/image fee has been consistently applied by EIS to TD Waterhouse on day-to-day requests when EIS retrieved a record from the archives at TD Waterhouse's request. EIS has invoiced TD Waterhouse \$2.50 per image, and TD Waterhouse has paid the invoice. TD Waterhouse states that the fee was intended to cover these one-off retrievals, not the mass repatriation of all the TD Data on termination of the Agreement. TD Waterhouse submits that it would be commercially absurd for the Agreement to be interpreted such that this document restore fee applies to the mass migration of all TD Data on termination of the Agreement.

[28] TD Waterhouse also submits that, in any event, more than \$460 million is far more than the value of the services EIS would provide to return the TD Data. TD Waterhouse notes that the total compensation it has paid to EIS under the Agreement over the past eight fiscal years is about \$65 million. TD Waterhouse submits that a \$460 million repatriation fee for TD Waterhouse to get its own data back is simply not commercially reasonable in the circumstances.

[29] The mass transfer of TD Data has been done on one prior occasion in accordance with a specially negotiated statement of work. In and around 2013, National Bank of Canada acquired TD Waterhouse's Institutional Services business. As part of the terms of the deal, TD Waterhouse was obliged to transfer to National Bank all the customer data and images in EIS's possession for any applicable active accounts. Accordingly, TD Waterhouse asked EIS to transfer the data and images to them for their review and transfer to National Bank. Instead of the \$2.50/Image "document restore" fee, EIS charged TD Waterhouse 15 cents per Image further to a negotiated Statement of Work. EIS states that the discount was provided to TD Waterhouse in recognition of their strong business relationship and the hope that it would continue well into the future.

[30] TD Waterhouse submits that a separate statement of work was required for the mass transfer of data because the Agreement did not contemplate mass transfers.

[31] The transfer of TD Waterhouse’s data to National Bank was done in two tranches: about 860,000 images from March to June 2021 and about 22,000 images from February to March 2022. EIS stated that the work associated with the process was time-intensive, and it took a financial hit because it had agreed to a discount with TD Waterhouse.

[32] TD Waterhouse submits that the parties have shown through their conduct that the \$2.50/image fee is not appropriate on a mass migration of data. The parties entered into a specially negotiated statement of work for the one prior time there was a mass migration of data. In that statement of work, the mass migration of data was referred to as “[i]mage and data delivery to NBIN website” at a cost of \$0.15 per image. TD Waterhouse submits that if the parties were of the view that the \$2.50/image fee would otherwise have applied, they would have used similar language as in the schedule to the Agreement.

[33] EIS takes the position that the ordinary grammatical meaning of the Agreement supports its position. EIS asks the court to consider the ordinary meaning of “document restore.” EIS states that restore means to return or give back to the original owner. EIS submits that the Agreement is plain on its face. TD Waterhouse is required to pay EIS \$2.50 for each image it wants restored.

[34] However, reading the contract as a whole, the better interpretation is that the “document restore” fee is for one-off transfers of images while the Agreement is ongoing, but when the Agreement is terminated, the “Transition” provisions (discussed below) come into play.

[35] EIS’s evidence is that it must undertake a complex and time-consuming process to restore the Images in its archives to TD Waterhouse. EIS says that it will take years, not months, to complete this repatriation to TD Waterhouse. There is no question that the process is complex. However, there are discrepancies in the understanding between the parties regarding the form in which the TD Data is to be delivered when returned. For example, Rose Kramer, EIS’s founder and President, described the complexity involved with the separate packaging of all Images pertaining to a particular customer. However, TD Waterhouse expects the Images to be individually delivered, not bundled by customer.

[36] EIS has stored TD Waterhouse’s data for about 17 years. EIS’s evidence was that under the Agreement EIS was also required to ensure the security of the TD Data and confidential information stored with EIS, including the obligation to “comply with TD’s security policies and procedures in connection with its facilities and systems in order to protect TD data and all other Confidential Information of TD,” to “keep all TD data physically and logically secured and segregated from data used in EIS’s own business”, and to ensure that systems and facilities used by EIS to provide the services “shall be physically located in, or on media that is physically in, Canada, and shall not be accessible outside of Canada.”

[37] EIS submits that it has carried out its end of the bargain. It has archived the TD Data and protected the data in accordance with TD Waterhouse’s requirements for almost two decades.

[38] Rose Kramer participated in the discussions when the Agreement was negotiated. She provided evidence regarding the negotiations. Ms. Kramer’s evidence regarding the negotiations was that she recommended that the TD Data be hosted online for six months, then hosted nearline

for six months, and returned to TD Waterhouse after a year. She stated that TD Waterhouse asked that EIS archive the data after the initial six-month period, with the ability to restore the images from the archives when required by TD Waterhouse. Ms. Kramer stated that: “It was not ideal for EIS to have to store and archive millions of images.” Therefore, she proposed the fee of \$2.50 per image to restore documents from the archives, hoping that TD Waterhouse would accept her proposal for the return of data after one year. TD Waterhouse elected to have EIS archive its images following the initial six-month period, with the ability to have its images restored from the archives as needed at a cost of \$2.50 per image.

[39] As noted by TD Waterhouse, EIS agreed to hold the TD Data. If a one-off request was made to have an Image restored, the negotiated document restore fee applied. However, TD Waterhouse submits that it was not a fee to be applied on termination of the Agreement.

[40] Similar to TD Waterhouse’s argument of commercial absurdity, EIS submits that it would be commercially absurd for EIS to agree to store TD Waterhouse’s data for more than 17 years and undertake the process of repatriating that data to TD Waterhouse for no consideration.

[41] EIS submits that at the time the Agreement was negotiated, neither party contemplated that EIS would be storing over 180 million Images for TD Waterhouse, resulting in an enormous repatriation fee when the Agreement terminated. The Agreement was initially contemplated for three years. For the first three years of the Agreement, the total number of Images was about 11 million. Starting in 2014, each year there were over 10 million new Images.

[42] However, the Transition provisions were added by amendment effective as of October 1, 2010, and further amended by the second amendment to the Agreement, dated September 30, 2013.

[43] In my view, the “Document Restore” fee that was included in the Agreement was contemplated for day-to-day requests by TD Waterhouse for archived data not for the mass migration on termination of the Agreement. I agree with TD Waterhouse’s supplemental submission that the structure of the Agreement represents the bargain between TD Waterhouse and EIS:

- a) At all times, TD Waterhouse owns the TD Data.
- b) Before the Agreement terminates, if TD Waterhouse needs EIS to restore an archived document to EIS’s website, TD Waterhouse pays a fee of \$2.50 per image.
- c) Upon expiry of the Agreement, the Transition Provision comes into play.

[44] The Agreement contemplates “Transition”, which is defined to mean “the orderly, timely and efficient migration of Services, Software and data from EIS to TD or another service provider, including the performance by EIS of the Transition Services, in accordance with the timetable specified in the Transition Plan and Statement of Work.” [emphasis added.]

[45] “Transition Services” is defined to have the meaning set out in Section 20. Section 20 of the Agreement (as amended by the second amendment to the Agreement) provides:

- (a) At TD’s request, EIS and TD will jointly develop a detailed plan for the Transition of Services from EIS to TD or an Other Service Provider (the “Transition Plan”) that will provide for the orderly wind-down and transfer of Services and, as applicable, associated assets, agreements and employees dedicated to TD or an Other Service Provider upon the termination or expiration of such Statement of Work or this Agreement. The Transition Plan will: (i) describe the overall approach with respect to the Transition of the Services from EIS to TD or an Other Service Provider designated by TD; (ii) identify and assign responsibility for the performance of all necessary Transition-related activities, including the return of data and records if any relating to data processing in a format acceptable to TD and any resources; and (iii) identify a projected completion date for the Transition Services. EIS will be responsible for providing to TD a draft of the initial Transition Plan for TD’s review and approval. EIS will incorporate any reasonable comments or suggestions made by TD into the draft Transition Plan. Using the Change Order Procedures, the Parties may subsequently amend the Transition Plan at any time, and from time to time, before or during the Assistance Period, to reflect any necessary or desirable changes. Unless otherwise agreed by the parties in writing, the following rates will apply during the provision of the Services under this section.

[hourly and daily rates specified]

[emphasis added.]

- (b) For such period as TD may reasonably require, up to a maximum of twelve (12) months after the date of termination or expiry of this Agreement (the “Assistance Period”) EIS will provide the following Transition assistance services (the “Transition Services”): (i) continue to perform the Services in accordance with this Agreement at the rates set out in the applicable Statement of Work; and (ii) perform the obligations specified in the Transition Plan at the time and materials rates set out in the Fees Schedule. During the Assistance Period, TD may terminate all or part of the Transition Services on thirty (30) days written notice to EIS.
- (c) Without limiting Sections 20(a) and 20(b), and in consultation with TD, EIS will use its Commercially Reasonable Efforts to minimize: (i) the period applicable to Transition activities; (ii) the costs to TD in connection with the Transition; and (iii) any adverse impact on the ongoing business or operations of TD, the Services or the Service Levels during Transition.

[46] The Transition provisions require the parties to agree upon a Transition Plan, which they have been unable to do. As noted by TD Waterhouse, in the absence of an agreement on a Transition Plan, the court is unable to enforce the Transition provision as a matter of contract. The court may not create a contract for the parties: *Kelly v. Watson* (1921), 61 S.C.R. 482, 57 D.L.R. 363, at 488.

[47] In its supplemental submission, EIS submits that the data transfer is not a Transition Service, despite the clear language of section 20(a) of the Agreement. Even the definition of

“Transition” refers to the migration of data from EIS to TD Waterhouse or another service provider. This provision is the only provision in the Agreement that addresses the return of data and records to TD Waterhouse on termination.

[48] In my view, the Agreement clearly contemplates that on termination, the migration of the data held by EIS is to be addressed in the transition plan. This is a commercially reasonable interpretation of the Agreement, reading it as a whole.

Is TD Waterhouse entitled to an injunction requiring EIS to return the TD Data?

[49] TD Waterhouse seeks a permanent injunction requiring EIS to return the TD Data.

[50] I am satisfied that TD Waterhouse is entitled to a mandatory injunction under the test set out in *Labourers’ International Union of North America, Local 183 v. Castellano*, 2020 ONCA 71, 44 D.L.R. (4th) 183, at para. 25:

- a) Has the claimant proven that all the elements of a cause of action have been established or threatened?
- b) Has the claimant established to the satisfaction of the court that the wrong(s) that have been proven are sufficiently likely to occur or recur in the future that it is appropriate for the court to exercise the equitable jurisdiction of the court to grant an injunction?
- c) Is there an adequate alternate remedy, other than an injunction, that will provide reasonably sufficient protection against the threat of the continued occurrence of the wrong?
- d) If not, are there any applicable equitable discretionary considerations (such as clean hands, laches, acquiescence or hardship) affecting the claimant’s *prima facie* entitlement to an injunction that would justify nevertheless denying that remedy?
- e) If not (or the identified discretionary considerations are not sufficient to justify denial of the remedy), are there any terms that should be imposed on the claimant as a condition of being granted the injunction?
- f) In any event, where an injunction has been determined to be justified, what should the scope of the terms of the injunction be so as to ensure that only actions or persons are enjoined that are necessary to provide an adequate remedy for the wrong that has been proven or threatened or to effect compliance with its intent?

[51] TD Waterhouse has established that it owns the TD Data and has requested its return. In Ms. Kramer’s affidavit, she states that “TD owns the customer data in EIS’s possession and [...] TD needs access to that data to continue serving its customers.” TD Waterhouse’s property continues to be held in the hands of another party that does not have lawful authority to withhold it. In the absence of injunctive relief, EIS’s retention of TD’s Data will inevitably continue. EIS has demanded that TD Waterhouse pay more than \$400 million for the return of the data. There

is no remedy other than an injunction that will suffice. TD Waterhouse needs the TD Data to service its customers and comply with regulatory requirements. There are no equitable discretionary considerations that apply to prevent the court from exercising its discretion to grant an injunction.

[52] As noted by TD Waterhouse in its supplemental submission, the Court has the power to impose terms when granting an injunction. The fifth step in *Labourers' International* requires the court to consider whether any terms should be imposed as a condition of granting the injunction.

[53] TD Waterhouse submits that as a condition of granting the mandatory injunction requiring EIS to return the TD Data, the court should impose a condition requiring TD Waterhouse to pay EIS for its services on a *quantum meruit* basis based on commercially reasonable daily rates for the services rendered. I have determined that I will include the condition suggested by TD Waterhouse. The parties have thus far been unable to work out appropriate transition terms. TD Waterhouse is entitled to the return of the TD Data. However, EIS is entitled to commercially reasonable compensation for the significant work it will have to undertake to return the TD Data.

[54] TD Waterhouse included a draft judgment with its supplemental submissions, which I have amended and attached.

J Steele J.

Released: August 15, 2025

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ONSC 4718
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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

TD WATERHOUSE CANADA INC.

Applicant

– and –

ELECTRONIC IMAGING SYSTEMS
CORPORATION

Respondent

REASONS FOR DECISION

J. Steele J.

Released: August 15, 2025