

Xpert Xpress

Terms of Use

1) Interpretation

a) Definitions

In this Agreement and the schedules annexed hereto, the following terms shall have the respective meanings indicated below:

"Agreement"

means this **Xpert Xpress Software Terms of Use**, the **Software License Agreement**, the **End User License Agreement** and all schedules therein referred to.

"Applicable Laws"

means any and all (i) laws, statutes, rules, regulations, by laws, codes, treaties, constitutions and ordinances ("Laws"), (ii) order, directive, judgment, decree, award or writ of any court (including a court of equity), arbitrator or arbitration panel, or any Governmental Authority or other body exercising adjudicative, regulatory, judicial or quasi-judicial powers, including any stock exchange ("Orders"), and (iii) policies, guidelines, standards, requirements, notices and protocols of any Governmental Authority ("Policies"); which are applicable to or govern Customer, Service Provider or the transactions contemplated by this Agreement.

"Authorized User"

means a Permitted User who Customer has authorized to access and use the Services.

"Business Day"

means any calendar day except as specified 2205347 Ontario Ltd.

"Business Hour"

means the hours which 2205347 Ontario Ltd is operating normal business activities within a Business Day.

"Claim"

has the meaning ascribed to it in paragraph 13(a).

"Confidential Information"

means this Agreement, the Software, Customer Data and all ideas, designs, business models, databases, drawings, documents, diagrams, formulas, test data, marketing, financial or personnel data, sales information, customer or supplier information, including information provided by such customers or suppliers, or any other information already furnished and to be furnished or made available by one Party to the other, whether in oral, written, graphic or electronic form including any such information exchanged during informational sessions designated as confidential,

including, without limitation, information concerning a Party's actual and potential customers and other Intellectual Property Rights of such Party, provided, however, that Confidential Information shall not include any data or information: (i) that, at the time of disclosure, is in or, after disclosure, becomes part of the public domain, through no act or failure on the part of the receiving Party, whether through breach of this Agreement or otherwise; (ii) that, prior to disclosure by the disclosing Party, was already in the possession of the receiving Party, as evidenced by written records kept by the receiving Party in the ordinary course of its business, or as evidenced by proof of actual prior use by the receiving Party; (iii) independently developed by the receiving Party, by Persons having no direct or indirect access to the disclosing Party's Confidential Information provided that the receiving Party provides clear and convincing evidence of such independent development; (iv) which, subsequent to disclosure, is obtained from a third Person: (A) who is lawfully in possession of the such information; (B) who is not in violation of any contractual, legal, or fiduciary obligation to either Party, as applicable, with respect to such information; and (C) who does not prohibit either Party from disclosing such information to others; or (v) is further disclosed with the prior written consent of the disclosing Party, but only to the extent of such consent.

"Customer Data"

means collectively any data, files, documentation or other information: (i) that Customer or any of its Authorized Users may upload to the Service Provider Platform when using the Services; and (ii) processed through the use of the Services.

"Effective Start Date"

means the date specified on the Software License Agreement

"EULA"

means the Xpert Express End User License Agreement as amended from time to time and which can be located here: xpertexpress.ca/end_user_agreement

"Fees"

means the Subscription Fees as provided in section 7 of the Agreement, to be paid by Customer to Service Provider for the performance of the Services.

"Governmental Authority"

means any domestic, foreign or supranational government, whether federal, provincial, state, territorial or municipal; and any governmental agency, ministry, department, tribunal, commission, bureau, board or other instrumentality, including inter-national institutions, exercising or purporting to exercise legislative, judicial, regulatory or administrative functions of, or pertaining to, government.

"Intellectual Property"

means any property, tangible or intangible, that may be subject to Intellectual Property Rights, including without limitation, ideas, formulae, algorithms, concepts, techniques, processes, procedures, approaches, methodologies, plans, systems, research, information, documentation, data, data compilations, specifications, requirements, designs, diagrams, programs, inventions, technologies, software (including its source code), tools, products knowledge, know-how, including without limitation, trade secrets, and other materials or things.

"Intellectual Property Rights"

means: (a) any and all proprietary rights anywhere in the world provided under: (i) patent law; (ii) copyright law, including moral rights; (iii) trademark law; (iv) design patent or industrial design law; (v) semiconductor chip or mask work law; (vi) trade secret law; (vii) privacy law; or (viii) any other statutory provision or common law principle applicable to this Agreement which may provide a right in either: (A) Intellectual Property; or (B) the expression or use of Intellectual Property; and (b) any and all applications, registrations, licenses, sub-licenses, franchises, agreements or any other evidence of a right in any of the foregoing.

"Licensed Materials"

means collectively the Service Provider Platform, Software and the User Documentation.

"Software License Agreement"

means the Software License Agreement signed by the Customer.

"Network Service Provider"

means a third-party service provider that offers connectivity services to securely link separate networks.

"Objectionable Content"

means content that infringes any Applicable Laws, regulations or third-party rights, and content which is obscene, indecent, pornographic, seditious, offensive, defamatory, threatening, liable to incite racial hatred, menacing, blasphemous, misleading, deceptive or in breach of any person's Intellectual Property Rights.

"Party"

means either Service Provider or Customer; and "Parties" means both of them.

"Permitted User"

means an employee of the Customer or an independent contractor who performs work for the Customer.

"Person"

means any individual, estate, sole proprietorship, firm, partnership, unincorporated association, unincorporated syndicate, unincorporated organization, limited liability company, corporation, body corporate, trustee, trust, Governmental Authority or other entity or organization and includes any successor to any of the foregoing.

"Privacy Policy"

Means the Xpert Xpress Privacy Policy as amended from time to time and located here: xpertxpress.ca

"Service Provider Platform"

means the Software, Service Provider Server and such devices and peripherals physically located with the Service Provider Server, including all computer hardware, software, network elements, and electrical and telecommunications infrastructure.

"Service Provider Server"

means that computer server located at Service Provider's premises, or a third-party provider of hosting and/or network services, that houses the Software.

"Services"

means collectively the Software, Maintenance and Client Care to be provided by Service Provider to Customer.

"Software"

means the SaaS Software licensed to the Customer as set out in the Software License Agreement signed by the Customer.

"Service Agreement"

means the Software License Agreement and the Software Terms of Use.

"Specifications"

means, with respect to the Software, the functional specifications for the performance, operation and use of the Software, as set out in the User Documentation.

"Term"

has the meaning ascribed to it in paragraph 8 of this Schedule.

"User Documentation"

means the documents, user manuals and guides with respect to the operation, use and functions of the Software, which may be amended or updated by Service Provider from time to time.

"Virus"

means a piece of code usually (but not necessarily) disguised as something else that causes some unexpected and, for the victim, usually undesirable, event and which is designed so that it may automatically spread to other computer users; the term "Virus" will also be deemed to include worms, cancelbots, trojan horses, harmful contaminants (whether self-replicating or not) and nuisance-causing or otherwise harmful applets.

b) Headings

The division of this Agreement into articles, sections, schedules and other subdivisions, and the inclusion of headings, are for convenience of reference only and shall not affect the construction or interpretation of this Agreement. The headings in the Agreement are not intended to be full or precise descriptions of the text to which they refer. Unless something in the subject matter or context is inconsistent therewith, references herein to Articles and Sections are to Articles and Sections of this Agreement.

c) Entire Agreement

This Agreement, together with the EULA xpertxpress.ca/end_user_agreement and the Privacy Policy xpertxpress.ca constitutes the entire agreement between the Parties pertaining to the subject matter hereof and supersedes all prior agreements, negotiations, discussions and understandings, written or oral, between the Parties. Except as expressly provided in this Agreement, there are no representations, warranties, conditions other agreements or acknowledgements, whether direct or collateral, express or implied, that form part of or affect this Agreement. The execution of this Agreement has not been induced by, nor do either of the Parties rely upon or regard as material, any representations, warranties, conditions, other agreements or acknowledgements not expressly made in this Agreement or in the other documents to be delivered pursuant hereto.

d) Governing Law

This Agreement shall be governed by, and construed and enforced in accordance with, the laws in force in the Province of Ontario, Canada (excluding any conflict of laws rule or principle which might refer such construction to the laws of another jurisdiction). The Parties hereto agree to submit to the exclusive jurisdiction of the courts of the Province of Ontario, Canada and waive any objection relating to improper venue or *forum non convenient* to the conduct of any proceeding in any such court.

e) Severability

In the event that any provision (or any portion of a provision) of this Agreement shall, for any reason, be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable for any reason, such invalidity, illegality or unenforceability shall not affect any other provision hereof and this Agreement shall be construed as if such invalid, illegal or unenforceable provision (or portion of a provision) had never been contained herein in regards to that particular jurisdiction.

f) Additional Rules of Interpretation

- i) In this Agreement, unless the context requires otherwise, words in one gender include all genders and words in the singular include the plural and *vice versa*.
- ii) Wherever the words "include", "includes" or "including" are used in this Agreement, they shall be deemed to be followed by the words "without limitation" and the words following "include", "includes" or "including" shall not be considered to set forth an exhaustive list.
- iii) The terms "this Agreement", "hereof", "hereunder" and similar expressions refer to this Agreement and not to any particular article, section or other portion hereof and include any agreement supplemental hereto.
- iv) Unless otherwise defined herein, words or abbreviations which have well-known trade meanings are used herein with those meanings

2) Services Generally

Subject to the terms and conditions contained in this Agreement and payment of the Fees by Customer to Service Provider, Service Provider shall perform the Services as set out herein to Customer in accordance with the terms hereof and the policies and procedures in relation to the Service, which are established by Service Provider from time to time. In the event of a conflict between the preceding documents, the following shall be the order of precedence: (i) this Agreement; and (ii) the policies and procedures set out by Service Provider from time to time, which may be posted on the Service Provider Platform.

3) Service Provider Platform

a) Provision and Access to Service Provider Platform

The Service will require access and use of the Service Provider Platform. Service Provider shall operate and maintain the Service Provider Platform in accordance with the terms of this Agreement. Access to the Service Provider Platform may be through a secure connection with the public internet or through the use of a Network Service Provider. Customer acknowledges and agrees that Service Provider is not responsible or liable for any communication over the public internet, or for the Network Service Provider's network or its operation or the Network Service Provider's network's failure to deliver communication to and from the Service Provider Platform on a timely basis.

b) Maintenance

From time to time, it will be necessary to perform maintenance on the Service Provider Platform. Such maintenance includes routine maintenance to ensure the continued provision of the Services through the continued operation of the Service Provider Platform or upgrading, updating or enhancing the Service Provider Platform. Commercially reasonable efforts to perform such maintenance at such times to minimize the impact of any downtime of the Service Provider Platform to Customer will be implemented. To the extent Service Provider is able, Service Provider shall notify Customer in advance of any scheduled maintenance by posting a message on the website or by sending an e-mail to the designated Customer Service Manager of the scheduled maintenance time and the anticipated duration of such maintenance.

c) Changes

Service Provider may, at any time, with or without notice to Customer: (i) make changes that are necessary to comply with applicable safety, security or other statutory requirements or orders from applicable Governmental Authorities; (ii) supplement or make changes to its user documentation and to its rules of operations, access procedures, security and privacy procedures and policies; and (iii) change the components, type and location of the Service Provider Platform.

d) Customer Data

Customer acknowledges and agrees that Service Provider: (i) will not be responsible for the accuracy, completeness or adequacy of any Customer Data or the results generated from any Customer Data uploaded to the Service Provider Platform and processed by the Software; (ii) has no control over any Customer Data or the results therefrom; and (iii) does not purport to monitor Customer Data.

4) Use of Services

a) Grant by Service Provider

Subject to the terms and conditions of this Agreement commencing and for the duration of the Term as specified in the Service Agreement, Service Provider hereby grants to Customer a non-exclusive, non-transferable, revocable right, for Customer's internal business purposes to access the Service Provider Platform as set out herein for the purpose of:

- i) using the Software;
- ii) viewing and displaying the User Documentation; and
- iii) uploading, processing, viewing, displaying, using and downloading Customer Data to and from the Service Provider Platform.

Customer acknowledges that this Agreement is a services agreement and the Service Provider will not be delivering copies of the Software to Customer as part of the Services.

b) Restrictions on Use

Any rights not granted herein are strictly reserved by Service Provider. Customer shall not: (i) permit any third Person to use the Licensed Materials; (ii) re-license or sublicense, lease, loan or otherwise distribute the Licensed Materials to any third Person; (iii) process or permit to be processed the data of any other Person; or (iv) use the Licensed Materials or the Service in the operation of a service bureau. Customer shall not, and shall not permit others to, reverse engineer, decompile, disassemble or translate any software used by Service Provider to deliver the Services, including the Software, or otherwise attempt to view, display or print such software, including the Software's, source code.

c) Permitted and Authorized Users

Only Permitted Users may be authorized by Customer to use the Services or the Software as strictly provided for in this Agreement, the EULA and subject to the Privacy Policy. Customer agrees and acknowledges that any Permitted Users will be required to opt into the EULA and the Privacy Policy prior to having access to our Service Provider Platforms. Customer shall ensure that all Authorized Users are aware of the provisions of this Agreement, the EULA and the Privacy Policy including their obligation to comply with the provisions contained therein as it relates to their use of the Services and the Software. Customer shall be responsible and liable for the actions and omissions of each Authorized User and their compliance of the provisions herein.

d) Customer Support

Service Provider shall make available various levels of technical and business support to Customers and Authorized Users during Business Hours, unless otherwise specified by Service Provider.

5) Customer's Obligations

a) Grant by Customer

Customer hereby grants to Service Provider a royalty-free, non-exclusive, non-transferable right and licence to use, copy, store, display and analyze the Customer Data: (i) for the purpose of enabling Service Provider to perform the Services under this Agreement; and (ii) to improve upon the software and Services provided for under this Agreement;

b) Customer Responsibilities

In addition to its other obligations contained in this Agreement, Customer shall:

- i) be responsible for procuring, installing, operating, supporting and maintaining Customer's systems, including computer hardware and software, including browsers, necessary for Customer to access the Services;
- ii) be responsible for procuring and maintaining communication services, including high speed internet connections between Customer's systems and the Service Provider Platform;
- iii) assign, record and control the issuance and use of all Authorized Users;
- iv) be responsible for the accuracy, completeness and adequacy of all Customer Data; for the management, manipulation and processing of Customer Data; and the maintenance of all Customer Data;
- v) use the Services, Service Provider Platform and Software, by itself and Authorized Users, in accordance with Applicable Laws, the terms of this Agreement and the User Documentation; and
- vi) comply, at all times, with all applicable legal and regulatory requirements and with Service Provider's conduct and security policies in respect of the use of the Services and the Software.

c) Prohibited Activities

Customer shall not:

- i) use the Services for improper or unlawful purposes;
- ii) include, or knowingly allow others to include, any Objectionable Content or introduce Viruses to the Service Provider Platform and shall institute such security procedures and safeguards as Customer deems necessary to prevent the posting, uploading or inclusion of any Objectionable Content or Viruses to the Service Provider Platform;
- iii) intercept or attempt to intercept any messages transmitted to and from the Service Provider Platform that are not intended for Customer or any of its Authorized Users;
- iv) take any action that imposes an unreasonable or disproportionately large load on the Service Provider Platform;
- v) use the Services or the Software to develop any derivative works or any functionally compatible or competitive software;
- vi) copy or download the Software or any other software used by Service Provider to provide the Services and which is contained within the Service Provider Platform; or

vii) remove any copyright or other proprietary rights notice on the Software or the User Documentation or any copies thereof.

d) Viruses

If Service Provider, in its absolute discretion, forms the view that any Customer Data or any other information or files uploaded by Customer or any of its Authorized Users contains or includes a Virus or is considered Objectionable Content, Service Provider may remove such Customer Data, information or file from the Service Provider Platform and take such other action as Service Provider deems necessary to protect the integrity and operation of the Services, Service Provider Platform and the Software. Any costs associated with such removal may be charged by Service Provider to Customer. Service Provider shall notify Customer of its actions under this para. 5(d) as soon as reasonably possible.

6) Audit Rights

a) Service Provider's Audit Right

i) Service Provider reserves the right to monitor and audit Customer's and its Authorized Users' usage of the Services for the purpose of (among others) ensuring compliance with the terms of this Agreement, including without limitation para. 5(c). Any such audit may be carried out by Service Provider or a third party authorised by Service Provider, at Service Provider's expense.

ii) If Service Provider's monitoring activities or its audit pursuant to para. 6(a)(i) reveals that Customer's or any Authorized User's use of the Services is in contravention of this Agreement, including any Applicable Laws, then Service Provider may immediately suspend and discontinue the Services to Customer or to that specific End User, at Service Provider's sole discretion and without notice to Customer. Service Provider shall notify Customer of such suspension as soon as reasonably possible, which notice shall set out the circumstances of the suspension. If Customer rectifies the situation to Service Provider's satisfaction, then Service Provider will reinstate the Services. If Customer does not rectify the situation within a reasonable period of time, then it shall be deemed a material breach of this Agreement and Service Provider shall be free to terminate this Agreement under para. 9(c) and pursue any remedies available to it.

b) Coordination of Regulatory Audits

Customer hereby agrees that Service Provider may hire an independent third-party auditor to conduct an audit in satisfaction of para. 6(a) and to provide the results of such audit to Customer in lieu of Customer conducting its own audit. Alternatively, and if consented to by Service Provider, Customer shall coordinate with Service Provider regarding the timing, scope and processes of any audit conducted by Customer under para. 6(a) to minimize any disruption to the Services and duplication of effort with any other similar audit.

7) Fees and Payment

a) Fees

Fees, payment terms and invoicing are as set out in the Service Agreement. For Terms that have expired beyond what is contracted in the Service Agreement and have not be renewed, Fees will default to 120% of the Fee of a standard monthly subscription rate of a one (1) year contract. The Fees do not include applicable taxes. Customer agrees to pay the Fees and applicable taxes in accordance with the payment terms as set out in the Service Agreement.

b) Taxes

Customer shall pay any and all taxes, however designated or incurred, which are paid or payable as a result of or otherwise in connection with the transactions contemplated in this Agreement including, without limitation, federal, provincial and local, excise, sales, use, goods and services, harmonized, value added and any taxes or other amounts in lieu thereof, except for any taxes based on Service Provider's net income.

c) Interest on Late Payments

Where Customer fails to pay any amount in accordance with the payment terms set out in The Agreement, Service Provider shall have the right, in addition to any other rights or remedies available to it, to charge, and Customer shall pay, interest on such overdue amounts at the rate of 3% per month calculated daily, compounded monthly both before and after any court judgement in respect of the same from the date such payment was due.

8) Term

The term of this Agreement and the rights and obligations of the Parties hereto shall commence as of the Effective Start Date as specified in the Customer's Service Agreement. Unless either Party notifies the other prior to the expiration of the Initial Term or the then Renewal Term, this Agreement and the rights and obligations of the Parties hereto shall renew on a monthly basis and will incur Services Fees that are 120% of those of a one standard (1) year contract's monthly fee.

9) Suspension and Termination

a) Suspension of Services

In the event that Customer does not pay the Fees or any portion thereof, when due, Service Provider may immediately suspend Customer's and each of its Authorized Users' right to receive the Services and access and use of the Software.

b) Customer's Right to Terminate

Subject to para. 9(e), Customer may terminate this Agreement and the rights granted hereunder without prejudice to enforcement of any other legal right or remedy, immediately upon giving written notice of such termination if Service Provider breaches any material provision of this Agreement and such breach continues for a period of twenty (20) Business Days after delivery of a written notice by Customer requiring Service Provider to correct such failure;

c) Service Provider's Right to Terminate

Subject to para 9(e) Service Provider may terminate this Agreement and the rights granted hereunder without prejudice to enforcement of any other legal right or remedy, immediately upon giving written notice of such termination if Customer:

- i) fails to pay in full any sum owing by it under this Agreement by the due date thereof and such failure continues for a period of five (5) Business Days after delivery of a written notice by Service Provider requiring Customer to correct such failure;
- ii) infringes the Intellectual Property Rights of Service Provider;
- iii) breaches any other provision of this Agreement and such breach continues for a period of twenty (20) Business Days after delivery of a written notice by Service Provider requiring Customer to correct such failure; or
- iv) becomes or is adjudicated insolvent or bankrupt, admits in writing its inability to pay its debts as they mature, or makes an assignment for the benefit of creditors; or Customer applies for or consents to the

appointment of any receiver, trustee or similar officer for it or for all or any substantial part of its property; or such receiver, trustee or similar officer is appointed without the consent of Customer; or Customer institutes any bankruptcy, insolvency, reorganization, moratorium, arrangement, readjustment or debt, dissolution, liquidation or similar proceeding relating to it under the laws of any jurisdiction, or any such proceeding is instituted against Customer and is not dismissed within sixty (60) Business Days; or any judgment, writ, warrant or attachment or execution of similar process is issued or levied against a substantial part of Customer's property and remains unsatisfied for sixty (60) Business Days.

d) Waiver

The waiver by either Party of a breach or default of any provision of this Agreement by the other Party shall not be effective unless in writing and shall not be construed as a waiver of any succeeding breach of the same or of any other provision. Nor shall any delay or omission on the part of either Party to exercise or avail itself of any right, power or privilege by such Party constitute a waiver.

e) Effect of Termination

Upon the termination of this Agreement for any reason:

- i) Service Provider shall terminate and invalidate any access to the Service associated with Customer and any of its Authorized Users;
- ii) Service Provider shall, but not earlier than 10 Business Days after the termination or expiration of this Agreement, destroy any copies of the Customer Data contained in the Service Provider Platform;
- iii) Customer shall pay to Service Provider the full amount of all Fees payable for the remainder of the Term hereunder as of the date of termination, if any, whether already invoiced or not (including any amounts due as late payment charges), and any other monies owing to Service Provider hereunder; and

Customer acknowledges and agrees if Customer fails to download the Customer Data from the Service Provider Platform in a timely manner, it may not have access to such information or such information may be destroyed by Service Provider in accordance with the terms of this para. 9(e). It is Customer's responsibility to download and obtain all Customer Data prior to the expiration or termination of this Agreement. Service Provider shall have no responsibility, or any liability to Customer, for maintaining or providing to Customer the Customer Data or any portion thereof from and after the 30th Business Day after the termination or expiration of this Agreement.

f) Survival of Covenants

Notwithstanding the termination or expiration of this Agreement for any reason, the covenants set out in this para. 9(g) and paras. 7(c), 9(e), 9(f), 10, 11, 15, 16, 17, 18(a) and those provisions set out in para. 1, as necessary to interpret the foregoing provisions, of this Agreement shall survive any such termination or expiration.

10) Ownership

a) Service Provider's Ownership

Customer acknowledges and agrees that, as between Customer and Service Provider, Service Provider owns all worldwide right, title and interest, including all Intellectual Property Rights, in and to: (i) the Service Provider Platform; (ii) Software; (iii) User Documentation; and (iv) any modifications, enhancements, upgrades, updates or customization to the Software or User Documentation. Customer does not acquire any rights, title or ownership interests of any kind whatsoever, express or implied, in any of the foregoing other than the licenses granted herein.

b) Customer's Ownership

Service Provider acknowledges and agrees that all worldwide right, title and interest, including all Intellectual Property Rights in and to the Customer Data, shall be the exclusive property of Customer. Service Provider does not acquire any rights, title or ownership interest of any kind whatsoever, express or implied, in any of the Customer Data, other than the license granted herein (save and except for the uses outlined in para 5(a) of this Agreement.

c) No Reverse Engineering

Without limiting the generality of the foregoing, the Customer shall not reverse engineer, decompile, disassemble or otherwise attempt to derive the design, device or create any derivative software from, any of the Software, the Service provider Platform, User Documentation or any other items described in 10(a).

11) Confidentiality

a) Obligation

Each Party acknowledges that all Confidential Information consists of confidential and proprietary information of the disclosing Party. Each Party shall, and shall cause its employees, agents and contractors to hold Confidential Information of the other Party in confidence, and shall use the same degree of care by instruction, agreement or otherwise, to maintain the confidentiality of the other Party's Confidential Information that it uses to maintain the confidentiality of its own Confidential Information, but with at least a reasonable degree of care commensurate with the nature and importance of such Confidential Information. Each Party agrees not to make use of Confidential Information other than for the exercise of rights or the performance of obligations under this Agreement, and not to release, disclose, communicate it or make it available to any third person other than employees, agents and contractors of the Party who reasonably need to know it in connection with the exercise of rights or the performance of obligations under this Agreement.

b) Subpoena

In the event that any Party receives a request to disclose all or any part of the Confidential Information under the terms of a valid and effective subpoena or order issued by a court of competent jurisdiction or by a Governmental Authority, such Party agrees to: (i) immediately notify the other Party of the existence, terms and circumstances surrounding such a request; (ii) consult with the other Party on the advisability of taking legally available steps to resist or narrow such request; and (iii) if disclosure of such Confidential Information is required, exercise its best efforts to obtain an order or other reliable assurance that confidential treatment will be accorded to such portion of the disclosed Confidential Information which the other Party so designates.

c) Injunctive Relief

Each Party acknowledges and agrees that any unauthorized use or disclosure by it of any of the other Party's Confidential Information, in whole or part, will cause irreparable damage to the disclosing Party, that monetary damages would be an inadequate remedy and that the amount of such damages would be extremely difficult to measure. The receiving Party agrees that the disclosing Party shall be entitled to seek temporary and permanent injunctive relief to restrain the receiving Party from any unauthorized disclosure or use. Nothing in this Agreement shall be construed as preventing the disclosing Party from pursuing any and all remedies available to it for a breach or threatened breach of a covenant made in this para. 11, including the recovery of monetary damages from the receiving Party.

12) Representations, Warranties and Disclaimers

a) Mutual Representations of the Parties

Each Party represents to the other that:

- i) it is a company duly organized, validly existing and in good standing under the laws of its incorporation and it has full power and authority to enter into this Agreement and to perform each and every covenant and agreement herein contained;
- ii) this Agreement, through the Customer's signing of the Service Agreement, has been duly authorized, executed and delivered by it and constitutes a valid, binding and legally enforceable agreement of it;
- iii) the execution and delivery of this Agreement, and the performance of the covenants and agreements herein contained, are not, in any manner or to any extent, limited or restricted by, and are not in conflict with, any commercial arrangements, obligations, contract, agreement or instrument to which it is either bound or subject; and
- iv) the execution and delivery of this Agreement and the performance of its covenants and agreements herein contained shall comply in all respects with all laws and regulations to which it or its business is subject.

b) Additional Representations of Service Provider

Service Provider represents to Customer that Service Provider possesses the knowledge, skill and experience necessary for the provision and completion of the Services in accordance with the terms of this Agreement.

c) Warranties

Service Provider warrants that:

- i) it shall perform the Services in a first class, professional and timely manner in accordance with the highest professional and industry standards; and
- ii) for the duration of the Term, the Software will substantially operate in accordance with, and have the functions set out in, the Specifications.

d) Exclusion of Other Warranties

Except as otherwise expressly stated in this Agreement, there are no express or implied warranties or conditions in relation to the Service, the Service Provider Platform, Software or User Documentation that are the subject matter of this Agreement, including implied warranties or conditions of merchantable quality, fitness for a particular purpose, or non-infringement, or that the services, Service Provider Platform, Software or User Documentation will meet Customer's needs or will be available for use at any particular

time or will be error free. Under no circumstances will Service Provider be liable for the results of Customer use or misuse of the Services, including any use contrary to Applicable Law.

13) Indemnities

a) Intellectual Property Indemnity

Service Provider shall defend at its own expense any claim, proceeding or suit (a "Claim") brought against Customer or any of its Authorized Users to the extent such Claim alleges that any of the Service, Software or User Documentation furnished hereunder infringes any Canadian copyright, patent or registered trademark of a third person and will indemnify and pay all damages which by final judgment or settlement may be assessed against Customer on account of such infringement, provided that:

- i) Service Provider is given prompt written notice of the Claim or of any allegations or circumstances known to Customer which could result in a Claim;
- ii) Service Provider is given all reasonable information and assistance from Customer, at Service Provider's expense, which Service Provider may require to defend the Claim;
- iii) Service Provider is given sole control of the defence of the Claim, and all negotiations for the settlement or compromise thereof; and
- iv) the alleged infringement does not result from any non-permitted uses, alterations, modifications or enhancements carried out by Customer or on its behalf by a third person.

If such Claim has occurred, or in Service Provider's opinion is likely to occur, Service Provider may, at its option and expense, either procure for Customer the right to continue using the Service, Software or User Documentation or modify the same so that it becomes non-infringing without loss of functionality, or if none of the foregoing alternatives is reasonably available and at Service Provider's discretion, discontinue the Service and use of the Software and refund to Customer any pre-paid and unused portion of the Fees paid by Customer in respect of use of the Services. The foregoing states the entire obligations of Service Provider with respect to any infringement of Intellectual Property Rights of any third Person.

b) Customer's Indemnity

Customer shall defend at its own expense any Claim brought against Service Provider, its affiliates, directors, officers, employees and agents, to the extent such Claim: (i) alleges, directly or indirectly, that any Customer Data infringes any copyright, patent or registered trademark of a third person; alleges, directly or indirectly, that the Customer Data contains any Objectionable Content; or (iii) is in relation to Customer's use of the Service, including contrary to Applicable Law, except however to the extent as Service Provider has indemnified Customer pursuant to para. 13(a); provided that Customer is given:

- i) prompt written notice of the Claim or of any allegations or circumstances known to Service Provider which could result in a Claim;
- ii) all reasonable information and assistance from Service Provider, at Customer's expense, which Customer may require to defend the Claim; and
- iii) sole control of the defence of the Claim, and all negotiations for its settlement or compromise thereof.

14) Limitation of Liability

a) Consequential Damages

Subject to para. 14(c), in no event shall either Party be liable to the other for any consequential, incidental, exemplary or punitive damages even if advised in advance of the possibility of such damages. Further Service Provider shall not be liable to Customer for any lost revenue, lost profit or lost savings.

b) Limitation of Direct Damages

Subject to para. 14(c), in respect of any claim, demand or action by either Party against the other or any of their respective employees, directors, officers, or agents whether based in contract, tort (including negligence), or otherwise, including a breach by a Party of any of its obligations under this Agreement (whether or not a fundamental breach), the other Party's sole and exclusive remedy shall be to receive from the breaching Party payment for actual and direct damages to a maximum aggregate amount equal to: (i) in the case of a breach by Service Provider the amount paid by Customer to Service Provider in the 12 months preceding the date of the event; and (ii) in the case of a breach by Customer USD\$500,000.

c) Exceptions to Limitations

Notwithstanding paras. 14(a) and (b), neither Party excludes nor limits any liability for:

- i) personal injury or death to the extent that such injury or death results from the negligence or wilful misconduct of a Party or its employees;
- ii) fraud, fraudulent misrepresentation or fraudulent concealment;
- iii) the Party's obligations set out in paras. 4(a), 4(b), 4(c), 5(c), 10(a), 10(c), 11 or 14; or
- iv) Customer's payment obligations contained herein.

15) Force Majeure

Except for any obligation to make payments, any delay or failure of either Party to perform its obligations under this Agreement or under any Schedule attached hereto shall be excused if, and to the extent, that the delay or failure is caused by an event or occurrence beyond the reasonable control of the Party and without its fault or negligence, such as, by way of example and not by way of limitation, acts of God, action by any Governmental Authority (whether valid or invalid), fires, flood, wind storms, explosions, riots, natural disasters, wars, terrorist acts, sabotage, labour problems (including lock-outs, strikes and slowdowns, except for any labour problems of the Party claiming a force majeure event), or court order or injunction; provided that written notice of delay (including anticipated duration of the delay) shall be given by the affected Party to the other Party within 10 Business Days of the affected Party first becoming aware of such event. If requested by the unaffected Party, the affected Party shall, within 10 Business Days of the request, provide adequate assurances that the delay shall not exceed 60 Business Days. In the event that the force majeure event lasts for 60 Business Days or longer, either Party shall have the option to terminate this Agreement upon written notice to the other without liability.

16) Dispute Resolution

a) Discussions

Each Party agrees to utilize all reasonable efforts to resolve any dispute, whether arising during the term of this Agreement or at any time after the expiration or termination of this Agreement, which touches upon the validity, construction, meaning, performance or affect this Agreement or the rights and liabilities of the Parties or any matter arising out of or connected with this Agreement, promptly and in an amicable and good faith manner by negotiations between the Parties.

b) Mediation

Either Party may submit a dispute to mediation by providing written notice to the other Party. In the mediation process, the Parties will try to resolve their differences voluntarily with the aid of a single, impartial mediator, who shall attempt to facilitate negotiations. The mediator shall be selected by agreement of the Parties. If the Parties cannot otherwise agree on a mediator within 10 Business Days, a single mediator shall be designated by the ADR Institute of Canada, Inc. or any successor organization ("ADR") at the request of a Party. Any mediator so designated must not have a conflict of interest with respect to any Party. The mediation shall be conducted as specified by the mediator and agreed upon by the Parties. The Parties agree to discuss their differences in good faith and to attempt, with the assistance of the mediator, to reach an amicable resolution of the dispute. The mediation shall be treated as a settlement discussion and therefore shall be confidential. The mediator may not testify for either Party in any later proceeding relating to the dispute. No recording or transcript shall be made of the mediation proceedings. Each Party shall bear its own costs and legal fees in the mediation. The Parties shall share the fees and expenses of the mediator equally.

c) Arbitration

Subject to para. 16(d), any dispute that has proceeded through mediation established in para. 16(b) without resolution may be submitted to arbitration. Any arbitration conducted pursuant to this Agreement shall take place in the City of Toronto. The costs of the arbitration shall be borne equally by the Parties or as may be specified in the arbitrator's decision. The provisions of Ontario's *Arbitration Act*, S.O. 1991, c. 17, as amended, except as otherwise provided in this Agreement, shall govern the arbitration process. The Parties agree to exclude the appeal provisions of the *Arbitration Act*, as may be amended from time to time, and in particular, s. 45 thereof. The determination arising out of the arbitration process shall be final and binding upon the Parties to the arbitration.

d) Exceptions to Arbitration

The following matters shall be excluded from arbitration under this Agreement:

- i) any disputes involving third Persons;
- ii) breach of confidentiality by either Party; and
- iii) intellectual property claims, whether initiated by third Persons or by one of the Parties to this Agreement.

17) Miscellaneous

a) Relationship

The Parties are independent contractors and no other relationship is intended. Nothing herein shall be deemed to constitute either Party as an agent, representative or employee of the other Party, or both Parties as joint ventures or partners for any purpose. Neither Party shall act in a manner that expresses or implies a relationship other than that of independent contractor. Each Party shall act solely as an independent contractor and shall not be responsible for the acts or omissions of the other Party. Neither Party will have the authority or right to represent nor obligate the other Party in any way except as expressly authorized by this Agreement.

b) Enurement

This Agreement shall enure to the benefit of and be binding upon each of the Parties hereto and their permitted successors and assigns.

c) No Assignment

Neither this Agreement nor any rights or obligations hereunder shall be assignable by a Party without the prior written consent of the other Party.

d) Language

It is the Parties desire and agreement that this Agreement and associated documentation be drafted in English..