



IBM Agreement for Services Acquired from an IBM Business Partner

IBM Canada Limited (“IBM”) has signed agreements with certain organizations (called “IBM Business Partners”) to promote, market, and support certain Services. Some IBM Business Partners also fulfill these functions through other remarketers who are not IBM Business Partners. However, when the term IBM Business Partner is used herein it will mean IBM Business Partners and their remarketers. This IBM Agreement for Services Acquired from an IBM Business Partner (called the “Agreement”) governs transactions by which Customer acquires Services from an IBM Business Partner that IBM is responsible for providing to Customer under the warranties and other terms of this Agreement. IBM is not responsible for the actions or statements of IBM Business Partners, any obligations either has to Customer, or any products or services that they supply to Customer under their agreements. IBM Business Partners establish the price and terms at which they market Services. In the event that Customer’s IBM Business Partner is no longer able to offer Services, for any reason, Customer may continue to receive Services by contacting IBM.

1. Definitions

Enterprise – any legal entity (such as a corporation) and the subsidiaries it owns by more than 50 percent. The term “Enterprise” applies only to the portion of the Enterprise located in Canada.

Licensed Internal Code (called “LIC”) – Machine Code used by certain IBM Machines IBM specifies (called “Specific Machines”).

Machine – a hardware device, its features, conversions, upgrades, elements, or accessories, or any combination of them. The term “Machine” includes an IBM Machine and any non-IBM Machine (including other equipment) for which IBM may provide Services to Customer.

Machine Code – microcode, basic input/output system code (called “BIOS”), utility programs, device drivers, diagnostics, and any other code (all subject to any exclusions in the license provided with it) delivered with an IBM Machine for the purpose of enabling the Machine’s function as stated in its Specifications. The term “Machine Code” includes LIC.

Materials – literary works or other works of authorship (such as software programs and code, documentation, reports, and similar works) that IBM may deliver to Customer as part of a Service. The term “Materials” does not include: i) Machine Code, or ii) licensed program products or other items available under their own license terms or agreements.

Service – performance of a task, assistance, support, or access to resources (such as an information database) that IBM makes available to Customer.

Specifications – information specific to a Machine. IBM Machine Specifications are in a document entitled “Official Published Specifications”.

2. Attachments and Transaction Documents

Additional terms for Services are in documents called “Attachments”, sometimes referred to as Amendments, and “Transaction Documents” provided by IBM. In general, Attachments contain terms that may apply to more than one Services transaction, while Transaction Documents (such as a statement of work, supplement, schedule, invoice, exhibit, change authorization, or addendum) contain specific details and terms related to each individual transaction. Customer may receive one or more Transaction Documents for a single transaction. Attachments and Transaction Documents are part of this Agreement only for those transactions to which they apply. Each transaction is separate and independent from other transactions. IBM makes the applicable Attachments and Transaction Documents available to Customer directly or through Customer’s IBM Business Partner.

If there is a conflict among the terms of this Agreement, Attachments, and Transaction Documents, those of an Attachment prevail over those of this Agreement, and the terms of a Transaction Document prevail over those of both this Agreement and an Attachment.

3. Acceptance of Terms

Customer accepts the terms in Attachments and Transaction Documents by i) signing them (by hand or electronically), ii) using the Service, or allowing others to do so, or iii) making any payment to Customer’s IBM Business Partner for the Service.

A Service becomes subject to this Agreement when IBM accepts Customer's order from Customer's IBM Business Partner by i) sending Customer a Transaction Document or ii) providing the Service.

Any Attachment or Transaction Document will be signed by both parties if requested by either party.

4. Charges and Payment

Customer's IBM Business Partner sets the charges and terms governing charges. Customer will make payment directly to Customer's IBM Business Partner. However, IBM may charge Customer directly for some expenses incurred to perform Customer's Service request (for example, actual travel and living expenses and out-of-pocket expenses). IBM will not incur these expenses without Customer's prior approval.

IBM will invoice Customer for such expenses. Amounts are due upon receipt of invoice and payable as IBM specifies. Customer agrees to pay accordingly, including any late payment fee. Payment may be made electronically to an account specified by IBM or by other means agreed to by the parties.

5. Changes to the Agreement Terms

In order to maintain flexibility in our business relationship, IBM may change the terms of this Agreement by providing Customer at least three months' written notice. However, these changes are not retroactive. They apply, as of the effective date IBM specifies in the notice, only to new orders, on-going transactions that do not expire, and transactions with a defined renewable contract period. For transactions with a defined renewable contract period, Customer may request that IBM defer the change effective date until the end of the current contract period.

Customer acknowledges its agreement to have these changes apply for such transactions by i) placing new orders for Services after the change effective date, ii) failing to request that the change effective date be deferred until the start of the next renewal period, iii) allowing transactions to renew after receipt of the change notice, or iv) failing to terminate non-expiring transactions prior to the change effective date.

Otherwise, for a change to be valid, both parties must sign it. Additional or different terms in any written communication from Customer (such as an order) are void.

6. Personnel

Each party will assign personnel that are qualified to perform the tasks required of such party under this Agreement and is responsible for the supervision, direction, control, and compensation of its personnel. Subject to the foregoing, each party may determine the assignment of its personnel and its contractors.

IBM may engage subcontractors to provide or assist in providing Services, in which case IBM remains responsible for the fulfillment of its obligations under this Agreement and for the performance of the Services.

7. Materials Ownership and License

IBM will specify Materials to be delivered to Customer. IBM will deliver one copy of the specified Materials to Customer. IBM grants, or will have granted, to Customer an irrevocable, worldwide, paid-up license to use, execute, reproduce, display, perform, and distribute, within Customer's Enterprise only, copies of the specified Materials.

Customer agrees to reproduce the copyright notice and any other legend of ownership on any copies made under the licenses granted in this section.

8. Customer Resources

If Customer is making available to IBM any facilities, software, hardware or other resources in connection with our performance of Services, Customer agrees to obtain any licenses or approvals related to these resources that may be necessary for IBM to perform the Services and develop Materials. IBM will be relieved of its obligations that are adversely affected by Customer's failure to promptly obtain such licenses or approvals. Customer agrees to reimburse IBM for any reasonable costs and other amounts that IBM may incur from Customer's failure to obtain these licenses or approvals.

Unless otherwise agreed in an Attachment or Transaction Document, Customer is responsible for i) any data and the content of any database Customer makes available to IBM in connection with a Service under this Agreement, ii) the selection and implementation of procedures and controls regarding access, security, encryption, use, and transmission of data, and iii) backup and recovery of the database and any stored data.

9. Service for Machines

9.1 Service Description

IBM provides certain types of Service to keep Machines in, or restore them to, conformance with their Specifications. IBM will inform Customer of the available types of Service for a Machine. At its discretion, IBM will i) either repair or exchange the failing Machine and ii) provide the Service either at Customer's location or a service centre. IBM manages and installs selected engineering changes that apply to IBM Machines and may also perform preventive maintenance.

Any feature, conversion, or upgrade IBM services must be installed on a Machine which is i) the designated, serial-numbered Machine, if applicable, and ii) at an engineering-change level compatible with the feature, conversion, or upgrade.

When the type of Service requires that Customer deliver the failing Machine to IBM, Customer agrees to ship it suitably packaged (prepaid unless IBM specifies otherwise) to a location IBM designates. After IBM has repaired or exchanged the Machine, IBM will deliver it to Customer at IBM's expense unless IBM specifies otherwise. IBM is responsible for loss of, or damage to, Customer's Machine while it is i) in IBM's possession or ii) in transit in those cases where IBM is responsible for the transportation charges.

Customer agrees:

- a. to obtain authorization from the owner to have IBM service a Machine that Customer does not own;
- b. where applicable, before IBM provides Service, to --
 - (1) follow the problem determination and service request procedures that IBM provides,
 - (2) secure all programs, data, and funds contained in a Machine, and
 - (3) inform IBM and Customer's IBM Business Partner of changes in a Machine's location.
- c. to follow the Service instructions that IBM provides (which may include installing Machine Code and other software updates either downloaded from an IBM Internet Web site or copied from other electronic media); and
- d. when Customer returns a Machine to IBM for any reason --
 - (1) to securely erase from any Machine all programs not provided by IBM with the Machine and data, including without limitation, the following: i) information about identified or identifiable individuals or legal entities ("Personal Data") and ii) Customer's confidential or proprietary information and other data. If removing or deleting Personal Data is not possible, Customer agrees to transform such information (e.g., by making it anonymous) so that it no longer qualifies as Personal Data under applicable law;
 - (2) to remove all funds from Machines returned to IBM. IBM is not responsible for any funds, programs not provided by IBM with the Machine, or data contained in a Machine that Customer returns to IBM; and
 - (3) IBM may ship all or part of the Machine or its software to other IBM or third party locations around the world to perform its responsibilities under this Agreement, and Customer authorizes IBM to do so.

9.2 Replacements

When Service involves the exchange of a part or Machine, the item IBM replaces becomes its property and the replacement becomes Customer's. Customer represents that all removed items are genuine and unaltered. The replacement may not be new, but will be in good working order and at least functionally equivalent to the item replaced. The replacement assumes the warranty or maintenance Service status of the replaced item. Before IBM exchanges a part or Machine, Customer agrees to remove all features, parts, options, alterations, and attachments not under IBM's service. Customer also agrees to i) ensure that the part or Machine is free of any legal obligations or restrictions that prevent its exchange and ii) transfer ownership and possession of removed parts to IBM.

Service for some IBM Machines involves IBM providing Customer with an exchange replacement for installation by Customer. Such exchange replacements may be i) a part of a Machine (called a Customer Replaceable Unit, or "CRU," e.g., keyboard, memory, or hard disk drive), or ii) an entire Machine. Customer may request IBM to install the replacement CRU or Machine, however, Customer may be charged for the installation. Contact Customer's IBM Business Partner to determine if installation charges apply. IBM provides information and replacement instructions with Customer's Machine and at any time

on Customer's request. IBM specifies in the materials shipped with a replacement whether the failing CRU or Machine must be returned to IBM. When return is required, return instructions and a container are shipped with the replacement, and Customer may be charged for the replacement if IBM does not receive the failing CRU or Machine within 15 days of Customer's receipt of the replacement. Contact Customer's IBM Business Partner to determine if any charges apply.

9.3 Items Not Covered

Repair and exchange Services do not cover:

- a. accessories, supply items, consumables (such as batteries and printer cartridges), and structural parts (such as frames and covers);
- b. Machines damaged by misuse, accident, modification, unsuitable physical or operating environment, or improper maintenance by Customer or a third party;
- c. Machines with removed or altered Machine or parts identification labels;
- d. failures caused by a product for which IBM is not responsible;
- e. service of Machine alterations; or
- f. service of a Machine on which Customer is using capacity or capability, other than that authorized by IBM in writing.

9.4 Warranty Service Upgrade

For certain Machines, Customer may select a Service upgrade from the standard type of warranty Service for the Machine. Contact Customer's IBM Business Partner to determine if any charges apply.

Customer may not terminate the Service upgrade or transfer it to another Machine during the warranty period.

9.5 Start of Maintenance Coverage

When Customer orders maintenance Service for Machines, Customer's IBM Business Partner will inform Customer of the date on which maintenance Service will begin. IBM may inspect the Machine within one month following that date. If the Machine is not in an acceptable condition for service, Customer may have IBM restore it. Contact Customer's IBM Business Partner to determine if any charges apply. Alternatively, Customer may withdraw its request for maintenance Service. Contact Customer's IBM Business Partner to determine if any charges apply.

10. Warranty for IBM Services

IBM warrants that it performs each IBM Service using reasonable care and skill and according to its current description (including any completion criteria) contained in this Agreement, an Attachment, or a Transaction Document. Customer agrees to provide timely written notice of any failure to comply with this warranty so that IBM can take corrective action.

10.1 Extent of Warranty

THIS WARRANTY IS CUSTOMER'S EXCLUSIVE WARRANTY AND REPLACES ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ANY WARRANTY OF NON-INFRINGEMENT.

10.1.1 Items Not Covered by Warranty

IBM does not warrant uninterrupted or error-free operation of any deliverable or Service or that IBM will correct all defects.

Unless otherwise specified in an Attachment or Transaction Document, IBM provides Materials and non-IBM Services **WITHOUT WARRANTIES OR CONDITIONS OF ANY KIND**. However, non-IBM suppliers may provide their own warranties to Customer.

11. Automatic Service Renewal

Renewable Services renew automatically for a same length contract period unless Customer, Customer's IBM Business Partner or IBM provides written notification (at least one month prior to the end of the current contract period) to the others of its decision not to renew.

12. Limitation of Liability

12.1 Items for Which IBM May be Liable

Circumstances may arise where, because of a default on IBM's part or other liability, Customer is entitled to recover damages from IBM. Regardless of the basis on which Customer is entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM's entire liability for all claims in the aggregate arising from or related to each Service (including any Material or Machine Code provided with the Service) or otherwise arising under this Agreement will not exceed the amount of any actual direct damages up to the greater of \$100,000, or the charges (if recurring, 12 months' charges apply) Customer paid to Customer's IBM Business Partner for the Service that is the subject of the claim.

This limit also applies to any of IBM's subcontractors and program developers. It is the maximum for which IBM and its subcontractors and program developers are collectively responsible. Damages for bodily injury (including death) and physical harm to real property and tangible personal property caused by IBM's negligence are not subject to a cap on the amount of damages.

12.2 Items for Which IBM is Not Liable

Except as expressly required by law without the possibility of contractual waiver, under no circumstances is IBM, its subcontractors, or program developers liable for any of the following even if informed of their possibility:

- a. loss of, or damage to, data;
- b. special, incidental, consequential or indirect damages (other than as part of the payments for bodily injury including death caused by our negligence) including, but not limited to, lost profits, business, revenue, goodwill or anticipated savings even if informed of their possibility; or
- c. exemplary damages.

13. General Principles of Our Relationship

13.1 Notices and Communications

Written communications, including notices to the receiving party's designated representative, are to be sent to the address (physical, e-mail or facsimile) specified in an applicable Attachment or Transaction Document. The parties consent to the use of electronic means and facsimile transmissions to send and receive communications in connection with our business relationship arising out of this Agreement, and such communications are acceptable as a signed writing. An identification code (called a "user ID") contained in an electronic document is sufficient to verify the sender's identity and the document's authenticity.

13.2 Assignment and Resale

Neither party may assign this Agreement, in whole or in part, without the prior written consent of the other. Any attempt to assign without consent is void. The assignment of this Agreement, in whole or in part, within the Enterprise of which either party is a part or to a successor organization by merger or acquisition does not require the consent of the other. IBM is also permitted to assign its rights to payments without obtaining Customer's consent. It is not considered an assignment for IBM to divest a portion of its business in a manner that similarly affects all of its customers.

Customer agrees not to resell any Service without IBM's prior written consent. Any attempt to do so is void.

13.3 Compliance with Laws

IBM will comply with laws applicable to IBM generally as a provider of information technology products and Services. IBM is not responsible for determining the requirements of laws applicable to Customer's business, including those relating to Services that Customer acquires under this Agreement, or that IBM's provision of or Customer's receipt of particular Services under this Agreement meets the requirements of such laws. Notwithstanding anything in this Agreement to the contrary, neither party is obligated to take any action that would violate law applicable to that party.

Each party will comply with applicable export and import laws and regulations, including those of the United States that prohibit or limit export for certain uses or to certain end users.

13.4 Dispute Resolution

Each party will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations under this Agreement. The parties will attempt in good faith to resolve all disputes, disagreements, or claims between the parties relating to this Agreement. Unless otherwise required by applicable law without the possibility of contractual waiver or limitation, i) neither party will bring a legal action, regardless of form, arising out of or related to this Agreement or any transaction under it more than two years after the cause of action arose; and ii) after such time limit, any legal action arising out of this Agreement or any transaction under it and all respective rights related to any such action lapse.

13.5 Other Principles of Our Relationship

- a. Neither party grants the other the right to use its (or any of its Enterprise's) trademarks, trade names, or other designations in any promotion or publication without prior written consent.
- b. The exchange of any confidential information will be made under a separate, signed confidentiality agreement. However, to the extent confidential information is exchanged in connection with any Service under this Agreement, the applicable confidentiality agreement is incorporated into, and subject to, this Agreement.
- c. This Agreement and any transaction under it do not create an agency, joint venture, or partnership between Customer and IBM. Each party is free to enter into similar agreements with others to develop, acquire, or provide competitive products and services.
- d. Each party grants only the licenses and rights specified in this Agreement. No other licenses or rights (including licenses or rights under patents) are granted either directly, by implication, or otherwise.
- e. Customer authorizes International Business Machines Corporation and its subsidiaries (and their successors and assigns, contractors and IBM Business Partners) to store and use Customer's business contact information wherever they do business, in connection with IBM products and Services or in furtherance of IBM's business relationship with Customer.
- f. No right or cause of action for any third party is created by this Agreement or any transaction under it, nor is IBM responsible for any third party claims against Customer except as permitted by the Limitation of Liability section above for bodily injury (including death) or physical harm to real or tangible personal property caused by IBM's negligence for which IBM is legally liable to that third party.
- g. Customer is responsible for selecting the Services that meet its needs and for the results obtained from the use of the Services, including Customer's decision to implement any recommendation concerning Customer's business practices and operations.
- h. Where approval, acceptance, consent or similar action by either party is required under this Agreement, such action will not be unreasonably delayed or withheld.
- i. Neither party is responsible for failure to fulfill any non-monetary obligations due to events beyond its control.
- j. As reasonably required by IBM to fulfill its obligations under this Agreement, Customer agrees to provide IBM with sufficient and safe access (including remote access) to Customer's facilities, systems, information, personnel, and resources, all at no charge to IBM. IBM is not responsible for any delay in performing or failure to perform caused by Customer's delay in providing such access or performing other Customer responsibilities under this Agreement.

14. Data Privacy

The following provisions shall apply in the event that one party makes Personal Data available to the other:

"Personal Data" refers to information relating to an identified or identifiable individual made available by one party, its personnel or any other individual to the other party in connection with an agreement between them.

- a. General
 - (1) Each of the parties is responsible for complying with any obligations applying respectively to each of the parties under applicable Canadian data privacy laws and regulations ("Laws").

- (2) Neither party will request Personal Data beyond what is necessary to fulfill the purpose(s) for which it is requested. The purpose(s) for requesting Personal Data shall be reasonable. Each of the parties will agree in advance as to the type of Personal Data which is required to be made available.
- b. Security Safeguards
 - (1) Each of the parties acknowledges that it is solely responsible for determining and communicating to the other the appropriate technological, physical and organizational security measures required to protect Personal Data.
 - (2) Each of the parties will ensure that Personal Data is protected in accordance with the security safeguards communicated by the other.
 - (3) Each of the parties will ensure that any third party to whom Personal Data is transferred is bound by the applicable terms of these provisions.
 - (4) Additional or different services required to comply with the Laws will be deemed a request for new services.
 - c. Use
 - (1) Each of the parties agrees that Personal Data will only be used, accessed, managed, transferred, disclosed to third parties or otherwise processed to fulfill the purpose(s) for which it was made available.
 - d. Access Requests
 - (1) Each of the parties agrees to reasonably cooperate with the other in connection with access requests for Personal Data.
 - (2) Each of the parties agrees to reimburse the other for any reasonable charges incurred in providing each other assistance.
 - (3) Each of the parties agrees to amend Personal Data only upon receiving instructions to do so from the other party, its personnel or any other individual.
 - e. Retention
 - (1) Each of the parties will promptly return to the other or destroy all Personal Data which is no longer necessary to fulfill the purpose(s) for which it was made available, unless otherwise instructed by the other party, its personnel or any other individual or required by law.

15. Geographic Scope and Governing Law

The rights, duties, and obligations of each party are valid only in Canada except that all licenses are valid as specifically granted.

Both parties agree to the application of the laws in the Province of Ontario to govern, interpret, and enforce all of Customer's and IBM's respective rights, duties, and obligations arising from, or relating in any manner to, the subject matter of this Agreement, without regard to conflict of law principles.

If any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement remain in full force and effect.

Nothing in this Agreement affects any statutory rights of consumers that cannot be waived or limited by contract.

16. Termination

16.1 Agreement Termination

Either party may terminate this Agreement on written notice to the other and Customer's IBM Business Partner following the expiration or termination of the terminating party's obligations under this Agreement, including any applicable Attachment or Transaction Document.

Either party may terminate this Agreement if the other does not comply with any of its terms, provided the one who is not complying is given written notice and reasonable time to comply.

Any terms of this Agreement that by their nature extend beyond the Agreement termination remain in effect until fulfilled, and apply to both parties' respective successors and assignees.

16.2 Termination and Withdrawal of a Service

Either party may terminate a Service transaction if the other materially fails to meet its obligations concerning the Service.

Customer may terminate a Service, on notice to IBM and Customer's IBM Business Partner provided Customer has met all minimum requirements. Contact Customer's IBM Business Partner to determine if any charges apply.

IBM may withdraw a Service or support for an eligible product on three months' written notice to Customer and Customer's IBM Business Partner. If IBM withdraws a Service for which Customer has prepaid and IBM has not yet fully provided it to Customer, Customer's IBM Business Partner will give Customer a prorated refund.

Any terms which by their nature extend beyond termination or withdrawal remain in effect until fulfilled and apply to respective successors and assignees.

This Agreement, including its applicable Attachments and Transaction Documents, is the complete agreement between Customer and IBM and replaces any prior oral or written communications, regarding the acquisition of Services from an IBM Business Partner. No machines or licensed program products are acquired under this Agreement.

Each party accepts, on behalf of its Enterprise, the terms of this Agreement by signing this Agreement (or another document that incorporates it by reference) by hand or, where recognized by law, electronically. Once signed, i) any reproduction of this Agreement, an Attachment, or Transaction Document made by reliable means (for example, electronic image, photocopy or facsimile) is considered an original and ii) all Services ordered under this Agreement are subject to it.

Both of us agree to write this document in English. Les parties ont convenu de rédiger le présent document en langue anglaise.

Agreed to:

{Customer Legal Name}

Agreed to:

IBM Canada Ltd.

By _____

Authorized signature

Title:

Name (type or print):

Date:

Customer identification number:

Customer address:

By _____

Authorized signature

Title:

Name (type or print):

Date:

Agreement number:

IBM address:

3600 Steeles Avenue East
Markham, Ontario L3R 9Z7