

This Master Services Agreement (“Agreement”) is made between Novell Canada, Ltd. with offices at 340 King Street East, Suite 200, Toronto, ON M5A 1K8 (“Novell”), and the customer identified below (“Customer”):

Customer Legal Name:	
Customer Address:	
Primary Contact Name:	
Primary Contact Phone:	
Primary Contact E-mail:	
Primary Contact Fax:	

### 1. Purpose

Novell provides a variety of technology-related services to its customers. This Agreement describes the terms and conditions under which Customer may engage Novell to perform services for Customer.

### 2. Definitions

The following definitions apply to this Agreement and any related Statement of Work.

- 2.1 “Code” means computer-programming code. Unless specifically stated otherwise in a SOW, Code includes Binary Code but not Source Code. “Binary Code” means Code that loads and executes without further processing by a software compiler or linker or that results when Source Code is processed by a software compiler. “Source Code” means human-readable form of Code and related system documentation, including comments and any procedural language.
- 2.2 “Deliverable” means Code or Documentation delivered by Novell to Customer to fulfill the services under a SOW or any other object identified as a Deliverable in a SOW. In no event will commercially available products be considered part of the Deliverable nor licensed to Customer under this Agreement.
- 2.3 “Documentation” means written information, other than Code, including text or graphic files.
- 2.4 “Effective Date” means the later of the dates this Agreement is executed by Customer and Novell.
- 2.5 “Services” means the services and Deliverables to be provided by Novell to or for the benefit of Customer, as described in a SOW. Such services may include, but are not limited to, technical support, consulting, or training services.

- 2.6 “Statement of Work” (“SOW”) means a (i) written document executed between the parties that includes at least the following information: (a) a description of the Services and Deliverables; (b) the parties’ responsibilities; and (c) the service fees and method of calculation (if applicable), or (ii) a purchase order for the purchase of standard Services offered on the Novell Corporate Price List that is signed by Customer and accepted by Novell.

### 3. Rules of Engagement

- 3.1 Initiating Services. All Services provided by Novell to Customer shall be provided pursuant to individual Statements of Work (other than the provision of standard Services purchased through a purchase order). A SOW will become effective upon execution by authorized representatives of both parties, unless the SOW is in the form of a purchase order signed by Customer, which will become effective upon acceptance by Novell.
  - 3.2 SOW Integration. Each SOW is part of this Agreement, and the Agreement terms and conditions will apply to each SOW. If a SOW contains provisions inconsistent with this Agreement, the SOW provisions shall prevail with respect to that SOW. This Agreement by itself does not obligate a party to provide any services or enter into any SOW.
  - 3.3 Change Order. Any changes to the obligations of either party or to any other material aspect of a SOW will require a written change order signed by both parties that describes the changes and any related cost adjustments.
  - 3.4 Acceptance. Services will be deemed satisfactory to and accepted by Customer unless within thirty (30) days after submission of Services to Customer, Customer gives Novell written notice of aspects in which the Services do not meet the SOW requirements. Upon receipt of such written notice, Novell will use commercially reasonable efforts to make such changes as will be required to correct any deficiencies; if Novell is unable to correct the Services within a reasonable period of time, Novell or Customer may terminate the relevant SOW and Novell shall provide a refund of the amount Customer paid for Services Novell did not correct.
- ### 4. Responsibilities
- 4.1 Assumptions. The description of the Services and related compensation amount in each SOW will be based upon information Customer provides to Novell and upon any assumptions set forth in the SOW. Customer acknowledges that if the information provided by Customer is incomplete or inaccurate, or if the stated assumptions are not correct, then the parties will modify the SOW pursuant to Section 3.3 above.
  - 4.2 Customer Assistance. Customer agrees that it will reasonably cooperate with and assist Novell in Novell’s performance of

the Services.

4.3 **Project Managers.** Each party shall appoint a project manager ("Project Manager") for each SOW. Each party may replace its designated Project Manager upon written notice to the other party.

4.4 **Protection of Customer System.** Customer is solely responsible to take appropriate measures to isolate and back up its computer systems, including its computer programs, data and files, and to take all other actions necessary to protect its systems and data.

4.5 **Site Regulations.** Novell employees performing Services on Customer premises shall observe reasonable safety and security protocols of which Novell is notified in writing.

## 5. Compensation and Payment Terms

5.1 **Compensation for Services and Expenses.** Customer shall pay all the amounts specified in the relevant SOW, including, without limitation, compensation for Services and all reasonable out-of-pocket expenses incurred in the performance of the Services, and for any non-standard expenses incurred at the written request of Customer.

5.2 **Purchase Order.** Prior to the start date of a SOW, Customer shall issue a Purchase Order ("PO") equal to the amount specified in the SOW. If Customer does not issue POs, Customer shall provide in the SOW Customer's billing contact and address.

5.3 **Invoicing.** Unless otherwise agreed in a SOW, Service fees and expenses shall be calculated by Novell on a monthly basis and invoiced to Customer within fifteen (15) days after the end of each month.

5.4 **Payment.** Payment shall be due thirty (30) days from the date of invoice. All payments shall be made in U.S. dollars. Payments made later than the due date will accrue interest from the date due to the date paid at the lesser rate of one percent (1%) per month or the maximum allowed by applicable law. If a payment is late, Novell shall be entitled to suspend performance of the Services and, at its option, terminate the relevant SOW on written notice.

5.5 **Taxes.** Payments made by Customer to Novell are exclusive of applicable taxes. Customer will pay and bear the liability for any taxes associated with the delivery of all Services, including sales, use, excise, and value added taxes (VAT), but excluding: (i) taxes on Novell's net income, capital, or gross receipts, or (ii) any withholding tax imposed if such tax is allowed as a credit against U.S. income taxes of Novell, such as a withholding tax on a royalty payment made by Customer where required by law. If Customer is required to withhold taxes, Customer will furnish Novell receipts substantiating such payment. If Novell is required to remit any tax or duty on behalf or for the account of Customer, Customer will reimburse Novell within thirty (30) days after Novell notifies Customer in writing of such remittance. Customer will provide a valid tax exemption certificate in advance of any remittance otherwise required to be made by Novell on behalf or for the account of Customer, where such certificate is applicable.

## 6. Intellectual Property

6.1 **License.** Subject to payment of all applicable fees for Services and Deliverables provided to Customer, Novell grants to Customer a nonexclusive, nontransferable, worldwide, perpetual, license to reproduce and internally use the Deliverables. All proprietary rights notices must be faithfully reproduced and included on all copies (including any modifications or adaptations allowed by this Agreement or any SOW).

6.2 **Ownership.** Except as expressly provided otherwise in this Section 6 or any SOW, Novell (and/or its licensors) owns all right, title and interest, including all intellectual property rights, in any Code, Documentation, or other materials developed, delivered and/or used by Novell in the performance of this Agreement. Neither this Agreement nor any SOW changes ownership of any pre-existing materials.

6.3 **Protection of Deliverables.** Customer shall take all reasonable steps to protect Deliverables under this Agreement, from unauthorized copying or use. If a Deliverable consists of Code, the Source Code of such Deliverable is not licensed to Customer (subject to section 6.1) and Customer agrees not to reverse engineer, decompile or disassemble any Code except and only to the extent it is expressly permitted by applicable law.

6.4 **Reservation of Rights.** Novell reserves all rights not expressly granted to Customer. Except as expressly authorized in this Agreement, Customer shall not sell, rent, lease, sublicense, distribute, transfer, copy, reproduce, display, modify or time share any Deliverable.

6.5 **Third Party Materials.** Nothing in this Agreement or any related agreement shall restrict or limit or otherwise affect any rights or obligations Customer may have, or conditions to which Customer may be subject, under any applicable open source licenses to any open source code contained in Deliverables or any third-party licenses for third-party Code contained in Deliverables.

## 7. Warranty

7.1 **Warranty for Services.** Novell warrants that the Services shall be performed in a professional manner in accordance with generally accepted industry standards. Unless otherwise stated in the SOW, this warranty shall be effective for ninety (90) days following acceptance of the Services in accordance with Section 3.4. Upon receipt of written notice of breach of this warranty, Novell's obligation is to correct the Services so that the Services comply with this warranty. If Novell is unable to correct the Services within a reasonable period of time, Customer's sole remedy is to terminate the relevant SOW and obtain a refund of the amount Customer paid to Novell for the Services Novell is unable to correct.

7.2 **Exclusions.** This warranty excludes non-performance issues that result from third-party hardware or firmware malfunction or defect; software not developed by Novell; incorrect data or incorrect procedures used or provided by Customer or a third party; or defects which are outside the reasonable control of Novell. Customer will reimburse Novell for its reasonable time and expenses for any Services provided at Customer's request to remedy excluded non-performance issues. This warranty shall immediately cease if Customer or any third party modifies any portion of a Deliverable and/or modifies Customer's system so that a Deliverable is no longer

functional or appropriate.

- 7.3 **Disclaimer.** EXCEPT AS EXPRESSLY DESCRIBED IN THIS WARRANTY SECTION, NOVELL MAKES NO WARRANTY OF ANY KIND. NOVELL DISCLAIMS AND EXCLUDES ALL OTHER EXPRESS, IMPLIED, AND STATUTORY WARRANTIES, REPRESENTATIONS, AND CONDITIONS WITH RESPECT TO SERVICES AND DELIVERABLES, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, GOOD TITLE, NON-INFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE. Novell does not warrant that the Services or any Deliverables provided will be without defect or error.

## 8. Confidential Information

- 8.1 "**Confidential Information**" means (i) the terms of this Agreement and any SOW, (ii) Customer documents, files and data which Novell has accessed in performing the Services, and (iii) any other information that the disclosing party ("Discloser") desires to protect against unrestricted disclosure by the receiving party ("Recipient") and that (a) if disclosed in tangible or electronic form, is marked in writing as "confidential" or (b) if disclosed orally or visually, is designated at the time of disclosure as "confidential."
- 8.2 **Exclusions.** Confidential Information will not include any information that is (i) already in possession of Recipient without obligation of confidence; (ii) independently developed by Recipient; (iii) becomes publicly available without breach of this Agreement; (iv) rightfully received by the Recipient from a third party without obligation of confidence; or (v) released for disclosure by the Discloser with its written consent.
- 8.3 **Exception.** When disclosure may be required by law in connection with a legal proceeding in a court or other governmental authority, Recipient may disclose Confidential Information provided that the Recipient (a) gives Discloser prompt notice of the order; (b) limits the scope of disclosure to what is reasonably required by the applicable authority; and (c) provides Discloser with an opportunity to challenge the release of the Confidential Information or obtain a protective order prior to disclosure.
- 8.4 **Obligations.** The Recipient of Confidential Information agrees to exercise reasonable care to protect Confidential Information from unauthorized disclosure, which care shall not be less than the Recipient exercises to protect its own confidential information. The Recipient may disclose Confidential Information only to its employees or agents who need to know such information and shall contractually require such employees or agents to comply with the obligations of confidentiality. The Recipient shall have no obligation to limit or restrict the assignment of persons that have accessed Confidential Information.
- 8.5 **Expiration of Duty.** Recipient's duty to hold Confidential Information in confidence expires five (5) years after termination of the Agreement or, in the case of Confidential Information received under a Statement of Work, the applicable Statement of Work; expiration of this duty shall not modify other restrictions on the Recipient or rights of the Discloser, such as any patent or copyright rights or additional obligations with regard to Customer confidential information.
- 8.6 "**Residuals**" means technical information or know-how retained in an employee's memory, but does not include information

deliberately memorized to classify it as Residuals. Either party shall be free to use for any purpose Residuals resulting from access to or work with Confidential Information provided that such party otherwise complies with the confidentiality obligations contained in this Section 8. However, this provision does not grant either party a license under the other party's patents or copyrights, nor does it give the Recipient the right to disclose business plans or financial, statistical, or personnel data, nor does it allow for any purpose the literal copying of a document.

## 9. Indemnification and Insurance

- 9.1 **Infringement Indemnity.** Subject to the limitations in Section 10, Novell will defend and indemnify Customer against any third party claim that Customer's exercise of its licensed use rights under this Agreement with respect to a Deliverable infringes upon such third party's rights under a copyright, trademark, or patent or misappropriates the subject matter of such third party's trade secret, under the laws of the country in which Customer takes delivery of the Deliverable ("IP Infringement Claim") provided that: (i) Customer promptly notifies Novell in writing of an IP Infringement Claim such that Novell is not materially prejudiced by any delay in such notification; (ii) Novell has sole control of the defense and all related settlement negotiations and (iii) Customer provides Novell with reasonable assistance (for which Novell will pay Customer's reasonable out of pocket costs) in defending the IP Infringement Claim. Subject to the limitations in Section 10, Novell will pay any damages, costs, and expenses finally awarded (or agreed to by settlement) for any such IP Infringement Claim. If Customer desires separate legal representation in any IP Infringement Claim, Customer will be responsible for the costs and fees of Customer's separate counsel.
- 9.1.1 **Remedy.** Should any Deliverable provided by Novell under this Agreement, or the operation of any such Deliverable, become, or in Novell's opinion is likely to become, the subject of infringement of any copyright, patent, trademark, or misappropriation of any trade secret, Novell's sole obligation and Customer's exclusive remedy under this Section shall be, at Novell's option and expense, either to procure for Customer the right to continue using the Deliverable, to replace or modify the Deliverable so that it becomes non-infringing, or to grant Customer a refund of the amounts paid by Customer.
- 9.1.2 **Disclaimer.** Novell shall have no responsibility for infringement, including obligations of indemnification under this Section, to the extent the infringement results from (a) compliance with Customer's designs or instructions, (b) a modification not authorized in writing by Novell, (c) use or combination with third-party software, equipment, or data, (d) non-licensed use, (e) third-party software provided under this Agreement, or (f) open source technology incorporated in or provided with Services or Deliverables.
- 9.2 **General Indemnity.** Each party (the "Indemnifying Party") will indemnify, defend, and hold the other party, its officers, directors, employees, and/or shareholders, harmless from any final court judgment (or settlement to which the parties have

agreed) arising from personal injury or tangible property damage which is determined by a court to be caused by the negligence or willful misconduct of the Indemnifying Party or its authorized employees relating to this Agreement. The Indemnifying Party's liability under this Section shall be reduced proportionally to the extent that any act or omission of the other party, or its employees or agents, contributed to such liability. "Tangible property" does not include electronic files, data, or other electronic information.

- 9.3 Insurance. Each party will maintain reasonable amounts of insurance, which shall at least meet any limits required by law, for public liability, property damage, employer's liability and workers compensation.

## 10. Limitation of Liability

10.1 LIABILITY. A PARTY'S LIABILITY FOR ANY CLAIM ARISING UNDER OR RELATING TO THIS AGREEMENT OR ANY SOW SHALL BE LIMITED TO DIRECT DAMAGES AND SHALL NOT EXCEED THE AMOUNT PAID, AND ANY AMOUNTS OWED BUT NOT YET PAID, FOR THE SERVICES. THE LIMITATION IN THIS SECTION 10.1 DOES NOT APPLY TO A PARTY'S INFRINGEMENT OF THE OTHER PARTY'S INTELLECTUAL PROPERTY RIGHTS, VIOLATIONS OF THE CONFIDENTIALITY PROVISIONS OF THIS AGREEMENT OR THE WILLFUL MISCONDUCT OF A PARTY.

10.2 DISCLAIMER. NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, (INCLUDING LOSS OF PROFITS OR BUSINESS) ARISING UNDER OR RELATING TO THIS AGREEMENT OR ANY SOW, EVEN IF THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

10.3 Limitation of Action. No action arising out of this Agreement, regardless of the form of action, may be brought by Customer more than one year after the action accrued.

## 11. Term and Termination

11.1 Term. This Agreement will become effective upon the Effective Date and will remain in effect for two (2) years. This Agreement will be automatically renewed for additional two (2) year terms until either party gives written notice otherwise at least thirty (30) days prior to the end of the then-current term.

11.2 Termination For Cause. Either party may terminate the Agreement or any SOW upon written notice for the substantial breach by the other party of any material term, if such breach is not cured within thirty (30) days following receipt of written notice of breach from the non-breaching party. Termination shall be in addition to any other remedies that may be available to the non-breaching party.

11.3 Effect of Termination. Unless otherwise agreed to in writing, upon termination of the Agreement, any SOW then in effect will immediately terminate.

11.4 Termination Payment. In the event of termination of a SOW, Customer shall pay Novell the amounts specified in the Costs Section of each such SOW relating to work performed by Novell prior to and including the date of termination, as well as any additional costs or expenses which Novell has incurred or

contracted for with respect to the Services and is unable to avoid. Additionally, all property of each party in possession of the other party relating to such SOW shall be returned, including, without limitation, any Deliverable provided to Customer by Novell under such SOW but not yet fully paid for by Customer. Except in case of breach by Customer, Customer may retain a license under Section 6.1 to use incomplete Deliverables for which it has paid; however, all warranties regarding such Deliverables shall cease.

11.5 Survival of Terms. The provisions of this Agreement and each SOW which by their nature extend beyond termination will survive termination or expiration of this Agreement or the relevant SOW.

## 12. General Provisions

12.1 Separate Software License. The Services may be in support of a Customer license to software under a separate agreement. Such separate agreement shall govern all use by Customer of such software, and this Agreement shall relate solely to the Services. This Agreement is not intended to modify in any way the licensing, warranty, or other agreement provisions for software products separately licensed by Customer from Novell or any other party, except as expressly provided in this Agreement or in a SOW.

12.2 Notice. Unless otherwise agreed to by the parties, all notices shall be deemed effective when made in writing and received by either (i) registered mail, (ii) certified mail, return receipt requested, (iii) overnight mail, or (iv) fax with confirmation, addressed and sent to the receiving party's address specified in the introductory paragraph to this Agreement, with the original of the notice being addressed to the Project Manager (with respect to any SOW).

12.3 Force Majeure. If either party shall be prevented from performing any portion of this Agreement by causes beyond its control, including labor disputes, civil commotion, war, governmental regulations or controls, casualty, inability to obtain materials or services or acts of God, such defaulting party shall be excused from performance for the period of the delay and for a reasonable time thereafter.

12.4 Independent Contractor. Nothing in this Agreement, and no course of dealing between the parties, shall be construed to create an employment or agency relationship or a partnership between a party and the other party or the other party's employees or agents. Each party shall be solely responsible for payment of its employees' salaries (including withholding of income taxes and social security), workers compensation, and all other employment benefits.

12.5 Jurisdiction. This Agreement shall be construed in accordance with and governed by the laws of the Province of Ontario. Venue for any actions arising under or relating in any way to this Agreement shall vest exclusively in the courts of general jurisdiction of the Province of Ontario.

12.6 Legal Fees. If a party initiates Agreement-related legal proceedings, the prevailing party will be entitled to recover reasonable legal fees.

12.7 Severability. If any provision or portion of this Agreement shall be held by a court of competent jurisdiction to be illegal, invalid, or unenforceable, the remaining provisions or portions

shall remain in full force and effect.

12.8 Waiver. No waiver of any Agreement right shall be effective unless in writing signed by an authorized representative of the waiving party. No waiver of a right arising from any breach or failure to perform shall be deemed a waiver of any future right.

12.9 Binding Effect/Assignment. This Agreement is binding upon the parties' respective representatives, successors, and assigns. Neither party shall transfer or assign this Agreement without the prior written consent of the other party. However, neither party shall unreasonably withhold consent to an assignment of this Agreement. Either party may, with written notice to the other party, assign the Agreement to the surviving entity in the case of a merger or acquisition.

12.10 Subcontracting Services. Novell may subcontract any portion of the Services to a third party contractor without the prior consent of Customer, provided that Novell remain fully responsible to Customer for the delivery of the Services.

12.11 Background Checks. Novell warrants and represents to Customer that all individuals it provides to perform Services under this Agreement have been subject to and passed, at a minimum, the following reference checks, verifications and screening processes to be performed by Novell: (a) employment history, (b) educational background, (c) criminal background, (collectively "Background Checks"). Novell agrees to provide to Customer, upon written request, certification that Background Checks have been performed and documentation of the processes followed for such Background Checks. Customer reserves the right, at its expense, to perform additional background checks, subject to the consent of the relevant Novell employee. Customer agrees that it shall treat any Background Check information required to be provided to it as "Confidential Information" in accordance with Section 8 of this Agreement, and Customer agrees to delete and/or destroy any such information as soon as reasonably practicable.

12.12 Use of Customer Name. With Customer's written permission, Novell may use and publish Customer's name in its customer lists, lists of referrals for other customers (or potential customers), and in other promotional information, including, but not limited to, press releases, brochures, reports, letters, white papers, and electronic media such as e-mail or Web pages.

12.13 Export and Compliance. Any products or technical information provided under this Agreement may be subject to U.S. export controls and the trade laws of other countries. The parties agree to comply with all export control regulations and to obtain any required licenses or item classification to export, re export or import deliverables. The parties agree not to export or re export to entities on the current U.S. export exclusion lists or to any embargoed or terrorist supporting countries as specified in the EAR. The parties will not use deliverables for prohibited nuclear, missile, or chemical biological weaponry end uses as specified in the EAR. Please consult the Bureau of Industry and Security web page [www.bis.doc.gov](http://www.bis.doc.gov) before exporting or re-exporting items subject to the EAR. Please refer to [www.novell.com/info/exports/](http://www.novell.com/info/exports/) for more information on exporting Novell software. Upon request, Novell can provide information regarding applicable export restrictions. However, Novell assumes no responsibility for your failure to obtain any necessary export approvals.

12.14 Entire Agreement. This Agreement, including any SOW, is the entire agreement between the parties with respect to the subject matter and supersedes any prior agreement or communications between the parties relative thereto, whether written or oral. This Agreement and/or any SOW may be modified only by a written addendum or change order signed by authorized signatories of both parties. The terms of any invoice, purchase order or similar document will not modify this Agreement.

Each of the parties agrees to the terms of this Agreement and has caused this Agreement to be executed its duly authorized representative.

**NOVELL**

Signature: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**CUSTOMER**

Signature: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_