NEGOTIATING AND DRAFTING IT AGREEMENTS

CONFIDENTIALITY AGREEMENTS

November 23, 2006

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Introduction

Information technology matters often involve the exchange of confidential information and materials between parties. Disclosure of or access to confidential information may be necessary for the purposes of performing IT services such as software development, data processing, Internet access or web site hosting, for developing and licensing software or content and for participation in web portals or on interactive web sites. Disclosure may also occur during the course of an acquisition or joint venture. While a duty of confidence may exist at common law, the parties involved may want to include confidentiality provisions in the agreement, or in a separate ancillary agreement between them, in order to maximize protection for their respective confidential information or materials and in particular trade secrets.

What Risks Does a Discloser of Confidential Information Face?

A discloser of confidential information faces the risk of disclosing more information than is necessary for the purposes of the related IT activity. This could have adverse consequences, such as competitive gains by the receiving party, loss of patentability on inventions disclosed by the disclosing party and loss of trade secret protection for the disclosing party’s proprietary secrets.

As well, once the confidential information has been provided to the recipient, there is a risk that adequate safeguards may not be in place to protect the information from further disclosure and that the recipient may use the confidential information for broader purposes than was intended by the discloser, or than was necessary for the performance of the receiver’s obligations or exercise of the receiver’s rights under the relevant IT agreement. This could be problematic where the discloser is under a legal or contractual duty to maintain the confidentiality of the information provided to the recipient and to control its use, or where the value of the information to the discloser is dependent upon the maintenance of the trade secret.

What Risks Does a Receiver of Confidential Information Face?

A receiver of confidential information faces two key risks. The first being that it does not receive sufficient confidential information and materials required to perform its obligations or exercise its rights. The second being that it receives too much confidential information in a confidential relationship, which could prevent the receiver from ever creating, using or disclosing the same information or materials in another situation. If the confidential information is defined too broadly, e.g. to include ideas and concepts, the receiver may have severe limitations.
How to Avoid the Risks?

Techniques to protect the parties may include the following:

- a confidentiality agreement to be signed in advance of any disclosure;
- a multi-phase disclosure process, in which each phase has greater disclosure, e.g. tied to progress in negotiations, term sheet, letter of intent, final agreement, and various points in time throughout the course of the relationship;
- limiting disclosure only to those persons who have a “need to know”, such as accountants, lawyers and consultants (who have also entered into binding confidentiality agreements or are bound by professional duties of confidence) acting for the parties to the IT agreement;
- in situations where trade secrets, undisclosed or unpatented inventions are involved, consider disclosure to an independent trusted third party (who has also signed a confidentiality agreement), who may prepare a report on the confidential information.

The foregoing techniques can help to promote confidence and trust between the parties to the IT agreement. They may also be necessary to achieve legislative or regulatory compliance (e.g., compliance with the applicable privacy legislation, to the extent that the information being used, disclosed or collected contains any personal information).

Principal Terms of Confidentiality Agreements

The Parties and Purpose

The agreement should define each party to the confidentiality agreement and clarify which related entities or persons will be part of the confidential relationship and each of their respective business activities. One needs to consider whether or not affiliates, subcontractors, suppliers, licensors, licensees, assignors, assignees, customers, agents, actual and potential, could be providing or receiving confidential information. When describing parties or entities, be sure to use full legal names, incorporating jurisdiction and addresses.

As well, the confidentiality agreement should set out the purpose of the confidential relationship and disclosure, e.g.:

(a) to conduct evaluation, due diligence, negotiations, beta testing;
(b) to obtain on-line access, data processing, development, hosting, support, maintenance and outsourcing services; or
(c) for licensing, distribution, etc.
The Confidential Information and Exclusions

The agreement should contain a definition of confidential information, which may include:

- information, ideas, concepts, inventions, trade secrets, processes, products, services, intellectual property applications, methods, formulas, specifications, manufacturing techniques, testing processes and procedures, documentation, software (including algorithms and internal workings of programs, object and source code, look and feel), creative works, data, databases, know-how, marketing strategies, business plans, pending projects, RFPs and proposals, studies, analysis, reports, research and development, work in process, customer lists, vendor lists, pricing, credit techniques, financial information, personal information, notes and documentation, copies of the foregoing, related to the party’s business activities (which should be defined), the purpose or competitive interests.

Depending upon which party one is representing, one should be careful when including ideas and concepts in the definition of confidential information as these would generally not be subject to intellectual property protection (unless they relate to a patented invention).

One should also consider whether confidential information includes:

(a) information that is indirectly obtained by recipient, i.e. gathered by inspection or heard by the receiving party or its representatives;

(b) information that is not in writing or in human readable form, e.g. oral or electronic versions;

(c) information that is not specifically identified as confidential;

(d) information that belongs to or is disclosed by either party’s representatives or related parties.

It may also be reasonable for the recipient of confidential information or its representatives to receive advance notice of the fact that they will be receiving confidential information (described sufficiently in a non-confidential way), with the opportunity on the receiving party or its independent agent to review and decline to receive the information, so as to avoid being tainted with the confidential information.
In defining confidential information, one should also consider whether there are any exclusions, such as:

(a) information which is in or becomes publicly available through no act or failure to act by the receiving party or its representatives and without breach of this agreement;

(b) information which the receiving party can demonstrate was developed independently by the receiving party from sources which do not include the confidential information or any part thereof;

(c) information which was in the possession of the receiving party at the time of disclosure and not subject to an obligation of confidence;

(d) information which was disclosed by the disclosing party to another without obligation of confidentiality;

(e) information which the receiving party or any of its representatives can demonstrate was received by it from a third party without any obligation of confidentiality;

(f) information which the receiving party or any of its representatives can demonstrate was independently developed; and

(g) ideas, concepts, know-how and techniques, that are related to receiving party’s business activities, abstracted from the disclosing party’s confidential information and retained in the unaided memories of receiving party’s employees, provided however that the receiving party or its recipients are not permitted to intentionally memorize the disclosing party’s confidential information.

Treatment of Confidential Information

In negotiating the treatment of confidential information, one needs to consider three primary obligations:

(a) each party’s degree of care in handling the confidential information, including security and treatment for maintaining the information, e.g. whether of the same or greater standard as used to protect the party’s own confidential information and no less than industry standard;

(b) each party’s non-disclosure obligation; and

(c) the handling, return or destruction of the confidential information after the end of the confidential relationship's purpose.
One should be careful when drafting these obligations to ensure that they only apply to the other party’s confidential information and not to one’s own confidential information. As well, one should be careful when stating that the obligation is on a “best efforts” basis, since this could imply “leaving no stone unturned”, in other words, exercising all means necessary at any cost. On the other hand, “commercially reasonable” efforts may be too little, in particular when dealing with such sensitive subject matter as trade secrets.

There may be certain circumstances under which confidential information may be disclosed, which situations should be negotiated and identified in the agreement, such as:

(a) for legal or regulatory compliance;
(b) disclosure to certain third parties (e.g. affiliates, employees, directors, officers, agents, subcontractors, legal, accounting and consulting advisors), who need to know to achieve the purpose of the relationship;
(c) if the same information was independently developed or previously known (except if patented or subject to confidentiality);
(d) if the same information is considered the general knowledge and skills of one’s trade;
(e) if the information becomes publicly available (at no fault of the receiving party of course);
(f) if the same information was obtained from third parties with no obligation of confidence (contractual, fiduciary, common law, statutory or otherwise); and
(g) if the party whose information it is provides prior consent, and consider whether the consent needs to be in writing.

As the owner of the confidential information, one may want to request advance notice of a pending permitted disclosure, in order to be given an opportunity to prevent disclosure, for example to contest a legal requirement to disclose.

If other persons or entities that are not party to the confidentiality agreement are going to be gaining access to any of the confidential information, the parties to the agreement may want to include a covenant on each of them to:

(a) provide notice of the confidentiality requirements to such third parties;
(b) if practical, to have them execute similar confidentiality agreements; and
(c) enforce the confidentiality agreement against such third parties with whom they have a direct contractual relationship or duty.
The parties to the confidentiality agreement should also consider the implications of vicarious liability and whether either party should indemnify the other for breach by a third party to whom they disclose, or provide access to, the other party’s confidential information.

Ownership and Licensing

The parties to the agreement may want to include an acknowledgement of ownership of confidential information and that it is being held in trust by the other party. If the confidential information includes intellectual property rights, appropriate licenses and the scope of usage rights and restrictions should be negotiated.

Consideration should also be given to the ownership of any modifications (derivative works), if permitted, and related assignments and waivers of moral rights.

Representations and Warranties

In addition to the usual representations and warranties given by parties to a contract, such as that each party has the authority to enter into the agreement and that the agreement does not and will not conflict with any other agreement or obligation that a party may have, confidentiality agreements require some additional representations and warranties to minimize the risk of unique liabilities that may arise.

When acting for the discloser, the following warranties to be given by the recipient may be requested:

(a) the scope of the recipient’s enterprise and the jurisdiction or territory of its business operations;

(b) that the recipient meets certain requirements, for example that the recipient has a minimum level of security, control of the confidential information, protection mechanisms, employee screening processes, etc.

When acting for the recipient, it is recommended that the following warranties be obtained from the discloser:

(a) where applicable, that the discloser is the developer or owner of the disclosed subject matter;

(b) if applicable, that the disclosed subject matter does not contain any third party material;

(c) that the discloser has the right to disclose the confidential information and that the use thereof by the recipient will not infringe anyone’s intellectual property rights. However, a discloser may not be willing to give such a broad non-infringement warranty and may want to qualify such warranty to the “best of its knowledge” or may prefer to address the recipient’s infringement concerns with the use of a more limited scope non-infringement warranty or indemnity;
(d) if required, that the confidential information meets certain requirements or standards, such as timeliness, accuracy, etc.;

(e) that the confidential information, if delivered electronically, does not contain any disabling mechanisms or viruses.

The negotiation of representations and warranties should also include discussions on corresponding limitations, remedies and damages.

**Remedies**

The confidentiality agreement should also set out the remedies that each party has if the other party is in breach of the agreement. Such remedies may include the right for the non-breaching party to terminate the agreement, to receive liquidated damages and to be indemnified for any third-party claims or damages, as well as to seek equitable remedies such as injunctions.

**Indemnities**

Indemnities raise many complex issues and require careful thought in light of the particular circumstances of each case. There is no standard indemnity that suits all purposes. In addition to representations and warranties, or sometimes as an alternative to risk allocation, the parties to the confidentiality agreement should consider which indemnities need to be provided in the agreement.

The first issue to consider in negotiating any indemnity, is who the indemnity applies to. Should it apply only to the contracting parties, or should it also extend to the relevant party’s directors, officers, agents, subcontractors, affiliates, customers, licensors and licensees as well? One may argue that an indemnity for persons or entities who are not party to the contract, in particular customers or successors, is too broad in scope and exposes the indemnifying party to unforeseeable risk. It would be reasonable to expect an indemnity to apply only to the contracting parties, their employees and agents and possibly the beneficiaries of any licenses or other rights under the agreement. Different indemnities may apply to different parties, depending upon the circumstances and which party is in the best position to insure against the risk. If the financial ability or viability of an indemnifying party is of concern, it may be worthwhile to seek a guarantee from a related company or an indemnity bond.

The second issue that needs to be considered when negotiating an indemnity is the scope of the payment. Some of the amounts to consider include:

(a) claims, demands or suits, that have not yet been proven, settled or decided;

(b) only damages that are awarded by a court of competent jurisdiction;

(c) damages that may be awarded by an arbitrator or that are agreed upon pursuant to a mediation settlement;

(d) only final damages, where appeal has been exhausted;
(e) only damages related to third party claims;

(f) losses and damages suffered (internally) by the indemnitee or its related parties, which may or may not include indirect damages, such as loss of profits, failure to realize expected savings, etc.;

(g) expenses and costs, including legal fees, investigation costs, costs of settlement;

(h) fines or penalties imposed under statute or self-regulatory body.

The third issue to consider when negotiating an indemnity is the subject matter, i.e. what is the indemnity for and how far will it extend. The agreement should provide for an indemnity by the disclosing party to protect the recipient (for the purposes of this section, the “receiving party”) from any liability arising out of the receiving party’s authorized use of the confidential information in accordance with the agreement. The indemnities generally given are indemnities for damages resulting from third party claims for breach of confidence, intellectual property infringement or trade secret misappropriation claims. However, a disclosing party will be relatively reluctant to indemnify the receiving party:

(a) if the claim is related to or caused by the receiving party having violated its obligations or licenses under the agreement or breached its representations or warranties under the agreement;

(b) for any items which were not created by the disclosing party (e.g., which were supplied to the disclosing party by third parties or supplied or modified by the receiving party); or

(c) for any items which the disclosing party does not own, or over which the supplying party has no control.

A disclosing party may be prepared to give indemnities for such items if it can obtain corresponding indemnities from the disclosing party’s developers, suppliers or licensors.

The receiving party will generally seek an indemnity from the disclosing party that the subject matter of the confidential information received or accessed does not infringe any intellectual property right of any third party, in jurisdictions where the receiving party will use or access such materials, or where the receiving party may otherwise be subject to a claim or judgment. It is reasonable for the parties to agree upon limitations upon the scope of such indemnity for example, by having it apply only in territories where the disclosing party has conducted intellectual property ownership searches and registrations, or where it would be reasonable to expect the disclosing party to do so. Furthermore, since patent and trade-mark applications are generally not publicly available until the patent or trade-mark has been issued, it might be reasonable to limit indemnities for patent or trade-mark infringement only to valid patents or trade-marks that have been issued as of the effective date of the agreement.
To the extent that the receiving party is able to maintain control over its employees, affiliates, end users or sub-licensees, the disclosing party may want to seek an indemnity from the receiving party for any damages or claims caused by the acts or omissions of such third parties (especially intellectual property infringement claims or unauthorized disclosure). However, if the disclosing party is expected to retain control over the confidential information (e.g. by the issuance of user keys) or the technology is warranted to contain certain functional controls to prevent unauthorized use or disclosure, then the receiving party may not want to agree to such indemnity.

The fourth issue to consider when negotiating an indemnity is how the indemnity is triggered and what other options each party has. For example, an indemnifying party would generally want:

(a) to receive adequate notice of a claim for which it is obliged to indemnify;
(b) the ability to conduct and control any settlement or defence of any related lawsuit; and
(c) assistance from the indemnified party in investigating the allegations and conducting the defence.

An indemnity for a claim of infringement of a third party’s rights could also include the ability on the indemnifying party to:

(a) modify the infringing material so that it becomes non-infringing;
(b) replace the infringing material (with consideration given to the criteria for such replacement, e.g. such that it materially has the same functionality); or
(c) obtain from the third party claiming infringement the right to use the infringing material (provided that such rights can be obtained on terms satisfactory to the indemnifying party).

The indemnifying party would argue that the foregoing remedies should be at its option, since it would be in the best position to determine the feasibility of the same. However, an indemnified party may want the option to decide which remedy should be sought, particularly where none of them are impossible and a choice could have different commercial implications on the indemnified party’s business.

As well, the indemnifying party would generally ask that in the event of an alleged infringement, it should have the ability to:

(a) request that the indemnified party and all users cease using, remove, return or destroy the infringing material, at least until the infringement allegation is dismissed; or
(b) terminate the license for the infringing material and possibly the entire agreement.
This is very important to the indemnifying party since the indemnified party’s or other users’ continued use of the infringing material would continue to expose the indemnifying party to liability.

From the indemnified party’s perspective, it would likely want to negotiate some kind of payment as liquidated damages in exchange for:

(a) losing the future benefit of the material that it was using;

(b) any pre-paid fees; and

(c) any early termination.

One should also consider whether the options, referred to above, are intended to be the sole and exclusive remedies of the indemnified party or whether the indemnified party can also:

(a) obtain the benefit of the additional indemnities afforded to it under the agreement;

(b) exercise other rights or remedies under the agreement, at law or in equity; or

(c) sue the indemnifying party for damages, subject to any limitations agreed to between the parties.

**Limitations on Liability and Disclaimers**

When negotiating confidentiality agreements, consideration should be given as to any limitations on either party’s liability for: breach of any obligations, representations or warranties in the agreement; for any tortious acts or omissions; or for any other damages that the other party may suffer.

Unlike other commercial agreements where it is common to cap the liability of both parties for breach of the agreement or negligence to a specified amount, e.g., the amount paid or payable under the agreement over a specified time period, in the case of intellectual property infringement claims or breach of confidence the liabilities a party may suffer could significantly exceed such pre-determined amounts. Therefore one may reasonably argue that any liability for breach of an intellectual property warranty (such as a warranty as to title, right to license or non-infringement); intellectual property infringement indemnities; and liability for a breach of confidence or breach of the confidentiality agreement, should not be limited to direct, quantifiable damages.

Exclusions are, however, often drafted for intellectual property infringement indemnities if:

(a) the infringement occurs as a result of unauthorized use or modification of the material that is determined to be infringing;

(b) the indemnified party continues to use the infringing material after such party has been notified of the infringement or such party has been provided with modifications that would have avoided the infringement;
(c) the indemnified party fails to notify the indemnifying party of any infringement claim that comes to the indemnified party’s attention;

(d) the indemnified party fails to co-operate with the indemnifying party in the investigation and defence of any infringement claim; or

(e) the indemnifying party does not have sole control over the defence and settlement of any infringement claim.

Subject to any specific warranties negotiated by the parties, a discloser of technology may want to disclaim any warranties as to uninterrupted, virus-free or error-free operation of the disclosed technology.

As in other commercial agreements, all other representations, warranties and conditions not expressly included in this agreement, whether statutory or otherwise, will often ordinarily be disclaimed, including, without limitation, warranties of merchantability, quality, fitness for a particular purpose, and those arising out of a course of dealing or usage of trade. It is important to note that some disclaimers may not be enforceable in certain jurisdictions, therefore review by local counsel is recommended.

If the recipient is permitted to make modifications or translations to the disclosed material, one should consider including a provision that exculpates the disclosing party from any liability related to or in anyway arising from such modification or translation. Furthermore, the disclosing party may want to attribute responsibility to and possibly obtain indemnities from the receiving party, if the disclosed materials are bundled or used with any of the recipient’s or third party materials.

Unlike other commercial agreements where it is common for the parties to disclaim indirect and consequential damages, such damages may be likely in the case of a breach of intellectual property warranties, indemnities or breach of confidentiality or the confidentiality agreement. It is important to consider the types of indirect damages that might be suffered and whether or not they should be excluded.

**Term and Termination**

It is important to clarify the date that the agreement commences, i.e. the effective date. This may be when the confidential information was first disclosed or when the relationship between the parties began.

The term for, and survival of, each of the specific obligations and license, discussed above, should be separately considered as each may be different. For example, the duration of the non-disclosure obligation may survive the agreement indefinitely or for so long as information is confidential, while the duration of the obligation to maintain a certain degree of care or security treatment for the confidential information may be shortened to the period during which the particular party is in possession of the other party’s confidential information.
The parties may also want to negotiate an early termination of the agreement for various reasons, such as upon:

(a) request or convenience;

(b) completion or failure to achieve the purpose of the relationship;

(c) a breach by the other party of the confidentiality agreement or an ancillary agreement (such as a related services contract);

(d) the bankruptcy or insolvency of the other party;

(e) the merger, amalgamation or change of control (which should be defined) of the other party;

(f) competition by the other party; or

(g) the entering into of a joint venture of the other party with a third party.

The parties should also turn their minds to what will happen at the end of the term of the agreement or completion of its purpose, for example, will:

(a) the confidential information in the possession of a party be destroyed or returned (including copies and method);

(b) the party returning or destroying the confidential information of the other party be required to present a certificate of compliance by an officer of such party;

(c) either party have the right to audit the other party to ensure the confidential information has been appropriately dealt with;

(d) certain license rights survive or will they all terminate.

General Clauses

As with other commercial agreements, one should consider including notice clauses, non-waiver, severability, assignability, entire agreement, force majeure, time of the essence, interpretation, independent contractors, binding on successors, survival, governing law and choice of language clauses.
CHECKLIST FOR DRAFTING CONFIDENTIALITY AGREEMENTS

• Set out effective date, i.e., when confidential info first disclosed or relationship began.

• Define each party to the agreement, with full legal names, incorporating jurisdiction and addresses.

• Define the purpose, e.g., evaluation, due diligence, negotiations, beta testing, on-line access, data processing, development, hosting, support services, maintenance, outsourcing, licensing, distribution, etc., and each party’s business activities.

• Define each party’s representatives, which could be providing or receiving confidential information, e.g., such as affiliates, subcontractors, suppliers, licensors, licensees, assignors, assignees, customers, agents, actual and potential, etc.

• Define confidential information, which may include information, ideas, concepts, inventions, trade secrets, processes, products, services, intellectual property applications, methods, formulas, specifications, manufacturing techniques, testing processes and procedures, documentation, software (including algorithms and internal workings of programs, object and source code, look and feel), creative works, data, databases, know-how, marketing strategies, business plans, pending projects, RFPs and proposals, studies, analysis, reports, research and development, work in process, customer lists, vendor lists, pricing, credit techniques, financial information, personal information, notes and documentation, copies of the foregoing, related to the party’s business activities (define), the purpose or competitive interests.

• Consider whether definition of confidential information includes information that is indirectly obtained by recipient, i.e. gathered by inspection or heard by the receiving party or its representatives.

• Consider whether definition of confidential information includes information that is not in writing or in human readable form, e.g., oral or electronic versions.

• Consider whether definition of confidential information includes information that is not specifically identified as confidential.
• Consider whether confidential information includes that of either party’s representatives, as defined above.

• Consider and state exceptions to confidential information definition, for example:
  
  (a) information which is in or becomes publicly available through no act or failure to act by the receiving party or its representatives and without breach of this agreement,
  
  (b) information which the receiving party can demonstrate was developed independently by the receiving party from sources which do not include the confidential information or any part thereof,
  
  (c) information which was in the possession of the receiving party at the time of disclosure and not subject to an obligation of confidence,
  
  (d) information which was disclosed by the disclosing party to another without obligation of confidentiality,
  
  (e) information which the receiving party or any of its representatives can demonstrate was received by it from a third party without any obligation of confidentiality,
  
  (f) information which the receiving party or any of its representatives can demonstrate was independently developed, and
  
  (g) ideas, concepts, know-how and techniques, that are related to receiving party’s business activities, abstracted from the disclosing party’s confidential information and retained in the unaided memories of receiving party’s employees, provided however that the receiving party or its recipients are not permitted to intentionally memorize the disclosing party’s confidential information.

• Specify whether recipient of confidential information or its representatives must receive advance notice of the fact that they will be receiving confidential information (described sufficiently in a non-confidential way), with the opportunity on receiving party or its independent agent to review and decline to receive.

• Specify each party’s degree of care/security/treatment for maintaining confidential information of other party, e.g., standard same as used to protect party’s own confidential information and in any event no less than industry standard.

• State each party’s non-disclosure obligation: ensure it only applies to other party’s confidential information and not own party’s confidential information; beware of “best efforts” language; consider whether mutual/reciprocal or one-way.
State exceptions to non-disclosure obligation, e.g., purpose for disclosing and using confidential information, disclosure to certain third parties (e.g., affiliates, employees, directors, officers, agents, subcontractors, legal, accounting and consulting advisors), need to know to achieve the purpose, independently developed or previously known (except if patented or subject to confidentiality), general knowledge and skills, publicly available (at no fault of receiving party), obtained from third parties with no obligation of confidence (contractual, fiduciary, common law, statutory or otherwise), abstractions not intentionally memorized but retained in the unaided memory of party, prior consent (oral vs. written), statutory, regulatory, by-law or audit requirements (including, without limitation, stock exchange rule, discovery procedures, deposition, interrogatory, request for documents, subpoena, summons, civil investigative demand, search and seizure warrant, court of competent jurisdiction order or other process), with notice and opportunity to other party to prevent disclosure, etc.

Define laws under which confidential information may be required to be disclosed.

Consider whether disclosing party has discretion to disclose confidential information that it deems appropriate, or whether certain obligations of disclosure to the receiving party or its representatives are necessary.

Specify requirement for third parties to execute similar confidentiality agreements; consider whether employees, directors, officers, agents, etc., should be required to sign undertaking; provide copy of agreement/undertaking to other party; covenant to draft policies, inform and enforce.

Acknowledge vicarious liability and consider indemnity for breach by third party.

Acknowledge ownership of confidential information and being held in trust; consider ownership of modifications (derivative works) and related assignments and waivers of moral rights.

To the extent confidential information includes intellectual property rights, draft appropriate license: specify scope of use (refer to rights under intellectual property statutes, e.g., copy, distribute, make, publish, translate, transmit, etc.), exclusive/sole/non-exclusive, transfer/assignability, sublicenseability, territory, purpose (e.g., internal), term, personal, etc.

Outline restrictions on license, e.g., no reverse engineering, decompiling, transfer, assignment, sublicensing, access by third parties, hosting, networking, sale, distribution, publishing, modifying, translating, transmitting, copying, compiling into database, etc.

Consider warranties, indemnities, disclaimers and limitations on liability (e.g., for functionality/performance, accuracy, reliability, quality, errors, virus-checked, completeness, non-infringement, for third party claims, for breach, etc.); note IP infringement issues.
• Specify term/survival of license to use and restrictions.

• Specify term/survival of non-disclosure obligation (should survive agreement indefinitely for so long as information is confidential).

• Specify term for obligation to maintain degree of care/security/treatment of confidential information.

• Consider early termination, e.g., upon request, upon completion or failure to achieve purpose, breach, bankruptcy/insolvency, merger/amalgamation, change of control (which should be defined), competition, joint venture with another.

• Specify what occurs at the end of the term/purpose, e.g., confidential info in possession of party is destroyed or returned (including copies, method, audit, certified by officer), certain license rights survive or all terminate, etc.

• Consider non-solicitation (note difference between solicit vs. hire) and non-compete (ensure reasonable) clauses.

• Acknowledge equitable remedies, e.g., right to seek injunction and reimbursement of costs.

• Governing law and exclusive/non-exclusive forum (include provincial and federal court), exclude application of conflicts of laws principles and International sale of goods legislation; consider Quebec law implications.

• Entire agreement clause (consider prior and concurrent agreements).

• Waiver, severability, no assignment, enurement, independent contractors, interpretation, counterparts clauses.