



## APPLICANT TERMS OF USE

Before beginning your assessment, please read over the following terms to ensure you understand what is expected from BOMA BEST Applicants.

1. Eligibility Requirements and Registration
  - a. It is the Applicant's responsibility to ensure that the building seeking certification meets the BOMA BEST eligibility criteria, described in *BOMA BEST Building Certification Program Policy – Eligibility Criteria*. Should there be any uncertainty in interpreting the BOMA BEST Program Policies, all questions should be directed to BOMA.
  - b. A building management representative is responsible for completing the online building application form and submitting the appropriate fee to BOMA. The Applicant will have 60 days to pay the fees in full; otherwise access to the online assessment will be revoked.
  - c. At a minimum, the Applicant must meet all Baseline Practices relevant to their building type to qualify for certification. Should there be any uncertainty in interpreting the BEST Practices, all questions should be directed to BOMA.
  - d. If security clearance is required for the BOMA BEST Verification Professional to perform the on-site visit, notice must be provided to BOMA (if applicable) as early into the assessment process as possible so that appropriate steps can be taken to obtain clearance. Verification cannot proceed if the BOMA BEST Verification Professional is not able to access all areas of the building pertinent to the assessment (e.g. mechanical room, waste processing area, tenant area, etc.)
  - e. While our program is designed to provide the necessary training and education for certification, we cannot guarantee that every applicant who completes the program will receive a certification. Certification is granted based on individual performance and meeting the required standards.
  
2. Completing the BOMA BEST Questionnaire
  - a. The Applicant is responsible for remaining up to date about modifications to the assessment resulting from the Technical Update Request (TUR) process.
  - b. Once the Applicant is satisfied with all answers in the online assessment, the Applicant can formally "Request Verification" in the online portal. The Applicant will be contacted directly by the Verifier to schedule the on-site verification visit.
  - c. Documentation demonstrating all Baseline Practices **must** be uploaded to the questionnaire prior to clicking on "Request Verification". If all documentation is not uploaded, verification cannot be scheduled.



- d. Assessments must be ready for verification in accordance with *BOMA BEST Building Certification Program Policy – Online Application Period* or additional fees may be incurred.
- e. Applicants must not contact the BOMA BEST Verification Professional with questions concerning the BOMA BEST assessment. These should be directed to BOMA for administrative and technical questions or policy interpretation.

### 3. On-Site Verification

- a. Applicants must meet the verification guidelines outlined in the Verification Process section of the BOMA BEST Building Certification Field Guide including (but not limited to):
  - i. Upload the Baseline Practice documentation to the questionnaire prior to requesting verification.
  - ii. Prepare remaining documentation (if applicable) so that it is easily retrievable during the on-site documentation review – including demonstrating energy and water performance metrics.
  - iii. Have the right people in attendance during the on-site visit (an individual familiar with the BOMA BEST questionnaire; AND an individual responsible for the building’s on-site management practices; AND an individual responsible for the building’s operations.)
  - iv. Accurately complete the assessment prior to the on-site visit (including correctly representing the building’s management policies and technologies, reporting on the entire building, etc.).
- b. Application fees include the building on-visit for the purposes of verification. Additional verification fees will be incurred for buildings located outside the metropolitan area of the Local BOMA Association office. The Applicant will be notified of estimated additional travel costs. All Verifier travel will require prior authorization from the Local BOMA Association.
- c. Additional verification fees will also be incurred if the BOMA BEST Verification Professional must perform more than one revision in each Focus area in the Applicant’s questionnaire following the on-site visit, if additional review of missing documentation is required or if a second on-site visit is required. Applicants are advised to familiarize themselves with *BOMA BEST Building Certification Program Policy – On-Site Verification: Additional Verification Costs*.

### 4. Appeals Process

If necessary, Applicants may launch an appeals process by filing a formal appeal with the BOMA via email. The complaint or appeal will be reviewed and resolved by BOMA. The outcome will be communicated directly to the Applicant. Every effort will be made to resolve the issue quickly. For more information, see *BOMA BEST Building Certification Program Policy – Appeals Process*.



## 5. Certification

Once the building has been successfully certified, the Applicant will receive an official BOMA BEST Certificate. The name of the building, its Level and management company will also appear on the Certified Buildings\_page of the BOMA BEST website.

### BOMA BEST TERMS OF REFERENCE

The use of this website, BOMA BEST® and the provision of the services related thereto are offered to you (“**You**” or “**Your**”) by Building Owners and Managers Association of Canada Inc. (“**BOMA**”), subject to your acceptance of the terms and conditions contained herein. (You and BOMA sometimes referred to herein as a “**Party**” and collectively as the “**Parties**”).

#### 1. ACCEPTANCE

PLEASE READ THESE TERMS OF REFERENCE CAREFULLY AS YOUR USE OF THE BOMA BEST PLATFORM CONSTITUTES YOUR ACCEPTANCE OF THESE TERMS AND CONDITIONS AND ANY SUBSEQUENT MODIFICATIONS THERETO. IF YOU DO NOT AGREE WITH ANY OF THESE TERMS AND CONDITIONS PLEASE DISCONTINUE YOUR USE OF THE WEBSITE.

BOMA may amend these Terms of Use from time to time. Your continued use of the BOMA BEST Hub constitutes Your acceptance to any such modifications. If You do not agree to any such modification, then You must discontinue use of the BOMA BEST Hub.

#### 2. ELIGIBILITY AND INSTRUCTIONS ON USE

The Terms of Use contains eligibility criteria for Your use of the BOMA BEST program and instructions on completing the assessment. By using the BOMA BEST Hub and continuing with the assessment You represent that You meet the eligibility requirements and will follow the instructions as set out on the Terms of Reference.

#### 3. DEFINITIONS

- (a) “**Aggregated Data**” has the meaning ascribed to it in Section 4(b).
- (b) “**Authentication ID**” means a security mechanism by which an Authorized User identifies herself or himself to the BOMA BEST Hub and gains access thereto, which security mechanism may include user identification, passwords, digital certificates or any other similar process mechanism for authentication and recognition as determined by BOMA from time to time.
- (c) “**Authorized User**” means a user who You authorized to access and use the BOMA BEST Hub and the services contained therein.
- (d) “**BOMA BEST**” means the assessment methodology deployed by BOMA to provide third-party verified environmental certification program for sustainable property management purposes; centered around a questionnaire designed to assess a building’s performance and management practices across six environmental categories: energy, water, waste reduction and site enhancement, emissions and effluents, indoor environment, and environmental management systems using established metrics to benchmark the performance of six distinctive building types: Office, Enclosed Shopping Centre, Open Air Retail, Light Industrial, Health Care, and Multi-Unit Residential Buildings; resulting in recommendations for improvement in a final report all of which may be updated, enhanced, added or expanded from time to time by BOMA, in its discretion.
- (e) “**BOMA BEST Hub**” means, collectively, BOMA BEST, the Software, BOMA Server and such devices and peripherals physically located with the BOMA Server, including all computer hardware, software, network elements, and electrical and telecommunications infrastructure located behind the Point of Access.



- (f) **“BOMA Server”** means that computer server located at BOMA’s premises, or a third party provider of hosting and/or network services, that houses the Software.
- (g) **“Personal Information”** means any information that is protected under applicable privacy legislation, including *Personal Information and Protection of Electronic Documents Act* (Canada) and any other Canadian federal or provincial privacy and health information protection legislation, as from time to time enacted or amended.
- (h) **“Point of Access”** means BOMA’s, or its subcontractor’s, border router, which is used to establish connectivity from the BOMA BEST Hub to BOMA’s, or its subcontractor’s, Internet provider, or the public Internet.
- (i) **“Software”** means the application computer software, in object code format, used by BOMA to automate BOMA BEST and provide the services herein.
- (j) **“Your Data”** means any data, files, documentation or other information that You or any of Your authorized users may upload to the BOMA BEST Hub.

#### **4. DATA AND PRIVACY**

- (a) Your Data and Privacy Policy: You acknowledge and agree that in the course of Your use of the BOMA BEST Hub, BOMA will collect, process and store information about You, Your building and Your use of the BOMA BEST Hub. This information consists of Your Data and may include Personal Information. BOMA will keep such information confidential and will only use it in accordance with the above BOMA’s Privacy Policy.
- (b) Aggregated Data: You further acknowledge and agree that BOMA may:
  - i. use Your Data, solely on an anonymous and de-identified basis and aggregated with other users’ information (such anonymous data referred to as the **“Aggregated Data”**), for the compilation and analysis of trends, statistics and other information without any link or identifiable reference to You or Your Data; and
  - ii. share its analyses with its business partners and customers. For the avoidance of any doubt, Your Data will never be distributed to or shared with anyone other than BOMA in a format that could identify You without Your consent.
- (c) Promotional Consent: In addition to the permitted uses of Your Data contained in these Terms of Reference, if You indicated agreement in the sign up process by clicking the “Consent to Share Picture” button; You hereby consent to BOMA to use, copy, replicate, modify (for the purposes of publication), publish, distribute, share those pictures of Your building that You uploaded to the BOMA BEST Hub for BOMA’s purposes, as well as Your building name and address, Your building’s achieved certification level, Your building’s management company including without limitation, marketing materials, annual reports, websites and such other materials that BOMA may produce from time to time. You hereby represent that You have the right to grant these photographic rights to BOMA and that BOMA’s use thereof will not infringe the intellectual property rights of any third party, including copyright and that You have obtained waivers of any individual’s moral rights.

#### **5. BOMA BEST HUB**

- (a) Provision and Access to BOMA BEST Hub: BOMA shall operate and maintain the BOMA BEST Hub in accordance with these Terms of Reference.
- (b) Security Requirements: BOMA shall implement and maintain those safeguards and controls as it deems necessary and commercially reasonable to deter and for the detection, prevention and correction of any unauthorized intrusion, access or use of the BOMA BEST Hub and Your Data. You acknowledge and agree that notwithstanding BOMA’s safeguards, such methods and procedures may not prevent unauthorized electronic intruders to access the BOMA BEST Hub through the Internet or through other form of electronic communication. If such unauthorized electronic intruders are able to bypass BOMA’s security protocols, firewall and safeguards, such unauthorized electronic intruder may change, delete or otherwise corrupt the contents and data contained in



the BOMA Server, including Your Data. Except for the maintenance of appropriate firewall and safeguards, which are designed to frustrate access from unauthorized electronic intruders, BOMA shall not be liable to You, and hereby disclaims responsibility, with respect to any action, destructive or otherwise, by any unauthorized electronic intruder.

(c) Maintenance: From time to time, it will be necessary for BOMA to perform maintenance on the BOMA BEST Hub. Such maintenance includes routine maintenance to ensure the continued provision of the services through the continued operation of the BOMA BEST Hub or upgrading, updating or enhancing the BOMA BEST Hub. BOMA shall use its commercially reasonable efforts to perform such maintenance at such times to minimize the impact of any downtime of the BOMA BEST Hub to You. To the extent BOMA is able; BOMA shall notify You in advance of any scheduled maintenance by posting a message on the website.

(d) Changes: BOMA may, at any time, with or without notice to You:

- i. make changes that are necessary to comply with applicable safety, security or other statutory requirements or orders from applicable governmental authorities;
- ii. supplement or make changes to its user documentation and to its rules of operations, access procedures, security and privacy procedures and policies, as well as, the Terms of Reference; and
- iii. change the components, type and location of the BOMA BEST Hub.

(e) Authentication IDs: BOMA will provide You with that number of Authentication IDs as requested and agreed to by BOMA to be distributed by You to Your Authorized Users. You shall control and maintain the security of all Authentication IDs. You shall be solely responsible for all instructions, commitments and other actions or communications taken under any of Your Authentication IDs. You shall promptly report to BOMA any errors or irregularities in the operation of the BOMA BEST Hub or any unauthorized use of any part thereof and inform BOMA immediately if any Authentication ID becomes known to any third person who is not authorized to possess such password. You hereby indemnify and hold harmless BOMA from any actions, claims, suits, proceeding or damages made against BOMA from a third person as a result of any use of Your Authentication IDs, whether or not such use is authorized by You.

(f) Your Data: You acknowledge and agree that BOMA:

- i. will not be responsible for the accuracy, completeness or adequacy of any of Your Data or the results generated from any of Your Data uploaded to the BOMA BEST Hub and processed by the Software;
- ii. has no control over any of Your Data or the results therefrom;
- iii. does not purport to monitor Your Data; and
- iv. shall not be responsible to back up or maintain any back up of Your Data or portion thereof.

## **6. USE OF SERVICES**

(a) Grant by BOMA: Subject to the terms and conditions of these Terms of Reference and for so long as You use the BOMA BEST Hub, but subject to BOMA's termination rights, BOMA hereby grants to You a non-exclusive, non-transferable, revocable right, for Your internal business purposes and for that number of permitted Authorized Users as permitted by BOMA, to access the BOMA BEST Hub in accordance with the security protocols as set out herein for the purpose of:

- i. using the Software;
- ii. performing the assessments under the BOMA BEST methodology; and
- iii. uploading, processing, viewing, displaying, using and downloading Your Data to and from the BOMA BEST Hub for the purpose of performing the assessments under the BOMA BEST methodology.



- (b) **Restrictions on Use:** Any rights not granted herein are strictly reserved by BOMA. You shall not:
- i. permit any third party to use the BOMA BEST Hub except as contemplated herein;
  - ii. re-license or sublicense, lease, loan or otherwise distribute the BOMA BEST Hub to any third party;
  - iii. process or permit to be processed the data of any other person; or
  - iv. use the BOMA BEST Hub in the operation of a service bureau.

You shall not, and shall not permit others to, reverse engineer, decompile, disassemble or translate the Software or any other software used by BOMA to deliver the BOMA BEST Hub, or otherwise attempt to view, display or print such software, including the Software's source code.

- (c) **Third Party Beneficiary:** You acknowledge that the Software is licensed to BOMA for Your use and that the licensor thereof shall be entitled to enforce the terms hereof in relation to Your use of the Software.
- (d) **Authorized Users:** You shall ensure that all Authorized Users are aware of the provisions of these Terms of Reference, including their obligation to comply with the provisions contained herein as it relates to their use of the BOMA BEST Hub and the Software. You shall be responsible and liable for the actions and omissions of each Authorized User and their compliance of the provisions herein.
- (e) **Audit and Unauthorized Use:** BOMA reserves the right to monitor and audit You and Your Authorized Users' usage of the BOMA BEST Hub for the purpose of (among others) ensuring compliance with the terms of these Terms of Reference. Any such audit may be carried out by BOMA or a third party authorised by BOMA, at BOMA's expense. In case of unauthorized use of the BOMA BEST Hub and Software, whether by You, an Authorized User or another person, BOMA reserves the right to deny access to the BOMA BEST Hub and/or the Software to You or such Authorized User, or other person, by blocking without prior notification the IP address(es) used to access the BOMA BEST Hub and/or Software by such Authorized User, or other person.
- (f) **Help Desk:** BOMA shall make available its help desk to support You and Your Authorized Users use of the BOMA BEST Hub during BOMA's business hours on business days.

## 7. YOUR OBLIGATIONS

- (a) **Grant by You:** You hereby grant to BOMA a royalty-free, non-exclusive, transferable right and licence to use, copy, store and display Your Data for the following purposes:
- (i) enabling BOMA to perform the Services under these Terms of Reference; and
  - (ii) to de-identify Your Data to generate Aggregated Data.
- (b) **Your Responsibilities:** In addition to Your other obligations contained in these Terms of Reference, You shall:
- (i) be responsible for procuring, installing, operating, supporting and maintaining Your systems, including computer hardware and software, including browsers, necessary for You and Your Authorized Users to access the BOMA BEST Hub;
  - (ii) be responsible for procuring and maintaining communication services, including high speed Internet connections between Your systems and the BOMA BEST Hub;
  - (iii) assign, record and control the issuance and use of all Authentication IDs;
  - (iv) be responsible for the accuracy, completeness and adequacy of all of Your Data; for the management, manipulation and processing of Your Data; and the back up and maintenance of all of Your Data;
  - (v) use the BOMA BEST Hub and Software in accordance with the terms of these Terms of Reference and the Terms of Reference; and



- (vi) comply, at all times, with all applicable legal and regulatory requirements and with BOMA's conduct and security policies in respect of the use of the BOMA BEST Hub.
- (c) Prohibited Activities: You shall not:
- (i) use the BOMA BEST Hub for improper or unlawful purposes;
  - (ii) include, or knowingly allow others to include, any objectionable content or introduce malicious software or data to the BOMA BEST Hub and shall institute such security procedures and safeguards as necessary to prevent the posting, uploading or inclusion of any objectionable content or Viruses to the BOMA BEST Hub (for the purposes of this Section, "**Objectionable Content**" means content that infringes any applicable laws, regulations or third party rights, and content which is obscene, indecent, pornographic, seditious, offensive, defamatory, threatening, liable to incite racial hatred, menacing, blasphemous, misleading, deceptive or in breach of any person's intellectual property rights);
  - (iii) intercept or attempt to intercept any messages transmitted to and from the BOMA BEST Hub that are not intended for You or Your Authorized Users;
  - (iv) take any action that imposes an unreasonable or disproportionately large load on the BOMA BEST Hub;
  - (v) use the Software to develop any derivative works or any functionally compatible or competitive software;
  - (vi) copy or download the Software or any other software used by BOMA to provide the services and which is contained within the BOMA BEST Hub; or
  - (vii) remove any copyright or other proprietary rights notice on the BOMA BEST or Software or any copies thereof.
- (d) Viruses: If BOMA, in its absolute discretion, forms the view that any of Your Data or any other information or files uploaded by You or any of its Authorized Users contains or includes a Virus, BOMA may remove Your Data, information or file from the BOMA BEST Hub and take such other action as BOMA deems necessary to protect the integrity and operation of the Services, BOMA BEST Hub and the Software. Any costs associated with such removal may be charged by BOMA to You. BOMA shall notify You of its actions under this Section 5(d) as soon as reasonably possible.

## 8. FEES

Fees, payment terms and invoicing can be found at [www.bomabest.org](http://www.bomabest.org). The Fees do not include applicable taxes.

## 9. TERMINATION

- (a) BOMA's Right of Termination for Cause: Subject to Sections 9(d) and 9(e), BOMA may terminate these Terms of Reference, Your use of the BOMA BEST Hub and the rights granted hereunder without prejudice to enforcement of any other legal right or remedy, immediately upon giving written notice of such termination if You:
- (i) fail to pay in full any sum owing by it to BOMA by the due date thereof and such failure continues for a period of five (5) Business Days after delivery of a written notice by BOMA requiring You to correct such failure;
  - (ii) infringe the Intellectual Property Rights of BOMA or any of its licensors;
  - (iii) breach any other material provision of these Terms of Reference, as determined by BOMA, and such breach continues for a period of twenty (20) Business Days after delivery of a written notice by BOMA requiring You to correct such failure; or



(iv) become or are adjudicated insolvent or bankrupt, admit in writing Your inability to pay Your debts as they mature, or make an assignment for the benefit of creditors; or You apply for or consent to the appointment of any receiver, trustee or similar officer for You or for all or any substantial part of Your property; or such receiver, trustee or similar officer is appointed without Your consent; or You institute any bankruptcy, insolvency, reorganization, moratorium, arrangement, readjustment or debt, dissolution, liquidation or similar proceeding relating to You under the laws of any jurisdiction, or any such proceeding is instituted against You and is not dismissed within sixty (60) Business Days; or any judgment, writ, warrant or attachment or execution of similar process is issued or levied against a substantial part of Your property and remains unsatisfied for sixty (60) Business Days.

(b) BOMA's Right of Termination for Convenience: Subject to Sections 9(d) and 9(e), BOMA may terminate these Terms of Reference and Your use of the BOMA BEST Hub and the rights granted hereunder at any time and for any reason by providing You with at least ninety (90) calendar days written notice. Such written notice may be by way of notification on the BOMA BEST Hub.

(c) Waiver: The waiver by BOMA of a breach or default of any provision of these Terms of Reference by You shall not be effective unless in writing and shall not be construed as a waiver of any succeeding breach of the same or of any other provision. Further, any delay or omission on the part of BOMA to exercise or avail itself of any right, power or privilege by BOMA shall not constitute a waiver.

(d) Effect of Termination: Upon the termination of these Terms of Reference for any reason:

- (i) You shall download any and all of Your Data contained on the BOMA BEST Hub and store Your Data on Your systems;
- (ii) BOMA shall terminate and invalidate any Authentication IDs associated with You and Your Authorized Users;
- (iii) You shall pay to BOMA the full amount of all Fees payable hereunder as of the date of termination, if any, whether already invoiced or not (including any amounts due as late payment charges), and any other monies owing to BOMA hereunder; and
- (iv) each Party will return to the other Party all Confidential Information of the other Party which is then in its possession or control

provided however, that BOMA may keep a copy of Your Data for the purposes of enhancing and improving the BOMA BEST methodology and each Party shall be permitted to keep any Confidential Information stored in accordance with bona fide organizational archival or document retention procedures, provided that the obligations of confidentiality contained herein shall continue to apply to such Confidential Information. You acknowledge and agree if You fail to download Your Data from the BOMA BEST Hub in a timely manner, You may not have access to such information at a later date. It is Your responsibility to download and obtain all of Your Data prior to the expiration or termination of these Terms of Reference. BOMA shall have no responsibility, or any liability to You, for maintaining or providing to You Your Data or any portion thereof after the termination or expiration of these Terms of Reference.

(e) Survival of Covenants: Notwithstanding the termination or expiration of these Terms of Reference for any reason, the covenants set out in this Section 9(e) and in Sections 4(b), 9(d), 10, 11, 12 and 14 of these Terms of Reference shall survive any such termination or expiration.

## **10. OWNERSHIP**

(a) BOMA's Ownership: You acknowledge and agree that, as between You and BOMA, BOMA (or its licensors, as the case may be) owns all worldwide right, title and interest, including all intellectual property rights, in and to:

- i. the BOMA BEST Hub;



- ii. the Software;
- iii. BOMA BEST;
- iv. the Aggregated Data; and
- v. any modifications, enhancements, upgrades, updates or customization to any of the foregoing.

You do not acquire any rights, title or ownership interests of any kind whatsoever, express or implied, in any of the foregoing other than the licenses granted herein.

(b) Your Ownership: BOMA acknowledges and agrees that all worldwide right, title and interest including, all intellectual property rights in and to Your Data shall be the exclusive property of You. BOMA does not acquire any rights, title or ownership interest of any kind whatsoever, express or implied, in any of the Your Data, other than the license granted herein.

## 11. CONFIDENTIALITY

(a) Definition: “**Confidential Information**” means the Software, Your Data, any recommendations regarding Your building and any other information disclosed by a Party to the other that the receiving Party knows or ought to know, by the nature of such information, the confidential nature of such information whether or not identified as confidential by the disclosing Party, provided, however, that Confidential Information shall not include any data or information:

- (i) that, at the time of disclosure, is in or, after disclosure, becomes part of the public domain, through no act or failure on the part of the receiving Party, whether through breach of these Terms of Reference;
- (ii) that, prior to disclosure by the disclosing Party, was already rightfully in the possession of the receiving Party, as evidenced by written records kept by the receiving Party in the ordinary course of its business, or as evidenced by proof of actual prior use by the receiving Party;
- (iii) independently developed by the receiving Party, by persons having no direct or indirect access to the disclosing Party’s Confidential Information provided that the receiving Party provides clear and convincing evidence of such independent development;
- (iv) which, subsequent to disclosure, is obtained from a third party: (A) who is lawfully in possession of the such information; (B) who is not in violation of any contractual, legal, or fiduciary obligation to either Party, as applicable, with respect to such information; and (C) who does not prohibit either Party from disclosing such information to others; or
- (v) is further disclosed with the prior written consent of the disclosing Party, but only to the extent of such consent.

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

(c) Subpoena: In the event that any Party receives a request to disclose all or any part of the Confidential Information under the terms of a valid and effective subpoena or order issued by a court of competent jurisdiction or by a governmental authority, such Party agrees, in accordance with applicable law, to:

- i. immediately notify the other Party of the existence, terms and circumstances surrounding such a request;
- ii. consult with the other Party on the advisability of taking legally available steps to resist or narrow such request; and
- iii. if disclosure of such Confidential Information is required, exercise its commercially reasonable efforts to obtain an order or other reliable assurance that confidential treatment will be accorded to such portion of the disclosed Confidential Information which the other Party so designates.

(d) Injunctive Relief: Each Party acknowledges and agrees that any unauthorized use or disclosure by it of any of the other Party's Confidential Information, in whole or part, will cause irreparable damage to the disclosing Party, that monetary damages would be an inadequate remedy and that the amount of such damages would be extremely difficult to measure. The receiving Party agrees that the disclosing Party shall be entitled to seek temporary and permanent injunctive relief to restrain the receiving Party from any unauthorized disclosure or use without the requirement to prove damages, post a bond or give an undertaking. Nothing in this Agreement shall be construed as preventing the disclosing Party from pursuing any and all remedies available to it for a breach or threatened breach of a covenant made in this Section 10, including the recovery of monetary damages from the receiving Party.

## **12. DISCLAIMER, INDEMNITY AND LIABILITY**

(a) Disclaimer: There are no express or implied warranties or conditions in relation to the BOMA BEST Hub, Software, or BOMA BEST, including implied warranties or conditions of merchantable quality, fitness for a particular purpose, or non-infringement, or that the BOMA BEST Hub, Software or BOMA BEST will meet Your needs or will be available for use at any particular time or will be error free. Under no circumstances will BOMA be liable for the results of Your use or misuse of the BOMA BEST Hub, including BOMA BEST. BOMA IS PROVIDING THE BOMA BEST HUB AND BOMA BEST ON AN "AS IS" BASIS WITHOUT WARRANTY OF ANY KIND OR NATURE WHATSOEVER. BOMA DOES NOT REPRESENT THAT YOUR USE OF THE BOMA BEST OR THAT ANY RECOMMENDATIONS THAT MAY BE PROVIDED WILL RESULT IN ANY IMPROVEMENT IN THE ECONOMIC OR ENVIRONMENTAL SUSTAINABILITY OF YOUR BUILDING. YOU USE THE BOMA BEST HUB AND THE BOMA BEST METHODOLOGY SOLELY AT YOUR RISK.

(b) Indemnity: You shall defend at Your own expense any third party claim brought against BOMA, its affiliates, directors, officers, employees and agents, to the extent such claim:

- i. alleges, directly or indirectly, that any of Your Data infringes any Canadian copyright, patent or registered trademark of a third person;
- ii. alleges, directly or indirectly, that Your Data contains any Objectionable Content; or
- iii. is in relation to Your use of the BOMA BEST Hub, including BOMA BEST.

(c) Consequential and Other Damages: Subject to Section 12(e), in no event shall either Party be liable to the other for any consequential, incidental, exemplary or punitive damages even if advised in advance of the possibility of such damages. Further BOMA shall not be liable to You for any lost revenue, lost profit, lost savings or any inability to achieve any improvement in the management of Your building, including any economic or environmental sustainability objective regardless of whether such damages constitute any of the types of damages in the preceding sentence, direct damages, or any other type of damage under any other concept or theory of law.

(d) Limitation of Direct Damages: Subject to Section 12(e), in respect of any claim, demand or action by You against BOMA or any of BOMA's employees, directors, officers, or agents whether based in contract, tort

(including negligence), or otherwise, including a breach by BOMA of any of its obligations under these Terms of Reference (whether or not a fundamental breach), Your sole and exclusive remedy, shall be to receive from BOMA payment for actual and direct damages to a maximum aggregate amount equal to the lesser of:

- i. the amount paid by You to BOMA in the twelve (12) months preceding the date of the event; or
- ii. five thousand dollars (\$5,000).

(e) Exceptions to Limitations: Notwithstanding Sections 12(c) and 12(d), neither Party excludes or limits any liability for:

- (i) personal injury or death to the extent that such injury or death results from the negligence or wilful misconduct of a Party or its employees;
- (ii) fraud, fraudulent misrepresentation or fraudulent concealment;
- (iii) Your breach of Sections 6(a), 6(b) or 7(c); or
- (iv) Your payment obligations contained herein.

### **13. FORCE MAJEURE**

Except for any obligation to make payments, any delay or failure of either Party to perform its obligations under these Terms of Reference shall be excused if, and to the extent, that the delay or failure is caused by an event or occurrence beyond the reasonable control of the Party and without its fault or negligence, such as, by way of example and not by way of limitation, acts of God, action by any governmental authority (whether valid or invalid), fires, flood, wind storms, explosions, riots, natural disasters, wars, terrorist acts, sabotage, labour problems (including lock-outs, strikes and slow downs, except for any labour problems of the Party claiming a force majeure event), or court order or injunction; provided that written notice of delay (including anticipated duration of the delay) shall be given by the affected Party to the other Party within ten (10) Business Days of the affected Party first becoming aware of such event. If requested by the unaffected Party, the affected Party shall, within five (5) Business Days of the request, provide adequate assurances that the delay shall not exceed fifteen (15) Business Days. In the event that the force majeure event lasts for thirty (30) Business Days or longer, either Party shall have the option to terminate this Agreement upon written notice to the other without liability.

### **14. MISCELLANEOUS**

(a) Notice: Every notice or other communication hereunder shall be deemed to have been duly given and made if in writing and if served by email or by personal delivery upon the Party for whom it is intended, if delivered by registered or certified mail, return receipt requested, or by a national courier service, or if sent by fax (receipt of which is confirmed) to the person at the address set forth below, or such other address as may be designated in writing hereafter, in the same manner, by such person:

To BOMA Canada  
1002-141 Adelaide Street West,  
Toronto, Ontario, M5H 3L5  
Email: [info@bomacanada.ca](mailto:info@bomacanada.ca)

To You:  
The address that You inputted onto the BOMA BEST Hub.

Any such notification shall be deemed delivered:

- (v) upon receipt, if delivered personally;
- (vi) on the next Business Day, if sent by national courier service for next Business Day delivery or if sent by fax.



Any correctly addressed notice or last known address of the other Party that is relied on herein that is refused, unclaimed, or undeliverable because of an act or omission of the Party to be notified as provided herein shall be deemed effective as of the first date that said notice was refused, unclaimed, or deemed undeliverable by the postal authorities by mail, through messenger or commercial express delivery services.

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

(c) Enurement: This Agreement shall enure to the benefit of and be binding upon each of the Parties hereto and their permitted successor and assigns.

(d) No Assignment: Neither this Agreement nor any rights or obligations hereunder shall be assignable by a Party without the prior written consent of the other Party, which shall not be unreasonably withheld.

(e) Language: It is the Parties desire and agreement that this Agreement and all Schedules and associated documentation be drafted in English. Les Parties conviennent que la présente convention et tous les documents s'y rattachant, soient rédigés en anglais.