



# RISK NOTE

## Subject: CONTRACTS: THE INDEMNITY APPROVAL PROCESS

### ***What is an Indemnity?***

An indemnity is a legally binding promise to make another party financially whole in the event of specified losses or damages stemming from the indemnifying party's acts, omissions or negligence. In a contract, an indemnity is a way to ensure the party that is best able to control certain risks, accepts responsibility for related losses.

Indemnity clauses often include language such as: “*indemnify*”, “*hold harmless*”, “*reimburse*,” “*assume liability*”, “*pay all financial obligations, loss or claims*”, “*pay for damage*”, “*obligation to repair or repay for repairs*”, “*defend and pay*” or “*accept responsibility for costs*.”

### ***What are Health Authorities (HAs) required to do before signing a contract that contains an indemnity to another party?***

HAs **must** obtain **prior written approval** of the Executive Director of the Risk management Branch (RMB), when granting indemnities to other organizations. This is a strict requirement under the *Financial Administration Act, Section 72*<sup>1</sup> and related *Regulations*<sup>2</sup>. Indemnity approvals cannot be granted **after** the contract has been signed by both parties. **If this has occurred, please contact HCPP for advice.**

### ***What makes an indemnity approvable?***

Indemnity obligations should be reasonable, and the risks should be within the control of the HA. For example, it is reasonable for the HA to indemnify another party for losses or damage that may arise due to the HA's acts, omissions, or negligence. However, an indemnity that requires the HA to reimburse the other party for damages arising from the other party's acts or negligence is not approvable.

Here is an example of an indemnity that could be approved:

The HA will indemnify the Landlord against all claims, actions, causes of action, loss, damage, expense and costs, made by any person arising from the performance, default of performance, or remedying of any default by the HA of its covenants and obligations under this Lease.

*This indemnity is approvable because the “indemnity triggers” (HA's default of its obligations in the agreement) are within the HA's control.*

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<sup>1</sup> [https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96138\\_01](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96138_01)

<sup>1</sup> [https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/153\\_2018](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/153_2018)

Here is an example of an indemnity that could not be approved:

The HA will indemnify the Landlord against all claims, demands, actions, suits and other proceedings brought against the Landlord arising out of the death or injury of any person or persons whether or not such death or injury was caused or contributed to by the HA its agents, contractors, servants, employees, or on the part of the Landlord, its officers, agents, servants.

*This indemnity is not approvable because some of the indemnity triggers (acts/ negligence of Landlord or its employees and agents) are not within the HA's control.*

### ***How can HAs get indemnities in their contracts approved?***

HAs must send their contracts to HCPP before they are executed. HCPP Risk Management Consultants will help HA staff review the risks in the agreements and determine whether the indemnities can be recommended for approval or will require changes. This review process helps to balance risk allocation between the parties and reduces the chance that HAs will accept responsibility for risks they cannot control.

If the indemnity language is reasonable, the Risk Management Consultant will recommend the indemnity for approval. Once the Executive Director has approved the indemnity, RMB will send the HA a formal approval letter, usually within 2-3 business days. This process is outlined in the **Indemnity Approval Process Flow Chart** (attached.)

### ***How can HAs support this process?***

HAs should contact HCPP early during contract negotiations. That way, HCPP Consultants can provide risk-based advice on indemnity clauses before the negotiation period ends. Please note that Consultants require time to review the contracts thoroughly and response times can be affected by contract complexity, incomplete information from HAs, and the Consultants' workloads.

HAs can also expedite the process by completing the **Contract Review Questionnaire** (attached) and submitting it along with each a new contract for review. The completed questionnaire will help the Consultants understand the context of the contract, which will speed up the review process.

### ***Blanket approvals***

When HAs expect to use the exact same contract multiple times, they should notify the Risk Management Consultant when submitting the contract for review. The Consultants may be able to obtain "blanket approval" for those contracts – which means the HAs would not need to resubmit them for indemnity approval each time they are used.

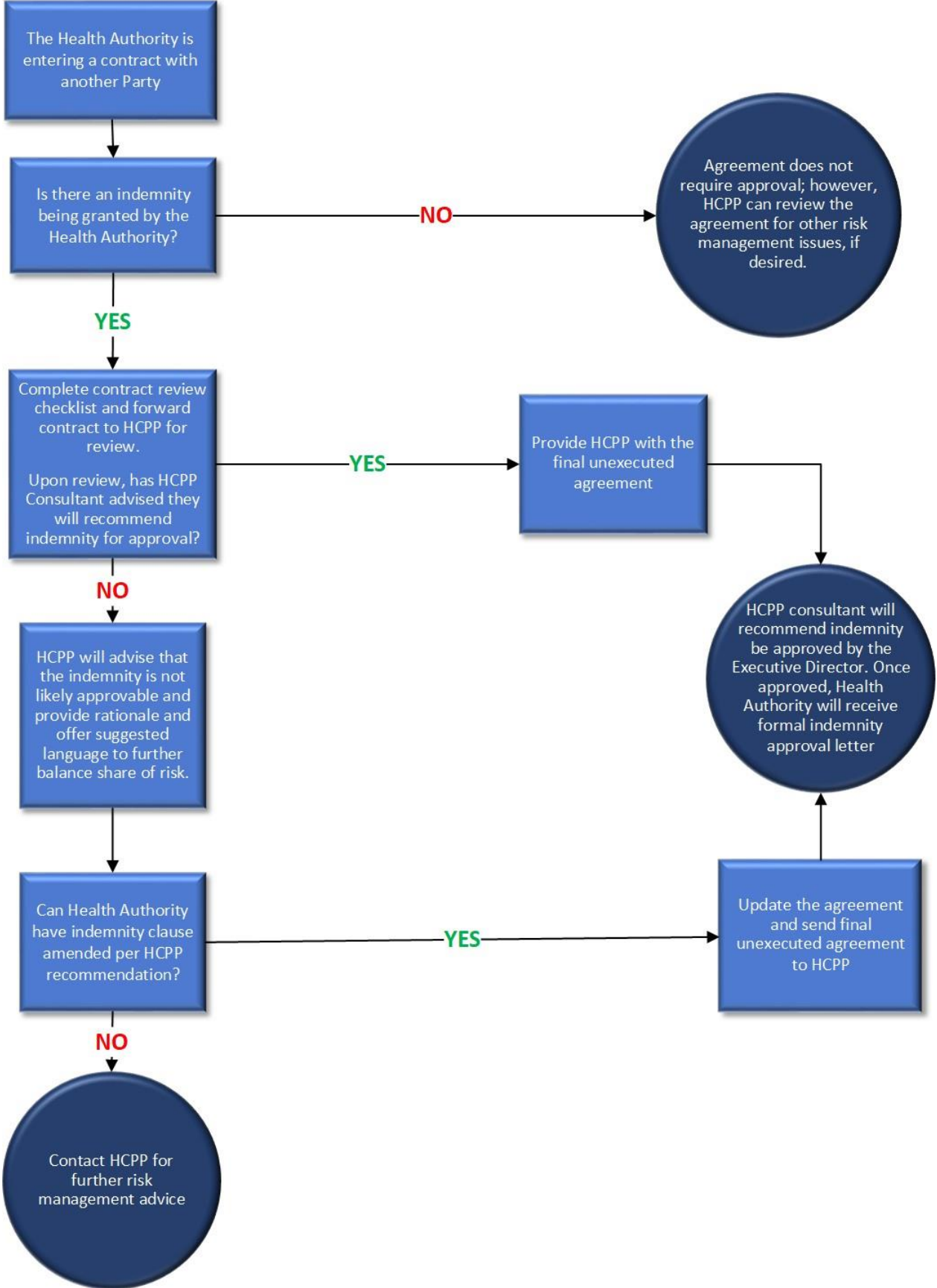
If you have questions about the Indemnity Approval Process, the Indemnity Approval Process Flow Chart, or the Contract Review Questionnaire, please feel free to call HCPP @ 250-356-1794, and a Risk Management Consultant will be pleased to help you.

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It should be clearly understood that this document and the information contained within is not legal advice and is provided for guidance from a risk management perspective only. It is not intended as a comprehensive or exhaustive review of the law and readers are advised to seek independent legal advice where appropriate. If you have any questions about the content of this Risk Note, please contact your organization's risk manager or chief risk officer to discuss.

# INDEMNITY APPROVAL PROCESS FLOW CHART





## Contract Review Questionnaire

When submitting a contract for review, please provide us with the following key information:

Are you working towards a particular deadline? If so, what is it? \_\_\_\_\_

Please explain what the contract is for and the purpose behind it. Sometimes a bigger picture context is required to understand proposed risk allocation.

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	Yes	No
<p>Is this contract subject to or part of another (Master) agreement or set of agreements? (e.g., sublease and head lease)</p> <p><i>If so please provide them, as we need to review those as well.</i></p>		
Is this considered the final form of the agreement?		

Does the Agreement include any of the following clauses:

	Yes	No	Section/ Article #	If you think these clauses are reasonable, please provide your comments below or track within the agreement:
<b>Indemnity</b>				
<b>Insurance provisions for HA<sup>1</sup> and other Party<sup>2</sup></b>				<sup>1</sup> Are they evidenced by the <a href="#">Memorandum of Coverage</a> ? <sup>2</sup> Do they align with the <a href="#">HCPP insurance risk matrix</a> ?
<b>Limitation of Liability</b>				

Additional Information	Yes	No	N/A
Will confidential info., including patient info., be shared with and or stored by the other Party? If so, has the HA Privacy Team reviewed?			
For Research or Clinical Trial Agreements: Are Investigators HA Employees?			
Is the other party providing professional services? (clinical training, nursing, software design, advertising etc.)			

<sup>1</sup> <https://hcpp.org/?q=node/34>

<sup>2</sup> [https://www.hcpp.org/sites/default/files/documents/Pub\\_HCPP\\_Insurance\\_Matrix\\_final.pdf](https://www.hcpp.org/sites/default/files/documents/Pub_HCPP_Insurance_Matrix_final.pdf)