



COVID-19: Addressing Challenges and Seizing Opportunities

CONSIDERATIONS FOR MANUFACTURERS



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It is well known that the COVID-19 pandemic has caused significant upheaval in the economy. Having provoked something of an existential crisis within many businesses, **the pandemic has led numerous manufacturers to consider restructuring their businesses, reinventing their product lines, and responding to increased demand for medical products and equipment.** Certain manufacturers have elected to ride out the current economic conditions at reduced production output, maintaining a focus on their core business segments. Additionally, many manufacturers are re-evaluating their manufacturing processes and supply chains in the aftermath of disruptions and delays caused by the COVID-19 pandemic. **Several instructive trends are described in this overview, and practical tips have been highlighted for interest.**

Trend #1: Pivoting towards medical products and equipment

In Canada, the federal government and certain provincial governments have **called upon businesses to supply products and services in support of Canada's response to the COVID-19 pandemic.** The products in high demand include disposable N95 respirators, surgical masks, nitrile and vinyl gloves, gowns and coveralls, eye protection, hand sanitizer, ventilators (ICU-level and other models), thermometers, COVID-19 testing kits, and flock swabs.

In order to directly supply the federal government, manufacturers must complete an online submission form.¹ If selected, manufacturers must ensure that their products meet the applicable specifications for the designated products.

Given the urgency of responding to the ongoing crisis, the federal government has **relaxed certain regulatory requirements with respect to the importation and sale of COVID-19 medical gear and devices**, provided that certain conditions are satisfied.² For example, manufacturers of Class I medical



devices such as masks and N95 respirators that receive an authorization from Health Canada under the interim regulatory requirements are not required to obtain a Medical Device Establishment Licence.

Some manufacturers have already entered into contracts with provincial public bodies for the supply of products and services responding to the pandemic, bypassing the normal process for public procurement. For example, in Québec, where a public call for tenders would normally be necessary, a public body may (upon authorization by its chief officer) enter into a contract with a supplier by mutual agreement, if the public body considers that it will be able to prove that a public call for tenders would not serve the public interest, based on the applicable principles.³ Another exception that permits a contract with a public body to be entered into without a public call for tenders is where there is an **emergency that threatens human safety or property**. These exceptions appear to provide a basis to justify **expedited contracting with government procurement bodies in Québec**.

Practical Tips

When manufacturers are contemplating a diversification of their production lines in order to survive the pandemic crisis or respond to shifting market demands, they should consider **reviewing their existing contractual relationships to identify any potential restrictions** – whether based simply on manufacturing capacity or resulting from restrictive covenants and exclusivities – **prior to diverting any production efforts to pursue alternative business opportunities**.

Manufacturers should also consider their **obligations to continue manufacturing their existing core products**; for example, under unfulfilled purchase orders and where they are required to produce spares and service parts.

Above all, manufacturers should assess the **impact of pivoting to explore new business opportunities on their existing customer relationships**, including where the shift could cause tensions due to competition or incompatible order and delivery expectations.

Finally, in the context of diversifying their product offerings, it is essential for manufacturers to **contact their insurance brokers** (or insurers) **to determine the impact on their coverage and premiums**, particularly with respect to product liability claims, especially where objectively “higher-risk” products (namely, medical supplies or equipment) would be produced as a result of shifts in manufacturing activities.

Trend #2: Supply chain challenges

Manufacturers with offshore suppliers are facing challenges such as factory shutdowns, dramatically increased prices for certain goods, transportation and logistics issues, and customs delays. These **unforeseen disruptions may impede** manufacturers' abilities to meet their own **production schedules and contractual obligations**.

Practical Tips

In order to mitigate the adverse effects of supply chain issues, manufacturers should **remain in close communication with all stakeholders**, especially customers and suppliers, in order to **manage expectations and identify compromises and solutions** in the context of the crisis and beyond.

Where feasible, it may be desirable for manufacturers to take measures to **support their suppliers and collaborate with them** to avoid quality degradation and late deliveries, to the extent possible.



Given that the COVID-19 pandemic is expected to have **lasting effects in local markets and the global economy**, and that **further waves of infection** are expected to occur in the short and medium term, manufacturers may consider **broadening their sourcing and supplier networks**, in order to minimize the detrimental consequences of future supply chain disruptions. There may also be **increasing interest in relocating supply sources to closer geographical markets**.

With respect to **logistics planning**, it may be advisable for manufacturers to consider **less formal contractual arrangements with carriers** and related service providers in order to allow flexibility in transport planning.

Trend #3: Process flexibility in forward planning

Forecast-driven production schedules that are optimized for operational efficiency are typically rigid. Due to the current unpredictable economic conditions and the anticipated future disruptions, manufacturers are increasingly **turning toward agile manufacturing processes and supply chains to promote enhanced flexibility**. For some, this will require investing in different, nimbler technologies, such as those enabling additive manufacturing, IoT devices for demand sensing, and advanced forecasting solutions.

Practical Tips

Manufacturers should **plan for the risk of force majeure events in future contracts with suppliers**, not only with regard to the consequences of such events on the parties' respective rights and obligations, but also in terms of project schedules and contingency planning.

For example, if a *force majeure* event occurs, impacting the ability of a supplier to provide the manufacturer with raw materials, what is the nature of the supplier's obligation to assist the manufacturer to procure an alternative supply source? What timeframe does the supplier have to take steps to remedy the situation?

Forging Ahead

In short, many manufacturers have their work cut out for them when it comes to surviving the COVID-19 pandemic and/or supporting the response to the crisis.

The pandemic certainly represents a challenge for numerous manufacturers; however, it may also be an opportunity for them to become more resilient.

As the lasting consequences of this public health crisis unfold, there are obvious benefits for manufacturers to engage in **proactive planning** in order **to mitigate the impact of similar crises in the future**, and other force majeure-type events. Such planning should be reflected in manufacturing and supply agreements where possible, with a view to ensuring greater certainty and stability among contracting parties in circumstances that are highly uncertain and unstable.

The information and commentary set forth herein are for the general information of the reader and are not intended as legal advice or as an opinion to be relied upon in relation to any particular circumstances.

If you have questions with respect to manufacturing and supply arrangements, please contact one of our specialized attorneys, who will be pleased to advise you.

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¹ The form can be found at <https://buyandsell.gc.ca/forms/help-canada-combat-covid-19-submission-form-0>.

² Interim order respecting the importation and sale of medical devices for use in relation to COVID-19 (Canada).

³ *Act respecting contracting by public bodies* (Quebec), C-65.1