Supply chains in a post-pandemic world

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Will the pandemic cause companies to diversify their choice of carrier?

Sarah Sweet , Senior Associate, Insurance & Tort Liability Group

Diversification is happening at both the shipper and carrier side of carriage. From the shipper's perspective, they are seeing what were thought to be relatively established carriers facing a real risk of insolvency and becoming faster to request changes in payment terms, decreasing payment times and moving to a pre-paid as opposed to payment on delivery system.

Shippers would be wise to establish relationships with multiple carriers to offset the risk of one carrier becoming insolvent, and to increase their bargaining power when negotiating carrier contracts terms. This also decreases the risk, depending on shipment volume, of a carrier's decision to claim, whether properly or improperly, a carrier's lien over the shipper's cargo in transport.

If a shipper is using an exclusive carrier and a large portion of their cargo is in movement at any given time, a breakdown in the relationship with the carrier could pose a substantial risk to the shipper. There may also be an interest for some shippers in investing in an internal fleet instead of relying on an external carrier. However, at a time when the financial circumstances of many shippers is unpredictable, a significant capital investment may not be wise.

On the carrier side we are seeing carriers diversify their service models and freight mix. Pre-COVID, many carriers either targeted a specific point of carriage, such a last-mile delivery, or specific markets, such as food and restaurant services. Diversifying both a carrier's customer base and industry will be key for most carriers in surviving this period.

Robin Squires , National Leader, Transportation Focus Group

Definitely. The risk of insolvency among carriers is too great to put all your eggs in one basket. In addition, the increased demand for certain types of cargo and slowdowns in certain ports will increase prices overall. As a result, companies will very likely shop around for the best price on a more regular basis than they may have done previously.

Do transportation contracts need overhauling to reflect the new reality? What changes should be recommended due to COVID-19 and its effects on the economy?

Robin Squires , National Leader, Transportation Focus Group

There is a need for review and overhaul of transportation contracts by carriers and companies in an effort to reduce exposure to delays and cancellation of services resulting from future pandemics and related events.

Sarah Sweet , Senior Associate, Insurance & Tort Liability Group

Prior to COVID-19, the typical concerns in transportation contracts were ensuring proper representations and warranties about the carrier's ability to perform the carriage or the type of goods to be transported. Other concerns involved adequate and robust insurance and indemnity provisions, and general risk management for what at that time were high priority concerns – for example, environmental spills or transportation of dangerous goods.

In a post-COVID world, thought should be given to a contract's *force majeure* provisions, as many industry members realized these provisions were significantly under drafted. In particular, consideration should be given to what has caused carriers and shippers to be unable to meet their contractual obligations during this period. Often it is the steps taken by governments and other authorities in response to COVID-19 that actually prevent or hinder contractual performance rather than the virus itself, save of course for an outbreak on a vessel or a circumstance similar to that.

In those circumstances, the key language is not "epidemic" or "public health emergency," but "government acts" or similar language. Consideration should also be given to payment terms and ways in which to remedy payment default, as well as service levels and a minimum of mandatory volumes – particularly if both the carrier and shipper intend on diversifying.

Has there been any relaxation of environmental standards to offset challenges businesses face due to COVID-19?

Heidi Rolfe , Senior Associate, Environmental, Municipal, Expropriation and Regulatory Group

And

Emily Pitre , Associate, Disputes Group

Generally, Canadian businesses should assume that environmental standards continue to apply.

Limitation periods were suspended with respect to civil proceedings in various Canadian jurisdictions, but deadlines under provincial and federal environmental legislation or those contained in orders issued by administrative decision-makers are not necessarily suspended. The applicable standards and deadlines must be considered on a case-by-case basis.

We are aware of at least one instance where the Ontario Ministry of Environment, Conservation and Parks has taken the position that deadlines imposed under Orders are not automatically extended, but was nonetheless prepared to grant an extension on a discretionary basis. It would be prudent to seek an extension where deadlines under Orders and approvals may be pending.

The British Columbia *Mines Amendment Act*, which came into force in August 2020,is another such example. This legislation introduces a new chief permitting officer position and strengthens the provincial government's ability to hold mines accountable for causing injuries, loss of life or property, or environmental damage. The Honourable Bruce Ralston, Minister of Energy, Mines, and Petroleum Resources, described the rationale behind this legislation as follows: "[t]he COVID-19 pandemic has reinforced that health and safety must remain a top priority."

On April 1, 2020, the British Columbia government introduced amendments to the *Greenhouse Gas Emission Reporting Regulation*, B.C. Reg. 249/2015. These amendments:

- Altered the reporting requirements;
- Allowed for extensions for submitting verification statements, emission reports and compliance reports (by up to six months); and
- Provided an option for virtual site visits.

At present, all other related requirements remain unchanged.

Companies with packaging and paper product obligations arising from recycling stewardship programs, also referred to as extended producer responsibility, benefitted from flexible reporting obligations in 2020, including extended deadlines to file reports and expanded payment deferral options. Stewardships in British Columbia, Saskatchewan, Manitoba, and Ontario also joined this announcement to apply relaxed reporting obligations in their respective jurisdictions.

Has the onset of COVID-19 led to any changes as far as environmental obligations?

Heidi Rolfe , Senior Associate, Environmental, Municipal, Expropriation and Regulatory Group

And

Emily Pitre , **Associate, Disputes Group**

Canadian businesses should also assume that all environmental and regulatory conditions with respect to monitoring, reporting, *etc.* remain enforceable.

Regulatory bodies and administrative decision makers across the country continue to carry out compliance and verification activities, although the manner in which those activities are carried out and the methods utilized by regulators may differ from those with which regulated companies are familiar (*e.g.*, video conference vs. an in-person field inspection).

Environmental regulators may, on a case-by-case basis, exercise discretion in circumstances where operators and facilities anticipate that they may be unable to comply with the conditions of their approvals or authorizations or associated deadlines. However, such relief from obligations cannot be presumed. Each particular regulatory agency or decision-maker may have different responses to COVID-19.

Companies have pivoted or shifted how they operate due to COVID-19. Will their new supply chains continue post-pandemic? If supply chains return to their past ways, what happens with overcapacity?

Martin Abadi , **Counsel, Insurance and Tort Liability Group**

What would have been understood as 'overcapacity' will more likely, post-pandemic, be understood as 'resilience.'

The trade-offs between efficiency and resilience, and between cost competition and a 'made-in-Canada' premium, are not new. However, the way these trade-offs are weighed may change in certain industries. The clearest example is 'critical' supplies, which in the case of the pandemic were healthcare products. From vaccines to sanitizer, Canadians experienced shortfalls and delays due to insufficient, or non-existent, domestic manufacturing capabilities. This has led to a push for national self-sufficiency, with the Canadian government rushing to onshore production of necessary materials related to COVID-19.

Despite this call for more made-in-Canada solutions, developing these capabilities requires both a reduction in red tape and adequate investment. One of the largest impediments to establishing a manufacturing presence in Canada is regulation – for example, the time and resources required to satisfy Canadian licensing requirements to produce and sell health products.

While Health Canada has streamlined some licensing processes during the pandemic – including allowing more types of ethanol for use in sanitizer, which allowed Canadian distilleries to adjust their manufacturing processes to produce the much-needed product – these regulatory changes are temporary, and cannot be relied on long-term. Therefore, much will depend on the level of investment by government or private investors, both of which will require a compelling value proposition post-pandemic, where many of these urgencies may be relegated by other priorities (economical and social) during the recovery process.

Accordingly, in industries where consumers typically prioritize low cost and variety, there is a good chance that supply chains will revert to pre-pandemic priorities. While businesses may look to capitalize on current consumer willingness to 'Buy Canadian,' concentrate their spending domestically and reduce the footprint of their purchases for environmental reasons, it is unclear how long this consumer sentiment will last. At the same time, suppliers that have benefitted from new supply chain arrangements should consider how they can retain these relationships once market conditions move closer to the pre-pandemic state, and how they can best leverage any new capabilities or financial gains that they have acquired from this (likely impermanent) pivot to onshoring.

What impact do you see the pandemic having on the adoption of automation in the supply chain?

Edona Vila , Partner, Insurance and Tort Liability Group

From manufacturing to delivery, the pandemic has led to a flourishing of automation throughout the value chain. Traditionally automation has faced both skepticism and fear related to job-security, which has hindered its dissemination into organizations. However, due to the pandemic and the need for more social distancing, supply chains have been able to incorporate automation faster, and leaders of companies around the world are investing now for an increasingly automated world post-COVID-19. By reducing the number of individuals needed in an operation, or by replacing them altogether, automation has enabled organizations to navigate and manage disruptions caused by the pandemic. There is likely no going back.

An additional impact of the pandemic is that deploying automation systems and robots virtually has become the industry standard, at least temporarily. Not only does virtual deployment limit the amount of physical face-to-face contact, companies that deploy automation can now reach companies faster and more comprehensively, leading to even faster adoption of automation across industries.

This has also influenced the usability of robots. As the need for robots has become so widespread across industries, it has become critical for anyone to be able to operate them successfully.

How specifically has COVID-19 affected large distribution centres?

Edona Vila , Partner, Insurance and Tort Liability Group

With an unpredictable future, warehouse and distribution centres will look to be as flexible as possible. First, businesses will increasingly emphasize industrial capabilities over retail. Large companies in the warehousing, distribution and logistics sectors will have shipping centres throughout Canadian municipalities to accommodate the increased demand for transportation of physical goods to businesses and residences. Second, online sales will require businesses to acquire more last-mile/last-touch facilities, distribution centres and cold-storage facilities. Land shortage will continue to be an issue and we will likely see more redevelopment of older industrial buildings within city centres.

It remains to be seen how, and where, businesses will find the space that they need to meet consumer demand. Time will tell whether they resort to using multi-storey warehouse buildings to do so, and the extent to which they will inform – as a key stakeholder – the development of smart roads (*e.g.*, using vehicle- to-infrastructure communication), smart city and transit-oriented developments currently under consideration in various jurisdictions.

How do manufacturers increase their advanced manufacturing technology capabilities, while balancing the associated risks?

Martin Abadi , Counsel, Insurance and Tort Liability Group

In order to retain a distinct source of competitive advantage using domestic supply chains, Canadian businesses will likely rely – as many already do – on advanced manufacturing technology to make a premium product, rather than compete on price alone.

In doing so businesses must consider the barriers to entry, such as cost of investment, licensing, continuing compliance and managing the ongoing risk related to product liability. The time required to implement these advanced manufacturing capabilities is also a cost, and potentially creates the most uncertainty of all when taking into account the waiting periods that may occur while seeking regulatory approval.

Ideally, businesses would have clear guidance from regulators as to the steps required to approve or certify their processes, as well as the certainty of how long such approvals would take. However, the pandemic has sent both elements into flux for the time being. Businesses that can overcome these barriers and make substantial commitments at a time where many competitors remain on the fence may be able to flourish and benefit from substantial first-mover advantages.

Keegan Boyd , Partner, Health Law Group

This depends on a number of variables. From my vantage point, it seems that some manufacturers have found opportunities because of the disruption in global supply chains resulting from the pandemic. For instance, some manufacturers have benefitted from government funding that has enabled them to invest in their production facilities and to focus on making products that were found to be in short supply.

In other cases, barriers to entry have been reduced. For example, we’ve seen expedited approvals for COVID-19 related drugs and medical devices that have enabled some manufacturers and distributors to focus on new products and endeavours. Longer term, some of the expedited processes and funding may not be available, but companies that strategically relied on such things to quickly respond to various demands may benefit in the long run. There are risks though. Some of the new products and devices that were rushed in to meet urgent demands may ultimately be found to have issues that could affect performance.

What actions should Canadian businesses take to manage their supply chains in light of COVID-19?

Milos Barutciski , Partner, Corporate Commercial Group

Looking ahead, businesses should focus on balancing resiliency and efficiency in their supply chains. They can do this by diversifying their international supply chains over several jurisdictions to maintain options in the event of future disruptions. A supply chain audit can assist in determining overall risk level, and help identify areas for enhancing resilience.

Businesses may also look to upgrade their supply chain oversight by incorporating a more comprehensive approach to compliance, with expanding regulatory obligations in areas like economic sanctions and human rights. Canada has increasingly implemented economic sanctions in the past decade, including recent sanctions with respect to Russia, China and Myanmar (Burma). Canada is not alone in its increased use of economic sanctions. Other countries have increasingly implemented sanctions, notably the United States, whose sanctions often have extraterritorial effect.

Similarly, Canada appears to be following the lead of other countries, such as the United States and United Kingdom, in considering the adoption of “Modern Slavery” legislation that would introduce transparency obligations with respect to compliance with human rights in international supply chains, as well as a prohibition on the importation of goods produced in whole or in part with forced labour. A supply chain audit can also secure compliance with existing and pending international trade regulatory requirements.

What have we learned from the challenges the medical industry faces because of the pandemic?

Keegan Boyd , Partner, Health Law Group

In Canada we rely on foreign companies for many things, including some forms of personal protective equipment and certain types of vaccines. While this approach works most of the time, evidently it is not the best approach to protecting Canadians from global threats, such as a worldwide pandemic. If Canada is going to continue relying exclusively on foreign entities in its supply chains, we should be stockpiling some items with long shelf lives to minimize the impact of our reliance on others.

COVID-19 vaccines and Canada’s vaccination rate provide a good example. Any delay in Canadians receiving a specialized COVID-19 vaccine, compared to individuals in countries that have the capacity to manufacture advanced vaccines, may be a necessary trade off. We should, however, be thinking about whether building the capacity to produce certain products domestically would be a worthwhile use of resources. Sanofi's recent announcement that it is planning to build a new vaccine manufacturing facility in Toronto demonstrates that different levels of government are already focused on partnering to increase Canada's domestic production capacity with respect to vaccines.

This is not just a pandemic-related issue. Even before the pandemic, there were recalls on medical equipment and devices. When you have only a few major suppliers of any medical product and no domestic production capacity, any recall or device issue can result in an immediate short supply. I think many hospitals will reflect on the global supply issues experienced during the pandemic and consider varying their suppliers and, where possible, maintaining larger inventories.

Are there any emergency regulations now in place that should continue post-pandemic?

Keegan Boyd, Partner, Health Law Group

Drugs and medical devices are heavily regulated in Canada, and the pandemic has exemplified how challenging it can be to launch new health products in the Canadian market. Many products have been authorized under interim orders, and it is unclear to what extent these products will be permitted to be sold and used post COVID-19. Ideally, products that have received such authorization and have 'proven themselves' during the pandemic will be approved for ongoing use through some form of expedited post-pandemic approval process.

Milos Barutciski, Partner, Corporate Commercial Group

When borders closed, the federal government adapted its customs legislation, policies, and procedures to meet the pandemic's logistical challenges, such as the need to acquire personal protective equipment (PPE) via production or procurement. In particular, the federal government implemented the following interim measures:

> (a) Expediting authorization for the manufacture, import and distribution of health supplies;
>
> (b) Relaxing customs procedures (*e.g.*, streamlined clearance procedures and reduced tariffs for PPE and other essential goods) and relief from fees and penalties in response to business disruptions; and
>
> (c) Encouraging collaboration in good faith among competitors to provide critical goods and services by providing guidance from the Competition Bureau on the treatment of such collaboration.

The federal government also enacted Bill C-20, *An Act respecting further COVID-19 measures*, whereby certain legislative time periods could be suspended or extended by ministerial order. This authority covers a broad range of legislation including notably the

Bankruptcy and Insolvency Act, the *Canada Business Corporations Act*, the *Income Tax Act*, the *Investment Canada Act* and the *Special Import Measures Act*.

As we navigate toward broader rollout of COVID-19 vaccinations, we expect Canada to gradually relax restrictions on border crossings, including quarantine rules and, notably, hotel stay requirements for incoming air passengers. We also expect Canada to gradually roll back changes in statutory timelines and customs processes introduced in response to the pandemic.

Nevertheless, as workplaces return to capacity with expanding vaccine programs in Canada and internationally, and with the gradual roll-back of emergency measures and pandemic regulatory intervention, Canadian businesses should expect that a more active regulatory environment is likely to exist for some time. This trend will increase the need for Canadian businesses to keep abreast of the regulatory frameworks applicable to their respective industries.

How has COVID-19 influenced and changed the supply chain process to date?

Robin Squires , National Leader, Transportation Focus Group

There has been a multitude of changes. There has been a diversification of preferred modes of transport. There has been a shift from just in time to having stock on hand or in warehouses to try to address the risk of future challenges similar to COVID-19, along with a focus on micro-fulfillment strategies to reduce floor space and cost.

There has been increased focus on accelerating the use of autonomous and robotic technologies to reduce similar impacts. There has been increased focus on addressing the long-standing issue of last-mile delivery for the same reason. Mergers, acquisitions, and insolvencies have created their own challenges. All of the above, among many other things, will create new challenges for investment and talent acquisition in the industry.

Sarah Sweet , Senior Associate, Insurance & Tort Liability Group

COVID-19, like other stressors on the supply chain we have seen in recent years, has emphasized the need to have an adaptive supply chain. In many ways, COVID may have accelerated this process for shippers and carriers.

Carriers are now, understandably, more wary about relying on one or two long-term, high-volume contracts and are moving instead to working with multiple shippers in multiple industries. It also helps to focus on servicing more national and international locations, where carriers are able, to account for potential lockdowns and quarantines.

These strategies can also assist with other non-COVID related stressors, such as port closures and worker strikes. Other considerations, including modernization and digitization of operations and infrastructure, have been critical to success during the pandemic.

Keegan Boyd , Partner, Health Law Group

In the medical field, we have seen Canadian companies retool to manufacture needed supplies and equipment, including ventilators and other medical devices, in an effort to meet a sudden increase in demand. Because of COVID-19, I suspect there will be a permanent increase in Canadian manufacturing capacity in the health care space.

In the future, Canada is likely to be more attuned to the advantages of maintaining multiple supply chains for important products, including some level of domestic capacity.

I think the bigger lesson is in pandemic preparedness – making sure that for supplies that we could need in an urgent situation, we've either stockpiled them or made agreements to ensure access in the event there is sudden increase in global demand. This pandemic has reminded people that things can turn on a dime, and we need to be prepared.

Martin Abadi , Counsel, Insurance and Tort Liability Group

And

Milos Barutciski , Partner, Corporate Commercial Group

For many businesses who used a 'just-in-time' delivery model, the impact of the international response to the COVID-19 pandemic – via emergency regulations, shutdowns, labour shortages, and transportation network disruption and delay – disproportionately affected their lean supply chains and disadvantaged their competitive position vis-à-vis businesses whose supply chains employed safer (and arguably less efficient) inventory practices and diversified portfolios of suppliers. At least in the short term, the pandemic will lead many businesses to introduce resilience into their supply chains, despite a potentially higher cost. We will see if pricing pressures – and the receding memory of the pandemic in coming years – causes supply chains to 'lean out' over time.

The pandemic also provided an opportunity for countries to promote 'buy local' policies and rhetoric, accelerating the global trend of protectionism that had been gaining traction over the past several years. As a result, it seems clear that that some governments will strive for self-sufficiency in critical sectors, exemplified by China's 14th Five Year Plan, while others enhance preferential treatment for domestic supply, such as the Biden administration's 'Buy American' policies. Both approaches can be expected to run into potential conflict with international trade commitments on export and import restrictions and government procurement.

How has Canada 's supply chain held up throughout the COVID-19 pandemic?

Sarah Sweet , Senior Associate, Insurance & Tort Liability Group

The Canadian supply chain was in many ways rattled, but certainly not broken, by COVID-19. The supply chain took some time initially to respond to rapidly changing conditions – for example, halting of production and closures, employee concerns and safety, and changing demand from customers and shippers. Overall, the supply chain has bounced back. It is now better at adaptive response and predicting the changes in the market and conditions than it was earlier in the pandemic.

Martin Abadi , Counsel, Insurance and Tort Liability Group

Canadian supply chains have adapted, with great agility, to rapid changes in consumer demand and available resources. They have faced labour shortages, particularly in the agriculture and food markets, and several outbreaks in meat packing facilities have left prices high and supplies lower.

For Canadian businesses, COVID-19 has highlighted the dangers of over-relying on any one source in any part of their supply chain. Many of these businesses have also shifted to domestic supply chains, increasing the trends of 'glocalization' and de-globalisation that had been taking hold pre-pandemic. And while domestic supply chains have also faced challenges – more than 60 per cent of organizations that source Canadian inputs reported medium to high disruptions due to the pandemic – many Canadian businesses still intend to make this shift permanent.

Keegan Boyd , Partner, Health Law Group

I'm not sure that Canada's supply chains held up any more poorly than other countries for certain things, but there were definitely shortages of some products that continued for quite some time.

I'd like to think most of these product shortages have resolved. Last year, from July to September, I was talking to many hospital clients about using alternatives to N95 masks because they could not get enough N95 masks to meet the increased demand. However, certain alternatives were able to be sourced. I suspect that similar issues happened all around the world. There was that initial toilet paper crunch, which was interesting. In addition, despite the early scare about groceries and many empty shelves in the early days, it seems that Canada's grocery supply chain has held up fairly well.

By

Sarah Sweet, Robin Squires, Heidi Rolfe, Emily Pitre, Sam Levy, Keegan Boyd, Avesta Alani

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Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749