



Dear Member,

During the past few months, BMS has worked collectively with its expert partners and your Association to develop timely resources to assist health professionals through the different stages of the COVID-19 Pandemic.

Included in this package are answers to commonly asked questions, articles and templates to support you in this next phase of returning to practice.

- Considerations When Resuming Practice
- Waivers of Liability – Considerations When Resuming Practice
- Virtual Health Care Services – Ensuring Continuity of Care
- Telehealth Consent Form
- Ethical Issues for Regulated Health Professionals in the Era of COVID-19
- Risk Management During the COVID-19 Pandemic
- Business Continuity Planning

As your broker, BMS is here to help. Our team can assist in answering any coverage-related questions, can provide insurance advice in relation to your specific practice circumstance, and assist you in navigating the steps to report a claim if an incident does arise. BMS is your partner in this process. We will continue to work with you, your association, and the industry to deliver timely information and tailored risk management resources to assist you wherever possible.

About BMS

BMS Canada Risk Services Ltd. (BMS) is headquartered in Ottawa, and is part of BMS Group, a global Lloyd's of London broker. Their Canadian team of industry experts provides industry-specific risk management and specialist brokerage services while offering a comprehensive range of insurance products and resources to Canadian associations and their members.

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This document is based on information available as of May 22, 2020. We encourage you to monitor the website of your provincial or territorial government and College for updates. This document is not intended to take the place of broker, legal or College advice. Please contact BMS if you have any questions about your liability insurance coverage and how it may respond in your practice scenario. The circumstances surrounding COVID-19 continue to change rapidly and BMS Canada Risk Services Ltd. (BMS) wanted to provide members access to information relating to Liability Insurance Coverages that they may have purchased through their respective Professional Association Program. As the environment and realities related to COVID-19 are still in their infancy and continue to change rapidly, this information is provided merely as a guide and must be interpreted reflecting on when the information was delivered recognizing that the expert advice may change as the situation develops. This document is a summary of coverage and is for information purposes only. It is not, nor should it be considered, broker advice and should not be relied upon as such. Full terms and conditions of the policy, including all exclusions and limitations are described in the policy wording, a copy of which can be obtained from BMS. For more information on the coverage please contact us.

CONSIDERATIONS WHEN RESUMING PRACTICE

With each province and territory working on a different strategy for when and how Canadian workplaces can begin to reopen and resume delivery of services, there is a common message for everyone – there will be a “new normal”.

This will include accounting for physical/social distancing, ensuring appropriate use of personal protective equipment (PPE), adopting proper cleaning and disinfecting protocols, and other measures to assist in reducing transmission of COVID-19 moving forward.

With this situation has also come new or increased liability exposures for professionals, particularly health practitioners. Therefore, it’s important to understand how to reduce or mitigate your liability risks, while also adhering to broader requirements.

This document provides a number of considerations for workplaces beginning to re-introduce staff and patients into their facilities. However, this is not an exhaustive list, and it is important to reference specific public health guidelines and occupational health and safety requirements from your provincial or territorial government, Health Officer, and regulatory body, if applicable. Professionals practicing in a public setting must also adhere to the protocols established within their workplaces.

Workplace Patient and Client Considerations

These include:

Screening, for instance of staff and clients before entry to assess for symptoms of COVID-19 and exposure history;

Physical Distancing, such as restricting the total number of individuals in the facility at one time;

Appropriate use of PPE, including appropriate use of procedure mask when carrying out interventions, and gloves, gown, mask, eye protection where there is risk of exposure to biological liquids;

Cleaning / Disinfection, including having staff and clients wash their hands with soap and water or use an alcohol-based disinfectant before and after each consultation, among other measures.

The lifting of restrictions due to the COVID-19 pandemic is determined by each individual province or territory.

More detailed recommendations for health professionals can be found here:

[Saskatchewan and here](#)

[Manitoba](#)

[Alberta and here](#)

[Ontario and here](#)

[Prince Edward Island and here](#)

[Quebec](#)

[New Brunswick and here](#)

[British Columbia](#)

[Newfoundland and Labrador](#)

Many professionals are also asking about new or increased liability exposures related to resuming in-person delivery of services, specifically around liability associated with transmission of the COVID-19 virus. For instance,

If I infect a patient without knowing I have COVID-19 while rendering care and am sued, will my Professional Liability Insurance protect me?

If you are delivering professional services and are worried about liability related to possible transmission of COVID-19 to your patients, please rest assured that your professional liability insurance (PLI) policy is there to protect you.

An allegation related to transmission of COVID-19 while delivering professional services is considered similar to any other allegation of injury to a patient under your PLI policy. In fact, the definition of “injury” in the policy wording includes “disease” and the consequences that result from it, including death, mental anguish, and disability, among others.

As with professional practice generally, you are expected to practice safely and work within your scope of practice. During the current COVID-19 pandemic this means following the recommendations of your provincial/territorial government and the best practice guidelines and standards set by your regulatory body and workplace, particularly with respect to infection prevention, use of PPE, and safe delivery of care. If you disregard these guidelines, it could be argued that transmission of the virus was an expected or intended consequence of your decision and your insurance coverage may not respond. It is also standard to have exclusions for claims arising from actual or alleged abuse. Please remember to practice safely to keep yourself and your patients’ safe in these difficult times.

Does my insurance coverage respond if a visitor contracts COVID-19 on my premises, such as a waiting room?

Your Commercial General Liability (CGL) insurance protects you against claims arising from “bodily injury” or “property damage” that you (or your business, including your staff) may cause to another person as a result of your operations and/or premises and not related to your delivery of professional services. Generally, the definition of “bodily injury” in a CGL policy includes disease.

There may be coverage under a CGL policy to respond in this scenario, provided there were allegations of bodily injury, property damage or personal injury claimed by a third party arising from your handling of the COVID-19 pandemic. As with any CGL claim under the policy, the loss must also have occurred during the policy period and in the Coverage Territory. There are also standard policy exclusions that would be reviewed in the case of a claim. Decisions about how coverage will respond to claims relating to COVID-19 will be made by the insurer based on the facts of each claim, the policy at issue and applicable law.

Telehealth

You may also be delivering services via Telehealth to assist clients who can be appropriately served by digital means. There are additional exposures when utilizing technology to deliver care, including potential privacy breach or ransomware attack. You may already have an element of cyber/privacy coverage under your professional liability insurance policy, however BMS recommends that you consider securing additional Cyber Security & Privacy Liability insurance for additional protection.

This document is based on information available as of May 11, 2020. We encourage you to monitor the website of your provincial or territorial government and College for updates. This document is not intended to take the place of broker, legal or College advice. Please contact BMS if you have any questions about your liability insurance coverage and how it may respond in your practice scenario.

WAIVERS OF LIABILITY - CONSIDERATIONS WHEN RESUMING PRACTICE

If you are in a position to return to your practice and see clients/patients in person, there are additional measures you should consider implementing in order to minimize your risk of a claim and/or complaint.

A best practice would be to consider having your client/patient sign a waiver acknowledging they will not hold you and/or your clinic, employees or agents responsible if they are exposed to and/or contract COVID-19 as a result of attending at your clinic/office/facility.

Prior to having a client/patient sign a waiver, you should:

- ensure that you are aware of any restrictions/limitations on the provision of services and social distancing and sanitization requirements that are applicable in your jurisdiction; and
- you have taken steps to ensure that you, your employees, agents or other health care professionals that you work with and the operator of the facility where you will be providing services (if applicable) are in compliance with those restrictions.

More information about public health guidelines and occupational health and safety requirements can be found by accessing the websites of your provincial or territorial government, Health Officer, and regulatory body, if applicable. Professionals practicing in a public setting must also adhere to the protocols established within their workplaces.

Once you have determined that you are in a position to provide services in person to your clients/patients safely and in compliance with the applicable restrictions, you may decide to have your client/patient sign a waiver that acknowledges the risk of being treated in person and releases you from any liability should the client/patient contract COVID-19 as a result of their attendance.

Sample language is produced on the next page. If you choose to use this sample clause, it should only be used as a starting point for an informed discussion with your client/patient. You should consider adapting and amending it, if you choose to use it, to meet the particular circumstances of your practice and to comply with the applicable legislation, guidelines and regulations in your jurisdiction.

In addition, if you choose to have the client/patient sign the waiver, this should be completed prior to the client/patient attending at your physical location.

While a signed waiver may reduce the possibility of the health care provider or facility becoming involved in a lawsuit, the decision whether or not to incorporate liability waivers into your practice is an important one that requires careful consideration.

Asking a client/patient to sign away their legal right to compensation, while possibly offering some degree of protection to the provider, may end up disrupting efforts to establish good patient-practitioner rapport. You should consider your professional and ethical obligations prior to implementing a waiver into your practice, including whether your regulatory body (if applicable) or professional ethics allows you to condition the provision of healthcare services on a signed liability waiver and refuse treatment to a client/patient who chooses not to sign the waiver.

Whatever your final decision, your risk management strategy must be complemented with good patient-practitioner communication. This should include, for example, explaining the risks associated with a treatment intervention, encouraging your client/patient to ask questions before signing forms, and attending to your client/patient's concerns and well-being following an unexpected outcome.

BMS also recommends that you regularly review your insurance portfolio to ensure that you and your business have the appropriate liability insurance to respond should a claim come forward against you. Please contact the BMS broker team if you have any questions about your insurance policies and how they may respond if a client/patient were to contract COVID-19 as a result of attending at your clinic/office/facility.

Sample Language for Waiver

Release of Liability, Waiver of all Possible Claims and Assumption of Risk

****Please review before signing****

I hereby acknowledge that I have agreed to meet with _____ (the "HCP")
(insert name of professional here)

at _____ (the "Facility") for the purpose of receiving
(insert name and address of facility here)

_____ (the "Services").
(insert services provided here)

I acknowledge and accept that there is a risk that I could be exposed to COVID-19 while attending at the Facility. I also acknowledge and accept that while receiving services, the HCP may need to be closer than the recommended social distancing guidelines in order to assess and/or treat me. I acknowledge and confirm that I am willing to accept this risk as a condition of attending at the Facility to receive services from the HCP.

In consideration of the HCP agreeing to see me in person at the Facility, I agree to release the HCP and the Facility (if applicable), their officers, directors, employees, agents and volunteers (the "Releasees") from any and all causes of action, claims, demands, requests, damages or any recourse whatsoever in respect of any personal injuries or other damages which may occur or arise as a result of exposure to COVID-19 during my visit to the Facility and/or through the provision of services to me by the HCP.

I do hereby acknowledge and agree that notwithstanding the generality of the foregoing, I declare that I will not commence litigation or otherwise seek to recover damages or other compensation against the Releasees based on any action, claim, demand, request, loss or any recourse whatsoever arising from any potential or actual exposure to COVID-19 while attending at the Facility and/or through the provision of services to me by the HCP. I further acknowledge that the Releasees can rely on this Release of Liability, Waiver of all Possible Claims and Assumption of Risk as a complete defence to any and all claims, damages, causes of action, or recourse or liability that may arise at any time.

I have carefully reviewed this Release of Liability, Waiver of all Possible Claims and Assumption of Risk and acknowledge that I fully understand the terms as set out above. I acknowledge that I am signing this Release of Liability, Waiver of all Possible Claims and Assumption of Risk voluntarily.

COVID-19: VIRTUAL HEALTH CARE SERVICES ENSURING CONTINUITY OF CARE

In the wake of the novel coronavirus (COVID-19), health professionals are exercising all efforts possible to ensure that there is no disruption in service or breakdown in patient care. The Ministry of Health in Ontario has released health-sector specific [guidelines](#) to assist health facilities minimize the risk of infection within their respective practices.¹

Current public health directives advise against direct patient care in non-urgent situations. In these circumstances, health professionals may consider the delivery of health care via telemedicine.

Telemedicine - or *virtual care* - is the remote delivery of health care services using telecommunications technology. In appropriate circumstances, it can provide a mechanism for professionals to provide continued care while simultaneously limiting the potential spread of the virus. Telemedicine allows patients to be assessed and treated without attending in clinic. Of course, professional judgment must be exercised in order to determine whether telemedicine is appropriate for each patient. If telemedicine is not appropriate and in-person care cannot be provided, health professionals must institute plans with their patients to ensure appropriate continuity of care.

Health facilities and clinic owners should be aware of various considerations and potential risks, including the following:

- Which patients can you offer telemedicine services to;

- What permissions or insurance do you need;
- What platform can you use to deliver telemedicine;
- How do you communicate this optional service to your clients; and
- If telemedicine is not an option, how do you ensure continuity of care?

Patients

When considering whether you can offer telemedicine to your patients, you must consider the nature of the services you are providing, as well as their location and the location of their patients.

In terms of the nature of services, please consider the relevant standards, guidelines and practice directions concerning the modalities of services you are offering and exercise your professional judgment to determine whether these services can be provided without direct physical contact.

Regarding location, consider where you and your patients are located when the service is being provided. Given the changing travel restrictions and quarantines, it is possible that some health professionals and their patients may be offering or requesting care while outside of their province or territory and temporarily unable to return home. When providing telemedicine, it is important that you confirm both your and your client's location at the outset of each treatment session and that this information is recorded in your clinical records.

¹ Ministry of Health and Long-term Care:
http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/2019_guidance.aspx

When one party is out of jurisdiction, you must consider whether you need special permission from the foreign jurisdiction to provide the care, understand the guidelines, standards and legislation that apply in that jurisdiction and ensure that you are compliant with them.

Some health care professionals practicing telemedicine might need to be licensed in both the jurisdiction in which they are located *as well as* the jurisdiction where the patient is located.

While there is currently no national framework for telemedicine, a number of medical associations in Canada and the United States have released guidelines for the provision of telemedicine. For example, in 2006 the Canadian Psychological Association published draft ethical guidelines for psychologists providing psychological services through electronic means.² In 2011, the Association of Canadian Psychological Regulatory Organizations published model standards for telepsychology service delivery.³ In 2015, the Ontario Psychological Association also published a best-practices guideline for the provision of telepsychology.⁴

Insurance

Prior to implementing telemedicine services, please ensure that proper insurance is in place to provide virtual care services. In doing so, make sure to ask your broker whether the insurance will provide coverage if you or your patients are outside of your home jurisdiction.

Platforms

Ultimately, professionals are responsible for ensuring that the virtual services that they are offering can be provided in a manner that protects their patients'

² Canadian Psychological Association; Providing Psychological Services via Electronic Media; Draft Ethical Guidelines for Psychologists Providing Psychological Services Via Electronic; <https://cpa.ca/aboutcpa/committees/ethics/psychservicesellectronically/>;

³<http://www.acpro-aocrp.ca/documents/ACPRO%20Model%20Standards%20for%20Telepsychology%20Service%20Delivery.pdf>

⁴Ontario Psychological Association; OPA Communications and Member Services Committee, April 2015 : Guidelines For Best

confidentiality and the security of their patients' personal health information.

While the use of readily available platforms like Skype for telemedicine can be appealing, Skype has been found not to be compliant with PHIPA⁵. Health care custodians must carefully review user agreements for any program or application that they intend to use for the delivery of telemedicine. For instance, the Ontario Psychological Association recommends the use of platforms that offer bank-grade, end-to-end encryption for the provision of telepsychology.

In addition to ensuring that appropriate platforms are used to provide patient care via telemedicine, practitioners and clinics should make reasonable efforts to offer a complete and clear description of the telemedicine services they can provide. Amongst other things, these descriptions should include any user-end costs associated with virtual services, as well as the limitations of these services.

If telemedicine is deemed appropriate, health care facilities and professionals must obtain and document informed consent from patients who wish to opt in for telemedicine. Patients need to be advised of the benefits and risks of proposed virtual care so that informed consent can be obtained. A best practice would be for clinics to develop standard terms and conditions for telemedicine and have patients review and sign their consent to those terms. Additionally, consent and any related discussions with the patient must be recorded in the patient's medical record.

Practices in the Provision of Telepsychology:
<http://www.psych.on.ca/Policy-Public-Affairs/OPA-Guidelines>

⁵ <https://www.ocswssw.org/wp-content/uploads/2014/12/b2-debra-grant-b2.pdf>; <https://www.cmpa-acpm.ca/en/advice-publications/browse-articles/2015/videoconferencing-consultation-when-is-it-the-right-choice>;

Communication with Clients

From the initial contact of proposing telemedicine services to the actual telemedicine patient visit, communication should be done through secured means.

While you may wish to email clients to communicate the options available to them, there are risks associated with email communication. For instance, one cannot guarantee that the intended recipient will receive and review the email once it has been sent. Additionally, there are risks of interception errors in sending emails. If you are unable to send secure encrypted email communication, then consent should first be obtained verbally (including over the phone) from patients before you communicate with patients through unencrypted email. Once consent is obtained, the amount and type of personal health information that is included in an unencrypted email should be limited. The simple identification of a patient as a patient can be a breach of applicable privacy legislation; therefore it is important that no patient identifiers (name, age, date of birth, address, etc.) be included in email communications.

Some public bodies, such as the Information and Privacy Commissioner of Ontario, also expect custodians to develop and implement a written policy for sending and receiving personal health information by email.⁶ In addition, they expect custodians to notify their patients about this policy and obtain patient consent prior to communicating via email that is not encrypted.

Continuity of Care

In considering your patient population and your obligations to ensure that your patients do not feel abandoned during this time when in-person care is not advisable, it is important to make best efforts to ensure that that your patients are left with as many options as possible.

This includes relaxing appointment rescheduling and cancellation policies, and coming up with a treatment

plan and protocol – which may or may not include telemedicine – that can carry patients through this time. This plan may include providing patients with additional resources, contact information to use in times of crisis, referrals to other professionals available to provide emergency or ongoing care in your absence, and open dialogue to ensure continuity of care.

Most provincial Colleges that govern health professionals have continuity of care policies in place. For instance, the College of Psychologists of Ontario requires psychologists who may be impaired due to health reasons to ensure that their clients are notified and receive assistance in obtaining replacement services. Health care facilities should refer to these policies and standards if they anticipate a disruption in services. A number of Colleges have also recently released statements meant to assist and direct professionals with navigating the issues of patient care in the wake of COVID-19.⁷

At the heart of these policies and statements is the objective of preventing breakdowns in patient care and providing patients with the tools they need to navigate the health care system.

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More information

This article is for information purposes only. Full terms and conditions of the policy, including all exclusions and limitations are described in the policy wordings, a copy of which can be obtained from BMS Group.

⁶ Nicole Minutti, Health Policy Analyst, Information and Privacy Commissioner of Ontario; May 11, 2017: Electronic Communication of Personal Health Information, “A presentation to the Porcupine Health Unit (Timmins, Ontario).

⁷ See for example the College of Nurses of Ontario: <https://www.cno.org/en/trending-topics/novel-coronavirus/>;

the College of Physicians of Ontario: <https://www.cpso.on.ca/Physicians/Your-Practice/Physician-Advisory-Services/COVID-19-Information-for-Physicians>; the College of Psychotherapists of Ontario: <https://www.cppo.ca/advice-to-rps-regarding-covid-19/>

CONSENT TO USE ELECTRONIC COMMUNICATIONS TO PROVIDE TELEHEALTH SERVICES

This template provides guidance as to the type of information that you should consider including in your consent for telehealth services. If you choose to make reference to this template in the development of your own consent form, it should only be used as the starting point for an informed discussion with your patient regarding the use of electronic communications. You should consider adapting and amending it, if you choose to use it, to meet the particular circumstances in which electronic communications are expected to be used with your patient and to accord with the applicable legislation, guidelines and regulations in your jurisdiction.

Service Provider Information

Name: _____

Name of Clinic/Corporation (if applicable):

Address:

Email (if applicable):

Phone (as required for Service(s)):

Patient Information

Name: _____

Address: _____

Email (if applicable):

Phone (as required for Service(s)):

Other account information required to communicate
via the Services

I, _____, acknowledge that in consenting to having _____ (the "Service
(Insert name) (Insert name of provider)

Provider") communicate with and/or provide services through _____,
(Insert name of medium(s) here [email, text, social media, videoconferencing, etc.]

I am aware of the following:

1. *Risks of using electronic communication*

While the Service Provider will use reasonable means to protect the security and confidentiality of information sent and received using electronic communications, because of the risks outlined below, the Service Provider cannot guarantee the security and confidentiality of electronic communications:

- Use of electronic communications to discuss sensitive information can increase the risk of such information being disclosed to third parties.
- Despite reasonable efforts to protect the privacy and security of electronic communication, it is not possible to completely secure the information.
- Employers and online services may have a legal right to inspect and keep electronic communications that pass through their system.
- Electronic communications can introduce malware into a computer system, and potentially damage or disrupt the computer, networks, and security settings.
- Electronic communications are subject to disruptions beyond the control of the Service Provider that may prevent the Service Provider from being able to provide services
- Electronic communications can be forwarded, intercepted, circulated, stored, or even changed without the knowledge or permission of the Service Provider or the patient.
- Even after the sender and recipient have deleted copies of electronic communications, back-up copies may exist on a computer system.
- Electronic communications may be disclosed in accordance with a duty to report or a court order.
- Videoconferencing using no cost, publicly available services may be more open to interception than other forms of videoconferencing
- There may be limitations in the services that can be provided through electronic communications, dependent on the means of electronic communications being utilized
- Email, text messages, and instant messages can more easily be misdirected, resulting in increased risk of being received by unintended and unknown recipients.
- Email, text messages, and instant messages can be easier to falsify than handwritten or signed hard copies. It is not feasible to verify the true identity of the sender, or to ensure that only the recipient can read the message once it has been sent.

2. *Conditions of Using Electronic Communications*

- While the Service Provider will endeavour to review electronic communications in a timely manner, the Service Provider cannot provide a timeline as to when communications will be reviewed and responded to. Electronic communications will not and should not be used for medical emergencies or other time-sensitive matters.
- Electronic communication may not be an appropriate substitute for some services that the Service Provider offers.
- Electronic communications may be copied or recorded in full or in part and made part of your clinical chart. Other individuals authorized to access your clinical chart, such as staff and billing personnel, may have access to those communications.
- The Service Provider may forward electronic communications to staff and those involved in the delivery and administration of your care. The Service Provider will not forward electronic communications to third parties, including family members, without your prior written consent, except as authorized or required by law.

- Prior to the commencement of the provision of services by the Service Provider through electronic communications, the Service Provider and the patient will establish an emergency protocol to address the following:
 - Steps to be followed in the event of a technical issue that causes a disruption in the services that are being provided by the Service Provider; and
 - Steps to be followed in the event of a medical emergency that occurs during the provision of services.
- The Service Provider is not responsible for information loss due to technical failures associated with your software or internet service provider.
- The Patient will inform the Service Provider of any changes in the patient’s email address, mobile phone number, or other account information necessary to communicate electronically.
- The Patient will ensure the Service Provider is aware when they receive an electronic communication from the Service Provider, such as by a reply message or allowing “read receipts” to be sent.
- The Patient will take precautions to preserve the confidentiality of electronic communications, such as using screen savers and safeguarding computer passwords.
- If the Patient no longer consents to the use of electronic communications by the Service Provider, then the Patient will provide notice of the withdrawal of consent by email or other written communication.

Acknowledgement and Agreement

I acknowledge that I have read and fully understand the risks, limitations, conditions of use, and instructions for use of the selected electronic communications as described above. I understand and accept the risks outlined above to this consent form, associated with the use of the electronic communications with the Service Provider and the Service Provider’s staff. I consent to the conditions and will follow the instructions outlined above, as well as any other conditions that the Service Provider may impose regarding electronic communications with patients. I acknowledge and agree to communicate with the Service Provider or the Service Provider’s staff using these electronic communications with a full understanding of the risks in doing so.

I confirm that any questions that I had regarding the provision of healthcare services through electronic communications have been answered by the Service Provider.

Name of Patient: _____

Signature of Patient: _____

Witness: _____

Date: _____

ETHICAL ISSUES FOR REGULATED HEALTH PROFESSIONALS IN THE ERA OF COVID-19

Published: 3rd April, 2020

Health care practitioners are routinely required to make ethical decisions in their practice. COVID-19, however, poses ethical dilemmas for health practitioners that can only be characterized as extraordinary.

Health care professionals in some of the hardest hit countries, such as Italy, now face unenviable and heartbreaking ethical decisions such as which patient gets an intensive-care bed or a ventilator and which patient does not. Canadian health practitioners may not be immune from making these types of decisions, if infections rates continue to rise and the demand for intensive-care beds and ventilators outpaces its supply.

While there have been no reports of health practitioners being required to make these types of decisions thus far Canadian health care professionals and facilities are facing novel ethical dilemmas as a result of the spread of COVID-19 virus. The decision whether to continue in-person services that may not be deemed essential by you but which may be perceived as essential to a patient and whether to compromise a patient's confidentiality, which may ultimately restrict the patient's movement, are two ethical dilemmas currently being faced by health practitioners in Canada.

Continuing To Provide Non-Essential Health Care Services

In response to the COVID-19 outbreak, several provinces have enacted orders or regulations specific to health professionals and facilities.

For instance, as a result of a Directive, dated March 27, 2020, issued by Alberta's Chief Medical Officer of Health of Alberta, any place of business offering or providing non-essential health services and wellness services is required to no longer provide services to the public. The Chief Medical Officer sets out exceptions for all non-essential health services deemed urgent by the health professional providing the services.¹

This Directive in Alberta is similar to an earlier Directive that was issued on March 19, 2020 by the Chief Medical Officer of Health of Ontario (CMHO). As a result of the Directive, dated March 19, 2020, all regulated health professionals (and people who operate group practices of regulated health professionals), such as clinic owners, are required to stop or seriously reduce all non-essential or elective in-person services until further notice. Exceptions to time-sensitive situations or cases where adverse patient outcomes would result if care is delayed are also set out in the Directive.

While British Columbia has not mandated similar closures, on March 23, 2020, the Provincial Health Officer in British Columbia advised regulated health professionals under the *Health Professions Act* to reduce all non-essential and elective services involving direct physical contact with patients and to

¹ <https://open.alberta.ca/dataset/c02f3b06-9c37-4845-98ee-d07d805fdce1/resource/32f3367d-9a15-4aef-af6e->

[4e960891c14e/download/health-cmoh-record-of-decision-cmoh-07-2020.pdf](https://open.alberta.ca/dataset/c02f3b06-9c37-4845-98ee-d07d805fdce1/resource/32f3367d-9a15-4aef-af6e-4e960891c14e/download/health-cmoh-record-of-decision-cmoh-07-2020.pdf)

minimal levels, subject to allowable exceptions, until further notice.²

While the issue of what is considered an essential service can be a grey area for some health care professionals, the CMHO and British Columbia's Provincial Health Officer recognize that clinicians are in the best position to make this determination. They also advise clinicians to take direction from their regulatory College in making decisions regarding the reduction or elimination of non-essential services and to consider certain principles in their decisions. For instance, British Columbia's Provincial Health Officer has set out the following principles³ to be considered when making decisions on the reduction or elimination of non-essential services:

1. **Proportionality:** *Measures taken should be proportionate to and commensurate with the real or anticipated risk one is trying to prevent.*
2. **The Harm Principle:** *Measures taken should attempt to limit harm wherever possible, taking into consideration all available alternatives, and the balance of differential benefits and burdens that result.*
3. **Fairness:** *Persons ought to have equal access to health care resources, benefit ought to be offered preferentially to those who will derive the greatest benefit, and resources ought to be distributed such that the maximum benefits to the greatest number will be achieved.*
4. **Reciprocity:** *Certain persons or populations will be particularly burdened as a result of a reduction in non-essential services. As such, patients and clients should have the ability to have their health monitored and it be reevaluated as required.*

The Directives also highlight that decisions regarding the reduction or elimination of non-essential and elective services should be made using processes that are fair to all patients.

Other provinces, such as Newfoundland and Labrador, have issued similar directives by their respective Chief Medical Health Officers.⁴ Those directives along with similar accompanying principles and the recommendations of provincial Colleges that govern health professionals can assist to guide all health care professionals who have limited their practice. Many regulatory Colleges have now dedicated web pages and have also produced a list of FAQs (frequently asked questions) pertaining to COVID-19 related issues.

While Colleges are developing guidance on continuing care with clients in the era of COVID-19, some questions to consider when making clinical judgements and ethical decisions about whether to defer services could include:

- What are the possible consequences to the client if I do not provide the client with service?
- If a client does not receive my professional service at this time will their condition deteriorate and to what extent?
- Am I able to meet my client's needs using alternative means such as virtual care?
- Do I have the capacity, tools and resources to prioritize clients and services and safeguard their health for in-person visits?

Release of Personal Health Information To Public Health Officials

Those health care professionals who continue to provide services may be concerned about how to handle confidentiality issues arising from COVID-19.

² <https://www.cdscbc.org/Documents/covid-19/PHO-Letter-Non-Essential-Services-Health-Mar-23-20.pdf>

³ These principles are almost identical to those set out in Ontario.

⁴ <https://www.gov.nl.ca/covid-19/files/Special-Measures-Order-Amendment-Order-March-24-2020.pdf>.

Health care custodians may face the ethical dilemma about whether to contact a health authority, where, for instance, their patient discloses or exhibits COVID-19 symptoms and yet does not wish to be tested. While regulated health care professionals are not required to report suspected COVID-19 cases, if health professionals who have reasonable grounds to believe that the disclosure is necessary for the purposes of eliminating or reducing a risk of harm, then they *may* disclose information under section 40(1) of the *Personal Health Information Protection Act, 2004 (PHIPA)*.⁵ This provision deals with disclosures related to risks and provides an exception to patient confidentiality. Any disclosed information by the health care custodian should be limited, such as contact information. Having a conversation with patients at the outset of their appointment around the limitations of confidentiality, especially pertaining to COVID-19 related issues can also be useful to navigate these issues.

Public health authorities in various provinces can also issue an order directing any health information custodian to provide information, including a client's personal health information.⁶ Such an order can only be made in limited circumstances, such where there are grounds to believe the information is necessary to investigate, eliminate or reduce the immediate and serious risk to the health of any persons.

The consequences of failing to comply with such a directive can be quite significant. For instance, one can be liable to a fine of up to \$5000 for each day of non-compliance, under the *Health Protection and Promotion Act (HPPA)* in Ontario.⁷

Health care professionals are better suited to make informed ethical decisions and act appropriately in order to protect both themselves and patients if they keep themselves apprised with up-to-date information. Trusted sources of information related to COVID-19 include the websites of provincial governments and the Government of Canada as well as:

1. Local and provincial centers for disease control;
2. Directives issued by Provincial and Local Chief Medical Officers;
3. Professional Associations; and,
4. Regulatory Health Colleges;

In addition to these resources, certain Health Ministries such as the Ministry of Health of Ontario have also set up a Health Care Provider Hotline for healthcare organizations that have questions relating to emergency planning.

Staying current around COVID-19 issues and consulting trusted available sources from health departments, regulatory Colleges as well as legal counsel, will not only assist health care providers in making informed ethical decisions, but will also fulfill the ethical obligation of being knowledgeable and duly diligent in a professional's practice.

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⁵ *Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, Sched. A.*

⁶ See for instance, Provinces Under section 77.6(1)-(7) of the Health Protection and Promotion Act.

⁷ Section 101 of *Health Protection and Promotion Act (HPPA)*, R.S.O. 1990, c. H.7.

RISK MANAGEMENT DURING THE COVID-19 PANDEMIC: CHECKLIST TO RECOVERY

All organizations can use the basic principles of risk management to shape a path through the COVID-19 pandemic and minimize the lasting negative impacts. Whether you have a robust Enterprise Risk Management (ERM) program in place or have not yet turned your corporate mind to risk management, the principles outlined below can help you move through this crisis and beyond:

1. Identify your risks

Organizations use risk management to “predict the unpredictable.” To navigate the risks (and opportunities) associated with the pandemic, it is critical to first identify what those risks are. Indeed, the exceptional circumstances surrounding COVID-19 may have brought to light risks you had not yet considered – or may have imbued previously identified risks with a new sense of urgency. Whatever the case may be, before moving in any one direction take a moment to catalogue the risks your organization may face over the next month, three months, six months, nine months and year.

In order to accomplish this most effectively, you should:

- Consider all kinds of risks – including operational, strategic, financial and reputational;
- Gather information from all employee levels and from a large cross-section of stakeholders (clients, vendors, etc.) – they might be in a position to identify risks that you would not think of;

- Look at other organizations, in Canada and abroad, and consider what they are facing; their risks might be the same as yours or perhaps their risks will create risks for you down the line (think supply chains).

Dig deep into this exercise before you move on, and return to it often over the next year, two years and five years so that you can update your risk profile as the world progresses through these unprecedented times.

2. Be agile

Albert Einstein said “learn from yesterday, live for today, hope for tomorrow. The important thing is not to stop questioning.” The world is collectively questioning everything as we navigate a new normal. The plans that you had two months ago are no longer appropriate, feasible or realistic for today.

Do not throw your entire play-book out but instead return to your values and redefine how you will realize them. Be ready to be uncomfortable. Navigate this period with flexibility and understanding. Be creative in your approach to moving forward, listen to what your stakeholders want and need and consider how you can pivot to fill a void.

3. Think people

The backbone of every organization lies in its people. Today people are stressed, tired, taxed, scared and pre-occupied. The organizational risks associated with mismanaging your employees in this time can be significant (health and safety, financial, reputational, legal, operational, to name a few).

Where then do we start? People generally need to feel heard, they need to be able to trust and they need to have information. Let your employees know that you have a risk plan, a business continuity plan, and a crisis plan – and take the time to communicate what each plan entails and how it will evolve, while also seeking their engagement and input.

ERM works because it fosters and relies upon a holistic approach to identifying, analyzing, evaluating and treating risk. While it has to be fully endorsed and supported by top management, it must involve the entire organization in order to succeed. ERM also encourages frequent communication between all levels of the organization, which in turn leads to greater transparency and trust.

As we move through this pandemic, we see that the heroes come in all uniforms – from the delivery drivers, to the cleaners, to the grocery store clerks, to the health professionals. The heroes within your organizations will also come in all roles. Consider how you can make their days easier in order for them to be more physically and mentally able to help you. Whether it is implementing flexible work hours or ensuring that they have a computer at their home, it starts with asking them what they need to do their job during these times.

4. Consider business continuity

The purpose of business continuity is to ensure that your business is able to survive a critical incident. It consists of a series of plans implemented over phases to shorten recovery time and mitigate impact.

For more information regarding business continuity, please see Gowling WLG's article "Business Continuity Planning in COVID-19".

Now is a reasonable time to evaluate the impact of COVID-19 on your organization, looking both internally and externally:

- **Internally:** This involves identifying business critical functions, equipment and employees, and determining how, where and by whom critical services are provided. You may consider suspending specific aspects of work to reduce risk of exposure, to support social distancing and to reduce unnecessary cash expenditures.

Ensure you carefully monitor employee availability, health and safety. As all people are at risk of being personally impacted by COVID-19, a continuity plan must be developed for all business critical employees that can be easily triggered should they become indisposed. The chain of command must be clearly identified and alternates and designates put in place for all critical functions.

- **Externally:** This requires a supply chain analysis and assessment of the possible risks faced by vendors, manufacturers, suppliers, distributors, purchasers and all organizations and stakeholders that you interact with and rely upon.

Amid government restrictions and instructions to "stay home," the use of technology is exceptionally important for many organizations.

Most have already mobilized an infrastructure to support remote working. To increase productivity and reduce interruption, ensure that employees have the necessary hardware, software, equipment and internet connectivity to work safely and efficiently from home.

Also ensure that your IT infrastructure can support the increased pressure from a significant portion of your team working from home.

The new normal has created the need for new policies and procedures. On the technology side, the remote working world has greatly increased the risk for cyber-attacks and phishing. Employees must be aware of these risks and trained on the new policies pertaining to the use of technology and the transfer of information and funds. If it is permitted by provincial regulators for employees to remain onsite to work, organizations will need to address health and safety concerns through new and evolving policies.

Consider your internal and external communication plan. Updates need to be communicated to stakeholders in real time. The situation is constantly evolving and appropriate measures need to be implemented such that communication can be disseminated immediately.

5. Consult with Advisers

This is the time for everyone to work together. Consider reaching out to:

- An outside risk management consultant: We can assist you in identifying, analyzing, evaluating and treating your risks. If you do not have a business continuity, incident management, risk management or crisis plan, or if the ones you do have are not working, it is not too late to seek advice to review, improve, create or implement.
- Legal counsel: We can help you navigate new and rapidly changing legislation, assist you with managing health & safety, employee, regulatory, essential service, insurance, travel, and contractual issues, to name a few, that present themselves.
- Insurance broker: We can help you understand your current insurance policies and advise whether you have coverage that can assist you and how.
- Financial advisers: Can discuss which financial incentives, loans, government programs, deferrals, etc. are available to you and how can you access them.
- Mental health professionals: Your staff may need support during these times. Finding a way to get that support to them may prove invaluable.

6. Consider your reputation

Last, consider your reputation. The success stories of COVID-19 will be the people and organizations whose reputation was improved with their response to the pandemic.

When the dust settles, we will remember the Marriott CEO relinquishing his salary for 2020, his executive team taking a 50 per cent pay cut and the Lyft cofounders donating their salaries to help their drivers.

We will also remember the many companies that re-deployed their entire workforce and production capabilities to create and produce personal protective equipment for frontline workers, hand sanitizers for health professionals and technology to help track the spread of the disease.

For those organizations that take a short-sighted view of the pandemic, by price gouging or supply hoarding, the long-term negative reputational impact may far outweigh the short term benefits experienced.

Stay true your organization's values and take the higher ground. It will pay dividends in the long-run.

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Business Continuity Planning during COVID-19: *What to do if you have no plan or if your plan isn't working*

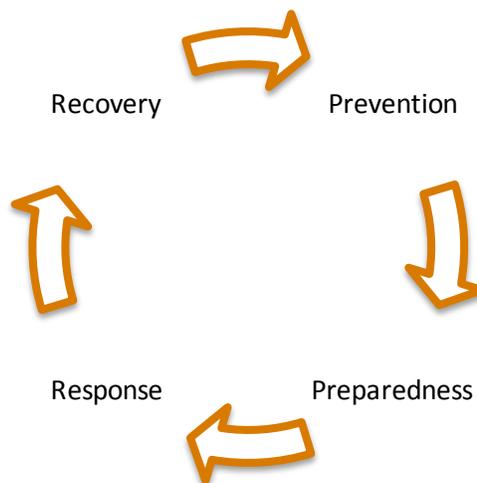
The purpose of a business continuity plan is to ensure that your business is able to survive a critical incident. It permits an immediate response to a crisis in order to shorten recovery time and mitigate impact. This pandemic has presented a “critical incident” for the world like no other. With unknown reach and duration, worldwide implications and no precedent to accurately base projections, it is fair to say we are in uncharted territory.

As the world reacts to COVID-19, it is likely not an ideal time for management to focus on developing complex business continuity plans. However, some key business continuity planning points may help your organization enhance its recovery time and trajectory. Once you are on your way through the recovery phase of this pandemic, you can then begin the exercise of reviewing and renewing your business continuity plan – using the lessons learned from COVID-19 to bolster your plan, increase efficiencies and allow you to respond more efficiently to future critical incidents.

While you consider the basics of business continuity planning – keep in mind that in order to succeed, you should prioritize critical business activities, stabilize cash flow, extend financial resources to keep operational and maintain your reputation.

How do Business Continuity Plans Help

A business continuity plan functions in phases:



Prevention is built upon the risk management principles of identify, analyze, evaluate and treat your risks. Preparedness focuses on analyzing the impact of events on an organization. It helps prioritize key functions, personnel, equipment, offerings and activities that could be impacted by a critical incident. Response is a plan detailing the list of steps to take immediately before (if possible), during and following an incident in order to contain, control and minimize impacts. Finally, recovery planning is the organization’s roadmap to minimize disruption and reduce the amount of time it takes to achieve recovery.

Although it is reasonable to conclude that we are in the response phase of the COVID-19 pandemic, for many organizations, the stages of the crisis associated with this pandemic are just picking up speed. Meaning, there is still time to consider all four of the phases - prevention, preparedness, response and recovery.

1. Prevention

Consider the risks that your organization could face in the months ahead – do not stop with the obvious ones; dig deep, speak to employees and to stakeholders, look at competitors and at similar industries. For example, if your business has been designated an essential service, you have likely considered the health and safety concerns and may have provided staff with personal protective equipment (PPE); however, the use of PPE also creates additional risks like the issue of its acquisition - is there sufficient supply of PPE? Do you have multiple distributors in case one source is not available? If not, can you find alternate sources?

As you identify your risks, review your service lines one by one and consider how they might operate in this COVID-19 environment. Think critically about what might go wrong so that you are prepared should those eventualities occur. It is also important to have a plan in the event that one of your employees show symptoms of/tests positive for COVID-19 – including, employee self-reporting, income compensation programs or availability, corporate reporting obligations, self-isolation requirements, notification protocols. The employee self-reporting requirements should be communicated to all employees and updated in accordance with The Public Health Agency of Canada (PHAC) guidance.

While it may seem like a simple or obvious task, it can be quite difficult to identify all the risks that your organization may be facing – particularly in the first months of a global pandemic that could impact the world economy beyond anything we have experienced in our lifetimes.

When thinking about your risks, you can use various risk identification tools to help with the brainstorming. One such tool is the risk quadrant. As you identify your initial strategic, operational, financial, and hazard risks, you can then consider how each of these individual risks will snowball to create others. Each risk that you identify can trigger multiple secondary risks, each of which need to be considered. We have prepared a non-exhaustive list of risks organizations could be facing as a result of this pandemic, which can be found in *Risk Management during the COVID-19 pandemic: Checklist to recovery*.



RISK QUADRANT



This is a general list and does not reflect all of the risks that your organization may be confronted with. It may also include risks that are not applicable to your organization. It is meant purely as a list to provoke thought and assist you in the development of your own list of corporate risks.

Once you have identified your risks, analyze them for likelihood and impact. Make a heat map, list every risk you have identified on your map and continuously update it as you move forward. This exercise will help you determine which risks you should address first and prioritize your focus moving forward.

		Impact				
		Negligible	Low	Medium	High	Extreme
Likelihood	Almost Certain					
	Likely					
	Moderate					
	Unlikely					
	Rare					

Evaluate the consequences of these risks materializing and think of ways you can mitigate – or treat – these risks. For example, do you rely entirely on one supplier? What happens if that supplier closes its doors? Can you start diversifying your supply chain now so that if one supplier is impacted you can rely on others? Have a clear plan of action for every identified risk. This will help you navigate the unpredictable.

Given that one of the key risks facing all organizations is the financial implication of the pandemic, look at your short-term liquidity. Become more disciplined in your cash flow monitoring so that you can react quickly to reduce unnecessary exposures. Reduce or eliminate all non-essential expenses and look at ways to raise capital. Monitor supply chain issues that could result in operational and financial exposures that could cripple your business unless remediation measures are implemented. If you would like more information regarding government funding programs please go [here](#).

As you are addressing risks during COVID-19, look to your existing contracts, leases and insurance policies. In your contracts and leases, look for force majeure, delay, relief and excusable conditions clauses. As you work with stakeholders through this process, renegotiate contracts wisely – be on the alert for cost escalations, long-term obligations and contingencies that may be out of your control.

2. Preparedness

What is your organization's critical business activity? Who are your critical personnel? What are the vital elements of your supply chain? Answering these questions is critical to conducting a business impact analysis.

Have contingency plans in place for modifying your activities going forward. You may not be able to offer services the way you previously did - virtually instead of in person? Delivery instead of on-site? Maybe you will change the services that you offer entirely - producing hand sanitizer instead of beer? Building ventilators instead of vacuums? Consider these eventualities so that you are positioned to transition when necessary.

Should you need to transition, be aware of the added risks that come with these changes, update your heat map and re-evaluate your mitigation steps to ensure that you are protected once these changes come into effect.

Also, ensure that you identify and source all the resources necessary to support these key activities. If possible, do so before you need to transition.

Should you be unable to perform your key activities (or source alternatives), consider what the impact would be on your business. Is there any mitigating measure you could put in place to reduce that impact? Are there any forms of assistance that you can make use of to prolong your business' survival?

As for your key personnel, make sure that you have delegates who can step in should they become incapacitated. Have key information, including plans (business continuity, incident response, recovery), policies (insurance, corporate), financial data, key agreements and contact lists available, such that the delegates have access to the key information necessary to keep your business running. This information is often found in a corporate emergency tool kit. If you do not have an emergency tool kit in place already, start compiling one such that should a key personnel handoff become necessary, the emergency tool kit can act as the delegate's guidebook moving forward.

3. Response

Your incident response plan is your roadmap of what to do in the face of a critical incident. These plans vary based upon the triggering event, your organization's size, structure and business activity.

First is activation: who has authority to activate the plan and in what circumstances.

Second is team: who is involved in the response. Depending on the size of your organization, this may range from all hands on deck to a select portion of the leadership team. Large organizations may have sub-groups charged with various elements of the plan. The key personnel should also have alternates in the event they become incapacitated. If your organization has various departments, it is important to have representatives from the legal, finance and human resources departments. It is also helpful to have a person appointed as secretary to record discussions and track all action items.

Third is communication. This is both an internal and external issue. On the internal side, the plan must address how all members of your organization receive communication in various circumstances. Do you have an emergency communication mechanism (like “Send Word Now”) to send updates to employees in a crisis? Is there a contact list with all employees’ personal phone and email addresses? Externally, you should have a list of all emergency services you may need to reach, all customers and clients who you might need to access and all suppliers and producers who you may be relying upon.

Fourth is recording. You should have an event log to record all relevant information, decisions and actions taken during the crisis. This will be an invaluable tool when addressing any liability concerns raised during the crisis (breach of contract, employment disputes, health & safety allegations, privacy breaches, etc.) but also as a debriefing tool to use once the dust settles and you are able to reflect on what was done well and what could have been done better. This log will prove very important as you create or renew your business continuity plan post-pandemic.

4. Recovery

As we push through this crisis, think of the recovery phase. Your recovery plan will assist you to respond effectively so that you can minimize loss and reduce the time necessary for recovery. The basic question asked in your recovery planning is “how will you get your business back in line after a crisis”.

Timing: Consider the *realistic* amount of time it would take your business to recover from being unable to engage in its critical business activities (as identified in the business impact analysis). You may have multiple critical business activities depending up on the nature of your operations and, if that is the case, each one should have its own recovery timeframe.

Strategies: Consider what your business needs to operate and develop strategies that prioritize the key elements of your operation. Some sample strategies:

- Retrieve your emergency tool kit (or collect all of the information that should be in the kit);
- Identify a recovery team or teams: identify key people who are tasked with focusing on the recovery of individual aspects of the business;

- Communicate: keep communication open, frequent and transparent with internal and external stakeholders;
- Identify alternatives: look at what you need to keep your operation running and identify alternative suppliers, distributors, manufacturers, locations, facilities, equipment, etc. that you could use in order to keep operational;
- Keep operational: consider ways to reduce operating costs and/or increase alternate sources of cash flow so that your business can survive through the crisis;
- Monitor the process using a checklist: this checklist reminds you to do all the things you should be during the crisis (recording information, communicating information, contacting the right people, seeking support from all available resources, obtaining tax advice and assistance, and reviewing your recovery). Gowling WLG's checklist can be provided to you upon request to Gowling WLG partner Jahmiah Ferdinand-Hodkin.

As it pertains to COVID-19, this recovery plan will gear you towards the questions of when and how you will be returning to normal business operations and what that "new normal" may look like for your organization. As there are so many unknowns at present, this plan may include multiple contingencies that you can narrow as various government decisions and funding programs are announced.

What to do now

If you do not have a plan or your plan isn't working, please do consider these steps, tricks and tools to help you navigate this crisis. These tools can be implemented by organization presently closed as well as those operating as essential services. For additional information regarding how to bolster your business continuity plan and manage incidents as you move through this pandemic, please do not hesitate to contact us.

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