

What Construction Can Continue in Ontario after April 4, 2020?

On April 3, 2020, the Government of Ontario revised its Order in relation to essential services passed under s. 7.0.1 of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E9 . The Order provides that, as of April 4, 2020 at midnight, a limited scope of construction projects will be allowed to proceed in Ontario. In announcing the changes, Premier Ford advised that, towards ensuring compliance, the Ministry of Labour would put ongoing construction under extremely high scrutiny.

Yet it appears, however, that the revised Order is in some ways no clearer than its predecessor as regards what construction activities can, and cannot continue. We do not mean to be critical when we say this. It is incredibly difficult to draft generally applicable language to surgically draw the line in an almost infinite number of scenarios. It is even harder when the goal is to both protect health and safety and meet the essential needs of the public. Our goal in this article is to simply point out, and discuss, the “grey-areas”.

Briefly stated the Order provides (at paragraphs 27-31 of the List of Essential Services) that the following types of construction remain essential and can proceed (see: <https://www.ontario.ca/page/list-essential-workplaces> for the entire list of essential services):

27. Construction projects and services associated with the healthcare sector, including new facilities, expansions, renovations and conversion of spaces that could be repurposed for health care space.
28. Construction projects and services required to ensure safe and reliable operations of, or to provide new capacity in, critical provincial infrastructure, including transit, transportation, energy and justice sectors beyond the day-to-day maintenance.
29. Critical industrial construction activities required for,
 - i. the maintenance and operations of petrochemical plants and refineries,
 - ii. significant industrial petrochemical projects where preliminary work has already commenced,
 - iii. industrial construction and modifications to existing industrial structures limited solely to work necessary for the production, maintenance, and/or enhancement of Personal Protective

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Equipment, medical devices (such as ventilators), and other identified products directly related to combatting the COVID-19 pandemic.

30. Residential construction projects where,

- i. a footing permit has been granted for single family, semi-detached and townhomes
- ii. an above grade structural permit has been granted for condominiums, mixed use and other buildings, or
- iii. the project involves renovations to residential properties and construction work was started before April 4, 2020.

31. Construction and maintenance activities necessary to temporarily close construction sites that have paused or are not active and to ensure ongoing public safety.

In addition, paragraph 20 provides that maintenance, repair and property management services strictly necessary to maintain the safety, security, sanitation and essential operation of properties and buildings are essential and can continue. Any construction that is in the nature of a repair that meets the conditions of the paragraph will accordingly be allowed to continue.

Much of this is self-explanatory. There remains, however, confusion.

Conspicuous by its absence is any clear statement that the construction, expansion or renovation of buildings or infrastructure for the purpose of which is to provide an essential service may continue. To the contrary, the clear intent of the Order appears to be that unless a project fits within the scope of paragraphs 20 or 27-31, the construction, renovation or repair cannot proceed. This creates some curious results, however.

For example, while families and businesses are struggling for better internet connectivity to meet their increased needs while schooling and working from home, internet providers must apparently cease the construction of much needed new server rooms and IT facilities. On the other hand, it appears clear that merely cosmetic renovations to a residential premises (whether to a building or to the landscape outside) will be considered essential so long as it was started prior to April 4, 2020. Similarly, while on the face of it, new construction or renovations intended to increase food productivity and distribution must stop, while the construction of residential homes and condominiums can continue, so long as specific permitting requirements have been met.

It is also not clear what construction “associated with the healthcare sector” means at paragraph 27. There is no question that hospitals, clinics, or doctor’s offices, etc., are part of this sector. The sector also probably includes services related to massage therapy, mental health care, addiction treatments and homeopathic care, etc. – ie. any service that is recognized and regulated by the province as a health care service. It is not clear, however, how far the “healthcare sector” extends.

For example, it is not clear that construction in relation to a pharmacy, medical supply warehouse, cannabis facility or health food store will be allowed to continue. While it would appear that these are most certainly “associated with the healthcare sector”, the Order goes out of its way to specify where construction in other areas of the sector will be allowed to continue. At subparagraph 29(iii), it specifically limits construction in relation to PPE equipment to “existing industrial structures limited solely to work necessary for the production, maintenance, and/or enhancement” of such products as ventilators and masks “and other identified products directly related to combating the COVID-19 pandemic”. Some would argue that, because the Order limits construction relating to such vital products to “industrial structures”, construction on non-industrial stores and distribution facilities will not be allowed to continue for less specific healthcare purposes.

To further confuse the healthcare sector issue, paragraph 27 allows projects including “new facilities, expansions, renovations and conversion of spaces that ***could be repurposed for health care space***” to continue (emphasis added). This, no doubt, because federal, provincial and municipal emergency response plans will generally incorporate hockey arenas, community spaces, university halls and libraries, etc., for various healthcare purposes during an emergency. The Order, however, offers no guidance as to what construction might meet the test. Some might argue, at the logical extreme for example, that if the space under construction is zoned to include for doctor’s offices, the space could be repurposed so as to meet the definition, such that the work can continue.

In deciding whether or not work should continue, owners, contactors, subcontractors and workers should consider the fines that can be levied under the *Emergency Management and Civil Protection Act*. Where they fail to comply with the Order, individuals may be fined up to \$100,000.00 and imprisoned for up to one year, while a corporation may be fined up to \$10,000,000.00. Corporate officers and directors may each be fined up to \$500,000.00 and, also, imprisoned for up to one year. It is unlikely that such substantial penalties would be meted out in most circumstances, however, construction participants need to be aware that the possibility is there.

The Ontario Government has set up a *Stop the Spread Business Information Line*, at 1-(888)-444-3659. Construction participants can call that number, or call the Ministry of Labour at 1-888-949-4173. However, we understand that firm advice on any particular circumstance may not generally be provided following such an inquiry. Many, including ourselves, are also seeking clarity from the province and the Ministry, however, that clarity has not as yet been provided.

In the end, we have been fielding questions on these issues for 3 straight days, and have been unable to offer much in the way of guidance. We have been able to say the following:

- a) those who are concerned about whether work should proceed or be suspended should assess whether or not the scope of their project fits into paragraphs 20 or 27-31 of the revised Order;

- b) if the work clearly fits into those paragraphs, the work *can* continue. (Whether or not it must or should continue is a contractual issue, which raises different issues we have addressed elsewhere);
- c) where the Order is not clear on the issue, and until the provincial government provides clarity, parties will have to make their best assessment in the circumstances. We, and others, can help with such assessments, however, it is unlikely that firm opinions can be provided at this time;
- d) arguments in support of a position should be explored and considered, however, given the community health risks and potential penalties involved, the spirit and intent of the Order should be kept in mind and a ‘smell test’ applied in that regard. Chances are that a Ministry of Labour inspector will do the same; and
- e) it may be that concerns about the Order are in fact concerns over who bears the financial burden of either a shutdown or work continuation. If that is the case, the contract/subcontract documents should be assessed and, perhaps, a resolution of the financial concerns negotiated between the parties.

Please see our prior articles on COVID-19 issues for a more in-depth discussion of the contractual allocation of the risks associated with COVID-19 in construction. We will also be discussing the above, as well as other COVID-19 issues, during our popular free weekly webinar series, which we offer along with Keith Burkhardt of Sherrard Kuzz LLP who speaks to OHSA, labour and employment issues. The seminars will be conducted every Tuesday morning at 9:00am and have a maximum enrollment of 500 people. For more information or to register for the webinars, please visit our website at www.kennaley.ca and click on ‘webinars’. Our past blog articles are also available on the website.

