

Interpreting the List of Essential Businesses in the Construction Industry

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Overview of Essential Businesses List

- All non-essential businesses are required to close pursuant to orders passed by the Ontario government under the *Emergency Management and Civil Protection Act*. All orders, including the order that all non-essential businesses must close, have been extended to April 23, 2020.
- *Ontario Regulation 119/20: Order under Subsection 7.0.2(4) - Closure of Places of Non-Essential Businesses* (the “**Essential Businesses List Regulation**”) lists the businesses that are considered essential and can remain open.
- The rule is that all businesses must close, unless the business can demonstrate it falls within an exemption. Exemptions will be narrowly interpreted and applied.
- The penalties for non-compliance are severe. A business and/or its directors and officers may be found guilty of an offence and subject to significant fines and/or imprisonment for violating the *Essential Businesses List Regulation*.

Essential Businesses List Regulation and Construction Projects

- The analysis of whether a project falls within the list of essential businesses and can therefore continue must be done on a project-by-project basis. The type of work being performed is also relevant.
- Some exemptions in the *Essential Businesses List Regulation* allow a project to continue, including any and all work associated with the project. Other exemptions are tailored to the type of work being performed, in which case, only the particular work that is exempted may continue.
- Premier Doug Ford has indicated that the Ministry of Labour has increased the number of health and safety inspectors responding to complaints, and investigating and inspecting workplaces. The government has specifically indicated that construction projects and sites can expect enhanced scrutiny.

Critical Provincial Infrastructure – Section 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” can continue.
- Requirements: (1) the project must be “critical provincial infrastructure”; (2) the work must not be daily maintenance; and (3) the work must be to ensure the infrastructure operates safe and reliably or to provide new capacity.
- This section contemplates that new critical provincial infrastructure projects can start.
- The list of sectors (transit, transportation, energy and justice) is not exhaustive – it could include other projects that are considered “critical provincial infrastructure). *E.g.*, work in the education sector.
- “Critical provincial infrastructure” is not defined. Most likely interpretation is that it refers to infrastructure within the province that ensures the province continues operating on a daily basis.
- “Day-to-day maintenance” is somewhat ambiguous. This probably refers to whether maintenance is required to ensure the safe and reliable operations of critical provincial infrastructure, and not necessarily how often this maintenance work is scheduled.

Healthcare Sector Projects – Section 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”.
- If a project is in the healthcare sector, then all work and services associated with the construction project can continue.
- Premier Ford also announced on April 8, 2020 that construction hours for projects in the health care sector may be extended to 24 hours a day to accelerate the completion of these projects.

Community Services – Section 34

- Businesses that support the delivery of services in section 34 – including companies that construct, maintain and repair existing infrastructure providing these services – are permitted to continue operating. Section 34 captures a range of activities of contractors in the sewers and watermains sector, the heavy engineering sector and the roads sector.
- Repair and maintenance of “critical infrastructure... including roads, dams, bridges, etc.”.
 - This does not contemplate new projects.
 - Listed “critical infrastructure” is not exhaustive – may include more than roads, dams and bridges.
- Contractors supporting the delivery of “sewage treatment and disposal”, the collection, transportation, storage, processing, disposal or recycling “of any type of waste” and “potable drinking water”.
 - Work on sewer lines, waste lines and water lines can continue.
 - Storm sewers are not included in this list.
- Section 34, on its own, does not permit the construction of new works that will eventually provide the services outlined in section 34.

Residential and ICI projects – Sections 20, 29, 30

- Maintenance and repair work is permitted on residential and ICI properties/buildings if it is “strictly necessary” for “the safety, security, sanitation and essential operation” of the properties and buildings (section 20).
 - May not include regularly scheduled maintenance.
- Residential construction projects may continue if (section 30):
 - (1) a footing permit has already been granted for a single family, semi-detached and townhomes;
 - (2) an above grade structural permit has been granted for condominiums, mixed use and other buildings; or
 - (3) the project involves renovations to residential properties and work started before April 4, 2020.
- If a development permit has been granted for a residential development, but none of the other requirements in section 30 are met, this work cannot continue.

Municipal Infrastructure Projects and/or Capital Works

- Section 34 largely contemplates the continuation of public projects involving sewer and watermain work. For roads and heavy engineering work, the work must involve repair and maintenance of critical infrastructure to be exempt under this section.
- New works can continue if they are associated with a new facility in the healthcare sector (section 27) or a project that will increase the capacity of critical provincial infrastructure (section 28).
- There is some overlap between the exemption for “critical provincial infrastructure” projects (section 28) and the repair and maintenance of “critical infrastructure” (section 34).
 - If a project involves a new work, a contractor will have to establish this is “critical provincial infrastructure” and the requirements of section 28 are met.
 - If a contractor is performing day-to-day repair and maintenance, the contractor cannot rely on section 28, and must show that section 34 applies.
- Although a contractor may be providing essential services under section 34, the contractor may not be able to continue performing that work if the whole project is otherwise required to close.



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