

April 7, 2020



Keith Burkhardt



COVID-19 and CONSTRUCTION: IDENTIFYING ISSUES and MANAGING RISK



Rob Kennaley

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COVID-19 and Construction: Identifying Issues and Managing Risk

COVID-19 and Construction

- ❖ The Order issued under the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c.E9 in relation to Essential Services was revised April 3, 2020
 - ❖ What Construction Can Continue After April 4, 2020 in light of that Order?
 - ❖ What are the Enforcement Mechanisms and Fines?

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COVID-19 and Construction

- ❖ Where Construction Has Been Shut Down by the Revised Order:
 - ❖ Who Bears the Costs of the Delay?
 - ❖ What Might those Costs Be?
 - ❖ What are the Parties' Ongoing Obligations?
 - ❖ (We may deal with these issues next week)

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COVID-19 and Construction: Identifying Issues and Managing Risk

COVID-19 and Construction

- ❖ On April 3 and April 6 we released two blogs on these issues:
- ❖ *Construction Has Been Ordered Substantially Shut Down in Ontario: Who bears the costs of delay, and what might those be?* Issued April 3rd ; and
- ❖ *What Construction Can Continue in Ontario after April 4, 2020?* Issued April 6th

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What Construction Can Continue?

- ❖ The Revised Order Incorporates a list of “Essential Services” that are allowed to continue
- ❖ <https://www.ontario.ca/page/list-essential-workplaces>
- ❖ Paragraphs 20 and 27-31 expressly deal with Construction and Maintenance

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COVID-19 and Construction: Identifying Issues and Managing Risk

What Construction Can Continue?

- ❖ The Revised Order Incorporates a list of “Essential Services” that are allowed to continue
 - ❖ Portions of the list are broadly stated
 - ❖ Portions of the list vague and ambiguous
 - ❖ It is not our intention to be critical or to second guess the decisions, but to point out and discuss the “grey areas” to assist participants to manage risk

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What Construction Can Continue?

20. Maintenance, repair and property management services strictly necessary to manage and maintain the safety, security, sanitation and essential operation of institutional, commercial, industrial and residential properties and buildings.

- ❖ ie. maintenance and repair necessary to protect health and safety (including security and sanitation) and essential operations are allowed to continue
- ❖ no guidance as to what operations are “essential”

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COVID-19 and Construction: Identifying Issues and Managing Risk

What Construction Can Continue?

- ❖ It appears that *repairs* to maintain essential services will be allowed, but *new construction or renovations* to expand essential services will not be allowed
- ❖ Conspicuous by its absence is any clear statement that the construction, expansion or renovation of a building or infrastructure the purpose of which is to provide an essential service may continue.

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What Construction Can Continue?

- ❖ It appears that *repairs* to maintain essential services will be allowed, but *new construction or renovations* to expand essential services will not be allowed
- ❖ To the contrary, the clear intent of the Order appears to be that unless a project fits within the scope of paragraph 27-31, the new construction or renovation or repair cannot proceed
- ❖ This creates some curious results

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What Construction Can Continue?

- ❖ For example, while families and businesses are struggling for better internet connectivity to meet their increased needs while schooling and working from home, it appears internet providers must cease the construction of much needed new server rooms and IT facilities, towards increasing bandwidth and capacity

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What Construction Can Continue?

- ❖ Similarly, it appears *on the face of it* that unless it can be fit into paragraphs 27-31, new construction or renovations intended to increase capacity for the production and distribution of food and other essential products must stop
- ❖ This is because the Order specifically addresses certain essential services in those paragraphs, telegraphing that if such a service is not listed there, the intention was to not allow construction or renovations to continue in that regard

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COVID-19 and Construction: Identifying Issues and Managing Risk

What Construction Can Continue?

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.

- ❖ It is not clear what “associated with the healthcare sector” means
- ❖ No doubt hospitals, clinics, or doctor’s offices, etc., are part of this sector and that the services related to massage therapy, mental health care, addiction treatments and homeopathic care, etc. are included
- ❖ It is not clear, however, how far the “healthcare sector” extends

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What Construction Can Continue?

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.

- ❖ it is not clear that construction in relation to a pharmacy, medical supply warehouse, cannabis facility or health food store will be allowed
- ❖ on the face of its, these are all “associated with the healthcare sector
- ❖ fridge or truck manufacturing? Courier facility expansions? Flowers and gift shops? How far does “association” go?

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- ❖ paragraph 27 also allows projects including “new facilities, expansions, renovations and conversion of spaces that ***could be repurposed for health care space***” to continue.

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What Construction Can Continue?

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.

- ❖ no doubt, because emergency response plans will generally incorporate hockey arenas, community spaces, university halls and libraries, etc., for various healthcare purposes during an emergency.

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- ❖ The Order offers no guidance as to what construction might meet the test
- ❖ At the extreme, if the space under construction is zoned to include for doctor's offices, one could argue that because it could be repurposed so as to meet the definition, the work can continue

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What Construction Can Continue?

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.

- ❖ This seems straightforward, but it is not clear why the test isn't simply "critical infrastructure"
- ❖ It is not clear what is meant by "provincial" infrastructure. Are we limiting the scope of the paragraph to public works and buildings?
- ❖ It may be that private infrastructure (buildings, plants, facilities) that are critical to meeting an essential service are *not* included.

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What Construction Can Continue?

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

❖ Straight-forward but notice the specific reference to the provision of PPE as being essential construction

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What Construction Can Continue?

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.

❖ In contrast, it appears that clearly ‘non-essential’ construction will be allowed to continue in the residential sector

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What Construction Can Continue?

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- 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.

❖ Under (iii) merely cosmetic renovations to 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

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What Construction Can Continue?

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.

❖ Under (i) and (ii), while construction of residential homes and condominiums can continue, so long as the specific permitting requirements have been met

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What Construction Can Continue?

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

- ❖ This is fairly self-explanatory
- ❖ However, keep paragraph 20 in mind

20. Maintenance, repair and property management services strictly necessary to manage and maintain the safety, security, sanitation and essential operation of institutional, commercial, industrial and residential properties and buildings.

- ❖ If the work can be characterized as a repair essential to the operation of a building (whether the building houses an essential service or not) it will be allowed to continue

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What Construction Can Continue?

- ❖ 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.

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What Construction Can Continue?

- ❖ fines and imprisonment can be imposed for breaches of Orders issued under the *Emergency Management and Civil Protection Act*.
- ❖ 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.

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What Construction Can Continue?

- ❖ Ministry of Labour inspectors will, and have been, inspecting job sites to determine if the Order has been breached
- ❖ The *Daily Commercial News* reported that, in the week prior to the revised Order being issued, 583 Ministry of Labour inspections occurred and five Ontario construction sites were shut down
- ❖ Doug Ford, in his press conference of April 3rd stated “Those few sites that will remain open will be placed under the highest level of scrutiny possible.”

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What Construction Can Continue?

- ❖ For more information and guidance:
- ❖ *Stop the Spread Business Information Line*,
at 1-(888)-444-3659
- ❖ The Ministry of Labour at 1-888-949-4173

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What Construction Can Continue?

- ❖ Our thoughts on an approach:
 - ❖ assess whether or not the scope of their project fits into paragraphs 20 or 27-31 of the revised Order
 - ❖ 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

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What Construction Can Continue?

- ❖ Our thoughts on an approach:
 - ❖ 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;

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What Construction Can Continue?

- ❖ Our thoughts on an approach:
 - ❖ 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

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What Construction Can Continue?

- ❖ Our thoughts on an approach:
 - ❖ 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

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- ❖ OHSA and Labour Issues

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