

ROUND 2: ONTARIO STATE OF EMERGENCY AGAIN RESTRICTS CONSTRUCTION

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On January 12, 2021, the Ontario Government [declared](#) a second state of emergency (the "**Declaration**") under the [Emergency Management and Civil Protection Act](#) ("**EMPCA**") in respect of the COVID-19 pandemic. In the Declaration, the Ontario Government announced that it would introduce enhanced lockdown restrictions to combat COVID-19.

The new restrictions took effect on January 14, 2021 at 12:01 a.m. and will remain in place until at least February 11, 2021. During this time, only construction projects deemed "essential" under the amended regulation [Rules For Areas In Stage 1](#) ("**O. Reg. 82/20**")^[1] may continue. All other construction activities must stop until the province has lifted the Declaration.

"Essential" Construction

Section 43 of O. Reg. 82/20 provides that construction activities or projects and related services, including land surveying and demolition services, are "essential" if they:

- (a) are associated with the health care sector or long-term care, including new facilities, expansions, renovations and conversion of spaces that could be repurposed for health care space;
- (b) ensure safe and reliable operations of, or provide new capacity in,
 - (i) municipal infrastructure; or
 - (ii) provincial infrastructure, including but not limited to, the transit, transportation, resource, energy and justice sectors;
- (c) support the operations of, or provide new capacity in, electricity generation, transmission, distribution and storage, natural gas distribution, transmission and storage or in the supply of resources;
- (d) support the operations of, or provide new capacity in, schools, colleges, universities or child care centres within the meaning of the *Child Care and Early Years Act, 2014*;

- (e) are required for,
 - (i) the maintenance and operations of petrochemical plants and refineries,
 - (ii) significant industrial petrochemical projects where preliminary work commenced before January 12, 2021, or
 - (iii) industrial construction and modifications to existing industrial structures limited solely to work necessary for the production, maintenance or enhancement of personal protective equipment, medical devices such as ventilators and other identified products directly related to combatting the COVID-19 pandemic;
- (f) would provide additional capacity in the production, processing, manufacturing or distribution of food, beverages or agricultural products;
- (g) were commenced before January 12, 2021 and that would,
 - (i) provide additional capacity for businesses that provide logistical support, distribution services, warehousing, storage or shipping and delivery services, or
 - (ii) provide additional capacity in the operation and delivery of Information Technology ("IT") services or telecommunications services;
 - (iii) provide additional capacity to, or enhance the efficiency or operations of, businesses that extract, manufacture, process and distribute goods, products, equipment and materials.
- (h) support the operations of broadband internet and cellular technologies and services;
- (i) are related to residential construction projects where,
 - (i) a building permit has been granted for a single family, semi-detached and townhomes,
 - (ii) the project is a condominium, mixed-use or other residential building, or
 - (iii) the project involves renovations to residential properties and construction work that was started before January 12, 2021,
- (j) prepare a site for an institutional, commercial, industrial or residential development, including any necessary excavation, grading, roads or utilities infrastructure;
- (k) are necessary to temporarily close construction sites that have paused, or that are not active, to ensure ongoing public safety;

- (l) are funded in whole or in part by,
 - (i) the Crown in right of Canada or in right of Ontario,
 - (ii) an agency of the Crown in right of Canada or in right of Ontario, or
 - (iii) a municipality,
- (m) are,
 - (i) intended to provide shelter or supports for vulnerable persons or affordable housing; and
 - (ii) being funded in whole or in part by, or are being undertaken by,
 - (A) the Crown in right of Canada or in right of Ontario,
 - (B) an agency of the Crown in right of Canada or in right of Ontario,
 - (C) a municipality,
 - (D) a service manager as defined the *Housing Services Act*, 2011, or
 - (E) a registered charity within the meaning of the *Income Tax Act* (Canada), or
 - (F) a not-for-profit corporation.

Return to May 2020 “Essential” Construction Activities

The new list of “essential” construction activities closely mirrors the list that was in effect from May 7 to 17, 2020 under the then-current version of [O. Reg. 82/20](#). One of the significant additions is that the new list deems construction “essential” if it is funded in whole or in part by the federal or provincial Government, or by municipalities. The current list also deems “essential” any construction projects intended to provide shelter or supports for vulnerable persons or affordable housing, so long as they are funded by registered charities, not-for-profit corporations, or specified Government entities. Additionally, the current list clarifies that certain natural gas, cellular, and broadband construction projects are “essential”.

Close Sites to Avoid Fines and Prosecution

In light of the Declaration, construction industry members should quickly close and secure all sites for non-essential activities or projects. Failing to do so may result in fines or potential prosecution as follows:

- in the case of an individual, a maximum fine of \$100,000 and a maximum 1 year term of imprisonment;
- in the case of an individual who is a director or officer of a corporation, a maximum fine of \$500,000 and a

maximum 1 year term of imprisonment;

- in the case of a corporation, a maximum fine of \$10,000,000

Practical Considerations

The Government's order appears to put many construction projects on hold, such as office renovations or recent builds in non-essential industries. Whether any particular project falls within an "essential" category will require a consideration of the particular project and activities at issue.

As in the spring of 2020, we can expect that these construction activity restrictions will cause some confusion and disputes over whether a site is "essential", delay and force majeure claims arising from the shutdown of non-essential construction, and many other shutdown-related claims in the coming months.

For questions or further guidance on the current requirements for construction activities in Ontario, please contact one of our construction group leaders, Geza Banfai, Glenn Grenier, Jason J. Annibale, Patrick A. Thompson, Annik Forristal, Laura Brazil and Jeremy Rankin.

[1] Note that as of January 15, 2021, O. Reg 14/21 further amends O. Reg 82/20.

by [Jason J. Annibale](#) and [Laura Brazil](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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