

# Commercial Leasing Bulletin:

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## Impact of Recent COVID-19 Restrictions on the Ontario Construction Industry

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By: [Commercial Leasing Group](#) – Minden Gross LLP

On April 3, 2021, the Government of Ontario placed the entire province in the shutdown zone pursuant to the [Reopening Ontario \(A Flexible Response to COVID-19\) Act, 2020](#). On April 7, 2021, it declared a third provincial emergency and announced legislative amendments imposing further restrictions on the operations of non-essential retail businesses. The restrictions, however, did not call for a cessation of construction activities. The shutdown was originally scheduled to expire on April 20, 2021.

On April 16, 2021, the Government extended the shutdown through May 20, 2021, and further strengthened the public health measures. The end date of the current shutdown is subject to possible further extensions. In particular, the Government sought to close all non-essential workplaces in the construction sector starting at 12:01 am on April 17, 2021, and continuing until the expiry of the shutdown. Initially, this raised the question about what types of construction activities would be considered “essential” and therefore be allowed to continue during the shutdown. Fortunately, the Government answered this question over the weekend by enacting legislation that confirms that the following types of construction activities **will be permitted to continue during the shutdown**:

Construction activities or projects and related services, including land surveying and demolition services, that,

- (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;
- (e) are required for:
  - i. the maintenance and operations of petrochemical plants and refineries;
  - ii. significant industrial petrochemical projects where preliminary work commenced before April 17, 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 April 17, 2021, and that would:
  - i. provide additional capacity for businesses that provide logistical support, distribution services, warehousing, storage or shipping, and delivery services;
  - ii. provide additional capacity in the operation and delivery of Information Technology (IT) services or telecommunications services; or
  - 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 residential construction activities or projects and related services;
- (j) prepare a site for 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; or
- (m) are:
  - i. intended to provide shelter or support 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](#),
- (E) a registered charity within the meaning of the [Income Tax Act \(Canada\)](#), or
- (F) a not-for-profit corporation.

The above list is very similar to the list used by the Government for the second state of emergency declared in January 2021. The Government has now added construction activities that began before April 17, 2021, and that would provide additional capacity to, or enhance the efficiency or operations of, businesses that extract, manufacture, process, and distribute goods, products, equipment, and materials.

The list prioritizes health care, personal protective equipment, municipal and provincial infrastructure, government-funded projects, affordable housing, and long-term care, etc.; however, it arguably does not sufficiently prioritize industrial construction projects given the prevailing circumstances. During the pandemic, industrial development has become the “darling” of the real estate world. Warehouse space, in particular, has become a hot commodity due to the boom in e-commerce. There are growing fears that industrial capacity in Canada is quickly waning; in fact, it is expected to run out by the end of 2021. Accordingly, it is imperative for businesses in Ontario to be allowed to proceed with industrial construction projects to ensure we maintain sufficient industrial capacity.

If the above-mentioned restrictions on construction activities are interpreted too broadly, it could stifle the progress of industrial construction projects in Ontario and worsen Canada’s industrial capacity. To what extent will existing and new industrial construction projects be allowed to proceed during the shutdown? It is arguable that a variety of existing industrial construction projects can proceed during the shutdown **so long as some aspect of the project (for example, site preparation) was started before April 17, 2021** – see item (g) of the above list of “essential” construction activities. Further, if an industrial project was not started before such date, a business could at least proceed with construction activities related to the preparation of a site for industrial development, including any necessary excavation, grading, roads, or utilities infrastructure – see item (j) of the above list of “essential” construction activities. However, it is odd that an entire construction project could proceed so long as its site preparation began before April 17, 2021, but could not proceed if the site preparation began after such date.

We will continue to provide regular updates on commercial leasing issues in Canada, especially [COVID-19 updates](#) as landlords and tenants struggle with the economic challenges brought on by the pandemic. If you have any questions or would like to obtain legal advice on any commercial leasing issues or litigation, please contact any lawyer in our Commercial Leasing Group below.



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