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By Email

Mr. Bart Kanters
President
Concrete Ontario
1 Prologis Blvd, Ste. 102B
Mississauga ON L5W 0G2

Dear Mr. Kanters:

Re: **Opinion regarding Determination of Essential Businesses and COVID-19**

You have asked us to provide an opinion if your members, concrete suppliers, are responsible to determine if customers are essential or non-essential business, and how your members may protect themselves from customers not operating as an essential business as defined in the Closure of Places of Non-Essential Business Order (“the Order”), Ontario Regulation 82/20, as amended by Ontario Regulation 119/20, made under subsection 7.0.2(4) of the *Emergency Management and Civil Protection Act* (“the Act”).

Background

You have provided us with the following background and facts regarding the issue upon which our legal opinion is based:

- Contractors requesting product from concrete suppliers who are not an essential business.
- Homeowner contacting suppliers for concrete for home projects that are started without a permit and after April 4, 2020.

The Statutory Framework

The supply of concrete, in our opinion, would likely be qualified as an essential business/workplace as identified in the Order:

1. *Businesses that supply other essential businesses or essential services within Ontario, or that supply businesses or services that have been declared essential in a jurisdiction outside of Ontario, with the support, products, supplies, systems, or services, including*



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processing, packaging, warehousing, distribution, delivery, and maintenance necessary to operate.

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 Equipment, medical devices (such as ventilators), and other identified products directly related to combatting the Covid-19 pandemic.*
- 29.1 *Construction projects that are due to be completed before October 4, 2020 and that would provide additional capacity in the production, processing, manufacturing or distribution of food, beverages or agricultural products.”*
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.*
32. *Businesses that provide and ensure the domestic and global continuity of supply of resources, including mining, forestry, aggregates, petroleum, petroleum by-products and chemicals.*



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33. *Electricity generation, transmission, distribution and storage and natural gas distribution, transmission and storage.*

An essential business/workplace in Ontario is now also subject to the following legal obligations, as stated in Schedule 3 of the Order:

1. Businesses must ensure the Project operates in accordance with all applicable laws, including the *Occupational Health and Safety Act* and its regulations. Since adherence to applicable laws is already required, this is not a new legal obligation.
2. In addition to compliance with any binding orders issued by local medical officers of health made under the *Health Protection and Promotion Act*, businesses must ensure their activities operate in compliance with the advice, recommendations and instructions of public health officials, including any advice, recommendations or instructions on physical distance, cleaning, or disinfecting. This requirement, in effect, mandates compliance with public health officials' advice, recommendations or instructions, even though they are not issued as binding orders.

Stipulations for non-essential business are set out in section 1 of the Order that states, "Beginning at 11:59 p.m. on Saturday, April 4, 2020, each person responsible for a place of business that is not listed in Schedule 2 shall ensure that the place of business is closed."

Legal Opinion

In our opinion, the products and services, provided by the members of Concrete Ontario, support essential businesses as listed above. Products and services associated with the concrete industry, in our opinion, would be required for any type of construction, including residential construction or renovations. However, the determination by your membership if the businesses they support are considered essential businesses is not a legal requirement mandated by the Order. This determination is mandated to be made by every person responsible for a place of business. Each person responsible for a place of business has the responsibility to determine if their business is an essential business or not, and if not, must close. Any business supporting a non-essential business that has not closed, would be in violation of the Order and subject to charges.

In order to protect your membership from providing products and services to non-essential businesses, and potential contravention and possible regulatory charges for violating the Order, processes must be in place that require persons responsible for the place of business to confirm, in writing, that their entity is an essential business as defined by the Order. Our recommendation is that your membership receive this confirmation, in writing, during the procurement or pre-order process. When ordering concrete or other products offered by the membership, including manpower, documentation must be provided outlining the reasons why the business is an essential business, preferably citing the section of the Order.

Similar requirements should be in place for any residential construction or renovation. Homeowners should be required to provide proof in the form of a permit that meets the requirement of item 30 of the Order. Personal home improvements that are beginning to present



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themselves to your membership, in our opinion, were not started prior to April 4, 2020. These projects do not meet the requirements of the Order, and providing products or services to these individuals would be a violation of the Order.

It is a difficult position for any company to decline business. However, at this particular time, during the enforcement of the *Act*, it is essential that companies protect themselves from any alleged violation of the Order. In our opinion, the best method for legal compliance and protection is to confirm that a business is essential, and that the determination is made by the person responsible for that place of business and is not made by your membership companies.

As mentioned above, the evidence should be in writing and prior to procurement of the product or service. For example, prior to accepting a purchase order, this requirement is either written on a purchase order or confirmed in a letter, signed by a signing authority of the company, provided in an email with the order for products or services. This documentation must be reviewed and evaluated. The membership company must be confident that the reasons provided to confirm the company meets the requirements of an essential business are listed in the Order. Performing this additional step takes the onus away from your membership to decide if a customer is an essential business, which we have already advised is not their responsibility. This action will likely provide your membership with a greater assurance that they have performed their legal compliance and due diligence, and are only providing products and services to essential businesses.

We have drafted a Bulletin for you to review and once approved, to your membership that reflects our opinion of the responsibility of the customer to confirm if they are an essential business as outlined by the Order.

This opinion reflects the content of the Order at the time of writing. It is also based on the facts, documentation and information that you have provided to us, as summarized above. This opinion may change if the Order is further amended.

Please contact the undersigned if you have any questions or concerns about this letter. You can contact me directly at 416-868-7824 or nkeith@fasken.com.

Yours very truly,

FASKEN MARTINEAU DuMOULIN LLP



Norm Keith*

*Practising through a professional corporation

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