

CORPORATION OF THE TOWNSHIP OF ESQUIMALT

BYLAW NO. 2350

A Bylaw to authorize a Municipal Access Agreement

WHEREAS pursuant to Section 589(1) of the *Municipal Act*, Council may make, adopt or ratify agreements with any person authorized by statute to supply or supplying electric light, power, telephone or other facilities for the use of electric current or energy inside the municipality, for the placing of wires and equipment in connection with them in tunnels or underground conduits or structures on mutually agreed terms;

AND WHEREAS it is deemed desirable to enter into a Municipal Access Agreement with Ledcor Industries Limited, a company that wishes to install and maintain wires, fibre-optic cables, ducts, conduits, manholes and other accessories, structures and equipment inside the municipality;

NOW THEREFORE, THE MUNICIPAL COUNCIL OF THE CORPORATION OF THE TOWNSHIP OF ESQUIMALT, in open meeting assembled, enacts as follows:

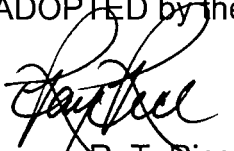
1. The Mayor and the Municipal Clerk authorized to execute an agreement pursuant to Section 589(1) of the *Municipal Act* with Ledcor Industries Limited in the form attached to this bylaw as Schedule A.
2. This bylaw may be cited for all purposes as the "MUNICIPAL ACCESS AGREEMENT BYLAW (LED COR INDUSTRIES LIMITED), 1999, NO. 2350".
3. The "Municipal Access Agreement Bylaw (Ledcor Industries Limited) 1998, No. 2335" of the Corporation of the Township of Esquimalt is hereby repealed and replaced by this Bylaw.

READ a first time by the Municipal Council on January 25, 1999.

READ a second by the Municipal Council on January 25, 1999.

READ a third time by the Municipal Council January 25, 1999.

ADOPTED by the Municipal Council on February 8, 1999.




R. T. Rice
Mayor



R. Seright
Municipal Clerk

MUNICIPAL ACCESS AGREEMENT**THIS AGREEMENT** made this day of *FEBRUARY 9*

Revised 18 January, 1999

~~1998~~ 1999 

BETWEEN

CORPORATION OF THE TOWNSHIP OF ESQUIMALT

A Municipality incorporated pursuant to the Municipal Act, having an office at:

1229 Esquimalt Road
Victoria, B.C.
V9A 3P1

AND

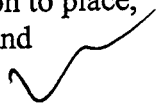
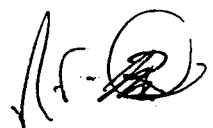
LEDCOR INDUSTRIES LIMITED
1066 W. Hastings Ste. 1000
Vancouver, B.C. V6E 3X1**WHEREAS:**

1. a) The Company wishes to install and maintain wires, fibre-optic-cables, ducts, conduits, manholes and other accessories, structures and equipment (collectively, the "Works") in, on, under, over, along and across Highways, streets, road allowances, lanes, bridges, viaducts and any other ways open to public use (herein called a "Highway") within the Municipality; and
- b) The Municipality is willing to permit the use of Highways where, in its judgement, such use will not interfere with its own service requirements and use of the streets including the consideration of the economy and safety and any rights or privileges previously conferred or hereafter conferred by the Municipality by contract or otherwise to others not parties to this Agreement to use any of the Highways;

NOW THEREFORE in consideration of the sum of TEN DOLLARS (\$10) paid by each of the parties to the others and of the premises, mutual covenants and agreements herein contained, the Municipality and the Company each agree with each other as follows:

1. Subject to the applicable by-laws and permit requirements of the Municipality and to this Agreement, the Municipality grants to the Company permission to enter in, upon, over, along, across, under all Highways within the Municipality and permission to use, break up, dig, trench, open up and excavate the Highways, and therein and thereon to place, construct, lay, operate, use, maintain, renew, alter, repair, extend, replace and and remove the Works.

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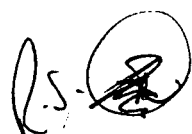



2. The Company shall not install any of its Works in, on, under, over, along or across a "Highway" without first obtaining the written approval of the Municipal Engineer with regard to the proposed location of the Works in, on, under, over, above and across the Highway. As a condition of such approval, the Municipality may, at its sole discretion, require that the Company submit detailed engineering plans to the Municipal Engineer showing accurately the location and dimensions of the Works as well as other nearby utilities or services, property lines and other relevant features, with respect to the work to be conducted on a Highway.
3. The Municipality may, from time to time in writing, empower the company to use public lands for the Works. The Municipality shall not unreasonably withhold permission in circumstances where other public utilities have been allowed to use those public lands. Where such permission has been granted to the Company, the Municipality shall have the right to require the Company to enter into a Right-of- Way agreement in registerable form and the Company shall pay to the Municipality compensation for the fair market value of the right-of-way. Fair market value shall be as agreed by the Municipality and the Company based on compensation paid by the Company or other public utilities to other municipalities in the Province of British Columbia for similar Rights-of-Way granted with respect to similar public lands in other municipalities. Failing agreement between the Company and the Municipality as to the fair market value of any Right-of-Way, compensation shall be determined in accordance with the Expropriation Act, 1987 S.B.C., c.23, as amended from time to time.
4. Despite Section 2, the Company may carry out routine maintenance, field-testing and subscriber connections without the consent of the Municipality, but in no case shall it carry out any excavation without the Municipality's prior consent.
5. All work conducted by the Company on a Highway, including installation, maintenance and removal of its Works, is subject to the following conditions:
 - a) all work shall be conducted and completed to the satisfaction of the Municipal Engineer, acting reasonably, and in accordance with Municipal specifications and the Municipality's Traffic Control Manual. Where the Works proposed are not covered by Municipal specifications, then commonly accepted engineering practice shall govern.
 - b) the portions of the Works which pass over or under existing utilities or cross beneath streets shall be placed in a carrier pipe or be encased in concrete.
 - c) the Company shall not install any Works by means of an open cut in pavement, if such pavement was installed in the last five (5) years, except in emergencies, where no other practical alternative method exists, or it may be approved by the Municipal Engineer in instances where such pavement is also cut for other municipal or utility services.

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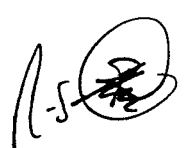
- d) the Company shall be responsible for the restoration of all its pavement replacements arising out of negligent performance of the restoration by the Company for a period of five (5) years.
 - e) when a portion of the Works is installed in a trench crossing the Highway the Company shall, where specified by the Municipal Engineer, use non-shrinkable fill under the pavement and shall ensure that the surface of the trench remains level with the surface of the adjacent Highway or land for five (5) years provided that the Company shall not be responsible for any settlement as aforesaid if such settlement was not caused by the Company's negligent performance of the restoration.
 - f) if the Company breaks the surface of a Highway, it shall repair and restore the surface of the Highway to substantially the same condition it was in before such work was undertaken by the Company and to the satisfaction of the Municipal Engineer. If the Company fails to repair and restore a Highway to the satisfaction of the Municipal Engineer within twenty (20) days of being notified by the Municipality, the Municipality may effect such repairs and charge all normal Municipal costs relating thereto to the Company in accordance with paragraph 11 hereof.
 - g) if the Municipality requires the installation, maintenance or removal of the Works to be stopped for any valid reason, the Company shall cease all such installation, maintenance, or removal of the Works forthwith upon receipt of notice from the Municipality;
 - h) prior to the Company abandoning its use of all or part of its underground Works, it shall remove all cable within the conduit, seal the conduit and provide the Municipality with certification by a Professional Engineer that the conduit is free from contamination and does not contain any hazardous materials; and
 - i) the Company is responsible for all installation, maintenance and replacement and removal of cable within the Works including the cost of such work.
6. The Company represents and warrants to and covenants and agrees with the Municipality that:
- a) after completion of any work related to the installation, maintenance, repair, replacement or removal of the Works, the Company shall leave the Highways in a sanitary, neat, tidy and safe condition and free from nuisance, all to the satisfaction of the Municipal Engineer;

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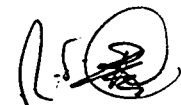
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- b) if this Agreement is terminated by the Municipality, all the unfulfilled covenants, indemnities and obligations of the Company hereunder shall survive such termination; and
 - c) the Municipality has made no representations or warranties as to the state of repair of the Highways or the suitability of the Highways for any business, activity or purpose whatsoever and the Company hereby agrees to use the Highways on an "as is" basis.
- 7. The Company shall provide "as built" drawings to the Municipality within two months of completing the installation of any of the Works.
 - 8. The Company shall, at no cost to the Municipality, provide locations of its Works within 24 hours of receiving a request by the Municipality.
 - 9. The Company shall provide to the Municipal Engineer a list of 24-hour emergency contact personnel for the Company and shall ensure that the aforementioned list is always current.
 - 10. Upon receipt of ninety (90) days notice from the Municipality or longer time as may be determined by the Municipal Engineer, the Company shall, at its own expense, relocate its Works within a Highway as may be required by the Municipality, provided that in cases of emergency, the Municipality may take any measures deemed necessary for public safety with respect to the Works that may be required in the circumstances as the Municipality shall determine, and the Company shall reimburse the Municipality for all reasonable expenses thereby incurred. Notwithstanding the foregoing if the removal or relocation of the Works or parts thereof are made solely to accommodate any third person, said third person shall reimburse the Company for its costs and expenses as aforesaid.
 - 11. If the Company fails to complete the relocation of the Works in accordance with paragraph 10 or fails to repair the Highway or do anything else required by the Company pursuant to this Agreement in a timely and expeditious manner to the satisfaction of the Municipal Engineer, the Municipality may, but is not obligated to, at its option complete such relocation or repair and the Company shall pay the cost of such relocation or repair to the Municipality forthwith plus an overhead equal to fifteen percent (15 %) of such cost and in default of payment thereof, the amount of such cost with interest at the rate of two percent (2 %) per annum above the prime lending rate of the Canadian Imperial Bank of Commerce carrying on business in the Municipality shall be due and payable by the Company to the Municipality upon receipt by the Company of an invoice setting out such costs and interest.

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12. If any Highway under or on which any part of the Works is constructed is permanently closed or alienated by any order, direction or request of the Municipality, the Municipality may give the Company notice and the Company shall, with all reasonable dispatch after receipt of such notice from the Municipality, remove and if possible or practicable, relocate that part of the Works affected by such closure or alienation. The Municipality shall reimburse the Company for the direct cost plus a ten percent (10%) mark-up of work done by the Company under this Section.
13. Except in cases resulting from negligence, wilful misconduct or gross negligence on the part of the Municipality, the Municipality is not responsible, either directly or indirectly, for any damage to the Works, nor is the Municipality liable to the Company for any losses, claims, charges, damages and expenses whatsoever suffered by the Company including claims for loss of revenue or loss of profits, on account of the actions of the Municipality, its agents or employees, working in, under, over, along, upon and across its Highways.
14. Except in cases resulting from negligence, wilful misconduct or gross negligence on the part of the Municipality, the Company covenants and agrees to indemnify and save harmless the Municipality, its agents, officers, elected officials, employees and assigns from and against all losses, claims, including a claim for injurious affection, charges, damages and expenses instituted by a third person against the Municipality at any time by reason, or on account of the placement, installation, relocation, maintenance or use of the Works in, on, under, over, along or across a Highway and the Company will, upon demand and at its own sole risk and expense, defend any and all such suits, actions or other legal proceedings which may be brought or instituted by third persons against the Municipality on any such claim, demand or cause of action, and will pay and satisfy any judgement or decree which may be rendered against the Municipality in any such suit, action or other legal proceeding, and will reimburse the Municipality for any and all legal expenses incurred in connection therewith. The Company's obligation to indemnify and save harmless the Municipality shall survive the termination of this Agreement.
- 14a. Notwithstanding anything contained in this agreement, under no circumstances will either party be liable to the other party for any special, indirect or consequential damage or loss, (including damages due to loss of use, loss of revenue, or loss of profits) whether arising out of contract, tort (including without limit negligence), nuisances or otherwise.
- 14b. The Municipality's liability for damages to the Works under Sections 13 and 14 shall not exceed the actual cost of repairs of the Work or the Annual Highway Use and Licence Fee, whichever is less. In no case, shall multiple claims for damages in one calendar year exceed the Annual Highway Use and Licence Fee for that year.



15. This Agreement shall commence upon the date of execution and shall, unless renewed, by mutual agreement of the parties, terminate March 1st, 2019, provided that the Company shall have the right and option to renew this Agreement for unlimited numbers of terms each for 5 years period. Both the Company and the Municipality shall act reasonably during any renewal or renegotiation of this Agreement. In the event that the Company and the Municipality fail to come to terms on a renewed or renegotiated Agreement, then this matter shall be resolved by arbitration pursuant to the Commercial Arbitration Act, S.B.C., 1986 C.3 as amended from time to time. In the event that The Company may give written notice of cancellation of this agreement not less than six (6) months prior to the expiration of this Agreement or any renewal term upon which this Agreement shall terminate and on the day as the Municipality and the Company mutually agree and all rights and privileges thereunder shall come to an end, provided that notwithstanding such termination the Company shall continue to be liable to the Municipality for all payments due and obligations incurred thereunder prior to the date of such termination. Notwithstanding the above and the termination of this Agreement, the Company shall have the right and option, without any further approval or consent of the Municipality, to abandon a portion or the whole of such Works in place, in accordance with the conditions of Sections 5 h) and i) of this agreement and, in which case same will become the Municipality's unencumbered property.
16. Nothing in this Agreement relieves the Company from utility tax payment obligations under the Municipal Act.
17. The Company herein recognizes that the Municipality is entitled to receive compensation for the use of and impact on the Highway due to the Company's Works over and above the Municipality's direct costs in providing access to Highways by the Company.
18. Prior to April 30th of each year, the Company shall provide the Municipality with a statement certifying the lineal dimensions of all its Works, excluding individual service connections to customers.
19. On completion of installation of the Works, the Company covenants and agrees to pay the Municipality an annual Highway use and licence fee of six dollars (\$6.00) for each linear metre of Highway occupied by the Works installed by the Company and the subsequent annual fees will come due on the anniversary date of completion of the installation. Failure to pay the fee by June 30th shall result in a late payment penalty of 2% per month for each month, or portion thereof, in which the Highway use and license fee remains outstanding. Fees payable under this section may be reduced by mutual agreement in consideration for in-kind services provided to the Municipality by the Company. . At the end of each five year period during the term of this Agreement, the Highway use and license fee shall be adjusted based on the prevailing market Highway use and licence fee within British Columbia or based on the percentage change to the fair market value of industrial land in the Greater Victoria area, using the first year of this agreement as the base year, (herein called "the percent change"); whichever is the greater . Three months prior the end of each five year period, the parties shall meet .../7



and use their best efforts to reach an agreement on the percentage change and if no such agreement has been reached by the date which is one month prior to the end of the five year period, the percentage change shall be determined by a single arbitrator pursuant to the Commercial Arbitration Act 1996 RSBC 55.

20. The Company further covenants and agrees to pay to the Municipality a one time charge Plan Review and Administration fee of six dollars (\$6.00) for each lineal meter of proposed Works to be located in the Highways prior to commencement of construction of the said Works.
21. The Municipality and the Company mutually agree that should the Company or the Municipality fail to carry out any of the terms, covenants and conditions herein contained or default in any of its obligations under the terms hereof or fail within thirty (30) days after receiving written notice from the Municipality or the Company to correct any such failure capable of correction, then this matter can be resolved by both parties or by arbitration pursuant to the Commercial Arbitration Act, S.B.C., 1986 C.3 as amended from time to time.
22. This Agreement shall be binding upon and shall enure to the benefit of the parties hereto and their respective successors and assigns. The Company shall not assign, transfer or sublet any rights or privileges granted hereunder without the prior written consent of the Municipality. Such consent shall not be unreasonably withheld by the Municipality. Notwithstanding the forgoing the Company shall be permitted to grant the following rights to any purchaser of strands of fibre optic cables or support structures related to the Works without the consent of the Municipality:
 - a) the right to own and operate purchased strands;
 - b) the right to own and use an undivided interest in support structure;
 - c) the right to transfer ownership of purchased strands and an undivided interest in related support structures to a purchaser;
 - d) the right to assign the sub-license granted by the Company to a subsequent purchaser; and
 - e) the right to peaceable occupation of the lands that are the object of this Agreement and to quiet possession and use of strands and support structures.

The Company shall be permitted to grant the following rights to any purchaser of indefeasible contractual rights of use related to the Works without the consent of the Municipality:

- f) the right to operate purchased strands;
- g) the right to transfer indefeasible contractual rights to a subsequent purchaser;

- h) the right to assign a sub-license granted by the Company to a subsequent purchaser."
- 23. No use of a Highway under this Agreement shall create or vest in the Company any ownership or property rights in a Highway, and the Company shall be and remain a mere non-exclusive licensee of the Highway and placement of the Works in a Highway shall not create or vest in the Municipality any ownership or property rights to the Works.
- 24. Nothing in this Agreement shall be construed as affecting any rights or otherwise of others not a party to this Agreement to use any Highway in accordance with the Municipality's legal authority.
- 25. The Company agrees that it shall, at its own expense, procure and carry or cause to be produced and carried and paid for, full Workers' Compensation Board coverage for itself and all workers, employees, servants and other engaged in or upon any work.
- 26. The Company shall maintain liability insurance in sufficient amount and description as will protect the Company and the Municipality from claims for damages, personal injury including death, and for claims from property damage which may be brought or instituted by any third persons and which may arise from the Company's operations in the Municipality under this Agreement, including the use or maintenance of the Works on or in the Highways or any act or omission of the Company's agents or employees while engaged in the work of placing, maintaining, renewing or removing the Works and such coverage shall include all costs, charges and expenses reasonably incurred with any injury or damage.
- 27. In addition to the foregoing, the Company covenants and agrees that:
 - a) the limits of liability for Personal Injury, Bodily Injury and Property Damage combined shall be for Five Million (\$5,000,000.00) Dollars for each occurrence.
 - b) the Municipality shall be added as additional insured with respect to the operations of the Company only under the Comprehensive General Liability Insurance.
 - c) the Comprehensive General Liability Insurance shall extend to cover the contractual obligations of the Company as stated within this Agreement.
 - d) a Cross-Liability Clause shall be made part of the Comprehensive General Liability Insurance.
 - e) all policies shall provide that they cannot be cancelled, lapsed or materially changed without at least thirty (30) days' notice to the Municipality by registered mail.
 - f) upon execution of this Agreement the Company shall file with the

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Municipality a certificate of each insurance policy required and shall thereof provide such certified copies of the policy to the Municipality on request.

28. Any notice required or permitted to be given hereunder or any tender or delivery of documents may be sufficiently given by personal delivery or, if other than the delivery of an original document, by facsimile transmission to the Municipality at the following address:

CORPORATION OF THE TOWNSHIP OF ESQUIMALT

1229 Esquimalt Rd.
Victoria, BC V9A 3P1

with a copy to:

Ledcor Industries Limited
1066 W. Hastings Ste. 1000
Vancouver, B.C. V6E 3X1

And to the Company at the following address:

Ledcor Industries Limited
1066 W. Hastings Ste. 1000
Vancouver, B.C., V6E 3X1

With a copy to:

Corporation of the Township of Esquimalt
1229 Esquimalt Rd.
Victoria BC V9A 3P1

Any notice may also be given by prepaid registered mail mailed within the Province of British Columbia and such notice shall be effective five (5) days following the date of mailing, except in the event that there shall be a disruption in postal services the date of mailing, in which case notice shall be effective by personal delivery or a facsimile transmission as state above.

29. This Agreement is the entire agreement between the Municipality and the Company regarding the subject of this Agreement and it can be amended or supplemented only by a document executed in writing by both the Municipality and the Company.
30. This Agreement benefits and binds the Municipality and the Company and the successors of each of them and permitted assigns.
31. If any term of this Agreement is found to be invalid, illegal, or unenforceable by a court having the jurisdiction to do so, that term is to be considered to have been severed from the text of this Agreement and the remaining portion of this Agreement remains in .../10

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force unaffected by that finding or by the severance of that term to the full extent as permitted by laws.

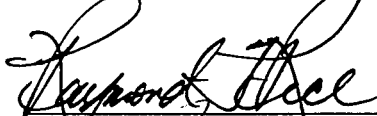
32. This Agreement creates contractual rights only between the Municipality and the Company and not an interest in the Highways and the Company covenants and agrees with the Municipality that the Company shall desist always from any registration of this Agreement or of any right howsoever arising under it.
33. No alleged waiver of breach of this Agreement is effective unless it is an express waiver in writing given by the non breaching party. No waiver of any breach of this Agreement operates as a waiver of any subsequent or future breach of this Agreement.
34. In this Agreement, unless the context otherwise required, the singular includes the plural and the masculine includes the feminine gender and a corporation.
35. In this Agreement, the term Municipal Engineer shall mean the Director of Planning and Engineering Services of the Corporation of the Township of Esquimalt or their designate.

This Agreement shall be governed by and construed and enforced in accordance with the laws of the Province of British Columbia and the laws of Canada, which may be applicable to a party in the Province of British Columbia.


IN WITNESS WHEREOF the parties hereto have executed this Agreement by their duly authorized representatives.

The Corporate Seal of the Municipality
was hereunto affixed in the presence of:

C/S



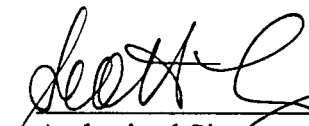
Mayor



Municipal Clerk

The Corporate Seal of the Company
was hereunto affixed in the presence of:

C/S



Authorized Signatory

SCOTT LYONS
V.P. Lebec Industries Limited.

Authorized Signatory