

## WITNESS STATEMENT OF DEREK TENNANT

- 1) My name is Derek Tennant. I reside at 10 Victoria Street, TH5, Barrie, Ontario, Canada L4N 6G2.
- 2) I am the President of Skyway 127 Wind Energy, Inc. I am a member of Tennant Energy, LLC, which is the claimant in this NAFTA arbitration. I am also a member of the management board of Tennant Energy, LLC.
- 3) John Tennant (John) and Jim Tennant (Jim) are my brothers. Jim lived for many years in Napa, California. After a severe injury, Jim moved to Delray Beach Florida. He lives there with his daughter. My brother John has resided for decades in San Mateo, California and still lives there.
- 4) I am 79 years old. My birthday is May 18, 1942.
- 5) I drafted this witness statement in English, and if called to testify, I would testify in English. I expressly consent to the use and processing of personal data, in or related to this witness statement, being used by the arbitration participants for this dispute, including its subsequent consideration and enforcement.

## SKYWAY 127 WIND ENERGY.

- 6) Skyway 127 Wind Energy Inc ("Skyway 127" or "SW127") is an Ontario Company. Skyway 127 was a wind energy project in Bruce County, Ontario, that made an application under the Ontario FIT Program.
- 7) John Pennie and I worked together on a variety of wind projects. These projects had been quite successful under the earlier Ontario wind power energy program before the FIT Program.
- 8) I have attached the share register from Skyway 127 in 2007.<sup>1</sup> The share register shows that on October 18, 2007, Skyway 127 issued 1,750,000 Common shares to me through my holding company, IQ Property Inc. I held half of the 3,500,000 common shares then issued of the company.

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<sup>1</sup> Skyway 127 Energy Inc Shareholders' Ledger, October 18, 2007. C-140

- 9) In the late summer of 2007, I was looking for additional capital sources for my business ventures. I asked my brother John to lend me \$200,000 for investments in the renewable energy business.
- 10) My brother John agreed to a loan. John provided me \$200,000 Canadian Dollars in September 2007.<sup>2</sup> We had a promissory note to cover the loan of the funds. My brother John advanced funds to me in September 2007. The promissory note was duly drafted and executed in October 2007. The term of the loan was for three years and due on October 19, 2010. The loan carried interest at 10% per year.
- 11) I was a personal guarantor of the loan.<sup>3</sup> My holding company, IQ Property Inc. pledged just over one-quarter of my shares in Skyway 127, which amounted to 457,500 common shares as collateral.<sup>4</sup>
- 12) The promissory note included a provision for a six-month extension. Under the terms of the note, there was a call option that would allow my brother to call away my shares at the end of the loan. The agreement stated:

The Lender has a Call Option ON DEMAND at any time after the due date or any extension thereof to convert its Promissory Note into the SW127 shares (or its successor company) such settlement shall be offset against the interest and principal of the note.

The Lender may grant a six-month extension of time or other indulgences provided that the interest earned as of the due date is paid in full, and the Lender may grant releases and discharges and otherwise deal with the Undersigned borrower as the Lender may see fit without prejudice to the rights of the Lender;

- 13) As the collateral for the loan were shares of Skyway 127, the loan was acknowledged by Skyway 127.<sup>5</sup> The acknowledgment stated:

WHEREAS Skyway 127 Wind Energy Inc. (the "Corporation") hereby acknowledges the attached Promissory Note between the Parties for \$200,000 Canadian funds, dated October 19<sup>th</sup>, 2007.

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<sup>2</sup> Promissory Note, 19 October 2007, **C-265**.

<sup>3</sup> Promissory Note, 19 October 2007, **C-265**.

<sup>4</sup> Promissory Note, 19 October 2007, **C-265**.

<sup>5</sup> Acknowledgement of Promissory Note, 20 October 2007, **C-266**.

The Corporation acknowledges and consents that the attached Promissory Note between the Parties is secured by a pledge of 437,500 common shares issued to IQ Properties Inc., by way of the Corporation's Certificate #COM-14, including but not limited to any anti-dilution, or other common share transfer rights from any other shareholder or shareholders by way of agreement, consent, or otherwise; and may not be transferred to any other party without the express written consent and Direction to the Corporation by both of the Parties.

- 14) The Province of Ontario delayed the announcement of the FIT Contracts in Ontario's Bruce region where the Skyway 127 Project was located. In 2010, I was not in a financial position to repay the loan. This delay put me in a difficult position with my brother John who wanted to be repaid or to have ownership in the Skyway 127 wind project.
- 15) IQ Property Inc. obtained a loan extension as allowed under the promissory note on the due date of October 19, 2010. Repayment of principal and accrued interest was due by April 19, 2011.<sup>6</sup>
- 16) On April 19, 2011, I still could not come up with the funds, and the loan defaulted. IQ Properties surrendered the shares in Skyway 127 shares held as collateral. John used the call option to call away the collateral of 437,500 common shares of Skyway 127 on April 19, 2011.
- 17) We knew how much IQ Properties owed for principal and interest under the loan for the forty-two month period of the loan. The problem was that we were unsure how to value the 437,500 shares of Skyway 127 as these were not publicly traded shares with a public market value.
- 18) I was the personal guarantor of the loan. I wanted to ensure that there would be no risk of my brother John coming back to me for additional demands for payment. I wanted no dispute over whether the shares were worth more or less than the debt. While John was always interested in obtaining an interest in Skyway 127 Energy, I wanted to confirm that the share transfer alone would constitute full satisfaction of all outstanding debt, with no remainder payable personally.
- 19) As a result, I came to an agreement with my brother John about the debt. John would agree that the shares from IQ Properties constituted full repayment of the principal and interest on the loan. I would be released from liability personally. In return, my brother John agreed to hold the Skyway 127 shares in a US holding company that he would designate. Having the shares in a company might ensure that while the value of the shares could be divided, the actual Skyway 127 shares themselves might not form community property under California family law. I did not want a voting bloc in the company where I was president to be tied up unnecessarily. This was a part of the agreement along with the personal release of the guarantee.
- 20) On April 19, 2011, I assumed that John would designate our brother Jim's existing holding company, Tennant Travel Services LLC, as the investment holding company because my brother ~~John did not have a holding~~ company like Jim or I had. At the time, John said that he thought he

<sup>6</sup> Demand Notice on Promissory Note, 19 October 2011, **C-267**.

would use our brother Jim Tennant's existing California LLC holding company, but he had not made up his mind.

- 21) One week later, on April 26, 2011, my brother John informed me of his decision to designate Tennant Travel Services, LLC ("Tennant Travel") to be the holding company. I relied upon my brother John's designation and his assurance that I would have no further personal liability under the April 2007 promissory note for the IQ Property loan. The transfer of shares into Tennant Travel constituted the satisfaction of the debts and any personal guarantee under the promissory note.
- 22) John Pennie was the overall wind developer and the Corporate Secretary of Skyway 127. I informed John Pennie about the terms of the agreement with my brother John.
- 23) John Pennie had earlier acknowledged the promissory note on behalf of Skyway 127, and he wanted to confirm the new arrangements directly.
- 24) John Pennie, my brother John and me got on a phone to confirm the arrangement on April 26, 2011. My brother John said that he was holding the shares in trust for Tennant Travel Services LLC. He explained the decision to use Jim Tennant's existing company, Tennant Travel to hold the Skyway 127 investment. Skyway 127 and I operated on the basis that my brother John Tennant was acting as a fiduciary in the role of trustee for the Tennant Travel Trust of these Skyway 127 shares.
- 25) I spoke with John Pennie and my brother John after the designation of Tennant Travel Services for the share transfer on April 26, 2011. John Pennie and his wife Marilyn Field would pool their votes in Skyway 127 together with my brother John's Trust voting power in Skyway 127.
- 26) I was aware of this arrangement as president of Skyway 127.
- 27) The spring of 2011 was a busy time for Skyway 127. I was very actively involved in the Skyway 127 Energy project that was submitted under the Ontario FIT Program. Skyway 127 was highly ranked in the FIT Contract Priority Queue.<sup>7</sup>
- 28) I told my brother John that on July 4, 2011 that Skyway 127 was put on the FIT Priority waitlist. We did not get a FIT Contract as expected, but since Skyway 127 was on the FIT Priority waitlist queue, I was patient because all available transmission was supposed to be awarded FIT Contracts and it seemed clear that there was more capacity in the Bruce transmission region available.

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<sup>7</sup> Bruce Transmission Project Rankings, 21 December 2010, **C-104**.

## **Control of Skyway 127**

- 29) General Electric Energy ("GE") had an investment in Skyway 127. As President of Skyway 127, I was pleased to have GE as an investor and a partner in the Skyway 127 wind project. GE was a silent investor. GE never voted its shares. From all appearances, GE was most interested in selling wind turbines and servicing the wind farm once operational. GE is a US company with a proven track record. It was an excellent partner because it did not involve itself in corporate operations, it had superb wind energy technology and a solid balance sheet.
- 30) I made sure that my brother John was aware that the 437,500 shares in the Tennant Travel Trust were a significant voting bloc in Skyway 127 because GE did not vote its shares.
- 31) Initially, GE only had 15% of Skyway 127, but that interest increased after December 30, 2011. At that time, GE had approximately half of the shares in Skyway 127. Because GE did not vote its shares, the remaining shareholders had a lot more control.
- 32) As President of the company, I needed to know which shareholders could overturn my decisions at a shareholders' meeting.
- 33) On December 30, 2011, one of the large investors, Premier Renewable, exited the Skyway 127 project. As of that date, the voting block led by my brother John established effective control over the Skyway 127 project through Tennant Travel Trust controlling a voting bloc.
- 34) My brother John received additional shares for the Tennant Travel Trust in Skyway 127 upon Premier Renewable's retirement on December 31, 2011. At no time did my brother John tell us that he was taking the shares personally. He always kept the shares as a trustee for the Tennant Travel Services Trust.
- 35) Because we all believed that my brother John was acting in a fiduciary capacity as trustee, John Pennie and Marilyn Field agreed that my brother John would get the last word on corporate decisions under the voting bloc.
- 36) We followed this control arrangement on the Skyway 127 shared from December 30, 2011, until the Skyway 127 shares were formally transferred to Tennant Travel Services LLC on January 15, 2015. At that time, Tennant Travel Services (subsequently known as Tennant Energy, LLC) formally had control of the Skyway 127 Wind power project but it previously had indirect control.
- 37) The Ontario Government canceled the FIT Program on June 12, 2013. At the time of the FIT Program's cancellation, Skyway 127 had not received a FIT Contract. This was the time. However, in June 2013, Skyway 127 was not aware of the following issues that are at the heart of the NAFTA Claim:

- a) We could not be aware of the "Breakfast Club" conspiracy of government officials.
- b) That International Power Canada received special protective treatment from the most senior Ontario government officials to ensure that it obtained FIT Program Contracts while Skyway 127 was not treated as fairly.
- c) We did not know that the most senior official in the Ontario government had private meetings with a FIT Proponent who then under a rule change obtained FIT Contracts ahead of us.
- d) We did not know that Ontario Ministry of Energy officials decided to ignore FIT program terms in awarding electricity transmission access and contracts.
- e) We were totally unaware that the Government decided to change its announced policy of awarding all available transmission capacity to FIT Contracts and actually decided not to award available power transmission to successful FIT Program applicants

None of this information discussed above about the FIT Program's actual misadministration was available to FIT proponents like Skyway 127 or disclosed to the public. The Government did not make public the situation about special treatment and special deals to International Power Canada and other friends of the Government. In light of the Government's decision not to make this information public, this information could not have been known by Skyway 127, and it was not known by Skyway 127 until the late summer of 2015.

### **Decisions after the cancellation of the FIT Program**

- 38) The active Skyway 127 shareholders (John Tennant, Marilyn Field, John Pennie) had a meeting with me after the FIT Program was canceled. My brother John wanted to keep the Skyway 127 project alive to find some potential value for the investment. No one argued with my brother John's view. The active shareholders maintained the voting agreement, and we followed my brother John's lead to keep the company alive so we could look for future opportunities.
- 39) General Electric later effectively ceased participation in the Skyway 127 project a year and a half later. My brother John supported Tennant Energy in obtaining the GE position when GE exited the Skyway 127 project.
- 40) Skyway 127 decided to go along with this share transfer. Skyway 127 had another active shareholder meeting of my brother John, John Pennie, and Marilyn Field. I was present. They supported acquiring the GE interest.
- 41) However, GE was going through a massive organization wide reorganization. This resulted in a delay in GE transferring shares until 2017. After GE left the project, Skyway 127 did not have another meeting until after we learned about the possibility of there being government measures contradicting the NAFTA in late 2015. Those discussions were the ones that related to actions

affecting the Skyway 127 investment owned and controlled by Tennant Energy, LLC that are the subject matter of this arbitration.

- 42) On January 15, 2015, Tennant Travel received additional shares in Skyway 127 to bring the Tennant Travel ownership stake to 42.5%.<sup>8</sup> These additional shares had no practical impact on control because the Tennant Travel's indirect shareholdings already controlled Skyway's day-to-day activities, as it had since 2011. The formal share transfer was registered on January 15, 2015.
- 43) Based on his statements and actions, I believed that my brother John Tennant acted as trustee over the Skyway 127 shares for Tennant Travel and acted as a fiduciary for the trust. He behaved consistently in a manner supporting this believe that the shares belonged to Tennant Travel.
- 44) When the shares were finally transferred to Tennant Travel, my brother John agreed to transfer any personal intangible rights that the trust had, or might ever have had, to Tennant Travel. Tennant Travel Services LLC was the successor in interest to the rights that my brother John Tennant held personally as trustee in Skyway 127.
- 45) My brother John Tennant confirmed the transfer of intangible rights to the ownership interest in Skyway 127 to John Pennie and me as we were officers of Skyway 127. John Pennie was also the operating officer of Tennant Energy. My brother John sent a written instrument to the Tennant Energy Management Board on February 8, 2016. That document was copied to me. The February 8, 2016 memorandum referred to:
  - a) That Tennant Travel (and Tennant Energy LLC) were the irrevocable successors in interest to any rights or benefits that my brother John Tennant received while acting as trustee over the Skyway 127 shares:<sup>9</sup>
  - b) That Tennant Energy LLC (and its predecessor Tennant Travel) was the successor in interest to any personal rights or benefits that I received while acting as trustee over the Skyway 127 shares:<sup>10</sup>
  - c) the existence of a trust holding the Skyway 127 shares;<sup>11</sup>

#### SKYWAY 127 AND OUR KNOWLEDGE ABOUT THE NAFTA BREACH

- 46) Jim Tennant, John Tennant and I are members of Tennant Energy's Board of Management. As a member of Tennant Energy's Board of Management, we make the decisions for the company.

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<sup>8</sup> Skyway 127 Energy Inc Shareholder's Ledger, 15 January 2015, **C-115**.

<sup>9</sup> John Tennant memo to Tennant Energy, **C-268** .

<sup>10</sup> John Tennant memo to Tennant Energy, **C-268** .

<sup>11</sup> John Tennant memo to Tennant Energy **C-268** .

- 47) I assumed that Ontario would follow due process and would follow the FIT Rules fairly. I assumed that Skyway 127 was not awarded a FIT contract through the fair and proper operation of the FIT Program Rules. I never attended any NAFTA hearings, including those for Mesa Power or Windstream. When those cases were underway, I was not aware that I would have any reason to go to those hearings.
- 48) Before the summer of 2015, I did not know that Ontario had applied the FIT Rules unfairly and in a contrived manner that resulted in the loss of my investment in Tennant Energy and Skyway 127. We discovered information in the documents describing the admissions from government officials at the *Mesa Power* Hearing. That information was not public before 2015. We would have no other way of knowing about the Government's treatment, especially given that the Government took steps to keep the information secret and hidden from the public. This included actively not disclosing information to the public and the active criminal destruction of Ontario Energy Policy emails and documents by government officials
- 49) I did not know about how Ontario unfairly affected our company before the middle of June 2015. John Pennie and I had a meeting with Barry Appleton in his office in 2015. We also joined my brother John Tennant by phone from this meeting.
- 50) I was astonished when I later was told by John Pennie that he had found information on the Internet coming from materials circulated after the *Mesa Power* NAFTA hearing about how Ontario treated our competitors in the FIT Program better than we had been treated because of political connections that were not related to the public terms of the FIT Program.
- 51) To be clear, I did not know about:
- a) the Breakfast Club conspiracy of government officials as was discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.
  - b) That International Power Canada was obtaining special preferential and unfair treatment in the FIT Program, as was discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.
  - c) Special meetings between senior Ontario government officials and senior wind power corporate officials as was discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.
  - d) The Ontario Ministry of Energy decided not to follow the Ontario FIT Program's terms, as discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.
  - e) The decision to not allocate all the available power transmission to successful FIT Program applicants as was discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.



- 52) Since filing our NAFTA Claim, I continued to speak with my brother John Tennant and John Pennie about additional discoveries of unfair treatment, which came from information arising from the NAFTA hearing that was not made available to the public at that time.
- 53) As a member of the Tennant Energy Committee of Management, I was astonished to learn more from John Pennie after he watched the full NAFTA hearing videos in 2020.
- 54) I have been surprised to learn of the unfair treatment that Skyway 127 received in Ontario. We were not treated fairly, and this has deprived me of the benefit of my investment in Tennant Energy and its ultimate investment in the Skyway 127 wind project. This just was not fair.
- 55) I have suffered a tremendous amount of stress from Canada's actions, which took away our legitimate opportunities to reward the local Ontario government's political friends.
- 56) In my opinion, Skyway 127 fairly and honestly was entitled to a long term Ontario FIT renewable energy contract. This contract was taken away from us all due to political expediency. I could not believe a government in a developed, and democratic country such as Canada would engage in such unfair and improper behavior.
- 57) I make this witness statement in support of this NAFTA arbitration and for no other or improper purpose.

Signed in Barrie, Ontario, this 12<sup>th</sup> day of February 2021.



Derek Tennant