

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

JAN 24 2023

Between:



**TAKU RIVER TLINGIT FIRST NATION,
ATLIN TLINGIT ECONOMIC LIMITED PARTNERSHIP,
ATLIN TLINGIT ECONOMIC GP LTD.,
XEITL LIMITED PARTNERSHIP and
ATLIN POWER LIMITED**

S 230552

No.
Vancouver Registry

In the Supreme Court of British Columbia

And:

PETER KIRBY

Plaintiffs

Defendant

NOTICE OF CIVIL CLAIM

This action has been started by the Plaintiffs for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- a. file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- b. serve a copy of the filed response to civil claim on the Plaintiffs.

If you intend to make a counterclaim, you or your lawyer must

- a. file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- b. serve a copy of the filed response to civil claim and counterclaim on the Plaintiffs and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the Plaintiffs,

- a. if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- b. if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- c. if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- d. if the time for response to civil claim has been set by order of the court, within that time.

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Claim of the Plaintiffs

PART 1: STATEMENT OF FACTS

Overview

1. The plaintiffs bring this action against their former director, president and chief executive officer for his unlawful misappropriation of \$540,249.26.

The Plaintiffs

2. The plaintiff Taku River Tlingit First Nation (the “**Nation**”), is a First Nation with traditional territories in northern British Columbia, the Yukon Territories and Alaska. The Nation’s operations are headquartered in Atlin, British Columbia.
3. The Nation operates and conducts business through a group of partnership and corporations, in which it is either a legal or beneficial shareholder or partner, as the case may be, including without limitation:
 - a. **Atlin Tlingit Economic Limited Partnership (“Atlin LP”)**, a limited partnership registered under the laws of British Columbia under registration number LP0579842. The registered office of Atlin LP is 1 Como Lake Reserve, Atlin, British Columbia VOW 1A0.
 - b. **Atlin Tlingit Economic GP Ltd. (“Atlin Ltd.”)**, a corporation registered under the laws of British Columbia under incorporation number BC0936297, with a registered and records office at 2600-1066 West Hastings Street, Vancouver, BC V6E 3X1. Atlin Ltd. is Atlin LP’s general partner.
 - c. **Xeiti Limited Partnership (“Xeiti LP”)**, a limited partnership registered under the laws of British Columbia under registration number LP0456257.
 - d. **Atlin Power Limited**, a corporation registered under the laws of British Columbia under incorporation number BC0794370, with a registered and records office at 2600-1066 West Hastings Street, Vancouver, BC V6E 3X1. Atlin Power Limited is Xeiti’s general partner.

(collectively, the “**Entities**”)
4. The Nation and the Entities conduct operations from Atlin, British Columbia and the surrounding areas.

5. During the relevant time period, the corporate Entities were governed by the same board of directors (the “**Board**”), of which the defendant, Peter Kirby, was a member.

The Defendant

6. The defendant, Peter Kirby (“**Mr. Kirby**”), is an individual citizen of the Nation and resident of Atlin, British Columbia.
7. During the material time period of this claim, Mr. Kirby exercised executive control over the Entities and was a director, president and chief executive officer of Atlin Ltd. and Atlin Power Limited, among other corporations in the group of entities through which the Nation operates and conducts business.
8. At all material times, Mr. Kirby had signing authority over the financial accounts of the Entities.
9. Mr. Kirby owed a fiduciary duty to the plaintiffs, which included, without limitation, the duty to:
 - a. refrain from exercising his powers for an improper, personal or collateral purpose;
 - b. refrain from placing Mr. Kirby’s personal interests above the interests of the plaintiffs;
 - c. refrain from obtaining secret profit from the plaintiffs;
 - d. act honestly, in good faith and in the best interests of the plaintiffs; and
 - e. avoid non-approved conflicts of interest.
10. Mr. Kirby moreover owed a duty of care to the plaintiffs to:
 - a. exercise the standard of care required of a director and officer;
 - b. refrain from concealing information from the Entities and the Nation;
 - c. provide prompt and forthright responses to information requests;
 - d. refrain from abandoning his positions as director, president and chief executive officer;
 - e. provide proper notice of any resignation from those positions; and
 - f. ensure Mr. Kirby acted in accordance with the articles and constating documents of the Entities and statutory requirements bearing on their governance.

Peter Kirby Misappropriated Funds

11. In August 2022, Mr. Kirby breached his fiduciary duty by misappropriating the following funds from the plaintiffs on the dates below:

| <u>Date of Misappropriation</u> | <u>Amount of Funds Misappropriated</u> |
|---------------------------------|--|
| July 16, 2022 | \$1,265.43 |
| August 22, 2022: | \$5,064.54 |
| August 26, 2022 | \$516, 419.19 |
| August 29, 2022 | \$17,500 |
| Total | \$540,249.26 |

(collectively, the “**Misappropriated Funds**”)

12. Particulars of Mr. Kirby’s misappropriation include the following:

- a. On August 22, 2022, Mr. Kirby secretly caused **\$500,000** to be transferred out of Xeitl LP’s bank account and into the bank account of Atlin LP (the “**August 22, 2022 Transfer**”).
- b. The August 22, 2022 Transfer was outside the ordinary course of business, and there was no legitimate reason for it. Rather, it was made for the improper purpose of facilitating Mr. Kirby’s misappropriation of funds from the plaintiffs.
- c. On August 26, 2022, Mr. Kirby signed a cheque to himself from the bank account of Atlin LP in the amount of **\$516,419.19**.
- d. On August 29, 2022, Mr. Kirby deposited the cheque for the **\$516, 419.19** into his personal bank account.
- e. In the months of July 2022 and August 2022, Mr. Kirby moreover caused the following funds to unlawfully be transferred out of Atlin LP to himself:
 - i. **\$1,265.43** on July 16, 2022;
 - ii. **\$5,064.54** on August 22, 2022; and
 - iii. **\$17,500** on August 29, 2022.

13. Mr. Kirby did not disclose to the Board or the Nation his payments of the Misappropriated Funds to himself, and those payments were not approved by the Board or the Nation.

Mr. Kirby Refused to Produce Corporate and Financial Records

14. Prior to the misappropriations above, in or around May 2022, the Nation began conducting a review and investigation of the operations of its Entities.
15. Between May 2022 and August 2022, the Nation made several requests (the “**Production Requests**”) to Mr. Kirby for the production of corporate and financial records related to the Entities and their operations (the “**Records**”).
16. At all material times, the Records were within Mr. Kirby’s possession or control.
17. Mr. Kirby refused to comply with the Production Requests and did not provide any of the Records.
18. On or around August 9, 2022, the Nation issued a Clan Directive in which it directed Mr. Kirby, and others, to produce the Records (the “**Clan Directive**”).
19. Mr. Kirby refused to comply with the Clan Directive and did not provide any of the Records.
20. Mr. Kirby breached his duty of care to the plaintiffs, including, without limitation, by concealing information from the Entities and the Nation; and failing to provide prompt and forthright responses to the Production Requests and Clan Directive.

Mr. Kirby Abandoned his Employment

21. After transferring to himself the Misappropriated Funds, on August 29, 2022, Mr. Kirby purportedly resigned from his position as chief executive officer of the Entities.
22. The next day, on August 30, 2022, Mr. Kirby purportedly resigned as director and president of the Entities.
23. Mr. Kirby provided no notice of his resignations.
24. Mr. Kirby’s abandonment of his positions as director, president and chief executive officer constituted a breach of his duty of care to the plaintiffs.

PART 2: RELIEF SOUGHT

The plaintiffs seek the following:

1. Judgment against the defendant in the amount of **\$540,249.26** for the following Misappropriated Funds:

| <u>Date of Misappropriation</u> | <u>Amount of Funds Misappropriated</u> |
|--|---|
| July 16, 2022 | \$1,265.43 |
| August 22, 2022: | \$5,064.54 |
| August 26, 2022 | \$516, 419.19 |
| August 29, 2022 | \$17,500 |
| Total | \$540,249.26 |

2. An order that the defendant pay the plaintiff interest pursuant to the *Court Order Interest Act*, R.S.B.C., 1996, c.79;
3. Further, or in the alternative, general and special damages against the defendant for:
 - a. breach of fiduciary duty;
 - b. conversion;
 - c. fraud;
 - d. negligence; and
 - e. unjust enrichment.
4. Costs against the defendant; and
5. Such further and other relief as this Honourable Court may deem just.

PART 3: LEGAL BASIS

1. Mr. Kirby breached his fiduciary duties owed to the plaintiffs.
2. Mr. Kirby unlawfully converted the funds of the plaintiffs for his personal benefit.
3. Mr. Kirby's conduct was deceitful and amounts to fraud.
4. Mr. Kirby caused damage to the plaintiffs by breaching his duty of care.

5. Mr. Kirby was enriched at the corresponding deprivation of the plaintiffs without juristic reason.


Plaintiffs' address for service: **MLT Aikins LLP**
 2600 - 1066 West Hastings Street
 Vancouver, BC V6E 3X1
Attention: K. Colleen Verville & Brendan Brock

Fax number address for service (if any): n/a
E-mail address for service (if any): n/a

Place of trial: Vancouver, BC

The address of the registry is: 800 Smithe Street, Vancouver, BC V6Z 2E1

Date: January 23, 2023



 Lawyer for the plaintiff
K. Colleen Verville / Brendan Brock
 MLT Aikins LLP
 2600-1066 West Hastings Street
 Vancouver, BC V6E 3X1

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
- (a) prepare a list of documents in Form 22 that lists
- (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
- (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.

Appendix**PART 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

A claim for the recovery of misappropriated funds by a director, president and chief executive officer.

PART 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

PART 3: THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

PART 4:

Court Order Interest Act, R.S.B.C. 1996, c. 79