

Court File No. 07-CU 335404 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ROBERT G. SMITH, ERNEST HEINEMANN and JOHN NOTHER

Plaintiffs

- and -

**LABATT BREWING COMPANY LIMITED and
COMPANHIA de BEBIDAS das AMERICAS (also known as AmBev)**

Defendants

Proceeding under the Class Proceedings Act, 1992

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date June 27, 2007

Issued by



Local registrar

Y. Grant
Registrar

Address of 10th Floor
court office 393 University Avenue
Toronto, ON M5G 1E6

TO: **Labatt Brewing Company Limited**
207 Queen's Quay West
Suite 299
Toronto, ON M5J 1A7

CLAIM

1. The plaintiffs claim:

(a) an order certifying this action as a class proceeding under the *Class Proceedings Act 1992*, S.O. 1992, c.6, on behalf of the following class of persons:

(i) All former salaried, non-unionized, employees of Labatt Brewing Company Limited (“LBCL”), its predecessor, John Labatt Limited, and their wholly owned subsidiaries (collectively “Labatt”) residing in Canada and retired as of March 1, 2007, who were in receipt of the Retiree Benefit Plan (as defined below) as of March 1, 2007, and their eligible dependents; and

(ii) All salaried, non-unionized, employees of LBCL who were receiving either salary continuance or vacation payments (collectively “salary continuance”) as of March 1, 2007 as a result of the termination of their active employment, or who had announced their intention to retire as of March 1, 2007, and will have reached or will reach age 55 and have or will have at least 10 years of continuous service with Labatt as of their date of retirement, and their eligible dependents

(collectively defined as the “Class”).

(b) an order appointing the plaintiffs as representative plaintiffs on behalf of the Class;

(c) An order that each member of the Class is entitled to receive those post-retirement health benefit coverages (the “health protection”) from the defendants under the plan in effect immediately prior to March 1, 2007 (the “Retiree Benefit Plan”, as further particularized below), and is entitled to continue to receive such health protection without limitation, reduction or termination until the death of the member, or, if at death the member has any

eligible dependents, until the death of all such eligible dependants, whichever is later;

- (d) a declaration that the defendants cannot unilaterally limit, reduce or terminate the level of health protection provided under the Retiree Benefit Plan in effect immediately prior to March 1, 2007;
- (e) an order requiring the defendants to reinstate the health protection under the Retiree Benefit Plan in effect immediately prior to March 1, 2007, and enjoining the defendants from making any adverse amendments to the health protection under the Retiree Benefit Plan in the future;
- (f) an interim interlocutory mandatory order requiring the defendants to reinstate the health protection under the Retiree Benefit Plan until the date of trial of this action or other final order of this Honourable Court.
- (g) an order requiring the defendants to refund to the plaintiffs and to members of the Class any costs they have incurred as a direct result of the defendants' unilateral amendments to the health protection under the Retiree Benefit Plan to the date of judgment;
- (h) in the alternative to (e), damages for breach of contract, inducing breach of contract, interference with economic relations, unjust enrichment, and conspiracy in the amount of the actuarial present value of the cost of providing the benefits.
- (i) punitive damages in the amount of \$50,000.00 payable to each Class member;
- (j) costs of this action, including Goods and Services tax, on a substantial indemnity scale; and
- (k) such further and other relief as this Honourable Court may deem just.

A. The Parties

2. The plaintiff Robert Gavin Smith (“Smith”) was born on October 29, 1949 and resides in the City of London, Ontario. Smith worked for the defendant Labatt from April 1980 until his retirement effective January 1, 2007. Smith’s last title with Labatt was Director of IT/IS Architecture. Smith retired after approximately 27 years of service to Labatt.

3. The plaintiff Ernest Heinemann (“Heinemann”) was born on February 23, 1951 and resides in North York, Ontario. Heinemann commenced employment with Labatt on December 1, 1973. In June, 2006 Heinemann was terminated from his employment as the Director of Finance for Labatt Breweries of Canada due to downsizing. Heinemann has been in receipt of salary continuance payments from June 2006 and will continue to receive them until June 2008, at which time he intends to formally retire and begin to receive a pension. Heinemann will retire after over 34 years of service to Labatt.

4. The plaintiff John Nother (“Nother”) was born on July 23, 1939 and resides in Brampton, Ontario. Nother worked for Labatt from January 1, 1970 until his termination in 1992, at which time he received salary continuance payments until his retirement at age 55 in July 1994. Nother’s last title with Labatt was Packaging Superintendent for the Kitchener/Waterloo brewery. Nother retired after over 24 years of service to Labatt.

5. The defendant Labatt Brewing Company Limited (“LBCL”) is a federal corporation under the *Canada Business Corporations Act* with share capital and its head office in the City of Toronto. LBCL carries on business as a brewer of beers, and has operations in four Canadian regions: Western Canada, Ontario, Québec and the Atlantic. LBCL and its predecessor, Labatt were the former employers of the plaintiffs.

6. The defendant, Companhia de Bebidas das Americas (“AmBev”), is a public company headquartered in Sao Paulo, Brazil, and carries on business as a brewer of beers and producer of other consumer goods. LBCL is a wholly owned subsidiary of AmBev.

B. Benefits Provided

7. LBCL provided its non unionized, salaried employees with a “Total Rewards Statement” which included all aspects of their compensation.

8. Prior to March 1, 2007, as part of its Total Rewards Statement and prior compensation communication packages, Labatt provided its non-unionized, salaried employees with a comprehensive health benefit and insurance program, which was set out in written communications including booklets distributed to employees, presentations made to employees, as well as other communications to personnel.

9. The health benefit and insurance program for non-unionized salaried employees was improved from time to time, and booklets and other written communications were amended to reflect these improvements. Prior to March 1, 2007, there had been no reductions in the complement of health and insurance benefits provided to non-unionized salaried employees, and it was an implied term of their contracts of employment that no such reductions would be imposed.

10. The health benefit and insurance program for salaried employees continued into retirement for those who were then at least age 55 and had completed at least ten years of continuous service. The features of the salaried employee health benefit and insurance program (the “Retiree Benefit Plan”) in effect up to March 1, 2007 included:

- (a) Health Retiree Drugs – 100% coverage with an annual deductible of \$25 per person or \$50 per family, and no lifetime or annual maximum;
- (b) Health Retiree Other Medical (e.g. vision care, hearing aids, private duty nursing, equipment rentals, prosthetics, ambulance) – 100% coverage with no lifetime or annual maximum; vision care of \$100 per 2 years per person; hearing aids \$300 per person lifetime;
- (c) Health – Retiree Emergency Out-of-Country – 100% coverage with a lifetime maximum of \$1,000,000 per person;

- (d) Health – Retiree Paramedical Practitioners (e.g. chiropractor, psychologist, physiotherapist, massage therapist etc.) – 100% coverage with no lifetime or annual maximum and 10 practitioners covered;
- (e) Retiree – Dental – No annual deductible, 100% payment of basic dental services, 60% payment of restorative and orthodontic services; with an annual maximum of \$10,000 per year per person for combined services, less any benefits paid in the two immediately preceding calendar years; and
- (f) Retiree Life Insurance Premiums – Life insurance: for age 55-59 in the amount of 1.5 times retiree’s salary to a maximum of \$30,000 and \$60,000 for Executives; for age 60-64 in an amount 1 times salary to a maximum of \$20,000 and \$40,000 for Executives; for age 65+ in an amount .5 times salary to a maximum of \$10,000 and \$20,000 for Executives.

11. The terms of the Retiree Benefit Plan were discussed during recruitment interviews, provided to and reviewed with new salaried employees upon the commencement of their employment with Labatt, and thereafter regularly communicated and broadly disseminated to salaried employees and retirees prior to their retirement, including in Employee Handbooks, Total Rewards Statement, annual Personal Benefits Statements, and information sheets provided to soon-to-be retirees. The communications promised the plaintiffs and Class members that the Retiree Benefit Plan was part of their retirement package and “...will continue for you and your eligible dependents, as long as you reside in Canada”.

12. In a letter to retirees dated December, 1987, Labatt advised that health protection would be provided indefinitely:

We are pleased to advise you that the Group Benefits for Hospital, Medical and Dental plans will be maintained for pensioners and survivors of pensioners for as long as they are required. (Historically, the Labatt program provided Group Insurance Benefits for pensioners and their survivors for a period of six months after the death of the pensioner.).

13. In a letter to Labatt salaried retirees dated September 8, 2004, Labatt advised “As a Labatt pensioner, you will continue to receive your regular monthly Labatt pension cheque and your benefits will not change.”

14. The Labatt Employee Handbook does not contain any terms allowing Labatt to reduce, limit or eliminate a retiree's health protection benefits during his or her retirement.

15. In a document sent to retirees entitled "Group Insurance Coverage – Retired Salaried Employees", reference is made to the "master insurance contracts":

"As a retired salaried employee of Labatt Breweries of British Columbia, and residing in Canada you are entitled to a wide variety of group insurance benefits. The following summary briefly outlines these benefits, but it should be understood that the master insurance contracts are the governing documents."

16. The plaintiffs and Class members were not provided with copies of the "master insurance contracts", or access to these documents.

17. Upon retirement, the plaintiffs and Class members were provided with a memo addressed to "Retired Salaried Employees" which set out the health protection to which they are entitled upon retirement under the Retiree Benefit Plan. Nowhere in this document prior to December 4, 2006 did Labatt reserve the right to limit, reduce or eliminate health protection under the Retiree Benefit Plan.

C. Changes to Retiree Benefit Plan

18. By letter dated December 4, 2006 from Labatt addressed to its retirees, Labatt announced that it would be implementing a new benefits program for retirees and employees effective March 1, 2007. Whereas Labatt imposed a new \$1,000,000 lifetime limitation for its active employees for health protection, in this letter it imposed a new \$50,000 lifetime limitation for health protection for its retirees and those employees who retire prior to January 1, 2009. In the letter, Labatt states:

"Our top priority is to provide benefits that give fair and optimal coverage for everyone, while at the same time managing our costs for the future."

19. In fact, the new lifetime health protection limit for Labatt retirees is 95% smaller and therefore 95% less "fair" than the new lifetime health protection limit provided for Labatt's active employees.

20. The letter detailed the following changes to the Retiree Benefit Plan:

- (a) Health – Retiree Drugs: a lifetime maximum is imposed of \$50,000 per person for all Health costs combined, then \$1,000 annual maximum if lifetime maximum is exceeded; generic substitute required where one exists;
- (b) Health – Retiree Other: a lifetime maximum is imposed of \$50,000 per person for all Health costs combined, then \$1,000 annual maximum if lifetime maximum is exceeded; a lifetime maximum is imposed on private duty nursing care of \$25,000;
- (c) Health – Retiree Emergency Out of Country: a lifetime maximum is imposed of \$50,000 per person for all Health costs combined, then \$1,000 annual maximum if lifetime maximum is exceeded;
- (d) Health – Retiree Paramedical Practitioners: a lifetime maximum is imposed of \$50,000 per person for all Health costs combined, then \$1,000 annual maximum if lifetime maximum is exceeded; maximum of \$1,500 per year per person per practitioner;
- (e) Retiree – Dental: Cost caps on basic, periodontic and endodontic care of up to \$2,500 per person per year; cap on major restorative of up to \$2,500 per person per year; lifetime maximum imposed of \$5,000 per person for orthodontic care.

21. The major changes to the Retiree Benefit Plan were to:

- (a) impose a cumulative lifetime cap of \$50,000 per person on health protection benefits that previously were neither individually nor collectively subject to any lifetime maximum;
- (b) in the case of out of country emergency coverage, to reduce the maximum lifetime coverage from \$1 million to \$50,000; and
- (c) in the case of dental coverage, to reduce the annual maximum coverage from \$10,000 to \$2,500 per person per year as well as imposing a lifetime limit of \$5,000 per person for any orthodontic care.

22. All of the changes described in the December 2006 letter were implemented March 1, 2007.

23. Enclosed with the letter was a brochure outlining a revised Retiree Benefit Plan, entitled "Retirement Benefits Effective March 1, 2007 for currently retired and active salaried employees looking to retire prior to January 1, 2009", which states "This document replaces any retirement benefit plan information prior to March 1, 2007". It further states: "Labatt reserves the right to make changes to this plan at any time." No such reservation wording appears in any prior communications to the plaintiffs and other Class members.

D. Breach of Contract

24. The plaintiffs plead that the health protection under the Retiree Benefit Plan became a fundamental term of their employment and retirement, having been communicated to them through various communications and accepted by them during the course of their active employment and upon retirement from employment and acceptance of salary continuance from Labatt. The health protection under the Retiree Benefit Plan constitutes deferred compensation for the plaintiffs' and Class members' employment service with Labatt. The plaintiffs, through their services provided to the defendants, gave good and valuable consideration for the health protection under the Retiree Benefit Plan.

25. Prior to December 4, 2006 Labatt never advised the plaintiffs and Class members in advance of their retirement that any aspect of the health protection under the Retiree Benefit Plan would or could be limited, reduced or terminated. Prior to December 4, 2006 Labatt never drew to the attention of the plaintiffs and Class members any terms or conditions that suggested that the health protection under the Retiree Benefit Plan could be adversely altered or discontinued.

26. The health protection under the Retiree Benefit Plan vested in the plaintiffs and Class at the latest upon each member's retirement or termination of employment from Labatt. The plaintiffs and Class members provided their service during their active employment as consideration for Labatt's promise of the health protection under the Retiree Benefit Plan. It was a term of the Class members' contracts of employment that their entitlement to receive

the health protection under the Retiree Benefit Plan vested no later than on retirement and could not be reduced or adversely affected thereafter.

27. In the case of Heinemann and Class members in receipt of salary continuance payments as of March 1, 2007 and qualifying for retirement at the end of their salary continuance periods, and those who announced an intention to retire prior to March 1, 2007, the health protection under the Retiree Benefit Plan likewise vested in such persons upon such announcement or cessation of their active employment.

28. Contrary to their contractual obligations, on March 1, 2007 Labatt unilaterally reduced the health protection benefits under the Retiree Benefit Plan. This unilateral change constituted a breach of each Class member's employment contract and violates his or her vested retirement rights and health protection benefits and those of their eligible dependents.

E. AmBev's Role

i) Inducing Breach of Contract and Intentional Interference with Economic Relations

29. The plaintiffs plead that AmBev, as the owner of LBCL, was at all material times aware of LBCL's obligation to provide the health protection under the Retiree Benefit Plan to the plaintiffs and Class members, unreduced, in accordance with their contracts of employment. At all times, AmBev controlled and directed all of the actions of LBCL pertaining to the Retiree Benefit Plan.

30. AmBev acquired LBCL in 2004 and arrived at a value based upon the balance sheet of LBCL at the time, including the valuation by actuaries of the contingent accrued liability associated with the Retiree Benefit Plan.

31. Thereafter, AmBev instituted a "zero based budgeting" policy for itself and LBCL. AmBev challenged all of their cost centres to reduce their liabilities and instructed LBCL to breach its contract with the plaintiffs and all Class members with respect to the health protection under the Retiree Benefit Plan.

32. The plaintiffs state that AmBev's conduct amounts to the inducement of a breach of contract and/or the tort of intentional interference with economic relations, as a result of which AmBev is responsible for the damages occasioned.

ii) Unjust Enrichment

33. Further, the plaintiffs state that AmBev benefited from the aforementioned breach of contract by LBCL by way of a balance sheet with a far reduced contingent accrued liability associated with the Retiree Benefit Plan and therefore a more valuable asset (namely LBCL) than it purchased in 2004. Such actions further improved the profitability of AmBev and LBCL.

34. The plaintiffs state that the aforementioned activities and the deprivation of the plaintiffs of their health protection under the Retiree Benefit Plan have resulted in an unjust enrichment of AmBev.

35. The plaintiffs state there is no juristic reason for such enrichment and as such AmBev is responsible for the plaintiffs' and Class members' damages as a matter of law.

iii) Conspiracy

36. The plaintiffs state that the defendants conspired together for an improper purpose, namely the aforementioned breach of contract, inducement to breach the contract, intentional interference with economic relations and/or unjust enrichment of AmBev.

37. The plaintiffs state that, as a result of the aforementioned conspiracy, they and the Class members have sustained damages and will continue to sustain damages for which the defendants are jointly and severally liable.

F. Impact of Benefit Reductions

38. The imposition of annual and lifetime health protection limits to the Retiree Benefit Plan and other measures designed to save costs for AmBev and LBCL will seriously impact the plaintiffs and members of the Class.

39. Smith, for example, suffers from a genetic kidney disorder which pre-existed his retirement, and underwent a kidney transplant operation in February 2006. Smith must take anti-rejection medicines, among other drugs, the cost of which exceeded \$13,500 in 2006. It is not known precisely how much he will spend on drugs in the future. However it is predicted that he will exhaust the \$50,000 health protection lifetime maximum under the revised Retiree Benefit Plan in a few years.

40. In addition, Smith cannot obtain out-of-country insurance because his kidney disease is now a pre-existing condition which insurers will not now insure against. Smith's plans to travel during his early retirement years have now been severely affected.

41. Likewise, all Class members who wish to travel outside of Canada will now have to purchase additional insurance (assuming such coverage is available to them) if they wish to ensure even minimal coverage to partially replace the health protection levels previously provided under the Retiree Benefit Plan prior to March 1, 2007.

42. Nother travels with his dependent spouse to Florida every year for varying periods of time, and is forced to incur the cost of additional out-of-country insurance coverage which he was previously not required to incur. Further, any insurance obtained would exclude any pre-existing health conditions of Nother and his dependent spouse.

43. Similarly, Heinemann will travel with his dependents to Mexico and will be forced to incur the cost of additional out-of-country insurance coverage which he was previously not required to incur, and which will exclude any pre-existing health conditions of Heinemann and his dependents.

G. Damages

44. As a result of defendants' unilateral reduction in the Retiree Benefit Plan, Class members will be required to incur costs for various medicines and services that exceed the maximums imposed. Accordingly, the Class seeks the appropriate permanent and mandatory orders requiring the health protection under the Retiree Benefit Plan be maintained under the terms as in effect prior to March 1, 2007, and other relief outlined in paragraph 1.

45. Further and in the alternative, such health protection costs to Class members constitute damages, the quantum of which shall be calculated prior to trial.

46. The plaintiffs claim punitive damages as a result of the arbitrary, callous and high-handed actions in unilaterally and materially retroactively reducing the health protection under the Retiree Benefit Plan which the plaintiffs and Class member are entitled to receive during their retirement, and for the lives of their eligible dependents, pursuant to the terms of their employment contracts.

47. Further, the actions of the defendants may endanger the health and economic well being of the plaintiffs and class members who may not now be able to afford the cost of medications, out-of-country hospital care, nursing homes, or other supplementary health benefits, and may not now be able to obtain adequate or any replacement insurance for pre-existing health conditions. The defendants have unlawfully and callously put the plaintiffs' and class members' health, health protection, and economic well-being at risk exclusively for the purpose of improving their own profits and financial position.

48. The plaintiffs state that by reason of the foregoing, LBCL and AmBev are jointly and severally liable to the plaintiffs and Class members for the remedies sought herein.

49. The plaintiffs propose that this action be tried in Toronto.

June 27, 2007

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Plaintiffs

**LABATT BREWING COMPANY
LIMITED and COMPANHIA de BEBIDAS
das AMERICAS (also known as AmBev)**
Defendants

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Proceeding commenced at **Toronto**

STATEMENT OF CLAIM

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