

MEDIA RELEASE FROM THE RIGHTS FOR NORTEL DISABLED

Wednesday, December 8, 2010, 7:15 PM

We are once again defeated in our efforts to obtain justice for Nortel management withdrawing close to \$60 million from our Health and Welfare Trust (HWT) and the Ontario courts approving a March 31st settlement and a subsequent HWT settlement that push us into poverty in three weeks time.

How much more abuse can the Nortel Disabled take? The Senate officially killed Bill S-216 tonight. The vote on Bill S-216 in the Senate was 47 Conservative Senators NO, 41 Liberal Senators YES, and 3 Independent Senators YES.

Before today's Senate vote we made the following plea to the Conservative Senators, only to learn this evening just before they left for their Christmas Party, that our plea fell on deaf ears.

"Regardless of what has happened in the court process, before us lies a real opportunity to effect a positive change to our bankruptcy and insolvency laws. If this Honourable Chamber nevertheless chooses to defeat Bill-S216 out of a misplaced sense of deference to a flawed insolvency court process that is in clear need of reform that is one thing; however, there should be no doubt that Parliament does have the ability to provide a real solution to the real and imminent crisis facing Nortel's disabled employees. The real issue is whether the Honourable senators will have the conviction to act in accordance with their conscience rather than engage in party politics and "tow the party line". Will we act to protect the most vulnerable in our society, surely a primary function of Parliament, or to protect financial creditors and other professional players in our bankruptcy system. I know on whose side my vote will go. Do you?"

Bill S-216 would not only have helped the Nortel disabled, but would also have ensured that over 1.1 million Canadians would have safe self-insured long term disability benefits in the workplace. Now up to 23,000 disabled employees in Canada are still exposed to the grave injustice of employers providing bogus disability insurance and the Ontario CCAA court turning a blind eye to breach of trust in Health and Welfare Trusts and relying upon deeply flawed insolvency court procedures.

We studied the December 7th Hansard Transcript below on the reasons given by the Conservative Senators for killing Bill S-216. Senator Stephen Greene was mistaken yesterday when he said Nortel has already filed a Plan of Compromise, by which the remaining funds in the company are divided and paid to creditors, and that this Plan has been approved by the court.

The court has only approved a March 31st Interim Settlement Agreement that is not Nortel's Final Plan of Compromise.

We have sought the advice of legal counsel who have shown us that Canadian jurisprudence, including decisions of the Supreme Court of Canada, establishes that a statute can apply retroactively even if it affects substantive rights and obligations, provided the language of the retroactive clause clearly says what it seeks to achieve.

Professor Côté, the leading scholar on the interpretation of legislation in Canada, states the applicable principles in the following manner:

..a new statute bringing substantive modification is applicable to a pending case if it retroactively modifies the law applicable on the day of the tort, the contract, the crime, etc. A pending case, even under appeal, can therefore be affected by a retroactive statute, and even by one enacted while proceedings are pending in appeal. (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 179)

There is no doubt that Parliamentary supremacy provides the federal government the ability to provide a solution for the Nortel disabled crisis, without relying on a bailout from taxpayers. The Bill S-216 Transition Clause was thoughtfully drafted to clearly prescribe the intent of the new legislation to apply retroactively to the Nortel LTD employees, notwithstanding any judgment or order by any court during a CCAA or BIA proceeding that has commenced and not yet closed.

It is highly unlikely that any litigation would have been commenced as to the retroactive effect of Bill S-216. **We should not allow the threat of unfounded litigation by U.S. bondholders and other creditors to deter our House of Commons and Senate from doing the right thing to amend bankruptcy and insolvency laws, not only for the benefit of Nortel's disabled employees but for individuals that find themselves the victims of similar mishandling of Health and Welfare benefits and trust funds in the future.**

Much has been said about the March 31, 2010 Nortel settlement during the deliberations regarding this Bill S-216. This Senate heard about the strong dissent to the settlement, the fact that our current bankruptcy laws allow a single individual to bind an entire constituency, that the disabled representative was acting under the advice of lawyers who also represent a much larger constituency of pensioners with different interest and that this law firm has recently acknowledged a conflict of interest and recused itself from matters relating to the allocation of the Nortel Health and Welfare Trust. We have also heard about the duress associated with the cutting off of critical medical benefits and the other procedural unfairness associated with the acceptance of the settlement agreement. We provide the evidence on the unfairness of the settlement and the deep flaws in Canada's archaic bankruptcy procedures at the following link:

[March 31st Settlement Agreement Was Procedurally Unfair and Substantively Unjust](#)

For additional information on unsafe long term disability benefits in the workplace and on what Bill S-216 was designed to fix, go to the website www.protectourtomorrow.com, which is developed and maintained by the following Canadian Nortel disabled employees:

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RIGHTS FOR NORTEL DISABLED EMPLOYEES

Debates of the Senate (Hansard)

3rd Session, 40th Parliament,
Volume 147, Issue 74

Tuesday, December 7, 2010

QUESTION PERIOD

Industry

Long-term Disability Benefits—Nortel Employees

Hon. Art Eggleton: Honourable senators, my question is to the Leader of the Government in the Senate.

I want to read portions of a letter received from Ann Hackett. She says:

I am a Nortel Networks disabled employee and I am a highly educated individual. When Nortel hired me in 1988, I was told that they highly valued their employees, and consequently they were offering the best benefit coverage to be found. Never the fact that this benefit program was self-insured by the company was mentioned. Thinking that my family and I were fully insured, I declined on many occasions opportunities to get insurance . . . which is now totally impossible in my condition.

I fully paid my contributions into Nortel's benefit plans; Nortel did not pay its share, not to mention that money from the fund was used for other purposes and that unsecured loans were taken against my future benefits. It is Nortel's responsibility to pay for its part of our contract. I am the mother of a ten year old child, I survived from a severe cancer which let me disabled. I fought extremely hard for my life, and now the perspective of losing my long term disability benefits by December 2010 causes me and my family a tremendous amount of stress and instability.

. . . failure to pass Bill S-216, Canadian taxpayers will eventually have to support the burden of Nortel despicable actions the day disable employees become left with no other alternative but to seek shelter from the state. The UK and other western nations have enacted laws to protect their citizens in a situation such as mine.

Employees were Nortel's most valuable asset; we worked hard and had confidence in our company. Most of my RRSP has been wiped out in the Nortel bankruptcy. We now find ourselves in line with bond sharks and speculators to recover money to pay for our own basic needs, and not to reap millions in profit or bonus. There are no other words to describe this injustice.

Nobody wants to be sick or disabled. Constant worry about what will happen when the disability/medical payments stop on Dec 31st, 2010 is a nightmare. Time is quickly running out for us . . .

. . .

In this coming Christmas time, I hope that, in your heart, you will find the strength to make the right decision for the sake of all 400 Nortel disabled employees. On Christmas day, when your loved ones will look in your eyes in happiness, only you will remember and imagine what shines from our eyes and the ones we love on the same day, but also for the rest of our life.

We thus turn our lives in your hands and ask you to save us from this injustice that struck our families in time of illness.

I ask the minister this question: Since the government has made the decision that it does not support Bill S-216, what will the government do to help these Nortel employees before the end of the year? Will the leader do the right thing in the spirit of this time of year? Christmas is a time of miracles. These people need a miracle. What will the government do?

Hon. Marjory LeBreton (Leader of the Government): Honourable senators, the letter that the honourable senator read into the record is sad and troubling. All our hearts go out to people from Nortel who are caught in this bad situation.

As a matter of record, I encountered a close friend of mine on Saturday who, of course, is also a Nortel employee. I think, though — and it pains me to say this — the reality is, and the honourable senator knows this, and even people that I have talked to know this, that Senator Eggleton's bill would have done absolutely nothing to help the unfortunate victims of the Nortel bankruptcy. That is a statement of fact.

Senator Moore: How so? That is shameful.

Senator LeBreton: Honourable senators, the government also was in the position of being asked to intervene in a situation that has already been settled in the courts.

At the moment, as we know, Nortel is going through restructuring. It can only be hoped that in this restructuring process, when December 31 arrives, the pensions will not end at that time. We have reason to be hopeful. I am hopeful that is the case.

As the honourable senator knows, at the moment, many other programs are available through the government, not only the federal government but also the provincial government, to assist people with disabilities. It is to be hoped that these and any future programs will continue to help and benefit people who, unfortunately, are faced with long-term disabilities.

No one, including myself, likes to contemplate people spending Christmas in such unhappy circumstances.

Senator Eggleton: I strongly disagree with the minister's assessment of whether Bill S-216 will help people. That assessment does not align with what expert witnesses told us; it does not align with what almost every other country that is a trading partner of ours already does. We can deal with that issue later in the subject of debate, which is still part of our agenda.

The minister said there are other ways that the state can help these people. Sure, there are Canada Pension Plan Disability Benefits, but they have a maximum of about \$13,000. These people, on average, have \$12,000 in medical expenses alone. Those benefits will not pay the rent or put

food on the table. There is also welfare, but one can understand why they would not want to go on to welfare. Why should the government have to pick up the tab when it should be Nortel that does that? They have the assets.

Senator Mercer: Hear, hear!

Senator Eggleton: I want to ask the minister about the Standing Senate Committee on Banking, Trade and Commerce. After the Banking Committee decided against my bill, a majority on a vote of six to five — in fact, it was Senator Greene who moved the motion — voted that we send a letter to the government and ask that they do something to help these people.

On behalf of all the Conservatives who voted on that particular motion, what will the government do? If it is not Bill S-216, then what is it?

Senator LeBreton: The honourable senator talked about the Banking Committee and witnesses. However, senators also heard from witnesses who confirmed that the Nortel long-term disability recipients would not be helped by this bill. Witnesses also warned that endless litigation would result for all those involved.

The fact of the matter is — and this fact is acknowledged by people I have spoken to — this situation is a result of a court-approved settlement among all the parties. It was arrived at under the legislation in effect at that time. As much as the honourable senator would like to wish it so, he knows full well that his bill would not have helped the Nortel pensioners.

(1500)

As I have mentioned before, the government is concerned and committed to finding solutions to address this serious problem. We acknowledged the seriousness of this matter when we made a commitment in the Speech from the Throne to better protect workers when their employers go bankrupt.

The situation with Nortel has been going on for quite some time. The bankruptcy and the failure of Nortel, I believe, started to develop when the honourable senator was in government. This is a long, sad story. However, the fact of the matter is that, although most of us wish it were not so, the honourable senator's bill would have done nothing to assist the Nortel pensioners.

Hon. Pierrette Ringuette: Honourable senators, I am a member of the Banking Committee and I want to set the record straight. I want to talk about the facts. The witnesses who appeared before the committee, to whom the leader referred, could not prove the issues of cost, litigation or retroactivity, which the leader's colleagues, as members of our committee, have included in their report.

With regard to the issue of cost, how can the leader accept that the seven CEOs of this company that is under bankruptcy are paying themselves \$8 million in bonuses only, on a one-year basis, while the people who are on long-term disability, afflicted with MS and so forth, cannot get the proper attention of her government?

Furthermore, with regard to retroactivity, we will soon have before us in this house a bill called Bill C-47. That again is a government bill, but in at least two places in that piece of legislation, there is retroactivity.

Why is retroactivity okay when it comes from this government, but it is not okay with regard to helping the people who desperately need it?

Senator LeBreton: Honourable senators, the retroactivity I am referring to is that this was a court-ordered settlement. The private member's bill introduced in this place by Senator Eggleton would not have helped the people of Nortel. No one derives any joy from any of this. It is a very sad situation.

I cannot answer for Canadian companies as to how they restructure themselves. Those matters are for others to comment on.

All I can say is that the government has made a commitment, as I have said before, and we made a commitment in the Speech from the Throne to address the issues in order to better protect innocent victims of companies that go bankrupt.

Again, since I am an optimist by nature, and since I do know that Nortel is going through restructuring, I am hopeful that this restructuring will in fact be such that come December 31, people who are receiving their pensions and disability pensions will continue to receive them under the restructured Nortel plan.

Hon. James S. Cowan (Leader of the Opposition): Honourable senators, I want to return to the last point the leader made and also to the answer she gave in response to Senator Eggleton's first question.

Last week, the leader suggested that in some way, Senator Eggleton was holding out false hope to these Nortel pensioners by introducing this bill, which she alleged was not the answer to this problem. The leader has now suggested that she is hopeful. Leaving Bill S-216 aside, both in response to Senator Eggleton and just again at the tail end of her response to Senator Ringuette, the leader has suggested that, as a result of the restructuring this company is now undergoing, she is hopeful that by the drop-dead date of December 31, this issue must be solved. We understand that.

No one would suggest that the leader is holding out any false hope, but can she explain to me and to the members of this house the basis upon which she is hopeful that, as a result of the restructuring, this issue will be solved?

Senator LeBreton: Returning to Senator Eggleton's bill, and others, we know from all the information that this was a court-ordered settlement. Senator Eggleton's bill had a long road ahead of it and it would not have solved the Nortel pensioners' issues.

With regard to my own comments, I am reflecting my own hope. There has been some comment in the media that Nortel is going through a restructuring, so I am holding out some hope for this deadline of December 31. This is not a government-driven comment; it is just me, as a person, trying to put myself in the position of these individuals. Since Nortel is still undergoing restructuring, I believe that there is some reason to hope that people who are receiving pensions and disability pensions from Nortel will not have their pensions cut off.

Perhaps it is wishful thinking on my part, but I am trying to be optimistic for these people. I know exactly what they are going through. As I mentioned, I have friends who were employees of Nortel.

If we are dealing specifically with the private legislation and not other issues that are going on, the legislation does not and will not help the employees of Nortel, principally because we are dealing with a court-ordered settlement that the Nortel pensioners participated in.

Senator Cowan: We are not talking about Bill S-216. The leader has already made it clear that the government will not support that bill. It is clear that bill is dead, although we would like to see it brought to a vote so that we can have that made absolutely clear. Let us assume, however, for the purposes of this discussion, that that bill is dead.

The leader spoke here not just as an interested, concerned citizen. She is the Leader of the Government in the Senate and she speaks in this chamber on behalf of the government, so this is not an idle comment by an ordinary senator. The leader is speaking in this chamber during Question Period on behalf of the government.

When the leader expresses a wish and a hope that out of this restructuring will emerge the answer to the problem that Senator Eggleton has tried to address, and when she says that Senator Eggleton's bill does not address that issue, let us accept that for the moment. The leader expressed a hope, as Leader of the Government in the Senate, in response to questions in this chamber. This is not just an idle comment. I ask the leader, so that no one would ever suggest that there was any false hope being held out to people who are in serious jeopardy, what is the factual basis of the hope she expresses in this chamber as Leader of the Government in the Senate?

(1510)

Senator LeBreton: Honourable senators, there are reports that Nortel is going through restructuring and my comments were based on that information. If I am not allowed to show any sympathy for these people at all, then I apologize for doing so.

I would like to think that while Nortel is going through this restructuring they will take into consideration the pensioners and those on disability.

Senator Cowan: We have had this kind of discussion before with the leader expressing faith in people and hoping that things will happen. However, if as a result of this restructuring no action is taken by December 31, what will the government do?

Senator LeBreton: Honourable senators, I must first point out that Senator Eggleton's bill would not have addressed this problem. Second, as the honourable senator knows, only 10 per cent of pensions in Canada fall directly under the purview of the federal government. The case of the Nortel pensioners actually falls more under provincial jurisdiction. Quite a number of people have rightly expressed concern for Nortel. I am simply saying that there are programs already available at various levels of government to assist the disabled.

In the Speech from the Throne, the government did commit to find means by which we can better protect workers who become unfortunate victims of the bankruptcies of their employers. We made the commitment that we would look at ways to deal with this situation.

Honourable senators, I have said before that this is a very complex issue. It involves many jurisdictions and many departments of government. The government is seriously looking at ways to better protect employees in the event of bankruptcy, and we will continue to seek out options to provide such protection.

[*Translation*]

Hon. Céline Hervieux-Payette: Honourable senators, giving the private sector the responsibility for finding a solution to a problem that could have been subject to an agreement in September is risky.

We should remember that Nortel received hundreds of millions of dollars for research and development. The government invested heavily in this company to ensure its growth which, in the end, did not materialize, not because of the employees we are talking about, but because of the employees in general.

It was the management of this company that failed. It is this management that will compensate these employees by using monies that are owed for the most part to financial institutions. Does your government have a responsibility in this matter? What does the government plan on doing to solve the problem, besides expressing empty wishes?

[*English*]

Senator LeBreton: Honourable senators, Senator Hervieux-Payette's question is similar to that of Senator Ringuette. Nortel is a private company. The honourable senator is right that it was the

previous government that put a significant amount of money into Nortel. We have privately-run companies.

The situation that developed with Nortel has been a long time coming. We have lived with this for about 10 years. I could ask Senator Hervieux-Payette or Senator Eggleton what they did when it was obvious that Nortel was in serious financial difficulty and their employees would suffer as a result.

I cannot answer for the management of Nortel, a private Canadian company. As I pointed out earlier, only 10 per cent of Canada's pensions fall under the jurisdiction of the federal government because of the way pensions are set up in Canada.

The honourable senator talked about laws that are in place in the United Kingdom and the United States. It is true that there are laws in place. When our government studies this matter to seek resolution, I am quite certain that our officials will look at examples in other countries.

I cannot answer for the executives of Nortel. There are many stories about the management problems at Nortel. I am, perhaps, dismayed like any other ordinary citizen, but there is nothing more that I can say to answer the honourable senator's question.

[Translation]

Senator Hervieux-Payette: I believe that the leader has forgotten to answer the question. We are facing a unique problem involving disabled people who will not receive pensions or medical treatment because, in Canada, there is no law requiring corporations to fund these programs. And given that Nortel accounted for one third of the transactions on the Toronto Stock Exchange, it was not a small corporation.

And as for the issue of leaving private businesses to their own devices, I would like to point out that your government invested \$9 billion to save a private American company. At this point, I do not believe that we have lessons to learn from you about whether government money can be invested to save jobs. We supported that measure. But do not turn around later and tell us that you are at arm's length from the company.

When will the government introduce a bill to ensure that no employee in Canada experiences such difficulties and that Canada will join the OECD countries that currently provide better protection for their employees?

[English]

Senator LeBreton: The honourable senator completely overlooked the very large responsibility that the provinces have with regard to pensions.

On the question of disabilities, the government has done a number of things to help people who suffer from disabilities. For instance, in March, Canada ratified the UN Convention on the Rights of Persons with Disabilities. We created the Registered Disability Savings Plan in September and over 35,000 Canadians have these plans. Last year's budget provided \$75 million for housing for people with disabilities. Our Working Income Tax Benefit provides an extra supplement for persons with disabilities. We have labour market agreements with persons with disabilities to help them prepare for or return to work. We have also increased the number of eligible medical expenses from a tax point of view for people with disabilities. The government has already taken some significant steps to improve the lives of the disabled.

I know that we are dealing here specifically with a group of people who were, unfortunately, employed by Nortel, but the government has programs to assist the disabled. As I have mentioned many times, in our Speech from the Throne we committed to looking at ways to better assist workers with companies that go bankrupt. There is nothing more I can add at this point.

Hon. Sharon Carstairs: Honourable senators, I know that the honourable senator has received numerous emails, as have I.

I hope the leader can help me, because I would like to respond to the particular individual who writes:

(1520)

Dear senators:

Nortel disabled employees like me never had a vote on the settlement and there was no evidence supplied that there was majority support from disabled employees, who were not, in any case, in a position to give informed consent without fear of Nortel cutting off their essential medical benefits within weeks of the first settlement, and hours of the revised settlement. I did not agree to the settlement as Minister Clement —

— and this honourable minister has said —

— implies when he says the lawyers for the parties agreed.

The Nortel disabled employees never voted for on court representative. Nortel disabled employees were not democratically involved in the process to select the court appointed lawyers.

...

What do I respond to this individual?

Senator LeBreton: Honourable senators, I have received the same emails. The fact is we can only deal with what we know. There are many people now who say they did not agree with the settlement. However, the fact is people representing these individuals went to court and agreed with the settlement. That is a question that that individual will have to direct to the people who were representing them directly in the court proceedings.

I do not know what else we can say to these people. When people go to court, like all of us if we are part of a court action, they have people representing them and there is a court settlement.

When, after the fact, they say, "Well, I did not agree with it," I do not know what Senator Carstairs, I or anyone could possibly say that would be of help to that individual. I do not know what anyone in the government or any individual senator could say to a person who has been part of a legal court action. It is one of those situations. We are now getting those emails. Nortel and their employees were part of a court action. The court decided and now, after the fact, the senator is asking us to do something that is not legally possible.

Bankruptcy and Insolvency Act and Companies' Creditors Arrangement Act

Bill to Amend—Sixth Report of Banking, Trade and Commerce Committee—Vote Deferred

On the Order:

Resuming debate on the motion of the Honourable Senator Hervieux-Payette, P.C., seconded by the Honourable Senator Tkachuk, for the adoption of the sixth report of the Standing Senate Committee on Banking, Trade and Commerce (Bill S-216, An Act to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act in order to protect beneficiaries of long term disability benefits plans, with a recommendation), presented in the Senate on November 25, 2010.

Hon. Stephen Greene: Honourable senators, I would like to begin by stating my sincerest sympathies for how difficult this situation is for the 378 Nortel long term disability claimants. Not only do they have to cope with whatever physical reasons have forced them into being disabled claimants in the first place, they are now drawn into a very complicated and difficult

legal and financial circumstance. I have read many of the claimants' letters and emails and have reflected on them.

In any insolvency situation, we are dealing with one constant: There is simply not enough money to go around and difficult decisions must be made. The case before us is perhaps as difficult to solve as anyone could imagine.

Unfortunately, Bill S-216 does not offer a solution for Nortel's LTD claimants. The reason for this is as follows: Bill S-216 attempts to retroactively change the legal framework for creditors, in particular the Nortel LTD claimants, but is not capable of enforcing the solution it wants.

It proposes to put unsecured LTD claims higher on the list of creditors, thus solving or ameliorating the workers' problem. I will admit that, as a policy issue, I am probably not against such a provision. Other countries have this type of priority, and it might be an option that Canada ought to look at in the future. Unfortunately, while future claimants could conceivably be helped by this bill, changing the current legal framework and having those changes apply to the past will not solve the problem for Nortel workers on long-term disability.

Nortel, of course, is subject to proceedings under the Companies' Creditors Arrangement Act, which requires that certain legal procedures must be followed, and they have. In this case, changing the legal landscape after the event will not be enough.

We have heard plenty of arguments as to how the will of Parliament is supreme and that it can legislate retroactivity. This is true. *British Columbia v. Imperial Tobacco Canada Limited*, 2005 confirmed this. This is not a case of simple retroactive legislation, though. The CCAA

procedures underline that if any claims are to be paid, Nortel itself must file a Plan of Compromise, by which the remaining funds in the company are divided and paid to creditors.

In the Nortel case this plan has been court approved. There is also a clause in the court agreement that immunizes the agreement from future changes in the law that might affect the plan. All of the creditors are bound by this, including the Nortel workers.

The Ontario Superior Court's decision states very plainly that Nortel can choose to ignore any future legal changes that have a retroactive effect on the order of claims. The judge stated that such compromises, as found in the sad case of Nortel, are final.

In rendering his decision the judge said:

It is not, in my view, reasonable to require creditors to, in effect, make concessions in favour of the Former and LTD Employees today. . .

Which has occurred,

. . . and be subject to the uncertainty of unknown legislation in the future.

It is thus highly unlikely that, just because a law has been changed, Nortel would file a new plan without a legal fight, and likely a lengthy and costly one, because there is no requirement for Nortel to do so. We all must recognize this. Retroactivity is not the only issue here. The court agreement allows Nortel to ignore legal changes. Thus, for the LTD claims to be extended, Nortel itself must recognize that the laws have been changed and then must decide to file a new plan in order that Nortel LTD claimants are satisfied.

(2020)

There is nothing in this bill that can force Nortel to file a new compromise plan, which would be necessary in order for any new claim to be awarded to the LTD claimants. This is unfortunate, but true.

In short, the bill changes the rules under which the previous compromise plan was made, but it is powerless in forcing a new compromise to be made and it is powerless in avoiding the court's decision that Nortel can ignore retroactive legal changes to the priority of claimants. As it is, the

bill would simply state that the order of claimants is different, to which Nortel can legally answer, "So what? We have a court agreement that says we can ignore it," and they can, without legal consequences.

We know Nortel will not file a new compromise plan, because they have given no indication that they wish to do so. They are free to alter the compromise plan now.

As it turns out, because of the court agreement, this bill, as it applies to Nortel, is a retrospective piece of legislation, not a retroactive piece. There is a difference.

The Supreme Court of Canada, in *Benner v. Canada*, adopted these definitions to explain the distinction: A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in the future with respect to a past event.

In plain English, a retroactive law has action on previous events, while a retrospective law only looks at previous events. With Bill S-216 — and this is a fact — the law would only be looking at the past and passing a kind of judgment on it. However, it is powerless to force any action.

The court settlement states exactly that. This bill will not force any action. Nortel will not file a new plan, as is necessary in any CCAA process. Nothing will change for Nortel LTD employees if this bill is passed, at least not unless Nortel wants change.

The bill can only look at the past, not act on the past. Of course, as senators, and as public servants, which we are, we would all like to help people. However, it is important that we actually help, and not just leave the impression that we are helping. As Senator LeBreton has said in this chamber, we must not raise false hopes with this bill. This goes for both this legislation and us senators: We must be more concerned with action that will help and less with appearances that will not.

Let us not forget that even if Bill S-216 was a magic bullet and actually worked, the money that would end up with LTD claimants would not come out of the pool of money that was used to pay the million-dollar bonuses to executives that my colleagues like to rail about. It would come from monies owed to other creditors, other companies, big and small.

When not discussing magic bullets and other fantasies, when truly discussing action on this file or any other, we must be wary of unintended consequences. We must be wary of unintended consequences whenever we contemplate picking out one group of people and seeking to legislate specifically for them in the context of a law that would apply and operate generally.

Once again, this is all so terrible; it really is. However, the answer is not in this legislation, not by a long shot.

Our committee's report mentions what some of these unintended consequences could be. For example, as some witnesses told us, this bill might cause companies in bankruptcy proceedings to prefer to be liquidated rather than to be restructured.

As several witnesses stated, Bill S-216 would reduce the amount that some creditors would otherwise hope to recover in bankruptcy proceedings. Bill S-216 would also increase the risk for investors and raise, however marginally, the financing costs for bond-issuing companies.

Considering further the cost to business of raising funds, companies that offer long-term disability insurance benefits would find themselves at a financial disadvantage to companies not offering such benefits, both domestic and foreign.

In the case of investors who buy bonds in a Canadian business, a change in the order of priority increases the risk that they will not be able to recoup their investment in the event of a company's failure. This increased risk could mean that investors will become less willing to buy corporate

bonds of companies offering LTD, depriving them of financing and hindering their ability to grow.

It could also create a higher risk premium on bonds, making financing more expensive. In effect, higher risk means increased financial costs for businesses financing their operations or expansions. In the grand scheme of the economy, this could lead to reduced economic growth and job creation.

There was lots of testimony at committee that the bill needs amendment before it even has a ghost of a chance to do some good. Senators Hervieux-Payette and Eggleton both mentioned a witness in their speeches, a legal expert by the name of James Pierlot. Both senators mentioned that this legal expert supported the bill. They failed to mention, however, that in his testimony and in his brief, Mr. Pierlot offered 35 amendments to the bill. Thirty-five amendments to a bill with only eight clauses by a supposed advocate ought to raise some flags amongst senators being asked to support a bill.

Do we realize how complex this issue is? There can be so many variables, depending on how generous the employer is to its employees. Each and every corporation may have a different definition as to what constitutes a disability or the length of the benefit term. What if some long-term disability plans are integrated with other programs? There are many variations that need study.

Looking at changing the order of claim priority in bankruptcy law for everyone from the date of Royal Assent onward is something the Senate or the minister might want to explore. I, myself, would be sympathetic to a study of this. However, singling out one group out of all the others in our country and making a general and broadly applicable legal change that affects the whole population, but which is actually aimed at one group to solve a particular problem, does not strike me as good law precedent and practice.

I say this with the full appreciation of the difficulties, stresses and heartaches that Nortel's LTD claimants are currently experiencing. We know that Nortel is going through restructuring right now, so there is reason to hope that the benefits for LTD workers will be extended beyond December 31.

In the meantime, the chamber should join my colleague Senator Kochhar's appeal to the current Nortel stakeholders to agree by consensus and in good faith to allow LTD claimants to withdraw their share of funds from Nortel's assets, and we encourage them to do so.

These, then, are the reasons that we must unfortunately adopt the report on Bill S-216 of the Standing Senate Committee on Banking, Trade and Commerce.

Hon. Art Eggleton: Will the honourable senator take questions?

Senator Greene: Yes, of course.

Senator Eggleton: Let me start with the question of retroactivity. The honourable senator cited James Pierlot, who is a pension lawyer, consultant and expert on this subject. He said that retroactivity is not an issue with this bill.

The honourable senator says that Mr. Pierlot proposed amendments. Yes, in fact, he proposed an amendment to clause 8, the transitional clause, which I indicated to the committee that I wanted to put forward. If you look at it in that light, clause 8 would read:

For greater certainty, this Act applies to a debtor in respect of whom proceedings under the Bankruptcy and Insolvency Act or under the Companies' Creditors Arrangement Act have commenced before the coming into force of this section and, notwithstanding any judgment or order by any court during those proceedings.

The honourable senator already cited the Supreme Court decision that says this kind of retroactivity is all legal to do. It is a limited retroactivity, because the matter is not closed yet; it is still before the courts.

I do not understand how the honourable senator can say that this bill would not be successful in terms of retroactivity when the clause that is in the bill, with that amendment, makes it clear that retroactivity applies to this case.

Can the honourable senator explain that?

Senator Greene: Yes, I would be happy to. I am looking for a particular reference. This is from the judgment of the Superior Court of Justice, Ontario, Justice Morawetz, who rendered his decision on the settlement agreement.

He said that he is firmly of the view, and is right in his judgment, that retroactivity is not a subject that can apply to this particular court agreement. He said, as I said in my speech: It is not, in my view, reasonable to require creditors to, in effect, make concessions in favour of the former and (disabled) employees today, and be subject to the uncertainty of unknown legislation in the future.

(2030)

Mr. Justice Morawetz is clear: It is right in the legal agreement that retroactivity cannot apply a change in the law. This particular agreement is immune to changes in the law. All that will result is endless lawsuits.

Senator Eggleton: If I can continue with the questioning; if more time is possible, I would appreciate it.

The Hon. the Speaker: As a matter of order, Senator Greene's allotted time has expired.

Senator Cools: So give him more time.

Senator Tardif: Five more minutes.

The Hon. the Speaker: It is up to the honourable senator whose time we have just been on —

Senator Cools: Ask for time.

The Hon. the Speaker: — to ask for additional time. Should he choose not to ask for additional time then we continue debate, and I hear no request for extension of time.

Senator Eggleton: Are you afraid of the questions?

The Hon. the Speaker: Continuing debate.

Senator Eggleton: Maybe he is afraid of the questions.

The Hon. the Speaker: Hearing no further debate, are honourable senators ready for the question?

Some Hon. Senators: Question.

The Hon. the Speaker: I will put the question.

It was moved by the Honourable Senator Hervieux-Payette, seconded by the Honourable Senator Tkachuk, that this report be adopted now.

Is it your pleasure, honourable senators to adopt the motion?

Some Hon. Senators: Yes.

Some Hon. Senators: No.

The Hon. the Speaker: Those in favour of the motion will signify by saying "yea."

Some Hon. Senators: Yea.

The Hon. the Speaker: Those opposed to the motion will signify by saying "nay."

Some Hon. Senators: Nay.

The Hon. the Speaker: In my opinion, the "yeas" have it.

And two honourable senators having risen:

Hon. Jim Munson: Your Honour, I wish to defer the vote.

The Hon. the Speaker: Pursuant to the rules, the chief opposition whip has the right to defer the vote, which is deferred until tomorrow, Wednesday, at 5:30 p.m.