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Of Couch Potatoes and Lexicographers: The Eternal Struggle Between Usage and the Imposed Neologism, and its Application to Legal Neology

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Article abstract

The author sets out to determine the sources from which legal neologisms are born and whether one source prevails over the other in regards to its prescriptive nature if any. Law's traditional sources are creators of neologisms, and each source plays a role of usage with respect to the other, whereby it can stifle or consecrate a neologism.

CHRONIQUE LEXICOGRAPHIQUE

Of Couch Potatoes and Lexicographers: The Eternal Struggle Between Usage and the Imposed Neologism, and its Application to Legal Neology

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ABSTRACT

The author sets out to determine the sources from which legal neologisms are born and whether one source prevails over the other in regards to its prescriptive nature if any. Law's traditional sources are creators of neologisms, and each source plays a role of usage with respect to the other, whereby it can stifle or consecrate a neologism.

Key-words: *Law reform, language and law, bijuridism, lexicography, legal translation, neology, jurilinguistics, legal translation.*

RÉSUMÉ

L'auteur s'interroge sur les sources des néologismes juridiques et de déterminer si une source prévaut sur une autre. Les sources traditionnelles du droit sont à l'origine des néologismes et jouent un rôle d'usage, l'une par rapport à l'autre, en vue de freiner ou de consacrer un néologisme.

Mots-Clés: *Réforme du droit, droit et langage, bijuridisme, lexicographie, traduction en droit, néologie, jurilinguistique, bilinguisme juridique.*

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INTRODUCTION

L'autarcie linguistique est un mythe : il faut qu'un idiome se frotte aux usages d'autrui, s'instruise, domestique des expressions de toutes origines. Perdre ce goût serait chez un peuple le signe de la croissance zéro. Son parler se figerait, captif de son territoire et du passé, comme le deviennent les patois.

Jean Giraud[1]

1. Seemingly trivial events sometimes conceal far-reaching underlying causes and effects. Such is the case of a recent demonstration by British potato farmers who complained about a linguistic spin off of the term potato : "Farmers stew over 'couch potato', Farmers want 'couch potato' removed from the dictionary because they believe the expression is damaging the vegetable's image".[2] Members of the British Potato Council went as far as protesting outside the dictionary publisher *Oxford University Press* and in *Parliament Square, London*.[3] The *Oxford English Dictionary* (OED) defines "couch potato" as : "a person who spends leisure time passively or idly, sitting around, especially watching television or videotapes."[4] Other definitions of this term are even more damning :

1. Jean GIRAUD, "Le néologisme et nous", (1973) 18 *Meta* 225, 225.
2. BBC NEWS, "Farmers Stew over Couch Potato", [Online]. http://news.bbc.co.uk/1/hi/uk/4108964.stm, June 20, 2005, (consulted June 10, 2008).
3. *Ibid.*
4. *Ibid.*

> The term "couch potato" was first coined in 1976 by ... a friend of American underground comics artist Robert Armstrong. ...
>
> The term eventually entered common American vocabulary, generally defining one who unceasingly watches television as a form of "Transcendental Vegetation (TV for short)." The phrase was entered into the Oxford English Dictionary in 1993. ... The potato was also chosen because of the potato chips that couch potatoes ate while watching television.
>
> Amongst Canadians, adhering to colloquial vernacular, the couch potato is referred to as the *Chesterfield Spud* or a *Jon Whyte.*
>
> Some studies have said that the "couch potato lifestyle" is a serious health hazard to its practitioners[3]; in the United Kingdom, a plan of the Prime Minister's Strategy Unit tried attempts "to combat the couch potato culture" to "[improving the U.K.'s] international sporting performance."[4]
>
> ...
>
> A research suggests that being a couch potato could make a person a decade older biologically than someone who is physically active.[6].[5]

2. Furthermore, in the caselaw, a couch potato's lifestyle is less worthy. Judicial criticism of this sedentary lifestyle is also evident in caselaw :

> I have kept these reasons for judgment brief, but I have considered more things than I have written here. I want to

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5. Definition of couch potato taken from : [Online]. http ://en.wikipedia.org/wiki/couch_potato, (consulted May 2, 2008). Compare with an earlier version : BBC NEWS, "Farmers Stew over Couch Potato", [Online]. http ://news.bbc.co.uk/1/hi/uk/4108964.stm, June 20, 2005 (consulted December 7, 2005) :

> A couch potato is (originally U.S.) slang for a person who spends most or much of his time sitting or lying on a couch, or perhaps an armchair or recliner, ... watching television in his underwear and often drinking beer. Typically, couch potatoes are supposed to be overweight or out of shape.
>
> The word first appeared in a December 1979 edition of the *Los Angeles Times*, and entered the *Oxford English Dictionary* 14 years later. The exact origin of the term is unknown but many believe it relates to some people's habit of eating potato chips while watching TV.

> emphasize that before the accident Marek was no "couch potato"; and after the accident, he was. Therefore, Marek's loss is greater than that of a sedentary person. A money award can never fully compensate a person who has suffered damages in a severe motor vehicle accident.[6]

3. It is by way of response to such negative perceptions that the British Potato Council argued "we are trying to get rid of the image that potatoes are bad for you ... of course it is not the OED's fault but we want to use another term than 'couch potato' because potatoes are inherently healthy."[7]

4. Let us suppose that the Council's claim has some merit. Can the Council then seek to influence the editors of the OED? If so, can or should the OED remove "couch potato" from the dictionary? Can it replace it altogether with a new term? Finally, what persuasive force, if any, do lexicographers have, on customary usage (*l'usage*)? It should be pointed out that the expression "couch potato" arose out of usage in 1976 and was first introduced into the OED.[8] Furthermore, to what extent are lexicographers bound by usage?

5. The answers to these questions raise further questions regarding the creation of words and also their extinction. The study of the creation and extinction (to a lesser degree) of a term is at the very heart of this paper. At its conception, a new term is known as a neologism. There are two types of neologisms. The "néologisme de sens" and the "néologisme de forme." The latter denotes a new term in its form, meaning that the term exists but is attributed a new sense.[9] The former type of neologism ("de sens") is a term altogether new, in its form and in its sense.[10]

6. Where do neologisms come from? We know that their origins vary from one discipline to another or from one specialised language to another. For instance a new term can be

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6. *Lachowski* v. *Dowell Schlumberger Canada Inc.*, (1997) A.J. No. 528 (Alta Q.B.), para. 27.

7. BBC NEWS, *loc. cit.*, note 2.

8. Definition of couch potato taken from: [Online]. http://en.wikipedia.org/wiki/couch_potato, (consulted May 2, 2008)

9. Nicholas KASIRER, "Le *Real Estate* existe-t-il en droit civil?", (1998) 29 *R.G.D.* 465, 475.

10. Such is the case, for example, with the naming of new chemical compounds.

found in literature, the coining of writers or, as we have mentioned, a new term might be created by a scientist to designate his or her new discovery. Thus, as a social finding, we know the obvious, that the neologism is man-made; the true question is whether the neologism is born spontaneously or whether the new term must be "officially" endorsed to be consecrated as part of the language. These are the types of questions we will attempt to answer in the following pages. The debate between spontaneous creation and dialectic creation is by no means a new one. Some authors have gone as far as to deny the possibility for the lay person to create a neologism whereas others have maintained that the creation of neologisms in certain areas such as science will be inevitable.[11] Also, in a more general sense, the creation of neologisms has given rise to two major tendencies being, as the title of this paper suggests, usage (*l'usage)* and imposed neologism (*le néologisme dirigé*); universality versus limitation;[12] continuity versus evolution.[13] Those preferring *l'approche dirigée* are known as "purists", whose point of view, taken to the extreme, holds that recourse to the creation of neologisms must be had only as a last resort, preferring borrowing, to the creation of neologisms.[14] On the other hand, those preferring *l'usage* would allow recourse to a spontaneous creation of neologisms but emphasize that such a path must not be abused.[15]

7. This paper looks at neologisms in general language and in law. We feel that there should be a balance between usage and imposed neologism. To illustrate and to defend this opinion, we will look at the creation of the neologisms in the context of usage in a general sense, as a social fact, and usage as an institutional fact when we enter the spheres of judicial and legislative neologisms.

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11. François GAUDIN, Louis GUESPIN, *Initiation à la lexicographie française. De la néologie au dictionnaire*, Bruxelles, Duculot, 2000, p. 242; André CLAS, "De la formation de mots nouveaux", (1980) 25 *Meta* 345, 346; J. GIRAUD, *loc. cit.*, note 1, p. 269.

12. Bernard QUEMADA, *Les dictionnaires du français moderne 1539-1863*, Paris, Didier, 1967, p. 231.

13. F. GAUDIN, L. GUESPIN, *op. cit.*, note 11, p. 236.

14. *Ibid.*

15. Jean-Claude GÉMAR, "Compte rendu : langues et langage du droit par Emmanuel Didier", (1993) 72 *Can. Bar Rev.* 403, 406.

1. THE SOURCES OF JURIDICAL NEOLOGISMS: METHODOLOGICAL TENDENCIES

8. Does there exist a methodology or a recognized source by which Law, as a discipline, determines its language? Not everyone thinks that there is.[16] Although there may not be a formal methodology, the language of the law has developed and evolved since the beginning of time. The question therefore becomes irrelevant. In effect, the question to ask is not whether there is a methodology but rather to identify and formalize the process of language creation that Law (as a system of norms) applies intuitively. Hence, if we were to look at Law from a systemic perspective, it is fair to state that Law, as a system, has differentiated itself (for instance, into different systems and areas of Law) and, its subsystems were able to self-generate their own linguistic systems. Such self-generation has occurred autonomously. In other words, the law and its language take on a life of their own to become, as some authors have called it, *autoréférenciel* or *autopoiétique*.[17] In other words, Law does not resort to outside lexicographers for the regulation and creation of its lexicon. It carries out the task autonomously. Hence, it is self-generated, autoreferencial, *autopoiétique*. It does so not only in regards to its linguistic component but also in regards to other areas of the law such as Business Law or Family Law. Law may seek and incorporate guidelines from other systems such as the business world but ultimately, Law, as a system of norms self-generates. If such is the case, the methodology or rules applied in the area of linguistics regarding the creation of neologisms (i.e. *le néologisme dirigé* and *l'usage*) would have no bearing in the creation of legal neologisms. It seems however, as will be further demonstrated that in the area of legal

16. N. KASIRER, *loc. cit.*, note 9, p. 482.

17. On the concepts of *autopoièse et autoréférentialité*, see: André-Jean ARNAUD (ed.), *Dictionnaire encyclopédique de théorie et de sociologie du droit*, Paris, L.G.D.J., 1993, p. 49. In general, on legal vocabulary, as a subsystem of the general language system, see Gérard CORNU, *Linguistique juridique*, Paris, Montchrestien, 1990, pp. 14-30. More generally, on the perspective of law as a subsystem of a general system, see: G. CORNU, *Linguistique juridique*, *id.*, pp. 15-20; Emmanuel DIDIER, *Langue et langage du droit*, Montréal, Wilson & Lafleur, 1990, pp. 238-242 and 251-252; J.-C. GÉMAR, *loc. cit.*, note 15, p. 405.

neology, the traditional sources of Law, are not in and of themselves binding on legal terminology. As it appears, legislation, case law and legal doctrine all interact with one another, as would the imposed neologism and usage. In the end, we end up with a *mélange de genres* between the creation of the law (autoreferencially) and the creation of neologisms in its linguistic sense. We can call this jurilinguistics.

9. If the language of the law can be seen as a subsystem of a general system that is linguistics, the law, as an activity or discipline, is in turn composed of a number of subsystems traditionally known as its sources : legislation, caselaw and legal literature. However, a less formal source must be mentioned for it does, albeit sporadically, enter the realm of the language of the law : *l'usage*.

1.1 USAGE

10. What role does usage play in legal linguistics? Usage in a strict sense is derived from the language created by the subjects of law, the lay persons and other social actors such as brokers and bankers. As a common example from Quebec's Civil Law, the terms *Real Estate* and *Condominium* come to mind.[18] These terms have little or no legal recognition although they are commonly used to convey concepts in the law of property.

11. Also, usage *stricto sensu* can be contrasted with the activity known as "lexicography" in that, in an ideal setting, usage is spontaneous, *libre* and public whereas lexicography is derived from a more rational approach. As an example, lexicographers will often restrain from publishing obscene words although such words are common in usage.[19]

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18. For a clever discussion of the legal and linguistic frameworks surrounding the notion of Real Estate, see : N. KASIRER, *loc. cit.*, note 9, pp. 477–478.

19. See, for instance : Fred R. SHAPIRO, "The politically Correct United States Supreme Court and the Motherfucking Texas Court of Criminal Appeals. Using Legal Data Bases to Trace the Origins of Words and Quotations", *in Language and the Law*, Buffalo, Hein & Co., 2003, p. 367, p. 370.

12. Therefore, usage can be independent of lexicographers and therefore of dictionaries.[20] By way of summary we can conclude that the language of Law, as a subsystem of a general linguistic system, is generative of its own neologisms through usage *stricto sensu* which, because of its spontaneity, is opposed to a more directive approach known as lexicography. However, we will see in the following paragraphs that usage in a general sense (*lato sensu*) is considered by some as the absolute authority on the creation of neologisms.[21] The creation of neologisms by the traditional sources of Law such as the legislation, caselaw and legal literature, is ultimately subject to reception by all subsystems of the law. In other words, the legislator might try to impose a legal term that may not be received by the legal community.[22] This being said let us now look at the traditional sources of Law as creators of neologisms.

1.2 THE IMPOSED NEOLOGISM

13. We said earlier that a neologism can be created spontaneously, independently of all formal sources. Conversely, a neologism can find its origin in a formal setting, a process known as *lexicography*, otherwise known as the process creative of the imposed neologism. One frequently cited example of lexicography is the art or science of translation, for it is a fertile ground for the creation of neologisms.[23] It is therefore important to make an incursion into this area of linguistics.

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20. Suzelle BLAIS, *Néologie canadienne ou dictionnaire de Jacques Viger (manuscrit de 1810)*, édition avec étude linguistique, Ottawa, Les Presses de l'Université d'Ottawa, 1998, p. 140.

21. E. DIDIER, *op. cit.*, note 17, p. 282, paras. 495 and 496 (the author distinguishes between the role of *l'usage* in the creation of neologisms and opposes it to its final authority in the ratification or rejection of such neologisms); Mario MORMILE, *La « néologie » révolutionnaire de Louis-Sébastien*, Rome, Bulzoni, 1973, p. 61 (on the absolute authority of *l'usage*).

22. For example see *infra,* note 35.

23. See for example the neologisms *fiducie résolutoire, fiducial, fiducie constructoire, lien confidentiaire* and *usage résultoire* just to name a few in Andrée DUCHESNE, Gérard SNOW, Réjean PATRY *et al.*, *Lexique du droit des fiducies (Common Law). Law of Trusts Glossary (Common Law)*, Ottawa, Travaux publics et Services gouvernementaux Canada, 2005. See also, *acte de créance, batterie, cession-sûreté, perte liée à l'intérêt-anticipation, voie de fait et batterie* in Andrée DUCHESNE, Gérard SNOW, Sylvette SAVOIE THOMAS *et al.*, *Lexique du droit des contrats et du droit des délits (Common Law). Law of Contracts and Law of Torts Glossary* (Common Law), BT-266, Ottawa, Travaux publics et Services gouvernementaux Canada, 2008.

14. Between the spontaneous neologism and the normalized neologism endorsed in lexicography, we find an intermediary category of neologism known as *l'usage raisonné* whereby the authors or *authorities* rely on usage while reserving for themselves the right to consecrate or normalize usage.[24] Spontaneous and directive approaches to neologisms are not incompatible. For instance, an expert lexicographer can conceive a critical lexicon in a most subjective manner without neglecting "les habitudes langagières des citadins."[25]

15. Although it may seem as if this formal and normalized approach to lexicography would necessarily exclude the spontaneous approach, this is not the case. As much as one may attribute formal authority on the creation of neologisms to usage, some reject altogether the necessity to resort to neologisms in the activity of translation. In other words, "creating a new word should be a last resort. ... Neologisms must not be created by default—through laziness or inadvertence."[26] The scope of this paper is not to favour one ideology or the other but to show that, given the context, neologisms can be born out of usage and/or lexicography and, given the right circumstance, one may have preponderance over the other and vice versa. This assertion is particularly true in the specific case of legal neologisms.

16. We said earlier that jurilinguistics, as an intellectual activity, derives from a general system of linguistics and Law. The obligatory nature of the juridical norm is thus transferred and incorporated into the creation and expounding of neologisms.[27] Given this assertion, how do we assess the "mandatory aspect" of the juridical norm arising from legislation, caselaw and legal literature? Do language and neologisms, as a mode of expression of the law *lato sensu* carry with them the same prescriptive aspect?

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24. B. QUEMADA, *op. cit.*, note 12, p. 228.

25. S. BLAIS, *op. cit.*, note 20, see in particular p. 21. Such is also the lesson of an historical approach to lexicography in the study of etymology, criminology and the meaning of words and phrases : F. R. SHAPIRO, *op. cit.*, note 19, p. 367, p. 368.

26. Martin WESTON, "Problems and in Principles in Legal Translation", (1983) 22 *The Incorporated Linguist*, 207, 209.

27. See N. KASIRER, *loc. cit.*, note 9, p. 478 — in particular at note 39 where the author cites the comments of J.-C. GÉMAR who asserts that the "force obligatoire" of the juridical norm is greater than that of the linguistic norm.

1.2.1 Legislation

17. Legislation plays a vital role in the creation of neologisms. Legislation refers here to the will of the legislator in a large sense. This encompasses two main activities : legislation in the strict sense of the word[28] and also government policy as expressed in various official publications and programs.

18. A distinction is not made here between legislation in the civilian or common law systems. With the increase in recent years in the volume of legislation in the common law and hence a convergence between civil and common law with respect to their sources, it is fair to assert that the influence of the legislator on neologisms is equally pronounced in both legal systems.

19. With regards to the second category of legislation, legislation by way of government policies, a few examples come to mind, the first being that of the French legislator's publication, a *Journal officiel* known as *activité de néologie officielle*. This watchdog was established in 1970 and retains its original purpose, namely the preservation of the French language from the threat posed by the influence of the Anglo-American languages.[29] In the province of Québec, a similar department of government known as *l'Office québécois de la langue française*

28. We refer here to neologisms created by the law but not specifically imposed by it. In other words, we refer to the mere usage of a term by the legislator. See also, examples of laws aimed at harmonizing specific laws with a newly adopted Civil Code : *An Act Respecting the implementation of the Reform of the Civil Code*, S.Q. 1992, c. 59, art. 423; *An Act to harmonize public statutes with the Civil Code*, L.Q. 1999, c. 40; Marie-Josée LONGTIN, "Les incidences de la réforme du Code civil sur la législation", in SERVICE DE LA FORMATION PERMANENTE, BARREAU DU QUÉBEC, *La réforme du Code civil*, Cowansville, Éditions Yvon Blais, 1998, at p. 5 ff. See also the following example in regards to the harmonization of Canadian federal and provincial laws : *A First Act to harmonize Federal Law with Civil Law of the Province of Quebec and to Amend Certain Acts in Order to Ensure that each Language Version Takes into Account the Common Law and Civil Law*, S.C. 2001, c. C-4; Nicholas KASIRER, "L'outre-loi, Droit et langue", in Lyne CASTONGUAY, Nicholas KASIRER (ed.), *Études offertes à Jacques Vanderlinden. Étudier et enseigner le droit : hier, aujourd'hui et demain*, Bruxelles, Cowansville, Bruylant, Éditions Yvon Blais, 2007, p. 329.

29. See F. GAUDIN, L. GUESPIN, *op. cit.*, note 11, pp. 245–246.

plays a similar role.[30] Other examples of activity in the area of official neologisms include the work of the *Centre de traduction et de terminologie juridiques, Faculté de droit, Université de Moncton* and the Canadian *PAJLO* (*Programme national de l'administration de la justice dans les deux langues officielles*/National Program for the integration of Both Official Languages in the Administration of Justice).

20. It would be fair to say that professional lexicography plays a necessary role in the creation of neologisms. Its extent remains however difficult to assess. Professor Kasirer is of the opinion that "l'emprise de la législation sur le lexique juridique est indéniable dans la préparation des outils comme les dictionnaires de droit."[31]

21. Didier states in his doctoral thesis that the legislator's efforts by way of policy programs plays a significant role. Although legislation in this sense plays an important role in the creation of neologisms, this role is relative in comparison to that played by actual legislation in the sense of prescriptive law and by caselaw.[32]

22. Didier goes on to state that the legislator can intervene directly to replace one term by another. One such case is the French term "*corporation*" which was replaced by "*société.*"[33] However, usage can play an *ex post facto* role to consecrate or reject a neologism suggested by the legislator :

> En aval, l'usage ratifie ou rejette le choix du législateur et du juge lorsque ceux-ci n'interviennent pas eux-mêmes pour modifier ou faire modifier la terminologie. Ainsi, le néologisme « bâtonnier » a été intégré dans le DCA [droit civil en anglais] du Québec. Au contraire, les mots « mort-gage » et « writ » qui avaient été introduits dans la version française de *l'Acte constitutionnel* de 1791 et de *l'Acte de l'union* de 1840 n'ont pas survécu non plus que « township » et « record ».[34]

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30. As an example of the Office's recommendations concerning the term Real Estate Brokerage, see : Denyse LÉTOURNEAU, *Vocabulaire du courtage immobilier, vocabulaire anglais-français*, Cahiers de l'Office de la langue française, Sainte-Foy, Publications du Québec, 2004.

31. N. KASIRER, *loc. cit.*, note 9, p. 479.

32. This remark is made in regards to the activity of translation in its lexical role : E. DIDIER, *op. cit.*, note 17, p. 257.

33. *Id.*, p. 283.

34. *Id.*, p. 282, para. 496.

23. Hence, it is fair to assert that legislation, in certain instances, overrides usage and conversely, usage can, in certain circumstances, when it acts as consecrator (as opposed to creator of neologisms) override neologisms created by the legislator. Viewed this way, it is reasonable to conclude that legislation plays a role of persuasion vis-à-vis the principal exponents of judicial language, in particular, judges and scholars, in that the latter *font usage* of said neologisms. In other words, judges and scholars together may not only act as creators of neologisms but act as *usagers* to either consecrate or reject a neologism. Thus, the persuasive role of the legislator is a relative one.[35]

1.2.2 Caselaw

24. As is the case with legislation, caselaw, as a traditional source of law, can also be a source of creation of neologisms. The question one must ask therefore is whether caselaw as a source of neologisms, is more effective in a common law perspective than in a civilian perspective. In our opinion, the question depends on whether the ruling judge directly attributes a new sense or idea to a neologism or whether the tribunal merely endorses, as a matter of fact, the neologism created by a source other than usage. In the first instance, the weight given to such practice will be greater in the common law jurisdiction by virtue of the relative authority of the *stare decisis* principle. In other circumstances, the distinction is negligible.

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35. For instance, see the following Court of Appeal judgments where the Quebec Court of Appeal overrides the Quebec legislator with regards to the abolition of the term *servitude réelle* in the new *Civil Code of Québec* and the rejection of the term *servitude personnelle* in the legal language: *151692 Canada Inc.* c. *Centre de loisirs de Pierrefonds enr.*, 2005 QCCA 376, (2005) J.Q. No. 4131, JJ. L. Rochette, F. Doyon, M.-F. Bich, *Sawdon* c. *Dennis-Trudeau*, 2006 QCCA 553, (2006) J.Q. No 3683, JJ. D. Morin, A. Rochon, F. Doyon. For a more formal rejection see *Fadous* c. *Lamy*, 2006 QCCA 1549, EYB 2006-111482, JJ. P.J. Dalphond, L. Giroux, J. Dufresne. In the latter judgement, the Court of Appeal acknowledges the legislator's abolition of the terms *servitude réelle* and *servitude personnelle* to replace them with *servitude* and *démembrement innomé (usufruit)* (paragraphe 16, note 5). That being said by the Court, it then proceeds to view the problem in dispute as one in terms of *servitude réelle* and *servitude personnelle*, as per usage existing prior to the enactment of the *Civil Code of Québec* of 1994.

25. In a Canadian perspective for instance, with regards to the creation of the common law in French, translation and the creation of neologisms for the purpose of translation of English common law to French common law, entrusts a substantial if not an essential role to caselaw. In other words, caselaw is the core of the common law.[36] It must be remembered however that in a contemporary perspective, legislation plays an important if not an essential role in the construction of common law and as a result in the creation of neologisms. In this context, Didier is of the opinion that both legislation and caselaw play an essential role in the creation of neologisms. In fact, their role far exceeds that of any other policy-guided body of legal translation such as *PAJLO*.[37]

26. As mentioned earlier in connection with legislation, the legislator and the judiciary sometimes intervene directly to replace the meaning of a word and thus modify the usage.[38] In the absence of such specific intervention by the court, neologisms created by the latter will be subject to usage. In other words, *l'usage en aval* (as opposed to *usage de création*) will ultimately be the authority that consecrates or rejects neologisms created by the courts.[39] Moreover, caselaw, as *usage en aval*, will itself consecrate or reject a neologism created by another source. This leads us to conclude, as we did in connection with the role of legislation in the creation of neologisms, that caselaw plays a dual role in the creation and retention of neologisms in legal language, and when it exercises this role, as creator, it will eventually be subject to consecration or rejection by usage, as manifested in legislation and in the legal literature considered as institutional facts. On the other hand, caselaw can play the same role as usage as an institutional fact to either consecrate or reject a neologism created by another source. To recapitulate, as a source of neologisms, caselaw may play a role of persuasion,[40] of consecration or rejection depending on the circumstances.

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36. E. DIDIER, *op. cit.*, note 17, p. 213.
37. *Id.*, p. 257. See in particular the neologisms created by the federal laws regarding harmonization cited at *supra,* note 28.
38. *Id.*, p. 283.
39. *Id.*, p. 282, para. 496.
40. See E. DIDIER, *id.*, p. 347.

1.2.3 Legal literature, dictionaries and encyclopaedias

27. Doctrine,[41] as a traditional source of law, also plays an important role in the creation and consecration of neologisms in law. In this context, doctrine covers a vast spectrum. For one, it includes legal literature, encyclopaedic dictionaries, dictionaries, critical dictionaries[42] and critical lexica.[43] In addition, doctrine includes the work of academic scholars in the area of jurilinguistics (*"droit de la traduction"*).[44] Last but not least, the type of work done by *PAJLO* plays an important part in the creation of neologisms through its mandate of translation of the common law in French (common law *en français* : CLEF) and civil law in English (*droit civil en anglais* : DCA). It is worth noting though that CLEF and DCA account for a double source in the creation of neologisms. They appear as doctrine in its conventional written form, and they are above all the creation of a policy-driven enterprise aimed at promoting Canadian law in both official languages. Although the legislator does not play a direct role in it, there is an officially led approach whereby some of the work prepared by officials is summed up in a legal lexicon aimed at "suggesting" neologisms where usage had not yet played its role of translation or where confusion set in through the existence of competing terms.[45]

28. From a purely linguistic perspective, the dictionary is thought *a priori* to represent the ultimate authority in the creation and/or determination of neologisms. In our opinion, this is the result of its traditional role. In the 17th and 18th centuries, the *Dictionnaire de l'Académie* in France played a fundamental role in imposing a monopoly on the creation of neologisms.[46] Historically, the role of the dictionary has been

41. The word doctrine is intended to include both dictionaries and encyclopaedias.

42. B. QUEMADA, *op. cit.*, note 12, p. 229 (the author discusses the role played by critical dictionaries).

43. See for instance S. BLAIS, *op. cit.*, note 12.

44. E. DIDIER, *op. cit.*, note 17, pp. 208–209.

45. On the political nature of the CLEF see : E. DIDIER, *id.*, pp. 208–209.

46. M. MORMILE, *op. cit.*, note 21. See also : F. GAUDIN, L. GUESPIN, *op. cit*, note 11.

said to be multiple. For some, dictionaries are merely a confirmation of usage.[47] It is also said of the dictionary that it serves as a lexicographic filter, an inventory or a mere aid.[48] Thus, the dictionary does not seem to play the unequivocal role that one might think.

29. What is the extent of the authority of doctrine in its general sense? It can be argued that dictionaries, given the specialization of their creators, and their multiple functions, might be thought to have the most extensive authority of all sources of doctrine, but that is not tantamount to ceding to lexicographers the authority to impose a term, its definition or any neologism for that matter on their audience. For legal actors in general, and particularly the courts, dictionaries in a legal perspective are said to be admitted not as evidence but as a check to the memory and understanding of the tribunals. Dictionaries do not play a normative or directive role in law.[49] In the legal perspective, special attention must be paid to the contextual meaning of terms in light of which, pure dictionary meanings do not bind the courts, which are called upon to interpret legislation. This means that in a particular context, usage can override dictionary meanings. One well-known example is a famous Ontario case where the court was called upon to decide whether a mushroom was to be regarded as a vegetable, as it is in common parlance, or whether the dictionarial meaning of fungus was to prevail. The court favoured the meaning found in usage for that was the legislatòr's intention.[50] In a purely prescriptive perspective, it is fair to say that the dictionary has at best, a moral authority where it will consecrate usage.[51] And where

47. James L. WEIS, "Jurisprudence by Webster's. The role of the dictionary in legal thought", (1987-1988) 39 *Mercer L. Rev.* 961, 968. See also BBC NEWS, "Farmers Stew over Couch Potato", [Online]. http ://news.bbc.co.uk/1/hi/uk/4108964.stm, June 20, 2005, (consulted June 10, 2008), ("Dictionaries just reflect the words that society uses").

48. Paul WIJMANDS, "Pour une redéfinition du néologisme lexicographique", in *La banque des mots*, 29 (1985), 11, 13–20.

49. J. L. WEIS, *loc. cit.*, note 47, pp. 963–964.

50. *R.E. Ontario Mushroom Co. Ltd. et al., Leareie et al.*, (1967) 15 O.R. (2d) 639, D.L.R. 3d 431. See also *Nix* v. *Hedden*, 149 U.S. 304 (1893) where Justice Gray of the U.S. Supreme Court classifies the tomato as a vegetable as opposed to its dictionarial classification of fruit.

51. F. GAUDIN, L. GUESPIN, *op. cit.*, note 11, pp. 235–236.

terms that make up *le langage vivant* may eventually face extinction, the dictionary can be said to play a merely historical role.[52]

CONCLUSION

30. The question raised at the outset was whether disgruntled potato farmers can successfully call upon the editor of the OED to delete the term "couch potato" from its lexicon.[53] The question was therefore to determine whether lexicographers approached by the disgruntled farmers played a normative role in regards to neologisms arising from usage.

31. In order to answer our question, we have analysed and reviewed the available sources. Because we are interested in the question from a more legal perspective, we have not only limited our discussion to linguistic dictionaries in general but we also extended it to law's traditional sources in addition to usage. We have thus scrutinized usage, legislation, caselaw and doctrine *lato sensu*.

32. We have concluded that each traditional source can initiate the creation of a neologism. However, a neologism is thereafter necessarily submitted to the other sources whereby each source plays the role of usage with respect to the other. In our view, only usage can stifle a term and, because the consecration of a term by dictionaries carries with it a historical aspect in light of the historical role of the dictionary, absolute extinction of a term appears to be impossible. Therefore, "couch potato" in *Oxford's Dictionary* is a

52. M. MORMILE, *op. cit.*, note 21, pp. 84–85.

53. It is quite amusing to note that in researching the present paper, it was brought to our attention that "mouse potato" derived from "couch potato" was consecrated by the 2006 edition of *Merriam-Webster's Dictionary*: Cyberpresse. "Le verbe 'Google' entre au dictionnaire, July 10, 2006" [Online]. http ://www.cyberpresse.ca/apps/tbcs.dll/article?AID=/20060707/CPACPUEL/60707032. Also, the ubiquitous McDonald's recently made a claim similar to that of the potato farmers: Rebecca SMITHERS, "Fastfood Chain Wants Rewrite of 'insulting' McJob Entry in OED [Oxford English Dictionary]", *The Guardian*, [Online]. http ://www.//business.guardian.couk/story/0,,2086791,00.html. See also Laurent GREILSAMER, "Rien ne vaut une citation bien couillue", *Le Monde*, September 11, 2007, [Online]. http :www.le monde.fr/web/imprimer_element/0,40-0@2-3232,50-953294,0.html (consulted September 11, 2007).

consecration of usage and even an eventual extinction cannot erase it for the dictionary will always play a historical role.[54]

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