MACKENZIE AND LESUEUR: HISTORIANS' RIGHTS

CAMERON HARVEY AND LINDA VINCENT*

Three biographies have been written of William Lyon Mackenzie. Charles Lindsey, Mackenzie's son-in-law, wrote a sympathetic one which was published in 1862, shortly after Mackenzie's death. In 1956, William Killborn's very readable biographical novel, *The Fire Brand,* was published. During 1906-08, W.D. LeSueur wrote his work on Mackenzie; its publication was suppressed for 71 years.

We are not competent to comment on the significance of LeSueur's book or on its merit from an historical point of view. Suffice it to quote the editor, A.B. McKillop from his Introduction: "William Dawson LeSueur's 'Mackenzie' was the first truly critical biography to be written in Canada. It stood as a direct repudiation of the memorializing tendency of virtually all of its predecessors . . . . Critical, yet judicious . . . . it also declined to invoke the 'Great Man' theory of historical change made popular by Thomas Carlyle. . . .LeSueur clearly felt [that complex economic, social and political forces seemed somehow to thwart the ability of the individual to shape his own destiny]. . . .His whole criticism of contemporary political practice was that the assertion of individual moral authority was thwarted by forces over which the single politician had no control. That he did not make a 'Great Man' version of the Canadian past in his study of Mackenzie was partly due to his awareness as an historian that such social, political and economic forces were important factors in the process of historical causation. Partly, too, LeSueur simply did not see Mackenzie as a positive moral example worthy of emulation."[1]

Professor McKillop has also described the thesis of the book in these words: "that social and political conditions made the advent of Responsible Government [in Canada] inevitable and that Mackenzie merely prolonged its coming."[2] To the *Makers of Canada* series for which the book was written, to conventional historical thought of the day, and especially to the Mackenzie-Lindsey-King family, this was heresy. Thus, one can appreciate another description of the book by Professor McKillop, that it is a testimonial to "one man's sustained commitment to scholarly enquiry."[3]

Our comment will be confined to the two court cases which arose out of the writing of LeSueur's biography of Mackenzie. But first, a few words about William Dawson LeSueur and about Professor McKillop, the editor of the recent edition of LeSueur's book, are in order.

LeSueur's Biography of Mackenzie

Who was W.D. LeSueur? He lived from 1840 until 1917. Professor McKillop sums him up as "the most wide-ranging Canadian-born intellectual of his generation,"[4] and "a man whose place in the intellectual history

---

* Both of the Faculty of Law, University of Manitoba.

1. W.D. LeSueur, *William Lyon Mackenzie: A Reinterpretation,* A.B. McKillop (ed.) (1979) xxiv-xxv.
2. A.B. McKillop, *A Critical Spirit: The Thought of William Dawson LeSueur* (Carlton Library Series No. 104) 255.
3. *Id.,* at 261.
4. *Id.,* at ix.

of Canada was a substantial one in his day, but who has largely been forgotten in ours."[5] Vocationally, LeSueur spent his life in the Post Office Department in Ottawa. In addition to becoming a senior civil servant, LeSueur was a major, prolific social essayist and historian for the last 47 years of his life. "By the twentieth century, LeSueur was well established as Canada's leading native-born social critic. In 1901 Queen's University honoured him with a Doctor of Laws degree. In 1912 his long service to the Royal Society of Canada was rewarded with his election to its Presidency."[6]

Professor McKillop, LeSueur's sponsor today, is a history professor at the University of Manitoba. This edition of LeSueur's book on Mackenzie is the second LeSueur book which Professor McKillop has edited. The other is a collection of LeSueur's writings.[7] In both books Professor McKillop has added excellent notes and commentary.

After the first version of his biography of Mackenzie was stifled, LeSueur wrote a revised emasculated version which was accompanied by a preface, in which he gave his side of the controversy concerning the first version. The revised version was never published. Professor McKillop has had published LeSueur's first version, together with the preface to the revised version.

In his book, *A Critical Spirit,*[8] Professor McKillop tells us that upon LeSueur's retirement from the Post Office Department at the turn of the century he was able to devote all of his time to reading and writing. He turned from political and moral essays to historical endeavours, including a biography of Count Frontenac for George N. Morang's *Makers of Canada* series. LeSueur was added by Morang to the editorial board of the series, and in this capacity, had occasion to read a manuscript on Mackenzie. On LeSueur's advice, the manuscript was rejected. Morang then asked LeSueur to do the Mackenzie book. Understandably, LeSueur refused. Another scholar was lined up, but later withdrew. Morang prevailed on LeSueur to undertake the project.

"Through a mutual friend. . . .LeSueur established contact with Charles Lindsey, in whose possession were the Mackenzie papers. After a personal interview with Lindsey, *an arrangement* was made whereby LeSueur was to live in the Lindsey home in Toronto to examine at his leisure Mackenzie's correspondence and newspaper writings. During the interview . . . LeSueur indicated that his biography was to be part of the 'Makers of Canada' series; but he did not mention that he had been responsible for the rejection of [the other] . . . book. The interview was satisfactory to all parties. Despite the fact that a mutual friend had informed the Lindseys that LeSueur was a 'Tory' (a label which LeSueur later disavowed in court) [and despite intermeddling by Mackenzie's grandson W.L.M. King who wanted LeSueur off the project] the family was satisfied that he would write a 'fair' biography of its forebear."[9] King continued to intervene. Morang fretted.

5. *Supra* n. 1, at viii.
6. *Supra* n. 2, at xvii.
7. *Supra* n. 2.
8. *Id.*, at 247 ff.
9. *Id.*, at 249- 50 (Emphasis added).

LeSueur offered to withdraw, but was urged by Morang to continue; he responded fairly frankly to Morang's periodic anxious inquiries and suggetions on the approach that he was taking. LeSueur finished the book in the spring of 1908. Morang's rejection of the book stunned LeSueur and he offered to repay his $500 advance in return for the recovery of his manuscript. Morang refused. LeSueur acceded to a request of George Lindsey, son of the by then deceased Charles Lindsey, to return all of the Mackenzie papers which he had, but he refused to give up his own notes.

LeSueur v. Morang

In order to recover his manuscript, LeSueur sued Morang. LeSueur won at trial and the trial judgment was upheld by the Ontario Court of Appeal and the Supreme Court of Canada.[10]

The argument advanced by Morang in defence of his refusal to return LeSueur's manuscript, was that since he had purchased it, property in it had passed to him and, therefore, he could do whatever he chose with it. This argument found favour with Moss, J.A. of the Ontario Court of Appeal and with Idington and Anglin, JJ. of the Supreme Court of Canada. Dissenters all, they remarked that the contract between the plaintiff LeSueur and the publisher Morang was to be found in correspondence between these two gentlemen; there was no formal arrangement. There was no mention of the author's rights or of the publisher's obligations, should the manuscript be rejected for publication. It was clear that this possibility had not entered the mind of either party at the time of contracting. In the absence of express agreement, these jurists reasoned along the lines of ordinary sale of goods law, that the contract called for the production of a manuscript on the life of an historical figure in return for a purchase price of $500. LeSueur had produced the work, turned it over to the defendant, and had been paid for it. The purchaser, finding the manuscript did not meet his requirements, was under no compulsion to return it to the seller. On the contrary, rejection was at his option. On his side, the seller, having received his tender of the money received from the purchaser. There was no need to imply any other terms into this arrangement. Idington, J. thought that the work done here was akin to the product of any workman, and Anglin, J. was of the opinion that LeSueur had merely been employed to do a particular task and having done it, property in the product became that of the employer.

The majority in both the Ontario Court of Appeal and the Supreme Court of Canada were persuaded that the arrangement between Morang and LeSueur was no ordinary contract for the sale of goods. As Meredith, C.J.O. pointed out, the plaintiff, "was not selling a pig or any other goods, wares, or merchandise; he was selling the offspring of his intelligence and

10. *LeSueur* v. *Morang & Co. Ltd.* (1910), 20 O.L.R. 594 (C.A.); aff'd. (1911), 45 S.C.R. 95.

education, a thing the chief value of which was in its intangible properties."[11]

An author, said Garrow, J.A., contracts for publication out of two motives, pecuniary gain and enhancement of literary reputation. It is plain that publication is at least part of the consideration he expects to receive. Therefore, a term is necessarily to be implied in such a transaction, to the effect that if publication is refused, for whatever reason, then the contract is at an end. No property in the manuscript passes, and each party must return the other to his original position. Morang must return the work; LeSueur must return the purchase price.[12]

The Courts were willing to imply such a term because of the nature of the contract and its subject matter. They drew comfort secondly from an analysis of prior dealings between Morang and LeSueur (the Frontenac book). There, publication had been promised by Morang and the terms of that agreement could be regarded as having been incorporated by reference into the contract concerning the Mackenzie book. Davies and Duff, JJ. of the Supreme Court were especially struck by this factor.

The first rationale is the more interesting and more important. It indicates an understanding that contracts having to do with artistic values are a breed apart from ordinary commercial concerns. Fitzpatrick, C.J.C. said, "After the author has parted with his pecuniary interest in the manuscript, he retains a species of personal or moral right in the product of his brain."[13] A publisher who purchased a manuscript, he said, could not change it to suit his particular religious or political views, or deny the author the right to make corrections to it prior to publication, or publish it as the work of another. Similarly, a purchaser could not buy a manuscript with a view to publication, and then be allowed to keep it after refusal to publish. Given the nature of the contract then, publication was tacitly understood to be an integral part of the consideration. The consideration having failed, the plaintiff could seek the return of the manuscript upon return of the $500. Duff, J. of the Supreme Court went so far as to say that to allow Morang to retain this manuscript would, in these circumstances, amount to a "monstrous" fraud on LeSueur,[14] and he found a resulting trust of the work in favour of the plaintiff.

The idea of moral rights is recognized legislatively in the *Copyright Act*,[15] but the *LeSueur* decision shows judicial recognition of these rights even where no question of copyright is involved. Dual rights of commercial exploitation and control of one's artistic reputation thus arise upon the creation of an intellectual work. These rights are protected by statute or by necessary implication in contracts concerning such products of the mind.

---

11. *Id.*, at 604 (C.A.).

12. The Courts also contemplated that LeSueur could have maintained an action against Morang for damages for loss of expected increase to his reputation, but, since LeSueur had abandoned such a claim, did not deal further with it.

13. *Supra* n. 10, at 97-98 (S.C.C.).

14. *Id.*, at 119.

15. R.S.C. 1970, c. C-30, s. 12(7).

Unfortunately, LeSueur fared poorly in his next round of appearances in court.[16] Far from championing the artistic rights of authors, the Courts took a narrow view of the transaction involved and, in the result, LeSueur was prohibited from making use of the manuscript he had fought so hard to retrieve. How did it come about that he could not freely publish this manuscript which was judicially declared to be his property?

Lindsey v. LeSueur

The Lindsey family brought an action for an injunction to prevent LeSueur from publishing his book about their relative William Lyon Mackenzie. They had probably been behind Morang's refusal to part with the manuscript[17] and may have financed the defendant's case. This time they were successful and achieved a unanimous judgment of the Ontario Court of Appeal (including three of the Judges who had ruled in LeSueur's favour in the earlier case), awarding the injunction they sought.

The Lindsey family based its claim on a breach of contract or a breach of confidence by LeSueur stemming from the arrangement they had with him which had given him access to those Mackenzie's papers in their possession. At trial, Britton, J. awarded the injunction on the basis of breach of contract and good faith. In the Court of Appeal, Meredith, C.J.O., giving the judgment of the Court, seemed to say that either on the basis of contract or confidence the injunction sought could be granted. He declined to state exactly on which basis it was given. It is submitted that only on the basis of breach of contract, and even that basis is doubtful, should this judgment have been given. If it is an example of a breach of confidence action, then it is not consistent with later decisions outlining the essentials of such an action and is furthermore unfortunate in its ramifications.

The contract involved seems to have been that in return for access to the Mackenzie papers, LeSueur gave an undertaking to write a fair and friendly study of William Lyon Mackenzie. The study was to portray him as one of the *Makers of Canada* and was to be suitable for publication in Morang's series of that name. Since the resulting book was judged by the publisher not to be in keeping with the title of the series, the plaintiff claimed to be entitled to prevent LeSueur from using the material in any other publication. The injunction was granted to stop this alleged breach of contract. LeSueur was ordered to return to the plaintiff all materials he had taken from the Mackenzie papers plus any copies or extracts therefrom. As well, LeSueur was enjoined from publishing or making public any information he had gleaned from those papers.

It is difficult to see how the arrangement entered into could be regarded as a contract and, indeed, the Courts spent little time in characterizing it as such. The Court of Appeal decision does not even use the word "contract" but refers to the arrangement as an "agreement." The difficulty lies in finding an intention to create legal relations. It is hard to see this as anything

16. *Lindsey* v. *LeSueur* (1913), 27 O.L.R. 588 (H.C.); aff'd. 29 O.L.R. 648 (C.A.).

17. In the *LeSueur* v. *Morang* decision at the Court of Appeal level, Meredith, J.A. (as he then was) said the defendant was "altogether in the wrong" and was only defending the action "at the instance of interested third persons." *Supra* n. 10, at 603.

more than a gentlemen's agreement, at best. As LeSueur himself points out in his preface to his intended publication of the rewritten life of Mackenzie, for an historian to make any agreement which would prevent his free and honest assessment of historical facts, would be unthinkable. It would be "an absurd and discreditable engagement."[18] It would involve "the immorality of manufacturing historial opinion by contract."[19]

Certainly, according to his evidence, LeSueur had no thought that his access to the papers was in any way circumscribed, and the Lindsey family made no such stipulation expressly. Rather, this undertaking on LeSueur's part was implied by the Courts from the nature of the transaction. One wonders why the Courts should have implied contractual intent here. Certainly there was no commercial necessity, and in non-commercial transactions the onus lies fairly heavily upon the party alleging the breach of contract to prove contractual intent.

It might be said that the Courts were more inclined to the view that LeSueur's obligations arose from the fact that he misrepresented himself at the interview with the Lindsey family's representative.[20] LeSueur did not reveal that he was the person who was responsible for Morang's rejection of an earlier manuscript on Mackenzie's life on the basis that it was too favourable to the man. Nor did he reveal, it was said, that he had a pre-existing bias against the view of Mackenzie as a builder of this country. The trial Court characterized this silence as amounting to fraudulent misrepresentation. Again, this conclusion is open to criticism. On the evidence, the Lindsey family knew at the time of the interview that LeSueur did not hold the same political views as they, and also knew that Mackenzie King was opposed to LeSueur's being chosen to do the biography and why. Also, LeSueur could not be faulted for his failure to reveal his involvement in the rejection of the earlier biography — he had no duty to speak and silence in that instance, is not regarded as misrepresentation.

The Court of Appeal was reluctant to conclude that there was fraudulent misrepresentation involved, although that possibility was not ruled out.[21] If there had been fraudulent misrepresentation or deceit involved, then presumably the injunction would have issued to prevent the defendant's profitting from tortious behaviour.

In the absence of tort or breach of contract, how could this injunction be sustained? Is there room for such a result on the basis of a breach of confidence action? Reference was made in argument to the case of *Prince Albert* v. *Strange*[22] and in the decision itself to the case of *Morison* v. *Moat*.[23] Both are cases concerning the intended use of information such use being prevented by injunction. In both cases it seemed that a breach of con-

18. *Supra* n. 1, at xliv.

19. *Id.*, at xlvi.

20. *Supra* n. 16, at 655 (C.A.).

21. *Id.*, at 657.

22. (1849), 13 Jur. 109 (Ch.).

23. (1851), 9 Hare 241; 68 E.R. 492 (Ch.).

tract had probably occurred but the actual decisions could not possibly have been founded on a contractual breach because the defendants were not parties to the contracts. Rather, the relief sought was granted on the basis that confidence had been reposed in a person who had then betrayed it. Neither the betrayers of the confidence nor their privies were to be allowed to publish or themselves make use of the information so gained.

There are difficulties in characterizing the *Lindsey* v. *LeSueur* decision as an example of a breach of confidence action. The major stumbling-block is that the information LeSueur gathered from the Mackenzie papers was a matter of public record. He learned nothing new, with the possible exception of one anecdote, from these documents. The only advantage to him was that he was saved more tedious research, as this needed material had been gathered into one place. In fact, because of the injunction, LeSueur was forced to re-create his manuscript from different sources and was able to do so. If it were not clear at the date of this case, it has subsequently become clear that the essence of a breach of confidence complaint is that secret or confidential information is about to be, or has been betrayed.[24] Also, given that the Lindsey family allowed LeSueur access to the papers with a view to publication, they could hardly have complained of a breach of confidence.

Perhaps less obvious, but no less troublesome, is this question: assuming confidence existed, whose confidence was involved? Surely it is only the person whose secret is about to be or has been revealed who may maintain such an action.[25] The information was about William Lyon Mackenzie, not about the Lindseys. What status had they to bring this action? What interest of theirs was involved? It might be said that they, as keepers of the ancestral papers, were thus also seized with the responsibility of tending the shrine; that they should have the legal ability to maintain the mystique against those who would cast a different light onto the relics in the shrine. If so, there is another question that must be raised: has the public any interest in the revelation of the secret? It is clear that the obligation of confidence is over-ridden in matters of public interest.[26] This defence was recognized (though not applied) in a case referred to by the Court of Appeal in support of its decision.[27] In its infancy, this defence was confined to matters involving criminal or tortious behaviour. It can be argued that it should be applied to matters concerning public figures. Do we not have a right to know the truth about important historical men and women who are part of our heritage? In view of the very wide expansion of this concept in recent years,[28] it would seem that such a question might well have been answered in the affirmative.

24. *See Mustad* v. *Allcock*, [1963] 3 All E.R. 416 (H.L.). Although not reported until 1963, this case was decided in 1928.

25. *See Fraser* v. *Evans*, [1969] 1 All E.R. 8 (C.A.) and *Philip* v. *Pennell*, [1907] 2 Ch. 577.

26. *Initial Services Ltd.* v. *Putterill*, [1968] 1 Q.B. 396 (C.A.).

27. *Laidlaw* v. *Lear* (1898), 30 O.R. 26 (H.C.).

28. *See Hubbard* v. *Vosper*, [1972] 1 All E.R. 1023 (C.A.) and *Woodward* v. *Hutchins*, [1977] 2 All E.R. 751 (C.A.).

Conclusion

As an example of breach of confidence, then, the *Lindsey* decision must be closely questioned and is probably not sustainable. It can perhaps be sustained on the basis of breach of contract, but, even there, doubts are raised. In the final analysis, this decision which resulted in the suppression of a scholarly work for some 70 years, may have been based on nothing more solid than the Ontario Court of Appeal's horror at what it regarded as a breach of etiquette. "If the document had been intrusted to the appellant [LeSueur], as he alleges, without any terms being imposed as to the use to which they [sic] should be put, *good taste, at least,* would have required that, when he found that he could not honestly write of Mackenzie as a 'Maker of Canada', he should have given to the respondent or destroyed the extracts and copies he had made, and refrained from making use of the information which he had been afforded by the respondent."[29] LeSueur not having such refined sensibilities, the Court of Appeal was happy to find a contractual duty which would compel him to behave according to his unfelt moral duty.

29. *Supra* n. 16, at 656 (C.A.) (Emphasis added).