

WHEN THE LOSERS WON

Norman Ward

When one considers how many years parliamentary institutions have existed both before and after Confederation, in the ten Canadian provinces, in the two territories, and in the federal Parliament, it is not surprising, that a number of very unusual incidents have taken place. In this article the author brings to light an oddity that happened not once, but twice, in Saskatchewan!

Legislatures commonly accept the winner of an election in any constituency as the person to seat on the floor of the chamber, but on two occasions the Saskatchewan Legislative Assembly has, for good reasons, decided to seat the runner-up. The assembly did not, either time, merely unseat the winner and vacate the seat to be filled through the electoral process. Both times, the original winning candidate whose company was lost to the assembly was a government supporter whose fellow members on the majority side acquiesced in his departure.

The first occasion was a feature of Saskatchewan's first election after it was created as a province in 1905. The general election of December 13, 1905, produced these results in Prince Albert, a sprawling lightly populated constituency which excluded Prince Albert City: Peter David Tyerman (Liberal) 411; Samuel James Donaldson (Provincial Rights) 316. *The Saskatchewan Executive and Legislative Directory, 1905-1970*, published by the Saskatchewan Archives Board, adds to its record of that polling a laconic footnote: "On April 2, 1907, by order of the Legislative Assembly, 151 votes recorded for Peter David Tyerman were set aside, and Samuel James Donaldson was declared duly elected."

Behind the footnote lies an arresting fact: the reason 151 of Tyerman's votes were set aside was that they were recorded in three remote polling divisions where in fact no poll had been held. How the votes were recorded and reported was never made entirely clear, but nobody, including Tyerman, appeared to dispute that they were fraudulent. He attempted to resign the seat on January 22, 1906, but failed because his return

had not yet been gazetted. At the same time Donaldson petitioned to be awarded the vacancy. The assembly agreed to the petition on April 2, 1907, in a lengthy motion which, after reciting in detail the relevant facts and related precedents, included as its substantive portion: "That the Clerk of the Executive Council be summoned by Mr. Speaker to attend the Bar of the House and amend his certificate relating to the return of the member elected to represent the electoral Division of Prince Albert at the election held on the 13th December, 1905, by inserting the name of Samuel James Donaldson in lieu of the name of Peter David Tyerman."

One could at least argue that the legislature in that motion seated a man who had no more right to the seat than any other qualified citizen. When Tyerman's resignation became effective, the seat was vacant. Had he not resigned, and action been possible under election law, (technically it was not) the result would again have been a vacancy. But when the legislature, in its might, decided with the support of both sides in the house to seat Donaldson, there was nobody to say it could not do so.

The incident might well have remained an incident, a curiosity in Saskatchewan's constitutional history; except that it happened again, in circumstances which made the Tyerman-Donaldson case an important precedent. In the provincial general election of June 26, 1929, Estevan, a constituency which had gone Liberal in every election since its creation in 1908 save one (1925, when an Independent won) was taken again by the same party. The winner, for his own reasons, shortly resigned, and in the ensuing by-election on December 23, 1930, the polling, after an official recount, yielded these

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results: David McKnight (Conservative) 2,700; Norman McLeod (Liberal) 2,686. Since the first count on election night had shown the Liberal McLeod the winner by 5 votes, the Conservatives' first victory in the seat was, at best, a precarious one.

It became more so when evidence began to accumulate which suggested that the ballots counted by the judge in the recount were not all the same ballots as those tallied by the returning officer. The local gossip about flagrant tampering between count and recount with the ballots in four boxes became too widespread — and apparently too well-founded — for the government to ignore, and it appointed a well-known lawyer to investigate the charges. His findings were conclusive: the ballots had in fact been tampered with before the recount.

The new Cooperative government, beset from the start by pressing problems of deepening depression and drought, had little desire for yet another distracting and expensive by-election and the premier, Dr. J.T.M.

Anderson, a Conservative, reportedly suggested that his party would withdraw its petition for the recount if the Liberals would withdraw their appeal against it, with both sides agreeing to accept the returning officer's original count. The former premier, now leader of the opposition, James Gardiner, thought it was too late for that, since an official recount had been held which in effect upset the count on election night.

After considerable maneuvering both sides decided to call the precedent of 1907 to their aid, and a motion whose substantive terms were identical to that of the motion of 1907, with the names and dates changed, was moved and seconded by the premier and leader of the opposition on February 9, 1931. Again the runner-up was seated.

One footnote remained. The motion of 1931 followed that of 1907 as far as it went, but added new words: "without prejudice to the rights of any person with respect to the said election under *The Controverted Elections Act* of the said Province." The parties' initial agreement on the wording of that proviso soon broke down in argument over what the proviso meant, and in due course the Liberal McLeod, having been awarded the seat by the legislature, finally lost it late in 1932 because it was shown to the courts' satisfaction that unqualified persons had voted in the by-election anyway. McLeod's loss of the seat (there was no candidate left to whom the legislature could have given it) led the Liberals to make one last attempt in 1933 to present a bill that would have re-seated him, but this time the majority supporting the government was giving Estevan a low priority. It killed the Liberals' bill, and the government left the constituency unrepresented until the next general election, in 1934. The government no doubt felt it was the least it could do.

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