

Is There a Lawyer in the House? The Declining Role of Lawyers in Elected Office

Fewer lawyers are being elected to Nova Scotia's Legislative Assembly in recent years. In this article, the author traces the decline over the past decades, provides some hypotheses as to why this trend has occurred, and analyzes what the relative absence of lawyers in a representative legislative body may mean. He cites the 1970s as a turning point for the decline of MLA-lawyers and suspects the shift from part-time work to full-time duties as an MLA, the relatively low salary compared to professional fees, and the poor post-politics job prospects, contributed to making the role less of a draw for practicing lawyers. The author also highlights skills lawyers may bring to the role of an MLA in terms of writing legislation and helping constituents with casework. He concludes by examining the Attorney General and Minister of Justice roles and the potential legal/constitutional questions that may arise if and when this cabinet position and the deputy minister position are occupied by non-lawyers.

Graham Steele

There is a common perception that lawyers dominate our elected assemblies. It was true at one time, but it is not true today.

In the May 2017 provincial general election in Nova Scotia, for example, the voters returned only two lawyers to a legislature with 51 seats. That is a post-Confederation low, both in absolute numbers and as a percentage of the seats.

This paper looks at the declining number of lawyers in the Nova Scotia assembly since Confederation, considers the possible reasons for the decline, then discusses a few implications.

Although this paper focuses on Nova Scotia, it is a reasonable hypothesis that the results would be similar across Canada.

Methodology: Where do the numbers come from?

To count the number of lawyers who have served in the Nova Scotia House of Assembly since Confederation, I started with a comprehensive biographical directory of Nova Scotia MLAs compiled by former legislative librarian Shirley Elliott.¹ That directory includes an occupational listing for almost all members up to 1983.

To bring the count up to date, I consulted the Nova Scotia legislative library about lawyer-MLAs who served since the end of Elliott's directory.²

This methodology produces good results, but we have to be a little cautious. What is a "lawyer"? Certainly it includes a person who has been admitted to the bar and who has practiced law. But should it include a person with a law degree but who was never admitted to the bar? Should it include a person who was admitted to the bar but never practiced?

Graham Steele served as a Nova Scotia MLA from 2001-2013. He teaches at the Rowe School of Business at Dalhousie University and is a member of the Nova Scotia Barristers' Society.

For the sake of consistency and simplicity, I counted an MLA as a lawyer if they are listed by Elliott as a “barrister”. For MLAs serving after the end of Elliott’s book, I counted them as a lawyer if they were, to my knowledge, admitted to a bar. That omits two MLAs who held a law degree, but were never admitted to a bar.

The next step was to compile a spreadsheet listing the sessions of the House of Assembly in which the lawyer-MLAs served. A “session” is the entire period between general elections. For example, the first general election after Confederation elected the 23rd House of Assembly. The current House, elected in 2017, is the 62nd Assembly. This spreadsheet allows us to count how many lawyers served in a given session.

One quirk of this methodology is that it is possible for some lawyer-MLAs to have served in the same session, but not at the same time.³

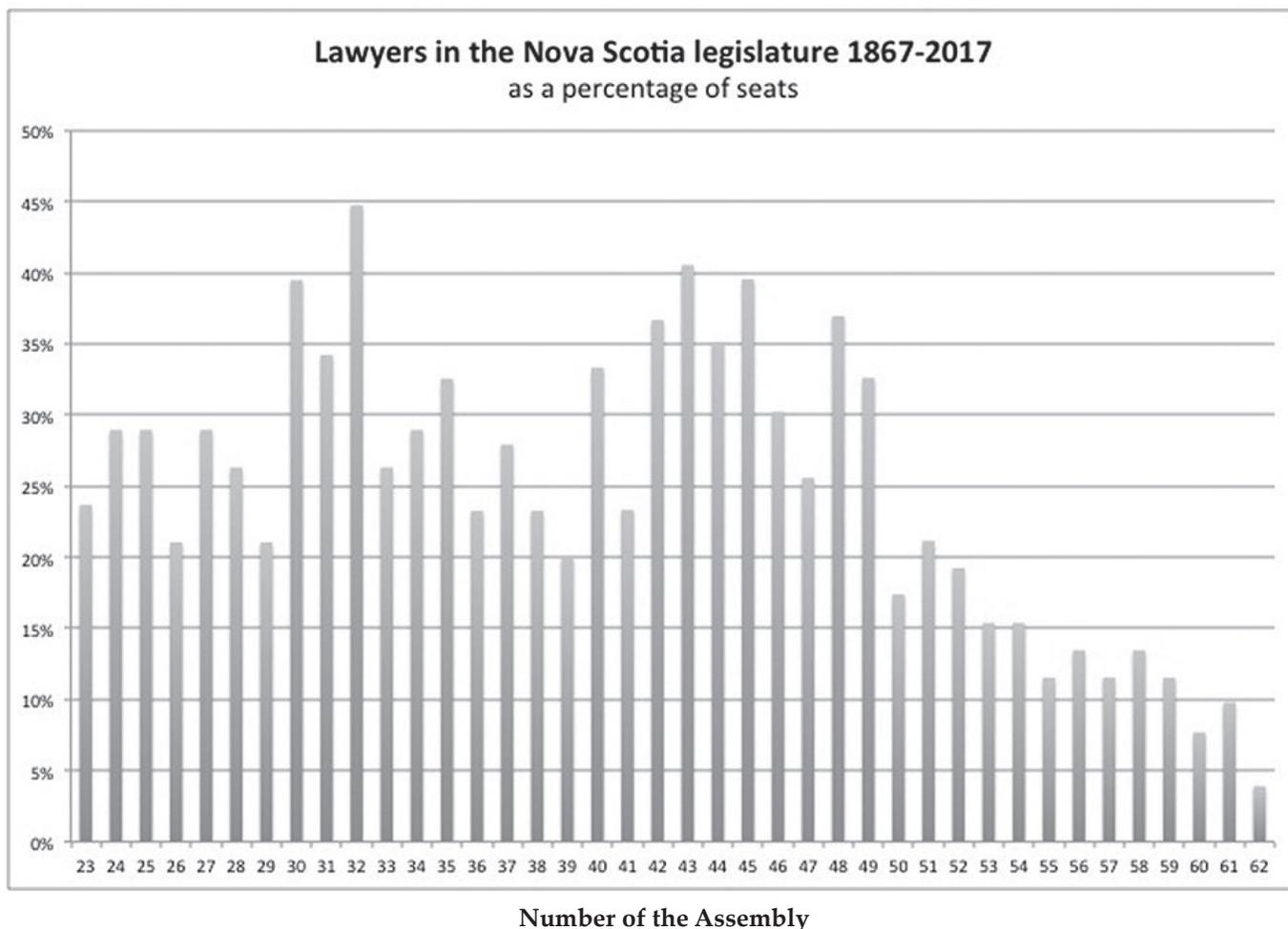
Results: What do the numbers show?

The results are shown in Figure 1. The most striking result is the steady decline in the percentage of lawyers in the House, starting in the 1970s and continuing to the present day.

Since Confederation, 155 lawyers have served in the Nova Scotia House of Assembly.

During that time, the total number of seats available during general elections was 1711. Taking into account the fact that many lawyers were elected

Figure 1



more than once, and leaving aside the complications of partial terms and by-elections, 490 of the 1711 positions (28.6 per cent) have been filled by lawyers.

From Confederation in 1867 until 1974, the percentage of lawyers in the House of Assembly never fell below 20 per cent. In 1974 (the 50th Assembly) the percentage of lawyers dropped to 17.4 per cent, the first time it had ever been below 20 per cent. Since then the trend has been steadily downward, and the 2017 election (the 62nd Assembly) produced the lowest absolute number of lawyer-MLAs (two) and the lowest percentage of the House (3.9 per cent) since Confederation.

The highest percentage of lawyers was the 1902-06 House (the 32nd Assembly), which had 38 members, of whom 17 or 44.7 per cent were lawyers. The 1957-60 House (the 45th Assembly) also had 17 lawyers, but by that time the House had grown to 43 members, so the percentage was a little lower (39.5 per cent).

Of the 155 lawyers who have served as an MLA since Confederation, 17 became premier. That is remarkable, considering Nova Scotia has had only 27 post-Confederation premiers. Even more remarkable is the fact that in the 94 years from 1896 to 1990, a lawyer was premier for all but six years.

Analysis: What's the story behind the numbers?

How can we explain the steadily declining numbers of lawyers in the House of Assembly?

Inevitably, there has to be some speculation involved in trying to find an answer. What follows are the most likely explanations. There may be others.

The shift from part-time to full-time work

Prior to the 1970s, the work of an MLA was generally considered to be a part-time job. The House of Assembly held a spring sitting that typically lasted under two months. Being an MLA was quite compatible with continuing with one's regular occupation, and so that is what most MLAs with a professional occupation did.

After the 1970s, the work of an MLA was generally considered to be a full-time job. One former MLA-lawyer, first elected in 1978, told me that he tried

to carry on a practice after being elected, but it was not easy and required the co-operation of judges and opposing counsel. For example, he participated in a five-day trial that was held on five consecutive Mondays, because the House of Assembly did not sit during the day on Mondays.⁴ He gave up his law practice entirely after three years, when his legislative duties became heavier.

The shift from part-time to full-time work was not legislated or otherwise mandated, so it is difficult to pinpoint a precise point when the shift occurred. It seems to be generally accepted that a pair of NDP MLAs from Cape Breton, Jeremy Akerman and Paul MacEwan, changed the game in the 1970's by working full-time. They experienced electoral success which they attributed to their full-time constituency work.

Relatively low salary

Until the 1970s, the pay of an MLA was low, in keeping with the part-time nature of the work.

Jeremy Akerman, one of the MLAs who led the change to full-time work for an MLA, wrote a book about his time in politics. He noted how difficult it was to maintain his family on the meagre pay of an MLA.⁵ In 1970, when Akerman was first elected, the MLA indemnity was \$7,500.⁶ In today's dollars, that is about \$48,000. A salary at that level did not justify, then or now, giving up a professional practice.

As more MLAs worked full-time, or wanted to, the pay of an MLA grew. Today, in 2017, a Nova Scotia MLA's base salary is \$89,235.⁷ This compares with the base pay of a Member of Parliament at \$172,700.⁸

There is an additional salary for Cabinet ministers. In Nova Scotia, that is currently \$49,047,⁹ and for a federal Cabinet minister it is \$82,600.¹⁰ Those salaries—payable in addition to the base pay of an MLA or MP—are more compatible with the income of a practicing lawyer. It goes without saying, however, that a lawyer could serve in office for many years without any guarantee of holding a Cabinet position.

Although an MLA's base pay has grown, it likely does not match the average income of a Nova Scotia lawyer. A full-time practicing lawyer who wanted to be an MLA would have to give up some income,

perhaps a lot of income.¹¹ Pay for lawyers in the provincial public service very quickly outstrips the pay for MLAs.¹²

One reasonable hypothesis, then, is that standing for public office became less attractive to lawyers when being an MLA became a full-time position with pay lower than could be earned in the practice of law.

Post-politics prospects are lowered

Once MLAs started working full-time, another career-related question arose: what would happen when one's political career is over? For lawyers and other professionals who have left a practice to enter politics, there is some evidence that their post-politics careers are stunted.

The average MLA-lawyer in Nova Scotia has served 2.6 terms of office, and the median is two terms of office.¹³ In our political system the length of a term of office is variable, but it is typically about four years. That means a lawyer who enters politics as an MLA can typically expect to serve for 8–10 years.

Even a relatively short time in politics—perhaps just one term, or about four years—may cause the lawyer to lose a client base. After 8–10 years, that is a virtual certainty. Law firms are unlikely to be interested in hiring lawyers who do not have a book of business they can bring with them.

There is a fairly recent phenomenon of legally trained ex-politicians being hired as counsel to law firms (and other consulting firms). These roles appear to be mainly non-practicing, and in the nature of business development. They also appear to be mainly restricted to ex-politicians who reached the highest levels of public office, such as prime ministers and premiers, and senior ministers. For everyone else, post-politics employment prospects may be unpromising.

No path to the bench

At one time, there was a well-travelled path from politics to the bench. Going into politics was considered a stepping stone to the judiciary. In many cases, it eliminated the question of what the lawyer-MLA would do after politics.

Of the 155 lawyers who have served as MLAs in Nova Scotia since Confederation, 40 (25.8%) were later appointed to the bench. That is a remarkably high percentage. Some went directly from the legislature to the bench, while others had to wait a while.

That well-trodden path from politics to the bench no longer exists.

Modern practices of judicial appointment mean that fewer and fewer ex-politicians are being appointed. The last MLA to be appointed to a Nova Scotia court was Bob Levy (MLA for Kings South) in 1988.

Analysis: What are the implications?

Does it matter how many lawyers are in the House of Assembly?

MLAs are law-makers, but the work of a modern MLA goes well beyond anything to do with law, and there is little reason to believe that lawyers are better at the non-legal parts of the job than anyone else.¹⁴

Indeed, one might argue that lawyers have historically been over-represented in the House of Assembly. The recent drop in the number of lawyers may be seen as a re-calibration of the House's composition.

Nevertheless, there are two specific job functions for which legal training may provide an advantage: legislative work and constituency casework.

Legislative work

The assembly is the lawmaking body for the province. One of an MLA's core functions is to be a lawmaker.

While we surely do not want to assert that lawyers are inherently better at this function than others—at least some lawyer-MLAs have been spectacular failures¹⁵—we should not dismiss a lawyer's training and experience as being irrelevant to the law-making function.

A lawyer is more likely than other MLAs to have an understanding of the constitutional and legal framework within which the legislature and

government is operating. The constitutional division of powers, the *Charter of Rights and Freedoms*, judicial review of legislation, defamation, privilege—those are no small things for an MLA to be conversant with on the day they first walk through the doors of the House.

A lawyer also brings a ready-made knowledge of substantive and procedural law. A lawyer will understand the basics of contract law, tort law, property law, corporate law, and commercial law that give sense to the bills presented to the legislature for debate.

Based on my own experience as a legislator, I would suggest that a lawyer's training and experience can be of assistance to an elected member in at least the following ways:

- Understanding bills tabled in the House, and their implications.
- Translating policy ideas into legislative drafting instructions.
- Drafting amendments to bills, and analyzing amendments to bills tabled by others.
- Sifting through large volumes of documents to identify key issues.
- Understanding real and potential litigation in which the government is involved.
- Questioning witnesses in legislative committees.

Certainly non-lawyer MLAs can have or develop some or all of these skills, and not all lawyers have all of these skills. But an MLA with legal training is, one would hope, more likely to be able to perform these functions efficiently and effectively.

In particular, lawyers have a certain comfort level with legislation, and that is one of a legislature's two principal work products (the other being budgets).

It is very easy for lawyers to forget that, to the untrained eye, legislation is like a foreign language. It is not like any other kind of written material with which MLAs have had experience. When there are fewer lawyers in the House, there are fewer MLAs with the training and experience to work closely with legislation. There are also fewer MLAs to whom their colleagues can turn for advice.

With the relative paucity of lawyer-MLAs, an MLA who wants to evaluate legislation has limited options. The reality is that, in the hurly-burly of

legislative proceedings where time is often at a premium, most MLAs have to try to get by with no legal advice at all.

But let's not kid ourselves. Today's assemblies are largely rubber-stamps for the government's legislative program. Many MLAs do not read the legislation. There are many better, more politically advantageous uses of their time than to try to read, decipher and act on a personal understanding of the legislation that is before the House. In an era of rubber-stamp assemblies, perhaps the occupational composition of the House is irrelevant.

Constituency work

Casework is when an MLA acts as a sort of ombudsman for individual constituents who are having some kind of difficulty with government services.

Casework has come to dominate the working lives of modern Canadian politicians:

Besides the belief that casework is tied to electoral success, there is a more altruistic reason why MLAs do it: there are so many people who need help, and there's really nobody else to help them. Legal aid covers only the poorest and is mostly limited to criminal and family law. The non-profits are well meaning, but their resources are limited, and advocacy isn't usually why they were set up. Because the MLA has no job description, everything fits. So, when the casework call comes in, it's pretty well impossible to say no. You say yes, over and over, until one day you realize that casework is all you're doing.¹⁶

A lawyer who has been in private practice will find constituency casework familiar. Good casework involves good file management.

It's like a law practice, but without the timekeeping and billing.

Not all casework files involve a legal issue, but many do. It is difficult for example, to work on an immigration file without a basic understanding of immigration law. The same goes for social assistance files, workers' compensation files, and Canada Pension Plan files. In that respect, a lawyer-MLA is going to have an advantage over non-lawyers.

Analysis: When the Attorney General is not a lawyer

When there are fewer lawyers in the House, there is at least one other important issue: what happens when the Attorney General is not a lawyer? Does it matter?

Lawyers as Attorney General

In Nova Scotia, since Confederation, 32 lawyer-MLAs have served as Attorney General. That is not surprising, because it used to go without saying that the Attorney General would be a lawyer. When the government caucuses were well-stocked with lawyers, premiers would have no problem finding a lawyer to serve as Attorney General.

With the declining number of lawyers, it is getting harder for premiers to find lawyer-MLAs to serve as Attorney General. The Nova Scotia House of Assembly has not yet experienced a government caucus with no lawyer in it, but in recent years the number has been as low as one, as it is currently.

Nova Scotia's first non-lawyer Attorney General was appointed in 1993, and since then, there have been more non-lawyers than lawyers in the job.¹⁷

Attorney General as legal adviser

The Attorney General and Minister of Justice—which is a single position, despite the two-part title—has a unique role as a legal adviser.

The Attorney General and Minister of Justice is “the law officer of the Crown, and the official legal adviser of the Lieutenant Governor, and the legal member of the Executive Council”.¹⁸ Moreover, the minister “shall advise the heads of the several departments upon all matters of law.”¹⁹ The Attorney General has “the functions and powers that belong to the Attorney General of England by law or usage”,²⁰ which imports a special constitutional role within the context of responsible government.

Nova Scotia has a particularly painful history in delineating the role of the Attorney General.

In 1971, Donald Marshall Jr. was a young Mi'kmaq living near Sydney, Nova Scotia. He was convicted of a murder he did not commit. He spent eleven years in prison before being released. A public

inquiry was established into Marshall's wrongful conviction.²¹ The inquiry looked at what went wrong in Marshall's specific case, but also ranged widely over questions of racism in the justice system and political influence over prosecutions.

The opening paragraph of the inquiry report reads:

The criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983. The tragedy of the failure is compounded by evidence that this miscarriage of justice could - and should - have been prevented, or at least corrected quickly, if those involved in the system had carried out their duties in a professional and/or competent manner. That they did not is due, in part at least, to the fact that Donald Marshall, Jr. is a Native.

The inquiry led to the establishment of a Public Prosecution Service, under the direction of an independent Director of Public Prosecutions (DPP), and with a strict statutory delineation of the relationship between the DPP and the Attorney General.²²

The Marshall Inquiry was central to fixing the role of the Attorney General and Minister of Justice with respect to criminal prosecutions. Less clear is the Attorney General's role on the civil side, such as being the legal adviser of the Crown, the Cabinet, and the departments.

When the Attorney General is not a lawyer, one may wonder in what meaningful sense he or she can offer legal advice to the government.

The first non-lawyer Attorney General in Canada was Jim McCrae in Manitoba, appointed in 1988. There was a serious question at the time as to whether it was constitutional for a non-lawyer to hold the position of Attorney General, but the point does not appear to have been litigated back then. The point did come up in a recent British Columbia case, in which the BC Court of Appeal ruled that the Attorney General does not need to be qualified to practice law.²³

The BC Court of Appeal decision relies on some very careful interpretation of several BC statutes, so it is not clear that the case puts the issue to rest for the rest of Canada. The court essentially skated around the issue by noting that the deputy minister of justice was, as a matter of fact, a lawyer. Since the deputy minister was empowered to perform the functions of the minister, there was (wrote the court) no obstacle to having an Attorney General who was not a lawyer.

Interestingly, there is in Nova Scotia no legal requirement that the deputy attorney general be a lawyer.²⁴ Indeed, Nova Scotia recently advertised for the position of deputy Attorney General, and did not specify that the deputy had to be a lawyer. In the end, a very experienced lawyer was hired to the position.²⁵ A constitutional crisis was averted, at least until the inevitable day that a non-lawyer deputy minister of justice is appointed.

Chances are very high that we will continue to see non-lawyers as Attorney General, at least as long as premiers feel constrained by the constitutional convention that the cabinet should be comprised of elected members, with few and brief exceptions.²⁶

In an era when the number of lawyers in the government caucus is declining, a premier selecting ministers has very few choices. The premier may have other roles in mind for the lawyer(s) in caucus, if indeed there are any at all. It is constitutionally permissible to appoint non-MLAs to Cabinet, but that option creates a raft of other issues having to do with responsible government.

Like it or not, the era of non-lawyer Attorneys General is here to stay. Lawyers are turning away from elected office, and there is no reason to believe that trend is about to change.

Notes

- 1 Shirley Elliott, ed., *The Legislative Assembly of Nova Scotia, 1758-1983: a biographical directory* (Province of Nova Scotia, 1984). Elliott's directory is itself an update of a biographical directory prepared by the Public Archives of Nova Scotia. That directory covered the period 1758-1958.
- 2 MLAs are not anywhere required to file biographical data, including occupation, so there is no formal database. The library does its best to compile information both from public sources and from voluntary disclosure by MLAs, but it cannot guarantee the completeness or accuracy of its results.

- 3 An example may be taken from the 51st Assembly, which ran from 1978 to 1981. Gerald Regan, a lawyer, was elected in the 1978 general election as the MLA for Halifax Needham, but resigned his seat in February 1980 to run federally. Fisher Hudson, also a lawyer, was elected in a by-election in Victoria County in May 1980. Regan and Hudson did not serve in the House at the same time. Nevertheless, both show up as lawyers serving in the 51st Assembly. Nevertheless, these occasions appeared to me to be relatively rare, so I adopted the simplest counting method rather than delve into the time-consuming task of precise historical dating.
- 4 Personal communication with the author.
- 5 Jeremy Akerman, *"What Have You Done For Me Lately?": A Politician Explains* (Lancelot Press, 1977) .
- 6 Personal communication with the author.
- 7 Members' Manual: Members' Compensation, Expenses and Constituent Administration, June 2017, at page 10. Obtained from Nova Scotia legislature website, nslegislature.ca/pdfs/people/CompensationExpenses.pdf (accessed October 18, 2017).
- 8 Indemnities, Salaries and Allowances, Members of the House of Commons, obtained from Library of Parliament website, lop.parl.ca (accessed October 18, 2017).
- 9 See Members' Manual, note 7 above, page 10.
- 10 See Indemnities, Salaries and Allowances, note 8 above.
- 11 There is not any good public data on lawyer income in Nova Scotia. The legal recruiter ZSA publishes averages for Toronto, Montreal, Vancouver, Edmonton, Calgary and "Atlantic Canada": see www.zsa.ca/salaries (accessed October 24, 2017). For 2017, the salary range for a seventh-year lawyer in a large firm in Atlantic Canada is listed as \$90,000-\$110,000, which exceeds the salary of a Nova Scotia MLA.
- 12 The Nova Scotia Public Service Commission publishes pay scales for public-sector lawyers: see novascotia.ca/psc/employeeCentre/payScales.asp. The last published pay scale for Legal Services is for 2014-2015. There have been very modest increases since then. Using Compa Ratios of 1.00, the pay for a Solicitor 1 is \$87,072; Solicitor 2, \$99,950; Solicitor 3, \$109,112; and Solicitor 4, \$114,674. Managers earn more.
- 13 These figures are derived by totalling the number of post-Confederation terms served by each lawyer-MLA and then calculating the average and the median. The largish difference between the average and the median suggests that there is a wide distribution around the mean, i.e. many lawyer-MLAs served fewer than 2.6 terms while a few served much longer terms. The champions, with seven terms each, are George Murray, who was MLA and premier 1896-1923; George Isaac "Ike" Smith, who was MLA 1949-

- 1974 and premier 1967-1970, and John Buchanan, who was MLA 1967-1990 and premier 1978-1990. In contrast, 54 lawyer-MLAs were elected only once, and another 36 were elected twice.
- 14 Graham Steele, *What I Learned About Politics* (Nimbus, 2014) esp ch 3, "What Does an MLA Actually Do?". "Today's MLA is essentially a full-time constituency worker who occasionally—and reluctantly—goes to Province House for a sitting of the legislature" (p. 36).
 - 15 Douglas Benjamin Woodworth, for example, was a lawyer expelled from the House in 1874 for "misconduct and contempt". He was nevertheless re-elected the same year, then resigned his seat for an unsuccessful run at federal politics. He later emigrated to Nevada and California. Numerous other examples could be given of lawyers with undistinguished political careers.
 - 16 Steele, *What I Learned About Politics*, note 14 at 44.
 - 17 The first non-lawyer was Dr. William (Bill) Gillis, who before politics was a professor of geology at St. Francis Xavier University. Gillis was the MLA for Antigonish from 1970 to 1998. The pre-politics occupations of Nova Scotia's attorneys general, after Gillis left the position in 1996, were: business owner, lawyer, physician, teacher, lawyer, teacher, police officer, economic development consultant, police officer (with a law degree), lawyer, management consultant, police officer.
 - 18 *Public Service Act*, RSNS 1989, c 376, s 29(1)(a). The functions, powers and duties of the Attorney General and Minister of Justice (which, despite its name, is one position) are enumerated in s 29.
 - 19 Section 29(1)(c).
 - 20 Section 29(1)(f).
 - 21 Royal Commission on the Donald Marshall, Jr., Prosecution (1989), commonly referred to as "the Marshall Inquiry". The Marshall Inquiry's research papers includes a series of opinion papers written by Prof. John LL. J. Edwards and published under the title "Walking the Tightrope of Justice: an examination of the Office of the Attorney General".
 - 22 *Public Prosecutions Act*, SNS 1990, c 21, especially s 6.
 - 23 *Askin v Law Society of British Columbia*, 2013 BCCA 233 (CanLII), aff'g 2012 BCSC 895 (CanLII), leave to appeal dismissed 2013 CanLII 71613 (SCC).
 - 24 *Public Service Act*, RSNS 1989, c 376, s 30(1): "The Governor in Council may, on the recommendation of the Minister of Justice, appoint a person to be Deputy Attorney General and Deputy Minister of Justice, who shall be paid such salary as the Governor in Council determines and shall perform such duties as are, from time to time, prescribed by the Governor in Council."
 - 25 News release, "Deputy Minister of Justice Appointed" (August 2, 2016), <https://novascotia.ca/news/release/?id=20160802007>.
 - 26 In Nova Scotia, the last non-MLA to be in Cabinet was Premier Russell MacLellan, who was sworn in as premier in July 1997 but was not elected to the assembly until November 1997. Before that, Premier Donald Cameron appointed two non-MLAs to his Cabinet just prior to the 1993 provincial election. Both were defeated in the election, so their time in Cabinet was brief.