

# ADVOCACY MATTERS

From The Editor | TAS Report | Professional Development | The Future of Advocacy  
Interview | Photo Gallery



## FROM THE EDITOR

### Advocacy

Lauren Tomasich, *Osler, Hoskin & Harcourt LLP*



This edition of Advocacy Matters focuses on our namesake – advocacy – and specifically on ways we might be able to take our advocacy practices to the next level. We all aspire to be persuasive, and we spend countless hours crafting arguments and carefully selecting our words (as an aside, on the “choice of words” point, I liked that Sean Bawden’s “most overused word” in this edition’s interview was derived from what appears most in his transcripts!). We even practice our oral advocacy to hone our delivery, speed and intonation. But what we may forget to practice, or even consciously realize, is how non-verbal cues can affect the persuasive abilities of an advocate. Mark Bowden and Tracy Thompson are coaches on non-verbal

communication, and their piece in this edition highlights some invaluable insight into non-verbal fallacies as well as persuasive techniques.

An advocate’s art of persuasion may be at its height during a jury trial. The Advocates’ Society recently intervened as amicus in a plaintiff’s motion in a motor vehicle accident personal injury proceeding, seeking various forms of relief – all focused on the objective of excluding potential jury members who pay insurance premiums from the jury pool due to conflict of interest. The Advocates’ Society has made fundamental contributions to decisions of significant importance to our legal system in the past, and this was no exception. Peter Kryworuk and Jacob Damstra acted as counsel to The Advocates’ Society, and provide a helpful overview of the decision and The Advocates’ Society’s important contributions.

Some of us may also want to try and improve our advocacy by expanding our legal knowledge or keeping up to date on the latest judicial developments. Who knew there were so many legal Podcasts out there? Brent Arnold reviews where we can tune in on the walk to work, at the gym, in transit, or anywhere you need a law and advocacy boost.

So read on, and be ready to be inspired to take your advocacy skills to a whole new level! ■

**Editor:** Lauren Tomasich, Ltomasich@osler.com

**Contributors:** Peter W. Kryworuk, Jacob R.W. Damstra, Mark Bowden, Tracey Thomson, Brent J. Arnold, Sean Bawden, Laurie Livingstone





## TAS REPORT

# Ontario Civil Juries Withstand Recent Challenge

Peter W. Kryworuk & Jacob R.W. Damstra, *Lerners LLP*



The Advocates' Society was recently asked by the Court to act as *amicus curiae* in a matter of significant importance in Ontario's justice system related to civil juries.

*Kapoor v. Kuzmanovski*, 2018 ONSC 4770, considered a motion by the plaintiff in a motor vehicle accident personal injury proceeding for various alternative relief related to potential jurors and the jury as a whole. In particular, the plaintiff sought the exclusion of potential jurors who drive and pay for automobile insurance premiums or have premiums paid on their behalf from the jury pool due to conflict of interest, or alternatively the ability to challenge those potential jurors for cause or want of eligibility. In the further alternative, the plaintiff sought an Order to strike the Jury Notice.

At the heart of the plaintiff's motion was the allegation that prospective jurors' financial obligations to pay automobile insurance premiums constituted a personal interest in the matter adverse to plaintiffs' interest in having their claim in motor vehicle accident cases fairly determined by an impartial trier of fact. The reason, the plaintiff argued, was that jurors would be disinclined to render a verdict in favour of injured plaintiffs or incentivized to award less than fair damages to plaintiffs because of a

general knowledge that verdicts and damages awards against insured drivers caused insurance companies to raise insurance premiums generally.

Considering the importance of these issues, the Court invited The Advocates' Society, along with the Attorney General of Ontario, to intervene as *amicus* for the purpose of rendering assistance to the Court by way of argument. The Advocates' Society accepted the invitation in accordance with its mandate to intervene in proceedings that involve issues affecting the legal profession, advocates, and the rights of litigants in Canadian courts.

The Advocates' Society focused its argument on a number of guiding principles applicable to the issues raised by the parties. In particular, The Advocates' Society advanced submissions in support of the following propositions:

- It is well established that the right to a jury trial in a civil action is a substantive right, entrenched in common law and statute in Ontario, not to be interfered with lightly.
- The jury system is founded on the two fundamental characteristics of impartiality and representativeness. Litigants are entitled to have their case tried by an unbiased and impartial adjudicator. In Canada, there is a strong presumption of juror impartiality and a heavy burden on a party seeking to rebut this presumption. Representativeness is equally important and enhances juries' impartiality.
- There is no right to challenge a potential civil juror for cause in Ontario.
- Existing mechanisms to protect jury fairness are available to safeguard against the concerns raised by the plaintiff and sufficient to ensure a fair and impartial resolution of disputes. These include: peremptory and

particularized challenges in ss. 32-34 of the *Juries Act*; the ability of a trial judge to discharge a juror on the ground of partiality during the course of the trial in s. 108(7) of the *Courts of Justice Act*; judicial pre-screening and judicial instructions; and striking the jury notice pursuant to Rule 47.02(2).

· Any necessary changes to the existing civil juries system are most appropriately left to the Legislature or the Civil Rules Committee to determine, based on a measured consideration of the issues.

RSJ Daley dismissed the plaintiff's motion. The decision provides an extensive and useful discussion regarding the admissibility of expert evidence and the admissibility of social science research and pure statistical evidence regarding survey evidence proffered by the plaintiff.

The Court relied heavily upon the submissions made by The Advocates' Society in support of a number of its conclusions. RSJ Daley held that the enumerated list of civil actions that must be tried without a jury in section 108(2) of the *Courts of Justice Act*, is "a complete code" that "exhaustively sets out the types of actions and relief claimed that are barred from being tried by a jury."

RSJ Daley confirmed the unavailability of a broad and general challenge for cause process in Ontario's *Juries Act*, and rejected the plaintiff's analogy between automobile insurance premium payers and municipal ratepayers, who can be challenged under section 34 of the *Juries Act*. The Court dismissed the plaintiff's submission that a challenge for want of eligibility pursuant to section 32 of the *Juries Act* and the eligibility provisions in section 3(3) was available if potential jurors had a conflict or may be partial, rising to the level of having "an interest in the action."

The motion judge concluded there was no basis to strike the jury notice on the evidence, and noted the availability of a section 108(7) *Courts of Justice Act* discharge, other jury fairness safeguards and the judicial pre-screening mechanism available to the trial judge.

The plaintiff has sought leave to appeal to the Divisional Court.

---

Editor's Note: The Court thanked counsel to The Advocates' Society for "their most valuable assistance". The Advocates' Society thanks Peter Kryworuk and Jacob Damstra for acting as our counsel in this intervention." ♣

## THE NEXT 8

### Mastering the Art of Examining Witnesses

Wednesday, October 3, 2018  
Toronto | 9:00 AM - 4:00 PM

**SOLD OUT**

### Stress-Free Litigation: A Myth?

Tuesday, October 16, 2018  
Vancouver | 6:00 PM

*To learn more click here*

### Breakfast Near Tiffany's

Wednesday, October 10, 2018  
Toronto | 8:00 AM - 10:00 AM

*To learn more click here*

### The Resilient Litigator: Skills for Professional Happiness

Wednesday, October 17, 2018  
Calgary | 9:00 AM - 3:30 PM

*To learn more click here*

### Conduct of the Family Law Trial

Friday, October 12, 2018  
Toronto | 9:00 AM - 4:00 PM

*To learn more click here*

### Applications Advocacy

Thursday, October 18, 2018  
Edmonton | 9:00 AM - 4:30 PM

*To learn more click here*

### L'Art de l'interrogatoire en chef

Le vendredi 12 octobre 2018  
Montréal | 9h00 - 16h30

*Cliquez ici pour plus de renseignements*

### A Retirement Reception in Honour of Master Carol Albert

Thursday, October 18, 2018  
Toronto | 5:30 PM - 7:00 PM

*To learn more click here*



## PROFESSIONAL DEVELOPMENT

# The Truth and Lies Behind Body Language, and How to Use Yours to Gain Credibility

Mark Bowden and Tracey Thomson



*Successful advocates have a manner about them. What is it? Where does it come from? These lawyers present as trustworthy, authoritative, and credible. What is their secret? Is it a skill of total persuasion that all of us can learn? We asked Mark Bowden, one of the leading instructors and coaches on non-verbal communication, to share some practical tips on body language with Advocacy Matters readers, including the power of speaking from the truthplane. If you enjoy these practical tips and want to learn more, we hope you will join us and Mark at the upcoming TAS program **Winning Body Language for Litigators**, taking place on November 15, 2018 and see for yourself! Program Chairs, Rob Bell, Lerner LLP and Dominique Hussey, Bennett Jones LLP*

Some people in the justice system feel they are “a natural” at reading other people’s body language. They have “the gift.” It’s an instinct. You may know people like that, and perhaps you feel you are one of them. Sometimes, you just *know* when someone is lying to you, and sometimes you may be right on the money. But what about those times when you find yourself wondering, “How did

I read that one so wrong?”

The reality is that the ability to accurately judge the thoughts behind someone else’s behaviour, including deceptions, does not come down to instinct. Rather, it’s a way of more *consciously* thinking that gets you closer to the truth that can be learned and practised. A system to better understand human behaviour and the nonverbal communication that goes with it revolves around a critical-thinking process that helps you suspend your judgments, get closer to the accurate facts and arrive at the most likely truth of any situation. Part of that process involves suspending our instinctive judgments, thinking about our learned assumptions and investigating the bias we may have.

Many of the judgments we make about what body language cues mean, though they feel to us so instinctive and obvious, are actually learned ideas and, surprisingly, not pure or innate. These ideas are often based on folklore that has become accepted as fact, something we pick up and inherit from family, friends, colleagues and the media – all that clickbait which feels so right and true, but can actually be dangerously false.

Here are just three examples of the many popular myths around the body language of lying.

### **Myth 1: Fidgeters are hiding something**

Fiddling with your hands for no apparent reason may be the displacement of emotions and thoughts that are unexpressed—anything from excitement or boredom to frustration or relief. It certainly can be a self-pacifying behaviour



where the physical movement creates a stimulus that calms us in times of anxiety. Sure, people who are hiding something or lying may be experiencing anxiety and fidgeting as a by-product of that. Equally so, being involved in, for example, the judicial system can be stressful for many people, and so displaying the body language of anxiety in these circumstances is not necessarily a tell-tale sign of deceit—it's just natural. If someone really wanted to hide something from you, don't you think they would be able to control their movements for a short while to get away with it? Without this ability poker players couldn't bluff, undercover cops would be instantly exposed and most relationships would be irreparably damaged.

### **Myth 2: Looking up to the right means they're lying**

Does the direction in which someone's eyes look give away that they are lying? Research shows it's a fallacy that looking to the right indicates lying while looking left suggests truth-telling. The University of Edinburgh completed three studies to show there is no definitive correlation between the direction of eye movement and whether the subject was telling the truth or lying. However, it is fair to say that eye-accessing cues (unconscious eye movements) do indicate an internal search for or retrieval of information, or the creation of data, information and memory.

### **Myth 3: Lying is as plain as the nose on your face**

Remember Pinocchio? Wouldn't it be useful if there were a single physical sign that exposed a deceitful person as plain as the nose on their face? Well, there's a good reason that the story of Pinocchio is a fairy tale. You cannot tell if someone is lying based

on just *one* body language sign. And to this end, the idea that people touch their noses when they are telling a lie is largely folklore. In fact, the idea that the nose alone can display subtle tell-tale signs of lying is pure fantasy. However, wrinkling the nose and flaring the nostrils in disgust, if detected alongside other signals, could in some cases indicate a deceitful person smelling their own rat of a lie.

### **Practical tips for winning trust**

Next time you feel you have instinctively spotted a liar by noting body language cues of deceit, take a moment to check yourself and think again. Was it one of the signals explained above that triggered you, or perhaps another popular idea about the body language of lying that you've read? When tasked with, for example, assessing witness credibility, ask yourself if there could be another story behind the behaviour that is more accurate than your initial snap judgment. After all, being mindful and taking stock of how you make judgments sets you apart from others and will help you get the results you are after.

Of course, because not everyone in your law offices, courtrooms and chambers has the ability to question their assumptions, they can be influenced and persuaded by any behaviour you (or people you're working with) consistently present.

How you use your own body language will convey volumes about your professional credibility. By putting your energy into influencing your audience to mirror your clear and positive non-verbal behaviour, clients, colleagues or the public will most likely trust and engage with you as a credible authority every time you communicate.

We have compiled our top practical tips to help you stand out and win trust immediately, every time you speak. These techniques will help

you appear at your most credible and persuasive to a jury or judge. Using these tips and appealing to the unconscious mind can help you achieve better results for your client.

### **Put your body on display**

Let them see more, and they will trust more. Move away from the furniture. If sitting, pull your chair back from any barriers to your visibility—in short, display more of your body to your audience. Your audience's instinctual "reptilian" brain needs to see your body and your body language to decide what they think your intentions and feelings are toward them. When they don't see enough of you, they will unconsciously default to making negative assumptions about you, your ideas, or your stories or statements.

### **Speak from your belly**

Place your hands in the horizontal plane that extends 180 degrees out of your navel area (what we call the "truthplane"). Bringing the audience's unconscious attention to this vulnerable area of your body makes them feel that you are confident. And by assuming this physicality, you will feel more confident, too. Our body language not only leads others to feelings about us and what we are saying, but also influences our internal thoughts and feelings about our performance. Speak from the "truthplane" and you'll look and feel more credible. When perceptions are the reality on which your audience will make a judgment, that alone can make the difference between who is seen as honest and who is seen as deceptive, especially under stressful conditions where even the truly innocent can behave like the guilty.

### **Show your hands**

Show your palms open with nothing in your hands to let others know that



**Log On! Volunteer to Mentor! Appear on the Member Directory! Track your CPD!**  
Click here to visit The Advocates' Society's NEW website!

you mean no harm and are speaking for their benefit. This is a universally recognized “friendly” gesture.

### **Hang out ... check out**

Avoid dangling your hands by your sides when giving important messages. This stance gives your voice a depressing or sleepy downward intonation and makes you look unconfident. And, of course, it causes you to *feel* unconfident and excites your fight-or-flight response when you are under pressure.

### **Attract recognition**

Keep your gestures symmetrical. The brain understands symmetry in the body more easily than asymmetry, and an audience finds it more appealing. Gesture symmetrically and not only will others interpret your message as “clear,” but they will find it to be more positive and more persuasive.

### **Reveal, don't conceal**

Avoid having your hands at mouth level when speaking; for example, sitting at a table with your chin in your hands. We lip-read more than we think, and when the

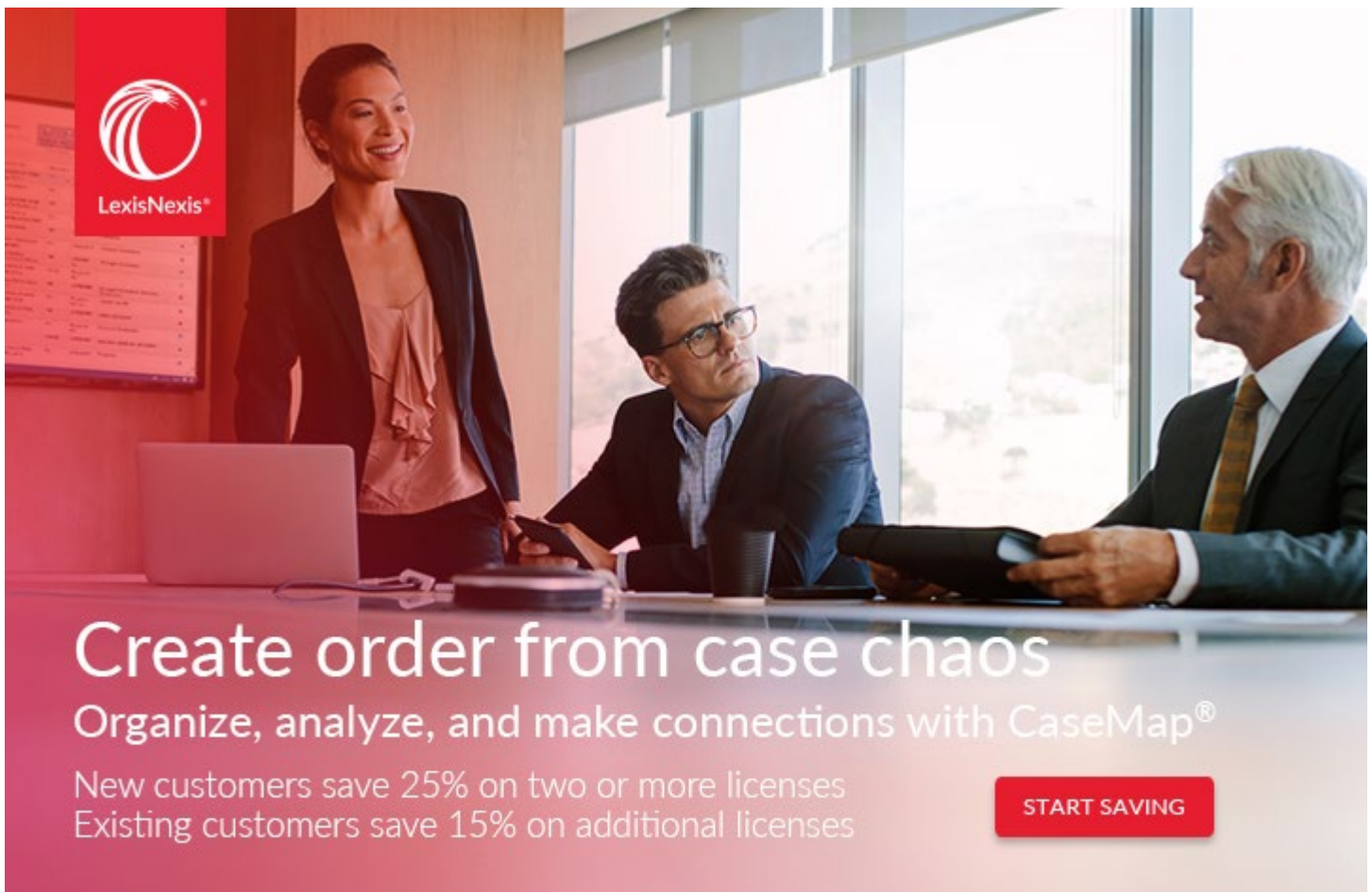
picture of the words is taken away, it becomes harder to verify the language. In the absence of the nonverbal information, the audience will perceive or create negative feelings about the speaker's intentions.

### **Move from complex to clear**

When conveying a complex message, story, argument or statement, avoid complex movement—so no fiddling with your pen! It is hard for the brain to decode complex verbal language when it is concentrating on complex nonverbal behaviour. Strange as it may seem, the simpler you keep your nonverbal communication the less you will confuse your listeners, the less you will lead them to make incorrect assumptions about your ideas or intentions, and the more competent you'll look in any situation.

### **Mirroring**

Mirror any body language from others that is in your favour and be aware of and avoid mirroring any body language from others that is not in your favour. This will cause others in turn to produce more of the mirrored behaviour. The more the behaviours are in your favour, the more favourable the environment that will be created for you and your argument. ▀



**Create order from case chaos**  
Organize, analyze, and make connections with CaseMap®

New customers save 25% on two or more licenses  
Existing customers save 15% on additional licenses

[START SAVING](#)



## Law Podcasts for Lawyers on the Go

Brent J. Arnold, *Gowling WLG (Canada) LLP*

Tired of reading law? Why not listen to some? The explosion of podcast content in the last decade has brought with it a wealth of entertaining and informative law-related programs. Here is a small sampling, with a Canadian skew.

### LSO Technology Practice Tips

Canadian law's best-kept secret: a trove of podcasts (not on iTunes, but playable from the LSO website) from the Law Society of Ontario to help lawyers use technology to improve their practices, and to cope with emerging tech issues that impact the practice of law. Topics include law firm websites, smartphone security, and BYOD.

### Of Counsel

Produced by Robichaud's, this podcast interviews luminaries of Canadian law like Justices Cromwell and Stratas, Brian Greenspan, and Tom Curry.

### The Docket

Ottawa lawyer spouses Michael Spratt and Emilie Taman tackle current issues in Canadian law, with true-crime diversions like coverage of *Making a Murderer* and *The Staircase*.

### The Pro Bono Podcast

A new podcast from Pro Bono Students Canada volunteers at Osgoode Hall Law School. Its first season covers issues like solitary confinement, Indigenous legal orders, and the public importance of the Supreme Court of Canada.

### Amicus

SLATE's Dahlia Lithwick covers SCOTUS, with interviews from leading U.S. advocates and academics.

### More Perfect

This Radiolab spinoff brings you historical moments in SCOTUS jurisprudence that shed light on current events.

### The McGill Law Journal Podcast

A premier law journal tackles important issues in Canadian law. Excellent episodes, dropped sporadically.

### Hull on Estates

This Hull & Hull LLP production has been providing estates law insight since 2006.

### **And TAS Presents:**

Watch out in the coming months for a podcast by your very own Advocates' Society: a co-production of YASC and the 10+ Standing Committee featuring insights, entertainment, and news about Society events.



## Interview with Sean Bawden, *Kelly Santini LLP*

Compiled By: Laurie Livingstone, *Cassels, Brock & Blackwell LLP*

Sean is a partner at Kelly Sanitini LLP with a practice focussed on employment law. He is also the author of the award winning law blog '[Labour Pains](#)'.

1. **Q. TV/movie lawyer you most relate to and why?**  
A. Mike Ross in the first season of Suits, because I am still not wholly convinced that the Law Society isn't going to one day come and knock on my door to advise me that there has been some horrible mistake.

---

2. **Q. What drives you insane?**  
A. The emphasis people put on Records of Employment.

---

3. **Q. Any pre-game rituals before court?**  
A. I invest a considerable amount of time choosing my socks before any appearance.

---

4. **Q. What gives you sanity?**  
A. Cycling.

---

5. **Q. Most embarrassing moment as a litigator?**  
A. I once flung a pair of boxer shorts across the courtroom while unpacking my bag. Court was not in session. It's a true story best told in person.

---

6. **Q. Restaurant recommendation for out of town counsel?**  
A. Near the court: Johnny Farina. Prepared to travel: The Cheshire Cat Pub in Carp.

---

7. **Q. During your commute to work you are ...?**  
A. Appreciative of all the Canadians who pay for the NCC pathways to be as fantastic as they are.

---

8. **Q. Most proud moment as a litigator?**  
A. Watching a moot team that I coached win a competition.

---

*Continued on page 9*

**Save the date for End Of Term 2019 on June 20, 2019**





**9. Q. Other than files, name 3 things that are always on your desk.**  
**A.** Puppy of the day calendar. Globe from my parents. Personalized coffee mug that reads "The Warrior", which was a gift from a client.

---

**10. Q. Preferred social media platform?**  
**A.** Twitter: @SeanBawden.

**11. Q. What word or phrase do you most overuse?**  
**A.** According to transcripts, "Alright."

---

**12. Q. Your key to staying healthy in a stressful profession?**  
**A.** Morning workouts, before doing anything – especially looking at email.

---

**13. Q. A person in the profession you look up to?**  
**A.** I've always strived to have the temperament, decency, and civility of Bryan Carroll.

---

**15. Q. Favourite vacation spot?**  
**A.** Waterbury, VT is the happiest place on earth: ice cream, beer, chocolate, cheese, gin.

**16. Q. A food you can't stand?**  
**A.** Blue cheese.

---

**17. Q. How long from the time you wake up in the morning to the time you first look at your phone?**  
**A.** Virtually instantaneous.

---

**18. Q. Your best advice for young litigators just starting out?**  
**A.** Don't trust precedents. In addition to the fact that the law may have changed, you need to use your own voice.

---

#### **THE SIX WORD CHALLENGE**

**Using six words, no more, no less, finish this sentence:**

**My favourite part of living in Ottawa is ....** small-town feel; big city opportunities. ▀

## PHOTO GALLERY



TORONTO PUB NIGHT | September 6, 2018



TORONTO PUB NIGHT | September 6, 2018



SUDBURY TRIVIA CHALLENGE | September 13, 2018



SUDBURY TRIVIA CHALLENGE | September 13, 2018  
Winning Team: Rising Stars



TOM CURRY ACCEPTING THE CATZMAN AWARD | September 13, 2018  
Julie Catzman, Tom Curry and TAS President Brian Gover

## Print or Digital?

What medium would you prefer for your TAS Journal?

We hope you will take a few minutes to answer our [mini-survey](#) and be part of the dialogue. Your opinions matter to us.

[Share your thoughts here](#)





## PHOTO GALLERY



1ER GALA ANNUEL DE LA SOCIÉTÉ DES PLAIDEURS | 20 septembre 2018  
Le très honorable Richard Wagner, C.P. Juge en chef du Canada,  
Cour suprême du Canada



1ER GALA ANNUEL DE LA SOCIÉTÉ DES PLAIDEURS | 20 septembre 2018



1ER GALA ANNUEL DE LA SOCIÉTÉ DES PLAIDEURS | 20 septembre 2018  
L'honorable Sylvain Lussier Juge de la Cour supérieure du Québec



1ER GALA ANNUEL DE LA SOCIÉTÉ DES PLAIDEURS | 20 septembre 2018  
Guy Pratte et Sylvie Rodrigue



1ER GALA ANNUEL DE LA SOCIÉTÉ DES PLAIDEURS | 20 septembre 2018

A graphic advertisement for the Advocates' Society Career Board. It features a stylized illustration of a man's head in profile, surrounded by various icons: a globe, a magnifying glass, a puzzle piece, a resume, a building, and a person. The background is a mix of teal and grey tones with circular patterns.

**Your Next Career Is Here**

The Advocates' Society Career Board is the only legal job board created just for the litigation bar. Access notices for litigation, ADR and judicial vacancies that are exclusively listed for advocates across Canada.

To find your next career click here.  
[www.advocates.ca](http://www.advocates.ca)