ESG best practices and lessons learned from the 2021 legal summit

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We are all environmental, social, and governance (ESG) lawyers now, whether we want to be or not. The Legal ESG Summit offered many insights for lawyers – whether or not they consider themselves to be ESG lawyers. As Canada's law firm, BLG was invited to share its perspective on ESG best practices and building a knowledgeable and skilled team across environmental, social and corporate governance disciplines.

Legal experts across North America, Europe, the U.K. and Australia, shared their vision on the impact of various market, climate and human rights forces on shaping best practices for organizations. The top themes discussed were:

- ESG disclosure risks and advantages;
- ESG strategy; and
- how lawyers can enable change while mitigating risk.

ESG performance measurement and management has rapidly expanded beyond a niche issue and into a **core strategy pillar** . While its predecessor CSR was primarily seen as performative, ESG is here to stay. And organizations that want to capitalize on this shift need to adjust their approach to ensure they avoid the pitfalls of CSR.

Here are three key takeaways from the conference that can support sustainability leaders setting best practices in Canadian ESG law.

Good ESG strategy is authentic

Good ESG performance helps positively differentiate your brand. Whether it helps you attract investors, retain employees, increase visibility to policymakers or build your market share, sharing your company's ESG story can be advantageous.

McKinsey's 2020 report on the "ESG premium" – the potential for ESG programs to increase shareholder value - generated significant interest in voluntary performance disclosure. There are tangible perks for organizations that deliver good ESG outcomes. However, companies can't fully respond to risks or fully leverage the upsides without evidence of their goals set or how they are being achieved. So how can businesses differentiate themselves – with authenticity?

In the session, “Opportunity vs. Obligation,” panellists discussed how organizations inadvertently limit their authenticity when sharing ESG metrics. Many focus solely on the ‘E’ and often from a narrow perspective. While investing in sustainable finance instruments or purchasing greenhouse gas offsets are practical tools for improving environmental impact, organizations can’t ignore social and corporate governance factors. What role does diversity, equity and inclusion have at your organization? How are charitable giving and pro bono work initiatives handled?

Lauren A. Hopkins, Principal at Beverage & Diamond, recommends setting policies that deeply connect your company’s sustainability goals with the everyday work of your employees, suppliers and partners. Some steps towards this goal could include incorporating ESG metrics in executive compensation reviews or adding a section to procurement agreements. With these measures, Hopkins says, “Each person the company touches in its operations can feel empowered to participate in that vision.”

Oliver Dudok van Heel, Head of Client Sustainability and Environment at Freshfield Bruckhaus Deringer, notes that climate risk is an often overlooked – but tangible – factor in evaluating the impact of your ESG investing strategy. He cautions that organizations may undervalue or overvalue their assets without considering climate risk.

Many organizations feel hesitant to disclose details about how they benchmark and achieve ESG goals. And disclosure risks are real – continue reading the following section to learn more. However, the advantages shared above illustrate why it can be worth it.

ESG disclosure risk is real, but you can mitigate it

Strong ESG leaders consider the entire disclosure equation: weighing the risks **and** opportunities it can offer. There’s a growing expectation – and in some cases a growing requirement – for companies to make disclosures about ESG factors. The focus of these reports is also expanding beyond an investor focus to greater stakeholder engagement for the media, public policy, NGOs and employees.

While our first takeaway from the Legal ESG summit relates to ESG disclosure opportunities, this one dives into the potential risks. As voluntary ESG disclosures grow in Canada, securities regulators have increased their oversight to review these marketing materials. In October 2021, the Canadian Securities Administrators opened the proposed National Instrument 51-107 – Disclosure of Climate-related Matters for comment. The Proposed Instrument seeks to align disclosure regulation with the Task Force on Climate Change-Related Financial Disclosure framework. A similar review is taking place in both Ontario and BC as regulators seek to curtail unverified ESG claims. Learn more about the “green sweep” affecting ESG marketing practices in Canada.

In his session “No Good Deed Goes Unpunished: Growing ESG Litigation Risks,” Partner Mark Henriques of Womble Bond Dickinson shared how companies can promote their ESG performance and disclosures while minimizing litigation exposure.

Most litigation exposure typically arises from three key areas:

- **Misrepresentation of claims**

- **Unfair and deceptive trade practices**
- **Securities fraud**

Energy companies, in particular, have seen a higher risk of litigations in these disclosure situations.

Although voluntary disclosures about ESG performance can increase risks, this doesn't mean you shouldn't be making them. Here are some risk mitigation strategies for companies considering sharing this information with stakeholders:

- **Consider regulatory requirements** – Regulatory bodies like the Ontario Securities Commission offer guides on how companies can make disclosures. Companies should study them before releasing disclosures about ESG practices. In general, it's best to avoid generic terms like "eco-friendly" and green energy claims can be particularly problematic. Another reason to consider investing in renewable VPPAs accompanied by certified RECs.
- **Implement a framework** – Critics of ESG often cite its lack of a consistent framework as a major shortcoming. But this doesn't have to be true for your organization. You can start with a respected framework standard from one of the following institutes:
  - IFRS International Sustainability Standards Board
  - Global Reporting Initiative
  - Value Reporting Foundation[1]
  - Task Force on Climate-Related Financial Disclosures
  - UN Sustainable Development Goals

- **Decide which disclosures are needed** – Henriques suggests that organizations ask, "Is this a disclosure we need to make or is it one we want to make?" Companies executing well on their ESG framework will likely want to share voluntarily, but even those with good results should ensure they are specific and offering proof.

While there are several benefits to sharing your organization's positive performance on ESG factors, there are some real risks if you don't consider your regulatory environment or pick a credible framework to follow. As your company goes through the decision matrix about what to measure, how to measure and how to share this information, Henriques cautions, "Lawyers need to be involved, this can be a useful and important way to hold companies accountable, but it can be a danger if you don't have someone thinking about legal risk."

It's essential to work with the right law firm

There isn't a one-size-fits-all approach to building your company's internal ESG team. Nor is there one for picking the right law firm to support your execution. Most law firms now say they advise on ESG. But what do they mean when they say this – or rather, *what should they mean?* Panellists dove into this during the session "Utilizing Firmwide Expertise to Build a Cross-Functional ESG Team."

Does the firm consider ESG to be a niche?

ESG strategy touches on every pillar of your business and your lawyers need to offer an equally wide range of expertise. Can most lawyers at the firm speak confidently about ESG, or do you find yourself being referred back to their sole expert? Pamela Grinter, Partner at Fox Rothschild, urges all lawyers, "You should be considering ESG when you are doing any work for your client."

Are they multi-disciplinary?

Your organization's ESG factors are not limited to one type of law, and the firm you engage shouldn't be either. Sarah E. Fortt, Counsel at Vinson & Elkins, recommends, "ESG by definition requires that we take a multi-disciplinary approach." But cautions, "This is easier said than done." The right law firm will offer a broad range of ESG knowledge whether you need support with litigation, environmental, community relations, or DEI issues.

Do they see ESG as a trend?

While some companies may see ESG as performative or trendy, it's here to stay. It will likely look different in 10 – 20 years as it becomes synonymous with ethical and sound strategy. To dig deeper into whether your external counsel sees ESG as a trend, consider what kind of CLEs are being offered, their public ESG resources available and whether lawyers of all seniority levels are involved.

Looking ahead

The summit offered several insights and ESG best practices for law firms providing excellence to clients – and BLG is pleased to be among them.

ESG is a broad concept that encompasses virtually every corner of every organization. Companies need to consider the risks and opportunities of disclosures. While many are voluntary now, regulatory oversight is increasing, and many will likely become mandatory.

In the session "Opportunity vs. Obligation" Oliver Dudok van Heel noted, "Lawyers can be barriers to change," but when it comes to ESG law, he proposes, "In fact – lawyers need to be the enablers of change."

Working with the right law firm can help you see it from all angles. BLG's ESG group spans all areas of practice and can help your organization separate fads from the future. Contact the author to learn more.

[1] To be combined with Climate Disclosure Standards Board into the IFRS' International Sustainability Standards Board by 2022

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