

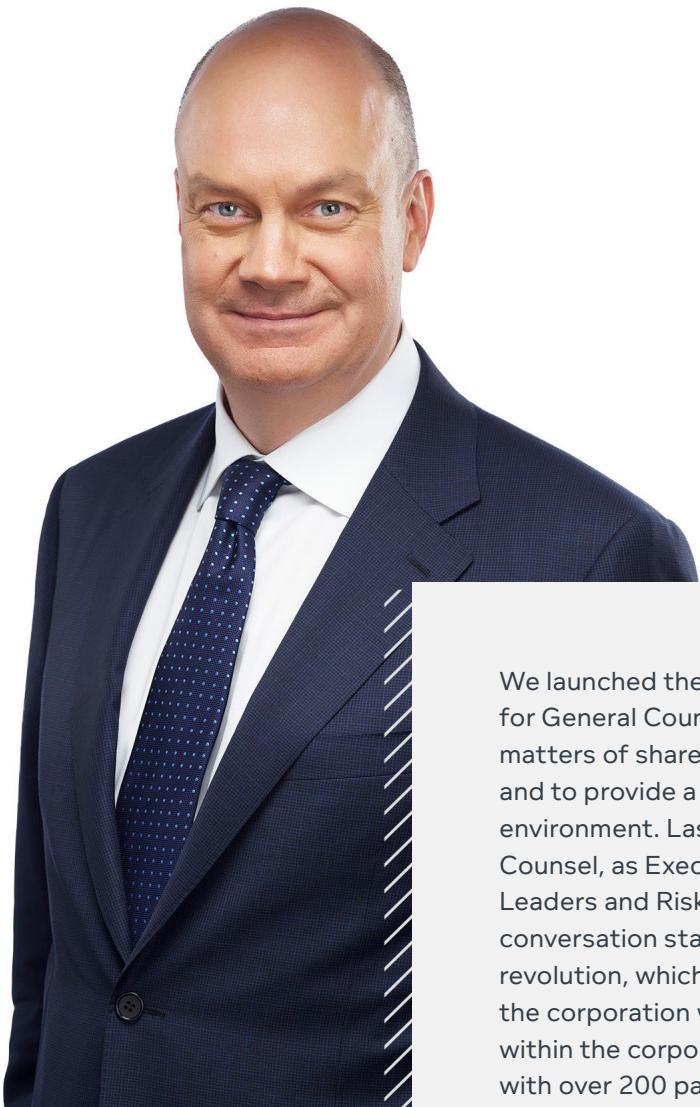
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The Second Annual GC Summit **ESG and Beyond:** Strengthening Sustainable Capitalism in a Time of Upheaval

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We launched the annual GC Summit program in 2020 to provide a forum for General Counsel and Chief Legal Officers to join their peers, to discuss matters of shared interest across a range of organizations and industries and to provide a platform for collaborative learning in a supportive, collegial environment. Last year, we focused on the many roles played by General Counsel, as Executive Leaders, Catalysts for Growth, Legal Operations Leaders and Risk Managers. This year's Summit offered a primer and a conversation starter on the environmental, social & governance ("ESG") revolution, which is having an increasingly important impact of the role of the corporation within society and, naturally, the role of the General Counsel within the corporation. Once again, your response has been tremendous, with over 200 participants in attendance.

In this report, we capture discussions from our two panels and GC roundtables, providing a view from 10,000 feet as well as drilling down to the practical ideas that you can use to support your organization's ESG efforts. We've also included a few suggested readings to think a bit longer about these topics.

We heard from many of you that you would like to continue the dialogue on ESG among your peers. To this end, we will be organizing additional curated GC roundtables more focused on particular aspects of ESG (e.g., industry-specific issues, corporate governance, sustainable investing, equity, diversity & inclusion, environment and climate change). Further details will follow soon.

Thank you for being part of the conversation and we look forward to seeing you at the 3rd Annual GC Summit next year!

A handwritten signature in black ink, appearing to read "Dave Leonard".

Dave Leonard
Chief Executive Officer, McCarthy Tétrault

The Second Annual GC Summit

ESG and Beyond: Strengthening Sustainable Capitalism in a Time of Upheaval

Hosted by McCarthy Tétrault – February 10, 2021

A Changing Model for the Future of Business – Is it Real? And, if so, Why Now?

In her opening remarks, **Judith McKay**, Chief Client and Innovation Officer at McCarthy Tétrault, herself a former general counsel, commented on the central role GCs play in the executive function of their organizations, advising on legal matters, driving business performance, enhancing integrity, and assessing reputation and business risk. Following a year marked by a global pandemic, sharper focus on climate change and greater calls for social justice, the increasing importance of the role of GC is well-recognized.

ESG considerations are moving beyond the confines of Human Resources and Environmental Compliance groups to become a key measure for investment and business decision-making. In doing so, it has also redefined the role of not only the CEO and Board, but the implications on the ever-evolving role of a GC. As a result of being connected with virtually all areas of the business, GCs are uniquely positioned within the corporate structure and can leverage their existing skill set as the “conscience of the corporation” to provide ESG leadership across an organization.

Depending on the industries and businesses within which they operate, GCs may be at different stages on their ESG journeys. To help accelerate awareness and inspire action, prominent business, policy and legal thought leaders discuss how ESG has taken centre stage, what it means for organizations, and how GCs can help companies to adapt.

CEO **Dave Leonard**, McCarthy Tétrault, facilitated a panel discussion featuring two of Canada’s leading minds on ESG:

- **Marc-André Blanchard**, Executive Vice-President and Head of Global, Caisse de dépôt et placement du Québec;
- **Poonam Puri**, Professor of Business Law, Governance & Strategy; Former Associate Dean, York University – Osgoode Hall Law School

Panelists kicked off the discussion by framing ESG as a set of criteria by which businesses should be measuring themselves internally, and which are being applied by a full range of stakeholders, including investors, employees, consumers, and communities. Increasingly, ESG is the lens through which a company will be viewed by society, and is therefore a key opportunity for organizations to share their corporate values with those who want to hear from them.

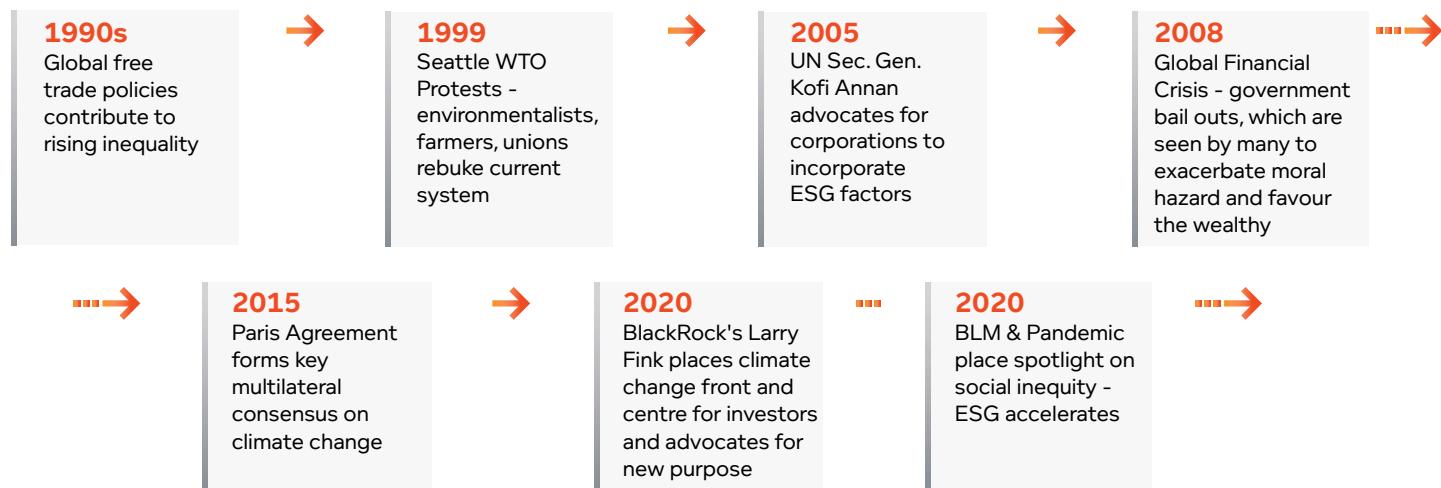


Discussion continued by placing ESG in its broader context. Panelists challenged the assumption that ESG is a fad by outlining historical events that have led to this point, and which are likely to carry forward as businesses seek social licence to operate in the long-term.

As a result, there was a consensus that ESG is likely here to stay. While skeptics predicted that ESG would be pushed aside in times of crisis, the COVID-19 pandemic and social movements of 2020 proved the opposite. Rather than shying away from ESG, many companies doubled down – and those that did often performed better.

EVOLUTION OF A NEW PARADIGM

The conversation made clear that ESG did not happen in a vacuum. **A few key events were highlighted to demonstrate the social, political, and economic context which gave rise to ESG's prominence:**



Stakeholder Capitalism on the Rise? The role of GCs, C-Suites, and Boards in a Changing Landscape

After introducing the core concepts surrounding ESG, the panel shifted to explore some of the practical mechanics involved, including how to think not only about the significant risks posed by ESG, but also the compelling opportunities it presents. Because of their unique vantage point, spanning across their organizations, legal departments are now frequently leading the charge in this area.

Panelists emphasized that there is no one-size-fits-all recipe for ESG success. Depending on the particular industry and stakeholder demands, business leaders – including GCs – must strategically prioritize particular aspects of ESG, and align these with overall corporate purpose.

In terms of what this means for C-Suite executives and boards, the panel agreed that ESG does not fundamentally

change the nature of these roles, but it means applying existing tools and skill sets in new ways.

- Executive teams, and GCs in particular, must ensure that ESG is fully integrated into enterprise risk management frameworks and help set the appropriate risk management culture – it should not exist in its own silo.
- Boards must consider where to place primary ESG responsibility, whether with the board as a whole, the audit committee, or a specialized ESG committee.
- GCs can play a key role in guiding the board on ESG decision-making regarding the type and quality of corporate disclosures, and helping them to navigate metrics, ratings, and standards.

Panelists also underscored the opportunities that come with ESG leadership such as investors and other stakeholders seeking to build partnerships with like-minded organizations, increased consumer demand, and the recruitment and retention of diverse talent.



Panelists included a number of practical tips for engaging with ESG:

- Incorporate ESG considerations early in decision-making processes before it is too late to course correct;
- While quantification can help inform decisions on capital and help management teams to set goals, track and achieve them, companies should not overlook the value investors and other stakeholders place on qualitative data and alignment with their ESG beliefs;
- Carefully consider whether external verification of ESG-related corporate disclosures is a worthwhile risk management strategy, particularly given the increasing scrutiny being placed on these materials and potential liabilities; and
- For those with international operations, establishing a cross-cultural understanding of ESG and, in particular, its supply chain implications is a critical step.

Canada and the World: How do we measure up?

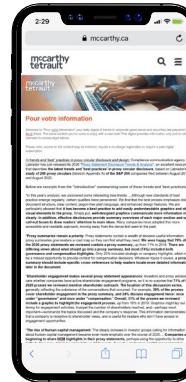
The discussion was optimistic with respect to Canada's positioning in the global market. Although our European counterparts have a strong reputation for the advancement and measurement of environmental goals, Canada may not be far behind. Panelists saw a potential niche for Canada to be a global leader on social considerations like diversity and inclusion. This stems particularly from the diverse makeup of Canadian society and forward-looking mindset of the corporate community.

The panel noted significant recent momentum (and capital flows) owing to changes in the leadership of key allies and trading partners. Even in those countries whose governments have recently been less enthusiastic about pushing the ESG envelope, many private sector actors have been leading the way, including members of the Business Roundtable. This corporate-led economic push for ESG success may well represent an important paradigm shift as we look to the future.



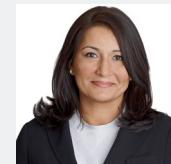
“Between 5-10 years from now we’re not going to be talking about ESG, it’s going to be as mainstream as it gets and will be the only way to do business.”

- **Marc-André Blanchard**, Executive Vice-President and Head of Global, Caisse de dépôt et placement du Québec



Further Reading

McCarthy Tétrault's **Benjamin Silver** publishes a daily digest entitled "Pour Votre Information" covering trends in corporate governance and securities law, and is a great resource for all things ESG. [Click here](#) for the most recent report.



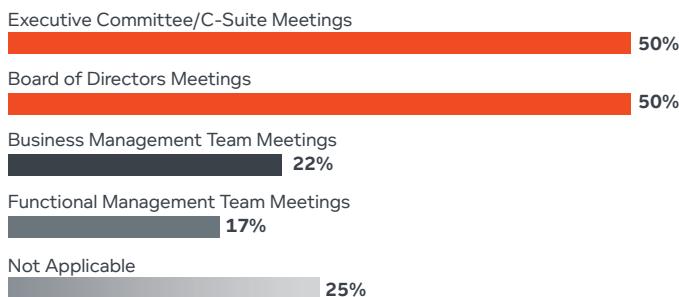
“There is a lot of work to be done to incorporate ESG into all aspects of corporate decision-making: capital allocation, product lines and production techniques, supply chains and evaluation of the workforce”

- **Poonam Puri**, Professor of Business Law, Governance & Strategy; Former Associate Dean, York University – Osgoode Hall Law School

Survey Says... Time for an ESG Pulse Check

To add some real-time data into the mix, Judith McKay led summit participants through a number of key questions related to ESG. The results were illuminating.

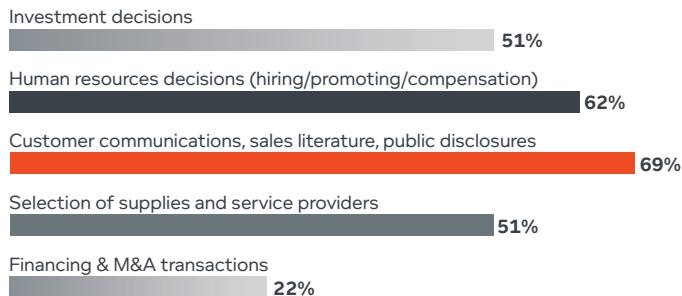
Has ESG/Sustainability become a standing agenda item for your organization's meetings?



While ESG is clearly gaining traction at the most senior levels of the corporation, survey results suggested that there may be an opportunity for companies to do more to integrate ESG throughout their organizations. At the same time, the number of participants who chose "not applicable" suggests that for some organizations, ESG has yet to make its way onto boardroom agendas.

Consider how to integrate such topics and conversations into all levels of the organization. Without an enterprise-wide dedication to ESG, organizations might risk a misalignment between corporate culture, purpose and public narrative.

Where do you see evidence of ESG considerations being taken into account in your organizations?

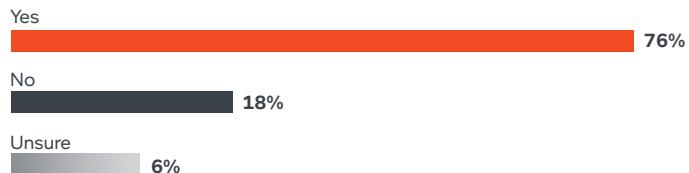


Perhaps unsurprisingly, ESG considerations are playing the strongest role in public-facing aspects of business, but have not yet taken hold in the transactional space as companies make acquisition decisions. Given the very real impact of ESG factors on both the present value and

future viability of a business, GCs may wish to consider whether these considerations should play a stronger role when evaluating the risks and opportunities involved in acquisitions and divestments. Incorporating ESG into due diligence considerations seems like an opportunity to avoid surprises about ESG performance.

It was interesting to see that a majority of respondents are taking ESG into consideration in both their investment decisions and selection of suppliers and service providers. Those GCs whose organizations are earlier in their journey may wish to use this data to prompt action to ensure they are competitively positioned for investment and procurement opportunities.

Do corporate directors and offices, in the proper exercise of their fiduciary duties, need to take into account ESG considerations in making business decisions?



While the consensus was by no means universal, an overwhelming majority of participants believed that fiduciary duty *requires* the consideration of ESG factors. While that viewpoint might represent a distinct departure from the concept of fiduciary duties under U.S. corporate law (which tends to be more shareholder-centric), it does not require a leap of imagination under Canadian corporate law. In its decision in *BCE v. 1976 Debentureholders* (2008 SCC 69), the Supreme Court of Canada held that directors' fiduciary duties are always owed to the corporation ("... to act in the best interests of the corporation viewed as a good corporate citizen.") and that, in weighing the best interests of the corporation, the board may give consideration to the interests of a range of stakeholders, including shareholders, employees, suppliers, creditors, consumers, governments and the environment.

At a high level, this seems to leave it open to directors and officers, in the exercise of their corporate fiduciary duties, to take into account ESG considerations. GCs may wish to share this data with their executive teams and boards if ESG is not already top of mind and a regular agenda item at meetings. This data may help catalyze action and accelerate ESG considerations into all aspects of business operations and investment decision-making.

What GCs Can Do to Get Ahead of ESG – Seizing Opportunities While Mitigating Risks

In the age of social media, the flow of information has been radically decentralized – it is no longer controlled primarily by the mainstream media, businesses, and governments, but increasingly by individuals and communities online.

Panelists gave thought to what has changed, or will change, for the role of the GC, consider how organizations can improve risk management processes, and look at ways GCs can assist an organization in making ESG an integral component in business decisions.

Bob Richardson, Business Law Partner at McCarthy Tétrault (and a former General Counsel at CIBC), led a discussion with:

- **Norie Campbell**, Group Head and General Counsel, TD Bank Group
- **Thomas Kim**, Chief Legal Officer & Company Secretary, Thomson Reuters
- **Thomas Schwartz**, Senior Vice-President & General Counsel, Enbridge



“ESG can’t be just the icing – it must be the cake. It will only succeed if we bake it into our company.”

- **Norie Campbell**, Group Head and General Counsel, TD Bank Group

Taking a backseat? The detriments of ESG inaction

Panelists emphasized that companies cannot simply opt out of ESG. ESG is not going away and companies ignore it at their peril. In short, ESG needs to become a lens through which all business decisions are made, as it is fast becoming an important component of a company's reputation and brand. Organizations need to actively manage a strong public ESG narrative, backed by meaningful and measurable actions, to ensure that the company tells its own story.



“In terms of highlighting systemic injustice – we have seen it’s not a traditional formula of mainstream media pushing out a formal agenda, but instead all forms of communication being used to amplify this message.”

- **Thomas Kim**, Chief Legal Officer & Company Secretary, Thomson Reuters

Aligning corporate purpose, culture, and public narrative

Expanding on the above theme, the panel delved further into public narrative, noting legal and communications teams can no longer control the message in the way they once could. Gone are the days when a corporation managed its messages through a glossy Annual Report, quarterly financial statements and periodic press releases. All stakeholders, not only shareholders, demand real-time transparency and are now able to perform their own due diligence. For GCs, this is a new frontier of ESG risk management. Consider the following to help manage risk and demonstrate leadership on issues that may emerge quickly and without notice.

- Develop a clear ESG framework and define the company's value proposition
- Build those values into the corporate culture and communicate purpose proactively
- Bring a more transparent lens between corporate and stakeholder communications
- Use the framework to guide behaviour and help reduce the likelihood of crises



“The legal department led adoption of our company’s security guidelines which embraces the Voluntary Principles on Security and Human Rights.”

– **Thomas Schwartz**, Senior Vice-President & General Counsel, Enbridge

Organizations need to walk the talk, or risk the consequences

While cultivating a strong narrative is important, panelists were quick to note ESG is not merely a feel-good communications exercise. One of the biggest risks associated with ESG is the potential for dissonance between an organization’s promises and its actions or outcomes. If you don’t walk the talk, it will catch up with you. Stakeholders of all types – from customers, to employees, to shareholders – may begin to feel this dissonance and react in negative ways that can harm a business and make it difficult to restore a positive narrative.

One such risk identified by the panelists is litigation. We have already seen numerous examples of this in the United States (e.g. where several class actions have been started by shareholders alleging that their corporations’ public commitments to ESG have been overstated and have not achieved tangible results), and a few instances have begun to pop up in Canada.

Public advocacy is increasingly common

Consistent with the spread of information, the magnitude of public advocacy is likewise experiencing a growth spurt. In the corporate world, there has been an uptick in shareholder activism. This movement is an important reminder that stakeholders are beginning to take a more active role in the operations of a company.

GCS that demonstrate ESG leadership can help ensure the smooth passage of important resolutions, along with broad-based support for management decisions.

For more on shareholder activism, please refer to our blog post, [What’s happening in shareholder activism in Canada?](#)



Closing Remarks

In closing the summit, **Godyne Sibay**, Regional Managing Partner for Ontario, found the discussions to be rich, providing opportunities to share best practices and insights. Godyne noted that GCs who are increasing their focus on ESG, are better placed, better equipped and better able to drive change and add value at their organizations.

Godyne invited participants to reach out to any of our firm ESG experts who served as GC Roundtable facilitators at the Summit if they have any questions. For further information you may also wish to visit our [Website](#).

Finally, Godyne introduced the new series that McCarthy Tétrault will be offering as of April 2021. MT Master Class is an exclusive limited virtual event series specially designed for GCs with both in-depth legal analysis and practical pro tips from distinguished experts and practitioners. Upon completion of each session, attendees will receive a session overview and further reading materials.

The first instalment of this series will be an in-depth examination of Good Faith In Contract Law: Analysis of Recent Supreme Court Decisions and How These Impact Business Conduct. This session will be conducted by:

Geoff Hall, Partner, McCarthy Tétrault and author of the authoritative text on contractual interpretation: Canadian

Contractual Interpretation Law, 4th Edition. This text is the only one of its kind that undertakes a thorough overview of the law of contractual interpretation from both the Canadian common law and Quebec civil law perspectives.

Shevaun McGrath, Partner, McCarthy Tétrault and Co-Head of McCarthy Tétrault's National Private Equity Group. An accomplished deal-maker, Shevaun's practice is focused on private equity, mergers and acquisitions, and capital markets.

Geoff and Shevaun will review the series of Supreme Court of Canada cases, most recently *C.M. Callow Inc. v. Zollinger*, where McCarthy Tétrault acted for the successful appellant, clarifying the duty of honest performance that applies to all contracts throughout Canada's common law jurisdictions. They will review both: how to interpret key contractual provisions, assess risk and promote compliance with existing contracts; and how to draft and negotiate new contracts going forward.

Participants will collaborate on case studies to share ideas and practical tips on how general counsel can get ahead of the issues and mitigate risk within their organizations. We will provide an executive-ready overview slide deck, contract checklist as well as additional suggested reading to all participants.

Please look out for our invitation over the next few weeks. We thank you for joining us and hope to see you next year.

Thank you to our Panelists & Moderators:

Session 1: A Changing Model for the Future of Business

– Is it Real? And, if so, Why Now?

Marc-André Blanchard, Executive Vice-President and Head of Global, Caisse de dépôt et placement du Québec

Poonam Puri, Professor of Business Law, Governance & Strategy; Former Associate Dean, York University – Osgoode Hall Law School

Dave Leonard, Chief Executive Officer, McCarthy Tétrault LLP, Toronto

Session 2: What GCs Can Do to Get Ahead of ESG

– Seizing Opportunities While Mitigating Risks

Norie Campbell, Group Head and General Counsel, TD Bank Group

Thomas Kim, Chief Legal Officer & Company Secretary, Thomson Reuters

Thomas Schwartz, Senior Vice-President & General Counsel, Enbridge

Robert J. Richardson, CD, Partner, Business Law, McCarthy Tétrault LLP, Toronto

GC Roundtable Breakout Discussions – Walking the Talk

Cameron Belsher, Partner, Business Law & Co-Head of Mergers and Acquisitions, McCarthy Tétrault LLP, Vancouver/Toronto

Nancy J. Carroll, Partner, Business Law, McCarthy Tétrault LLP, Toronto

Debra J. Finlay, Partner, Business Law Group, McCarthy Tétrault LLP, Vancouver

Carrie Fleming, Counsel, Real Property and Planning, McCarthy Tétrault LLP, Toronto

Miranda Lam, Partner, Litigation, McCarthy Tétrault LLP, Vancouver

Hartley Lefton, Partner, Business Law, McCarthy Tétrault LLP, Toronto

Wendi A. Locke, Partner, Business Law, McCarthy Tétrault LLP, Toronto

Clemens Mayr, Partner, Business Law, McCarthy Tétrault LLP, Montréal

Shevaun McGrath, Partner, Business Law & Co-Head, Private Equity, McCarthy Tétrault LLP, Toronto

Anca Neacsu, Partner, Business Law, McCarthy Tétrault LLP, Montréal

John S. Osler, Partner, Business Law, McCarthy Tétrault LLP, Calgary

Joanna Rosengarten, Counsel, Environmental, McCarthy Tétrault LLP, Toronto

Sonia J. Struthers, Partner, Business Law, McCarthy Tétrault LLP, Montréal

Thank you to our General Counsel Summit Steering Committee:

Debra J. Finlay, Partner, Business Law, McCarthy Tétrault LLP, Vancouver

Clemens Mayr, Business Law, McCarthy Tétrault LLP, Montréal

Judith McKay, Chief Client and Innovation Officer, McCarthy Tétrault LLP, Toronto

Robert J. Richardson, CD, Partner, Business Law, McCarthy Tétrault LLP, Toronto

Godyne N.L. Sibay, Managing Partner, Ontario Region, McCarthy Tétrault LLP, Toronto





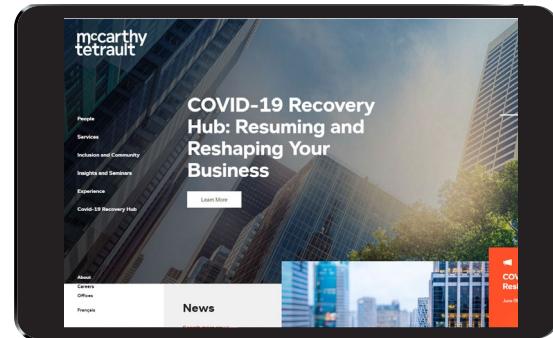
3rd Annual GC Summit

We are incredibly fortunate to work with exceptional General Counsel and in-house lawyers across the country, and we thank you for your support and trust throughout the year. We value opportunities to meet with you face to face, and hope you can join us for the 3rd Annual GC Summit in 2022.

Send a note to **Judith McKay**, McCarthy Tétrault's Chief Client and & Innovation Officer (jmckay@mccarthy.ca) and we'll be sure to let you know when registration opens for our third annual event. We welcome your ideas for speakers and topics to explore.

About McCarthy Tétrault

McCarthy Tétrault LLP is a premier full-service Canadian law firm advising on large and complex transactions and disputes for domestic and international clients. The firm has offices in every major business center in Canada, and in New York and London. The firm's industry-based team approach and depth of practice expertise helps our clients achieve exceptional commercial results.



VANCOUVER

Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5

CALGARY

Suite 4000, 421 7th Avenue SW
Calgary AB T2P 4K9

TORONTO

Suite 5300, TD Bank Tower
Box 48, 66 Wellington Street West
Toronto ON M5K 1E6

MONTRÉAL

Suite 2500
1000 De La Gauchetière Street West
Montréal QC H3B 0A2

QUÉBEC CITY

500, Grande Allée Est, 9e étage
Québec QC G1R 2J7

NEW YORK

55 West 46th Street, Suite 2804
New York, New York 10036
United States

LONDON

1 Angel Court, 18th Floor
London EC2R 7HJ
United Kingdom