



David Tupper

Partner | Calgary

david.tupper@blakes.com

Calgary: 403-260-9722

Blakes

David practises in the Litigation & Dispute Resolution group. His practice involves all aspects of corporate/commercial litigation with an emphasis on securities law, construction law, insurance law, environmental law and oil and gas law. He has appeared before all levels of courts in Alberta, in applications, trials and appeals, and has appeared in the Federal Court and the Federal Court of Appeal. In securities matters, he often appears in the Alberta Securities Commission.

David has acted as counsel for plaintiffs and defendants in construction disputes involving engineering, builder and architectural issues. The construction projects at issue have included oil sands facilities, roadways, bridges, buildings, manufacturing plants, transit systems and energy facilities. Issues have included delay, cost overruns, deficient construction, deficient design and negligent estimates. Many of the matters have been worth hundreds of millions of dollars and have involved millions of documents. The matters have been dealt with both by way of arbitration and in the courts.

In the securities area, David has acted for both the acquiror and the target in hostile take-overs and has frequently appeared before the Securities Commission of Alberta to attack or defend shareholder rights plans, defend the use of *Securities Act* exemptions, challenge the use of novel securities instruments and defend break fees. He has acted in dozens of arrangements, including the Suncor/Petro-Canada arrangement, and has successfully defeated challenges to those arrangements by adverse parties. David has also acted for management, and for dissident groups, in proxy contests and related court challenges. He has had significant experience in oppression cases, including disputes over the entitlements of shareholders and holders of debt instruments.

In the insurance area, David has acted as counsel in subrogation actions, coverage actions and liability defence matters involving property, liability and life insurance policies. He has also prepared coverage opinions dealing with numerous issues involving property and liability policies and reinsurance losses of very significant magnitude. He has acted in reinsurance treaty disputes, including in related arbitrations.

In the oil and gas area, David has given advice, led litigation and conducted trials in a range of matters involving contractual disputes, unitization, pooling, farmouts, processing agreements and other issues. He has also acted in a number of arbitrations involving pipeline construction, contracts and cost of service issues.

David also acts in the environmental area and has provided advice on large and small matters, including in one of the largest environmental cases ever brought before the Alberta courts, and in disputes relating to gas-station contamination, oil spills on waterways and coverage for environmental claims.

Year over year, David is ranked as a leading business litigator in legal trade publications, including *Chambers Global: The World's Leading Lawyers for Business*, *The Legal 500 Canada*, *The Canadian Legal Lexpert Directory*, *Benchmark Canada: The Definitive Guide to Canada's Litigation Firms & Attorneys*, *The Best Lawyers in Canada* and the *Who's Who Legal* series. In *Chambers Global*, clients have noted that he has a "tremendous ability to listen to [them], understand the issues, and convert that to a successful strategy" and is "smart, effective, no-nonsense and moves very quickly."

David has also been named Alberta Litigator of the Year by Benchmark Litigation in both 2018 and 2017 and has been chosen by Best Lawyers as the Calgary Class Action Lawyer of the Year in 2017, Calgary Product Liability Lawyer of the Year in 2020 and 2018, Calgary Director and Officer Liability Lawyer in 2019, and Calgary 2022 International Arbitration Lawyer of the year.

In his free time, David is active in many volunteer organizations.

SELECT EXPERIENCE

The following are some of the matters in which David has been involved:

Securities

- Acted for Pembina Pipeline Corporation before the Securities Commission to defend its break fee and challenge the use of a total return swap by Brookfield Infrastructure Corporation Exchange Limited in the context of a hostile bid made by Brookfield for Inter Pipeline Ltd. and a white knight bid by Pembina.
- Acted for Waterous Energy Fund before the Securities Commission to defend its use of exemptions in the context of a hostile takeover bid made by Waterous for Osum Oil Sands Corp.
- Acted for Exxon Mobil Corporation in the context of fair value proceedings involving shares of InterOil Corporation.
- Acting for Western Energy Services Corp. in a contest over a break fee after an unsuccessful white knight bid by Western Energy Services Corp for Savanna Energy Services Corp.
- Acting for Superior Plus Corporation in a contest over mutual claims for a break fee with Chemtrade Electrochem Inc., formerly known as Canexus Corporation.
- Litigation counsel to Suncor in its hostile take-over of Canadian Oil Sands.
- Litigation counsel to Suncor in its arrangement with Petro-Canada.
- Acted in a novel and precedent-setting oppression litigation case, leading to trial in which David successfully acted for Agrium in a suit against its commercial partners in a business.
- Acted for EPCOR Utilities Inc. and Capital Power Corporation in successful defence of an injunction brought by a former chair of the Alberta Securities Commission, seeking to enjoin a C\$3-billion transaction on the basis of deficient approval by the shareholder of EPCOR and the City of Edmonton.

- Acted for EPCOR Utilities Inc. and Capital Power Corporation to successfully defend an application brought by a number of Unions seeking to overturn the C\$2.8-billion transaction involving the creation of Capital Power Corporation and its initial public offering.
- Acted for dissident group in proxy contest for control of the board of a significant energy company. The dissident group won the proxy contest.
- Acted as litigation counsel to Independent Chair in a proxy contest involving a widely held private company.
- Acted on a number of occasions for management in proxy contests over the board election of dissident directors of prominent Calgary companies.
- Defended Canada Southern Petroleum Ltd. in a Securities Commission application brought by Petro-Canada to cease trade the shareholder rights plan of Canada Southern, in the context of a hostile take-over bid made by Petro-Canada for Canada Southern. Canada Southern was ultimately acquired by Canadian Oil Sands Trust in a friendly bid.
- Acted in an application before the Securities Commission for Mercator Minerals Ltd. to cease trade the shareholder rights plan of Tyler Resources Inc. in the context of a hostile bid made by Mercator for Tyler.
- Appeared in a large number of successful applications for arrangements involving numerous energy companies, including arrangements that were challenged by securityholders or other interested parties.
- Acted for an energy company in a dispute over entitlement of debentureholders in a change of control. Trial was ordered to take place six weeks from the filing of pleadings.

Construction Dispute Resolution

- Acted in an arbitration related to construction of a municipal light-rail transit system.
- Acted in a matter in arbitration involving construction of a terminalling facility.
- Acted in a number of arbitrations related to claims of cost overruns and delays in construction of a large oil sands facility.
- Acted for AMEC Foster Wheeler in a long litigation involving construction of a magnesium oxide plant in Jordan.
- Acted in a South American mine arbitration with a value of C\$550-million, involving losses caused by deficient design.
- Acted in a long international commercial arbitration with a value of over C\$800-million, involving construction issues and insurance issues in the oil sands.
- Acted in a C\$250-million arbitration involving cost overruns and delays in a petroleum plant.
- Several actions as plaintiff's counsel relating to negligent design and maintenance of compressors.

- Defended an engineer in litigation relating to negligent design and build of a roadway.
- Defended of an architect relating to negligent design of a recreational complex.
- Acted for a contractor in a dispute with multiple parties as to validity of builders' liens and the timing of filing.
- Acted for a multinational construction company in defence of allegations of negligent design and gross negligence in project management relating to an international construction project.
- Represented a large oil sands company in a multimillion-dollar dispute over the applicability and validity of a cancellation provision in a construction contract.
- Counsel to a multinational energy company in a contractual dispute regarding the design, supply and installation of components for a major project in the Alberta oil sands.
- Acted for a contracting firm in litigation involving a government owner and an engineering firm. This matter involved interpretation of a design-specified contract evaluation of construction practices against industry standards.
- Acted for a company in a suit over deficiencies related to construction of its headquarters building.

Commercial Litigation

- Obtained an injunction for a large retail company preventing a former employee from using confidential information, and from competing, with the company.
- Defended an action for Agrium leading to judgment after trial, involving, among other things, allegations that Agrium breached a change of control agreement relating to the grant of options and the valuation of those options.
- Defended an action for Nexen, leading to trial, in which Nexen successfully defended against allegations of breach of an employment contract.
- Successfully defended a large multinational company against allegations that it defectively designed and manufactured an electric blanket, leading to fire.
- Acted for a manufacturer of oilfield equipment in a dispute over intellectual property rights attached to that equipment.
- Acted for a safety company in a matter leading to a favourable trial judgment in which allegations were made of breach of fiduciary duty and theft of confidential information.
- Acted for the creditor of an insolvent oil field service company to advance bankruptcy claims, resulting in a settlement at nearly full value.
- Acted for a creditor seeking to lift the statutory stay of proceedings in a *Companies' Creditors Arrangement Act* (CCAA) proceeding to allow independent litigation to be advanced; succeeded in obtaining that order and ultimately resolved the matter.

- Acted for a mid-size oil and gas company in distress resulting in an order granting CCAA protection and the staged wind-up of that company.

Class Actions

- Acted in a number of class actions relating to:
 - Obligations alleged to be owed by a trustee to a First Nation
 - Airline transportation fees
 - Competition issues in the consumer area
 - An over-the-counter treatment product
 - The alleged effects of medication
 - Non-bank consumer loans

Oil & Gas

- Acted in a number of arbitrations relating to:
 - Energy cost accounting and operatorship issues
 - Pipeline construction and cost of service arrangements
 - Product liability issues related to oil sands construction
 - Oil pipeline financial guarantees
 - Pipeline cost of service arrangements
 - The entitlement to co-generation revenue streams
 - Pipeline construction standards and deficiencies
- Successfully appeared before the Alberta Energy Regulator for Hunt Oil Company in its application for an order-approved enhanced recovery of a number of productive wells. The application was challenged by a significant energy company and a hearing held in which Hunt was wholly successful.
- Acted for Dominion Exploration Canada Ltd. in a dispute over ownership of a gas well involving unitization and contractual issues, leading to trial, in which judgment was given for Dominion.
- Acted in a dispute over gas-plant-processing fees and allocation of capacity.
- Acted in a dispute over lapse of freehold leases and offset wells.

Environmental & Regulatory

- Acted in a significant pipeline spill matter in Manitoba.
- Acted in a dispute over environmental contamination related to adjacent energy facilities.
- Acted for a large multinational energy company in a dispute over historic contamination arising from refinery lands.
- Acted in an arbitration over damages arising from contamination.
- Defended an appeal of an arbitration decision relating to lease obligations to clean-up.
- Acted for an oil and gas company in a dispute relating to alleged contamination of a hotel property.

Insurance

- Acted in an arbitration involving reinsurance treaty obligations.
- Acted in a number of matters involving advice about Covid coverage issues.
- Acted in the New Brunswick courts in a significant coverage dispute involving a nuclear power facility.
- Coverage counsel in a significant matter involving transmission line failure.
- Acted in a significant coverage dispute involving construction of an oil sands tailings pond.
- Acts as an Umpire pursuant to the *Insurance Act* in valuation disputes.
- Acted as coverage counsel for a liability insurer in a significant dispute over the oil sands.
- Provided coverage advice with respect to diverse risks and unique or standard form policies in a variety of industries, in Canada and across the world. The opinions have considered issues relating to losses involving manufacturing plants, tailings dams, co-generation facilities, sulphur plants, oil well blowouts, ammonia plants, oil sands production facilities, gold mines, oil refineries, chemical plants, trucking operations, drilling rigs, oil batteries, gas plants, coal mines, transformer stations, pipelines, turbines, copper mines, warehouses, apartment buildings, and myriad other circumstances. The losses have occurred in North America, South America, Europe, Australia and Asia.
- Provided numerous opinions dealing with the obligation to disclose material facts and the consequences of non-disclosure of such facts.
- Acted in a coverage dispute relating to faulty design and workmanship, corrosion, wear and tear, latent defect, and erosion exclusion in a property policy in a matter involving the interjection of chemicals into a plant.
- Acted for a life insurer in defence of a coverage claim relating to the definition of “accidental” in the context of accidental death benefits.

- Acted in a subrogation action arising because of a compressor explosion, causing property damage and loss of profits.
- Acted in a recovery action arising from an explosion and fire at a gas processing plant. Limitation of liability clauses were at issue.
- Defended a scaffolding company in relation to claims of poor workmanship leading to paint overspray on adjacent property.
- Acted for an engineering firm in defence of an action alleging breach of duty in the assessment of soil conditions and design of a building foundation.
- Acted for an electrical company in defence of allegations that a defective transformer station caused a fire that destroyed a number of high-value condominium complexes.

PROFESSIONAL ACTIVITIES

2018-Present – Board of Directors, The Advocates' Society

2017-Present – Mentor, The Law Society of Alberta

2016-Present – Member of the Alberta Regional Advisory Committee for The Advocates' Society

2016-2017 – Member of the Code of Conduct Review Committee of The Law Society of Alberta

2013-2015 – Member of the Professional Responsibility Committee of The Law Society of Alberta

2009-2013 – Member of the Civil Practice Advisory Committee of The Law Society of Alberta

2009-2012 – Co-founder and Member of the Retention of Women Working Committee of The Law Society of Alberta

Since 2007 – Instructor at CPLED on various topics

Since 1996 – Volunteer with Calgary Legal Guidance

AWARDS AND RECOGNITION

David is recognized for his expertise in litigation in the following publications and awards:

Publications

- *Chambers Canada: Canada's Leading Lawyers for Business – 2016-2022* (Litigation: General Commercial – Alberta; Insurance: Dispute Resolution – Canada): “David Tupper maintains a strong position in the market and is regarded by clients as ‘a bet the company litigation lawyer that we would go to on very serious litigation matters.’ One interviewee added: ‘He is a litigator who knocks it out of the park.’” Another said: ‘He is fantastic – very practical and

knowledgeable. He understands that it is not always just about law, but that other things come into play.”

- *Chambers Global: The World's Leading Lawyers for Business – 2009-2021* (Dispute Resolution): “David Tupper ‘is a prominent name’ in litigation in Alberta and is praised by clients for his wide-ranging skill set...” Other comments include: “very well-reasoned, very persuasive, and a very calm court presence,” “has a tremendous ability to listen to clients, understand the issues and convert that to a successful strategy” and “smart, effective, no nonsense and moves very quickly.”
- *The Canadian Legal Lexpert Directory* (2014-2021: Most Frequently Recommended: Litigation – Corporate Commercial; 2021: Consistently Recommended: Commercial Arbitration; 2018-2021: Repeatedly Recommended: Directors and Officers Liability; 2016-2021: Repeatedly Recommended: Litigation – Commercial Insurance; 2017-2021: Repeatedly Recommended: Construction Law; 2018-2021: Repeatedly Recommended: Litigation – Product Liability; 2020-2021: Repeatedly Recommended: Class Actions; 2020-2021: Repeatedly Recommended: Litigation – Securities)
- *The Legal 500 Canada – 2015-2021* (Listed in the elite "Leading Lawyers in Canada" list for Dispute Resolution and Insurance)
- *The Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada – 2018-2021* (Corporate Commercial Litigation)
- *Benchmark Canada: The Definitive Guide to Canada's Leading Litigation Firms and Attorneys – 2013-2021* (Litigation Star: Construction, Energy and Natural Resources, Insurance, General Commercial): “David has an ability to anticipate and in certain instances defuse situations before they become major issues. With that said, I did get the opportunity to see him in the court room and I was very glad he was on my side!”
- *Acritas Stars 2019-2021: Independently Rated Lawyer* (Nominated as a stand-out lawyer by senior in-house counsel)
- *The Best Lawyers in Canada – 2011-2022* (Corporate and Commercial Litigation, Securities Law, Alternative Dispute Resolution, International Arbitration, Construction Law, Class Action Litigation, Insurance Law, Product Liability Law, Appellate Practice, Directors & Officers Liability, and Bet-the Company Litigation)
- *Who's Who Legal: Litigation – 2017-2020* (“David stands out as an excellent trial lawyer.”)
- *Who's Who Legal: Arbitration – 2020*
- *Who's Who Legal: Insurance & Reinsurance – 2015-2020*
- *Lexpert Special Edition on Litigation: Canada's Leading Litigation Lawyers – 2013-2019* (Ranked Lawyer)

Awards

- Winner of Best Lawyers' "Lawyer of the Year Award" for Calgary (2022: International Arbitration; 2018 and 2020: Product Liability Law; 2019: Director and Officer Liability Practice; 2017: Class Action Litigation)
- Alberta Litigator of the Year for 2017 and 2018 – Benchmark Canada Awards

PROFESSIONAL ACTIVITIES

David regularly speaks at conferences throughout Canada on topics that impact the areas of law in which he practises. He is also active in many volunteer organizations.

EDUCATION

Admitted to the Alberta Bar – 1996
LL.B., University of Toronto – 1995
B.A., University of Alberta – 1991