Registrar's Office
TransCanada Pipelines Tower
2600, 450 - 1st ST SW
Calgary AB T2P 5H1

TEL: (403) 297-2206
FAX: (403) 297-5294

COURT OF APPEAL OF ALBERTA

Registrar's Office
Law Courts Building
1A Sir Winston Churchill Square
Edmonton AB T5J 0R2

TEL: (780) 422-2416
FAX: (780) 422-4127

I. Moore
Deputy Registrar, Calgary and Edmonton

https://albertacourts.ca

December 23, 2016

J.W. Mcdonald
Mcdonald & Ross
Fax No. 519-740-6368

H. Gorman, Q.C. / A. Badami
Norton Rose Fullbright
Fax No. 403-264-5973

Re: ***Lanny K. Mcdonald v. Brookfield Asset Management Inc.***
Appeal No. 1501-0131AC

This is to advise that the reserved judgment in the above named case will be released the morning of **Tuesday, January 3, 2017**. On that day, **between 9:30 a.m. and 10:00 a.m.**, a copy of the judgment will be sent to you as set out above.

That same day, the judgment will also be sent to the Canadian Legal Information Institute (CanLII) at 10:00 a.m. for publishing to its website, which may occur that same day. Any concerns with on-line judgments should be raised directly with CanLII.

If you have any concerns about the judgment being sent to you as set out above, please contact our office as soon as possible to make alternate delivery arrangements.

Thank you,

for Deputy Registrar
Court of Appeal – Calgary
/jn

☐ Date: _____

As indicated above, attached is the judgment which was released today.

Thank you.

Court of Appeal of Alberta

Phone: 403-297-2206

Fax: 403-297-5294

Fax

TO:	**J.W. McDonald**	**FROM:**	**Court of Appeal**
FAX:	**1-519-740-6369 8**	**PAGES:**	**4**
DATE:	**December 23, 2016**	**CC:**	
RE:	**McDonald v Brookfield Asset Management Inc. – 1501-0131-AC**		

Urgent Original to Follow in Mail

Comments:

Following this coversheet is a Memorandum of Judgment that has been filed today (December 23, 2016) in the above noted matter.

In the Court of Appeal of Alberta

Citation: McDonald v Brookfield Asset Management Inc., 2016 ABCA 419

Date: 20161223
Docket: 1501-0131-AC
Registry: Calgary

Between:

Lanny K. McDonald

Appellant
(Plaintiff)

- and -

Brookfield Asset Management Inc., Brookfield Special Situations Partners Ltd. and Hammerstone Corporation

Respondents
(Defendants)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment

Application for Release of Transcripts

Memorandum of Judgment

The Court:

[1] The appellant has requested a transcript of the oral argument leading to the decision reported as ***McDonald v Brookfield Asset Management***, 2016 ABCA 375. The policy of the Court is that the digital recordings of oral argument are for internal use only, and transcripts will not be provided except in exceptional circumstances upon authorization of the panel or judge presiding at the hearing.

[2] The appellant advises that he intends to seek leave to appeal to the Supreme Court of Canada, and he requires the transcripts to:

(a) confirm the ruling on the admissibility of fresh evidence, and

(b) clarify the "discussion surrounding" certain issues during the oral argument, in relation to proposed arguments in support of the application for leave to appeal, i.e. that the reasons for decision overlook or incorrectly apply some of the relevant statutory wording or evidence.

Neither of these is a circumstance requiring the transcripts.

[3] Firstly, the reasoning of the Court is found in the Memorandum of Judgment. Any reviewable errors, and any issues of national importance justifying leave to appeal will be found in that Memorandum. If issues or evidence were overlooked, that will be apparent from a review of the Memorandum.

[4] Specifically, discussions during oral argument are not a part of the reasons of the Court. The point was made by Viscount Simon, and reported in a *Practice Note*, [1942] WN 89:

> During the hearing of an appeal Viscount Simon L.C., referring to reports which might be made of the case, said that it was well understood that interlocutory observations of members of the Board or of a Court were not judicial pronouncements. They did not decide anything, even provisionally. They were made to elucidate the argument, to point the question, or to indicate what were the matters which the judicial spokesman thought needed to be investigated, and that was all. It would be a very great pity, and a profound error, if anybody, foreigner or fellow-subject, supposed that interlocutory observations were anything more.

Appellate Courts have repeatedly emphasized that questions asked or opinions expressed during oral argument do not necessarily reflect the final position of that judge, much less any sort of final adjudication by the panel of the Court: ***Toliver v Koepke***, 2013 ABCA 390 at para. 6, 566 AR 24;

R. v Hehn, 2008 BCCA 170 at para. 35, 254 BCAC 215; ***R. v Sanghera***, 2015 BCCA 326 at para. 59, 375 BCAC 78; ***Menzies v Harlos*** (1989), 37 BCLR (2d) 249, 37 CPC (2d) 94 (CA); ***R. v Baccari***, 2011 ABCA 205 at para. 24, 510 AR 301. It follows that if there are any reviewable errors to be found, they are to be found in the Memorandum of Decision, and the transcripts of the oral argument are generally irrelevant.

[5] Secondly, it is rarely necessary or appropriate for the Court to provide "clarification" of the reasons for decision. The reasons must speak for themselves, and stand or fall based on the reasoning (or absence of reasoning) in them. In those rare cases where some clarification is appropriate, the proper procedure is to apply to the panel for clarification, not for counsel to sort through the oral argument in an attempt to supplement the formal written reasons.

[6] With respect specifically to the ruling on the fresh evidence application, the long standing practice of the Court is that such applications are adjourned over, and are heard by the same panel hearing the substantive appeal: R. 14.38(2)(b). That is because a part of the test for the admission of fresh evidence is whether it could, when considered with the rest of evidence, reasonably be expected to have affected the result. A consideration of the fresh evidence application therefore involves a consideration of the merits of the appeal, and it is most efficient that the application and the appeal be heard at the same time. As a result, it is possible that the panel might hear the contents of the fresh evidence during the argument of the appeal, but ultimately rule that it is inadmissible. Counsel must effectively argue the appeal on the basis that the fresh evidence will, or will not be admitted: ***Armoyan v Armoyan***, 2013 NSCA 99 at para. 132, 334 NSR (2d) 204.

[7] The procedure for having the same panel hear both the application for fresh evidence and the appeal was set out in ***R. v Stolar***, [1988] 1 SCR 480 at pp. 491-2:

> The procedure which should be followed when an application is made to the Court of Appeal for the admission of fresh evidence is that the motion should be heard and, if not dismissed, judgment should be reserved and the appeal heard. In this way, the Court of Appeal has the opportunity to consider the question of fresh evidence against the whole background of the case and all the other evidence in the case. It is then in a position where it can decide realistically whether the proffered evidence could reasonably have been expected to affect the result of the case. If, then, having heard the appeal, the court should be of the opinion that the evidence could not reasonably have affected the result, it would dismiss the application for the introduction of fresh evidence and proceed to a disposition of the appeal. On the other hand, if it should be of the view that the fresh evidence is of such nature and effect that, taken with the other evidence, it would be conclusive of the issues in the case, the Court of Appeal could dispose of the matter then and there. Where, however, the fresh evidence does not possess that decisive character which would allow an immediate disposition of the appeal but, nevertheless, has sufficient weight or probative force that if accepted by the trier of fact, when considered with

> the other evidence in the case, it might have altered the result at trial, the Court of Appeal should admit the proffered evidence and direct a new trial where the evidence could be heard and the issues determined by the trier of fact.

This was the procedure outlined by the Chief Justice at the commencement of the oral argument, and followed by the panel in this appeal.

[8] When appellant's counsel asked, the panel confirmed (after the routine morning break) that he was at liberty to refer to the fresh evidence during the oral argument, on the basis that its admissibility would be considered along with the disposition of the substance of the appeal. The panel never ruled during the oral argument that the fresh evidence was admissible, and merely confirmed that it could be referred to. The fact that the evidence was subsequently ruled inadmissible is not inconsistent with permitting its use during the oral argument. As stated in ***Stolar*** at p. 487: ". . . there is a distinction between an order which actually admits the proffered evidence and one which allows consideration of the evidence for the purpose of determining whether it will be admitted".

[9] The draft press release of July 3, 2008 was added to the record at the oral argument on the consent of the respondents.

[10] The request for release of the transcripts of the oral argument is accordingly refused.

Written submissions received on December 8, 19 and 21, 2016

Memorandum filed at Calgary, Alberta
this 23rd day of December, 2016

REGISTRAR
FILED
DEC 23 2016
Court of Appeal of Alberta

Authorized to sign for: Fraser C.J.A.

Slatter J.A.

Authorized to sign for: O'Ferrall J.A.

Appearances:

J.W. McDonald
for the Appellant

H. Gorman, Q.C. and A. Badami
for the Respondents