Federal Court of Appeal | Cour d'appel fédérale

**Date: 20260219**

**Docket: A-132-24**

**Citation: 2026 FCA 33**

**CORAM:** **WEBB J.A.**
**WOODS J.A.**
**LEBLANC J.A.**

**BETWEEN:**

**SUNCOR ENERGY INC.**

**Appellant**

**and**

**HIS MAJESTY THE KING**

**Respondent**

Heard at Calgary, Alberta, on December 9, 2025.

Judgment delivered at Ottawa, Ontario, on February 19, 2026.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: WOODS J.A.
LEBLANC J.A.

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## REASONS FOR JUDGMENT

**WEBB J.A.**

[1] Subsection 13(31) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) deems a transferee who has received depreciable property from a person with whom the transferee was not dealing at arm's length to have acquired the property at the time it was acquired by the transferor for the purpose of determining when the property will be available for use as provided in paragraph 13(27)(*b*) of the Act. The issue in this appeal is the interaction of these two

provisions when the transferee does not exist as of the time that the transferee is deemed to have acquired the property.

[2] The properties in question in this appeal were acquired by Suncor Energy Inc. (Suncor) in January 2005. The Suncor Energy Oil Sands Limited Partnership (the "Limited Partnership") was formed on February 1, 2005. The fiscal period of the Limited Partnership ended on January 31. Suncor held a 99.9% interest in the Limited Partnership and did not deal at arm's length with the Limited Partnership. The properties were transferred to the Limited Partnership on January 1, 2006.

[3] For long term projects, where the depreciable property may not be used to earn income for several years, paragraph 13(27)(*b*) of the Act provides that such property will be considered to be available for use after the beginning of the first taxation year of the taxpayer that commences more than 357 days after the end of the taxation year of the taxpayer in which the property was acquired by the taxpayer. The Tax Court Judge found that since subsection 13(31) of the Act did not deem the transferee to have a taxation year before it was formed, the property acquired by the Limited Partnership would only be available for use after the end of two actual taxation years of the Limited Partnership following the acquisition of the properties (2024 TCC 31). As a result, he found that the property was not available for use in the fiscal period ending January 31, 2007, as claimed by the Limited Partnership, and dismissed Suncor's appeal of the reassessment of its 2007 taxation year.

[4] Suncor appealed this decision of the Tax Court. For the reasons that follow, I would allow this appeal.

## I. Background

[5] The facts related to the acquisition of the depreciable properties by Suncor and the subsequent transfer of these properties to a newly formed limited partnership are not in dispute.

[6] In January 2005, Suncor acquired $34,368,000 of depreciable property described in Class 41 of Schedule II of the *Income Tax Regulations*, C.R.C., c. 945 (the "MCU Depreciable Properties") in relation to the Millennium Coker Unit project (the "MCU Project"), which was started in 2003. The purpose of the project was to add a third set of cokers to the upgrader associated with the Millennium Coker Unit as well as make modifications to other upgrader components.

[7] The MCU Project was not completed during any of the taxation years relevant in this appeal.

[8] Suncor Energy Oil Sands Inc. (the "Subsidiary") was incorporated on January 19, 2005 as a wholly owned subsidiary of Suncor. On February 1, 2005, the Limited Partnership was formed and registered as a limited partnership, with Suncor as the general partner and the Subsidiary as the limited partner. Suncor held a 99.9% interest in the Limited Partnership. The Subsidiary held a 0.1% interest.

[9] Suncor transferred assets used in carrying on its oil sands business (which included the MCU Depreciable Properties) to the Limited Partnership on January 1, 2006. The elected amount for the MCU Depreciable Properties was the fair market value of these properties ($34,368,000).

[10] Suncor and the Limited Partnership were not dealing at arm's length with each other for the purposes of the Act.

[11] The fiscal period of the Limited Partnership ended on January 31, and the taxation year of Suncor ended on December 31.

[12] The Limited Partnership added $34,368,000 in computing the undepreciated capital cost of its Class 41 property for its fiscal period ending January 31, 2007 on the basis that the MCU Depreciable Properties became available for use immediately after the beginning of this fiscal period. The Limited Partnership then deducted the related capital cost allowance when computing its net income for its fiscal period ending on January 31, 2007.

[13] The Limited Partnership allocated 99.9% of its income for its fiscal period ending on January 31, 2007 to Suncor. Since Suncor's taxation year was the calendar year, Suncor included this amount in computing its income for its taxation year ending December 31, 2007.

[14] The Minister of National Revenue (the "Minister") reassessed Suncor's 2007 taxation year on the basis that the MCU Depreciable Properties were not available for use at any time during the Limited Partnership's fiscal period ending on January 31, 2007. The reassessment

disallowed the addition of $34,368,000 to the Limited Partnership's undepreciated capital cost balance and the related capital cost allowance deduction. This resulted in an increase in the income of the Limited Partnership and, therefore, in the amount of income allocated to Suncor in respect of the Limited Partnership's fiscal period ending on January 31, 2007.

## II. The Tax Court Decision

[15] The Tax Court Judge reviewed the relevant provisions related to claiming a deduction for capital cost allowance for depreciable property. The Tax Court Judge noted that capital cost allowance cannot be claimed until a property has become available for use (subsection 13(26) of the Act). A property that is being used to earn income will become available for use when it is first used to earn income (paragraph 13(27)(*a*) of the Act). A property, such as the Class 41 properties in this appeal, that is acquired to be used in earning income but which is not currently being used to earn income will be considered to be available for use in the first taxation year that begins more than 357 days following the end of the taxation year in which the property is acquired (paragraph 13(27)(*b*) of the Act).

[16] The Tax Court Judge found that subsection 13(31) of the Act provides that a transferee (who is not dealing at arm's length with the transferor) is deemed to have acquired the property at the time it was acquired by the transferor. The Tax Court Judge agreed with Suncor that:

> [51] …the wording of the paragraph [13(31)(*a*)] leads to the conclusion that the purpose of the provision is to provide for continuity of ownership between non-arm's-length parties when applying the two-year rolling start rule.

[17] However, the Tax Court Judge found that subsection 13(31) of the Act does not deem the transferee to have a taxation year at the time it is deemed to acquire the property, if the transferee was formed after such time. Since the Limited Partnership did not exist in January 2005 (the time when Suncor acquired the MCU Depreciable Properties) it did not have a taxation year at that time. The Tax Court Judge also noted that the taxation year for a Canadian resident partnership is its fiscal period (subsection 249(1) of the Act). Since subsection 13(31) of the Act did not deem the Limited Partnership to have a taxation year in January 2005, it was not available for use as of February 1, 2006. Therefore, capital cost allowance could not be claimed for the Limited Partnership's fiscal period ending January 31, 2007. Since the income for that fiscal period was allocated to Suncor, Suncor's appeal from the reassessment of its 2007 taxation year was dismissed.

## III. Issue and Standard of Review

[18] The issue in this appeal is the interpretation of subsection 13(31) and paragraph 13(27)(*b*) of the Act when depreciable property is transferred to an entity that did not exist as of the date that the transferor acquired such property.

[19] Since the only issue raised in this appeal is a question of law, the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33).

[20] The relevant subsections of section 13 of the Act are set out in the appendix attached to these reasons.

## IV. Analysis

[21] A taxpayer who acquires a depreciable property for use in a business is entitled to claim capital cost allowance on a declining balance basis in determining the taxpayer's income for the purposes of the Act. The rate at which capital cost allowance may be claimed is determined by the classification of the property. In this appeal, the MCU Depreciable Properties would be included in Class 41 of Schedule II to the Regulations.

[22] Under the Act, capital cost allowance can only be claimed once a property has become available for use (subsection 13(26) of the Act). A property that is being used to earn income becomes available for use when it is first used to earn income (paragraph 13(27)(*a*) of the Act). For long term projects, where the depreciable property may not be used to earn income for several years, the Act provides that such property will be available for use after the beginning of the first taxation year of the taxpayer that commences more than 357 days after the end of the taxation year of the taxpayer in which the property was acquired by the taxpayer (paragraph 13(27)(*b*) of the Act). In general, for such property acquired in a particular year the property will be available for use, not in the following year, but in the year after the following year. Therefore, in general, for property acquired in the 2005 taxation year, the property will be available for use in the 2007 taxation year.

[23] As a result, if Suncor would have retained the MCU Depreciable Properties (which were acquired in January 2005), these properties would have been available for use in Suncor's taxation year ending December 31, 2007.

[24] Suncor acquired the MCU Depreciable Properties in January 2005 and transferred these properties to the Limited Partnership in January 2006. The issue in this appeal is the application of the deeming rule in subsection 13(31) of the Act, which deems the Limited Partnership to have acquired the MCU Depreciable Properties in January 2005, even though the Limited Partnership was not formed until February 1, 2005.

[25] The majority of the Supreme Court of Canada in *Piekut v. Canada (Minister of National Revenue)*, 2025 SCC 13 summarized the modern principle of statutory interpretation:

> [43] The modern principle requires a court to interpret statutory language "according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10; *R. v. Downes*, 2023 SCC 6, at para. 24). Even so, a court need not address text, context, and purpose separately or in a formulaic way, since these elements are often closely related or interdependent (*Bell ExpressVu*, at para. 31; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84, at para. 28).

[26] The text of subsection 13(31) of the Act is clear. If a depreciable property is transferred to a person with whom the transferor does not deal at arm's length, the transferee is deemed to have acquired that depreciable property at the time that it was acquired by the transferor. Since Suncor acquired the MCU Depreciable Properties in January 2005, the Limited Partnership is deemed to have acquired the MCU Depreciable Properties in January 2005.

[27] The deeming rule in subsection 13(31) only applies for the purposes of three provisions — paragraphs 13(27)(*b*) and 13(28)(*c*), and subsection 13(29). Paragraph 13(27)(*b*) of the Act provides the applicable holding period for a depreciable property (other than a building or part

thereof) to be available for use. Paragraph 13(28)(*c*) of the Act provides the applicable holding period for a building or part thereof to be available for use. Subsection 13(29) provides an election for depreciable property (other than a building) acquired for long-term projects that also references a time period following the taxation year in which property is acquired. Of these three provisions, the only one relevant in this appeal is paragraph 13(27)(*b*) of the Act.

[28] Paragraph 13(27)(*b*) provides that a depreciable property that is not being used for the purpose of earning income will nonetheless be considered to be available for use after "the time that is immediately after the beginning of the first taxation year of the taxpayer that begins more than 357 days after the end of the taxation year of the taxpayer in which the property was acquired by the taxpayer" (emphasis added). The time period during which a taxpayer must wait for a depreciable property (that is not otherwise being used) to be considered to be available for use commences at the end of the taxation year in which the property was acquired by the taxpayer. Therefore, even though the property is deemed to be acquired at a particular time under subsection 13(31) of the Act, if that time is not considered to be in a taxation year of the transferee, the time period stipulated in paragraph (*b*) does not start and therefore cannot be determined.

[29] In the case that is before us, the Tax Court Judge found that the Limited Partnership did not have a taxation year when it was deemed to have acquired the property in January 2005 as the Limited Partnership was not formed until February 1, 2005. In paragraph 70 of his reasons, the Tax Court Judge stated: "[u]nder subsection 13(27)(b), two actual year-ends must pass before a property is considered to have become available for use".

[30] Since the first actual year-end for the Limited Partnership would have been January 31, 2006, the Tax Court Judge concluded that the MCU Depreciable Properties would not have been available for use as of February 1, 2006 (and hence for the Limited Partnership's fiscal period February 1, 2006 to January 31, 2007). Therefore, the Limited Partnership could not claim any capital cost allowance in relation to the MCU Depreciable Properties for its fiscal period ending January 31, 2007 (which would have been reflected in the income allocated to Suncor and included in Suncor's income for its 2007 taxation year ending December 31, 2007).

[31] Although the 2008 taxation year for Suncor was not before the Tax Court, the Tax Court Judge indicated, in paragraph 76 of his reasons, that, in his view, the MCU Depreciable Properties would have been available for use on February 1, 2007 (and hence the Limited Partnership could have claimed capital cost allowance in relation to these properties in determining its income for its fiscal period ending January 31, 2008).

[32] However, in order for the MCU Depreciable Properties to have been available for use in the Limited Partnership's fiscal period ending January 31, 2008, the MCU Depreciable Properties would have had to have been acquired in the taxation year of the Limited Partnership that began on February 1, 2005 and ended on January 31, 2006. This is inconsistent with subsection 13(31) of the Act which deems the MCU Depreciable Properties to have been acquired by the Limited Partnership in January 2005, before the fiscal period of the Limited Partnership began on February 1, 2005. In effect, the Tax Court Judge changed the deemed date of acquisition from January 2005 to sometime during the fiscal period of the Limited Partnership that ran from February 1, 2005 to January 31, 2006. Absent a finding that the Limited

Partnership acquired the MCU Depreciable Properties during its fiscal period February 1, 2005 to January 31, 2006 there would be no basis to find that the time period stipulated in paragraph 13(27)(*b*) of the Act had started following the end of the Limited Partnership's taxation year February 1, 2005 to January 31, 2006.

[33] Although the Crown's position is not entirely clear, during oral argument in this appeal the Crown appeared to take the position that since the MCU Depreciable Properties were deemed to be acquired at a time when the Limited Partnership did not exist, the MCU Depreciable Properties were not acquired by the Limited Partnership in a taxation year of the partnership. Therefore, the time period as set out in paragraph 13(27)(*b*) of the Act did not commence. The Limited Partnership would, as a result, not be able to claim any capital cost allowance in relation to the MCU Depreciable Properties until these properties were used in carrying on a business or some other provision would allow the Limited Partnership to claim capital cost allowance in relation to these properties. The Crown did not identify any other provision (other than actual use) that would allow the Limited Partnership to claim capital cost allowance in relation to these properties.

[34] The issue in this appeal is whether this is the correct interpretation of the deeming provision in subsection 13(31) of the Act as it applies for the purposes of paragraph 13(27)(*b*) of the Act, based on a textual, contextual and purposive analysis.

[35] As noted by the Supreme Court of Canada in *R. v. Verrette*, [1978] 2 S.C.R. 838, at page 845, a deeming provision is a statutory fiction:

> … A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is….

[36] In *Canada (Attorney General) v. Scarola*, 2003 FCA 157, this Court adopted the following description of a legal fiction:

> [19] …The purpose and operation of a legal fiction has also been described eloquently by Yan Thomas in an article entitled: '*Fictio Legis*. L'empire de la fiction romaine et ses limites médiévales' (1995), 21 *Droits -- Revue française de théorie juridique* 17:
>
> > [TRANSLATION] Fiction is a process that, as repeatedly noted, is part of the pragmatics of law. It consists first in misrepresenting the facts, stating them to be other than what they really are and extracting from that very adulteration and that false supposition the legal consequences that would flow from the dissembled truth, if that truth existed beyond the cloak of external appearances.

[37] In this appeal, it is necessary to determine the legal consequences that would flow for the purposes of paragraph 13(27)(*b*) of the Act as a result of an entity being deemed to have acquired property before that entity comes into existence.

[38] In *La Survivance v. The Queen*, 2006 FCA 129, (*La Survivance*) the issue before the Court related to the deeming rule in subsection 256(9) of the Act. This subsection deems control of a corporation to have been acquired at the beginning of the day on which it is otherwise acquired. In 2006, this subsection read in part as follows:

| | |
|---|---|
| …where control of a corporation is acquired by a person or group of persons at a particular time on a day, | […] le contrôle d'une société qui est acquis à un moment donné est réputé l'être au début du jour où tombe ce |

> control of the corporation shall be deemed to have been acquired by the person or group of persons, as the case may be, at the commencement of that day and not at the particular time…
>
> moment

[39] While the subsection deems the time at which control is acquired, it does not address the time at which control is surrendered by the person who previously had control.

[40] This Court concluded that the correct interpretation of the provision was to deem control to be both acquired and surrendered at the commencement of the day during which control was otherwise acquired:

> [65] Subsection 256(9), notwithstanding its special features, must be construed in its entire context, in accordance with the grammatical and ordinary sense of its words, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (see, for example, *Ludco Enterprises Ltd. v. Her Majesty the Queen*, [2001] 2 S.C.R. 1082, at paras. 36-37).
>
> [66] If this approach is faithfully adhered to, it must be concluded that, for the purposes of the Act, and subject to the exceptions provided, Société Nationale is deemed to have acquired control of Les Clairvoyants and the appellant is deemed to have surrendered it at the first moment of the day of July 5, 1994. That is what flows from the ordinary sense of the words, read in their context, and from the statutory objective.

[41] Therefore, even though the deeming rule in subsection 256(9) of the Act only deemed control to have been acquired at the commencement of the day on which it was actually acquired, it was also interpreted as deeming control to be surrendered at the same time.

[42] This is consistent with the principle of necessary implication as set out by Professor Ruth Sullivan in *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: LexisNexis Canada Inc., 2008) at page 183:

> ***Reliance on necessary implication***: Legislative silence with respect to a matter does not necessarily amount to a gap in the legislative scheme. A gap is a 'true' gap only if the legislature's intention with respect to the matter cannot be established by necessary implication. An intention is necessarily implied if (1) it can be established using ordinary interpretation techniques and (2) the implication is essential to make sense of the legislation or to implement its scheme.

[43] In the appeal that is before us, the purpose of the deeming rule in subsection 13(31) of the Act was described by Bruce R. Sinclair, in his paper "Depreciable Property: A Review of Recent Legislative Developments," in Canadian Tax Foundation, Report of Proceedings of the Forty-Third Tax Conference (1991) (Toronto: Canadian Tax Foundation, 1992) 26:1-20, at page 26:13:

> There are several proposed provisions to put a transferee of depreciable property in the same position as the transferor under the available-for-use rules. Both proposed subsections 13(30) and 13(31) apply where a taxpayer has acquired property
>
> 1) from a person with whom the taxpayer was not dealing at arm's length (otherwise than by reason of a right referred to in paragraph 251(5)(b)) at the time of acquisition, and
>
> 2) in the course of a butterfly reorganization described in paragraph 55(3)(b).

[44] In the present appeal, the Tax Court Judge also found that the purpose of subsection 13(31) of the Act is to provide for continuity of ownership between non-arm's-length parties when applying the rule in paragraph 13(27)(*b*) of the Act to determine when a depreciable property that is not being used will be considered to be available for use. However, in order for

this continuity of ownership to apply, the property must be considered to be acquired in a taxation year of the transferee. It is a necessary implication of the deemed acquisition of property at a particular time that such time must occur during a taxation year. Otherwise, the time period in paragraph 13(27)(*b*) of the Act never commences and there is no continuity of ownership.

[45] In *La Survivance*, where the deeming rule did not explicitly state that control was surrendered at the commencement of the day, the Court found that in the context of that provision and the statutory objective, control was also deemed to be surrendered at the commencement of the day. Similarly, in the present appeal, since the deeming rule only refers to a particular time at which the property is deemed to be acquired by the transferee, a necessary implication is that this acquisition of property occurs in what would have been the taxation year of the transferee if the transferee existed as of the time of the deemed acquisition. This is necessary to start the time period as set out in paragraph 13(27)(*b*) of the Act. This necessary implication of the acquisition of property in such a taxation year would only be for the limited purpose of determining when the property will be available for use under paragraph 13(27)(*b*) of the Act.

[46] The question in this appeal is therefore whether Parliament intended that the deemed acquisition of property by a transferee occurred in what would have been the taxation year of that transferee if the transferee had existed at that time. In my view, this question is answered by completing the contextual and purposive analysis to interpret paragraph 13(27)(*b*) and subsection 13(31) of the Act.

[47] As noted above, the Tax Court Judge found, and I agree, that the purpose of the provision is to provide for the continuity of ownership for the purpose of the available for use rules where property is transferred between parties not dealing with each other at arm's length.

[48] The deemed acquisition of property under subsection 13(31) to the application of paragraph 13(27)(*b*) of the Act is relevant to depreciable property that is acquired as part of a long term project that may take several years to complete. In this appeal, Suncor began the Millennium Coker Unit project in 2003. The Tax Court Judge noted in paragraph 17 of his reasons that the project was not completed until "some future date".

[49] The parties agree that the total elected amount for the depreciable property included in Class 41 that was transferred from Suncor to the Limited Partnership on January 1, 2006 was $823,241,000. Since the MCU Project started in 2003 and continued for some time after the Limited Partnership acquired the property from Suncor, it is more likely than not that the Class 41 depreciable property that was transferred to the Limited Partnership included property that was acquired during the period commencing in 2003 and ending when the property was transferred to the Limited Partnership on January 1, 2006. The application of the Act to the property transferred to the Limited Partnership, solely for the purposes of determining when the property would be available for use, will be considered based on the acquisition of property by Suncor during three time periods — the property acquired by Suncor prior to January 2005 (*i.e.*, in 2003 and 2004), the property acquired by Suncor in January 2005 (the MCU Depreciable Properties), and the property acquired by Suncor after January 2005 (*i.e.*, during the period from February 1, 2005 to December 31, 2005).

[50] For any depreciable property acquired by Suncor in 2003 and 2004, such property would have been available for use by Suncor on or before January 1, 2006 as a result of the application of paragraph 13(27)(*b*) of the Act. Therefore, such property would be available for use by the Limited Partnership when it acquired the property from Suncor in January 2006 as a result of the application of subsection 13(30) of the Act. Under this subsection, if a property is available for use by a transferor before it is transferred to a person with whom the transferor is not dealing at arm's length, it is deemed to be available for use by the transferee when it is acquired by the transferee.

[51] The Limited Partnership would therefore be entitled to claim capital cost allowance for such property in computing its income for the fiscal period ending January 31, 2006. Since the Limited Partnership does not pay tax but rather allocates its income to its partners, Suncor would have had the benefit of the capital cost allowance in computing its income for that year ending December 31, 2006, which would be the same taxation year in which it would have had the benefit of the capital cost allowance if it had retained the properties.

[52] For the properties acquired by Suncor in January 2005, if these properties were not acquired in a taxation year of the Limited Partnership, the time period under paragraph 13(27)(*b*) of the Act would not commence. Hence, no capital cost allowance could be claimed in relation to these properties until they are used to earn income or some other unidentified provision would be applicable that would allow the Limited Partnership to claim capital cost allowance in relation to these properties.

[53] For the properties acquired by Suncor after January 2005 (*i.e.*, during the period from February 1, 2005 to December 31, 2005), which were transferred to the Limited Partnership on January 1, 2006, these properties will be deemed to be acquired at a time after the Limited Partnership was formed. Therefore, there would be no dispute that these properties would be deemed to be acquired in the 2006 taxation year of the Limited Partnership (February 1, 2005 to January 31, 2006) for the purposes of paragraph 13(27)(*b*) of the Act and would be available for use February 1, 2007 (for the Limited Partnership's fiscal period February 1, 2007 to January 31, 2008).

[54] As a result, the only properties for which capital cost allowance could not be claimed until the properties were in use would be those properties acquired in January 2005. There is nothing to indicate that Parliament intended this result. In order to provide a full continuity of ownership when properties are transferred between persons not dealing with each other at arm's length, the correct interpretation of subsection 13(31) and paragraph 13(27)(*b*) of the Act would have to be that the reference in paragraph 13(27)(*b*) of the Act to the time when the property is acquired, would mean the time in what would be the taxation year of the transferee if the transferee had existed as of the deemed date of such acquisition.

[55] Suncor in this appeal, in support of its position that paragraph 13(27)(*b*) of the Act can apply when property is deemed to be acquired by a transferee at a time prior to the transferee being formed, referred to paragraph 13(31)(*b*) of the Act. This paragraph applies to divisive reorganizations commonly referred to as butterfly reorganizations. If a transferee acquires depreciable property in the course of a butterfly reorganization, the transferee is deemed to have

acquired such property at the time it was acquired by the transferor under subsection 13(31) of the Act. It appears that Suncor's argument concerning how subsection 13(31) and paragraph 13(27)(*b*) of the Act would work together when property is transferred in the course of a butterfly reorganization was not raised before the Tax Court. The only comment of the Tax Court Judge concerning the application of subsection 13(31) of the Act to a butterfly reorganization is in paragraph 24 of his reasons. He states that paragraph 13(31)(*b*) of the Act "is not relevant for purposes of determining the point in time when the MCU Depreciable Properties were available for use".

[56] The Department of Finance, in *Amendments to the Income Tax Act: Explanatory Notes* (Ottawa: Department of Finance, November 1994) (the 1994 Explanatory Notes) describe a "typical butterfly reorganization" as one in which the assets of the transferor are transferred to newly incorporated companies. This supports the view that in referring to a butterfly reorganization in paragraph 13(31)(*b*) of the Act, it would have been contemplated that the deeming rule in subsection 13(31) of the Act would be applied to a newly formed corporation. As such, the newly formed corporation would be deemed to acquire property before it existed.

[57] The deeming rule in subsection 13(31) of the Act is only applicable for the purposes of three provisions of the Act, all of which refer to the taxation year of the taxpayer in which the taxpayer acquired the property. Therefore, the reference to this deeming rule being applicable to transfers in the course of a butterfly reorganization (paragraph 13(31)(*b*) of the Act) would be rendered meaningless if the property is transferred to a new corporation (which did not exist as

of the time that it is deemed to acquire the property) and such property cannot be considered to have been acquired in a taxation year.

[58] The specific reference to the application of the deemed acquisition of property in subsection 13(31) of the Act to reorganizations in which property is transferred to newly formed corporations implies that Parliament intended to make subsection 13(31) and paragraph 13(27)(*b*) of the Act work together. The only way that these two provisions can work together, when a transferee is deemed to acquire property before the transferee exists, is that the reference to the transferee being deemed to acquire the property at the time it was acquired by the transferor means that the time should be treated as occurring during what would be the taxation year of the transferee if the transferee existed at that time. This would be determined by applying the taxation year as determined after the transferee is formed.

[59] The Crown in its memorandum submitted that the 1994 Explanatory Notes were published in 1994 but the available for use rules were enacted in 1991. As a result, the Crown submits that the 1994 Explanatory Notes cannot be relied upon as support for finding that property would be transferred to a newly formed corporation in a typical butterfly reorganization in 1991.

[60] In the 1994 Explanatory Notes, the Department of Finance refers to a “typical butterfly reorganization” which implies that butterfly reorganizations were not new in 1994. In the paper “The Taxation of Corporate Reorganizations - The Butterfly” (Douglas Ewens and Jack

Boultbee, (1982) Canadian Tax Journal Vol. 30 No. 4, pages 604-609) a butterfly is described as follows, at page 604:

> A butterfly is a reorganization involving transfers of assets under subsection 85(1) and deductible intercorporate deemed dividends under section 84 of the Income Tax Act to accomplish a division of corporate assets among shareholders at no immediate income tax cost.
>
> The butterfly came into prominence when proposals for a major revision of Canada's banking legislation were released in August 1976….

[61] This article confirms that butterfly reorganizations came into prominence around 1976 — 15 years before 1991. The article also confirms, at page 604, that, as part of the butterfly reorganization undertaken by the banks, "each incorporated its own wholly owned subsidiary ('Newco A' and 'Newco B'), which acquired from Jointco an undivided 50 per cent interest in all its assets". The use of a new corporation as part of the butterfly transaction was not a new idea in 1994.

[62] There are also other references to butterfly reorganizations in published articles that predate 1991. In the paper "The Butterfly Matures", published in the 1984 Conference Report of the Proceedings of the Thirty-sixth Tax Conference of the Canadian Tax Foundation, Douglas S Ewens, at page 870, refers to the *Technical Notes to Draft Legislation Amending the Income Tax Act and Related Statutes,* August 1984. In these Technical Notes, the Department of Finance refers to "the explicit exception for butterfly transactions provided by amended paragraph 55(3)(b)" not applying in certain situations. The Technical Notes also state that "revised paragraph 55(3)(b) does not alter the basic intent of the butterfly provision but it does represent a significant technical broadening of the scope for permissible butterflies". Although there is no

specific reference to how a butterfly transaction would be implemented, there is clear indication that the Department of Finance was well aware of butterfly transactions prior to 1991.

[63] In the paper "The Butterfly Reorganization: A Descriptive Analysis" (Dart and Kellough: Report of the Proceedings of the Forty-first Tax Conference, Canadian Tax Foundation (1989, 1990)) the authors describe several different types of butterfly transactions including a "Full Double-Winged Butterfly", a "Partial Double-Winged Butterfly", a "Full Single-Winged Butterfly", a "Partial Single-Winged Butterfly", a "Full Wingless Butterfly", a "Partial Wingless Butterfly", and "Revenue Canada's Wingless Butterfly". In describing the different butterfly transactions, for the most part, the transactions include transfers of assets to newly formed corporations. This paper also predates the enactment of the available for use rules in 1991.

[64] At the hearing of this appeal, the Crown also referred to additional income tax rulings that refer to butterfly transactions using "an existing shelf corporation or newly created Corporation". There is, however, no qualification on when the shelf corporation must have been incorporated. Assume that the taxation year of the transferor and the transferee corporations is the calendar year. Assume that a depreciable property is acquired in January 2005, and the butterfly transaction is completed in December 2006. Unless the shelf company was incorporated prior to the acquisition of assets by the transferor in January 2005, the shelf company would have the same issue as a newly formed corporation as neither would be in existence when the transferor acquired the depreciable property. There is no indication in the advance ruling of any requirement that the shelf company be incorporated as of any particular date.

[65] In any event, the advance rulings identified by the Crown also refer to a transfer to a shelf company or a newly formed corporation. Therefore, the advance rulings also contemplate the use of a new corporation.

[66] The Crown was unable to point to any article or authority to explain how the deemed acquisition of property contemplated by subsection 13(31) for the purposes of paragraph 13(27)(*b*) of the Act would work in a butterfly reorganization. In the course of a butterfly reorganization, depreciable property is transferred to a newly formed corporation (or a shelf company that may be incorporated after the time that it is deemed to acquire property). Unless the time at which the acquiring corporation is deemed to acquire the depreciable property of the transferor occurs in a taxation year of the transferee, paragraph 13(31)(*b*) of the Act would be rendered meaningless.

[67] The Crown also argues that any issue concerning the application of paragraph 13(27)(*b*) to a depreciable property acquired as part of a butterfly reorganization was resolved by the amendments to paragraphs 87(2)(j.6) and 88(1)(e.2) of the Act to include a reference to paragraph 13(27)(*b*) of the Act. The Crown submits:

> 49. … In 1991, when enacting s. 13(26) to s. 13(31), s. 87(2)(j.6) was also amended to add reference to s. 13(27)(b). S. 88(1)(e.2) extends this amalgamation rule to a winding up. Therefore, s. 88(1)(e.2) deems a parent (the new corporation in the 1994 Explanatory Note) to be a continuation of a subsidiary (Opco in the 1994 Explanatory Note) on a winding up for the purposes of the two-year rolling-start.
>
> 50. Therefore, the appellant's argument that s. 13(31)(b) is read out is both incorrect and moot. When the available for use rules were introduced in 1991, Parliament explicitly included rules for corporate reorganizations (including butterfly transactions) that involve wind-ups. Parliament had

> purposely amended the provisions to deem continuity of Opco in the hands of its parent (the newly created corporation) for the purposes of paragraph 13(27)(b). This also shows that, in enacting s. 13(31), Parliament did not intend for the provision to create a notional taxation year for a newly created corporation.

[68] The butterfly transactions as described in the 1994 Explanatory Notes relate to a corporation that has two shareholders (Mr. A and Ms. B) who each own 50% of the shares of Opco. The steps are then set out:

> Step 1: Mr. A transfers, on a tax-deferred basis under section 85 of the Act, his shares of Opco to a newly incorporated holding corporation (Aco) in exchange for shares of Aco. Ms. B likewise transfers her shares of Opco to a new corporation (Bco) in exchange for shares of Bco.
>
> Step 2: Opco transfers, also on a tax-deferred basis under section 85 of the Act,
>
> - one-half of Opco's cash and all of the business and assets of Division A to Aco in exchange for redeemable preferred shares of Aco; and
>
> - one-half of Opco's cash and all of the business and assets of Division B to Bco in exchange for redeemable preferred shares of Bco.
>
> The new shares issued to Opco by Aco and Bco in consideration for the transferred assets will have an adjusted cost base to Opco equal to the tax cost of the transferred assets immediately before the transfer. The paid-up capital of the new shares will not exceed their adjusted cost base.
>
> Step 3: Aco and Bco each redeem the shares of their capital stock that were issued to Opco in step 2. Each of them issues a promissory note to Opco in payment of the redemption price.
>
> Step 4: Opco is wound up and, in the course of the winding-up, the promissory notes issued by Aco and Bco in step 3 are distributed to Aco and Bco, respectively. As a result, the obligations under these notes are extinguished.

[69] Although the Crown referred to paragraph 88(1)(*e.2*) of the Act deeming the new corporation to be a continuation of Opco on the winding-up of Opco for the purposes of paragraph 13(27)(*b*) of the Act, paragraph 88(1)(*e.2*) of the Act is only applicable when the conditions as set out in the opening part of subsection 88(1) are satisfied:

| | |
|---|---|
| **88 (1)** Where a taxable Canadian corporation (in this subsection referred to as the "subsidiary") has been wound up after May 6, 1974 and not less than 90% of the issued shares of each class of the capital stock of the subsidiary were, immediately before the winding-up, owned by another taxable Canadian corporation (in this subsection referred to as the "parent") and all of the shares of the subsidiary that were not owned by the parent immediately before the winding-up were owned at that time by persons with whom the parent was dealing at arm's length, notwithstanding any other provision of this Act other than subsection 69(11), the following rules apply: | **88 (1)** Lorsqu'une société canadienne imposable (appelée « filiale » au présent paragraphe) a été liquidée après le 6 mai 1974, qu'au moins 90 % des actions émises de chaque catégorie de son capital-actions appartenaient, immédiatement avant la liquidation, à une autre société canadienne imposable (appelée « société mère » au présent paragraphe) et que toutes les actions de la filiale qui n'appartenaient pas à la société mère immédiatement avant la liquidation appartenaient alors à des personnes avec lesquelles la société mère n'avait pas de lien de dépendance, les règles suivantes s'appliquent malgré les autres dispositions de la présente loi, exception faite du paragraphe 69(11): |
| [emphasis added] | [non souligné dans l'original] |

[70] In the example set out in the 1994 Explanatory Notes, Aco owns 50% of the shares of Opco and Bco owns 50% of the shares of Opco immediately before Opco is wound up. Therefore, paragraph 88(1)(*e.2*) of the Act would not be applicable on the winding-up of Opco. The Crown's argument concerning the application of paragraph 88(1)(*e.2*) is without merit.

[71] Subsection 13(31) and paragraph 13(27)(*b*) of the Act can only work together if the time that the transferee is deemed to acquire property under 13(31) of the Act occurs during a taxation year of the transferee. Butterfly reorganizations were being implemented for several years prior to 1991 (when the available for use rules were enacted) and a routine element of a butterfly transaction is the use of a new corporation to acquire property. It is therefore a necessary implication that, for the purposes of paragraph 13(27)(*b*) of the Act, a new corporation that did not exist when the transferor acquired the property is considered to have acquired such property in a notional taxation year of the transferee that included the time that the transferee is deemed to have acquired the property. This notional taxation year would be determined using the fiscal period adopted by the transferee once it has been formed.

## V. Conclusion

[72] As a result, in my view, the correct interpretation and application of the deemed acquisition rule in subsection 13(31) as it applies to the available for use rule in paragraph 13(27)(*b*) of the Act is that, in deeming the time at which the depreciable property is acquired by the transferee, if such time is before the transferee is formed, the necessary implication is that this time occurred in what would have been the taxation year of the transferee if the transferee would have then been in existence. This allows the time period as contemplated by paragraph 13(27)(*b*) of the Act to start.

[73] I would therefore allow the appeal and set aside the Judgment of the Tax Court. Rendering the Judgment the Tax Court should have given, I would allow Suncor’s appeal from

the reassessment of its 2007 taxation year, with costs in the Tax Court, and refer the matter back to the Minister of National Revenue for reconsideration and reassessment on the basis that the MCU Depreciable Properties were available for use in the Limited Partnership's fiscal period ending January 31, 2007. The income for the Limited Partnership for this fiscal period allocated to Suncor would reflect the capital cost allowance claimed on these properties.

[74] The parties submitted a letter indicating their agreement that costs in this Court be calculated pursuant to the midpoint of Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106. I would therefore award costs to Suncor in this appeal calculated pursuant to the midpoint of Column III of Tariff B of the Rules.

"Wyman W. Webb"
J.A.

"I agree.
Judith Woods J.A."

"I agree.
René LeBlanc J.A."

# APPENDIX

## Excerpts from Section 13 of the *Income Tax Act*

**Subsection 13(26)**

| | |
|---|---|
| **(26)** In applying the definition undepreciated capital cost in subsection 13(21) for the purpose of paragraph 20(1)(a) and any regulations made for the purpose of that paragraph, in computing a taxpayer's income for a taxation year from a business or property, no amount shall be included in calculating the undepreciated capital cost to the taxpayer of depreciable property of a prescribed class in respect of the capital cost to the taxpayer of a property of that class (other than property that is a certified production, as defined by regulations made for the purpose of paragraph 20(1)(a)) before the time the property is considered to have become available for use by the taxpayer. | **(26)** Pour l'application de la définition de fraction non amortie du coût en capital au paragraphe (21) dans le cadre de l'alinéa 20(1)a) et des dispositions réglementaires prises pour l'application de cet alinéa, pour le calcul du revenu qu'un contribuable tire d'une entreprise ou d'un bien pour une année d'imposition, aucun montant n'est inclus dans le calcul de la fraction non amortie du coût en capital, pour le contribuable, d'un bien amortissable d'une catégorie prescrite au titre du coût en capital, pour lui, d'un bien de cette catégorie (sauf un bien qui est une production portant visa, au sens des dispositions réglementaires prises pour l'application de l'alinéa 20(1)a)) avant le moment où le bien est considéré comme devenu prêt à être mis en service par le contribuable. |

**Subsection 13(27)**

| | |
|---|---|
| **(27)** For the purposes of subsection 13(26) and subject to subsection 13(29), property (other than a building or part thereof) acquired by a taxpayer shall be considered to have become available for use by the taxpayer at the earliest of | **(27)** Pour l'application du paragraphe (26) et sous réserve du paragraphe (29), le bien qu'un contribuable acquiert, à l'exception de tout ou partie d'un bâtiment, est considéré comme devenu prêt à être mis en service par lui au premier en date des moments suivants : |
| **(a)** the time the property is first used | **a)** le moment où le contribuable |

by the taxpayer for the purpose of earning income,

**(b)** the time that is immediately after the beginning of the first taxation year of the taxpayer that begins more than 357 days after the end of the taxation year of the taxpayer in which the property was acquired by the taxpayer,

l'utilise pour la première fois pour gagner un revenu;

**b)** le moment immédiatement après le début de la première année d'imposition du contribuable qui commence plus de 357 jours après la fin de son année d'imposition au cours de laquelle il a acquis le bien;

**Subsection 13(30)**

**(30)** Notwithstanding subsections 13(27) to 13(29), for the purpose of subsection 13(26), property of a taxpayer shall be deemed to have become available for use by the taxpayer at the earlier of the time the property was acquired by the taxpayer and, if applicable, a prescribed time, where

**(a)** the property was acquired

**(i)** from a person with whom the taxpayer was not dealing at arm's length (otherwise than because of a right referred to in paragraph 251(5)(b)) at the time the property was acquired by the taxpayer, or

**(ii)** in the course of a reorganization in respect of which, if a dividend were received by a corporation in the course of the reorganization, subsection 55(2) would not apply to the dividend because of paragraph 55(3)(b); and

**(b)** before the property was acquired

**(30)** Malgré les paragraphes (27) à (29) et pour l'application du paragraphe (26), le bien d'un contribuable est réputé devenir prêt à être mis en service par le contribuable au premier en date du moment de son acquisition par le contribuable et, le cas échéant, du moment fixé par règlement dans le cas où:

**a)** d'une part, le bien a été acquis soit auprès d'une personne avec laquelle le contribuable avait un lien de dépendance, autrement qu'à cause d'un droit visé à l'alinéa 251(5)b), au moment de l'acquisition du bien par le contribuable, soit dans le cadre d'une réorganisation relativement à laquelle le paragraphe 55(2) ne s'applique pas, par l'effet de l'alinéa 55(3)b), au dividende qu'une société pourrait recevoir à l'occasion de la réorganisation;

**b)** d'autre part, le bien est devenu

by the taxpayer, it became available for use (determined without reference to paragraphs 13(27)(c) and 13(28)(d)) by the person from whom it was acquired.

prêt à être mis en service, avant le moment de son acquisition par le contribuable, par la personne auprès de qui il a été acquis, compte non tenu des alinéas (27)c) et (28)d).

**Subsection 13(31)**

**(31)** For the purposes of paragraphs 13(27)(b) and 13(28)(c) and subsection 13(29), where a property of a taxpayer was acquired from a person (in this subsection referred to as "the transferor")

**(a)** with whom the taxpayer was, at the time the taxpayer acquired the property, not dealing at arm's length (otherwise than because of a right referred to in paragraph 251(5)(b)), or

**(b)** in the course of a reorganization in respect of which, if a dividend were received by a corporation in the course of the reorganization, subsection 55(2) would not apply to the dividend because of the application of paragraph 55(3)(b),

the taxpayer shall be deemed to have acquired the property at the time it was acquired by the transferor.

**(31)** Pour l'application des alinéas (27)b) et (28)c) et du paragraphe (29), le contribuable qui acquiert un bien auprès d'une personne est réputé l'avoir acquis au moment où la personne l'a acquis si, selon le cas :

**a)** au moment où il a acquis le bien, il avait un lien de dépendance avec la personne, autrement qu'à cause d'un droit visé à l'alinéa 251(5)b);

**b)** il a acquis le bien dans le cadre d'une réorganisation relativement à laquelle le paragraphe 55(2) ne s'applique pas, par l'effet de l'alinéa 55(3)b), au dividende qu'une société pourrait recevoir à l'occasion de la réorganisation.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-132-24 |
| **STYLE OF CAUSE:** | SUNCOR ENERGY INC. v. HIS MAJESTY THE KING |
| **PLACE OF HEARING:** | CALGARY, ALBERTA |
| **DATE OF HEARING:** | DECEMBER 9, 2025 |
| **REASONS FOR JUDGMENT BY:** | WEBB J.A. |
| **CONCURRED IN BY:** | WOODS J.A.<br>LEBLANC J.A. |
| **DATED:** | FEBRUARY 19, 2026 |

**APPEARANCES:**

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