Federal Court  Cour fédérale

Date: 20121127

Docket: T-1949-10

Citation: 2012 FC 1375

Ottawa, Ontario, November 27, 2012

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

SIGNALGENE R&D INC.

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

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I. Introduction and Background

[1] On the 22nd of November 2010, Signalgene R&D Inc filed an application in this Court seeking judicial review in the following terms:

> This is an application for judicial review in respect of an act or proceeding by the Minister of National Revenue (the "Minister"), specifically the verbal refusal (the "Refusal") on October 26, 2010 of a request to issue notices of determination (the "Notices of Determination") of the amount of the Applicant's refundable investment tax credits for each of the April 20, 1997, December 31, 1997, December 31, 1998 and December 31, 1999 taxation years.
>
> The Applicant makes application for a review of the Refusal and an Order requiring the Minister to issue Notices of Determination which the Minister has unlawfully failed to do or has unreasonably delayed in doing.
>
> The grounds for the Application are:
>
> a) the Minister refused to exercise its jurisdiction by refusing to issue the Notices of Determination;
>
> b) the Minister erred in law in making the Refusal;
>
> c) the Minister based the Refusal on an erroneous finding of fact that the Minister made in a perverse or capricious manner or without regard for the material before the Minister; and
>
> d) the Minister acted in a way contrary to the law.
>
> …..
>
> Pursuant to subsection 317(1) of the *Federal Courts Rules*, SOR/98-106, the Applicant requests material relevant to this application that is in the possession of the Respondent, and not in the possession of the Applicant, specifically all documents related to the Refusal.
>
> [Emphasis added]

[2] The application for judicial review makes reference to a verbal refusal of October 26th 2010 of a request to issue Notices of Determination. That communication was a telephone message from

Guylaine Gaudreault, then Acting Assistant Director of the Scientific research and experimental development (SR&ED) expenditures division of the Montréal Taxation Office of Canada Revenue Agency (CRA) and the decision-maker in this case to Evelyn Moskowitz, partner in KPMG and in that accounting firm's affiliated law firm who was advising Signalgene. A transcription of the telephone message reads:

> Hello, Evy, Guylaine Gaudreault. Sorry for the long delay in replying to your letter of September 23rd. I finally took the afternoon yesterday to go through your file. Essentially, what I have in the file is that a Notice of Objection was filed for the '97 year, and it was closed with the mention that the appeal was not valid, and then a request was made in October/03 to modify certain tax credit rates, and according to the notes in the system, this was rejected in February/04, and now we have your request. My problem is that I am not in a position to issue a Notice of Determination because the company is not in a loss position. And, essentially, because it is statute-barred, I'm not in a position to issue a Determination that would re-open the year. I've been told by people that I have spoken to here that I'm not authorized to do that. So, essentially, I don't have a [sic] good news for your case. I think the only way that you can present your case and be heard is to go to the Federal Court, I believe. So, anyways, if you want to call me back, I'm in and out, but'd be more than happy to talk to you and here again I apologize for the delay. You'll be getting something in writing very soon. Thank you.
>
> [Emphasis added]

[3] On December 1, 2010, Ms. Gaudreault sent Ms Moskowitz the following letter:

> We are responding to your letter of September 23, 2010 in which you requested that the Canada Revenue Agency (CRA) either make the payment Refundable ITCs (RITCs) to which you believe that the Corporation is entitled or issue a Notice of Determination of the RITCs for each of the relevant years.
>
> We have examined our records and our conclusion concerning your requests has not changed. We therefore maintain our response which was expressed to you in our letter dated July 27, 2010.
>
> [Emphasis added]

[4] The reference by Guylaine Gaudreault to Mrs. Moskowitz's September 23, 2010 letter to her is important in context because in that letter Evelyn Moskowitz was responding to a decision Guylaine Gaudreault made on July 27, 2010, which reads:

> We are responding to your letter of September 22, 2008 in which you requested refundable Investment Tax Credits (RITCs) in the four tax years of the Société Algène R&D Inc ending from 1997 to 1999. This letter was accompanied by a binder containing one new T2 Return for each of those tax years and each T2 was changing the taxable income previously assessed by the CRA.
>
> Our view of the CRA's records indicates that the CRA has already reviewed the claims for ITCs. Your request for refundables ITCs was filed after each of the statute-barred date applying and therefore it cannot be accepted. Furthermore, your request does not meet the conditions under which CRA would be authorized to reassess.
>
> [Emphasis added]

[5] The nature of the September 22, 2008 request made by KPMG on behalf of Signalgene to CRA is also pivotal to this case because it was made shortly after the Federal Court of Appeal had dismissed from the bench an appeal by the Minister from the Tax Court of Canada's decision in Perfect Fry of March 6, 2007 reported at 2007 TCC 133.

[6] Signalgene through KPMG on September 22, 2008 made a claim for refundable investment tax (RITCs) credits for Signalgene's taxation years ended April 30, 1997, December 31, 1997, December 31, 1998 and December 31, 1999 (the Relevant Taxation Years).

[7] Signalgene's claim for RITCs was made in two ways. For taxation year ended April 30, 1997, Signalgene renewed or reasserted its claim for the RITCs made in October of 2003 which

CRA had denied ruling on May 28, 2004 the Notice of Objection filed against CRA's refusal of February 6, 2004 was invalid as not being a Notice of Determination or a Notice of Reassessment. Second, in respect of all other taxation years, KPMG filed amended income tax returns claiming for the first time RITCs in those other taxation years.

[8] CRA's letter of July 27, 2010 constituted a rejection of all of Signalgene's RITCs claims.

[9] In her affidavit in support of Signalgene's judicial review application, Mrs. Moskowitz deposed the following in respect of her September 23, 2010 letter in response to the July 27, 2010 RITCs claim denial:

> (a) She explained CRA's assertion that the Claims could not be accepted because they were statute-barred was contrary to the TCC's decision in *Perfect Fry* (which she said, had been accepted by the FCA without further comment on the issue). More specifically, she referred to paragraphs in the TCC judgment that made it clear that:
>
> - there is no requirement that a claim for RITCs be made within the normal reassessment period; and
> - under the combined provision of subsection 127.1 and paragraph 152(1)(b) of the Act, the required response to a claim for RITCs is for the CRA to "determine" the amount of RITCs to which the taxpayer is entitled – not to "assess" it – and that the time period for issuing such a determination is not subject to the normal reassessment period.
>
> (b) She stated that the July 27, 2010 Letter was not a "determination" for these purposes because it had simply advised of the CRA's decision to not "accept" the Claims (based on its statute-barred argument). Having thus refused to even look at the Claims, the CRA had made no determination as to the *amount* of the RITCs to which it believed the Applicant was entitled. (This position was consistent with the CRA's own position with respect to the February 6th 2004 letter – *i.e.*, a letter refusing to accept an RITC claim was not a notice of determination.)

(c) She requested that the CRA issue of Notice of Determination for each of the Relevant Years, setting out the *amount* of RITCs to which the CRA believed the Applicant was entitled for each such year.

[Emphasis added]

[10] On October 21, 2010, not having had a response from CRA, Mrs. Moskowitz filed a Notice of Objection to the July 27, 2010 letter but, in her covering letter she stated July 27, 2010 letter of response was not a Notice of Determination and that Signalgene was filing the Notice of Objection as a protective measure in the event CRA took a contrary view.

II. The relevant statutory regime

[11] Under the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) (the *Act*), a taxpayer who incurs SR&ED expenses in a particular taxation year is entitled to claim investment tax credits for those expenditures in addition to claiming the SR&ED expenses themselves.

[12] There are two types of investment tax credits for SR&ED expenses which operate in different wayb: ordinary investment tax credits (ITCs) and refundable investment tax credits (RITCs). Ordinary ITCs not used to offset federal tax payable in a year may be carried forward for a period of years or carried back three years to offset tax payable in those years.

[13] RITCs are only available for a taxpayer who is a "Canadian controlled private corporation" (CCPC) as defined in the *Act*. Where the taxpayer is a CCPC, and its taxable income for the previous year does not exceed a certain threshold amount, the taxpayer is generally entitled to both a higher rate of ITCs and to an immediate refund of those tax credits to the extent they exceed the

taxpayer's federal taxes payable for the taxation year in question. Unlike excess ITCs, excess RITCs are not carried forward (or back) to offset federal taxed payable in other taxation year. Instead, they are immediately paid out to the taxpayer with the assessment of its Part I tax as a "refund" of taxes that the taxpayer is deemed to have paid in respect of the particular taxation year (the Deemed Overpayment). Under section 127.1(1) of the *Act* no Deemed Overpayment (and no consequent entitlement to an RITC refund) arises unless the taxpayer files certain prescribed forms and information with the Minister.

[14] In terms of the statutory provisions, the point of departure is section 127.1(1) entitled Refundable investment tax credit, it reads:

127.1 (1) Where a taxpayer (other than a person exempt from tax under section 149) files	127.1 (1) Lorsqu'un contribuable (à l'exception d'une personne exonérée d'impôt en vertu de l'article 149) présente :
(a) with the taxpayer's return of income (other than a return of income filed under subsection 70(2) or 104(23), paragraph 128(2)(f) or subsection 150(4)) for a taxation year, or	a) avec sa déclaration de revenu produite pour une année d'imposition, à l'exception d'une déclaration de revenu produite en vertu des paragraphes 70(2) ou 104(23), de l'alinéa 128(2) f) ou du paragraphe 150(4);
(b) with a prescribed form amending a return referred to in paragraph 127.1(1)(a) a prescribed form containing prescribed information, the taxpayer is deemed to have paid on the taxpayer's balance-due day for the year an amount on account of the taxpayer's tax payable under this Part for the year equal to the lesser of	b) avec un formulaire prescrit modifiant une déclaration visée à l'alinéa a), un formulaire prescrit contenant les renseignements prescrits, il est réputé avoir payé, à la date d'exigibilité du solde qui lui est applicable pour l'année, une somme au titre de son impôt payable pour l'année en vertu de la présente partie égale à son
(c) the taxpayer's refundable investment tax credit for the	

year, and	crédit d'impôt à l'investissement remboursable pour l'année ou, s'il est inférieur, au montant qu'il a indiqué dans le formulaire prescrit.
(d) the amount designated by the taxpayer in the prescribed form.	

[Emphasis added]

[15] Section 152(1) of the *Act* is entitled "Assessment" and its subsection 152(1)(b) keys into section 127.1(1) above. It reads:

152. (1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine	152. (1) Le ministre, avec diligence, examine la déclaration de revenu d'un contribuable pour une année d'imposition, fixe l'impôt pour l'année, ainsi que les intérêts et les pénalités éventuels payables et détermine :
(a) the amount of refund, if any, to which the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year; or	a) le montant du remboursement éventuel auquel il a droit en vertu des articles 129, 131, 132 ou 133, pour l'année;
(b) the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.	b) le montant d'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année.

[Emphasis added]

[16] Section 152(1.2) provides that statutory provisions as they relate to an assessment or a reassessment and to assessing and reassessing tax apply to a determination or re-determination of an amount under this division. It reads:

(1.2) Paragraphs 56(1)(l) and 60(o), this Division and Division J, as they relate to an assessment or a reassessment and to assessing or reassessing tax, apply, with any modifications that the circumstances require, to a determination or redetermination under subsection (1.01) and to a determination or redetermination of an amount under this Division or an amount deemed under section 122.61 to be an overpayment on account of a taxpayer's liability under this Part, except that	(1.2) Les alinéas 56(1)l) et 60o), la présente section et la section J, dans la mesure où ces dispositions portent sur une cotisation ou une nouvelle cotisation ou sur l'établissement d'une cotisation ou d'une nouvelle cotisation concernant l'impôt, s'appliquent, avec les adaptations nécessaires, à toute détermination ou nouvelle détermination effectuée selon le paragraphe (1.01) et aux montants déterminés ou déterminés de nouveau en application de la présente section ou aux montants qui sont réputés par l'article 122.61 être des paiements en trop au titre des sommes dont un contribuable est redevable en vertu de la présente partie. Toutefois :
(a) subsections (1) and (2) do not apply to determinations made under subsections (1.01), (1.1) and (1.11);	a) les paragraphes (1) et (2) ne s'appliquent pas aux déterminations ou aux montants déterminés en application des paragraphes (1.01), (1.1) et (1.11);
(b) an original determination of a taxpayer's non-capital loss, net capital loss, restricted farm loss, farm loss or limited partnership loss for a taxation year may be made by the Minister only at the request of the taxpayer; and	b) le montant d'une perte autre qu'une perte en capital, d'une perte en capital nette, d'une perte agricole restreinte, d'une perte agricole ou d'une perte comme commanditaire subie par un contribuable pour une année d'imposition ne peut être initialement déterminé par le
(c) subsection 164(4.1) does not apply to a determination made under subsection 152(1.4).	

	ministre qu'à la demande du contribuable;
	c) le paragraphe 164(4.1) ne s'applique pas aux montants déterminés en application du paragraphe (1.4).

[Emphasis added]

[17] Section 152(2) of the *Act* headed "Notice of Assessment" reads:

(2) After examination of a return, the Minister shall send a notice of assessment to the person by whom the return was filed.	(2) Après examen d'une déclaration, le ministre envoie un avis de cotisation à la personne qui a produit la déclaration.

[Emphasis added]

III. Facts

[18] Throughout the Relevant Taxation Years Signalgene:

(1) Was a sole purpose research and development company that carried a scientific research and experimental development activities in connection with which it incurred SR&ED expenses.

(2) Filed its initial income tax returns (1) on September 26, 1997 for its April 1997 taxation year (2) on May 22, 1998 for its December 31, 1997 taxation year (3) on June 29, 1999 for its December 31, 1998 taxation year and (4) on June 29, 2000 for its December 31, 1999 taxation year (the relevant taxation years).

[19] For each of the relevant taxation years Signalgene claimed the deduction of SR&ED expenses as well as ITCs. It did not claim any RITCs being of the belief same, as *Perfect Fry* was,

that it was not a CCPC but rather a corporation controlled by a public corporation (a Non-CCPC) and therefore not eligible to claim RITCs. [Emphasis added]

[20] CRA assessed each of Signalgene's initial returns and generally accepted the amounts claimed leading to the issuance of Notice of Assessment; in each case, it was CRA's practice to audit the SR&ED expenses claimed. Subsequent to audits, in a few cases involving Signalgene, the audit led to the issuance of a Notice of Reassessment of previous assessments. Both the initial assessment and the Reassessment could be challenged by filing Notices of Objection which provide an opportunity for internal review and subsequent appeals to the Courts.

[21] On or about October 29, 2001, Signalgene's auditors sought to modify (1) its April 30, 1997 tax return so that the maximum of SR&ED expenses could be deducted from its net income (2) the ITCs previously deducted from its Part I tax payable be reduced to zero (3) the amount of undeducted ITCs be fixed at $451,076 and (4) a non-capital loss be established in the same account. On September 16, 2002, CRA rejected the modifications sought on the ground the request did not comply with the conditions set out in Information Canada 84-1 paragraph 9. Signalgene did not take the matter further.

[22] The first time Signalgene claimed RITCs was on or about October 30, 2003 when KPMG filed an amended tax return for Signalgene's taxation year ended April 1997. In their view, the Federal Court of Appeal's recent 1997 decision in *Parthenon Investments Ltd v The Minister of National Revenue*, 97 DTC 5343, meant that Signalgene qualified as a CCPC and thus eligible for RITC tax credits.

[23] KPMG requested the Minister, pursuant to subsection 152(1)(b) of the *Act*, to determine the amount of tax deemed to have been paid pursuant to subsection 127.1(1) on account of Signalgene's payable taxes for its April 1997 tax year in order to enable the Minister to refund any excess as authorized by section 164(1)(b). KPMG pointed out the *Act* authorized Signalgene to file a refund request within a six year window quoting subsections 152(4) and 152(6) of the *Act*.

[24] CRA advised Signalgene on February 6, 2004 it could not accept the T-2038 amendment because it was filed 18 months after the end of its August 30, 1997 taxation year. On May 4, 2004, Signalgene filed a Notice of Objection which ultimately was rejected by CRA Appeals on May 28, 2004 on the ground that CRA's February 6, 2004 response was neither a Notice of Determination nor a Notice of Reassessment and therefore its Notice of Objection was not a valid one. The matter was not pursued by Signalgene on the advise of its auditors who were also involved in a case which was before the Tax Court, known as the Perfect Fry Case, which raised similar issues, and, in particular, (1) the Minister, in that case, was arguing a contrary position to the one taken in this case i.e. that an analogous response to the one which Signalgene received on February 6, 2004 could support a Notice of Objection (2) *Perfect Fry* had a similar tax profile in terms of CCPC qualifications and (3) the issue of the 18 month bar was similarly at play.

[25] It is important to describe how the *Perfect Fry* Case reached the Tax Court. That company (1) carried on SR&ED activities throughout its taxation years from October 31, 1993 to October 31, 1998 for which it claimed SR&ED expenses as well as ITCs but not RITCs believing it was a Non-CPPC but (2) changed its mind based on the FCA's decision in the *Parthenon* case instructing its

auditors KPMG to seek appropriate amendments to its initial return (3) which its auditors did on August 9, 2001 filing amended T-2038 forms containing the prescribed information.

[26] On December 12, 2002, the CRA issued a Notice of Determination to *Perfect Fry* stating the amount of RITCs Perfect Fry was entitled was zero which lead its auditors to file a Notice of Objection against the determination on March 12, 2003 for which it received Notices of Reassessment for all relevant years. *Perfect Fry* was partial successful before CRA appeals; it obtained RITCs for all years except 1996, 1997 and 1998, hence the appeal to the Tax Court which Justice Paris decided on March 6, 2007. The Minister's appeal to the Federal Court of Appeal was dismissed from the Bench on June 18, 2008.

[27] The other important events after Signalgene's request on September 22, 2008 for RITCs, were (1) CRA's Montreal Tax office's referral on July 23, 2009 to CRA-HQ in Ottawa of certain questions arising out of Signalgene's September 2008 RITC claim (2) the answer back on July 14, 2010 from CRA's Technical Guidance Decision to Brigitte Gener, a senior Financial reviewer at Montreal TSO (3) Guylaine Gaudreault's letter of July 27, 2010 denying Signalgene's RITC claims for the Relevant Taxation Years (4) Evelyn Moskowitz's letter of September 23, 2010 letter to Guylaine Gaudreault in which she questioned the reasons for rejection and a request for the issuance of Notices of Determination have previously been set out in full in the early part of these reasons and (5) the Directive issued on August 13, 2010 by the Director of the Policy Division of the SR&ED Directorate in Ottawa to all Taxation Offices.

IV. The Affidavits

[28] Two affidavits were filed in support of the Minister's position: (1) the affidavit of Guylaine Gaudreault, the decision-maker in this proceeding and the affidavit of Brigitte Gener, Senior Fiscal Analyst at CRA Montreal TSO who was mandated to review and make recommendations on Signalgene's RITC claim of September 2008; she also requested CRA-HQ's input and drafted the July 27, 2010 response for Guylaine Gaudreault's signature. Both affiants were extensively cross-examined.

[29] Signalgene's position was supported by the affidavit of Evelyn Moskowitz whose background has been previously described in these reasons. She was not cross-examined. Guylaine Gaudreault said in her cross-examination she agreed with the contents of Ms. Moskowitz's affidavit except for a few items which do not affect the outcome of this case.

[30] It was in Guylaine Gaudreault's affidavit that the basis of the Minister's defence to this judicial review application emerged.

(a) The affidavit of Guylaine Gaudreault

[31] The main points made by the decision-maker may be summarized as follows:

(1) She described the nature of Signalgene's September 22, 2008 claim for RITCs as requiring changes to previous tax filings in order:

(a) to recognize it as a "Canadian-controlled private corporation" ("CCPC") for each of the relevant taxation years;

(b) to modify the computation of its net income, its taxable income and its Part I Tax for each of the relevant taxation years;

(c) to modify the rate at which it earned its Investment Tax Credits ("ITC") for each of the relevant taxation years, from a 20% rate to a 35% rate; and

(d) to allow and pay the RITCs it claimed for each of the relevant taxation years.

(2) Stated the only issue raised in Signalgene's request was whether it is possible for the Applicant to modify the Income Tax Returns it initially filed for each of the relevant taxation years in order to apply the changes described above.

(3) Acknowledged that on or about July 23, 2009 CRA's Montreal SR&ED Division decided to consult CRA-HQ in Ottawa on certain technical issues arising from Signalgene's September 22, 2008, request; HQ's response was provided in July 2010 which following internal consultations with Senior SR&ED division staff at the Montreal TSO led her to finally come to the conclusion that:

(a) CRA had already reviewed the Applicant's claims for ITCs for each of the relevant taxation years during the audits performed for each year;

(b) the Amended Income Tax Returns could not be accepted because they were filed after the statute-barred date applying for each year, and therefore the Applicant could not modify its net income, its taxable income and its Part I Tax for each of the relevant years; and

(c) the Amended Income Tax Returns did not meet the conditions under which CRA is authorized to reassess after the statute-barred date, as per Information Circular IC84-1.

(4) Those conclusions were communicated to Signalgene in her letter of July 27, 2010.

(5) Deposed that on September 23, 2010, she received a new second request from Evelyn Moskowitz; (1) making additional submissions on the merits of the issue that the taxation years at issue were not statute-barred; (2) requesting CRA issue a Notice of Determination for the relevant years setting out the amount of RITCs to which CRA believed Signalgene was entitled; and (3) after conducting appropriate internal consultations decided she had no obligation to issue the requested Notices of Determination for the following reasons:

(a) RITCs are refundable in the taxation year in which they are earned and therefore, by their nature, they cannot be carried forward;

(b) if a taxpayer is entitled to any RITCs for a given taxation year, they are either applied against its Part I Tax payable for the year, or are immediately refunded to the taxpayer with the assessment of its Part I Tax;

(c) if the taxpayer did not claim any RITCs for a given taxation year and did not receive any refund of RITCs for that same year upon it being assessed, the taxpayer is reasonably informed at that time that it is entitled to no RITCs for the year;

(d) CRA had already reviewed the Applicant's claims for ITCs for each of the relevant taxation years during the audits performed for each year; and

(e) Since the Applicant's RITCs had already been determined to be nil for its April 30, 1997, December 31, 1997, December 31, 1998 and December 31, 1999 taxation years, the years were statute-barred and she had no obligation to issue such a Notice of Determination for any of the relevant years.

(6) And expressed her conclusion in the December 1, 2010 letter to Mrs. Moskowitz that she stood by her July 27, 2010 response.

(b) The affidavit of Brigitte Gener

[32] Brigitte Gener also deposed an affidavit to which was appended all of the available documentation held by CRA relevant to the issues in this case. As noted, she was mandated to review Signalgene's RITCs request of September 22nd, 2008. She described the documents submitted by Signalgene in support of its request and, in particular, the amended Income Tax Returns with relevant schedules and forms for all tax year involved.

[33] She noted Signalgene had previous to its RITCs request filed initial income tax returns in which it is indicated, amongst other things, that:

(1) it was a Non-CCPC;

(2) it had a different net income, taxable income and Part I Tax for each of the relevant taxation years;

(3) it earned its ITCs at a 20% rate, and was not entitled to earn ITCs at a 35% rate, and

(4) it was not entitled to any RITCs and that it did not calculate or claim any RITCs for each of the relevant taxation years.

[34] She recognized that the September 22, 2008 Signalgene request was the first request for RITCs for its December 1997, 1998 and 1999 taxation years and the only way to allow that request was:

(1) to recognize the Applicant as a CCPC for each of the relevant taxation years;

(2) to modify the computation of the Applicant's net income, its taxable income and its Part I Tax for each of the relevant taxation years; and

(3) to modify the rate at which the Applicant earned its ITCs for each of the relevant taxation years, from a 20% rate to a 35% rate.

[35] She also expressed the view Signalgene's September 2008 request was a departure from both its tax planning and the manner in which it was assessed and reassessed for each of the Relevant Taxation Years prior to the September 2008 request.

[36] She explained that (1) deductions of both SR&ED Expenditures and ITCs are elective meaning a taxpayer may or may not choose to deduct such amounts in any given taxation year (2) SR&ED expenses are deductible in the compilation of net income and any undeducted amount of SR&ED expenses may be carried forward for deduction over an unlimited number of future taxation years unlike ITCs which are deducted from the compilation of its Part I Tax and any undeducted amount of ITCs undeducted amount of ITCs may be carried back for three years or carried forward over the subsequent 10 years and if not so deducted are lost (or expire).

[37] She also recognized in her affidavit at paragraph 15 Signalgene in its initial filing neither calculated nor claimed any RITCs and calculated its ITCs at the rate of 20% versus 30% for RITCs. She also explained Signalgene's tax strategy prior to its September 2008 RITCs requests, namely, an election to deduct no more that the minimum of SR&ED expenses necessary to bring its net income to a level which would allow it to deduct the maximum of ITCs against its Part I Tax and in doing so Signalgene generally deducted the ITCs which would otherwise expire after the 10 year period and preserved its SR&ED expenses which never expire. Brigitte Gener indicated Signalgene was assessed in conformity with its tax planning.

[38] She identified the modifications which would have to be made to Signalgene's SR&ED expenses and to its declared ITCs at the end of each relevant taxation year in order to implement its request of September 22, 2008 writing at paragraph 25:

> The modifications sought in its Amended Income Tax Returns filed with the Applicant's Request are necessary to overcome limitations in the ITA which would otherwise preclude it from being entitled to the amount of RITCs it calculated for the years at issue. However, all of the relevant taxation years are now statute-barred. It is therefore too late for the Applicant to obtain those modifications.

[39] She appends as Exhibit #13 to her affidavit the response she received from the Technical Guidance Branch to her July 2009 request for advice which after discussion at the Montreal TSO the conclusions were set out in her July 29, 2010 audit report.

[40] In particular (1) she identifies for each relevant year when the tax year became statute-barred (2) states no RITCs were allowed to Signalgene in CRA's initial assessment, adding

Signalgene's RITCs cannot be negative and "therefore they were determined to be nil in the initial assessment." [Emphasis added] (3) states the audits for each relevant years had the same impact adding "the result of the audits resulted in the RITCs being established at nil which is reflected in the two reassessments issued during the relevant years since for a relevant taxation year RITCs cannot be negative, they were established to be nil."

[41] She deposes Signalgene did not object in a timely way to any assessments, audits or reassessments.

[42] She then refers to various Information Circulars to conclude the conditions set out therein do not allow CRA to modify Signalgene's taxable income or to reassess it. She concludes Signalgene's September 22, 2008 request constitutes retroactive tax planning pursuant to which Signalgene is attempting to modify its net income, its taxable income and its Part I tax in order to allow it to calculate amounts of RITCs it would otherwise not be entitled to.

[43] She acknowledges being the author of the July 27, 2010 refusal (signed by Guylaine Gaudreault) which reasoned:

(1) CRA records indicate that it had already reviewed the claims;

(2) the RITC request was filed after the statute-barred date and that it could therefore not be accepted; and

(3) the request does not meet the conditions under which the CRA is authorized to reassess.

V. The cross-examinations of the Respondent's affidavits

(a) Guylaine Gaudreault cross-examination

[44] The cross-examination of Guylaine Gaudreault on her affidavit covers 195 pages of transcript. For the purpose of these reasons only the essential points are referred to.

[45] First, she maintained a Notice of Assessment (or reassessment) is a deemed Notice of Determination of the amount of RITC Signalgene is entitled to "L'avis de cotisation fait foi de l'avis de détermination des credits d'impôt". The following exchange took place between counsel for Signalgene and the affiant:

> Q. [172] And that was your decision when you refused to issue one in November of two thousand and then (2010)?
>
> A. My decision was I didn't have to issue one for years that were statute-barred because the Notice of Assessment is also a Notice of Determination for the RITC for SR&Ed purposes.
>
> [Emphasis added]

[46] She explained she made the link between a Notice of Assessment and a Notice of Determination for RITCs purposes because of the manner RITCs work. At page 271 of the Applicant's record she answered:

> As I said earlier, when the Notice of Assessment is issued, if a taxpayer is entitled to RITC and it's refundable, he gets it right away. It's not carried forward or whatever.
>
> [167] So, is it the CRA's position and was it your position when you were making your decision in November of two thousand and ten (2010) that Notices of Determination had been issued year before to Signalgene?
>
> Yes

[47] At page 301 of the Applicant's record she explained that a Notice of Assessment stands in lieu of an official Notice of Determination because what it did was to inform the taxpayer its RITCs were nil.

[48] It was on this basis she recognized that a taxpayer receives a Notice of Determination for RITCs it did not claim and did not request i.e. a determination of the amount of tax deemed to have been paid on account (Applicant's record p. 272). She also recognized September 23, 2010 was the first time Signalgene had requested such a determination.

[49] At page 271 of the Applicant's record, she agreed the issuance of a Notice of Determination affords a taxpayer the right to object to a determination of RITCs by CRA.

[50] She further explained her position at page 270 of the Applicant's record:

> A. Okay. So, I had no obligation to put in writing again that the RITC was nil, and this is linked to the fact that we were looking at very old years and you have to look at the ITA dans son ensemble. And by issuing a new Notice of Determination to which I was not obligated to do, I was giving a right to appeal to a taxpayer that should not have a right because the years were too old.
>
> Q. [162] So, you would agree that a taxpayer has a right to appeal once a Notice of Determination is issued?
>
> A. I would say yes because it would reopen statute-barred years.
>
> Q. [163] Let's put aside statute-barred years. I'm just talking…
>
> A. It's the crux of the matter, sir.

[51] She added another reason in support of the fact CRA had made a determination of RITCs in this case. She referred to an audit of Signalgene's returns in which the company was informed its RITCs were zero (Applicant's record p. 254).

[52] When she received Ms. Moskowitz's letter of September 23, 2010 seeking a Notice of Determination, she said the question was whether a Notice of Determination had been issued or not (Applicant's record p. 276) adding what troubled her in this case was it appeared to be retroactive tax planning on Signalgene's case (Applicant's record p. 277).

[53] She expressed the view the Perfect Fry Case was different based on the facts of that case.

[54] I set out some of the other important points made during her cross-examination.

[55] First, she conceded prior to the Signalgene request she had never dealt with a Notice of Determination or whether there were prescribed forms. To her that did not matter. What matters is that an RITC is refundable and cannot be carried forward and if CRA tells a taxpayer his RITC is zero or no cheque is issued that is sufficient; if the taxpayer did not claim any RITCs for a given tax year and did not receive any refund he/she is reasonably informed that he is entitled to no RITCs (Applicant's record p. 255 to 279).

[56] Second, at page 406 of the Applicant's record she recognized that statute-barred is not an issue with respect to a request for refund under section 127.1 of the *Act*. Such a request can be made under section 127.1 at any time adding "it does not mean it's accepted".

[57] Third, for the request by Signalgene for a Notice Determination did not affect and is independent of her previous decision of July 27, 2010 (see also Applicant's record p. 281, 282-300).

[58] Fourth, she was taken to the July 14, 2010 CRA-HQ response to the questions asked by Brigitte Gener on July 23, 2009. Her attention was drawn to the heading entitled "concerning the normal redetermination period for refundable ITCs" and to an Income Tax Ruling internal interpretation 2001-0109817(E) (the February 2002 Tax Ruling) which suggests that where there is no claim for a refundable ITC pursuant to subsection 127.1 there has been no determination of the amount deemed to have been paid in that respect. She answered she had no recollection of that issue being discussed (Applicant's record p. 303-304).

(b) Brigitte Gener Cross-examination

[59] The essential points of her cross-examination are the following.

[60] First, the question which was put to Guylaine Gaudreault was also put to Brigitte Gener whether an assessment of a nil amount indicated for RITCs in the initial T-2038 filing by a taxpayer constituted a determination in respect of subsection 127.1(1) in the light of the February 2002 Tax Ruling. Brigitte Gener said she was familiar with the issue discussed in the response she received from CRA-HQ dated July 14, 2010; she, however, challenged the view expressed there.

[61] She did so, on the basis of another interpretation bulletin also dated February 13, 2002 and bearing the same identification number as mentioned in CRA-HQ's response of July 14, 2010.

[62] During cross-examination, it was established the document she had, while supporting her position, was incomplete and the one upon which CRA-HQ had relied on was the correct document. Brigitte Gener never put the correct document (which she did not have) before the decision-maker, a document which established that in the view of CRA Rulings the assessment of a nil return was not a determination by the Minister under section 127.1(1) of the *Act* and consequently a Notice of Assessment of that nil amount could not be a Notice of Determination (see Applicant's record p. 210-223).

[63] Second, she recognized in reviewing the entire Signalgene file she had found a request for a determination under subsection 152(1)(b) of the *Act* had been made by Sylvain Charest of KPMG on behalf of Signalgene on October 20, 2003 which included a claim for refundable ITC accompanied by a modified T-2038 (Applicant's record p. 161/165). She also confirmed that Mr. Charest's request was the first time Signalgene had requested a determination of RITCs (Applicant's record p. 168). Upon further questioning she stated she did not find a document in the file entitled Notice of Determination because she did not think such document existed (Applicant's record p. 173) and reiterated what is important is not what a document is called but what information it contains (Applicant's record p. 172).

[64] Third, counsel for Signalgene asked the witness to identify from the documents appended to her affidavit which ones she believed to be Notices of Determination. Several times she answered she did not know of any document entitled Notice of Determination or Notice of Re-determination existed (Applicant's record p. 175) but she pointed out some of her documents to be such

determinations: one was her Exhibit 39 a proposed reassessment where the item Remboursement du C11 demandé – shows blank (zero) (Applicant's record p. 647) another with a different reassessment at Exhibit 45 showing zero opposite the item Remboursement du C11 demandé and another at Exhibit 53 being a proposal for reassessment where at p. 656 a blank is shown opposite the item refund asked and finally Exhibit 54 a similar document as previously mentioned.

[65] She acknowledged at p. 208 of the transcript that she thought the Notice of Assessment notice was a Notice of Determination and that is why it is statute-barred and in her view everything in refusing the issue a Notice of Determination hinged on the Notice of Assessment being a Notice of Determination.

[66] Finally, she also recognized any tax planning, such as modification of income had no bearing on a refusal to issue a Notice of Determination (Applicant's record p. 225).

(c) The affidavit of Evelyn Moskowitz

[67] Signalgene's case was supported by the affidavit of Evelyn Moskowitz. She was not cross-examined and its substance was recognized as accurate by Guylaine Gaudreault. The essence of the facts she described have also been accepted by this Court and are reflected in this judgment. For the reasons which are set out later in this decision this case mainly turns on the assertion made by the Respondent's deponents a Notice of Assessment or Reassessment is the equivalent of a Notice of Determination. In these circumstances, there is no need to elaborate on her affidavit.

VI. The position of the Parties

(a) That of Signalgene

[68] Briefly stated, Signalgene argues that upon the filing of prescribed documents and information with the Minister claiming RITCs, which can be made at any time, the Minister is required under paragraph 152(1)(b) of the *Act* to determine that amount of tax deemed to be paid by that taxpayer under section 127.1(1) of the *Act*. Through the combined provisions of subsection 152(2) and (1.2) of the *Act* then requires the Minister to send the taxpayer a Notice of Determination of that amount which is the necessary foundation for the exercise of rights of appeal and review via an appropriate Notice of Objection.

[69] The focus of Signalgene's argument in this proceeding is on Guylaine Gaudreault's October 26, 2010 decision communicated by a telephone message left with Evelyn Moskowitz. It must be appreciated, however, Guylaine Gaudreault formalized that telephone message by issuing the letter of December 1, 2011 which reaches back to her July 27, 2010 decision which was not a decision refusing to issue Notices of Determination but a refusal to issue the RITCs requested in Signalgene's letter of September 22, 2008. Put another way, Signalgene is not attacking the July 27, 2010 decision in this proceeding which, as previously noted, offered three reasons for refusing its September 22, 2008 request for the issuance of RITCs; (1) CRA has already reviewed its claims for ITCs; (2) its request for RITCs was filed after each statute-barred date for the relevant taxation year; and (3) the RITCs request does not meet the conditions under which CRA would be authorized to reassess. The July 27, 2010 refusal has not been challenged in this Court. Guylaine Gaudreault herself recognized the two decisions were distinct, namely, on the one hand the refusal

to issue the RITCs and on the other hand the decision challenged in this application to refuse to issue Notices of Determination of RITCs.

[70] Signalgene has emphasized the relief sought in this proceeding to the issuance of a *writ of mandamus* to compel to Minister to do what it says he has unlawfully refused or failed to do. As Signalgene's counsel puts it, the Court's order would require the Minister to issue the Notices of Determination which would then allow, if need be, his client to argue the substantive merits of its RITCs claims in the appropriate forum, for otherwise, the Respondent will have precluded Signalgene from filing Notice of Objection and accordingly will have been deprived of its appeal rights which, during cross-examination Guylaine Gaudreault agreed would be the case.

[71] Counsel for Signalgene points to the powers of this Court on an application for judicial review under section 18.1(3) of the *Federal Courts Act* (R.S.C., 1985, c. F-7):

18.1 (3) On an application for judicial review, the Federal Court may	18.1 (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure

proceeding of a federal board, commission or other tribunal.	ou tout autre acte de l'office fédéral.

[Emphasis added]

[72] Counsel also points to the grounds of judicial review under 18.1(4) of the same statute:

18.1 (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18.1 (4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.

[Emphasis added]

[73] He also refers to section 18(1)(a) of the *Federal Courts Act* conferring upon this Court exclusive original jurisdiction (subject to that of the FCA) to issue a *writ of mandamus* against a federal board which can only be obtained on an application for judicial review. He cites the Supreme Court of Canada's decision in *Apotex Inc v Canada (Attorney General)*, [1994] 3 SCR 1100 which spelled out the requirements for the issuance of a *writ of mandamus* and argues the Respondent (1) refused to exercise its public duty to issue the Notices of Determination (2) failed to observe a principle of natural justice or fairness (3) erred in law in making its decision and (4) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it and acted in other ways contrary to law.

[74] Signalgene's counsel also dealt with the appropriate standard of review. He argues in favour of the correctness standard because, in his view, the case turns on a question of law that involves the proper interpretation of subsections 127.1(1), 152(2) and 1.2 and paragraph 152.1(b) all of which are mandatory provisions.

[75] Signalgene argues the Minister breached its legitimate expectations. He submits Signalgene legitimately expected the Minister to issue Notices of Determination in respect of its RITC claims and could not have legitimately expected the Minister would take the position that the Respondent already had issued Notices of Determination in respect of the RITCs to which Signalgene was entitled for the relevant years i.e. that the Notices of determination were embedded in and formed part of the Initial Notices of Assessment (and in the case of the two April 1997 claims the 1997 Notices of Reassessment) and this was notwithstanding Signalgene had made no claim for RITCs at

or before the time of the Initial Notices of Assessment or Reassessment considering itself not eligible to do so as a Non-CCPC. He bases his argument on the Respondent's published position set out in the Technical Interpretation of February 2002 previously identified. It reads:

> It is our opinion, *that where no claim for the amount of tax deemed by subsection 127.1(1) of the Act to be paid on account of the taxpayer's tax payable has been originally claimed, no determination of the amount of tax deemed by subsection 127.1(1) of the Act to be paid would be issued when the minister issues the notice of loss determination*….[A]s previously stated, it is our opinion that since the 'NIL' amount indicated for the refundable ITC on the original T2038 *does not constitute a claim for an amount under subsection 127.1(1) of the Act, the Minister has not issued, a determination in respect of the subsection 127.1(1) of the Act* with either the issuance of *the original nil assessment* or a possible notice of loss determination.
>
> [Emphasis added]

[76] He adds two other factors (1) the refusal of CRA, when it rejected Signalgene's 2004 Notice of Objection on the basis Signalgene had not produced a Notice of Determination to which it could object, made no mention of the deemed previous Notices of Determination nor did it take the position that the 1997 Initial Notices of Assessment constituted Notices of Determination in respect of Signalgene's RITCs entitlement.

[77] The second factor is the fact the Respondent, in all previous decisions dealing with the Applicant's claims, never identified or told Signalgene a Notice of Determination was contained in the Notice of Assessment. Signalgene's counsel also argues the Respondent's position a Notice of Determination as to a taxpayer's entitlement to an RITCs refund can be issued before the taxpayer ever makes a claim for such a refund and, indeed, is always set out in the Notice of Assessment for the year in question is wrong in law as contrary to the statutory scheme and the Respondent's

acknowledgement in Guylaine Gaudreault's cross-examination a taxpayer can make an RITC claim at anytime but the claim may not be accepted by CRA.

[78] He cites 152(1)(b) of the *Act* which requires the Minister to determine the amount of tax deemed to be paid on account of the taxpayer's tax payable for the year under section 127 of the *Act* with other statutory provisions compelling the issuance of that determination. He points to the fact section 127.1(1) requires the taxpayer to take positive steps to assert an RITC claim by filing certain prescribed forms and information which Signalgene did not do except for the 2003 filing for April 1997 tax year and its September 2008 filing (for all tax years).

[79] He argues, on its face, the acknowledgement in the *Act* a RITC claim can be made at any time is inconsistent with the fact, that regardless when the claim is made, it has already been determined for the tax year the RITCs are being asserted.

[80] He also argues the Minister's position the Notices of Determination are embedded in the Notice of Assessment for each relevant year blurs the distinction between assessment and determination and Notice of Assessment and Notice of Determination. In the language of the *Act* taxes are "assessed" whereas "refunds" are determined. This distinction was recognized, he argues, in *Perfect Fry* at paragraphs 43 to 45.

[81] Finally, in the alternative, he argues if the correct standard of review is unreasonableness, that standard has been met particularly flowing from the fact (1) the 2002 Ruling was erroneously not taken into account because Montreal TSO did not have the complete text of the Ruling (2) it is

unreasonable in the circumstance to assimilate a blank space in the original tax return as in effect being a claim for RITC which the taxpayer made barring him from even making a claim in the future because he did not timely object to that blank space (3) the decision-maker took into account irrelevant considerations such as; a) the Directive; b) to issue a Notice of Determination would grant Signalgene a right of appeal; and c) tax planning by Signalgene.

(b) That of the Minister

[82] In his memorandum of fact and law, counsel for the Minister sets out, in the overview, the Respondent's fundamental position which is based on the following building blocks:

(1) On two separate occasions i.e. on October 30, 2003 and again on September 24, 2008, well after the years at issue became statute-barred, Signalgene filed amended income tax returns for the relevant years for its 1997, 1998 and 1999 taxation years in which it claims RITCs that it had not claimed when it filed its initial returns several years earlier.

(2) The Minister advised Signalgene that he refused to process the amended returns on February 6, 2004 and on July 27, 2010 and the applicant did not contest the refusals before this Court but instead chose to make additional representations to the Minister on September 23, 2010.

(3) What Signalgene now seeks is to take the matter of its entitlement to the Tax Court. It asks the Court to revive its rights to object to the Minister's prior assessments, rights which expired more than 10 years ago by farming its application as a request for *mandamus* alleging a distinction between a Notice of Assessment and a Notice of Determination a distinction which this Court has

already rejected in *Greenpipe Industries Ltd v Canada (National Revenue)*, 2006 FC 1098 para 13-19.

(4) Signalgene had the responsibility under the *Act* to assert its entitlement to RITCs which at failed to do in a timely manner.

(5) Signalgene's argument that the Minister failed to comply with his duties under the *Act* to make the determinations sought fails to recognize that it did not make its claim as required under the *Act* and cannot seek *mandamus* in an attempt to correct its failure to meet the statutory requirements.

[83] In terms of the facts, counsel for the Minister states:

(1) In all of its returns for the relevant years the Applicant claimed the deduction of SR&ED expenses, non-refundable ITCs and RITCs with the RITCs identified as zero for all years (see Respondent's memorandum p. 7).

(2) Signalgene identified itself as a Non-CCPC calculating its ITCs at the 20% rate and claimed a nil amount of RITCs in its returns.

(3) The Minister initially assessed the applicant for all of relevant years without allowing any RITCs and Signalgene did not object to any of those assessments.

(4) Identified the date on which Signalgene's relevant tax year became statute-barred with its last relevant taxation year – ended December 31, 1999 – becoming statute-barred on July 31, 2004.

(5) All of Signalgene's SR&ED claims were audited by CRA with the result all its RITCs were established as nil and again no objection from Signalgene to any of the reassessments which were issued following those audits.

(6) The Minister recognizes Signalgene's first request for RITCs was on October 30, 2003 when it submitted a first amended return for its April 2, 1997 taxation year which the Minister advised on February 6, 2004 he refused to process on the grounds the RITC claim was filed out of time. It was against this decision Signalgene filed a Notice of Objection on May 6, 2004 which was rejected by CRA on the ground no reassessment was made to which an objection could be filed. The Minister advised, after several exchanges, Signalgene could not object to February 6, 2004 letter but only could to a reassessment or a determination which the letter was neither. Signalgene did not appeal to the Tax Court nor did it undertake judicial review proceedings against the Minister refusal to process its amended returns.

(7) Counsel for the Minister then addressed Signalgene's second request of September 24, 2008 for the issuance of RITCs covering of its April 1997 taxation year and a first request for RITCs by filing a first amended return for all remaining relevant taxation years claiming changes in SR&ED expenses, in ITCs and in RITCs. It was at that time Signalgene identified itself as a CCPC and proposed substantial modifications for the computation of its income, taxable income, and tax payable which were required in order to allow it to claim a refund for the RITCs.

(8) In this context, counsel for the Minister submits, the *Perfect Fry* case which Signalgene relied upon was a case which dealt with the Minister's power to issue refunds after the statute-barred date and with the CCPC issue. He also notes the *Parthenon Investment* case was decided by the FCA on May 30, 1997 before

Signalgene had filed any of its initial income tax returns; its first RITC claim of October 2003 was made more than 6 years and its September 2008 claims more than 11 years after the *Parthenon* decision. He also states the *Perfect Fry* case was affirmed by the FCA on the CCPC issue only.

(9) He also refers to the July 27, 2010 grounds for refusal of the RITC claims made on September 24, 2008. After an inquiry from Evelyn Moskowitz, shortly after she received the letter, with respect to its statute-barred aspect, counsel says the Minister answered the next day that the returns not the refunds were statute-barred.

(10) The Minister recognizes that on September 23, 2010, Evelyn Moskowitz, on behalf of Signalgene, *inter alia*, requested the Minister issue Notices of Determination to set out the amount of RITCs to which he believed Signalgene was entitled and that on October 26, 2010 she was advised because the years were statute-barred the Minister was not authorized to issue a determination that would reopen the years.

[84] In terms of the law, counsel for the Minister submits:

(1) Signalgene's application for *mandamus* should be characterized as a request for a *writ of certiorari* and *mandamus* in aid citing the Supreme Court of Canada's decision in *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 ; [2001] 2 SCR 281 para 16 and says that in fact what Signalgene is requesting is a *writ of certiorari* to quash the Minister's February 6, 2004 and July 27, 2010 decisions refusing to process its amended

return and its claims for RITCs contained therein coupled with a *writ of mandamus* ordering the Minister to issue Notices of Determination of RITCs thereby reviving its rights of objection and appeal.

(2) He submits Signalgene's application is time barred because, under the *Federal Courts Act*, was made more than 30 days after it was advised on February 6, 2004 and on July 27, 2010 its amended returns would not be processed and that its claims for RITCs would not be allowed.

(3) He argues that on September 23, 2010 Signalgene provided further representations in respect of the Minister's July 27, 2010 decision rather than seeking a judicial review of it. He submits the Minister did not render a new decision on October 26, 2010 leaving a voicemail message in which he reiterated the reasons for decision, namely, the issue had already been reviewed by the CRA, the years were statute-barred and the Minister was not authorized to issue determinations; those reasons are substantially the same as those given on July 27, 2010 as clarified on August 4, 2010.

(4) He submits there is no merit to Signalgene's argument he is now only seeking Notices of Determination. He submits "a Notice of Determination of RITCs is not provided for in the *Act* and the Minister's only obligation is to send a Notice of Assessment which he did more than 10 years ago. He relies on the *Greenpipe* decision and the structure of section 152(1) of the *Act* which requires at paragraph (b) that the Minister determine if any the taxpayer's RITCs for the year. He looks at sections 152(1.01), (1.11), (1.5), (3.3) and (3.5) to argue when

Parliament requires that a separate and distinct "Notice of Determination be sent out upon the Minister making a determination" it will say so clearly.

(5) He submits what Signalgene sought on October 30, 2003 was for the Minister to process its amended returns so as to modify both its income and tax to obtain the refund of the RITCs claimed. The proper manner to dispute the Minister's refusal would have been to seek judicial review within 30 days after being advised of the Minister's refusal to process. It did not to so and cannot now rely on an alleged distinction between a Notice of Assessment and a Notice of Determination to take the matter to the Tax Court.

(6) In the alternative, if the Court is of the opinion the essential nature of the claim is for an order of *mandamus* and the 30 day limit does not apply, this application should be dismissed for the reason it was made after an unreasonable delay citing *Krause v Canada* (CA), [1999] 2 FC 476 para 19 (FCA), counsel for the Minister points out again the *Parthenon* case on which Signalgene relies to claim its being a CCPC and thus entitled to claim RITCs was decided on May 30, 1997 but Signalgene only brought its change of status forward until October 30, 2003 for its April 7, 1997 year and waited for years thereafter i.e. September 24, 2008 for the first time with respect to all of the other taxation years.

(7) Counsel for the Minister adds another element. Signalgene was also assessed, reassessed but never exercised its rights of objection and appeal even though no refunds had been allowed; the same can be said of Signalgene's lack to exercise its rights when the audits for each of the relevant years showed the RITCs were established nil.

(8) Moreover, counsel adds a further factor following the Minister's February 6, 2004 denial Signalgene chose to await the decision in *Perfect Fry* rather than seek judicial review.

(9) Finally, counsel for the Minister argues *mandamus* does not lie against the Minister on the facts of this case.

(10) He argues the Minister no longer had a duty to determine the amount of RITCs Signalgene would have been entitled when it filed its initial returns had it claimed RITCs in the first place. Counsel submits Signalgene's initial assessments discharged the Minister of any obligation in that respect and no longer had a legal power to determine its RITCs as all of the years at issue were all statute-barred when Signalgene filed its amended returns and claimed RITCs for the first time.

(11) Counsel adds the Minister's obligation to determine RITCs, if any, arises only from the filing of an income tax return and that once the Minister had assessed Signalgene, the Minister had discharged his obligations under the *Act*, adding, that Signalgene's only recourse was to file an objection with the Minister and appeal to the Tax Court which it did not do.

(12) Minister's counsel then argues no public duty to act exists and no duty is owed to Signalgene because under section 152(1) of the *Act* upon the filing of an income tax return by the Minister must with all due dispatch examine the return assess the tax for the year, the interest and penalties if any payable by the taxpayer and determine among other things, the amount, if any, of the taxpayer's RITCs for the year and then send a Notice of Assessment. Counsel points out the

amount of a taxpayer's RITCs is equal to the lesser of the RITCs for the year and the amount claimed.

(13) Minister's counsel then says and concludes on this point:

> Put in other words, the Act imposes upon the taxpayer the initial responsibility and obligation to assert a claim to RITCs. It is only upon it complying with this obligation that its entitlement to RITCs, if any, arises. When the taxpayer fails to assert such a claim in its return, or upon the taxpayer filing the prescribed forms with its return indicating a nil amount of RITCs, as Signalgene did, there is no "amount" of RITCs to be determined.
>
> In assessing Signalgene, the Minister fulfilled his obligations under the Act. As no amount of RITCs was claimed by the Signalgene in any of its returns, there was no "amount" of RITCs to be determined by the Minister.
>
> [Emphasis added]

(14) Finally, the Minister concludes by arguing Signalgene has no clear right to the performance of a duty. First, he argues there is no obligation to process an amended return. He relies on the Federal Court of Appeal's decision in *Armstrong v Canada (Attorney General)*, 2006 FCA 119 at para 8:

> An amended return for a taxation year that has already been the subject of a notice of assessment does not trigger the Minister's obligation to assess with all due dispatch (subsection 152(1) of the *Income Tax Act*), nor does it start anew any of the statutory limitation periods that commence when an income tax return for a particular year is filed and then assessed. An amended income tax return is simply a request that the Minister reassess for that year.

(15) Second he argues the Minister has no legal authority to reassess statute-barred years that is to determine the amount of Signalgene's RITCs upon the filing of amended returns as each of the taxation years at issue was, at that time, statute-

barred. He states the power to assess outside the context of paragraph 152(1) of the *Act* is set out in subsection 152(4) of the *Act* and is subject to the time limitations mentioned therein. Again, counsel for the Minister relies on the *Greenpipe* case.

(16) Third, he argues the circumstances of this case do not require any modification to subsections 152(1) and (2).

(17) Fourth, he argues, the *Perfect Fry* case is fact specific. He notes Justice Paris did no discuss the Federal Court's decision in *Greenpipe* and in *obiter dicta* nevertheless concluded that the statute barred period for RITCs starts on the day of the original determination of the RITCs rather than the day of the original assessment and that the refund of the RITC, at issue was thus statute barred. He argues, whether correctly or not, the Minister was responding to the tax payer's claim by issuing notices indicating nil amount of RITCs even though the years at issue were long since statute barred but considered he could not issue refunds after the statute barred period. He concludes by stating Justice Paris did not discuss whether the Minister was empowered to make such a determination when six months later in *Greenpipe* this Court held he could not.

(18) Fifth, he concluded by arguing that an adequate remedy was available to Signalgene through objection and appeal. He submits that although no appeal lies through a nil assessment the Federal Court of Appeal and the Tax Court have confirmed a tax payer may appeal such a nil assessment when the subject of the appeal is to dispute its entitlement to RITCs.

VII. Analysis and Conclusions

(a) Analysis

[85] As stated in Signalgene's application for judicial review, it is limited in scope. The applicant only challenges the Minister's decision of October 26, 2010 to refuse its request to issue Notices of Determination in respect of its claim to RITCs in all of the Relevant Taxation Years. Its application does not seek a remedy against the Minister in respect of CRA's July 27, 2010 decision in which Guylaine Gaudreault refused Signalgene's of September 23, 2008 on the heals of the *Perfect Fry* case (decided by the FCA in early 2008) in which Signalgene claimed for the first time, with one exception (the 2003 claim for RITCs in Signalgene's April 1997 year and taxation year).

[86] The Minister in his memorandum of law submits the applicant's application should be characterized as a request for a *writ of certiorari* and *mandamus* in aid. Counsel for the Minister says the applicant in fact is requesting *certiorari* to quash the February 6, 2004 and July 27, 2010 decisions refusing to process its amended returns and its claims for RITCs contained therein.

[87] I share the Minister's view in substance the application before me seeks to quash the October 26, 2010 decision to refuse to issue Notices of Determination in respect of its RITCs claims and seeks to do so on legal grounds; (1) refusal to exercise its jurisdiction; (2) error of law in making the refusal of October 26, 2010; and (3) acting in a way contrary to law. However, I do not agree that in this application Signalgene is reaching back to quash the refusals to recognize its RITC claims.

[88] Guylaine Gaudreault, the decision-maker, during her cross-examination said:

(1) To her knowledge before she was named acting Assistant Director of the SREDD Division in the Montreal TSO, Signalgene had never requested the determination of its RITCs (Transcript p 26).

(2) The September 2008 request was not a request for the determination of its RITCs by the applicant; that occurred on September 10, 2010; it was a brand new request (Transcript pp 264 and 299).

(3) Recognized the request to issue the Notice of Determination for Signalgene's RITC, was not statute-barred, that is, made out of time; such a request could be made at any time (Transcript pp 329, 330 and 404).

(4) Her July 27, 2010 decision had no impact on her decision being reviewed this proceeding because it is not related to the same request (Transcript p 333).

(5) If the request for the issuance of a Notice of Determination of RITCs had been made and no Notice of Assessment or Re-assessment had been issued before she stated "of course, we would have had to provide one" (Transcript pp 404 and 414).

(6) In her mind, the decision to refuse the request to issue Notices of Determination for the Relevant Taxation Years was based on the fact that CRA had already issued one and was not obliged to issue another one (Transcript p 409); a conclusion which was based on the fact she considered the Notices of Assessment or Re-assessment issued (after audit) to be the same as a Notice of Determination (Transcript pp 313, 335, 371 and 413) but she recognized that she

had not taken into account in reaching her decision the February 2002 Tax Ruling (Transcript p 322) which expressed a contrary view.

(7) At page 414 of the Transcript she stated she could make multiple determinations and was not limited to only making one determination and when asked why she did not do so when it was requested for this first time on September 10, 2010 she answered "It probably had to do with all the previous requests that had been denied because I think this claimant made several requests from different angles and it was always no and I didn't feel I had the obligation to issue a Notice of Determination that had already been issued."

(8) Did not consider the right of the taxpayer to amend his/her returns when she decided to refuse the request for the issuance of Notices of Determination (Transcript p 421).

(9) In short, the judicial review application was not filed out of time.

[89] Much of Signalgene's case turns on matters of statutory interpretation. The Supreme Court of Canada in the case of *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, paras 21-23 settled the law on the issue in a unanimous decision whose reasons were authored by Mr. Justice Iacobucci:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in

> their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, 1997 CanLII 318 (SCC), [1997] 3 S.C.R. 213**; *Royal Bank of Canada v. Sparrow Electric Corp.*, 1997 CanLII 377 (SCC), [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, 1996 CanLII 186 (SCC), [1996] 3 S.C.R. 550; *Friesen v. Canada*, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103.
>
> I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".
>
> Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.
>
> [Emphasis added]

(b) Conclusion

[90] I accept the purpose of the provisions of the *Act* related to SR&ED and ITC (both ordinary and refundable) is to encourage Canadian enterprises and in particular start-up enterprises to engage in scientific research in order to ensure that Canada remains globally competitive in new immerging technologies (See *Datacalc Research Corp. v Canada* 2002 DTC 1479).

[91] I am of the view the standard of review of the impugned decision is the standard of correctness because the decision under review turns on matters of statutory interpretation.

[92] For the reasons that follow I am of the view this judicial review application must be granted:

(1) The reason the decision-maker did not issue to Signalgene the requested Notices of Determination for the RITC claims was because she took the view that since Signalgene had received initial Notices of Assessment and in some cases Notices of Reassessment (the Notices) in respect of its Income Tax Returns for the relevant taxation years such Notices were the equivalent of or deemed to be Notices of Determination of the amount of tax deemed to have been paid on account of its tax payable for that year under Part I of the *Act* notwithstanding the fact that:

(a) Signalgene never claimed nor calculated the amount of such tax (as required by paragraph 127.1(1)(c) of the *Act* nor filed the prescribed information upon which CRA could verify its calculation because at the time of its initial filing Signalgene did not believe it was eligible for such credits as a Non-CCPC which was clearly indicated on page one of its return.

[93] This view expressed by the decision-maker is contrary to the statutory scheme which is premised on the filing of prescribed information and the calculation of RITCs and specifically provides in paragraph 127.1(1)(b) for amended returns. Moreover, it is contrary to the Technical Tax ruling referred to above which states:

> However, as previously stated, it is our opinion that since the 'NIL' amount indicated for the refundable ITC on the original T2038 does not constitute a claim for an amount under subsection 127.1(1) of the Act, the Minister has not issued a determination in respect of the subsection 127.1(1) of the Act amount with either the issuance of the original nil assessment or a possible notice of loss determination.

[94] In the circumstances of this case, the erroneous view that the initial Notice of Assessment or reassessment was the equivalent of a Notice of Determination led to a series of other faulty determinations such as the initial Notice of Assessment started the clock ticking for the purposes of calculating the start time of when a tax payer amended tax filings are statute barred. This view also led the tax official to ignore the teachings of the *Perfect Fry* case which specifically dealt with RITCs. In particular, at paragraph 43, Justice Paris held that refunds which are payable as a result of a determination [of RITCs] must be requested within the tax payer's normal redetermination period rather than within its normal reassessment period.

[95] I close by mentioning that the Minister's reference on the *Greenpipe* case is not appropriate. That case was decided in September 2006 after the *Perfect Fry* case was taken under reserve but before a decision was issued in 2007. The *Greenpipe* case was heard and decided in September of 2006. It was decided under the fairness provisions of the *Act*.

JUDGMENT

THIS COURT'S JUDGMENT is that this judicial review application is granted with costs to be assessed on Column V with the units fixed at the highest number in the range for each assessable service of the Court's Tariff. The Minister's decision of October 26, 2010 refusing to issue to the applicant Notices of Determination of the amount of the applicant's RITCs for the Relevant Taxation Years is quashed and the matter is remitted pursuant to this Court's power under paragraph 18.1(3)(a) of the *Federal Courts Act* to the Minister for issuance of the requested Notices of Determination of the amount the Applicant is deemed to have paid on account of its tax payable under Part I of the *Income Tax Act* in each relevant tax year in accordance with paragraph 152(1)(b) of the *Income Tax Act*.

"François Lemieux"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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