[TRANSLATION]

Caloil Inc. (*Plaintiff*) *v.* **Attorney-General of Canada** (*Defendant*)

No. 2

Dumoulin J.—Ottawa, September 11, 12, 16, 1970.

Constitutional law—Trade and Commerce—National Energy Board Act, 1959, c.46, Part VI—Regulation 20 of Aug. 12, 1970—Licence for importation of gasoline—Refusal of licence authorized where importation violates national policy—Regulation intra vires.

Following this court's decision of August 1, 1970 (*ante*, p. 512), Regulation 20 of the National Energy Board Part VI Regulations was amended on August 12, 1970. The amended regulation provided, *inter alia*, that the Board could license the importation of oil for consumption in the area of Canada specified and could impose such a condition on the licencee, and that a licence should not be issued if the Board was not satisfied that the imported oil would be consumed in the area specified in the application and that the terms of the licence would be complied with.

On August 17, 1970, plaintiff applied for a licence to import 160,000 barrels of gasoline to be distributed in the areas of Montreal, Cornwall, Toronto, and Port Stanley. The Board was prepared to license importation of gasoline for consumption in the Montreal and Cornwall areas on receipt of a declaration that the imported gasoline would be consumed in those areas but it rejected the application to import gasoline into the Toronto and Port Stanley areas on the ground that it was not satisfied that such importation would be consistent with the development and utilization of Canadian indigenous oil resources.

Held, dismissing an action for a declaration that the amended regulation and Part VI of the *National Energy Board Act* were unconstitutional, the amended regulation did not infringe on civil rights but was a valid exercise of federal authority with respect to the regulation of international and interprovincial trade.

Murphy v. *C.P.R.* [1958] S.C.R. 626; *Att'y-Gen. Can.* v. *Att'y-Gen. B.C.* [1930] A.C 111; *Shannon* v. *Lower Mainland Dairy Products Board* [1938] A.C. 708, considered.

ACTION for declaratory judgment.

R. Langlois, for plaintiff.

R. Bedard, Q.C., for defendant.

DUMOULIN J.—This declaratory action for avoidance is for all practical purposes the second act of a constitutional controversy the first part of which ended on August 1 last with the judgment of the President of this Court, the Honourable Mr. Justice Jackett, invalidating " . . . the legislative scheme contained in Part VI of the *National Energy Board Act* (S. of C. 1959, c. 46) and section 20 of the National Energy Board Part VI Regulations", which, to the learned jurist, seemed to exceed "the power of Parliament insofar as it authorizes the prohibition of the importation of motor gasoline except subject to the condition set out in section 20(4)"[1] hereinafter quoted. The initial phase of the argument bears No. B-3887 in the records of this Court. Since it

[1] *ante*, p. 518.

was not followed by any appeal to the Supreme Court—the Attorney General agreeing that it was correct—it therefore constitutes *pro tanto* a *res judicata* between the parties.

Because the facts are identical, we can refer forthwith to the above-mentioned judgment for a description of the commercial undertaking of Caloil Incorporated.

> The plaintiff has imported, and distributed in Canada, petroleum products, since August 28, 1963. For the purposes of its business, it operates storage installations for petroleum products at the port of Montreal and at the port of Toronto, which installations have a capacity of 45,675,000 gallons and 5,600,000 gallons, respectively.
>
> Those installations are linked by a distribution network to wholesalers and retailers doing business in the Province of Quebec and in the Province of Ontario. The plaintiff has assets worth at least $12,000,000 and furnishes employment for at least 1,200 employees.
>
> The plaintiff acquires its petroleum products on the international market (the port of exportation which concerns us is Algesiras, Spain) and imports such products, by sea, by way of its Montreal storage installations, at an annual rate of around 178,500,000 gallons, of which 63,000,000 gallons go into the Ontario market.[2]

In article 8 of the plaintiff's statement in the present action we read that "On May 7, 1970, the Governor General in Council extended to oil the provisions relative to importation and exportation contained in Part VI of the *National Energy Board Act* in the exercise of the new powers delegated to it as a consequence of the said proclamation . . . " with the result, as related in article 12, that:

> 12. On the date of the filing of the said proclamation, the plaintiff had bound itself to deliver 63,000,000 gallons of gasoline in Ontario to be marketed in the region described as Region III in the National Energy Board Regulations, namely, west of the Ottawa Valley.

These promised deliveries became possible because, as stated in article 10 of the application,

> on the date of the filing of the proclamation (May 7, 1970). . .the plaintiff had bound itself to buy, on the international market, to supply its requirements for the year 1970, some 178,500,000 gallons of petroleum products including 126,000,000 gallons of gasoline;

and delivery to Canada was to be made, article 11 continues, "by tanker at the rate of around 5,600,000 gallons per voyage".

Such was the situation, therefore, at the time of the first proclamation (May 7), subjecting the importation of oil products to the restrictions stipulated in regulation 20 which, as we know, was rendered void by the henceforth irrefragable decision of August 1, 1970. And so ends act one.

Now we come to the second act, or if you prefer another metaphor, to the second lap of this jurisdictional steeplechase.

Since the faculty to amend its regulations was one of the powers delegated to the National Energy Board by its organic Act, S. of C. 1959, c. 46, it did not consider itself irreparably defeated and, though one amendment was invalid, another, of different scope, might meet a better fate. No sooner said than done; on August 12 last, " . . . National Energy Board Part VI Regula-

[2] *ante*, p. 512f.

tions (were) amended by Order in Council P.C. 1970-1419 of August 12 . . . ", notice of which was given to Caloil by telex dated the 14th of the same month.

In the new text, the provisions which may influence the present dispute are worded as follows:

> 1. Section 20 of the *National Energy Board Part VI Regulations* is revoked and the following substituted therefor:
>
> "20. (1) In this section and section 21 'consumption' means the placing of oil in tanks connected to an internal combustion engine for purposes of operating such engine.
>
> (2) Where the Board is of the opinion that importation of oil that is the subject of an application for a licence to import into Canada will be consistent with the development and utilization of Canadian indigenous oil resources, it may issue a licence to import oil for consumption *in the area of Canada specified therein, in such quantities, at such times and at such points of entry into Canada as it may consider appropriate.*
>
> (3) *Any licence issued by the Board pursuant to subsection* (2) *may be issued on the condition that the oil to be imported will be consumed in the area of Canada specified in the licence.*
>
> (4) *Where the Board is not reasonably satisfied that the consumption of oil to be imported will be in the area of Canada specified in the application for a licence and that the terms of the licence to be issued will be complied with, it shall not issue a licence.*"

(All the italics here and elsewhere are mine, with one exception.)

This amendment is found on pages 961 and 962 of the *Canada Gazette,* issue of August 26, 1970, No. 16, Vol. 104.

In addition to the right to refuse a licence to import, s. 84 [of the *National Energy Board Act*] provides for the revocation or suspension of such a licence, after notice has been given to the person alleged to have committed a violation, if, in the opinion of the Board, any term or condition has been violated. Finally, s. 86 [of the Act] specifies that any person who violates any of the provisions of Part VI "or the regulations made under this Part is guilty of an offence punishable on summary conviction as provided in the *Criminal Code*". This double penalty, an integral part of the *National Energy Board Act,* was in no way affected by the second amendment procedure, Order in Council 1970-1419 of August 12.

After this purportedly corrective manoeuvre by the Board, it was up to Caloil to make a decision: either to take legal action or to submit; as we know, it chose the first course of action.

It was well within the plaintiff's intention to ascribe to its application for a licence to import, submitted to the Board by telex dated August 17, 1970 (exhibit R-4), should a refusal be forthcoming, the added objective of testing the legality of the regulation amended just a day or so before. Furthermore, this intention is expressed in the opening lines of the telegram sent to the National Energy Board on August 17:

> Further to your Telex of Friday, August 14, 1970 concerning Order in Council P.C. 1970-1419 of August 13 [*sic*], Caloil, without prejudice to its rights to contest the validity of the said regulations, thereby applies for the issuance of a licence to import the quantities of motor gasoline specified in the table hereunder.

The gasoline was to be taken on in the port of Algesiras, Spain, and unloaded at the port of Montreal, the expected date of entry being September 1, 1970, and "the quantity loaded or anticipated: 160,000 barrels". This information did seem to meet the requirements of section 20 of the new text; the objection, the effects of which will become apparent hereafter, stems from the item worded as follows in the telex of August 17 (exhibit R-4):

10. Unloaded cargo distributed as follows:

Montreal area	60,000 barrels
Toronto area	50,000 barrels
Port Stanley area	40,000 barrels
Cornwall area	10,000 barrels

Four days later, on August 21, the National Energy Board notified Caloil that its application dated August 17 for a licence to import was rejected because (exhibit R-5):

> ... Every applicant for a licence to import shall furnish to the Board information concerning, among other things, the region of Canada (province or territory) in which the imported product is to be consumed. A separate application shall be required for each region in which the product will be consumed.
> Your application is incomplete in that it does not precisely define the regions in which the imported gasoline will be consumed. (See section 20, subsection (1) of the amended National Energy Board Regulations.)

The next two paragraphs lay further stress on the Board's main objection, which, in its opinion, justifies its dismissing Caloil's application:

> Upon receipt of a declaration from you, signed by an authorized director of your company, specifying that the imported gasoline destined for consumption in the Montreal and Cornwall areas will in actual fact be consumed in those areas, the Board would be prepared to approve the issuance of licences in those two cases. The applications to import motor gasoline into the Port Stanley and Toronto areas are not approved in view of the fact that the Board is not satisfied that such importations would be consistent with the development and utilization of Canadian indigenous oil resources.

To this plea in bar the plaintiff brings the declaratory action for avoidance, subparagraphs (*b*) and (*c*) of section 26 of which specify the result that it is proposing to attain; I quote:

> 26. (*b*) To declare the new regulations decreed pursuant to Part VI of the National Energy Board Act by Order in Council P.C. 1970-1419 unconstitutional, invalid, null and void *ab initio*, as well as Part VI of the National Energy Board Act, in as much as these regulations are illegal;
> (*c*) Subject to any other existing legislation, to declare that the plaintiff is entitled to import petroleum products without any restriction as to their marketing.

The defendant and the *mis-en-cause* are, of course, opposed to the Caloil claim and conclude "may it please the Court":

> To dismiss the plaintiff's action;
> To declare the legislative scheme in question *intra vires* of Parliament and of the Governor in Council.

My task, as I conceive it, lies less in comparing the former regulations with the new ones in force, less in ascertaining how one differs from the other, than

in considering, apart from any earlier regulations, whether or not the text adopted by Order in Council P.C. 1419 on August 12 is constitutional. However, I cannot avoid including here certain extracts from the regulations since superseded, in particular 20 (4) which the learned counsel for the parties repeatedly commented upon; they likewise dwelt, with different conclusions, on the omission in the new section 20 of the division of Canada into six (I to VI inclusive) topographically defined regions.

Before last August 12, it was prescribed in section 20 (4) that:

> 20. (4) The Board may issue licences to import motor gasoline through Customs ports in Regions I (the four Maritime Provinces) and II (Province of Quebec and part of the Province of Ontario east of the Ottawa Valley) and the Board may make any or all of such licences subject to the condition that *the importer shall not, without the consent of the Board,*
>
> (*a*) *transport or cause to be transported any motor gasoline from Regions I or II to Region III* (Province of Ontario, except those counties and townships included in Region II) or
>
> (*b*) *sell or deliver to any third party any motor gasoline except on the condition that such sale or delivery is made for consumption within Regions I or II.*

When we read this quotation, it becomes quite clear that the Board was claiming to regulate the sale of gasoline, without adequately defining its place of origin, within the boundaries of certain Provinces. Unless I am mistaken, such seems to be the feeling that the learned President of this Court summarized as follows at page 18 of his judgment of August 1:

> Section 20 (former text) does not purport to confer authority on the National Energy Board to regulate the movement of imported gasoline. What it does purport to do is to authorize the imposition of a prohibition on a licencee, as a condition of getting a licence, against transporting, without the consent of the Board, "any motor gasoline" from East of the aforesaid line into the balance of Ontario. *In other words, this term operates on any motor gasoline in the hands of the licencee even if it is produced in Canada. This certainly is not a law that purports to regulate imported goods.*

After this very long preamble, this possibly tedious account of the situation, it is high time to look more closely at the subject of the dispute where, for the hundredth time perhaps, we have a confrontation between the claims of the two classes of legislative authority, namely, Parliament and the Legislatures. Specifically, in this case, which should take precedence, s. 91 (2) or s. 92 (13)? Do the regulations decreed on August 12 stem mainly from a concern for regulating trade and commerce or do they have a greater bearing on civil rights and property?

It does not solve the problem to recall the endless conflicts of this nature which have arisen since confederation, but it does enable us to point out the close if not specious affinities which complicate the drawing of a precise line between these powers, both sovereign in their own sphere.

This complexity was pointed out as long ago as 1881 (to go no further back) in *Citizens' Insurance Co. v. Parsons,*[3] a judgment of the Privy

[3] (1881) 7 App. Cas. 96 at p. 109.

Council, which many decades later prompted Mr. Justice Locke, speaking on behalf of the Supreme Court in *Murphy v. C.P.R.*,[4] to remark:

> It was said in the judgment of the Judicial Committee in *Citizens' Insurance Co. v. Parsons,* and it has been said many times since, that in performing the difficult duty of deciding questions arising as to the construction of ss. 91 and 92 of the *British North America Act* it is a wise course to decide each case which arises without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular question in hand...

In an appeal to the Privy Council in *Att'y-Gen. Can. v. Att'y-Gen. B.C.*[5], Lord Tomlin, on his own behalf and on that of his colleagues, suggested four ways to distinguish the judicial nature of constitutional conflicts; the eminent jurist wrote that:

> Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated:—
>
> (1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, *even though it trenches upon matters assigned to the provincial legislatures by s. 92...* (May I repeat that all the italics are mine.)
>
> (2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion.
>
> (3) *It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91.*
>
> (4) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.

I shall endeavour to follow these judicious directives.

From these four interpretative norms, we can make the following assumptions, which have gone unchallenged: first, Parliament alone has legislative competence over trade and commerce both where importation and exportation are concerned; secondly, this power consequently extends to interprovincial trade. In support of this latter faculty, may we cite one of many cases that have recognized it, the following excerpt from Mr. Justice Locke's reasons for judgment in *Murphy v. C.P.R. supra*[6]:

> As pointed out by the learned Chief Justice of Manitoba, it has been long since decided that the provinces cannot regulate or restrict the export of natural products such as grain beyond their borders...The matter had been considered in earlier cases and in the judgment delivered by Duff J., as he then was, in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction,* a case which dealt with the marketing of natural products produced in the province of British Colum-

[4] [1958] S.C.R. 626 at pp. 627 and 628.
[5] [1930] A. C. 111 at p. 118; Olmsted, Vol. 2, 617 at 623.
[6] [1958] S.C.R. 626 at p. 631.

bia, *it was said that foreign trade and trading matters of interprovincial concern are among the matters included within the ambit of head 2 of s. 91.*

It would be fitting to add these lines of a pronouncement made by the late Duff C.J. in the *Lawson case*[7]; I believe that the view of the eminent magistrate is also applicable to companies such as Caloil, of provincial creation, under similar circumstances; quotation:

Matters, otherwise of local concern only, and, so long as they continue to be so, outside the scope of head 2 of section 91, may become, in virtue of their relation to the trading activities of such companies, matters of national concern, and, in so far as they are so, subject to regulation under that head. It seems hardly necessary to observe that, here, there is nothing pointing to the conclusion that the regulative authority in respect of Trade and Commerce, in its application to matters which, in themselves, are involved in interprovincial or foreign trade, can only be invoked in aid of the execution of some power which the Dominion possesses independently of that head.

With respect to trade, it is immaterial, it seems, whether it is a question of fruit and vegetables, as in the *Lawson* case, or a product as indispensable to industrial and commercial activity as gasoline, as in the case that now concerns us.

Let us examine the close similarities between the *Produce Marketing Act (1926–27)* of British Columbia, held to be *ultra vires* of that legislature, and regulation 20 made on August 12 of the current year; in the provincial Act it is stipulated that:[8]

By section 3 of the *Produce Marketing Act* of British Columbia (1926-27), c. 54, a "Committee of Direction" was constituted, "with the exclusive power to control and regulate (under the Act) the marketing of all tree fruits and vegetables... being products grown or produced in that portion of the province contained within" boundaries therein specified. By section 10 (1), it was provided that "for the purpose of controlling and regulating, under this Act, the marketing of any product within its authority (the) *Committee shall,* so far as the legislative authority of the province extends, *have power to determine at what time and in what quantity, and from and to what places, and at what price the product may be marketed, and to make orders and regulations in relation to such matters*"...

Held that this legislation is *ultra vires* of the provincial legislature.

There is certainly an objective analogy with our section 20, wherein it is stated that the Board "... may issue a licence to import oil for consumption in the area of Canada specified therein, in such quantities, at such times and at such points of entry into Canada as it may consider appropriate".

Plaintiff's very able counsel expounded on the decisions, *inter alia,* in *Shannon v. Lower Mainland Dairy Products Board,*[9] a judgment of the Privy Council, and in *Home Oil Distributors Ltd v. Att'y-Gen. of B.C.*[10] a Supreme Court judgment. However, let us note that with respect to the *Natural Products Marketing (British Columbia) Act,* R.S.B.C. 1936, c. 165, it was decreed that:

Sect. 4, sub-s. 1, of the Act provides:

"The purpose and intent of Part I of this Act is to provide for the control and regulation in any or all respects of the transportation, packing, storage, and

[7] [1931] S.C.R. 357 at p. 370.
[8] [1931] S.C.R. 357.
[9] [1938] A.C. 708 at p. 717.
[10] [1940] S.C.R. 444 at pp. 446-7.

marketing of natural products *within the Province*, including the prohibition of such transportation, packing, storage, and marketing in whole or in part."

That there was an intention to limit the scope of another British Columbia statutory provision (*Coal and Petroleum Products Control Board Act*, B.C. 1937, c.8) to provincial boundaries is attested even more emphatically in the second case cited, in secs. 14 (1) (2)(a) and 15, worded as follows:

> 14. (1) The Board may from time to time, with the approval of the Lieutenant-Governor in Council, fix the price or prices ... at which coal or petroleum products may be sold *in the Province* at wholesale or retail or otherwise for *use in the Province.*
>
> (2) . . .
>
> (*a*) Fix different prices for different parts *of the Province*;
>
> 15. Where the Board has fixed a price for coal or for petroleum or for any petroleum product, it may ... declare that any covenant or agreement for the purchase or sale *within the Province* of coal or petroleum or a petroleum product *for use in the Province* ...

What is at issue in these two statutes is nothing other than an interest strictly confined within provincial borders, an implicit acknowledgement that only the federal authority can regulate interprovincial trade.

It seems to be venturing far to contend that the regulation in question here (section 20) does not affect the movement of motor gasoline between Provinces; there is no better proof that Caloil's application for a licence to import oil into the Quebec region of Montreal and the Ontario regions of Toronto, Port Stanley and Cornwall.

In the celebrated appeal which tested the validity of the *Canadian Wheat Board Act*, the *Murphy v. C.P.R.*[11] case, Mr. Justice Rand held that:

> The provisions of the Act embody a policy adopted by Parliament as being in the best interests of the grain producers and the country generally; and the question is whether that administration is within the competence of Parliament to set up, which, in turn, is to be decided on the validity of the substantive enactments of Parts III and IV.
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> * * *
>
> In the situation before us, *the intended shipment was to be one of transportation across a provincial line for the purposes and in the course of a business.* It makes no difference whether business is connected or associated with the owner's production of raw material in another province or with that of strangers; in either case the merchandise and the transportation serve exactly the same purpose, and ownership is irrelevant. *The merchandise was to move between interprovincial points in the flow of goods of an economic and business character and that is sufficient.*

Likewise, the National Energy Board, in exercising the authority delegated to it by Parliament, plans to see to the protection of gasoline consumers and of the Canadian industry.

From the reasons for judgment of the President of this Court, I am excerpting the following passage from a statement issued by the Board on the policy it is endeavouring to put into practice (*ante*, p. 520):

> The Board understands its responsibility regarding the movement of imported gasoline into Ontario west of the Ottawa Valley line, whether the movements

[11] [1958] S.C.R. 626, 637 and 738.

> are direct or by subsequent transfer, to be to limit the volumes to those which are necessary to ensure adequate supplies, to minimize any price increases to consumers and to meet special hardship circumstances of companies whose legitimate interests might be adversely affected by the policy.

Subsection (2) of regulation 20 as amended reiterates this legitimate ambition.

The plaintiff was insistent in maintaining that the term "consumption" in subsection (1) of the regulation conferred an intrinsically local (i.e. provincial) character on any motor gasoline sale.

It goes without saying that any movement, each delivery of a product, of a purchased object is completed at some point in the country; this is physically inevitable. But is such necessity of a nature to give this rather immaterial fact a legally distinctive character? I hesitate to believe so.

Regulation 20, before amendment, indiscriminately included "*any motor gasoline in the hands of the licencee even if it is produced in Canada*" (exhibit R-2, page 18), an extensive clause which, going beyond the boundaries of interprovincial trade, trenched on the free exercise of civil rights in the provinces. Was this shortcoming not rectified in the recent text which provides instructions on the quantities imported, the time of importations, the region of Canada where such oil would be consumed?

It goes without saying that everyone is in agreement on the commercial nature of such major transactions and recognizes the right vested in the federal authority to prohibit any product, when necessary, from entering the country. As the venerable philosophical adage observes, "He who can do more can do less". In the present case, for purposes that the Board had to provide for, the regulation of this vital trade must be exercised where it takes place, namely, in all points of the ten Provinces and of the two territories of Canada. Then, the amendment decreed by the Order in Council of August 12 empowers the Board to specify in what quantities, at what times and to which regions gasoline can be imported, from its place of origin to its area of consumption; it brands it to some extent and prevents its confusion with oil extracted in Canada. It may be that this is a subtle distinction; however it appears sufficient to me.

According to jurisprudence, which has been consistent, there should be a dividing line in such matters to indicate whether provincial civil rights are being encroached upon or whether the federal authority is exercising its responsibility for regulating both international and interprovincial trade. This was the opinion expressed by Mr. Justice Rand in *Murphy v. C.P.R.* (*supra*) when he wrote, at page 641:

> This diversity in structure and the scope and character of power over interstate trade and commerce, although illuminating in its disclosure of variant constitutional arrangements, suffices to require an independent approach to and appraisal of the question before us. Section 91 (2) of the Act of 1867 confides to Parliament, "Nowithstanding anything in this Act", the exclusive legislative authority to make laws in relation to "The Regulation of Trade and Commerce". *By what has been considered the necessary corollary of the scheme of the Act as a whole,* apart from general regulations applicable equally to all trade, and from incidental requirements, *this authority has been curtailed so far but only so far as necessary to avoid the infringement, if not "the virtual extinction" of provincial jurisdiction over local and private matters including intra-provincial trade . . .*

Once again I repeat that in my humble opinion the regulations now in force avoid infringement of civil rights, a prerogative of the provincial legislatures. No less humbly, I hope that in this examination of a complex problem I have acceded to the criteria inferred by Lord Tomlin and the Judicial Committee of the Privy Council after their exhaustive review of such constitutional conflicts; I refer mainly to the first and third recommendations reproduced at pages 623 and 624 of the second volume of the Olmsted compilation.

For all these reasons, the Court, dismissing the declaratory action for avoidance brought by the plaintiff, allows the conclusions of the defendant and the *mis-en-cause;* declares that the legislative scheme in question is *intra vires* of Parliament and of the Governor in Council and orders the plaintiff to pay all costs.