**CITATION NO.:** Fleetway Fuels Inc. v. Liberty Mutual Insurance Company, 2025 ONSC 2513
**COURT FILE NO.:** CV-22-80100
**DATE:** April 25, 2025

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Fleetway Fuels Inc., Plaintiff

**- and -**

Liberty Mutual Insurance Company, Defendant

**BEFORE:** MacNeil J.

**COUNSEL:** *Z.S. Pete Volaric and Beau S.M. Chapman* – Lawyers for the Plaintiff

*W. Colin Empke* – Lawyer for the Defendant

**HEARD:** January 21, 2025



## REASONS FOR DECISION

## INTRODUCTION

[1] Pursuant to Rule 22 of the *Rules of Civil Procedure*, the parties have concurred in stating a question of law in the form of a special case for the opinion of the court. To that end, the plaintiff made a motion for a determination of the following question of law: Was the removal of the underground storage tank by the plaintiff, under the circumstances described herein, a "voluntary removal" as contemplated by Endorsement No. 10 of the insurance policy issued to the plaintiff by the defendant?

## BACKGROUND FACTS

[2] The plaintiff operated a trucking and refuelling station at its property located on Garnet Road ("the Premises"). It obtained a policy of insurance from the defendant, commencing November 29, 2020, entitled "Storage Tank Third-Party Liability Corrective Action and Cleanup Policy" ("the Policy"). The Policy was drafted and prepared by the defendant in its final form before it was issued to the plaintiff.

[3] The Policy stated that it provides:

(i) claims-made and reported coverage for storage tank third-party bodily injury and property damage liability;

(ii) release-reported coverage with respect to corrective action for underground storage tanks; and

(iii) release-reported coverage with respect to corrective action for aboveground storage tanks.

[4] The Policy specified three types of coverage. However, this case only concerns Coverage B, which is entitled "Corrective Action Due to Underground Storage Tank Releases". It reads:

> We will pay those reasonable and necessary costs that the insured is legally obligated to pay for "corrective action" due to a "confirmed release" resulting from a "pollution incident" from an "underground storage tank system", provided a "claim" reporting the "confirmed release" is first made during the "policy period" or during the Extended Reporting Period, if applicable.

[5] The Policy contains the following relevant definitions in Section VI:

> 7. "Confirmed release" means a "pollution incident" from an "underground storage tank system" … that has been investigated and verified by or on behalf of the Insured utilizing a system tightness check, site check or other procedure approved by the "implementing agency" in accordance with "Environmental laws".
>
> 8. "Corrective action" means response to a "confirmed release" as legally required by any "Environmental laws".
>
> 11. "Environmental laws" means any federal, provincial, territorial or local law (including, but not limited to, statutes, rules, regulations, ordinances, and governmental, judicial or administrative orders and directives) that are applicable to "Pollution Incidents".
>
> 12. "Governmental order" means an order, including any governmental directive, lawfully issued against the insured by any federal, provincial, or local agency or court having jurisdiction over the "covered locations" and acting under authority granted by "Environmental laws".
>
> "Governmental order" does not include any order issued pursuant to or as an agreement between an insured and an agency described above if we did not give our prior written approval for the agreement.
>
> 16. "Pollution incident" means any spilling, leaking, discharging, escaping or leaching of "pollutants" from … an "underground storage tank system" into groundwater, surface water, or surface or subsurface soils.
>
> …
>
> 19. "Underground storage tank system" means a tank or tanks operated by the insured, including any connected underground piping, underground ancillary equipment and containment system:

a. that are on, within, or under a “covered location”; and

b. that are used solely to contain “regulated substances”.

Each tank in an “underground storage tank system”, including associated underground piping connected to the tank, must have at least ten (10) percent of its volume beneath the surface of the ground.

[6] The Policy includes eleven (11) endorsements. Endorsement No. 10 to the Policy is the relevant endorsement for present purposes. It sets out an additional exclusion and reads:

VOLUNTARY TANK REMOVAL EXCLUSION – ABSOLUTE

It is agreed that the following is added to SECTION I – INSURING AGREEMENT, paragraph 3. **Exclusions – Coverages A, B, and C**:

any “claim” arising from, out of, caused by, resulting from, contributed to, or in any way related to any “pollution incident” discovered during any voluntary removal of any “underground storage tank system” insured under this policy.

[7] The term “voluntary” and the phrase “voluntary removal” are not specifically defined in the Policy.

[8] At the plaintiff’s property, a 50,000-litre underground storage tank was used to store diesel fuel in the operation of its business (“the Underground Tank”).

[9] Approximately one year prior to the incident giving rise to the within litigation, the plaintiff was advised by its insurance broker that the plaintiff was not going to be able to continue insuring the Underground Tank because of its age. At that time, it was contemplated by the plaintiff that the Underground Tank would have to be excavated before the business was sold or the Premises were leased.

[10] The plaintiff sold its trucking business and, on February 1, 2021, it entered into a commercial lease for the Premises with the buyer of the business (“the Commercial Lease”). One of the conditions of the Commercial Lease was that the plaintiff, as the landlord, would remove the Underground Tank; it is set out in Schedule “C” – Landlord’s Work, and states:

At a time that is acceptable to the Tenant, the Landlord will be responsible for decommissioning the existing 50,000 litre UST [Underground Storage Tank]. The landlord will be responsible for all costs associated with the decommissioning.

[11] The Policy was in force at the time the plaintiff entered into the Commercial Lease.

[12] The plaintiff retained a licensed contractor to remove the Underground Tank. It also retained an environmental engineering company to observe the removal of the Underground Tank.

[13] On November 4, 2021, during the removal of the Underground Tank, suspected hydrocarbons were discovered in the soil surrounding the tank. On the advice of its environmental engineers, the plaintiff undertook the removal of impacted groundwater and soil for off-site disposal.

[14] On November 5, 2021, the plaintiff made a claim to the defendant, seeking indemnification under the Policy for its costs associated with the environmental clean-up.

[15] On January 10, 2022, the defendant denied coverage for the environmental clean-up based on exclusions contained in the Policy on the basis that the decommissioning and removal of the Underground Tank constituted a "voluntary removal" of same by the plaintiff.

[16] It is agreed that the hydrocarbons appear to have been first discovered by the plaintiff at the time it undertook the removal of the Underground Tank.

[17] The parties have agreed that they will resolve the within action in its entirety through a determination on this motion.

**ISSUE**

[18] The issue to be determined is as follows:

(a) Was the removal of the Underground Tank by the plaintiff, under the circumstances it was removed, a "voluntary removal" as contemplated by Endorsement No. 10 of the Policy?

**POSITIONS OF THE PARTIES**

**The Plaintiff**

[19] It is the plaintiff's position that the decommissioning and removal of the Underground Tank was not a "voluntary removal" as contemplated by Endorsement No. 10 since the tank's removal was a material contractual term of the Commercial Lease and required by the buyer/tenant as part of the sale of the plaintiff's business.

[20] The Policy was not a broad commercial general liability policy. Rather, it was obtained by the plaintiff for the specific purpose of insuring its underground storage tank.

[21] The plaintiff submits that the word "voluntary" has a multitude of meanings and, since the word is not defined in the Policy, its use in Endorsement No. 10 is ambiguous. The defendant drafted the Policy and so any ambiguity affecting the terms of coverage arising from the meaning and application of the word "voluntary" is to be decided in the plaintiff's favour, pursuant to the doctrine of *contra proferentem*. It is the plaintiff's position that, if the defendant intended to exclude the removal of underground storage tanks in the Policy, like what happened in the facts of this loss, then it was incumbent on the defendant to put such exclusionary wording explicitly in the Policy.

[22] By its wording, Endorsement No. 10 allows for the "removal" of underground storage tanks. If the insurer intended to not insure any "removals" of an underground storage tank, the modifying word "voluntary" would not have been included in the Endorsement. The defendant's interpretation of Endorsement No. 10 means that, for all intents and purposes, the same denial of coverage would result whether the Endorsement said "voluntary removal" or simply "removal". Such a broad interpretation of the exclusion would have the effect of essentially invalidating all coverage for all losses arising from the removal of an underground storage tank, and such an interpretation cannot be legally and contractually correct.

**The Defendant**

[23] It is the defendant's position that the plaintiff's removal of the Underground Tank constituted a "voluntary removal" as contemplated by Endorsement No. 10 of the Policy.

[24] By agreeing to the terms of the Commercial Lease, the plaintiff voluntarily assumed the contractual obligation to remove the Underground Tank in exchange for valuable consideration. Such agreement resulted in the discovery of a pollution incident during the "voluntary removal" of the Underground Tank. Accordingly, the exclusion set out in Endorsement No. 10 of the Policy applies. The Commercial Lease was entered into after the Policy was in force.

[25] A year prior to the Underground Tank being removed and a diesel spill being discovered, the plaintiff was aware that it would need to remove the tank because of its age. The plaintiff was aware the Underground Tank would have to be removed if the business was to be sold or the Premises leased.

[26] The plaintiff's decision to remove the Underground Tank was not specifically contemplated by the defendant at the time of the inception of the Policy, although it appears it was contemplated by the plaintiff at or about the time the Policy was issued.

[27] The plaintiff has not presented two reasonable but opposing interpretations of the voluntary removal exclusion such that the principle of *contra proferentem* applies. The defendant's interpretation does not result in no coverage at all for losses related to underground storage tanks. And the plaintiff's alternative interpretation, that "any losses" related to underground storage tanks are to be covered, is not a commercially reasonable interpretation.

[28] The court should not apply dictionary literalism when interpreting the Policy. The court must discern meaning from the context of the whole policy wording. Further, the insuring intention of the Policy and the commercial expectations of the parties must be determined from the Policy's wording.

[29] The Policy provides considerable coverage for pollution incidents involving underground storage tanks, but it does not cover the costs of cleaning up pollutants discovered when the plaintiff chooses to remove a tank in the course of its own business and for its own – not regulatory – benefit.

## THE LAW

### General Interpretation of Insurance Contracts

[30] In *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, at paras. 22-24, the Supreme Court of Canada discussed the principles of insurance policy interpretation as follows:

> 22 The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole (*Scalera*, at para. 71).
>
> 23 Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (*Consolidated-Bathurst*, at pp. 900-902). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (*Gibbens*, at para. 26; *Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901), so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (*Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (*Gibbens*, at para. 27). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.
>
> 24 When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* — against the insurer (*Gibbens*, at para. 25; *Scalera*, at para. 70; *Consolidated-Bathurst*, at pp. 899-901). One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly (*Jesuit Fathers*, at para. 28).

See also *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*¸ [1993] 1 S.C.R. 252, 1993 CarswellMan 96 (SCC), at paras. 37, 42-43; *Somersall v. Friedman*, 2002 SCC 59, [2002] 3 S.C.R. 109, at paras. 47-48.

[31] While the words of the insurance contract must be examined in determining the intention of the parties, the interpretation of the words used should not defeat the commercial purpose for the insurance or otherwise be at odds with basic insurance principles: *Abdulrahim v. Manufacturers Life Insurance Co.*, 2003 CanLII 48161 (ON SC), at para. 38.

## ANALYSIS

[32] The main issue to be determined is whether the phrase "voluntary removal" has a clear meaning in the context of this case or one that can be derived from the joint intention of the parties. If not, the exclusion clause in Endorsement No. 10 must be construed narrowly and the words given a meaning that, if reasonable, favours the plaintiff as the insured: *Abdulrahim*, at para. 35; *Somersall*, at para. 47.

[33] I find that the Policy is not reasonably capable of the interpretation asserted by the plaintiff. I find that it was not the intention of the parties, at the time of entering into the insurance contract, that the plaintiff could willingly undertake to decommission the Underground Tank, without the defendant's knowledge and consent, and then require payment under the Policy for the cost of "corrective action" related to that decommissioning. I find that such an intentional, freely undertaken act is captured by the phrase "voluntary removal" as found within Endorsement No. 10.

[34] Between the two of them, the parties submitted the following dictionary definitions of the word "voluntary":

(a) *Merriam Webster Dictionary*: 1 : proceeding from the will or from one's own choice or consent 2 : unconstrained by interference : self-determining 3 : done by design or intention : intentional 4 : of, relating to, subject to, or regulated by the will 5 : having power of free choice 6 : provided or supported by voluntary action 7 : acting or done of one's own free will without valuable consideration or legal obligation.

(b) *Collins Dictionary* (on-line) includes: 1. performed, undertaken, or brought about by free choice, willingly, or without being asked; … 4. endowed with, exercising, or having the faculty of willing; … 6. *law* a. acting or done without legal obligation, compulsion, or persuasion; …

(c) *Black's Law Dictionary* (on-line): Free; without compulsion or solicitation. Without consideration; without valuable consideration; gratuitous.

[35] In my view, the word "voluntary" as used in Endorsement No. 10 is not ambiguous. I find that the usual meaning of the word "voluntary" – acting of one's own free will and without compulsion – was intended by the parties to apply, given the plain language of Endorsement No. 10. Since I have found that the word "voluntary" is not ambiguous, there is no need to apply the *contra proferentem* rule as against the defendant.

[36] I do not agree with the plaintiff that the fact that the removal of the Underground Tank was a material condition of the Commercial Lease makes the removal not voluntary. The Commercial Lease is a written contract willingly and intentionally entered into by the plaintiff with the buyer/tenant. It is well-established that obligations under a contract arise from the voluntary agreement of the parties to the contract: *Toronto Distillery Co. v. Ontario (Alcohol and Gaming Commission)*, 2016 ONCA 960, at para. 8.

[37] As stated in G.H.L. Fridman, *The Law of Contract*, 5th ed. (Toronto: Carswell, 2006), at pp. 5-6, when discussing the contract as agreement approach:

> The fact that contract involves or requires agreement makes it clear that contracts are voluntary. They stem from an exercise of the will of the parties. This does not exclude the possibility that some contractual rights or obligations may be created or imposed by the law against the will of one or both of the parties, for example, by statute. When this occurs, it is not the relationship of the contract that is being forced upon the

> parties, but one or more of the *incidents* of such a relationship. The original contract, which gives rise to the situation in which the imposition of rights and duties occurs, must have come about voluntarily. [Emphasis in original.]

[38] I find that the plaintiff entered into a contract, the Commercial Lease, with the buyer/tenant for a commercial advantage and it was not otherwise compelled by an outside force or authority to undertake the decommission of the Underground Tank when it so did. The plaintiff voluntarily assumed that responsibility. There is no evidence of undue influence, duress, or compulsion that caused the plaintiff to enter into the Commercial Lease in the first place, such that it could be said that the assumption of the obligation to decommission the Underground Tank cannot properly be viewed as being a voluntary act. The buyer/tenant could not have otherwise forced the plaintiff to decommission the Underground Tank if the plaintiff had not willingly agreed to that contractual term being included. The plaintiff had the freedom to choose whether it would enter into the Commercial Lease or not. It willingly chose to assume the obligations set out therein without the prior permission of the defendant and, in doing so, undertook the risk that coverage would not be extended in the circumstances the plaintiff now finds itself.

[39] I accept the defendant's argument that the word "voluntary" was used with the purpose of limiting the application of the exclusion to situations of such a nature. I further accept the defendant's submission that there were a number of other stated exclusions applying to Coverage B, set out in clause 3 of Section I, that show that the intention of the Policy was not to cover any and all incidents related to the Underground Tank. On the clear language of the Policy, the defendant did not intend to remove coverage for all removals of an underground storage tank. Only those that were undertaken on a voluntary basis. The word "voluntary" must be given meaning when interpreting the Policy.

[40] In considering the Policy as a whole, I find that the agreement of the defendant to pay for the cost of "corrective action" was in the context of environmental legislation and regulations, and this was made clear by the definitions given to the phrases used in the definition of "corrective action", including the definition of "Environmental laws". Here, the requirement for the plaintiff to remove the Underground Tank was a matter of contract law and not of "Environmental laws".

[41] Moreover, the definition of "Governmental order" in the Policy states that it "does not include any order issued pursuant to or as an agreement between" the plaintiff, as the insured, and a governmental agency if the defendant did not give its prior written approval for the agreement. In my view, this language makes it clear that the defendant does not intend to cover any "corrective action" relating to a removal of the Underground Tank if that removal is occurring because the plaintiff *agreed* to the removal and the defendant did not agree to same. If the defendant is not intending to cover a tank removal that the plaintiff may agree to with a governmental authority, without the defendant's approval, I infer from that that the defendant also did not intend to cover a removal that was negotiated and accepted by the plaintiff with a non-governmental agency, like the buyer/tenant, without the defendant's prior written approval.

[42] It is reasonable to interpret the exclusion clause in Endorsement No. 10 as meaning that there would be coverage only when there was a discovery of a "pollution incident" during any involuntary removal of the Underground Tank. That is, when the plaintiff was compelled or

directed to remove the Underground Tank by virtue of an outside force or authority. I am not convinced that there was any clearer language that should have been used by the defendant to capture that intention.

[43] I am satisfied that this interpretation of "voluntary removal" is not inconsistent with the very reason the plaintiff took out the Policy or that it is contrary to basic insurance principles. There was no evidence that the plaintiff entered into the Policy with the intention or for the purpose of seeking coverage for any and all removals of the Underground Tank, including those done of its own free choice. I do not accept the plaintiff's submission that, when the defendant issued the Policy, it did so on the understanding that it was providing insurance coverage for any losses specifically arising from the Underground Tank. If that was the case, there would have been no need to include the word "voluntary" to qualify the word "removal" as found in Endorsement No. 10.

[44] The facts agreed to by the parties indicate that the plaintiff contemplated, approximately one year prior to the incident, that the Underground Tank would have to be excavated before the Premises were leased. In my view, the plaintiff could have asked for assurance from the defendant that such excavation/removal of the Underground Tank would be covered under the Policy and, if not, requested additional coverage at that time.

[45] To accept the plaintiff's interpretation that the removal of the Underground Tank was not a voluntary removal because the Commercial Lease required the plaintiff to decommission the tank would place too narrow an interpretation on the word "voluntary". It could also render the term ineffective since it would mean that the plaintiff could avoid a finding that an act was voluntary simply by inserting the obligation to perform that act into a contract thus rendering it involuntary, even though the plaintiff agreed to performing that act of its own volition. I find that this would run contrary to the express language used in the Policy, is not commercially reasonable, and is not in accordance with the reasonable expectations of the parties.

[46] Accordingly, based on the foregoing, I find that the removal of the Underground Tank undertaken by the plaintiff was a "voluntary removal" as contemplated by Endorsement No. 10 of the Policy.

**CONCLUSION**

[47] The question put to this court on the special case is answered as follows:

> *Was the removal of the Underground Tank by the plaintiff, under the circumstances described herein, a "voluntary removal" as contemplated by Endorsement No. 10 of the Policy issued to the plaintiff by the defendant?*
>
> *Yes.*

## COSTS

[48] I would urge the parties to agree on costs. If they are unable to do so, then costs submissions may be made as follows and submitted to the Judicial Assistants to my attention:

(a) By May 16, 2025, the defendant shall serve and file its written costs submissions, not to exceed three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers; and

(b) The plaintiff shall serve and file its responding costs submissions of no more than three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers, by May 30, 2025; and

(c) The Applicant's reply submissions, if any, are to be served and filed by June 6, 2025 and are not to exceed two pages.

(d) If no submissions are received by June 6, 2025, the parties will be deemed to have resolved the issue of the costs and costs will not be determined by me.

[49] If the parties are able to settle the issue of costs or if a party does not intend to deliver submissions, counsel are requested to advise the court accordingly.

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**MacNEIL J.**

**Released: April 25, 2025**