

Terrorism and the Law

An Act of War

By Albert S. Frank, LL.B.

The monstrous attacks of September 11, 2001 have been referred to by U.S. President Bush and others as being an act of war. It is obvious that they do not mean this metaphorically, as in the so-called "war on poverty," but literally. Others have disagreed, preferring to view this situation as a criminal matter more than a military one.

In Law, What Is An "Act of War"?

As of the time I am writing these words, the monstrous attacks do not seem to be the work of a nation or nations. Since war is generally understood to be an activity that takes place between nations, there are those who argue that the monstrous attacks are therefore not an act of war. In their view the situation should be treated as a criminal matter, with all of the limitations on the actions of the U.S. and its allies that would be implied by this perspective.

Black's Law Dictionary defines "war" in a way that seems to support the nation versus nation concept. But that is not the only possible kind of war. If we look further into *Black's*, we see that there is such a thing as a "mixed war." According to *Black's*, "A mixed war is one which is made on one side by public authority, and on the other by mere private persons."

This definition makes it clear that war can include a conflict between a nation and a

terrorist organization or network of organizations.

Insurance Implications

Many insurance policies covering property contain an exclusion for damage caused by acts of war. In other words, if the damage was caused by an act of war then the insurance company is not obliged to pay compensation to the insured.

Insurance companies currently face the issue of whether or not they should take advantage of this exclusion. If they seek to do so there would be considerable litigation about whether the exclusion applies. Just because political leaders call something an act of war does not mean that courts would necessarily agree that it is an act of war as defined in a given insurance policy. Moreover, seeking to use this exclusion would strike many as being outrageously unpatriotic.

Indeed, members of the U.S. House Financial Services Committee are reported to have sent a September 17, 2001 letter to the National Association of Insurance Commissioners. The letter reads in part, "any attempt to avoid coverage obligations... would be not only unsupportable and unpatriotic – it would tear at the faith of the American people in the insurance industry."

On the other hand, the amounts that the insurance companies would have to pay if they do not invoke the act-of-war exclusion would be massive. The total could be as high as \$30 billion, which would make it the most expensive disaster for insurers in U.S. history. Some

individual companies could have to pay hundreds of millions. If the insurance companies have to pay, some of them might be bankrupted. Should insurance companies pay, or is this more properly an expense to be covered by the taxpaying public as a whole?

Insurance companies rarely inspire much sympathy, but I must say that they are in a difficult position that is not their fault.

The Larger Issue

One of the core responsibilities of any government is to defend its citizens. This includes waging war when necessary. The United States is clearly taking this responsibility seriously. What about the rest of the world?

On September 12, 2001 the countries of the North Atlantic Treaty Organisation, NATO, decided that if the attacks were directed from abroad – which seems obvious – article 5 of the Washington Treaty would apply. Article 5 treats an armed attack against any member of NATO as an attack against all of NATO. Every member country is to assist the attacked member by taking action forthwith. This action can include the use of armed force.

Various non-NATO countries, including Russia, have indicated a willingness to help in the struggle against terrorism.

As for our own country, Canada is the United States' neighbour, largest trading partner, and fellow NATO member. Canadians were among those who died in the attacks. Most Canadians

want Canada to take action, including military action.

Shamefully, despite our glorious military history Canada today has only a minature military, with obsolete and aged arms and equipment. This seems not to trouble our prime minister. He gives the unfortunate impression that his version of rising to the occasion to combat evil is to lie on his couch while murmuring sympathetic banalities to the Americans. I can only hope that despite these handicaps Canada will do something of substance, and soon.

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The above article originally appeared in the October, 2001 issue of ***The Bottom Line***.

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*Albert S. Frank is a business trial lawyer
(commercial litigator).*

E-mail: afrank@FrankLaw.ca

Web: www.FrankLaw.ca

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